Judicialism in Nigeria: Gasping For Breath Under Our Watch*

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Abstract

Judicialism underscores the attitude and actions of the courts in ensuring that litigants who have come before it get justice, the discharge of which both judges and lawyers play huge roles. These attitude and actions determine how litigants look on the courts. This paper examines the position and role of judges as well as lawyers in the business of adjudication. It highlights the challenges of the judiciary in living up to expectations. It finds that despite the exalted position of judges, the society appears to have lost hope in the courts as citizens now resort to other means of settling their disputes such as by petitions to law enforcement agencies. The paper recommends that judges and lawyers must reshape their attitude and actions to appeal to the eyes of the citizens so as not to completely lose societal relevance.

1. Introduction

The truth be told, Judges are God's deputies on this earthly plane: they preside over the destinies of fellow men and women alike; and the judicial pen can do infinite good just as it can cause incalculable harm. That is why judgeship is at once a position of power and one of grave responsibility: a public trust that

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demands of its holders the finest societal values there ever can be hence, it is fitting that we take time out to reflect on the future of law and survival of judicialism in Nigeria. One senior member of the Bar,[1] who was upbeat and obviously enthused by a ruling delivered by a high court commented as follows:

> I wish to state unequivocally, my appreciation for the painstaking consideration and the exertions which are obvious in your [Lordship's] evaluation of the points which came up for adjudication. The Ruling has given me hope that notwithstanding the undisguised vilification of Judges in certain quarters and pessimism about the future of law and legal development in our country, the proud tradition of judicialism will endure.

I must confess to not being as upbeat as the senior counsel, but his commentary touched upon three (3) salient issues that command attention: (i) undisguised vilification of judges in certain quarters; (ii) pessimism about the future of law and legal development in our country; and (iii) that the proud tradition of judicialism will endure. These are, undoubtedly, weighty issues of continuing and steadily increasing relevance in contemporary Nigeria and it will probably require an entire book volume to explore their various themes and sub-themes.

2. What Does Judicialism Mean?

The term '***judicialism,'*** which seems to me a condensed variant of ***judicial activism***[2], is unknown to conventional law dictionaries.

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1 Awa U. Kalu, was reacting to a Ruling delivered by Affen, J on 20/11/14 in *Motion No. FCT/HC/M/7216/2014: All Progressives Congress v First Bank of Nigeria PLC* (*Unreported*).

2 *Judicial activism*, which is the antithesis of *judicial restraint,* espouses a philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usually with the suggestion that adherents of this philosophy tend to find constitutional

Credit for coining the term belongs to Africa's foremost constitutional law expert and first academic Senior Advocate of Nigeria, *Ben O. Nwabueze*. In his authoritative work, ***Judicialism in Commonwealth Africa***[3], which is the final volume in a trilogy[4], *Nwabueze* emphasised the central role of the judiciary in constitutional governance; and after embarking on a theoretical excursion into various aspects of the role of constitutional courts, coupled with a pragmatic analysis of how they have discharged that role, he handed down an unfavourable verdict that the courts have consistently failed to discharge the functions which his views of constitutionalism expects of them.[5] *Nwabueze* traced this failure to the judges themselves who, according to him, have not fully appreciated either the nature or the magnitude of the grave responsibilities cast upon them by the constitutionalist system of government: a feature he blamed on the education and socialisation of judges in Commonwealth Africa.[6]

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violations and are willing to ignore precedents. See *Black's Law Dictionary, 8th Edition, p. 862*.

3 First published in the UK by Hurst & Co (Publishers) Limited, London in association with Nwamife Publishers Ltd, Enugu in 1977 (now out of print). I remain eternally grateful to *Ikeazor Akaraiwe*, who tirelessly combed both public and private law libraries in Enugu in search of this invaluable book to no avail: he eventually succeeded in obtaining a photocopy from the law library of Nnamdi Azikiwe University, Awka.

4 The other volumes are *Constitutionalism in the Emergent States (1973)* and *Presidentialism in Commonwealth Africa (1974)*

5 Using the era of judicial activism of the US Supreme Court which began in the mid-1950s as benchmark for desirable judicial behaviour.

6 Nwabueze conceded that "*the detailed specification of Commonwealth African constitutions, unlike the broad and vague phraseology of the US constitution cannot but limit the amount of constitutional litigation*", but insists that "*the formula employed in the Commonwealth African constitutions for dealing with the conflict between individual liberty and state authority still affords quite ample scope for creative judicial activism*" – see Chapter XV at pp. 309-312. Nwabueze's book was published in 1977, but it is unlikely that his views on the performance of the courts' role in governance since then may have changed markedly. In the *Foreword* to the book *'A Right to be Wrong'* by Celestine Omehia (AuthorHouse: 2011), he was unsparing in his criticism of the Supreme

Nwabueze's assertions coincide, approximately, with the views of *R.A.C.E. Achara*[7] who, in a thought-provoking article titled "*Judicial Flip-flops and Theory Deficit in the Supreme Court (Have Nigerian Law Faculties Flunked their Final Exams?)"*, pointed out disturbing inconsistencies and/or incoherencies neatly tucked away in the *corpus* of several decisions handed down by the Supreme Court of Nigeria in the past decade or so: decisions that, according to him, "...*elide good law and thus open up the legal space to confusing and subversive precedent*" – a development he attributes to a deficient theory-base from the Law Faculties in post-independent Nigeria, which precipitates a "*failure to appreciate one or other central feature of a larger picture of law*" as manifested by the growing tendency to glibly dismiss as merely academic "*intricate or complex problems demanding sometimes hair-splitting layers of distinction and analyses for accurate solution*."

But whilst *Nwabueze's* remedy for the poor performance of the courts rested with the "*indigenisation of legal education as a way of freeing future lawyers and judges from the influence of the common law judicial techniques and practices … and of laying the foundation for a complete re-orientation of outlook; the devising of a system of legal education designed to improve the intellectual quality of the Bench and Bar, and to equip the lawyer for a better understanding of government, sociology and economics; the*

Court decision in *Rotimi Amaechi v INEC [2007] 18 NWLR (PT. 1065) 105* as one that *"must go down in history as one of the most amazing decisions ever handed down by a court of law in a democratic polity founded on the rule of law … because it makes a mockery of the lofty principles and ideals of democracy, constitutionalism and justice which it professes to affirm, uphold and apply."*

7 Achara is a Bill & Melinda Gates Foundation Fellow of the Five College African Scholars Program, University of Massachusetts, Amhherst, USA. I owe a debt of gratitude to *Ikeazor Akaraiwe,* for drawing my attention to this invaluable article, which is *Achara's* contribution to a volume of essays to commemorate UNEC Law Faculty at 50.

complete indigenisation of the Bench…", *Achara* traced the root cause of 'judicial flip-flops' to "*defect of adequate preparation*" of lawyers by the academic arm of Nigerian law as well as lack of post-production control or accountability by the Nigerian Legal Academy, and feared that "*unless a way is found to curtail the current incoherence in the judiciary, the Nigerian society might well conclude that the Nigerian law faculties have in this half-century flunked their final examinations*"[8]. Different strokes for different professors!

