

MAY THE SUPREME COURT NEVER BECOME AN UNDERGROWTH

*Honourable Justice Odemwengie Uwaifo's
valedictory speech on his retirement as
Justice of the Supreme Court
on January 24, 2004*

This is one special occasion I found difficult in my choice as to what to say and how to begin. Then I remembered what a Justice of the United States, known for his traditional criticisms of some government policies on labour and taxation, said on the day of his retirement.

When in your last day in this hallowed hall you are asked to make a speech, some will wonder whether you are about to spit a fire of criticisms or are committed to the reaffirmation of the foundation upon which this great constitutional institution has built its reputation. You are at liberty to do either but you must erect the cause on honesty, courage and conviction.

In my own assessment, I would like to believe that I have embraced neither cause directly in my speech. I have preferred simply to be largely ordinary but have bared my heart over some troubling issues all the same. Please be patient to hear me out with an open mind. I can assure you this is the last time you will listen to me, sitting on this dais. Let me begin by thanking the Almighty God for today. It is a rare privilege—indeed a providential privilege—for me (and I think for anyone passing through this court) to sit here and have the opportunity to say the final goodbyes to all and sundry in my judicial service. It is a marvelous celebration of a personal event, which culminates in the end of some 30 long years on the higher bench. I pray that each of the learned brothers here may have the blessings of God for a similar ceremony in due course. There shall be neither deaths nor illnesses to prevent its occurrence.

When I was growing up I had a curious perception of the legal profession. In those days, I noticed a small number of lawyers of rather very mature age (in my estimation then) in Benin City, where I grew up. I never dared even to pass by their chambers. I always saw them in their dark suits and this struck me in my subconscious as a bad omen. I wondered what they did in their chambers and how they performed their duty in court. I thought that incantation was one of their tools of the trade; that they specialized in fine-tuning the art of tutoring their clients and witnesses to lie in pursuit of their case, being the second tool. There was one of them, I remember, who was usually stern-faced and always seen flickering lit cigarette between his fingers, a profuse smoker that he was. The joke was that that particular lawyer quaffed some large whisky for Dutch courage before going into court, invariably harassing his opponent's witnesses. So, I thought alcohol and tobacco were the third tool particularly as I heard that lawyers were called members of the Bar. With all these, my impression of lawyers was very negative and I was scared of the perverted aura they bore in my imagination.

On the other hand, I thought members of the Bench were there to demystify that aura. I could not then connect the Bar and the Bench as members of the same legal profession. The manner in which my ignorance misled me was complete, comical and confused. However, although I had a sense of admiration for members of the Bench, I trembled whenever I heard of or saw even a magistrate. As for Judges, I thought they must not be seen in public. This was because they were simply reputed to have the power of life and death, and to be spiritualists performing a dangerous job.

It was therefore never my ambition to be a member of the legal profession. As a matter of fact, I did not believe I could be. My desire was to take a degree in

Mathematics and teach it somewhere. But as I grew older I began to give lawyers some credulity—though very little. It was the day I looked through the window of a court hall and saw late Hon. Justice Ephraim Akpata (of blessed memory) as a young lawyer taking part in an election petition case that my ambition was aroused. I was absolutely fascinated seeing him in his sparkling wig and dark gown. His neckband was snow white and well adjusted. Two weeks later, I saw in the court premises Hon. Justice I. O. Aluyi with whom I had worked briefly before he left for Britain. He had come back a very young lawyer. He was in well-cut designer suit and he told me he had just argued a case in the Magistrates' Court. I felt, well, these were persons I had been familiar with and knew could not fall within my mental characterization of lawyers.

It was then I made up my mind and rushed to read law in Britain with little or no financial support. It was a matter of working and studying. Fortunately, I got my LLB degree from the University of London and Bar Final within three years. I began in October 1961. In April 1964 I was through with Bar Final and in June that same year the degree. I had no money to register in the Inns of Court in time.

So when I passed the Bar Final I had not done the minimum dining terms for the call to Bar that immediately followed. I was later called at the Inner Temple in absentia on 9th February 1965 because I had to return to Nigeria early enough for the three months' course in the Nigerian Law school, which I completed in December 1964.

I was appointed from the Bar as a High Court Judge in the erstwhile Mid-western State (later Bendel State) on May 1, 1975 where I served in several Judicial Divisions, both urban and rural. Then on 4 February 1988, I was appointed to the Court of Appeal where I served in Enugu, Lagos and Port Harcourt Divisions.

Finally, I was appointed to the Supreme Court on 25 November 1998. I am eternally grateful to all those God used to make the appointments possible.

