

A PAPER TITLED:

“Managing Relationship between Heads of Court and Executive against the backdrop of non-implementation of the Constitution for Judicial Autonomy”

DELIVERED AT

ROUNDTABLE FOR HEADS OF COURT 2019: By Hon. Justice Ayodeji Simeon Daramola, Chief Judge, Ekiti State

PROTOCOL

I consider it a great honour and privilege to have been invited to deliver this paper at this Roundtable for Heads of Court. I am immensely grateful to the authority of the National Judicial Institute for the opportunity to share my thoughts on the topic assigned to me with this distinguished audience on this most momentous occasion.

The topic on which I am mandated to speak on here today: ***Managing Relationship between Heads of Court and Executive against the backdrop of non-implementation of the Constitution for Judicial Autonomy*** is quite apt against the background of our present experiences in this nation of ours. I

also believe my choice by this great Institute to speak on this particular topic is not accidental at all. It is my calculated guess that I was assigned this topic in the general belief, which was not without good basis, that I have had the ‘fortune or misfortune’ of co-habiting with arguably the most disagreeable and cantankerous State Chief Executive in Nigeria in recent years.

Now, we will not be able to understand the thorny issue of managing the relationship between Heads of Court and the Executive against the backdrop of non-implementation of the Constitution for judicial autonomy unless we discuss and highlight the potential sources of disagreement between the Heads of Court and the Executive.

The Judiciary as an Arm of Government

The Judiciary is made up of the Courts and by virtue of Section 6 of the Constitution of the Federal Republic of Nigeria 1999, the judicial power of the Federation and of the States reposes in the Courts. The Judiciary is a creation of the Constitution as an arm of Government in the same manner as the Executive and

Legislative arms created under Sections 4 and 5 respectively of the same Constitution. The Judiciary as an arm of Government is *sui generis*; it is neither a department nor a parastatal of government as it is being cynically treated at the State level presently. The role of the Judiciary is to adjudicate in matters between government and government or between two arms of government or between the citizens and government or between the citizens as the case may be from time to time.

The Judiciary is generally regarded as a haven of last resort for the protection of the society particularly the weak and the oppressed. It is to be noted however, in the light of our experiences in this nation of ours, that even the high and mighty in our society today are by no means excluded from using the court to seek protection of their rights.

It cannot be gainsaid therefore that the ability of the Judiciary to discharge this onerous constitutional responsibility will at best be illusory if it is not properly and adequately funded. The much vaunted independence of this branch of government will also be wishful if the Judiciary is not independent and self-accounting.

The problem of funding of the Judiciary in this country is not new. It has been a problem of our governance even before independence but became more acute in the military era and further exacerbated in the present civil dispensation. It would appear that successive governments, saw funding as a means of keeping the Judiciary under their wraps to ensure that this branch of government does not become too independent as to constitute a major check on their excesses.

In 2014, the Federal High Court delivered a judgment in favour of the Judiciary in the matter filed by Judiciary Staff Union of Nigeria (JUSUN) in respect of section 162(9). That decision should have put to rest the struggle for financial autonomy of the Judiciary. However, despite that judgment, there was no compliance by the appropriate authority to which the order of court was directed. The resultant effect was that the nationwide strike by JUSUN which lasted variously from State to State of the Federation between 3 - 12 months did not bear the anticipated fruit of financial autonomy for the Judiciary.

Chief Olisa Agbakoba SAN filed **Suit NO: FHC/ABJ/CS/63/2013** in which he sued the Federal Government & 2 Ors. on interpretation of sections 81(2) and section 84(1), (2), (3), (4) and (7) of the 1999 Constitution. He, amongst other reliefs sought, challenged the National Judicial Council's practice of sending its budget to the Budget Office of the Executive arm for appropriation. The Court, in its judgment delivered in 2014, ordered the Council to henceforth send its budget directly to the National Assembly for appropriation. I am not sure whether this is now the current practice.

Sincerely, availability of funds and even infrastructural facilities to the Judiciary vary from State to State. However, one undeniable common feature at the State level is always the insistence of the Governors that as Chief Executive of their States, it is their right to allocate any amount they like to the Judiciary and to also help manage such funds in that behalf.