For present purposes however, even though Nigerian courts derive their power and authority from the Constitution[9] and every exercise of judicial power therefore necessarily entails the discharge of a constitutional role, the term *judicialism* is not employed in the strict formal sense of the court's role in constitutional governance *per se*, but as encompassing the entire gamut or range of what the courts -*and therefore judges and lawyers*- do in delivering (or purporting to deliver?) justice to all who look up to them for redress as well as those for whom

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8 *"Indigenisation of legal education*" is one of the remedies prescribed (in 1977) by *Nwabueze* for the courts' failure to discharge their role in constitutional governance, but if *Achara*'s thesis of theory-deficit induced flip-flops in judicial decision-making which he blames on poor preparation of lawyers in the universities and the Nigerian Law School is anything to go by, it would seem that Nwabueze's high hopes in that regard remain [largely] unrealised! I chanced upon an interview by *Ernest Ojukwu* (former Deputy Director-General of Nigerian Law School, Enugu Campus) in the Tuesday, April 21, 2015 edition of *Thisday Lawyer* in which he *inter alia* expressed concern about the teaching of law as a liberal art in Nigerian Universities without any goal for functional legal education; and how Nigerian Bar Association's mandatory continuing legal education (MCLE) programme has become moribund. He equally proffered thought-provoking, workable solutions on how to properly situate legal education in Nigeria.

9 By section 6(6)(a) & (b) of the Constitution of the Federal Republic of Nigeria 1999 (as amended), the judicial powers vested in the courts extend to all inherent powers and sanctions of a court of law and to *"all matters between persons, or between government or authority and to any person in Nigeria, and to all actions and proceeding relating thereto, for the determination of any question as to the civil rights and obligations of that person"*

sanctions are a just dessert for desecrating the law. In doing so, we shall underscore certain ***'ill-wind'*** in the legal horizon which, if not contained adequately and in a timely manner, may become potent (and deadly) enough to tip the entire judicial system over the cliff!

3. The Business of Judging

In Nigeria, as in other countries of the world, judges occupy a privileged position which springs from public recognition that democratic governance and society as a whole can only function fairly and properly within a framework of laws administered *justly* and *fairly* by men and women who owe obligation to nothing other than justice itself. This demands that judges must not be subjected to disciplinary sanctions or premature retirement on account of reaching decisions that do not find favour with the powers that be or with powerful vested interests or even with prevailing public opinion.[10] They must be truly independent. This is, of course, not a *carte blanche* for judges to give vent to their whims and caprices, for *'absolute discretion, like corruption, marks the beginning of the end of liberty'*.[11] Rather, judges are conferred with certain important privileges for the greater good of the public; and society legitimately expects of them very high standards of propriety, integrity, assiduity and personal conduct as complimentary aspects of the judicial role.

The Judge must exude learning because, according to the Justinian Institutes, *ignorantia judicis est calamitias innocentis - the ignorance of the judge is the misfortune of the innocent!* The judge's discretion is not to be exercised whimsically or erratically: "it is not an indulgence of a judicial whim [but] the exercise of

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10 *Talba, J* of the FCT High Court was suspended from office for twelve months without pay on the basis of public opinion for exercising a discretion which the law under which the accused was charged allowed him.

11 *State of New York v. United States (1951)342 US 822 at 884 – per Justice William Douglas*.

judicial judgment based on facts and guided by the law and equitable decisions. It is the court's epistemological tool for winnowing solid truth from windy falsehood; for dichotomising between shadow and substance; and distilling equity from colourable glosses and pretences. By its very character, judicial discretion does not brook any capricious exercise of power according to private fancies and affections".[12]

Indeed, as *Daniel Webster* once remarked: *"there is no character on earth more elevated and pure than that of a learned and upright judge and he exerts an influence like the dews of heaven falling without observation*". In *Jones v National Coal Board,*[13] *Denning LJ* gave a classic account of the judge's function in the adversarial system of justice as being *'above all … to find out the truth and to do justice according to law'* and *'at the end to make up his mind where the truth lies'*.

In his 1958 satirical work with the intriguing title *Anatomy of a Murder,* a former American judge, *John D. Voekler*[14] wrote that:

> Judges like most people, may be roughly divided into four classes: Judges with neither head nor heart – they are to be avoided at all costs; Judges with head but no heart – they are almost as bad; then judges with heart but no head – risky but better than the first two; and finally, those rare judges who possess both head and heart.[15]

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12 See *Udotim & Ors v. Idiong (2013) LPELR-22132 (CA) 13-14 - per Dr. C. C. Nweze JCA (as he then was).*

13 [1975] 2 QB 55 at 63-44

14 Better known by his pen name *Robert Traver*. He was an attorney, judge, and later a writer.

15 Whilst we are not quite sure of what to make of his rather sharp sarcasm, we must confess that *Voekler* somehow succeeded in constraining us to remit a passionate plea to Heaven not to make any room for us in the first two compartments, and that in the not unlikely event that we do not make it into that class of "*rare judges who possess both head and heart*", there should, at least, be some tiny space for us in the third category.

In a speech presented on 30 July, 1982 at the retirement of the legendary Lord Denning, MR at the age of 83, *Lord Hailsham of St. Maryleborne* said of him *inter alia* that "it was given to few to be legends in their own lifetime" and that:

> ...We shall miss your passions for justice, your independence and quality of thought, your liberal mind, your geniality, your unfailing courtesy to colleagues, to counsel and to litigants in person, who like the poor are always with us particularly at the Court of Appeal...[16]

The Times declared that Lord Denning *"had legal genius and a laudable mission to make the law accord with justice"*. The primary reason for the existence of courts of law is the dispensation of justice. In the words of St. Augustine: *"Remove justice, and what are kingdoms but a gang of robbers on a large scale*." The integrity of the process by which justice is done is as vitally important as the actual 'doing' of justice in any particular case; for it is essential that "justice must not only be done but it must be manifest that it is done".[17] The sad reality however, is that the ordinary citizen, the proverbial common man whose last hope the courts are said to be, has always been sceptical about the relationship between courts and justice; and this scepticism is not indigenous to Nigeria, even though it would seem that the Nigerian has elevated it to heights hitherto unknown: there is hardly any case that is won and lost on its factual and legal merits!

The venerable *Hon. Justice Chukwudifu Akunne Oputa* told once and again of the dialogue between *Lord Coleridge, CJ* and a

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16 Lord Hailsham's Speech is published as an epilogue under the title, "Farewell to Lord Denning", in *Lord Denning: The Judge and the Law* (Sweet & Maxwell: 1984), p. 475.

17 See *Okupe v FBIR* (1974) 4 SC 93 at p. 117 – per Coker, JSC; see, Peter O. Affen: "The Principles of Fair Hearing and the Powers of Arrests and Sanctions by Law Enforcement Agencies in Nigeria", (2009) 2 NJPL pp. 258 - 273

London cab driver who is said to have quipped that everyone knows the location of the 'law courts', but not that of the "courts of justice" which is an entirely different matter, because to make the law approximate to justice, one must have *"just laws, just courts and just judges"*! to which we may add "*just lawyers*".

4. The Lawyer's Role

The human instinct for justice finds expression in the administration of law in our courts[18] where a symbiotic relationship exists between lawyers and judges, and one cannot talk about one to the exclusion of the other. Both are referred to as '*ministers in the temple of justice*' because they are the main *dramatis personae* in the courts: the very theatre in which '*the citizenry primarily feels the keen cutting-edge of the law*'.[19]

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18 Chukwudifu Oputa, *The Independence of the Judiciary in a Democratic Society, Its need, Its Positive and Negative Aspects*, in T. O. Elias & M. I. Jegede (eds.) Nigerian Essays on Jurisprudence.

