

## **Eso at 83: Judicial activism revisited**

By Gbolahan Gbadamosi

The 1982 All Nigerian Judges' Conference was about to end in Ilorin, Kwara State when the Ilesa Osun State born former Supreme Court Justice Obakayode Eso ignited a debate on judicial activism. Although the communiqué at the conference didn't capture his vision, he had laid a principle worth commendable. The conference resolved among others that it was not desirable for the Judges to take a fixed stance in advance as to whether the courts should take an activist or conservatism stance in the interpretation and application of the provisions of the constitution when the court is faced with the problem of interpretation, it should adopt an attitude by which the aims of the constitution are not defeated.

Justice Eso who clocked 83 recently argued that the courts must rise to the challenge of the nation's constitution, whereby the judicial arm as "guardian of the constitution" must shed any form of inferiority complex and take its proper place as a co-ordinate arm of government with the mandate of checking the excesses of both the executive and legislative arms of government.

However on the other side of the argument was Justice Philip Nnaemeka-Agu who preferred a form of judicial activism but with restraint.

In a lecture delivered on October 16, 1998 at the Faculty of Law, University of Nigeria, Enugu Campus, Bar Dinner, Hon. Justice Eugene Ubaezonu, JCA, admitted that "judicial activism... is a highly complex explosive and amorphous concept."

Ubaezonu said that, "The Justice Kayode Eso, formerly of the Supreme Court of Nigeria is very well known as an activist Judge and a strong protagonist of judicial activism. He is the Lord Denning of Nigeria. He refused to be tied to the apron string of bad statutes or bad decisions. I salute him."

Last week Thursday, at the Lagoon Restaurant, Victoria Island, Lagos the Centre for Law and Business Law also saluted Justice Eso more with its biennial public lecture in his honour.

Kateena O’Gorman, a lecturer in Corporate Law at the Queen Mary University of London delivered a paper titled: Corporate Governance For Law and Business.

Reading Justice Eso’s citation, Supreme Court Justice Pius Aderemi tendered “Justice Eso as a permanent exhibit”.

“Eso’s decisions as a judge are legendary and a delight to study. Full of erudite scholarship, well reasoned and replete with legal authorities. They are fine statements of law and veritable guides for all in the legal profession or concerned with law,” Aderemi added.

Turning to Eso who was accompanied by his wife, Aina, Justice Aderemi noted that “during a study of the British and Scottish Judicial and Penal systems on the invitation of the British Council, Hon. Justice Kayode Eso was honoured with an honorary sitting on the Bench of the English Court of Appeal at the kind invitation of another legal icon, Lord Denning, Masters of the Rolls.”

One of the recommendations of Justice Eso’s panel on the Re Organisation/Reform of the judiciary in Nigeria (1993) led to the establishment of the National Judicial Council. He chairs the Board of CLB and currently the Chairman of the Rivers State Truth and Reconciliation Committee.

The father of judicial activism himself, Lord Denning, had in the celebrated case of Parker V Parker (1954) All E.R p.22 held that, “What is the argument on the other side ?Only this that no case has been found in which it had been done before. The argument does not appeal to me in the least, if we never do anything which has not been done before we shall never get anywhere. The law will stand still whilst the rest of the whole world goes on. That will be bad for both.”

Courtesy of a book: ‘Kayode Eso : The Making of A Judge’ authored by Prof. J.F Ade -Ajayi and Yemi Akinseye- George, Justice Eso had decided early in his career that he would spare no efforts in maintaining discipline and in protecting the integrity of his court.

One of the noticeable cases where Eso demonstrated his judicial activism philosophy is known as Mystery Gunman case. This is the trial of Wole Soyinka

over his role in a broadcast which the government of the defunct Western Region of Nigeria tagged offensive.

While returning a verdict of 'not guilty' on Soyinka, Justice Eso once again demonstrated the independence of the judiciary. Shortly after the judgment, he was transferred to Akure, then regarded by Judges as a rural station.

