

## Juristic Thought and the Judicial Process

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### ABSTRACT

John Locke identified one shortcoming in the state of nature; the lack of an umpire or a Judex for the settlement of conflicts by due application of laws and the punishment of offenders. The institutionalization of judicial process is therefore man's efforts in search of justice to promote the flowering of peace and tranquility in society. The judiciary is one of the organs of government. It is the branch of government that is saddled with responsibility of dispensing justice. In Nigeria, judicial powers, that is, vested on the power of the judiciary is vested in the courts. The powers vested on the courts by section 6 of the constitution include.

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#### Interpretative Powers

The courts in Nigeria with the Supreme Court at the apex of the judicial hierarchy are the interpreter to what the constitution as the basic law and other laws are: In *Nafui Rabiun V Kano State*. The Supreme Court declared that its approach in the process of interpretation will be that of liberalism [1,2]. In the same vein *Eso Jsc*, as he

then was in *State v Gwonto*<sup>4</sup> adumbrated this liberal approach when he declared that, "the court is more interested in substance than in mere form" and that "justice can only be done if the substance of the matter is considered. He concluded that "Reliance on technicalities leads to injustice [3].

#### Powers of Adjudication

By the authority of section 6 (6) (b) of the constitution the powers of the court extends to all "matters between persons, or between government or authority and any person in Nigeria, and to all actions and proceedings relating thereto, for the

determination of any question as to the civil rights and obligations of that person" [4]. This is to say that there is no state immunity and the judiciary can exercise its powers against individual persons; natural and artificial.

#### Inherent Powers and Sanctions of Courts

The inherent powers of courts was vested on them by section 6 (6) (a) of the constitution. Inherent powers of the courts are distinguished from statutory or general powers. The inherent powers

are not set in any statute. According to *Nnaemeka Agu JSC*, "it is simply the power of the court to control and regulate its processes and procedure [5].

#### The Power of Guardianship of the Constitution

By subsection (8) of section 4 of the constitution the judiciary is expressly empowered to keep surveillance over

the legislative acts of the legislature. It provided that:

*Save as otherwise provided by this constitution the exercise of legislative powers by the National Assembly or by a House of Assembly shall be subject to the jurisdiction of courts of law and of judicial tribunals established by law: and accordingly, the National Assembly or a House of Assembly shall not enact law that ousts or purports to oust the jurisdiction of a court of law or of a judicial tribunal established by law.*

It is on the authority of the above provision that courts in Nigeria had intervened in the legislative process and

often declare any law that violates the provision of the constitution null and void. The most prominent among these

*By virtue of the provisions of section 4 (8) of the constitution, the courts of law in Nigeria have the power, and indeed, the duty to see to it that there is no infraction of the exercise of legislative power, whether substantive or procedural, as laid down in the relevant provisions of the constitution. If there is any such infraction, the courts will declare any legislation passed pursuant to it unconstitutional and invalid.*

The judicial has also invoked the above provision to scrutinize the acts of the Executive organ of government to determine whether they are consistent with the constitution and in situations where executive acts had affected or infringed the civil rights and obligations of the citizen the courts had successfully declared such acts invalid, unconstitutional, null and void. This plenitude of powers has not only emphasized the importance of the judiciary, it also shows that the judiciary, and indeed the Supreme Court of Nigeria is the final authority on the [7].