19 Hon Justice Author T. Vanderbilt – quoted in Olayide Adigun, *Enforcement of Judicial Decisions on Fundamental Right*, High Level Workshop for Judges (September, 1992). The following dictum of *Crampton, J.* in the case of *R v O'connel (1884) L. R. Ir. 261 at 312* is probably the most graphic depiction of a court as a temple of justice: *"This court in which we sit is a Temple of Justice, and the advocate at the Bar as well as the Judge on the Bench are equally ministers in that Temple. The object of all equally should be the attainment of Justice; now justice is to be reached through the ascertainment of the truth, and the instrument which our law presents to us for the ascertainment of the truth and falsehood of any criminous charge is the trial by jury; the trial is the process by which we endeavour to find out the truth. Slow and laborious, and perplexed and doubtful in its issue that pursuit often proves, but we all – judges, jurors, advocates and attorneys – together concerned in this search for truth; the pursuit is a noble one, and those are honoured who are instruments engaged in it. The infirmity of human nature, and the strength of human passion, may lead us to take false views, and sometimes to embarrass, and retard rather than assist in attaining the great objects; the temperament, the imagination, and the feelings may all mislead us in the chase – but let us never forget that the advancement of justice and the ascertainment of the truth are higher objectives and nobler results than any which in this place we can purpose to ourselves... I would say to the Advocate upon this subject – let your zeal be as warm as your heart's blood, but let it be tempered by discretion, and*

Being a temple of justice, the court has as major players the Judges who preside on the Bench, the lawyers who practice before them at the Bar, and the litigants who require that their grievances be heard and adjudicated upon. But because the judicial role is not self-activating, the courts can only act when 'moved' by lawyers who, in the course of their advocacy, avail the courts of their "prolific legal expertise".[20] What this means is that the proper, speedy, efficient and effective administration of justice under the rule of law cannot be achieved without the active cooperation of an honest, able and fearless, responsible and trustworthy Bar[21]; and although the end product of all endeavours in court is issued under the hand and seal of the judge in the form of judgments and rulings, the skill and creative genius of the advocate are the raw materials that yield that outcome. Let us therefore invite a learned author, ***Richard Du Cann***[22] to interrogate why men choose to become advocates at all:

> What is it that attracts them to meddle with bits and pieces of other men's lives? It would be pleasant to think that most advocates come into practice because they wish to serve their fellow men but the likelihood is that such social zeal influences as many grave diggers as it does advocates. There is probably no common denominational inducement. Carson became an advocate because of parental pressure; Rufus Isaacs only after he had been hammered on the stock exchange; Marshall Hall originally intended to enter the Church but changed

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with self-respect; let your independence be firm, uncompromising but let it be chastened by personal humility, let your love for liberty amount to a passion, but let it not appear to be a cloak for maliciousness."

20 See *General Oil Ltd v Oduntan* [1990] 7 NWLR (Pt. 163) 423 at 673 – *per* Niki Tobi, JCA (as he then was)

21 Oputa, *The Crises in the Rule of Law* in Chris Okeke (ed.), Towards Functional Justice: Seminar Papers of Justice Chukwudifu Oputa (Ibadan: Gold Press Ltd, 2007), p. 152.

22 Richard Du Cann, *The Art of the Advocate*, (Penguin Books Ltd: 1964, 1980), p. 7.

> his mind solely because he wanted to have enough money to get married. No three men of the same generation ... could have been more dissimilar, yet all three rose to the front rank of the profession."

The point to underscore here is that each one of the great advocates mentioned above 'rose to the front rank of the profession' not by reason of the circumstance that propelled him to become an advocate, but on account of the passion he brought to bear in the practice of the profession. The first rule for the advocate therefore, is that he must develop a strong passion for his profession. But passion amongst lawyers has become a scarce vegetation, and this dearth of passion which in turn breeds defective ethics[23] is largely responsible for most ills confronting the legal profession in the present day. Even some of those who have been lavishly decorated by the legal profession fail to demonstrate the required passion. There are instances where eminent senior counsel have taken appeals to the Supreme Court against the current of clear constitutional prohibitions,[24] thereby needlessly overheating the polity!

The Rules of Professional Conduct for Legal Practitioners[25] prescribe minimum standard of conduct expected of lawyers who

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23 See, ABA Committee on Professionalism, *In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism*, 112 F.R.D. 266, Cited in O. Oko, *Problems and Challenges for Lawyers in Africa: Lessons from Nigeria* (New York: The Edwin Mellen Press, 2007), 400

24 See Awuse v Odili [2003] 18 NWLR (Pt. 851) 116, Oni v. Fayemi [2013] 12 NWLR (Pt. 1369) 431, etc. Prior to the enactment of the 1st Alteration Act, 2011, s. 246 (3) CFRN 1999 provided that "*the decisions of the Court of Appeal in respect of appeals from election petitions shall be final*". The 1st Alteration Act now allows appeals from governorship election petitions to the Supreme Court.

25 The current Rules of Professional Conduct came into force on 2nd January, 2007. The unfortunate thing however is that many lawyers have not read these Rules, and merely rely on whatever they can vaguely remember from their studies in the Nigerian Law School.

appear as counsel before the courts of law (or hopefully, the courts of justice). Since counsel owes a bounden duty to maintain this minimum standard of conduct and behaviour,[26] especially in his relationship with the court, it is the scrupulous observance by counsel of this minimum standard that makes for hitch-free interface, and fosters cordiality between the Bench and the Bar.[27] One duty that stands out is the lawyer's duty to display respectful attitude towards judges, not for the sake of the temporary incumbent but for the maintenance of the supreme importance of the judicial office: the duty of candour and fairness to the court and to other lawyers. But nowadays, judges are freely addressed as "you" in open court and the courts have had occasion to lament this development.[28] In one case, the court[29] reacted to a deposition in an affidavit in support of a motion for stay that the defendant was *"dissatisfied and scandalised*" by its judgment in the following terms:

> It is not unusual for a litigant to be 'dissatisfied' with the eventual decision of a court in a cause or matter. That is the reason appellate courts are set up to possibly correct any error to which lower courts in the hierarchy may have been betrayed. But for a learned counsel, who is a minister in the hallowed temple of justice, to draw up an affidavit on behalf of a litigant, and state in cold print that the litigant is 'scandalized' by the decision of a superior court of record merely because the decision did not go in his favour is unimaginably bizarre. It only

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26 See *Magna Maritime Services Limited & Anor v. Oteju & Anor [2005] 14 NWLR (Pt. 945) 517*

27 J. O. Orojo, *Professional Conduct of Legal Practitioners in Nigeria* (Lagos/Abuja/Port Harcourt: Mafix Books, 2008), p. 256

28 See, for instance, *Health Care Products (Nig) Limited [2003] FWLR (Pt. 162) 1937* where Sanusi, JCA noticed the consistent reference to the learned trial judge as "trial judge" without the adjective "learned".

29 Per *Affen, J* in *George Ifada v Minister of FCT & Ors - Suit No. FCT/HC/CV/70/07* delivered on 19/7/2010 (*unreported*)

> exemplifies the unfortunate abyss into which legal practice has plummeted in the present day.

Of course, if professional respect is being withheld from the courts, then one can only imagine that counsel-to-counsel courtesies have virtually gone with the wind. Vitriolic "*attack(s) on the professional competence of opposing counsel*" contrary to the ethics, etiquette and decorum of the legal profession has become regular occurrences.[30] The point being made here is that counsel must always have it in mind that good manners are not a sign of weakness. Deference to the judge [or opposing counsel], politeness at all times and to everyone are becoming attributes which generally get them liked; and in the face of heavy weather from a difficult tribunal, deference is the only way to proceed: there is no other route.[31]

Interestingly, just as *Voekler* divided judges into broad categories, a notable Nigerian jurist, *C. C. Nweze, JSC*[32] has opined that:[33]

> The imperatives of modernity impel a distinction between creative advocacy and unethical litigation tactics, [and] one could speak of judicial characterisation of the typologies of advocacy in contemporary legal practice.

