

THE EVOLVING ROLE OF SENIOR ADVOCATES IN THE ADMINISTRATION OF JUSTICE AND NATION BUILDING*

BY

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A. INTRODUCTION

I am honoured to give this maiden annual lecture of the Senior Advocates of Nigeria. There is perhaps no better time to speak on the role of senior advocates in justice administration and nation building than now. Our country is challenged in various ways; some would say we are on the edge of a precipice – economically, we are challenged by deep devaluation of our currency, slow economic growth and lingering recession, severe youth unemployment and widespread adult underemployment and general economic mismanagement; we are plagued by a variety of social upheavals including genocide and ethnic cleansing – Rwanda by instalments in many parts of the country particularly the middle belt (we are still counting the death toll in the plateau massacre of a few days ago), widespread kidnapping all over the country, general breakdown of law and order and insecurity arising from Boko Haram insurgency in the North East and the menace of marauding Fulani herdsmen across the length and breadth of our country; we are challenged politically by intolerance and political immaturity, unstable political parties, the greed, arrogance, hypocrisy, indiscipline and recklessness of political actors, and anxiety regarding the 2019 general elections. Our legal system is challenged by unacceptable delay in the administration of justice at all levels of decision-making, lack of capacity and infrastructure in the judiciary, a weak case management regime, chaotic, poorly administered and ineffective court registries, widespread misunderstanding of the role of costs in civil litigation, and a seeming inability to bring criminal transgressors to book.

Against this background, what should the proper role of the Senior Advocate of Nigeria (SAN) be both in relation to the administration of justice and the wider business of nation building? In order to answer this question, I have broken down my presentation into four parts: the first looks at the history, privileges of and eligibility for the rank of senior advocate. The second at the role of senior advocates in the administration of justice. The third is the role of senior advocates in nation building. The fourth evaluates the performance of senior

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advocates in justice administration and nation-building and the challenges of the rank. Finally, I conclude with a Note on how to address female judges.

B. SENIOR ADVOCATES: HISTORY, PRIVILEGES AND ELIGIBILITY

The rank of senior advocate is the pinnacle of a professional journey as an advocate and a position of prestige and honour which is much sought after by practitioners and clients alike. The rank of Senior Advocate of Nigeria (SAN), which is conferred pursuant to section 5 of the Legal Practitioners Act 1975, recognises primarily distinction as an advocate in Nigerian courts and/or significant contribution to the development of Nigerian law. It was first conferred on 3 April 1975 on the late Chief FRA Williams and Dr Nebo Graham-Douglas. Prior to 1975 the rank of Queen's Counsel (QC) was conferred on distinguished Nigerian advocates until Nigeria became a republic in 1963. The rank of QC for distinguished advocates practising in Nigerian courts appears to have disappeared or been abolished in 1964 and between 1964 and 1975 there was no formal ranking among Nigerian advocates.

The rank of QC, which is the forebear of the SAN, senior counsel (SC), state counsel (SC) and other ranking of courtroom advocates, is of considerable antiquity. It was first conferred in 1604 on the very distinguished English jurist Francis Bacon and recognises excellence in advocacy, both written and oral. During the reign of a female monarch, the rank is known as QC, but reverts to King's Counsel (KC) during the reign of a male monarch. Given that the first three individuals in the line of succession to the UK monarchy are males, it is inevitable that sooner or later all QCs would convert into KCs. The rank of QC/KC has been adopted in many common law countries by different nomenclatures – Australia, Canada, Hong Kong, India, Kenya, Mauritius, New Zealand, Singapore, South Africa, Uganda and Zambia to mention a few. In some countries the title QC remains, eg some Australian States such as Queensland, some Canadian provinces such as British Columbia, and New Zealand. In others, senior advocates are called Senior Counsel or State Counsel (SC). In Nigeria, we call it the senior advocate, perhaps to emphasise the focus on advocacy rather than on broader legal practice. By whatever name senior advocates or counsel are called, the privileges attached to the rank appear to be substantially similar and the criteria for appointment remain primarily excellence in advocacy, written and oral. The differences in nomenclature reflect perhaps the attainment of republican status or independence from the British monarch. The rank recognises excellence as an advocate and is much sought after by junior practitioners and clients seeking advocacy services.

By convention the rank of QC confers certain **formal privileges**. The first is the privilege of wearing the silk gown to court, which appears to be the origin of addressing holders of the

rank as being Silks; being promoted to the rank is known as taking Silk. In contrast, junior barristers and solicitor advocates wear the stuff gown. A second privilege is the wearing of the full bottomed wig and ceremonial robes on ceremonial occasions such as the start of the new legal year. Junior barristers wear their stuff gown and short wig on such occasions. A third privilege is that QCs are admitted to the “inner bar” and therefore sit in the inner bar while junior barristers are admitted to and sit in the outer or “utter” bar. In practice, UK courts no longer have inner bars and I doubt that courts in any part of the world do. QCs exercise this right by sitting in the front row in courts where lawyers are required to robe. In hearings where lawyers are not required to robe, junior counsel often sit on the front row with QCs. Finally, the UK courts historically gave QCs the right to call their motions out of turn. This rarely happens today. Motion days are largely a relic of the past. Most cases are on a fixture at different times, so that there is hardly any need to call a case out of turn. There used to be **constraints** attached to the QC rank of which three deserve mention. The first is that QCs do not draft or settle pleadings. The second is that QCs do not receive evidence or interview potential witnesses. The third is that QCs must appear with a junior counsel. These restrictions have largely fallen away. QCs now draft and settle pleadings and many appear without junior counsel. Although the restriction on the taking of evidence remains, it exists largely as a matter of professional conduct to reduce the embarrassment of senior counsel.