#### The Judiciary as a Subsystem of the Political System

The judiciary as an organ of government is part and parcel of the larger political system. It does not operate in isolation as Robinson Crusoe. It is only a subsystem of the whole system. Whatever affects other systems of the system affects the judiciary as they input into it and the output of the judiciary conversely have implications for the other subsystems within the political system. It may be necessary to use the Eastonian analysis of the political system and its relationships with other systems in the wider environment to clarify the above assertion [8]. A political system according to Easton operates within a given environment and also can be distinguished from that environment. The political system however responded to influences arising from the environment, while the activities of the political system also affect the environment. Put another way, the political system receives input from the environment and conversely make output into the environment. Stating this specifically, demands from the people for specific allocation of values or resources, their support or lack of it

meaning of the constitution. In the words of Charles Evan Hughes, "The constitution is what the Judges say it is". This view of Hughes was supported by Bishop Hardy who declared that "whoever hath an absolute authority to interpret any written or spoken law, it is he who is truly the law giver, to all intent and purpose". The Supreme Court is at the apex of the judiciary. It is a court of appeal and a court of last resort, and review decisions made by the Court of Appeal and other lower courts. It epitomizes the Nigeria Judiciary

constitute the input into the political system. If the input is not regulated and controlled, Easton states, the consequences could cause a system overload, stress and instability. The need to regulate the flow of input necessarily created the need for regime of rules which could define the categories of inputs the political system could admit. The input the political system admitted, Easton explains further, would undergo a conversion process and the result of this conversion process is thrown to the wider society as outputs. These outputs could however generate further demands and support which goes back to the political system through the feedback mechanisms [9].

David Eastons, a political theorist of the Weberian line and of the Chicago School of thought in his analysis of a political system also provided a framework or an insight of how the judicial system works. Juristic thought is expressed in the pronouncements, declarations, comments, judgments, orders of the courts in the discharge of its interpretative jurisdictions. Through its judgment, orders, opinions, and

decisions, the judiciary is also involved in the authoritative allocation of values through the judges. These judgments, opinions or decisions which may be called ratio decided, or *obita dicta* constitute the output of the judiciary which could affect the wider environment. The inputs into the judicial sub-system come in the form of litigation and the feedback is channeled through newspapers, journals, and organized bar. As earlier stated, the judicial subsystem has developed its own regime rules which would help to ensure that inputs into the system do not cause system overload, stress and instability. Such regime rules include rules of practice and procedure, jurisdiction, *Locus standi*, justiciability etc. However, the conversion mechanism of the judicial system is central to a clearer understanding of the workings and dynamism of the judiciary. Following Easton's analysis the conversion mechanism is the core of the judicial system. According to Schubert, the conversion mechanism is central to the judicial decision making

#### The Judicial Process

The question has arisen; what do courts and judges do in adjudicating cases; do judges make or declare law as they see it? The answers to these questions can only be found if the dynamics of the judicial process is comprehended. The Judicial process traditionally comprehends four major themes

#### Legal Reasoning

The role of reason in the affairs of human society has been controversial. To some people reason is relevant in directing the affairs of human beings. To some, it does not and cannot play any role in human affairs. For Thomas Aquinas' reason cannot be divorced from human and law which in fact is central to every human society without which there will not be any society in an ordinance of reason promulgated by one who has care of the community.<sup>13</sup> By making rulership the exclusive preserve of philosophers to the exclusion of other classes, Plato also placed reason at a premium in human affairs. Thomas Hobbes will however, not agree that reason is relevant in human affairs. Thomas Hobbes will however, not agree that reason is relevant in human affairs;

process, and it consists of the values, and prejudices of the individual judges as well as the issues in question in the particular case of determination.

In other words, the conversion mechanism of the judicial system includes the personal idiosyncrasies of the judges, their philosophy of law, and their background. It also includes the tradition of the judiciary, and its regime rules. In other words, judiciary decisions are influenced by two separate but overlapping sets of stimuli: legal and environmental influences. Such environmental influences include the personal idiosyncrasies of the judge, his background, political affiliation, and process of recruitment, ethnicity, the influence of public opinion, and the influence of other arms of government. If this is so, then, the positivist conception of the judiciary as politically neutral and the adjudication process as characterized by a mechanical search for the intention of the legislature and also law as distinct and separate from morals may not be the whole truth.