He identified the following nine (9) typologies of advocacy:

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30 See, *A. N. Mohammed Petroleum Limited v. Afribank Nigeria PLC*

31 Iain Morley, *The Devil's Advocate, A Short Polemic on How To Be Seriously Good in Court* (Sweet & Maxwell Ltd, 2005), p. 60

32 (who, incidentally, was on the Enugu High Court Bench from 1995 until his preferment to the Court of Appeal in 2007)

33 C. C. Nweze, *Redefining Advocacy in Contemporary Legal Practice: A Judicial Perspective* (Nigerian Institute of Advanced Legal Studies, 2009), pp. 15 -16.

(i) **Decent advocacy** anchored on the rules of professional conduct;

(ii) **Diligent advocacy** i.e. advocacy exercised with reasonable professional diligence and caution;

(iii) **Honest advocacy** which recognises the importance of the requirement of absolute probity: that the public interest requires that the courts should be able to have absolute trust in the advocates who appear before them[34]. Honest advocates will never contemplate misrepresenting findings not made by a trial court merely for the purpose of unfairly castigating the court on appeal. In *B & B Construction Ltd v Ahmed,*[35] the Court of Appeal deplored counsel for ascribing to the trial court a false submission actually made by him in his final address which did not form part of the Ruling of the lower court at any page of the record;

(iv) **Guileful advocacy,** which is converse honest advocacy. The list of the sly activities of this advocacy category is never closed; and they are known more for their chicanery than their commitment to the course of justice, hence they employ all sorts of unholy stratagems;[36]

(v) **Advocacy by blackmail** where unethical advocates demonise judges to compensate for their incompetence or weakness of their cases[37]. The

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34 See, *Abse and Ors* v *Smith and Anor (1986) 1 ALL ER* 350 at 354 - per Donaldson MR

35 [1998] 9 NWLR (Pt. 566) 456

36 *Akpan* v *UBN Plc* [2003] 6 NWLR (Pt. 816) 279 at 307

37 *In Re Isaac Oluwaleyinmi* (1974) 2 WSHC 48 at 66, the court denounced such advocacy style as follows: *"It appears to me that [counsel in this case] became apprehensive of the fact that the case may (I will deliberately refrain from using a stronger word) likely go against his clients and thereby made allegations of*

strategy of this advocacy typology is to attack the judge when both facts and the law are against their cause;

(vi) **Irritating advocacy**, which is characterised by pomposity: the exhibition of character traits that flow from conceit, which is an "*inevitable occupational disease of the Bar" [38]*;

(vii) **Indolent or lackadaisical advocacy.** Lawyers of this typology cite statutes in court without giving their full particulars[39] nor do they cite cases correctly;[40]

(viii) **Tactical advocacy**: In the hands of tactical advocates, the noble art of cross examination constitutes a most lethal weapon for the demolition of the case of the opposing party; and

(ix) **Fiery, fearless, courageous or strong advocacy** which is *sine qua non* for the independence of the Bar, but *"the arms which he wields are to be the arms of the warrior and not of the assassin"*[41].

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corruption and bias as a face-saving device….He has sacrificed principle for personal gains. He is an officer of court and his first duty is to the court. Contrary to expectation, he has smeared the good names of some officers of the court. Any officer who pollutes the foundation of justice is not fit to be an officer of the court."

38 H. Cecil, *Portrait of a Judge* (New Delhi: Rupa and Co, 2004) 193.

39 *Ugbah v Ugbah* (2009) All FWLR (Pt. 472) 1103 at 1119.

40 *Araka v Ejeugwu* (1999) 2 NWLR (Pt. 589) 107; *Cocoa Merchants Ltd* v *Commodities Sales Ltd* [1993] 1 NWLR (Pt. 271) 627, 623.

41 Kayode Eso, *Thoughts on Law and Jurisprudence* (Lagos: MIJ Publishers, 1990) 97. Reference is made at p. 146 to Cockburn, CJ who enunciated the characteristics of this advocacy style. : *An advocate must be fearless in carrying out the interest of his client. But I couple that with this qualification and this restriction that the arms which he wields are to be the arms of the warrior and not of the assassin. It is his duty to strive to accomplish the interests of his client per fas but not per nefas; it is his duty to the utmost of his power to seek to reconcile the interests he is bound to maintain, and the duty it is incumbent*

It cannot escape notice that there are credit and debit sides of the coin in *Nweze's* characterisation of advocacy typologies. A judicial system which is gifted with a preponderance of advocates on the credit side of the coin is more likely to achieve its objective of delivering justice than one that is populated by advocates on the debit side. But even without the necessity of undertaking any empirical studies, one can state with a measure of confidence that the percentage of advocates on the debit side of the coin is growing in geometric proportions, and unless something is done urgently to shrink the ranks of those who practice beyond professional bounds by devising or adopting appropriate methodologies to rein in their unholy stratagems, our judicial system, which is already being asphyxiated, may not long endure!

The challenge of the present day is that of fidelity to the law. As Lord Halifax put it, *'if the laws could speak for themselves, they would complain of the lawyers in the first place'*.[42] The filing of frivolous claims (and appeals) with no *'reasonably articulable basis in law or in fact'*[43], which the virtual absence of an effective sanctions regime and the quest for that 'be all' rank of senior advocate have conspired to institutionalise, is the bane; and this is exacerbated by the fact that even some of those entrusted with the

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on him to discharge with the eternal and immutable interests of truth and justice.

42 Lord Halifax, *Political Thoughts and Reflexions* - quoted in Ademola Popoola, *Babatunde Olusola Benson: The Man, His Universe and the Crisis of Justice in Nigeria*, in Nurudeen Ogbara (ed.), High Court of Lagos State Civil Procedure Rules, 2004: So Far, So What? (Nigerian Bar Association, Ikorodu Branch, 2006 & 2007), p. 28.

43 In the United States, Rule 11 of Federal Rules of Civil Procedure (FRCP) imposes an objective standard of reasonableness on lawyers in regard to their filing of claims as a positive way of cleaning up court dockets: the Rule "*requires an attorney who signs a complaint to certify both that it is not interposed for delay, harassment, etc., and that there is a reasonable basis in law and fact for the claim"*. See United Food & Commercial Workers v. Armour & Co. 106 F.R.D. 345,347 (1985).

responsibility of enforcing discipline are living comfortably in glass houses!

Where a counsel knows that a claim is bound to fail because a matter is either indefensible, speculative or totally devoid of merit, he ought to advise against the prosecution of such claims.[44] But in my very limited experience, nearly half of the cases pending in both trial and appellate[45] courts have no business being initiated in the first place, but no one is sanctioned for this obvious professional misdemeanour. An example that readily comes to mind is where a tenant in a one bed-room, *face-me-I-face-you* accommodation who is owing two or three years rent somehow succeeds in getting a lawyer to file an action in court to restrain his landlord from taking steps to evict him!

If we are truly desirous of pulling ourselves out of the cesspit of frivolous litigations, the United States practice of *'lawyers beware'* [46] is the way to go! In 1983, the US Congress amended the *Federal Rules of Civil Procedure (FRCP),* specifically *Rule 11, "in order to discourage dilatory or abusive tactics and to streamline the litigation process by lessening the amount of frivolous matters brought before the federal courts"*[47]. The rule is *"intended to reduce the reluctance of the courts to impose sanctions ... by emphasizing the responsibility of the attorney"*[48].