In Nigeria, the privileges attached to being a senior advocate are largely statutory rather than conventional. They derive in part from section 5(7) of the Legal Practitioners Act 1975 and in part from the Senior Advocate of Nigeria (Functions and Privileges) Rules 1979. Three privileges are conferred: the right to wear a silk gown; the right to sit at the inner bar or front row; and the right to mention cases out of turn. Apart from the obligation to appear with a junior counsel which appears to derive from convention rather than statute and the restriction from practising other than as a barrister which derives from section 5(8) of the Legal Practitioners Act 1975, there appear to be no restrictions on a senior advocate – they routinely sign pleadings and draft evidence.

The eligibility criteria for SAN, QC, SC are broadly similar in their primary focus on the core competence in advocacy, but they differ in how they evaluate advocacy skills. In relation to QC appointments, for example, the body responsible for selection and nomination of candidates – QC Appointments (QCA) has a Competency Framework for Queen’s Counsel Competition. The one for the 2018 competition is attached to this paper. The award of Queen’s Counsel is intended to recognise excellence in written and oral advocacy **in cases of substance** in the higher courts of England and Wales. To be appointed, an applicant must demonstrate each of the competencies to a standard of excellence in his professional life. The

Competency Framework identifies five competencies which a successful applicant must demonstrate to an excellent standard in cases of substance, complexity or particular difficulty or sensitivity. The advocacy competences being evaluated are (a) understanding and using the law; (b) written and oral advocacy; (c) working with others; (d) diversity; (e) integrity. The competency required for written and oral advocacy is whether the applicant develops and advances a client's case to secure the best outcome for the client by gaining a rapid, incisive overview of complex material, identifying the best course of action, communicating the case persuasively, and rapidly assimilating the implications of new evidence and argument and responding appropriately. In relation to diversity, the applicant must demonstrate an understanding of diversity and cultural issues, and must be proactive in addressing the needs of people from all backgrounds and promoting diversity and equality of opportunity. In relation to integrity, the applicant must be honest and straightforward in professional dealings, including with the court and all parties

The eligibility and competence criteria for SAN are set out in the SAN Guidelines 2017 and they emphasise competence in advocacy, integrity and good standing in the legal profession. For example, paragraph 1 of the 2017 Guidelines state that the rank of SAN is conferred on those who are in full time legal practice, have distinguished themselves as advocates and have otherwise made significant contribution to the development of the legal profession. Paragraph 2(a) of the 2017 Guidelines states that the award is intended as a signal of high quality advocacy and advice to clients, the court and the public. To be able to attain this standard an advocate is supposed to provide evidence of twenty final judgments in the High Court in which he played a significant role as an advocate, five in the Court of Appeal and four in the Supreme Court, in each case in the ten years preceding the application. The eligibility and competence criteria in the award of SAN appear somewhat unclear. As regards eligibility, paragraph 18 of the 2017 Guidelines mentions two: the candidate must (1) have been in active legal practice for at least the 10 years preceding the date of application, and (2) be of good character and have no pending disciplinary complaint against him.

In relation to competence, paragraph 19(1), (3), (6) and (7) set out what a candidate must possess: (a) high professional and personal integrity; (b) diversity; (c) sound knowledge of the law and excellent skill as an advocate; (d) tangible contribution to development of the law through writings and/or lectures at national or international conferences; (e) leadership qualities and loyalty to the legal profession including payment of practising fees and undertaking pro bono cases.

The evidence required to demonstrate these competences appears largely quantitative rather than qualitative and the scoring reflects a similar philosophy. For example, paragraph 16(2) of the 2017 Guidelines states that the evaluation of a candidate's competence shall be based on the following weighted criteria – (a) integrity 20%; (b) opinion of judges and referees 20%; (c) general knowledge of law 25%; (d) contribution to development of law 10%; (e) leadership qualities in the profession 10%; quality of law office/library 15%. It is not easy to relate these scores to the core advocacy competence, whether generally or those set out in paragraph 19 of the 2017 Guidelines. For example, it is unclear why opinion of judges and referees should carry 20% when it is not an evaluation criterion. The same is true of quality of law office/library. The Guidelines need to be revised and refocused on the competences being evaluated. For sure the opinion of Judges/referees is not one of them.

The rank of senior advocate is an instant quality symbol intended to engender expectations of excellence in advocacy and advisory services. It is intended as a mark of quality and is perceived as such by the market. 478 SANs have been conferred since 1975.

To whom much is given, much is expected. What, then, are the responsibilities of senior advocates and what should their role be in justice administration and nation-building?

C. ROLE OF SENIOR ADVOCATES IN ADMINISTRATION OF JUSTICE

In the days before the advent of film and television eminent senior advocates were the “celebrities” of the day, because criminal and defamation trials were often principal sources of entertainment for the public. That is no longer the case. Television and social media mean that the public is well fed with an endless stream of celebrities outside the law. Consequently, the public adulation of leading advocates has waned. And so have soaring flights of rhetoric and rhetorical flourishes which characterised advocacy in a bygone age. Courtroom displays of theatricality and emotion are likely to be received with amusement today. Advocacy is now largely a matter of fact built on the three pillars of competency, preparation and integrity. There is now more attention to detail than waspish oratory.

