LAW AND JUSTICE IN NIGERIA AFTER COVID 19

C. A. Candide-Johnson Esq., SAN, 1st April 2020

Long before the global health emergency triggered by COVID 19, the administration of justice in Nigeria was in deep trouble. The Nigerian judiciary was on a swift downward spiral to ceremonial irrelevance – well fed Africans dressed in 17th century English court dress doing nothing in particular. Without a 21st century vision, under rampant politically compromised and self-interested leadership, lacking motivation and absent any overarching judicial ideology, the delivery of equal justice to the widest group of Nigerians was a cruel mirage. COVID 19, has exposed breathtaking aloofness and incompetence which throws these systemic failures into high relief.

For our judiciary, the collapse of justice delivery has been well manifested in the irrational, inconsistent and democracy subversive decisions in political cases. The relationship between law and politics are sometimes taken for granted but the political cases expose the fact that legal decisions are often determined more by political considerations than legal principles and legal interpretations. But the majority of disputes coming before our courts are commercial and social, not political. In these day to day disputes, efficiency and effectiveness are the only measure by which the function of societal regulation can be measured. Yet, engaging the court process at any level can be a death sentence for business and parties. It takes needless years to determine simple commercial disputes, needless adjournments waste valuable court resources, timid judges are unable to effectively take control of their docket and weak appellate justices obsessing with technicalities overwhelm their own resources by entertaining unproductive arguments. If justice delivery is not available, accessible, efficient and rational, then it fails its purpose and makes the public resources deployed for this purpose no more than another crime against the Nigerian people.

WHEN COVID 19 STRUCK

When COVID 19 struck many nations of the world (Africa included) were ready to continue business. It's called "Government Continuity Planning". In Kenya, and in Ghana and Uganda, highly organized judicial services manifested quickly with well-conceived and simply articulated arrangements for government continuity in justice delivery. The Kenyan judiciary published a manual containing the phone numbers and email addresses of all judicial officers per division so that by easily available and inexpensive modern technological tools they may continue to function.

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In Hong Kong, on 21st February 2020 the High Court issued a landmark ruling in Action No. 677 of 2006, Cyberworks Audio Video Technology Limited v Mei Ah (Hk) Company Limited, to address important practical matters for case management, and in particular in the context of the current General Adjournment Period ("GAP") arising from the Covid-19 situation in Hong Kong. The judge stated the obvious as follows

> "It cannot be in the interests of the administration of justice, or the maintenance of the rule of law in Hong Kong, for all work in the civil courts effectively to come to a halt simply because hearings normally require the kind of physical attendance which health considerations point against, where numerous court hearings can effectively, cost-effectively, expeditiously and fairly be dealt with over the telephone. (I ignore for present purposes the possibility of disposal on the papers.) Leaving aside the question of costs, there are clear benefits from conducting telephone hearings so as to continue management and disposal of cases, if circumstances would otherwise prevent that from happening."

The Judge ruled that hearing would proceed by telephone under detailed technical arrangements to be made in consultation with his clerk.

The Dubai International Financial Centre Court (DFIC) issued detailed directives to immediately begin to operate on a (generally) completely remote basis. This includes remote hearings, online filings and e-bundling. All hearings conducted from 17 March 2020 are via teleconference. The courts e-bundling platform was advertised. Only by permission may bundles be lodged in hardcopy. All hearings will be either through video-conference or teleconference.

The United Kingdom judiciary has issued a number of guidance's regarding proceedings during the coronavirus pandemic; new practice directions to stay possession hearings; practice directions on video and audio hearings and civil court guidance on how to conduct remote hearings. In the matter of Fowler v Commissioners for Her Majesty's Revenue and Customs made legal history as the first Supreme Court case to be conducted entirely by video conferencing. The Supreme Court said that all cases and judgment hand-downs will continue via web-based video conferencing until further notice. Parties, their legal teams, counsel and each of the Justices will be located in different places. Proceedings will be available to the public and media via the court's website in the usual way. Footage will be available to view on demand within 48 hours of the live broadcast.