namely: legal reasoning, judicial discretion, precedent and statutory interpretation. An examination of these four major themes would be examined for an understanding or fair understanding of how courts discharge their interpretational and adjudicatory responsibilities

rather man for him is selfish and only ruled by passions of the mind. Hobbes position is supported by David Hume, who opines that reason "is and only ought to be the sale of passion". The inclination of this work is that reason plays a great role in human affairs and it identifies with Thomas Reid's views that reason cannot be ignored in human conduct as a "being trained to certain purposes by discipline, as we see many brute - animals are, but would be altogether incapable of being governed by law." What Reid is saying is that some degree of reason is inevitable if any subject of the law would be able to comprehend a general rule of conduct. The question now is: Is legal reasoning or reasoning in law distinct or different from other forms of reasoning? The

answer is no. Legal reasoning is not different from other forms of reasoning. They have the same structure and forms as elsewhere. However, lawyers and judges do reason with their own conventions and in their traditions which have been transmitted to them in their course of training and which they are expected to bring to bear in the daily practice of their profession. According to Cass R. Sunstein legal thinking is not economics, or politics or philosophy. Lawyers and judges, he said, have their vocabularies. They are concerned only with issues of legitimate authority.

Legal reasoning however, is like everyday reasoning. It relies on argument by analogy. It is both inductive and deductive in form. In its inductive form it generates a type of reasoning in which a general principle of law is inferred from an observed singular fact; in other words particular cases for instance in a court are examined from a general proposition of law. The problem is that in some circumstances, an element of novelty could ensue in particular cases and the existing general proposition may be inadequate to cover the particular cases. The question raised by this circumstance is what a judge faced with this novelty would do in order to achieve substantial justice.

In deductive reasoning, reasoning proceeds from the premise to the conclusion and outcome in particular cases are viewed as a logical

*Whichever device, precedent or legislation, is chosen for the communication of standards of behaviour, these however smooth they work over the great mass of ordinary cases, will, at some point where their application is in question, prove indeterminate; they will have what has been termed an open texture.*

There is inherent lacuna in human language and therefore "uncertainty at the borderline is the price to be paid for the use of general classifying terms in any form of communication concerning matter of fact. Hart attributed this situation to the use of language, like English language which when used "irreducibly" are open textured and to the human predicament who labour under two connected handicaps whenever an attempt is made to use a general standard to moderate or regulate the conduct of people

consequence of the general theory. In other words particularly cases are approached through the lens of a broad or general theory; e.g. All men are mortal, Okeke is a man, therefore Okeke is a mortal. This form of reasoning is reasoning by analogy; a tendency of treating like cases alike. Although this type of reasoning may play an important role in the functioning of the principle of formal justice, circumstances may arise in which some cases might pose considerable doubt and uncertainty. That is, in analogical thinking, there could be many possible similarities and differences. A situation may arise where one may ask, "if you have treated John that way, must you not treat James that way as well. If you have treated Okeke that way, but my case is different, shouldn't you treat me differently?" The point is that applying principles to particular cases could lead to absurdity or to circumstances or cases would be unhelpful in the resolution of legal disputes. One characteristics of law is generality of application. In other words, law as an instrument of social control must be general. Rules or standard cannot be directed to each individual separately. In all legal system such general rules are communicated to the people either through "authoritative general language (legislative)" or through "authoritative example (precedent)" Hart however observed that:

unambiguously and in advance. The first handicap according to Hart is "our relative ignorance of fact" and "the second is our relative indeterminacy of aim", a situation that could not have arisen if we had lived in a world "characterized only by a finite number of features" and lack of knowledge of "how all the models in which they could combine were known to us". The result Hart asserts could have been that provision could be made in advance for every possibility. In Hart's words:

*We could make rules, the application to particular cases never called for a further choice. Everything could be known, and for everything, since it could be known, something could be done and specified in advance by rule. This would be a world fit for "mechanical" jurisprudence.*

It is for this reason of uncertainty, the limitation of human knowledge, the lacuna of language and its open texture, and the indeterminacy of aim that compelled Hart and other positivists to admit that discretion is an element of the judicial process, a standpoint that is giving credence to the claim that the judiciary also make law in the course of interpreting the law. Legal reasoning is logical but there are situation where it becomes illogical to apply because it will create palpable absurdity. No wonder Holmes, asserts that the life of the law has not been logic but has been

experience. According to him, "the felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which could be governed. The law for him is replete with the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics [8].