To my mind a senior advocate of Nigeria has **five** principal roles in the administration of justice. The **first** is to assist the court to achieve the objectives of civil and criminal litigation, which is a just disposal of the case based on the law and the evidence. This duty transcends all other duties. A senior advocate must assist the court to resolve disputes before it through effective presentation rather than soaring flights of rhetoric, waspish oratory or recourse to delay tactics and dilatory manoeuvres. Effective court room presentation requires the senior

advocate to show mastery of the facts of the case and sound knowledge of the substantive, procedural and evidence laws. He must naturally promote and protect fearlessly and **by all proper and lawful means** his client's best interests. However, to champion the cause of his clients fearlessly is one thing; to mislead or deceive the court or opponents is quite another. Two aspects of this role deserve special mention. The first is the duty of candour. The second is the duty not to impede or frustrate the progress of a civil or criminal hearing or trial. Regarding the first aspect, integrity is everything. A senior advocate has a duty not to mislead, conceal or create a false impression to the court, or other counsel and other parties in the litigation. He should not fabricate evidence or doctor the record or alter a document or claim that a process has been served when it has not. As regards the second, a senior advocate must not knowingly or negligently impede the smooth progress of civil or criminal litigation, or create deliberate delay so as to frustrate the trial of a civil or criminal matter, because such conduct erodes public confidence in the rank and in the administration of justice. A cynic might say that the problem in Nigeria is not access to justice, but exit from justice. Justice administration is often seen as an interminable process. Justice delayed is justice denied. A senior advocate should not knowingly or negligently take steps calculated solely to impede and frustrate proceedings, for example, by claiming not to be available on dates suggested for a hearing, by filing unnecessary interlocutory applications and appeals, by seeking to arrest a ruling or judgment, and by sundry other ill-conceived manoeuvres.

The **second** role of the senior advocate in the administration of justice is to provide **leadership** in and out of court. He must be an exemplar of good behaviour at all times. This requires that the senior advocate be courteous to the court and other advocates (both junior and senior), be modest, honourable and economical and show sound judgment. The senior advocate should be a voice of reason and moderation and cross examine witnesses with respect and restraint but effectively. He should not be a peacock strutting around the courtroom. As Chief Justice Onnoghen observed during the swearing-in of SANs in 2017, the senior advocate must never abuse his position nor regard his rank as a weapon of intimidation or a licence for rudeness or arrogance.¹

Third, as role models, senior advocates must mentor and groom younger members of the profession directly through **mentorship** schemes and indirectly through the example he provides. We know that many junior members of our profession look upon senior advocates as role models. They learn largely by imitation. They want to behave the way they see the seniors behave. If, as senior advocates, we are courteous, polite and measured in our approach

to the practice of law, the juniors would imbibe these qualities and model their own practice after ours. If we show rudeness, gratuitous aggression and brashness or disrespect to the court or our colleagues or other court users, the juniors imbibe our wrong approach and build their practices on our bad examples. It behoves us as the leading lights of the legal profession to show excellence in our professional and personal lives and the highest professional and ethical standards at all times, so that through our example the younger members of our profession may learn, be moulded and guided.

Fourth, Vice President Osinbajo SAN admonished us in 2017 that, as senior advocates and the elites of our profession, we owe a duty to ensure not just the survival of our profession, but that it continues to thrive and flourish.² We do so by defining the common purpose, by articulating what is acceptable and what is not and by developing effective regulation to ensure that transgressions are punished. The British perfected the act of self preservation and through the lawyers maintained the ubiquity of English law. Today, London is the world's leading centre for the resolution of international commercial disputes, whether by litigation or arbitration. In over 75% of the cases in the commercial courts neither party is a British person. As the Lord Chancellor said in March 2018 during the investiture of new QCs: "The title of Queen's Counsel is a mark of excellence, not just in this country but around the world, where it plays an important role in supporting the attractiveness of English and Welsh legal services more broadly." We want to be able to say this of our senior advocates but as most of you would agree with me, there is little evidence that the title of SAN plays any role in supporting the attractiveness of Nigeria as a centre for the resolution of commercial disputes.

Fifth, the senior advocates should provide a pool from which judges of superior courts in Nigeria can and should be appointed. In the UK, over 99% of judges of superior courts are appointed from the ranks of QC. In the last 3 years, two members of my chambers have been appointed as judges, one to the commercial court and the other to the Chancery Division. There is something to be said for the appointment of leading advocates to the bench. Not only are they masters of substantive and procedural law and evidence, they are hard workers who have achieved the highest level of eminence as practitioners. They are very familiar with most issues coming before them. Many of the issues they would have had occasion to deal with as advocates providing referral services to solicitors. The quality and robustness of the English Judges shine through their judgments. Over 60% of reported litigation in England are decisions of first instance judges. The deep and talented pool of QCs provides a very valuable

¹ Onnoghen CJN, A Speech to Mark the Commencement of the 2017/2018 Legal year and the Swearing-In of New SANS, page 14.

and dependable source for the appointment of high quality judges and reinforces the pre-eminence and attractiveness of both English law and England as a venue for the resolution of commercial disputes – the convergence of everything excellent: excellent advocates making submissions to equally excellent, first rate judges.

In Nigeria, whether by reason of history or accident, the SANs have not been considered a source of candidates for the appointment of judges. In 2017, applications were invited from senior advocates and others for appointment to the Court of Appeal and Supreme Court bench, but nothing appears to have happened.

D. SENIOR ADVOCATES AND NATION BUILDING

So much has been written on the role of lawyers in society.³ I do not want to reinvent the wheel and can see little point in doing so. Instead I will focus on what I consider to be the role of senior advocates in our journey as a nation and as nation builders.

Senior advocates and political development

A useful starting point is perhaps the role of lawyers in defending and strengthening our nascent democracy. The democratic ideal involves two principles. First, the people entrust power to the executive and the legislature in accordance with the principle of majority rule. Second, in a democracy there must be an effective and fair means of achieving practical justice through law between individuals and the state. Where there is a dispute between the individual and the state, the courts adjudicate.