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COVID 19 FOUND NIGERIA ASLEEP

In Nigeria, since a terse circular issued by the Chief Justice of Nigeria in the wake of this crisis, courts have fallen silent and judges have gone home as if law and order will administer itself in this crisis. It is common place to observe that crisis exposes the weaknesses of governance but it is also true, that crisis provides the best opportunity for enduring progressive change.

We should have been better prepared, and even as far back as 2011, Nigerian Chief Justice Dahiru Musdapher [1], set out a thoughtful progressive mission for his colleagues whose accomplishment would have served us well now. He described a a table of reforms to bolster the capacity of the bastion of constitutional democracy to discharge its mandate in a manner that is credible and consistent with democratic ethos. He envisioned a judicial system that is simple, fast, efficient and responsive to the needs and yearnings of the citizenry. That the benefits of computerization and online access are, of course, obvious and that in this respect, they would ensure full computerisation of court operations. Specifically, he promised a system which would, inter alia:

i. Ensure efficient and speedy processing of court documents;
ii. Make it possible for court processes to be filed electronically (e-filing) thereby saving valuable time;
iii. Simplify and fast track case management;
iv. Fast track compilation (and transmission) of records of proceedings and other vital documents;
v. Make it possible for a Judge, with the click of a mouse, to find out if new processes have been filed and give appropriate directions;
vi. Enable court registries to post decisions of the courts and other relevant information online;
vii. Enable Judges, litigants, lawyers, researchers and the general public to have easy access to online legal databases;

[1] "The Nigerian Judiciary: Towards Reform Of The Bastion Of Constitutional Democracy" - Hon. Justice Dahiru Musdapher, GCON, FNIALS, Chief Justice Of Nigeria, Nigerian Institute Of Advanced Legal Studies 2011.

viii. Enable court registries to devise electronic mailing lists through which the larger society is kept abreast, through alerts, of current judicial developments;
ix. Provide a veritable platform for networking;
x. Engender an informal system of peer review of judicial decisions, given that judges of comparable standing in other jurisdictions can access our judgments; and
xi. Provide a platform for comparative jurisprudence.

When I put this list to a senior appeals court justice recently, that person laughed uproariously. Saying, most appeal court divisions do not even have internet access. Heads of courts in Nigeria are all powerful. They collaborate with the executive to aggregate in their own hands the resources allocated to the judiciary which they are administer often whimsically under their sole discretion. As the same justice pointed out, often the same contract will be awarded without result in successive years. This is aside from the luxury cars and foreign travel even when basic court room material is not available in court rooms.

In the same year that Chief Justice Musdapher gave that high minded speech, Kenya began an actual judicial revolution under Chief Justice Willy Mutunga who had been chosen by a competitive and transparent process to restore the frail structures of their own judicial institution. For decades, Kenya's judiciary had been known for inefficiency, corruption, and political bias. Kenya's courts had enormous backlogs. It was burdened by cumbersome procedures which dragged out the process of getting to trial, and judges and magistrates and tolerated dubious applications to adjourn from lawyers. Records often disappeared either because of haphazard procedures but salso because of deliberate efforts to delay cases. A popular saying, "Why hire a lawyer when you can buy a judge?" was said to sum up many Kenyans' views of judicial integrity.[2]

After the political crisis which followed a disputed presidential election in 2007-08, Kenya's major parties formed a coalition government and appointed an independent commission to draft a new constitution that would address the underlying causes of the violence, the weakness of the judiciary being among them. The drafters of the 2010 constitution considered removing all serving judicial officers and requiring them to reapply, with no guarantee they would return to the bench. Although they eventually opted against such a drastic measure, the document created a clear mandate for judicial reform. The 2010 constitution required that the courts deliver justice to all

[2] How Kenya Cleaned up its Courts - https://foreignpolicy.com/2016/07/09/how-kenya-cleaned-up-its-courts/

Kenyans regardless of economic or social status and without delay or undue regard for technicalities. It also restructured the institution, bringing in new leadership through the creation of the Supreme Court and reconstituting the Judicial Service Commission to make it independent of the executive branch.