The celebrated case of Chief Obafemi Awolowo V Alhaji Shehu Shagari (1979) S.C.Suit Sc 62/1979 is where Justice Eso displayed his leading role in the development of the law relating to election cases particularly in relation to the interpretation of electoral statutes and other legislations such as the Evidence Act as applicable in the proof of petitions. He was part of the panel about one year after his elevation to the Supreme Court.

By a majority of 6 to 1, the apex court affirmed the election of Shagari as duly elected president. However, Justice Eso in his dissent opinion held that at least 2/3 of 19 states could only be 13 and not 12 2/3.

According to him, the intention of the legislature can only be that the one-quarter of the votes should be sought in at least 13 states. This position was supported by local and foreign legal scholars like Prof. Ben Nwabueze, Dr. Olu Adediran and Prof. James S. Reed of the University of London.

Justice Eso's voice was louder in the case of Ojukwu V Military Governor of Lagos State (1986) 1 NWLR (Pt. 18) 621 otherwise known as "executive lawlessness" case.

Justice Eso's pronouncement years ago is instructive to President Umaru Yar' Adua government whose rule of law slogan is more of lip service needs to be restated here.

"I think it is a very serious matter for anyone to flout a positive order of a court and proceed to taunt the court further by seeking a remedy in a higher court while still in contempt of the lower court. It is more serious when the act flouting the order of the court is by the Executive .... The organs wield those powers and one must never exist in sabotage of the other or else there is chaos. Indeed there will be no Federal Government. I think, for one organ and more especially the

Executive, which holds all the physical powers to put itself in sabotage or deliberate contempt of the other is to stage an executive subversion of the constitution it is to uphold. Executive lawlessness is tantamount to a deliberate violation of the constitution.”

Eso’s activism on the bench was also recorded in the Garba vs Federal Civil Service Commission (1988) 1 NWLR (Pt.71) 449, Attorney General of Bendel State vs Attorney- General of the Federation (1981) NSCC 314 at 388. Fawehnmí vs Akilu (1987) NWLR (Pt.67) 797, among others.

Justice Eso’s principle of judicial activism has disciples like the former Supreme Court Justice Emmanuel Olayinka Ayoola now Chairman Independence Corrupt Practices Commission and Justice Omotayo Onalaja, formerly of the Court of Appeal.

“Lawlessness,” according to Justice Ayoola “as an attitude is capable of exhibition in every sector of society... In the executive, lawlessness manifests in persistent exercise of power in disregard of law and refusal to be subjected to the control of lawfully given judicial orders.”

Justice Ayoola’s paper: ‘Lawlessness and the Rule of Law’ in Legal Profession and National Development in Nigeria (ILARN 1998) P. 58 concluded by saying that , “Judicial lawlessness manifests in deciding cases knowingly in disregard of a well-known and established principles and arbitrary exercise of discretion. Professional lawlessness manifests in the abuse of process of the court and deliberately advising clients to ignore lawfully given court orders or to manipulate proceedings to the disadvantage of the opponent. Legislative lawlessness... “occurs when the Legislature persistently disregards the basic law in the exercise of its powers.”

Onalaja JCA has also captures his activist mind in his books: “Commentaries From the Bench Parts 1-4” as well as his pronouncements in various rulings and judgments in particular his verdict in The Registered Trustees of the Constitutional Rights Project vs President of the Federal Republic of Nigeria M/102/93, where he applied the provision of the African Charter on Human and Peoples’ Rights over the military law to save the lives of Gen. Major General Zamani Lekwot (rtd) and his kinsmen on the Zango-Kataf Kaduna crisis.

As submitted by Ade-Ajayi and Akinseye-George, the judicial activism “does not necessarily involve a confrontational or anti-government stance by the judiciary. Indeed, judicial activism means no more than judicial dynamism coupled with zeal to ensure that the powers that be do not trample upon the common man with impunity.”

This is the message of Eso’s judicial activism’s principle to those on the bench who have been behaving more than the executive in interpreting the 1999 constitution and the Electoral law.