2005 ALL NIGERIA JUDGES' CONFERENCE

NATIONAL JUDICIAL INSTITUTE

SPECTRUM LAW SERIES

2005
ALL NIGERIA JUDGES' CONFERENCE

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Theme:

Sustenance of Good Governance: The Role of the Judiciary

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Preface

It is for me a singular honour and privilege to write the Preface to the proceedings of the 2005 All Nigeria Judges' Conference.

The vision of the founding fathers of the National Judicial Institute is well reflected in section 3 (1) of the National Judicial Institute Act No. 28 of 1991 (as amended) which states *inter alia* that the Institute shall serve as the principal focal point of judicial activities relating to the promotion of efficiency, uniformity and improvement in the quality of judicial services in the superior and inferior courts. It is important to stress that in order to "serve as the principal focal point of judicial activities", the Institute is further mandated by the statute setting it up to "organise once in every two years a Conference for all Nigerian Judges of superior and inferior courts respectively" and to disseminate by way of publication of books, journals, record, reports or other means of information about any part of its activities, to the extent deemed justified by the board and generally as a contribution towards knowledge.

This publication is therefore in fulfilment of the statutory obligation conferred on the Institute. Let me reiterate the fact that the theme of the Conference, to wit:

> 'Sustenance of Good Governance: The Role of the Judiciary' is both relevant and *germane*. The distinguished personalities who served as resource persons including the former Head of State, His Excellency, Chief Ernest Shonekan, *GCFR*, Justices of the Supreme Court, and President of the Court of Appeal exhibited a high level of industry and research in the quality of the papers they presented. Of truth, the papers presented and the commentaries by erudite scholars and jurists of distinction coupled with the level of intellectual interaction made the Conference to be a memorable one.

I cannot but thank the Chief Justice of Nigeria and Chairman, Board of Governors of NJI Hon. Justice I. L. Kutigi, *CON*, and all the Governors

of NJI for their continuous support for all the activities of the Institute. It is on the authority of the Board of Governors of NJI that this publication was made.

The papers presented at the Conference in 2005 were as relevant then as they are even now. It is on this note that I commend this publication to the reading pleasure of all Judicial Officers, Legal Practitioners, Law Lecturers, Law Students and the general public who I believe will also find it informative and stimulating.

Hon. Justice T. A. Oyeyipo, (rtd), *OFR*
Administrator, National Judicial Institute

WELCOME ADDRESS BY HON. JUSTICE JOHN ADEMOLA AJAKAIYE

Administrator, National Judicial Institute, Abuja.

I have this unique privilege and honour to welcome you all to the opening ceremony of the 2005 all Nigeria Judges' Conference taking place in the Capital City of Abuja, the city of Unity and Peace.

The 2005 All Nigeria Judges' Conference is the 7th Conference since Decree No. 28 of 1991, which established the National Judicial Institute, was promulgated. The first Conference was held in Port Harcourt in 1993. The Institute is in fact strictly complying with section 3(1)(c) of the Decree which enjoins the Institute to organise this auspicious event once in two years, for All Nigeria Judges of the superior and lower courts.

It is pertinent to draw attention to the objectives and functions of the Institute as stipulated in Section 3 of Decree 28 of 1991:

> 3"(1) The Institute shall serve as the principal focal point of judicial activities relating to the promotion of efficiency, uniformity and improvement in the quality of judicial services in the superior and inferior courts.
>
> (2) For the purposes of subsection (1) of this section, the Institute is hereby empowered to:
>
> (a) conduct courses for all categories of judicial officers and their supporting staff with a view to expanding and improving their overall knowledge and performance in their different sections of service;
>
> (b) provide continuing education for all categories of judicial officers by undertaking, organising, conducting and facilitating study courses lectures, seminars, workshops, conferences and other programme related to judicial education;
>
> (c) organise once in two years a conference for all Nigerian Judges of superior and inferior courts, respectively;

(d) disseminated by way of publication of books, journals, records, report or other means of information about any part of its activities, to the extent deemed justified by the Board and generally as a contribution towards knowledge; and

(e) promote or undertake any other activity which in the opinion of the Board is calculated to help achieve the purpose for which the Institute was established"

The management of the affairs of the Institute is vested in the Board of Governors. The Chairman of the Board of Governors is the Honourable, the Chief Justice of Nigeria, The Federal Character of this Institute is reflected in the composition of the Board namely, the Attorney General of the Federation, the President of the Court of Appeal, the most senior of the Justices of the Supreme Court, the Chief Judge of the Federal High Court, the Chief Judge of each State of the Federation and the Federal Capital Territory Abuja, two Grand Kadis of the Sharia Court of Appeal and two Presidents of the Customary Court of Appeal appointed annually by the Chief Justice of Nigeria and four other persons of unquestionable character to be appointed by the Chief Justice of Nigeria.

The Institute is currently accommodated within the Supreme Court Complex. The Permanent Site is however, being developed. The Administrative Block has now been completed while work has reached an advanced stage on the Auditorium. We hope to move to the Permanent Site early in the new year.

The Board of Governors approves annually the programmes and courses run by the Institute. The Programmes and Courses include

(i) All Nigeria Judges' Conference of the Superior Courts

(ii) Biennial Conference of All Nigeria Judges of the Lower Cour

(iii) Induction Course for newly appointed Judges and Kadis

(iv) Refresher Course for High Court Judges, Kadis of Sha

Courts of Appeal and Judges of Customary Courts of Appeal of 3-6 years post appointment

(v) National Workshop for Magistrates

(vi) Workshop for Judicial Librarians

(vii) Workshop for Area and Customary Court Judges

(viii) Workshop for Judges and Director/Inspectors of Area/ Customary Courts

(ix) Workshop for Judges and Directors/Inspectors of Sharia Courts

(x) Judicial Administration Workshop for Chief Registrars, Deputy Chief Registrars, Directors, Chief Accountants, Secretaries of Judicial Service Commissions.

(xi) Workshops for the Supporting Staff – Registrars of Court, Confidential Secretaries, Typists etc.

The Institute in collaboration with some National and International organizations/bodies organises seminars and conferences for Judges. These Organisations/Bodies include the Nigerian Institute of Advanced Legal Studies (NIALS), Economic and Financial Crime Commission (EFCC), Nigerian Shippers' Council (NSC), Chartered Institute of Bankers of Nigeria (CIBN), Independent Corrupt Practices and Other Related Offences Commission (ICPC), World Jurist Association (WJA), Commonwealth Lawyers Association (CLA), United Nations Environment Programme (UNEP), United Nations Fund for Women Development (UNIFEM), United Nations International Children's Fund/National Agency for Prohibition of Traffic in Persons and Other Related Matters (UNICEF/NAPTIP), and Civil Liberties Organisations (CLO).

Your Excellency, ably represented, my Lords, this Conference, as you are quite aware, has over the years become and important biennial event for judges of all courts of record in Nigeria. It has always served as a necessary forum for Judges in this country to

associate, to discuss pertinent matters which affect your work. The Conference equally affords us an opportunity to rub minds on judicial reforms and developments in our different jurisdictions. Not only this, it has also served as a forum for continuing legal and judicial education for the members of the Bench. This has been especially so in cognizance of the quality of Resource Persons and presentations which the Conference has attracted in recent years.

The theme of this year's Conference is: **Sustenance of Good Governance: The Role of the Judiciary**. We could not have chosen a more appropriate theme. It is not only timely, but of immense relevance to our nation at this time. In the last six years, Nigeria has been going through a democratic system of government – a system of government associated with good governance as opposed to dictatorial military rule.

While it is not in dispute that the doctrine of Separation of Powers recognizes the Judiciary as an important arm of government, the Constitution of the Federal Republic of Nigeria, 1999 also accords the Judiciary a place of eminence in the scheme of things. The focus of this Conference this year is an examination of our role as Judges in the sustenance of good governance.

The concept of good governance posits a mode of administering a nation in such a way as to make the generality of the citizenry positively feel the impact of the government. Thus a government is said to be a good government when it is responsive to the needs and legitimate aspiration of its citizens. These needs and legitimate aspirations cut across diverse issues from protection of lives and property to the provision of essentials of life including (but not limited to) food and shelter.

The rule of law is a stimuli or platform for the preservation and enjoyment of these rights. Unless the government in a democratic political arrangement accepts the supremacy of the rule of law, whatever constitutional provisions that might exist in relation to human rights, would be of no utility.

The quest to sustain good governance is not the preserve of the Executive and the Legislative arms of government alone. The role of

the judiciary is aptly placed within the context of its constitutional duties in governmental affairs. Strictly speaking this is within the purview of administration and dispensation of justice between the different levels of government – the federal, the state and the local government. Secondly, it extends also to the resolution of disputes between the state and the citizenry as well as between the citizenry inter se. This role must not just be performed; it must be seen by all and sundry to be so performed transparently. Otherwise, the citizens will resort to self-help: the consequence of which will be chaos and a reinvention of Thomas Hobbes' State of Nature.

An independent judiciary is a *sine qua non* to the realisation of the practice of the rule of law and the evolution of good governance. The practice in most modern states is to separate clearly the judicial functions from the activities of the other arms of government.

The philosophy behind the theory and concept of separation of power becomes imperative given the need to prevent arbitrariness and to ensure restraint in the use of government powers. Therefore, the three arms of government thereby effectively carry out this principle of checks and balances. The survival of the rule of law and realisation of individual rights ultimately depends on judicial performance.

For as Justice Arthur Vanderbilt posited:

> ...it is in the courts and not in the legislature that our citizens feel the keen, cutting edge of the law. If they have respect for the work of the courts, law will survive the shortcomings of every other branch of government, but if they lose their respect for the work of the courts, their respect for law and order will vanish with it to the great detriment on the society.

Your Excellency, my Lords, Ladies and Gentlemen, please permit me to stress the fact that in order to discharge these responsibilities adequately and ensure good governance, the Judiciary must be independent of the Executive and other political influences in the society. It must be allowed to function in an atmosphere of freedom

from external interference. While their mode of appointment should not weigh heavily in favour of, or be at the pleasure of the Executive, they should also enjoy financial independence and be allowed to be self-accounting. In addition, security of tenure of office is essential so that dispensation of judicial function is not inhibited by unnecessary pressure.

At this juncture, I would like to express our profound thanks and appreciation to my Lord, the Chief Justice of Nigeria and Chairman, Board of Governors of the National Judicial Institute, The Hon. Justice M. L. Uwais, *GCON, FNIALS* for his Lordship's encouragement, support and sense of direction in the conduct of the affairs of the Institute. I must not forget to thank the Governors, of the Institute for their support.

I must also thank our erudite Resource Persons and paper Presenters, Commentators and the Chairmen and members of the Education Committee of the Conference. I want to specially thank Chief (Dr) Ernest A. O. Shonekan, *GCFR, CBE,* for accepting to grace this occasion and deliver a paper on the topical issue: "*Judging the Judges: Judicial Ethics, Code of Conduct for Judicial Officers*" I am confident that we will all benefit from your scholarly papers and rich experience. I would also like to thank the Hon. Minister, Federal Capital Territory, Mallam Nasir Ahmed El-Rufai and the Chief Judge, Federal Capital Territory, Abuja, Hon. Justice L. H. Gumi, for their warm welcome and hospitality.

I also express my grateful thanks to all our invited August guests for honouring our invitation.

To the participants I say welcome once again. The period of this Conference is not devoted to academic discussions alone; we have room for sight-seeing and social events. I believe you will have a pleasant stay in Abuja.

Your Excellency, The President and Commander in Chief of the Armed Forces, I thank you for honouring our invitation. I also thank you for the monumental reforms your administration has made and which have undoubtedly moved Nigeria forward despite all odds.

Your Excellency, my Lords, distinguished invitees, members of the Press, Ladies and Gentlemen, I thank you for your attention. I wish all the participants a stimulating and refreshing Conference.

WELCOME ADDRESS BY MALLAM NASIR AHMAD EL-RUFA'I, *OFR*

The Minister of Federal Capital Territory

It gives me great pleasure to welcome my Lords, Judges of the Superior Courts of Record in Nigeria, who are gathered in our nation's capital, on the occasion of the 2005 all Nigeria Judges' conference, which has as its theme, **Sustenance of Good Governance: The Role of the Judiciary.**

The timing and theme of this week-long conference, being attended by Justices of the Supreme Court, Court of Appeal, the Federal High Court, the FCT and State High Courts, the FCT and State Sharia Courts of Appeal and the FCT and State Customary Courts of Appeal, shows that the National Judicial Institute and indeed our judiciary have woken up to the challenges posed by contemporary legal and political problems that beset us in our quest to build and sustain a great nation founded upon the ideals of equality, liberty, justice and the rule of law.

Since I welcomed you to Abuja two years ago during a similar conference, a lot of things have taken place in our country that have caused many Nigerians to demand that the judiciary should indeed establish its authority as the third estate of the realm so as to make Nigeria's democracy more credible.

As a matter of fact, this year's conference demonstrates that deliberations at the last convention have been utilised as a search light to the various problems besetting our country, especially as they concern the judiciary which is the third arm of government.

Let me commend and encourage the Judiciary, especially the National Judicial Council not to rest on its oars in its efforts at reforming and re-orientating the judiciary. This is because the determination of the common man in the pursuit of justice would further be reassured when there is zero tolerance for corruption: when there is integrity in the land: when access to the courts is less cumbersome and judgments are delivered in time.

Distinguished learned gentlemen, permit me to use this opportunity to inform you that we have established an Urban and Regional Tribunal to address complaints from members of the public on the on going removal of offensive and illegal structures round the city, in furtherance of our efforts to ensure protection of the democratic rights of citizens.

You are no doubt aware that our commitment to restoring the original Abuja master plan is anchored in our belief that the interest of the majority far outweighs the selfish personal interests of a few who may be privileged and who believe that they are above the law. It is in this regard that we need the cooperation of the judiciary to complement our efforts as our partners in progress.

In the same order of logic, we as human beings are susceptible to errors of human judgment and it behooves the judiciary to point out any errors of omission or commission on our part, with a view to rectifying them.

In closing, let me use this opportunity to remind you that hosting the all Nigeria Judges' Conference simultaneously with the 14th International Conference on AIDS and Sexually Transmitted Infections in Africa (ICASA, 2005), has put Abuja and Nigeria on world spot light. It is my hope that you would include the human rights of victims of the pandemic in your deliberations.

While wishing you a successful conference, I urge you to enjoy the warm hospitality offered by our beautiful capital city. Thank you and may God bless our efforts.

WELCOME ADDRESS BY HON. JUSTICE M. L. UWAIS, *GCON*

Chief Justice of Nigeria

It is my honour and privilege to welcome His Excellency, the President of the Federal Republic of Nigeria, Chief Olusegun Obasanjo, *GCFR*, who despite his busy schedule, has once more graciously consented to open our Conference. It also gives me great pleasure to welcome you all to the opening ceremony of the 2005 all Nigeria Judges' Conference.

In 1974 when the late Hon. Justice Teslim Olawale Elias, *GCON* was the Chief Justice of Nigeria, I attended the All Nigeria Judges' Conference for the first time. With my impending retirement next June, this will be the last Conference of all Nigeria Judges that I will be privileged to attend as a serving Judge. I thank almighty God for sparing my life and for making it possible to attend, without exception, all the All Nigeria Judges' Conferences that have taken place from 1974 to date.

As you no doubt know, the Conference is held biennially by the Judges of our Superior Courts. That is the court created by the Constitution. It is now a statutory conference authorised, since 1991, by the National Judicial Institute Act of the same year. Accordingly, this is the 7th Conference to be held since the Act came into force.

The aim of the Conference is to give the Judges the opportunity to come together every two years in order to discuss our common problems, to exchange ideas and experiences for the improvement of our performance as the third arm of government at both Federal and State levels. This year, about 500 Judges are participating in the Conference.

The theme of the Conference is: **Sustenance of Good Governance: The Role of the Judiciary.** The 1999 Constitution has distributed power amongst the three arms of government, namely, the Executive, the Legislature and the Judiciary. This is popularly

referred to as the separation of powers. As it is known, or goes without saying, the Judiciary is that arm of government which is charged with the responsibility of interpreting our laws and in particular the Constitution which governs the running of the affairs of our Nation. To have good governance, our judges are enjoined to, without fear or favour, ill-will or affection, give fair and liberal interpretation to the Constitution.

The primary role of the Judiciary is indeed adjudication. This means that a dispute or controversy must exist before the courts can be called upon to adjudicate. As you are aware, in any democratic society, people are free to hold opinions and to express themselves as vehemently as they may wish. It is inherent to the exercise of such freedom that controversies are bound to arise. This, therefore, makes the role of the Judiciary indispensable.

For the Judiciary to carry out its function creditable, it must be independent as an arm of government. This can only be sustained and guaranteed when there is no interference by the other arms of government, viz – the Executive and the Legislature. Funding of the Judiciary is one of the indices for assessing the independence of the Judiciary. In this regard, the Federal Government has done marvelously well. However, the same cannot be said of the State Governments which despite the passing of annual Appropriation Laws, administer the budget in the manner of the past military governments, by not releasing funds directly to the State Judiciaries in accordance with the dictate of section 121 subsection (3) of the 1999 Constitution, which provides that any amount standing to the credit of the State Judiciaries in the Consolidated Revenue Fund of the States should be paid directly to the heads of the State Courts. It will be remembered that the failure to comply with this provision of the Constitution had led the staff of some State Judiciaries to go on protracted labour strikes.

The Judiciary is concerned about its public image. The independence of the Judiciary, undoubtedly, carries with it the responsibility for every judicial officer to perform his duties with

probity. Any misconduct by a judge, including corruption, tarnishes the reputation of other judicial officers and brings the entire institution to disrepute. This is why the National Judicial Council (NJC) pays special attention to allegation of corruption made against any Judge of our superior courts, no matter how highly placed. Many a judge that had been found wanting in that regard had been removed from office with ignominy. The National Judicial Council will not rest on its oars.

One other factor that affects the image of the judiciary is the inordinate delay in the determination of cases in our courts. A quiet reform by both the Federal and State Judiciaries has been taking place in this regard. To ginger up the Judges, the National Judicial Council has introduced, about two years ago, the submission of quarterly returns by every judicial officer, for the National Judicial Council to determine how many cases are pending before a judge and how many have been disposed of by him or her during the quarter. This will expose lazy judges, who are being made answerable for the delay in their courts. Let me once again warn that inability by a Judge to discharge the functions of his office is a ground, under section 292 of the Constitution, for him or her to be removed from office.

Another cause of Delay is the procedure followed in our courts. This too is being looked into. All the Chief Judges of the Federal and State High Courts have recently, under the auspices of the National Judicial Institute, agreed to adopt a uniform Civil Procedure, based on the new Lagos State High Court (Civil Procedure) Rules, of 2004, which have the effect of speeding up trials and considerably reducing the number of cases that even get to trial. As a corollary to this, court recording equipment have since been purchased and supplied to all the Federal Superior Courts and a number of State High Courts in order to speed up the recording of proceedings and do away with the archaic recording by long handwriting by the Judges. In this regard more needs to be done, as only about 6 State High Courts have so far succeeded in securing from their State Governments the necessary funds to purchase and install the recording equipment.

Section 292 of the Constitution is being employed by the State Executives and Legislatures to diminish the independence of the Heads of State Courts and thereby the State Judiciaries. So far not less than 3 State Chief Judges and a Grand Kadi had been removed from office under that procedure without recourse to the National Judicial Council. A fourth State Chief Judge has very recently narrowly escaped being so removed after the procedure was followed in the State House of Assembly concerned but was left off, so to speak, with a warning by the State Governor to remain of Good behaviour, whatever that means, for the next one year. A fifth State Chief Judge was also lucky, after being tormented, to be told by the State House of Assembly that he was not found lacking. It may be asked: For how long will the harassment continue? Does it indicate good governance by the States' Executive and legislatures? Must the Judiciary be made to appear to be an appendage of the Executive despite the provisions of the Constitution?

Your Excellency, Mr. President, Hon. President of the Senate, Hon. Speaker of the House of Representatives, Hon. Members of the National Assembly, Hon. Ministers, My Lords, Distinguished Ladies and Gentlemen, the independence of the Judiciary can only be sustained and guaranteed when there is no interference directly or indirectly by the other arms of government or their agencies in the discharge of its duties.

Another thorny point is disobedience to court orders. This malady, which was rampant under the past military regimes, has started rearing its head again. In a democratic set up like ours, obedience to the Constitution is paramount and imperative since all key office holders under the Constitution are made to take oaths of office, which enjoin us to observe, protect and defend the Constitution. Section 287 of the Constitution provides in subsection (3) thereof that:

> The decisions of the Federal High Court, a High Court of a State and all other courts established by this Constitution shall be enforced in any part of the Federation by all authorities and persons...

So that any functionary of government, howsoever placed, is d
bound not only to observe but also enforce any judgment of a co
of record. Failure to do so is an affront to the Constitution and cle
evidence of bad governance. Those in authority and their agenci
cannot pick and choose what court order to obey. If they fe
aggrieved by the order, the only remedy open to them is to appea
but in the meantime the order must be obeyed.

In conclusion it is now my honour and pleasure to invite, on behal
of Nigeria Judiciary and the National Judicial Institute, Mr. President
to graciously address us and formally declare the Conference open.

I thank you all for your patience and attention.

ADDRESS AND OFFICIAL OPENING BY HIS EXCELLENCY CHIEF OLUSEGUN OBASANJO, *GCFR*

President of the Federal Republic of Nigeria

MY LORDS,

It gives me pleasure to address this great assembly of judges. Only recently, I was privileged to address the conference of the International Association of Women Judges. On this occasion, we are faced with another powerful and all-embracing theme on **Sustenance of Good Governance: The Role of the Judiciary.** This theme is of particular interest to us because it brings into sharp focus the main challenge confronting our country. More than ever before we have come to terms with the fact that the country cannot develop without the component of effective, purposeful, transparent and accountable governance. It is disheartening to note that although our country is endowed with rich human and natural resources. We still suffer similar developmental problems as poorer African countries.

All over the continent, there are clear signs of poverty, underdevelopment and human misery. The economic indicators show that 340 million people or half the population of Africa live in abject poverty; the mortality rate of children is quite high while life expectancy is low; no safe water and the rate of illiteracy for people over 15 is about 41%. There are only 18 mainline telephones per 1000 people in Africa compared with 146 for the world as a whole and 567 for high income countries. The situation in our country is hardly different from the African wide situation.

The theme of your Conference underscores the critical role of the Judiciary in the quest for good governance. As your Lordships are aware, this administration places great emphasis on the need for transparency and accountability. I am delighted that your Conference has chosen to focus on the same issue.

We are all agreed that corruption is a threat to our collective

existence as a happy and free people. It has retarded our progress as a nation and distorted our development. That is why this administration has taken the bull by the horn by introducing measures which are aimed at ensuring good governance. Whilst the Judiciary has been quite supportive of these measures, I would like to solicit for greater partnership in the implementation of this reform measures that government has put in place.

I therefore urge this conference to come up with resolutions which would enhance the performance by the Judiciary of its role as an agency of reform and development. It is hoped that this Conference would also endeavour to develop strategies for judicial support for the National Economic Empowerment and Development Strategy (NEEDS), the New Partnership for Africa Development (NEPAD) as well as the Millennium Development Goals (MDGs). Permit me to address this issue a little further.

The challenge of transforming our country demands a judicial system that is proactive in using the law as an instrument for meeting the needs of society. While the law may be "backward-looking" through its reliance on precedents, Sociological Jurisprudence teaches us that the law could nevertheless be an instrument for social engineering. Therefore, the Judiciary in a transforming society as ours must not be too aloof from the realities that confront the society. While maintaining its independence, the judiciary must creatively engage in the progressive task of using the law for resolving practical problems of society.

Perhaps I should stress that the chronic problem of delay in the dispensation of justice does not boost investor confidence in our economy. Rather, it scares away investors who may wish to come in with the much-needed investments that could contribute to economic growth and poverty alleviation. One is happy to observe that the leadership of the Judiciary has already begun to address this problem through the issuance of more stringent guidelines for rendering returns. However, there is need to put in place measures for scrutinising such returns in order to ensure that the intended benefits are realised.

As a specific response to the challenge of delay in the dispensation of justice, government is considering the introduction of fast track system of adjudicating commercial cases. We have recently embarked on a study visit to Ghana to observe the operation of their Fast Track Courts. In due course I intend to seek the support of your lordships in introducing a similar system in the Federal Capital Territory as a pilot project. It will thereafter be extended to other Courts in the country.

One other issue which flows from the theme of your Conference is that of resolution of electoral disputes. Your Lordships would agree with me that this is closely connected to the sustainability of good governance and democracy. The Constitution places an enormous responsibility on your shoulders by conferring on you jurisdiction over electoral matters. At a recent Conference on Electoral Matters, I had cause to raise some pertinent questions which bear repetition at this unique gathering of judges. These include:

- What should be the proper role of the judiciary in pre-election matters such as Party Primaries, delimitation of Electoral Constituencies, and selection of candidates for elective positions?
- To what extent should the Judiciary be involved in intra-party disputes such as in determining who should be presented as candidates for an election? Indeed, how could we minimise such disputes?
- Granted that political disputes are inevitable in a developing society as ours, how could we manage such disputes in order to ensure that they do not constitute a threat to the survival of the democratic system in the country?
- In what ways can we ensure a speedier and more transparent dispensation of electoral justice by Election Tribunals in post election situations?

I do not have the answers to these questions but I believe the

judiciary should consciously and deliberately develop some guidelines for resolving these issues in future cases. This Conference may wish to consider concrete ideas for improving the dispensation of electoral justice. It may be necessary to fashion out special Practice Directions for dealing with election matters. Once such guidelines are produced, there should be massive and intensive publication of the guidelines in order to sensitize the politicians, judges, legal practitioners and other role players. There should be developed a code of acceptable behaviour for politicians and political parties. It is noteworthy that while the judiciary took steps to discipline some judges who were found wanting in dispensing electoral justice after the 2003 Elections, there is no evidence that the politicians who exerted serious pressures on those judges were ever brought to book.

As this is another opportunity to address the Conference of the Nigerian judges, let me seize this opportunity to highlight my programme for the justice sector with a view to enlisting the support of your lordships.

Criminal Justice Reforms

My Lords, there is no doubt that our Criminal Justice System is long overdue for reform. Although the Colonialists had long departed our shores, the Criminal Laws which they left behind continue to hold sway in our courts. We have therefore put together a Bill known as the Administration of Criminal Justice Bill. The Bill attempts to unify the Criminal Procedure Act with a view to providing a system of criminal procedure that would be applicable all over the country, to all courts and all criminal trials as far as local circumstances would permit. The major innovations in this Bill reflects a wide range of views and reform ideas which have been canvassed at different fora over a long period of time. It incorporates many principles of case laws which the Supreme Court has confirmed time and again. It also incorporates some best practices in contemporary criminal justice administration around the world. Specifically, the innovations in the Bill include the following:

- Definition and clarification of the objectives of criminal justice administration to include efficiency and speedy delivery of justice.
- Standardisation of arrests, investigation and search procedures to include mandatory inventory of properties of arrested persons, mandatory recording of personal data including fingerprints, photographs, measurement etc Setting up of Central Criminal Record Registry, prohibition of arrest of persons for reasons only of affinity with a suspect Duty of citizens in arrests and crime prevention.
- Pretrial Issues including delays arising from indefinite remand of defendants in prison custody- enlarging the power of the Attorney General to control case file management, introduction of time frame and protocol for arrests, indictments, charges, enlargement of the powers of the Administration of Criminal Justice Committees.
- Bail clarification of the objects of bail and clearer guidelines for police and judicial consideration of bail introduction of use of bonds, registered bondsmen in perfecting bail applications.
- Trial and related issues-specific abolition of Holden Charge, improving victims and witness protection, plea bargaining, payment of compensation to victims of crimes by the offenders, etc.
- Sentencing review of rates of fines and the power of a Chief Judge to review periodically, alternatives to custodial punishment such as suspended sentence, community services, etc.

Substantive Criminal Laws

We have identified the need to critically review and bring the Penal

and Criminal Codes up-to-date in order to reflect modern concepts of crime.

Prison Congestion

A further area of interest is the issue of prison congestion. This is a very complex issue and a long standing problem. Although the Administration of Criminal Justice Bill has now made far-reaching proposal that would address this problem in the long run, it cannot be overemphasised that there is an urgent need for immediate practical measures for the quick decongestion of the prisons. I am proposing some far-reaching measures which would be forwarded to the Federal Executive Council soon. I believe we ought to deal with this problem now and decisively too.

I will therefore appreciate your Lordships' views on how to achieve immediate reduction in the awaiting trial population of our prisons which is currently estimated at about 65% of the total prison population. I also would like to solicit support for the work of the special task force for the prosecution of criminal cases including pipelines vandalisation cases. Already, the Federal Ministry of Justice has engaged the services of several legal practitioners for the purpose of assisting in prosecuting the backlog of pending criminal cases. The support of your Lordships would ensure the quick conclusion of the cases which must not become another occasion for endless applications for adjournments.

Further, I have identified the issue of victims' rights protection as a way of improving our criminal justice system in this country. Government is showing the way through the recent decision to pay compensation to the families of the Apo six killings. There is no gainsaying the fact that our criminal justice system ought to improve on the way it treats victims of crime, especially when they are women and children. There have been suggestions for a Victim Compensation Scheme. It is my view however that we need to create a framework, not only for victim compensation, but also victim empowerment:

- improve the access of disempowered groups to the criminal system, including women, children and victims in general;
- redesign the criminal justice system to empower victim;
- provide a greater and more meaningful role for victims in the criminal justice system;
- improve the service delivery by the criminal justice process to victims of crime; and
- deal with the damage caused by criminal acts by providing remedial interventions for victims.

In developing this framework, we will be guided by best practices and experiences from other jurisdictions in dealing with issues of restitution and victim offender reconciliation.

Civil Procedure Reforms

We note with pleasure the ongoing reform in different parts of the country in the area of civil procedure. However, we believe that an orderly development of the Nigerian legal system would be better assisted if the civil procedure system across the country is uniform in both federal and state courts. A legal practitioner should be able to practice freely in any part of the country without being inhibited by considerations of difference in rules of civil procedure. Unlike some other federal systems, ours is unique in the sense that not only do we have only one Constitution; we also share a unified court system especially at the appellate level. Indeed it is our legal system that best exemplifies the concept of unity in diversity. We are therefore urging the adoption a uniform civil procedure system in the country.

Other practical measures that we are taking to reposition that justice sector include:

1. *National Committee for the Reform of the Law of Evidence:* Headed by His Lordship, Hon. Justice M. Belgore, *CON, JSC*, this Committee is mandated to review the draft Evidence Act

submitted to my Ministry by the Nigeria Law Reform Commission, headed by my Lord, Hon. Justice O. Somol (retired). Who did a good job on the proposed Act.

2. *National Committee for the Reform of Arbitration and other ADR Mechanisms:* Government is concerned that arbitral proceedings appear to be loosing its hallmark of speedy resolution of disputes. There are also complaints that too many technicalities are being introduced whilst enforcement of arbitral awards is becoming increasingly difficult. Consequently, it is feared that unless some urgent steps are taken, arbitration may lose its advantages over litigation. This Committee is therefore mandated to take a critical look at the situation and propose appropriate intervention measures.

3. *National Committee for the Review of Law Discriminatory Against Women*: On its part, this Committee is given the task of reviewing various aspects of our laws and procedure with a view to recommending ways of tackling the problem of discrimination that women have continued to suffer in various spheres of life.

4. *National Committee on the Elimination of Violence*: This committee has concluded a review draft of the bill for the prevention of violence against women with a view to widening the scope of the bill to include reduction of domestic and other forms of violence. This is a collaborative project between the Federal Ministry of Justice and the Security, Justice and Growth Programme of the DFID.

In concluding this address, permit me my Lords, to reiterate some issues which I believe would be of interest to your Conference:

- **Welfare of the lower bench:** Justice E. O. Ayoola, retired Justice of the Supreme Court has said, "The reform that we should do is to go back again to the base of the structure, strengthen the base, restore dignity, quality, efficiency to

Magistrate' Courts'[1] Unless we reform, reorganise and empower the Magistracy, our Prisons will continue to be filled with awaiting trial inmates the majority of whom are in custody through Magisterial Orders.

- **The issue of award of costs:** It is necessary to make the award of costs realistic in order to discourage frivolous litigation which wastes the precious time and resources of the court[2].
- **Interlocutory applications:** These have become serious and embarrassing clogs in the wheel of justice. All it takes to keep a trial going interminably is to keep on filing objections and appealing to the higher courts whilst the main proceeding itself remains stalled indefinitely. It seems that there is need for clearer guidelines in this respect to check further abuse.

My Lords, there is nothing wrong with our legal system which cannot be cured by what is right with the system. We are fortunate to have a dynamic and stable judiciary in this country. We also have the political will to implement reforms. Therefore, it is the only way to bequeath to future generations a profession, more virile, more dynamic and more responsive to the needs of the public.

I therefore on behalf of His Excellency, Chief Olusegun Obasanjo, *GCFR*, President of the Federal Republic of Nigeria warmly welcome you all to this Conference. I hereby declare this conference open and wish you very fruitful deliberations.

Thank you for your attention.

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1 . Quoted in Tunde Ogowewo, 'Self-Inflicted Constraints on Judicial Government in Nigeria', *Journal of African Law*, 49, 1 (2005), 39-53, at p.46.

2. See powerful arguments as regards the need for realistic costs by Dr Tunde Ogowewo, in the article referred to in footnote 1.

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PAPER 1

JUDGING THE JUDGES: JUDICIAL ETHICS, CODE OF CONDUCT FOR JUDICIAL OFFICERS

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JUDGING THE JUDGES: JUDICIAL ETHICS, CODE OF CONDUCT FOR JUDICIAL OFFICERS

Chief (Dr) E.A.O. Shonekan, ***GCFR, CBE***

Introduction

The letter inviting me to deliver this lead paper at the 2005 All Nigeria Judges Conference signed by the Honourable Justice J.A. Ajakaiye, Administrator, National Judicial Institute, stated that the organisers of this Biennial Conference, chose the theme "Sustenance of Good Governance: The Role of the Judiciary", for deliberation. For all practical purposes, I believe it is fair to say that the choice of this theme is in recognition of the central role of the judiciary in ensuring the sustenance of good governance in Nigeria. This inevitably raises a number of questions including what good governance means and what is expected of the judiciary in the quest to ensure sustenance of good governance.

The World Bank defines good governance as the use of political authority to exercise control over a society, and the management of its resources for social and economic development. In short, it is the efficiency and efficacy of a government in promoting the well-being of its people. The World Bank goes further to identify the following elements of good governance as those that are crucial to the effectiveness of a government in achieving social and economic development:

- Accountability: of government officials... for public funds
- Transparency: in procedures, investment decisions, contracts and appointments

- Predictability: no capriciousness in the policies, ac
and behaviour of government and public institutions.
- Openness: the importance of the role of the free pre
disseminating information in an unfettered manner.
- Rule of Law and Sanctity of Contracts: governments
institutions (and indeed everyone) should be subject to r
and regulations which are understood by all.

Simply put, we cannot talk of good governance if any of th
elements is absent in the governance arrangement of a country. W
the foregoing when viewed in the context of the theme of
conference suggests, is that the judiciary indeed, can play a key r
in the sustenance of good governance. The precondition for t
however, is that the judiciary must have a clear understanding of
expectations of it by the society as enshrined in rules, regulations a
policies, and also strive to meet and possibly, exceed the
expectations. Whichever way we look at it, the judiciary has so
roles to play in ensuring that these elements are present in a
governance arrangement. The relevance of the theme of t
conference will become obvious in this context.

The topic for my paper selected by the Conference organisers
"Judging The Judges: Judicial Ethics, Code of Conduct for Judic
Officers". There is no denying that the organisers of this confere
have a good appreciation of the place of ethics and judicial Code
Conduct in ensuring that judges play their onerous roles in line w
the expectations of the society. Once judges play their roles
accordance with the expectations of their Code of Conduct, we
assume that they are contributing to the sustenance of g
governance. Put differently, when expected standards of performa
are adhered to by Judicial Officers, the results can only be posi
for a nation and its citizenry. And there is some empirical evide
around the world in support of this assertion. A report publishe
Transparency International in 1996 indicated for instance, that a str
correlation existed between countries ratings on corruption and

weakness of the judicial system. The stronger the judicial system, the lower the incidence of corruption. And we all know the enormous damage that corruption has caused in countries ranking highly on the corruption chart.

In considering the issues raised by this topic, I have assumed that maintaining high ethical standards and adhering to the code of conduct defined for any professional body or group is not only good for that group or body, but also for the entire society. This is even more so for our judicial officers whose sphere of influence straddle the entire spectrum of the society, both in terms of geography and in terms of the range or dimension of issues that can, and are often adjudicated upon.

Ethics and the code of conduct are all about ordinary decency in professional conduct and activities and in my considered view, there cannot be any alternative to them if we are really serious about promoting and sustaining good governance. Good ethical conduct and adherence to established code of conduct cannot have preferred alternatives.

To enable me cover these issues and others, I have organized the paper into the following parts:

I. Introduction

II. Conceptual Issues/ Clarifications

III. Elements of the Code of Conduct for Judicial Officers

IV. Some Inhibitions to Adherence to and Enforcement of Code of Conduct

V. What should be done?

VI. Conclusion

Conceptual Issues/Clarifications

To avoid being misunderstood, it is always good to identify and possibly, clarify the concepts, issues and ideas that we shall be referring to in the course of this presentation.

Assessing Judges

Justice Ajakaiye stated in the letter inviting me to deliver this pa
and I quote, "it is pertinent to have members of the public assess
performance of judges so that they will note areas for change a
adjustments". The intent of this of course, is noble, but the issue
raises for me is how? Should we be assessing judges and the judicia
on the pages of newspapers as we seem to have had over the pa
several months by way of allegations of widespread corruption
should we expect lawyers appearing before judges to make allegatio
in the courts, as it was the case recently at the Supreme Cour
Could it be that the much talked about corruption in the judiciary
the direct consequence of the rot that seems to pervade the Nigeria
society? As the argument goes, if corruption has truly eaten dee
into the moral fabric of Nigeria and is indeed, widespread as it i
often said, judicial officers, not being angels, cannot be insulatec
from it. What this means is that as long as Nigeria continues tc
rank highly on the global corruption chart, we cannot really
expect to have an ethical judiciary. Another question that it raise
is should this assessment be in the context of the number c
judicial opinions that are upturned by the superior or appellat
courts?

Another pertinent question is what should be the basis of th
assessment? What is the place of the length of time it takes
review and dispose of cases or judicial activism, that is, being
the forefront of championing and protecting human rights, et
Should it be an assessment relative to the code of conduct f
judicial officers? Even if we agree that the latter may be sensib
there is still the issue of the methodology or how this assessm
can be carried out. Nonetheless, we can, for our purpose at t
Conference rely on the established Code of Conduct in assess
judges.

While there is no question about assessing the performance
Judicial Officers, what is somewhat unclear is by who and how. Shc
it be the state represented by the executive and legislative arm

government or should it be the people for who the executive holds power in trust? Should this assessment be undertaken by specific groups within the larger society who have an understanding of how the judicial system works such that it will become clear that a fair assessment has been undertaken? Perhaps the answer lies in a combination of the different groups. We shall revisit this in the course of this presentation.

Code of Conduct

Each self-respecting group or organisation that is worth its name in this country and elsewhere in the world has established for its members a code of conduct. A number of private sectors organisations have gone further to establish a Code of Conduct or Code of Ethics for their officers and employees. What this does is to establish in clear and unambiguous terms what constitutes acceptable and unacceptable behaviour among officers and employees of the organisation. It follows therefore that having a Code of Conduct while necessary, is insufficient. The organisation or body in establishing this Code of Conduct must have the intention and will to hold the parties bound by it accountable for their actions based on this Code.

A well-known Chartered Accountant, Chief J.A. Adebayo, has argued that a set of Code of Ethics (Code of Conduct) must satisfy the following criteria:

- The code itself must be clear and unambiguous;
- Its infringement or sanctions, imposed for same, must be both justifiable and in given circumstances, justiciable;
- Prescribed punishment must be well-defined for infractions;
- There must be the elementary rule of natural justice or what lawyers call *"Audi Alterem Partem"*, hear the other side.

To him, a set of Code of Conduct that cannot satisfy t criteria can really not guarantee professionalism. I cannot a more.

My preliminary review of the Judges' Code of Conduct of cou suggests that it meets each of these criteria. This is how it sh be. Needless to say that a Code of Conduct that is observed m in the breach is worth no more than the paper on which it is print The key issue then is to ensure that an established code of cond is not only observed, but is widely acknowledged to be so by th who should know.

The Central Postulation

The central postulation in this paper is that judicial officers c significantly contribute to the promotion and sustenance of goo governance by adhering to their code of conduct in a fair ar consistent manner. This being so, an assessment of the performanc of judicial officers must be undertaken against this code of condu notwithstanding the practical difficulties, which members of the publ may encounter in undertaking this assessment. But what really do this code of conduct say?

Elements of the Code of Conduct for Judicial Officers

The code of conduct, which I understand is given to each Judic Officer, is indeed very comprehensive, clear and unambiguous. Before presenting the code, it may be useful to review the framewo to be used to assess the performance of judges in relation to tl code of conduct. We can categorise the interested parties into fo distinct groups:

The Judiciary

This covers the National Judicial Council and all other agencies the judicial arm of government responsible for appointmen promotion and discipline of judicial officers.

The Bar

This group covers practising lawyers and all those who interact from time to time with judicial officers in the course of their professional activities.

The Executive/ Legislative

In this group would be the arms of government responsible for making laws and for enforcing such laws in the interest of the society.

The Public

This category encompasses the general public including the media. It includes individuals or organisations who would normally seek the intervention of the Judiciary when necessary.

This categorisation is intended to help draw attention to any common or emerging trend we may see in the observance of this code of ethics. I argue here that by taking this broad view in the assessment of our Judicial Officers, we can come to what will look like a consensus, especially if common patterns are observed in these assessments.

As part of the preamble of the Judicial Code of Conduct document, all those who ought to adhere to the Code are identified. In addition, it is explicitly stated that violation of the rules contained in the Code shall constitute judicial misconduct or misbehavior and may entail disciplinary action. It is however, silent on the process of assessment. Let me now take some time to review the Code in details.

RULES

The Code states that in the performance of his duties, a judicial officer should observe the following rules.

Rule 1

A judicial officer should avoid impropriety and appearanc
impropriety in all his activities:

(i) A Judicial Officer should respect and comply with the law
the land and should conduct himself at all times in a mar
that promotes public confidence in the integrity and impartia
of the judiciary.

(ii) ***Social relationships***

(a) A Judicial Officer should avoid social relationsh
that are improper or give rise to an appearance
impropriety, that cast doubt on the judicial office
ability to decide cases impartially, or that bri
disrepute to the judiciary;

(b) A judicial Officer shall not be a member of any soci
or organisation that practices invidious discrimination
the basis of race, sex, religion or ethnic origin or wh
aims and objectives are incompatible with the functi
or dignity of his office.

What common trends do we find in these set of rules from
lenses of the four groups outlined earlier?

From published reports, we have had a few cases of Judi
Officers being removed from office through a collaborative eff
of the Judiciary, the Executive and of course, the public.
pattern is such that a petition by a member of the public (in m
cases, the plaintiff or respondent) is followed by investigati
and application of sanctions, where the allegations are found
be true. We have also seen the outcome of the Hon Justice Kay
Esho Committee that established allegations of improper conc
against some judicial officers. The Commission was of cou
empanelled by the Executive.

Currently, the whole process of assessment is shrouded in sec

and it seems to me that there is no systematic process in place to evaluate the performance of judges against this code of conduct. This needs to change. We have heard of Judicial Officers taking bribes to pervert the course of justice. There is no denying that some of our judges have not complied with the laws of the land. Based on what we have seen, it will become clear that judges handling cases with political connotation have a proportionately higher rate of exposure here. Whether we review the Late Justice Ikpeme case or the other cases that came up as a consequence of the events of that period, the inescapable conclusion remains that some of our Judicial Officers have failed to ensure full compliance or observance of their Code of Conduct.

Rule 2

Adjudicative duties

(i) A Judicial Officer should be true and faithful to the Constitution and the law, uphold the course of justice by abiding with the provisions of the Constitution and the law and should acquire and maintain professional competence.

(ii) A Judicial Officer must avoid the abuse of the power of issuing interim injunctions, *ex parte;*

(iii) In judicial proceedings, a Judicial Officer should maintain order and decorum.

(iv) A Judicial Officer should be patient, dignified and courteous to accused persons and litigants, assessors, witnesses, legal practitioners and all others with whom he has to deal in his official capacity and should demand similar conduct of legal practitioners, his staff and others under his direction and control.

(v) i – A Judicial Officer should accord to every person who is legally interested in a proceeding or his representative full

right to be heard according to law, and except as author
by law, neither initiate, encourage, nor consider *ex part*
other communications concerning a pending or impen
proceeding.

ii. For the purpose of this sub-rule- An "*ex p*
communication" is any communication involving less
all the parties who have a legal interest in the c
whether oral or written, about a pending or impend
case, made or initiated by the judicial officer presid
over the case.

(vi) A Judicial Officer should promptly dispose of the business
court. In order to achieve this, the Judicial Officer is requi
to devote adequate time to his duties, to be punctual
attending court and expeditious in bringing to a conclusi
and determining matters under submission. Unless ill
unable for good reason to come to court, a Judicial Offi
must appear regularly for work, avoid tardiness, a
maintain official hours of the court.

(vii) A Judicial Officer shall endeavour that there is str
compliance with the provisions of the constitution whi
require that a copy of the judgment of the superior court
record be given to parties in the cause within seven days
delivery thereof.

(viii) A Judicial Officer should abstain from comment abou
pending or impending proceeding in any court in this count
and should require similar abstention on the part of the co
personnel under his direction and control. This provision d
not prohibit a judicial officer from making statements in
course of his official duties or from explaining for public
private information the procedure of the court provided su
statements are not prejudicial to the integrity of the judici
and the administration of justice.

(ix) A Judicial Officer shall be bound by professional secrecy with regard to his deliberations and to confidential information acquired in the course of his duties other than public proceedings.

(x) A Judicial Officer should prohibit broadcasting, televising, recording of or photographing in the court room and areas immediately adjacent thereto during sessions of court or recesses between sessions in order to prevent the distortion or dramatisation of the proceedings by such recording or reproduction. A Judicial Officer may authorise the:

(a) broadcasting, televising, recording or photographing of investigative and other proceedings;

(b) the electronic recording and reproduction of appropriate court proceedings by means of recording that will not distract participants or impair the dignity of the proceedings.

The trends that can be observed under the above set of rules using the same framework include:

(a) Abuse of the power of issuing interim injunctions *ex parte*. As you would recall, things got so bad that these injunctions issued by courts of coordinate jurisdiction were conflicting. It is worthy of note here that the intervention of the leadership of the judiciary on this issue has brought some semblance of order.

(b) The perception of the public seems to be that some judicial officers are either tardy or have failed to devote adequate time to their duties or how else can we explain the notable delay that is associated with the administration of justice in Nigeria?

(c) While the professional competence of judges may not be in doubt, the scope for professional improvement is limited

(primarily to law reports). For officers with poter to rise to the appellate courts it seems to me that opportunity and space for greater professio improvements needs to be widened further.

(d) We have seen cases in which copies of judgments w not made available within seven days of delivery Th clearly, is at variance with this code of conduct an behoves the National Judicial Council to intensify surveillance with a view to identifying and punish culprits whenever the evidence to support this available.

As earlier noted, the application of sanctions by the judiciary some judicial officers who were found to have abused the issuar of interim injunctions has been rather swift. This is how it shou be. Typically, the process is such that concerns are expressed the media followed by appropriate actions by both the executi and the judiciary.

One area of interest where change is most desperately needed that of delay in the disposal of cases. As the maxim says, "justi delayed is justice denied". Nowhere has this been brought hor closely than in the area of judicial review of the 2003 Gene Elections. It is clearly unacceptable in my view that we have r concluded election petitions more than half way into the tenure those whose elections are being contested. There is no doubt in r mind that this is one reason why the confidence of the public in t judiciary is sometimes not as it should be.

When I say this, I do not by any stretch of imagination imp that Judicial Officers are solely responsible, neither do I sugge or imply that the frequent adjournment of cases is as a result tardiness or laziness of Judicial Officers only. It is possible th some of the lawyers appearing before judicial officers may ev be adopting this as a strategy to frustrate the plaintiff. Judici Officers have the responsibility to focus attention on this area. Th

point of immediate interest is that this is one area that deserves urgent attention. Is there something we can learn from the practice in the United States here? As you are aware once the trial date is set, the court will not adjourn until the case is disposed off under the US system.

Administrative duties

(i) A Judicial Officer should diligently discharge his administrative duties, maintain professional competence in judicial administration and facilitate the performance of the administrative duties of other judicial officers and court officials.

(ii) A Judicial Officer should require his staff and other court officers under his direction and control to observe the standards of fidelity and diligence that apply to him.

(iii) A Judicial Officer on becoming aware of reliable evidence of unethical or unprofessional conduct by another judicial officer or legal practitioner should immediately take adequate steps to report the same to the appropriate body charged with disciplinary powers on the matter complained of.

(iv) In the exercise of his administrative duties, a judicial officer should avoid nepotism and favoritism.

(v) A Judicial Officer must refrain from sexual harassment.

(vi) A Judicial Officer shall not be a member of the tenders board or engage in the award of contracts.

Against the background of our framework, we can make the following observations:

(a) Nigerians generally, for cultural reasons, are rather timid about volunteering information on their neighbors, colleagues and friends. It will therefore, not surprise me

if no cases of judicial officers reporting a unprofessional conduct or unethical conduct by anoth judicial officer or legal practitioner have be documented. The same is also true of the issue of sexu harassment.

(b) The preponderance of opinion in Nigeria is that ve few people in the position of authority (judicial office inclusive) can actually avoid nepotism and favoritism. Th is largely due to the pervasive influence of ethnicity the country. Although reliable evidence may be hard find, there is the perception that nepotism and favoritis can be discerned in the performance of the administrativ duties of many a responsible officer whether in the publ or private sector. In my experience however, I can confir that there are refreshingly large numbers of people i responsible positions who do not succumb to th temptations of nepotism or ethnicity, public percepti not withstanding.

The point should be made however, that this is not peculiar to th judiciary. Perhaps a way around it is for organisations to provide th mechanism that can allow aggrieved members to provide eviden of nepotism, parochialism, etc without any fear of being punished f it. The whistle blower must be protected if we are keen on havi people that will be willing to blow the whistle.

Furthermore, it is unclear how much influence Judic Officers can have on the staff and other court officers under th direction relative to the issue of observing standards of fidel and diligence that apply to the judicial officer. One thing is cl and that is that in Nigeria today, anything goes. In a situation which everything seems to have a price, how far can the judic officer go in enforcing his standards of fidelity on his staff and ot court officers? The point really is that while the judicial officer n give instructions, it is not unlikely that the staff or other court offic

who may have diabolical instincts can still choose to ignore such instructions. The lesson in it however, reinforces the Chinese proverb which says actions speak louder than words. Leadership by example should be the standard of our judicial officers or anybody that leads for that matter. Whenever court officers and staff are found to be in breach of the code of conduct, they should be promptly disciplined based on the rules of service in the judiciary.

Similarly, very disturbing are situations in which the judgment or the declaration that a judicial officer is to make, is already public knowledge even before the judgement is delivered. Quite a few instances can be identified here and since it is not really based on the evidence adduced, one is left in no doubt but to conclude that there are some members of the judiciary who are willing to be used to score points particularly, in epic cases with political undertones. Needless to say here, that this constitutes a breach of the code of conduct.

Disqualification

(1) A Judicial Officer should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to the instances where:

(a) he has a personal bias or prejudice concerning a party or personal knowledge of facts in dispute;

(b) he served as a legal practitioner in the matter in controversy, or a legal practitioner with whom he previously practiced law served during such association as a legal practitioner concerning the matter or the judicial officer or such legal practitioner has been a material witness in the matter;

(c) he knows that he individually or as a judicial officer or his spouse or child, has a financial or any other interest that could be substantially affected by the outcome of the proceedings;

(d) he or his spouse, or a person related to either of
or the spouse of such a person:

(i) is a party to the proceedings, or an officer, direct
trustee of a party;

(ii) is acting as a legal practitioner in the proceedings;

(iii) is known by the judicial officer to have an interest w
could be substantially affected by the outcome of
proceedings;

(iv) is to the judicial officer's knowledge likely to be a mate
witness in the proceedings.

(II) A Judicial Officer should inform himself about his perso
and fiduciary financial interests.

(III) For the purpose of this section-

(a) "Fiduciary" includes relationships such as execu
administrator, trustee and guardian;

(b) "Financial interest" means ownership in a substan
manner of a legal or equitable interest, or a relations
as director, adviser or other active participation in aff
of a party except that:

(i) ownership in a mutual or common investment fund wl
holds securities is not a "financial interest" in s
securities unless the judicial officer participates in
management of the funds;

(ii) an office in an educational, religious, charitable or
organisation is not a "financial interest" in securities
by the organisation;

(iii) the proprietary interest of a policy holder in a mu
savings society or similar proprietary interest
"financial interest" in the organisation only if the outc

of the proceedings could substantially affect the value of the interest.

(iv) Ownership of government securities is a "financial interest" in the issue only if the outcome of the proceedings could substantially affect the value of the securities.

Disqualification is a common feature of the judicial system in modern societies, although my personal observation is that our judicial officers tend to wait till a litigant points out the need for them to disqualify themselves. Needless to stress here that judicial officers need to increasingly take steps to disqualify themselves on their own volition when the situations described here are either present or when there is an appearance of them. We need to get to that situation where the existence or appearance of conflict of interest will be cause for disqualification. Judicial officers have a duty to be fair to their conscience here and come out to let the public know why they are disqualifying themselves. The idea of keeping mute until a litigant draws attention to the potential conflict of interest situation of a judge will certainly not portray the judiciary in good light.

Waiver of disqualification

A Judicial Officer disqualified by the terms of Rule 2C (1) (c) or Rule 2C (1) (d) may, instead of withdrawing from the proceedings, disclose on the record the basis of his disqualifications. If based on such disclosure, the parties, their representatives and/or their legal practitioners, independently of the Judicial Officer's participation, all agree that the Judicial Officer's relationship is immaterial or that his financial interest is insubstantial, the Judicial Officer is no longer disqualified and may participate in the proceedings. The consent by the parties, their representatives and/or their legal practitioners shall be recorded and shall form part of the record of proceedings.

This places the responsibility for disclosure on the Judici Officer and I think it is good. In reality, I cannot remember a recent occurrence. To me, one key message is that it is als important for Judicial Officers to increasingly take the initiativ and fully disclose potential reasons for them to disqualify themselve from a case.

Rule 3

A Judicial Officer should regulate his Extra-Judicial Activities t minimise the risk of conflict with his judicial duties.

Vocational activities

A Judicial Officer may engage in the arts, sports and other social an recreational activities, if such a vocational activities do not adversel affect the dignity of his office or interfere with the performance o his judicial duties.

Civil and charitable activities

(i) A Judicial Officer may participate in civic and charitabl activities that do not reflect adversely upon his impartiality o interfere with the performance of his judicial duties. He may therefore, serve as an officer, director, trustee, or non-legal advise of an educational, religious, charitable or civil organization no conducted for the economic or political advantage of its member subject to the condition that he should not serve if it is likely tha the organisation will be engaged in proceedings which woul ordinarily come before him or will be regularly involved in lega proceedings in any court.

(ii) Freedom of expression and association – In accordance wit the fundamental rights enshrined in the Constitution, a Judici Officer is like other citizens entitled to freedom of expressio belief, association and assembly, PROVIDED, however, that exercising such rights, he shall always conduct himself in such manner as to preserve the dignity of his office and the impartiali

and independence of the judiciary.
(iii) Judicial Officers shall be free to form and join associations of judges or other organisations to represent their interests, to promote their professional training and to protect their judicial independence.

Chieftaincy titles
A Judicial Officer shall not take or accept any Chieftaincy title while in office.

Fiduciary activities

A Judicial Officer should not serve as the executor, administrator, trustee, guardian or other fiduciary, except for the estate, trust, or person of a member of his family, and that only if such service will not interfere with the proper performance of his judicial duties. "Member of his family" includes a spouse, child, grandchild, parent, grandparent, or other relative or person with whom the Judicial Officer maintains a close familiar relationship. In this capacity a Judicial Officer is subject to the following conditions:
(i) he should not serve if it is likely that as a fiduciary he will be engaged in proceedings which would ordinarily come before him, or if the estate, trust, or ward becomes involved in legal proceedings in the court to which he serves or one under its appellate jurisdiction;
(ii) while acting as a fiduciary, a Judicial Officer is subject to the same restrictions in financial activities which apply to him in his personal capacity.

Even though, I cannot remember any documented case in which a Judicial Officer was found culpable here, the issue is to place the onus of disclosure on the Judicial Officer.

Business and financial activities

1. A Judicial Officer may own investments and real property PROVIDED that in the management of his investments he

shall not serve as an officer, director, manager, gener
partner, adviser or employee of any business entity.

2. Otherwise permissible investment or business activities ar
prohibited if they:

(a) tend to reflect adversely on judicial impartiality,

(b) interfere with the proper performance of judicial duties,

(c) exploit the judicial position, or

(d) involve the Judicial Officer in frequent transactions with lega
practitioners or with people likely to come before the Judicia
Officer's court.

These are of course, clear and straightforward. The presumptio
at this time is that Judicial officers are observing these until prove
otherwise.

Acceptance of Gifts

1. A Judicial Officer and members of his family shall neith
ask for nor accept any gift, bequest, favour, or loan on accou
of anything done or omitted to be done by him in the discharg
of his duties.

2. A Judicial Officer is, however permitted to accept:

(i) personal gifts or benefits from relatives or perso
friends to such extent and on such occasions as a
recognised by custom;

(ii) books supplied by publishers on a complimentary bas

(iii) a loan from lending institution in its regular course
business on the same terms generally available to peo
who are not Judicial Officers;

(v) a scholarship or fellowship awarded on the same terms applied to other applicants.

Perhaps a way forward is to establish thresholds for gifts that judicial officers can accept. In some organisations, any gift above a particular level must be declared to the authorities.

Practice of Law

A Judicial Officer should not practice law nor act as an arbitrator.

I do not have any documented case of violation of the code of conduct as far as this article and the one preceding it are concerned, but as we all know, this does not necessarily imply that there had been no violations. What it does suggest is the need for deliberate actions on the part of the judiciary aimed at eliciting information from Judicial Officers on whether or not they are complying with this aspect of the code of conduct.

Whichever category we look at it, it seems to me that while some of our Judicial Officers have in general, demonstrated faithfulness in adhering to the issues raised under Rule 3, some have been less than faithful. This is not to say that there have not been allegations of Judges accepting gifts unethically to pervert the course of justice. As I alluded to earlier, a plaintiff's counsel on Tuesday 21st of June 2005 made there what Mrs Folake Solanke SAN referred to in the recent lecture in Lagos on Justice in Contemporary Nigeria as "the father and mother of all accusations". The President of the Federal Republic was also reported in the media to have said that the judiciary was corrupt. Corruption in this sense is interpreted to mean the receipt of financial or material inducement with the aim of perverting the course of justice.

The judiciary itself seems to underscore this by some disciplinary actions meted out to some members of the Election Petition Tribunal a few months ago. However, since there is a case before a competent court of law on this, it might not be necessary to comment on it, but the point must be made that both the judiciary and the public are

aware that some Judicial Officers routinely violate the rules outlin
under the code of conduct here.

From what I have said so far, it will become clear that so
Judicial Officers have been less than faithful in adhering to the
code of conduct. It is also obvious that where cases of infractio
have been established, the affected Judicial Officers have bee
disciplined. This is how it should be. What is perhaps lacking an
needs to be mentioned, is the need for an in-built mechanism fo
the judiciary to monitor and enforce compliance with the code
conduct.

Some Inhibitions to Adherence to Enforcement of the Cod of Conduct

Lack of Enabling Environment

There seems to be no institutional mechanism in place to monitor an
enforce compliance with the code of conduct by Judicial Officers
Since Nigerians are typically reluctant to come forward wit
information, which can lead to the downfall of a wrongdoer, for cultura
reasons, there is a need to put in place a self-sustaining process t
monitor and enforce compliance.

What I am driving at here is that the unwillingness of Nigeria
except in very rare circumstances to come up with informatio
available to them on the unethical conduct of Judicial Officers
indeed, any officer, is a major impediment and until we get over
cases of violation of code of conduct may continue to slip b
undetected. The judiciary in collaboration with the executive a
legislative arms must put a mechanism in place to monitor and enfo
observance of the code of conduct.

Lack of Strict Adherence to Established Criteria f Appointing Judicial Officers

Even though I have no evidence here, it seems to me that if
criteria are rigorous and are strictly followed, cases of violatio

code of conduct will become very rare. As in every sphere of human endeavour, merit, personal character are critical. Personal character in particular is key. Individuals with strong moral values are likely to do better in complying with the established code of conduct. I would like to submit here that we need to go back to the drawing board, review the criteria and ensure that we comply consistently. In doing so, we must continue to recognize the peculiarities of Nigeria, and comply with the constitutional provision of federal character. I do not have any doubt here that since no one part of the country has a monopoly of good people, we can select the best and still be able to reflect the diversity of the nation or its constituent parts.

Pervasiveness of Corruption and Indiscipline in Nigeria

It is common knowledge that corruption and social indiscipline are the twin evils haemorrhaging the Nigerian society today and that is why it is imperative to prosecute the war against these evils without any let up. Because of the pervasive influence of corruption, Judicial Officers particularly the lighthearted can get caught in the web. Nigeria as we all know has come to be known as a nation of anything goes. Everything is said to have a price in Nigeria. Nepotism, tribalism or ethnicity have become established as vices that need to be urgently exterminated. Even when Judicial Officers are determined to isolate themselves, the temptation will always be there until we take steps to lay the ghosts of these vices to rest. What am I saying here? The kernel of my argument my lords, is that part of the solution lies with the larger society. As an expert on ethics in business, J.M Elegido has noted, in so far as corruption and unethical practices become widespread in a certain environment, the reputation of all actors who operate in that environment will tend to become tainted whether they deserve it or not. Since the judiciary suffers from the problem of corruption in the society, the temptation is there to "join them if you cannot beat them". The honourable course of action is to refuse to join them.

Poverty and Deterioration of Public Institutions

Another impediment that can be identified is the high level of pove in Nigeria. This coupled with the systematic deterioration of pub institutions including education and healthcare, has imposed additio burden on our Judicial Officers. In spite of what may have be done to boost the remuneration of Judicial Officers, I am of t view that the income available to Judicial Officers is inadequa for comfortable living in today's Nigeria. In a country in which t public elementary and secondary schools have all but collapse Judicial Officers like other parents are left at the mercy of priva schools who are reported to be charging exorbitantly today. I w told recently that fees in some private secondary schools in Lag and other parts of the South are as high as N1million per annur The issue is how will our Judicial Officers and indeed, publ servants generally, be able to afford this? What this suggests to n is the imperative of reviving the public education sector in additi to payment of living wages to public officers if we are to succe in the war against corruption.

It is important to emphasise here that when Judicial Officers f to comply with their code of conduct, the judiciary is harm irreparably.

Ways in Which the Judiciary Can Be Harmed

(a) The reputation of the judiciary can be damaged a consequently, good people might not be interested in join the judiciary, with far reaching ramifications. Of course, if g people refuse to join, the coast will be clear for charlatans second rate individuals to preside over the dispensation justice. This cannot be in anyone's interest and it is precis for this reason that I believe the judiciary itself should def and promote its interest in the observance of the code conduct.

(b) If the judiciary is damaged, other arms of government and institutions can be infected. The consequence of this can be better imagined. Suffice it to say that anarchy will result. To avoid this doomsday scenario, the judiciary must act fast and firmly to ensure observance of its code of ethics by all members. Deviants should of course, be promptly identified and sanctioned as we have already seen.

(c) The rule of law can break down. Where the judiciary is weak or is hardly respected, we cannot talk about the existence of the rule of law. Without the rule of law, the quest for good governance will be a mirage.

What Should Be Done?

(ii) Review and Update Criteria for Appointing Judicial Officers

This must be done with emphasis on merit and individuals who place importance on values such as honesty, integrity, morality and honour. Anyone who cherishes personal honour will find it difficult to violate the established code of conduct. The question as is often the case, is how can we identify the right people?

(ii) Providing an Enabling Environment

A conducive environment ought to be provided for Judicial Officers to function. A situation in which Judicial Officers are expected to record proceedings in long hand or where the needed work tools are not provided, the probability of unethical conduct will be high. In an age in which anyone can hook up to the internet and access information on just any subject, I am convinced that we will be doing ourselves a lot of good if we ensure that what our Judicial Officers need to work with are provided. This will include providing them opportunity to learn and unlearn ranging from participation in international seminars and conferences, and even, refresher courses at recognized training centers for Judicial Officers.

(iii) Payment of Living Salaries.

As I have alluded to, the cost of living is very high in Nigeria rela- to the income level. We must therefore, ensure that judges paid a remuneration that can guarantee them a measure of pers- comfort even after taking care of the education and other needs their families. What this means is that we should put in plac- mechanism to regularly review this remuneration in line with of living changes.

(iv) Application of Firm and Consistent Sanctions in ce of Infractions

As we have already seen, the judiciary scores highly here. T question for me is that if no active measures are taken to unco violations, how can we talk about application of firm and consist sanctions? It is essential to conduct systematic or rout investigation to uncover any misconduct. In this context, I wo like to propose the establishment of a compliance unit in e judiciary across the country. The unit should be charged with responsibility of ensuring that laid down procedures and code conduct are observed.

Additionally, the unit can have a hotline telephone number o e-mail address that the public can call or send mails to. The will therefore, be able to receive input from the public.

(v) Placing the Onus for Reporting Compliance or N compliance on Judicial Officers

We can put in place a process that would require Judicial Office report annually on what they are doing in compliance with the of conduct and this will of course, be on oath. Such a require will constantly remind Judicial Officers the need to observe the of conduct. Permit me here to recall what we put in place durin tenure as the Chairman and Managing Director of UAC of Ni Plc. First, we prohibited what we called "insider trading" a

directors and officers of the company and later led the vanguard of advocacy for widespread adoption of this code of conduct. Today, it is a listing requirement of the Nigerian Stock Exchange. What was really novel about it was that we placed the responsibility for reporting compliance or otherwise on the officers and directors of the company.

(vi) Ethics Training

One thing that some large organizations do, which helps ensure ongoing compliance with the code of conduct is regular ethics training. This will help instill in everyone the need for good ethical conduct.

The constant repetition of the message of compliance with the code of conduct by leaders of the judiciary during these seminars coupled with appropriate recognition and rewards for exemplary conduct should help ensure observance of this code of conduct.

(vii) Special Investigations

These can be warranted if a Judicial Officer is observed to be living above his legitimate earnings. Is the standard of living compatible with what the Judicial Officer can legitimately earn? This should provide sufficient cause for such special investigations. This of course, should be standard practice across the board in Nigeria. It should not be peculiar to the judiciary.

Conclusion

Let me conclude by reiterating some points I have made or may have alluded to in this presentation:

(i) The judiciary is central to promoting and sustaining good governance. It is therefore, critical that the code of conduct established for it is observed and those found to have violated the code are swiftly and consistently punished.

(iii) Payment of Living Salaries.

As I have alluded to, the cost of living is very high in Nigeria relative to the income level. We must therefore, ensure that judges are paid a remuneration that can guarantee them a measure of personal comfort even after taking care of the education and other needs of their families. What this means is that we should put in place a mechanism to regularly review this remuneration in line with cost of living changes.

(iv) Application of Firm and Consistent Sanctions in case of Infractions

As we have already seen, the judiciary scores highly here. The question for me is that if no active measures are taken to uncover violations, how can we talk about application of firm and consistent sanctions? It is essential to conduct systematic or routine investigation to uncover any misconduct. In this context, I would like to propose the establishment of a compliance unit in each judiciary across the country. The unit should be charged with the responsibility of ensuring that laid down procedures and code of conduct are observed.

Additionally, the unit can have a hotline telephone number or an e-mail address that the public can call or send mails to. The unit will therefore, be able to receive input from the public.

(v) Placing the Onus for Reporting Compliance or Non compliance on Judicial Officers

We can put in place a process that would require Judicial Officers to report annually on what they are doing in compliance with the code of conduct and this will of course, be on oath. Such a requirement will constantly remind Judicial Officers the need to observe the code of conduct. Permit me here to recall what we put in place during my tenure as the Chairman and Managing Director of UAC of Nigeria Plc. First, we prohibited what we called "insider trading" among

directors and officers of the company and later led the vanguard of advocacy for widespread adoption of this code of conduct. Today, it is a listing requirement of the Nigerian Stock Exchange. What was really novel about it was that we placed the responsibility for reporting compliance or otherwise on the officers and directors of the company.

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Conclusion

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(i) The judiciary is central to promoting and sustaining good governance. It is therefore, critical that the code of conduct established for it is observed and those found to have violated the code are swiftly and consistently punished.

(ii) The Judiciary itself currently does a fairly good job of responding promptly to allegations of unethical or unprofessional conduct by Judicial Officers. What is lacking is an internal mechanism for uncovering such unethical/ unprofessional conduct. The judiciary has in place a very robust code of conduct for its members that could help nurture a strong and highly respected judiciary. This code of conduct must not only be observed by all members, but also the general perception must be that it is being observed in the interest of the reputation of the institution and the larger society.

(iii) The widespread perception is that there is pervasive corruption in the judiciary. However, if one thing is clear it is that there will be excellent Judicial Officers and also there will be some unethical and unprofessional ones. This, I suppose, is the fact of life. What is important is the existence of an internal process for acknowledging and rewarding excellence and for identifying and sanctioning the unprofessional or unethical ones.

(iv) As in every field of human endeavour, it is important to strictly adhere to the criteria defined for the appointments and advancement of Judicial Officers. Given the nature of the responsibility of the judiciary, we must not ignore the position of personal values as part of these criteria. Indeed, my personal preference will be to place a high premium on it.

(v) There is a need to pursue the ongoing war against corruption and social indiscipline to its logical conclusion. Where corruption and other forms of indiscipline-nepotism parochialism, tribalism or ethnicity are pervasive, i becomes rather difficult for the judiciary to be an island o angels. The judiciary, it must be acknowledged, can mak or mar this war.

Already, there are allegations that the tardiness of the judiciary including the delay in disposing of corruption cases is hampering the effectiveness of the anti-corruption agencies. In my considered view, the judiciary needs to rise up to this challenge and demonstrate to the whole world that it is as concerned about corruption as any other segment of the Nigerian society.

The greatest challenge in my view is putting in place an internal mechanism for monitoring and enforcing observance of code of conduct. I do have the conviction however, that this is not insurmountable. Where there is a will, there will always be a way.

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COMMENTARY (I)

Hon. Justice M. M. A. Akanbi, *CFR*

Introduction

I am delighted to be offered the opportunity at this auspicious 2005 All Nigeria Judges' Conference to present a commentary on the lead paper on the topic: "Judging the Judges: Judicial Ethics, Code of Conduct for Judicial Officers" written by no less a distinguished personality than a former Head of Sate, Chief (Dr) Ernest A. O. Shonekan, *GCFR, CBE*. I have perused the paper and would like to acknowledge that the distinguished writer has made a good job of it and has in his consideration brought to bear his wealth of experience as a foremost industrialist, an administrator of no mean order and his deep knowledge and understanding of the "goings on" in our judicial system.

What is more, the author, a lawyer of many years standing has in his paper identified and showed great concern for the lapses in our judicial systems and operations and proffered solutions to some of the nagging problems.

I find myself in respectful agreement with some of the views expressed and the solutions proffered. I however propose in this commentary to elucidate on some of them against the background of my experiences on the bench and outside the bench. I intend to place the topic in three separate compartments namely:

(i) Judging the Judges;

(ii) Judicial Ethics, and

(iii) Code of Conduct for Judicial Officers

before making any general summation and/or conclusions.

Please permit me to say with all sense of modesty and candour

that since retiring from the bench of our great country, I have had closer inter-action with the wider public and learnt so much about mortal man than I ever did on the bench. The cloistered life of a judge has its own limitations. More often than not most of us when in the "gilded cage" often see the woods for the trees and hardly appreciate that the world of the judges is not the same as that of those they are called upon to judge.

Invariably most judges live in the world of make-belief but ordinary people do not. Forty-five years of independence, have made the ordinary Nigerian wiser and sharpened his wits. Nigerians now look out for the realities of life. They have become more inquisitive and more daring in their actions. Many of them now look beyond the scarlet robes to reach out to the soul of any weak judge. They look deeper into his character or conduct and place a price on him. All these because they have come to realize more than ever before that the judges are but mortals like themselves and that they did not descend from the planet Mars.

By their nature ordinary people, not having been trained and nurtured in the art and mastery of talking less and listening and considering issues soberly, speak out their minds at the earliest prompting. What they cannot say in the open they say in private. They do not engage in sophistry but they fuel the rumour mills and this is why today stories of judges being corrupt rent the air. No doubt many of these stories may or may not be true, but whatever is the case, they add to the problems and tend to lower the honour and the dignity of the hallowed sanctuary of justice. The barrage of criticisms, the attacks, the insults, the assaults and venoms sometimes quite unjustifiable being poured on our judges at times from quarters least expected not only call for great concern but also for a re-assessment of the qualities and character of those whom it has pleased Almighty God to make judges over their fellow men.

For several years, I have always held the view that the Nigerian judiciary was an epitome of honesty, integrity and probity and this

belief is fortified by the frequent demand for Nigerian judges to serve on the bench of other African countries and indeed at several international fora.

With the recent happening in the judiciary the increasing spate of criticisms from the high and low, the adverse comments by the print and electronic media which are becoming more and more pronounced tend to make one wonder whether the Nigerian Judiciary is still on course. If not, why not?

Having been part of the system, it is easy to want to shy away from the realities or to turn a blind eye or off-handishly dismiss all one hears or sees as the work of the miscreants and even pretend that all is well with our judicial system

Human nature being what it is, one may even feel compelled by sheer force of circumstances to want to maintain the esprit-de-corps that is to say the brotherhood of the bench, so as to avoid a clash with respectable colleagues. On balance, however, it is better to speak out, freely and frankly if only to ensure that the judiciary as a veritable institution remains sacrosanct.

For there can be no doubt that the judiciary deserves the veneration, the reverence, the adoration and the respect of the citizenry. A bastardised or corrupt judiciary or a judiciary that has lost its aura of respectability, its reverence, its honour and its dignity, cannot provide hope, comfort or solace for the common man. Such a judiciary cannot be seen as a bastion of democracy. On the contrary, a good judiciary manned by men and women of proven integrity and great intellect is the bedrock of a stable, progressive, dynamic and decent society. It makes for peace and good governance.

Judging the Judges

The choice of topic is apposite. It underscores the point and the need to examine the performance of judges generally in the light of the on-going changes within and outside the judiciary in this country. In England, "all judges of the High Court and above, hold office

during good behaviour, subject to a power of removal by her majesty on an address presented to her by both houses of parliament. There is however no record that the power has been exercised in the case of an English judge. The only case on record is that Sir Jonah Barrington, a judge of the High Court at Admiralty in Ireland was removed in 1830 for helping himself with money paid into court by suitors."

In colonial Nigeria and in the years immediately after independence it would appear that Nigerian judges, like English High Court judges enjoyed security of tenure. However, with the seizure of power by the military in 1966 and in the subsequent years matters took a different turn. Various decrees were enacted which ultimately vested the power to appoint and remove judges of the superior courts of record whether at the State and Federal level on the Supreme Military Council (see Decree 32 of 1975).

Many great judges including the Chief Justice, the scholarly Dr Teslim Elias were perfunctorily removed from office without being given fair hearing. Similarly in 1983, another set of military rulers unceremoniously removed many High Court Judges from their offices. Their offences or transgressions (if any) were not made known to us. Everything was shrouded in secrecy. Some of the victims of this military assaults never recovered from the shock they had. While these actions by the military may be considered as aberrations, the removal of the judges such as we have witnessed in recent times and under a civilian regime, cannot be so described and this is why it becomes necessary to assess and judge the judges with a view to determining whether or not they are living up to the expectation of their exalted office.