Now, since these State Chief Executive Officers will not obey the Constitution and release the amount standing to the credit of the State Judiciaries to the Heads of Court, what are the

strategies that can be employed by the Heads of Court to get funds for their courts to stay afloat? On this point, I can only give my personal experiences and leave my brothers from other jurisdictions to compare and contrast that with their own experiences.

Effects of Non-compliance: My Experience

What are the effects of non-compliance with the provision on release of fund to the State Judiciaries?

1. It has practically left the State Judiciaries at the whims and caprices of the State Governors. The infrastructural facilities of most of the State High Courts are in advanced state of decay. For instance, it took the Executive in my State, both Military and Civilian twenty years after the State was carved out of the old Ondo State to think of putting up a modest High Court building. I must also say here that almost a year after the said High Court building was commissioned by the last administration that built it, we are still unable to make use of it till now as it was not properly designed as court house. The man at the helms of affair in my State then ignored all my protestations and

entreaties that he should allow us the court users to make contributions on how the court should be designed. I, on my own part, set up a technical committee to put up recommendations on what the court building should look like and forwarded same the Architect but he too, like his employer, ignored what we recommended. He ignored all protests and built the court in his own image and the end result is that virtually all essential court house attributes were missing when it was declared completed and commissioned. That same court house is now undergoing massive reconstruction by the new administration to enable us put it into proper use.

2. In my State, save for salaries of staff, I have always had to go to the Governors cap in hand to beg for funds to run and maintain the State Judiciary. We cannot do anything unless approval is given to my request for release of funds to make the State Judiciary function properly. The Judges and Magistrates have been sitting and working under uncomfortable and treacherous environments. Purchase of vehicles for Judges, Magistrates and Management Staff is another issue that is capable of disturbing the repose of

mind of Heads of Court and had indeed disturbed mine a number of times in the past and I am on the march again now. To get such things done, one has virtually to relocate to the Governor's office at both official and odd hours. It could be very scary sometimes.

3. For some years now, we have been unable to attend International Conferences approved for Judicial Officers and Magistrates in my jurisdiction. Even though we daily see the obscene opulence frequently engage in by these State Chief Executive Officers, request for release of funds to attend workshops and conferences organized even by this great National Judicial Institute is proving herculean. The refrain from the executive branch is more often than not 'the State is broke'. As a result of that, continuing education for Judges, Magistrates and staff which is critical to updating and upgrading their knowledge and exposure to international best practices has been neglected and stagnated to the detriment of the system.

4. For a period of 3 years during the last administration the monthly subvention with which we pay salaries of staff from Chief Registrar downward to office cleaner and

housing allowances for Judicial Officers were always in arrears of between 6 - 7 months. When the then Governor left office, he left behind 6 months unremitted subventions. The new administration had paid one month of that leaving five months outstanding arrears till date. It is noteworthy that my State was regularly collecting its monthly revenue allocation at Federal level with the internally generated revenue at State level during that period yet in that same government did not give the Judiciary a single kobo for 6 months.

5. The State Chief Executive Officers often engage in subtle threats and subterfuge whenever State Courts deliver judgments against them. It is on such occasions we are cynically reminded we are part and parcel of government machinery and should not make orders that will hamper their operations. Now, since they are always afraid to come into the open to challenge the Judges, they utilize the instrumentality of friends to let you know they are not comfortable with our judicial pronouncements. As for me, I always ignore such subtle meddling.

In this past nine years that I have been in the saddle as Head of Court, I have dealt with two different State Chief Executive Officers. In manner and approach of doing things, the two are complete opposites. My approach in relating with them has always been to study and analyze their personalities and adopt suitable strategies in dealing with both of them.

Knowledge is power, as Judicial Officers and Heads of Court we must not limit ourselves to being judges of law and facts but must also extend our judicial accoutrements to being judges of human character in the same way we watch and assess the demeanour of witnesses who daily testify before us during judicial proceedings. This will enable us to know the persona of our Governors and put in place the strategy to deal with all that comes from the Executive branch of Government.

As Heads of Court, we must totally shun pursuit of parochial and individual gains. Some State Chief Executive Officers believe in divide and rule tactics. One of their machinations is to set the Heads of Court and their Judges against one another and exploit that division to their own advantage. If you are

upright and shun greed, you will have nothing to worry about. As for me, it is not in my habit or character to search for what I have not lost. Such attitude has stood me in good stead in the face of a belligerent State Chief Executive.

