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LIMITATION OF ACTIONS UNDER THE PUBLIC OFFICERS' PROTECTION ACT: EVALUATION OF *JUS DICERE* AND THE POVERTY OF THE DECLARATORY THEORY OF JUDICIAL METHODOLOGY

by

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*I*ntroduction

Judicial interpretation or construction[1] of legislative instruments indexes the practical functionality of the doctrine of the separation of powers. English courts have over the years formulated rules that guide them in this all important task. At the core of those rules is the objective of finding the intention of parliament and applying it to the factual situations that confront them. For a very long time, Common Law judges conceived their role in legislation as *jus dicere* (a declaration of the law) and not *jus dare* (text creation or policy formulation). The latter was viewed with suspicion and as

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1. There is a great deal of controversy in regard to an appropriate answer to the question, whether there is any difference between 'interpretation' and 'construction' of statutes. For example, Benion, Driedger and Campbell think there is; and their view is supported by the definition supplied by Chambers 20th Century Dictionary. See: Benion on *Statute Law (3rd edition)*, Longman, London(1987) pp 87-88; Driedger, E.A: *The Construction of Statutes*, Harper Press & Publishing Co.London(1984) p.ix; Ramage, R.W. Dias: *Jurisprudence*, (5th edition) Butterworth & Co. London(1985); Campbell, H. A Handbook on the Construction & Interpretation of the Laws (1986), quoted in *Black's, Law Dictionary,* (7th edition) pp.308-310. Sir Rupert Cross has, however, dismissed as wasteful effort any attempt to identify any distinction between the two terminologies in relation to the work of the court. His view is fortified by judicial attitude, which uses the two terms interchangeably. See, Sir Rupert Cross, *Statutory Interpretation*, Butterworth & Co., London (1976), p.18.

something antithetical to the doctrine of the separation of powers. Thus, Lord Simmonds is reported to have admonished Lord Denning to refrain from 'engaging in a naked usurpation of legislative power under the guise of interpretation of statutes'. The warning came as a result of the latter's expressed desire to 'fill – in gaps' he found in any statute.[2] Thus, restraint was the rule in regard to the court's capacity to do justice by 'covering the field'[3] in any statute, in order to do justice. Even if *lacunae* existed, it was thought, it was not the business of the court. Rather the remedy lay with the legislature in amending the statute.[4] This attitude was transported to British colonies of which Nigeria was one. Several Nigerian cases have been decided in line with this approach. But in point of time, it has been realized even in England that this attitude cannot always adequately meet the ends of justice, hence the adoption of a new attitude called the 'purposive approach', which embraces the *jus dare* conception as necessary in contemporary judicial method. This 'new' approach, in some respect, is not entirely new because it is an expansion of an aspect of the old declaratory theory – the mischief rule; which could also be viewed as a re-engineering and glorification of the old mischief rule in a new gab, but with renewed vigor.

This paper aims to illustrate the increasing weakness of *jus dicere* (otherwise called the Declaratory or Phonographic theory) in modern judicial praxis. A random sampling of cases decided under the Public Officers Protection Act[5] has helped to reveal the absurdity or injustice that can often result from an undue adherence to the *jus dicere* or the declaratory theory of judicial methodology in contemporary times.

2. See, *Seaford Court Estates Ltd. v. Asher*[1949] 2 KB 481 & *Magor & St. Mellon's R. D. C. v. Newport Corporation*[1952] AC 189.
3. 'Covering the field' in this context is used as an aphorism for filling a lacuna and not the same as what it means in constitutional law.
4. See the dictum of Lord Simmonds in *Magor & St. Mellon's R. D. C. v. Newport Corporation (supra)* at 191.
5. Each state also has its Public Officers Protection Law.

The discussion which follows opens with a synoptic re-statement of the major cannons of statutory construction, all of which constitute varied expressions of the declaratory theory. Next, we propose to examine the basis for a shift in attitude towards a new (purposive) approach in England. Thirdly, we hope to embark on a random sampling of cases decided under the Public Officer's Protection Act[6], in order to show that the conditions which prompted the desire to seek new ways of doing justice with statute law in England are equally present in Nigeria. Finally, an argument will be made that, although it may not be desirable to completely supplant the *jus dicere* with the *jus dare*, courts should be more predisposed to invoking the latter approach in appropriate cases; particularly those which touch upon social justice concerns. The preference for *jus dare* in our context is premised on the fact that many modern legislative instruments encapsulate a great deal of social policy or social justice objectives, which are aimed at redressing the widening gaps in the socio-economic strata of society, in an increasingly globalized world of competition and free market economy.