Today, the power to appoint and remove judges of the Superior Court of Record, with which we are concerned, is as set out in the 3rd Schedule part 1, paragraphs 21 and 22 of the Constitution of the Federal Republic of Nigeria 1999. The National Judicial Council (NJC) on question of removal of judges is charged with the responsibility of making necessary recommendation to the President

in respect of Federal Judges and in the case of State High Court Judges, to the State Governors. In practice no such recommendation are made until the complaint against an erring judge has been fully investigated, and he or she has been offered opportunity to defend himself or herself.

But how have the judges fared since the return to democratic rule. It is a sad irony that the records continue to show that in spite of everything that has been said and done to enhance the image of the judiciary and the quality of life of judges, some of our judges are yet to learn lessons from the experiences of the past. Or how else does one explain the series of complaints made against certain judges who were removed from their exalted position and shown the way out by the National Judicial Council.

In this regard, attention may be drawn to a few of them: Justice Kusherki, a judge of the High Court, Abuja had to be removed from office for conduct unbecoming of a judge. So also was Justice Kolo Muhammed of the Federal High Court while serving in Jos. Justice Egbo-Egbo of the Federal High Court and Justice Nnaji of the Enugu High Court were also sent packing. The first for granting an *ex parte* application which the NJC thought he ought not to have granted; the other for deliberately assuming jurisdiction where he had none. Justice Nnaji, a judge of the Enugu State High Court exercised jurisdiction in a matter which was outside his jurisdictional competence. The events complained of occurred in Anambra State, yet with brazen effrontery, he handled the case in Enugu and made far reaching orders, thus creating unnecessary furore. In the result Justice, Nnaji fell with the case and lost his job.

Perhaps more disconcerting is the removal of certain judges on proven allegation of receiving bribe or gratification in the course of their official duties. Five judicial officers –two Plateau State High Court judges, a judge of the Customary Court of Appeal from Delta State were also removed from office on an allegation of receiving bribe while serving as members of the Election Petition Tribunal.

Another judge who was also sent packing for allegedly using his influence and/or for attempting to bribe members of the panel has taken his case for review by the Court. As this latter case is *sub judice*, I believe there is no need to delve deeper into it. However, I am constrained to make a passing remark on the case of corruption made against two Justices of the Court of Appeal namely Justice Opene and Adeniji, who I understand have also taken their case to court for review, have also been removed from office and sent packing from the judiciary.

Indeed some heads of courts have also been removed from office for helping themselves or others with money held *in custodia legis*. In the Lagos judiciary, a high ranking judge was also sent packing for conduct which fell foul of acceptable standards. These are but a few that I can recall from memory of judicial transgressions and unwholesome activities that tend to give the judiciary a bad name or bring low the image of our judges.

These unfortunate developments are a sad commentary on our efforts to make the Nigerian judiciary the finest in black Africa.

At this stage, I cannot but re-echo what I stated at the 1995 All Nigeria Judges' Conference held in Kano in my paper, *"The Many Obstacles to Justice According to Law"*

> First is the problem of corrupt judge. He is an afflicted person just like the carrier of the AID virus or a kleptomania. He suffers from a deadly disease. To him justice is not his primary concern. No! What matters to him is the corrupt money that is turned over to him by his partners in crime. His conscience is warped. His judicial oath means nothing and so he hardly realizes that he is an obstacle to justice according to law. In any case, he is a stranger to justice, and if he is not caught in the act, he remains a perpetual obstacle in the way of justice until perhaps Nemesis catches up with him...

It is now about ten (10) years since that statement was made. The statement still rings true today. The national Judicial Council NJC which succeeded the Advisory Judicial Committee, has shown

greater dynamism and strength of character in dealing with reported cases of corruption and other acts of indiscipline among judges. It has put in place a written Code of Conduct applicable to all categories of judicial officers throughout the federation.

The learned author of the lead paper has quoted fully the various Rules of the Code and made very useful comments thereon. He has also made passing reference to certain aspects of the PREAMBLE to the Code. For my part, I deem it expedient to quote fully the words of the Preamble since it appears to me that it underscores the basic ethics and norms by which the conduct and character of judicial officers are to be gauged. I shall deal with that *anon*.

The Preamble reads thus:

> Whereas an independent, strong, respected and respectable Judiciary is indispensable for the impartial administration of Justice in a democratic State;
>
> And whereas a Judicial Officer should actively participate in establishing, maintaining, enforcing, and himself observing a high standard of conduct so that the integrity and respect for the independence of the Judiciary may be preserved.
>
> And whereas the judicial duties of a Judicial Officer, which include all the duties of his officer prescribed by law, take precedence over all his other activities;
>
> And Whereas it is desirable that standard of conduct which a Judicial Officer should observe be prescribed and published for the information of the Judicial Officer himself and the public in general so that the objectives set out in this preamble may be achieved;
>
> Therefore, this Code of Conduct for Judicial Officers of the Federal Republic of Nigeria is hereby adopted.

Judicial Ethics

The Preamble throws some light on what is expected of Judicial Officers. It sets the tone. For the judiciary however to achieve its set goal of doing justice to all manner of people without fear or favour,

affection or ill will, it must be manned by men and women of honour and great integrity – men who the lust for money and power cannot buy. Being a sacred institution, no matter what, its hallowed precinct must not be desecrated or polluted by anything that is foul. Priests and servers at the temple of justice are presumed to be men of honour. And if my memory serves me right, no less a distinguished personality than the Hon. Justice Kayode Eso once described Supreme Court Justices as *"Super Men."* And who am I to disagree with the great judge.

All I can say is that being a super man does not necessarily make any judge infallible. Infallibility belongs to God alone.

The important thing however is to rise up to the challenges and do all that is humanly possible in our common endeavour to make the Nigerian Judiciary the pride of Africa.

The Code of Conduct

The Preamble quoted above as I said before sets the moral tone, the focus, the objective, the normative values or acceptable standard of behaviour for all judges. All these have been encapsulated in the Code of Conduct for those charged with the responsibility of administering justice in the polity. The Code states in clear terms what a judge can do and what he cannot do. The operative Rules have been quoted in the lead paper line by line and paragraph by paragraph. There is therefore no need for me to rehash them here. Furthermore, the language of the Rules is clear and unambiguous and therefore requires no further elucidation or explanation. All that is necessary is to pick a few important issues for discussion.

First, Rule 2(VII) requires a Judicial Officer to furnish copy of his judgment to parties in a cause within seven (7) days of delivery thereof. The rule is made pursuant to Section 294-(1) of the Constitution of the Federal Republic of Nigeria, 1999. It reads:

therefore ought to have been considered first and that in any case, the judge ought to have been aware of the Supreme Court decision which precludes arbitrarily stopping of investigation by the Police or other institutions having similar powers as the Police. However, I say no more on this issue; save to advise our judges to appreciate the need to follow and act in accordance with their Judicial Oath, the Constitution and the law.

For many of us who have had the privilege of appearing before some great judges in this country, in our hey days as counsel, what is happening today makes our hearts bleed. The chilling stories going the rounds can make the blood clot. Some of these stories are told silently and in whispers. Some in open but private discussions. A few of the untold stories may be briefly discussed here.

Case No. 1

The story of a judge here in Abuja was that he would grant an order of injunction to a party in the morning and make a similar order in favour of the opposite party in the next four to six hours. The orders end up taking the two parties to square one - making fools of the parties. The Judge is not a mad man but the general belief was that he was corrupt. He eventually went down and was disgraced out of office.

Case No. 2

The story was also told of a judge who collected bribe in a case involving members of two political parties. I cannot remember if he collected from the two political parties. He however, gave his ruling after collecting his booty. The givers of the bribe arranged to recover the illegal money from him. Robbers paid him a nocturnal visit and forced him to surrender the money. The judge lost out in the deal. He also lost his job.

Case No. 3

Once upon a time, there was an on-going exercise for appointment of Justices to the Court of Appeal. A Chief Judge strongly recommended one of his brilliant judges and his close friend and ally for appointment. Enquiries were separately made from a senior colleague who before his elevation served in the same jurisdiction with the judge and another officer of court who knew the recommended judge. The two agreed that he was undoubtedly a brilliant judge but was generally known to be corrupt. He was later dropped as unfit for higher judicial appointment.

Case No. 4

Again once upon a time, a judge was posted to chair an Election Tribunal Panel. On the surface everything went on well. The judge returned to his duty post apparently without blemish. Later, information got to the Court that there was underhand deal. Unfortunately, no formal complaint was received and it was not considered necessary to open a Pandora box as the Tribunal still had more work to do. The particular judge approached a brother judge who was his friend to lobby for him to be placed on another panel. An approach was made but his soliciting friend was told what happened when he went on the first assignment and the request was immediately dropped.

Time and space would not permit me to go on and on. It however suffices to say that there are other similar cases which often come to the ears of senior judges and Heads of Courts. The pity of it is that some of these stories though true are often told in gossips. You may ask why listen to gossips? The reason is that if you do not, you may not be able to distinguish between facts and fiction and may not therefore be able to know where the truth lies. I dare say that not all gossips are untrue. For every story told, there is a reason and as the saying goes, 'there can be no smoke without fire.' The important point is that no one's image should be destroyed as a

result of gossip and unproven fact. I have asked myself why should people weave a story around some judges. The answer I believe has to do with the way a judge comports himself, the friends he keeps, the company he belongs to and the way he carries himself. A judge who keeps the company of political jobbers, business moguls of doubtful characters and associates with questionable characters, charlatans, crooks and cranks, has himself to blame, if he is painted black. The old saying that 'birds of the same feather flock together' still rings true. With the upsurge in the number of judges, there is bound to be an increase of bad eggs.

Leadership by example has been emphasised in the lead paper. That is very true. After all, it is said that to whom much is given, much is expected. The image of judges is enhanced by the qualities of the leadership of the court. If the leader is a man of impeccable character, of great distinction, and is able to exhibit a high level of professionalism and competence, his brother judges, his entire staff and the public at large, will see him as a role model worthy of emulation. On the contrary, a leader who is selfish, avaricious and greedy to the extent of helping himself to the monies meant for the upkeep of the court or money tendered as exhibits will never get the respect of his peers and even the public. His story will be told if not in the open, in gossips and whispers. And sooner than later, will be exposed to ridicule.

The rules require that in the exercise of his administrative duties, a Judicial Officer should avoid nepotism, favouritism and if I may add eschew ethnicity, tribalism and religious discrimination. These negative qualities tend to make victims of such discriminatory acts disloyal and sometime saboteurs. A Judicial Officer, the rules say, should not engage in sexual harassment. I remember that this kind of allegation was sometime ago made against a Head of Court in one of the States of the Federation. The Judge escaped going down by the skin of his teeth. Thank God this is not a common occurrence as far as I know but it is well to note that in this age of gender sensitivity, it would be hazardous to exhibit any trait of infidelity.

Perhaps in view of the complaints often made against Heads of Courts that they have a propensity for getting involved in the award of contracts, there is a compelling need to draw attention to an aspect of the Code of Conduct for Judges which reads thus:

> A Judicial Officer shall not be a member of the Tenders Board or engage in the award of contracts.

It is common knowledge that some judges have been complaining that the N200,000.00 per month being given to Heads of Courts in the States for upkeep of the Courts are not being used judiciously or for the purpose intended. The issue must be addressed, Heads of Courts must know that the money is not meant for their private pockets. Let them always remember the African saying that "if you eat alone, you die alone." So let all be careful. I believe that if Heads of Courts see themselves as overseers exercising over-sight authority, there will be less murmuring, less gossip, less suspicion, less bickering and greater understanding among the judges. Perhaps giving a run down of the income and expenditure pattern of the Courts from time to time, or at the end of each legal year may help to build up confidence. The EFCC is on prowl. There are newspaper reports to the effect that the judiciary is being targeted and some of them are already under searchlight of public scrutiny. Therefore, we must all gird our loins and ensure that the judiciary is able to keep its head above water. Anything short of that is sure to be catastrophic. Our Chief Registrars must be warned not to put themselves in very embarrassing situations. Heads of Courts must be more vigilant, more determined than ever before to see that their Chief Registrars/Accounting Officers are indeed open and accountable for any fund entrusted to their care. It is no good even for the image of the court, that a Chief Registrar, who has the potential of being appointed a judge, is facing criminal charge for embezzlement or corruption. Heads of Courts must ensure that the integrity of their courts is never compromised. There should be no shady deals.

According to the lead paper writer "Nigerians are generally, for cultural reasons, timid about volunteering information on neighbours, colleagues and friends..." Our experience in the ICPC, is that some Nigerian judges are also timid and reluctant to try their follow judges, townsmen, highly-connected persons or powerful men in their geographical or area of jurisdiction even though they know them for what they are. True it is said that 'dogs do not eat dogs", but that should not be the case in a society that is committed to fighting corruption. Recently, a Judge of the Kano State High Court was arraigned and tried for accepting gratification. The trial judge was *ab initio* prepared to hear the case. He was certainly an unwilling trial judge. It was evident for all who care to see that the accused would be let off the hook and so it was. But the judge's luck soon ran out when he tried to use his friend, a magistrate to harass and try the complainant on a trumped-up charge. The complainant made a report against the Judge to the NJC and after a thorough and diligent investigation, the Judge was eventually removed from office. Lawyers in Kano who knew the Judge for what he was heaved a sigh of relief.

Gradually Nigerians are coming out from their cocoon. They are now speaking out. They are taking their cases to the ICPC and the EFCC. So let everyone be warned that it is no more business as usual. One never knows when the hour 'cometh'. So move away from trouble and don't cause your own downfall.

The lead writer also drew attention to the need for a Judicial Officer to disqualify himself in any case or proceedings in which his impartiality might be questioned.

He advised that judges should not wait to be challenged in open court; they should of their own volition in any appropriate case step aside to avoid unnecessary embarrassment. I think this is a sound advice. There are known cases where judges in some superior courts sat to hear cases where for one reason or the other, they ought not to sit. They should have excused themselves or stepped aside on grounds of interest, relationship or close affinity with a party. It is known that

there was a time in this country that a practicing lawyer was appearing in a court presided over by his father without any one raising eyebrow. That was a different time. I dare say if that happens today people will shout 'foul' and the Press will make noise. The point being made here is that Nigeria of today is not Nigeria of yesterday or yester- years. Judicial Officers must therefore take note.

For the legal maxim is that justice must not only be done in each case, but it must manifestly be seen to have been done. In this day and age if those who are affected by the judgment of a biased or seemingly biased court did not even cry foul, those who feed the rumour mills will talk and this may have effect of stigmatizing the judiciary.

I now proceed to the question of delays, adjournments, not devoting adequate time to court work and lateness to work etc. often associated with a number of courts, especially the High Courts. This lackadaisical or non-challant attitude to work has been giving the judiciary a bad name. It is an issue that has to be addressed.

Rule 2 (VI) states:

> A Judicial Officer should promptly dispose of the business of court. In order to achieve this, the Judicial Officer is required to devote adequate time to his duties, to be punctual in attending court and expeditious in bringing to conclusion and determining matters under submission. Unless ill or unable for good reasons to come to court, a Judicial Officer must appear regularly for work, avoid tardiness, and maintain official hours of work.

The Rule is explicit and calls for no further expatiation. Compliance with it is a *sine qua non* for effective and quick administration of justice. A Judicial Officer who abides by this Rule is sure to command the respect of lawyers and litigants alike. For it is axiomatic to say that the justice delayed is justice denied. Some Judicial Officers who unfortunately see themselves as law

unto themselves, will not abide by the Rules and will come to court or sit at any hour of the day it pleases them. They close sometimes before noon to do their own business. Traditionally, court work begins at 9.00 a. m. And when for any reason the Judge cannot sit at 9.00 a. m. Or so soon thereafter, he will out of sheer courtesy send words of apology across at least to senior members of the bar. Unfortunately, some judges observe the rule in breach; and as I said before, they sit when they like and leave the court at their pleasure. This does not make for discipline and decorum and does not portray the judge as a serious and responsible individual. What is more, it brings down productivity and even affects adversely the integrity, the image and the dignity of the court.

The writer of the lead paper observed that:

> The perception of the public seems to be that the Judicial Officers are either tardy or have failed to devote themselves to their duties or how else can one explain the notable delay that is associated with the administration of justice.

The writer after noting also that there is some need to improve upon the professional competence of Judicial Officers further advised:

> The National Judicial Council to intensify its surveillance with a view to identifying and punishing culprits whenever the evidence to support this is available.

My Lords, I cannot but reiterate that some judges engage themselves in private business and hardly apply themselves to the sacred duties of their office. They will leave their day's work undone to attend unnecessary ceremonies, functions and unrewarding, time wasting activities. The remedy as suggested by the lead writer is for the NJC to re-examine the position, intensify its surveillance and see what measures can be further introduced to ensure that only people with the right orientation get on to the bench of this country. In this age of lobbying, patronage cringing and crawling

to get appointment, special care must be taken to ensure that not many undesirable elements pass through the proverbial eye of the needle. In the past good and responsible lawyers are usually invited to the bench after a distinguished career at the Bar and or the magistracy. Although there were no rigid guidelines as obtains today, the caliber and qualities which produced the likes of J.I.C. Taylor, Justice Daddy Onyeama, Fatayi Williams, Charles Madarikan, Sir Udo Udoma, Sir Adetokunbo Ademola, Sir Louis Mbanefo, Justice Mohammed Bello and many more great judges gave the Nigerian judiciary a good name. I have only mentioned here the names of some of those who have passed to the great beyond to avoid being accused of partiality. History and our own generation shall in the fullness of time judge us all the living.

As at today, it is important to know that apart from the constitutional requirements for appointment on the Bench and the Revised Guidelines and Procedural Rules made by the NJC to regulate the Practices and Procedures for such appointments; there is also, however, the Performance Evaluation of Judges to assist the Council. The nominations of any suitable candidate for appointment are made by Judicial Officers of Superior Courts in the State and other Heads of superior courts in the country. The names of short listed candidates are circulated to (a) all serving judicial officers of the State (b) the Nigerian Bar Association Branches in the State.

The Judicial Service Commissions are expected in making their recommendations to have regard to the following qualities:

(a) Good character and reputation, maturity, honesty, integrity, sound knowledge of law and ability;

(b) Successful practice at the bar/satisfactory presentation of cases in court as legal practitioner both in private practice and as legal officers in the Ministry of Justice or corporate establishments.

In addition to the above there shall be placed before JSC a detailed

certificate of fitness issued by Government Hospital or Institution and a report by the Department of State Security Services touching on the conduct of the candidate. The Guidelines and Procedure specifically state *inter alia:*

> There shall be no canvassing or lobbying for appointment directly or indirectly.

It is common knowledge that the rule against lobbing is generally observed in breach. The Rules are more or less in line with what the Lord Chancellor in England looks for in appointing judges. These are:

> Professional ability, experience, standing, integrity, a sound temperament and physical ability to carry out the duties of the post.

The difference however is in the ability to enforce the Rules to the letter and of ensuring strict compliance. The introduction of Judges Performance Evaluations is a step in the right direction. What is necessary is to ensure that any evaluation made is error-proof and that the recommendations are effectively used and made applicable to any candidate recommended for appointment. At present, it appears that the evaluation is mainly used to determine the performance ratio of the court and to justify whether or not a particular court deserves to have more judges on its bench.

The evaluations should be more scientific. Efforts should be made to constantly check the veracity of information given and proper analysis made in each case. This can be done by either having a committee on Evaluation or by appointing certain individuals to obtain copies of judgements submitted by each Judge, study and comment on them. For, information has it that some of the judgments recorded are inaccurate and some Chief Judges are often reluctant to make any adverse comments especially, if the judge concerned is a "beloved one." The time has come for more stringent method to be adopted to ensure that the authenticity and the accuracy of

the judgment can be vouched for. It is common knowledge that a judgment on the "undefended" list cannot be given the same treatment as a considered judgment in any given case.

Alternatively, the NJC should start thinking of having an Inspectorate Division which can carry out inspection of judgments of the High Court in the same way as has been the case when the Inspectorate Division of the office of the Commissioner for Area Court used to examine and comment on the proceedings in the Area Court. Although, we are dealing with the superior court of record, I suggest this can be extended to the magistrate Courts about which we hear quite a lot of unpleasant stories. The report of all evaluations or inspection should from time to time be published for pubic consumption so that the populace may be able to access and gauge the development and progress being made by each Judiciary.

The National Judicial Institute must strengthen its efforts to train more and more judges. They must also encourage each Judiciary to organise training courses for the large number of judges employed in recent times. Information has it that some of the judges appointed recently do not have the right orientation and the ability to stand up to the challenges by some of the senior lawyers who believe that they are more intellectually sound than some of these new judges before whom they appear. Indeed, the Judges themselves do not exude the confidence expected of them as holders of high judicial offices. It is true induction courses are held for these new judges but that in itself is not enough. State judiciary must endeavour at all times to see that judges are constantly and consistently undergoing training which will make them masters of their courts. On no account must a judge feel inferior to any counsel appearing before him. A court must be *dominus lis*.

However, training must not stop at the level of the High Court and the Lower Court bench. For it is now fully accepted by judges all over the world that the training of judges at all levels is essentially not only for the development of the mental capacity of the adjudicators, but also, to keep all who are engaged in the

administration of justice abreast of the changes that are going on not only in their immediate surroundings but also in the outside world. It is true to say that nobody knows everything; old taboos must be done away with. Even senior judges must be prepared to accept that there is always room for improvement, for acquisition of new skills, and for a greater appreciation and understanding of man and his environment as well as the sociological and philosophical approach to the solving of the problems of man and the society in which he lives.

Nigeria today, is undergoing serious reforms. Every organ of government is engaged in exploring new avenues for development. Judges must therefore see themselves as part of the on-going reforms. If they fail to, they may find to their regret that they have missed the boat.

Part of the reforms being carried out by the present administration is to fight corruption and reduce it to zero tolerance level. The judiciary must be part of the struggle. Indeed the judiciary must be in the vanguard against corruption. Collectively and individually judges must see themselves as stakeholders in any reform that is designed to bring about good governance, peace, order and stability in the nation. They must support it. Unless they see themselves as partners in this gruesome battle to rid Nigeria of corruption. Nigerians will continue to see the judiciary as the one institution that is not amenable to positive changes which make for professionalism and good governance.

Clearly, the Nigerian judiciary holds the key to the greatness of this country. It is said to be the last hope of the common man. It cannot therefore afford to shirk its responsibilities to the nation. So let us all to a man be up and doing. Let us bequeath to posterity a banner without stain. Let us join this crusade to make Nigeria better than we found it. And finally, let us join hands together to build a strong, virile, healthy and incorruptible Nigeria to the glory of God Almighty and the credit of our people.

Thank you and God bless.

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COMMENTARY (II)

Chino Obiagwu

Introduction

It is a great privilege to be invited to comment on the lead paper by Chief (Dr) Ernest Shonekan, GCFR, CBE on the very important topic bordering on judicial code of conduct. A number of issues have been raised in the lead paper. but I will limit my comments to the relationship between the judiciary and the community its serves with respect to ethics and integrity.

There are three issues in the lead paper I intend to address. The first is the Nigerian context in which the judiciary exists and functions, and its potential to maintain good practices in a society described by Dr Shonekan in the paper as "a nation of anything goes." The second issue is the relationship between the community and the judiciary, and the role of the community in 'judging the judge'. And finally the imperatives and the political will to create a protection system for whistle blowers within the judiciary.

My comments on these issues are based on my personal experiences as a practicing lawyer in Nigeria, and also as a leader of a legal services NGO focusing on the promotion of the rule of law and judicial independence. Chief (Dr) Shonekan posited in the lead paper[1] that:

> It is common knowledge that corruption and social indiscipline are the twin evils haemorrhaging the Nigerian society today and that is why it is imperative to prosecute the war against these evils without any let up. Because of the pervasive influence of

1. Chief Ernest A. O. Shopnekan, GCFR, CBE "Judging the Judge: Judicial Ethics, Code of Conduct for Judicial Officers, "Paper delivered at the 2005 All Nigeria Judges' Conference held in Abuja 5-9 December, 2005.

> corruption, judicial officers particularly the lighthearted can get caught in the web. Nigeria as we all know has come to be known as a nation of anything goes. Everything is said to have a price in Nigeria. Nepotism, tribalism or ethnicity has become established as vices that need to be urgently exterminated. Even when judicial officers are determined to isolate themselves; the temptation will always be there ... The kernel of my argument my lords, is that part of the solution lies with the larger society. ... in so far as corruption and unethical practices become widespread in a certain environment, the reputation of all actors who operate in that environment will tend to become tainted whether they deserve it or not. Since the judiciary suffers from the problem of corruption in the society, the temptation is there to "join them if you cannot beat them". The honourable course of action is to refuse to join them.[2]

I agree with the picture of the social context of the corrupt Nigerian society, as well as the recommendation for judicial officers to turn blind eyes to those influences, but I note that the judiciary has the primary responsibility in addressing the question of corruption in the society. In our recent report titled "*Impunity in Nigeria,*"[3] we noted from empirical study, that the reason why corruption and other forms of rights abuses persist in Nigeria is because of the high rate of impunity. Impunity is the situation where violations or misdeeds go unpunished or without redress. Impunity not only emboldens the culprit but also encourages others because they would always get away with it. One unprosecuted misconduct encourages ten other future misconducts. The most effective deterrence against misconduct including corruption is the existence of a high likelihood of apprehension and punishment. That is, a *universal* application of an enforcement regime, in which no one in the system is exempted. Such universal enforcement of rules is not achieved by random punishments as we see today. Assurances of capacity to address misconduct is only made when the recourse mechanism is well established, publicised and utilised. I will later

2. Page 25.

address the issue of protection against reprisals for those who bring information on misconducts of others, especially their superiors.

The fact that the society is pervasively corrupt is not a justification for judicial misconduct. In fact, it can be said, based on our analysis of impunity in the country, that corruption is pervasive because the judicial system has remained weak in addressing misconducts. In this context, we refer to the "judicial system" in the broad sense to include the law enforcement, the courts, the bar, and all other agencies of the law and order sector. As we will see later, this is the sense the common man perceives the judicial or the justice system. Flowing from this premise is that the justice system has a huge responsibility of addressing corruption in the society, and that means starting from its fold. In a recent seminar paper to the National Seminar on Economic Crimes held in Abuja, between 6th and 9th August 2005, Hon Justice Ibitola Sotuminu, former Chief Judge of Lagos State judiciary noted that:

> an autonomous and neutral judiciary ... is a necessary prerequisite for effective combating of economic and financial crime. Closely following this is that only the best candidate should be appointed to the bench. The bench should be a body with discipline reigning supreme. Discipline that ranks them in line with the prophets of old: as the saying goes, 'judges must, like Caesar's wife, be above board'. This necessitates them to go through self-cleaning from time to time. For the bench to remove the speck of wood in the eye of the society, it must at all times be preventing and at worst be removing the log of wood that may be in its eye.[4]

3. Legal Defence and assistance Project LEDAP, *Impunity in Nigeria: Report of Summary and Extra Judicial Killings in 2004"* May 29, 2005. The report and previous years' reports are available on the organisation's website www.ledapnigeria.org.

4. Hon. Justice Ibitola Sotuminu, "Legal and Judicial Reforms Initiatives in curbing Economic and Financial Crimes: The Role of the Bench" Paper presented at the National Seminar on Economic Crimes held in Abuja, between 6th and 9th August 2005, page 14.

A number of current initiatives to address judicial misconduct by the National Judicial Council are commendable. For instance, the requirement for periodic returns from judicial officials that addresses quantitative job output, and recent discipline of some judicial officials, speak volumes of the readiness of the judicial leadership to address the problems. However, there is need for a holistic, consistent and across-the-board approach to judicial ethics and code of conduct, which should not stop at financial corruption, but include other forms of misconduct that diminish the integrity of the judiciary including poor attitude to work. The response should also address the entire justice system because if a judge is upright and his clerk or process servers, or even the counsel functioning in the courts are corrupt, the society will not isolate that judge in its assessment of the judicial system, but will look at the entire system as one. It is no gainsaying that the non-courtroom officials of the judiciary, and of course, the bar, are essential parts of the justice sector and should be addressed in dealing with judicial accountability. I therefore support the call by Dr Shonekan in the lead lecture for an "internal mechanism for monitoring and enforcing observance of code of conduct" for the entire judicial system. I also urge the judicial authorities to support, if not take over and lead, the on going efforts of the Federal Ministry of Justice to reform the criminal procedure laws to modernise the criminal justice administration and improve the speed at which cases are processed from investigation to trial[5]

The Judiciary and Its Community

On the issue of the relationship of the judiciary and the community it serves, I will make three points. The first is that the judiciary, as a supply institution in the law and order sector, is universally placed

5. The Working Group set up in June 2004 for this purpose has produced the first draft of the reform bill titled "Administration of Criminal Justice Bill 2005".

between two social entities making respective demands on it, namely, the political class that would want to promote and protect its social and political interests on the one hand, and the public, the common people on the streets, who look up to the judiciary as the last hope in seeking justice against the state or other influential persons and in meeting their demands of common dispute settlement. The measure of judicial integrity and independence is based on how balanced the institution meets both demands without undermining its neutrality.

The second point is that the judiciary, and the justice sector as a whole, being a service institution, must be subject of the scrutiny of the community it serves. There is no gainsaying that the effectiveness of the justice system is measured by how those it serves *perceive* and *engage* with it.

The third and final point on the relationship of the judiciary with the community is that public assessment of the judiciary usually depends on the level of interaction, information and transparency of the judicial system itself. The public assessment of the judiciary may on the one hand be entirely based on perceptions, which, most times are wrong, or may on the other hand be based on informed data from the judiciary. I will demonstrate this point with 2 case studies.

Between 2002 and 2005, our organisation, LEDAP, undertook two projects that focused on the public assessment of the judiciary. The first was in 2002. We commissioned a paper by Dr Reuben Abati of *The Guardian* Newspaper on "How the ordinary Nigerian perceives the Nigerian Justice System". The second was in 2004. We collaborated with the National Center for State Courts in Abuja to undertake court monitoring in Lagos and Kaduna States. The reports of the two projects showed divergent public views of the judiciary, even though they were both based on feed back from the ordinary members of the public. The outcome of each study report was based on the source of feedback and information, and the level of interaction with the judiciary. The first report was based on

"perceptions" only of the common man of the judicial system, and the other report from informed and verified data from court monitors as well as information from the courts themselves.

In the commissioned paper,[6] which was also the keynote address at the 1st Legal Aid Practitioners Forum in Abuja in 2002, Dr Abati noted:

> Justice is the true basis of society. There is no such thing as abstract justice for the simple reason that whatever pattern of justice exists in a particular society is tied to the attitude of its people and the effectiveness of the organs for the administration of justice. In this regard, the ordinary citizen is important. Laws are made for him and for the good of the society in which he lives. It is therefore in relation to him that the efficacy of laws should be tested in terms of (a) how he perceives the laws, (b) the access that he enjoys or does not enjoy to the judicial process, (c) his specific experiences as he encounters the justice system, and (d) his capacity to understand his own rights and the means of defending those rights. ... The ordinary Nigerian I speak of then, is not a lawyer or a judge or a policeman; he is not an organ in the administration of justice. He is the labourer out there in the streets; he is the farmer in farmlands in Delta; she is the young lady in Kano who is trapped between religion and modernity. The ordinary Nigerian is the litigant looking up to the Nigerian justice system for justice, hoping to enjoy access to that system and that the system will fulfill his expectations and protect his rights as guaranteed in Chapter 4 of the 1999 Constitution.[7]

In summarising the general public perception of the judiciary, Dr Abati said:

> The point is worth stating however that people are naturally suspicious when the word 'justice' is mentioned, and in their

6. Dr. Reuben Abati, "How the Ordinary Nigerian Perceives the Nigerian Justice System," *The Prosecutor* No 2, 2002 pages 12-17.

7. Page 12.

relationship with the organs of justice, they are often biased. This comes from the assumption that justice in society is also a matter of interpretation, subject to other variables, which are equally important to the life of the ordinary citizen. ... I should also like to draw our attention to the fact that an appraisal of how the ordinary Nigerian perceives the justice system is also invariably an assessment of Nigerian nationhood, and how the evolution of the state and the challenges encountered in the process have all combined to determine how the ordinary Nigerian perceives his whole environment, and subsequent reaction."

Reporting on the specific perceptions of the ordinary Nigerian of the judiciary as an institution, Dr Abati noted that:

> "What the generality of the Nigerian people would seem to have arrived at is the conclusion that judges are corrupt and are corruptible, and that it is possible for the man in power to manipulate the judiciary to suit his whims and caprices and thereby subvert the cause of justice. It was in this same country that an election that had been adjudged free and fair was upturned by a court allegedly sitting at night in Abuja. The lady of justice is blind, but the persons involved in the administration of justice are human beings with emotions and needs. What we have seen is that what happens in the law courts account largely for the attitude of the ordinary Nigerian to the justice system... the impression is that justice is available for sale. Court registrars, magistrates, police and lawyers collude to pervert the course of justice. In many courts, there is always a racket going on against the interest of the common litigant. One other impression about the court system is the rather slow process of judicial administration. Justice delayed is justice denied. ... the point bears repeating that a judiciary that impeded the administration of justice subverts its own essence as the 'bastion of the legal rights and liberties' of the people."

The summary of the report is that the ordinary Nigerian *perceives* the judiciary and the entire justice system as deeply corrupt, and incapable of dispensing justice. This conclusion, as

noted earlier, is based purely on perception. But should the judiciary, or indeed any social institution, be assessed on perceptions? What are the sources of information that influence those perceptions?

Now, contrast this public perception of the judiciary in the "Reuben Abati Report" with the positive reports of court monitors deployed in the second case study. Some 30 volunteers were deployed for over 24 weeks to various courts in Lagos and Kaduna States to observe courtroom proceedings and other non-courtroom activities in the judiciary. The monitors (or observers) came from all walks of life, and none of them had encountered the justice system in the past as a litigant. Most of them had not stepped into a courtroom for the first time before the exercise. They were trained on how to observe and report facts objectively and analyze those facts in order to assess the effectiveness and integrity of the judiciary in the state. At the pre-project assessment of their perceptions of the judiciary, most of them held similar views as Dr Abati's ordinary Nigerian. But when the project started, the reports they submitted were drastically different from the views they earlier held of the judiciary. 90 percent of the monitors reported that the judicial officials they observed were "quite objective", "understanding", "quite thorough" and "humane" in dealings with the court users. A monitor in Kaduna state reported that a judge he observed over 9 weeks "dispensed all cases speedily" and "treated litigants, lawyers and others attentively, patiently and courteously in all ramifications". In Lagos State, a monitor reported that the judge he observed was "objective with great determination for her work" and "combines commitment and integrity in her character towards litigants and lawyers."[8].

8. See Legal Defence and Assistance Project LEDAP/National Centre for State Courts NSSC: Quarterly Reports of Lagos State Court monitoring Project, and Kaduna State Court Monitoring Project. The reports were submitted to the Chief Judges of the States, and is available on request to LEDAP or NCSC.

Though the monitors reported a number of misconducts and sharp practices at the court registry and in the bailiff sections, they generally scored the performance of both courtroom and non-courtroom officials very high.

The inference to be drawn from the two case studies is that most times, the perception of the public of the judiciary is not borne out of facts of the conduct of the majority of the judicial officials. Granted that some officials in the justice sector are corrupt, and may be inefficient and incompetent, but a majority of Nigerian judicial officials are upright, committed and knowledgeable in law. This can be attested by the high testimonials of Nigerian judges serving in foreign lands and the high regard with which Nigerian case law is held in the common law jurisdictions. But the reality is that one bad case creates huge public perception that overshadows a thousand good works. For instance, an order of a High Court judge on the Anambra State political power tussle gained more public visibility than the landmark judgments of the Supreme Court on the registration of political parties, resource control, Electoral Act, anti-corruption Act, etc.

Dr Shonekan has raised the question of what mode for assessment of the judiciary would be recommended? Should the judiciary allow itself to be assessed by the public based on its uninformed notions of what goes on in the courts and the justice system, or should Dr Abati's "ordinary Nigerian's" uninformed perceptions be allowed to guide the assessment?

'Judging' vs. 'Policing' the Judiciary

Public *assessment* of the judiciary will largely depend on what image and information the judiciary gives of itself. But the professional task of *policing* the judiciary lies with the judiciary. I make the distinction between "assessment or judging" and "policing" the judges because effective and transparent policing of the judiciary by the judiciary will positively influence public assessment of the entire justice system. The judiciary is a sacred institution, deserving of highly

esteemed integrity. It should not be subject of public ridicule and misperceptions. The judiciary would lead its positive assessment by providing transparent, consistent, secure, accessible and effective internal mechanism for addressing misconducts and promoting accountability in line with its established Codes of Conduct for both judicial and non judicial officials of the sector.

This leads me to the third and final issue of my commentary, namely, the need for the protection of whistle blowers in the justice sector.

Encouraging 'Whistle Blowing'

The lead paper noted that "the unwillingness of Nigerians except in very rare circumstances to come up with information available to them on the unethical conduct of judicial officers or indeed, any officer" is an impediment to the enforcement of the code of conduct for judicial officials.[9] The reason for this public reluctance at whistle blowing is *fear of reprisals*, especially, where there are no assurances that such information given to the authorities would be effectively utilized in addressing the issues raised. Code of conduct and ethical standards cannot be effectively enforced without adequate protection for potential whistle blowers. These are individuals who are willing, at great personal risks to themselves, their families and their careers, to provide information on misconducts of others, including their superiors. These individuals must be adequately protected, and their established good faith should guarantee them protection against reprisals. In particular, the best assurance of protection of whistle blowers is to ensure that every information provided is objectively and confidentially investigated and dealt with to finality, and no one should be treated as a sacred cow. Such internal mechanisms

9. Page 24.

and commitment towards transparency and accountability will le
a credible fight against corruption and other rights abuses in th
society, and would positively influence a change of perception o
Dr Abati's ordinary Nigerian of the judicial system in Nigeria.

PAPER II

CONSTRAINTS IN THE ADMINISTRATION OF JUSTICE: THE NIGERIAN EXPERIENCE

Hon. Justice Umar Faruk Abdullahi, ***CON***
President, Court of Appeal of Nigeria

COMMENTARY (I)

Mr O. C. J. Okocha Esq., ***MFR, SAN, JP***
Former President of the Nigerian Bar Association

COMMENTARY (II)

Professor Johnson Ola Anifalaje
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CONSTRAINTS IN THE ADMINISTRATION OF JUSTICE: THE NIGERIAN EXPERIENCE

Hon. Justice Umar Faruk Abdullahi, *CON*

Introduction

I would like to start by thanking the Organisers of this Conference for the opportunity to make this presentation. When one talks of administration of justice, whether in Nigeria or any where else in the world, the foundation is the rule of Law.

The concept of the Rule of Law can be very wide and often time vague. However, an attempt can be made to get a general idea which by and large includes the following:

1. That no one is punished or can lawfully be made to suffer, personally or materially, except for a distinct breach of the law, the proof of which is established by due process in the ordinary Courts of the land.

2. That no person is above the law and that every person is subject to the jurisdiction of the Courts.

3. That the Constitution of the land is supreme and everybody including Governments, Institutions and Individuals are subject to the Constitution as interpreted by the Courts.

This again presupposes that the judiciary must operate within certain defined principles, within certain conditions, and work importantly within certain acceptable environment. In the Nigerian context, the Judiciary is the Third Arm of Government. This does not require any further elaboration.

Before I formally delve into full discussion on this very important topic, I believe a good starting point would be a sincere view expressed by one of the most distinguished Jurists and an illustrious son of this country. He is no less a distinguished personality than the Hon. Justice A. N. Aniagolu, *CFR*, retired Justice of the Supreme Court.

His Lordship had an overview of this topic way back in 1999 in similar forum like this one. I was struck by the eloquent way he brought to light the condition and the situation under which the Nigerian Judiciary and the Nigerian Judges were operating then. This is the way His Lordship put it:

> I thank your Lordships, the Judges of this country and the entire Judiciary, for carrying the burden of the administration of Justice in this country all these years, hardly ever complaining, bearing the heat and the burdens of inadequacy in almost everything from accommodation to lack of stationeries; from insufficiency in Court houses to lack of residential houses; from lack of funds for payment of salaries to lack of funds for maintenance of residential houses, of Court rooms, and for payment of pensions and allowances. In spite of all these and many more, you have stuck to your jobs and have continued to render service to the entire country, in season and out of season to the eternal glory of Almighty God and the welfare of the citizenry. I thank and congratulate you now and always.

I think, we can say in all fairness that the general situation as it were in 1999, has drastically changed as of today. There are however still some areas that have not seen the light of change fully, which means, there is still a lot to be done before arriving at the promised land.

Before I go into specific areas, it is very important to make the point that by virtue of its place as the Third Arm of Government, the Nigerian Judiciary is assigned the constitutional responsibilities for the interpretation of the laws of the land. It has the duty of directing society for the attainment of justice. Judges must always bear in mind that people look up to the Judiciary, as a haven of last resort.

for the protection of society and particularly for protecting the weak and the oppressed. It therefore follows that any Judge, who does not believe in even-handed justice to all, should not, and must not continue to belong to the Judiciary.

I will now go into specific areas that constitute or are likely to constitute constraints in the administration of justice.

Availability of Resources

There is a school of thought that believes that there is a link between the quality of justice in a given country on the one hand and the level of resources available for its judicial system on the other hand. The basic idea is that the quality of what you get depends on how much you can spend. This situation arises every time we go shopping. One can go for the expensive product and get good quality, or one can opt for the cheaper product, save money and be able to afford something else which is neither here nor there.

I think I agree with the notion that there is a link between the quality of justice and the level of resources available for the judicial system. I also share the view that there is a correlation between quality of justice and the level of resources available for the judicial system. This can easily be confirmed by simple analysis on international and cross-country data available to show that low income countries are more likely to have poorly performing judicial systems than high income countries.

I would like to have your indulgence to give one illustration on this, and it is this:

> Just recently some of us were opportuned to attend the World Jurist Association Conference in Beijing, China. While there, I had a singular honour to accompany the Hon. Chief Justice of Nigeria on a visit to the Chambers of the Chief Justice of China. The reception hall of the Chambers, where we were received by the Chief Justice of China is so magnificent in terms of aura and authority that no one in his wildest imagination would ever think of breaking into the premises for whatever reason.

I agree once again with the notion that there is no 'either or' when it comes to quality of judicial services and efficient allocation of resources. Conceptually, there is no quality of justice without efficiency, and there is no efficiency of justice without quality of justice, both are part of each other. It is a truism that the lack of a minimum of judicial resources can seriously impact the quality of justice.

I would like to add here that when I talk of resources or judicial resources as some may like to call it, it includes financial resources, human resources and also judicial infrastructure.

Budgetary Process

It is fair to say that the degree of involvement in the budget process is a good indicator for the extent of judicial independence in a country. Imbalance of powers and unchecked domination of one branch over the others can produce dysfunctional budgetary allocation process.

In Nigeria, we clearly see this inter play at States levels where clear constitutional provisions are recklessly ignored by the Governors of the States, particularly with regards to the capital expenditure for State Judiciaries.

See Section 121, (3) of the Constitution of the Federal Republic of Nigeria, 1999. It provides as follows:

> Any amount standing to the credit of the Judiciary in the Consolidated Revenue Fund of the State shall be paid directly to the Heads of the Courts concerned.

This provision I dare say is observed more in breach than in compliance by State Governments.

This dysfunctional budgetary allocation process more often than not gives rise to disastrous situation for the Judiciary. Examples are many, for example in the case of non-availability of physical structures or grossly inadequate structures like court halls, Chambers, Registries and offices for support staff, the flow of cases and other essential

services would be lacking; thus the system will not be able to face the demand and deliver good services.

In some instances, salaries and allowances of supporting staff can be too low and are in arrears for months; thus creating an atmosphere of frustration and discontentment; which normally breeds indiscipline and breakdown of the system.

Internal Misapplication of Resources

It is not just the availability of resources that is important, the internal allocation of the available resources is also very important.

In other words, it is not only about the amount that is allocated, but also about how and whom these amounts are first determined, and then assigned to specific purpose or to particular persons or things within the system. It goes without saying that insufficient or weak capacity to carry out internal distribution of available resources can mar any meaningful plans for the development of the Judiciary. The system can then easily be manipulated by certain self serving interests, and this undoubtedly affects administration of justice negatively.

Bribery and Corruption

This is a monster that requires no further description; corruption simply destroys the nerve system of any organisation. To put it in a nutshell, the effectiveness of Courts relies on their fairness and impartiality. Inequality of influence affects the Courts in their fairness. Once impartiality and efficiency is undermined the users of the system will not go to the Courts to settle disputes so long as the playing field is skewed. In this situation, the more powerful and influential Court users invest in bribing of individual or small group of public officials. At times they go to the extent of acquiring media outlets or some authoritative connections to pervert the course of justice. The consequence of this devilish action will beset the initially well situated pursuit of socially balanced acts of administration of justice in favour of the established instead of those who

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genuinely request it. This is particularly so, as the established recognise that the legal, political and regulatory system will not hold them accountable, but gleefully get what they want. This inequality of influence thus appears to generate a self-reinforcing dynamic in which the subversion of Courts strengthens the underlying political and economic inequalities

In societies with subverted institutions like the judiciary, small elite groups do all the inverting, while a much larger group is rendered helpless. A weak Judiciary enables only those who are able to protect their investment to become the dominant group even though a smaller group.

In short, corruption reduces the effectiveness of the justice system and severely distorts public confidence in the system. Discriminatory practices will thrive, which will entail the exclusion of considerable segments of the population from the delivery of judicial services, which means limited access to justice, mainly for the poor and other marginalised groups. Nigeria is no exception to this endemic.

Limited Access to Justice

This manifests itself in various ways. It has earlier been shown that corruption favours particular interests instead of serving the common good.

Apart from corruption, there are also the problems of ethnicity, linguistic, geographic, and social and other forms of bias which makes justice system in many developing and transition countries like Nigeria incomprehensible. It becomes unaffordable, and unfair in the eyes of ordinary people. It is also fair to say that those who would need the justice system most to see their rights enforced suffer most from unfair proceedings, delay and high costs. Thus such class of people generally has recourse to informal, traditional or para-traditional forms of justice in extreme situation to down right foregoing of their rights. These marginalised groups are normally found in rural settings.

It is also fair to say that any justice system based on the perception that courts are by and large an instrument of domination rather than of fair conflict resolutions as experience has shown in many developing countries is not worth the name.

Having set out the general view; let me at this juncture mention briefly some specific issues.

(1) Appointment of Judicial Officers and Judiciary Staff

There was in the past and I think still now the notion that, the method used in the appointment of judicial officers is faulty and because of that some bad judicial officers find their way on the Bench. That there is no special scrutiny on the people recommended for appointment, as a result, candidates without sufficient knowledge of the law scale through and get appointed as Judges. That even less scrutiny is made in the appointment of members of the lower Bench.

There is also the allegation that in some cases, the appointment of Judges has been politicised to the detriment of good quality material.

I am of the view that these criticisms could have been valid many years back, but from my personal experience as a member of the Federal Judicial Service Commission (FJSC) as well as being a member of National Judicial Council (NJC), I can cross my heart that these lapses as mentioned are no longer valid. The process now being followed in appointing Judicial officers, at the Federal and State level is very exerting and thorough to create any room for suspicion. The Chief Judges and other Heads of Courts can testify to what they had been going through to get their candidates through, particularly at National Judicial Council level. I believe a similar measure of control, is being applied at the State Judicial Service Commission when it comes to the appointment of Principal Officers and other supporting staff of the various Judiciaries in the country.

(2) Interference by the Executive Arm of Government

It is fair to say that with the progress so far achieved with regard to development of democratic culture in Nigeria, I believe cases of direct interference by Executive with the work of the Judiciary has virtually been eliminated.

The more worrying one now is the indirect interference, which I believe is still rampant, particularly at State level, where a number of the Governors simply refused to comply with the provisions of the Nigerian Constitution regarding release of funds to the judiciary, particularly with regard to capital expenditure. I already discussed this issue under budgetary allocation.

This is a very serious issue, I believe this Conference has to look into it and take a stand.

(3) Remuneration of Judges and Supporting Staff

It can still validly be argued that the remuneration of the Nigerian Judges even though comprehensively improved over the recent years is still unsatisfactory, there can still be room for improvement, compared with their colleagues in other developing and transition states, particularly having regard to the volume of work and the environment under which they operate.

This is particularly more compelling with the judges of the lower courts. There is also the need for the complete overhaul of the conditions of service of the supporting staff of the Nigerian Judiciary. This overhauling must cover the areas of their remunerations, which should include salaries and allowances, environmental and social facilities both in their places of work and family matters.

(4) Training and Manpower Development

The efforts of the National Judicial Institute must be appreciated and commended for all the year round programmes for the purpose of Induction Courses for the various levels of the Nigerian Judiciary. I believe a lot had been achieved in this respect.

However the world is moving too fast. Innovations are being introduced in all sphere of life. Communication is taking the centre stage. Modern technologies are rapidly taking over activities hitherto being handled by manual method.

There have been spirited efforts to put in place modern technologies to assist the Judiciary to move with time, but there are still some hurdles to jump to be able to utilise these facilities fully. Some of these hurdles entail equipments acquisition and manpower training to operate them. There is also the acute shortage of energy and conducive infrastructure to be solved. All these are real challenges that have to be faced and conquered in order to benefit from the full potential of these new technologies. There is no doubt that full utilisation of these modern equipments will enhance the quality of justice delivery system in Nigeria.

D. Politicians and Their Antics

I decided to treat this subhead last, because it is a new phenomena in the annals of our judicial history. It is easy to say, "O, politicians are only concerned with political cases particularly Election Petition Cases, which are not supposed to last long". I agree election petitions are periodical, that is what they ideally should be. But in Nigeria are they? This is also where the most dangerous phenomena is developing, most dangerous to the survival of judges and the judicial process.

The situation has been made more difficult by the attitude of a number of the politicians and often times in collusion with some members of the bar. Rather than concede anything, they prefer to do whatever it takes to secure victory rightly or wrongly. They are willing to do anything as ominous as offering bribe to the Judges as well as intimidation in the form of writing callous, baseless and false accusation against Judges in the event that their offer of bribe is not accepted.

It is incredible that up to this moment, there are still pending election petition cases being tried as well as appeals pending for determination.

We have witnessed how some Judges fell by the way side for recklessly doubling and conniving with politicians of mean disposition. They paid the supreme price because they were disgraced out of office. The Nigerian press had a field day in trying to rubbish the Nigerian Judiciary and portray it as corrupt. We all know the truth. The Nigerian Judiciary is one of the best in the world, despite the behaviour of the few bad eggs, I mentioned above.

I call to witness the testimony of no less a person than the President of the Nigerian Bar Association PRINCE LANKE ODOGIYON on Monday, 26th September, 2005 at the occasion of the swearing-in ceremony of the newly appointed Senor Advocates of Nigeria at the Supreme Court. The learned counsel had this to say:

> We have resolved that nobody would be allowed to drag the Judiciary's name in the mud recklessly and baselessly. It is in this vein that we reject any blanket attempt to classify the Nigerian Judiciary as corrupt.
>
> This is unacceptable to the Nigerian Bar Association. cannot be classified as corrupt. It is the bad eggs their in that must be fished out and flushed out. Nigeria, we are proud to say, has one of the best Judiciaries in the world.

Conclusion

I would like to conclude this short paper with a short Hadith. (Saying of Holy Prophet (S.A.W):

"That out of three categories of Judges, two shall end up in hell fire, while one shall end up in paradise.

(1) a Judge, who knows the correct law but misapplied it to achieve his own personal objective.

(2) a Judge, who does not bother to know the correct law and yet adjudicated in a matter in complete disregard of the consequences of his action.

(3) The one category that shall be in paradise is the one who knows the correct law and applied it correctly for the benefit of the parties that came before him to get justice."

May almighty Allah help us to be in the category of Judges that shall end up in paradise - Amen.

Thank you for listening.

COMMENTARY (I)

Mr O. C. J. Okocha Esq. *MFR, SAN, JP*

Introduction

Many, many thanks to the Education Committee of the National Judicial Institute (NJI) for the kind invitation for me to participate in the 2005 All Nigeria Judges' Conference. In the letter ref. no. NJI/96/VOL.VI dated 28th June, 2005, signed by The Honourable Justice J. A. Ajakaiye, the Administrator of the NJI, I was requested to write a Commentary on the paper to be presented by The Honourable Justice Umar Faruk Abdullahi, CON, who is the Honourable President of the Court of Appeal, and the Lead Speaker at this Working Session. The title of the paper is **Constraints in the Administration of Justice: The Nigerian Experience.** Of particular significance was the directive contained in the aforesaid letter, that I should consider the new High Court (Civil Procedure) Rules, 2004 of Lagos State as well as the new High Court (Civil Procedure) Rules of the Federal Capital Territory, while taking care to bring out the innovations geared towards achieving speedy trial of causes and matters, and shortcomings in the provisions thereof, with suggestions, if any, for amendment.

I have to say that I have read the paper presented by Honourable Justice Abdullahi, and, for me, it is an honour and a privilege to make commentaries thereon. I came to know The Honourable President of the Court of Appeal at close quarters between the years 2000 and 2005, when I served as a Member of the Federal Judicial Service Commission, and I can testify that His Lordship is modest and moderate in his demeanour and fair minded and just in the discharge of his duties as the Head of the Court of Appeal.

His Lordship has dealt with the topic under several broad heads, and it is my intention to comment on those heads *seriatim*, and, at the end of my commentaries, I shall make a few comments on the

w High Court (Civil Procedure) Rules of Lagos State and the deral Capital Territory, Abuja.

he Rule of Law and Separation of Powers

ie paper, in the introduction thereof, dealt with the principles of the ule of Law and Separation of Powers. As rightly noted by His ordship, the foundation upon which the machinery for the dministration of justice and the maintenance and enforcement of aw and order, is constructed in Nigeria is the Constitution of the ederal Republic of Nigeria, 1999, and the Laws of Nigeria and the onstituent States thereof. The Constitution categorizes the powers of the Federal Republic of Nigeria into three, namely:

i) Legislative powers;

(ii) Executive powers; and

(iii) Judicial powers.

Legislative powers are vested in the legislatures at the Federal and States' levels, executive powers are vested in the President and the Governors of the States, while judicial powers are vested in the Courts established for the Federation and the States by the Constitution, and pursuant to the provisions thereof.

An important point was made by His Lordship, and that is that by virtue of its place as the third arm of Government in Nigeria, the Judiciary is assigned the constitutional responsibility for the interpretation of the laws of the land, and the duty of directing society in the attainment of justice. The point is underscored by the provisions of section 6(6)(b) of the Constitution, which provides that the judicial powers vested in the Courts:

> ... shall extend to all matters between persons, or between government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination

of any question as to the civil rights and obligations of that person.

This is to show, clearly and indisputably, that all persons governments and authorities in Nigeria are subject to law, and n person, government or authority can be above the law.

The other important point made relates to the well-know principles of Separation of Powers. My submission is that, in so fa as the powers vested in the three arms/branches of governmen are clearly circumscribed, each of those arms/branches o government, in the exercise and discharge of their powers and functions, should remain separate and independent, and the one should not interfere with or otherwise hamper or impede the other arms/branches in the exercise and discharge of their own respective functions.

My further submission is that no particular arm/branch of government is stated to be superior or inferior to the others. And so, while it may be true, as His Lordship has posited in his paper, that the Judiciary is the "Third Arm of Government" (perhaps following the serial order of sections 4, 5 and 6 of the Constitution), it should not in any wise be seen as inferior to the Legislature or the Executive.

The Judiciary, and particularly the Heads of the various courts in Nigeria, must recognise this fact, and act accordingly. That is the main idea encapsulated in the unending clamour for the independence of the judiciary.

Availability of Resources, Budgetary Process and Internal Misapplication of Resources

May I say that I agree entirely with His Lordship that there is a direct link and correlation between the quality of justice and justice delivery and the level of resources available for the judicial system in any country, and that that truism is amply illustrated by the reality of the situation in Nigeria. While we all like to proclaim that Nigeria

"... *has one of the best Judiciaries in the world*", that can only be true with regard to the quality in terms of learning and character of most of our Judges and Magistrates. The truth of the matter, which we must all accept, is that the efficiency and effectiveness of our courts in the administration of justice, and the maintenance and enforcement of law and order, cannot truly be said to be satisfactory. At the time when I was the President of the Nigerian Bar Association (NBA) (2000 - 2002), Olisa Agbakoba, *OON*, (SAN), in his capacity as Chairman of the Judiciary Committee of our once and forever great Association, recommended that a State of Emergency be declared with respect to the Judicial Sector in Nigeria. Even though he had a valid point, I did not quite agree with him that the system was in total collapse. But then, at that time and even now, the average duration of a case before the High Courts is between two to five years, with some pending and un-concluded for ten or more years; three to five years for appeals before the Court of Appeal; and four to five years for appeals before the Supreme Court. And what about the infrastructure and other basic equipment and machinery for the courts in most of our States?

What about the ability of the courts to enforce their judgments and orders? There is still so much to be desired, with regard to what His Lordship called "judicial resources", in their financial, human and infrastructural aspects.

The other truth of the matter is that, while it may be true that the poverty level in Nigeria is deplorably low, Nigeria is not a poor country. The resources are amply available to secure sufficient allocation of funds to the Judiciary. Witness Milords, that the Annual Budget of the Federal Government is now in trillions of Naira, while those of most States in Nigeria are in billions; and yet, the Judiciary, as a very important arm/branch of Government does not even get as much as 5% thereof; not at the Federal level and not at the States' level.

Clearly, there is a whole lot wrong about a budgetary process where the Judiciary, at the various levels aforesaid, will not be allowed

to budget and obtain allocation of funds for what it actually requires to run its services in each and every year, and is left at the mercy and uninformed generosity of Ministerial Advisers in the Budget Offices nationwide, and the Appropriation Committees of the various Legislative Houses in Nigeria.

In the Lead Paper, His Lordship referred to section 121 (3) of the Constitution, which provides as follows:

> Any amount standing to the credit of the judiciary in the consolidated Revenue Fund of the State shall be paid directly to the heads of the courts concerned.

There is an earlier provision in section 81 (3) of the Constitution, which provides as follows:

> Any amount standing to the credit of the judiciary in the Consolidated Revenue Fund of the Federation shall be paid directly to the National Judicial Council for disbursement to the heads of the courts established for the Federation and the States under section 6 of this Constitution.

Section 162 (9) of the Constitution, on its own, provides as follows:

> Any amount standing to the credit of the judiciary in the Federation Account shall be paid directly to the National Judicial Council for disbursement to the heads of courts established for the Federation and the States under section 6 of this Constitution.

In the Third Schedule to the Constitution, the various Federal Executive Bodies established by section 153 of the Constitution are enumerated, and their powers also stipulated therein. The National Judicial Council is empowered thereunder:

> ... to collect, control and disburse all moneys, capital and recurrent, for the judiciary.

Now, when all the aforesaid provisions of the 1999 Constitution are considered, the question will be: Why is it the case that funds for the capital expenditure requirements of the Judiciary are not being disbursed to the National Judicial Council as stipulated in the Constitution, and the Executive continues to insist that it will undertake the execution of the capital budget for the Judiciary?

On the budgetary and fund allocation process, I have to say also that the time has come for Nigeria to shed this culture of "approval and mandate" by the Executive before funds duly appropriated and allocated to the Judiciary, and indeed to the other agencies of government, are duly released. My humble view, and this is what I suggested in my Memorandum to the recently concluded National Political Reform Conference, is that there should be an Accountant General of the Federation, then Accountants-General for the Government of the Federal Republic of Nigeria and the Governments of the States and Federal Capital Territory. And once funds are duly appropriated in the yearly Appropriation Acts and Laws, the Accountant-General of the Federation should release the same, as and when due, to the various Accountants-General of the Federal Government and the States' Governments, for their various Governments; and they, in turn, should duly release, as and when due, the funds duly allocated to the Judiciary, and the other agencies of Government.

As I have already noted above, any act or omission on the part of either the Legislature or the Executive to appropriate and release funds, as and when due, to the Judiciary must be seen as an attempt to interfere with the due discharge of the constitutional duties and functions of the Judiciary, and, accordingly, an unjustifiable breach of the principles of the Rules of Law and the Separation of Powers. This also comprehends the other point of interference with the judicial process by the Executive, and what His Lordship categorized as "Politicians and their Antics". These are matters in respect of which I can only urge Your Lordships to constantly keep in mind the Judicial Oath to which you have all subscribed your names, and to faithfully

abide by the same. Stand boldly to repel politicians who seek to influence you by hook or by crook, and do your duty to God and to the country, in accordance with the law and the dictates of your conscience.

Still on this matter, it is my humble opinion that the Judiciary should not allow the Executive, at the Federal and States' levels of government, to continue to dictate to it. And I call upon the Heads of the various courts in Nigeria to take the bull by the horn, and to enlist the co-operation of the NBA as they seek proper interpretation of the aforesaid provisions of the Constitution, so as to secure not only adequate allocation of funds, but also proper custody, release and utilisation of such allocated funds. The matter is a justiceable one, as can be amply illustrated by reference to the decision of the Supreme Court in the landmark case of *A-G Federation v. A-G Abia State No2 (2002) 6 NWLR (Pt. 764) 542.*

His Lordship also touched on the small but important matter of Internal Misapplication of Resources, and this calls to mind the muted complaints of many of Your Lordships, as to how their Chief Judges either misapply or do not equitably distribute the funds that are allocated and released to the Courts for the benefit of Judges and Magistrates. My humbly suggestion, and this has been tried and found workable in some jurisdictions, is that a Finance/Fund Allocation Committee be set up by each Chief Judge or Head of Court, to advice the Head of Court on such matters. And, of course, there must be internal checks and balances with respect to the funds that are received by the Courts, so as to ensure that such funds are faithfully applied for the purposes for which they have been allocated, and also to avoid waste or misapplication.

Bribery and Corruption

Under this head, His Lordship has stated what is undoubtedly true, that corruption destroys the nerve system of any organisation, and further opined that the effectiveness of the Courts is to a very large measure dependent on their fairness and impartiality. While one must

commend the Judiciary and Your Lordships as a whole, and particularly the National Judicial Council, for resolutely waging the war against bribery and corruption in the Courts, and for dealing decisively with those Judges and Magistrates found to be engaged in corrupt practices, a point must be made about non-judicial officers and other personnel of the Judiciary. Some of Your Lordships promptly deliver to Counsel and Parties printed copies of Judgments and Rulings once they have been handed down, and we are indeed grateful for that. But do Your Lordships know that Registrars and Clerks of your Courts also charge Counsel and Parties as much as N5,000.00 (five thousand Naira) to issue and certify copies of such Judgments and Orders? Are Your Lordships aware of the rackets being run by some Deputy Sheriffs and Bailiffs, particularly with regard to the execution of Judgments? What about curious charges imposed by Registry Staff for opening Files for newly filed processes? What about extra charges imposed by Registry Staff for procurement of materials for production of Records for Appeals, even after parties have perfected the stipulated conditions of appeal? I have to confess that some of us, whose clients are able to pay, have made such payments, to facilitate our clients' appeals; but what about those litigants and counsel who may not be able to pay those charges. It cannot be denied that most courts are now well funded for stationery items, and for the transportation and other expenses of Bailiffs who serve processes and execute Judgments. May I therefore call upon Your Lordships, particularly those whose courts are outside the headquarters of the High Courts, i.e. out-station courts, to try and monitor closely what the Registrars and Clerks of your courts engage themselves in. As is always the case, the well-earned reputation of Your Lordships are likely to be dented, if the nefarious activities of those Registrars and Clerks of Court are not checked. And please be bold to erect Suggestion Boxes in your Courts, and to invite Legal Practitioners, Litigants and other members of the public to report the misconduct of the non-judicial personnel of the Judiciary.

Limited Access to Justice

His Lordship, in the Lead Paper, has alluded to the matter of Acc to Justice, and the unaffordability to the ordinary people and ru dwellers of the commodity called JUSTICE. I am in compl agreement with His Lordship's views, that when proceedings a unfair, or unduly delayed, or afflicted by high costs, the resulta effect is in truth a denial of the right of access to justice. On th matter, it is my humble opinion that section 251 of the 19 Constitution, which deals with the jurisdiction of the Federal Hig Court, needs to be critically re-examined, and some of the item stipulated therein for the exclusive jurisdiction of the Federal Higl Court be reserved for the concurrent jurisdiction of both that Cour and the High Courts of the States and the Federal Capital Territory, Abuja. I refer particularly to the following items in section 251 (1) of the Constitution, namely:

1. bankruptcy and insolvency;
2. arms, ammunition and explosives;
3. drugs and poisons;
4. mines and minerals (including oil fields, oil mining, geological surveys and natural gas);
5. weights and measures;
6. the administration or the management and control of the Federal Government and any of its agencies;
7. the operation and interpretation of the Constitution in so far as it affects the Federal Government or any of its agencies; and
8. actions or proceedings for a declaration or injunction affecting the validity of any executive or administrative action or decision by the Federal Government or any of its agencies.

This is very critical, especially in view of the fact that the Federal

High Court, as presently established, cannot in reality cope with all the causes and matters as are likely to arise under those items. Some states have presently no Federal High Court sitting within their borders, and some of the Divisions of that Court have only one court, while those that have two courts are in dire need of more.

Another point on Access To Justice is the high and rather exorbitant rates of court fees. It should be remembered that the Courts render a most essential service, which cannot be quantified in terms of Naira and Kobo, and we all know that JUSTICE is a commodity which should not and ought not to be sold. May I therefore urge the Heads of all the Courts in Nigeria to constantly bear this in mind, when they make amendments to the fees payable for commencement of actions, and for other matters.

Appointment of Judicial Officers and Judiciary Staff

In the Lead Paper, His Lordship has highlighted the concern of many that, on account of the faulty method used for the appointment of judicial officers, and indeed other non-judicial staff of the Judiciary, some unsuitable persons have found their way to the Bench and into the employment of the Judiciary. While I must agree with His Lordship that some serious efforts have been made by the National Judicial Council (NJC), the Federal Judicial Service Commission (FJSC), and the Judicial Service Commissions of the States and the Federal Capital Territory, Abuja, I hold the view, most humbly, that the system presently in place is still faulty, and that political and other nepotic influences are still at play, and they continue to compromise the integrity of the process.

I recall that at the time when I was President of the NBA, I went to the United States of America, in the company of several others, including the then Chairman of the Independent Corrupt Practices Commission, some Judges of some superior courts in Nigeria, the Director-General of the Nigerian Institute of Advanced Legal Studies, some Deans of Law Faculties, some officials of the

Federal Ministry of Justice, and some members of the National Assembly. We were on a Study Tour of some of the institutions involved in the Administration of Justice and the maintenance and enforcement of Law and Order in the U.S.A. Of great significance to me, and obviously to most of the others who participated in that Study Tour, was the fact that the Commission charged with responsibility for the appointment, promotion and other service matters of Judicial Officers and other Staff of the Judiciary was different from the Commission charged with responsibility for the discipline and removal of such Judicial Officers and Staff of the Judiciary.

Now what do we have in Nigeria? We have, for the Federal Courts, i.e. the Supreme Court, Court of Appeal and Federal High Court, etc., the NJC and the FJSC, with the Honourable Chief Justice of Nigeria as Chairman, and their functions include the appointment and discipline of the Honourable Chief Justice, and the appointment and discipline of the President of the Court of Appeal and the Chief Judge of the Federal High Court, who are also members thereof. For the High Courts of the States and the Federal Capital Territory, we have the NJC and the respective Judicial Service Commissions of the States and Federal Capital Territory, which are chaired by the Chief Judges, some of whom are also members of the NJC. In my memorandum to the National Political Reform Conference, I had suggested that separate and distinct Commissions be established at various levels, for appointment, promotion and service matters of Judges, Magistrates and other Judiciary Staff, while separate and distinct Commissions be established for discipline and removal of such Judges, Magistrates and other Judiciary Staff; and that where necessary, but only on ad-hoc basis, Heads of Courts like the Chief Justice of Nigeria, President of the Court of Appeal and Chief Judges may be invited to participate in the deliberations of such Commissions. That way, the integrity of the system for the appointment, discipline and removal of Judicial Officers and other Judiciary Staff may be further strengthened.

Another point which I would like to mention is the need for the levant Commissions charged with responsibility for appointment of dicial Officers to enlist the assistance and co-operation of the NBA, rough its Judiciary Committees at the National Headquarters and e Branches of the Association nationwide, when persons are being reened for appointment to judicial office, which appointment must seen to include elevation to higher Benches, e.g. from the High ourts to the Court of Appeal, and from the Court of Appeal to the upreme Court. As can be expected, we know our colleagues at the ar, and the quality of their practice before the various courts of igeria, and so are we also in a position to express responsible views bout the performance of our erstwhile colleagues who get appointed the Bench.

raining and Manpower Development

he Lead Speaker has dealt admirably with this matter, and not uch more needs to be said on it, except to emphasize the point at there is urgent need for our courts to re-train its personnel, not nly to appreciate the tools, machinery and equipment of modern nformation technology systems, but also to be able to utilise them. is when the full import of the new Rules, now being introduced in tates like Lagos, is understood, and the impact thereof begins to ecome manifest, that the point being made can be fully appreciated. he goal of such training and manpower development should be eared towards the production of a new crop of Registrars and lerks of Court, who will be armed with the skills requisite to ssist Judges and Magistrates perform their duties with efficiency nd maximum dispatch.

There is also the need for a new cadre of Law Clerks to be ntroduced, particularly in the superior courts, who should ordinarily e lawyers, and also persons of good character and integrity, to ssist the justices and judges of those courts in doing research, evilling through Law Books and Law Reports, and even browsing he world-wide web for judicial authorities from overseas

jurisdictions on relevant principles of law. This should go a lon way in improving the quality of the contents of judgments and ruling handed down by Your Lordships.

Other Constraints

May I say, with respect to the Lead Speaker, that there are som other constraints in the administration of justice, and these have to d with the other agencies of government which are also part and parce of the machinery for the administration of justice, and the maintenance and enforcement of law and order. I speak of the Police and the Prisons, both of which institutions have vital roles to play, particularly in the administration of criminal justice. As we know too well, the Police is even involved in the prosecution of offenders charged with criminal offences, while the Prisons keep custody of crimina offenders, including those awaiting trial. I will summarize my comments here by just saying that much of what has been said above concerning Availability of Resources, Bribery and Corruption, Training and Manpower Development, also applies to those two institutions, and the Government of the Federal Republic of Nigeria must take immediate steps to also address those matters, as they relate to the Police and the Prisons.

When I was President of the NBA, the Association, i collaboration with some Civil Society Organisations, prepared an produced a National Action Plan for the Reform of the Justice Secto in Nigeria, and this was duly submitted to the relevant authorities an agencies of government engaged in the Administration of Justice an the Maintenance and Enforcement of Law and Order. It is regrettab that nearly four years thereafter, nothing much seems to have be done. May I therefore appeal to Your Lordships to call attention the fact that the Justice Sector in Nigeria is in dire need of urge reform, and that all hands be brought on deck to attend to that mat without further delay.

The New High Court (Civil Procedure) Rules of Lagos State and the Federal Capital Territory, Abuja

May I say that, as a member of the Drafting Committee of the proposed new Rules of the High Court of Rivers State, I have had the privilege of reading and reviewing the High Court of Lagos State (Civil Procedure) Rules, 2004 and the High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules, 2004.

The High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules, 2004 is basically modelled on the Uniform High Court Rules that were introduced nationwide in or about the year 1987. The one innovation that I spotted therein is Order 36, which deals with written addresses, but the provisions thereof seem to relate to substantive trials only, and not to Interlocutory Applications, and actions commenced by Originating Motions, Originating Summons and Petitions. It is humbly suggested that the provisions in the Order be amended to take into account the Addresses/Arguments of counsel in Interlocutory Applications, Originating Motions, Originating Summons and Petitions, where the evidence is usually by affidavits.

The High Court of Lagos State (Civil Procedure) Rules, 2004 contains quite a lot of innovative and progressive provisions, and, if the same are faithfully applied, there is no doubt that the speed of justice will be quickened, and this will invariably lead to the quicker and more convenient disposal of causes and matters before the High Courts. Of particular note is the concept of Front Loading, and the idea behind the same is clearly to ensure that only serious cases are filed by litigating parties. So it is now requisite for a party commencing an action by Writ of Summons to accompany the originating process with the following, namely:

1. a Statement of Claim;
2. a List of Witnesses;
3. Written Statements on Oath of the Witness to testify at the trial; and

4. Copies of every document to be relied upon at the trial.

The same applies to a Defendant who intends to defend t action, and his Statement of Defence is expected to be support by the following, namely,

1. Copies of every document pleaded by him;
2. List of Witnesses; and
3. Written Statements on Oath of his Witnesses.

There are provisions made for Written Addresses, and e Motions and Interlocutory Applicants are to be accompanied by s Written Addresses at the time of filing, and a party who an intenc oppose an application is also expected to file his Written Addre opposition thereof, with or without a counter-affidavit.

By far the most remarkable innovation made by the said I Court of Lagos State (Civil Procedure) Rules, 2004 is Order 25, w deals with **Pre-trial Conference and Scheduling.** In view o need to fully appreciate the purport of the provisions of the said (I crave your Lordships' indulgence to deal with the same in detail.

RULE 1, deals with Pre-trial Conference Notice, and provide within fourteen (14) days after the close of pleadings, the cla shall apply to the Registrar for the issuance of a Pre-trial Confe Notice, which shall be as prescribed in Form 17 in the Sched the Rules. Upon such application, the Judge, who is to preside Pre-trial Conference, shall cause to be issued to the parties o Legal Practitioners (if any) the prescribed notice, accompanie Pre-trial Information Sheet as in Form 18, for the following pu namely:-

(a) disposal of matters which must or can be dealt w interlocutory application;

(b) giving such directions as to the future course of the action as appear best adapted to secure its just, expeditious and economical disposal; and

(c) promoting amicable settlement of the case or adoption of alternative dispute resolution.

Form 18, the Pre-Trial Information Sheet, is intended to include reference to all applications which the parties may wish to make at the Pre-trial Conference. The parties are expected not later than seven (7) days before the first Pre-Trial Conference, to file and serve on each other:

(a) all applications in respect of matters to be dealt with before the trial, including but not limited to the matters listed in the Pre-Trial Information Sheet; and

(b) written answers to the questions contained in the Pre-Trial Information Sheet.

The questions contained in the Pre-Trial Information Sheet include the following, namely:

(1) Do you require this action to be consolidated with any other action(s)? If so, give particulars.

(2) Are amendments to any originating or other processes required?

(3) Are further and better particulars of any pleading required? If so, specify what particulars are required.

(4) Do you object to any interrogatories that may have been delivered pursuant to Order 28, Rule 1 of the High Court (Civil Procedure) Rules? If so state the grounds of such objection in compliance with Order 26, Rule 4 of the Rules.

(5) Do you object to produce any document in respect of which a request for discovery has been made pursuant to Order 26, Rule 8(1) of the High Court (Civil Procedure) Rules? If so,

state the ground of such objection in compliance with Order 28, Rule (3) of the Rules.

(6) If you intend to make any additional admissions, give details.

(7) Will interpreters be required for any witness? If so, state in what language.

(8) Is this a case in which the use of a single or joint expert might be suitable? If not, state reasons.

(9) Is there any way in which the court can assist the parties to resolve their dispute or particular issues in it without the need for a trial or full trial?

(10) Have you considered some form of Alternative Dispute Resolution (ADR) procedure to resolve or narrow the dispute or particular issues in it? If yes, state the steps that have been taken. If not, state reason.

(11) State any question or questions of law arising in your case, if any, which you require to be stated in the form of a special case for the opinion of the Judge in accordance with Order 28 of the Rules.

(12) List the applications you wish to make at the Pre-Trial Conference.

The Pre-Trial Information Sheet is to be signed by the Legal Practitioners to the parties, and duly served on each of them.

Rule 1, Sub-Rule 3 provides that if the Claimant (i.e. the Plaintiff) does not make the application in accordance with Sub-Rule (1), the Defendant(s) may do so within fourteen (14) days or apply for an order to dismiss the action, while Sub-Rule 4 provides that if neither Claimant nor Defendant makes the application, the Registrar shall by a certificate to the Judge notify the Judge of that fact. Upon receipt of the certificate of the Registrar, the Judge shall cause the case to be listed for striking out, and the parties shall be so notified.