#### Statutory Interpretation

To interpret is to give ones own conception of, to place in the context of one's own experience, perspective, point of view, or philosophy. One of the cardinal functions of the judiciary is the interpretation of rules, statues and even the constitution and it only when a law is interpreted that it can be applied to concrete cases. This is the task of a judge in the process of interpretation, how to balance the need for stability and certainty, embodied in the principle of *stare decisis*, with the need for the constructive adaptation of the law to the changing social needs; how to balance the certainty aimed at if not always achieved, by strict adherence to the letter of the law, with individual justice.

If sweeping clauses like "due process" "reasonable" "fair" are contained in the general proposition of law, his immediate task becomes how to fit the facts of the case before him into the abstract generalizing definition of the legislation. Is a judge faced by such situation guided simply by blind arbitrary choice or does he just mechanically deduce from the general rules? Can moral principle play any role in the effort of the judge to weigh and balance the evidence before him in an effort to do justice? In order to discharge this interpretative responsibility the courts, have however evolved a set of principles to guide it [9].

#### Judicial Approaches to Statutory Interpretation

The principles evolved by the courts for the purpose of guiding it in the course of statutory interpretation are the literal rule, the golden rule and the mischief rule. These principles are also known as canons of interpretation. They are briefly discussed as follows:

(a) **Literal Rule:** This principle simply requires that statutes are to be construed in their usual grammatical meaning especially when their wordings are not unambiguous. It is immaterial that the application of the statue would occasion any injustice. In this principle a statue is to be expounded according to the intent of the parliament that made it; and this intention has to be found by

an examination of the language used in the statue as a whole. The question to be answered is, what does the language mean and when we find what the language means in its ordinary and natural sense, it become the duty of the judge to obey the meaning, even if he thinks the result to be incontinent, impolitic and improbable. Some questions have been posed which literalists judges are expected to address and that is whether a legislative could have intended injustice when the whole purpose of law is to do justice? Whether it is not also possible that the draftsman could not have captured adequately, the intention of the

lawmakers as language is not a subject of mathematical precision.

Again, whether a general proposition of law can take adequate care of particular situations, occasions or events that may occur at the point of application of law; for instance, a law might say that no dogs are allowed in restaurants, that no car should exceed the speed limit of 65 miles per hour: Does that prohibition apply to the case of a police officer accompanied by a dog trained to smell bombs in the event of a call from a restaurant owner that a bomb is at the verge of exploding somewhere in the building, and how would the law respond in the case of a driver who have exceeded the speed limit of 6.5 miles per hour because he was fleeing from an armed terrorists. In the absence of a legislative provision to apply in these new situations, what would a judge faced with such situation do; would it be proper for him to construe the statute to produce absurdity or injustice, or could

*The fact is our society, although some may disapprove, the court had advantage as a forum for the discussion of political - moral issues.*

According to Levi, in a broad based vocal and literate society, susceptible to the persuasion of many tongues and pens, and with inadequate structuring of relevant debate, the court has a useful function, not only in staying time for further second thought, but in focusing issues. The court is sometimes the only forum in which issues can be sharply focused or appear to be so. It has the drama of views that are more opposing and less scattered. The court also has the advantage of beginning with certain agreed upon premises to which all participants profess loyalty and for this reason it can force concentration upon the partial clarification of ambiguities. It must reach a conclusion that has the force of our moral judgment upon the particular situation.