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44 *Cocottopoulos* v *PZ and Co Ltd* (1965) LLR 74

45 An appeal is held to be frivolous *"when the result is obvious or when the appellants argument is wholly without merit"*. See *Orange Production Credit & Frontline Ventures Ltd 801 F2d1581, 1582-83 (9th Cir. 1986); Incomco v. Southern Bell Tel &Tel Co., 775 F.2d at 185 (1977)*

46 Jeffrey H. Roberts, *The New And Improved FRCP Rule 11: Lawyers Beware,* in The Journal of the Legal Profession [Vol. 13 1988], pp. 319 – 236. I am grateful to *George Anibowei,* for this invaluable article and other materials on Rule 11 of the US Federal Rules of Civil Procedure.

47 See *Coburn Optical Industries Inc. v Cilco Inc. 610 F.Supp. 656, 659 (MCNC 1985)* - cited in Jeffrey H. Roberts, *op.cit. supra*

48 See *Eastway Constr. Corp. v City of Newyork 762 F.2d 243, 253 (2d Cir. 1985)* cited in Jeffrey H. Roberts, *op.cit. supra*

A clear and unequivocal message was therefore sent to lawyers and clients alike that: *"the court system has become too bogged down with frivolous claims and in order to clean it up, we must punish those who are responsible"*[49]. Thus, by presenting to the court any pleading, written motion or other paper -whether by signing, filing, submitting, or later advocating it- an attorney or unrepresented party certifies that to the best of his knowledge, information, and belief, formed after an enquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.[50]

Crucially, the court is empowered to *suo motu* order an attorney, law firm or party to show cause why conduct specifically described has not violated the rule; and where, after notice and a reasonable opportunity to respond, the court determines that the

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49 See Jeffrey H. Roberts, *op. cit.*, p. 326

50 US FRCP Rule 11(b)

rule has been violated, the court is empowered to impose appropriate sanctions on any attorney, law firm or party that violates or is responsible for the violation.[51] The objective is to deter repetition of the conduct or comparable conduct by others similarly situated, but not to "*chill an attorney's enthusiasm or creativity in pursuing factual or legal theories"*.[52]

Nigerian lawyers must come to terms with the fact that substantial changes have already occurred in the world of dispute resolution: there is a paradigm shift from lawyers as combative, gladiatorial, adversarial advisers to lawyers as empathetic counsellors who are more inclined to negotiate, mediate and seek consensus; that many stereotypes of lawyers are outdated and a new breed of lawyers who are skilled at preempting disputes as they have traditionally been at escalating them may well be emerging.[53]

Contemporary phenomena such as information technology, commoditization, outsourcing, external investment, etc have far-reaching implications for legal practice in the 21st Century and lawyers must reconsider the sustainability of their traditional role,

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51 US FRCP Rule 11(c)(1). The most common sanctions are (i) striking out of the pleadings or dismissal of the complaint *sua sponte:* the courts have *"the power to dismiss a complaint if it is frivolous or brought for ulterior purposes*" – *Blair v. Shenandoah Women's Centre Inc. 757 F.2d 1435, 1438(1985);* and (ii) the award of monetary damages in the form of attorneys fees to the victim of the frivolous lawsuit against the attorney personally *"where although the party was responsible for pursuing bad litigation, the client had received bad legal advice" - Thornton v. Wahl 787 F.2d 1151, 1154 (7th Cir, 1986).* The imposition of sanctions themselves can, of course, be appealed to ascertain "*whether the reviewing court would have applied the sanction, but whether the district court abused its discretion in doing so*" - *Blair v. Shenandoah Women's Centre Inc. 757 F.2d at 184.*

52 Marco Holding Co. v. Lear Siegler, Inc. 606 F.Supp. at 211 cited in Jeffrey H. Roberts, *op. cit.*

53 J. Macfarlane, *The New Lawyer* (Vancouver: UBC Press, 2008).

even as there is some concern about "*whether lawyers might fade from society as other craftsmen have done over the centuries"*.[54]

5. Judicial Independence

An independent judiciary has been described as the *"lifeblood of constitutionalism*".[55] Judicial independence implies that disputes are adjudicated on the basis of their factual and legal merits, and judges being free to act on their *'own convictions without any apprehension of personal consequences.'*[56] Since a fair trial in a fair tribunal is the first test of due process, this requires both institutional and decisional independence.

The judiciary has the responsibility of not only ensuring transparency and consistency in deciding disputes; it must also ensure timeliness in the disposal of such disputes. Whether or not the judiciary we have presently fits the toga of independence is an open-ended question. But one thing we cannot shy away from is that unless judges perform their roles *"properly, none of the objectives of a democratic society can be realised*".[57] Judges must apply the law firmly, transparently and consistently '*without fear*

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54 According to Richard Susskind, modern lawyers are in denial of being lawyerly and generally downplay the legal content of their jobs *"because they recognise the need to change and diversify in response to shifts in the market"*. He argues that even though *"being a lawyer is, bluntly, not the coolest of jobs, and perhaps not as prestigious as once it was, and there may even be a stigma of sorts attached to lawyers (hence the wealth of lawyer jokes) … and the ill-informed and disconnected may thrash the legal profession, in most walks of life, lawyers remain well respected"*. – see Richard Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services*, (Revised Edition) (Oxford University Press, 2008 & 2010), pp. 4 - 5.

55 See *Beauregard v Canada* 1986 CarswellNat 1004 at para 24.

56 *Bradley v Fisher* (1871) 80 US 335 at 347. See also the soft law principles enunciated in the UN Basic principles on the Independence of the Judiciary adopted by the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August – 6 September 1985 and endorsed by the United Nation General Assembly Resolutions 40/43 of 29/9/85 and 40/146 of 13/12/85, para 2.

57 Julius Nyerere, *Freedom and Socialism* (Oxford University Press: Dar es Salam, 1968) at 110

or favour, affection or ill will' in keeping with their judicial oath and the code of conduct for judicial officers!

The court system implies that the citizen should freely approach the courts with the conviction of obtaining justice, which further implies that the courts are not tied to the apron strings of the executive or other concentration of power: courts that are free from legislative pressure, political pressure, big business pressure or, worse still, mob pressure. It is the removal of these extrinsic and unnecessary influences or pressures that helps to ensure the independence of the judiciary. The court system also presupposes that the courts are not inhibited by factors such as ignorance, corruption, favouritism, prejudice, fear or favour from delivering just decisions. But deliberations on judicial independence tend to focus on institutional independence to the detriment of decisional independence. We submit that judicial independence depends, in the ultimate analysis, not on physical structures, or even the fact that the Judiciary controls its own recurrent and capital budget, but on the qualities of confidence and courage exhibited by appointees to the judicial bench, and this is gravely undermined by the current remuneration structure, which we often shy away from discussing publicly.