Upon the case coming up for striking out, the Judge shall strike out the case, unless good cause be shown why the case should not be struck out. A claimant who does not want his case to be struck out shall file in court, within three (3) days of the service upon him of the notice of striking out, an application containing the reasons for his failure to comply with Sub-Rule 1 or Sub-Rule 3 of Rule 1.

RULE 2 deals with Scheduling and Planning, and provides that at the Pre-Trial Conference, the Judge shall enter a Scheduling Order for:

(a) joining other parties;

(b) amending pleadings or any other processes;

(c) filing motions;

(d) further pre-trial conferences; and

(e) any other matters appropriate in the circumstances of the case.

RULE 3 provides that at the Pre-Trial Conference, the Judge shall consider and take appropriate action with respect to the following matters or aspects of them as may be necessary or desirable, namely:-

(a) formulation and settlement of issues;

(b) amendments and further and better particulars;

(c) the admission of facts, and other evidence by consent of the parties;

(d) control and scheduling of discovery, inspection and production of documents;

(e) narrowing the field of dispute between expert witnesses, by their participation at pre-trial conference or in any other manner;

(f) hearing and determination of objections on points of law;

(g) giving orders or directions for separate trial of a claim, counterclaim, set-off, cross-claim or third party claim or of any particular issue in the case;

(h) settlement of issues, inquiries and accounts under Order 27;

(i) securing statement of special case of law or facts under Order 28;

(j) determining the form and substance of the pre-trial order;

(k) referring the matter for amicable settlement or Alternative Dispute Resolution at the Multi-Door Court House; and

(l) such other matters as may facilitate the just and speedy disposal of the action.

RULE 4 stipulates that the Pre-Trial Conference or series of pre-trial conferences with respect to any case shall be completed within three (3) months of its commencement, and the parties and their Legal Practitioners shall co-operate with the Judge in working within that timetable, and that, as far as may be practicable, the pre-trial conferences shall be held from day to day or adjourned only for purposes of compliance with pre-trial conference orders. The Chief Judge may however extend the time-table.

RULE 5 stipulates that after the Pre-Trial Conference(s) the Judge shall issue an Order giving directions for further proceedings in the matter, which order shall guide the subsequent course of the proceedings, unless the same is modified by the trial Judge.

RULE 6 provides sanctions where a party or his Legal Practitioner fails to attend the Pre-Trial Conference or obey a Scheduling or Pre-Trial Order, or is substantially unprepared to participate in the conference, or fails to participate in good faith. In any of such

cases, the Judge may be at liberty to dismiss the case, if the Claimant is the party at fault, or to enter final judgment, if the Defendant is the defaulting party. Such judgment may however be set aside, upon an application made within seven (7) days of the judgment or such other period as the Pre-Trial Judge may allow, not exceeding the Pre-Trial Conference period. The application is to be accompanied by an undertaking to participate effectively in the Pre-Trial Conference, as may be re-scheduled.

RULE 7 deals with the management of the case, and the Judge shall direct the Pre-Trial Conference with due regard to its purpose and agenda, and shall require the parties and/or the Legal Practitioners to co-operate with him effectively in dealing with the conference agenda.

The aforesaid Order, as already stated above, is quite remarkable, and it is by and large very innovative, and, if properly applied and operated, most pre-trial matters can be effectively dealt with, so that when trial proper commences in any case, such trials can proceed from day to day without the usual hitches. This will surely secure the speedy determination of causes and matters that ultimately go to trial. There are problems to be considered though, and these include the following, namely:

1. Where will the Pre-Conference Trial be held?
2. Are the parties and all their witnesses expected to attend?
3. How convenient will the Judges find the time limits for Pre-Trial Conference?
4. Why should the application for setting-aside any judgement given under Rule 6 be restricted to the particular Pre-Trial Judge himself.

I have to say that much as my mind has been agitated to raise the few aforesaid issues, I find myself unable to propose any amendments. This is chiefly because I am yet to see the new Rules in operation,

and I believe that they should be tried and tested, and made uniformly applicable, before any serious amendments are made thereto. I may add though that the Drafting Committee of the proposed High Court of Rivers State (Civil Procedure) Rules did make a few amendments to the new Rules of the Lagos State High Court, and the new Rules of the High Court of Rivers State are to come into force on the 1st of January, 2006. When the same are published, we shall all be in a position to compare and contrast. Be that as it may, I would still suggest that the High Court of Lagos (Civil Procedure) Rules, 2004, should be adopted nationwide as a model for Uniform High Court Rules throughout the Federation. It is quite progressive and we must all see it as such.

Conclusion

Milords, Ladies and Gentlemen, I must conclude now, but not before reminding you all that the foregoing are just commentaries, and they have been made from the point of view of a Legal Practitioner in practice, not a Judge. May I thank you all for listening, even as I congratulate Your Lordships for the success of the 2005 All Nigeria Judges Conference. And I also pray, as has Milord, The Honourable President of the Court of Appeal, that the Almighty and Eternal God may bless you all, and grant that you all end up in paradise. AMEN.

COMMENTARY (II)

Professor Johnson Ola Anifalaje

Introduction

The theme of this paper is a faithful compliance with the directive of the Organisers of this important Conference since my mandate is to write a commentary on the lead paper by His Lordship, Hon. Justice Umar Faruk Abdullahi (CON) Hon President, Court of Appeal. I should hasten to express my deep appreciation to the Organisers of this Conference for the privilege to present this commentary as a voice on the lead paper from *the academic perspective*. It is from this narrow vision that I believe the *commentary* from my humble self on the lead paper by such a highly-placed judicial mind as the current President of the Nigerian Court of Appeal, may be tolerably understood and psychically justified.

The theme of this paper is invaluable to the sound health of municipal law and is surely one of the most topical themes conceivable in a Judges' Conference in a developing country such as Nigeria. The Conference theme in question is tendentious in opposite directions that on the one hand, *all* the prevailing constraints are, at least, at this time, *completely* ill-founded or unfounded *and* that on the other hand no time ought to be lost further to decisively arrest the perceived drifts with *foolproof* reform measures. The terse, analytical and pragmatic approach of Hon. Justice Abdullahi (CON), Hon. President of the Court of Appeal has apparently been patterned skillfully after this dual presupposition. In the interest of the fundamental duty on a commentator of a lead paper, its appraisal ought to be undertaken in the light of the conventional academic approach and to that we may now turn.

Views on Identified Structural Constraints

The lead paper is divisible into two distinct parts. The first aspect of the lead paper is concerned with a pungent exposition on the *general* relevance and *some* of the incidents of the Rule of Law. In the candid language of the lead paper, it has been stated cohesively as follows:

> when one talks of administration of justice, whether in Nigeria or anywhere else in the World, the foundation is the Rule of Law ... it is very important to make the point that by virtue of its place as the 3rd Arm of Government, the Nigerian Judiciary is assigned the Constitutional responsibilities for the interpretation of the laws of the land. It has the duty of directing society for the attainment of justice. Judges must always bear in mind that people look up to the Judiciary, as a haven of last resort, for the protection of society and particularly for protecting the weak and the oppressed. It therefore follows that any judge, who does not believe in evenhanded justice to all, should not, and must not continue to belong to the Judiciary.

With due respect, that is a loaded speech which has condensed into clearly intelligible prose the myriads of "*constraints*" in the "*administration of justice*".

It is this first aspect of the lead paper that would readily admit of some elucidation and exemplification for the purpose of emphasising and enhancing the intended impact of the lead paper. We shall make recourse to that later in this commentary.

The second aspect of the lead paper has been concerned with what may classify as "*structural constraints*". The list provided and examined in the lead paper is long and with due respect, they are extremely important to the health, vibrancy and social efficacy of the Third Arm of Government. The list includes: (i) availability of resources, (ii) budgetary process, (iii) internal misapplication of resources (iv) bribery and corruption of judicial personnel (v) limited access to justice (vi) appointment of judicial officers and judiciary staff (vii) interference by the executive arm of government

iii) remuneration of judges and supporting staff (ix) training and anpower development and (x) politicians, and their antics.

His Lordship, the writer of the lead paper has written with great thority stemming from his lofty privileged position as the Honourable esident of the Court of Appeal, consequently, his privileged views structural constraints confronting the average *"administrator"* judicial affairs in Nigeria is impregnable, unassailable and deserving *due and speedy* attention and response by the Federal Government.

With due respect, His Lordship's opinion in the lead paper that *verty* is a constraint in the administration of justice, is infallible. In y event, His Lordship took the time to prove convincingly that there a causal relationship in the quality of justice in Nigeria or any country r that matter and the level of resources available for the judicial stem in the polity. With due respect, the indictment of some State xecutive Governors in the lead paper concerning capital expenditure r State Judiciary is a matter of deep regret which should arouse e attention of and remedial action by the State Governors ncerned or those who are constitutionally privileged to compel em to obey the unambiguous provision in **Section 121 (3) of the onstitution of the Federal Republic of Nigeria, 1999** which e State Governors concerned have flagrantly violated to date. f course it is hardly a matter for controversy if monies belonging the judiciary in the Consolidated Revenue Fund of the State hich are expected to be paid directly to the Heads of Courts ncerned are misappropriated or misapplied, then that would nount to an impeachable offence and would surely give rise to sastrous situation for the Judiciary as suggested in the lead paper. ne hopes that the appropriate authorities would expeditiously nfront and resolve this scandalous species of constraint in the sclosure in the lead paper that:

> in some instances, salaries and allowances of supporting staff can be too low and are in arrears for months; thus creating an atmosphere of frustration and discontentment; which normally breeds indiscipline and breakdown of the system.

With due respect, the honest fears expressed in the lead paper on the dangers of internal misapplication of resources is a constraint which is avoidable and ought to be scrupulously avoided so that available scarce resources allocated to the judiciary would not suffer unnecessary diminution. It is on this note that one may repeat for the sake of emphasis His Lordship's opinion on this point:

> It goes without saying that insufficient or weak capacity to carry out internal distribution of available resources can mar any meaningful plans for the development of the judiciary. The system can then easily be manipulated by certain self-serving interests and this without doubt has affected the administration of justice negatively.

His Lordship's painstaking characterization of bribery and corruption in the judiciary is with due respect highly commendable, incisive and progressive. The misfortunes of the victims of bribery plot in a judicial trial are incalculable and extremely severe. It would probably qualify as the highest constraint in the administration of justice in Nigeria today. The explicitness, conciseness and great details concerning the evils of bribery and corruption in the judiciary as articulated by His Lordship in the lead paper irretrievably points to the fact that His Lordship's personal self-discipline and the spirit of contentment which have permitted this bold exposition in a National Judicial Conference, is a trait which one hopes would commend itself to those described in the lead paper as *"very few bad eggs in the judiciary."* It is gratifying to note that none of the constraints in the administration of justice constituted by the risk of wrong recruitment of unqualified or unscrupulous or undeserving judicial personnel which was a problem of a profound dimension has now been neutralized by the joint efforts of the Federal Judicial Service Commission (FJSC) as well as the National Judicial Council (NJC). With due respect, one should seize this opportunity to lend support to the call in the lead paper for spirited efforts by the participants at this Year's National Conference of Judges to combat

the evils of *indirect* interference by the executive arm of government with judicial functions.

With due respect, it has not been possible for this commentator to agree with His Lordship in the lead paper on *two minor points*. The first, concerns the quantum of judges' remuneration which His Lordship believes ought to be increased considerably further. It is this writer's conviction that bloated salaries in a country always lead to inflation but the purchasing power of a currency is what is actually material and not the quantum of such salaries. Of course, our judges ought to be provided with the greatest comfort and wherewithal comparable with what obtains in the rest of the world. Moreover, the point ought to be made that a Nation deserves its judiciary and its supporting staff. Commitment to official duty which permeates the rank and file of the judiciary in the developed communities we daresay has been bought at a handsome price by the government and the people of the relevant community. The question is: Can Nigeria continue to be an exception? We hope not and we seize the opportunity to respectfully urge the Federal Government not to relent in the salutary crusade to provide adequately for the Nation's judiciary in a way that would compare favourably with the best standards in the World.

Secondly, this writer is unable to agree with His Lordship that the problem of inordinate perpetuation of the time frame for allowing election petition has been caused by politicians. The entire problem, with due respect, arose from the decision of the Supreme Court in *Paul Unongo* v. *Aper Aku*[1] that trials in election petition cases can continue presumably *sine die*. Thus, many election petitions including that by Gen. Buhari (rtd.) against the incumbent President Obasanjo, has continued unabated for more than two years after the last general election took place in Nigeria. One wonders why this situation has to be permitted simply on account of *judicial interpretation* of the relevant Nigerian law. It is painful that the

1. (1983) 11 S.C. 129; (1983) 14 NSC 563.

decision in Paul Unongo's case was not really inevitable as an unambiguous directive of an enabling Statute but was a spirited effort by the Supreme Court to advance the presumed legal right of the aggrieved election petitioner without balancing that right with the competing right and interests of the larger community who may be and has been seriously embarrassed by seemingly endless hearing of election petition in Nigeria. In the American case of *Bush* v. *Gore*[2], the election petition in that case against President George Bush was disposed off before he was even sworn in for his first term in office. We respectfully urge the Supreme Court to reverse its decision in the Paul Unongo's case[3] at the earliest opportunity in the national interest. Alternatively, it would be faster for the National Assembly to enact an appropriate law to set a deadline to be backed up with suitable criminal and other sanctions, for bringing election petitions. The sanctions in question would be applicable to compel compliance with the deadline and to punish any manipulation or perversion of the election process that is liable to frustrate the deadline.

We may now pursue further the cursory exposition of His Lordship in the lead paper on the constraints surrounding the Rule of Law and its incidents.

Supplementary Ideas on the "Constraints" Question

The "constraints" question or element in the administration of justice in Nigeria has numerous attributes which cannot be taken for granted without compromising the balance of intelligibility and ready activation of anticipated and desirable responses to the corresponding proposals for eliminating the perceived constraints. Thus, we daresay that there would forever be one form of constraint or another in the administration of justice in Nigeria and in any other country because of the nature of man which is imperfect and

2. 1531 U.S. 1 (2000).
3. (*supra*).

because of the abiding quest of man for perfection as an ideal. In short, **"constraints in the administration of justice"** is a function of the present level of the civilisation in a given society. In the same vein, such **"constraints"** is also a ***challenge*** to the quality of the civilization in the given society. Secondly, the **"constraints"** in question stemming from the Rule of Law and its incidents invariably concern well-established legal principles whether mistaken or ill-advised or otherwise perilous. Thirdly, ***such*** constraints in the administration of justice in Nigeria must relate to the competing claims between government and citizens ***vice-versa*** on the one hand and among the citizens ***inter se*** on the other hand. Fourthly, ***such*** constraints must be pragmatic and relate to adverse issues in order to amount to "constraints". Thus, superficially, the power of a court to raise issues ***suo muto*** in the course of a trial may appear as a constraint in the administration of justice but its salutary pragmatic effect which requires the court to call on counsel to the parties to address it on the matter, will not make the exercise of such a power to qualify as a **"constraint"** because it is patently just. Moreover, it is also subject to the test that such exercise of power has not occasioned miscarriage of justice: see ***Ibori*** **v.** ***Agbi***.[4]

However, the **"constraints"** element on the administration of justice in Nigeria is not a straight-jacket question nor an abstract question even though it is a question of strict definition. Moreover, it is important to note that in far more cases than not, the courts have not been idle and have struggled within the constitutional limitation on their powers to devise tenable departures from embarrassing constraints. For example, one of the greatest constraints and bane of the received English law in Nigeria has been its embarrassing technicalities in many areas. Thus, apparently without qualms, even the House of Lords in ***Macaura*** **v.** ***Northern Assurance Corporation***[5] held that the legal theory of incorporation was a

4. (2005) 28 WRN 1 S.C. at p. 47.

5. (1925) A.C. 619.

sustainable technicality to defeat the just expectation of the plaintiff in a contractual relationship. Apparently, the House of Lords ***completely*** forgot everything about such compatible doctrine as that against unjust enrichment in equity. On the contrary, the Supreme Court of Nigeria was eloquent in its speech in *Joseph Afolabi & ors* v. *John Adekunle & Anor*[6] *that:*

> ... it is perhaps necessary to emphasize that justice is not a fencing game in which parties engage themselves in an exercise of outsmarting each other in whirligig of technicalities to the detriment of the determination of substantial issues between them.

We may now examine some of the most conspicuous constraints in the administration of justice in Nigeria in the hope that they may soon wither away to the glory of the Nigerian legal process but more importantly that they would serve as abiding food for thoughts for purposes of replicating and multiplying the lineal and interstitial illustrations which the following exposition simply represents on account of ***inter alia*** limited time and space.

The first constraint in the administration of justice in this context concerns constitutional immunity from civil process of some public functionaries in Nigeria as enshrined in section 308 (1) of the Constitution of the Federal Republic of Nigeria, 1999. That constitutional provision has been wreaking enormous havoc ***clearly unintended*** by the framers of the Constitution, in the both civil and criminal processes. The immunity clause which apparently was designed to protect some public functionaries from litigations which would have distracted their attention while discharging the functions of their public offices, has regrettably served to shield, and protect fraud, iniquities and other crimes and to frustrate even just demands

6. (1983) 2 SCNLR 141 at 149. See also *Sarakatu v. Nigerian Housing Dev. Ltd & Anor* (1981) 4 S.C. 26.

for debt and the prosecution of corrupt politicians. Thus in *I.M.B. Securities Plc. v. Bola Tinubu*[7], the Supreme Court held that a private debt of N2.5 million owed by the incumbent Governor of Lagos State could not be litigated upon on account of the constitutional immunity of the defendant as the Governor of Lagos State. Also, some corrupt Governors in Nigeria including the incumbent Governor of Plateau State, Governor Joshua Dariye and the Governor of Bayelsa State, Diepreye Alamieyeseigha have escaped prosecutions because of the same constitutional immunity. The former is still in office but the latter is on his way out of office pending the completion of impeachment proceedings against him by which time he would hopefully be arrested and prosecuted for the various alleged embezzlement of public funds.

The perfect solution to this national embarrassment of a constraint in the administration of justice, in our humble opinion is ***not*** to repeal the constitutional immunity at the next opportunity because its main thrust and actual objective is well-founded and indispensable to the smooth running of government and is a common practice in democratic communities. But the *"Nigerian experience"* would warrant ***detailed*** exceptions to the general rule that would include (i) the competence of a creditor to recover a contractual debt from a public functionary with the cloak of constitutional immunity and (ii) to allow prosecutions of such functionary, for the embezzlement of public funds ***after a prima facie*** case based on ***proper*** investigation.

Another major constraint in the administration of justice in Nigeria is what is now known as **"executive lawlessness"**. This constraint would be found at both the State level by erring Executive Governors and at the Federal level by an unyielding executive President. In the *Military Governor of Lagos State & Ors* v. *Ojukwu & Anor*[8], the Lagos State Governor flagrantly flouted the lawful

7. (2001) 45 WRN 1 S.C.
8. (1986) 1 NWLR (Pt. 18) 621 SC at p. 639.

orders of a duly constituted court. The Supreme Court condemned in very strong terms the executive lawlessness of the Lagos State Governor. In that case, Uwais JSC (as he then was) spoke the minds of the court as follows:

> I think I should still stress that it is a matter of grave concern that the Military Government of Lagos State should be seen to disregard a lawful order issued by a court of Law. If governments treat Court Orders with levity and contempt the confidence of the citizens in the Courts will be seriously eroded and the effect of that will be the beginning of anarchy in replacement of the rule of law. If anyone should be wary of Orders of Court it is the authorities; for they, more than anyone else, need the application of the rule of law in order to govern properly and effectively.

Also, in *Attorney General of Lagos State v. Attorney General of the Federation*[9], the Supreme Court unanimously condemned the illegal act of the President of Nigeria in withholding or suspending the payment of allocation from the Federation Account to the Lagos State Government on behalf of the State's Local Government Council.

Another major constraint in the administration of justice is poor drafting of Statutes. Unclear, contradictory and incomplete statutory provisions are gradually becoming a nuisance and a cog in the way of effective use of statutory provisions by counsel in advancing the interest of their clients and by the courts in administering justice.

We ought to provide at least one of the numerous examples. In Section 91 (1) (2) and (3) of the Evidence Act, it is provided that:
(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied –

9. (2005) 2 WRN 1 S.C.

(a) if the maker of the statement either

(i) had personal knowledge of the matters dealt with by the statement, or

(ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who has, or might reasonably be supposed to have, personal knowledge of those matters; and

(b) if the maker of the statement is called as witness in the proceedings: Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success.

(2) In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) of this section shall be admissible as evidence or may, without any such order having been made admit such a statement in evidence –

(a) Notwithstanding that the maker of the statement is available but is not called as a witness.

(b) Notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof [illegible] copy in such manner as may be

specified in the order or as the court may approve, as the case may be.

(3) Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish.

It is submitted that sub-section 3 is a provision which has been designed to codify the salutary common law doctrine of *lis pendens (pendent elite nihil innovetur-* During a litigation nothing new should be introduced). The *marginalia* to section 91 states its caption as **"Admissibility of documentary evidence as to facts in issue"**. The mischief illustrated in the long line of cases which ended at the Supreme Court including *Barclays Bank of Nig. Ltd. v. Ashiru*[10]; *Osagie v. Oyeyinka*[11]; *Ogundiani v. Araba & Anor*[12] was to be adequately cured by section 91 (3) of the Evidence Act but unfortunately on account of unimaginative draftsmanship, section 91 (3) of the Evidence Act has been so sweeping in its language that it has unwittingly nullified the wise privileges which are ***expressly*** enacted in section 91 (1) and (2) of the same Evidence Act. One hopes that section 91 (3) of the Evidence Act would be given a separate provision and removed from the present section 91 of which it should be completely independent.

Another major constraint in the administration of justice is the judicial interpretation of statutes and some incomprehensible judicial decisions. The first example would be found in the leading case of *Ibrahim* v. *Judicial Service Committee, Kaduna State & Anor*[13] in which the Supreme Court of Nigeria by a majority of 4 to 1, with due respect, gave an incorrect or wrong decision about the true meaning

10. (1978) 6 S.C. 99.
11. (1987) 3 NWLR (Pt. 59) 144 S.C.
12. (1978) 67 S.C. 55
13. (1998) 14 NWLR (Pt. 584) 1 S.C.

and import of section 2 of the Public Officers Protection Law when the majority held that the word *"person"* in the special context of the given statute includes a corporation when in actual fact by the necessary intendment and the inevitable context of the statutory provision can only mean a natural person. It is submitted with due respect that the mere fact that "person" *may* mean *"natural and artificial person"* in a given statute will not make it an ***invariable*** fact applying across the board as if it is incapable of admitting any exception warranted by justifiable special content of the given statute. With due respect, the highly ***instructive***, thoroughly ***persuasive***, eloquently ***explicit*** dissenting opinion of Ogundare, JSC in that same case represents the correct position of the law. Unfortunately, the Supreme Court has not had the opportunity yet to re-examine upon proper invitation by counsel[14] its decision in question with a view to reversing same in the interest of justice.

On a curious note, a Justice of the Court of Appeal in *Afribank of Nig. Plc.* v. *Bonik Industries Ltd* [15] has stated that he did not understand what is meant by **"equitable jurisdiction"** in a case in which that was the only ground in the respondent's brief in defense of an award by the trial court of three million, seven hundred and twenty three thousand, six hundred and eighty-five naira, sixty-eight kobo (N3,723,685.68k). On that strangely confessed ignorance of the law, the Court of Appeal allowed the appeal. As this revelation may sound incredible, to many people, the learned Justice of the Court of Appeal's candid statements are reproduced as follows:[16]

> I had exerted sufficient efforts to grapple with the meaning of "**equitable jurisdiction**" to no avail. The word "**equitable**" means just, comfortable to the principles of justice and right. All known

14. See *Offoboche* v. *Ogoja Local Government & Anor* (2001) 15 NWLR (Pt. 739) 458 S.C. at p. 490.
15. CA/1/69/01 of 13th July 2005 (Unreported).
16. At p.4 of the Unreported Judgment.

ramifications of "**equitable**" appear not to include equitable jurisdiction. Jurisdiction is a term of large and comprehensive import as it embraces every kind of judicial action. Jurisdiction exists when a Court has cognizance of the class of cases involved, proper parties are present and the point to be decided is within the powers of the Court. I admit that the term "**jurisdiction**" could have suffixes such as "**jurisdictional dispute**", jurisdiction does not, in my view, admit of a prefix such as the one in point. Jurisdiction is all embracing whether it is described as legal or equitable. It is, in essence, the legal right conferred on a Court by relevant legislation.

Another major constraint in the administration of justice is the impact of transfers of judicial officers from one judicial division to another especially at the beginning of a new legal year, on part-heard cases. Regardless of the level or degree of the proceedings in a case in such a situation unless and until any of the parties has applied for a fiat of the Chief Judge and the Judge concerned is favourably disposed to continue with the hearing of the case at his or her own convenience, such a case would be discontinued automatically and the parties would be called upon to start ***de novo***.

Surely, the disadvantages and injustice of subjecting the winning party to the challenges of restating his case are best imagined than narrated. It is therefore respectfully submitted that transfers of judicial personnel from one judicial division to another ought ***never*** to occur without at least one year's notice to the judge concerned and with a directive that he should ensure that all his pending cases are completed before the transfer would commence.

Judges cannot with due respect be faithful to their judicial oaths if an injustice such as this is allowed to continue unabated and to constitute as a blemish to the administration of justice in the country. Perhaps, one of the most troublesome constrains in the administration of justice in Nigeria is that of ***locus standi*** by which the Court denies a party who cannot show a personal interest in a suit the

ight to maintain same. In *Thomas* v. *Olufosoye*[17], the Supreme Court observed that:

> the fundamental aspect of **locus standi** is that it focuses on the party seeking to get his complaint before the court and not on the issues he wishes to have adjudicated ... As the law stands, there is no room for the adoption of the modern views of **locus standi** being followed by England and Australia. The adoption of those views in England has found support in the Statute Law of England. The appeal for a change in the law by learned counsel for the appellant should therefore be directed to the Law-making authorities in the country.

Surely, the doctrine of ***locus standi*** is a form of technicality which may promote corrupt and unjust actions in some cases. With due respect, no amending Statute is necessary for the Supreme Court to allow the litigant to maintain an action "**on the issues**" on the basis of the inherent jurisdiction[18] of the Court under **Section 6 (6) of the Constitution of the Federal Republic of Nigeria 1999**. About twenty years after the *Thomas* v. *Olufosoye's* decision, it is a pity that the hints given by Obaseki, JSC that the reforms in England and Australia ought to be pursued in Nigeria has not been heeded yet by any person.

Concluding Remarks

The stake in the administration of justice in Nigeria is not alone that of the common man or even exclusively that of the ***concerned*** government but indeed, it is a common stake of all Nigerians.

Therefore, we all have one form of duty or another to see to it that as much as possible, the administration of justice in Nigeria

17. (1986) 1 NWLR (Pt. 18) 669; Reprinted in (2004) 49 WRN 37.
18. See e.g. *Osunrinde* v. *Ajamogun* (1992) 6 NWLR (Pt. 246) 156 S.C. at p. 192.

should be free of constraints. Then, we may lift up our heads with satisfaction and pride that our own judicial system and our legal process is neither artificial nor a parody of the ideal situation.

Thank you for listening.

PAPER III

EVALUATION OF JUDGES' PERFORMANCE: THE ROLE OF THE NATIONAL JUDICIAL COUNCIL

Hon. Justice B. O. Babalakin, *CON*
Retired Justice of the Supreme Court of Nigeria and
Member of the National Judicial Council

COMMENTARY (I)

Hon. Olajide Olatawura
Retired Justice of the Supreme Court of Nigeria

COMMENTARY (II)

Hon. Justice T. A. Oyeyipo
Chief Judge Kwara State

EVALUATION OF JUDGES' PERFORMANCE: THE ROLE OF THE NATIONAL JUDICIAL COUNCIL

Hon. Justice B. O. Babalakin, ***CON***
Retired Justice of the Supreme Court of Nigeria and
Member of the National Judicial Council

Introduction

I thank the Board of Governors of the National Judicial Institute for the opportunity given me to address this august body of all Nigerian Kadis, Judges and Justices. The topic assigned to me reads:

> Evaluation of Judges Performance: The Role of the National Judicial Council.

Before addressing this topic, it is necessary to give a resume of the nature and standing of these set of Officers in the Community. To realise the gravity of their responsibility, I wish to quote the prayers that have been offered for Judges and Magistrates in England as far back as the 15th Century. It runs thus:

> Oh God, at whose hand the weak shall take no wrong, nor the mighty escape just judgment, pour THY grace in THINE servants, our Judges and Magistrates that by their true and fruitful execution of justice and equity to all men equally, THOU may be glorified, the Commonwealth daily promoted and increased, and we all live in peace and quietness, in Godliness and virtue.

The Administration of Justice in any democratic Country such as ours, lies with the Judiciary. This therefore makes the role of the Judiciary to be very cardinal in every democracy.

To maintain the sacred nature of Judicial Administration, all Judicial Officers on appointment, must take the Oath of Allegiance and Judicial Oath prescribed in the 5th Schedule of the Constitution of the Federal Republic of Nigeria 1999. Thus, Every Judicial Officer must bear in mind that the authority given him to exercise judicial powers is a solemn responsibility which must be taken serious and not be misused. It must be jealously guarded. To ensure that Judicial Officers keep to their Oath of Office, a Code of Conduct for Judges was provided. Some of the most important provisions are reproduced hereunder:

Code of Conduct for Judicial Officers

The preamble to the Code of Conduct for Judicial Officers of the Federal Republic of Nigeria, provides, *inter alia*, that a Judicial Officer should actually participate in establishing, maintaining, enforcing, and himself observing a high standard of conduct.

And whereas the judicial duties of a Judicial Officer, which include all the duties of his office prescribed by law, take precedence over all his other activities.

And whereas it is desirable that a standard of conduct which a Judicial Officer should observe, be prescribed and published for the information of the Judicial Officer himself and the public in general so that the objectives set out in this preamble may be achieved.

RULES

In the performance of his duties, a Judicial Officer should observe the following Rules.

Rule 1

A Judicial Officer should avoid impropriety and the appearance of impropriety in all his activities.

(1) A Judicial Officer should respect and comply with the Laws of the land and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the Judiciary.

(2) *Social relationships*

(a) A Judicial Officer must avoid social relationships that are improper or give rise to an appearance of impropriety, that cast doubt on the Judicial Officer's ability to decide cases impartially, or that bring disrepute to the Judiciary.

(b) A Judicial Officer shall not be a member of any society or organisation that practices invidious discrimination on the basis of race, sex, religion or whose aims and objectives are incompatible with the functions or dignity of his office.

Rule 2

A. ***Adjudicative duties***

1. A Judicial Officer should be true and faithful to the Constitution and the Law, uphold the course of justice by abiding with the provisions of the Constitution and the Law and should acquire and maintain professional competence.

2. A Judicial Officer must avoid the abuse of the power of issuing interim injunctions, *ex parte*.

3. In judicial proceedings, a Judicial Officer should maintain order and decorum.

4. A Judicial Officer should be patient, dignified and courteous to accused persons and litigants, assessors, witnesses, legal practitioners and all others with whom he has to deal with in his official capacity and should demand similar conduct of legal practitioners, his staff and others under his direction and control.

5. (i) A Judicial Officer should accord to every person who is legally interested in a proceeding, or his legal representative full right to be heard according to law, and except as authorised by law, neither initiate, encourage, nor consider *ex parte* or other communications concerning a pending or impending proceedings.

(ii) For the purpose of this sub rule – An "*ex parte* communication" is any communication involving less than all the parties who have a legal interest in the case, whether oral or written, about a pending or impending case, made to or initiated by the Judicial Officer presiding over the case.

6. A Judicial Officer should promptly dispose of the business of Court. In order to achieve this, the Judicial Officer is required to devote adequate time to his duties, to be punctual in attending Court and expeditious in bringing to a conclusion and determining matters under submission. Unless ill or unable, for good reason, to come to Court, a Judicial Officer must appear regularly for work, avoid tardiness and maintain official hours of the Court.

7. A Judicial Officer shall endeavour that there is strict compliance with the provisions of the Constitution which require that a copy of judgment of the superior Court of record be given to parties in the case, within seven days of the delivery thereof.

8. A Judicial Officer should abstain from comment about a pending or impending proceeding in any Court in this country, and should require similar abstention on the part of court personnel under his direction and control. This provision does not prohibit a Judicial Officer from making statements in the course of his official duties or from explaining for public or private information the procedure of the Court provided such statements are not prejudicial to the integrity of the Judiciary and the administration of justice.

9. A Judicial Officer shall be bound by professional secrecy with regard to his deliberations and to confidential information acquired in the course of his duties other than in public proceedings.

10. A Judicial Officer should prohibit broadcasting, televising,

recording of or photographing in the Court room and areas immediately adjacent thereto during sessions of Court or recesses between sessions in order to prevent the distortion or dramatisation of the proceedings by such recording or reproduction. A Judicial Officer may authorise:

(a) the broadcasting, televising, recording or photographing of investigative and other proceedings.

(b) the electronic recording and reproduction of appropriate Court proceedings by means of recording that will not distract participants or impair the dignity of the proceedings.

Any violation of any of the paragraphs of the Code of Conduct in the 5th Schedule to the 1999 Constitution or the aforesaid Rules in the Code of Conduct for Judicial Officers shall constitute judicial misconduct or misbehaviour and may entail disciplinary action.

It is on this question of disciplinary action for judicial misconduct or misbehaviour that the National Judicial Council comes in.

In recent times, the granting of unwarranted *ex parte* Orders constitute a major cause of judicial misconduct or misbehaviour for which Judicial Officers have been removed from service.

The Chief Justice of the Federal Republic of Nigeria and Chairman of the National Judicial Council has taken pains to warn Judicial Officers times unnumbered against granting unwarranted *ex parte* Orders.

Now to the topic:

'EVALUATION OF JUDGES' PERFORMANCE: THE ROLE OF THE NATIONAL JUDICIAL COUNCIL'

In 1993 when it was discovered that there was general deterioration in the ethical standard and performance by Judges, the Abacha Administration set up a Commission to probe the conduct of Judges all over the Country and make recommendations for solution to the

problems that gave rise to the bad situation. The Commission was headed by Hon. Justice Kayode Eso, *CON*, a retired Justice of the Supreme Court.

This Commission found 28 Judges culpable for offences ranging from corruption to declining productivity. The report was accepted by the Government in 1994 but was never acted upon.

The Judges that were recommended therein to be removed from office continued to be in office. Meanwhile, some of them died or retired.

In the Constitution of the Federal Republic of Nigeria 1999, the National Judicial Council (NJC) was set up. This body is charged, *inter alia*, with power to recommend the appointment of Judicial Officers all over the Country, to pay their salaries and to discipline erring ones.

The paramount idea is to ensure that Judicial Officers are insulated from Executive influence or interference as well as to ensure maximum and efficient performance by Judicial Officers.

In 2001, the ESO Commission's Report was referred to the National Judicial Council for necessary action. The National Judicial Council in turn set up a Review Committee to re-visit critically the cases of the indicted Judicial Officers.

As a result of deaths and retirements, the cases of only fourteen (14) Judges and Justices were examined. The author was the Chairman of the National Judicial Council, that reviewed the ESO Commission's Report. At the end of the exercise, six Judges including two Chief Judges were recommended to be removed from office by retirement.

The National Judicial Council accepted the Report, and its recommendation to the President of the Federal Republic of Nigeria in this regard was also accepted. The affected Judicial Officers have since been duly retired.

The ESO Commission recommended that, a Performance Assessment Commission to monitor the performance of all Judicial Officers be set up in Nigeria.

As a result of the wide powers given to the National Judicial Council by the Constitution, the Council considered that a Committee of its own can effectively do the work of a Commission hence the setting up of a Committee on ***PERFORMANCE EVALUATION OF JUDICIAL OFFICERS OF COURTS OF RECORD*** by the Council under the Chairmanship of the author.

The other Members of the Committee were:

(1) Hon. Justice Owolabi Kolawole, *OFR*, retired Justice of the Court of Appeal, now of blessed memory;

(2) Mr. Andrew Anyamene, SAN, a former President of the Nigerian Bar Association;

(3) Alhaji Aminu Muritala, *OFR*, the Galadima of Adamawa and an active member of the Nigerian Bar Association; and

(4) Dr. Abigail Ajoku, KSM, a former Member of the Federal Judicial Service Commission.

The setting up of this Committee was further reinforced by the sound reasoning of the Members of the National Judicial Council to the effect that, since the retirement of Judicial Officers is among other things based on corruption and declining productivity, it behoves the National Judicial Council to have a record of the performances of all the Judicial Officers over a period of time to determine whether their performances are declining or not. This step we understand, is not peculiar to Nigeria alone.

Another reason for setting up this Committee is the outcry of members of the public that there are delays in hearing cases in the Courts, that there are many old cases pending in various courts that are not unattended to, that the maxim, judgment delayed is judgment denied. This has not been given due consideration.

The Committee on ***PERFORMANCE EVALUATION OF JUDICIAL OFFICERS OF COURTS OF RECORD*** therefore designed a form which the National Judicial Council approved showing, *inter-alia*, the number of cases pending before each Court at the

beginning of a quarter, the number of cases: Civil and Crimin and Motions disposed of during the quarter and the remaining Case in each Court at the end of the quarter. The Form is attached a Appendix I to this paper.

This Form is to be personally filled by the Judicial Officers an should be passed to the Chief Judge of his or her State who will the confirm the authenticity of the facts contained therein.

It is from this Form that the ***PERFORAMNCE EVALUATIO COMMITTEE*** now grades the performance of each Judicial Officer

The Committee recognised the additional administrative function of the Heads of Courts and therefore arrived at different assessme rating for the Heads of Courts and other Judges as shown below:

(A) For Chief Judges/Grand Kadis/Presidents Customary Courts of Appeal, the Assessment is as follows:

S/No.	No. of Contested Cases and Motions in which Judgments were given in 3 Months	Committee's Grading
1.	0	No Performance
2.	1	Very Low
3.	2 - 3	Low
4.	4 - 5	Fair
5.	6 - 9	Good
6.	10 - 12	Very Good
7.	13 and Above	Excellent

(B) For Other Judges/Kadis and Appellate Courts, the Assessment is as follows:

S/No.	No. of Contested Cases and Motions in which Judgments were given in 3 Months	Committee's Grading
1.	0	No Performance
2.	1 - 3	Very Low
3.	4 - 6	Low
4.	7 - 11	Fair
5.	12 - 18	Good
6.	19 - 23	Very Good
7.	24 and Above	Excellent

Allowances are always made for officials who are sick, on official assignments and Election Petitions.

Attention is also always paid to reasonable matters stated in the remark column of the Form - Appendix I.

The Committee sends periodic **Progress Reports** to the National Judicial Council. As at the time of preparing this paper, five Progress Reports have been presented to the National Judicial Council.

Due to frequent complaints by the Committee about carelessness, inadvertence and mathematical errors in filling the Form (Appendix I) by some Judges - a situation that always results in incessant correspondence between the Committee and the affected Judges, the Chairman of the Board of Governors of the National Judicial Institute, our respected Chief Justice of the Federal Republic of Nigeria, who is also the Chairman of National Judicial Council, invited me to give a talk on *Performance Evaluation of Judicial*

officers of courts of record at their meeting held on 16th February, 2004.

To get a picture of the state of Affairs in the work of the Committee on *Performance Evaluation*, I reproduce hereunder the record of the said Meeting of 16th February, 2004, as recorded by Alhaji M. A. Tambawel, Deputy Director (Planning, Research and Statistics) National Judicial Council, and Secretary to the Committee on Performance Evaluation of Judicial Officers of Courts of Record:

REPORT OF THE MEETING OF HON. JUSTICE B. O. BABALAKIN, *CON*, CHAIRMAN, NATIONAL JUDICIAL COUNCIL COMMITTEE ON PERFORMANCE EVALUATION OF JUDICIAL OFFICERS OF COURTS OF RECORD, WITH THE BOARD OF GOVERNORS OF THE NATIONAL JUDICIAL INSTITUTE, ON MONDAY, 16TH FEBRUARY, 2004

The Hon. the Chief Justice of Nigeria and Chairman, National Judicial Council, Hon. Justice M. L. Uwais, *GCON*, graciously allowed me to give my presentation on the workings of our Committee to the Board of Governors of the National Judicial Institute, before they commenced their proceedings.

I began by giving a background to the membership and mandate of the Committee and also made some key observations on the problems being encountered by the Committee and then suggested solutions. In summary, the Board of Governors of the National Judicial Institute (NJI) were informed that:

(i) Despite the Committee's many letters, returns were not sent on time, thereby delaying the Committee's work;

(ii) The Forms were not completed correctly by many of the Judges, the common errors were pointed out;

(iii) It appears the Chief Judges were not vetting the Forms before signing;

(iv) The criteria for the assessment were based on a number of contested cases in which judgments were given. The Committee's rating for Chief Judges and other Judges were shown to the members;

(v) Some Courts had not yet submitted all their returns for 2003 and the list of all the Courts in the Country and the status of their submissions of returns for the 4th quarter in 2003 was shown to them;

(vi) The Committee had submitted to the National Judicial Council two Progress Reports, and further reports would be submitted after the assessment of all the returns for 2003;

(vii) The Committee's work had been an eye opener to the delay in the dispensation of Justice in the Nigeria, as some Judges did not complete a single case in 6 months;

(viii) Some Courts had many backlog of cases.

I then made some recommendations as follows:

(i) The Committee is appealing to Chief Judges to also take up cases, especially sensitive ones. The Committee observed that in States where the Chief Judges take up cases, the performance of the other Judges is better when compared to States where the Chief Judges do not take up cases;

(ii) The Chief Judges should have copies of all judgments in their office, for records, to enable them confirm all returns sent to them;

(iii) The Chief Judges should scrutinise the returns sent to them, for errors before signing same;

(iv) The Chief Judges should ensure timely submission of the quarterly return of cases;

(v) Backlog of pending cases should be cleared by setting up task forces.

I finally informed them that the Committee recognises that there might be need to improve on the methods or criteria set for the assessment of return of cases and therefore told them that suggestions would be welcomed.

The Honourable Chief Justice, who was the Chairman of the occasion allowed the members to ask questions. The questions mainly bordered on the need for the Committee to re-visit the format and remove items such as Rulings which to many of the members, did not dispose of a case and could result in double counting.

Another observation was that, the Committee should have a serving Judge as a member. The Chief Justice of Nigeria and Chairman of the occasion informed the members that there are experienced Judges on the Committee and that the Committee reports to the main National Judicial Council (NJC) where there are serving Chief Judges as members.

Hon. Justice B. O. Babalakin, *CON*
Chairman, Committee on Performance Evaluation of Judicial Officers of Courts of Record
(NATIONAL JUDICIAL COUNCIL)

I was invited for a similar dialogue on 24th April this year. The interaction was very rewarding.

The various Reports given to the National Judicial Council by the *Performance Evaluation Committee* has evoked some action on the administration of Justice among which is that, requests for more Judges by some States have been reduced or rejected, following the overall assessment of work of Judges on the ground. It is also likely that Judges with high scores, will have an edge when considering advancement to higher judicial positions.

On 29th July, 2005 the Honourable Chief Justice of Nigeria and Chairman of the National Judicial Council, sent out a Circular to all Heads of superior Courts, Judges and Kadis of superior Courts on the necessity and importance of submitting of quarterly returns of

cases to the Committee on the Evaluation of Judges' Performance.

For ease of reference, I hereby reproduce the Circular:

NATIONAL JUDICIAL COUNCIL,
Tel. No. (09) 5236841 SUPREME COURT COMPLEX,
THREE ARMS ZONE,
CENTRAL DISTRICT,
P. M. B. 308,
ABUJA - NIGERIA

Ref. No. CJN/NJC/RC/S.620/324

29th July, 2005

To: All Heads of Superior Courts,
Judges and Kadis of Superior Courts

Submission of Quarterly Returns to the National Judicial Council

It is now more than two years since the National Judicial Council directed that quarterly returns of cases in your Courts should be submitted to its Committee on the Evaluation of Judges Performance. While some Judges have observed the directive to the letter, the behaviour of others has left much to be desired.

2. The National Judicial Council feels that the time has come for it to impose sanctions against Judges with poor performance, or, who have deliberately failed to submit their quarterly returns as directed by its Committee. In this regard, your attention is drawn to the provisions of Section 292 of the Constitution of the Federal Republic of Nigeria, 1999, that a Judge may be removed from office on account of his or her inability to discharge the functions of his or her office.

3. Henceforth, the National Judicial Council will not hesitate to exercise its powers under paragraph 21(b) and (d) of Part I of the Third Schedule to the 1999 Constitution where a Judge has failed to

submit the quarterly returns, or has continued to perform poorly in the disposal of cases in his or her Court. The Heads of Courts are required to emphasise the foregoing to all the Honourable Judges of their Courts

(Signed)
(M. L. Uwais, *GCON*)
Chief Justice of Nigeria and Chairman
National Judicial Council

The directives in this Circular affects all Judges and Justices in the Federation, except the Justices of the Supreme Court.

The Committee on *Performance Evaluation of Judicial Officers of Courts of Record* has been re-constituted as follows:

(1) Hon. Justice B. O. Babalakin, *CON*
retired Justice of the Supreme Court – CHAIRMAN

(2) Hon. Justice E. O. Ayoola, *CON*
Retired Justice of the Supreme Court.

(3) Alhaji Abdullai Ibrahim, Senior Advocate of Nigeria (SAN), CON, a former Attorney-General of Nigeria.

(4) N. Nwanodi Esquire, Experienced Legal Practitioner.

(5) Mrs. G. Nnamani – a Member of the National Judicial Council (NJC)

The Secretary of the Committee is Alhaji M. A. Tambawel – Deputy Director (Planning, Research and Statistics) of National Judicial Council.

In my view, Performance Evaluation is a culture that should be introduced to all Government Departments; and all aspects of industry in Nigeria. It is helpful to improve efficiency and reduce or avoid wastage in revenue.

This was what I advocated in one of my speeches at the recently

concluded National Political Reforms Conference. If the country must move forward, there must be efficiency in Performance at all levels of our Industry and Endeavours.

My dear colleagues, it is important that due attention should be given by all Courts of Record to efficient Performance if the good image of the Judiciary will be maintained.

We should all bear in mind the time honored adage that ***"Justice Delayed Is Justice Denied"***.

I thank you for your patience in listening to me.

APPENDIX 1

Form.NJC/MCPJ/2

NATIONAL JUDICIAL COUNCIL

MONITORING COMMITTEE ON THE PERFORMANCE OF JUDICIAL OFFICERS OF SUPERIOR COURTS OF RECORD.

QUARTERLY RETURN OF CASES FOR THE QUARTER ENDED.....200.....

STATE.....COURT..... (COURT OF APPEAL, HIGH COURT/SHARIA COURT OF APPEAL AND CUSTOMARY COURT OF APPEAL)

CASES	1	2	3	4	5	6	7*	8**	9
	CASES BROUGHT FORWARD FROM LAST QUARTER	CASES ASSIGNED THIS QUARTER	TOTAL OF 1 & 2	NO. OF CONTESTED CASES and JUDGEMENTS GIVEN.	NON - CONTESTED CASES DISPOSED OF.	CASES STRUCK OUT	TOTAL NO OF CASES DISPOSED OF DURING THE QUARTER	CASES PENDING AT THE END OF THE QUARTER.	REMARKS
CIVIL									
CRIMINAL									
MOTION									
TOTAL									

* Total Number of Cases Disposed of During the Quarter, Column 7 above = Columns 4 + 5 + 6

** Cases Pending at the end of the Quarter , Column 8 above = Column 3 minus Column 7.

NAME OF JUDGE .....

SIGNATURE..... DATE .....

CONFIRMED BY ME, CHIEF JUDGE/GRAND KADI/PRESIDENT CCA

Name .....

SIGNATURE ..... DATE.....

N B: This is the form to be used as from 1st January, 2004.

COMMENTARY (I)

Hon. Justice Olajide Olatawura

Introduction

On 14th July 2005, I received a letter from the Administrator of the National Judicial Institute informing me of the decision of the Education Committee of the National Judicial Institute about my nomination to write a commentary on the paper written by my former colleague in the Supreme Court of Nigeria, Honourable Justice B.O. Babalakin. The title of the paper which has been delivered by His Lordship is:

"Evaluation of Judges' Performance:
The Role of the National Judicial Council"

I have been very much honoured by the Education Committee for asking me to write a commentary. I sincerely thank members of this august Committee.

Hon. Justice Babalakin referred in great detail to the provisions of the Code of Conduct for Judicial Officers of the Federal Republic of Nigeria. The entire Code gives an indepth analysis of what is expected of a Judicial Officer. I have also been assisted in my commentary by the Secretary to the National Judicial Council who, at my request, supplied me with all the circulars issued by the Council on Performance Evaluation of Judicial Officers of Superior Courts of Record. The latest circular titled: Submission of Quarterly Returns to the National Judicial Council was issued by the Honourable Chief Justice of Nigeria and Chairman, National Judicial Council. This was also quoted verbatim in the paper just presented by Hon. Justice Babalakin. That the Honourable Chief Justice of Nigeria was impelled to read the riot act to Judicial Officers, underscores its importance. The rendering of monthly

returns of cases disposed off by Judges and Magistrates started as far back as the fifties when I was a Clerk of Court. The accuracy of returns was a serious issue the Chief Registrar for the then Judicial Department never compromised. There was one Judicial Department for the entire country. The sole purpose was to know the amount of work done by Magistrates and Judges and the number of cases filed, tried and pending. At no time in the history of the Judiciary of this country right from the time I joined the Judicial Department in 1949 till date has indolence been tolerated, encouraged and rewarded. Consequently what used to be governed by circulars issued by the Chief Registrar at the instance of the Chief Justice of Nigeria now has the full force of the Constitution. It is therefore not surprising that paragraph 3 of the circular on the submission of Quarterly Returns to the National Judicial Council spelt out clearly the sanction for its breach. It reads:

> 21 The National Judicial Council shall have power to:
>
> (b) recommend to the President *the removal from office* of the Judicial Officers specified in sub-paragraph (a) of this paragraph and to exercise disciplinary control over such officers;
>
> (d) recommend to the Governors *the removal from office* of the judicial officers specified in sub-paragraph
>
> (c) of this paragraph and to exercise disciplinary control over such officers;

Officers listed in sub-paragraph (a)(i) are the Chief Justice of Nigeria, Justices of the Supreme Court, the President and Justices of the Court of Appeal, the Chief Judge and Judges of Federal High Court.

Those in paragraph (a)(ii) are the Chief Judge and Judges of the High Court of the Federal Capital Territory Abuja, the Grand Kadi and Kadis of the Sharia Court of Appeal of the Federal Capital Territory, Abuja and the President and Judges of the Customary Court of Appeal of the Federal Capital Territory, Abuja.

These are judicial officers also covered by the Code of Conduct for Judicial Officers. It is now no longer in doubt that the powers of the National Judicial Council are wide and coercive.

What contributes to the low productivity can be traced to non-observance of sub-Rule A6 under Rule 2 which deals with ADJUDICATIVE DUTIES. I will for the purpose of emphasis reproduce it again.

> A Judicial Officer should promptly dispose of the business of Court. In order to achieve this, the Judicial Officer is required to devote adequate time to his duties; to be punctual in attending court and expeditious in bringing to a conclusion and determining matters under submission. Unless ill or unable, for good reason, to come to court, a Judicial Officer must appear regularly for work, avoid tardiness, and maintain official hours of the court.

It is my own opinion based on personal experience, that a judicial officer who keeps strictly to this rule will neither perform below expectation nor incur the displeasure of members of the Bar and litigants who, though will not complain openly, would make members of the public believe that Judicial Officers careless about their working relationship with members of the public. The Courts are expected to sit at 9.00 a.m. Except in the Appellate Courts, some High Court Judges do not start the business of the day until they have finished reading the daily newspapers. I recall a situation where a Senior Advocate of Nigeria went to remind a Judge in his Chambers that counsel and litigants were expecting him to sit since 9.00 a.m. High Court Judges in an attempt to satisfy counsel pile up many part-heard matters. It is the duty of Judges to sit at 9.00 a.m. but if for good reasons, a judge cannot sit at 9.00 a.m., the Judge ought to inform counsel before 9.00 a.m. or a day before the case comes up for hearing. But where for unseen circumstances he comes to the court late, he or she should be courteous enough to apologise *"for keeping counsel and litigants waiting."*

There is no doubt that the recommendation of the Eso Commission for an Assessment was based on the very low

performance of some Judges. It appears to me scandalous that some Judges were unable to deliver 3 considered Judgments in a quarter.

There is no doubt that the Table of expected performance within 3 months is a target expected from each Judge. I can only hope that this table applies to High Court and not the Appellate Courts especially the Court of Appeal. It is at this juncture that I will refer to section S. 294 (1) of the Constitution of the Federal *Republic of Nigeria 1999, on " Determination of causes and matters"* This Section provides:

> Every Court established under this Constitution *shall deliver* its decision in writing *not later than 90 days* after the conclusion of evidence and final addresses and furnish all parties to the cause or matter determined with duly authenticated copies of the decision within seven days of the delivery thereof.

This Section calls for a careful examination bearing in mind the number of judgments a judge is expected to deliver before he can be given a pass mark by the National Judicial Council. A Judge is expected to deliver between 7-11 judgments in 3 months. On paper it looks reasonable, but in practice what happens? There must be a distinction between the nature of cases tried; more so when there are divisions within the State Judiciary: Commercial Division, Criminal Division, Land Division, etc, as against some States where a judge deals with all cases filed.

It is in an attempt to obtain a good pass that I caution that we must not sacrifice merit for quantity. Unless we place emphasis on quality as against quantity, we will overburden the Appellate Courts especially the Court of Appeal not in respect of the number of cases tried but the quality of judgments on appeal. The Land Use Act notwithstanding, I cannot see how a family land dispute can end with two witnesses. I concede there must be a limit to the number of applications for adjournments, but where do we place the constitutional provisions for Hearing? Where a party applied and paid for subpoena what about the manipulation of Bailiffs? As said earlier no indolent

judicial officers should stay a day longer on the Bench, but in order to attain a pass mark on the number of cases **"completed"**, we must not sacrifice mere number for efficiency.

On each occasion, when the number of cases completed comes up, I remember a Magistrate in Ife Magisterial District in the fifties who completed 10 cases in one month. On appeal, 8 of the judgments delivered were sent back for retrial. *Prima facie*, he has satisfied the required returns but woefully failed when called to account in the temple of justice! Attainment of justice must at all times be taken into consideration. Fair hearing is the hub of justice.

I have been privileged to see another circular on further clarification on Motions and Rulings issued on 15th July 2004. Paragraph 2 provides:

> The Committee observed that following the removal on "Ruling" on the aforesaid form, there was some misunderstanding by some Judicial Officers. Consequently, the Committee decided to provide the following additional clarifications:
>
> (d) *No case submission.* In criminal cases no case submissions whether upheld or **refused** should be treated as judgment.

Where refused and subsequently a judgment is delivered, it means the judge has delivered two judgments in one case. This has an advantage of one judgment in his favour!

I sincerely hope the demand by the National Judicial Council has taken into consideration the working conditions within the Court and Judges Residential Quarters. Where a judge has no regular supply of electricity both in his court and official quarters, he cannot be and in fact he is not expected to give his best in the onerous task of writing good judgments. Equally there must be a steady supply of electricity in the Courts so that Counsel and litigants will be comfortable in the Court Hall. Of equal importance is a good library both in the courts and the judges' quarters. More than half of the judgments delivered are written by the judges in the night. If judges should depend solely on Power Holding Company of Nigeria (PHCN) (Formerly National

Electric Power Authority-(NEPA) for their supply of electricity both in the courts and their official quarters, little will be achieved by way of reform. This is not the time to take comfort in what Theodore Roosevelt, one-time President of the United States of America said: "*Do what you can, with what you have, where you are.*" It is necessary to mention that no judge can succeed without efficient and reliable members of staff in his/her court. I am aware of the tremendous impact made by the workshops organised regularly by the National Judicial Institute. The accuracy of returns, the filing of court processes, the keeping of records, court diaries, and exhibits tendered in court are what a judge can rely upon in writing his judgments. An efficient court clerk is an asset to a court. There must be a modern library stocked regularly with Law Reports. While Nigerian Courts are not bound by the decisions of foreign Courts, the country stands to gain by reading their Law Reports.

I strongly believe that no judge is now expected to go through what happened to me between 1972 and 1974 when I was the High Court Judge in charge of Ife Judicial Division. I travelled daily on a 54-mile death-trap road between Ibadan and Ife I did this on four days of the week: Monday-Thursday. I sat regularly at 9.00 a.m. There was no Court library.

I had the sympathy of the then Chief Justice of Nigeria, late Dr Teslim Elias. The demands for Judicial Divisions should only be granted if the amenities for a Judicial Division:- Court Hall, Library, Judges' residence are in place. If the administration of justice is regarded as an amenity, there must be enough resources to maintain and sustain it. Bringing justice nearer to the people should not be at the expense of the health and comfort of judges. Judges need strong and comfortable cars to get to their stations.

The anxiety or cause for anxiety by the National Judicial Council is understandable. It is not to the knowledge of this commentator that any judge has been retired because of these returns. That not withstanding, their Lordships must ensure that their judgments can stand the test of time. What is expected is a sound judgment which

will recommend the judge for preferment. I recall that I was one of those who recommended a judge of the High Court for consideration to the Court of Appeal on a brilliant and sound Ruling delivered by His Lordship. His judgments both in the Court of Appeal and happily in the Supreme Court are shining examples of industry, research and learning.

Let me express my gratitude to your Lordships for giving me a hearing. Thank you.

COMMENTARY (II)

Hon. Justice T. A. Oyeyipo

Preamble

I consider it a great honour and a most delightful privilege to once again be a participant in this impressive, stimulating, educative, rewarding and highly refreshing biennial 2005 All Nigeria Judges Conference of the Superior Courts of Record. The All Nigeria Judges Conference is an important forum for cross fertilisation of ideas. It affords the Judiciary a welcome opportunity for stock taking and of discussing matters of common concern and relevance to law and its institutions in our beloved Country, Nigeria.

I wish to thank the Honourable Chief Justice of Nigeria, Hon. Justice M. L. Uwais, *GCON*, who is the Chairman of the Board of Governors of the National Judicial Institute (hereinafter referred to as the 'NJI'), the Education Committee of the Board of Governors of NJI under the Chairmanship of Hon. Justice S.M.A. Belgore, *CON*, Justice of Supreme Court of Nigeria and the Administrator of the NJI Hon. Justice J. A. Ajakaiye for this kind invitation to me to comment on the paper titled "EVALUATION OF JUDGES' PERFORMANCE: THE ROLE OF THE NATIONAL JUDICIAL COUNCIL" by Hon. Justice B. O. Babalakin, *CON* retired Justice of the Supreme Court of Nigeria and Member of the National Judicial Council.

The paper just delivered by Hon. Justice B. O. Babalakin is highly lucid and stimulating. It is a most resourceful paper delivered by a highly distinguished and diligent jurist of tremendous experience. Without mincing words, Hon. Justice B. O. Babalakin is a man of high integrity and impeccable character who has left his footprints on the legal sands of Nigeria. He has been involved in all areas of legal practice both at the Bar and on the Bench for several decades before retiring from the Apex Court on 21st April 1992.

Hon. Justice Babalakin who is the Chairman of the Committee on Performance Evaluation of Judicial Officers of Superior Courts of Record (hereinafter referred to as the Committee), a committee of the National Judicial Council (hereinafter referred to as the NJC) is a most fit and proper person to educate us on this topic. It is therefore with some trepidation I am commenting on this well written paper because I wonder if I can add anything useful to what this 'oracle' has said, espoused and expounded.

Be that as it may, I wish to elaborate on a few areas of the paper and topic. However before doing so, I adopt what the learned main paper writer has said *in toto*. As a prelude to the topic, the learned jurist reiterated in a most admirable way the importance of the Judiciary as the third arm of Government in a democratic society and the pride of place which is accorded to Judges as worshippers in the sacred temple of justice.

In support of the most apposite quotation of the learned writer and in further elaboration of the unique position of judicial officers in any society, I wish to refer to what Sir Winston Churchill said on March 23, 1954 during the debate in the House of Commons on the judges salaries. Sir Winston Churchill the Prime Minister of United Kingdom at the material eulogised Judges as follows:

> There is nothing like them at all in our Island. They are appointed for life. They cannot be dismissed by the executive Government. They cannot be dismissed by the Crown either by the Prerogative or on the advice of Ministers. They have to interpret the law according to their learning and conscience. They are distinguishable from the great officers of State and other servants of the Executive, high or low, and from the leaders of commerce and industry. They are also clearly distinguishable from the holders of less exalted judicial office. Nothing but an Address from both Houses of Parliament, assented to by the Crown, can remove them.[1]

1. *The Road to Justice* by Rt. Hon. Sir Alfred Denning 1955 edition, page 14.

In a similar vein, Oputa, JSC in a most admirable way summarised the role of the Judiciary in the following words:

> It is the Judiciary that will compel the legislature to act within the Constitutional limits by striking down as unconstitutional, all laws that the legislature, either has no power to enact or else that conflict with the spirit or letter of the constitution. It is the judiciary that has to ensure that even the state is subject to the laws and that government - that is the executive branch - should respect the rights of the individual under the law. It is the judiciary that has to ensure that parties who come before it go out satisfied that justice has been done.
>
> It is, thus, clear that without the judiciary, there can hardly be any effective challenge to unconstitutional laws nor can there by any challenge at all to executive lawlessness.[2]

My learned brother Hon. Justice U. A. Eri Chief Judge of Ke State also brilliantly opined on the role of the Judiciary in a democratic society like ours thus:

> It is the pivot on which the government and the society rest. It guarantees freedom for the individual and groups. It ensures a conducive atmosphere for the individual and groups to realise themselves and strive to contribute their quota to national development. Thus, it not only guarantees a humane and tolerable government but also ensures stability in the political system.
>
> As the arm of government endowed by the Constitution with the powers to adjudicate in disputes between citizens and government, it is the last hope of the common man for the protection of his fundamental human rights and the watchdog of sentinel of the Constitution.[3]

The foregoing clearly underscores the importance of the Judi in the scheme of things. The learned paper writer also drew atte

2. See Justice (*Journal of Contemporary Legal Problems*), Vol. Number 3 1990) page 20.

3. *All Nigeria Judges' Conference 2001*, Spectrum Law Series, page 200.

to the Oath of Allegiance and Judicial Oath prescribed in the 5th schedule of the Constitution of the Federal Republic of Nigeria, 1999 and to which every judicial officer must subscribe on his appointment before embarking on his judicial career. It seems to me from a careful perusal of the words of the Judicial Oath and reflection on same that a great and indeed a grave responsibility rests upon the judges. The conception of the task of the Judges finds its finest expression in the words of the Judicial Oath. If one takes this oath word by word, one will find that a lot is embedded in the judicial oath. Every word of it is worth weighing. The Oath taking ceremony must therefore not be regarded as a mere ritual. Every judicial officer must demonstrate an abiding commitment to the tenets of the judicial oath throughout his life.

Hon. Justice Babalakin has again rightly pointed out that in order to ensure that Judicial officers keep to their Oath of office, a Code of Conduct for Judges was provided.[4] As rightly opined by the distinguished paper presenter, the Code of Conduct which came on stream on 1st of October, 1998 is meant to reinforce the Judicial Oath and to further ensure transparency, probity and accountability in the Judiciary. As far as my researches have gone, I believe the Nigerian Judiciary must be one of the few Judiciaries in the Commonwealth that voluntarily imposed on itself a very strict Code of Conduct. Tanzania had its own Code in 1984. It was adopted at the Judges and Magistrates Conference held at Arusha from 15 to 16 March 1984.

Hon. Justice Babalakin has again refreshed our memory by quoting extensively the salient aspects of the Code of Conduct and pointed out that any violation of the Code of Conduct under the 5th Schedule will be appropriately sanctioned.

4. Code of Conduct for Judicial Officers of the Federal Republic of Nigeria, 1998.

Subject Matter of Discourse

At the end of a very comprehensive introduction, Hon. Justice Babalakin proceeded to examine in detail the topic in question. The subject matter of this discourse, no doubt is of immense importance to the Judiciary viewed from whatever angle. In this well written paper which encompasses all that can be said on the subject, I have identified a number of salient points from the paper on which I shall make brief comments. I think this approach will ensure clarity and brevity.

The identified points are:

(1) Genesis of the present evaluation of performance procedure.

(2) Juridical basis for the setting up of the Performance Evaluation Committee by the NJC.

(3) Rationale for the present performance procedure.

(4) Operation of the present procedure.

(5) Advantages of the present procedure.

(6) Disadvantages of the procedure, if any

(7) Suggestions.

I shall now proceed *anon* to examine each of these identified points.

Genesis of the Present Evaluation of Performance Procedure

There is no gain saying the fact that rendering of quarterly returns by judicial officers is not a novel practice in the Judiciary of Nigeria. It is a phenomenon which is old as the Judiciary itself. Unfortunately, immediately, prior to 1993, it would appear that a number of Judges had jettisoned the idea of rendering returns to their Heads of Courts for onward transmission to the Chief Justice of Nigeria who at the material time was the Chairman of the defunct

Advisory Judicial Committee (AJC).[5] As brilliantly pointed out in the main paper, as at 1993, the performance situation of a few Judges, had deteriorated and the public perception of the Judiciary was nothing to write home about. A few of our colleagues regrettably misunderstood the concept of Judicial Independence. They thought they were not accountable to any one. Some Heads of Courts could not persuade their colleagues to render returns because the concept of *primus inter pares* (first among equals) was stretched by a few bad eggs into a shibboleth and a ridiculous position. I remember a case of a Judge who had the temerity to tell his Head of Court that his "official quarters was an extension of his chambers and as such he could leave his chambers for his residence as early as 11 a.m. in the morning." Some Judges would neither sit, punctually at 9.00 a.m nor even sit at all. There was evidence of loose ethics, laziness and ineptitude on the part of a few Judges. Unfortunately, these few bad eggs by their conduct exposed the Judiciary to odium, ridicule and contempt. They did an incalculable damage to the image, integrity and contributed immensely to the poor public perception of the Judiciary.

The response of the Government at the material time was to set up a Commission headed by a distinguished jurist Hon. Justice Kayode Eso, *CON* a retired Justice of the Supreme Court to look *inter alia* into the general deterioration in the ethical standard or performance by Judicial Officers in the Country. One of the recommendations of the Eso Commission was that there should be in the Country a Performance Assessment Commission to monitor the performance of all Judicial Officers in the Country. However the report, as it were, went into limbo and nothing was heard about it again until 1999 when the 1999 Constitution of the Federal Republic of

5. Advisory Judicial Committee (AJC) was the body, prior to the coming on stream of 1999 Constitution of the Federal Republic of Nigeria, responsible for recommending appointment and removal of Judicial Officers in Nigeria. It then performed the functions essentially now assigned to the NJC under the 1999 Constitution.

Nigeria (hereinafter referred to as the Constitution) came on stream to usher in a new civilian administration and the nation's fourth experiment in Constitutional democracy.

Juridical Basis for the Setting up of the Performance Evaluation Committee by the NJC

The National Judicial Council is one of the Federal Executive Bodies established by Section 153 of the 1999 Constitution of the Federal Republic of Nigeria. It is the highest administrative judicial body in Nigeria today. The NJC which is unique in the annals of the Judiciary has been invested by the Constitution with plenitude of powers which are essentially meant to enthrone excellence in the administration of justice.

It is part of the powers of the NJC as discernible in paragraph 21, Part I of the Third Schedule to the Constitution to *inter alia* appoint, dismiss and exercise disciplinary control over all Judicial Officers in Nigeria. Taking umbrage under the provisions of the Constitution the NJC in its wisdom set up a Committee on Performance Evaluation of Judicial Officers of Courts of Record. This Committee of the NJC according to the learned main paper presenter is doing exactly what the Performance Assessment Commission recommended by the Eso Panel was meant to do if that report had been accepted and implemented.

There is therefore in my view a clear juridical basis for the Performance Evaluation Committee of the NJC. The Committee has no life of its own outside the NJC. Hence every report of the Committee must be brought to NJC for implementation. The role of the NJC therefore in establishing the Performance Evaluation Committee is to strengthen judicial integrity and capacity. The Judiciary is a crucial player in any anti-corruption war and Judges who will have to sit in judgment over others must like Caesar's wife be above board. Indeed it requires integrity to be self disciplined in the way we perform our responsibilities. Although the empanelment of a monitoring Committee within the framework

of the NJC to monitor Judges performance may be novel, it must be realized that it is the conduct of a few judges that has given rise to the situation. Here I find the jibe of Cassius to Brutus in William Shakespeare's play of *Julius Caesar* very appropriate.

> The fault dear Brutus is not in our stars, but in ourselves that we are underlings.[6]

Rationale for the Present Performance Evaluation Procedure

This point has been lucidly put by His Lordship in his illuminating write up. According to the learned writer, a Judicial Officer can be removed either for corruption or declining productivity. It is in order to be fair to all concerned that a performance index has been devised by the Performance Evaluation Committee of the NJC. One cannot but agree with the main paper writer that the Judiciary has no business in keeping dead woods in its institution. Every Judicial Officer must earn his pay. The maxim is that a good day's work deserves a good day's pay. What the NJC is doing is to re-emphasise the dignity of labour. According to Theodore Roosevelt:

> No man needs sympathy because he has to work .. Far and away the best prize that life offers is the chance to work hard at work worth doing.[7]

Moreover Voltaire said "work keeps us from three great evils, boredom, vice and need."[8] In short the fresh impetus which the NJC has now given to the concept of return of cases is laudable.

Another reason for the present performance evaluation procedure is to reduce delays in the adjudicatory process to the barest minimum. It must be appreciated that delays in the

6. *Julius Caesar* Act 1 Scene 1 by Williams Shakespeare.

7. *Dictionary of Quotations* published 2002 by Geddes and Grosset, David Dale house, New Lanark, page 132.

8. *Dictionary of Quotations* published 2002 by Geddes and Grosset, David Dale House, New Lanark, page 133.

administration of justice constitute one of the enemies of judicial integrity. There is no doubt that the present performance evaluation procedure will keep every Judicial Officer on his toes. Gone are the days of judicial ineptitude and laziness. I am firmly of the view that the NJC through its Performance Evaluation Committee stands as a vital underpinning for the Judiciary. By its watchfulness, the NJC is safeguarding the integrity of the Judiciary. The Judiciary must endeavour to remain an island of moral rectitude. Judicial integrity connotes the respect which citizens have for Judicial Officers and judicial decisions. The strength of the judiciary lies in the command it has over the hearts and minds of the citizens. It is therefore right to agree with Professor Schwartz that:

> The quality of justice depend more on the quality of men who administer the law than on the content of the law they administer.....[9]

Operation of the Present Procedure

The Committee has created two columns – one for the Heads of Courts and the other for other Judicial Officers. It seems to me and I say this with the greatest respect that the emphasis now from a careful perusal of the grading and reflection on same is on quantity. While it is a truism that "justice delayed is justice denied", it is also a truism that "justice rushed is justice denied". Unless the present parameter is carefully monitored, the emphasis on the number of cases delivered could become counter productive because it could produce the un-salutary effect of judgments that are not very sound. Admittedly, the Performance Evaluation Committee must evolve a system for its assessment but it is my submission that adherence should be more to quality than to quantity. Thus if the number of cases disposed of by a Judge in a quarter appears low, the Evaluation Committee may call for the judgments or rulings delivered. A distinguished jurist of distinction and phenomenal

9. *American Constitutional Law* 1955, page 130

xperience once told us in a Workshop that a Judge was elevated to ne Court of Appeal on account of a brilliant ruling he delivered in matter before him. I would implore the NJC to take a second ook at the present method of grading. For example it may take nonths before a chieftaincy case is disposed of even if the Judge is itting every day. I also think I am right to say that the *O. J. Simpson's case took more* than three months to be completed even though the Judge was sitting virtually everyday with all modern stenographic and recording gadgets at his disposal. Again the recent case involving Michael Jackson who was accused of being a serial pedophile also took more than three months to complete. The present procedure, therefore if one may say with due deference, appears too subjective for comfort.

Another aspect of the present procedure which I find worrisome is the use of the performance index to determine whether or not a State Judiciary should have more Judges appointed. It is hoped that the Judiciary would not unwittingly prevent good materials from joining the Bench. I think it would be better to remove Judicial Officers who had become dead woods and who have failed to improve after several warnings than to prevent fresh capable candidates of impeccable integrity from joining the Judiciary. The sins of those who are guilty should not be visited on the innocent.

All the observations I have made above are made with due deference and are not meant to be construed as criticism of the NJC which has been doing a yeoman's job in sanitising the Judiciary and working assiduously to enthrone excellence in the administration of justice. It is evident that the under-pinning philosophy behind the setting up of the Committee is to encourage Judicial Officers to give expeditious hearing to cases coming before them. I think one's anxieties should also be assuaged by the fact that the Chairman and members of the Performance Evaluation Committee are persons of distinction and great experience who will examine each case on its own merit. It is judgment by one's own peers and as such Judicial Officers who have worked conscientiously would have nothing to

fear in explaining their inability to reach the target stipulated for good performance.

Advantages of the Present Procedure

The advantages of the present procedure are numerous. In the first place it keeps every Judicial Officer on its toes. There is dignity in labour and hard work does not kill. In the second place it has greatly improved the perception image of the Judiciary by the public.

I also firmly believe that the NJC through the instrumentality of the Performance Evaluation Committee has enhanced the leadership role of heads of courts. Under the new scheme of things, each Head of Court has to countersign the returns submitted by Judges/Kadis after verifying such returns. Every Head of Court is in a position today more than ever before to monitor the performance of his colleagues. Of course, every Head of Court must also demonstrate leadership by example. A hardworking and dedicated Head of Court will be respected by his colleagues. It is my firm view that although Heads of Courts have a lot of administrative work to perform, judicial work must remain the primary assignment of every Judicial Officer.

It is to the eternal credit of our various Heads of Courts in Nigeria that they are able to combine in an admirable way their judicial work with their administrative responsibilities. It must be appreciated that in many States of the Federation today, financial autonomy is not yet a reality. Heads of Courts still have to contend with the problem of cap-in hand mendicancy and inadequate funding. In order to secure fund for their courts, they have to demonstrate maturity, patience, wisdom and tact in dealing with their respective State Governors. Heads of Courts from States have to travel notably to Abuja to attend meetings of Judicial bodies. But in spite of all these, majority of Heads of Courts have given their judicial work the preeminence it deserves.

In the light of all that I have said above, it is my submission that the present performance evaluation procedure, though not perfect, is

commendable. Apart from facilitating the duty of monitoring and supervising of Judicial Officers by their Heads of Courts it also enables Heads of Courts to appreciate more than ever before the need for leadership by example.

I think from the available statistics, Judicial Officers are now committed more than ever before. There is now an appreciation that we now live in an era of greater public demands for judicial accountability. The Judiciary is no longer considered a sacrosanct and an inviolable sanctuary of its occupants. The present system has brought a lot of self discipline which is said to be the best form of discipline.

Disadvantages of the Present Procedure

I am of the view that the duty of scrutinising the performance of Judicial Officers is best performed by their own peers. This is vital for judicial independence which is the corner stone of the rule of law. But if Judicial Officers were unwittingly exposed to ridicule, it could affect judicial independence and integrity. Although the scores by the Performance Evaluation Committee are meant for internal circulation within the Judiciary if such scores get to the Press, they could be used by the enemies of the Judiciary to embarrass not only the Judicial Officers concerned but the entire Judiciary as an Institution of respect and dignity. Such a situation may also affect collegiality and *espirit de corps* in the Judiciary. Judges are expected to be their brothers' keepers. There is need for circumspection.

Suggestions

Before I conclude this brief commentary, I wish to proffer hereunder suggestions for the consideration of the Performance Evaluation Committee of the NJC.