(b) The Golden Rule: In this rule grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument. In which case, the grammatical and ordinary sense of the words may be modified, so as to

Aristotle and Purposive Interpretation  
The idea that what is fair and just in the

have the legislature itself intended the law to apply in this situation?

Proponent of literal rule may interpret the action of the judge in not strictly applying the statute in the above scenario as policy making. For them, courts cannot evolve an exception in law; and cannot take care of any unexpected outcome. It is either that the rule is applied strictly or nothing. In their view, "the judges judgment about purposes and absurdity may be untenable; because it is costly and time consuming for litigants and courts to inquire into purpose and absurdity and because the legislative can correct the absurdity in any event". The fact still remains that the courts are more properly placed to correct absurd applications through the process of casuistical interpretation adapting the general rule to the particular situation. As realistically observed by Edward H, Levi [9];

avow the absurdity and inconsistency, but no further.

(c) Mischief Rule: This rule was first formulated in Heydons case. It allows the court to look at the provision of the law before the enactment in consideration of the new legislative policy.

The golden and mischief rule approaches are all purposive. A judge following the two approaches does not fold his hand when he encounters a defect in the legislation. He will look at the history of the enactment, the mischief it sought to eradicate and the purpose of the legislation and construe his interpretation not from the language of the statute but from the need to achieve a social purpose. In purposive interpretation there is a resort to casuistical judgment at the point of application where a strict literal application of rule would create absurdity or gross injustice. This often occurs in a situation where a rule would not take account of individual circumstances.

circumstance should be paramount in

the administration of law is very visible in the writings of Aristotle. Put another way, Aristotle in his writings made an important distinction between the spirit of the law and the letter of the law. The spirit of the law is the purpose, the aim,

the objective it sought to achieve, while the letter of the law is concerned about the law as it is simpliciter. In one of his most popular discussions of the problem, Aristotle said;

*There are some things about which it is not possible to pronounce rightly in general terms; therefore in cases where it is necessary to make a general pronouncement, but impossible to do so rightly, the law takes account of the majority of cases, though not unaware that in this way errors are made... This is the essential nature of equity; it is a rectification of law in so far as law is defective on account of its generality. This in fact is also the reason why everything is not regulated by law; it is because there are some cases that no law can be framed to cover, so that they require a special ordinance. An irregular object has a rule of irregular shape, like the leaden rule of Lesbian architecture: just as this rule is not rigid but is adopted to the shape of the stone, so the ordinance is framed to fit the circumstances.*

The idea of equity is to pardon human failings where strict application of law would occasion injustice. The origin of the doctrine of equity has been traced to the Roman canonical law which was prevalent in most of medieval European state. It was the Roman Jurists that proclaimed the idea of natural law to mean that law ought to be repugnant to equity and natural justice. Common law judges engaged in adjudication in accordance with common law and statute but they also occasionally modify and supplement common law and statute by the exercise of judicial discretion or judicial equity, i.e. In terms of what is fair and just. It was however the Chancery Court that introduced and developed the technical rules of equity.

Through series of enactments broad principles of equity was introduced into the Nigerian legal system particularly in the ascertainment of and application of Nigeria Customary Law. The broad principles of equity known as the repugnancy doctrine was introduced to allow the administration of indigenous law along with the received law. With the doctrine in place our courts now have a duty to enforce customary law as long as it is not repugnant to natural justice, equity and good conscience. It was expected that Nigerian courts in ascertaining and applying any illegal rule of customary law, would apply equity in a broad sense thereby giving humane and liberal interpretation to any alleged rule of customary law.