Cannons of Statutory Construction: a Synoptic Re-Statement of *Jus Dicere*

Cannons of statutory construction or interpretation of statutes are a result of an attempt by common law courts at finding the intention of Parliament in enacting a given statute and to give effect to it[7]. Yet, even as onerous as the task appears, the judge was not expected to be anything but a passive vehicle in the administration of justice; doing but what he should, not according to his own notion of justice but in accordance with the will of the legislature;

6. Cap P41 LFN 2004.
7. See**,** C.C.Nweze: '*Eugenes: The Sociology of a Judicial Ideology'* in C.C.Nweze [Ed]: *Justice in the Judicial* Process, Enugu, 4th Dimension Pub. Co. Ltd.(2003)p. 6.

Notwithstanding that the supposed 'will' may have lost its potency or in some other way may have been rendered unhelpful in meting out justice, in regard to the facts in hand.[8]

Leading the train of cannons in this engagement is the plain meaning rule, popularly referred to as *The Literal Rule*.[9] The rule is that, where the words used in the statute are plain and unambiguous the court should adhere to their ordinary and grammatical construction, as representing the intent of the law maker. It does not matter if such literal interpretation results in absurd or undesirable consequences. An important disadvantage of relying on the literal rule always is that it could constitute a gloss upon the face of justice and blur its vision. Human communication through the use of words is not always very easy as words used, verbal or written, can mean many things, depending on the context in which they are used. Absurd consequences often arise by reason of such textual [or contextual] appraisal of [English] words. In order to forestall this scenario a way out had to be fashioned by English courts. To the extent that the literal rule could sometimes work hardship by producing absurd or jaundiced outcomes, the *Golden Rule* may be resorted to as alternative cannon.[10] *The Golden rule* is that, it is infinitely better to adhere to the plain and grammatical meaning of words used, unless in doing so it results in absurd consequences or manifest injustice. Should that happen, the court is required to construe the words and place such interpretation on it that would remove the absurdity and avoid the undesirable consequences. Nevertheless, the court, even in applying the golden rule, is not expected to go outside the four walls of the statute itself, but work within its precincts. The

8. *Ibid.*
9. Enunciated in the *Sussex Peerage Case*(1844) 8 E.R 1034.
10. Otherwise known as the Rule in Heydon's Case(1584) 76.ER 637.

underlying basis of the Golden rule is that Parliament did not intend to legislate on absurdity.[11]

The Mischief Rule[12], which is, in fact, the earliest cannon, differs from the *Literal and Golden Rules*. Here the court does not work within the confines of the language of the statute in order to discover the intention of parliament. It could review the historical antecedents of the legislation, which necessitated its enactment, using the efficacy of the Common law as the raw material to guide the inquiry. This option becomes necessary where even the Golden rule proves unhelpful in finding the true intention of parliament in a given case. As it is often the case, Parliament may not always foresee varied future circumstances that may attenuate the implementation of a given measure contained in a statute. Such varied circumstances arise after the law has been passed so that the challenges that face the court in its interpretative jurisdiction require more than grammatical construction. Experience has shown that the common law court resorts to the mischief rule to find the true intent of parliament, which is expected to be discerned from an appreciation of the objective which the statute was aimed at attaining and in respect of which the Common law failed to adequately address. This approach was first adopted in *Hayden's Case.* The mischief rule never permitted a judge to look beyond the common law in order to discover the intention of Parliament. He had no right to consider any other extrinsic material beside an evaluation of the common law position prior to the Act. To do otherwise was considered as tantamount to judicial law-making; an anti-thesis of the doctrine of the separation of powers. A judge was therefore required to act with the utmost restraint so as to avoid having to unwittingly engage in legislative exercise.

11. Enunciation of this rule at that time was applauded as something revolutionary. See, E.R.Hopkins: "The Literal cannon & The Golden Rule" (1937) 14 *Canadian Bar Review* 689 cited in C.C. Nweze, *op. cit.*
12. Otherwise known as the *Rule in Hayden's Case*(1584) 76.ER 637.