In the assessment rating, allowances ought to be made separately for rulings on contested motions which do not dispose of the

substantive matter. This is in view of the fact that such rulings also take precious time of Judges especially when there are many of them within a quarter. It cannot be gainsaid that some interlocutory applications which are not reckoned with in the Performance Evaluation Report apart from taking the precious time of the Judge, often than not raise knotty issues of law. Therefore limiting the Performance Evaluation to cases disposed of is not enough yardstick for discovering a Judge with declining productivity.

It is said that allowances are made for officials who are sick, on official assignment and election petitions. This is quite understandable. However, we are not told what types of allowances are usually made in such cases. To drive this point home, it is apt to postulate an example. One of my hardworking Judges was involved in election petition cases. Despite this, he still found time to take up some of his normal court cases. He was commended by the Committee. However in the quarterly report for the same period, he had a low performance grading.

On the issue bordering on methods or criteria set for the assessment or returns of cases, it is good the NJC Committee on Performance Evaluation recognises the need for improvement and thus called for suggestions. There is certainly the need for such improvement. It is most humbly suggested that in order to give credibility to the returns being made; copies of the judgments and rulings delivered should be available for inspection by heads of courts. Randomly, the Performance Evaluation Committee may also inspect such rulings/judgments including those of heads of courts themselves. This will guide against the human factor in rendering fake returns.

Moreover, with regard to high scores as part of consideration for elevation, it is suggested that such scores must be those that are consistently maintained over a reasonable length of time. And more importantly, the Council must be convinced that such returns rendered are real and not imaginary.

It is at this stage necessary to allude to the general belief that

there is undue delay in the disposal of cases in Nigeria. The problem of delays in disposal of cases has long been a cause of concern to all stakeholders in the administration of justice in Nigeria. The situation has a long history and is sometimes very pathetic. In his lecture at the Induction Course for Newly Appointed Judges and Kadis in 1992, His Lordship, Hon. Justice Olajide Olatawura, JSC (Rtd.) gave a personal experience about a case which he as Clerk of Court opened the case file in 1957. The same case resurfaced before His Lordship as a Judge in 1971. Commenting on the unfortunate situation, His Lordship said:

> It was when I was going through the case file that I discovered the endorsement in the case file and some of the Hearing Notices issued were in my handwriting. I became curious and wanted to find out why it has taken almost 14 years. The pleadings were completed that same 1957 but the plaintiff who used the process of the Court as a stop-gap for the sale of the house already attached went to sleep. The Registry with the growing number of cases filed apparently paid attention to Counsel who cared to ask for hearing dates. This is scandalous.[10]

It is in fact so bad in real terms that the only person who benefits from the process are those who now professionally and dubiously use lawsuits as delay ploy to frustrate the opponent from the pursuit of genuine and legitimate legal claim.

Generally, the Rules of Court do not prescribe definite time frame for trial of civil and criminal cases. There is however a guide on the time frame required for proper determination of cases. This guide is contained in Section 36 (1) of the 1999 Constitution which states that:

> In the determination of his civil rights and obligations, including any question or determination by or against any government of

10. Organisation of Chambers: Fixing of cases and adjournments, lecture delivered by Olajide Olatawura, JSC published in the 1992 edition of *Induction Course lectures for Newly Appointed Judges and Kadis*, page 138 at 140-141.

authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.[11]

Thus the Constitution requires that a civil matter be dispensed with by Court within a reasonable time. This is one of the essences of fair hearing. Reasonable time in the above Constitutional provision would mean such time as is necessarily convenient for the Court to hear and determine a case. That is as soon as the circumstances of the case permit. But it should be such time as would not wear out the parties in their search for justice.

In practice, whether or not the Court has complied with the requirement will depend on the facts and circumstances of the case including the complexity of the subject matter in dispute as well as the nature of evidence available. Thus, where the facts are simple and possibly, admitted and the law is plain, the case should take a lesser period to try than where the facts are complex and disputed with the law possibly uncertain. It cannot be disputed that in some jurisdictions, majority of cases filed are on land matters and chieftaincy disputes, most often than not, these kind of cases are complex with each party calling a number of witnesses. Definitely, this cannot be compared with situation where undefended suits are filed. It is submitted that a Judge who is faced with such complex cases can hardly dispose of many of such cases within a quarter compared with a Judge handling simple and undisputed or uncontested cases. It is in view of the foregoing that one can say that the present Performance Evaluation Report gives no consideration to Judges handling these type of cases may have to be looked into and given a more pragmatic consideration.

A lot of factors are responsible for the pathetic situation regarding delays in trials in Nigeria which in effect leads to low

11. Section 36 (1) of the 1999 Constitution of Federal republic of Nigeria

performance of Judges. Most of these factors are already well known and well-discussed by stakeholders in the judicial process but unfortunately, as with most other problems in our polity, actions in providing remedies have been slow. Some of the factors include corruption, inadequate judicial personnel; the Bar with regards to unnecessary requests for adjournments, frivolous interlocutory applications and other ploy and tactics by Counsel aimed at frustrating opponents in litigation which have the unsavoury effect of clogging the wheel of administration of justice. Another cause of delay in our Court is poor facilities. Judges are known to live and work in poor condition. While one notes with some level of satisfaction that in recent time the welfare of Judges has been addressed and improved upon to a considerable extent, it is not yet Uhuru as there is still room for improvement. Be that as it may, essential facilities and equipment for the smooth administration of justice are in most cases either dilapidated, nonexistent or inadequate. It is a known fact that most Judges and justices all over the Country still write in long hand during trial of cases and hearing of interlocutory and other applications. All these and other factors including but not limited to undue regard to technicalities which dominate most trials at the expense of trial on merit of the case, Defective Use of Alternative Dispute Resolution and poor case flow management in no small measure contribute to inefficiency in the court system which most often than not leads to low performance on the part of Judges.

It is therefore humbly suggested that as an impetus in enhancing the productivity of Judges in the prompt disposal of cases pending before them, the NJC should see to it that modern communication gadgets including Dictaphone, Computers and other recording/ reproduction equipments together with well equipped libraries both at Chambers and homes are provided for Judicial Officers. All these in addition to regular supply of electricity and water as well as adequate training of supporting personnel, would help to reduce congestion by reducing the time spent in the determination of cases.

Also, Judges of superior Courts of record should be entitled to and be served by research assistants from the crop of young and brilliant lawyers to assist them in the laborious task of specific research into various aspects of the Law. All these will be in consonance with one of the resolutions reached at 2003 All Nigeria Judges Conference.

Conclusion

In conclusion, Judicial Officers must constantly keep in mind the wise saying of Longfellow which runs thus:

> The heights by great men reached and kept
> Were not attained by sudden flight;
> But they, while their companions slept,
> Were toiling upward in the night.[12]

It is therefore important for Judicial Officers to keep the flag of dedication and commitment to duty flying aloft throughout their career.

Once again, I thank My Lord, Hon. Justice Babalakin for his insightful and in-depth paper which has helped to shed a flood of light on the activities of the Performance Evaluation Committee of the NJC and its mode of operation.

The position of the NJC in insisting on hard work, transparency, probity and accountability is not only existentialist but unassailable in every way. We should all join hands with the NJC in its efforts to restore the high ethical standard and ethos of the Judiciary. My Lords, I rest my case and I thank you all for your patient listening.

12. *Dictionary of Quotations* published 2002 by Geddes & Grosset, David Dale House New Lanark page 49

PAPER IV

TOWARDS A BETTER ADMINISTRATION OF JUSTICE: ISSUES AND CHALLENGES

Speaker 1

Dr Tonnie O. Iredia, *OON*
Director General,
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Speaker 2

Mr Bunmi Oni
Managing Director/CEO Cadbury Nigeria Plc.

TOWARDS A BETTER ADMINISTRATION OF JUSTICE: ISSUES AND CHALLENGES

Dr Tonnie O. Iredia, *OON*,
Director General,
Nigerian Television Authority, NTA

Introduction

I appreciate the opportunity to be part of this great conference.

The topic given to me appears too narrow in the gamut of issues relevant to the subject. Public perception angle restricts the speaker to only one of his professional roles – Journalism.

The topic will however be strictly followed so as not to exceed the brief. It is hoped that other speakers will cover the areas that are outside the brief.

The Public and the Judiciary

Corruption

Like most Nigerian institutions, the judiciary has its bad eggs. There are daily reports of judicial officers who receive fabulous gifts like flashy cars from litigants, politicians, governors, etc, which the public believes can pervert the course of justice. Nigerians have continued to witness the indictments of judges on grounds of corruption, especially on election matters. The cases of Nnaji, Egbo-Egbo, etc, are fresh but not new. In 1997, "petitions, allegations of bribe-taking and even confessional statements by some members of the Election Tribunals threatened to undermine the credibility of the judicial process" (Diya, 1997).

On the order of the Chief Justice of Nigeria, a Chairman of

one of the Tribunals was arrested and removed from office; a member of the Tribunal in Kaduna State was arrested and removed from office for demanding and receiving a bribe of N150,000:00.

Corruption in the Judiciary is not just a public perception, judges attested to it. According to some judges "the non constitutionally established courts particularly some of the Customary Area Courts solicit for bribes unabashedly" (Achike, 1996).

It used to be only in the Magistracy but it has since "gradually crawled to the High Courts and would appear to have had a foothold among a noticeable number of judicial officers there. Many senior members of the Bar now openly complain" (Uwaifo, 2005):

> There are also dishonest lawyers who after charging their normal fees, charge extra for the judge. Whether that extra reaches the judge or not is irrelevant for in such abominable practice the guilty lawyer has scandalised the client into believing that justice can only be done if the judge is *paid a fee (Oputa, 1998)*.

Delays in Justice Delivery

The public has an idea of when a case starts but no one can even hazard a guess as to when it will end. It could be 20 years later:

> There are judicial officers who cause 30 or more cases to be put on the cause list. They routinely commence sitting at about 11:30 a.m. and spend the next one hour adjourning the cases on the cause list and rise at about 1p.m. (Ejiofor, SAN, 1998).

Instead of striking off wrong parties in matters before them, some judges strike out the case for it to start *de novo* (Abayomi, 2004).

If a judge retires or is transferred, cases commenced by him are usually started de novo by another judge.

Laziness

If the public cannot appropriately evaluate the judiciary on this, the

views of some judges on it are instructive. "There is the aspect of their attitude and orientation to duty, late sittings, laziness, incompetence, doubtful integrity, impertinence towards counsel. Now, there is a real apprehension that the appellate court may soon be infected if not already contaminated with some of the vices. Some recent events seem to sound an alarm bell" (Uwaifo, 2005).

Lack of Courage

Refusal by judges to handle certain sensitive political and volatile cases e.g. The Bola Ige murder case involving Senator Iyiola Omisore.

In the eyes of the public, this amounts to abdication of Judges' responsibilities. The judiciary like every profession should have its own level of risk. "If every judge who is threatened withdraws from a case, what would be the function of the judiciary?" (Iredia, 2004).

Clarity of Judgment

The public may never understand the technicalities behind judgments that do not have a victor and a vanquished. A judgment in which both sides claim to be winners is rather confusing to the layman. An example is the Supreme Court judgment in *Lagos State Government v. The Federal Government* on Revenue Allocation to Local Government.

Granting of Frivolous Interlocutory Injunctions

The granting of interlocutory applications by judges has become a standard tool employed to frustrate the effective dispensation of justice.

High Cost of Litigation

Court fees are too high especially at the appeal level.

Challenges

The judiciary certainly has its fair share of challenges which have whittled down its performance. They include:

(i) Lack of basic facilities and infrastructure;

(ii) Insufficient personnel;

(iii) Inadequate training for judges and other personnel of the judiciary;

(iv) Poor conditions of service for judicial personnel;

(v) Inadequacies of other institutions such as the Police, the Bar etc that have rules to play in the administration of justice;

(vi) Disobedience of Court Orders;

(vii Insufficient public awareness on the operation of the judiciary;

(viii) Unserious litigants who do not pay their lawyers and do not produce witnesses or documents to enable their cases to be prosecuted timely.

Suggestions

A Change in the Style of Operation

The Judiciary should depart from the old fashioned conservative practice and become more expressive to sensitise the public of problems and reasons for certain judgments. In this wise, the role of the Chief Justice, i.e. as head of the Judiciary should be distinct from his role as a judge.

Reorientation of the Public

The objective would be that the public begins to view the Judiciary as the arm of Government that can give succour and solace.

Quick and Timely Dispensation of Justice

A maximum time within which a case can be concluded should be prescribed. Approval for extension where the case cannot be concluded within the prescribed time should be at the discretion of the Chief Justice e.g. Election Petitions.

Training

Adequate training for Judges to give them more exposure both national and international to develop their minds. To quote the American Constitutional Law writer, Schwartz, "The quality of justice depends more on the quality of the men who administer the law than on the content of the law they administer."

Adequate Funding and Provision of Infrastructure

Chief Gani Fawehinmi "Our Judiciary which is constitutionally charged with the responsibility of dispensing justice, is in a pitiable state of gross neglect." The funding should be all embracing; salaries, allowances, infrastructures recurrent expenditures.

Computerisation

Our courts should be computerised; manual recording discarded for electronic ones to be abreast with what is obtainable in the judicial system abroad.

Independence of the Judiciary

As the only arm of Government with power to check the excesses of the executive and the legislature, the judiciary needs to be strengthened and also needs to strengthen itself. An independent Judiciary includes "that ingredient which allows a judge to rise above passion, above public clamour and above the politics of the moment" "An independent Judge is one who resists the pressures of hysteria, fanaticism tribalism and ethnicity. (Oputa, 1998).

Chief Justice's and Chief Judges' Visit to Prisons

The discretionary powers of the Chief Justice and the Chief Judge to release suspects who have been unduly held should be more positively employed through more regular visits. "Our prisons are filled with persons who have no business being there" (Hassan-Baba, 2004).

Interlocutory Injunctions and Technicalities

Judges need to exercise caution in acceding to frivolous requests for interlocutory injunctions especially when it is clear that such requests are intended to frustrate the other party:

> The court has for some time now laid down a guiding principle that it is more interested in substance than in mere *form. Justice can only be done if the substance of the matter is examined. Reliance on technicalities leads to injustice* (Eso, 1983).

My root belief is that the proper role of a judge is to do justice between parties before him. If there is any rule of law which impairs the doing of justice, then it is the province of the judge to do all he legitimately can do to avoid that rule – or even to change it, so as to do justice in the instant case before him (Denning, 1981).

Conclusion

Media Support for the Judiciary

Whereas the public perception of the judiciary can generally be described as negative there are people who know that the judiciary, especially at the higher levels, has done well. On our part at the Nigerian Television Authority (NTA), we recognise this and without prompting, we have realigned our programming to compel service delivery in the sector with increased coverage of cases in the courts, emphasising only those that are being concluded in record time:

> Law remains an instrument, not an end in itself. Law is the means. Justice is the end. And for law to achieve justice, it can never remain still. It must never be allowed to get out of touch.... The principles of justice do not change, but their appreciation in terms of positive law must alter with changes in society and circumstances. This presupposes a race of lawyers, a breed of judges, not aloof from the society of their time but alive to its revision ... (Lord Hailsham, 1971)

TOWARDS A BETTER ADMINISTRATION OF JUSTICE: ISSUES AND CHALLENGES

Mr Bunmi Oni[1]

Managing Director/CEO Cadbury Nigeria Plc.

I accepted your kind invitation to speak at this conference with great trepidation and must have gone through a number of emotions in quick succession. Not being an official member of the learned profession, I felt on the one hand that I was taking my life in my thoughts, before your Lordships and Ladyships, putting on your wigs and gowns, attire that intimidates mere mortals like me. On the other hand I felt better and indeed truly privileged when it dawned on me that this may well be an induction of sorts for me, seeing I have an unusual chance to interact with an elite group as this. But my acceptance was really determined by the opportunity to share and to learn about a subject that is also at the heart of the day-to-day business of making candies like Tom-Tom, Éclairs, and other great brands from Cadbury that people love.

Well, I said the subject of effective administration of justice is integral to making chocolates because dispute is a natural occurrence in the course of every commercial undertaking, and for me, the resolution of those disputes must always be achieved in a manner that ensures that the normal business cycle of making, selling and eating candies can continue without further hindrance. It is the sustenance of commerce that draws investment, which drives economic growth, creates employment and raises quality of life. I do not have a fact base for this assertion, but I believe that a greater proportion of disputes have a foundation in preserving commercial interests, even tangential matters like family feuds.

Having spent virtually all my working life in the harsh world of

1. Being text of a speech at the *2005 All Nigeria Judges' Conference*, Abuja.

business, a world that only recognizes winners and hardly remembers who came second, I also know that if you left two complete strangers who do not understand each other's language in a room and placed the dollar bill on the table, they will negotiate in a matter of minutes. Somehow they will find the way to communicate and come to a win-win agreement on who would offer what service to the other and for what fee.

The point I'm making is that people possess an inherent capacity to resolve disputes, disagreements or misunderstandings, provided they can find the win-win ground, and provided the dispute can be apprehended in good time-well before lawyers get involved. Oliver Wendell Holmes, author and professor of *Anatomy and Physiology (1809-1894)* said, 'what lies behind us and what lies before us are tiny matters compared to what lies within us'. There is not much that cannot be tackled if we come with the right attitude. Because people do not take advantage of that inner resourcefulness and capacity to resolve issues, lawyers will of course always be involved. I personally believe that people find it hard to draw on this capacity because as humans we tend to be consumed by the desire for territory and supremacy, which makes one person seek to take advantage of another, for self-preservation or other selfish reasons. My validation for this hypothesis is that most of the major disputes around the world, down through the ages and into contemporary time, are about land and territory. Wars have been fought and wealth destroyed because of the desire of man to dominate another. We have now seen 50 years of uninterrupted wealth accumulation, (the last time that wealth was destroyed on a massive scale was the Second World War), and the platform for dominance has shifted to economic power.

In the process, relatively simple matters get complicated by cover-ups, dissembling and half-truths and distortions; compounded by ego, greed and sloth. This is perhaps what informed the early Irish settlers to first build Churches and Prisons as basic institutions of their society.

You will notice from my opening that I have no intention of getting into legal jargon in this discussion. Those of us who look to the third arm of government for succour actually have little capacity for 'legalese' and would rather leave that to the luminaries. The truth also is that the more we try to understand those jargons the more confused we get. We prefer the simpler, but not necessarily the simplistic path where we restore our relationships after a dispute and get life on the move again without diminutions in our humanity. You would also have noticed that I have assumed that there is a fundamental desire for disputants to have their relationship restored at least to their original status, if not better, after the dispute has been resolved. In that sense disputes are interferences that diminish the realisation of potential, and most people want to get rid of such irritants as painlessly as possible. We may have inadvertently hampered the realisation of this potential; in that the Law School Curriculum focuses on how to marshal evidence and the fine points of law, but not on restoring relationships.

I believe these two factors-simplicity and a desire to restore relationships-constitute the cardinal objectives of the administration of justice. Of course these are generalisations in reality, and I don't particularly like sweeping statements, but I believe it is broadly true. This assertion brings me to the real point I want to make, that the superior delivery of justice administration must fully integrate Alternative Dispute Resolution mechanisms, which are less adversarial and does not necessarily give one party a sense of loss when the other jubilates triumphantly.

The beauty of an effective ADR system is that the disputants actually arrive at the solution to their issues themselves, with the help and guidance of a Mediator or Conciliator, and they therefore own the outcome. Not only is it also a much cheaper way to settle disputes, it allows difficulties to be resolved fairly quickly so the parties can get on with their lives. Integrating ADR more deeply into our justice delivery system will free the courts of considerable amount of time and energy, and as the large part of disputes are probably

commercial in nature, will be good for economic growth too.

I am aware of course, of the initiatives that have been taken in this direction, including the roll out of the Lagos Multi-Door Courthouse initiative, which has been successfully synchronised with the Judiciary in Lagos and elsewhere, and which many Judges have used effectively by offering it to would-be litigants-even if only as a first step. My advocating ADR so strongly is precisely because of the success it has accomplished where parties to disputes have found it as elating as it is rewarding to devise the solution to their disputes themselves. It often makes them wonder what the dispute was about in the first place. I believe that more aggressive training of Mediators and Conciliators will raise the patronage level, and a greater use of this window by the Bench will relieve some of the pressure on Judges.

We in our Company have stipulated ADR as a mandatory first step for dispute resolution in creating contracts and agreements, and I know many other companies are doing the same. One more advantage of ADR is that, it educates the parties much better about the virtues of seeking first to understand before seeking to be understood. This virtue has phenomenal potential in building relationships.

However we know that moral persuasion will not always work and litigation will still go on, so the rest of this brief discussion will be based on that premise. I will be preaching to the choir if I attempt to extol the virtues of high standards in the administration of justice, seeing that we have a room full of legal luminaries. I am the least competent here to undertake such, so I won't. My observations will focus first on systemic issues, in accordance with my personal belief that form follows the principles. I will, of course, also raise a few specifics as challenges we might face in achieving the high standards we desire to see in our justice administration system.

At the level of society, the cardinal objective of the justice system is to promote and preserve good governance and orderly coexistence.

Good governance is the foundation of a progressive society, and in its broadest sense governance is about holding the balance between economic and social interests, and between individual and communal goals. The cardinal objective is to promote the efficient and equitable use of resources, as well as share accountability for the stewardship of resources in a manner that aligns the interests of individuals, the state and society at large. Governance is not just about the public sector, and as James Wolfensohn observed, the governance of corporations is now as important to the world economy as the government of nations. The import of this statement is clearer. When one understands that the market capitalization of many Stock Exchanges exceeds the GDP of the country.

Corporations create jobs, generate tax income, produce a wide array of goods and services, and increasingly manage our savings and secure our retirement income. Amid growing reliance worldwide on the private sector, the issue of corporate governance has similarly risen in importance. Corporate Governance has now become a mainstream concern, even though this phrase meant precious little to all but a handful of scholars and shareholders not too long ago.

Two events helped to heighten this interest in corporate governance. During the wave of financial crises in 1998 in Russia, Asia and Brazil, the behaviour of the corporate sector affected entire economies, and deficiencies in corporate governance endangered the stability of the global financial system. Barely three years later, confidence in the corporate sector was sapped by scandals in the US and Europe that triggered some of the largest insolvencies in history. The misdeeds of a few sent ripples across boundaries like a domino. One after the other we saw Enron, WorldCom, Pamalat and a host of other major firms collapse and some CEOs hauled into jail. Shell came under tremendous pressure first when an NGO protested the oil spillage in some of their installations, and more when it came to light that the company had overstated its reserves. Suddenly the top blew open for business leaders who

must now balance this additional scrutiny with the shareholders' pressure for higher performance quarter after quarter, and their own craving for bonuses.

We have also seen auditors who sell tax shelters, which in reality is a product that blurs the lines between tax evasion and tax avoidance. In the aftermath, not only has the phrase "corporate world governance" become nearly a household term, economists, the corporate world, and policy makers everywhere began to recognise the potential macroeconomic consequences of weak corporate governance systems. In the developing world especially, macro-economic difficulties can be worsened by systemic failure of corporate governance stemming from:

(a) Weak legal and regulatory environment

(b) Ineffective administration of justice

(c) Poor banking regulation and practices

(d) Inconsistent accounting and auditing standards

(e) Improperly regulated capital markets

(f) Ineffective oversight by corporate boards

(g) Scant recognition of minority stakeholders

The strength of the legal environment is one of the dominant factors that determine the health of the macroeconomic climate in the country.

Democracy stands no chance unless the checks and balances are systematised and made operational. The judiciary is or should be, the safe haven and shelter from the shenanigans of politicians, some of whom we know have doubtful antecedents and therefore little scruples. An incredible number have a failed past, and in some cases there is hardly a visible means of livelihood before venturing into politics as a last resort; while for not a few, there is no known track record of managing anything apart from themselves – which, I think,

is why we hear a lot of phrases like "my administration" or "when we came to power".

Leadership comes with a lot of responsibilities, and leaders need authority to discharge those responsibilities (on which they can be called to account) and deliver their accountabilities (on which they are liable to render account). What we often see is a brazen use or misuse of the authority that incidentally derives from the rest of us. Perhaps because we were for too long in the clutches of military misadventure in governance, we struggle with accountability and experience great difficulty in restoring and keeping faith with those values that once shaped our society. One misdemeanor leads to another, the lure of money becomes too hard to resist until we begin to blur the edges of reason. I am sure you see this in your job and interaction more than most of us can or have access to.

This is why the proposed Fiscal Responsibility Act is so crucial to the advancement of governance and accountability in our country.

The Fiscal Responsibility Act as proposed simply seeks to provide guidance in aligning resource allocation by the three tiers of government in a manner that promotes efficiency, fiscal discipline and accountability. For example it also seeks to achieve a balance between capital expenditure and recurrent expenditure to make for sustainability. We will be well served if the principle of fiscal responsibility is entrenched in the constitution once and for all, to take it further away from the peering eyes of politicians.

Speaking about the Constitution, perhaps we should also consider exempting elements of criminal immunity from the document, seeing some of our leaders have chosen to conduct themselves irresponsibly under the guise of immunity-a privilege that was granted on the assumption that high office holders are honorable men and women. Effective leadership must be principle-centered, and not one that leans on the position. Principles are tightly interwoven threads running with exactness, consistency, beauty, and strength through the fabric of life. In essence, principles are the territory. Values are maps. When we value correct principles, we have truth

and knowledge of things as they are. This raises the primary issues in my mind of how to prepare, or fail to prepare people for leadership in each of the three arms of government, and indeed in the private sector. We do need an acceptable and systematic preparation for leadership, and each person who aspires to leadership carries a significant responsibility for self-development. We have left too much to chance or a cursory passage through prison and that is clearly not adequate.

I believe that good governance is imperative to the entire process of justice administration. Leaders must be willing to be challenged, engage in intellectual debates on matters that affect the lives and livelihood of others, and create equal opportunity for everyone on a level playing field. The civil service needs to be equipped with new lenses to see its job as facilitating rather than to control, as a critical step to minimising the scope for discretion in the design and execution of policy. Discretion fires the same power syndrome we discussed before, and creates tollgates. We already noted the central role of commerce in driving economic growth.

Commerce thrives on competition because competition is what stimulates the creative juices in us. Innovation is borne out of competition, is and if discretionary allocation of resources on the basis of patronage distorts the playing filed, it also kills innovation, hampers economic growth and diminishes quality of life of the Nigerian people. Similarly the private sector needs to conduct itself with dignity and compliance with ethics and the codes it professes.

My second point in this discussion is therefore the whole issue of governance and how we prepare people for leadership. Effective leadership delivers good governance system, fair and equitable allocation of resources, entrepreneurship and prosperity. I am not naïve to presume that prosperity itself reduces disputes, otherwise the rich countries of the world would have shown example. My premise is that it makes for orderliness, and derives from good governance.

But a discussion about the pursuit of better administration of justice

must begin with the judiciary turning a searchlight on itself, and
we stay with the subject of success into leadership for a minu
we need to re-assure ourselves that the process of succession
leadership of the judiciary is sufficiently robust to provi
opportunity to all qualified persons, whether within or outside
established lineage.

Seniority on the Bench is obviously a dominant criterion
cannot be jettisoned, but complementing this with other cle
measurable performance criteria will enhance quality in
selection process and higher standards in the institution. This
critical for the execution of meaningful reform over time. T
bigger challenge is the risk of politicisation of the Bench thro
the succession process, and the judiciary, as an institution,
preserve its own sacredness whatever the circumstances.

The preservation of its sanctity enables it to influence change
other spheres. Gandhi said, 'We must be the change we wish to
in the world', and change happens when we are first willing to sub
to the inevitable process of reform.

But at the end of the day reforms are about reaffirming
guiding principles and values that will govern our processes
including selection and appointment processes. We need humil
to submit to the higher powers of these principles, since princip
by definition don't change.

We need courage to live by the values we subscribe to, even if
makes us seemingly disadvantaged in the short term. This thou
accords with the trend in business for Boards of Directors to dev
performance measurement criteria for the Board to assess their
performance as a Board. It also provides a mechanism for provid
a feedback to the Chairman on his or her own performance as Ch
of the Board.

One such reform is the imperative to better insulate the office
the Chief Justice from the machinations of politicians, especially
relates to removal of Chief Judges, Grand Kadis and Presidents
Customary Courts of Appeal. Perhaps the role of the Natio
Judicial Council specified in the 3rd Schedule, Part 1 Section 21

and (d) should be better aligned with Section 292 (1) (a) and (b) of the Constitution. As things are, the Governor of a State can remove a Chief Judge by a simple two-thirds majority of the House of Assembly, which have not been always independent of the Executive, and regardless of the view of the NJC. It is not unheard of for the Executive Branch to act in concert with the State Assembly to remove a Judge for reasons other than misconduct, thus making the justice powerful icon depicting the absolute neutrality of the institution.

The NJC is perhaps better shielded from politics, and it should not be so easy for politicians to sidetrack its recommendations in matters of discipline of Chief Judges. It will mean that sooner than later we must revisit Section 292 of the Constitution.

The fourth dimension I wish to discuss in improving the administration of justice is training and capacity building in the Judiciary. The world today is so dynamic and changes in many areas of commerce are profound. For example technology has blurred the lines in Intellectual Property rights to an extent that what constitutes infringement may have to be redefined, and to this extent the application of law is evolving.

The Oil and Gas sector has many emerging issues and trading terms are being refined in fundamental ways that makes it mandatory for the Judiciary to proactively inform itself, to avoid a steep learning curve. New concerns of civil society around the world impose new disclosure requirements on business. Companies are increasingly required to report not just financial performance but also their performance on the environment and corporate social responsibility.

We have seen class action suits from groups against individual companies or industry groups over environmental pollution or perceived or potential injury to health.

Concerns around Human Rights and Ethnic Trading have forced businesses to take a greater degree of care in sourcing raw materials. For example, today I have to declare that we have made our best endeavour to ensure we do not buy cocoa from farmers who use forced child labour. The capital market operations are getting more

sophisticated and will require those who administer justice to be completely familiar with these trends, including the interpretation of financial reports of companies.

Many countries are taking steps to prevent the potential damage from corporate misdeeds, especially because such misdeeds in another jurisdiction can impact economies elsewhere. For example, the Sarbanes-Oxley Act of 2002 came into effect in the US in the wake of the corporate collapses we discussed earlier, and has had reverberation ripples in an increasingly borderless world. You will notice that most of the examples I have raised are commercial in nature. I know that those changes will be even more profound in the years ahead, driven by the power of technology. For example, we know the pressure to win the market share game is real, but in Nigeria we don't have an updated Competition and Anti-trust legislation. As privatisation proceeds, new industry segments will open up, and in time the big players may not only hold near monopoly, but may use such market power for undue advantage.

I was privileged to chair the Steering Committee that produced the draft Competition and Anti-trust legislation nearly three years ago, and I hope it comes through the National Assembly soon. The training and education dimension includes training in ADR mechanisms, and has to be extended to the support staff in the Judiciary as well. The point I make is that the pace of change in many spheres that impact our everyday lives creates new horizons for the Bench as much as for most other disciplines, and the challenge we all face is to keep pace with the change and preferably create institutions that are proactive in anticipating change.

This means we cannot make light of training and re-training as the only way to build enduring institutions. For an individual, death is not just the cessation of life; death comes when a person stops learning. It is the same for an institution.

The fifth and final dimension I will discuss is the impediments that hamper the speedy administration of justice, and they generally relate to matters of speed, reliability and efficiency of service delivery. I will discuss them as a group, even though they manifest

in different ways. First, I think it is time we complete the deployment of equipment to record Court proceedings at all levels so we can banish hand writing to the archives.

Second, the increasing adoption of Civil Procedure Codes will facilitate speedy dispensation of justice, and one hopes this will be more aggressively pursued.

The case management model initiated I believe in Lagos is worthy of mention, where expected conclusion period of matters is flagged from the commencement. It also introduces a good element of visibility and accountability.

Third, I also believe the Bench must keenly track and disallow lawyers who delay the course of justice for lack of diligence or content or just to frustrate the other party to the dispute. Such actions have the semblance of being deliberate or just a share abuse of the court processes, one recognizes that the challenge is to ensure that no party suffers unnecessarily by insisting on keeping up the pace of the proceedings.

The Bench will always have to make a call on this issue, but many legal practitioners suggest that a more determined effort is required from the Bench to enforce discipline among erring lawyers.

Fourth, it will not be appropriate not to mention the damage that corruption could inflict on the justice delivery system, more visible at certain levels of society than others. The huge task of cleaning up such cesspool of iniquity in our society must engage every major institution, and the visible effort of the Judiciary in investigating and sanctioning its erring members is commendable. Corruption desecrates the judicial process, and there is bound to be concern if lawyers loose faith in the system they lead their clients to for fair hearing.

The point about corruption though is that there are always two parties, and there is a receiver only because there is a giver. As in consumer markets, with which I am copiously familiar, the law of supply and demand also works. Where there is a supply and there is no demand, the supply soon dries up. We can also significantly weaken demand in the corruption game if the supply is denied, but

we need to persuade those whose influence can be moderated by material gain that such act does incalculable damage.

In all, the swift and competent dispensation of justice is a prerequisite for the much desired investment flows, whether from local investors or foreign. Investment accelerates free enterprise, which drives growth, creates jobs and raise quality of life. Our ability to attract the right levels of investment to power the growth of our economy is capable of deriving directly from our demonstrated capacity to run a functional society, where no one is oppressed.

The integrity of justice administration in one of the first criteria that determine investment destinations, and as we said at the beginning, there is so much accumulated wealth in the world today seeking a place to nest. Countries that succeed in the long run are the investors' haven. The opportunity for us to attract this investment is so huge because of the absorptive capacity of the Nigerian economy. The linkage between effective administration of justice and economic prosperity is what this discussion has been more about, and I hope emphasises the imperative for the judiciary to pro-actively position itself to facilitate economic growth.

I have raised five broad challenges and issues we face in our bid to achieve a better administration of justice, the first being a more aggressive adoption of ADR and to cascade the Multi-Door Courthouse mechanism. Others are governance and the question of succession into leadership, judicial reforms especially those reforms aimed at preserving the sanctity of the judiciary, and capacity building especially in the light of the rapid changes in our world. The fifth challenge is the combination of discipline and the provision of those tools that will facilitate the speedy administration in the Third Arm of government. The interesting thing is that challenges also represent great opportunities for growth and improvement, and I believe we have tremendous scope in these areas to raise the effectiveness of the judicial process.

PAPER V

CRIMINAL JUSTICE ADMINISTRATION: THE ROLE OF THE POLICE, MINISTRY OF JUSTICE, JUDICIARY AND THE PRISONS

Hon. Justice Hannatu A. Balogun

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CRIMINAL JUSTICE ADMINISTRATION: THE ROLE OF THE POLICE, MINISTRY OF JUSTICE, JUDICIARY AND THE PRISONS

Hon. Justice Hannatu A. Balogun

Introduction

It gives me great pleasure and indeed I consider it a rare privilege to be invited to come and share my thoughts on this very important topic. It is my hope that the bit I shall share will generate discussions that will go a long way in improving justice administration in the country.

It has been said over and over again that the judiciary is the last hope of the common man. Indeed, a good and effective justice delivery system is a *sine qua non* for the growth and stability of any democratic state. I consider the timing of this paper to be apt in view of the present review being made to the criminal justice administration system which has given rise to the draft administration of criminal justice bill. Section 2 of the bill captures the essence of the criminal justice administration in the following words:

> To ensure that the system of administration of criminal justice in Nigeria promotes the speedy dispensation of justice, protection of the society from crime and protection of the rights and interests of the defendant and the victim.

I hope that the distinguished participants will bare their minds on various aspects of the topic and at the end of the day, we all would have made our own contributions to the draft bill.

Definitions

Criminal Justice Administration

I understand the phrase "criminal justice administration" within our context to mean the whole process of handling crime from the time it is committed until the individuals involved are reintegrated back to the society or otherwise dealt with according to law.

It has been opined by a learned author that:

> the criminal process is the basic instrument by means of which the society seeks to sift the criminals from non-criminals for the purpose of checking anti-social conduct proscribed by the society through its laws. Therefore the criminal process should be recognised as a diagnostic instrument. Such an instrument definitely requires improvement and even perfection since a faulty instrument will result in incorrect diagnosis, and consequently prognosis[1]

In this definition, the learned author likened the process to a medical diagnostic process which has as its aim the eventual healing of the society from the illness of crime. He sees the whole criminal process as a diagnostic instrument which itself should be sound otherwise it will lead to the wrong diagnosis and in the end the wrong treatment. In other words, the system itself if misused, can lead to the society getting worse instead of getting better.

I agree with Professor Adeyemi and I think that our criminal justice system has not been able to cure the society of crime due to its many constraints some of which I shall discuss later. Our national experience has shown that many persons who have gone through the system have become worse rather than be reformed and reintegrated. They have come out of the system only to re-infect the society with as it were the same virus or a worse one.

1. A. A. Adeyemi in the criminal process as a selection instrument for the administration

Crime

Crime is defined by the learned author in the following words:

> Lawyers despite their quibblings on definition however seem to have accepted by conduct an operational definition, best expressed and explained in the words of Terrence morris that, 'crime is what society says is crime by establishing that an act is a violation of the criminal law. Without law, there can be no crime at all.

This is true, for the constitution in section 36 re-enacts the common law principle of *noelola poena sine lege and nullum crimen sine lege*. Crime is defined by section 2 of the criminal code as an '*act or omission which renders the person doing the act or making the omission liable to punishment under this code, or under any other order in council, ordinance, or law or statute.*'

Simply put therefore, a crime is therefore any act or omission which is proscribed by law and which attracts a punishment.

The Role of the Police

Traditionally, the police are the first contact a suspect has with the criminal justice system. The Nigerian police force was established by section 214 of the 1999 constitution. The powers and duties of the police in the criminal justice system is as contained in section 4 of the Police Act which include the prevention and detection of crime, the apprehension of offenders, the preservation of law and order, the protection of property with which they are directly charged.

The police being the very first actors in the administration of justice have a very crucial role to play because a case that is improperly investigated is doomed for failure. Similarly, if the suspect has the misfortune of being handled by a police officer or officers who are either ignorant of their roles or who have no regard for the person's rights as enshrined in section 46 of the constitution, then he or she has had it.

For the police to effectively fulfill their role under the law, they need to be properly trained and equipped. It has been stated thus:

> The object of police powers is to give the means of catching and convicting offenders without sacrificing standards of justice and the basic safeguards of the common law and the constitution, bearing in mind not only the natural tendency of those conferred with powers over others to abuse them but also the lack of ethical training and discipline of a force which is called upon to exercise powers of the same magnitude as those entrusted to judges and magistrates that is to say, people specially trained and chosen for their impartiality and sound judgment."[2]

From the Provisions of the Police Act, the role of the police in the administration of justice can be divided into four major groups:

a. crime prevention and the preservation of law and order;

b. Investigation and crime detection;

c. Arrest and detention of suspects;

d. Evidence production and prosecution.

Constraints

The question thus is how have the police fared in fulfilling their role?

Faulty Strategies

It is true that the police have performed fairly well in the area of preservation of law and order, however, in the area of crime prevention, it is quite a different story. It would appear that crime is still on the increase despite several strategies like operation fire for

2. Hon. Justice Saka Yusuf in the role of the police in the administration of justice in Nigeria.

fire, operation sweep etc. I think there are many reasons for the above, varying from poor crime detection strategies to lack of adequate training, to inadequacy of facilities to corruption, non chalant attitude in some cases, faulty or corrupt information system etc.

It would appear that the police seems to be overwhelmed by the increase in crime in the country. In his paper, the relationship between the police and the judiciary, the former Inspector-General of Police Mr Ibrahim Coomassie, *NPM mni.* stated this:

> Today, we have the onerous duty to police a country richly blessed by nature and a people variously rich and poor, in a largely deteriorated economy, where there is perennial unemployment and a pervading air of general decadence, dishonesty, and criminality. Youngsters of today leave school to turn to crooks and criminals as if that is now taught in schools. We are apprehensive of cult practices in the schools, an avenue for not learning to be brigands or frauds. All sectors have been ravaged by corruption, theft of public and private funds, fraud and the like of them and we have to police them all.
>
> There has been so much political turmoil and intolerance... we have had untold class contradictions,... political logjams, thuggery, robberies and assassinations, indiscipline and corruption, tribal and communal clashes, destruction of farmland by cattle, students and labour unrests as well as religious fanaticisms, where most of all these have been violent. And of recent the new crime of terrorism has come visiting us with its usual devastation...
>
> The foregoing represents on array of undesirable social and political situation for any country and its police. The likes of them if perennial, lead to confusion.

Lack of Equipment

I have listened to several victims of armed robbery who upon calling the police got several responses like 'we do not have a vehicle or fuel'. In one case the policeman asked if the victim could send a vehicle to pick up the policemen. The situation became so bad that

people generally feel that criminals only get apprehended by sheer luck or perhaps the hand of God. I was however pleasantly surprised when the police actually responded to my neigbbour's call for help recently.

Lack of Adequate Funding

Similarly, one of the first questions a person would be asked is if he or she suspected anyone. A negative response to that question is usually seen as a failure to cooperate with the police while any person mentioned is usually treated as if he was already guilty. In many cases demands for money to 'assist' in investigation is made after complaints of lack of funds is made to the already suffering victim. These demands whether genuine or not should never be the case. For justice to be properly administered, adequate funding of all the relevant agencies is a must.

Corrupt or Faulty Information System

Still another constraint is that of faulty or corrupt information system. The police often rely on informants some of which may be corrupt and may even report persons they have scores to settle with. In a paper on the topic Hon. Justice S. Yusuf quoted late Hon. Justice T. O. Elias thus:

> the police are in most cases led into making arrests by private informants who for one reason or another disappear later or withdraw vital elements of their original statements. These informants are always persons with personal grudges against the accused. They often make reports out of mischief or malice or employ the police consciously and deliberately to serve their private ends which are beyond the scope of criminal law.'[3]

Ignorance

I am sure your Lordships have time and again had to intervene in

cases where applications have been brought requiring you to declare that the police are not debt collectors. People for various reasons prefer to go to the police to collect their debts. This may be due to ignorance or due to delays in court procedure or their lack of understanding of the court processes to perhaps knowing someone within the police who in their opinion might 'help.'

Human Rights Abuses

Other constraints include the failure to respect the fundamental rights of suspects to fair hearing and the treatment of suspects as convicts. In many cases bail is refused or used as a money making avenue. As Hon. Justice A. Aniagolu, JSC (rtd) once put it:

> 'one aspect of criminal justice where the police come in readily is the issue of grant of bails by the police. It has now become standard practice by the police that before granting bail to a suspect or indeed to any arrested person even if the arrest was unwarranted having regards to the facts of the case, the police collect or extort money from the individuals before releasing them on bail. The usual practice is for the police upon a complaint lodged in a police station of an allegation of the commission of an offence to arrest as many people as possible – whether all those people have anything to do with the matter or not, lock them up in the police cell, and proceed to demand bail fees from them before they could *be released on bail.* The monies they collect – running sometimes into thousands of naira – they keep to themselves.[4]

Similarly, the Supreme Court in the case of *Ikomi* v. *The State* (1986) 3 NWLR pg 340 held that courts have a duty to protect the rights of an accused person and prevent the police from playing 'Rusian roulette' with people's liberty.

4. Constraints in the administration of justice; ANJC 99.

Holding Charges

Other handicaps to justice administration from the police end include the long unconstitutional detention of suspects in police custody, the detention of persons on FIR or holding charges in prisons vide magistrate courts when the investigation is 'still in progress'. This practice is undesirable as many times the persons who are to be presumed innocent by our constitution are kept in prison for indefinite periods of time. This practice has been met with disapproval many times. In the case of *Anaekwe vs. Cop (1996) NWLR (PT 436 320 at 332*. Honourable Justice Niki Tobi, JSC (then JCA), said:

> It is not the function of the prosecution to rush a charge to a magistrate court, a court which has no jurisdiction to try murder cases and play for time, while investigation is in progress. The unique police phraseology of a 'holding charge' is not known to the criminal law. It is either a charge or it is not. There is nothing like a holding charge. The so called charge ... before the magistrate court Onitsha is moribund and the law treats it so.

Torture

The extraction of 'confessional statements' which are often retracted leading to a trial within a trial. In a case I handled as a state counsel we had to conduct trial within a trial about 7 times as there were 9 accused persons. Needless to say that it took years to be concluded.

Falsehood

There have been cases where the police have framed people or have participated in unlawful prosecution. Sometimes identification parades are manipulated while evidence has also been known to have been planted in a few cases. I have seen live cases on this. I even confronted the IPO on the matter. However, before I could make a report, his maker summoned him before the highest court

In some cases, there is manufacture of evidence. In his article the Judicial impression of the criminal process, Hon justice Adewale Thompson (as he then was) had this to say:

> Evidence has been known to be manufactured. In fact, a government analyst had been made to testify that the blood which he examined in a shrine belonging to 20 persons charged with managing an unlawful society was human blood whereas in fact the blood stains were those of their sheep and goats[5]

Inadequate Skills

Another constraint is the difficulties encountered by police prosecutors in prosecuting some cases that are technical especially those involving documentation. His Lordship Hon Justice A. Aniagolu in the above quoted paper summed up the position thus:

> The courts cannot function without the assistance and cooperation of the police force. The police has to assist the court in various forms and circumstances. The existence of a corrupt and uncooperative police force is undoubtedly a great constraint on the administration of justice. In the court's criminal jurisdiction, the police has to feature prominently in the arrest and investigation of cases; in the prosecution of those cases in the magistrate courts; and in many pre-trial activities. Unless the police carry out there duties honestly, the courts may never come to be seized with the true facts of a case and without these true facts, the courts may never be in a position to do justice. Where the police choose to be dishonest the administration of justice will undoubtedly be impaired. (at pg 89)[6]

The Ministry of Justice

The powers of the ministry to prosecute is derived from the constitution. Sections 150 and 195 establish the office of the Federal

5. Published in the *Nigerian Criminal Process*, edited by A.A. Adeyemi.

6. *Ibid.*

and state Attorneys-General respectively. By sections 174 and 211 the Attorneys-General are given the powers and duties to institute, undertake, take over, continue or discontinue any criminal proceedings other than a court martial in their areas of jurisdiction. The provisions also empower the AG's to delegate the powers to members of his department commonly called state counsel. The only guide given is that the exercise of such power he shall have regard to public interest, interest of justice and shun abuse of the legal process.

In the exercise of their duties as state counsel, they are expected to see themselves as ministers in the temple of justice first and foremost and thus present all facts within their knowledge notwithstanding that the facts are more favourable to the accused than the prosecution. In the case of *Enahoro vs. The State* (1965) *NLR 125 it was held that the duty of the state counsel is to present the facts of the case as they are to the court. Equally, in the case of Waziri v. The State*, it was held that the state counsel had a duty to be fair and impartial in his presentation of his case and must not necessarily secure a conviction at all cost. He equally must either present all facts including that which is more favourable to the accused before the court or make same available to the accused.

Although the police often prosecute cases especially before the magistrate courts, their powers are subject to that of the Attorney General. The police have in this regard, the duty of sending all case files to the office of the Attorney General for vetting and advice before they embark on prosecution.

Apart from their specific duties as state counsel, state counsel have a duty to conduct themselves as members of the distinguished legal progression. Thus:

> For there to be proper administration of justice, there has to be cohesion between bar and bench. Thus, the bar is duty bound to respect the bench. It is the duty of a legal practitioner to maintain a respectful attitude towards the court. This duty of respect is reciprocal. A legal practitioner has to be punctual in appearance, refrain from soliciting favours from the judge. As a minister in

> the temple of justice, the role of a legal practitioner should be the pursuit of justice. As such he must be candid and fair in the presentation of his case. It is not candid or fair for a legal practitioner to knowingly misquote the contents of a paper or the testimony of a witness, or the language of a decision or a textbook or with knowledge of its invalidity, to cite as authority, a decision that has been overruled or a statute that has been repealed.[7]

Constraints

The above duties are not without constraints. These range from insufficiency of working equipment to corruption. Many of our ministries of justice have a problem of shortage of counsel. This might not be unconnected with the poor salaries they receive compared to what private practice could fetch them. This apart, the ministries have very few law reports and other necessary facilities like libraries, computers etc. In many cases there is the problem of inexperience as the senior counsel often leave for greener pastures. There are also a few bad eggs that will receive money to give an advice terminating an otherwise good case. In some cases, this is the lack of necessary guidance by the AGs who see themselves more like commissioners than AGS and will not lead their counsel to court even for the most sensitive of cases. In a few cases, their appointments are only political in nature without regard to requisite experience.

There is also the problem of dwindling discipline in the civil service. Some counsel do no work and get away with it so others see no need to put in their best. There is also the near absence of continuing legal education as counsel are rarely sent on further

7. Rules of professional conduct in the legal profession as quoted by Mrs. B. Sa'idu in administration of justice in Nigeria: Role and constraint of the public and private bar.

training to enhance their performance. Sometimes, there is also a lack of proper coordination between the ministries and the police. This leads to trading of blames between the two when anything goes wrong. Several times when on prison visit, the two would trade blames as to who was responsible for the delay in the prosecution of those awaiting trial or who was responsible for a missing case file.

Another important constraint in the administration of justice is the misuse of the powers of the AG to discontinue a case known as *nolle prosequi*. In some cases this power has been abused for personal or political reasons. It would however appear that the tendency is dying out or is it that people no longer complain?

By far the most damaging of the constraints is the attitude of some of the counsel to their cases in courts. In many cases they hardly show up and when they do, they are not ready to go on for one reason or the other. Sometimes they find it difficult to get their witnesses. In many cases, the IPOs would have been posted out of the states before the cases get to court and money will not be made available to them to come. This coupled with the problem of non payment of witness expenses greatly hinders criminal justice administration.

In his paper titled "The relationship between the police and the judiciary", the former Inspector General of Police (quoted *supra*) narrated an experience where a court had this to say about a state counsel:

> When this case came up, the prosecution was not ready to proceed with the case. This case has suffered series of adjournments at the instance of the prosecution.
>
> Today, the State Counsel is not in court and has not written and none of the witnesses is in court, in spite of the order made on the 15th of March 1995 that the prosecution's case shall be closed and the defence allowed to start their defence. By virtue of the fact that the accused persons are in court but the state counsel has not written and no witness for the prosecution is in court, I

> hereby dismiss the charge under s. 280 of the Criminal Procedure Law and discharge the accused persons accordingly.[8]

I need not say more for I know we are all familiar with this scenario.

The Judiciary

By section 6 of 1999 Constitution, Judicial powers of the federation and the states of Nigeria have vested in the courts. Chapter 7 of the same constitution specifically creates the superior courts of record and makes provision for the creation of all other courts.

The Judiciary is certainly the most important organ in the administration of justice. It is the court that is well positioned to protect the rights of its citizens and forestall executive tyranny.

In the criminal process, it is the judge that is saddled with the responsibility of listening to the case both of the prosecution and the accused. The court's role in this regard includes to adhere to the constitutional requirements as enshrined in section 36 of the constitution. The court shall ensure that a person charged is given fair hearing and the case shall be held in public (except where public interest, interest of a child, and protection of a private life etc are involved) and concluded within a reasonable time.

The court also has the duty to accord the accused person other rights like the presumption of innocence, right to a counsel of his choice, (except for legal aid where he has no counsel and is charged with a capital offence), interpreter, etc. In summary, the judiciary is to ensure that justice is always done both to the accused and the society. The key is thus evenhanded justice. This view was expressed by Hon. Justice Aniagolu when he wrote:

> A judge who does not believe in evenhanded justice and does not bother to work hard to achieve it, who deliberately strays away

8. As in 4 *Supra*.

from the path of rectitude, who panders in the words of the honourable Thurgood Marshall, justice of the supreme court of AMERICA to the sirens of power and influence' in the discharge of his judicial duties is wrecking society from the very roots and is committing a judicial coup d 'etat on the constitution. He is committing an act equivalent to that of armed saboteurs but only the difference that he is overthrowing society, not by direct armed conflict, but by corrosive means, namely that of undermining society, for its eventual breakdown by the insidious method of effecting its decay from within. In addition to striving to do justice and being fair minded, a judge must be knowledgeable, industrious, hardworking independent and above all God fearing. In the words of his lordship "there is no other job on earth having a direct bearing and connection with Almighty God, as that of a judge sitting on that bench, a judge is the keeper and the custodian of justice which he administers on behalf of Almighty God, as God would, were He to come down on earth and sit on that same bench, God as it were, has delegated His job to the judge who receives it, and by his oath of office, has promised to properly represent Him on that bench."

Similarly, in the words of Hon. Justice Akanbi JCA (rtd):

> Indeed it has been said that justice is an attribute of our creator the Almighty God. And if that is accepted as being axiomatic, it must necessarily follow that all of us must not only be decent, honest and good men and women of integrity, but must also be God-conscious, bearing in mind always that we are in the final analysis accountable in the performance of our judicial assignments to the All-seeing God, and then to our profession and the nation.[10]

Constraints

There are several constraints that hinder the smooth administration of justice in our courts.

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9. *Ibid* at page 92.

10. Commentary on Hon. Justice A. Aniagolu's paper, *supra*.

Delay

Since we are generally agreed that justice delayed is usually justice denied, any delay in the handling of our cases will hinder the administration of justice. In many serious cases, the accused is incarcerated in prison pending the conclusion of his trial. This, coupled with any delay in his trial will surely be unjust to him.

The Honourable Chief Justice of Kogi state Hon. Justice U. Eri while commenting on the role of the judiciary under the constitution had this to say:

> One of the most nagging and intractable problems being faced is that of delay. The problem has become perennial, often leading to frustration and disenchantment with the system. There is a tendency in some quarters to hold the judiciary entirely responsible for this delay. While I cannot completely exonerate the judiciary, I can confidently assert that it is not 100% guilty. It seems clear to me that the problem of delay in the court cannot be effectively tackled until there is a realisation that the bench, bar, police and the prisons are together.

His Lordship then went on to say that some of the delays are inherent in the system we operate. For example, an accused person must be accorded his rights to a counsel, interpreter, preparation of his defence etc. All these could lead to adjournment. In that paper, his Lordship demonstrated to us that delays could be minimised if all actors did their parts. Thus, in the case of *The State* v. *Benjamin Oyakhire and Ors no HCL/6/2001:* a case involving robbery and homicide, the case was concluded in three weeks. In that case, a total of 9 persons testified.

Insufficiency of Funds

Although a lot has been done by this administration to improve the emoluments of judges, there is still insufficiency of funds to run the courts. Up until now, the capital resources are still not being controlled by the NJC which body knows where the shoe pinches as it were. Many courts face insufficiency of court rooms, library books, law reports and other necessary facilities.

Long hand Recording

Even though the world has become mainly computerised and Nigeria is fast becoming so, it appears the judiciary in its traditional conservatism is lagging behind. Most courts in Nigeria are yet to be computerised. Most still record proceedings in long hand. This in no small measure contributes to the delays being faced in the administration of justice generally and especially in the criminal justice system since in many cases, persons awaiting trial for serious offences are detained for year. Conservatism should however be used positively and not to hinder progress, so says the honourable Chief Justice of Nigeria Hon. Justice M.L. Uwais, *GCON*, when he stated thus:

> The legal profession takes pride in the fact that ours is a conservative profession. What this means is that we have always resisted those tendencies that will destroy or compromise the integrity and dignity of the bar and bench. It does not mean that we are averse to reform. On the contrary, we have always welcomed reform, wherever it has been for the better. We all want to decongest our courts, the prisons and police cells. We want to remove all obstacles that stand in the way of speedy dispensation of justice.... Judges, lawyers and other stakeholders in the legal and judicial system must therefore continually improve their learning and acquire new skills in order to keep pace.[11]

Corruption

The judiciary like other organs responsible for the administration of justice has its own bad eggs. Some registry staff and even judges especially of the lower courts have been known to be corrupt. This

11. Keynote address at the National summit on legal and judicial component of EMCAP

ought not to be so. If the judiciary which is the last hope of the common man is corrupt then the common man is doomed. In the words of Hon. Justice Akanbi, a corrupt judge "is an afflicted person - just like the carrier of the AIDS virus or a kleptomaniac. He suffers from a deadly disease.. His conscience is warped. His judicial oath means nothing to him and so he hardly realises that he is an obstacle to justice, and if he is not caught in the act, he remains a perpetual obstacle in the way of justice until perhaps nemesis catches up with him.[12] "It is however gratifying to note that the trend appears to be going down.

Poor Attitude to Work

Despite the reforms going on and the almost oppressive supervision of the superior court judges, some judges still have a poor attitude to work. They are lazy, they hardly sit or sit late without a good reason and they grant adjournments for the flimsiest of reasons. This does not augur well for the system and certainly gives the judiciary a bad name. While discussing the subject of delays in his paper, Hon. Justice T. A. Oyeyipo had this to say" "Frequent delay in judicial proceedings in the Nigerian courts has militated against the proper administration of justice in Nigeria. The case of *Ariori and Ors* v. *Muriamo Elemo and Ors* is particularly illustrative. In Ariori's case, the action in the case was commenced on October 1960 and the Supreme Court delivered judgment 22 years after, that is, on 21st January 1983 and then ordered a retrial. In a very inspiring article titled Adjourning Justice, Professor Sagay an erudite scholar expressed his utter disapproval for the frequent adjournments of cases in our courts in the following words:

> I personally know of a high court judge who adjourned a case indefinitely on the application of the defense counsel whose client's case was hopeless, on the ground that another case

12. As in 10 *supra*.

raising a similar issue was before the Supreme Court even though there was a clear decision of the court of Appeal on point which was binding on him. Usually, in this process of adjournments, dilatoriness and postponements, parties and counsel do die, leading to a fresh set of motions for substitution and further delays. It was this type of judicial indifference ... that led to the sad result in the notorious case of *Ariori* v. *Elemo*.[13]

I have personally inherited cases that have been in the system for over 10 years. Happily, none of them is a criminal case.

The Prisons

The prison has a very important role in the administration of justice. The prisons were created by the prisons Act. Their role includes the keeping or detention of persons convicted of offences for the purpose of retribution i.e. to serve as deterrent to others, rehabilitation to equip convicts with vital skills to enable them effectively reintegrate back to the society at the end of their sentences. The prisons have the role of equally keeping of detained persons who are awaiting their trials before the courts. Like the other organs, the prisons also face a number of constraints. These include.

Congestion

In a recent lecture,[14] the Ag Comptroller-General of prisons stated that as at August this year, there were about 38,721 persons in the prisons out of which 25,029 or 65% were awaiting trial. While 85% of these were awaiting trial for serious offences that are not ordinarily bailable. He stated that sadly, many of these have been

13. The relationship between the bar and bench in the course of justice. Induction course for Judges, 2004.

14. By Uche Kalu, Ag. Comptroller-General of Prisons at National stakeholders summit on the reform of the criminal justice administration in Nigeria..

incarcerated for more than 10 years. (An independent researcher[15] put the figure at 10,000). The Ag. Comptroller-General reported that Ikoyi prison which has an inmate capacity for 800 has 2200 inmates out of which only 60 are actual convicts while Kaduna prison with its capacity for 547 inmates houses 796 out of which 506 are awaiting trial.

While discussing alternatives to imprisonment, the Honourable Chief Judge of Kaduna State, Hon. Justice R.H. Cudjoe, *OFR*, had this to say on the state of our prisons:

> During my tour of prisons, I discovered that majority of the prison in Kaduna state are over populated. Most of the structures were built during the colonial era for a limited number of inmates. Ventilation is very poor and in some instances inhumane, for instance, where cells are built with corrugated iron sheets. The heat in those cells must be unbearable. The Kaduna central prison for instance, was built to accommodate 547 prisoners. Now the prison accommodates on the average about 800 inmates, comprising convicted prisoners and awaiting trial. A cell meant for 5 inmates is used to accommodate 7 to 10 inmates. There is no distinction between a first offender and a habitual or hardened criminal in the allocation of cells to inmates. Many inmates come into the prison healthy, only to be infected with one disease or the other during their sojourn in prison. Of course medical care for the inmates is either not available or very inadequate. Hence I have often granted bail to inmates or even discharged them to go out and seek medical care rather than allow them to languish and die in prison for lack of medical attention.[16]

Lack of Facilities

Due to lack of facilities, the prisons have not been able to carry out their reformatory and rehabilitative duties successfully. The various

15. Mr. Fapohunda, Managing Partner, Legal Resources Consortium at above National Summit.

16. Judiciary's perspective to alternatives to imprisonment, A.G.s National workshop, 2000.

workshops are ill-equipped and so the inmates cannot learn trades that will enable them cope with life outside. Akin to this is the insufficiency of black Maria to efficiently transport awaiting trial inmates to the various courts. In some cases, the vehicles are broken down and sometimes there is no money to fuel them. The buildings are sometimes old and dilapidated. The lack of medical facilities has already been highlighted above.

Recommendations

Having regard to the hindrances highlighted above, I wish to make some recommendations to remedy the situation. Some of the recommendations have already been discussed in a number of seminars, workshops and summits but I reiterate them to serve as reminders.

Computerisation

This is needed by all the four organs. Further, electronic recording as is being done in some courts in Lagos, Kaduna and the FCT should be embraced.

Joint Stakeholders Meetings

Should be held at state levels where strategies for improvement, budgeting, in-house problems will be discussed. It is important to stress that the meetings should not just be a blame-trading one but one aimed at strategic planning and progress. The administration of justice committees if strengthened can fulfill this role. States may wish to adopt the strategic planning council as we have in Kaduna state as its functions are wider than those of the administration of justice committee.

Training

More training is needed for all the stake holders to enable the officers function better. Personal training and research is vital to

improvement of the system. As Hon. Justice L. H. Gumi, has stated:

> With the current wave of change in the world and our society, a stagnant judicial force will be a disaster of an irredeemable nature. The whole universe has become a global village, we can no longer hide from the searchlight of development under the shield of inadequate funding, the Government must take adequate measures to ensure that judges and khadis and all the principal staff of the judiciary are computer literate now, not in some future time. We cannot afford to stand by and plead limited resources. We must brace up to the clarion call to modernisation.[17]

Amendments

Amendment of the relevant laws to enhance the system as is being proposed in the administration of criminal justice bill is necessary. The draft bill provides, *inter alia,* for:

(a) Monthly reports on all arrested persons by heads of police stations to the closest magistrate and eventually to the chief judges.

(b) Monthly visits by Chief Magistrates to police station.

(c) Prohibition of arrest of persons solely for affinity with runaway suspects.

(d) Inclusion of plea bargaining in some non capital offences under stringent conditions to forestall abuse.

(e) Introduction of alternatives to imprisonment like the suspended sentence, parole, community service, etc.

(f) Introduction of witness protection strategies.

(g) The abolishing of holding charges.

(h) Adequate victim compensation and victim involvement.

17. Keynote address delivered at the 2003 refresher course for Judges.

Other alternatives to imprisonment like victim-offender mediation, coupled with restitution and compensation as well as life skills acquisition system as being practiced in places like South Africa and Botswana should be introduced especially for young adults, first offenders and compoundable offences. There is the need to expand the scope of compoundable offences and to train the police in handling such cases.

In the guidelines on the role of prosecutors adopted by the United Nations congress on the prevention of crime and the treatment of offenders, prosecutors are enjoined to always explore alternatives to prosecution. Rule 18 state:

> In accordance with national law, prosecutors shall give due consideration to waiving prosecution, discontinuing proceedings conditionally or unconditionally, or diverting criminal cases from the formal justice system, with full respect for the rights of suspect(s) and victim(s). For this purpose, states should fully explore the possibility of adopting diversion schemes not only to alleviate excessive court loads, but also to avoid the stigmatisation of pre-trial detention, indictment and conviction, as well as the possible adverse effects of imprisonment.

Police Prosecution

This should as much as possible be restricted to lawyers serving in the police force. In this regard, the non lawyer prosecutors should be trained as lawyers. Lawyers in the police should be encouraged to participate with other lawyers in continuing legal education. They should be constantly trained and retrained.

Prison Visits

Prison visits by Chief Judges and other judges will help in decongesting the prisons. The other stakeholders to be present to answer any questions relating to their departments.

Appointments, Promotion and Discipline

More judges need to be appointed. The strict measures of the NJC in this regard aimed at getting very competent judges is a welcome development and should be emulated by state JSCs in the appointment of lower court judges. Similarly, the police should be more careful and transparent in its recruitment. There should be more discipline to erring officials of all the stakeholders. Promotion and reward of deserving officers should also be given priority in order to encourage excellence.

Control of funds

Control of all funds by the judiciary will go a long way in solving problems like inadequacy of court rooms and other facilities and pave the way for computerization and better service delivery. Quick release of the funds of all the organs will enhance efficiency.

Provision of Equipment

Like libraries for courts and ministries, Black Maria and workshop and other materials for the prisons and relevant gadgets and equipment for the police will help.

Attitudes

A more positive attitude on the part of all stakeholders is necessary. They must be honest, eschew corruption, be fearless and hardworking. They must abide by the rules of their professions and ensure a high quality of work and conduct.

State Witness Expenses

This should be controlled by the ministries of justice. However, the criminal justice committees can decide to let the judiciary handle same if it is considered more convenient.

Specialisation

For administrative convenience and specialization, the State High Courts may wish to consider dividing their cases into divisions. This can however only be done where it is feasible. In Kaduna, we have specific courts that deal with criminal cases. They are specifically located near the prison and CID office.

Matters Arising/Food for Thought

Bearing in mind the above, several questions come to mind which need pondering over:

(a) If the role of the criminal justice system as a whole is the eventual reduction of crime to its barest minimum, how well have we fared since the return to democratic rule in May 1999?

(b) In view of the recent unsolved murders of very highly placed Nigerians including a serving Attorney-General of the Federation, how can we assess the role of the police in crime detection?

(c) How can the system effectively handle the frequent inter-communal and inter-religious violence being experienced in the country?

(d) In view of the recent indictment of some prominent Nigerians who have immunity under the constitution will the effectiveness of the system not be slowly eroded?

(e) Do the above not show some inequality before the law and serious symptoms of the 'Nigerian' 'who you know' or 'who you are' syndrome?

(f) If so, is the system not in danger of eventual collapse?

Conclusion

I shall conclude by quoting Hon. Justice Ilori, (rtd) who summed up the position aptly thus:

> Every cog on the wheel of effective administration of justice is a constraint to attainment of the supremacy of the rule of law. Conversely, everything which enriches the administration of justice promotes the supremacy of the rule of law. The quality of justice administered within any society is the yardstick by which its democracy is determined. The quality of justice itself is determined by whether justice is administered within the society without constraints, or subject to coercive impediments.[18]

Finally, it is my hope and prayer that justice will roll down like water in Nigeria and righteousness will flow like a never ending stream.[19]

Thank you for listening and may God bless us all, and help us to do justice in His fear and according to law, amen.

18. Bar and Bench in the administration of justice.

19. The Holy Bible, Amos 5: 24.

COMMENTARY (I)

Mr Sunday Ehindero, ***NPM, FWC***
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Introduction

I am highly honoured to present a commentary on this important topic presented by no less a person than Hon. Justice Hannatu A. Balogun. The theme of the conference: **Sustenance of Good Governance: The Role of the Judiciary,** rightly points to the fact that the judiciary is a veritable instrument in bringing about Good Governance. It is in this light that I accord great honour to respectable members of the bench at this conference for being alert to their traditional responsibilities.

My mandate is to comment on the paper titled 'Criminal Justice Administration: The Role of the Police, Ministry of Justice, Judiciary and the Prisons: The paper no doubt has been well delivered.

The Role of the Police

I have the benefit of reading the presentation of the Hon. Justice Balogun, no doubt a good paper. She started with a definition of Criminal Justice administration and crime ending up with a conclusion that those who go into prison come out worse of. She then discussed the Role of the police emphasising the need for the Police to be properly trained and equipped. She identified constraints to police effectiveness including faulty strategies, lack of equipment, inadequate funding, corruption, human rights abuses, holding charges, torture, falsehood and inadequate skills.

The Role of the Ministry of Justice

She also discussed the role of the ministry of justice. But erred when she said:

> The Police have in this regard the duty of sending all case files to the office of the Attorney-General for vetting and advise before they embark on prosecution.

I shall discuss this in a moment. Thereafter she noted the constraints of the ministry of Justice including insufficient working equipment, corruption, improper training of counsel, lack of coordination between the ministry and the police, attitude of counsel to cases in court, non payment of witness expenses.

The Role of the Judiciary

She also discussed the role of the Judiciary, noting the constraints of delayed justice, insufficient funds, long hand recording, corruption and poor attitude to work

The Role of the Prisons

After discussing the role of the prison she identified the constraints including congestion, lack of facilities.

At the end of it all she made the following recommendation:

(i) Computerisation of the (4) organs;

(ii) Training for all stakeholders;

(iii) Abolition of holding charges;

(iv) The use of alternatives to imprisonment and diversion schemes for young adults, first offenders and for compoundable offences;

(v) Only Police lawyers should prosecute cases in court;

(vi) Prison visits by Chief Judges;

(vii) Transparency in the appointment of Judges and recruitment of police Officers.

(viii) Proper funding of the four (4) organs.

(ix) Attitudinal changes by all stake holders.

Matters Arising

She itemised the following as matter arising:

(i) How well has the Criminal Justice fared in reducing crime since the return to democratic rule in 1999?

(ii) How can the police be assessed in crime detection in view of the recent unsolved murders of highly placed Nigerians including the Attorney-General of the Federation?

(iii) How can the system handle the frequent intercommunal and inter-religious violence?

(iv) The question of constitutional immunity of prominent Nigerians recently indicted?

She concluded with hope and prayer for righteousness to flow like never ending stream quoting Hon. Justice Ilori that the quality of justice administered within any society is the yardstick by which its democracy is determined.

The Approach Adopted in the Commentary

My approach is to start from this conclusion of attitudinal change and thereafter discuss the following:

a. Repair as it were her appraisal of police role and the role of the Ministry of Justice

b. The Holding charge issue and Police prosecution.

c. Answer the four (4) questions itemised in matters arising above.

The need for Attitudinal Changes in the System

It is agreed that our Criminal Justice system is not working well because the end result is congestion of cases in courts and congestion

in Prison. Unless there is a fundamental change in the way we traditionally do things and a substitution of new ways of doing things, the prisons will continue to be congested. That is why I advocated for the Police Force a paradigm shift. Of course there has to be a reformation of the law.

A paradigm is a model, a theory, a perception, an assumption. It is not the reality. It is a way we understand, perceive or interprete the world. It is like a map, a map is not the territory but an explanation of certain aspects of the territory. If you have a wrong map of Abuja, however diligent you are, it will not take you to your destination.

Our world is full of examples of paradigm shift. And every significant break-though in the field of science is first a break with tradition, with old ways of thinking, with old paradigms. Our constitutional democracy is a result of paradigm shift. The traditional concept of government for centuries was a monarchy, the divine right of Kings. Then a different paradigm was developed – government of the people, by the people, for the people – a constitutional democracy was born creating a standard of living, of freedom and liberty, of influence and hope unequalled in the history of making.

Thus paradigms are the tools that provide the framework for established models of operating. And paradigm shift represent a fundamental alteration in underpinning concepts and beliefs and their substitution by new ones.

Since my assumption of office as the 12th indigenous IGP in January 18, 2005 my approach to policing has been to have a paradigm shift in the way we police this country. Developing morally principled and commendable policing practices were my focus, the development of police officers with justice, integrity and humanity as their cornerstone attracted our attention. A transformational police force that think strategically and act positively is our vision. The need to change from *para-military* policing to community policing. A paradigm shift from reactive policing to sensitivity and sensibility policing. We must change the conventional wisdom and

stereotypes about our policing styles and develop a strong performance culture based on probity. This vision has a paradigm shift from the motto of 'Fire for Fire' to "To Serve and Protect with Integrity." The vision is based on the principle of effectiveness, accountability and responsiveness of the police where the notion of Justice, fair play and the pursuit of the common Good or humanity is the focus.

This vision is articulated in the following 10 point programme and the strategies for the implementation.

S/N	Plan	Strategies
1.	Effective crime prevention and control through intelligence-led policing.	• Strengthen the intelligence and investigative capacity of the Force through training of officers; • Provision of intelligence and investigation equipment and tools; • Efficient deployment of officers and resources; • Enhance capacity for investigation, detection and apprehension of criminals; • Partnership with the public in ensuring that the opportunity for crime is not created; • Improved criminal record data base; • Promote Inter-security agencies' collaboration; • Reorganise and strengthen the research, planning and statistics department of the Force in order to ensure that reliable crime statistics are produced and disseminated, and also to ensure that adequate and reliable information for intelligence, planning and operation are available to the Force.

2.	Combat of violent and Economic crimes	• Effective surveillance, intelligence and patrols to reduce crime and the fear thereof; • Effective control of illegal firearms; • Seek the assistance of the Federal Government, though the Ministry of Police Affairs and relevant national Assembly Committees on Police; the state and local governments as well as private organisations for adequate equipping of the force with transport and communication equipment and crime fighting facilities; • Organization of the police Mobile Force and the regular patrol units to be public friendly and thus able to secure public support, trust, and assistance in crime fighting; • Maintain up-to-date records from landlords about their tenants and their occupations, so as to identify those without jobs but living above their means, and therefore subject to police surveillance; • Enhance quick response to distress calls and report of crime incidents; • Partnership with the public to enhance community-based information gathering on crimes and criminals; • Effective presence and patrol of borders to ensure that arms smuggling are controlled; • Effective Collaboration with law enforcement agencies in neighbouring countries to control trans-border crimes.

3.	Conflict prevention and resolution.	• Monitor potential conflicts and alert appropriate authority; • Training in interventions in situations of violent conflicts to ensure that they do not escalate, linger or cause serious harms and damage; • Maintain relationships with groups and organizations to develop trust and partnership in conflict resolution.
4.	Community policing and police-public partnership.	• Create, maintain and strengthen avenues (such as sports, PCRC, interactive sessions in community) for positive interactions between the police and various groups in society (e.g. transport workers union, students, religious and community leaders, private enterprises, market and traders association, etc.) in order to build trust and implement crime prevention and control measures that reflect the concerns and fears of citizens; • Review the curriculum for police training at entry and other levels to include relevant topics on human right; Nigerian history and culture; police-public relations; economic and political development and conditions in Nigeria so that policemen and women can better understand the people and context in which they work; • Machineries for public complaints against police misconduct (e.g. PMB A22; X-Squad, Public complaints bureau, National Human Rights Commission, Police Service Commission, Coroner's Inquest) will be reviewed and strengthened;

		• Effective control of police misconducts; • Improved police service delivery that is responsive to crime incidents and distress calls; patrols; enforcement of the rule of law and respect for human rights, especially relating to arrest, detention and interrogation; • Establish Family Support Units in the police force to cater for the welfare of women and children with the assistance of the National Human Rights Commission, UNICEF and NGOS.
5	Zero-tolerance for police corruption and indiscipline	• Review police training curriculum to include topics on democratic policing, community policing, human rights, and International legal instruments on conduct of law enforcement officer and the Independent Corrupt Practices and Other Related offences Act so that officers are well-acquainted with demands of efficient and accountable policing; • Review and strengthen internal discipline mechanisms; • Collaborate with the Police Service Commission to enforce discipline; • Collaborate with the National Human Rights Commission, mass media and NGOs to promote public enlightenment on the role of Police in society and citizens' duties toward the police; • Training of police officers in proper handling of firearms, crowd control, highway patrol, traffic control, etc.; • Rugby-tackle of corruption on our roads and police stations.Re-organize the Federal Highway patrol System.

6.	Improved career development, salary and welfare packages to motivate police officers and thereby promote better service delivery and discipline.	• Seek the assistance of Federal Government (through the Ministry of Police Affairs, and the national Assembly Committees on Police) for adequate funding of the Nigeria police Force so that (a) police are well remunerated; (b) salary and allowances are paid as at and when due; (c) training and retraining programmes are regularly conducted; (d) adequate and appropriate facilities, logistics, communication and transportation, intelligence and investigation tools, and accommodation are provided, and (e) deserving officers are promoted without delay. • Enhance opportunities for professional training
7.	Re-organisation of the investigation outfit of the Force to ensure prompt and timous investigation of cases.	• Transfer of policemen who have acquired professional skills e.g. lawyers, computer scientists, accountants, insurance officers, bankers to the CID; • Utilisation of police lawyers to vet complaint and case files to ensure weak cases do not go to court. • Fix time limit for police investigation; • Ensure investigators are not routinely transferred out of the CID; • Ensure witnesses are subpoenaed to court by investigators. Improve the detection and conviction rates.