As senior advocates we can define and enforce democratic principles and standards. We must protect the democratic infrastructure, in particular, the pillars of every meaningful democracy – the rule of law, a strong and independent judiciary and a free but responsible press. We must play an active role in ensuring that those who claim to represent us or to rule us do in fact have our mandate to do so. In short, we must be sensitive to and uphold the integrity of the electoral process. We should not allow elections to become instruments for the subversion of the will of the people, for example, by using the legal process abusively to

² Vice President Prof Yemi Osinbajo, The Integrity and Credibility of the Legal Profession is Under Threat in Nigeria (2018).

³ Useful discussions in relation to Nigeria include T O Elias, Law in a Developing Society (1969) Nig L J 1; O Akinkugbe, The Role of Lawyers in Society, in T O Elias (ed), Law and Social Change (1972); T O S Benson, Lawyers and Our Society (1974) 12 Nig B J 63; O Oko, Consolidating

challenge free and fair electoral results as happened in 1993, nor assist despots to claim or retain power. If senior advocates allow themselves to be used to thwart the will of the people and our democracy fails, we would have done ourselves and society the greatest disservice. This is a responsibility which falls on both the senior advocates and the courts and it is a heavy one.

Our role as senior advocates does not end with free and fair elections. We must also ensure that those who claim to exercise power in our name – the executive and the legislature – act in accordance with law. Judicial review of administrative actions is the ground on which the contours of modern democracy are shaped.⁴ Modern administrative law, founded upon the power of the courts to review executive actions on grounds of illegality, irrationality, procedural unfairness⁵ and perhaps lack of proportionality⁶ - is entirely judge-made, but it shows how the courts, with the assistance of the legal profession, have imposed and enforced judicially created standards of public behaviour. Every person exercising a public function is subject to the jurisdiction of the courts.⁷ In this way, judges ensure that the power (discretion) given to those exercising a public function, in particular, those exercising statutory power, is not transgressed by its donees, and that abuse of public power is constrained. This vindicates the rule of law, not only by confining statutory power and other exercise of public function within the four corners of the statute, but also by ensuring that the statute is not usurped by anyone – including the courts themselves.

As senior advocates we are the vanguards of civil societies. We must ensure that human rights and civil liberties are protected. This requires courage and independence. The fact that human rights and civil liberties are enshrined in our 1999 constitution is important, but it is not enough. The rights and liberties need to be enforced and this requires our best professional skills as advocates and high quality legal advisers.

Democracy on a Troubled Contingent: A Challenge for Lawyers in Africa (2000) Vand J of Trans Law 575.

⁴ Lord Steyn, Democracy Through Law [2002] EHRLR 723 at 725.

⁵ Council of Civil Service Union v Minister for the Civil Service [1985] AC 374 at 410-411, per Lord Diplock. This was accepted by the Supreme Court of Nigeria in Stitch v Att-Gen of Fed [1986] 5 NWLR 1007.

⁶ Sir John Laws, Is the High Court the Guardian of Fundamental Constitutional Rights? [1993] PL 59 at 71-75

⁷ Sir John Laws, Law and Democracy [1995] PL 72.

Senior advocates and economic development

Senior advocates have an equally important role to play in the economic development and prosperity of our country, although we often overlook our role in this regard. Just as economies are underpinned by trade, so trade is underpinned by the fabric of law and the civil justice system. The law itself provides the basic structure within which commerce and industry operates. It safeguards the rights of individuals, regulates their dealings with others.

The extent to which Nigeria can attract business and foreign direct investment depends in part upon investor perception of the quality of our civil and criminal justice system. If our system of civil and criminal justice is perceived to be inefficient and ineffective, we would lose out to more efficient and effective systems. If foreign and domestic investors lose faith in the ability of our law and the judicial system to protect their investments and property rights or to adjudicate disputes in a timely and fair manner without undue or improper influences, they will be reluctant to invest. The result would be a flight of capital out of our country to other countries where these values are given greater primacy. In this way, as leaders of the legal profession we have a substantial, albeit indirect, role to play in our national economic development.

We can also contribute directly to our nation's economic development through the invisible earnings which we can get from foreign clients. We already do; but there would be scope to earn considerably more and contribute more to Nigeria's invisible earnings if our legal system were perceived by foreign users of legal services to be reliable, efficient and effective.

If we can get our act together and promote Nigeria as a centre of excellence in legal services and as an acceptable, if not preferred, venue for the resolution of domestic and international disputes, the result would be an increase in investment in Nigeria and an increase in the amount of international legal business coming into Nigeria.

Senior advocates and social development

The law and lawyers have always been instruments for social engineering, integration and change. As senior advocates we must repair and rejuvenate the civil society and encourage citizens to have faith in our democracy and assist the nation to achieve the social objectives set out in section 17 of the 1999 Constitution. The central social objective, according to

section 17(1), is the recognition that the nation's social order is founded upon the ideals of freedom, equality and justice. Law should foster rather than hinder the growth of social life and cohesion in our community, facilitate the recognition of the sanctity of human life, maintain and enhance human dignity, and our lawyers should rededicate themselves to public service and act as effective agents of change and social engineering.

In contributing to the political, economic and social development of our nation, senior advocates must be creative. Our 1999 Constitution is ambiguous in many respects. Our statutes are sometimes obscure. In a time of rapid social and technological change, precedents are sometimes silent or not really directly applicable to the issue in hand. In resolving the ambiguities, repairing the obscurities and filling the gaps, the senior advocates have a creative role. The perception of opportunities for creativity and the enthusiasm for the task may differ from one practitioner to another and from one judge to another – some are conservative; others are dynamic; some adopt a narrow, compartmentalised approach to legal reasoning; others are more holistic in their approach. The legitimate debate concerns the forensic tools which should be provided to help in the resolution of this tension and the extent and occasions in which judges should act or refrain from acting and leave gap filling and the repair jobs to the legislature.