The maxim that guided this attitude was expressed as *ita scriptum est judicium est quase juis dictum*; which may be explained to mean: it is written and as such judgment is a declaration of the law as made by parliament, whose intention in making it is to be gathered from the words used. Thus Francis Bacon is quoted as having stated that

> Judges ought to remember that their office is *jus dicere*, and not *jus dare*; to interpret the law and not to make or give law.[13]

The above underscores what has been described as the "Declaratory" or "phonographic" theory of judicial method.[14] This theory evolved from the experience of English judges, arising from the 17th century struggle between king and parliament, contesting for supremacy in legislative power. The judges took sides with parliament. This move greatly enhanced the triumph of parliament over the Crown and, ultimately, helped to the latter to entrench its sovereignty as the first principle in British constitutional law and praxis. As a corollary the willingness of the courts to accept almost unquestioningly and to presume the correctness of parliamentary Acts was reflected in the literal rule of interpretation of statutes, sustained in turn by the worshipful doctrine of *stare decisis*. However, as stated earlier on, the literal rule was not the first rule; rather it was formulated to mitigate the hardship occasioned by the age-old mischief rule before it. The mischief rule was a practical expression of the attitude of the Pre-17th century English judge, whose almost pathological attachment to the common law was such that he saw the statute law as an intrusion of, or at best, a gloss upon the common law[15]. Thus he was wont to ask the

13. See**,** Bacon, F Essays**,** quoted in C.C.Nweze, *op cit* p. 11.
14. *Ibid*.p 12.
15. The royal justices had cause to be skeptical of the legitimacy of statute law, because many of the Kings were involved in flagrant abuses of the use of the Prerogative, the principal means by means by which the Sovereign made positive

questions: "what was the common law before the Act?" "What mischief did parliament intend to curb through the legislation in question?" "What remedy or cure has parliament appointed to cure it?" But adherence to this approach had its drawbacks, because the language used may not have adequately expressed the objective of the legislation or it could be that there is obscurity as the words stand. It was this drawback that led to the formulation of the literal rule. It just happened that by 1884 when the literal rule came on board, the courts had already confirmed the supremacy of parliament and were now more predisposed to upholding its intentions as contained in the enactment, even if it meant a complete change and not merely a gloss upon the common law.

In emphasizing that the intention of parliament is to be gathered from the words used in the legislation, the courts de-emphasized any further attempts at a backward integration with the common law as they did with the mischief rule. This was so because such an approach almost always was likely to lead to absurd results. It was in the light of this that even as late as 1952, Lord Bramwell declared:

> it is infinitely better to adhere to the words of an Act of parliament and leave the legislature to set it right than alter those words according to one's notion of an absurdity.[16]

Happily, it was realized quite early that the likes of Lord Bramwell would remain in the minority, in that undue adherence to

law. Many of the laws were quite unpopular with the people. But the courts were helpless, l*et a*lone Parliament which, at the time, played a less significant role in legislation. It was not until 1689 when Parliament, with the active support of the courts, succeeded in severely limiting the king's prerogative powers in favour of Parliament in legislative affairs. See, Bannette, H.: *Constitutional & Administrative Law* (Cavendish Publishing Co. Ltd., London 2006) p. 89.

16. See, *Black-Clawson Int'l v. Papier Werk* [1952] AC 189 at 191.

grammatical construction of words too often results in absurd consequences, which really did not represent the true intention of parliament. And, steeped in the belief that parliament was so eminent and benevolent that it did not intend to legislate on absurdities, the courts were prepared to depart from undue adherence to the literal and grammatical meaning of words; if to do so would avoid consequences which were undesirable. Thus, Lord Reid declared *ex curia*:

> There was a time when it was thought almost indecent to suggest that judges make law….they only declare it. But we do not believe in fairy tales anymore.[17]

The above words are the forerunners to the modern approach to the interpretation of British Acts of parliament- what is now termed "the purposive approach" - an expansion of the old mischief and golden rules.

Jus Dare: A Purposive Rule of Construction

Although Lord Denning[18] had blazed the trail in espousing gap-filling, the law-making power of the English judge, Lord Griffiths' dictum in *Pepper [Inspector of Taxes] v. Hart* [19] is perceived as the foundation for the contemporary dimension of the purposive approach, because Lord Simmonds, sitting on appeal over the case would not hear of such 'travesty' of English convention when he admonished Lord Denning for daring to fill in gaps in statute law. Thus in the words of Lord Griffiths in *Pepper*:

17. See, Lord Reid: "The Judge as the Law Maker" Presidential Address to The Holds worth Club London (1975)cited in C. C. Nweze, *Op cit* p.11.
18. See, *Magor and St. Melons Rural District Council v. Newport Corp* (1940)2All ER1226.
19. [1993]1All ER 24 at 64.