After taking office in June 2011, Mutunga assembled a team to take stock of the judiciary's challenges and develop a blueprint for reform. The team developed a 2012-16 strategy called the Judiciary Transformation Framework. The final document, issued in May 2012, structured judicial reform around four pillars: people-centered delivery of justice, organizational culture and professionalism of staff, adequate infrastructure and resources, and information technology as an enabler for justice. Each pillar consisted of several "key result areas," which grouped together specific actions to achieve the goal.

Mutunga took symbolic steps to signal that the judiciary's culture had to change. One of his first acts as chief justice was to ban the wigs that judges had worn since the colonial era, a move meant to reduce the perceived divide between jurists and everyone else. To help litigants navigate the snarled judicial system, the transformation framework called on the courts to streamline procedures when possible and make the processes clearer. In each case, it was a consultative process, designed to find out what each court station was doing and reach a consensus on the best practices to adopt nationwide.

Improving operations at the registries where case files were stored was an important step in reducing delays. Because many registries were physically disorganized, locating case files was a common problem. Without an effective system to keep track of files, unscrupulous staff could easily hide them or remove critical documents in order to derail a case. To better organize the stacks of paper files, registries serving the High Court and the magistrates' courts adopted simple measures to make the files easier to locate and trace. Color coding of files based on the type of case-such as criminal cases or children's cases-enabled staff to tell at a glance whether something was in the wrong place. In addition to color coding, the High Court, which comprised several specialized divisions, began to reorganize its files to store each division's files separately.

Making it easier to find files was not the only issue. It was also important to communicate to litigants the documentation needed for their cases to move forward. The High Court registry

developed a checklist of standardized requirements that applied to all venues. The courts took other steps to clarify and speed up court procedures. To ensure that a case was ready, the Court of Appeal introduced practice directions that required pretrial conferences to avoid situations in which a case went for a full hearing and then was adjourned. The directions also limited the amount of materials submitted so that judges could spend less time going through files. To communicate processes to litigants, each court station was required to produce a service charter in the form of a billboard that listed the requirements, fees, and timelines for each court process.

A long-awaited reform to reduce delay was the introduction of a case management system. In January 2013, Mutunga established a committee to develop a performance management system for the judiciary. To provide the data necessary to evaluate court stations' and individual judicial officers' performance, the committee and Performance Management Directorate developed a new case-tracking tool known as the Daily Court Returns Template, in October 2015. The template included information about each active case, the judicial officer responsible for it, and the dates it had moved from each step in the process to the next. As a case progressed from filing to judgment, the Performance Management Directorate could track how long each step took and if it had exceeded specified timelines. Information about the type of case also facilitated analysis of workloads, because a simple plea in a disorderly-conduct case required far less time and effort than a murder case.

In September 2011, Mutunga appointed Kennedy Bidali, a magistrate and deputy registrar, as the judiciary's first internal ombudsperson. The Office of the Judiciary Ombudsperson, a department within the office of the chief justice, was responsible for collecting and resolving citizen complaints about administrative issues. In addition, the Court Users' Committees (CUCs) offered an important mechanism for transparency and public participation. Since 2006, many courts had created CUCs, which brought together the local judge or magistrate, representatives of other agencies involved in the judicial system such as police and corrections, civil society organizations, and community leaders. The Judiciary Transformation Framework and the 2011 Judicial Service Act created a formal role for the committees and sought to increase their effectiveness.

The Judicial Service Act also required the chief justice to provide a yearly update on the state of the judiciary. The combination of direct engagement, media, and publicly available reports helped make the judiciary far more transparent than it had been before.

Public perceptions of the judiciary improved in the early years of the reform program. In 2013, a Gallup poll found 61% of Kenyans had confidence in the judiciary compared with a low of 27% in 2009.

A MODEL FOR NIGERIA

Since Nigerians are often resistant to adopting European and American models, Chief Justice Mutanga's African model should be interesting. The COVID 19 crises is a golden opportunity for a far thinking Chief Justice to define the modern role of our nations judiciary and bend the arc of history towards progress for our nation.