We must be scrupulously prudent, open and honest in all we do in our official capacity. Do be deceived, the politicians are not in love with us. They do not easily fall in love with anyone or anything they cannot control. If we must do our work effectively as stipulated by the Constitution and be truthful to our oaths of office, we must not allow the politicians to control or dictate to us how we do our own job.

The Way Out

On this unenviable position that the State Judiciaries are presently, I pose this rhetorical question:

Will the Governors ever shift from their intransigence on financial autonomy for the State Judiciaries?

My simple answer is that, it is unlikely they will do so. Asking them to give up the power they misguidedly believe they have contrary to the intendment of the provision of the Constitution is

like asking drug addicts to give up their drugs. I have come to that conclusion from comments and attitudes of even the Lawyers among them who to all intents and purposes should be good examples to their lay colleagues in the implementation of that constitutional provision on judicial autonomy. The Lawyers among the State Executive Officers are worse than those who are non-Lawyers.

A major root cause of the malaise is our imperfect Federal system. At the beginning in 1999, the National Judicial Council (NJC) was paying all the staff of the Federal and State Judiciaries nationwide until the outcome of the case of *Attorney General of Federation Vs Attorney General of Abia State (No. 2)(2001) 6 All NWLR (Pt. 764) 542* put paid to that.

In the above Supreme Court case, the source of funding of the judiciary was a major issue. The Supreme per Ogundare, JSC, at pages 688 - 689, paragraphs G – A of the Report held thus –

“It is clear from the provisions of section 84 of the 1999 Constitution that it is the Consolidated Revenue Fund of the Federation, and not the Federation Account, that is

charged with the salaries and allowances of judicial officers and recurrent expenditure of judicial offices of the Federation. The Consolidated Revenue Fund is established under section 80 of the Constitution. The charge on the Federation Account is clearly inconsistent with section 84 of the Constitution and is, therefore, unconstitutional, notwithstanding the provision of sub-section 9 of section 192 which provides:

‘9 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.

‘It may be that it was intended to give the judiciary a share of the Federation Account but this has not been expressly or impliedly provided for.’

Agreeing with Ogundare, JSC in the lead judgment, ONU, JSC at pages 876 - 877, paragraphs D – C said:

“Consideration for the funding of the judiciary is provided for in the Constitution. Sub-sections (1), (2), (4) and (7) of section 84 of the Constitution provide:

‘(1) There shall be paid to the holders of the offices mentioned in this section such remuneration, salaries and allowance as may be prescribe by the National Assembly, but not exceeding the amount as shall have been determined by the Revenue Mobilisation Allocation and Fiscal Commission.

(2) The remuneration, salaries and allowances payable to the holders of the offices so mentioned shall be a charge upon the Consolidated Revenue Fund of the Federation.

‘At sub-section 4, the long list (which I do not intend to set out) of the holders of such office is set out while sub-section 7 (ibid) enacts that:

‘7 The recurrent expenditure of judicial offices in the Federation (in addition to salaries and allowances of the judicial officers mentioned in sub-section (4) of this section) shall be a charge upon the Consolidated Revenue Fund of the Federation.’

‘The above provisions have been made to emphasise how it is the Consolidated Revenue Fund of the Federation established under section 80 of the Constitution and not the Federation Account that is charged with the salaries and allowances of judicial officers as well as recurrent expenditure of judicial offices in the Federation. It is then to be stressed how the charge on the Federation Account is clearly inconsistent with section 84 of the Constitution and is therefore unconstitutional notwithstanding the provision of sub-section 9 of section 162 which states:

‘9 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’

‘If it was intended by the above provision to give the Judiciary, a share of the Federation Account such has not been made manifest. Sequel to these, all the charges on the Federation Account considered herein are inconsistent with the Constitution and are therefore invalid.’

The National Judicial Council (NJC) had no other option after that decision than to wash its hands clean, save for Judicial Officers, of payment of the salaries and allowances all States Judiciary workers nationwide. One of the deleterious effects of that decision is that often when State Judiciary workers are owed 6 months or more salaries and embark on strike action to press for payment, the Judicial Officers being paid by the National Judicial Council (NJC) cannot sit in open court without the striking staff.