> The days have long passed when the courts adopted a strict constructionist view of interpretation, which requires them to adopt the literal meaning of language. The courts must adopt a purposive approach which seeks to give effect to the true purpose of the legislation.

The purposive approach does not confine itself to merely *determining the intention of parliament* from the words used but goes a step further to *determine the purpose of the legislation* and give effect to it. In doing this the court could look beyond the confines of the language of the statute and the position of the common law prior to it. It can even take into account the prevailing social conditions at the time the case is being heard, in an effort to discover the true purpose of the legislation. This calls for a broad and liberal interpretation that is necessary to protect and preserve the dynamic character of the law as an instrument of social engineering. The words of retired Honourable Justice Oputa are quite illuminating; in regard to the proper attitude a court ought to adopt in order to achieve a purposeful interpretation:[20]

> Law is like an old but vigorous tree which has its roots in the past, but takes on new grafts, puts on new sprouts, and occasionally drops dead wood. He is a better judge who accepts the challenges to be the husbandman [and who does] the necessary pruning, who accepts to adapt the existing law to a fast changing society. Such judge must shake off all the inhibiting legacy of the past and assume a

20. The present writer likes to refer to this prescription as "Oputa's fig tree technique"; analogous to the biblical fig tree that Jesus Christ had cursed for its failure to bear fruits. See, Matthew 21:18-19. The idea conveyed here is that a statute that cannot yield fruits of justice should be cursed and discarded.

> dynamic role in interpreting the law to meet the realization of all the human rights of our oppressed and disadvantaged citizenry.[21]

As stated earlier, the purposive rule is generally seen as a glorification or a re-engineering of the old mischief rule, which was also aimed at judicial resolution of social problems that were beyond the capacity of the common law to resolve. It was therefore thought that if a literal construction of the language of a statute proved unhelpful in fulfilling its objective the judge would be right to take into account the weakness of the common law, which prompted the enactment of an Act.

It is true that traditionally there are probably few legal systems beside the common law that possess a zealous concern for the protection of individual rights. But these rights exist as aggregates of case law, since the common law is unwritten. More over the British constitution is itself unwritten, with parliament as the supreme legislative authority, without limitation by any person, thing or authority. But inevitable problems were soon to be encountered even by English courts through an unyielding adherence to the declaratory theory, particularly, in regard to the enforcement of individual rights which were increasingly being incorporated in statutes; gauged and bench – marked by international instruments. Indeed, the variety categorized as "human rights"[22] are generally perceived as evolving and

21. See, Hon C.A Oputa: **"**Forward and the Ascription of Glory" in C.C.Nweze, *et al* [eds]: *Imprints on law & Jurisprudence: Essays in Honour of Justice E. C. Ubaezonu,JCA* Enugu, (1996) 4th Dimension Pub.Co.Ltd. p. xiv.
22. Used here in contra-distinction to Common Law rights in Tort, Contract, etc See, for example the 1981 Human Rights Act of the UK which is reckoned as containing 'Convention rights', categorized to be of higher normative character than the Common Law private rights, because of their International (treaty) flavour (the UDHR, 1948 and the European Treaty of Rome 1950, which established the European Convention on Human Rights). Again, the whole of Chapters 2 and 4 of the 1999 Constitution of Nigeria are a domestication of the same and allied treaty provisions.

expanding on geometric proportion. This, of course, is a reflection of the equally changing socio-economic conditions which have a direct bearing on the individual's rights. More often than not social or economic conditions which have a direct bearing on the individual's survival or sustenance may change much faster than the law could change or much faster than the law even anticipated. Thus, if the court were to adhere to only the intention of parliament as could be gathered from the words used, that intention may have been directed at solving problems that were already known or were reasonably foreseeable, but not those that could never have been anticipated by parliament at the time the law was passed. What may really be required of a court in such circumstances, in the absence of any legislative amendment is to administer justice according to the spirit of the law and not just its letters - functional justice and not just technical or "legal" justice. In other words, justice according to the letters and spirit of the law and not merely justice according to the letters of the law, which the phonographic theory is more suited to.

Judicial Construction of the Public Officers' Protection Act of Nigeria: the Poverty of the Declaratory Theory

The first Public Officers' Protection Act applicable to Nigeria was enacted in 1916 to replace the received English law - the Public Authorities Protection Act of 1893 - which is a statute of general application. However, the purpose of the English Act was to protect public authorities, in their "corporate personality", when engaged in the discharge of public responsibilities imposed by parliament. But the Nigerian Act is aimed at protecting "public officers as individuals" in the discharge of public duties.[23] Thus, section 2 of the Nigerian legislation provides that:

23. See the Long Title to the Act and *Momoh v. Okewale* (1977) NSCC 365, *Alapiki v. Gov. of Rivers State* (1991) 8 NWLR (Pt.211) 575.