#### The Doctrine of Precedent

These consist of rules, practices and norms that have developed overtime. It is traditionally called the legal reasoning or what may be described as "thinking like a lawyer". The lawyers reasoning pattern is reasoning by example. He tries to establish a similarity between two cases and applied the rules of law agreed in the first on the second case. This is known as the doctrine of precedent. This doctrine of *stare decisis* (stand by what has been decided) is cardinal principle of the common law which Nigeria inherited from British Colonial masters. Oputa JSC (rtd)

explained the workings of the doctrine in the following words: Our law is the law of the practitioner rather than the law of the philosopher. Decision have drawn their inspiration and their strength from the very facts which framed the issues for decision. Once made, these decisions control future judgments of the courts in like or similar cases. The facts of two cases must either be the same or at least similar before the decision in the earlier can be used in a later case and even there, merely as a guide. What the earlier decision establishes is only a

principle, not a rule. The reason a court gives a case in a particular way is the *ratio decidendi*. It is the governing element, the principle or the inspiration which the court has established. It is the only part of the decision that is binding on the lower courts. Opinions in the judgment of a court or statement made by judges who are not necessary for the determination of the case do not constitute part of the *ratio decidendi*, and are not binding. They are referred to as *obita-dicta*. They may however having strong persuasive effect.

In Nigeria, the decision of the Supreme Court is binding on all the lower courts. No court in Nigeria would refuse to follow the decision of the Supreme Court even if the decision is wrong. The Supreme Court however can overrule itself. A binding decision remains binding on all subordinate courts until reversed or overruled notwithstanding that the reasoning in the decision may be wrong both in law or fact. They must follow the erroneous binding decision.

One effect of the doctrine is that it bequeaths on law the character of uniformity, consistency and the opportunity of being predicted. The rules of precedent is therefore to avoid a situation whereby a judge is at liberty to decide each case as he thinks without any regard to principles laid down in previous similar cases. This could result to completely uncertain law in which no citizen would know his right or liabilities until he becomes aware of the identity of the judge who would handle his case from which he could guess what the judge would take on a

consideration of matter without any regard to previous decisions. Therefore, the justification for the doctrine of judicial precedent is that it ensures some amount of certainty in the law. This means then that a judicial authority must be applied in relation to the facts of a case and cases with similar facts will more readily admit of the same legal principle. But there are often dissimilar factors between cases from time to time either in terms of details of the facts or the circumstances of environment or even changes in attitudes or change caused by developments such that a new approach to the law is imperative. This calls for a realistic deviation from case to case in the application of legal principles. Therefore, while it creates uniformity and certainty in law, it denies individuals judges their sense of individualism as they cannot decide cases before them on what appeared fair and just. Legal principles should be applied in such a way as to ensure the justice of a case, otherwise the doctrine rather than create certainty would make the law moribund through the indiscriminate use of doctrine. The result according to Uwaifo in the case of *Iwuno v Iluno*<sup>33</sup> is that robotism would have been installed as machine for the administration of justice. It will all end in inevitable confusion and unreality. However creative judges can through the process of distinguishing depart from a precedent in order to meet with the justice of a case before him or to account for changing societal values and practices.

#### CONCLUSION

The proper of a judge has continued to generate a range of debate among philosophers, lawyers and jurists; whether they make law or simply declare the law as it is. The debate on the concept of judicial discretion has only added another dimension to this nagging issue. In his contribution to the issue, Barry Hoffmaster identified three main camps involved in the debate. In one camp, according to him are those who believe that judges as a matter of fact, make law, invent law, legislate, make policy, or exercise discretion. For them, judges are entitled to exercise

discretion, and in exercising it should be activists or instrumentalists. In the second camp are those who believe that judges as a matter of fact apply law, discover law, declare law, interpret law, do not legislate, adjudicate or do not exercise discretion and therefore judges are not entitled to exercise discretion. Consequently, judges should be formalist, conservatives, or strict constructionists. The third camp adopted elements of both positions, they believe that although judges as a matter of fact make law, invent law, legislate, make policy, or exercise



discretion, therefore judges are entitled to exercise discretion but should in exercising discretion remain formalists, conservatives, or strict constructions.

Some vital fundamental questions have been raised from an analysis of the issues raised by the three different camps identified by Hoffmaster. They are:

- I. What is term discretion?
- II. Do judges actually exercise

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