WHAT MUST HAPPEN

The Chief Justice of Nigeria should study the example of Kenya. Other African countries, such as Ghana, Uganda, even Sierra Leone have put into operation far reaching judicial reforms. These judiciaries are better organized and better motivated around recognized judicial ideas than the judiciaries of the mighty Nigeria. The Chief Justice can follow any road map if he has the will and if he accepts the burden of this historic moment.

ORGANIZATION OF THE APPEAL COURTS

- The Supreme Court of Nigeria itself has too many cases on its dockets and hears too many cases to be effective or to be taken seriously as a supreme court. Most of the cases that reach that court should never have flown that high. These mostly deal with trifling procedural issues and 75% or so, deal with the diversionary issue of subject matter jurisdiction. The primary task of a court is to decide disputes on their merit and to so settle the law, that multiple dubious cases will not be filed in the first place. A supreme court ought to hear no more than 100 cases, and these should be on substantive law. For this reason, apart from limiting the right of appeal, no leave or extension should be granted to hear any procedural matter. This includes INJUNCTIONS, STAY OF PROCEDURE. Parties must be encouraged to go to the merits at the earliest time even if jurisdiction is

raised. Experience shows that mostly it is not genuinely in issue, but the proliferation of challenges has been encouraged by judicial decisions that are weak and inconsistent.

- The application for leave should be scrutinized very closely. This is the prescription of the SCN itself but in practice the judges are partial to particular faces. There is a reason why justice is blinkered, it is not for individuals it is for society at large and across the board.

- Supreme Court of Nigeria ought to physically catalogue its filing system, by year and by suit number and microfiche filed papers so that they can be easily accessed and so that a rational docket system can be operated, right now you can only get a case listed by corrupt means. This work only needs ten men in jean over two or three weekends.

- The docket system and the procedure for listing cases and the procedure for hearing a case before the court ought to be documented and published as is done by the US Supreme court and the UK Supreme court as well as others. Right now, the judicial procedure in Ghana and Rwanda is superior to that of Nigeria.

- The Supreme Court of Nigeria ought to commission a project to analyze its outstanding docket and rationalize it and also to analyze the nature of appeals and the judicial philosophy behind contradictory and confusing pronouncements on a variety of issues.

- Parties ought to know that the Supreme Court empanels only for serious business and is not a place to learn law or to play. Judges should sit when they say and signal that when a matter is listed it will be determined on its merits. If parties are not prepared, then they ought not to be appearing before the Court. There is nothing wrong with cases being thrown out finally and peremptorily for merits reasons. That is how other Supreme Courts operate.

- **Ethics and discipline of legal practitioners** ought to be a high priority for the court and they ought to signal that deception, incompetence and failure of attention and skill are forms of misconduct that will have severe consequences.

- A higher standard should be required of senior lawyers especially senior advocates of Nigeria. It is a fact that a majority of SANs today cannot concisely present a legal argument in English!! Many are in the forefront of judicial corruption and the subversion of the legal system

- It will be helpful to review the GUIDELINES FOR PRACTICE BEFORE THE US SUPREME COURT, (http://www.supremecourt.gov/oral_arguments/guideforcounsel.pdf) you will see that every single person has 45 minutes. Start talking when the light is green and stop when it is red. The judges have read the papers and will tackle counsel on merits and substantive law. The oral recordings of cases as old as ROE V WADE are available free online (http://www.supremecourt.gov)

- The Supreme court of Nigeria must develop and publish a manual of practice which the select lawyers who appear in that court ought to master.

HIGH COURTS AND BELOW.

As the High Court of Lagos under Chief Judge Opeyemi Oke demonstrated dramatically, much progress can quickly be achieved by modern, simplified and practical Civil Procedure Rules and Practice Directions; The Courts must encourage and maybe even compel recourse to ADR as a first resort before approaching the courts; there must be a change of attitude among legal practitioners. The philosophy of change is founded on several core premises:

i. The court, not lawyers or the parties, must control the pace of litigation.
ii. The "court" is not solely the trial judge. The term encompasses the entire judicial branch including its staff and technological resources.
iii. Civil cases should be triaged immediately at filing to determine the amount of judicial attention needed to resolve all disputed issues in a just, timely, and cost-effective way.

iv. Based on the initial assessment, cases should be assigned to a pathway with procedural rules that provide a presumptively sufficient process to meet the needs of the case.

v. Effective rules, procedures, and business practices are especially critical to ensure just, speedy, and inexpensive resolutions in uncontested cases and cases involving large asymmetries in legal expertise.

vi. Restoring to all judges their primary and chief duty to decide cases and removing the tempting distraction of procurement and running infrastructure to professional managers. This by itself may mitigate the unholy struggle of many judges to head courts.