8.	Contribute Positively to improving the quality of justice delivery in Nigeria	• By obeying lawful court order; • By educating policemen about the unconstitutionality of a holding charge; • By facilitating the conviction of the guilty and acquittal of the innocent. • By abhorring extra-judicial Killings, torture or inhuman treatment. • By giving effect to pre-trial rights of accused persons. • By participating in workshops, seminars and symposia organised by the National Judicial Institute.
9.	Empower field officers operationally by devolution of powers to improve the standards, reliability, consistency, and responsive-ness of the service.	• AIGs are to take decisions on matters relating to officers of the ranks of Inspector and below including discipline and promotion subject to the authority of the IGP. • Commissioners of Police of State Commands are to take decisions on matters relating to the Rank and File subject to the authority of the AIG.
10.	Re-orientate the FPRO to focus on improving public perception and image of	• By public enlightenment in schools, colleges and tertiary institutions the functions of the police and the civic responsibilities of students. • By promoting the programmes and policies of the force. • By promoting public respect for the law. • By involving the civil society, the academia, the PCRC, the NBA and the NUJ on ways to improve police image. • By developing activities to foster good police community relations. • By promoting good practices in the police force and disseminate them while discarding outdated and outmoded attitudes. • By improving public confidence and trust in the police.

The whole essence of the criminal justice system is the containment of crime and the promotion of human rights. There is thus a clash between two ideologies. Should the rights of suspects be diminished or should the struggle against serious crime be curtailed?

Whatever decisions are taken there is the need for the vision and mission of probity to permeate though the organs of the Criminal Justice System if the issues of corruption, poor attitude to work of the stakeholders, transparency and indiscipline are to be properly addressed. As far as the Police Force is concerned since my assumption of office, the following steps have been taken to ensure probity in the performance of police duties.

(a) Decentralisation of the Federal Highway patrol.

(b) Re-organisation of the police Mobile Force (PMF);

(c) Devolution of powers to CP Commands and AIGs in charge of the zones in the discipline and promotions of inspectors and other ranks.

(d) Reintroduction of promotion courses as means of promoting professionalism in the Force.

(e) Fighting corruption both internally and externally by

(i) Dialoguing with the National Union of Road transport Workers (NURTW).

(ii) paying course allowances to officers on course.

(iii) Monitoring the on-going in the quartermaster and police Pay Offices.

(f) Introduction of Chaplaincy and Imam into the force as a means of reducing corruption and Extra Judicial Killings.

(g) Re-organisation of the Force CID and the State CIDs to bring in professional accountants, computer scientists, bankers, lawyers etc.

(h) Addressing the issue of low take home pay of Police Officers by recommending to Government a review of Police allowances.

(i) Changes in the Police practices and procedures that congest the courts and Prisons.

(i) By utilising the workforce of 400 Police Lawyers to prosecute in Superior Courts.

(ii) Introduction of the practice of police Lawyers vetting complaints before they are passed for investigation so that weak cases, civil cases, do not go to court.

(iii) Working in partnership with the Legal Aid Council to facilitate the introduction of duty solicitor scheme into the Force.

(iv) Collaboration with the Nigerian Bar Association (NBA) and the National Human Right Commission (NHRC) in establishing human rights desk and Family support units into the Nigeria Police Force.

(v) Expansion of Community Policing to more States of the Federation.

(vi) Setting up of Task Forces to decongest Police Cells particularly in the Force CID

(vii) Encouraging collaborative ventures with Inspectors General of police in the West African sub-region in tracing stolen vehicles and reducing arms trafficking by effective border patrols.

(viii) Advising Government about the change in the dynamics of Crime in the Society within the last few years. Bank robberies have assumed a brigandage dimension necessitating a change in police strategy and the tools with which to combat crime.

(ix) Promotion of internet connectivity in the force.

(x) Curtail the transfer of investigators.

On the part of the government, the following positive measures have been taken.

(i) Provision of funds to Police Affairs to ensure a functional Police Forensic Laboratory.

(ii) Increase of the numerical strength of the Force from 112,000 in 1999 to 320,000 in 2005.

(iii) Provision of 1000 motor-cycles and two helicopters for Crime Prevention duties.

(iv) Award of contract for the reactivation of 100 armoured vehicles

(v) Provision of funds for completion and reactivation of barracks. Etc

Comments on the Role of Police and the Ministry of Justice

It is incorrect to say that Police have the duty of sending all case files to the office of the Attorney-General for vetting and advice before Police embark on prosecution. I am not aware of any law, regulation or statutory provisions supporting the above views. The practice of sending case files to the director of Public Prosecution (DOPP) is discretionary and not binding on the police.

It is quite true that the Attorney-General is the Chief Law Officer. But he is not the chief law enforcement officer. The law gives a wide range of discretion on the police on who to prosecute and the Attorney-General is not permitted by law to interfere with this discretion.

The Holding Charge Issue

The laws of this country do not intend that those awaiting trials should be kept in Prison custody. Prisons are meant as places of detention

for convicts. Our constitution forbade Police detention of arrested persons for more than 48 hours without arraigning them before a court of competent jurisdiction. It is however, known that in hard cases such as robbery and murder, police investigation cannot be completed within 48 hours. Moreover, police have no power to grant bail in such cases. Therefore, Police take them to court for the purposes of remand only. This practice is taken in reliance to section 236(3) of the Criminal Procedure Laws (CPL) of Lagos State or section 243 of the CPL, Law of Anambra State 1986 which provides that:

> If any person arrested for any indictable offence is brought before any Magistrate for remand, such Magistrate shall remand such a person in custody or where applicable grant bail to him pending the arraignment of such person before the appropriate court or tribunal for trial.

The Court of Appeal had ruled that the charge under which the Police arraign such a suspect in court which has no jurisdiction to try him for the purposes of remand is a holding charge which is unknown to the criminal law. Such a charge is not only moribund but unconstitutional. Of recent, the Court of Appeal held in *Johnson v. Lufadeju* that Section 234(3) of the Criminal Procedure Law of Lagos State which permits the police to hold a person arrested for an indictable offence in detention under a holding charge without any information being filed against him in appropriate Court does not conform with any of the stipulated exceptions to the right to personal liberty guaranteed in section 32 or 35 of the 1979, 1999 Constitutions respectively. Consequently, section 236(3) of the Criminal Procedure Law of Lagos State is unconstitutional for being inconsistent with section 35 of the 1999 Constitution.

What did *Johnson* v. *Lufadeju* decide?

There is uncertainty with regard to what this case decides. Did it decide that section 235(3) of the CPL of Lagos State is

unconstitutional or that the section is inapplicable to the case of Johnson? It is a known fact that the laws should be a guide to police action. Where the laws are not clear, police actions may sometimes be misguided. At the moment, the Judges of the lower courts are in confusion in relation to what to do with such cases brought before them where they lack jurisdiction to hear and determine the cases. *Johnson v. Lufadeju* says strike out the case. The consequence is that the society will be flooded with robbers, murderers and one of the aims of the criminal justice of containment of crime could not have been fulfilled.

The purpose of section 236(3) of the CPL of Lagos Sate is to provide for the remand of persons arrested for indictable offences pending the arraignment before the appropriate court. The section is inapplicable to a suspect who is charged. Thus, where an accused person is charged with an indictable offence and is detained in custody awaiting trial, section 236(3) is inapplicable.

My submission is that because section 236(3) of the CPL of Lagos State is inapplicable to an Accused person who is awaiting trial after charge does not make it unconstitutional. The Police practice of a holding charge has to be abandoned. The modality for the new process recommended by the Court of Appeal in Johnson's case is being disseminated. That is, in remand proceedings the police need not charge the suspect after arrest for indictable offence but ought to file the request for the remand of the arrested person before the Magistrate and provide explanation and reasons for the arrest and the need for his remand.

The Lagos State Initiatives

Believing that section 236(3) of the CPL Lagos State is constitutional. the Lagos State proposes pre-remand protocols, the non-compliance of which may lead to refusal to remand. Magistrate may only remand on *'Probable cause'*. Thereafter, there are periodic reviews of detention. These are measures to ensure that arrested persons do not remain in custody indefinitely. Perhaps the lasting solution is for

the police to arraign suspects arrested for indictable offences direct before the High Court particularly cases of Murder and Robbery. There are more than 400 police Lawyers in the Police Force. It is gratifying that the cases of *Johnson* v. *Lufadeju*[1] and *the Federal Republic of Nigeria v. George Osahan and 7 others*[2] are on appeal in the Supreme Court.

Answers to the Four Questions in Matter Arising

How well has the Criminal Justice fared in reducing crime since the return to democratic rule in 1999?

There is no doubt that since the advent of democracy in 1999, there have been concerted efforts by all the agents of the criminal justice system to tackle the problem of congestions in courts and congestions in Prisons. Cases of fraud including '419', human trafficking and financial crimes have reduced drastically while most of the Kingpins have been convicted. It is to the credit of our Criminal Justice System that some of Nigeria's stolen money stashed abroad is being repatriated. With regard to the assassination of the Attorney-General of the Federation, the suspected criminal had been charged to court and where being prosecuted. Against all odds, the Nigeria police has done well in reducing crime by the arrest and prosecution of criminals, and embarking on a large scale recovery of illegal firearms and ammunition. This year alone a total of 780 arms and 36,346 ammunitions have been recovered.

Although he dynamics of robbery has changed, only last week precisely November 24, 2005 Police not only foiled armed robbery in Enugu but arrested the eighteen (18) suspects in Anambra State. Because of the brigandage nature of bank robbery, police do suffer reverses by the killing of some of our personnel and the degree of armament of the robbers. Annex 'A' is the comparative tables of crime administration for 2003 and 2004.

1. (2002) 8 NWLR (pt. 768) 192.
2. Suit No. SC NOSC/23/2004.

The Handling of Frequent Intercommunal and Inter-religious Violence

You will agree with me that such clashes are now far between. Such clashes were rampant at the beginning of the present administration when people had the freedom to express themselves after the military rule. Like a corked bottle of wine that had just been opened these emotions were expressed. The stage had been reached when the bubbles are settling down because the populaces are tired of killing one another. The political terrain that used to heat the system has also settled down. There is now mutual respect for diverse religious faith.

The Constitutional Immunity of Prominent Nigerians Recently Indicted

Section 308 of the Constitution of the Federal Republic of Nigeria confers immunity to certain group of leaders while in office like the President, Vice president, the Governor and the Deputy Governor. Recent events where some Governors were arrested outside Nigeria on alleged criminal offence of money laundering are unfortunate. It has left much to be desired as it is a dent on our corporate image. It calls to question the continued relevance of constitutional immunity for prominent Nigerians. Obviously, the authors of the constitution did not envisage that constitutional immunity would be abused with reckless abandon. It is my opinion that the Constitution provision would be reviewed so that when a public officer commits a criminal offence while in office, he or she would be prosecuted.

Annex 'A'

Table 5.1:

COMPARATIVE TABLE ON CASES OF ARMED ROBBERY 2003 AND 2004

OFFENCES	2003	2004	REMARK
Armed Robbery Report	3,497	3,142	Decrease
No of Persons Killed	482	543	Increase
No of Person injured	566	558	Decrease
No of persons Arrested	4,320	4,588	Increase
Total	**8,865**	**8,829**	**Decrease**

Table 5.2:

COMPARATIVE CRIME ADMINISTRATION SUMMARY FOR THE PERIODS OF 2003 AND 2004

OFFENCES	2003	2004	REMARK
Total No of Cases Reported	157,366	152,426	Decrease
Total No of Persons Arrested	206,331	220,642	Increase
Total No of Cases Prosecuted	102,305	104,018	Increase
Total No of Cases prosecuted	102,305	104,018	Increase
Total No of Persons prosecuted	133,577	129,826	Decrease
Total No of Cases Acquitted	15,688	6,976	Decrease
Total No. of Cases Convicted	32,416	26,079	Decrease
Total No Person Convicted	40,416	35,896	Decrease
Total No of Cases Awaiting Trial	58,309	36,858	Decrease
Undetected			
Total No of Persons Awaiting Trial	83,690	84,378	Increase
Total No of Cases Closed	4,840	5,882	Increase
Undetected			
Total No of Cases under Investigation	50,081	40,490	Decrease
Total No of Persons Under	73,132	90,521	Increase
Total	**977,712**	**943,720**	**Decrease**

Table 5.3:

COMPARATIVE TABLE ON OFFENCES AGAINST PERSONS 2003 AND 2004

OFFENCES	2003	2004	REMARK
Murder	2,136	2,550	Increase
Manslaughter	6	23	Increase
Attempted murder	233	315	Increase
Suicide	191	131	Decrease
Attempted Suicide	38	19	Decrease
Grievous Harm and Wounding	17,666	18,733	Increase
Assault	29,126	29,863	Increase
Child Stealing	39	45	Increase
Rape and Indecent Assault	2,253	1,626	Decrease
Kidnapping	410	349	Decrease
Slave Dealing	18	18	Stable
Unnatural Offences	306	265	Decrease
Other Offences	15,037	11,600	Decrease
Total	**67,459**	**65,537**	**Decrease**

Table 5.4:

COMPARATIVE TABLE ON OFFENCES AGAINST PROPERTY 2003 AND 2004

OFFENCES	2003	2004	REMARK
Armed Robbery	3,4976	3,142	Decrease
Demanding with Menace	80	56	Decrease
Theft and Stealing	33,324	37,289	Increase
Burglary	2,769	2,908	Decrease
House Breaking	4,706	4,713	Increase
Store breaking	2,790	2,968	Increase
False Pretence and Cheating	9,508	9,532	Increase
Forgery	570	650	Increase

Receiving Stolen Property	1,289	2,733	Increase
Unlawful Possession	4,142	5,358	Increase
Arson	1,499	1,289	Decrease
Other Offences	11,052	9,027	Decrease
Total	**75,226**	**79,665**	**Increase**

Table 5.5:

COMPARATIVE TABLE ON OFFENCES AGAINST LAWFUL AUTHORITY AND CURRENCY 2003 AND 2004

OFFENCES	2003	2004	REMARK
Forgery of Currency Notes	74	50	Decrease
Coining Offence	16	7	Decrease
Gambling	148	165	Increase
Breach of public Peace	7,298	6,050	Decrease
Perjury	50	4	Decrease
Bribery and Corruption	36	55	Increase
Escape from Lawful Custody	272	222	Decrease
Other Offences	3,322	1,843	Decrease
Total	**11,216**	**8,396**	**Decrease**

Table 5.6:

COMPARATIVE TABLE ON OFFENCES AGAINST LOCAL ACTS 2003 AND 2004

OFFENCES	2003	2004	REMARK
Offences Against Traffic Act	4,339	2,349	Decrease
Offences Against Towing Act	125	231	Increase
Offences Against Liquor Act	39	22	Decrease
Offences Against Dog Act	17	6	Decrease
Offences Against Narcotics Act	199	47	Decrease
Offences Against Firearms Act	58	355	Increase
Other Offences	293	64	Decrease
Total	**5,171**	**3,074**	**Decrease**

COMMENTARY (II)

S. Aliyu
Ag. Director, Public Prosecution of the Federation

Introduction

One of the most important impediments to the Criminal Justice administration is the awaiting trial phenomenon. So serious is this problem that it seems to defy solution. Accused persons are held for long periods in police cells without regard to the provisions of S.35 (4) and (5) of the 1999 Constitution that mandates they be brought to trial within 24 hours where a court of competent jurisdiction exists within a radius of 40 kilometres and, within 48 hours or such other reasonable time as the court may decide in other cases. It also provides for commencement of trial within 2 months of arrest in respect of non- bailable offences and 3 months in respect of accused persons on bail; who if not tried, shall otherwise be released either unconditionally or upon such terms and conditions as may be reasonably necessary to ensure that the accused appear for trial at a later date.

This provision of the Constitution has been mostly observed in the breach. The simple truth of the matter is that the police were hitherto unaware of the procedure to adopt in order to comply with the provisions of S.35 of the Constitution in cases where investigation is not completed within 24 hours. This has resulted in persons accused of non-bailable offences taken to courts that have no jurisdiction to try the offence on what is often called a "Holding Charge" which, at least, the Court of Appeal, has held to be a procedure unknown to our Laws. The result is that suspects are remanded in prison custody by courts that lack jurisdiction to try the offences of which they are accused and are often forgotten for periods of up to 8 - 10 years. This problem of awaiting trial inmates can be broadly categorised into two:

- those already in prison custody awaiting trials, and;
- those that are daily arrested for non-bailable offences that would eventually be sent into prison custody as awaiting trial inmates.

The question here is; is the Law absolutely silent on accused persons accused of non-bailable offences where investigation cannot be completed within the constitutionally provided period of 24 hours of which they are required to be taken before a court of Law?

The answer is no:

In the case of police officers, sections 129 and 225 of the CPC adequately provides for the procedure. And sections 143(c) and 255 provide a procedure to be followed by Attorneys – General. For the sake of clarity, I hereby reproduce the sections:

S.129 (1) Whenever it appears that an investigation under section 118 cannot be completed within twenty four hours of the arrival of the accused or suspected person at the police station, the officer in charge of the police station shall release or discharge him under section 340, or send him as soon as practicable to the nearest court competent under Chapter XV to take cognisance of the offence.

(2) The court may from time to time, on the application of the officer in charge of a police station, authorize the detention of the person under arrest in such custody as it thinks fit for a time not exceeding fifteen days, and shall record its reasons for so doing.

(3) If the court refuses to authorise detention of the accused under arrest, it shall make an order of discharge under section 45.

(4) If the police investigation is not completed within fifteen days and the court considers it advisable that the accused should be detained in custody pending further investigation, it shall remand the accused as provided in section 255.

S. 255(1) "If from the absence of a witness or any other reasonable cause it becomes necessary or advisable to postpone the commencement of or adjourn any inquiry or trial, the court may if it think fit by order in writing stating the reasons therefore from time to time postpone or adjourn the same on such terms as it thinks fit for such time as it considers reasonable and may by a warrant remand the accused if in custody.

(2) Notwithstanding the provisions of subsection (1), no court shall remand an accused person to custody under this section for a term exceeding fifteen days at a time.

It is submitted that the combined effect of sections 129 and 255 of the CPC is to provide for bringing an accused to the nearest court competent to take cognisance of the offence and the court may then order the detention of the person under arrest in such custody as it think fit for a time not exceeding 15 days or, upon further applications, for subsequent periods not exceeding 15 days for each order of detention.

At least five issues stand out clear from the interpretation of S.129 and S. 255 – of the CPC:

(1) an accused person shall be brought to a court of competent jurisdiction to take cognisance of the offence within 24 hours;

(2) the court may if it thinks fit then from time to time, on the application of the police officer authorise the detention of the person under arrest for a time not exceeding fifteen days;

(3) the detention shall be in such custody as the court may think fit;

(4) the application and order of detention may be repeated after each period of fifteen days; and

(5) each time the court orders such detention, it shall record its reasons for so doing.

It is submitted however, that such detention orders shall not cumulatively exceed a period of two months in the case of a person

who is in custody or is not entitled to bail. This is in accordance with section 35(4) of the 1999 Constitution, which provides:

> S.35 (4) Any person who is arrested or detained in accordance with subsection (1) (c) of this section shall be brought before a court of law within a reasonable time, and if he is not tried within a period of-
>
> (a) two months from the date of his arrest or detention in the case of a person who is in custody or is not entitled to bail; or
>
> (b) three months from the date of his arrest or detention in the case of a person who has been released on bail, he shall (without prejudice to any further proceedings that may be brought against him) be released either unconditionally or upon such conditions as are reasonably necessary to ensure that he appears for trial at a later date.

A similar procedure is also provided for under S.143 of the CPC for laying of a complaint in writing by Attorneys-General to any court competent to take cognisance of the offence. It is respectfully submitted that S.143(c) of the CPC, read in conjunction with S.255, would achieve the same results as S.129 and S.255. The only difference being, under S.129 the application is by a police officer, while under S.143 the application is by Attorneys-General.

Faced with the problem of inmates awaiting trial and newly arrested accused persons; and the establishment of, a Criminal Division of the FCT High Court, application forms under S.129; S.143 (c) and S.255 of the CPC were drafted by the Chambers of the Hon. Attorney-General of the federation. These forms have so far withstood the onslaught of legal challenge at the FCT High Court and are currently being used. The sample forms for the FCT High Court are attached at b.c to this paper and marked Annexure 'A'. Similar Forms for other States where the CPC is applicable have been drafted and attached at b.c. as Annexure '2'. The purpose of the forms are to ensure that there is no application for a "Holding charge" detention; orders are made according to Law, and that trials

are commenced within 2 months of arrest or detention in custody.

An associated problem with this application is monitoring by the courts; the absence of which was amongst other things, a major defect of the "Holding charge". It is suggested that when such detention is ordered; the Court should also order that the accused be brought before it at the expiration of the fifteen days for which the detention order is made and, also cause the matter to be listed in its Cause List to eliminate the risk of the accused being forgotten in prison.

Whereas the CPC of the Northern States have provided a procedure to prevent the indefinite detention of an accused person without trial, and the Constitution has provided for his trial to commence within two months of his arrest in the case of non-bailable offences, a similar comprehensive procedure does not exist under the CPA applicable to the southern states and the Federal High Court.

Section 17 of the CPA provides: when a person is taken into custody without warrant for an offence not punishable by death he may in any case and shall, if it is not practicable to bring him to a Magistrate or justice of the peace, having jurisdiction with respect to the offence within twenty four hours discharge the accused upon conditions or where such person is retained in custody be brought before a court or justice of the peace having jurisdiction with respect to the offence as soon as practicable whether or not inquiries are completed.

Section 20 of the CPA also makes it mandatory for officers in charge of police stations to report to the nearest Magistrate the cases of all persons arrested without warrant within the limits of their respective stations whether such persons have been admitted to bail or not. Suffice to note that both sections 17 and 20 of the CPA do not deal with offences punishable with death and do not provide the courts with a procedure of detention pending completion of investigations similar to those in the CPC, and at best, could be said to leave everything within the discretion of the court using its inherent powers.

The chambers of the Hon. Attorney-General of the Federation cognisant of this lacuna, drafted application forms for such a procedure under S.35 (4) and (5) of the 1999 Constitution and the inherent powers of the Court.

These forms have not so far been filled in any of the High Courts of the Southern States nor, to the best of my knowledge, the Federal High Court. It is hoped that the forms, which are similar to those, drafted for the FCT and High Courts of the Northern States under the CPC, will withstand legal onslaughts by way of objections pending when the CPA is amended to include similar provisions to sections 129; 143 and 255 of the CPC, which is strongly recommended.

Criminal Divisions of High Courts and Federal High Court

The establishment of a criminal division of the FCT High Court has been a positive and giant step towards a faster, better and more efficient administration of the criminal justice system. With five judges assigned to the Criminal Division adjudicating on criminal matters only, delays and bottlenecks have been largely eliminated in criminal trials within the FCT. It is therefore recommended that each High Court of the States of the Federation and the Federal High Court should establish a Criminal Division to tackle this monster of awaiting trials that has led to congestions in Prisons and Courts.

The present procedure whereby the Attorney-General of the Federation and Attorneys-General of States have to obtain the consent of a High Court Judge by way of application under S.185 of the CPC in order to prefer a charge for direct trial is both cumbersome and causes delay in filing charges for a direct trial at the High Court. It is therefore suggested that Attorneys-General should be trusted with the ability of identifying a *prima facie* case and, file charges directly in the High Courts.

The special peculiarities of prosecution by Chambers of Attorneys-General require, in order for them to be effective, special funding for

handling of cases outside the present envelope budgeting system. There should be a vote for prosecution.

In the later part of 2004, a meeting of the Director Public Prosecution of the Federation, Police prosecutors, Investigating Police Officers, the Legal Aid Counsel and Prison Officials in FCT was held at the instance of the Chief Judge of FCT. The recommendations which reflect actual facts on the ground as experienced by operators in the system are hereby reproduced:

A. ***Government***

1. Leadership should live up to expectation with a view to providing jobs for the jobless and eradicate poverty, which is presently considered as the reason for crimes.

2. There is need to enlarge the monetary and sentencing powers of the lower courts to entertain more serious offences.

3. Laws of the criminal Justice system should be amended to allow for restitution and compensation for victims of offences as an alternative to automatic prosecution, conviction and imprisonment or fine.

4. There is need to enact a law to prevent formal prosecution of minor offences; thus non-custodial prosecution should instead, be encouraged with a view to decongesting the Courts and Prisons.

5. Parole system for some offences should be introduced thereby allowing the offender limited freedom while continuing to earn a living and at the same time serving a sentence.

6. Open prisons system should be adopted as a means of decongesting the prisons.

7. Remand Homes should be built for children and young persons.

8. The gender discriminatory practices of disallowing women, as sureties to criminal suspects should be discouraged.

9. Funds should be made available for specific purpose of purchase and maintenance of "Black Maria"; or, in the alternative other vehicles for the conveyance of detainees/ awaiting trial to and from Police stations and Prisons.

10. Judicial officers, Prosecutors and the Police investigators should be motivated for a more effective discharge of their duties to further guard against compromising their position.

11. There should be training and retraining of all judicial officers and prosecutors to enhance efficiency.

12. Steps should be taken to stop unnecessary interference by high profile personalities to influence the administration of criminal justice.

B. *Office of the DPPF*

1. Prosecutors must be diligent in prosecuting cases whilst long adjournments should be discouraged.

2. The Office of the DPP should improve the coordination of activities between all agencies involved e.g. DPP, the Police, Prisons and Courts to better the administration of criminal justice.

3. A liaison mechanism should be introduced to assist the office of DPP and Police Prosecutors in the co-ordination of investigation and prosecution activities in serious offences.

4. The Director of Public Prosecutions of the Federation should embark on random visits to prisons and courts with a view to discovering for himself the nature and number of pending cases and how to improve on prosecution.

5. DPPs should ensure the delivery of prompt legal advice/opinion by their offices and strive to ensure that such advice/opinion is rendered within fourteen (14) days on receipt of duplicate case diary from the Police.

C. *Judiciary*

1. Criminal Divisions should be established in all States High Courts and the Federal High Court.

2. More Courts should be built and more Judges/Magistrates appointed to reduce congestion in prison and delay in the hearing of cases.

3. The Chief Judge should ensure that promotion and transfer of Magistrates do not affect matters handled by them to the detriment of both the accused and the criminal justice system.

4. Suspended sentences should be imposed for minor offences so long as the accused does not commit the offence again.

5. Imprisonment/remand for minor offences/offenders should be used sparingly.

6. Either the Chief Judge or a committee set-up by him should visit Prisons from time to time to ensure that persons awaiting trial do not stay in prison longer than the term they would serve if convicted.

7. There should be well-equipped law libraries for all Judges for ease of reference so as to enhance speedy trial.

8. Certain minor criminal offences should be assigned to Area Courts for quick adjudication.

9. Funds should be created from which allowances would be paid to prosecution witnesses to encourage them (witnesses) come to court and testify considering the fact that witnesses are so vital to criminal matters in Court.

10. Bail should be granted to persons awaiting trial with less stringent conditions in non-capital offences unless it is not possible to guarantee the person's attendance at the trial.

11. The practice by some Magistrates to refuse signing documents from the Police, especially on bail matters should be discouraged.

12. Prolonged delays in delivering rulings by some Magistrates should be discouraged.

13. Unnecessary adjournments should be discouraged.

14. There is need for better understanding between the Prosecutors and the Magistrates for fair and quick dispensation of Justice.

15. Magistrates should not succumb to unethical practices by some private practitioners.

16. Need for prompt sittings by Magistrates.

17. A pilot project be started whereby Courts are built next to Prisons to observe the positive effect on logistics.

D. *Police*

Prosecutors and Investigating Police Officers (IPO'S)

1. There should be provision for well-equipped and functional Libraries, photocopying machines and other equipment to facilitate and ensure prompt response to matters that require the advice/opinion of the Director of Public Prosecutions.

2. The issue of "Holding Charge" in capital offences taken to the Magistrate Courts should be discouraged and that such matters should be referred to office of the DPP for immediate and appropriate action.

3. Police Prosecutors who are lawyers should be allowed to prosecute in the High Courts.

4. More specialised units of the Police as the forensic laboratory and Fingerprints Analysis; etc should be established to hasten trials that require the use of such facilities.

5. Police Prosecutors should be motivated, encouraged and trained.

6. IPOs should be encouraged by the provision of adequate and necessary tools and facilities in the discharge of their duties.

7. Locating of witnesses living in the outskirts of Abuja and/or working in construction companies proves to be very tedious and cumbersome which militate against the successful prosecution of some criminal matters. Funds should be allocated for that.

8. Police Prosecutors should be exempted from other routine duties, except where absolutely necessary, so as to avoid stress and fatigue for the purposes of concentration and better performance.

9. Appointment of (IPO's) should be on merit and indiscriminate transfer of (IPO) should be discouraged.

10. The method of serving court processes by private legal practitioners on the Police should be reviewed to stop the unwholesome practice.

11. The cost of duplicating case diaries should be borne by the appropriate authority and not individuals.

12. The prison service should stop the practice of rejecting suspects legally ordered to be remanded in prison.

13. All Police Prosecutors should be pooled under the State C.I.D. for proper coordination, monitoring and better performance.

E. *Prison Service*

1. More prisons of international standard should be established.
2. There should be better funding of the Prisons and provisions of equipment and machinery for their work.
3. Courts should be built close to the prison yards to avoid logistical problems. In fact, if introduced as a pilot scheme their performance can be compared with courts presently far from prisons.
4. There is the need to re-activate the judicial committee comprising of Judges, Magistrates, Prosecutors, the Police and the Prison Service to enhance service delivery in line with the government policy.
5. There is the need to also resuscitate juvenile Courts/borstal Homes to try and keep juvenile offenders.
6. Sitting hours for Magistrate be re-organised to accommodate two Magistrates sitting in a day on a six-hourly basis with a view to enhancing performance and to enable them handle as many cases as possible.
7. Prosecutors' forum is a welcome development and therefore should be encouraged to take place quarterly.
8. The DPP should undertake random visits to Courts and Prisons with a view to improving prosecution.
9. Welfare of inmates, rehabilitation of inmates and monitoring of ex-convicts should receive increased attention.
10. There is need for improved coordination of activities between all agencies involved in the administration of criminal justice, such as the office of the DPP, the police, prisons and courts.
11. Rehabilitation and Reform Centres should be established to assist the homeless and less privileged convicts on the completion of their term.

12. Supervised Community Service should be introduced for some category of offences.

13. Prisons should be effectively funded for the provision of staff welfare, training for officers/inmates, provision of logistics and provision of libraries.

14. Legislation that impede the media or the general public from having access to prisons should be amended in order to allow the media/general public to have first hand information about the prisons.

15. There should be functional Medical Clinics in all prison formations nationwide. Also, adequate feeding, clothing and medical facilities for all prisoners;

16. Provision of instructional materials in prisons for education of prisoners;

17. Adequate care for children born by female prisoners while in prison;

18. Training of prisoners in handiworks to prepare them for life after imprisonment.

19. In addition to the establishment of more prisons, all prisons should be constantly maintained.

ANNEXTURE 1 A

IN THE HIGH COURT OF JUSTICE OF THE FEDERAL CAPITAL TERRITORY HOLDEN IN ABUJA

BETWEEN:

ATTORNEY-GENERAL OF THE FEDERATION.....COMPLAINANT

VS

1.
2.
3. ACCUSED PERSON(S)

COMPLAINT BY THE ATTORNEY-GENERAL UNDER SECTION 143 (C) AND S. 255 OF THE CPC OF THE FCT

SUMMARY OF OFFENCE:

On or about the .....2005 the above named accused person(s) were alleged to have committed the offence(s) of ..... in the; FCT; within the Jurisdiction of this Hon. Court.

2 The Hon. Court is hereby requested to take cognisance of the above alleged offence and that there is reasonable cause to order the remand of the above named accused person(s) pending the conclusion of investigation and to enable the Attorney-General file a formal charge.

3. The Hon. Court is hereby prayed to order the remand of the accused person(s) pending completion of investigation and filing of a formal charge.

Dated.....this day.....2005

Prosecutor
For: Hon. Attorney-General of the Federation and Minister of Justice

ANNEXTURE 1 B
IN THE HIGH COURT OF JUSTICE OF THE FEDERAL CAPITAL TERRITORY
HOLDEN IN ABUJA

BETWEEN:

THE COMMISSIONER OF POLICE .....COMPLAINANT

VS

1.
2. ACCUSED PERSONS(S)
3.

APPLICATION BY POLICE OFFICER FOR REMAND UNDER S.129 AND S.255 OF THE CPC OF THE FCT

SUMMARY OF OFFENCE:

On or about the .....2005 the above named accused person(s) were arrested on allegation of having committed the offence(s) of.....in the.....; FCT; within the Jurisdiction of this Hon. Court.

2. The Hon. Court is hereby requested to take cognisance of the alleged offence(s) and that there is reasonable cause to order the remand of the above named accused person(s) pending the conclusion of investigation and filing of a formal charge.

3. The Hon. Court is hereby prayed to order the remand of the accused person(s) pending completion of investigation and filing of a formal charge.

Date.....this day.....2005

Name of Police Officer :.....

Rank:.....

For: Commissioner of Police

ANNEXTURE 2 A

IN THE HIGH COURT OF JUSTICE OF KATSINA STATE HOLDEN AT KATSINA

BETWEEN:

ATTORNEY-GENERAL.....COMPLAINANT

VS

1.
2.
3. ACCUSED PERSON(S)

APPLICATION BY POLICE OFFICER FOR REMAND UNDER S.143 AND S.255 OF THE CPC OF THE FCT

SUMMARY OF OFFENCE:

On or about the .....2005 the above named accused person(s) were arrested on allegation of having committed the offence(s) of.....in the.....: FCT; within the Jurisdiction of this Hon. Court.

2. The Hon. Court is hereby requested to take cognisance of the alleged offence(s) and that there is reasonable cause to order the remand of the above named accused person(s) pending the conclusion of investigation and filing of a formal charge.

3. The Hon. Court is hereby prayed to order the remand of the accused person(s) pending completion of investigation and filing of a formal charge.

Date.....this day.....2005

Prosecutor
For: Honourable Attorney-General

ANNEXTURE 2 B
IN THE HIGH COURT OF JUSTICE OF KATSINA STATE
HOLDEN AT KATSINA
BETWEEN

THE COMMISSIONER OF POLICE.....COMPLAINANT

VS

1.
2.
3. ACCUSED OPERSONS(S)

APPLICATION BY POLICE OFFICER FOR REMAND UNDER S. 129 AND S. 255 OF THE CPC OF THE FCT

SUMMARY OF OFFENCE

On or about the.....2005 the above named accused person(s) were arrested on allegation of having committed the offence(s) of .....in the.....within the Jurisdiction of this Hon. Court.

2. The Hon. Court is hereby requested to take cognisance of the alleged offence(s) and that there is reasonable cause to order the remand of the above named accused person(s) pending the conclusion of investigation and filing of a formal charge.

3. The Hon. Court is hereby prayed to order the remand of the accused person(s) pending completion f investigation and filing of a formal charge.

Date.....this day.....2005.

NAME OF POLICE OFFICER:.....

RANK:.....

For: **COMMISSIONER OF POLICE**

ANNEXTURE 3
IN THE FEDERAL HIGH COURT
HOLDEN AT ABUJA

BETWEEN:

ATTORNEY-GENERAL OF THE FEDERATION.....COMPLAINANT

VS

1.
2.
3. ACCUSED PERSON(S)

APPLICATION BY ATTORNEY-GENERAL OF THE FEDERATION FOR REMAND UNDER S.35(4) AND (5) OF THE CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA AND THE INHERENT POWERS OF THE COURT.

SUMMARY OF OFFENCE:

On or about the .....2005 the above named accused person(s) were arrested on allegation of having committed the offence(s) of.....in the.....; FCT; within the Jurisdiction of this Hon. Court.

2 The Hon. Court is hereby requested to take cognisance of the alleged offence(s) and that there is reasonable cause to order the remand of the above named accused person(s) pending the conclusion of investigation and filing of a formal charge.

3. The Hon. Court is hereby prayed to order the remand of the accused person(s) pending completion of investigation and filing of a formal charge.

Date.....this day.....2005

NAME OF POLICE OFFICER.....

RANK:.....

For: **COMMISSIONER OF POLICE**

ANNEXTURE 4 A
IN THE HIGH COURT OF JUSTICE OF EDO STATE
HOLDEN AT BENIN CITY

BETWEEN:

ATTORNEY-GENERAL.....COMPLAINANT

VS

1.
2. ACCUSED PERSON(S)

APPLICATION BY POLICE OFFICER FOR REMAND UNDER S. 35(40 OF THE CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGEIA 1999 AND THE INHERENT POWERS OF THE COURT

SUMMARY OF OFFENCE:

On or about the .....2005 the above named accused person(s) were arrested on allegation of having committed the offence(s) of.....in the.....; FCT; within the Jurisdiction of this Hon. Court.

2. The Hon. Court is hereby requested to take cognisance of the alleged offence(s) and that there is reasonable cause to order the remand of the above named accused person(s) pending the conclusion of investigation and filing of a formal charge.

3. The Hon. Court is hereby prayed to order the remand of the accused person(s) pending completion of investigation and filing of a formal charge.

Date.....this day.....2005

Prosecutor
For: Honourable Attorney-General

ANNEXTURE 4 B

IN THE HIGH COURT OF JUSTICE OF EDO STATE HOLDEN AT BENIN CITY

BETWEEN:

THE COMMISSIONER OF POLICE.....COMPLAINANT

VS

1.
2.
3. ACCUSED PERSON(S)

APPLICATION BY POLICE OFFICER FOR REMAND UNDER S. 35(4) AND (5) OF THE CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA 1999 AND THE INHERENT POWERS OF THE COURT

SUMMARY OF OFFENCE:

On or about the .....2005 the above named accused person(s) were arrested on allegation of having committed the offence(s) of.....in the.....; FCT; within the Jurisdiction of this Hon. Court.

2. The Hon. Court is hereby requested to take cognisance of the alleged offence(s) and that there is reasonable cause to order the remand of the above named accused person(s) pending the conclusion of investigation and filing of a formal charge.

3. The Hon. Court is hereby prayed to order the remand of the accused person(s) pending completion of investigation and filing of a formal charge.

Date.....this day.....2005

NAME OF POLICE OFFICER:.....

RANK:.....

For: COMMISSIONER OF POLICE

COMMENTARY (III)

O. U. Kalu,
(Acting Comptroller-General of Prisons)

Introduction

The Police and of course allied law enforcement agencies, the Ministry of Justice, the Judiciary and the Prisons constitute the organs that make up the Criminal Justice System in any modern State. The Criminal Justice System has the sole responsibility of ensuring that all forces of disorder capable of disturbing the peaceful evolution of society are arrested and put in check. Seen from this perspective, the Criminal Justice System is the trouble shooter of society.

But it is not a monolith. By this I mean that all these agencies though related by a macro description of their assortments are never in one fold. The Criminal Justice System is Multi-Institutional construct, which cooperatively perform the role of the agencies of social control in any modern state. In Nigeria, the Criminal Justice System should and do consist of the following:

i. Law Enforcement and Prosecution Agencies. i.e. the Police, NDLEA, Customs, Economic and Financial Crimes Commission (EFCC), Independent Corrupt Practices Commission (ICPC) and Ministries of Justice among others.

ii. ii. The Judiciary comprising all properly constituted courts from the lowest to the Supreme Court.

iii. The Prisons and other Institutions for Corrections.

Between them, these institutions are expected to prevent crimes, arrest suspects, process and certify them, and treat and reform them so that they are returned to the society sober and law-abiding. If they do this successfully, then the society is the better for it. But

if they fail as now seems the case in Nigeria, then something must be wrong. If there is pervasive crime in society as now in Nigeria then all is not well with the Criminal Justice System.

The point I am making here is these agencies are systemically linked by their functions in such a way that no one single department can take credit for social order where it exists. It is a collective effort and unless practitioners in these areas realise it, they will be working at cross purposes with the peace and security of the Nation being the worse for it.

The Prison and Criminal Justice Administration

The main duty of the Prison is to take those legally interned into custody and try to reform them so that on discharge they will become law-abiding once again.

The Prisons Service derives its powers from CAP 366 Laws of the Federation of Nigeria 1990 to perform the following functions:

i. Take into custody all those legally interned,

ii. Producing them before the courts as and when due if they are on remand,

iii. Identifying the causes of their anti-social conduct,

iv. Set in motion mechanisms for their retraining and reformation preparatory to returning them back to the society as normal, law abiding citizens,

v. Generating revenue for the State through the use of Prison Farms and Industries for the purpose.

The functional relevance of the Prisons in the crime control and prevention efforts of the State is subsumed in these roles. By taking felons into custody, the first message that is sent out to both the offenders and would-be offenders is that the commission of crime will inevitably lead to loss of personal freedoms, at least for a while. And this message contains deterrence. For nobody wants

to lose his or her freedoms let alone in Prison custody. The fact that one could be sent to Prison for any crime committed deters some persons even today from committing crimes with impunity. Besides, when armed robbers, drug pushers, pipeline vandals, murderers etc. are taken into prison custody with the due process of law, they are prevented even if temporarily from further acting in ways that threaten social peace in the country.

Another dimension to taking into custody is that it assuages the feelings of the injured party be it an individual or the society as a whole. One important aspect of this point is that those who would have taken the laws into their own hands in order to exact retribution get consoled when a felon is taken into custody. This act reinforces their fate in the rule of law and their capacity to live within that law. (Bakassi Boys, I presume, came about because the people in the areas where they operate could not trust the existing institutions and laws to protect life and property and quickly turned their allegiance to the outfit even if its methods are deplorable)

Taking into custody also protects the convict from himself and his peer group. As stated earlier, taking into custody involves the loss of liberty. But this liberty could also be liberty to destroy oneself. Many felons who come into the prison suddenly realize after moments of reflection and introspection that they became criminals in the first instance more for the company they kept before coming to the prison than any other urge. They begin to see their former peers as really no-good and make spirited efforts to embrace the reform efforts of the prison and put their past and their peers behind them. When this is done, one more criminal is won over. The processes I have described above sum up the fact that felons are saved from further self-destruction while in custody.

It can therefore be summarised that by taking felons into custody, the message of deterrence is sent to the would-be offender that such a fate awaits him if he were to toe the same line as those taken into prison custody. By so doing, people are discouraged from committing crimes.

Besides, law and order is at once guaranteed if the society or even individuals are assured that the law would take its course by depriving the felon of his liberty. If this is not done, there is the likelihood that the public may decide to take the laws into its own hands and deal with the offenders as they see fit. This of course is a recipe for anarchy.

Therefore custodisation saves the prisoner from himself, prevents him from further acting in ways that are inimical to social peace, protects him from the wrath of the society and sends the message of deterrence to all and sundry, thereby ensuring law and order.

Reformatory Roles

There is more to imprisonment than opening and closing of Prison Gates. Modern penal management techniques emphasize reform of the convicts. The current attitude in penal circles is to see imprisonment from the perspective of reform and rehabilitation rather than from the perspective of punishment. It is assumed that those who have committed crimes need help so that rather than be punished for their crimes, they should be assisted to lead a good life. This view is predicated upon the understanding that those who have fallen foul of the collective norms and laws of their societies expressed in criminal laws are those who have had problems of adaptation and conformity with the general value systems of their societies. And this is largely due to the fact that they were unable at some point in their socialisation process to cope with the internalisation of the values and norms of their society and therefore express this shortcoming by breaking the laws.

When therefore they commit crimes, they are sent to Prison more for reform and rehabilitation than for punishment so that on discharge they would be free to rejoin society as normal law abiding citizens. The role of the Prison in this modern sense is to treat and reform the offenders according to this ideology. That is why the term corrections is applied to reflect this new thinking rather than

Prison which still conjures punishment in peoples minds. The purpose of this training and treatment of convicted prisoners shall be to encourage and assist them to lead a good life, on discharge.

This treatment and training of convicts is condensed within four broad categories namely:

i. The provision of work for prisoners which will so far as practicable help to fit them to earn their living on discharge,

ii. Special attention to Education in its widest sense,

iii. The exercise of personal influence on the individual by members of the prisons Staff,

iv. The provision of all possible opportunities for the development of a sense of personal responsibility, including, for suitable prisoners, training in open conditions.

The implication of (i) above is that those who commit crimes are those who do not have work or possess skills or do not even have an orientation for work of any kind – the drifters. Through Prisons farms and industries, these prisoners are not only exposed to the culture of work but are also imparted with skills that will help to sustain them on discharge.

Imperatives of Sustaining the System

The interrelationship of the agencies of the Criminal Justice System is such that if any one segement falters, the implication reverbrates among the others. For instance the law enforcement agents must arrest and arraign, the Ministry of Justice must prosecute, the Judiciary must arbitrate and the Prison must enforce the sentence passed. If as it happens now, the judiciary fails to process cases speedily, the reverbration is felt in the increasing Awaiting trial Persons in the Prisons. If the law enforcers fail to conclude investigations on time, the courts are congested and if the Prisons fails to secure in proper custody, and there are escapes, the work of the law enforcers are made doubly difficult. And so it goes on and on.

Today out of about 40,000 inmates in our Prisons, 26,000 or 68 percent are Awaiting Trial Persons. Some have spent more than ten (10) years awaiting trial. This state of affairs has meant that the role of Prisons as a reforming agency has been sacrificed on the altar of containing the persons in custody.

This has led to disquiet among prisoners because of the pressures of congestion. You may have heard of riots and jail breaks in many of our prisons in recent times. All these prisons have one thing in common; the Awaiting Trial Persons are usually many and easily overwhelm the structures as a result of pressures of overstay in Pre-trial detention.

When people talk of Prison congestion today, it is almost laughable. It is particularly disturbing because with a population of about 131 million people with the type of crime profile we have, it is rather a sign of a faltering criminal justice system that we have just 40,000 people in custody. And out of that number, 26,000 are yet to know what justice is all about.

There is no Prison congestion really.

I want you to know that at the moment the Nigerian Prisons Service has a capacity for 46,778 persons. I also want you to know that 15 years ago, and with a capacity for just 31,000 persons, the Nigerian Prisons Service was locking an average of 52,000 persons. The only difference was that most of those persons in custody then were convicts.

Most of awaiting trial persons we have in custody today are mainly in our urban prisons which means that most of the spaces in the Prisons are not utilised optimally. If these 26,000 persons are to be convicted and we, exercising our powers, disperse them to low density prisons, it will be discovered that there is indeed no congestion in the Prisons. I may even make bold to say that if most of our inmates are convicted persons, the Nigerian Prisons Service can lock up to 75,000 persons and the issue of congestion will not arise.

But with the dearth of Prosecution, the Nigerian Prisons Service

has been reduced to the status of a warehouse which keeps suspects until they are either needed or released. The Nigerian Prisons Service has therefore been robbed of the opportunity of applying dynamic remedies for the recovery of convicts.

This state of affairs is not the ideal for National Development. Every effort that has to be made must be made to ensure that the agencies of the Criminal Justice Administration are empowered to make them more relevant in the dispensation of Justice. By so doing we shall be laying the correct foundations for effective Criminal Justice Administration in Nigeria.

Our vision and our mission is to return to the original concept of Prisons, which is a place for the reform of convicts preparatory to their rejoining society as normal law-abiding citizens. This means that this Awaiting Trial Persons' congestion must be done away with. Until that is done, our preoccupation in the Prisons will be containment and not reform of persons in custody because they are innocent until proven guilty.

PAPER VI

THE ROLE AND DEVELOPMENT OF SHARIA (LAW) IN THE NIGERIAN LEGAL SYSTEM

Justice (Dr) I. T. Muhammad, *JCA*

COMMENTARY (I)

Prof. Auwalu H. Yadudu
Faculty of Law, Bayero University, Kano

COMMENTARY (II)

Dr. Muhammed Tawfiq Ladan
Department of Public Law, Faculty of Law, ABU, Zaria

CHAPTER SIX

THE ROLE AND DEVELOPMENT OF SHARIA (LAW) IN THE NIGERIAN LEGAL SYSTEM

Justice (Dr) I. T. Muhammad, *JCA*

Introduction

In discussing the above assigned topic, I think it is important, though elementary, to remind ourselves from the outset, of the basic historical facts interwoven within the Federal Character of our country. It is a federation of 36 States and a Federal Capital Territory. It is a country with people who differ in tribes, languages, dialects, cultures and religious beliefs. It is not a country of irreligiousness or a nation that wanders around in perfidy. Except for the Atheists among us, we all acknowledge the existence of God.[1] There was never a time when religion or legal culture was one and the same.[2] Prior to the advent of the colonialists, two distinct sets of laws: Islamic Law (Sharia) and the Indigenous different

1. See for instance the Preamble to the Constitution of the Federal Republic of Nigeria, 1999 which states:

"To LIVE in unity and harmony as one indivisible and indissoluble sovereign Nation under *God*..."

See also the Seventh schedule thereof which is one Oath of Office. Each Oath ends with "so help me God."

2. The Report of the Political Bureau of 1987 attested to this fact in the following words: It is not quite certain how many nationality or ethnic groups are found in the country but these are estimated at between a minimum of 250 and a maximum of 400. Each group has its own language and custom and has accepted one or more of the main religions namely, Christianity, Islam and African Traditional Religion." (See page 20, *Ibid).*

local customs, practices or laws were in operation.[3] When the colonialists set in with their laws, the scope of the Nigerian legal systems expanded by accommodating the English legal system. These now gave rise to the present three strata of laws: English Law (Common Law); Islamic Law (Sharia) and Customary Laws operating side by side.[4] Islamic law was mainly in vogue in almost the whole of the Northern Region which now transformed into 19 States.[5]

Pre-colonial period

My focal point of discussion on the topic will be centred towards but not necessarily limited to the Northern Region. A quick recapitulation of the application of Sharia in Northern Nigeria vis-à-vis its political development in this sub-region reveals that SHARIA had been in full operation among the Muslims before the arrival of the Colonialists. Artefacts and historical anecdotes are

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The Muslims are taught by the Quran that if Allah had willed He could have made all human beings into one nation, one tribe, one language and one religion. See: Al-Quran: 5:45; 10:19, 11:118; 16:93; 42:8 Allah decided to chart for each of us a course.

3. Anderson, J.N.D. (1978) *Islamic Law in Africa*. Frank Cass and Company Limited London, (Second Impression), page 172 Keay E. A., *et al* (1966) *The Native and Customary Courts of Nigeria*. Sweet and Maxwell, London, pages 230-232.

4. The effect of that is the recognition by the Constitution of three types of Superior Courts of Record:

   (a) Common/Statutory Courts such as the High Courts (and Magistrate Courts/District Courts at Sate level);

   (b) Sharia Courts of appeal with Sharia Courts; i.e. the erstwhile Area Courts but now renamed by some States as Sharia Courts of various grades; the Customary Courts including the Customary Courts of Appeal in some States. See Sections, 6, 249(1); 255(1); 260(1); 265(1); 270(1); 275(1) and 280(1) of the Constitution of the Federal Republic of Nigeria, 1990

5. The States are: *Adamawa, Bauchi, Benue, Borno, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Kogi, Kwara, Nassarawa, Niger, Plateau, Sokoto, Taraba, Yobe and Zamfara.*

still available, jealously preserved in the older Islamic Civilizations such as Kano, Sokoto, Katsina, Borno, Zaria, Bauchi, Zamfara, etc. One can still find in such places, minutes, correspondences of Emirate Councils to or from the Sultanate. Court Proceedings, revenue documentations and other policies all written and conducted in the Arabic Language which is the original and formal Language of the Sharia which had total bearing on the Muslims' entire mode of living. It fashioned for him and controlled his social, economic, political and religious life. Thus, it defined for him how to relate or interact with people who belong to same religion with him as well as those from other beliefs. It teaches him how to respect and protect the life and property of those who coexist with him whether of same faith or not.[6]

In the realm of social life, the Sharia provides for him how to court a lady and get her married to himself; how to live a happy and successful marital life; how to train and educate the offsprings endowed to them by God; how to get divorced from one another if continued harmonious and happy marital life is no more feasible; how to share the estate left behind by anyone of them who predeceased the other; who among the family circle is entitled to share the

6. Al-Quran: 60:8; Allah the High sayeth:

> Allah does not forbid you from those who do not fight you because of religion and do not expel you from your homes – from being righteous toward them and acting justly to toward them. Indeed, Allah loves those who act justly.

The Prophet (SAW) is reported to have said in a *hadith* that the blood, property and honour of a Muslim is made forbidden to another except in compliance with due process of law. In the Charter of al-Medina, the Prophet (SAW) made clear the rights of each inhabitant of al-Medina with a Muslim or a non-Muslim. No citizen shall deprive the other of his guarantee rights. The Muslims should not destroy or defile worship places for the non-Muslims and vice-versa. Thus, extremism, inhuman degradation, depriving one of ones life, extortion and other animalistic tendencies do not form part of Sharia (Islam). They are alien to the religion. Terrorism, by whatever name call is a foreign vocabulary to the Sharia legal system. See: Ali, S.A., *A Short History of the Saracens*, Kitab Bhavan, New Delhi, pages 14-15.

estate and who is not so entitled. There are categories of social gatherings a Muslim should attend and there are those he will not attend. In the Islamic economic system, a Muslim is permitted to acquire and enjoy any wealth which is free from illegality.[7] In politics, a Muslim is a political human being. He has some set rules which prescribe for him who to elect for a political office. He must respect and obey those in authority provided they confine their orders, directives and control within the limits of the law.[8] He must respect and enforce Treaties and international laws whether of war or peace *(Al-Siyar)*. The Law of Crime and punishments are well defined for him in the chief sources of Sharia.[9]

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7. A Muslim is not permitted to enrich himself through any form of blood shed (ritual or non-ritual); he should not draw benefit from any form of misappropriation, deceit (Advance Fee Fraud/419; theft brigandage, robbery with or without arm; dubious transactions or transactions on illegal contracts, *Riba* (usury) and its proceeds, etc.

8. At the inception of Islamic polity and for quite sometime there existed no watertight separation of powers especially between the Executive and the judiciary, The *Imam (leader)* was the executive and Judge. He could delegate the role of adjudication to those of this disciples who were found qualified to run the office of a Judge. This was the Practice during the time of the prophet (SAW) and his companions. Companions like *Muaz bin Jabal, Abu Musa Al-Ashari* were appointed as Judges and sent to different cities. Exigencies of time, place and population growth made it necessary to entrench the Orthodox separation of power system among the three organs of government: Executive, Legislature and judiciary. 'See: Al-Mawardi, *Sheikh Uthmanu bin Fodio's* Bayan wujubul Hijra alal Ibad *paragraphs 51-57 on Good Governance (translated into English by Dr. F.H. El-Masri of the Khartoum University, 1978; Sheikh Abdullahi bin Fodio's Dhiyaul Hukkam. Muhammadu Bello bin Uthmanu bin Fodio's Usulussiyasa (Principles of Politics) unpublished).*

9. These are: (a) the Holy Quran, (b) the Sunnah (Practices) of the Prophet (SAW), (c) the Ij'ma i.e. Consensus of opinion of the Jurists on a given subject matter, (d) Qiyas i.e. Analytical deduction which provides a solution to a new problem not covered by any of the above three sources. There are many secondary sources such as Al-Masalih al-Mursala or ISTIHSAN i.e. public policy wich proves for the good of the Public; *Istidlal (public interest); Istishab (presumption of continuance of a law not categorically abrogated).* Urf (custom), etc.

ıere are other provisions which take care of minor offences; rtuous liabilities, Trust, sales and purchases, Hire, issues on nded properties; loans, gifts; pre-emption, etc.

In a more graphic expression, Hon. Justice Mohammed Bello, rmer CJN and of blessed Memory put it this way:

> In its generality, Sharia covers all aspects of human endeavour, be it economical, political, social, theological and is a way of life of a Muslim from his birth to the time he will be buried in a grave. It prescribed the "*huduba*", the prayer for receiving him as a baby at birth, it also specified the size and dimension of his grave, how to wrap his corpse and how to bury it therein.[10]

Islamic Law, thus, is so comprehensive making provision for the inutest aspect of a Muslim's life.[11] This is the law that was in full plication in the sub-region before it's truncation to its present sition.

olonial Period

his period covered 1902 to independence (i.e. 1960). With the nefit of political hindsight, it is significant to note that at the ception of British Rule in the former Northern Nigeria (1902) e British imperial forces found the polity and system of public d judicial administration firmly established on Islamic law inciples operated by two Islamic dynasties i.e. the Sokoto liphate and the Kanem-Borno Empire. The British administration bsequently established a firm territorial claim over the two rritories and brought them into one protectorate. A truce was tered into by the British with the leaders i.e. Emirs of the two stwhile dynasties by which British undertook not to interfere

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A keynote address delivered by the former CJN Bello, at a National Seminar on Sharia, held at Kaduna on 1st and 2nd of February, 200.

The Holy Quran in 6:38 states:

"We have not neglected in the Register a thing."

with the Muslim's freedom of worship and legal system.[12]

Initially, the colonial masters allowed the Emirs' courts to continue applying all aspects of Sharia without any let or hindrance. The Sharia courts retained their unlimited jurisdiction in both civil and criminal Islamic Law matters. Gradually, however, the colonial masters took deliberate steps to subdue and subsume the Islamic Law system. The meddlesome hands of the colonialists in the truncation of the Sharia legal system can visibly be seen in the following instances:

(a) They subjected the Emirs' court to the supervisory control of District officers who were political and administrative staff of colonial office lacking any judicial training. These officers subtly took control over the application of Sharia and the *ALKALI* (Judges) who dispensed justice according to Sharia.

(b) They introduced common law courts to coexist alongside the *ALKALI* courts. The former enjoyed superior status and were empowered to exercise supervisory control over the latter.

(c) They introduced local legislation by which the SHARIA was treated as local custom with the result that within the hierarchy of applicable laws, SHARIA was accorded inferior status.

(d) They introduced "repugnancy test" clause, by which any principle or rule of native law and custom which by definition

12. The Royal Instructions issued in 1946, Article 17(2) provided:

"Nothing in any Ordinance contained shall take away or affect any rights secured to any natives in the protectorate by any treaties or agreements made on behalf or with the sanction of her late Majesty Queen Victoria, her heirs, and Successors, and all such treaties and agreements shall be and remain operative and in force, and all pledges and undertakings therein contained shall remain mutually binding."

includes the SHARIA,[13] was declared to be repugnant to natural justice, equity and good conscience and shall, *ipso facto* not be enforced by the High Court established for the Northern Region. Through the instrumentality of this device, many substantive and procedural laws of the Sharia were rendered inapplicable.

(e) The Emir or chief was to appoint the Judges subject to the Resident's approval. Where there was no emir or chief, the Resident appointed the Judges.

(f) The Resident had the power to enter the courts at any time, and to inspect them. He could transfer a case from one court to another; he could review the findings of a court and order a retrial or modify the sentence (or the order) of the courts.

(g) The practice and procedure of the courts were to be governed by native law and custom subject to the rules that might be made by the High Commissioner. In criminal matters the native courts might award any punishment, and in civil matters they might make any order that native law and custom authorized subject to the condition that no inhuman treatment could be inflicted and they could not inflict the penalty of death.[14]

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13. The definition given to native Law and Custom by Statutory provisions generally, include Islamic law. But even Lord Lugard in his book *Political Memoranda*, differentiated and distinguished Islamic law from native law and custom or customary law. He stated for instance:

"the fundamental law in the Native Muslim Courts of Nigeria is the Maliki code of Muhammadan Law, and in the native Pagan Courts it is the local native law and custom."

See page 84 thereof.

I tried to draw distinction between Native law and custom (Customary law) and Islamic Law in my LLM Thesis, 1984, ABU, Zaria.

14. See: Native Courts proclamation No. 5 of 1900.

Subsequent amendments such as the native Courts Proclamation of 1906, the Native Courts Ordinance 1915-1918, etc, up to 1956 when native Courts Law was promulgated, continued to incorporate the substance of the 1900 proclamation. All these proclamations occasioned unnecessary interference by the colonial matters in one way or the other with the then traditional court system which was fully based on Islamic Law. I will only cite in support, few cases decided on Islamic Law Principles by Islamic Law Courts but reversed on appeal:

(1) In the case of *Abba* v. *Baikie*, **Suit No. K/20A/1943,** it was decided that Mary could not inherit the property left by her father who was a Moslem because of difference of religion. On appeal, the then Supreme Court reversed this decision on the ground that such Provision of Islamic law is repugnant to natural justice, equity and good conscience. Conversely however, the Privy Council refused to declare repugnant to natural justice, equity and good conscience, rules of Customary Law which disqualified a child from inheriting his father. See the case of *Dawudu v. Danmole.*[15]

In *Guri* v. *Hadejia N.A.*[16] the Emir of Hadejia's Court found Guri guilty of committing robbery and homicide and sentenced him to

15. (1962) 1 W.L.R., 1053. this is where a deceased person left behind 9 sons and 4 daughters. His property was divided between them in accordance with the Yoruba custom of *Idi Igi"* under which estate left by a deceased person would be shared equally between the spouse relicts. Thus, a child who had no mother in the house (as a result of her death, separation or divorce) at the time of the deceased's will not get any share. That was what made the appellant to appeal to the Privy Council. His appeal was unsuccessful on the reason that since that was the Yoruba custom it had to be complied with. in other words, this grave depravation was not viewed as repugnant to natural justice, equity and good conscience.

16. (1959) 4 F.S.C. 44. The proper position of Islamic Law is that a party is not a competent witness in his case. Others who witnessed the event can be summoned to give evidence on the matter objectively. This principle is in contradistinction with the English Law principle where a party is quite competent to give evidence from the witness box on his own matter.

death accordingly. On appeal, the Federal Supreme Court annulled the judgment on the ground that the appellant was not allowed to testify in his own defence. The court held that that was repugnant to natural justice, equity and good conscience.

Another case is that of *Gubba* v. *Gwandu N.A.*[17] Gubba was found guilty of intentional homicide by killing a person he saw having sexual intercourse with his wife. The Emir of Gwandu's court found the accused guilty and sentenced him to death. On appeal, the decision was quashed on the defence of provocation.

How the Colonialists Determined the Application of Islamic Criminal Law

The decision of the then West African Court of Appeal in 1947 in the celebrated case of *Tsofo Gubba v. Gwandu Native Authority,* (supra) was a forerunner to the termination of the application of Islamic Criminal Law in the sharia (native) courts.[18]

1958 Constitutional Conference. The provision of the bill proposed as follow:

> In this case, the accused (a Muslim) had been convicted of deliberate homicide by a Grade A native court (Emir of Gwandu's Court) according to Islamic Law provisions and sentenced to death. The Supreme Court (which was akin to our present Court

17. (1947) 12 WACA 141. Under English Law principles, provocation is a defence. Thus, where a person commits culpable homicide in a state of provocation, the punishment for the offence can be mitigated. Under Islamic Law provocation is not a defence.

18. 1958 Constitutional Conference. The provision of the bill proposed as follow:

"No person shall be tried for a Criminal Offence except for an offence which is codified under a written law."

By the definition given to "Native Law and Custom" which included Islamic Law, the latter, though written and codified even before the advent of English law, was regarded as "unwritten" and "uncodified."

of Appeal), hearing the appeal, held that on the facts the offence did not amount to the capital one of deliberate homicide by Islamic Law and had the case been tried by the Supreme Court under the Criminal Code on the same facts the accused would have only been convicted of manslaughter. But, following a 1946 WACA decision, it held itself incompetent to upset the judgment since the native court was statutorily empowered to administer native law and custom and to award whatever sentence was laid down thereby, subject to the usual repugnancy clause. On appeal to the WACA, the latter court held that the intention of the 1933 amendment to Section 4 of the Criminal Code was to make the code directly applicable to native courts and that *whenever a native court tried any person for any offence which was defined in the criminal code it was bound to follow the code and not native law and custom*. Thus, the WACA held that the conviction against the accused was wrong in law as on the facts the offence amounted to manslaughter only. Accordingly, the conviction was quashed and the death sentence set aside.

Analysing the whole situation and the heat this decision generated, Keay and Richardson observed:

> This judgment caused consternation in the North especially. In most non-Moslem native courts the criminal law applied was becoming, under the guidance of administrative officers, more and more assimilated to the Criminal Code. In Moslem Courts, however, Moslem law, which is a system of a written and firmly established jurisprudence, was being in almost as pure a form as may be seen in any country. To ask these courts to abandon Moslem law and try according to the Criminal Code would have been virtually impossible. First because the courts were completely unfamiliar with the Code, and secondly because it would have meant a reversal of all the principles on which Northern Nigeria had been governed since the commencement of the Protectorate, and (since Moslem law has religious as well

as legal sanctions) a breach of the original undertakings not to interfere with Islam.[19]

One anomaly that featured in the above decision was the restriction which the 1933 Ordinance set upon the Court's appellate powers; the court interpreted the Ordinance as not allowing it to order a new trial in the case and compelled it to acquit the accused person in the circumstance.[20] In order to rectify the anomalous situation a Native Courts Ordinance of 1948 was passed.[21] This Ordinance made far reaching provisions which allowed the door open to the Native Courts to use the Code if they wished to do so. They were in fact encouraged to do so with a view to moving towards statutory criminal law and away from the native law and custom. The courts hearing appeals including WACA were given more comprehensive powers thereby correcting the statutory omissions which necessitated the quashing of *Tsofo Gubba's* case rather than substituting the native courts decision with an alternative verdict. Thencefrom, Tsofo Gubba's case acquires the force of law by the doctrine of *STIRE DECISIS*.

The second step taken by the colonialists is that towards the tail end of their administration they tabled a Motion before the 1958 London Constitutional Conference in which they called for the discontinuance of the application of all criminal laws in the native courts other than the statutorily codified criminal law.[22] This resolution was accepted, the Motion passed into law and entrenched in the 1960 Constitution (Order in Council). Hence the cessation of the application of Islamic Criminal Law and the Sharia Courts were compelled to apply the Criminal Code.

19. Keay, E.A., *et al, Ibid;* pp. 48-49.

20. *Ibid*, pp. 44-45.

21. See: Native Courts Ordinance, 1948, Sections 3 & 5. This Ordinance took effect on 1/10/1951 and operated concurrently with the 1933 Ordinance.

22. Keay, E.A., *et al, Ibid, pp. 49-50.*

Emergence of the Penal Code

The introduction and application of the Criminal Code in the North brought a lot of unpleasant consequences to the Muslim Community as it was opposed to the principles of the Sharia. Under the guise of "Re-organisation" of the legal and judicial systems operating in the North, and realising the fact that a "self-government" for the North was fast approaching, a visitation Panel of Jurists was set up and it visited the region in September 1958.[23] The panel made its recommendation to the administration that it was necessary for a self-governing Northern Region to establish a system of Criminal law which would apply uniformly to all persons living within the region whether Muslims or not. The first draft of the Penal Code was completed in December 1958. It finally became law on 26th of September 1959. The Code was brought into operation on 30th September 1960 and was in force together with other legislations, such as the Criminal Procedure Code (CPC)[24] on 1st October 1960, the day on which the Federation of Nigeria achieved its independence.

Shortcomings of the Penal Code vis-à-vis Islamic Law Provisions and Practice

It is widely propagated that the Penal Code takes care of offences known and punishable under Islamic Law. But that appears to be in

23. Membership of the visitation Panel comprised of: Sayed Muhammed Abu Ranat the Chief justice of Sudan (Chairman); Mr. justice Muhammad Sharif, a retired judge of the Supreme Court of Pakistan; Professor J.N.D. Anderson, Professor of Oriental Laws of the University of London; Shettima Kashim, CBE, the Waziri of Borno; Mr. Peter Achimugu, O.B.E. and M. Musa Othman, the Chief alkali of Bida. The panel undertook working visits to the Sudan, India, Pakistan, Ceylon and Libya.

24. The application of the CPC was not made compulsory on the Native Court Judges who experienced some difficulties in applying it. They were left to apply the Islamic Law and rule of procedure, but while making conviction they applied the statutory provision of that law.

flict with the factual situation. Although certain crimes like king of alcohol by a Muslim, the *hadd* punishment for mation of character, adultery by a Muslim male/female, theft, andage and robbery were reflected in the Penal Code, the shments prescribed for the offenders by the Code are not the e under Islamic Law provisions. For instance, adultery is never shed by imprisonment in Islamic Law. It attracts a capital ishment. Fornication between the unmarried youths is shable by lashes. Thus, imprisonment in that respect is a clear arture. Theft, brigandage and robbery attract specific shments under Islamic law different from the ones provided he Penal Code. Again, although culpable homicide in general been provided for in the Penal Code, the method of proof dence), punishment for the offence and extenuating mstances are different from the ones provided by Islamic Law. hnicalities can make an offender escape punishment. micalities in Islamic Law generally play very insignificant role, all.

It is therefore a misstatement to describe the Penal Code as ia. The best that can be said of the Code is that it is an amalgam ws drawn from other countries such asPakistan and from the inal Code.

Another aspect of the "reorganiation" of the legal and cial system in the North was the enactment in 1960 of the Sharia rt of Appeal Law which replaced the Moslem Court of Appeal of 1956. The Court was appellate in nature as it had no inal jurisdiction to consider first instance cases of whatever re. Secondly, the Court was only competent to determine cases erned by Moslem Personal Law and for matters ancillary

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The Preamble to this law provides that it is:

"a law to establish a Shariah Court for the hearing of *appeals* from native Courts in cases governed by *Moslem Personal Law* and for matters ancillary thereto." (Underlining supplied for emphasis).

thereto.[25]

The Preamble to this law provides that it is:

As for the law, practice and procedure to be applied by the Sharia Court, Section 14 of the law enumerates them out:

"14.The Court, in the exercise of the jurisdiction vested in it by this law as regards both substantive law and practice and procedure, shall administer, observe and enforce the observance of, the principles and provisions of:

(a) Moslem Law of the Maliki School as customarily interpreted at the place where the trial at first instance took place; This law (i.e. the Shariah Court of Appeal Law, 1960).

(b) The Native Courts Law and any other law affecting;

(c) Native courts in so far as it appertains to a cause or matter within Section 11 of this Law; and

(d) Natural justice, equity and good conscience."[26].

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26. For the purpose of the Sharia Court of Appeal Law, "*Moslem Personal Law*," Means only Moslem law of the *MALIKI School governing matters set out in Paragraphs (a)-(d) of Section 11 of the law. Section 11 provides as follows:*

"11. The Court shall be competent to decide:

(a) Any question of Moslem Law regarding a marriage concluded in accordance with that Law, including a question relating to the dissolution of such a marriage or a question that depends on such marriage relating to family relationship or the guardianship of an infant;

(b) Where all the parties to the proceedings are Moslems, any question of Moslem Law regarding a marriage, including the dissolution of that marriage or regarding family relationship, a founding or the guardianship of an infant;

(c) Any question of Moslem Law regarding a wakf, gift, will or succession where the endower, donor, testator or deceased person is a Moslem;

(d) Any question of Moslem Law regarding an infant, prodigal or person of unsound mind who is a Moslem or the maintenance or guardianship of a Moslem who is physically or mentally infirm; or

The Constitution of the Federal Republic of Nigeria, 1963

The Constitution of the Federal Republic of Nigeria, 1963, did not involve itself in any matter of details relating to establishment, Composition and Jurisdiction of the regional courts. It only laid the methods of appeal from the regional courts to the Supreme Court. Section 119 (5) provided that wherever the phrase "Shariah Court of Appeal" was used in this Constitution, it had the same meaning as in the Shariah Court of Appeal Law, 1960, or as amended by any later enactment.

However, this Constitution mandated each of the then existing four regions to have its own Constitution. Perhaps this was largely due to the basic understanding that each of the regions had its own peculiarities as to socio-cultural indices and religious practices. This arrangement appeared to be the best for a democracy as all the regions were free to legislate according to their own taste of what they

Where all the parties to the proceedings (whether or not they are Moslem) have by writing under their hand requested the Court that hears the case in the first instance to determine that case in accordance with Moslem Law, any other question."

Although it might be the intent of the legislature to achieve cohesion and steadiness by the courts in the application of Islamic Law by limiting its application and interpretation to the *Maliki* School of Jurisprudence only, that by no means suggests that the whole of Islamic Law is what the Maliki school of Jurisprudence applies. It is much more than that. The author of the *Hideyat Al Tullab* stated that it is well settled in Islamic Jurisprudence that there is nothing sacred about restricting SHARIA within the confines of a particular school. Even in Nigeria her, Sheikh Uthman bin Fodio stated that all that which was received from the Prophet cannot be called a MADHHAB (School) of anybody, it is binding law.

On the limitation of the jurisdiction of the Sharia Court of Appeal, Kumo, S; in a paper "The application of Islamic Law in Northern Nigeria problems and prospects." 1976, A.B.U. Zaria, stated that the limitation (to Moslem personal Law) is a serious and totally inexplicable diminution of what ought to be the jurisdiction of the Shariah Court of Appeal.

considered fundamental.

Constitution of Northern Nigeria, 1963

There was nothing spectacular about this Constitution which enhanced the application of Islamic Law. It retained the truncated jurisdiction of the Sharia Court of Appeal. It conferred enlarged jurisdiction on the High Court of the region empowering the Court to entertain appeals from Native Courts on all matters civil or criminal and where a Sharia matter was involved, a Judge of the Sharia Court was to form part of the Panel. This practice was declared unconstitutional by the Court of Appeal in 1982.[27]

Thus, the 1963 Regional Constitution did not help matters as far as Sharia was concerned.

The First Military Era

The position of Sharia continued unabated during the First Military era 1966-1979.

The Constitution of the Federation, 1979

This was the grundnorm of the Nation Sharia legal principles derived their force and "legitimacy" from the Constitution. Establishment of Sharia Courts for any State that desired it was guaranteed. Jurisdiction of such Courts was still limited to Islamic Personal Law.[28] Thus, where two Muslims entered into a simple sale agreement e.g. of a farmland/house and there was a breach by one of the parties, and they resorted to litigation, the obvious was that the Area and Upper Area Courts (as they were) would have jurisdiction but on appeal, the matter would go to a High Court rather than the Sharia Court of

27. See the case of *Mallam Ado v. Hajiya Rabi and Anor. Appeal No. FCA/K/69/82.*

28. See Section 242(10 and (2) of the Constitution.

29 See Paragraph 27 of the Area Court Reform Committee's Report (1978). Despite Government's approval and white Paper on this committee's Report, the reform was never implemented up to the very period of the commencement of the 1979 Constitution.

Appeal as the latter lacked jurisdiction on the subject matter.[29]

It can be recalled that in the year 1976, the then Federal Military Government set up a Committee – Area Courts Reform Committee. This Committee listened to almost all views across the nation. The Committee finally submitted its report to Government. The government accepted and approved the report which was followed with a White Paper. It was in that report that the Committee made the following observation:

> We also observe that only appeals in Islamic Personal law go to the Shariah Court of Appeal. All other matters including civil matters emanating from Area Courts and where the applicable law at first instance is Islamic law go to the High Court. We think it is an unsatisfactory state of affairs as of whittles down the Status of both Islamic Law and the Shariah Courts of Appeal – a situation which is offensive to popular sentiment. We believe that the Shariah Court of appeal Law should be amended to enable the Shariah Court of Appeal to hear all civil appeals coming from the Area Courts in all cases where the proper law is Islamic Law.

The Second Military Era and Decree No. 26 of 1986

During the 2nd Military Regime, Decree No. 26 of 1986 was promulgated into law. This Decree sought to restore the full civil jurisdiction on the Sharia Courts on civil appeals emanating from the Area Courts. It provided in Section 2 for the deletion or removal of the word "personal" after the word Islamic, wherever it occurred. This amendment was challenged in the superior courts and it was rendered inoperative, as it had no jurisdictional consequence.[30]

In 1993, Decree No. 107 was promulgated by the then Military Regime. That Decree amended Sections of the 1979 Constitution dealing with Sharia Court of Appeal's Civil Jurisdiction by again

30. See: Kaduna State High Court decision in Case No. KDH/24/A/86 - *Dogon yaro v. Bello.*

removing the word Personal wherever it occurred after the word "Islamic". This amendment was held as well to be inconsequential. See: *Gambo* v. *Tukuji (1997) 10 NWLR 591; Gana* v. *Alhajiram (1997) 10 NWLR (Pt. 525) 424; Gwabro v. Gwabro (1998) 4 NWLR (Pt. 544) 60; Jiji* v. *Abare (1999) 1 NWLR (Pt. 586) 243* and the Supreme Court decision in *Abdul Salam* v. *Salawu (2002) 51 WRN page 132 at pages 140, 146.*

So, as the position stands now, it is Section 277 of the Constitution of the Federal Republic of Nigeria, 1999 which is a replica of Section 242 of the 1979 Constitution that provides for the application of Islamic Personal Law in our superior Courts of record.