Federal and State Judiciaries: A comparative View

Even though the conditions of service of our colleagues at the Federal Judiciary are still crying for improvement, they enjoy comparative advantages over those of us at the State level. They work in better environments and their pensions and gratuities are paid promptly on disengagement. At the State level, it is a complete opposite.

The international best practice is that whoever pays the salaries also pay gratuities and pensions. In our jurisdiction here, that is not the case. The National Judicial Council (NJC) pays the

salaries and allowances of State Judges but shuns their gratuities and pensions and leaves them at the mercy of their States where most of them are viewed and treated as strangers. It is not uncommon for Judges to retire at the State level and their gratuities would still be outstanding 5 years after leaving service. The situation is that bad at the State level.

It is paradoxical that virtually all the Judicial Officers of the Federal Judiciary at the appellate courts were elevated from State Judiciaries. What the appropriate authority has been neglecting to note is that if the State Judiciaries are allowed to deteriorate further beyond their present state, it will eventually manifest in the quality of our appellate courts.

Now, must this present state of hopelessness and helplessness continue? It is to the eternal credit of the Judiciary that, by and large, it has stood firmly as best as it could in the circumstances, to uphold the rule of law in this country. I particularly salute the sacrifices that were made in the past by our patriotic forebears who despite poor emoluments and other conditions of service of housing, et cetera and, on retirement, peanut pensions,

bequeathed to us a Judiciary to be proud of. The sacrifices of these gallant patriots saved this country from falling into anarchy and abyss.

It is for us and those coming behind, to see that their sacrifices are not in vain. We must continue the fight for good and acceptable conditions of service, civilized environment under which we work and proper and adequate funding of the Judiciary. We must not give in to the political class that constitutes the other two branches of government. We must be unrelenting in our quest to collectively persuade them to see reason that it is in a virile Judiciary that commands the respect and confidence of the populace and ensures the rule of law that the peace, progress, and prosperity of this country lie. We cannot afford to be indifferent and do otherwise.

Finally, with the advantage of hindsight, let me conclude by reiterating the need for Nigerian Judges to maintain a very big distance from politics and politicians. The politicians in both the Executive and Legislative Arms who see Judges who decline to hobnob with them as not only their enemies but also as friends of their political rivals are seriously mistaken. On this

point, I could hardly improve on the memorable pronouncement of Niki Tobi, JSC, of blessed memory in the case of ***Buhari Vs. INEC (2008) 19 NWLR (Pt. 1120) 246 at 408-409*** where the distinguished erudite jurist said as follows:

“Our Constitution forbids any mingling. As Judges, we must obey the Constitution. The two professions do not meet and will never meet at all in our democracy in the discharge of their functions. While politics as a profession is fully and totally based on partiality, most of the time, judgeship as a profession is fully and totally based on impartiality, the opposite of partiality. Bias is the trade mark of politicians. Non-bias is the trade mark of the Judge. That again creates a scenario of superlative in the realm of opposites. Therefore the expressions, ‘politician’ and ‘judge’ are opposites, so to say, in their function contents as above; though not their ordinary dictionary meaning. Their water never meet in the same way Rivers Niger and Benue meet at the Confluence near Lokoja. If they meet, the victim will be democracy most of the time. And that will be bad for sovereign Nigeria. And so Judges should, on no account, dance to the music played by

politicians because that will completely destroy their role as independent umpires in the judicial process. Let no Judge flirt with politicians in the performance of their constitutional adjudicatory functions. When I say this, I must also say that I have nothing against politicians. They are our brothers and sisters in our homes. One can hardly find in any Nigerian community or family without them. There cannot be democracy without them and we need democracy; not despotism, oligarchy and totalitarianism. They are jolly good fellows. The only point I am making is that their professional tools are different from ours and the Nigerian Judge should know this before he finds himself or falls into a mirage where he cannot retrace his steps to administer justice. That type of misfortune can fall on him if the National Judicial Council gets annoyed of his conduct. Ours are not theirs. Theirs are not ours. I will not say more. I will not say less too. So be it.”

I thank you all for listening and for the invitation to deliver this paper.