5.1 Remuneration and Judicial Independence:

It would seem that the subtle but crucial nexus between the remuneration of judges and judicial independence as an imperative for an enduring tradition of judicialism is not immediately obvious to many. At a judicial reform conference tagged: *"Putting Our Best Foot Forward – The Judiciary and the Challenges of Satisfying Justice Needs of the 21st Century"*, organized by UNODC in July 2014 (with over 200 participants drawn from the Bench and Bar, Civil Society Organizations, the academia, the media and the international community), judicial independence was identified as a prerequisite for enhancing the performance of the justice sector. The Conference equally underscored the

imperative of reforming the justice sector, especially the process of appointing judges to make it transparent and merit-driven.[58] But surprisingly, the conference was deafeningly silent on improving the remuneration of judicial officers as a means of making judicial appointment attractive to the right quality of lawyers, and the erroneous impression is thereby created that judicial officers in Nigeria are already well remunerated like their counterparts elsewhere, whereas the reality is that the Nigerian judiciary (and therefore judges) remains the poor cousin of the other supposedly co-equal arms of government. We ought to interrogate why most successful legal practitioners in Nigeria, (notably senior advocates) consider the Bench beneath their dignity when Queen's Counsel in the UK readily accept such appointments at the zenith of their professional success; and whether this has not, over the years, impacted on the independence of our judiciary in some negative way. The relevance of the above interrogation is further underscored by the fact that successful lawyers often wield considerable influence in and out of court, even as it is rumoured that some judicial officers defer to them in a manner that stands judicial independence on its head to the discomfiture of other counsel and the general public!

As far back as 1992, the *Law Society of New South Wales* made a submission to the effect that:

> The question of salaries constitutes one of the Society's major concerns so far as judicial independence is concerned. The opening up of a "dispiriting chasm" between the relatively low salaries of those seated on the nation's benches and the much more remunerative incomes of the leading practitioners on court floors below them has been the chief subject of apprehension. The disparity of the incomes of those who judge and

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58 Leadership Newspaper of July 26, at (http://leadership.ng/news/379072/reforming-judiciary).

> those whose arguments are judged by them has become shameful. [59]

It must be recognised that in the Nigerian society of today, there is a direct relationship between what someone earns and the status or prestige he enjoys, and it is seriously doubtful that the status and prestige of the average Nigerian judge matches that of even a Local Government chairman! Whilst *Nwabueze* did not give any reasons for his assertion that "the argument that judges should be remunerated out of proportion to the general salary structure in the public service in order to secure their independence and to compensate them for 'lifelong limitations on additional sources of income' available to them is hardly persuasive"[60]Lord Bingham[61]acknowledged the subtle but crucial interconnectedness between judicial independence and remuneration of judges. According to him:

> Financial rewards are not, of course, everything but nor are they nothing. Unless, therefore, the rewards of judicial office (with or without other benefits) are sufficient to attract the ablest candidates to accept appointment, albeit with some financial sacrifice, the ranks of the judiciary must be filled by the second best, those who under our system have failed to make it in private practice, and there would be an inevitable lowering in the standing and reputation of the judiciary and a sea change between advocate and judge. There would also be, I suggest, a loss of those qualities of

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59 Commonwealth Law Bullettin (July 1992), 1043

60 Nwabueze, *Judicialism in Commonwealth Africa*, op. cit., p. 270

61 Tom Bingham, *The Business of Judging, Selected Essays and Speeches (1985 -1999)*, pp. 65-66. Lord (Baron) Bingham of Cornhill held office successively as Master of the Rolls, Lord Chief Justice of England and Wales, and Senior Law Lord of the United Kingdom, the only person ever to hold all three offices. The *Guardian* described him as "*the most eminent of all our judges*" - see Tom Bingham, *The Rule of Law* (Penguin Books, 2011).

> confidence and courage on which the assertion of true independence not infrequently depends, because these qualities tend to be the product of professional success, not the hallmark of professional mediocrity. This is not mere speculation: one need only look at some other countries with a career judiciary, in which those opting for a judicial career are by and large the weaker candidates, to see that the judiciary which results lack the authority and the standing which we very largely take for granted…[the] maintenance of a strong and independent judiciary is recognised to depend, at least to some extent, on the payment of a reasonable salary: and I believe it to be true that British judges are on the whole more generally rewarded than their European counterparts (except Germany). Different countries of course have different traditions. Our tradition does, however, depend on the willingness of the most successful practitioners, at the height of their careers, to accept appointment to the judicial bench, and I gravely doubt whether that tradition can be maintained if what the New South Wales Law Society calls a 'dispiriting chasm' becomes too deep.

Lord Bingham's views are, doubtless, thought-provoking, and we submit that the subject of adequate remuneration for judicial officers has a direct, if not decisive, bearing on judicial independence and cannot be lightly wished away. Any deliberations on enhancing judicial independence through a transparent and merit-driven process of recruitment of judges, which genuinely aims at "putting our best foot forward" by attracting the ablest candidates, must make appropriate judicial remuneration a front-burner issue; otherwise true judicial independence will continue to elude us.

6. Some ill-winds that blow no good:

(i) Appeal as of right

The Nigerian Constitution contains generous provisions on "appeal as of right"[62] from decisions of the Court of Appeal to the Supreme Court[63] and from decisions of the Federal High Court, High Court, Sharia Court of Appeal, Customary Court of Appeal, Court Martial, Code of Conduct Tribunal and National Assembly Election Tribunals and Governorship and Legislative Houses Election Tribunals to the Court of Appeal.[64]

By conferring an untrammeled right of appeal against every final decision (as well as all interlocutory decisions involving points of law, etc,) the Nigerian Constitution has created the disturbing impression that the lower courts and tribunals created by it are incapable of delivering justice without being interposed by an appeal. But whilst the jurisprudential underpinnings which underlie the conferment of appeal by right in certain cases (notably, from first instance decisions imposing the death penalty) are immediately obvious, it is difficult in the extreme to appreciate the rationale behind extending automatic right of appeal against every decision of first instance courts (including, for instance, judgments entered under the undefended list or other summary judgment procedure in respect of claims for simple debt or liquidated money demand).

Aside from the fact that such an untrammeled right of appeal is, of course, open to capricious abuse (especially in the form of interlocutory appeals), it derogates from, if not completely undermines, the respectability of lower courts and pokes a salty finger directly in their eyes by rendering the Court of Appeal a mere "gateway" on the way to the final word from the apex court. Not infrequently, the high court would barely have finished delivering a judgment before counsel jumps to his feet to gleefully

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62 Also called "appeal by right" is an appeal to a higher court from which permission need not be first obtained –Black's Law Dictionary, (8th edition), p. 106

63 Section 233(2) CFRN 1999 (as amended)

64 Sections 241(1), 244(1),245(1) and 246(1) & (2) CFRN 1999 (as amended)

tell the court to its face that he is going on appeal, and this has absolutely nothing do with the legal merits of the case!

In the case of the Supreme Court, appeals as of right is, quite arguably, the most awful thing we have done our court of last resort. The Nigerian Constitution clearly did not appreciate the status of the Supreme Court as a court of policy, and not merely as a court of law. My admittedly limited research did not reveal any other final court to which appeals lie as of right, and this makes the Supreme Court of Nigeria the most overworked and overburdened final court:[65] a fact acknowledged even by ardent critics of its work.[66] It certainly is not realistic to expect the sixteen (16) justices[67] of the Supreme Court to cope with the deluge of (interlocutory and final) appeals arising from decisions of the sixteen (16) divisions of the Court of Appeal.

Statistics obtained from the Supreme Court Registry reveals that whereas 532 appeals were entered in 2012, 763 in 2013 and 904 in 2014, the Supreme Court of Nigeria delivered 146 judgments in 2012, 185 in 2013 and 106 in 2014. Conversely, the United Kingdom's leading law firm, *Clifford Chance* in its January 2015 Briefing Note titled "The final frontier: the UK Supreme Court in 2014" stated that only 66 cases reached the Supreme Court, giving rise to 68 decisions, a minuscule fraction of the cases in the UK's courts".