Although Islamic law is dynamic and grows with time, it is clear that it was deprived of the fertile ground for growth and development. Perhaps one needs to add here that by virtue of Section 38(1) of the Constitution of the Federal Republic of Nigeria, 1999, the Muslims as citizens of this great country, have every right to freedom of thought, conscience and religion which can be manifested, propagated, taught, observed and practised without any let or hindrance. It will indeed tantamount to a travesty of justice to permit a Muslim to enter into a civil contract of sale, for instance, under Islamic Law Principles, but to have a case against him emanating from the same contract, tried under the principles of the Common and Statutory Laws.

The ZAMFARA Initiative

At the inception of the third Republic, Zamfara State House of Assembly passed a bill which was later assented to by the State Executive Governor, for the full implementation of Sharia in the State.[31] Several other States in the North followed suit.[32] The

31. Principal Law is the Zamfara State Sharia Penal Code Law, 2000, which was subsequently followed by other enactments.

32. These States are: Katsina, Kebbi, Kano, Jigawa, Sokoto, Niger, Kaduna, Yobe, Bauchi and Borno.

Zamfara initiative was greeted with lots of mixed feelings ranging from enthusiasm or revulsion which thrust upon Nigerians, Muslims and non-Muslims alike, a number of practical, politico-legal and sometime philosophical questions for resolutions. Some ask: (1) can a State in Nigeria adopt any religion as State religion in spite of the provision of Section 10 of the Constitution? (2) Can Nigerian Legal System tolerate legal pluralism? Others ask: (1) How can a Muslim citizen of Nigeria exercise his right to freedom of thought, conscience and religion as guaranteed by Section 38(1) of the constitution when only insignificant portion of Sharia (termed as "personal law") is allowed to apply to him? (2) If Muslims are not opposed to the application of other sets of laws to other citizens, why should others oppose the application of Sharia in all its ramifications to the Muslims only? Put in another way: Why do people tolerate man-made laws and oppose Divine Laws? These are some of the questions that still remain to be answered to the satisfaction of the two divides.

I do not think I am competent at this forum, which to my mind, is more of academic, to proffer any solution to any of the above and other related problems. Be that as it may, when asked on the rationale of reintroducing Sharia in its full scale, some of the governors stated, *inter alia:*

> It is in our effort to retrace our steps back to our roots we find it pertinent to pursue new social and moral development policies taking Divine Injunctions as our basis. (Alh. Sani Ahmed Ya. Bakura, Governor of Zamfara State.)

The Executive Governor of Sokoto State, Alh. D. Bafarawa stated:

> Our people requested for the introduction of Sharia in the State. It is in keeping with the principle of our democratic dispensation of allowing the will of the majority I responded (to)[33]

33. See the Light of Islam magazine Vol. 8 of 15th June – 15th July 2000, published by *Jama'atu Jajdid al-Islam, Zamfara State* Chapter.

Thus, the sole aim and purpose of Sharia which the states compliant with Sharia set out to achieve is the eradication of evil and forbidden acts such as alcoholism, prostitution, armed robbery, dishonest conducts such as "419", theft, adultery, fornication, sodomy, lesbianism, imperfections in the market fora such as reduction in weights and measures, concoction or adulteration of food items; uprooting laziness and hopelessness; deceit by whatever name called; unwarranted spilling of blood through killing or wounding of a human being, kidnapping of children or abduction of girls, etc.[34]

But for a society to achieve these lofty ideas, it is very necessary that some mechanisms have to be put in place. One of such mechanisms is the Institution of Welfarism and social security in the society. Permit me Mr. Chairman and My Lords to repeat the advice I offered to my State Governor when he sought for my advice on the implementation of full scale application of Sharia in Bauchi State:

> A legal system which is largely based on religion is humanitarian in approach and seeks to provide for a welfare State. I have noted the recommendations given on matters affecting the have-nots and the disabled in our Ummah. It only requires emphasis Your Excellency, that a society that suffers abject poverty, deprivation and wantonness cannot be described as a just society. There are bound to be antithesis of justice. Crimes of all kinds must be rampant. People are bound to be greedy and bootlickers; laissez-faire, etc. Proper implementation of sharia legal system, Your Excellency, can only be meaningful if there thrives conducive atmosphere in the society. Therefore, Government must see it as a duty to provide at least the minimum requirements for a welfare state. This, Government can do in several ways such as rejuvenating the cottage industries, dry season (irrigation) farming on large scale, soft loans to enterprising citizens, etc. This will minimise crimes associated with theft,

34. See the Provision of the Zamfara State Sharia Penal Code.

idling, etc. The Zakat Committee is very much of essence here and must be backed by law.[35]

I concluded by saying that it is not a just society where the whole economy is in the hands of a few while the majority are in squalor; it is not a just society when few overfeed themselves and their families when others are dying in hunger; it is not a just society where the strong overpowers the weak; it is not a just society where the ruler oppresses the ruled; it is not a just society where the orphans and the handicapped are not protected and respected; it is not a just society where armed robbery and other banditry activities terrorize the lives of the citizenry; it is not a just society where a person, incompetent, will be imposed upon the competent; it is not a just society where elections are won by rigging and other electoral malpractices; it is not a just society where rulers are only after the welfare of themselves and family. These and their similarities offend true concepts of justice and equity. Thus, a lot has to be done to balance the inequalities and the injustice prevalent in the society in order to salvage the citizens and lay the ideal fertile ground for the Sharia legal system to operate effectively.

Assessment of Application of Sharia in the implementing States

One would begin by asking whether the implementation of the Sharia in States that operate it in full has been a success or a failure. There is no doubt that a lot has been achieved in such States in the areas of strict observance of religious practices. In the economic sector, the setting up of *Zakat* (poor dues) Committees which collect and distribute *Zakat* proceeds to the needy and the indigent has to a large extent succeeded in bringing succour to the lives of such class of people in the society. In the social realm many anti-social

35. See: My 1st Memo on the implementation of Sharia Legal system in Bauchi Stated, dated 23rd January 2001, sent to the Executive Governor of Bauchi State, Alh. (Dr.) Ahmed Adamu Muazu (Walin Bauchi).

behaviours have been uprooted from the society such as gambling, en prostitution, etc. In the Area Courts (Sharia Courts) corruption ng the Judges and their supporting staff has been reduced to arest minimum. The system of appointing such Judges and posure to the work ethics has greatly improved. Crimes erally reduced. The following Commissions have been almost all the Sharia implementing States:

Commission – which checks the general conduct/moral ur of the Muslims generally.

mission – which collects and distributes proceeds m Zakat (poor dues)

ma – which has the advisory responsibility to matters of Islamic Law generally.

so far by the States implementing wn that there are some areas which execution of punishment of theft fara State, who, ultimately lost een no record of cutting-off of again, since the two cases of in Sokoto State and Amina guilty of committing adultery urts, but discharged by the spective States, there have blic of the Commission of nat there are no subsisting here such Courts have cases to the Executive me governors refuse r the execution of

such punishments? Can one be justified to say that there may be some political undertones in the adoption of the Sharia? These are other sets of questions which can competently and best be answered by those at the helm of affairs in those states. What appears certain to us is that there is a problem or problems.

(ii) Non-Muslim Residents of Sharia States

At the inception of the application of Sharia (full-scale), fears and uncertainties were mounting from non-Muslims who were either indigenes of such states or those who for one reason or the other found themselves residents of such states. The fears were mostly that of intimidation, assault, subjugation to Sharia legal system, marginalisation or total denial of say; Government educational facilities, medical care from government hospitals; places of service such as churches, just to mention a few.[36]

But up to today, the Nigerian Media or even foreign ones have not reported a situation from any of the states where a non-Muslim has been subjected to such ordeals. In fact what needs to be brought to light more is that it is a total prohibition for a Muslim to maltreat, disrespect, denigrade, assault or marginalise any human being just because he is not a Muslim. He has no reason to deny such a non-Muslim any of the rights which are available to others. He is prohibited to demolish or defile a non-Muslim's place of worship.[37]

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36. See for instance what *The Punch* of Thursday, 22nd June 200, Vol. 17 No. 17900 on page 2 carried when Kano State Government announced its adoption of Sharia full-scale application:

    The decision of the Kano State Government to impose the strict Islamic Code in a country torn by religious divides between the Muslim dominated North and the Christian dominated South, has renewed fears over Nigeria's future.

37. The first constitutional document in Islam was the CHARTER OF MEDINA. The Prophet spelt out the rights of the residents of medina among who were Christians, Jews and others. He forbade the Muslims from demolishing churches, synagogues, etc.

(iii) Unfounded Rivalry between the Sharia Courts and the High Courts

The High Courts, the Sharia Courts of Appeal and in some States, the Customary courts of Appeal are the most superior courts of record at State level. There is no recorded rivalry, between the Customary Court of Appeal and the other two. However, there used to be a deep rivalry neigh: call it antagonism between the High Court and the Sharia Court of Appeal of a State. It all revolved around politics and leadership. This certainly can mar the development of the law. Thank God, with the National Judicial Council (NJC) in between and with the new crop of leadership, this despondent attitude appears to abate presently.[38]

(iv) The Evidence Act

Evidence Act is under the Exclusive Legislative List. No State Government has competence to legislate on it. Islamic Law has complete different sets of rules governing evidence. It is elementary to state that where there is inconsistency between Islamic Law of evidence and the Evidence Act, it is the latter that will prevail. This may pose a problem to the States implementing Sharia in full scale.

(v) Activities of Some Legal Practitioners

Some legal practitioners pose a number of problems to some of the Courts operating the Sharia. Some of the lawyers are not learned or versatile in Islamic law but insist to exercise their constitutional right of appearance before any court.

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38. There are heaps of memoranda where foul language and words were traded between the Chief Judges and grand Kadis of the then 10 Northern States. The joint meetings between them collapsed and there was in fact no meaningful dialogue between the two. The situation has now abated. The joint meeting/ conference has now fully resumed.

N. Conclusion and Suggestions

Mr. Chairman Sir, permit me to conclude by saying that if Islamic Law is allowed the fertile ground to grow, the society shall record sustained peace, harmony, development and maximum security. We have seen already that all the capital offences are punishable by strict sentences. These are the offences ravaging the Nigerian Society. There must be a way out to curb them and sharia legal system is one of them.

In attempting to provide permanent solutions to the hurdles facing the sharia implementation generally, I wish to offer my humble suggestions as follows:

General Amendment to the Constitution and other Statutes

(1) All sections which curtail the application of the Sharia in full scope should be amended to provide for the free and full application of the Sharia only on the Muslims for any State that requires it. Evidence should come under the concurrent Legislative List to allow States to enact their evidence Laws which will, among others, take care of Sharia Principles, etc.

(2) It is beneficial for the Muslims and the non-Muslims alike to have cross fertilisation of ideas on each others religion. This is the only panacea to ignorance, suspicion and unfounded fears and uncertainties. It will foster a harmonious and enlightened coexistence where each shall be his brother's keeper.

(3) Courts of law generally, whether Common law, Sharia or Customary law, are meant to serve one purpose: give justice to those who deserve among litigants. That is the only way to ensuring peace and harmony in the society. The Courts are birds of same feathers. They must be seen flying together. The Constitution has spelt out the role of each of the courts. Each of the courts must be bound by the role so assigned to it.

(4) There is no denying the fact that every legal practitioner entitled to appear before any court in Nigeria. It will howev enhance the professional dexterity of a legal practitioner wh appears before Sharia courts to try to equip himself wit Sharia legal principles which will make his submission before such courts easier and admirable. That will earn him more respect from the Sharia Judges.

Finally, governors in Sharia implementing States have to provide the fertile ground for the proper implementation of Sharia, as Sharia cannot operate in abstract form.

COMMENTARY (I)[1]

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Introduction

I am overawed to be asked to comment on a paper presented by a distinguished judicial officer of the rank and caliber of a Justice of the Court of Appeal. However, and with his permission, I can take consolation in the following facts. Not as yet being on the Supreme Court of Nigeria and hence being amenable, perhaps having become accustomed or not too infrequently, to being overruled in his judgment or opinion, the author, I hope, will not mind my concurring with him on some issues and disagreeing with him on others.

Secondly, it is a universal convention, as I understand it, that lawyers in the academia are allowed substantial latitude to be critical of the views expressed, and even conclusions reached, by the ultimate judicial officers: Justices of the Supreme Court.

Thirdly, having expressed views outside his judicial function, the author, if I may say so, is estopped from committing me to contempt should he find my critique of his paper somewhat sour. Be that as it may, I must thank the organisers for deeming me capable and fit to offer a critical review of the opinions and recommendations made in the paper titled above.

I have had the benefit of reading the paper which I found quite enriching. The author has devoted considerable space to an historical discourse pertaining to the place of the Sharia in Nigeria. He did also provide some observations in regard to certain matters which, in his considered views, may pose difficulties to the expanded

1. Being a paper presented by His Lordship, Dr I.T. Muhammad, JCA during the said Conference.

application of the penal aspects of the Sharia and its procedure. He concluded the paper with a recommendation section in which he proffers some ideas which, if embraced by Sharia implementing States, will assist the application of this law.

In my considered opinion, the historical background detailed by the author is particularly informative. He first reminds us of the exalted place and unhindered reach the Sharia and its institutions had had in the lives of the Muslim during the pre-colonial era. Next he gives an account of the place, the extent of applicability and constraints thrown in the path of the Sharia law during colonial times and in contemporary Nigeria. The facts as narrated are so notorious as to require repeating or disputing in this commentary. Suffice it to observe that the generous space allocated to this section of the paper is more than warranted. This is because, by providing the details, the author has very admirably set the context and background against which his later observations and recommendations could best be situated, understood and appreciated.

The section which highlights what the author foresees as problem areas reveals his very remarkable insight and displays his sound understanding of the issues on the ground. Surely the list of such problem areas is not exhaustive. If the reader has hardoured any lingering doubts about the author's acquaintance with and firm grasp of the issues in contention, the author attempts to dispel this in the section where he makes his recommendations which are also very apt.

While discussing problem areas, the author has reviewed judicial cases pertaining to the "repugnancy clause" and others in which appellate courts in the land have taken a definite stand as to the effect of Decree No 26 of 1986. It will be recalled that this Decree had sought to expand the jurisdiction of the Sharia Court of Appeal beyond maters of personal status. By adverting our attention to these cases, one understands the author to be reminding us of stresses and tensions and the ever-present potential for conflict which

may arise on account of the on-going actualisation of the expanded jurisdiction of the same courts under State Laws enacted as part of the implementation of the Sharia processes.

It is noteworthy to point out that the author has not failed to underscore one important point: It is the anomaly which has remained unabated whereby Sharia Courts of Appeal are stripped of jurisdiction in civil and criminal matters to which Islamic law is the applicable law and the same jurisdiction conceded to regular High Courts of Justice which in majority of States are empanelled with few or no judicial officers qualified in that body of law. Without any doubt, this anomaly will be further heightened with the reconstitution of former Area Courts and their empowerment with expanded jurisdiction to try more cases involving questions of Islamic law in civil and criminal matters by most Sharia implementing States. By virtue of the enabling laws, appeals in these matters are to go to the Sharia Courts and not State High Courts.

In another section of the paper, the author has listed several areas and key issues which he has characterised as posing difficulties to the place and application of Islamic law in the country. He wonders aloud why a case pertaining to adultery or *Zinah*, the conviction of which will earn the victim a sentence of stoning to death, and theft or *Sariga*, which results in amputation, have suddenly dried up since the Jangebe and Amina Lawal's celebrated cases.

The reasons are not far to seek. To avoid the errors committed in these cases, both the prosecutors and judges, one would surmise, are a bit more cautious in their handling of similar cases so as to avoid a miscarriage of justice or reversal on appeal. It must be pointed out also that the Appellate Sharia Bench has discharged its onerous judicial function with professionalism, undeterred by meddlesome intruders in the guise of human rights crusaders and not swayed by populist agitation which insists that the success or failure of the enforcement of hudood offences can be measured by

the frequency or lack thereof of the occurrence of amputations, floggings and the stoning of Zinah convicts. Arguably, it can be asserted that there is greater sense of awareness among the populace of the prevailing Sharia system in its comprehensive sense which, while not totally eliminating such vices, may have impacted in such a manner as to reduce their incidence or lead to other means of dealing with them apart from judicial intervention. Finally, I am aware that concerted efforts are being expended to retrain the judicial personnel who will be called upon to apply the Sharia and rules of procedure.

Another area of difficulty identified by the author is the loud and widespread apprehension with which non-Muslims welcomed the implementation of shariah in the country and beyond our shores. On this, he wastes no time in observing that it is perhaps misplaced or uncalled for. Without being dismissive of such perception on the part of non-Muslim, the author recommends dialogue and communications as a panacea and as a responsible gesture of goodwill.

The sour relation between the Sharia judges and their Common law counterparts is, in the opinion of the author, one other area posing some problems to the application of Islamic law. However, he quickly and happily notes in his footnote No 38, that, while he considers it totally unnecessary, undesirable and uncalled for, the matter appears to have been amicably settled.

He worries seriously about the potential conflict which may arise between some Islamic law rules of civil and criminal procedure and its penal codes and the Evidence Act. Hypothetically, the possibility of such conflict exists. However, since most appeals in civil and criminal suits have thus far tended to terminate in State Sharia Courts, we are yet to encounter it since the re-introduction of the Sharia penal system. Nevertheless, the danger lurks in the dark and awaits the necessary trigger to occur.

Finally, the judicial and legislative establishment and the professional body concerned must look seriously into the anomaly, as

pointed out by the author, whereby a legal practitioner, however untutored or unfamiliar he is with Islamic law, is granted unhindered access and audience in these courts merely on account of having his name enrolled on the Supreme Court register. I am not unmindful of the constitutional implications of tempering with that I am also well aware that there is a line of judicial authority which have fortified this professional rights of counsel. Be that as it may, the interest of justice and professional integrity demand that a reconsideration of the matter be undertaken urgently.

Without reiterating his well thought out recommendations, I wish to commend the author for these. All necessary constitutional amendments will need to be effected to augur for uninhibited application of Islamic law to its millions of followers who have willingly submitted to it. More and more channels of communications between Muslims and other stakeholders would vastly generate and enhance an atmosphere of dialogue, better understanding and harmony in society.

May I conclude my comments by reminding the audience about the context, background and dynamics against which the Muslim agitation for the application of the Sharia to them ought to be situated?[2]

1. That it was intense public agitation and struggle which forced the unwilling governors of many of the twelve implementing states to champion or join the bandwagon of the implementation process;

2. That the *Sharia* is being implemented not by military decrees or fiat but within the context of and constrained by democratic and legislative processes and in response to popular demand and/or agitation;

2. Permit me to quote from some observations I have made in respect of another paper presented at the Jos Conference on the Implementation of the Shariah in Nigeria, by Prof. Rudd Peters, January 2004 the proceedings of which have sine been edited by Ostien P, Nasir, J and published.

3. That the implementation has been anchored on constitutional legitimacy and is subject to its constraints;

4. That the *Sharia* is applied within the English common law tradition which accords primacy of place to judicial precedent for any authoritative pronouncement on the law which, in turn, thrives on a hierarchical relation of courts;

5. That sufficient time has not elapsed from the first gale of the adoption of *Sharia*, which commenced late in 1999, to the present, to lead to the emergence of any discernible or definitive trend or pattern to warrant incontrovertible or iron-cast conclusions;

6. That the *Sharia* is being implemented within the concrete setting of a federal polity by some of the federating units and not by the Nigerian State or national government, with all the attendant consequences of diversity in the content and methods of incorporating the codes by the various implementing states.

COMMENTARY (II)

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Introduction

This commentary on the above mentioned topic is essentially based on the issues and arguments as well as the conclusions arrived at by the lead speaker in his paper. Hence this commentary is divided into the following parts:

Part 1:

The lead speaker rightly mentioned the Juxtaposition between the three different legal systems and three systems of administration of Justice. But the question here is, what is the nature, problems and challenges of legal pluralism in Nigeria? The answer to this question lies in the analysis below.

Part One: Nature, Problems and Challenges of Legal Pluralism in Nigeria

Nigeria is one indivisible and indissoluble Sovereign State consisting of thirty six states and Federal Capital Territory, Abuja. This legal entity is known by the name of the Federal Republic of Nigeria.[1]

The 1994 population census put Nigeria's population at 89 million, though is commonly held to be over 100 million today. These millions of people are made up of some 250 ethnic/linguistic groups, making Nigeria one of the world's most populous and ethnically diverse societies.[2]

1. Sections 2 and 3 of the 1999 Nigerian Constitution.
2. International Commission of Jurists (ICJ: Nigeria and the Rule of Law – a Study, 1996, Geneva, Switzerland, p. 30.

Nigeria is undoubtedly one of the few countries in the world which experience conflict of law problems of every conceivable dimension that is, international, inter-state, inter-local (or inter-personal) and inter-temporal.[3]

First, there is a conflict between territorial systems of law arising from the coexistence of federal and state laws. This was brought about by the system of government introduced in 1954 with the creation of three Regions together with the then Federal Capital Territory of Lagos. Today, we have 36 states and the new Federal Capital Territory, Abuja. There are also separate State High courts, State Sharia Courts of Appeal, and State Customary Courts of Appeal constitutionally established. Appeals from these courts go to the Court of Appeal and from there to the Supreme Court both of which are federal institutions.[4]

On the other hand, there is also a conflict between the Received English Law/Common Law/Nigerian Statutes (i.e. the general Law) and the Customary/Islamic Laws, between Islamic and Customary Laws and between systems of Customary Law, *inter se*.[5]

Under our current constitutional democratic dispensation, the 1999 Nigerian constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria. If any other law is inconsistent with the provisions of this constitution, this constitution shall prevail, and that other law shall to the extent of the inconsistency be void.[6] Further, if any law enacted by the State House of [7]Assembly is inconsistent with any law validly

3. See 1.0 Agbede, "Towards Unification of Law in Africa", in Verfassuung and Recht Ubarsee (3/4 Heft) 1975, pp. 423-433.

4. See sections 232 – 5; 260 – 4; and 265 – 9 of the Nigerian Constitution.

5. See P.N. Agu, "The Dualism of English and Customary Laws", in *African Indigenous Laws*, 1975 Chapter 12, p. 251. This is a whole subject of independent study and outside the scope of this paper to discuss.

6. Sections 1(1) and (3) *Supra* note 1.

7. *Ibid*, Section 4(5).

made by the National Assembly, the law made by the National Assembly shall prevail, and that other law shall to the extent of the inconsistency be void.[8]

Nature and Problems of Legal Pluralism in Nigeria

The introduction of British laws into Nigeria to coexist with the indigenous systems of customary and Islamic Laws has produced a tripartite system of law. It is this type of multiple system of law that is often referred to as legal pluralism.

The ethnically diverse groups that constitute Nigeria each has its own system of customary law.[9] Although the rules within one group are broadly similar yet there could be significant difference as to matter of details whilst as between the customary law of one ethnic group and another there could be wide divergence.[10]

A further problem is posed within this context by the existence of Sharia or Islamic Law which is administered in some Jurisdictions as a variant of customary law and in some others as a distinct and separate system while it is almost completely ignored in others.[11]

One of our major problems in Nigeria is that we do not have a single system of administration of justice but three systems. Admittedly the three systems merge near the very top of the Judicial hierarchy but if we are to develop, according to a writer, a truly Nigerian Common Law, it appears necessary to re-examine

8. See Agbede I.O, *Legal Pluralism*, Shaneson Publishers 1991.

9. See Ladan, M.T. "Effects of the Test of Enforceability of Customary Law on the Applicaton of Islamic Law in Nigeria" in, *ABU Journal of Islamic Law*, Vol. 1, 1999, pp. 41-74.

10. See Obilade, A.O., *The Nigerian Legal System*, Sweet and Maxwell, (1979) p. 83.

11. Islamic law is applicable in some northern States as a distinct system whereas in the Western States it is applied as a variant of customary law whilst it is almost totally ignored in the Eastern States of Nigeria.

ly and see what changes that would be necessary
of the suggested goal.[12]

on of Nigeria vests Judicial powers of the
e States in the earlier mentioned superior courts
ition to these, both the Federal and the State
powered to establish other courts by statute. It
nus conferred that some of the States have
Area/Customary/District/Magistrate Courts of
vers and Jurisdiction.[14]

of administration of Justice is premised upon a
long which a litigant can climb from the lowest
hest court of the land by way of successive

these is that whereas at the state level we have
systems of courts purporting to be administering
of laws, appeals from all these courts converge
al established by the Federal Government. That
indeed does make authoritative pronouncements
e systems and of all the sources of law.[16] Hence

distinguished jurist) *Law and Social Change in Nigeria*.
and Evans Brothers Ltd., (1972

's Administration of Justice and Certain Consequential
of 1999 of Zamfara State. See section 4(7) of the
, 1999.

Nigerian Law may be classified as follows: (a) the
(the English Common Law and Certain English Statutes
his country as part of the General Law); (b) Nigerian
y both the Federal and State Legislatures since
les of Customary Law deemed to be applicable in causes
Nigerian's and between Nigerians and Non-Nigerians.
repunant to natural justice, equity and good conscience.
any law for the time being in force; (d) The rules of
w has been introduced into the northern part of this
th and 15th century A.D. and in the nearly five hundred

the constitutional requirement that the Judges of the court of Appeal must consist of at least three members learned in Islamic and Customary Laws respectively. It is intended that such Judges will constitute the Court of Appeal in deciding appeals from the Sharia or Customary Courts of Appeal.[17] Finally, at the very pinnacle of the courts hierarchy stands – the Supreme Court which has the final responsibility of piloting the course of administration of Justice, Judicial and Legal development in the country.[18]

The resultant tripartite system of law and of court has created uncertainty or lack of uniformity, at times, in the administration as well as in the teaching of the law, especially customary and Islamic family and Penal Laws and Jurisprudence.[19]

First, the frequent recourse to the received English Law in cases where the rules of the indigenous laws are objectionable, or inadequately developed or practically non-existent has often obstructed the need for a restatement or indeed for the necessary modification of the rules of these customary laws.[20]

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years Islamic observances and practices had more or less supplanted those of the customs of the people in the affected states. (See Spencer Trimingham, (1962) *A History of Islam in West Africa*, London: Oxford University Press. In all courts other than those applying Islamic law directly, it must be proved by oral and possibly documentary evidence (see *Onibudo and others* v. *Akilyu and Ors* (1982 7 section 60 at pg 94); and (e) decisions of superior courts of record of Nigeria, particularly of the Court of Appeal and the Supreme Court of Nigeria.

17. See section 240 and 244 – 5 Nigerian Constitution, 1999.

18. See Ladan, M. T., (ed.) (2001) *Law, Human Rights and the Administration of Justice in Nigeria*, , Zaria, Nigeria: ABU Press, pp. 1 – 404.

19. For example, the National Universities Commission of Nigeria prescribed minimum course content for a law degree (LL.B) in Nigerian Universities also includes two optional subjects: Islamic Law and Customary Law. It is suggested that more time should be given/devoted to the study of Islamic law and at least the customary laws prevailing in the state of location of every faculty of law and these courses should not be optional, but mandatory or core. See NUC Booklet on Minimum Standard for Law in Nigeria Universities, 1989.

20. See Ladan, M. T., *supra* note 9.

Second, the ultimate recourse to customary law in cases of "injustice" has also created the need to effect necessary modifications on the exotic rules of the received English Law.[21]

Third, the choice of law rules are themselves so unsuitable to modern conditions that they are often misapplied or practically ignored by the courts.[22]

Attempts made by the courts to sanction a change of customary law within the context of the existing choice of law rule appears unconvincing if not altogether misleading.[23]

It is however clear that with the increasing fluidity and frequency of movement of individuals and groups, the penetration of Western education and culture into circles formally traditional and the resultant gradual breakdown of ethnic and even family cohesion, a wholly new situation is arising which demands the formation of new rules in the regulation of personal rights.[24]

It has been argued that "the idea of subjecting individual citizens to different laws within a single state is a mark of legal under-development. It is indeed absurd that different courts still exist to administer these different laws."[25]

The resultant problem here is not limited to conflict of Jurisdictional rules but also include the divergence in the quality of Justice obtainable in the various systems of court. This is so because of the different rules of procedure, and the marked differences in the quality of the judicial personnel of these courts. In fact, the point has been made

21. *Ibid*, note 9.

22. See the following decided cases: *Yinusa v. Adesubokah* (1968) NMLR97; *Olowu v. Olowu* (1985) 3 NWLR 378; See Agbede, "Legal Pluralism and the problems of Ascertaining personal Laws: a consideration of Yinusa Psystem of Law: Synthesis or symbiosis" in *Law and Development*, (ed.) Omotola and Adeogun (1987) Chapter 7.

23. *Supra note* 22.

24. *Ibid.*

25. Agbede, *supra* note 22. The Korah commission made this observation over a quarter of century ago. Se native Courts commission of Inquiry (gold Coast) Ghana 1951 at p.3.

that the greater defect of the arrangement is the possibility that a litigant may, on occasion, be left without a competent court to hear his complaint.[26]

Challenges of Legal Pluralism in Nigeria

Integrating the Tripartite System of Law and Unifying the Diverse Systems of Court

One of the challenges of legal pluralism in Nigeria, according to a Legal Scholar,[27] is not the desirability of simply abolishing Customary and Islamic Laws and courts but our failure or neglect to explore the possibility of integrating the tripartite system of law and unifying the diverse systems of court which, in our view, is long overdue for the following reasons:

Economic Consideration

Mounting separate system of customary, Islamic and general court is hardly a healthy way of utilising scarce human and material resources within the context of the prevailing adverse economic situation of a developing economy like ours.[28]

Legal Certainty

The performance of the Judges in matters of internal conflict of law has made it almost impossible to tell in advance, in most cases, which

26. The Brooke Commission's Report cited a case where the Native Court, the Magistrate Court and the supreme Court all declined Jurisdiction. The unfortunate plaintiff was a Syrian who was claiming title to land subject to customary law. See Brooke Commission's Report at p.82. Established by the Governor of Nigeria under the Commission of Enquiry ordinance Cap. 37 Laws of Nigeria, 1948.

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particular system of law the court will apply to a given situation.[29]

Legal Simplification

An integrated system of law will not only simplify the teaching of law but also its administration. The courts will be spared the perplexing task (of which the law reports show more than ample evidence) of having to decide in any given case whether the general or customary law applies and to ascertain the particular customary law to be applied.[30]

Matter of Policy

There is the issue of policy as to whether it is right and proper that citizens of a sovereign state in modern times should continue to be governed by different laws in their legal relations.

Social Convenience

An integrated system of law which takes account of contemporary social requirements will be more suitable to the needs of the time than either the inchoate and somewhat outdated rules of customary laws, the exotic rules of the received English Law or the excessive reliance on ossified and outdated *fiqh* literature, legal rules and procedures of a particular School of Islamic Jurisprudence, especially the Maliki.[31]

If we must for now content ourselves with the symbiosis of imported, customary or religious laws (as perhaps there is no other option in sight) we should at least ensure that the diverse systems of law are judiciously applied. It should be stressed however that no single principle could cover satisfactorily the Juristic analysis of the

29. *See Okoh* v. *Olotu* 20 NLR 123; and *Vanghan* v. *George* 16 NLR 85.

30. The choice of law rules in this respect are not particularly helpful.

31. See Ladan, M.T., *supra note 9*.

process of choosing between two or more applicable systems of law.

Part 2: PP. 3-24 of the Lead Paper

The lead presenter understandably raised the issue of pre-colonial development vis-à-vis the status of the Sharia but unfortunately avoided indicating the outstanding legacy of this period for the Nigerian legal system in terms of its contribution to the development of the concept of law and Justice, land and economic policies under the Sharia.

Further, while the lead presenter critically examined the impact of colonialism and repugnancy doctrine on the application of Islamic Law, he however restricted his analysis to the penal law and left out the civil matters component of the Sharia.

Furthermore, the presenter rightly traced the development of the Sharia between 1963 – 2000 and the efforts made at deleting the term "personal" and the frustrations witnessed in its subsequent retention in the 1989, 1995 and the 1999 Nigerian Constitutions. What the paper ought to have raised is the consequence of the Sharia being treated as a "personal law" within the Nigerian Legal System

Hence my reaction to the above gaps identified are as follows:

The Sharia under the Sokoto Caliphate

The Sharia, is essentially a "Believer's Law", in the sense that it is primarily binding on those who believe in it. With its own ethical norms of virtue and vice, good and evil, it represents the standard of Judgement for all human actions.

The emergence of the Sokoto Caliphate in the 19 Century A.D. gave the Sharia a new outlook altogether in Nigeria: it became supreme in every sphere of life:- government, economy, foreign policy, administration of justice and the organisation of society.[32]

32. See generally, Ibrahim, S., (1987), "The Conception of Law" in the *Islamic State and the Challenge of History*, London: Mansell Publishing Co., pp. 61-74.

The Sokoto Caliphate represents probably the most ambitious attempt in Islamic history, after the first two centuries of Islam, to organise state and society in accordance with the Prophetic model and in compliance with the precepts and provisions of the Sharia.

The merit of the Sokoto Caliphate experience lies not just in the conclusive proof it provided that the Sharia is for all times and for all people, but more fundamentally in its contribution to the conception of law[33] and its utilisation of the political and social institutions of Islam to achieve maximum benefit for the muslim community. The thoughts of the Caliphate's greatest ruler Muhammad Bello, on the Sharia[34] are as relevant today as they were about one and a half centuries ago when they were first contemplated.

Every people, every generation and even every country, Muhammad Bello said, does have a responsibility to examine the Sharia and out of it formulate their fiqh (Jurisprudence) to meet their peculiar circumstances. No generation should rely on another as far as the understanding and application of the Sharia is concerned. Superimposing fiqh of one generation on another would ultimately lead to corruption.

The State, Muhammed Bello pointed out, as the Custodian of the Sharia, has the primary responsibility to examine critically the social and moral conditions of its people, and on the basis of what it understands to be the purposes and spirit of the Sharia, formulate policies and legislations relevant to the issues at hand. The State must therefore review the Sharia continuously, emphasise aspects of it which have become important, shelve for the time being the aspects that have, due to changing circumstances, become less important. The State, as the authority with the ability to evaluate the conditions of society from all perspectives from a vantage viewpoint, is permitted to ignore the letter of the law in favour of the spirit if the occasion so

33. *Ibid*, Chapter 5.

34. *Ibid*., pp. 64-67.

demands. It is only in this way that the fundamental objectives of the Sharia can be realised, and the interests of humanity in general and the muslims in particular safeguarded.

Human society is inherently susceptible to change; the change ideally should be in the positive direction but that is not always the case. Change in the direction of corruption and moral decline is a strong possibility. The State, when applying the Sharia, must keep the fact of life in mind, and strive not only to accommodate such changes but to reorient them through a balanced and empirical approach in the application of the law towards fulfilling the ends of the sharia. Muhammad Bello explains that it is God's continuing practice to ordain laws suitable to the people concerned: that is if their faith and morality are strong this is reflected in the law, if otherwise, God then relaxes the law for them. Unless this is done by the State, the likely consequences will be that the people will abandon the Sharia altogether.

Finally, Bello did not see any need for the Islamic State to subscribe to particular Schools of law when initiating policies or in the administration of law. If the State is indeed Islamic, then it should have leaders who are profoundly learned in the Sharia, and can arrive at the right decision regarding the problems and welfare of the people. The State as conceived by Muhammad Bello, is a *mujtahid*, capable of drawing right inferences and designing right programmes for the people and does not need to rely on a particular school of law to solve its problems. It should face its peculiar situations with boldness and initiative, and deal with them on an empirical basis. The implication of Bello's thought is that the schools of law were created for specific purposes and for a specific age, and that age has passed. What is happening now is different. For that reason a new legal framework, in terms of conception, policies, institutions and methodology is essential if the Muslim Ummah is to move forward.

The Sokoto Caliphate did make considerable contribution to the

development of the concept of Justice under Islamic law; in particular, it shows clearly that many of the principle of the Shariah, when applied by a state, tend to have revolutionary implications. The Sokoto land policy is one example. Land is conceived as the common property of citizens – not just of one age but of future generations – and therefore it cannot be privately owned, nor monopolised by a few individuals or families. Land is seen as the most solid basis for securing the economic and social well being of citizens, and the law in Sokoto stated that non-muslim powers or economic interests cannot be granted any part of Muslim land. Moreover, land is directly related to the defence of Islam,[35] making it illegal for the Islamic urban centres to be allocated to those who have no interest of Islam at heart.

Another example is the economic policy.[36] The Caliphate believed that the Sharia imposed on it a duty to pursue the improvement of the quality of human life until what it terms "human perfection" is achieved. This had two desirable results: the Caliphate had to make itself self sufficient especially in food, and in general, self-reliant economically, so that there was no state on which it depended or to which it was accountable. Secondly, the Caliphate felt obliged to take almost complete control over the economy of West Africa, making the region into what a writer calls Sokoto Common Market. Added to this was the security the application of the Shariah gave to the Caliphate. "A woman," says the European visitor to the Caliphate, Clapperton,[37] "could travel alone with a casket of gold from one end of the State to the other without any fear of being robbed or molested."

In short, the Shariah gave to the Sokoto Caliphate what no human law could ever confer:- Security, prosperity, integration of society, economic self-sufficiency and above all political sovereignty.

35. *Ibid.*, pp. 55-59
36. Ibrahim, S., chapter 8, pp. 111-114.
37. *Ibid.* p. 83

European scholars have to concede that what the British empire overthrew was not a despotic and primitive state, but a very great civilisation whose achievements in terms of human development could stand any where. It is the Shariah, in company with Islamic ideology, that made that possible.

At the turn of the century that society was engulfed by world forces that were too strong for it. Now, fitting enough, it has been reborn as the nucleus of a new and powerful nation.

This potentially powerful nucleus is still to play its rightful role in Nigeria, for two obvious reasons. It has been denied for so long the guidance of Islam in matters of organisation of state and society, and public life in general. Secondly, the civilisation which has given it its strength and vitality has been over many decades its very - the sharia. The scheming and plotting of the colonial power ensured that it would take a very long time for muslims to regain their composure and initiative. The first aspect of Islamic law to be destroyed by the colonial power was the land tenure law which was immediately replaced by a law which justified the usurpation of Islamic lands, and gave repression a legitimacy.

The colonial power also abolished the economic system built around the institution of *zakat*. The only part of the sharia it was ready to concede was the so-called law of personal status; all others were dismantled. And this is the situation today. Infact Islamic Criminal Justice was eliminated in the era of independence: Nigeria was not to be granted independence, nor admitted to the United Nations unless Northern Nigeria abandoned the sharia - this threat was backed with a vow to impose sanctions on the North and strangulate its economy.

Impediments to the Application of Sharia

Islamic Law in Nigeria came to be adversely affected by colonial legislation in two ways:- Firstly, by being totally replaced with the comparable provisions of English Law, as happened in the case of the enactment of the Penal Code, which totally annulled the rules of

Islamic and customary criminal law, with some minor and cosmetic exceptions. Secondly, by statutorily recognising provisions of Islamic and Customary Laws. The Marriage Act of 1914 for instance provides for a monogamous form of marriage, but does not abolish other forms of marriage under Islamic and Customary Laws. Such legislation nonetheless derogates from the status of Islamic and Customary Laws and enhances that of the received English Law when it provides that in case of conflict between the two, the provisions of the enacted received English Law shall prevail. And so even though Islamic Law on the subject might not be abolished, yet certain aspects of it might become inconsistent with the provisions of the enactment and so become void.

While modification in the Islamic Law is sometimes achieved by express legislative enactments, as for example the adverse impact of the enactment of the Penal Code, it is also often achieved by implication. In a recent[38] decision the Court of Appeal, Kaduna division, ruled against the long-standing practice whereby two judges of the High Court sit when hearing appeals on Islamic Law matters, from Upper Area Courts. The Court of Appeal held that section 63 of the High Court Law, 1963 which allows this practise is in conflict with section 235 of the 1979 constitution which states the qualifications of a High Court Judge and the manner of his appointment.

It decided that only a Judge with these qualifications could sit on the bench of the High Court. The consequence of this decision is that when hearing appeals from Upper Area Courts even on matters of Islamic Law, the High Court Judges now have to rely on Assessors. The Constitution does not provide for the appointment of High Court Judges who are learned in Islamic Law, even in the Northern States where the High Courts have a wide Jurisdiction in the application of Islamic Law.

38. See *Mallam Ado and Hajiya Rabi v. Hajia Dije, FAC/K69/82* (unreported). See also appendix VIII, p. 25 *Islamic Law in Nigeria*, ed., K. Rashid, for the text of this important Judgement.

Next impediment to the application of Islamic Law in Nigeria is the criteria of repugnancy and incompatibility.[39] The repugnancy test requires that no rule of Islamic Law or Customary Law shall be applicable if it is 'repugnant to Natural Justice, equity and good conscience.'[40] This requirement is untenable to a primarily divine system of Justice of Islamic Law to be subjected to the test of human values that are always conflicting and liable to err. It is not permissible for the Justice of Islamic Law which plays a significant role in providing virtue by crushing vice; which strikes at the very root of the evil and obviates the causes which give rise to it, to be subjected to contradictory human values solely based on reason. Moreover, natural Justice has meant different things[41] to different people at different times. What is considered as natural justice by an Englishman might not be considered so by a Nigerian. Infact even the colonial Judges and Lawyers were not certain as to what made a rule of Islamic Law repugnant to natural justice, equity and good conscience. Let alone to talk of the neo-colonial Judges and Lawyers. That's why in TSAMIYA V. BAUCHI N.A.[42] Jibowu, Ag. F.C.J., of the then Federal Supreme Court of Nigeria observed that: "The fact that the Maliki Law of Wilful or intentional homicide differs from the English Law or the provisions of the Criminal Code because it does not recognise provocation as a defence will not Justify the conclusion that the Maliki Law of homicide is contrary to natural Justice, equity and good conscience. It is the recognised law of the area to which it applies and it has been recognised by the people to whom it is applicable as their native law and custom. It is for the people to decide whether the law is good enough for them or not and whether they desire a change.[43]

39. See section 34(i) High Court Law (N.N. Laws 1963) cap. 49.
40. Generally, see Park, A.E.W., (1963), *The Sources of Nigerian Law*, London, pp. 69-75; Obilade, A.O., (1979), *The Nigerian Legal System*, pp. 100 – 103.
41. *See speed, Ag. C.J. in Lewis* v. Bankole (1908) I.N.L.R. 82 at 84
42. (1957) N.R.N.L.R. 93 at 81.
43. See also *Fagoji* v. *Kano N.A.* 1957 NRNLR 84.

Also in Rufai V. Igbira N.A.[44] while dismissing the appeal of the appellant, Brown, C.J., observed that: "Upon the second question it was said that in refusing to grant the injunction it purported to deprive the appellant of a legal right which he has had under the common law of England. The magistrate was concerned to give effect to section 32 (i) of the Magistrates' courts (Northern Region) Law, 1955. By that section he was required to observe and enforce the observance of every native law and custom which is not repugnant to natural Justice—". He had found from the evidence that the Chief's order was a lawful one (according to Islamic Law) by native law and custom. He was bound to observe it and enforce the observance of it unless it was repugnant to natural justice".

Moreover, the courts have not hesitated to use the test to widen the Jurisdiction of the received English Law. In the words of *Lord Atkin in Eleko v. The Government of Nigeria*[45] a rule which fails to pass this test must be totally rejected. Without the court having any power to modify it or remove the repugnant element. For such rejected rules, comparable provisions of the received English Law have proved to be convenient replacements.

There is also the rule that so long as a provision of Islamic Law or Customary Law remains 'incompatible either directly or by necessary implication with any law for the time being in force', it cannot be enforced. The only reasonable interpretation of this provision is that rules of Islamic or Customary Law must not conflict with enactments of the Nigerian Legislature. This is enough to have reversed the normal situation under the sharia where decrees of a political authority are necessarily subordinate to the dictates of the Absolute Sovereign-Allah. Yet our courts of law have gone even further by subordinating the rules of Islamic Law not only to the enactments of the Nigerian Legislature, but also to the received English Law. For instance, in *Adesubokan v. Yinusa*[46]

44. 1957 NRNLR 178.

45. 1931 A.C. 662 at 673.

the Supreme Court of Nigeria made statements[47] implying that the phrase 'Law for the time being in force' includes the provisions of the received English Law. It has been rightly remarked[48] that such an interpretation if strictly followed would result in the virtual abolition of Islamic and Customary Laws in this country.

One of the disadvantages of reference to Islamic Law as part of 'native law and custom' is that it prevents the formulation of a proper policy for the determination of Islamic Law and its application to Muslims. Reference to Islamic Law as part of 'native law and Custom' could be grudgingly allowed so long as this phrase is used merely as a convenient term for describing the system of laws which the British found in operation among the inhabitants of this country. Islamic Law therefore, with its insistence of stable rules of social life and its universality, cannot accommodate the so-called characteristics of customary law which portray it as a collection of ad-hoc rules, differing from community to community, and subject to the caprices of 'accepted usage'. In support of this contention is the most recent decision of the Supreme Court of Nigeria. In the case of *Alhaji Ila Alkamawa v. Alhaji Hassan Bello and Anor*,[49] Hon. Justice Bashir Wali, who read the lead Judgement commented on the status of Islamic Law *vis-à-vis* customary law in Nigeria in the following words:

> Islamic Law is not the same as customary law as it does not belong to any particular tribe. It is a complete system of universal law, more certain and permanent and more universal than the English Common Law.[50]

46. 1971 IALL NLR 226.
47. *Ibid*, at p. 232.
48. See Obilade, *op. cit. 106*
49. (1998) 6 SCNJ 127.
50. *Ibid*, at p. 136.

Strengthening His Lordship's statement is the fact that by making separate and distinct provisions for the administration of both Islamic and customary laws, the Nigerian Constitution has recognised them as distinct and separate Laws.[51] It follows therefore that any statutory law that purports to abrogate the distinction made between the two laws, becomes null and void to the extent of its inconsistency with the constitution.[52]

The first challenge is whether the Sharia (Islamic Law)[53] is customary law (Personal Law)[54] within the Nigerian legal system?

To this question, it is worth noting that under the Sharia, once a person voluntarily accepts Islam as his own religion, Islamic law applies to all his affairs including his estate whether testate or intestate.

Before the promulgation of the 1979 constitution, Islamic law was treated as personal law of Muslims in Nigeria. The word "personal" was deleted from section 242 of the 1979 constitution by Decree No. 23 of 1986, but was retained in the defunct 1989 Constitution and in section 262 of the 1999 Constitution.

One of the consequences of the Sharia being treated as a 'personal law' within the Nigerian Legal System is that its applicability to a muslim's estate becomes 'optional'. Thus, any muslim may expressly choose to exclude Islamic Law from governing his estate. He may do this by making a will under the Wills Act.[55] In the notorious case of *Yinusa v. Adesubokan*,[56] a muslim born of muslim parents, made a will under the Wills Act

51. See sections 250-264 and 279 of the 1999 Nigerian Constitution.

52. See sections 1(i) and (3) of the 1999 Nigerian Constitution.

53. The terms "Sharia" and "Islamic Law" are used interchangeably in this paper.

54. This expression was adopted in the Sharia Court of Appeal Law Cap. 122, Laws of Northern Nigeria, 1963.

55. A statute of General application in Nigeria: Section 45(1) of the Interpretation Act, Cap. 192 Laws of the Federation of Nigeria, 19990 and the various High Court Laws applicable in the various States of the Federation.

56. (1971) 1ALL NLR 226.

of 1873 under which he gave to plaintiff/respondent his first son, £10 (ten pounds), and to his other two sons a house each in Zaria. In addition, he gave the same two sons jointly, a house in Lagos and the residue of his estate in equal shares. Probate was granted to the defendant/appellant by the probate Registrar. The plaintiff/respondent filed an action in the High Court challenging the will on the ground that a muslim cannot make a will distributing his estate in a manner contrary to Maliki Law which is the law applicable to the testator.

Under the sharia, a muslim cannot dispose of more than a third of his estate by wassiyah (bequest) and even then, he cannot bequest anything to any person who is among his legal heirs,[57] whose portion of inheritance has been fixed by the sharia.[58] These include sons.[59] Thus Bello, J. (as he then was) upheld the plaintiff's arguments in the then Northern Regional High Court.[60] On appeal to the Supreme Court, his decision was reversed. The Supreme court held that any person can make a will under the Wills Act of 1873 disposing his estate in any manner he wants. The court relied on section 3 of the Wills Act, 1873.

Further, the court held the inconsistency between the contents of the will and the stipulations of the Sharia could not avail the respondent's case because under section 34(1) of the High Court Law[61] any customary law that is incompatible with the provisions of a statute is null and void to the extent of the incompatibility. The Wills Act of 1873 being statute of general application while the Maliki Law is a customary law.[62] If the two Laws are in conflict, the former will prevail.

57. Except with the consent of the other heirs: See Ruxton, *Maliki Law* (London, 1914) p. 371.

58. Generally see *the Holy Quran*, Chapter Four.

59. *Ibid*, at verses 11-13 and 176.

60. (1968) NNLR 97, also reported in *Journal of African Law*, (1970) Vol. 14, No. 1 at p. 56.

61. Cap. 49 Laws of Northern Nigeria, 1963.

62. See Y.K. Saadu, "Islamic Law is NOT Customary Law", in Kwara Law Review (1997), Vol. 6, pp. 136 to 150.

Muslim Judges, Jurists and Scholars have critized heavily this policy of defining Islamic Law as Customary Law. In the case of *Alkamawa v. Bello and Another,*[63] the Supreme Court said that:

> Islamic law is not the same as customary law as it does not belong to any particular tribe. It is a complete system of universal law, more certain and more permanent and more universal than the English Common Law. - Per Bashir Wali, J.S.C.[64]

Part 3:

On the Zamfara State initiative and other sharia implementing states that follow, the lead paper ought to have examined the significance of the different Sharia models in operation to the Nigerian Legal System and whether there is a need for harmonising these different models aimed at realising the same objective.

Similarly, on the assessment of the application of the Sharia and the challenges identified by the lead paper, it is evident that this assessment is incomplete without critically examining the role of Sharia lower court Judges in the administration of criminal Justice in the context of the rights of accused persons and the way forward.

Further, with due respect to his Lordship, it is too simplistic to ascribe a positive or pass mark to the Sharia implementing States without giving us comparative facts and figures supported by empirical findings at least from the perspective of Quranic recipients eligible for *Zakat* whether the *Zakat* has reached or is reaching them. What is the statistical analysis of the volume and trend as well as impact of the *zakat* collected and distributed so far to the eligibles? My response to these broad issues are as follows:

Models of Sharia Implementation in Nigeria

There is the challenge of harmonising the different models of sharia implementation in Nigeria Since 1999.

63. (1998) 6 SCNJ 127.

64. *Ibid* at p. 136.

The states that have expanded the application of the Sharia legal system are Bauchi, Borno, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Sokoto, Yobe and Zamfara States.

Some of the laws passed by the states include:

Bauchi State

a. The Sharia Penal Code Law 2001
b. The Sharia Commission Law 2001
c. The Districts Courts Law 2001
d. The Sharia Courts Commencement (Administration of Justice and Certain Consequential Changes) Law 2001
e. The Sharia Courts Commencement (Administration of Justice and Certain Consequential Changes) Amendment Law 2001
f. The Penal Code Amendment Law 2001
g. The Sharia Court of Appeal (Amendment) Law 2001
h. A Law to Repeal the Liquor Law 2001

Borno State

a. The Draft Sharia Penal Code Law 2001
b. The Sharia Administration of Justice Law 2000
c. The Sharia Administration of Justice Amendment Law 2001
d. The Borno State Zakat and Endowment Board Law 2001
e. Liquor Business (Prohibition) Law 2000
f. Prostitution, Lesbianism, Homosexuality, Operation of Brothels and Other Sexual Immoralities (Prohibition) Law 2000.

Gombe State

a. Sharia Criminal Procedure Code Law 2001

b. Sharia Penal Code Law 2001

c. Customary Code Law 2001

d. Customary Court of Appeal Law 2001

Jigawa State

a. The Sharia Penal Code Law 2000

b. The Sharia Criminal Procedure Code Law 2001

c. The Sharia Courts (Administration of Justice and Certain Consequential Changes Law 2000

Kaduna State

a. A law to provide for the establishment of Sharia Courts in Kaduna State 2001.

b. A law to amend the Sharia Court of Appeal Law

c. A law to repeal the Area Courts Law

d. A law to amend the Criminal Procedure Code Law

e. A law to establish Customary Courts in Kaduna State of Nigeria 2001

f. A law to establish a Customary Court of Appeal for the State

g. A law to establish a Sharia Penal Code Law for Kaduna State 2002

h. A law to establish Sharia Criminal Procedure Code for Kaduna State 2002.

Kano State

a. The Sharia Penal Code Law 2000
b. The Sharia Court Law 2000
c. The Criminal Procedure Code (Amendment) Law 2002

Katsina State

a. The Sharia Penal Code Law 2001
b. The Katsina State Sharia Commission Law 2000
c. The Katsina State Liquor Law 2001
d. The Sharia Courts Law 2000
e. The Islamic Penal System (Adoption) Law 2000

Sokoto State

a. The Sharia Penal Code Law 2002

Zamfara State

a. The Sharia Criminal Procedure Code Law 2000
b. The Sharia Penal Code Law 2000
c. Area Courts Repeal Law
d. Sharia Courts (Administration of Justice and Certain Consequential Changes) Law 1999.
e. Sharia Court of Appeal (Amendment) Law 2000
f. Certain Consequential Reform (Socio-economic, Moral, Religious and Cultural) Law 2001.

The Different Models of Implementation

From the laws passed by the states one can conceive of 3 models or approaches in the implementation of the Sharia. These are the

a. The Kaduna and Gombe States Models

b. The Niger State Model and

c. The Zamfara State Model which has been adopted by the remaining states.

The Kaduna and Gombe States Model

Under this model. the Area Courts were abolished and in their place Sharia and Customary Courts were established for Muslims and non-Muslims respectively.[65]

The Customary Courts have jurisdiction over all persons who agreed or may be presumed to have agreed that their obligations shall be regulated wholly or partly by custom prevailing within the area of jurisdiction of a Customary Court. They further have jurisdiction to try and determine criminal cases and to impose such punishment thereof as may be prescribed in the laws of the states. The laws to be administered include:

a. The appropriate customary law in so far as it is not repugnant to natural justice, equity and good conscience nor incompatible either directly or by necessary implication with any written law for the time being in force.

b. Any law for which jurisdiction is conferred on the court.

c. Any Law enacted by the State House of Assembly.[66]

Appeals lie from the Customary Court to the Upper Customary Court and then to the Customary Court of Appeal, in civil cases and matters. Appeals lie to the High court in Criminal matters.[67] Appeals from the

65. See Area Courts (Repeal) Law 2001, Customary Courts Law 2001, Sharia Courts Law 2001 all laws of Kaduna State.

66. See Section 20-25 Customary Courts Law 2001.

67. See section 53(2) of the Customary Court Law and section 6 Customary Courts (Amendment) Law 2001 of Kaduna State.

Customary Court of Appeal and the High Court lie to the Court of Appeal of the federation and then to the Supreme Court.

Judges of Customary Court of Appeal must be qualified lawyers of 10 years of experience as provided for in the 1999 Constitution. However, Judges of the Customary courts need only be legal practitioners of not less than one-year experience or hold a diploma in law with 5 years working experience. Muslims are not considered for appointment as judges of the Customary Courts.[68]

The Sharia Courts have jurisdiction over:

Persons of the Islamic faith

Any other person in a case or matter who consents to the jurisdiction of the court.[69]

The Court is to administer Islamic Law as defined by the Maliki School in both civil and criminal proceedings and provisions of any written law which the court may be authorized to enforce. The judges must be Muslims and possess a degree in law with specialisation in Islamic law and 2 years experience or a diploma in sharia and civil law with 5 years experience or a degree in Arabic of Islamic studies with 5 years experience.[70] The Judges are assisted by members called muftis all appointed by the Judicial Services Commission. The Language of the courts is English and vernacular. The Sharia Courts are subject to the general supervision of the Grand Khadi and Inspectors of Sharia Courts who must be Muslims. Appeals lie to the Sharia Court of Appeal of the State whose jurisdiction has been expanded to include any question of law regarding crime and punishment to which the accused is a Muslim.[71]

68. Section 4 Customary Courts amendment Law 2001.
69. Sections 19 and 20.
70. Section 7 Sharia Courts Law 2001.
71. Section 8-9 Sharia Court of appeal Amendment Law 2001.

The Niger and Kebbi States Model

Here, the Area Courts have not been abolished but their jurisdiction reviewed so that only persons professing the Islamic faith and any other person that consents to the jurisdiction of the courts will become subject to the jurisdiction of the Court. Further, the jurisdiction of the courts extend to both civil and criminal cases.[72]

In Niger State, the law also provides that a Judge of the Area Court must be legal practitioner with relevant qualification in Islamic law; or has obtained a recognised qualification in Islamic law for a period of 5 years together with considerable experience in the practice of Islamic law or is a distinguished scholar of Islamic Law.[73] In Kebbi State a Judge of the Upper Area Court must be a male Muslim with 7 years experience as an Upper Area Court Judge or legal practitioner with 7 years experience or has any qualification in Islamic Law recognised by the state's judicial service commission while an Area Court Judge is required to have 5 years experience or has any recognised qualification in Islamic Law.[74]

The Criminal Procedure Code in Niger State further provides that where separate punishment was specified in the Penal Code for offenders who are of the Muslim faith in respect of some offences, no court other than the Area Court shall at first instance try those offences or impose those punishment specified. And except as above, no Area Court shall exercise jurisdiction and power in a town where there is a Magistrate Court[75], nor can an Area Court determine a matter bothering on Customary Law.

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72. Section 5 Area Courts amendment Law of Niger State 2000 and section 4, 9 Kebbi State Sharia Courts Law 2000 and Sections 2, 4 and 5 of the Kebbi State Sharia Courts Amendment Law 2000

73. Section 5 Area Courts Amendment Law of Niger State 2000.

74. Section 7 Sharia Courts law 2000 Kebbi State.

75. Section 4 Criminal Code Amendment Law Niger State

The cumulative effect of the above is that in civil matters governed by Islamic Law, Muslims are subject to the jurisdiction of the Area Courts. In criminal matters they are subject to the jurisdiction of the Area Court exclusively in cases where separate punishments are provided for Muslims based on the principles of Islamic law e.g. in cases of rape, theft, robbery, etc.[76] However, for offences where no separate punishment is provided for Muslims, they are still subject to the jurisdiction of the Magistrate and High courts. Non-Muslims are however subject only to the jurisdiction of the Magistrate and High Courts in all cases. If they consent in writing, they will be subject to the jurisdiction of the Area Courts. There are no such changes in the criminal procedure code of Kebbi State.

In both states appeals lie from the Upper Area Courts to the Sharia court of Appeal. Appeals from the High Courts and Appeals from the Sharia Courts of Appeal in both states still go to the Court of Appeal of the Federation and then to the Supreme Court.

The Zamfara Model

The Zamfara model (adopted by the other states including Borno, Bauchi, Jigawa, Kano, Katsina, Sokoto and Yobe States) abolished the Area Courts and in their place only Sharia Courts were established. The courts have both civil and criminal jurisdiction over persons professing the Islamic faith and any other person who does not profess the Islamic faith but consents to the jurisdiction of the courts.[77] Appeals from the Sharia Court of Appeal lie to the Court of Appeal of the Federation and thereafter to the Supreme Court.

Other person who are not Muslims and who do not consent to

76. Section 5 Penal Code Amendment Law 2000 Kebbi State.

77. Sections 5 and 29 of the Sharia Court Law Kano State; section 5 Sharia Courts (Administration of Justice and Certain Consequential Changes) Law 1999 Zamfara State, Section 3 Area Courts Repeal Law 2000 of Zamfara State, Section 3 Area Courts Repeal Law 200 of Zamfara State; section 3, 7 and 41 of Sharia Courts law Katsina State.

the jurisdiction of the Sharia Courts can only have their causes and matters determined by the High Courts and District or Magistrates Courts in those states. Appeals from the District/Magistrates Courts lie to the High Court and from the High Courts to the Court of Appeal of the Federation and thereafter to the Supreme Court.

Common Features of the Models

Inspite of the above differences in the approaches the states have some common features.

These include:

a. Establishment of Separate courts for Muslims

b. Creation of separate penal codes for Muslims

c. Creation of separate criminal procedure codes for Muslims.

d. Creation of Boards and or commissions for implementation of the sharia law.

e. Prohibition of certain practices in the states and punishing offenders whether or not they are persons of the Islamic faith.

f. Amendments to the Sharia Courts of Appeal laws to allow for appeals in criminal causes in addition to appeals in civil causes.

The Sharia Penal Code

Separate penal codes were enacted in the states. These are the Sharia Penal Codes. According to Sections 3 and 4 of all the codes in the states (section 4 and 5 in the case of Kebbi State) the Sharia penal Codes provide for offences and punishments to be imposed and applicable to every person who is a Muslim and every other non Muslim who voluntarily consents to the exercise of the jurisdiction of any of the Sharia courts. Specifically they provide as follows:

Section 3

Every person who professes the Islamic faith and or every person who voluntarily consents to the exercise of the jurisdiction of any of the Sharia Courts established under the Sharia Courts (Administration of Justice and Certain Consequential Changes) Law, ... shall be liable to the punishment under the Sharia Penal Code Law for every act or omission contrary to the provisions thereof of which he shall be guilty within the state.

Section 4

Where by the provisions of this law, the doing of an act or the making of an omission is made an offence, those provisions shall apply to every person subject to the provisions of this law who is in the state at the time of his doing the act or making the omission.

Offenders under the law are liable to the following punishments:

- Death (by various forms like stoning, crucifixion, hanging, firing squad);
- Closure of premises, forfeiture or destruction of property
- Imprisonment
- Detention in a reformatory
- Fine
- Canning
- Amputation
- Retaliation
- Blood-writ
- Restitution
- Reprimand
- Boycott
- Exhortation

- Compensation
- Warning.[78]

The Codes appear to draw inspiration form the Penal Code of Northern Nigeria and applicable in all the states. They retained most of the offences except a few like the different classes of theft, brigandage, hurt, homicide, assault, trespass, defamation and some offences relating to marriage. The new codes also create new offences like dealing in alcoholic drinks,[79] death caused by a ***Waliyy aldamn,***[80] invasion of privacy,[81] Blasphemy of the Holy Prophet,[82] Girl child hawking,[83] Praise singing and Drumming,[84] and Unlawful gathering of male and female adults.[85]

The Codes also recognise punishments prescribed by Islamic law as seen above. The offences under the codes are divided into *Hudud* and *Hudud* related offences and *Qisas* and *Qisas* related offences. The latter are offences punishable by retaliation while the former are offences for which specific offences are provided under Islamic law.[86]

In Niger State however, no new Sharia Penal Code was enacted.

78. Section 5 Zamfara State Sharia Court of appeal Amendment Law 2000.
79. See sections 93 (1) Jigawa State Sharia Penal Code; 93(1) Zamfara State; 94 Kebbi State; 96 Kaduna State; 93 Borno State (Draft Bill); 92 Katisina State; Kano State; 96 Bauchi State; 95 Sokoto State; s.5 Penal Code amendment Law Niger State
80. See for instance SS. 145, 148, 148, 152 of the Sharia penal Codes of Kaduna, Bauchi and Sokoto States.
81. See for instance SS 163, 373 and 82 of the Sharia Penal Codes of Kaduna, Bauchi and Sokoto States.
82. See for instance SS 163, 3734 and 82 of the Sharia Penal Codes of Kaduna, Bauchi and Sokoto States.
83. Section 398 of Kaduna State.
84. Section 191 of Kaduna State.
85. Section 192 of Kaduna State.
86. Sectin 195 of Kaduna State.

The penal code of the state is still applicable to all persons in the state. The code was only amended to prescribe additional punishment for persons professing the Islamic faith in respect of some offences in the code like homicide, theft, adultery, defamation, drunkenness, rape and causing hurt.[87]

Apart from offences created by the Sharia Penal Codes, additionally, in Kaduna State, muslims are also liable to be tried in the Sharia Courts for offences against other laws but which are not in the Sharia Penal Code law.[88]

Sharia Criminal Procedure Codes

The enactment of new criminal procedure laws called the Sharia Criminal Procedure Codes is also common in the states. The Sharia Criminal Procedure Code regulates trial of offences under the Sharia Penal Code Law. It is applicable only to persons of Muslim faith or persons who voluntarily subject themselves to the jurisdiction of the Sharia Courts established by the Sharia Courts Laws.[89] While Katsina, Borno and Bauchi only have draft bills on the codes, Niger and Kano States only amended their existing Criminal Procedure Codes to provide for trials in Area Courts/Sharia Courts respectively. The Sharia Criminal Procedure Codes draw inspiration from the Criminal Procedure Codes of the respective states. The Codes make provisions for the constitution and powers of the Sharia Courts, processes to compel attendance of persons in the courts like summons, arrests, bail, trial proceedings, judgments, appeal and execution of judgements.

Establishment of Commissions and Boards

In some of the states, Commissions and Boards were created for the implementation of the Sharia legal system. For instance the *Zakkat*

87. Sections 63 and 65 Sharia Penal Code Law of Bauchi State.
88. Section 5 Penal Code Amendment Law 2000, Niger State.
89. Section 4 of Kaduna State Sharia Penal Code Law.

Commissions were established in Niger, Kebbi, Borno and Zamfara States for the purpose of collecting *Zakkat*.[90] Further sharia Commissions were established for the purpose of enlightenment, education and maintenance of awareness of the citizenry on sharia, reviewing relevant laws with a view to advice government on reforms of the system to conform with Islamic law and implementation of certain Islamic injunctions.[91] In Bauchi State, a Sharia Consultative Council is established to issue *fatwa* among other functions[92], [93] while in Zamfara, there is a State Preaching Board, and a Committee on Moon Sighting established and responsible for sighting of the lunar months and for compiling monthly reports on the sighting of the lunar moon[94] All the Committees, Commissions and Board are composed mainly of Muslims and funded by government of the states. In Borno State, the Zakat and Endowment Board is to be financed by the funds from the consolidated revenue of the state.[95]

Prohibition of Certain Practices Throughout the States

In the states implementing the Sharia, laws were enacted to prohibit and or criminalise certain practices which hitherto were not. The prohibition affects all persons resident in the states irrespective of

90. Section 4 Sharia Criminal Procedure Law Kaduna State.

91. See sections 5 Zakkat Collection and distribution Endowment Boards law 2001 of Niger State; 7 Boarno State Zakkat and Endowment Boards Law 2001; 5 Kebbi State Zakkat and Sadaqat (Collection and Distribution) Board Law 200.

92. See Section 8, of the Sharia Commission Laws of Katsina, Bauchi and Niger States.

93. Section 3 Sharia Courts Commencement (Administration of Justice and Certain Consequential Changes) Law 2001.

94. Section 2 Certain Consequential Reforms (Socio Economic, Moral, Religious and Cultural) Law 2001, Zamfara State.

95. Section 3 (2).

their religious or cultural beliefs. These include manufacture, sale and consumption of alcohol, prostitution, gambling etc. Zamfara state went further to prohibit and punish the following:

a. Association in public of two or more persons of opposite sex to engage in discussions or acts of immoral or indecent nature and in circumstances not approved by the tradition and culture of the people of the state.

b. Female and Male commuters in taxis or buses who sit on the same seat or row of seats whether in intra or inter state transport services.

c. Females putting on trousers or shirts exposing their legs, thighs to public offices and males putting on short knickers or wearing singlets only at working hours.

d. Dressing to expose sensitive private or sensual parts of the body like chest, thigh etc exposed directly or in transparent clothing.

e. All forms and styles of foreign hairstyles that are generally viewed by society to be indecent or improper or not acceptable or improper to the tradition/culture of the people.[96]

The prohibition on the sale and consumption of alcohol has received considerable attention in the Sharia debate by those for and against. There are generally three approaches to the prohibition, these are:

The Niger and Kebbi States approach

The Kaduna and Zamfara States approach

The Bauchi State approach

The Katsina State approach

96. Section 3-10 Certain Consequential (Social Economic, Moral, Religious and Cultural Law 2001.

In the *Niger and Kebbi States approach*, the liquor laws of the states and the regulations prescribing fees for dealing in alcohol were amended. The old Liquor Law Cap 71 Section 4 provide as follows:

1. For the purposes of this law, the state shall be divided into Prohibited areas-areas in which intoxicating liquor may not be sold except under license, and in which the sale of spirits to, and the possession of spirits by indigenes of a prohibited areas is prohibited.

2. Licensed are-areas in which intoxicating liquor may not be sold by non Nigerians except under license, and in which the sale of liquor by non indigenes may be restricted by bye laws of a local government council."[97]

The above shows that the sell of liquor is permitted under license whether in prohibited, restricted or licensed areas. Under the Sharia system in the 2 states, the amendment to the Liquor laws reduces the categorization into 2-prohibited areas where total bans have been placed on every form of dealing in alcohol and restricted areas-where dealing in alcohol must be under license.

Section 3(1)

No person shall sell, manufacture, consume or posses liquor within the prohibited areas of the state.

3/2

No person shall sell, or manufacture liquor within restricted areas of the state except under license issued under the law."[98]

97. Section 4 Liquor Laws of Niger State 1989 and Kebbi State 1978, all the other Northern Sates have similar provisions.

98. Kebbi Stae Liquor (Prohibition, Restriction and Control) Law 2000 and Section 5 Liquor amendment Law 2000 Nigeria State.

In Niger State the Prohibited areas for which the sale of alcohol is banned include areas within 8 kilometer radius of the post offices in Minna, Bida, Suleja, Kontagora and Agaje and 8 kilometer radius from the emirs palaces in Lapai, Kagara, New Bussa and Mokwa except the military formations in the above mentionplaces. All other towns and villages in the state are restricted areas for which licenses must be acquired. Punishments for contravention were increased from ₦20 to between ₦50,000 and ₦1,000,000 or imprisonment for 3 - 5 years. Previously local liquor was exempted and vehicles on transit. Under the present law there is no such exemption. In addition non-Nigerians cannot hold any license.[99] The fees for licenses for the sale of liquor have also been increased to N200,000.00 for ordinary local liquor license and N1,000,000.00 for a general retail liquor license.[100]

In the case of Kebbi State the prohibited areas include Gwandu, Yauri, Argungu and Zuru Emirates excluding some areas in Zuru town, and headquarters of local governments and districts. All others are restricted areas for which license must be obtained for the manufacture and sale of liquor. The law does not apply to military formations.[101]

Kaduna and Zamfara States present the second approach. Here, the Liquor Laws still apply and the local governments still exercise their powers under the liquor laws to make bye laws and regulations on alcohol sale and consumption taking into consideration their peculiar circumstances. Thus in Kaduna State, while some local governments placed bans on the sale and consumption of the product, others only increased the license fees minimally. The following are some of the

99. Sections 5-24 and First and Second Schedules, Liquor (Amendment Law) 2000 of Niger State compare withhold Liquor Law Cap 71 of the state 1989.
100. Schedule to Regulation 3 Liquor (Licensing) regulation 2000, Niger State.
101. Sections 3 to 15 and Schedules 1 and 2 of Kebbi State Liquor Prohibition, Restriction and Control) Law 2000.

bye – laws prohibiting the sale and consumption of alcohol:

1. Giwa Local Government Sale and Drinking of intoxicating liquors, gambling and prostitution (prohibition) Bye-Law2000.
2. Soba Local Government (Buying, Selling and consumption of Liquor) Bye-Law 2000.
3. Makarfi Local Government (Control of Liquor, Brothel and Gambling) Bye-Law 2000.
4. The Kubau Local Government (Control of Liquor, Brothel and Gambling) Bye-Law 2000.
5. The Zaria Local Government (Control of liquor, Brothel and Gambling) Bye-Law 2000.
6. Birnin Gwari Local Government (Sale and Drinking of Intoxicating Liquor, Gambling and Prostitution (Prohibition) Bye-Law 2000.
7. Kudan Local Government (Control of Liquor, Brothel and Gambling) Bye-Law 2000.
8. The Ikara Local Government (Sale and Drinking of Intoxicating Liquor, Gambling and Prostitution (Prohibition) Bye-Law 2000.

The laws revoked previous licenses issued for sale of liquor and beers. They also ban gambling and prostitution. They punish breaches with terms ranging from 3 months to 5 years imprisonment and N500 fine. However exempted from the law are medical practitioners using alcoholic substances for treatment and persons conveying liquor on transit. (The latter is applicable only in Kudan, Zaria, Kubau and Makarfi local governments areas). The local governments that did not ban the sales and consumption of alcohol but increased licenses minimally include Kaduna North Local Government whose new Liquor License fees are as follows.

Type of licence		Fee ₦
a.	On and off licence	2500
b.	Whole sale liquor	5000
c.	Native Liquor	1000
d.	Annual Renewal	500
e.	New Open Liquor	5000
f.	General retailing	2500
g.	Off licence	2000
h.	Tavern licence	5000
i.	Club licence	5000
j.	Hotel licence (medium)	5000
k.	Hotel licence (big)	20,000[102]

The third approach is the **Katsina State approach** which other states adopted. Here Liquor Laws were repealed and a complete ban is placed on the manufacture, sale, possession or advertisement of alcohol throughout the state.[103] Borno State which has similar law however exempts the application of the law to military and para – military formations and foreign missions.[104] The law also provides that a non – Muslim who takes alcohol or liquor or intoxicating substance in an open or public place shall be guilty of an offence and shall on conviction be liable to fine of N2000.[105]

The Fourth Approach is the Bauchi State approach where the liquor law was repealed and a ban placed against non-muslims through

102. Kaduna North Local Government (Revenue Rates Review) Bye Law 2000 item 5 schedule to section 4.
103. Sections 5 and 9 Katsina State Liquor Law 2001.
104. Section 8 Liquor Business (Prohibition) Law 2000 Borno State.
105. Section 4(2).

the instrumentality of the penal code from selling or dealing in alcohol in "predominantly muslim towns and villages."[106]

Other prohibited practices include prostitution, gambling, lesbianism, etc have only now been re-emphasised as they have been in the penal code of the states even before the current Sharia regime e.g. obscene acts (S. 200) keeping brothels (S. 201), keeping gaming houses (S. 205) offences relating to lotteries (S.206) etc.

It is evident from the above analysis that the different models of Sharia implementation both in terms of rationale, aims and objectives, nature and scope, structure and contents as well as administration of Justice require or need urgent attention for a possible harmonisation and ease of implementation in the affected Northern States of Nigeria.

Lack of Observance of procedural guarantees or procedural Justice under Sharia by Trial Court Judges

Between the year 2000 and now, in all the notorious criminal cases decided by the Sharia trial court Judges in respect of adultery or fornication (Zina) namely, Safiya, Amina Lawal and a host of others, and with regards to theft or the offence of Sariqa, the procedural guarantee were not observed in favour of the accused persons, thereby resulting into denial of justice and violation of human rights. The procedural guarantee are mainly the basic rights of an accused person before, during and after trial, and provide conditions for their imposition of *hudud* punishments or sentences such as stoning to death and amputation of hands.

The importance of procedural guarantees or procedural justice is adequately reflected in the Judgement of the Sokoto State Sharia Court of appeal in the case of *Safiya Hussaini v. Attorney General of Sokoto State* (25-3-2002) where the court unanimously allowed

106. Bauchi State penal Code (Amendment) Law 2001 and Volume 2 Report of the Task Force on Sharia implementation Bauchi State 20001 p. 14

the appeal of Safiya and quashed her conviction of stoning to death on grounds of procedural irregularities.

This aspect of Justice, often called formal Justice, is manifested in the degree of regularity, meticulousness, integrity and impartiality in the application of the substantive law. Even if little or no elements of Justice were to be found in the law, the individual could derive satisfaction if the law were applied with regularity and impartiality.

Lack of observance of procedural guarantees/procedural Justice by Sharia Court Judges is partly due to the absence of Sharia Criminal Procedure Codes (containing these guarantees) in many of these states, e.g. Katsina, as at the time the above cases were decided.