E. EVALUATION OF SENIOR ADVOCATES

Without any doubt, the rank of senior advocates has largely identified and recognised the very best advocates practising law in Nigeria today. Whatever anyone might say – and the rank has been quite polarising – the very best and eminent advocates are to be found among the senior advocates. Most SANs are well behaved and fulfil at least most of the roles that their prestigious position requires. However, in every group, there is a black sheep. The senior advocates are no exception. There are senior advocates who are crooks and who engage in unethical conduct. Some are said to fabricate evidence. Some doctor court records, some suppress evidence; some notorious for faking service of process; some bribe court officials, etc. These misconducts must be acknowledged, but they provide no case, still less a compelling case, for the abolition of the rank of SAN.

There are generally two sets of criticisms of the rank of SAN – one set relates to the method of appointment; the other to the privileges and conduct of SANs.

As regards the method of appointment, the following criticisms have been made:

- The method of appointment is said to be opaque and contradictory, eg paras 2(b) and 2(c) of the 2017 SAN Guidelines – the former says applications are to be considered without regard to ethnic origin of applicants, while latter enjoins the Legal Practitioners Privileges Committee to reflect national character and geographical spread in the appointment of SAN!
- The annual cap on the numbers that may be appointed is arbitrary.
- Appointment is subject to federal character which is incompatible with merit. Section 14(3) and 14(4) of the 1999 Constitution and their predecessors, which provide that federal character and state/local government character is a fundamental principle and objective of the Nigerian state, have done incalculable damage to Nigeria. Section 14(3) and section 14(4) are concerned with the composition of the government, its agencies and the conduct of government affairs. The rank of SAN is conferred on merit and is not a division of the spoils of any tier of government or government agency.
- Competency framework is superficial and quantitative and involves ticking the box rather than requiring a qualitative evaluation.
- Lobbying is the order of the day.
- Nepotism - children of judges and leading SANs tend to be favoured above other applicants.
- Rank has been politicised as selection of appointees from eligible applicants is subjective and prone to manipulation.
- Alleged conflict of interest arising from the selection procedure and the composition of the Legal Practitioners Privileges Committee (LPPC).

As regards the conduct of SANs, the following criticisms have been made:

- SANs are a bullying tool against the bench, other lawyers and the public.
- The rank has become an irresponsible professional self adulation which makes senior advocates believe that they are beyond reproach either by the court or anyone else.
- The privileges conferred on SANs are discriminatory and give the impression to the lay and professional clients that SANs would be favoured by the court.
- SANs are said to aid and abet corruption by deliberately impeding the fight against corruption.

Most of these criticisms have a germ of truth. In my view, the three biggest challenges facing the rank of SAN today are, first, the abuse of the rank by **obstructing the progress of cases**;

second, the **indiscipline and sense of entitlement** of some senior advocates using the rank as an instrument of oppression and rudeness; third, the apparent **lack of integrity** among some senior advocates.

Almost all of us are guilty of the first sin. Every senior advocate has at one point or another filed an application which was calculated to slow down the progress of a case. Indeed, many senior advocates see such applications as a useful tool in the implementation of a robust litigation strategy in Nigeria.

The second challenge is unfortunate. It goes beyond the usual flowery language which characterises oral and written advocacy in Nigeria. For example, it is not unusual to hear submissions that an opponent's argument is "grossly misconceived" or that depositions in an affidavit are "fabricated, false, dishonest and calculated to deceive the court", when all that is intended is that the submission or deposition is wrong or not accepted as correct. To one who is not accustomed to the language of litigation in Nigeria, these submissions appear troubling and unfortunate, not least because it is professional misconduct to allege fraud or dishonesty against a professional colleague or a party to proceedings without cogent evidence. As senior advocates we can begin to wean ourselves off such inappropriate language, begin to respect our rank by showing courtesy and respect to the court and other stakeholders.

The third challenge – lack of integrity - is very serious and threatens the existence of and public confidence in the rank. As Vice President Osinbajo noted in 2017, the integrity and credibility of the legal profession is gravely threatened and it appears that "some of the greatest acts of malfeasance are perpetrated by those of us who are senior lawyers...the challenge is how to preserve our profession, preserve the prestige of our privileges, avoid the indictment of history and ensure that our profession and the administration of justice system survives the assault on it by all manner of misconduct."

There are, however, numerous other challenges to the administration of civil and criminal justice in Nigeria apart from those posed by the senior advocates. I will highlight just 12 of such impediments.

Impediments to Administration of Justice in Nigeria

1. Delay

- I have pointed out that the problem in Nigeria is not access to justice, but exit from justice.

- Our civil and criminal justice systems operate at a speed chosen for the convenience of the legal practitioners and defendants (sometimes prosecutors and claimants), rather than for the convenience of the court or the ends of justice.
- In practice, the problem is not the existence of useful procedural tools such as adjournments or preliminary objections. The problem is the deliberate abuse of the procedural tools.
- It is not uncommon for legal practitioners to go to the court deliberately to seek adjournments, in some cases very late adjournments, for no particularly pressing reason. There does not seem to be any limit to the number of adjournments that may be obtained.
- There appear to be few, if any, effective sanctions to ensure that a defendant in civil or criminal proceedings cannot delay and frustrate the proceedings.

2. Allocation of Jurisdiction between Federal and State High Courts

- Allocation and definition of jurisdiction between the Federal and the State court – section 251 of the 1999 Constitution and its statutory predecessor (section 230 of the 1979 Constitution) has perhaps generated the most litigation in Nigeria. It is a disgrace that 45 years after the creation of the Federal High Court (initially as Revenue Court) there should continue to so much confusion as to the boundaries between Federal and State High Court jurisdictions, with attendant waste of litigants time and money.
- Accounts for a significant proportion of appeals.
- Many cases go right up to the Supreme Court before that court decides which court has jurisdiction.
- In many cases over 10 years would have elapsed and the applicable limitation period would have expired.
- Case is therefore disposed of on jurisdiction and limitation without any regard to the merits.
- Millions of naira is wasted in a fruitless excursion to the Supreme which is irrecoverable, even by the victorious party because our courts refuse to exercise their cost awarding power.