Let me mention in particular for the High Court appointment: late Hon. Justice M A Begho, then Chief Justice of Mid-Western State as the post of Chief Judge was then known; Dr. S. O. Ogbemudia, the Military Governor of the State; late Hon. Justice Taslim O. Elias CFR, GCON, Then Chief Justice of Nigeria; and General Yakubu Gowon, GCFR, then Head of State. I also recall with kind memory and gratitude, that General (then Brigadier) Murtala Ramat Muhammed as Head of State signed my warrant of office after the Gowon government had been toppled.

For the Court of Appeal, Hon. Justice J.A.P. Oki OON, as Chief Judge, Bendel State; Prince Bola Ajibola KBE, CFR, as Attorney General of the Federation and member of the advisory Judicial Committee (AJC); Hon. Justice Mamman Nasir GCON, as President Court of Appeal and member of the AJC; late Hon. Justice Mohammed Bello GCON, then Chief Justice of Nigeria and Chairman of the AJC; and General Ibrahim B Babangida GCFR, as Military President of Nigeria.

For the Supreme Court, Alhaji Abdullahi Ibrahim CON, as Attorney General of the Federation and member of the AJC; Hon. Justice M.M.A. Akanbi CFR, as President, Court of Appeal and member of the AJC; Hon. Justice M.L. Uwais GCON, as the Chief Justice of Nigeria and the Chairman AJC; and finally, General Abdulsalami Abubakar GCFR, as the then Head of State.

There is the unfortunate tendency for some people (even those in authority) to misunderstand the important role of the judiciary in the maintenance of law and order, for redressing grievances, protecting individual rights, and promoting and ensuring democratic culture. There is often an underlying doubt about the dispensation of justice on the merits. Those who really do not want their official action questioned even in a democratic dispensation regard Judges as undeclared enemies. This puts justice and injustice at crossroads in relation to the concept of democracy. As Reinhold Niebuhr put it:

Man's capacity for justice makes democracy possible, but man's inclination to injustice makes democracy necessary.

Democracy is most obviously seen to be necessary when the tendency of an autocrat puts justice at risk. But one sure way of make (sic) democracy stay on course is to enthrone justice. Similarly, individual right when systematically trampled upon leads to loss of faith in the polity. Therefore, in the performance of its office, a superior court (in particular) owes itself, for the sake of dignity of the Judiciary, and owes the society, for the sake of maintaining the public's confidence, and not least owes the parties before it, for the sake of justice, the duty to administer the law in a manner which ensures that there remains reasonable validity in the claim that the Judiciary is the last line of defence and hope of those who approach it. A corrupt judge is more harmful to the society than a man who runs amock with a dagger in a crowded street. He can be restrained physically. But a corrupt judge deliberately destroys the moral foundation of society and causes incalculable distress to individuals through abusing his office, while still being referred to as "honorable." It is difficult to bring him to account under our system.

No judge worth the name should feel inclined to hide any positive element of his head in the closet through fear or favour, or from corrupt motives or simply on ground of intellectual compromise when reaching a decision. He must to the best of his ability act as God's nominated agent. That has been my personal moral philosophy of the duty call of a judge since I was appointed a High Court Judge. So, a judge should not just write his judgment. He must let it appear he *made* it with a clear commitment to convince. That must be demonstrated by the quality of its analysis and transparency. An unconvincing judgment is like a song rendered in awkward decibel: it can neither entertain nor can it be danced to.

You can hardly experience the real need to have a Judiciary that can be relied upon until you are put through the anxiety of having the court to decide your fate or your civil rights and obligations or those of your loved ones. I experienced one recently in a civil matter of trespass to my land. Although I felt rather confident of my title to and possession of the and, defence counsel who had already conceded that his clients had no defence and in fact filed none, suddenly raised irrelevant issues and engaged in diversionary and delaying tactics when I proceeded to establish my title by evidence. I was amazed at how possible it could be for what looks quite straight-forward to take some twists and turns in the hands of incompetent or unreliable Bench or Bar or both. I was lucky in that I saw both my counsel and the learned trial Judge at their best. I was able to interpret the effect of each step of the proceedings and this kept me well adjusted in and out of the courtroom. You can imagine what lay litigants risk by staking their confidence in our justice system. This calls for the competence and integrity of both Bar and Bench for goodness sake.

The Supreme Court is both the final court and the constitutional court of the land. I need hardly advert to the importance of this court in its role in the Judiciary as the third arm of government. But I must not fail to emphasize that everything should be done to ensure the continued constitutional relevance and credibility of the Supreme Court. The Court needs very capable judicial officers at all times to be able to achieve this. Let the day never come when it may be said that the Supreme Court could not stand forthright enough but buckled under pressure having regard to the manipulative dimension prevalent in our socio-politico environment, but manifesting as an undergrowth, and tending to over shadow with unpredictable consequences our sense of honour and direction as a nation. The Supreme Court must always demonstrate, even more than ever in such atmosphere, that it can neither bend nor break.