Lack of training of Sharia court Judges in comparative Human rights and Administration of Justice in Nigeria

Continuing judicial education of all judges is very critical to the effective enforcement of human rights and administration of Justice. Most Sharia Court Judges were appointed to man these courts without any training at all in comparative human rights and the administration of Justice in Nigeria. The resultant consequence of some Judgements delivered by these Judges is nothing but a denial of Justice and violation of citizens' rights.

Part 4:

On item v titled "Activities of some legal practitioners" posing problem, the lead paper lost the opportunity of telling us, or at least reviewing, the significance of the decision of the full Sharia bench of the Court of Appeal, Kaduna Division in the celebrated case of *Karimatu Yakubu v. Alhaji Paiko*, to the Nigerian Legal System and whether the right to legal representation exists under the sharia and whether the right to a lawyer's audience can be denied by a particular court, and whether such Judicial attitude will be constitutional or not under the Nigerian Legal System.

This issue came to be decided by Sharia bench of 3 learned Justices of the court of Appeal for the first time in the case of *Karimatu Yakubu and Anor v. Alhaji Yakubu Paiko and Anor*,[107] in that case, the appellants, at the Upper Area court, had been represented by a legal practitioner. But at the Sharia Court of Appeal, Minna, Niger State, when Karimatu's legal practitioner announced his appearance, he was refused audience by the court. The Sharia Court of Appeal based its decision to refuse him audience on the ground that it found him, after questioning him, to be ignorant of the Islamic law relating to evidence, procedure and legal representation, and that at any rate section 20 of the Sharia Court of Appeal Law barred legal practitioners from representing parties appearing before the court.

This issue of refusal of legal representation was one of the appellants' grounds of appeal. Their argument was that they had a constitutional right to be represented by a legal practitioner. They questioned the power of the Sharia Court of Appeal to lay down any condition which a legal practitioner must satisfy before he could appear before it. The appellants further argued that the Sharia Court of Appeal could not rely on section 20 of the Sharia Court of Appeal Law since that section was inconsistent with the appellants' right to fair hearing under the 1979 constitution.

The Court of Appeal, Kaduna division, accepted these arguments of the appellant in this case and declared the proceedings of the Sharia Court of Appeal, Minna in this case null and void for violating the appellants' rights under the constitution.

This is a significant decision. In their Civil Proceedings the Sharia Courts of Appeal and the Area Courts are not only obliged to apply substantive Islamic and Customary Laws, but their practice and procedure are also governed by rules of Islamic and Customary Laws.

The Legal Profession in Nigeria is basically a product of the English Legal System, originating from Nigeria's British Colonial

107. Unreported Appeal No. CA/K/80S/85.

history. The contents of Legal education and the rules governing the life and practice of a legal practitioner are all similar to or modelled on the traditions of the English legal profession. This is so down to the small details of dress and mannerism in court.

In the Sharia Courts, the spectacle of legal practitioners in their grey wigs and black gowns, and with their predilection for technicalities of language and procedure, is indeed a major innovation.

As a matter of fact, there is nothing in the Islamic Law against legal representation. The Sharia allows the litigant to appear in person, or to appoint a representative of his choice. But the point the Sharia Court of Appeal was making was that the appearance of a legal Practitioner in a Sharia Court should be governed by the Islamic rules of practice and procedure which govern other aspects of the practice and procedure of the court.[108] Rationally that is how it should be.

Unfortunately, this is not how it is with the decision of the Court of Appeal giving lawyers the right of audience in the Sharia Court and with no amendment to the laws governing the training, practice and ethics of legal practitioners, no additional conditions can be imposed by the Sharia Court of Appeal in relation to the qualification or behaviour of legal practitioners for them to appear before it. Yet the Sharia Courts have their own Islamic traditions, procedure and legal ethics on which their unique character and their effectiveness are based.

Conclusion

Finally, on the conclusion of the lead paper, pp. 35-36, in particular, paragraph 2, I think it is more of open-mindedness and tolerance, education and continuing inter-faith dialogue between adherents of different faiths in Nigeria.

108. Appeal No. SCA/NS/CV/15/1985 (unreported).

There is also the role of Muslim scholars themselves in r
evaluating the contemporary role of the Sharia as a problem-solvi
tool in all fields of human endeavour capable of responding to t
changing needs, circumstances, conditions, hopes, aspiration
concerns and fears of the Muslim community on the one hand, and c
mankind on the other. This requires a movement away from *taqli*
(blind imitation) to the activation of the role of *Ijtihad* as a researc
initiative or tool capable responding to contemporary global needs,
peace and security.

PAPER VII

THE NEED FOR PROCEDURAL REFORM TO FACILITATE ACCESS TO JUSTICE AND SPEEDY TRIAL OF CASES

Hon. Justice A. Adetula Alabi
Chief Judge, Lagos State

COMMENTARY (I)

Hon. Justice L. H. Gummi
Chief Judge, FCT Abuja

COMMENTARY (II)

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CHAPTER SEVEN

THE NEED FOR PROCEDURAL REFORM TO FACILITATE ACCESS TO JUSTICE AND SPEEDY TRIAL OF CASES

Hon. Justice A. Adetula Alabi
Chief Judge, Lagos State

Introduction

It is my honour and privilege to present this paper on a subject that is so dear to the hearts of all jurists and all those people out there who, for good reasons still look up to the judiciary as the last hope of the common man.

The case for facilitating access to justice and speedy trial of cases is indeed a constitutional mandate which does not require to be justified by advancing any reasons. In other words, it is self justifying, being a constitutional imperative. By sections 6(1) and 6(2) of the Constitution of the Federal Republic of Nigeria, 1999 (herein after referred to as 'the Constitution'), the Judicial powers of the Federation and States are respectively vested in the courts established for the Federation and each State. Under section 6(6)b of the Constitution, it is provided that these judicial powers shall extend to all matters between persons or between government or authority and to any person in Nigeria and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person. In interpreting this provision BELLO JSC (as he then was and now of blessed memory) in the case of *Senator Adesanya* v. *President of Nigeria*[1] said "it seems to me that upon

1. (1981) 2 NCLR 358 at 385 - 386.

the construction of the subsection, it is only when the civil rights and obligation of the person who invokes the jurisdiction of the court are in issue for determination that the judicial powers of the court may be invoked".

In other words, the courts are constitutionally established as a forum for the resolution of legal disputes between person or persons and government or government and government.

In performing this role, section 36(1) of the Constitution provides *inter alia* that:

> ...a person shall be entitled to a hearing within a reasonable time by a court or other tribunal established by law...

Reasonable time would depend on the particulars of each case. Whilst some cases, due to their complexities would take a long time to be disposed of some are simple and could be handled within much shorter period. Generally, reasonable time within which a trial should take place would mean a moderately and practically possible time within which a court or tribunal could complete a trial and pronounce its decision (see the case of *Effiong v. the State*.[2] Reasonable time is such time as is necessarily convenient to do what a contract requires to be done and as soon as circumstances will permit.

An unreasonably long completion time is much more easily determinable, recognisable and condemnable. A suit which takes 5 years to conclude is not one that was concluded within a reasonable time, yet we know that before 2004, the average period for conclusion of cases in Lagos state was much longer than five years owing to the heavy congestion of cases characteristic of a busy jurisdiction like Lagos.

It is not disputable that there are congestions and long delays in our law courts all over the country and publication of statistics on that issue will send chills down the spines of many.

2 1995 1 NWLR Part 373 page 507.

Today, all of us are familiar with the interminable delays in the legal system. From the filing of papers to hearing of cases and final determination, the entire process has become bogged down by fundamental deficiencies. In a busy jurisdiction such as Lagos, determining the length of trials is essentially a shot in the dark. Many young lawyers after a few years of going to the court have still not had the benefit of a full trial. At best all the experience they may have is limited to a few motions and countless adjournments. It appears that the expertise required now for practice especially where you are a party with a bad case is how to ensure that the case is not heard. Over time, we are coming to a point where most cannot rely on the courts any more. In the well known case of *Amadi v. NNPC*[3] the issue of jurisdiction alone went up to the Supreme Court and took 13 years to conclude before it was referred back to the High Court for trial on the merits.

In the said AMADI case, at page 100 paragraph E-H, UWAIS (JSC) (as he then was and now Chief Justice of Nigeria) in his lead Judgment had this to say:

> Finally, this appeal succeeds and must be allowed. The checkered history of this case once more brings to light the dilatory effect of interlocutory appeal on the substantive suit between parties. The action in this case was brought on the 29th day of April, 1987. The motion on notice to strike out the case for want of jurisdiction is dated 15th day of April 1988; that is about a year after the suit was filed. The ruling of the High Court was delivered on the 20th day of June, 1988. The appeal against the ruling was delivered by the Court of Appeal on the 16th day of February, 1989. The final judgment on the interlocutory appeal is delivered today by this court.

It has thus taken thirteen years for the case to reach this stage. With the success of the plaintiff's appeal before us the case is to be sent back to the High Court to be determined, hopefully, on its merits

3. 2002 10 NWLR pt 674 page 76.

after a delay of 13 years. Surely, this could have been avoided had it been that the point was taken in the course of the proceedings in the substantive claim to enable any aggrieved party to appeal on both the issue of jurisdiction and the judgment on merits in the proceedings, as the case might be.

I believe that counsel owe it, as a duty to the court to help reduce the period of delay in determining cases in our courts by avoiding unnecessary preliminary objections as the one here; so that the adage 'justice delayed is justice denied 'may cease to apply to the proceedings in our courts".

A perpetuation of this state of affairs is bound to lead to a total loss of confidence in the judicial process and carry with it the attendant risk of primitive retrogression to the brutal past of man where "might is right".

In his book, Administration of Justice[4] the author reported a former Chief Justice of United States of America as saying:

> A sense of confidence in the courts is essential to maintain the fabric of ordered liberty for a free people and three things could destroy that confidence and do incalculable damage to society:
>
> (a) that people come to believe that inefficiency and delay will drain even a just judgment of its value;
>
> (b) that people who have long been exploited in the smallest transaction of daily life come to believe that courts cannot vindicate their legal rights from fraud and overreaching; and
>
> (c) that people come to believe that in the large sense the court cannot fulfill its primary function to protect them and their families in their homes, at their work, and on the public street.

At a time past, congestion and delay appeared to be a global virus eating away at the fabric of administration of justice but

4. By Melvin – P. Sikes.

modernisation of rules in many countries is either a top priority or has been concluded.

In this respect, a recent *Newsweek* Magazine[5] story on Indian Courts titled "Unclogging the Courts" caught my attention. It reads:

> A recovery of premises matter went through different judges and lasted 16 years and the plaintiffs reportedly considered themselves lucky as it is much worse for others.

It was further reported that India's lower courts have a backlog of about 20 million civil and criminal cases, an additional 3.2 million cases are pending before the High Courts whilst their Supreme Court has about 20,000 old cases on the docket.

The report blamed part of the problems on the fact that India has fewer judges than almost any country in the world and in year 2000 had 3 judges per 100,000 people.

The comparable figures for Nigeria would make interesting reading but are not available. In England for instance following what has become known as the "WOOLF REFORMS" (the recommendations made by a committee under the chairmanship of Lord Woolf), England and Wales have, since 1999 operated a modern Civil Procedure Rules.

I am delighted to say that Lagos State has followed the modern trend in modernisation of Rules.

The radical reforms culminating in the Lagos State (Civil Procedure) Rules 2004 drew a lot of inspiration from the English Rules but went beyond them in many respects.

They owe a lot too to the law reform zeal of the State Governor, Asiwaju Bola Ahmed Tinubu, the Lagos State indomitable Attorney-General and Commissioner for Justice, Professor Yemi Osinbajo, SAN, the British Overseas Department for International Development and the United States National Center for State Courts.

5. *NEWSWEEK*, July 18, 2005 page 6.

The Burden of this Paper

In the summons served on me to present this paper and signed by my learned brother the Administrator of the National Judicial Institute, Honourable Justice J. A. Ajakaiye I was directed to focus my discourse ".... On the innovations and changes made in the new High Court of Lagos State (Civil Procedure) Rules 2004 geared towards facilitating speedy trial".

The directives stated further "Moreover the rules have been in operation now for some time and you will do well to point out areas, if any, needing review".

I have had to lay this foundation before proceeding to deal with the subject of the paper in order to forestall any 'orders' by your lordships that the evidence I am about to give, namely, that a presentation of the innovations in the Lagos State Rules are outside the pleadings as summarized by the topic.

Having laid that foundation, I will now proceed to highlight the innovations in our Rules stating briefly, where necessary, the mischief that the particular orders were intended to cure.

Lagos State (Civil Procedure) Rules 2004

After a period of gestation that was longer than that of human beings, the Lagos State Civil Procedure Rules 2004 finally came into being on 16th June 2004.

We had the singular privilege of having the Chief Justice of Nigeria Mohammed Lawal Uwais (GCON) as the launcher. I use this opportunity to thank his lordship for his support and encouragement throughout the gestation period.

Overriding Objectives

The philosophy and *raisons d'etre* of the Rules is clearly in Order 1 Rule 1.2 which provides that:

> the application of these Rules shall be directed towards the achievement of a just, efficient and speedy dispensation of Justice.

Every Judge and every legal practitioner as an officer of the court, is at all times when applying the rules, to bear in mind this overriding objective which translates simply to "the achievement of expeditious and inexpensive litigation.

The equivalent of our overriding objective is in Order 1 Rule 1.1(2)(d) of the English Rules and provides *inter alia* that the courts should ensure that cases are dealt with "expeditiously and fairly."

In commenting on this provision, the learned author, Neil Andrews in his book[6] had this to say at page 337, paragraph 13.09 " the overriding objective is constantly at the shoulder of lawyers and Judges."

In the same manner, it is expected that our own overriding objective should constantly be on our shoulder such that the application of every one of the rules is directed towards the achievement of a just, efficient and speedy dispensation of justice.

Commencement and Front-loading

One of the most prominent innovations in the Rules relates to commencement of an action. It should be mentioned at the onset that some old terminologies have given way to more functional ones that are more in consonance with everyday usage and less mystifying. Thus in the Rules a plaintiff is known as a 'claimant' being the person who claims.

An action can still be commenced by a writ of summons[7] or an originating summons[8] as has always been the case in the past (depending on the nature of the action) but it is now imperative to accompany same with certain documents, the act of such attachments being referred to as 'front-loading'.

A writ of summons should be accompanied by (a) Statement of Claim (b) list of witnesses to be called at the trial (c) written statement on oath of witnesses and (d) copies of every document to be relied

6. *English Civil Procedure, Fundamentals of the New Civil Justice System.*
7. Order 3 Rule 1.
8. Order 3 Rules 5 & 6.

on at the trial.[9] Where a claimant fails to comply with the aforesaid 'front-loading' provision, his originating process will not be accepted at the Registry for filing.[10] It means that he is not ready to file an action.

Where per chance the originating process sails though the eye of the Registry needle in spite of failure to comply with the provision, such failure shall nullify the proceedings.[11] A distinction is made in the Rules between (a) failure to comply with the provisions in "beginning or purporting to begin" any proceeding and (b) failure to comply with other provisions in connection with proceedings after commencement.

The former failure earns a nullity which is incurable but the latter earns an irregularity only which is curable.[12] The clear message is that front – loading provisions cannot be compromised.

Service

Service of an originating process may be made not only by a bailiff but also by (a) law chambers (b) courier company or (c) any other person; in all these cases, they have to be appointed by the Chief Judge and duly registered as process servers.[13] Personal service of an originating process is not required where the defendant has authorized his Legal Practitioner in writing to accept service and the Legal practitioner has entered appearance; The written authority must be attached to the memorandum of appearance.[14]

9. Order 3 Rule 1
10. Order 3 Rule 2.2.
11. Order 5 Rule 1.
12. Order 5 Rule 1, 2.
13. Order 7 Rule 1.1.
14. Order 7 Rule 1.3.

Defending an Action: Front-Loading

A defendant must enter appearance within the time specified in the originating process (Order 9 Rule 1) and must file his statement of defence not later than 42 days after service on him of the originating process.[15] As in the case of the claimant, the statement of defence must be supported by copies of documentary evidence to be relied upon, list of witnesses and their written statements on oath.[16]

The Intendment and objectives of the front-loading requirements are:

(a) To discourage the filing of weak frivolous cases;

(b) To afford parties an opportunity to assess the relative strength and weakness of their cases and thus facilitate settlement at the earliest possible time before too much expenses are incurred;

(c) To identify and focus attention on the main issues from the onset and thus avoid the tendency to dissipate energy on irrelevances;

(d) To minimise the incident of amendment of pleadings and most importantly;

(e) To avoid trial by ambush.

Originating Summons

In addition to the motion paper, affidavit and exhibit, an originating summons must be accompanied by a written address; failure to comply will earn a nullity as in the case of writ of summons (Order 3 Rule 8.1). The respondent who desires to defend must also accompany his counter affidavit and exhibits with his written address.

15. Order 15 Rule 12.2.
16. Order 17 rule 1.

Formulation of Issues

In all proceedings, issues of fact in dispute must be defined by each party and filed within 7 days after close of pleadings (Order 27 Rule 1.1). If the parties differ on the issues the pre-trial conference Judge may settle the issues (Order 27 Rule 1.2).

Striking out of Pleadings

Pleadings that are outside the issues or are scandalous or otherwise unnecessary may be struck out by a pre-trial Judge *suo motu* (or at any time thereafter if it discloses no reasonable cause of action or defence or is an abuse of court process or will delay the fair trial of the action.

Amendments Limited as to Number

A party may amend his pleadings at any time before the close of pre-trial conference but *not more than twice during the trial before the close of the case (Order 24 Rule 1).*

Pre-Trial Conference

Another major innovation in the rules is that of case management and the pre-trial conference. The pre-trial conference is presided over by a Judge named the Pre-trial Conference Judge.

By Order 25[17] within 14 days of the close of pleadings, the claimant must apply for the issuance of a pre-trial conference notice as in form 18. The Judge then orders the issuance of the pre-trial conference notice accompanied by a pre-trial conference information sheet.

The pre-trial conference notice notifies the parties of the date of the pre-trial conference hearing and its purpose. The pre-trial information sheet must be completed and returned to the court seven days before the hearing. The question that this sheet poses and the information that it calls for are detailed.

17. Order 25 Rule 2.

The pre-trail conference though held in open court is most informal. Judges and counsel are not robed and parties are allowed to make contributions at the discretion of the Judge.

The agenda at the conference is:

(a) Disposal of matters which must or can be dealt with on Interlocutory applications;

(b) Giving directions as to the future course of the action as appears best adopted to secure its just, expeditious and economical disposal;

(c) Promoting amicable settlement of the case or adoption of alternative dispute resolution.[18]

In the past, a party may take out a writ to force a defendant to negotiate and after serving it he goes to sleep. He may then take out a statement of claim some 6 months later following the procurement of extension of time to do so, an application that is rarely or hardly ever refused. In those days, the defendant, on receiving the statement of claim may take no action until the plaintiff takes out an application for final judgment in default of pleadings.

In circumstances like this, pleadings may take one or more years to close. The "Front-loading" provisions will ensure that the tardiness of the past is minimised.

Case Management

At the pre-trial conference, the Judge is mandatorily required to consider and take appropriate action in respect of such of the matters listed in order 25 Rule 3 of the Rules as follows:

(a) Formulation and settlement of issues;

(b) Amendments and further and better particulars;

18. Order 25 Rule 2.

(c) The admission of facts, and other evidence by consent of the parties;

(d) Control and scheduling of discovery, inspection and production of documents;

(e) Narrowing the field of dispute between expert witnesses by their participation at pre-trial conference or in any other manner;

(f) Eliciting preliminary objections on point of law;

(g) Giving orders or directions for separate trial of a claim, counterclaim, set-off, cross-claim or third claim or of any particular issue in the case.

The effect of the combined reading of the front-loading provisions of Order 3 Rule 2 (1) which deals with form and commencement of action and Order 17 Rule 1 which deals with filing of defence and counterclaim is that at the pre-trial conference, the Judge would have been seized of the claimant's claim and the defence, the list of witnesses on oath and copies of the documentary evidence to be relied on by the parties.

A prior study of these documents would enable him to see before hand, the relative strength and weaknesses of the parties' case and thus assist him in effectively managing the conference. He is thus empowered to determine what amount of front-loading material is necessary for the determination of the issues which arise in the case.

Similarly, where a party desires to call 5 witnesses to testify to the same facts – as often happens at trial, the judge can order that one will suffice in order to avoid unnecessary delay and expenses.

Issuance of a Report

Under Order 25 Rule 5, it is provided that on conclusion of the pre-trial conference or series of pre-trial conferences, the pre-trial Judge

"shall issue a report" which shall guide the subsequent course of proceedings unless modified by the trial Judge.

The file is then returned to the Chief Judge who allocates it to another Judge for trial. I will come back to this procedure later.

Delivery of Judgment

(a) A pre-trial conference Judge may deliver judgment at the pre-trial conference as for instance upon the admission of a defendant to the claimant's claim or in default of a defence by the defendant, and without the necessity of sending the case to a trial judge.[19]

(b) Judgment may also be given by a pre-trial conference Judge by consent of the parties and in consequence of the resolution of questions of law submitted to the pre-trial conference Judge in the form of a special case.[20]

(c) If a party or his legal practitioner fails to attend the pre-trial conference or obey a scheduling or pre-trial order or is "subsequently unprepared" to participate in the conference in good faith, the Judge shall:

(i) in the case of the claimant dismiss the claim;

(ii) in the case of a defendant enter final judgment against him;

(iii) any judgment given under this rule may be set aside upon application made within 7 days of the judgment or such other period as the pre-trial judge may allow not exceeding the pretrial conference period.

The Concept of Penalties and Costs

The jurisprudence behind the imposition of penalty where actions are

19. Order 35 Rule 1.
20. Order 28 (*Supra*).

taken outside the time permitted under the Rules[21] is to instill time consciousness into the system and use such imposition as an engine to drive the parties and counsel – not to punish them.

The same consideration for timeliness is true of the provisions on costs. The award of costs has always been a matter of the discretion of the Judge but Order 49, which deals with the subject now, makes provisions to strengthen the hands of a Judge in that regard.

The common law principle – costs follow the event – is the principle to be observed in fixing the amount of costs.

Thus the party who is in the right is

(a) to be indemnified for the expenses to which he has been necessarily put in the proceedings;

(b) compensated for his time and

(c) compensated for his effort in coming to court.

The Judge may take into account all the circumstances of the case.[22]

A legal practitioner is personally liable for costs in a situation where the Judge considers him or his servant or agent (e.g. his litigation clerk) responsible for undue delay or other misconduct or default.[23]

When costs are ordered in the proceedings, they are payable forthwith within 7 days of the date of the order and a defaulting party or his Legal practitioner may be denied audience in the proceedings.[24]

Granting Extension of Time: Penalties Payable

The imposition of penalty to discourage tardiness is also another major innovation in the Rules.

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21. Order 44 Rule 4.

22. Order 49 Rule 1.

Order 44 Rule 4 of the rules retains the powers of the court to grant extension of time within which to do a specified act beyond the time so limited but a provision to the rule imposes a mandatory fee of ₦200 for each day of such default by a party payable at the time of filing the application for extension of time and in addition to the usual filing fees.

In the case of an application for extension of time to comply with conference orders, it is important to keep in mind that orders for extension of time are circumvented by order 25 Rule 4 (*supra*) which puts conclusion time of the pre-trial conference at not later than 3 months after the date of commencement of the conference but may be extended for a just cause by the Chief Judge.[25]

Monitoring the Process of the Cases

The empowerment of a Judge to take an active control of all proceedings and police the parties in a suit is further illustrated by the provision of Order 27 Rule 13 of the Rules which provides as follows:

> if it shall appear to a Judge that there is an undue delay in the prosecution of any proceedings, the Judge may require the party having the conduct of the proceedings or any other party, to explain the delay and may thereupon make such order with regard to expediting the proceedings or the conduct thereof, or the stay thereof and as to the costs of the proceedings as the circumstances of the case may require; and for the purposes aforesaid any party may be directed to summon the persons whose attendance is required, and to conduct any proceeding and carry out directions which may be given.

Periods granted for compliance with conference orders (e.g amendment, discovery, extension of time etc.) must be short, say 2 or 3 days.

23. Order 49 rule 13.
24. Order 49 Rule 9.2.
25. Order 29 Rule 4.

Evidence at Trial

Yet another major innovation is the limitation of the oral examination of a witness in his evidence-in-chief. Such oral examination is now limited to confirming his written deposition and tendering in evidence all disputed documents or other exhibits referred to in the deposition.[26]

Agreed documents and other exhibits may be tendered from the Bar.[27] Oral cross-examination follows. This procedure saves a lot of valuable time particularly in areas of law that are pre-disposed to long stories e.g. chieftaincy and land matters.

Compulsory Written Addresses

Upon conclusion of trial, the Judge makes an order for filing of written addresses which are to be filed not later than 21 days from the date of conclusion of trial for the party who begins; 21 days from the date of service thereof for the other party. Liberty is granted to the party who began to file a reply on points of law within 7 days from the date of service of the other party's address.[28]

In adopting their written addresses parties have 20 minutes each to make oral submission.[29] A party may choose to merely adopt his written address without making any further arguments.

Enabling Powers: Omnibus Provision

The Rules are thought to be comprehensive but should a situation arise which is not covered by them, there is an enabling power given to a Judge to use his discretion in such matter under section 2 of the law which brought the Rules into existence.[30]

26. Order 32 Rule 1.3.
27. Order 32 Rule 1.2.
28. Order 30 Rules 14 - 16.
29. Order 31 Rule 4.

The section provides:

> where a matter arises in respect of which no adequate provisions are made in the Rules, the court shall adopt such procedure as will in its view do substantial justice between the parties concerned.

In such cases, resort may be had to the rules of any common law country including but not limited to English Rules.

Conclusion

The Rules have been in operation for about 18 months only and their application is being constantly monitored to see and identify areas which may require a review. It is still too soon to pass judgment but the consensus amongst Judges, Legal practitioners and Litigants is that the Rules are definitely better suited to the attainment of Justice than the old Rules.

Applications for extension of time are fewer than before but are still too many for our liking. Whilst tardiness of parties is met with penalties and brings in some revenue, it is important to stress that we would rather have compliance with the Rules without money than all the money in the world without compliance.

The pre-trial conference concept has been well received. Many cases get amicably resolved or are referred for alternative dispute resolution at the Multi-door Court House located on the premises of the Lagos High Court.

However, a potential for delay has been identified in the practice of taking back an unresolved matter and sending it to another Judge for trial. The potential for delay consists of the following:

(i) Time is spent in sending the file back to the Chief Judge for re-assignment.

30. The High Court of Lagos State (Civil Procedure) Law.

(ii) Time is spent by the Chief Judge when re-allocating and sending the file to another Judge.

(iii) Time is spent by the new Judge in studying the file and mastering the facts.

(iv) Finally, time is spent by the file on the queue before trial.

An amendment is being proposed in some circles that valuable time will be saved if in appropriate cases, the pre-trial conference Judge who has mastered the facts also deals with the trial itself rather than send it to another Judge where it will inevitably suffer the delays observed above.

It is further proposed however, that in cases where a Judge feels he has become too involved with a matter in the course of promoting its amicable settlement and can no longer trust his impartiality, he should disqualify himself from hearing it and in that case send the file to the Chief Judge as is presently the case in all situations.

If this proposal, gains popular support, it can be achieved through a practice direction of the Chief Judge because the Rules do not specifically say that the same Judge cannot be a pretrial conference judge and a trial Judge in the same matter.

What Order 25 Rule 5 says is that upon the conclusion of the pre-trial conference(s), a pre-trial conference Judge shall issue a report which shall guide the subsequent course of the proceedings unless modified by the trial Judge.

Therefore, the Judge who has the conduct of a case at a pre-trial conference state is designated a pre-trial Judge: when the trial begins, his designation changes to "trial Judge". That is all.

It is one thing to have the Rules in the book. It is another thing to apply them and their successful application is the burden of both Judges and Legal Practitioners.

Indeed Order 25 Rule 4 provides, *inter alia*, that: "the parties and their Legal Practitioners should cooperate with the Judge." It is

only with such cooperation that the laudable overriding objectives of the Rules i.e. just, efficient and speedy dispensation of justice can be achieved.

My Lords and My Ladies, I can tell you that so far in Lagos State, it has been so good. It has been a success story compared with what the situation used to be before 16th June 2004.

The air of complacency is disappearing; diligence is taking over. At the moment, 45% of our cases end at the pre-trial conference stage. I am aware that change creates fear and anxiety in human beings yet if progress must be made, we must prepare for change. There does not seem to me to be any option on this matter. Forward ever, backward never.

COMMENTARY (I)

Hon. Justice L. H. Gummi
Chief Judge, FCT Abuja

It is my singular honour to comment on the paper presented by my learned brother and friend, Justice Adetula Alabi, Chief Judge, Lagos State, in respect of the above-named subject matter.

I must confess that I was not availed of the privilege of seeing my learned brother's paper before the commencement of this conference to enable me, adequately, comment of this subject matter. Be that as it may, what I lost in time, I have gained by the clear and straight forward manner in which the author presented the paper.

In spite of the title of this paper, the author was directed to focus, his discourse "...on the innovations and changes made in the new High Court of Lagos State (Civil Procedure) Rules 2004 geared towards facilitating speedy trial". I intend to limit my comments on the issues raised therein.

The author captures the overriding principles guiding the coming into existence of the Rules in Order 1 Rule 1.2 of the Lagos Rules which is "the achievement of a just, efficient and speedy dispensation of Justice". This is a laudable development in justice delivery in a society where hopes are beginning to wane on our justice resolution system as a result of the prolonged delays in our Courts.

The learned author's call on the Judges and lawyers not to lose sight of these overriding principles in the application of these rules is very apt, because the success or failure of these rules weigh heavily on their shoulders.

The author's detailed account on the operation of the Front-loading system leaves no doubt in any prospective litigant as to what steps to take in filing process in the Lagos State High Court.

Although the writer distinguished the effects of failure to comply

with the Rules before and after commencement which attracts a nullity for the former and a curable irregularity for the latter, one would have expected to know what happens to matters that were filed shortly before the commencement of these Rules in which trial had not started or during their early stages. Would the Court, in line with the same overriding principle of "a just, efficient and speedy dispensation of Justice, ask the parties to re-file their processes in compliance with the new Rules? Or did the Rules make any provision as to what the Court should do in this circumstance? The learned author did not throw light on these issues.

On the issue of service of originating process, the author enumerated those who can serve such process on the appointment of the Chief Judge after being duly registered. I had wished that the author did throw more light on the process of registering the process servers. One hopes that this process will not cancel the gains that would have been made by the front-loading system. By and large, there is no better way of achieving a speedier and more efficient justice delivery than the front loading system. This much the learned author has striven to show by listing the inherent advantages of the front-loading system in his paper.

Another laudable feature of the Lagos Rules as presented in this paper, is the pre-trial conference where all issues between the parties are compressed, allowing only contentious ones to go for trial.

The pre-trial conference can thus be seen as the sieve through which all court processes pass before trial. It is indeed heartwarming to learn from the learned author that 45% of their cases end at the pre-trial conference stage, and that some cases are even concluded at that stage.

The filling of written addresses by counsel in the Lagos Rules will also facilitate speedier trial of issues.

In line with the legal principle that costs follow the event, it is gratifying to note that our lawyers will not engage in frivolous

applications for adjournments in view of the costs that they are personally liable to pay for any undue delay or default resulting from them or their agents.

In conclusion, I will say that the Lagos State Judiciary has blazed the trail of reform process in the Judiciary with the making of its Civil Procedure Rules. The Federal Capital Territory Judiciary has since followed suit with its new Rules which are basically the same with those of Lagos, save for some few local adaptations. This is a step higher than presently are. I enjoin every state Judiciary to embrace this reform, it is a laudable one that will eventually restore and sustain the Judiciary in its enviable position as the last line of defence for the common man.

Additional Thoughts on Justice and Speedy Trial of Cases by Hon. Justice L. H. Gummi, Chief Judge of the Federal Capital Territory

Nigeria is in a state of transition: not democratic transition—we have attained that; we are in a transition to a more enduring and a more positive national culture. We are transiting in various forms...from a society in which corruption is celebrated, to one in which it is reviled; from a society demonised by the rest of the world, to one courted and feted by the discerning members of the diplomatic community, and the world. The journey is not as fast as some would have it; but that we are moving, and in the right direction, is accepted by the majority. The governments' anti corruption crusade is gradually yielding fruit...Nigeria is now number six, as opposed to number two on the Transparency International Corruption Index; the drive for foreign investment is over subscribed...to borrow a phrase from the communications industry...arguably, the greatest beneficiary of the drive; the debt problem is gradually being addressed. On every front, Nigeria is on the march again! But, is this the time to rest on our oars; to congratulate ourselves on our achievements? I will answer a resounding no! Why; because as much as we have achieved, there

is one area in which progress is too slow to be celebrated. This area is the judicial system.

The judicial system of a country is one of the crucial factors considered in judging the level of civilization of that country. It affects most aspects, and helps in projecting a positive image of any country. In contemplating the various achievements of the present administration, I dare say that a negative assessment of the judicial system will impact adversely on that assessment. The impact of the judicial system is pervasive and all encompassing. Lack of confidence in the judicial system engenders self help, and therefore chaos in citizens; and an outright refusal or significant reduction in the flow of foreign direct investment into the country. An appraisal of the current situation in Nigeria will reveal the accuracy of these assertions.

Crime, Social Unrest and the Judicial System

The nexus between crime, social unrest and the judicial system cannot be denied. Some social crimes: lynching, riotous behavior, arson and even murder, can be traced directly to a failure or lack of confidence in the judicial system. This is not to suggest that crimes will disappear once the judicial system is developed to world standards; no! There will always be criminals, social misfits and non-conformists. However, some people are lured into criminal behavior because the system has failed them. This is demonstrable and can be gleaned from happenings around us. Our newspapers are replete with stories of clashes between groups and between tribes. The recent sad story that undoubtedly brings home the failure of the justice system, here I mean the whole process, from arrest through trial to incarceration, is the story of the 11year old boy that was recently lynched for allegedly attempting to kidnap a child. One question that needs an answer, and that goes to the root of our discussion is: why do people take the law into their hands? This is a question that might require delving into jurisprudence, philosophy and psychology. Some might even say that it will require a doctoral

dissertation to do it justice; but I will answer it in one sentence. It is because the law has failed them! This assertion is particularly true of Nigeria. I am of the opinion, and I stand to be corrected, that Nigerians are innately good! If that is so why do we have so much crime? Why did Umuleri and Aguleri happen? What brought about Ife and Modakeke? What leads to the various communal clashes all over the country? What leads one community to take up arms against its neighbour; one it has coexisted peacefully with for generations? What leads to chaos?

A small disagreement that is not properly resolved escalates and turns into a major dispute. An injury done, to which there is no adequate redress, leads the injured to adopt self-help. A communal disagreement, not nipped in the bud through proper resolution or adjudication, becomes a conflagration, consuming innocent bystanders and costing the nation millions and billions of naira in human and material resources. Need I say more? Until this nexus between crimes, social unrest and the judicial system is understood, the journey before the country is bleak.

Foreign Direct Investment (FDI) and the Judicial System

I once heard a colleague state that all those that will invest in Nigeria are already in the country. I wondered at that statement; I sought clarification because we all know how desperately the country needs foreign investment. The President's trips abroad attest to the priority government is willing to accord it. My colleague's explanations enlightened me. He categorised those that will invest in Nigeria into three; first were Nigerians already living in the country; second were foreigners living in Nigeria or who have had cause to do business in Nigeria and are satisfied with the environment and; third were Nigerians and foreigners living abroad who might be convinced by their relations or business partners who have had dealings with Nigeria to invest in the country. I believe the list, when you think about it, is exhaustive as every other category of investor will fall within these three.

I am not an economist; but the common sense in the above assertion appears glaring. However, what I took out of the statement is that Nigeria and 'Nigerians', by this I mean all those living within the geographical expression known as Nigeria, are crucial to the attraction of the much needed FDI. They need to be convinced in order to convince others. The question is, how many 'Nigerians' are convinced enough to convince others? A significant number, I would assume, going by the GSM revolution. However, much more can be achieved if Nigerians are more enamoured of their country; and they will be if they have more faith in their justice system.

One important factor that determines the direction of foreign investment is the efficacy of dispute resolution system in a country. This is easy to understand. If it will take me 7 years to enforce a contract in one country and 6 months in another; and I have to choose where I would rather do business, common sense dictates that I should choose the one that will take less time; why, because time is a very important resource in business. This should underlie the importance of a vibrant and responsive justice system to the development of a country. Thus, if we consider that Eastern Europe and Asia are as hungry for FDI as we are, and that they have better developed justice systems, we will appreciate why the direction of foreign investment flow is in their favour. We must understand one thing; I am not suggesting that we copy whatever judicial systems other countries operate, far be it from me to say so. We are a different people with different cultures and different development objectives. However, the time within which we resolve disputes, both commercial and otherwise, should be ascertainable and should not be unconscionable. This belief is what has informed the changes we have introduced into the justice system through the High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules, 2004.

High Court of the Federal Capital Territory (FCT), Abuja (Civil Procedure) Rules 2004 (the 2004 Civil Procedure Rules)

A lot agitated our minds before we decided to exercise the powers vested in us by the Constitution of the Federal Republic of Nigeria, 1999 ('99 Const.). We were seized of all the above and were aware of the general opprobrium that attended our justice system in Nigeria. This was the period when *ex parte* injunctions appeared to be for sale; the President was being accused of being an absentee President, because of his drive for FDI; adjournment of cases for frivolous reasons was the norm rather than the exception; in short our justice system was in shambles. At that time, we considered what we could do to complement the efforts of the Government by providing an enabling environment that will assist in attracting the much needed FDI. We considered what powers we had and what we could do without reference to any other arm of government. Section 259 of the '99 Constitution provided a means. Under that Section, the Chief Judge of the High Court of the Federal Capital Territory, Abuja has powers to make the Rules of Court. One must understand the need for this certainty before attempting to delve into rule making. The legislative arm of government is totally vested with powers to make laws, the judiciary interprets, except in particular situations where power to make subsidiary legislation is conferred or delegated by the legislature via a law. This the '99 Constitution does in Section 259. Pursuant to such powers as were conferred on us by Section 259, we introduced changes; far reaching changes into the civil process in the FCT. I will discuss some of those changes and what we sought to achieve. I will not go so far as to say that we have attained the pinnacle; rather I will deign to say that what we have done is a start, which can be built upon.

While we were yet in the process of introducing much needed changes into the civil process in the FCT, we had introduced what was then considered a novelty in Nigeria, and indeed Africa; the Abuja Multi-Door Courthouse. This is an Alternative Dispute

Resolution (ADR) Centre. Lagos had established one, through the auspices of a Non-Governmental Organisation (NGO), the Negotiation and Conflict Management Group (NCMG). We followed in the footsteps of Lagos because we believed that the ADR option would provide succour for our business people as ADR is particularly useful for resolving commercial disputes. Again, we thought that the prevailing practice whereby foreigners, in entering into contracts with Nigerians, insisted on designating other countries as dispute resolution forum would be reduced or even stopped with the introduction of the very system they said was lacking in the country.

With the introduction of the ADR centre, we took the first step towards overhauling our civil system. The second step entailed introducing changes that will bring our justice delivery system into the 21st Century. Having established the ADR Centre, we needed to strengthen it by according it recognition in our normal court processes. Admittedly, we had issued Practice Directions for the ADR Centre pursuant to Section 259 of the '99 Constitution but more needed to be done. In the 2004 Civil Procedure Rules, we introduced Order 17, which enjoined a Judge before whom a matter was to encourage ADR, and other lawfully recognized methods of dispute resolution. By this, we have given room for traditional ADR mechanisms such as Mediation, Arbitration and Conciliation, and other lesser known ones such as Early Neutral Evaluation, Community Mediation and hybrids like Lit-Med, Med-Arb etc. We needed to re-emphasise the necessity for judges to encourage ADR for the benefit of a few lawyers who still doubted the efficacy of the Centre. While one admits that the justice system leaves a lot to be desired, and that some of the fault can be traced to judicial officers, it must be stated that a greater percentage of the rot is caused by lawyers who take advantage of lacunae in the law to unnecessarily delay cases. To substantially reduce delays and abuse of court process, we included Order 4, rule 17. This rule requires Counsel and litigant to file a pre-action counseling certificate showing that the parties have been

appropriately advised of the relative strength or weakness of their case. This rule also makes counsel personally liable for costs incurred as a result of frivolous litigation.

As would have been gleaned, most new introductions under the 2004 Civil Procedure Rules were designed to remove delay and facilitate speedy trial of cases. This was done through the following Orders;

- Order 7 provides for Interlocutory Applications. A key factor in this Order is found in Rule 12 (1), which states that a motion *ex parte* shall subsist for 14 days, and by Rule 12 (2) if a motion to vary or discharge is not taken within 14 days it shall automatically lapse.

- Order 21 provides for Undefended List and has removed the discretion of the Judge to list a matter in the General Cause List or the Undefended List. Once a defence is not filed following appropriate service, the matter shall be listed as undefended and judgment shall be entered accordingly. Of course where a court feels compelled, it may call for hearing under Order 4 at any stage of the proceedings.

- Order 35 provides for trial proceedings in general. In Rule 3, an interesting dimension has been added and this is that the number of adjournments sought on behalf of a party in a cause may not exceed two throughout the duration of the trial.

- Order 36, provides for written addresses at the conclusion of evidence. The unique feature of this Order is that it brings in a requirement for brief writing, a skill that is sadly being lost in our profession, and also ensures the continuation of proper advocacy by providing in Rule 5 for Counsel to adopt, clarify or emphasise issues in the brief through oral argument.

Several other Orders and Rules designed to facilitate speedy trial of cases exist in the 2004 Civil Procedure Rules. However, no matter how good a law is, people will operate it. The people must necessarily be ready to take advantage of the Rules we have put in place, and in this wise, lawyers are key to the success of our efforts. I know my brother judges and I have roles to play; I can assure you that we are ready to play our part...my question to counsel is: are you?

Conclusion

Let me reiterate that the failure of the justice system, of which the courts are only but one aspect, represents the failure of society. The courts are doing their bit through such efforts as modernising the rules; the rest of society should do its bit.

There is a lot that can still be done; our criminal laws need reform; our Evidence Act is stale and is overdue for overhaul. Unfortunately, it is not within the powers of the Chief Judge to undertake these reforms. If we desire a just and egalitarian society; if we honestly wish to reduce crime and attract foreign exchange, then we must undertake a holistic review of our laws.

I know that there are various proposed reforms submitted to relevant authorities by the Nigerian Law Reform Commission. We should expedite action on those reforms; then, maybe then, we will have the Nigeria of our dreams.

COMMENTARY (II)

THE NEED FOR PROCEDURAL REFORM TO FACILITATE ACCESS TO JUSTICE AND SPEEDY TRIAL OF CASES IN NIGERIA

A. B. Mahmoud, *SAN* [1]

INTRODUCTION

I am delighted to be invited to this auspicious gathering to comment on the paper by the Hon. Justice A. Adetula Alabi, the Chief Judge of Lagos State "On the Need for Procedural Reform to Facilitate Access to Justice and Speedy Trial of Cases." Although the topic is very broad, the accompanying letter from Hon. Justice Ajakaiye, the Administrator of the National Judicial Institute shed more light on the expectation of the organisers. The presenters and discussants are expected to focus on the recent efforts to reform Civil Procedure Rules in our High Courts. In this regard, there is perhaps no better person to present a paper on the topic than Hon. Justice Alabi. His State has spearheaded the current wave of civil procedure reforms in our High Courts. A gathering of this nature would provide an excellent opportunity not only to restate the imperatives for the current reforms, but also to review the experiences so far, especially of States such as Lagos State and others, that have followed suit, such as Jigawa State and the Federal Capital Territory.

Justice Alabi's paper is lucid and comprehensive. Although, as the paper acknowledges, it is too early to make a fair evaluation of the Lagos reforms, it nonetheless, provides some practical insights into the experience in the state especially on some of the key innovations in the new Rules.

The recent reforms as we all know are very significant. The last major reform took place in the mid-eighties and brought about the Uniform Civil Procedure Rules adopted in most states in the late-eighties. The current reform efforts though far less uniform, nevertheless, underscore the increasing concern about the ineffectiveness of the civil justice system in the country.

The reforms in Lagos and elsewhere have generally been pursued in the context of improving not only the efficiency of the civil justice system but also of enhancing access to justice in our society. Thus as we discuss these issues, we must bear in mind the needs of the various users of the civil courts. These cut across various segments of our population. We have the emerging big businesses in need of speedy adjudication of complex commercial disputes. We also have ordinary rural folks with simple claims but who often have to turn to the courts for redress. It is important that we bear in mind this category of users who still constitute the vast majority of Nigeria's population. The technical report on the Nigerian court procedures project undertaken by the Nigerian Institute of Advanced Legal Studies and published in 2001[2] for instance, which was an important catalyst of the new reforms, was based on research and studies conducted in the Lagos area. In some respects, the problems faced by litigants in Lagos State, a cosmopolitan state with a sprawling commercial capital, may well be similar to those faced by litigants in Jigawa State, a fairly rural environment. Yet in many other significant respects, the differences would be radical.

In both Lagos and Jigawa States, as indeed in the whole country, the statement by the former Chief Justice of the United States of America quoted on page 4 of Justice Alabi's paper on the three things that could destroy confidence in the courts could be said to be present. These three things are listed as:

(a) that people come to believe that inefficiency and delay will drain even a just judgment of its value;

(b) that people who have long been exploited in the smallest transaction of daily life come to believe that courts cannot vindicate their legal rights from fraud and overreaching; and

(c) that people come to believe that in the large sense, the court cannot fulfill its primary function to protect them and their families in their homes, at their work, and on the public street.

If these three statements provide any useful yardstick for evaluating the justice system, I think no one here would genuinely expect that the majority of the people of this country would give a pass mark to our justice system.

But Why the Reforms?

Justice Alabi, rightly in my view, situates the imperatives of the new reform on the demand by our Constitution for speedy and fair trial, a demand which we all know has been observed more in the breach in the Nigeria legal system.

It has been said that the very essence of civil liberty consists in the right of every individual to claim the protection of his rights whenever he receives an injury. One of the first duties of government is to afford that protection.[3] It is recognised in all jurisdictions, that good rules of procedure aid efficient and speedy adjudication of disputes thereby enhancing access to justice. Good rules of court, together with provision of adequate resources to the judiciary and efficient management of those resources, should greatly enhance administration of justice.

There is increasing realisation that enthroning the rule of law, improving administration of justice and generally enhancing access to justice must be one of the corner stones of aiding the development process in poor countries. The importance of the courts lies not just in the protection of civil liberties or constitutional rights. The courts also play a vital role in providing a fair, just and efficient environment for commerce, trading and other economic activities to take place.

In other words, our courts have a vital role to play in fighting poverty and ultimately guaranteeing the prosperity of our people.

In a recent address at the All Africa Conference on Law, Justice and Development held here in Abuja, the President of the World Bank, James D. Wolfenson, in my view, captured the essence of the challenge of having functioning legal and judicial systems in our countries when he said:

> The development prospects for Africa can be highly leveraged up or down by several conditions that may be perceived to be found in its countries, including the rule of law, justice and peace. African governments may need to deal with a number of things simultaneously. The first is to have appropriate political systems taking into account their socio-political and cultural situation. This means having good people in government and strengthening the capacity of government, so that the instruments of government can work. Secondly, we know that there is a need for financial system that works and that is transparent, that is honest, and that is available to all people. And the third thing that we know is absolutely critical – is that there should exist a legal and judicial system which functions equitably, transparently, and honestly. If these forms of legal and judicial systems do not exist in Africa, there is no way that you can have equitable development...A people confident in their legal system are more likely to enter into contracts with all seriousness and if most of these contracts are economic based and lead to better production capability, economic growth would be better sustained'.[4]

When we discuss the reforms of civil procedure rules, we are not engaged in some esoteric dialogue. We are talking about matters that affect the ordinary people in very direct ways and are indeed critical to the development process in our communities. In this context, as Justice Alabi ably surmises, the reform of our procedural systems are both necessary and urgent.

To fully appreciate the current reforms, it is perhaps necessary to remind ourselves of the highlights of the last effort at reform which ushered the Uniform Civil Procedure Rules.

The Uniform Civil Procedure Rules

The Uniform Civil Procedure Rules introduced in 1988, represented a significant improvement to the earlier High Court Rules of the mid 1970's. The new Rules were considered more comprehensive and filled in many of the gaps in the old Rules. Under the old Rules litigation tended to be more counsel driven and practically every step from entry of appearance by a defendant to the order of pleadings had to be done in open court or needed the order or leave of the Judge. Many of these impediments were dispensed with in the new Rules. Appearance by a defendant for instance was by filing a written memorandum; pleadings were automatically triggered at the commencement of proceedings itself. Because the new Rules were more comprehensive, there was less recourse to the practice and procedure applicable to the Courts in England, which our High Court Laws generally permitted. It is however fair also to say, that the 1988 reforms were motivated to some extent by the desire for uniformity of laws across the various states which it was felt would enhance smooth administration of justice in the country. Thus, although States were expected to adapt the Rules to suit their peculiar needs or circumstances, in majority of the states very little modification was undertaken. The rules thus remained truly uniform.

More than 15 years after these new Uniform Rules of Procedure came into force; the problems seemed to be mounting. Courts have continued to be congested, civil litigation more expensive and slow and the general disaffection with the system appeared on the increase. All studies in this country recognise the problems to be multifaceted. These range from poor infrastructure, ineffective administration of the judiciary to corruption in the system. Other problems include lack of professionalism on the part of lawyers and abuse of the judicial process including abuse of rules of court by lawyers and litigants. The question thus remains valid: to what extent are the delays in our courts more a function of larger problems affecting the

legal system than merely a question of archaic rules of procedure?

As a prelude to a consideration of the key areas of recent reform efforts, it may help to say a few things on the methodology and some aspects of the reform process in some jurisdictions.

1. Reforms of civil procedure rules could proceed in many directions. We may choose a revolutionary approach for instance of coming up with practically a brand new code or we may prefer a more evolutionary approach of amending existing rules by adopting suitable innovations from other jurisdictions. It is important I think that in many of our states a careful appraisal is made of the existing rules vis-à-vis the needs of the people to determine if a more radical or evolutionary approach is desirable. Innovations should not be accepted merely because they have become fashionable or are in vogue.

   The Model Civil Procedure Rules developed by Hurilaws borrowed heavily from the Civil Procedure Rules introduced in England and Wales in 1998 following Lord Woolf's Report on Access to Justice. This was regarded as revolutionary not only in the changes introduced but also in its dramatic shift to the new and modern approach to 'plain English' drafting style. In Hong Kong on the other hand for instance, the Chief Justice's Working Party on Civil Justice Reform commissioned to review the Hong Kong High Court Civil Procedures favoured what may be considered a more evolutionary approach. They recommended that Hong Kong adopts selective amendments to the existing rules. The new Lagos State High Court Rules 2004, appear to be somewhere in-between the approach in England and Wales and that of Hong Kong.

2. The reform of civil justice system cannot be effective unless it is accompanied by a sustained effort to inculcate a new

culture amongst the key players in Nigeria's civil justice system. These are the lawyers, the judges and the parties. Fair and efficient adjudication of disputes depends on the cooperation of these key players.

For many lawyers, civil litigation is like guerilla warfare. It consists of ambushes, surprise attacks and victory by fair or foul means. If you cannot win, then prolong the fight for as long as possible. You could try deliberate delays by tardy filings, deliberate absence from court sittings, you could try interlocutory appeals. If all that fails petition the Chief Judge to transfer the case mid-stream or better still get the file to disappear! For judges, many are worried that a more active control of the trial process may be perceived as 'descending into the arena' or taking sides which they are told they must not under whatever circumstance. For some judges, however especially those who get appointed without requisite litigation experience, they become victims of the antics of lawyers. They are afraid to take control of the proceedings lest they make mistakes. They adjourn for every simple decision they have to make because they need to give a 'considered ruling'. Parties on the other hand are instrumental in many cases to abuse of judicial process. They prefer to patronise lawyers who 'know their way around', not those who know the law and abide by the ethics of the profession. In many cases parties initiate judicial proceedings not for the purpose of seeking genuine redress or resolving their disputes but to buy time or to avoid their contractual obligations.

3. Any reform of civil procedure rules ought to be accompanied with strong training component for lawyers, judges and court administrators. I do not recall that there was any organized training for any of these categories of users of the Rules when the New Uniform Rules were introduced in most States in the mid and late eighties. The result is that many of the changes in

the Rules were never really implemented to date as both counsel and judges found it convenient to continue with the old Rules with which they were more familiar or were simply accustomed to.

Take for instance the simple rules relating to pleadings. Under the old Rules, pleadings were ordered by the court after a defendant appears in court and formally denies liability. When the pleadings are settled, the parties appear on a 'mention day' for the judge to verify the conclusion of pleadings. The new Rules did away with this requirement. Pleadings were now automatically triggered yet many courts continued with the practice of 'mention days' even before pleadings are formally closed contributing to unnecessary delays and congestion in the courts.

4. To some extent therefore, the problems of civil justice are as a result of conspiracy of silence between the key players who abuse the process for their own ends. Judges who abuse their judicial powers, lawyers who abuse their professional responsibility and parties who aid and abet the process for their corrupt benefits. Some of these problems cannot be dealt with within the framework of reforms of rules of procedure alone. No matter how good the rules are, they can be subverted by an indolent and irresponsible legal profession.

5. There is yet another problem which I may term the movement towards 'substantial justice' which has become established as part of Nigerian jurisprudence. This may sound paradoxical, as it suggests a conflict between substantive justice and access to justice. Since *Gwanto* v. *The State,*[5] the Supreme Court has moved consistently toward what is termed substantial justice as opposed to what is termed 'rigid adherence to technicalities.' Substantive justice is however sometimes used to defeat demands for adherence to procedural rules which

are designed to aid speedy adjudication in our courts. I thin
there is a need to maintain a balance between the demands c
substantive justice and of adherence to procedural rule
designed to ensure that justice is delivered fairly, economicall
and speedily. Whilst rules of court must not be seen as an en
in themselves, yet does justice not mean justice according t
law? And does law not include adjectival or procedural law

The Key Issues in the Recent Reforms

Hon Justice Alabi's paper has dealt with all the key innovations ir
the new rules, particularly with reference to the Lagos State Rules.
I will only like to add a few comments.

The Overriding Objective Principle

It is suggested that the absence of policy or guiding principles in our rules of court is a major draw back to the rules. A clear statement of the 'overriding objective' of the rules would provide a clear 'interpretative philosophy' that will guide the judges and lawyers in the use and the application of the rules. Absence of such clear statement of the objectives it is argued has left individual Judges to their subjective attitudes, taking each rule autonomously and without any coherence.

The overriding objective concept is one of the major contributions of the Lord Woolf's Access to Justice Reports in England. The concept is intended to provide a foundation for a new methodology for deciding procedural issues. It is adopted by Hurilaws in their new Model Civil Procedure Rules for adoption by High Courts in Nigeria. Order 1 Rule 2 of the model rules states the overriding objective thus:

> These Rules are a new procedural code with the overriding objective of enabling the Judge to deal with cases justly and swiftly;

(2) Accordingly, the Judge shall at all times and at every stage of every proceeding aim at and conduct the proceedings towards:

(a) ensuring that the parties are on equal footing;

(b) saving time and expense;

(c) dealing with cases in ways which are proportionate to the:

i. amount of money involved

ii. importance of the case

iii. complexity of the issues and

iv. financial position of each party

(d) ensuring that cases are dealt with expeditiously and fairly; and

(e) allotting to each case an appropriate share of the Court's resources while taking into account the need to allot resources to other cases.

Order 1 Rule 3 also provides that 'The Judge must constantly and conscientiously seek to give effect to the overriding objective at every stage of every cause, matter or other proceeding and whenever she exercises any power given her under these Rules or otherwise and whenever she interprets any rule.'

The formulation of these principles follows similar formulation under the new English Civil Procedure Rules (CPR) of 1998. *The overriding objective is intended to empower judges with significant level of discretion to deal with cases justly*. This would include where practicable, ensuring the parties are on equal footing,

saving expense and dealing with cases fairly, expeditiously and allotting appropriate share of court's resources on the basis of principle of proportionality having regard to the amounts involved, complexity or importance of the case.

I must say that, all those familiar with the workings of our courts, both trial and appellate, would agree that some of these principles already constitute the unwritten codes on the basis of which our courts operate. Judges generally pay regard to urgency, public policy importance and other aspects of the cases before them. They sometimes grant accelerated hearings in cases they perceive to have particular significance. It may be that stating these rules clearly may serve as a constant reminder to judges, lawyers and litigants of the overriding objective of our civil procedure rules.

The new Lagos State High Court Civil Procedure Rules 2004 states the policy objective of the new rules rather simply in Order 1 Rule 1(2). It provides "Application of these Rules shall be directed towards the achievement of a just, efficient and speedy dispensation of justice." The FCT High Court Civil Procedure Rules 2004, on the other hand contain no such policy formulation. The Chief Judge's working party in Hong Kong similarly, decided it would be inappropriate to prescribe an 'overriding objective' with the kind of level of discretion in the English CPR. Instead, it recommended the adoption of a rule acknowledging certain aims of judicial case management as the 'underlying objectives' of the civil justice system.

Whichever model is adopted, there is merit in stating clearly and I think in some details, the policy objectives of rules of procedure. This will no doubt serve as a constant reminder to Judges and Lawyers not only of the objective of rules of court but of their responsibility in the attainment of those objectives.

Front-loading

A major innovation that has been adopted in many of the new rules and to a lesser extent by the Federal High Court Civil Procedure

Rules 2000 is the concept of front-loading. By this, parties are expected to reveal their entire case before trial. The plaintiff or claimant at the time of commencing the action is expected to file his statement of claim, list of witnesses to be called at the trial, written depositions on oath of the witnesses and copies of every document he intends to rely on at the trial. Failure to do this will mean that his originating process will not be accepted for filing by the Registry.[6] A defendant is similarly required to include with his statement of defense copies of documentary evidence, list of witnesses and their written statements on oath.[7] A less radical approach is that of the Federal High Court Civil Procedure Rules which only requires a party to attach to his pleadings copies of documents he/she intends to rely on at the trial.[8]

Front loading will require the amendment of our rules of pleading which permit the pleading of facts only and not evidence. Under the Lagos State High Court Rules, 2004 oral examination of witnesses during evidence-in-chief is 'limited to confirming his written deposition and tendering in evidence all documents or other exhibits referred to in the deposition'.

Front-loading is intended to save time, discourage vexatious litigation and encourage easy identification of issues which could then be narrowed before the trial of the action. It is also suggested that this could allow for a realistic assessment of a party's case and thus promote settlement or reconciliation.

'Front-loading' has been in use in commercial arbitration for some time. It is generally believed to have contributed to making arbitral proceedings speedier, more natural (witnesses are not required to memorise their testimonies for instance) and has enhanced speedier resolution of commercial disputes. Yet as attractive as it may appear, there is justifiably apprehension that this requirement will add considerable cost to litigation and perhaps hindering easy access to court in very urgent cases. Many trial lawyers are familiar with the circumstances in which they are required to take extremely urgent steps to file their cases in court. This is common in

commercial litigation and in circumstances when urgent protection may be needed to avert an injury. There are instances when cases need to be initiated in order to beat deadlines or limitation periods. It appears a lot may yet be learnt from the experience of Lagos state in this area.

The Theory of Case Management

One of the major causes of delay in trial courts in many jurisdictions is that lawyers generally set the pace of litigation. Judges adopt a non-interventionist approach to the process. This is part of the tradition of our adversarial system of adjudication in which the judge is expected to play the role of an impartial umpire and not to descend into the arena. Reform efforts now generally advocate a new approach of *'managed system of dispute resolution'*: a system that gives judges powers to manage cases in a way that promotes the overriding objective of the rules. Under the Hurilaws model rules for instance, Judges will be able to step into the battle arena in order to *maintain a balance between the interest of the parties and the public interest* in ensuring that the parties do not use more than their fair share of public resources (the court's time). The Judge should thus be able to control the progress of a case, impose sanctions for procedural failures. The Judge is given powers to dispose of certain matters summarily and issue or make certain orders *suo motu*. Order 1 Rule 4 of the model rules provides that *'the Judge must further the overriding objective by actively and pro-actively managing cases'*. Sub-rule 4(2) defines Active Case Management to include:

(a) encouraging the parties to cooperate with each other in the conduct of the proceedings

(b) identifying the issues at an early stage;

(c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;

(d) deciding the order in which issues are to be resolved;

(e) encouraging the parties to use an alternative dispute resolution mechanism where appropriate and facilitating the use of such device;

(f) helping the parties to settle the whole or part of the case;

(g) fixing timetables and otherwise controlling the progress of the case;

(h) considering whether the likely benefits of taking a particular step justify the cost in taking it;

(i) dealing with as many aspects of the case as possible on the same occasion;

(j) dealing with the cases without the parties needing to attend Court when not strictly necessary;

(k) allocation of cases to case management tracks;

(l) making use of technology; and

(m) giving directions to ensure that the trial of a case proceeds quickly and efficiently.

Order 1 Rule 5 of the model rules spells out the case management powers and empowers the judge to exercise them *suo motu*. The general expectation is that these provisions will help deal with a key flaw in the existing rules which allows parties to delay proceedings and obstruct the progress of a case through manipulation of the rules. In particular, it will help deal with the problem of excessive leniency and a culture of tolerating non-compliance with the rules which enable parties to stave off trials or to slow them down.

Some aspects of the above case management powers are covered under the existing rules in Uniform Civil Procedure Rules. Order 35 for instance deals with Settlement and Trial of issues. This order

is designed to assist the parties to narrow down the triable issues and gives the court broad powers 'of its own motion' to ascertain and determine the material questions in controversy between the parties and settle them in the form of issues. The court also has powers to amend the issues or frame additional issues. Indeed Rule 6 empowers the court to summarily dispose of issues and may even dismiss or give judgment as may seem just. This procedure is seldom used. And the wide powers given to the courts are seldom if ever used.

Under the old Lagos State High Court Civil Procedure rules of 1994, the main procedure for case management by the court was Order 27, the Summons for Directions. This was viewed as too permissive and seldom used by lawyers. The procedure has now been replaced with a mandatory pre-trial conferencing.[9] The main object of the pretrial conferencing is for the purpose of a) disposal of non-contentious matters and b) giving such directions on the future course of the action for its just expeditious and economical disposal. The Judge may also in desirable situations promote amicable settlement of the case or direct the adoption of alternative dispute resolution. If the plaintiff fails to apply for pre-trial conference notice, the defendant may do so or apply for the dismissal of the action.

Hon. Justice Alabi has highlighted some of the practical difficulties and delays that have arisen in Lagos with respect to the mandatory pre-trial conferencing. A major problem seems to be delay that arises after pre-trial conferencing when a case needs to proceed to trial and is required to be reassigned by the Chief Judge to a new judge who has to study the case file and master the facts. According to his Lordship, proposals are being considered that may make it possible for the pre-trial conference Judge who has mastered the facts to also deal with the trial itself rather than send it to another Judge.

It is necessary to observe that the procedure for pooling interlocutory and pre-trial proceedings and assigning them to available judges is designed to enhance the utilisation of judicial time. It also

enhances judicial accountability in the sense that different aspects of the same case may be dealt with by different judges until the commencement of the proper trial. If well managed, I think this could greatly enhance justice delivery in our courts. The practice could help curtail abuse of judicial powers such as 'forum shopping' by litigants.

The Written Advocacy Principle

Our traditional civil justice system places a lot of emphasis on oral advocacy. This however, tends to slow down the litigation process particularly as Judges in most of our courts have to take notes long-hand. In many jurisdictions now, the move is towards written advocacy. All applications must in general be accompanied with written submissions accompanied with copies of all authorities, case law and statutory, cited by counsel. Limited oral hearings are permitted to clarify issues or points arising from the written submissions or to answer questions from the Judge.

The practice of written briefs has long been introduced in appellate courts and most commentators agree that it has revolutionised appellate advocacy in this country. It is not clear though, how effective it has been in speeding up the appellate process.

Written advocacy at the trial court will surely not be without its pitfalls. One major problem will be the accompanying mass of paper work that it will generate. Perhaps there may be a need to limit written submissions in interlocutory proceedings to contentious applications only.

The Problem of Preliminary Objections and Interlocutory Injunctions

There is general agreement that preliminary objections and applications for interlocutory injunctions are much abused in our courts contributing to significant delays and denials of justice. These

are nevertheless potent tools in the administration of justice when used appropriately. Amongst the methods used in the rules to control abuse of preliminary objections is to provide that they must be raised at the earliest opportunity before any step is taken in the proceedings. The rules sometimes require that preliminary objections are raised as part of the defense. But these are clearly not enough. In some jurisdiction, an objection is required to be accompanied with a written submission and the judge is free to look at it and rule on the application without the necessity of calling for oral hearing.

With respect to interlocutory injunctions or interim injunctions particularly *ex parte* orders, the problem is more difficult. Lawyers and Judges, in my view share equal blame. *Ex parte* orders in our legal system are amongst the most abused forms of judicial process. Their unjustifiable use has contributed to eroding public confidence in the judiciary. Recent reforms attempt to deal with these problems. The Federal High Court Civil Procedure Rules 2000, for instance limits to 14 days the time during which an *ex parte* order will remain in force once application is filed to discharge it. If an application is filed to discharge it and it is not taken within 14 days the order automatically lapses.[10] Similar provisions are also contained in new high court rules of the Federal Capital Territory.[11]

The new Lagos State High Court Rules 2004 adopt a slightly different approach. First, the rules require every *ex parte* application to be filed with it a motion on notice and provides for orders made *ex parte* to abate after 7 days unless an application is made to the Judge to extend the order and the extension should not be for a period exceeding 7 days.[12] It will be important to know what the experience of Lagos State has been in implementing this rule.

The Problem of Cost

Adverse costs orders are expected to act as a deterrent to abuse of court procedures or initiation of vexatious or frivolous litigation.

Judges and lawyers fail generally to appreciate that adjudication requires investment of public resources both in terms of judges' time and provision of infrastructural facilities by the state, not to talk of the opportunity cost associated with the abuse of such resources. This means therefore that those who abuse judicial process should be made to pay recoverable cost at least, if not punitive costs as well. Although our courts have powers to award costs, these powers are seldom exercised rationally. This has encouraged wasteful and irresponsible conduct in litigation. The prevailing new approach is that cost must be compensatory and should aim at deterring undue tardiness in the conduct of litigation. Some of the new rules also empower the Judges to direct that costs be settled by erring counsel instead of the litigant.

Order 53 of the Uniform High Court Civil Procedure rules in my view embodies all the relevant principles relating to the award of costs except that of requiring the erring legal practitioner to bear the cost. I think the problem relates largely to implementation. Judges must be required to observe the rules and to exercise their discretion judiciously on the basis that a successful party is entitled to be indemnified the cost of the litigation. In particular, the provisions of Rule 8 which empower the court to stay proceedings until costs are paid should be applied more frequently. At the end of the proceedings, the Judge should make a genuine effort to assess the actual costs of the successful party and if he cannot realistically do that he should take advantage of Rule 9 by referring the issue to a taxing master to be ascertained by him and approved by the Court.

The 'Multi-Door Court House and Other ADR Mechanisms

Amongst the various mechanisms being tried in some states across the country are the 'multi-door court house' concept and the court linked ADR. The multi-door concept is premised on the view that not all disputes are amenable to being resolved by one process alone. Thus, a matter coming to court need not be resolved through litigation alone. Cases 'could be diagnosed and referred through the appropriate

door for resolution. The objective of multi-door concept is to provide easy access to justice to avoid the frustration associated with litigation.

A multi-door programme could be linked to the Court as is now being experimented in Abuja and Lagos, or it could be run by independent organisations. A similar initiative is also on the drawing boards in many states. The existing Uniform Civil Procedure Rules allow reference to Arbitrator (order 19) or to a referee (order 20). The new FCT High Court rules make a general provision for Alternative Dispute Resolution. Order 17 provides as follows:

> A Court or Judge, with the consent of the parties, may encourage settlement of any matter(s) before it by either:
>
> (a) Arbitration;
>
> (b) Conciliation;
>
> (c) Mediation; or
>
> (d) Any other lawfully recognised method of dispute resolution.

Clearly even these provisions do not go far enough. If no clear and adequate provisions are made for any court-linked alternative dispute resolution, such mechanisms may just become another layer in the litigation process and will quickly become unpopular.

The Specialist Divisions and Small Claims Courts

There has been a strong case in some states for Specialist Divisions in the High Court. I believe Lagos State has already started on this. In most states, every judge handles all matters that are assigned to him by the Chief Judge both civil and criminal. It is argued that such practice does not allow for specialisation which overtime builds greater familiarity and confidence in the Judges. It is suggested that the State High Courts should have commercial division, family law division and criminal division for instance with judges assigned over time to those divisions and dealing with only cases in those divisions. This, it is envisaged, will help in speeding up litigation. It would have been useful to know the experience on this in States like Lagos. In my

view, nothing precludes the State Chief Judges from designating specialist divisions of the High Court should that be seen as desirable.

Should Adjournments and Amendments Be Limited?

The Technical Report on the Nigerian Court Procedures Project and many other studies identify incessant adjournments and amendments of processes as among major causes of delay in civil proceedings in this country. Lawyers are seldom ready to proceed with their cases and judges have become accustomed to granting adjournments. Many factors are responsible for this. First, the plaintiff's case may have very little merit in the first place or the defense may not have a good case. In either case the party with a bad case employs delay tactics to stave off the trial.

Adjournments could also reflect the level of organisation of private (or indeed public) legal practice. Many lawyers tend to be over-worked and often take more cases than they can conveniently handle. They are always criss-crossing the town from one court to another. In such circumstance, it is not unusual for many cases to suffer.

There are two possible approaches on how to deal with the problem. If courts become less lenient on requests for adjournments, lawyers will be forced to sit up and perhaps either re-organise their practices to make them more efficient or they will be compelled to take fewer cases and refer others to colleagues. The second approach may be to look at the need for regulating the law firms to ensure that they have basic facilities and the lawyers undertake regular continuing legal education. This is a task for the Bar Association and perhaps the General Council of the Bar.

The FCT High Court Rules 2004 do not introduce any changes to the rules on amendments. However, the Rules now limit the number of adjournments to a maximum of twice per party 'throughout the duration of the trial'.[13] It is not clear whether trial here is limited to actual trial of the case or includes inter-locutory stages of the proceedings. In Lagos State the new rules limit both

amendments and adjournments. Amendments can be made as usual before and during pre-trial conferencing. Thereafter they are limited to no more than twice. Amendment cannot also be made after the close of the party's case. Most of our rules currently allow for amendments to be made at any time before Judgment. Similarly, the rules allow not more than two applications for adjournment to be made at the request of a party[14] although the judge retains the powers to adjourn from time to time upon such terms as he deems fit. Perhaps it is too early to tell the effects of these provisions. Whilst mechanical approach to the problem which impinges on the court's discretion may be too stifling, certainly some restraint is called for along the use of costs in compensating the opposing party.

The Use of Information Technology

One of the major revolutions of this century is that of Information Technology. The developments have indeed been dramatic in the last decade. IT has challenged all aspects of the law and it is not only transforming the way we do business, including legal business, but it is also challenging our basic legal principles and concepts in every branch of the law, principles that over the centuries have appeared well-settled. The point of concern here is not the broad impact of IT on the law, but how IT could come to the aid of procedural justice. IT can improve the way civil justice is delivered. IT can empower our court rooms and court administrators. It can speed up the process of recording proceedings, providing information, communication between parties and the court. Sensibly used, it can greatly enhance access to justice. Although, Lagos is again a pacesetter in this field, Justice Alabi's paper did not deal with this.

Fortunately, many states are investing considerable resources in IT including such rural states like Jigawa. To fully take advantage of these developments however, it is necessary to reform the existing Laws and Rules of Procedure. Take for instance, Section 79 of the High Court Law of Jigawa State. It provides as follows:

> 79 (1) In every cause or matter the presiding judge *shall take down in writing* the purport of all oral evidence given before the court and minutes of the proceeding and shall sign the same at any adjournment of the case and at the conclusion thereof. (Emphasis added)

It is doubtful if any interpretation can be given other than that the judge is required to take long hand the proceedings in court. Clearly, these sorts of provisions cannot promote speedy proceedings in information age. Our courts must move speedily away from the practice of taking proceedings long hand. It appears to me if our legislatures can be provided with facilities for recording their proceedings, no justification can be offered for not doing so for our courts.

Conclusion

It is heartening to hear from Hon. Justice Alabi that the 'air of complacency' is disappearing, in Lagos. I hope in the not too distant future we can say so all across the country. Although his Lordship said 45% of the cases end at the pre-trial conference stage, it is not clear what 'end' means. Does this mean that the disputes are satisfactorily resolved or that the litigants abandon the cases or the cases are otherwise dismissed or struck out? Notwithstanding these questions, and the clear need for further evaluation, the developments in the states that have taken the path of procedural reforms are encouraging. Other states must follow suit.

Finally, I will like to emphasise, that speedy, effective and fair administration of justice demands change of attitude from lawyers, judges and litigants. We must demand for a new culture of litigation. Lawyers must see their duty as one of helping clients to avoid dispute. When disputes arise, as they inevitably will, it is our task to ensure that they are resolved in the most effective, fair and just means, if possible without recourse to litigation. If litigation becomes inevitable, we must observe the rules of procedure honestly and diligently.

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PAPER VIII

THE ROLE AND DEVELOPMENT OF CUSTOMARY LAW IN THE NIGERIAN LEGAL SYSTEM

Hon. Justice Margaret Mary M. Igbetar
President, Customary Court of Appeal, Benue State

COMMENTARY (I)

Prof. Charles U. Ilegbune
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CHAPTER EIGHT

THE ROLE AND DEVELOPMENT OF CUSTOMARY LAW IN THE NIGERIAN LEGAL SYSTEM

Hon. Justice Margaret Mary M. Igbetar
President, Customary Court of Appeal, Benue State

Introduction

I consider it a great honour and privilege to be invited by the Education Committee of the National Judicial Institute to participate as a Resource Person at this august Conference of All Nigeria Judges. Let me express with boundless joy and profound gratitude my appreciation to the Honourable, the Chief Justice of Nigeria, Hon. Justice M. L. Uwais, *GCON*, Chairman of the National Judicial Institute and to the entire Board of the Institute.

The topic which I have been asked to write the lead paper on is:

> The Role and Development of Customary Law in the Nigerian Legal System.

There is no gain saying the fact that the topic under discussion is very apt considering the theme of this year's Conference: "*Sustenance of Good Governance: The Role of the Judiciary.*"

The present democratic dispensation is a period when the citizenry, more than ever before, is yearning for good governance. There is therefore a greater expectation from the Nigerian Judiciary in the role it has to play in ensuring good governance. Customary Law comes from a worthy pedigree and cannot be left out in these great expectations. Customary Law has played a very significan

role in shaping the Nigerian legal system and has thus ensured that the judiciary has lived up to its expectation of good governance in the country.

What Then Is Customary Law?

This question brings to focus the fact of the Nigerian plural society, with multiplicity of ethnic or tribal groups, with a corresponding multiplicity of divergent customary laws. There are over three hundred and fifty (350) tribal groups in Nigeria. Each of these has its own rules of customary laws, which govern the day-to-day relationship among their members. Thus, one may be correct to state that there is no uniform system of customary law operating throughout Nigeria. There are as many systems of customary law as there are ethnic groups and even within the ethnic area, there may be variations not in essence but in detail in respect of the particular localities of the area.

Justice Anyebe in his book titled "**Customary Law, War without Arms**" defined customary law as: "An expression of the ideals and aspirations of a given people", while A. A. Kolajo defined customary law as "Those rules of conduct which the persons living in a particular locality have come to recognise as governing them in their relationships between one another and between themselves and things."[1]

He stated further that it is an ancient rule of law binding on a particular community and which rules do change with time and rapid development of social and economic conditions.