3. Misuse of jurisdictional objections

- Jurisdiction is said to be a threshold issue, the lifeblood of litigation. Every Nigerian lawyer cites Lord denning in **UAC v Macfoy** that you cannot put something on nothing. This is a mere catchphrase and as a legal proposition it is not correct. If a

thief steals my N10,000, he acquires no title to the money. But if he goes to a shop he can purchase goods with my N10,000 and give a valid title to the shopkeeper because title in currency passes upon delivery. Our task is to interrogate the catchphrase so that we can ascertain the extent, if any to which it is correct. Unfortunately, the catchphrase is a favourite of Nigerian judges and they often take refuge in it. If anything, it obscures rather than assists our understanding. It is invoked as a substitute for analysis.

- The jurisdictional objection is a judge made obstacle to timely and efficient justice delivery in Nigeria. It should be solved by Judges. It is cheaper to have a single hearing on jurisdiction and merits than to continue to encourage and perpetuate the current ruinous system where the merits can be kicked into long grass by a jurisdictional objection.
- Partial solution in proceedings begun by originating summons. Partial solution in Order 29 of the Federal High Court Rules 2009 – must be raised within 21 days otherwise will be dealt with at the conclusion of trial.
- Neither is effective because of the variety of possible jurisdictional objections and the menace of interlocutory appeals.
- Problem in actions begun by writ.
- Apparently jurisdiction cannot be waived or given by consent.
- Perhaps single biggest source of interlocutory appeals.
- Does it serve the interest of justice?

4. Misuse of interlocutory appeals

- Distinction between interlocutory and final appeal.
- The main instrument for the delay and stifling of criminal proceedings (and to a lesser extent civil proceedings) in Nigeria is the interlocutory appeal.
- It is astonishing that virtually any issue can be taken literally all the way to the Supreme Court provided the appellant can formulate grounds of appeal based upon error of law, regardless of whether the points being appealed involve any public interest.
- It is all too easy to dress up factual questions as questions of law.
- But even if the law were to allow spurious interlocutory appeals, why should the criminal proceedings be stayed merely because an interlocutory appeal is pending?
- The result is that there is a substantial backlog of pending appeals both in the Court of Appeal and the Supreme Court.

- In addition to the backlog, our appellate judges do not have the luxury of a calm and considered reflection on the issues under appeal. Excessive workload compromises the quality of the appellate judgments and the health of the appellate judges.
- A recent example is the case of **Ikechukwu v Federal Republic of Nigeria & 2 Ors** (2015) 7 NWLR (Pt 1457) 1. In that case (which was commenced in **2011**), the FCT High Court granted leave to the Independent Corrupt Practices and Other Related Crimes Commission (ICPC) to prefer charges against the appellant and the 2nd and 3rd respondents. On arraignment, the appellant raised a preliminary objection seeking an order of court to set aside the said leave and to quash the order and arraignment. The objection was based on the ground that the ICPC, being a delegate of prosecutorial powers from the Federal Government could not sub-delegate same to a private prosecutor. The trial court heard and dismissed the application, prompting the appellants to file an appeal. The appellant's appeal was opposed by the first respondent on the ground that the notice of appeal was not personally signed by the appellant as required by the rules of court. This objection was upheld by the Court of Appeal. The appellants appealed to the Supreme Court. The Supreme Court was clearly unimpressed by the seeming ploy by appellant's counsel to stall proceedings. While delivering the lead Judgement at 14E-G, Nweze JSC noted thus:

“So, since 2011, that is for four whole years now, the appellant, through the disingenuous ploy of his counsel, has held up proceedings at the trial court relating to his alleged offences under the Corrupt Practices and Other Related Offences Act.”

This view was echoed by Aka'ahs JSC at 24E-B where His Lordship noted that:

“It is to be noted that the trial of the appellant is yet to commence. It should become abundantly clear even to the layman that the sole aim of this appeal is to stall and eventually frustrate the actual trial of the appellant. It is in the interest of both appellant and the wider society that his innocence of guilt is established as public confidence in the administration of criminal justice is eroded where those with means or the powerful erect legal bumps in the judicial process to delay justice.”

- **Section 306 Administration of Criminal Justice Act (ACJA)** may solve this problem. It provides that:

“An application for stay of proceedings in respect of a criminal matter before the court shall not be entertained.”
- By reason of section 306, applications for stay of proceedings shall no longer be heard until judgment. Further, such applications can longer operate to stall continuation of trial.

- Section 306 has the potential to curb the misuse of interlocutory appeals to scuttle criminal trials.
- Can solution be found through soft law, eg Practice Directions?
- Attitude of Appellate Courts to interlocutory appeals.