TOOLBOX OF TECHNIQUES

Any reform must be grounded in the local legal culture and socio-economic environment and these should be anticipated and met in advance. They include:

Diversionary measures

i. The first tool is to divert disputes from full-blown litigation. In brief, this is achieved through the use of, inter alia, alternative dispute resolution ("ADR"), pre-action protocols and extra-judicial resources.

ii. Even if ADR does not result in a full and final settlement of all the disputes between the parties, the process on its own would still have benefited the parties because it may have narrowed the disputed issues, compelled parties to consider their options and alternatives (including whether the possible benefits of pursuing litigation would outweigh the costs) or, at the very least, allowed for some venting of pent-up emotions.

iii. As far as arbitration, the Lagos High Court supports arbitration by giving full effect to party autonomy and keeping curial intervention with arbitration proceedings to a minimum. In addition, bodies, such as the Lagos Court of Arbitration, exist to promote and encourage arbitration both locally and internationally. As in Singapore, where the growth of arbitration as a viable ADR process was further boosted by the launch in 2009 of Maxwell Chambers, the "world's first integrated dispute resolution complex housing both best-of-class hearing facilities and top international ADR institutions".

Facilitative measures

iv. One step that any Judiciary may take in order to prevent or ameliorate the problem of a backlog of cases is to improve the "supporting infrastructure" for disposing of cases.

Monitoring and control measures

v. Importance of setting benchmarks and Key Performance Indicators ("KPIs") and of monitoring the relevant statistical data in order to improve on the overall quality and efficiency of the justice system. In this regard, we mention three KPIs that we have found to be helpful – lifespan of cases, clearance rates and waiting periods.

vi. It is important that cases that have come into the court system do not remain there for an unduly long time. In this respect, the Singapore Supreme Court has set itself the target of disposing of 85% of all writ actions within 18 months of filing. This is not an easy target to meet. Nevertheless, the 85% standard is still reasonable because it allows for the courts to give complex cases some leeway while still ensuring that the majority of the cases does not drag on unnecessarily.

Dispositive measures

vii. Automatic discontinuance. Singapore's Rules of Court provide that if no step or proceeding has been taken in any action, cause or matter for more than a year, the action, cause or matter will be deemed to have been discontinued.91 To appreciate the value of automatic discontinuance, one need only consider the state of affairs before its introduction. Before automatic discontinuance was introduced, cases could remain in the court system for years and years although no action was being taken in those cases. Defendants in such cases could apply for dismissal of the action on the basis of want of prosecution, but this was seldom granted unless a fair trial was no longer possible.

viii. They would therefore be left with claims hanging over their heads for lengthy periods of time. With the automatic discontinuance rule, claimants bear the burden of moving their cases forward expeditiously; no action, cause or matter can have an indefinite lifespan. It nevertheless remains open to a claimant to file a fresh action if his case is discontinued automatically pursuant to the rule, provided that the cause of action is not time-barred under

the Limitation Act. To avoid injustice, there is also a legislative provision for reinstatement of automatically discontinued cases93 if exceptional circumstances can be demonstrated.94

EXHORTATION

It should not be necessary to exhort the heads of Nigerian courts who are trained and experienced lawyers as to the vital importance of effective and efficient justice delivery and of the importance of public confidence in the system that they operate but it seems that it is. The smooth and efficient working of the machinery of law and justice in Nigeria is fundamental to the viability of our system of government; law and order are matters that become more acutely existential in a crisis. A crisis like COVID 19 is an existential threat to governance and we are going to have to meet that challenge squarely on all fronts of re-invented government. It is the duty of sworn public officials to ignite these reforms in the interest of the all and even after many lost opportunities the time to act is now!