The question is what is the guarantee for the sustenance of that needed quality? It is a pertinent question in my view. Times are changing in very sense and we cannot

deny this. The Judiciary is no longer serving the Nigerian society of the 1960s, 1970s, 1980s, or even 1990s. It is the 21st century society. The constitutional challenges, which the Supreme Court had had to meet in the last six years, are more profound, in my views, than those it coped with in the last two decades put together.

There are indications either from comments made by the public or from personal experience that there is need to be concerned about the lowering of standards in the judiciary of this country. It was once thought to be only in the magistracy because of the disturbing was some of the personnel tended to abuse their office. It gradually crawled to the High Courts and would appear to have had a foothold among a noticeable number of judicial officers there. It is not unusual for even senior members of the Bar to complain about the general disposition of those High Court judges. There is the aspect of their attitude and orientation to duty: late sitting, laziness, incompetence, doubtful integrity, impertinence towards counsel.

Now there is real apprehension that the appellate court may soon be infested if not already contaminated with some of these vices. Some recent events seem to sound an alarm bell. The glimmer of hope so far in the face of the creeping malaise is that the National judicial Council, under the leadership of the Chief Justice of Nigeria, the Hon. Justice M.I. Uwais GCON, has tackled head-on some of the reported cases of abuse of office.

What omen does this trend of falling standards portend for the country? First, a culture of compromises will take root in the dispensation of justice. Second, public confidence will be badly and broadly eroded. Third, democracy will suffer or can even collapse. Can we afford any of these consequences because we fail to think ahead for possible solutions to contain the situation?

I have heard view expressed which tend to suggest the existence of three schools of thought. There is the conservative but well-meaning view that appointments to the Supreme Court should be restricted to the Court of Appeal. The merit of this is that Justices of that Court who are competent and suitable are encouraged. It is only right that this be so. Fortunately, there are some bright stars among them who also work incredibly hard. With their tenure in that Court, they will bring their wealth of experience along with them to the Supreme Court if they are given the opportunity.

The other gradually emerging school of thought is that in a dynamic world, talents should be attracted wherever they may be found to meet the growing challenges in justice administration. This school cites section 230(3) of the 1999 Constitution as making room for this. The subsection reads:

A person shall not be qualified to hold the office of Chief Justice of Nigeria or of a Justice of the Supreme Court, unless he is qualified to practice as a legal practitioner in Nigeria and has been so qualified for a period of not less than fifteen years.

The merit of this may become obvious in circumstances of the application of the Federal Character policy. I like to defend Federal Character. That policy or something similar is applied even in some well-advanced democracies. But I will not say it should be embraced just for its sake. That may tolerate mediocrity. The hope is that with appropriate exploration it will be possible to find and acquire the right materials to meet Federal Character policy. Therefore, in case a situation should arise where there is apparent difficulty in applying Federal Character from the conservative source for any particular area, should seasoned Senior Advocates and academics cum legal practitioners or any other suitable judicial officer from that area not provide a solution? That allows for comparative options in order to maintain standards for the overall good of the county. It also has its own indirect merit. It would remind those from any particular

area in the Court of Appeal that there could be a possible alternative to their choice if they fell below standard.

This country belongs to all of us. Its citizens and those who live in it deserve legal justice, i.e. justice according to the laws of the land, properly administered by those suited and capable and paid to do so without expecting any secret or personal or group benefits or advantages as a condition for performing their duty.

The third school of thought is that as soon as it is practicable—a likely long-term solution—if we work hard towards it) only of mostly Senior Advocates of distinction should be appointed to the High Court Bench. They will eventually climb the judicial ladder and so in time to come the concerns for lowering standard will be minimized or even eliminated. Maybe the experimentation of a combination of all these schools of thought may in due course prove its own justification.

In advanced democracies, competence and suitability have attained a broad spectrum in the society because first, of the socio-cultural milieu which has tended to raise the level of awareness for standard; second, a conscious effort to maintain high standard which underpins the desire to eliminate mediocrity; and third, they have had a fairly long and consistent experience of evolutionary development. For instance in Britain, as far back as the 13th and 14th centuries, sergeants-at-law, who were in a sense the precursors of Queen's Counsel, were the main source of recruitment to the Bench until the early 17th century when the rank of Queen's (King's) Counsel was established and this upstaged sergeants-at-law in the recruitment to the Bench, and led to their eventual extinction. Nowadays, it is hardly conceivable that appointments to the High Court Bench would be made other than from among experienced QCs. Naturally, this ensures high standard right from the outset through the judicial hierarchy. I must place on record that I have become aware of some of our High Court Judges who truly deserve to be on the Bench. They need to be encouraged.