5. Obsession with procedure

- Nigerian law is excessively and destructively procedural – Nigerian civil and criminal justice system appears beholden to procedure at the expense of the substance.
- Our civil and criminal justice system is obsessed with form rather than substance.
- Excessive focus on form over substance, eg if statute provides a particular way of doing a thing no other way is acceptable, signing of processes in the names of law firms (Fidelis Oditah & Co instead of Fidelis Oditah invalidates the proceedings even if the point is raised after 10 years at the Supreme Court – **Okafor v Nweke**), failure to use correct form, etc.
- It is self-indulgent and does not serve the needs or interests of users of civil or criminal justice system.
- Over 70% of reported litigation is on procedure.
- Produces technical, unmeritorious justice.
- Judges fail to see the wood for the tree and see procedure as an end in itself even when no conceivable prejudice could or has been caused and there is no risk of miscarriage of justice.
- If an “i” is not dotted and “t” crossed the proceedings are defective because a condition precedent to the assumption of jurisdiction has not been satisfied.
- No matter how much time, energy and resources have been spent on the trial, it will be set aside.
- A lot of the senior SANs whom high profile criminals patronise do not prepare for trial. They are specialist on procedure and procedural objections and scuttle criminal proceedings and swell the ranks of their clientele!
- Solution – anti technicality provisions: effect of non-compliance with rules, eg Order 51 of the Federal High Court Rules 2009

6. Case management

- Stronger case management powers free from appellate court interference.
- The aim of a managed system of dispute resolution is to ensure that cases are disposed of fairly and justly and above all that each case is allotted its appropriate share of the court's resources.

- Case management orders should balance the interests of the parties to civil proceedings and the public interest in ensuring that the parties do not use more than their fair share of a public resource - the courts.
- Case management powers underpin and seek to achieve this balance by ensuring that a judge makes procedural orders which are best for the active management of the case.
- This includes the manner in which all of the other powers which the court has to control the progress of a case (including the power to impose sanctions for procedural failures) is exercised.
- In determining the appropriate way to manage a case, the court should have regard to the need to prevent any one case being conducted in a way that interferes with the resolution of other disputes and wastes the resources of the court.
- The significance of case management powers is that they mark a change from the traditional position under which the progress of cases is left largely in the hands of the parties to a system where the court plays a proactive role in managing the procedural steps between commencement of proceedings and trial.
- In this way the court exercises its case management powers to enable it, and not the parties, to dictate the progress of cases at the pre-trial stage, ensuring that the practices and procedures applicable during that stage are complied with promptly and not abused.

7. Court registries

- Almost without a single exception, our court registries (High Court, Court of Appeal and Supreme Court) are chaotic, dirty and very poorly managed.
- Even the small matter of diarising cases can prove to be beyond the capacity of the court registries and their staff.
- The result is that courts at all levels of decision-making perform registry functions in open court, including the Supreme Court and waste valuable court time.
- Root and branch reform is required which would be aided by digital filing, recording and retrieval of court files.

8. Judicial attitude

- Sitting times.
- Pursuit of personal business instead of sitting – parties, school runs, conferences, etc.
- Refusal to inform counsel in advance that court will not sit, eg by sms or email.

- Double whammy – next hearing will be for “Mention” of case only, even if it was previously listed for trial.
- Cynical attitude – if you fail to take a procedural step on time you are sanctioned (default fees, strike out or dismissal of proceedings, etc, eg **Oloyede v The State** (2018) 8 NWLR (Pt 1621) 311 – dismissal of appeal in the Supreme Court for failure to file brief of argument on time and Supreme Court refused to reinstate appeal insisting that dismissal was on merit and permitted by the Supreme Court Rules. Supreme Court refused to investigate the reason for the delay in filing the brief. The court has created a procedural monster which strikes blindly in all directions!!)). No sanction for judge for missing time limits. And when briefs are filed on time, often appeals are not heard in some cases for 8-10 years. The approach of the Supreme Court defeats the ends of justice and is incompatible with its status as a policy court.
- Multiple re-adoptions for simple rulings. Many Judges have not given judgments in concluded matters over a year after conclusion of trial and argument. Every 3 months counsel is asked to re-adopt. In some cases over 3 years would have elapsed between close of arguments and delivery of Ruling or judgment.
- Reform the way cases are listed – by reducing the number of cases listed and the way they are listed so as to reduce multiple bookings for the same lawyer.
- Tentative and feeble use of modern technology.
- A lot of wasted time because of failure to inform counsel that Judge will be absent.
- Inability to give Bench Rulings, which means that every point, however small or immaterial, will be adjourned for a Ruling, eg adjourning to rule on an objection to a question put to a witness in cross examination?
- No evidence that the adjournment for Ruling gives rise to well considered Ruling. Instead, in the vast majority of cases, counsel is kept waiting in court while the Judge belatedly writes a Ruling on a matter that had been adjourned for a Ruling for several months.
- In short, there is rampant indiscipline

9. Defective system for the appointment of Judges

- excessive lobbying for appointment to the Bench has meant that merit has been largely surrendered to patronage.
- It is not unusual for Chief Judges of State High Courts to ask Governors for nomination of candidates for appointment as Judges.
- Serving Judges lobby for promotion to the higher Bench.

- Judges nurture unnecessary social relationships because they believe they need such relationships to progress on the Bench.
- Senior Judges ask lower court Judges to throw cases as favour.
- These make it all but impossible for the Judges to be independent or impartial.
- What is required is a merit based and rigorous selection process.

10. Appeals

- Appellate courts perform registry function in open court
- Shows failure of administration.
- Why can't court staff contact counsel and ensure that case files are ready for argument before the date fixed for appeals
- Should every decision be appealable?
- Should permission be introduced in all civil cases and some criminal cases?

11. Costs in civil litigation

- Role of costs in civil litigation
- Incentives?
- Basis for assessment
- Are costs awards realistic?
- Wasted costs
- In any rational system of civil procedure, adverse costs orders are the principal deterrent against abuse of litigation.
- In addition, the successful party should recover his costs (or a substantial proportion thereof) from the unsuccessful party.
- The threat of adverse costs can induce parties to settle their proceedings either without recourse to the courts or without a trial.
- Unfortunately, although our courts have powers to award costs, surprisingly they have exercised the powers almost without exception in a manner which not only encourages wasteful and irresponsible conduct of litigation, but also appears to penalise the successful party by awarding what can fairly be described as nominal costs.
- The result is that quite often a successful party can only claim a pyrrhic victory. This calls into question the proper function of an award of adverse costs in civil litigation.
- I believe that no matter how detailed our civil procedures rules are or become and no matter the spirit in which the rules are applied and administered, unless proper costs

orders are made, we cannot achieve any appreciable improvement in our civil justice system.