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65 Gani Fawehinmi, *The Way the Law Should Go*, being a speech delivered at the conferment of the rank of Senior Avocate of Nigeria on him and others in 2001

66 R.A.C.E. Achara, *above*, p. 8 –"Clearly, the Supreme Court of Nigeria seems to be overworked and too exhausted to think through many of its recent decisions".

67 Section 230(2)(b) of the Constitution provides the Supreme Court of Nigeria shall consist of "such number of Justices not exceeding twenty-one, as may be prescribed by the Court but has not had more than 16 justices at any given time."

The Briefing Note, earlier cited, gave the following statistics: "The [UK] Supreme Court gave 68 decisions in 2014,[68] down from 81 in 2013 but up from 61 in 2012, 60 in 2011 and 58 in 2010"; and that "[by] way of contrast, the US Supreme Court gave 68 decisions in 2014". Of course, neither the UK Supreme Court nor the US Supreme Court takes appeals as of right. In 2014, there were 198 decisions on applications to the UK Supreme Court for leave to appeal and only 59 of these applications (or 30%) were successful. The standard reason offered for refusing leave is that the case "does not raise an arguable point of law"[69] which is another way of saying that the UK Supreme Court, like that of the US, only takes cases involving an issue that is of interest to it, such as where the law is unclear, etc.

But here in Nigeria, the Supreme Court is bogged down with countless appeals that are of nuisance value only which give rise to decisions that add little or nothing to existing jurisprudence and sometimes end up obfuscating otherwise settled law, thereby ultimately undercutting *"the policy-shaping and conduct reforming role of the [Supreme Court of Nigeria] as the ultimate appellate court in Nigeria"*[70] with grave implications for legal development and judicialism.

This paper submits that in order for judicialism to endure, there is an urgent need to do away with appeals as of right (subject, of course, to very limited exceptions) as a crucial first step towards eliminating frivolous appeals from Supreme Court docket. We may need to draw up broad guidelines to address concerns of caprice in granting or refusing leave to appeal. For instance, a

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68 This figure excludes decisions given by the UK Supreme Court in its capacity as *Judicial Committee of the Privy Council* which hears and determines appeals from decisions in various outlying British or former British territories such as Trinidad, Mauritius, Jamaica, the British Virgin Islands, Antigua, the Bahamas, Bermuda, St. Vincent, Grenadines, Turks & Caicos, St Lucia, Gilbrata, The Isle of Man and Jersey.

69 Clifford Chance, *Briefing Note*, January 2014.

70 R.A.C.E. Achara, *op. cit.*

party seeking leave to appeal may be required to demonstrate that his case is not covered by existing binding precedent or what novel issues of law he intends to canvass in a further appeal to the Supreme Court or that he wishes to urge the court to overrule itself on a point of law, etc. Applications for leave may be made to the Court of Appeal and if declined, it may be made to the Supreme Court which may dispose of the application for leave in chambers without oral hearing, etc.

It is equally needful to restrict appeal as of right to very limited circumstances even at the level of the Court of Appeal. As pointed out above, we can hardly sustain the current untrammeled right of appeal (irrespective of the legal merits) against all final decisions emanating from courts and tribunals of first instance. Why should a defendant in an undefended list action who failed to file a notice of intention to defend despite being served be allowed to appeal the eventual decision as of right?

(ii) The perennial jurisdictional contest between the Federal High Court and State High Court

The exact scope of the jurisdiction of the Federal High Court (FHC) vis-à-vis the State High Court (SHC) has been enmeshed in controversy since the days of its precursor, the Federal Revenue Court which was established in 1973. Cases such as *Jammal Steel Structures v. ACB*[71] and *Bronik Motors v. Wema Bank*[72] are familiar territory, but the more the courts interpret the issue, the more cases come before the courts and they will continue to come before the courts as long as lawyers disagree as to the real purport of the constitutional provisions in respect of the two courts.[73] In one case,[74] the Court of Appeal lamented that:

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71 (1973) 1 All NLR (PT. II) 208

72 (1983) 6 SC 158

73 *Onuorah v. KRPC Limited* [2005] 6 MJSC 137 at 150 – per Niki Tobi, JSC

74 *Oladipo v. Nigeria Customs Service Board* [2009] 12 NWLR (Pt. 1156) 563 – per Nweze, JCA (as he then was)

> It is very worrisome that thirty six years after its creation, the determination of the question of the precise ambit of the substantive jurisdiction of the Federal High Court has continued to excite curious reactions and provoke divergent interpretations. The chequered movement of this case exemplifies the odd consequence of this state of affairs. Whereas the Federal High Court holden at Ilorin declined the invitation to adjudicate on the matter on the ground that it lacked the jurisdiction to do so, the State High Court equally chased the plaintiff away from the temple of justice, pleading the same want of jurisdiction. The effect is that the appellant, like the bat which is neither a bird nor a mammal, has been unable to ventilate his grievance in either of the courts since 2002 when he took out his writ of summons. This speaks ill of our jurisprudence.

Whilst some decisions donate the proposition that the FHC, even though it now enjoys an enlarged jurisdiction under the 1999 Constitution, is still a court of enumerated jurisdiction which is subject matter specific, other decisions are to the effect that all matters affecting the Federal Government or any of its agencies can only be ventilated in the FHC irrespective of subject matter.[75] And if one throws the National Industrial Court (NIC) into the mix, the confusion may well have reached boiling point! By the 3rd Alteration Act, the NIC is vested with wide exclusive jurisdiction in employment and allied matters, but in *NEPA v Edegbero*, *supra*, dismissal from employment was held to fall within the ambit of the administration or management and control of a federal government agency. Pray, since both the NIC and the

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75 See NEPA v. Edegbero [2002] 18 NWLR (Pt. 798) 79; Oloruntoba v. Dopamu [2008] All FWLR (Pt. 411) 810; *Ayeni v University of Ilorin* [2000] NWLR (644) 290; *Inegbedion v Selo-Ojemen* [2013] All FWLT (Pt. 688) 907 at 922-923; *ABSIEC v Kanu* [2013] All FWLR (Pt. 696)546 at 555.

FHC have exclusive jurisdiction, which of them has jurisdiction over employment matters involving the Federal Government or any of its agencies? Could this be another protracted jurisdictional tussle in the making? Also, even though both the FHC and the SHC have concurrent jurisdiction in fundamental right matters, there is some confusion as to which court to approach in fundamental right matters involving the federal government or its agencies.

In *Adetona v Igele Gen. Ent. Ltd.*[76], it was held that the FHC lacks jurisdiction in fundamental right matters arising from outside its enumerated jurisdiction, whilst the SHC equally lacks jurisdiction in fundamental right matters arising from a transaction or subject matter which falls within the exclusive jurisdiction of the Federal High Court. ***Query:*** Since the Nigeria Police, Department of State Security, Civil Defence, Nigerian Immigrations Service, etc., are agencies of the Federal Government, does this imply that every fundamental right action against them can only be ventilated at the FHC? *Jeremy Bentham* probably had us in mind when he stated that "*the power of the lawyer lies in the uncertainty of the law*"!