However, at the moment in this country, a situation exists where many lawyers, who could not cope with the intricacies and intellectual demands of the profession, seek the High court as a haven and, unfortunately, arrive there. This is bound to be counter-productive. What do we sometimes find? Some Judges loathe being bothered about legal principles and will ignore them if they manage to listen. There are those who will not want judicial authorities from other jurisdictions cited to them. The Privy Council not too long searched for authority over an obscure legal problem and was delighted to examine one it found in an equally obscure Nigerian decision.

I have said it before and will like to say it here, that the trend in some other jurisdictions is for Judges to welcome relevant authorities from anywhere, even opinions in learned Journals, for consideration. They are sometimes found to be quite useful guide even when they are considered and rejected on good cause. To be hostile to probing opinions is a failure to meet intellectual challenges, whereas the courts should always decide cases in order to convince and the extent to which they do so usually manifests in the strength of the reasons for rejecting or accepting challenges arising in their judgments. When there is hostility to other opinions, there is the tendency for a cover-up in the reasoning to arrive at a result or conclusion. This may serve as a sanctuary for corrupt practice.

The dynamics for improvement in any endeavor is the willingness to try novel methods. As this idea may have been applied to appointment to the higher bench in this country, I cannot say there is much evidence. Let me be specific in my probe. Take for instance, appointment to the Court of Appeal. Names are submitted for consideration for appointment. These names are considered by those actively concerned with appointment and eventually successful candidates emerge. It is not at all clear what verifiable criteria are used to ensure the suitability and capability of those appointed. But

whenever any of those appointed prove indeed to be suitable and capable it is rather a matter of good fortune or chance. It could thus happen that even those about whom there is common knowledge of corruption pass through; those with skewed appreciation of legal principles and the lazy ones may similarly benefit. I think those responsible for such appointments have an uphill task because of lack of sufficient data available to them. In my view, there are certain imperatives, which must not be compromised or overlooked if a particular appointment can be truly justified.

I wish to suggest some rather pro-active ways that may help to some extent in addressing the situation. The whole idea is to make effort to improve and maintain standard of integrity and performance, and eliminate mediocrity. Mediocrity is a form of socio-cultural miasma of degradation, which has the imperceptible but strong effect of depriving the people of their just and legitimate expectations. Again, mediocrity tends to create an atmosphere of hostility towards meritocracy and tries to put it under suffering or slavery. The effect may take sometime to mature, but eventually there is bound to be an awful rebound. A society or institution, which tolerates mediocrity, is inevitably left behind. When it is installed in the Judiciary it breeds a whirlwind of injustices. Therefore no effort ought to be spared to keep it at bay.

If for instance, this county which has produced several legal luminaries since about a century and a strong Supreme Court for half of that period, were to be unfortunate enough to have a Supreme Court, which was top heavy with mediocres (I mean no offence to this great institution or to anyone for this hypothetical projection), then it would be a reflection of the method of appointment and elevation in the Judiciary. That method would need to be revisited. But we do not have to wait for that calamity to happen before new methods are tried out so as not to make the Supreme Court a huge, dreadful and costly national liability. Can this or is it likely that this will happen? This question does not need to be answered. All I have to say is that conscious efforts must be made to prevent it happening. The emphasis is on the preeminent importance of the Supreme Court in the affairs of this country. It should not be a court for all comers simply because they have been in the Court of Appeal; nor should appointment to it be on favour or just to satisfy any other cause. It should stand and act really supreme and continue to be under the leadership that can be trusted for truth, fairness and even-handedness; which will not compromise on the priority of putting the call to duty first always, and accordingly will equally be concerned about the welfare of all members of the court of all grades, who make the scheme work. It must be a leadership that has no skeleton in the wardrobe, which may be exploited externally as a bargaining chip in times of difficulty to try to bend the court. It must in the same vein discourage and shun sycophancy, which is no sign of loyalty but a means of misrepresentation of the true view about facts and circumstances, including that about the sycophant himself, through the instrumentality of a blindfold devised by him, all for personal private purposes tending to the disadvantage of others. The leadership must ensure that an acceptable overall ethos prevails so as to firmly uphold this sensitive national organ of State.