- There are two aspects of costs that I would like to deal with. The first is the discretion to award costs and the basis for the assessment of costs – standard taxation or taxation on an indemnity basis; the second is the power to award wasted costs against the legal practitioner.
- The Judge has a discretion whether costs should be payable by one party to another and, if so, the amount of such costs, and when they should be paid. Although costs are always in the discretion of the Judge, the normal rule is that the successful party is prima facie entitled to his costs, but the court may make a different order or even no order as to costs.
- In determining the incidence and quantum of costs, the Judge will normally take into account the conduct of all the parties, whether a party has succeeded on part of his case, even if he has not been wholly successful, and any binding offer for settlement made by one party.
- In evaluating the conduct of the parties, the Judge will be primarily concerned with their conduct during the proceedings, including whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue, the manner in which a party has pursued or defended his case or a particular allegation or issue, and whether the plaintiff who has succeeded in his claim, in whole or in part, exaggerated his claim.
- The significance of these factors is that the Judge should make a genuine effort to assess the costs of the successful party and not take the easy way out by awarding nominal costs and taking refuge in his discretion regarding costs. The assessment should normally be on a standard basis under which the successful party would get about two-thirds of his reasonably incurred costs. In exceptional cases, assessment on an indemnity basis may be appropriate.
- In Nigeria, however, costs awarded are usually very small. They cannot possibly cover the real costs of a single step in the proceedings, let alone the costs of issuing proceedings and taking the proceedings to trial. The practice is the same both in the High Courts and in the appellate courts. It is not clear why it is so.
- 14 years ago, in a paper presented by Dr Ogowewo on 20 February 2004 on the occasion of Justice Ayoola's retirement he collected and presented data which showed that in the 1970s and 1980s our courts awarded over N300,000 in some case, which was then equivalent to US\$300,000! No court can do that today. Why?
- As regards wasted costs orders, I believe that the time has come for our judges to order legal practitioners to pay wasted costs, if they have conducted themselves or the

proceedings in a manner which falls below proper professional standards. Hostile wasted costs orders are exceptional and the power to make such costs orders should be exercised very sparingly. But even with such caveats, there must be circumstances where such orders would plainly be appropriate. I believe that such orders would help to raise the overall standard of legal practice, which would be good for the legal practitioners and our civil and criminal justice system.

- Sanction erring lawyers especially senior lawyers including imposing wasted costs., which would be good for the legal practitioners and our criminal justice system.

12. Funding of courts

- Better funding and resources of the judiciary.
- Notwithstanding the billions of dollars wasted in Nigeria on public administration, the judiciary is the least funded of the three arms of government.
- In some cases remand prisoners remain in custody for periods often exceeding the maximum sentence which can be imposed in the event that they are convicted. Criminal trials are repeatedly adjourned, often because the accused has not been brought to court – the broken down “Black Maria” problem – or because witnesses for the State have not turned up. There is apparently no system for reimbursing witnesses their travel costs. Given these and other resource issues, it is unfair to criticise the courts for failure to dispose of criminal matters expeditiously.
- Pay Judges better than they are paid now, instead of wasting our scarce resources on inflated remuneration for Federal, State and Local Government lawmakers.
- Make Judges to declare their assets periodically and prosecute corrupt judges, not just retiring them with full benefits
- Provide judicial assistants
- Automatic recording and transcription of court proceedings.
- In some State High Courts, there are automatic recording machines but the recordings are not transcribed for weeks or even months. That defeats substantially the purpose of automatic recording.

F. A NOTE ON MODE OF ADDRESS OF FEMALE JUDGES

I would like to conclude my talk with a footnote on the modes of addressing female judges. All over the country and at all levels of decision-making I hear male and female Judges addressed uniformly as “My Lord”. Whilst this is understandable in the case of a male Judge, it is less obvious in the case of a female Judge. I am told that the explanation for addressing

female Judges as “My Lord” is the 19th century philosophy that there are no females at the Bar and Bench or for that matter in the legal profession. The law, it is said, admits of only the male gender. I am not sure that the premise is correct historically, but it is certainly wrong today to address a female Judge as “My Lord”. In England, ever since female Judges were first appointed in the middle of the 20th century, they were always addressed in court as “My Lady”. My Lady is the appropriate mode of address for a female Judge whether she sits on the High Court, Court of Appeal or Supreme Court Bench.

Unless there is some statutory provision in Nigeria governing modes of address, I would respectfully suggest that the correct mode of address for a female Judge is My Lady and for a mixed bench consisting of male and female Judges “My Lords and My Ladies” or simply “The Court”.

There are occasions when a female Judge had felt that the correct way to address her is “My Lord”. Indeed, a female Judge had told me in open court that she is “My Lord”, and not “My Lady”.

In England if one were writing to a female Judge or addressing her outside court, the correct mode of address for a High Court Judge is “Hon Mrs Justice XYZ”, whether married or unmarried. Since 2014, she may also be styled as “Hon Ms Justice XYZ”. For the Court of Appeal, it is “Rt Hon Lady Justice XYZ” and for the Supreme Court it is “Lady XYZ”. At the moment, the UK Supreme Court has two female members – Lady Hale and Lady Black. Lady Hale is President of the UK Supreme Court.

I want to start this conversation so that in due course the profession can choose how to deal with the correct mode of address of Nigerian female Judges!

Good afternoon.

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Lagos

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