Obaseki, JSC in the celebrated case of *Oyewunmi* v. *Ogunesan*[2] defined Customary Law as:

> the organic or living law of the indigenous people of Nigeria regulating their lives and transactions. It is organic in that it is not static. It is regulatory in that it controls the lives and

1. Kolajo A., (2000), *Customary Law in Nigeria through the Cases*, Ibadan: Spectrum Books Ltd.

transactions of the community subject to it. It is said that custom is a mirror of the culture of the people. I would say that customary law goes further and imports justice to the lives of all those subject to it.

Customary law may also be defined as that body of unwritten norms, rules and regulations which a given community accepts and recognises as binding, and having the force of law, which governs and regulates the relationship and transactions between the members of that community. This implies that for a particular rule of customary law to acquire the status of law, it must be recognized and adhered to by the members of the community as binding and enforceable by the courts. There are several judicial definitions of the term as in *Owonyin* v. *Omotosho,*[3] *Eshugbayi Eleko* v. *Government of Nigeria*[4] *and Saka Salau* v. *Alimi Aderibigbe.* [5]

Section 2, Laws of Northern Nigeria 1963, vol. II, Cap 78 states that:

native law and custom" includes Moslem law.

Islamic law is the custom of the Arabs, which has been reduced into writing as revealed to the Holy Prophet Mohammed (peace be upon Him). It is applicable to only the Muslim faithfuls. Islamic Law has modified a lot of the Arab's custom in the area of marriage regarding the number of wives a Moslem can marry, inheritance among women, unlimited right of divorce on the part of the man, the position of illegitimate children etc. It enjoys an edge over other customary laws because the Quran which is the grundnorm, and the Sunnah its interpretation by the Holy Prophet and further interpretations of both by distinguished Jurists are all in written form.

2. (1990) 3 NWLR (Pt. 137) 182 at 207.
3. (1961) 1 ANLR (Pt. II) 304 at 309.
4. (1931) A. C. 662 at 673.
5. (1963) WNLR 80 at 86.

However, the mere fact that the custom is reduced into w does not take the transaction or the arrangement outside the of customary law if in fact the transaction is otherwise know and governed by, customary law.

Role and Development of Customary Law

Pre-Colonial Nigeria

Before the British rule in Nigeria, the method of resolving disp outside the family or the extended family was Community orie There were no structures of State Courts. Dispute resolu was done by the elders of the various communities. It w hierarchical system of justice based on Customary or Isla laws.

The indigenous judicial system was characterised by simple informal procedures. The procedures were *reconciliation, media* and in some cases *arbitration*, not trial of issues. People attac greater importance to the notion of settling disputes without the rup of harmonious relationship.

That is why Chief Justice A. M. Silungwe of the Republi Zambia, writing on pre-colonial Zambia, described what to s extent is also true of Nigeria thus:

> People lived in closely knit groups and societies and so the promotion and maintenance of social solidarity and harmony were of the essence to them. Traditional institutions such as an extended family including a clan, village or other neighbourhood arrangements played a crucial role in fostering social relationships and harmony by resolving differences, quarrels or disputes between persons. When a dispute arose, for instance, between members of a family, an extended family or clan, efforts were made to resolve it within the family circles, to avoid washing dirty linens in the public, this would be achieved by reconciliation, conciliation, mediation or arbitration. If such efforts met with no success or partial success, a mediator or arbitrator would be found outside the family circles, and this

might include a village headman or someone respectable from the same village, another village or area.[6]

Even when litigations were resorted to, courts tended to be reconciling and strove to effect a compromise acceptable to, by the parties. This was the position before the advent of the British and the received English common law in Nigeria.

The Colonial Nigeria

Foreign influence in the community produced conflict of values and that has been the effect of British colonisation of Nigeria. The colonial rule in Nigeria ushered in new institutions. In the coastal areas, we had the institutions of *consular courts, price courts* and *admiralty courts* to deal with disputes between European merchants and African traders. There was the introduction of Magistrates Courts to deal with crime and misdemeanour according to the notion of English Criminal Law. The Supreme Court was established to administer English Common Law and the Doctrines of Equity and pre-1900 Statutes of General Application.

To consolidate the Native Administration system which had been introduced by Lord Sir Frederick Lugard, a Native Court Ordinance was promulgated. The Provincial Courts introduced were presided over by British Administrative Officers whose knowledge of the law was limited to the Criminal Code, Evidence Act and the Criminal Procedure Code. The Judges of the Provincial Courts tried serious criminal offences. Land matters were excluded from the jurisdiction of the then Supreme Court (High Court) and so were matters of customary marriages, custody and guardianship of children. The native courts dealt with land matters and other customary cases under the supervision of the *British District Officers and Residents*. Appeals from these courts were determined in the Governor's Court.

6. Supplementary paper by Chief Justice A. M. Silungwe; Alternative Dispute Resolution: The ZAMBIA EXPERIENCE delivered at the 9th Commonwealth Conference Auckland, New Zealand, 1990.

The net result of the introduction of British Rule in Nigeri was to suppress and finally destroy the traditional forum o domestic or communal dispute resolution. *Under the colonial rule such institutions became illegal Courts and their decisions no recognised.* The native courts became the only recognised courts officially.[7] Proceedings in these courts became formalised. The mode of adjudication changed from conciliation, reconciliation, mediation and arbitration to the adversary system. To God be the Glory as the Alternative Dispute Resolution (ADR) is now steadily creeping back.

It is gratifying to note the Supreme Court's decision in *Owonyin* v. *Omotosho*[8] that customary arbitration is the prevailing practice of arbitral process or arbitrament governed by rules of customary law. Our customary arbitration still maintains its flexibility and in the words of Osborn, C.J. in *Lewis* v. *Bankole*,[9] "it appears to have been always subject to motives of expediency, and it shows unquestionable adaptability to altered circumstances without entirely losing its character."

Similarly, the impact of the establishment of British styled Courts affected traditional mores and customs. The Repugnancy Doctrines was introduced. Gradually, it became part of the evolving Nigerian jurisprudence for the British established courts to declare Native Law and Customs which did not conform to the British ideas of justice and morality as "repugnant to natural justice and morality."

By the beginning of 1900, the legal machinery according to British notion and ideas of justice had been established all over Nigeria. However, the application of English Common Law to Nigerians and to other Africans within Nigeria was a problem because of the nature of the Nigerian plural society with multiplicity of ethnic or tribal

7. See Nnaji and Ors v. IGP (1957)2 FSC 18.
8. (1961) 1 All NLR 304.
9. (1909) 1 NLR 100-101.

groups with divergent cultural practices. In the Northern part of the country for instance, the Islamic law had been firmly established, accepted and become part of the Moslem personal laws of most of the ethnic groups.

It was therefore no wonder that Sir James Marshall, a Director of the Royal Niger Company, and later the Chief Justice of Nigeria observed in 1887:

> My own experience of the West Coast of Africa is that Government has for the time succeeded best with natives, which has (sic) treated them with consideration for their native laws, habits and customs, instead of ordering all these to be suppressed as nonsense, and insisting on the wondering Negro at once submitting to the British Constitution, and adopting our ideas of life and civilisation... What I wish to say is that the natives of the Gold Coast and West Coast of Africa *have a system of laws and customs which it will be better to guide, modify and amend, rather than to destroy by ordinance and force.*[10]

It was therefore more out of necessity than the wisdom of the British that Section 13 of the Supreme Court Proclamation 1900 enacted by Sir Lord Frederick Lugard as the High Commissioner for Nigeria provided thus:

> Nothing in this Proclamation shall deprive the Supreme Court of the right to observe and enforce the observance, or shall deprive any person of the benefit of any law or custom existing in the Protectorate, such law or custom not being repugnant to natural justice, equity and good conscience...

During this period, therefore, the development of customary law was stultified and consigned to the role of making the colonial masters achieve their aim of coming to Nigeria, nay Africa.

10. Quotation from pages 31-32 of African Indigenous Laws printed by the Government Printer, Enugu, 1975.

Post-Independent Nigeria

What is the position of customary law in the post-independent era? This question is indeed pertinent considering the fact that the statutory provisions governing the application of customary law has largely been retained in our books. A good example is Section 34(1) of the High Court Law of the Northern States which provides that:

> The High Court shall observe and enforce the observance of every native law and custom **which is not** repugnant to natural justice, equity and good conscience, nor incompatible either directly or by necessary implication with any law for the time being in force, and nothing in this law shall deprive any person of the benefit of any such native law and custom.[11]

Similar provisions can be found in the High Court Laws of various jurisdictions in the country.

Also, under Section 14(3) of the Evidence Act, Cap 112, Laws of the Federation of Nigeria 1990 which forbids the enforcement of a custom:

> If it is contrary to public policy and is not in accordance with natural justice, equity and good conscience.

In essence, a rule of customary law may be applied by the courts, subject to two rules:

1. That it is not found to be "repugnant to natural justice, equity and good conscience"; and
2. That it is not incompatible with "any law for the time being in force."

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11. See Cap 49, Laws of Northern Nigeria, 1963. This Law was adopted by the then 12 States of Northern Nigeria in 1967 and came into force on 1st April, 1968. The Law still applies to all the 19 States of the former Northern Region of Nigeria.

A look at some of the decided cases against the background of the Repugnancy clause will show to what extent Customary Law has developed or otherwise fallen back in the Nigerian jurisprudence. It is indisputable that this has greatly hampered the development of the customary law system in Nigeria.

As regards Customary Law of Inheritance which affects women for instance, some of the few cases which make it to the court are decided in favour of the archaic and repugnant customs which are predominantly discriminatory against them. This can be attributed to the patriarchal nature of African societies, which developed patterns of property rights designed to perpetuate male dominance.

Stella Omiyi, one time Nigeria country Vice President, International Federation of Women Lawyers (FIDA), the Executive Council of which I was a member noted thus:

> One rule of Customary Law which all the traditional African societies are unanimous about is that, in the customary law of intestate succession, the widow has no place in the sense that she can never inherit from her husband on intestacy. It is remarkable to find such uniformity in the customary laws of so many people with different origins, histories and customs.[12]

In the case of *Neziannya v. Okagbue*,[13] upon the husband's death, his widow began letting his house to tenants; later sold a portion of the land and with the proceeds, built two mud huts on another portion of the land which she also let out. The only child she had for her husband was a daughter who predeceased her, leaving children. When she tried to sell more of the lands, her late husband's family objected that she had no right. Her grand children sued the husband's family claiming a right to exclusive possession on the ground that the widow, their grand mother, had had long and adverse possession of the land. The matter was governed by the Onitsha native law and custom, which prohibited women from inheriting property from their

12. A Critical Appraisal of the Legal Status of the Widow under Nigerian Law.
13. (1963)1 All NLR 352.

father. ***The plaintiff contended that the custom ought no applied as being contrary to natural justice, equity an conscience***. The trial judge held that the claim failed. The went on appeal to the Supreme Court which held that under the law and custom of Onitsha, a widow's possession of her de husband's property is not adverse to her husband's family an not make her the owner; ***she cannot deal with his property w the consent of his family which may be actual or implied ir circumstances***. It also held obiter that if a husband dies wit male issue, his real property descends to his family; ***his female do not inherit it according to Onitsha custom.***

This case, though decided as far back as 1963, has reaffirmed in some fairly recent judicial decisions. This is of in consonance with the customs of most ethnic or tribal gro Nigeria. Though some of these decisions have sought to give measure of solace to the widows, they however skirted arou main issues and did not come outright to declare the part infringing custom repugnant.[14] So as it turned out, the customs still in force but the widows were given some privileges something, which was otherwise their right.

One of the judicial decisions which bravely took the bull b horns and declared such obnoxious custom repugnant was the of *Mojekwu v. Mojekwu*.[15] In this case, the appellant, as plai claimed that his father Charles Mojekwu inherited the property brother Okechukwu Mojekwu on his death. Okechukwu's onl predeceased him and he had only daughters at the time of his d He contended that under the Nnewi custom of Oli-ekpe, fe were not allowed to inherit because they themselves were pro to be inherited. As such, the eldest surviving male member c

14. *Nzekwu* v. *Nzekwu (1989)2 NWLR; Muojekwu* v. *Ejikeme (2000)5 NWL* where it was held that a widow has the right to remain in her late husb house and that if his family fails to maintain her, she is entitled to let p the house and use the proceeds to maintain herself.

15. (1997)7 NWLR 283.

family will inherit. The respondents/defendants' case was that the oli-ekpe custom was repugnant to natural justice, equity and good conscience and as such, the deceased person's direct descendants, though females, were entitled to inherit their father's property. The trial court dismissed the claim of the appellants. They appealed to the Court of Appeal where the Oli-ekpe custom was declared repugnant to natural justice, equity and good conscience. Delivering the leading landmark judgment, Niki Tobi, JCA (now JSC) stated *inter alia:*

> Is such a custom consistent with equity and fairplay in an egalitarian society such as ours where the civilised society does not discriminate against women? Day after day, month after month and year after year, we hear of and read about customs, which discriminate against the womenfolk in this country. They are regarded as inferior to the men folk. Why should it be so? All human beings – male and female are born into a free world and are expected to participate freely without any discrimination on grounds of sex, and that is constitutional. Any form of discrimination on grounds of sex, apart from being unconstitutional, is antitheses to a society built on the tenets of democracy, which we have freely chosen as a people. We need not travel all the way to Beijing to know that some of our customs including the Nnewi "**Oli-Ekpe**" customs relied on by the appellants are not consistent with our civilised world in which we all live today including the appellants. In my humble view, it is the monopoly of God to determine the sex of a baby and not the parents. Although the scientific world disagrees with this divine truth, I believe that God, the creator of human beings, is also the final authority of who should be male or female. Accordingly, **a custom or customary law** to discriminate against a particular sex is to say the least an affront on the Almighty God Himself. Let nobody do such a thing. On my part, I have no difficulty in holding that the "Oli-Ekpe" custom of Nnewi is repugnant to natural justice, equity and good conscience.[16]

16. (1997)7 NWLR at pages 304 – 305.

I commend His Lordship by adding succinctly from the Bible injunctions thus:

> So God created man in His own image; in the image of God He created him; male and female He created them alike.[17]

And a closer look at the Holy Quran states thus:

> Man be dutiful to your Creator for He created you out of one source.

This case is a landmark decision worthy of emulation recognised that it was unfair practice to deprive a widow and daughters of the property, which they struggled alongside th husband and father to acquire just because the woman does not ha a male child who would continue the man's lineage. The case i breakthrough in the fight for the recognition of the inheritance rig of women under Customary Law, a worthy and welcome developm in the Nigerian legal system.

This no doubt conforms with international practice, sou reasoning and the law. Equality of rights for women is the ba principle of the United Nations. In its preamble to the Charter, one the Organisation's central goals is the reaffirmation of "faith fundamental human rights, in the dignity and worth of the hum person, in the equal rights of men and women." Article 1 of the Char proclaims that one of the purposes of the United Nations is to achie international cooperation in promoting and encouraging respect f all without distinction as to race, sex, language or religion. Und the Charter, the first international instrument to refer specifica to human rights and to equal rights of men and women is that member states of the United Nations are legally bound to stri towards the full realisation of all human rights and fundamen freedoms. ***The status of human rights***, including the goal

17. The Holy Bible – Genesis 1:27, Quran 4:1.

equality between men and women is thereby elevated to a contractual obligation for all Governments of the United Nations. Subsequent international instruments have allowed similar objectives as the United Nation's Charter. These include the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), ***and the Convention on the Elimination of all forms of Discrimination Against Women*** (CEDAW), Nigeria is signatory to most of these treaties. In addition, Section 42(1) of the Constitution of the Federal Republic of Nigeria, 1999 forbids discrimination on grounds of SEX.

It must be admitted, sadly though, that in spite of all these, there is still another school of thought which holds the *archaic traditional view that a woman should not inherit a deceased husband's property because she will marry and carry her property to another man.* This school of thought forgets that the "inherent person" in the woman is more important and valuable than the heritable. These prejudices should be left outside the courtroom by the judge, as he is there to interpret the law while taking into consideration the fundamental rights of the society as a whole and not some part of it.

Jurisdiction of the Customary Court of Appeal as It Affect the Development of Customary Law

A discussion of this topic will not be complete witho examining the consequences of the interpretation of the Suprem Court regarding appeals from the Customary Court of Appe as it has direct bearing on the development of customary la in Nigeria.

Before 1979, all the superior courts in the country were the Engli type of courts. Under the Constitution of the Federal Republic Nigeria 1979, two additional superior courts of record we established – the Sharia Court of Appeal and the Customary Co of Appeal. These courts were made specialised courts to d exclusively with Moslem personal law and the customary

matters. This was a deliberate effort to develop the Sharia customary laws specially and thereby enhance their growth in Nigerian legal system. However, the interpretation given by Supreme Court, with due respect, to appeals from the Custom Courts are not cheering.

The Constitution of the Federal Republic of Nigeria, 199 Section 282(1) and (2) sets out the jurisdiction of the Custom Court of Appeal as follows:

> (1) A Customary Court of Appeal of a State shall exercise appellate and supervisory jurisdiction in civil proceedings involving questions of Customary Law.
>
> (2) For the purpose of this Section, a Customary Court of Appeal of a State shall exercise such jurisdiction and decide such questions as may be prescribed by the House of Assembly of the State for which it is established.

As plain as these provisions are, the interpretation placed thereon the Court of Appeal and the Supreme Court has created a lot difficulties for litigants and is in effect stultifying the development Customary Law. These courts have held in several decisions tha general ground of appeal which complains of *"weight of evidenc* is not a proper ground before the Customary Court of Appeal since does not raise any issue of customary law.

In *Iorpuu Hirnor & 1 or.* v. *Aersar Dzungu Yongo*,[18] t proceedings leading to this appeal were first initiated at Adikpo Upp Area Court, Benue State. In that court, the respondents, as plaintiff claimed against the defendants, now appellants, *a declaration title to a piece or parcel of farm land situated at Mbape, Shange ya in Kwande Local Government Area of Benue State.*

18. Unreported judgment of the Supreme Court of Nigeria in Appeal No SC.2 1997 on the 25th day of April, 2003 from Benue State Customary Court Appeal.

The trial court, at the conclusion of hearing, dismissed the plaintiff's claims and entered judgment in favour of the defendants. The plaintiffs, being dissatisfied with this decision of the trial Upper Area Court, lodged an appeal against the same to the Customary Court of Appeal, Benue State, upon the sole ground that the decision of the trial court was "against the weight of evidence." Subsequently the plaintiffs applied for leave to file additional grounds of appeal before the Customary Court of Appeal, Benue State.

Before the appeal came on for hearing, the defendants filed a Notice of Preliminary Objection before the Customary Court of Appeal, Benue State. *In it, they contended that the original sole ground of appeal filed against the decision of the trial court had nothing to do with any question of customary law and that the appeal was therefore incompetent and unarguable. They further argued that since there was no valid appeal properly pending before the Customary Court of Appeal, the appellant's application to file and argue additional grounds of appeal was unsustainable, incompetent and misconceived and that the same ought to be dismissed.*

The Customary Court of Appeal, Benue State overruled the application on 12/11/96 and subsequent application for leave to file an appeal to the Court of Appeal on 2/12/96 that no leave was required in view of Section 224 of the 1979 Constitution. Defendant filed application direct to the Court of Appeal, Jos for leave to appeal o 17/2/97. The *Court of Appeal ruled that it had no jurisdiction o matters other than Customary Law and relied on Section 224(1 of 1979 Constitution and struck out the appeal.*

The defendants went to the Supreme Court. The court foun that the sole ground of appeal upon which the Plaintiffs/Responder sought to impeach the judgment of the Upper Area Court Adikpo the *omnibus ground of appeal which can not be said to invol any questions regarding customary law*, neither does it conce any matter prescribed by an Act of the National Assembly. Pursu to Section 224 of the 1979 Constitution, the Supreme Court held t what the appellants were seeking for is the unlimited right of app from the decision of the Customary Court of Appeal to the Cour

Appeal. *The appeal was dismissed.* The point here is that the ri
of the parties thereto which is the *interest in the customary far*
land, a matter properly before the trial Upper Area Court Adik
was buried under the interpretation placed on the statute.

Uwouku Atsor v. *Tordue Mbauhar and 2 ors,* was a motion be
the Customary Court of Appeal, Benue State to strike out the app
before it on the ground that it was an abuse of Court Process
that the Court lacks jurisdiction to hear the appeal. In the cc
below, the respondent sued for a declaration of title to a piece
farmland situated at Ayati village in Ukum Local Government A
of Benue State, under Tiv native law and customs. It was held

> ...that a general ground of appeal which complains of ***weight of evidence is not a proper ground before the Customary Court of Appeal***. If Customary Law is deemed to be a question of fact to be proved by evidence (see Sections 14 & 15 of Evidence Act), and if a ground of appeal complaining of weight of evidence, is deemed to be a complaint against a finding that it is either against the evidence at the trial, or that there was no evidence to support such a finding, we fail to see how such a ground of appeal should not be a proper ground of appeal before this court.[19]

The question may therefore be asked, that in establishing t
Customary Court of Appeal, was it the intention of the Legislatu
that wherein an appeal originally involving questions of Customa
Law, as in the above matters, a party before the court should
denied the right to complain in an appeal that *the decision at t*
Area Customary Court of trial is unreasonable, unwarranted a
cannot be supported having regard to the "weight of evidence"
was decided at the Court of trial? Going by the liberal interpretatic
of the Constitution by the Supreme Court in several decisions,[20] it

19. (2002)1 Q.C.L.R.N. page 40 at 55.

20. *Rabiu* v. *State* (1980) 8-10 S.C. 130 at 148 – 149; *A-G Bendel State* v. *A-G of th*
Federation (1982)3 N.C.L.R. 1 at 132 – 134.

respectfully submitted that this rather restrictive interpretation is not in keeping with the spirit and intendment of the Constitution.

Prior to the establishment of the Customary Court of Appeal in the States which require it (Section 280 of the 1999 Constitution),[21] all appeals from the decisions of the Customary/Area Courts went to the High Court. With the establishment of the Customary Court of Appeal, an appeal against the decision of such court now lies to either the High Court, the Sharia Court of Appeal or the Customary Court of Appeal as the case may be. In either case, it is the issue at the court of trial which an appeal raises by the grounds of appeal that should determine which of the three courts of co-ordinate jurisdiction to determine the appeal. *The omnibus ground* which has become the bone of contention is just a wage to hold unto until the proceeding is received before the grounds of appeal could be filed. It does not go to the substance of the appeal. Section 61 of Area Courts Laws of Benue-Plateau State, 1968 ***enjoins all courts to do substantial justice without undue regard to technicalities in handling matters from the Area Courts.***

In *Usman* v. *Umaru,*[22] *Ogundare, J.S.C* delivering the lead judgment of the Supreme Court laid down the criterion for determining which of the three courts an appeal shall lie from the decision of a area court thus:

> The unlimited jurisdiction conferred by the Constitution on the High Court is curtailed by section 242 and 247 conferring jurisdiction on the other two courts in respect of their areas of specialty. The Area Court possesses jurisdiction to administer customary law (including Islamic law) generally. It is from this court that appeals go to any of the three superior courts, that is, High Court, Sharia Court of Appeal and Customary Court of Appeal. *In my humble view, the superior court to which the*

21. They have been established in the following States: Plateau, Edo, Delta, F.C.T., Abia, Nassarawa, Benue, Taraba, Kaduna and Ebonyi etc.
22. (1992)7 SCNJ 388 at 400.

> *appeal goes would be determined by the nature of the questions raised by the ground of appeal.* If the appeal raises issues of general law, it goes to the High Court. But if it raises questions of Islamic personal law, it goes to the Sharia Court of Appeal. And if it raises questions involving customary *law, the appeal goes to the Customary Court of Appeal.*

The above decision, as simple as it may appear, is not alwa easy to apply in practical situations. See the decision in *Golok Diyalpwan*[23] where Uwais, JSC (now CJN) in his leading judgme at page 419 held that

> ...the nature of the complaint is general. It is therefore an **omnibus ground** which deals purely with facts and has no connection whatsoever with customary law. There cannot, on that ground, be an appeal as of right as envisaged by Section 224 subsection (1) of the 1979 Constitution. The Court of Appeal should have struck it out.

Where an appeal raises only one issue, it is easily sent to th court concerned. But what happens where it raises questions general law, Islamic personal law and customary law; to which the courts should the appeal go? If it goes to the High Court, th court would be without jurisdiction to determine the questions Islamic law and customary law raised in the notice of appeal. This because the unlimited jurisdiction of the High Court has been qualifie by the provisions of the Constitution itself, which reserves the questio of customary law to be resolved by the Customary Court of Appea and the Islamic law by the Sharia Court of Appeal. Conversely, if th appeal is lodged with the Customary Court of Appeal, that court wil be without jurisdiction, to determine the question of general law raise in the notice of appeal. Should the appellant in such situation file th appeal simultaneously in both the High Court, Customary Court o Appeal and Sharia Court of Appeal? Certainly that course may b

23. (1990) 3 NWLR [Pt. 139] 411 at 419.

liable to a complaint of an abuse of court process as in the case of ***Uwouku Atsor* v. *Tordue Mbauhar & 2 ors*** *(supra)*. It is our humble appeal that the restrictive interpretation of the Supreme Court regarding appeals from the Customary Court of Appeal to the Court of Appeal is making the Customary Court of Appeal the final court in certain matters. It is quietly foreclosing the channel of appeals from the Area and Customary Courts to the Customary Court of Appeal and thence to the Court of Appeal and finally the Apex Court of the land. A wider interpretation of Section 224 of the 1979 Constitution is highly desirable rather than the narrow meaning presently accredited to it.

There has been a general cry by all concerned that what should determine the competence of an appeal from the Customary Court of Appeal to the Court of Appeal should be the ***Subject-Matter of the Claim From the Trial Area/Customary Court***. Once the subject- matter is one of customary law, all grounds of appeal from the trial Area/Customary Court to the Customary Court of Appeal whether omnibus or otherwise, the appellate court should turn the pages to see whether the subject matter in controversy pertains to customary law so as to declare it competent. There is every need to lift the veil to enable the court to really see what is behind the mask i.e. the subject matter at the trial Area Court.

It is only by this approach that our customary law will be nurtured to maturity as the received English Common Law and thus play its proper role in the administration of justice in the Nigerian Legal System.

It is perhaps apposite to state that for our customary law to develop and assume its rightful role in our legal system, we need to borrow a leaf from the Malaysian experience. It is encapsulated by the **Chief Justice of Malaysia, Rt. Hon. Dato' Bin Chin** in his speech at the opening ceremony of the 11th Commonwealth Law Conference thus:

> In Malaysia, like other commonwealth countries, we apply the English Legal System. While the bulk of the laws are statutory, the courts in Malaysia also apply the Common Law of England. But in applying the Common Law of England, **We Do Not Follow It Blindly**, because by law, we have also to consider the **Malaysia circumstances**, the **culture**, the **customs** and **religions** of the various races in Malaysia. So it is not surprising if, on a given subject, a Malaysia Court may come to a different conclusion from an English Court.[24]

It is my humble appeal that same be applied to the Nigerian customary laws. This is because, with the present position, it would appear that we have only gained political independence but not legal independence as we are still tied to the apron strings of the Common Law of England. Nigeria is 45 politically but still enslaved and in bondage of the English legal system. The only way to achieve legal independence is for Nigerian Judges to follow the Malaysian example and consider the Nigerian circumstances, i.e. the cultures, customs and religions of the various ethnic or tribal groups therein in handling cases that come before us. After all, the well-noted common feature of customary laws is their capacity to develop and modify themselves in response to social and economic changes.[25] Legislation has already provided the dress rehearsal in this regard- the introduction of the Sharia Court of Appeal and Customary Court of Appeal in the 1979 Constitution; the provisions of Section 237(2)(b) of the 1999 Constitution of the Federal Republic of Nigeria which requires not less than three justices of the Court of Appeal to be learned in Islamic law and customary law as the case may be. There may be need to add more.

Section 288(1) of the 1999 Constitution also provides that:

> In exercising his powers under the foregoing provisions of this Chapter in respect of appointments to the offices of Justices of the Supreme Court and Justices of the Court of Appeal, the

24. The Conference was held in Kuala Lumpur, Malaysia on 13th September, 1999.

25. *Lewis v. Bankole* (1908)1 N.L.R. 81 at 100 - 101.

President shall have regard to the need to ensure that there are among the holders of such offices persons learned in Islamic personal law and persons learned in Customary law.

By the provisions of the Evidence (Amendment) Decree No. 61 of 1991, Evidence Act does not apply to judicial proceedings in civil causes or matters in or before the Sharia Courts, Area/ Customary Courts, Sharia Court of Appeal and Customary Court of Appeal. The idea is to make for easy case flow as the courts have been spared the rigours of proof of the sharia/customary laws by evidence as is usually experienced in the English type of courts where the Evidence Act is applicable. Sadly though, instead of looking at this from the Malaysian perspective, it is viewed as an abuse on the ignorance of those concerned as not knowing and or applying the evidence law and thereby being considered not knowledgeable enough for appointment in these courts which the Constitution so expressly provides. It is worthy of note that Evidence Act is now applicable in Area/Customary and Customary Court of Appeal in some States of the Federation such as Edo etc under special dispensation. It is highly desirable therefore, that the authority should accord the deserving status to our Customary Legal System in the areas of placement at all the hierarchies of our courts in the country. These courts should be allowed unfettered hands to make proper pronouncements on aspects of customary law that come before them. This will be a commendable step to enhance the growth of customary law in the Nigerian jurisprudence.

From the overview, the question of Customary Law should not be the issue of specialisation but calls for the basic training at all levels of our institutions of learning up to university level. It is a welcome development worthy of commendation that the National Judicial Institute (NJI) programme has included conferences and seminars on the Islamic and the Customary Legal Systems to educate the people on the various customary law practices.

Another area of consideration is whether we need to legislate or codify our customary laws to enable them assume the status of the

received English Common Law? There are two views here. The progressive would answer in the affirmative while the conservative holds a contrary view. I would love to say yes, because that will make our customary law system precise and enhance justice.

We are overjoyed that the Alternative Dispute Resolution (ADR) concept which was the customary method of settling disputes is now being sung as slogans in the Received English Legal System of our Courts. This is because there is increasing global awareness of the ADR Justice System. Thus the preamble to the 1999 Constitution of Venezuela consecrated expressly the ADR in that country's justice system. Franklin Hoet Linares, Honorary President of the World Jurist Association, Venezuela, writing on Access to Justice at the 22nd Biennial Congress on the Law of the World, Beijing, September, 2005 stated as follows:

> Who said that justice can only be accessed via legal proceedings? This can be a way, just one, which must be the last one without any doubt, **not the first**, and least of all not the only way. **The first approach to justice must be settlement**, the civilised agreement. Litigation is not therefore the best way to access justice; it must be sometimes a necessary evil only by way of exception, a fact that does not exonerate it from being the cause of failure of a previous negotiation state....

Similarly, Mago Bendahan, a Venezuelan Jurist echoed that:

> Access to justice is misinterpreted as the access to litigation. These two instances are totally different among each other. The monopoly of justice previously exerted by the State through the Judicial Power no longer exists.... The field of mediation is limitless, it engulfs all aspects of human life, from the most private spheres to the most public environment, as expressed by Professor Michele Guillaume-Hofnung.[26]

26. See the 1999 New Constitution of the Bolivarian Republic of Venezuela, Articles 253 and 258.

> Mediation concerns the public and particulars, individuals and corporations, the Bar and the Bench, national, transnational and international activities, as well as those of simple family nature (as used by our ancestors). ADR contributes to progress of peace, to the establishment of relationship between the Parties. **It is in essence a winner/winner solution, contrary to the English Courts litigation, which only leads to loser/winner results. What is important is not that there is a winner, but rather to preserve a good understanding between the Parties,** and that there should not be a loser.

Conclusion

It is stating the obvious therefore that any country that throws away its indigenous values to place premium on another will find it very difficult if not impossible to succeed. China is quietly becoming the world super power because it places high premium on its local values, customs, traditions and justice system.

It is hoped that at the end of this conference, participants will go home as born-again judges in the sense that they will give both flesh and blood to issues of Islamic and customary law that come before them. It is only in this vein that customary law can thus be nurtured to play its proper role in the Nigerian jurisprudence.

COMMENTARY (I)

Prof. Charles U. Ilegbune
Dean of Law, University of Abuja

Introduction

Hon. Justice Margaret Mary M. Igbetar, whom, with due respect, I will sometimes refer to in this commentary as *"the author"*, deserves a flurry of congratulations for her excellent and scholarly handling of the subject of her paper. Being herself a high priest – or, should I say, a high priestess – in the temple of customary law jurisprudence in Nigeria, her treatment of the subject in such a way is perhaps not surprising. To borrow her own words in describing the origin of customary law, she comes from "a worthy pedigree" of customary law experts and is therefore on strong and familiar grounds in the subject. This being the case, it seems to me necessary and fair to take an early opportunity to request Your Lordships and other members of the audience to tune down your expectations of me in this Commentary.

The author sets out with definitions of customary law as a foundation for her work. She offers four definitions from academic and judicial sources, and makes reference to three others. Then, drawing from all the definitions, she caps up the discussion (at page 3) with her own self-constructed definition. From all the definitions offered by her, three distinctive characteristics of customary law can be identified, as follows:

- *first*, customary law is essentially a body of unwritten rules applicable to a community;
- *second*, the rules are intended to regulate the relationships and transactions of the community; and
- *third*, the community must accept and recognise the rules

as binding, that is to say, as having the force of law.

The author, however, reminds us, citing the statutory authority of section 2 of the Native Courts Law 1963 of Northern Nigeria, that the expression "native law and custom" includes Moslem Law, and goes on to observe – arguably, it seems – that Islamic law "enjoys an edge over other customary laws" because it proceeds from sources which are all in a written form.

Having completed the foundation work, the author proceeds to build on it by addressing first, two developmental stages in the structure of customary judicial system in Nigeria. Here again, I cannot but praise her analytical skill and detail. The *first* stage, she said, was the pre-colonial period and witnessed the full rein of indigenous judicial system. Customary judicial system during this stage was characterised by simple and informal procedures anchored on a three-pronged pedestal of reconciliation, mediation and arbitration undertaken in recognised traditional institutions and fora. The adversary system of common law procedures was foreign to the customary system. The dominant and ultimate objective of judicial action within the system was to settle disputes without rupturing harmonious relationships.

The *second* stage occurred in colonial Nigeria and was characterised by a doctrinaire infusion of foreign – that is to say, British colonial – administrative and judicial institutions and values into the indigenous system. The erstwhile purely indigenous judicial institutions were made illegal and their decisions stripped of recognition by legislative measures introduced by Lord Lugard under his Native Courts[1] and Provincial Courts[2] statutes. The statutory native and provincial courts created by these statutes were supervised or

1. See Native Courts Proclamation (No. 9) of 1900; Native Courts Proclamation (No. 25) of 1901.
2. See Provincial Courts Ordinance (No. 7) of 1914.

presided over by British colonial administrators who knew next to nothing about customary law and procedures, and such courts became the only official and recognised fora for adjudication. The mode of dispute settlement changed from reconciliation, conciliation and arbitration to the adversary system with which the colonial administrators were familiar. The author concluded that the net result of the introduction of British rule in Nigeria was to suppress, and finally destroy, the hallowed traditional institutions and mode of domestic and communal dispute resolution.

But in all these developments, one thing remained constant. Within the implanted English adjudicatory system, as also within the supplanted indigenous system, "native law and custom" remained operative and the author cites examples of statements of successive British colonial administrators extolling the pragmatic utility of continuing to retain such rules in the administration of indigenous peoples subject only to the need to "guide, modify and amend" them.

The author next proceeds to identify the tools adopted by the British colonial administrators for guiding, modifying and amending rules of customary law. The tools, of course, were, and have since remained, the three statutory prescriptions that native law and custom shall not be applied if it is found to be:

(1) repugnant to natural justice, equity and good conscience;[3]

(2) incompatible, either directly or by implication, with any law for the time being in force;[4] and

(3) contrary to public policy.[5]

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3. See e.g., the Supreme Court Proclamation (No. 8) of 1900. See also s. 26(1) of the High Court Law 1973 (of Lagos State), and similar provisions in the High Court Laws of other States.

4. *Ibid.*

5. See s. 14(3) of the Evidence Laws of the States.

These statutory prescriptions have come to be known in our customary law jurisprudence respectively as the repugnancy clause or test, the incompatibility clause or test, and the public policy clause or test. The author correctly identifies the original provisions of statutes from which the prescriptions emanated, but somehow faltered in her summation of the tests as she (at page 10) recognises only the tests of repugnancy and incompatibility and left out that of public policy. Yet, each of the three tests has received profound and incisive judicial and academic application.[6]

The author's discussion of these tests of applicability of customary law receives an understandable pro-female concentration, if not partiality, as the author belongs to that species of highly appreciated and treasured *homo sapiens*. The discussion is beamed solely at the repugnancy test as it applies to customary laws of intestate property inheritance which she characterises as "archaic, repugnant and discriminatory against women." She illustrates this characterisation with particular reference to the Onitsha custom – indeed not only Onitsha, but all-Igbo and at least all-Southern Nigerian custom – which insists that a wife or other female cannot inherit or administer her husband's or father's estate in her own right. The custom was the central issue in the 1956 case of *Nezianya* v. *Okagbue*,[7] which eventually reached the then Federal Supreme Court in 1962[8] and has since been repeatedly affirmed or considered in other cases.[9]

The author attributes this custom to "the patriarchal nature of African societies" which, as she says, "developed patterns of property rights designed to perpetuate male dominance" (p. 10). Elsewhere back in 1929, Berkeley J. had offered a similar

6. See e.g., Obilade, A. O., (1979), *The Nigerian Legal System* (London, Sweet & Maxwell, pp. 100-110; Asein, J. O., (1998), *Introduction to Nigerian Legal System*, Ibadan: Sam Bookman Publishers, pp. 125-135.
7. See Suit No. 0/17/1956 (Onitsha High Court), unreported.
8. [1963] 1 All NLR 352.
9. See e.g., *Nwugege* v. *Adigwe* (1934) 11 NLR 134.

rationalisation of the *Nezianya* v. *Okagbue* custom as it applies to widows. The reason for it, his Lordship said, was that "in an intestacy under native law and custom, the devolution of property follows the blood. Therefore, a wife or widow, not being of the blood, has no claim to any share".[10] The author criticises the general attitude of courts to the *Nezianya* v. *Okagbue* custom as timid and apologetic. Citing as examples the cases of *Nzekwu* v. *Nzekwu*[11] and *Muojekwu* v. *Ejikeme*[12] in which only residential rights were conceded to the widows, she laments (at page 11):

> Though some of these decisions have sought to give some measure of solace to the widows, they however skirted around the main issues and did not come outright to declare the particular infringing custom repugnant.

The author accordingly extols and eulogises the landmark decision of the Court of Appeal in *Mojekwu* v. *Mojekwu*[13] in which the Court categorically and unequivocally declared the *Oli-Ekpe* custom of Nnewi in Anambra State to be not only repugnant to natural justice, equity and good conscience, but also unconstitutional and a breach of international law. The judgment of the Court is exemplified in the clearly courageous and revolutionary judgment of Niki Tobi, JCA, (as he then was), which the author quotes *in extenso* and endorses with biblical and quranic blessings. The author declares (at p. 14):

> The case is a breakthrough in the fight for the recognition of the inheritance rights of women under customary law, a worthy and welcome development in the Nigerian legal system.

I cannot agree more with her.

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10. *Sogunro-Davies v. Sogunro* (1929) 9 NLR 79, at p. 80.
11. [1989] 2 NWLR (Pt. 104) 317.
12. [2000] 5 NWLR (Pt. 657) 402.
13. [1997 7 NWLR (Pt. 512) 283.

In the face of the position so clearly taken by the author, it seems to me somewhat surprising that she would say (at p. 10) that the repugnancy clause "has greatly hampered the development of the customary law system in Nigeria". I think the contrary is the case. All in all, and ignoring perhaps a few over-zealous cases in which mainly colonial judges had tended to gauge some indigenous customary law practices in the barometer of English and European sensibilities and ideas of justice,[14] the repugnancy clause is a cleansing or winnowing therapy on customary law to remove or separate any aspect of it which is barbaric, crude, or otherwise objectionable from the good ones. No wonder then that up to this day, almost half a century since independence, Nigerian legislatures have not banished the clause but instead have continued to retain, not only the repugnancy clause but also the incompatibility and public policy clauses, in all our relevant court statutes.[15]

One other issue which the author discusses in the paper as having a direct bearing on the development of customary law in Nigeria is the interpretation placed by the Court of Appeal and the Supreme Court on section 282(1) and (2) of the Constitution which sets out the jurisdiction of the Customary Court of Appeal. The section gives the Customary Court of Appeal power to "exercise appellate and supervisory jurisdiction in civil proceedings *involving questions of customary law*".[16]

The interpretation placed on section 282(1) by the Court of Appeal and the Supreme Court in appeals before them from the Customary Court of Appeal in a number of cases cited by the author[17] is that an omnibus or general ground of appeal which complains that the

14. See Obilade, *op. cit.*, p. 100, *et seq.*

15. See High Court Laws of the various States of Nigeria.

16. Italics mine for emphasis.

17. See *Iorpuu Hirnor v. Aersar Dzungu Yongo* Suit No. 5C.24/1997 (unreported), decided by the Supreme Court on 25/4/2003; *Uwouku Atsor v. Tordue Mbauhar* [2002] 1 QCLRN 40.

decision of the trial court is against the weight of evidence is not a proper ground of appeal to found the jurisdiction of the Customary Court of Appeal within the meaning of that section since it does not raise any issue of customary law.

So far as I am able to gather, the author criticizes this interpretation on four main grounds:

> *First*, that it is too restrictive of the words used in section 282(1);
>
> *second*, that it is equally too restrictive of the true intention of the legislature in conferring appellate jurisdiction on the Customary Court of Appeal in civil proceedings involving questions of customary law;
>
> *third*, that it creates a lot of difficulties for litigants in that the use of an omnibus ground in appeals has become a hallowed technique to provide a wedge to hold unto until the record of proceedings is received before the grounds of appeal could be filed; and
>
> *fourth*, that by rendering appeals to the Customary Court of Appeal on issues of customary law difficult, the interpretation is stultifying the development of customary law.

On the main peg on which the Supreme Court and the Court of Appeal hang their decision on section 282(1) – namely, that an omnibus or general ground complaining that the decision of the trial court is against the weight of evidence does not raise any questions of customary law – the author argues, adopting the view of the Benue State Customary Court of Appeal in *Uwouku Atsor* v. *Tordue Mbauhar*[18], that if under the Evidence Act[19] customary law is a question of fact to be proved by evidence, then a general or omnibus ground of appeal complaining of weight of evidence is essentially a complaint that the finding at the trial as to the status of customary law was either against the evidence adduced, or that there was no

18. [2002] 1 QCLRN 40.

19. Section 14(3).

evidence at all to support such a finding. In either case, there is a presumptive question of customary law to be settled by the Customary Court of Appeal, only awaiting full particulars to be subsequently supplied in the detailed grounds of appeal.

These arguments seem to be tolerably persuasive and warrant support for the conclusion reached by the author (at p. 33): She said:

> What should determine the competence of an appeal from the Customary Court of Appeal to the Court of Appeal should be the SUBJECT-MATTER OF THE CLAIM FROM THE TRIAL AREA/ CUSTOMARY COURT. Once the subject-matter is one of customary law, all grounds of appeal from the trial Area/ Customary Court to the Customary Court of Appeal whether omnibus or otherwise, the appellate court should turn the pages to see whether the subject matter in controversy pertains to customary law so as to declare it competent. There is every need to lift the veil to enable the court to really see what is behind the mask, i.e., the subject matter at the trial Area Court.

The author believes, and I again agree with her, that it is only by this approach that our customary law will be nurtured to maturity like the received English common law and thus play its proper role in the administration of justice in the Nigerian legal system.

The next important point raised by the author on which I would draw the curtain in this commentary is whether we need to codify our customary laws to enable them assume the status of the received English common law. She notes that there are two shades of opinion, the proponents whom she calls the progressives, and the opponents whom she calls the conservatives – and she chooses to cast her vote in favour of the proponents. She offers one reason for her choice, namely, that codification will make our customary law system precise and enhance justice.

I venture to say that the author's treatment of this issue of codification is superficial and shallow. Codification is a very large and complicated subject over which very serious works have been

written from the earliest times.[20] The case for and against it has been a well-gnawed bone of contention. Regrettably, time will not allow me to delve into the subject either in favour or against. Suffice it to say that the fact that, apart from a few re-statements in so-called manuals of customary law in some places,[21] there has been no real attempt since colonial times to codify the customary law of any ethnic group or community in Nigeria.[22] This, to me, is at least a presumptive evidence against any vaunted advantages of codification.

It remains for me, in conclusion, to once again give well-deserved kudos to the avid author of the paper I have been commenting upon, Hon. Justice Margaret Mary M. Igbetar. As we have seen, the paper has raised many stimulating issues on the role and development of customary law in the Nigerian legal system, and has discussed them with evident and riveting scholarship and conviction. I thank his Lordship very much and thank you all, my Lords, for listening.

20. See e.g., Sir Henry Maine, *Ancient Law*, p. 1; Scarman, "Codification and Judge-made Law" (Univ. of Birmingham, 1960).
21. See e.g., Obi, SNC (ed.), *A Manual of Igbo Customary Law*.
22. Those interested in the subject may see a concise treatise on it in Dias, *Jurisprudence* (Butterworths, 5th ed.), pp. 324-327.

THE ALL NIGERIA JUDGES' CONFERENCE HELD IN ABUJA BETWEEN 5TH – 9TH DECEMBER 2005 WITH THE THEME: "SUSTENANCE OF GOOD GOVERNANCE: THE ROLE OF THE JUDICIARY"

COMMUNIQUÉ AND RESOLUTIONS

The Conference Hereby Resolves as Follows:

1. The Conference hereby acknowledges and duly appreciates the presence of Chief Olusegun Obasanjo GCFR, the President of the Federal Republic of Nigeria, ably represented by Chief Bayo Ojo, SAN, the Attorney – General of the Federation and Minister of Justice, at the Opening Ceremony of the Conference.

2. The Conference appreciates the President's efforts to reform the administration of criminal justice by the establishment of the Commission set up for the unification of the Criminal Procedure Code and Criminal Procedure Act.

3. The Conference extends its deepest gratitude to the Chief Justice of Nigeria, Hon. Justice M.L. Uwais GCON, for the effective, transparent and dedicated manner in which he has piloted the affairs of the Judiciary of the Nation throughout his tenure.

4. The Conference reaffirms its belief that by the strict and collective adherence to the tenets of the Code of Conduct for Judicial Officers in the performance of their duties, Judges will be contributing to the sustenance of good governance and will thereby meet public expectation.

5. The Conference recommends that emphasis should continue to be placed on high moral standards and merit in the

appointment and promotion of Judges to all strata of the Judiciary.

6. The Conference notes with deep concern that the non-compliance of State Governors with the provisions of Section 121 (3) of the Constitution of the Federal Republic of Nigeria 1999 Constitutes a serious impediment to the administration of justice in Nigeria and hereby resolves that amounts standing to the credit of the Judiciary in the Consolidated Revenue Fund of the States be paid directly and regularly to the Heads of the Courts concerned.

7. The Conference condemns the several incidents of dis-obedience of Court Orders by Government Officials and authorities against whom such orders are issued as no one is at liberty to pick and choose which court order to obey.

8. The Conference lauds the intention of the Evaluation Performance Committee of the National Judicial Council (NJC) to enhance productivity but recommends that objective criteria be set forth which do not sacrifice quality for quantity.

9. The Conference recommends the adoption by all Federal and States Judiciaries of uniform Civil Procedure Rules using the High Court of Lagos State Civil Procedure Rules, 2004 as a standard in order to minimise delays in the administration of justice and enhance speedy access to justice.

10. The Conference condemns the abuse of Section 292 of the 1999 Constitution by State Executives and Legislatures by the removal from office of State Heads of Court without recourse to NJC and recommends that the said section 292 of the 1999 Constitution be amended to the effect that no State Head of Court shall be removed without prior recourse to the NJC.

11. The Conference notes the delay in the determination of Election Petitions and suggests that the President of the Court of Appeal issue Practice Directions with regard to setting time limits for

the determination of election petitions and that the Electoral Bill before the National Assembly to so provide with regard to Tribunals.

12. The Conference recommends that all stakeholders in the criminal justice sector, that is the Judiciary, the Police, the Ministry of Justice and the Prisons, should work together harmoniously in ensuring the smooth and speedy administration of criminal justice and further recommends with emphasis that all stakeholders in the sector should be adequately funded.

13. The Conference recommends that subject to local circumstances, each State should explore the possibility of creating criminal divisions and where applicable to establish such divisions of their High Courts.

14. The Conference notes the need for more open-mindedness, tolerance, education and continuing inter - faith dialogue particularly in the Judiciary and is of the view that this will lead to the harmonious coexistence of Common law, Sharia and Customary law in Nigeria.

15. The Conference hereby conveys its gratitude to Mallam Nasir El-Rufai, Minister of the Federal Capital Territory, for the warm hospitality accorded the participants and his participation at the opening ceremony through his representation.

16. Finally, the Conference expresses it deep gratitude to His Lordship, the Honorable the Chief Justice of Nigeria Hon. Justice M.L. Uwais, *GCON*, the Administrator of the National Judicial Institute, Hon. Justice J.A. Ajakaiye, and the Hon. Chief Judge of the Federal Capital Territory, Hon. Justice L.H. Gumi for a very successful Conference.

APPENDIX

List of Participants

JUSTICES OF THE SUPREME COURT OF NIGERIA

1.	Hon. Justice M. L. Uwais, *GCON,*	Chief Justice of Nigeria
2.	Hon. Justice Salihu M. A. Belgore, *CON*	Justice of the Supreme Court
3.	Hon. Justice Idris L. Kutigi, *CON*	Justice of the Supreme Court
4.	Hon. Justice S. U. Onu, *CON*	Justice of the Supreme Court
5.	Hon. Justice A. I. Katsina-Alu, *CON*	Justice of the Supreme Court
6.	Hon. Justice Umaru A. Kalgo, *CON*	Justice of the Supreme Court
7.	Hon. Justice A. O. Ejiwunmi, *CON*	Justice of the Supreme Court
8.	Hon. Justice Niki Tobi, *CON*	Justice of the Supreme Court
9.	Hon. Justice D. Musdapher, *CON*	Justice of the Supreme Court
10.	Hon. Justice I. C. Pats-Acholonu, *CON*	Justice of the Supreme Court
11.	Hon. Justice G. A. Oguntade	Justice of the Supreme Court
12.	Hon. Justice S. A. Akintan	Justice of the Supreme Court
13.	Hon. Justice A. M. Mukhtar	Justice of the Supreme Court

14. Hon. Justice M. Mohammed	Justice of the Supreme Court
15. Hon. Justice W.S.N. Onnoghen	Justice of the Supreme Court
16. Hon. Justice I. F. Ogbuagu	Justice of the Supreme Court

COURT OF APPEAL

1. Hon. Justice Umaru Abdullahi, *CON*.	President
2. Hon. Justice I. A. Salami	JCA
3. Hon. Justice J. O. Ogebe	JCA
4. Hon. Justice R. D. Muhammad	JCA
5. Hon. Justice R. O. Rowland	JCA
6. Hon. Justice S. Muntaka-Coomassie	JCA
7. Hon. Justice D. Adamu	JCA
8. Hon. Justice I. T. Muhammad	JCA
9. Hon. Justice B. A. Ba'aba	JCA
10. Hon. Justice S. A. Ibiyeye	JCA
11. Hon. Justice Z. A. Bulkachuwa	JCA
12. Hon. Justice M. L. Garba	JCA
13. Hon. Justice Kudirat Kekere-Ekun	JCA
14. Hon. Justice Uwani M. Abba Aji	JCA
15. Hon. Justice Mohammed Ladan Tsamiya	JCA
16. Hon. Justice R.C. Agbo	JCA
17. Hon. Justice Bode Rhodes-Vivour	JCA
18. Hon. Justice Tijjani Abdullahi	JCA
19. Hon. Justice Jean Omokri	JCA
20. Hon. Justice Monica Dongban-Mensem	JCA
21. Hon. Justice G. I. Udom-Azogu	JCA

FEDERAL HIGH COURT

1.	Hon. Justice R. N. Ukeje	Chief Judge
2.	Hon. Justice A. Mustapha	Judge
3.	Hon. Justice D.D. Abutu	Judge
4.	Hon. Justice I. N. Auta	Judge
5.	Hon. Justice R. O. Olomojobi	Judge
6.	Hon. Justice M. A. Edet	Judge
7.	Hon. Justice . Bello	Judge
8.	Hon. Justice Soba	Judge
9.	Hon. Justice S. Yahaya	Judge
10.	Hon. Justice O. J. Okeke	Judge
11.	Hon. Justice S. J. Adah	Judge
12.	Hon. Justice G. C. Okeke	Judge
13.	Hon. Justice C. Nnamani	Judge
14.	Hon. Justice G. K. Olotu	Judge
15.	Hon. Justice C. M. Olatoregun	Judge
16.	Hon. Justice B. F. M. Nyako	Judge
17.	Hon. Justice C. Archibong	Judge
18.	Hon. Justice A. O. Faji	Judge
19.	Hon. Justice A. O. Ogie	Judge
20.	Hon. Justice T. Abubakar	Judge

HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

1.	Hon. Justice L. H. Gummi	(Chief Judge)
2.	Hon. Justice S. D. Bage	Judge
3.	Hon. Justice I. M. Bukar	Judge
4.	Hon. Justice M. Mukhtar	Judge
5.	Hon. Justice I. U. Bello	Judge

6.	Hon. Justice M. N. Oniyangi	Judge
7.	Hon. Justice O. O. Goodluck	Judge
8.	Hon. Justice M. M. Dodo	Judge
9.	Hon. Justice Mwada Balami	Judge
10.	Hon. Justice Abubakar S. Umar	Judge
11.	Hon. Justice Abubakar Talba	Judge
12.	Hon. Justice Ogakwu U. Anthony	Judge
13.	Hon. Justice A. A. I. Banjoko	Judge
14.	Hon. Justice S.C. Oriji	Judge
15.	Hon. Justice M. E. Anenih.	Judge

SHARIA COURT OF APPEAL, FEDERAL CAPITAL TERRITORY

1.	Hon. Justice Mohammed Shehu	Grand Kadi
2.	Hon. Justice Ibrahim Abba	Kadi
3.	Hon. Justice Ibrahim R. Imam	Kadi
4.	Hon. Justice Aliyu Abdulrahiman	Kadi

CUSTOMARY COURT OF APPEAL, FEDERAL CAPITAL TERRITORY

1.	Hon. Justice Moses A. Bello	President
2.	Hon. Justice M. B. Abdullahi	Judge
3.	Hon. Justice A. M. A. Saddeeq	Judge
4.	Hon. Justice M. G. Gwagwa	Judge

NATIONAL INDUSTRIAL COURT, FEDERAL CAPITAL TERRRITORY/LAGOS

1.	Hon. Justice B. A. Adejumo	President, NIC
2.	Judge (Prof.) B.B. Kanyip	
3.	Judge M. B. Dadda	
4.	Judge M. A. B Atilola	

HIGH COURT OF JUSTICE, ABIA STATE

1.	Hon. Justice K. O. Amah	Chief Judge
2.	Hon. Justice J. I. Onuh-	President, CCA
3.	Hon. Justice A. Onwuchekwa	Judge, CCA
4.	Hon. Justice S. A. Nwakanma	Judge, HC
5.	Hon. Justice C. N. Uwa	Judge, HC
6.	Hon. Justice C.I. Jombo Ofo	Judge, HC
7.	Hon. Justice L N. Akuma	Judge, HC
8.	Hon. Justice O. A. Otisi	Judge, HC
9.	Hon. Justice O. Oji	Judge, HC
10.	Hon. Justice S. N. Analaba	Judge, HC

HIGH COURT OF JUSTICE, ADAMAWA STATE

1.	Hon. Justice B. S. Bansi	Chief Judge
2.	Hon. Justice T. Oluoti	Judge
3.	Hon. Justice A. A. Abba	Judge
4.	Hon. Justice A. A. Mubi	Judge
5.	Hon. Justice B. Umar	Judge
6.	Hon. Justice A. L. Lagre	Judge
7.	Hon. Justice N. Musa	Judge

HIGH COURT OF JUSTICE, AKWA IBOM STATE

1.	Hon. Justice E.D.U. Idiong	Chief Judge
2.	Hon. Justice J. B. Essang	Judge
3.	Hon. Justice Enefiok Udoh	Judge
4.	Hon. Justice Edemekong E. Edemekong	Judge
5.	Hon. Justice Stephen E. Okon	Judge
6.	Hon. Justice Margaret Mary E. Udoma	Judge
7.	Hon. Justice John L. Okoro	Judge

HIGH COURT OF JUSTICE, ANAMBRA STATE

1.	Hon. Justice C.J. Okoli	Chief Judge
2.	Hon. Justice U. Nri-Ezedi	Judge
3.	Hon. Justice J. O. Ernest-Egbuna	Judge
4.	Hon. Justice C. E. Iyizoba	Judge
5.	Hon. Justice O. M. Anyachebelu	Judge
6.	Hon. Justice M. I. Onochie	Judge
7.	Hon. Justice J. I. Nweze	Judge
8.	Hon. Justice D. O. C. Amaechina	Judge
9.	Hon. Justice P. C. Obiora	Judge
10.	Hon. Justice V. N. Agbata	Judge
11.	Hon. Justice J. C. Iguh	Judge

HIGH COURT OF JUSTICE, BAUCHI STATE

1.	Hon. Justice S. S. Darazo	Chief Judge
2.	Hon. Justice Bala Umar	Judge
3.	Hon. Justice Ibrahim M. Zango	Judge
4.	Hon. Justice Haruna M. Tsammani	Judge
5.	Hon. Justice Bitrus G. Sanga	Judge
6.	Hon. Justice Habibi I. Shall	Judge
7.	Hon. Justice Aliyu M. Liman	Judge

SHARIA COURT OF APPEAL, BAUCHI STATE

1.	Hon. Kadi Aminu Halliru Usman	Kadi
2.	Hon. Kadi Dahiru Abubakar Ningi	Kadi
3.	Hon. Kadi Muhammad Adam Abubakar	Kadi

HIGH COURT OF JUSTICE, BAYELSA STATE

1.	Hon. Justice E. J. Igoniwari	Chief Judge

2.	Hon. Justice M. I. Akpomiemie	Judge
3.	Hon. Justice Kate Abiri	Judge
4.	Hon. Justice L. M. Boufini	Judge
5.	Hon. Justice G.S. Botei	Judge
6.	Hon. Justice M. A. Ayemieye	Judge
7.	Hon. Justice N. Aganaba	Judge
8.	Hon. Justice T. I. Cocodia	Judge
9.	Hon. Justice M. A. A. Adumein	Judge
10.	Hon. Justice A. Ayah	Judge
11.	Hon. Justice D. E. Adokeme	Judge

HIGH COURT OF JUSTICE, BENUE STATE

1.	Hon. Justice Ejembi Eko	Ag. Chief Judge
2.	Hon. Justice Iorhemen Hwande	Judge
3.	Hon. Justice Joseph S. Ikyegh	Judge
4.	Hon. Justice Ada O. Onum	Judge
5.	Hon. Justice Joseph T. Tur	Judge
6.	Hon. Justice Aondoaver Kaka'an	Judge

CUSTOMARY COURT OF APPEAL, BENUE STATE

1.	Hon. Justice M.M. Igbetar	President, C.C.A.
2.	Hon. Justice M. O. Gbim-Gbande	Judge
3.	Hon. Justice C. A. Idye	Judge

HIGH COURT OF JUSTICE, BORNO STATE

1.	Hon. Justice Adzira Gana Mshelia	Ag. Chief Judge
2.	Hon. Justice Ibrahim Shata Bdliya	Judge
3.	Hon. Justice Juddum Mohammed	Judge
4.	Hon. Justice Isa Othman	Judge

5. Hon. Justice John Jilantikiri — Judge
6. Hon. Justice Usman Bukar Bwala — Judge
7. Hon. Justice Kashim Zannah — Judge

HIGH COURT OF JUSTICE, CROSS RIVER STATE

1. Hon. Justice D. N. Eyamba-Idem — Chief Judge
2. Hon. Justice O. I. Itam — Judge
3. Hon. Justice M. Edem — Judge
4. Hon. Justice I. I. Agube — Judge
5. Hon. Justice Obojor A. Ogar — Judge
6. Hon. Justice E. E. Ita — Judge

HIGH COURT OF JUSTICE, DELTA STATE

1. Hon. Justice R.P.I. Bozimo — Chief Judge
2. Hon. Justice Z. A. Smith — Judge
3. Hon. Justice S.A. Ehiwario — Judge
4. Hon. Justice T. C. Makwe — Judge
5. Hon. Justice A. P. E. Awala — Judge
6. Hon. Justice M. Umukoro — Judge
7. Hon. Justice E. U. Akporido — Judge

CUSTOMARY COURT OF APPEAL, DELTA STATE

1. Hon. Justice S. O. N. Ogene — President, CCA.
2. Hon. Justice O. Oyagborogha — Judge

HIGH COURT OF JUSTICE, EBONYI STATE

1. Hon. Justice A. N. Nwankwo — Chief Judge
2. Hon. Justice P. O. Elechi — Judge
3. Hon. Justice Ede Nwali — Judge
4. Hon. Justice E. E. Odanwu — Judge

5.	Hon. Justice A. A. Nwaigwe	Judge
6.	Hon. Justice E. A. Ngene	Judge
7.	Hon. Justice Obande Ogbuinya	Judge

CUSTOMARY COURT OF APPEAL, EBONYI STATE

8.	Hon. Justice C. E. Ekuma-Nkama	President C.C.A.
9.	Hon. Justice Uche Onyemenam	Judge
10.	Hon. Justice O' Connell Ogbonna	Judge

HIGH COURT OF JUSTICE, EDO STATE

1.	Hon. Justice M.I. Edokpayi	Ag. Chief Judge
2.	Hon. Justice C. O. Idahosa	Judge
3.	Hon. Justice M.O. Oyanna	Judge
4.	Hon. Justice R. I. Amaize	Judge
5.	Hon. Justice T. Akomolafe-Wilson	Judge
6.	Hon. Justice E. F. Ikponmwen	Judge

CUSTOMARY COURT OF APPEAL, EDO STATE

1.	Hon. Justice J. O. Olubor	President, CCA
2.	Hon. Justice M. I. Ojo	Judge
3.	Hon. Justice A.S. Abiri	Judge
4.	Hon. Justice P. O. Isibor	Judge

HIGH COURT OF JUSTICE, EKITI STATE

1.	Hon. Justice O. F. Omoleye	Chief Judge
2.	Hon. Justice M. Fasanmi	Judge
3.	Hon. Justice K. R. Bamisile	Judge
4.	Hon. Justice J. K. B. Aladejana	Judge
5.	Hon. Justice S. B. Oyewole	Judge

6.	Hon. Justice E. O. Kowe	Judge
7.	Hon. Justice I. O. Akeju	Judge
8.	Hon. Justice A. S. Daramola	Judge
9.	Hon. Justice A. Agbelusi	Judge
10.	Hon. Justice J. O. Jegede	Judge

HIGH COURT OF JUSTICE, ENUGU STATE

1.	Hon. Justice I. A. Umezulike (OFR)	Chief Judge
2.	Hon. Justice F. K. Ezeike	Judge
3.	Hon. Justice R. O. Odugu	Judge
4.	Hon. Justice I. S. Amanoh	Judge
5.	Hon. Justice A.O Anidi	Judge
6.	Hon. Justice A.A Nwobodo	Judge
7.	Hon. Justice L.O. Okereke	Judge
8.	Hon. Justice E.C.N. Onyia	Judge
9.	Hon. Justice P.I. Enejere	Judge
10.	Hon. Justice F.I.N. Ngwu	Judge

HIGH COURT OF JUSTICE, GOMBE STATE

1.	Hon. Justice H. Y. Heman	Chief Judge
2.	Hon. Justice Sa'ad Mohammed	Judge
3.	Hon. Justice Hamma A. Barka	Judge
4.	Hon. Justice Adamu Jauro	Judge
5.	Hon. Justice B.L. Iliya	Judge
6.	Hon. Justice M. A. Pindiga	Judge

SHARIA COURT OF APPEAL, GOMBE STATE

1.	Hon. Justice Mohammed Adamu Idris	Grand Kadi
2.	Hon. Justice Usman Baba Liman	Kadi

3.	Hon. Justice Abuddllahi Maikano Usman	Kadi
4.	Hon. Justice Tukur Mohammad Abdulkadir	Kadi

HIGH COURT OF JUSTICE, IMO STATE

1.	Hon. Justice Paul C. Onumajulu	Chief Judge
2.	Hon. Justice Agnes U. Amaeshi	Judge
3.	Hon. Justice N. O. Adigwe	Judge
4.	Hon. Justice B. A. Njemanze	Judge
5.	Hon. Justice C. E. Nwosu-Iheme	Judge
6.	Hon. Justice A. N. Opara	Judge
7.	Hon. Justice P. O. Nnadi	Judge
8.	Hon. Justice D. U. Ogwurike	Judge

CUSTOMARY COURT OF APPEAL, IMO STATE

1.	Hon. Justice G. M. Nkwoada	President
2.	Hon. Justice J. O. Iwuagwu	Judge
3.	Hon. Justice A. B. C. Egu	Judge

HIGH COURT OF JUSTICE, JIGAWA STATE

1.	Hon. Justice Tijjani Abubakar	Chief Judge
2.	Hon. Justice M. A. Nakullum	Judge
3.	Hon. Justice Muktar Adamu	Judge
4.	Hon. Justice Umar Maigari	Judge
5.	Hon. Justice Aminu Sabo Ringim	Judge
6.	Hon. Justice Umar M. Sadiq	Judge

HIGH COURT OF JUSTICE, KADUNA STATE

1.	Hon. Justice Rahila Hadea Cudjoe, *OFR*	Chief Judge
2.	Hon. Justice Dogara Mallam	Judge

3.	Hon. Justice Mairo Laraba Mohammed	Judge
4.	Hon. Justice Gideon Isa Kurada	Judge
5.	Hon. Justice Munir Mohammed Ladan	Judge
6.	Hon. Justice Luka Didi Aba	Judge

SHARIA COURT OF APPEAL, KADUNA STATE

7.	Hon. Grand Kadi Dr. Maccido Ibrahim, *OON*	Grand Kadi
8.	Hon. Kadi Adamu A.S. Fada	Kadi

CUSTOMARY COURT OF APPEAL, KADUNA STATE

9.	Hon. Justice S.H. Makeri	President
10.	Hon. Justice Charles Ibrahim Sani	Judge

HIGH COURT OF JUSTICE, KANO STATE

1.	Hon. Justice Sanusi C. Yusuf	Chief Judge
2.	Hon. Justice Saka Yusuf	Judge
3.	Hon. Justice Abdu Aboki	Judge
4.	Hon. Justice Shehu Atiku	Judge
5.	Hon. Justice Wada Abubakar Omar	Judge
6.	Hon. Justice B. S. Adamu	Judge
7.	Hon. Justice P. A. Mahmoud	Judge

SHARIA COURT OF APPEAL, KANO STATE

1.	Hon. Justice Dahiru Rabiu	Grand Kadi
2.	Hon. Justice Muh'd Umar Muh'd	Kadi
3.	Hon. Justice Abdullahi Waiya	Kadi
4.	Hon. Justice Shehu Ibrahim Matawalle	Kadi
5.	Hon. Justice Abubakar Isma'il K/K	Kadi
6.	Hon. Justice Tijjani Yahaya Dukawa	Kadi

HIGH COURT OF JUSTICE, KATSINA STATE

1.	Hon. Justice Sadiq A. Mahuta	Chief Judge
2.	Hon. Justice Sada Abdulmumini	Judge
3.	Hon. Justice Ibrahim Maikaita M. Saulawa	Judge
4.	Hon. Justice Ibrahim M. Bako	Judge
5.	Hon. Justice Sanusi Tukur	Judge

HIGH COURT OF JUSTICE, KEBBI STATE

1.	Hon. Justice Ibrahim Umar	Chief Judge
2.	Hon. Justice I. B. Mairiga	Judge
3.	Hon. Justice Fati I. Wara	Judge
4.	Hon. Justice Sani Adamu	Judge
5.	Hon. Justice Jakari Gulma	Judge
6.	Hon. Justice Muh'd S. Ambursa	Judge
7.	Hon. Justice Samaila H. Bashir	Judge

HIGH COURT OF JUSTICE, KOGI STATE

1.	Hon. Justice Umaru Eri, *OFR*	Chief Judge
2.	Hon. Justice S. K. Otta	Judge
3.	Hon. Justice M. A. Medupin	Judge
4.	Hon. Justice S.S. Idajili	Judge
5.	Hon. Justice S. T. Husseini	Judge
6.	Hon. Justice S. Otu	Judge

SHARIA COURT OF APPEAL, KOGI STATE

7.	Hon. Kadi U. Y. Abdallah	Grand Kadi,
8.	Hon. Kadi S. O. Olorunfemi	Kadi
9.	Hon. Kadi Abdulkarim Aruwa	Kadi
10.	Hon. Kadi Alhaji Nurudeen Abdallah	Kadi

HIGH COURT OF JUSTICE, KWARA STATE

1.	Hon. Justice T. A. Oyeyipo	Chief Judge
2.	Hon. Justice O. Ajayi	Judge
3.	Hon. Justice F. A. Ojo	Judge
4.	Hon. Justice A. O. Bamigbola	Judge
5.	Hon. Justice S. D. Kawu	Judge
6.	Hon. Justice S. T. Daibu	Judge
7.	Hon. Justice A.A. Adebara	Judge

SHARIA COURT OF APPEAL, KWARA STATE

1.	Hon. Justice M. A. Ambali	Grand Kadi
2.	Hon. Justice A. K. Imam Fulani	Kadi
3.	Hon. Justice M. A. Oredola	Kadi

HIGH COURT OF LAGOS STATE

1.	Hon. Justice A. Ade Alabi	Chief Judge
2.	Hon. Justice A.A. Phillips (Mrs)	Judge
3.	Hon. Justice K. O. Alogba	Judge
4.	Hon. Justice D.T. Okuwobi (Mrs)	Judge
5.	Hon. Justice Z. A. Ashiyanbi	Judge
6.	Hon. Justice O. H. Oshodi	Judge
7.	Hon. Justice O. A. Ipaye (Mrs)	Judge
8.	Hon. Justice S. O. Ishola	Judge
9.	Hon. Justice A. O. Opesanwo (Mrs)	Judge
10.	Hon. Justice O. A. Kayode Ogunmekan	Judge

HIGH COURT OF JUSTICE, NASARAWA STATE

1.	Hon. Justice A. Y. Ubangari	Chief Judge
2.	Hon. Justice B. Maina	Judge

3.	Hon. Justice I. A. Ramalan	Judge
4.	Hon. Justice S. Dikko	Judge
5.	Hon. Justice J.A. Viko	Judge
6.	Hon. Justice A. M. Ahmed	Judge

SHARIA COURT OF APPEAL, NASARAWA STATE

7.	Hon. Alhaji L. M. Nagogo	Grand kadi
8.	Hon. Alhaji Abdullahi Mohammed	Kadi

CUSTOMARY COURT OF APPEAL, NASARAWA STATE

9.	Hon. Justice Yusufu Yakubu	President
10.	Hon. Justice Jibril Idrisu	Judge

HIGH COURT OF JUSTICE, NIGER STATE

1.	Hon. Justice Jibrin Ndatsu Ndajiwo	Chief Judge
2.	Hon. Justice Adamu Gado	Judge
3.	Hon. Justice Maria Sanda Zukogi	Judge
4.	Hon. Justice Christopher I. Auta	Judge
5.	Hon. Justice Aliyu Muhammad Mayaki	Judge
6.	Hon. Justice Aisha A.L.B. Bwari	Judge
7.	Hon. Justice Amina Wambai	Judge

HIGH COURT OF JUSTICE, OGUN STATE

1.	Hon. Justice C. O. Jacobs	Chief Judge
2.	Hon. Justice G. O. Shoremi	Judge
3.	Hon. Justice O.O. Olopade	Judge
4.	Hon. Justice O.A. Ogundepo	Judge
5.	Hon. Justice M. A. Dipeolu	Judge
6.	Hon. Justice O. Mabekoje	

2.	Hon. Justice T.K. Osu	Ju
3.	Hon. Justice C.I. Uriri	Ju
4.	Hon. Justice I.A. Iyayi	Ju
5.	Hon. Justice J.N. Akpughunum	Ju
6.	Hon. Justice S.O. Iragunima	Ju
7.	Hon. Justice Boma G. Diepiri	Ju
8.	Hon. Justice W.A. Chechey	Jud
9.	Hon. Justice T.S. Oji	Jud
10.	Hon. Justice M. O. Opara	Jud

HIGH COURT OF JUSTICE, SOKOTO STATE

1.	Hon. Justice Aisha Sani Dahiru	Chief Judg
2.	Hon. Justice Muhammadu H. Binji	Judg
3.	Hon. Justice Bello Abbas	Judg
4.	Hon. Justice Abubakar Risku	Judg
5.	Hon. Justice Danlami B. Sambo	Judg

SHARIA COURT OF APPEAL, SOKOTO STATE

1.	Alh. Abdulkadir S. Tambuwal	Grand Kad
2.	Hon. Kadi Muh'd Bello Rabah	Kad
3.	Hon. Kadi Muh'd T. Usman	Kad

HIGH COURT OF JUSTICE, TARABA STATE

1.	Hon. Justice Adamu Aliyu	Chief Judg
2.	Hon. Justice Joseph Jella	Judg
3.	Hon. Justice F.B. Andetur	Judg
4.	Hon. Justice I. Andyangtso	Judg
5.	Hon. Justice Mohammed Danjuma	Judg
6.	Hon. Justice Sanni Mohammed	Judg

SHARIA COURT OF APPEAL, TARABA STATE

1.	Hon. Kadi Ismaila Mohammed	Grand kadi
2.	Hon. Kadi Ahmad Mohammed Bose	Kadi
3.	Hon. Kadi Abdulmumini Abubakar	Kadi
4.	Hon. Kadi Tanimu Mahmud	Kadi

CUSTOMARY COURT OF APPEAL, TARABA STATE

1.	Hon. Justice E.D. Audu	President
2.	Hon. Justice D. Shida	Judge
3.	Hon. Justice C.D. Awubra	Judge

HIGH COURT OF JUSTICE, YOBE STATE

1.	Hon. Justice B.S. Gujba	Chief Judge
2.	Hon. Justice G.M. Nabaruma	Judge
3.	Hon. Justice Ali Garba	Judge
4.	Hon. Justice G.K. Kaigama	Judge
5.	Hon. Justice I.W. Jauro	Judge

HIGH COURT OF JUSTICE, ZAMFARA STATE

1.	Hon. Justice Kulu Aliyu	Chief Judge
2.	Hon. Justice Bello Aliyu Gusau	Judge
3.	Hon. Justice Nasir Umar Gummi	Judge
4.	Hon. Justice Bello Muh'd Shinkafi	Judge

SHARIA COURT OF APPEAL, ZAMFARA STATE

1.	Hon. Grand Kadi Alhaji Muhammad Anka	Grand Kadi
2.	Hon. Kadi Auwal Abubakar Gummi	Kadi
3.	Hon. Kadi Ibrahim Abubakar	Kadi
4.	Hon. Kadi Dahiru Mohammad	

List of Rapporteurs

1. Hon. Justice F.F. Tabai — Chief Rappo
   Justice, Court of Appeal

2. Hon. Justice O. F. Omoleye — Mem
   Chief Judge, Ekiti State

3. Hon. Justice I.A. Umezulike, *OFR* — Mem
   Chief Judge, Enugu State

4. Hon. Justice Abdullahi Marafa — Meml
   Grand Kadi, Bauchi State

5. Hon. Justice Onyekachi Otisi — Memb
   High Court of Justice, Abia State

6. Hon. Justice S.O.N. Ogene — Memb
   President, Customary Court of
   Appeal, Delta State

7. Mr Peter Akper, — Memb
   Senior Research Fellow NIALS

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The papers and their corresponding commentaries, written and delivered [illegible] distinguished judges and legal luminaries both in practice and the academia, are well-researched, compelling [illegible] intely presented, stimulating further intellectual discu[illegible]

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