In making suggestions, I shall again use appointment to the Court of Appeal as an example. First, the appointing authorities must not overlook what I shall call common knowledge about the corrupt tendencies of any Judge in the dispensation of justice. The present attitude seems to be a insist on "official" or "concrete" evidence of corruption even when those taking part in the appointment, or some of them are themselves aware of this common knowledge. Caught-in-the-act evidence of corruption is an extreme occurrence; "official" or "concrete" evidence can only be got when the whole scheme has bursts open. Again, this is a rare occurrence in this country. I think common knowledge ranks as strong public opinion. Anyone who has negative public opinion of corruption about him has no business on the Bench or if already there should not be appointed to a

higher position because justice delivery relies largely on the public's confidence. Usually people do not have common knowledge of corruption against an upright judge.

My second suggestion is that lazy judges should not be appointed to the Court of Appeal. A lazy judge is easy to identify. Thirdly, an incompetent judge should be similarly denied appointment. He is as reprehensible and irritating as a corrupt judge. Both are twin evils all said and done. In this regard, every judge being considered for appointment to the Court of Appeal must be asked to present copies of his judgments (say 5 or 10 judgments). The appointing authorities should design a method of disguising his identity from those judgments which should then be made available to an *ad hoc* committee of senior judges, distinguished senior advocates, and top academics in law and other disciplines, for assessment as to quality in all aspects in order to help the appointing authorities reach a fair decision. Those who fall below acceptable standard for that high office should never be appointed. Finally, seniority should not be a major factor for consideration. It should be regarded relevant only when all other things are equal.

I have made suggestions. It is all about reinforcing the Judiciary of this country as the third arm of government of which the Supreme Court stands as the beacon so that it will continue to be relevant and credible. They are, by no means an ultimate recipe for achieving the desired goal. They at least serve to agitate concerns. If those in charge have a better option and are prepared to apply it, then it can be said we are all travelling in the same direction. But let there be the acute awareness that the Judiciary, particularly the Supreme Court, is the hub of stability for this country; and let us not assume that things cannot go badly wrong if there is no new approach to its wellbeing.

I commend the Hon. Chief Justice for the cult of brotherhood he instituted in the Supreme Court. I use the word "cult" in a positive way. Supreme Court Justices cooperate and interact as brothers without grudge under any circumstances, even when they disagree sharply on any legal issue. Notwithstanding, this unusual *esprit de corps* under the auspices of Honorable Justice M. L. Uwais, I can testify that every Justice enjoys ample opportunity to exercise absolute freedom of thought in the discharge of his office.

I like to end this short address upon a personal note and on a lighter mood. I have since leaving office started to earn the dividends of retirement. For 30 years my peace of mind depended largely on my ability to quickly get rid of accumulated work. There were usually at any given time stacks of files waiting to be studied and judgments prepared. This pressure was very intense in the Supreme Court. Until that was done I remained restless. Now that it is over, I have turned my back with great relief on that arduous routine. I keep wondering what kept me on for that long period. This underscores the judge's world. He is the only public servant who cannot delegate his work. He must prepare his judgments himself, His constitutional obligation to perform the job is always staring him in the face. I think he deserves to be specially catered for both in and out of office.

To my learned brothers sitting here, I say it was a rare pleasure and privilege working with you. But the wind still sits in the shoulder of your sail. Thank God I have disembarked, safe and sound, to face another chapter, a good part of which is to savour a refreshing rest. All I love to wish you is *bon voyage* and to say *adios amingos*.

I am grateful to all those who have come to this special court session and have wished me well. I have always looked forward to an opportunity to show my appreciation to counsel, both of the Inner and Outer Bar, and to all Judges and Justices who at any point in time considered me their elder brother on the bench, for the great respect and consideration they have always shown towards me. This is the occasion for me to do so. In doing so, let me disclaim and denounce my childhood misconception of

the legal profession. I say not only is it unfounded, I have for some 40 years been part of the profession and can now confirm that the world is better off with lawyers.

I specially want to thank all those who served me as my secretaries at every stage throughout my career on the Bench. I sometimes felt guilty conscience that I tended to overwork them. I still do. But their efficiency so easily eclipsed the volume of work they had to contend with that they never complained. It looked as if there had been no pressure. They made my work a lot easier for me. I also thank all others who worked in my Chambers.

I must thank those in the administration of this court, particularly the Chief Registrar Mr. Danlami Z. Senchi, who has made far-reaching reorganization for better efficiency. He has demonstrated what a committed officer and a good administrator he is. I also thank those in charge of related sections of the court, the names of whom are imprinted on my mind, who always readily catered to my demand for my welfare. I take away with me fond memories of all of you.

Thank you and may God Almighty bless you all.

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