This paper hereby calls attention to the fact that court users and business people are only interested in the actual resolution of the disputes that brought them to court. They have no interest in forensic arguments advanced in furtherance of jurisdictional contests. In order for judicialism to endure, the judicial system must devise a means of reducing jurisdictional skirmishes to the barest minimum so that its energies can be directed towards resolving the substance of disputes presented by the litigating public. Since the FHC is empowered to transfer[77] matters wrongly commenced to the SHC, there seems to be no justifiable reason why we should not take deliberate steps to invest SHCs with

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76 [2011]7 NWLR (PT. 1247)535

77 Section 22 of the Federal High Court Act

corresponding power to transfer cases to the FHC. New procedures and approaches are constantly needed to deal with challenges, and this can only come from within the legal profession. We cannot pretend not to know that the legislature is not interested in the practice of the courts and if the legal profession is hesitant, then very little can be done.[78]

(iii) Signing of court processes in the name of a law firm:
Since 9 March, 2007 when the Supreme Court struck out a motion signed by the law firm of '*J.H.C. Okolo SAN & Co'* on the ground that a law firm, not being a person whose name is on the roll of legal practitioners admitted to practice law in Nigeria, cannot sign court processes, there has been renewed interest on how and by whom court processes are signed. In *Nweke*, the Supreme Court considered the issue of substantial justice *"on the other side of the judicial scale in the balancing act*" before it struck out the motion *"leaving the Plaintiffs with the opportunity to present a proper application for consideration".*[79] However, this *'balancing act'* seem to have given way in subsequent decisions[80] to an inflexible rule of jurisdiction which can be raised for the first time on appeal notwithstanding that the opportunity to present a proper case for consideration has been extinguished by applicable limitation laws.

There is an ongoing debate in legal circles on the propriety of the Supreme Court's insistence on making "legal practitioners responsible and accountable in the signing of court processes" to the detriment of hapless litigants whose only undoing is that they retained the services of counsel. This presentation will not join in that debate, but will call attention to the fact that court processes are routinely being signed in the name of law firms in spite of the

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78 Edmund Heward, *Lord Denning: A Biography* (Little London, Chichester: Berry Rose Law Publishers, 1997), p. 160.

79 *Id*, at p. 532

80 Notably *SLB Consortium Limited v NNPC* [2011] 9 NWLR (Pt. 1252) 317 and *First Bank of Nigeria v Alhaji Maiwada* [2013] 5 NWLR (Pt. 1348) 444.

litany of binding decisions from the stable of the Supreme Court on the point. And because this is an ill wind in the legal horizon, bearing in mind the settled distinction between substantive want of jurisdiction on the one hand and procedural want of jurisdiction on the other hand, one would like to see a situation where objections to the manner in which court processes are signed are required to be raised at the earliest opportunity before taking any step in the proceedings (such as filing defence) at the trial court, rather than the current scenario in which, more often than not, such objections are raised for the first time on appeal after the cases have already been won and lost on their factual or legal merits at the trial court.

(iv) Closure of courts:

In 2015, virtually all state courts were under locks and key owing to the industrial action embarked upon by *Judiciary Staff Union of Nigeria (JUSUN)* to press for fiscal autonomy for the judiciary[81]. In the case of Rivers State, the courts were closed for almost one year owing to irreconcilable differences that had attended the attempt to fill a substantive vacancy in the office of Chief Judge of Rivers State. What is of immediate concern to us is that prolonged closure of courts (as in the case of Rivers State) has far-reaching implications for the survival of judicialism in Nigeria: *Firstly* the seeming inability or failure on the part of judicial system to seamlessly resolve the issue of succession to the high office of Chief Judge calls to question the ability (and moral authority) of the same judicial system to resolve disputes presented

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81 The Abuja Division of the Federal High Court (*per* Ademola, J) had in January 2014 declared as illegal the practice whereby statutory allocations are handed to the Judiciary through the Ministries of Finance on the ground that it contravened s. 162(9) of the Constitution which provides that: "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."

to it from outside of the judicial system; and *secondly* (which is the more insidious implication), since all living things (including humans) generally respond to stimuli, the citizenry may well be getting accustomed to doing without the courts: for if they have been without the courts for as long as one year and their lives have not been radically or detrimentally altered, they may begin to think that the courts are *not indispensable!* This is certainly an ill-wind that blows no good!

Of course, there are other ill-winds in the legal horizon. A major intractable obstacle that has plagued judicial systems throughout all ages is the question of delay[82] and the expression *"justice delayed is justice denied"* is a familiar one. For most court users and business people in Nigeria, the length of the trial process is the most prominent obstacle to access to justice.[83] There are other issues like manual recording of court proceedings, lack of conducive environments, etc.

7. Conclusion

A disturbing trend in Nigeria is that citizens now take their disputes (such as debt recovery, matrimonial and land disputes, etc.,) to law enforcement agencies (notably the Police and EFCC) for resolution. In most cases, petitions to these law enforcement agencies are written by, or based on the advice of, lawyers. They do so because the perception is that (a) disputes would be resolved

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82 That the *Magna Carta* of 15 June, 1215 *inter alia* proclaimed "…to no one will we sell, deny or delay justice" underscores the considerable antiquity of the plague of delay in justice delivery.

83 The United Nations Office on Drugs and Crime (UNODC) reported that in a survey conducted in Lagos and Bornu States, court users and business people identified the length of the trial process, the financial means required to cover lawyers' fees and the complexity of the process as the most significant obstacles to access to justice. According to the Report, an overwhelming majority of court users in Lagos and Bornu States considered the length of the trial process (delay) as the most important obstacle to using the courts. See *UNODC Assessment of the Integrity and Capacity of the Justice System in Three Nigerian States, Technical Assessment Report, Vienna, January 2006*.

effectively and quickly when the *res* is still current (and hot) at a relatively low cost without stultifying legal procedures; and (b) there is certainty of outcome owing to fear of, or (un)healthy respect for, immediate sanctions by those wielding physical powers. It is, of course, obvious that the ready recourse to law enforcing agencies (rather than the regular courts of the land) constitutes a monumental indictment on our judicial system. One does not have to look too far to discover that the underlying transactions that have given rise to countless fundamental human right actions are purely civil claims with little or no criminal undertone. The gory reality therefore is that law enforcement agencies are fast usurping the traditional role of the courts, and if we (judges and lawyers) do not deliberately make the court's arbitrament appealing to all sections of the community and thereby encourage greater resort to its services in a genuine way, judicialism might well ebb out of relevance under our watch!

The main thesis of this paper, therefore, is that law is not an end, but merely a means to an end, namely, justice: it is part of society and should serve the ends of society or else it loses its societal relevance.[84] Unless all endeavours on the part of judges and lawyers conduce to serve the ends of society, the judicial system may not have vindicated the primary reason for its existence. Proponents of the utilitarian school of jurisprudence are quick to remind us that all human behaviour is motivated by a desire to maximize pleasure and avoid pain by engaging in a pain-pleasure calculus or a cost-benefit analysis; that law must be made to conform to its most socially useful purpose; and that the utility of the law lies in its ability to increase happiness, wealth or justice, or conversely, its ability to decrease unhappiness, poverty or injustice. As a matter of fact, utility is a measure in economics of the relative satisfaction from, or desirability of, the consumption

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84 Chris Okeke (ed.), *Towards Functional Justice: Seminar Papers of Justice Chukwudifu Oputa* (Ibadan: Gold Press Ltd, 2007) (Editor's Note) –The editor drew an interesting distinction between legal justice and functional justice.

of goods or services. That is to say, the value of goods or services is a function of the utility or benefit derivable there from.

The challenge therefore is to continually evaluate and re-evaluate the utilitarian content of the services of lawyers and judges on the whole from the perspective of those who engage (and pay for) such services in order to guarantee their continued patronage; for, more often than not, it is possible to lose sight of the fact that the most important person in courts is not the judge or the lawyer but the litigant! It is hoped that lawyers will urgently rethink the ways and retool the strategies from the standpoint of enlightened self-interest before it becomes like the proverbial salt that has lost its saltiness and is fit for nothing but to be trodden under feet by men! That should not happen under our watch.