> Where any action, prosecution, or other proceeding is commenced against any person for any act done in pursuance or execution of any law, duty or authority, the following provisions shall have effect:-
>
> "the action, prosecution, or proceeding, shall not lie or be instituted unless it is commenced within three months next after the act, neglect or default complained of, or injury, …within three months next after the ceasing thereof.

In *Ekeogu v. Aliri*[24] the Supreme Court stated that the Act is designed to protect a public officer against any action, prosecution or other proceeding; and for any act done in pursuance of or execution of any law, public duty, or authority; or for any alleged neglect or default in the execution of any law, duty or authority. The limitation period of three months within which actions may be brought is the crux of the matter in this essay, especially as construed by the courts. In *Fasoro v. Milborne*[25] a District Officer ordered a policeman to slap the Plaintiff. The Plaintiff commenced proceedings against the District Officer after three months of the incident of assault. The action was rightly held to be statute barred. *No reason was given for the delay in bringing the action*. But in *Obiefuna v. Okoye*[26] the Plaintiff was injured while driving his motor bike, which was knocked down by the defendant who was in turn driving a police truck. He commenced this proceeding after three months of the accident, *because he had been in hospital for treatment for quite sometime.* Nevertheless, the court held than his claim must fail as one that is statute – barred. Again, in *Ekeoga v.*

24. (1991) 3 NWLR (Pt.179) 258. But it does not afford protection for conduct that is criminal or acts done outside the scope of employment. See, *Yabugbe v. C.O.P* (1992) 4 NWLR(Pt.234) 152.
25. (1923) 4 NLR 85.
26. (1965) All NLR 357.

Aliri[27] The Plaintiff was injured in the eye by her class teacher in a public school. *She went through different hospitals for treatment during which time three months had passed*. But, quite unfortunately, she lost the eye. She sued for damages by her next friend (the mother). It was held that the action was statute – barred!

In all the fore going cases the plaintiffs went back home broken and frustrated as no judicial relief was available to them. The express letters of the statute in question had to be adhered to despite the yearning expectation of justice by the aggrieved. Maybe if the court had gone beyond merely declaring the literal language of the Act it might have arrived at a different conclusion. Maybe if any of the courts had considered that social conditions that affect economic capacities of families vary from home to home it might have realized that a situation such as revealed by the facts in *Obiefuna's* and *Ekeogu's* cases, show that an injured and sick person is not in a position to file an action in court. He necessarily has to be up and doing to be able to raise the funds with which to instruct counsel to take up his case, especially in a country where there is complete absence of state funded legal aid in civil cases.

Perhaps it is in the case of *Adigun v. Ayinde*[28] that one witnesses the grim reality of the hardship and injustice that results from a strictly literal construction of the section of the Act under review. The facts are that, the Appellant who was a civil servant with the Federal Ministry of Agriculture had an automobile accident and sustained very serious injuries in the course of a trip on an official assignment. The car was an official one and it was driven by the first Appellant, a driver in the ministry. The Appellant had been rushed to the University Teaching Hospital in Ibadan, where he spent 18months. From there he was further referred to a hospital in Edinburgh in the U.K. for treatment. He

27. *Supra.*
28. (1993) 8 NWLR (Pt.313) 516.

spent quite a long time there. And although he survived the accident, he was paralyzed from the waist downwards owing to damage done to his spinal cord. As at the time of the accident (February 10 1978) he was just 33 years. He spent about three years from the date of the accident, moving from one hospital to the other in search of medical treatment. His disability upon final discharge from hospital was assessed at 100%. On the 21st of January 1981 (a period of about three years) he commenced this action against the 1st Respondent and his employers, the Federal Ministry of Agriculture before the High Court in Minna. The Respondent objected to the hearing of the suit because, since the first Respondent was a civil servant he was covered by the provision of the Public Officers Protection Act, to the end that a suit such as the one in hand could not be brought against him after three months from the date of the accident. The trial court upheld the objection and dismissed the suit as one which is statute-barred. The Court of Appeal upheld the Order dismissing the claim. On further appeal to the Supreme Court the decision of the two Lower Courts was upheld. The most regrettable thing is that although the apex court recognized the injustice in the statute, it nevertheless adopted the literal and plain interpretation of the Act and held that the action was statute – barred all the same. It chose to play the ostrich game in the face of such a grave challenge to justice. In the words of the Honourable Justice Alfred Karibi-Whyte:

> The defendant has succeeded on technicality, which is not underserved but also exposes the injustice in the protection of the public officer. It is unconscionable that a public officer should be deprived of a remedy he ordinarily would have enjoyed merely because the injury was caused by another public officer, where both of them were lawfully carrying out their duty. Again, the public officer was unable to bring action within the prescribed period because the defendants were

> undertaking his treatment in accordance with his conditions of service. I think the 2nd and 3rd respondents should review the case with especial sympathy in the interest of the public service and the morale of serving officers, and pay to the plaintiff whatever is due to him.[29]

In the same vain, the Honourable Justice Alpha Belgore JSC stated that:

> I share the sentiments expressed in the penultimate paragraph of the judgment that the law has been cruel to the appellant. The appellant has been caught in the strait jacket of computation of time within which to sue and legally seems to have no remedy. The remedy he cannot enforce is that of the litigation in Court of law because his suit is statute-barred. The notwithstanding there is the inbuilt remedy against this type of situation in all civilized governments, which I believe will be available to the appellant. Administratively, from the Head of Department to the Governor in the state, or from Head of Department along communication line to Head of State at Federal level *ex-gratia* payments are usually made victims of this type of misfortune. I am very sure that if pursued, these legal decisions will not be a bar to ex-gratia payment once a petition is written with this judgment attached.[30]

29. *Ibid*, at p. 536-537.
30 *Ibid*, at p. 537.

In no less despondent tone, the usually pragmatic (but not in this case, though) the Honourable Olajide Olatawura, JSC (as he then was) expressed his own sentiments in the following words:

> This unfortunate incident occurred when the appellant was on duty. The joy of service is the benefit due to dutiful and loyal public servants after retirement. If his service is cut short through no fault of his as in this case, he should not be cast away in his hour of need. As at the time of the accident he was just 33 years of age. He is now unable to fend for himself, his wife and children. These are his dependants. To leave him without any compensation based on the usual computation will demoralize public servants. His services to the nation have been cut short by an event over which he had no control. He carries a scar, a deformity and all other disadvantages for the rest of his life. He should not be cast away like a rag no longer useful for even a dirty job. He deserves pity and compassion. I will therefore order that a copy of this judgment be sent to the 3rd defendant to consider what is due to the plaintiff whose services were terminated by the accident suffered in the course of duty.[31]

The Incredulity of the Lamentations of the Supreme Court

Based on the facts and the foregoing remarks, one could feel justified to respectfully describe the above dicta as epitomizing the 'lamentations of the Supreme Court'. One may also liken the scenario to part of the dialogue between the fiercely radical French revolutionary and leader of 'the reign of terror', Maximilien

31 *Ibid*, at p.529.

Robespierre[32] and the English political philosopher, Edmund Burke[33]; both of whom were part of the intellectual vanguard - the 'enlightenment'- and of the French Revolution of 1789, *albeit* at opposite ends. Robespierre had bemoaned the onslaught of the counter- revolutionaries and rather helplessly appeared to have wished the revolution had been delayed to enable the major players to negotiate terms tending towards a constitutional monarchy of the English type. This lamentation attracted the attention of Edmund Burke who, in reaction and bewilderment at this *volte face* admonished Robespierre for "killing the bird but pitying its plumage".[34] What the apex court, which is in charge of leading the way in laying down judicial policy for other courts did in *Adigun's case*, with due respect, could be likened to the statement credited to Edmund Burke as stated above. Having "killed the bird of justice" by an undue adherence to *jus dicere*, the court turned *volte face* to "pity its plumage" through the recommendation of *ex-gratia* payment for the sake of the welfare of Adegun's dependants. That approach, it is respectfully submitted, was too lame, timid, inconsequential and unpragmatic. First, the recommendation for "remedial" or administrative treatment is at best only advisory and as such can be ignored. This is obvious in a country notorious for executive contempt for court Orders. How much less would such advisory opinion, laced with sentiments and emotive remarks be treated with any regard? We recall with regret that the judgment was delivered in the era of military rule when even the judiciary survived on the knife's edge. Perhaps this accounts for the rather deft maneuver on the issue by the court. Never the less, it is submitted that the policy of rendering advisory opinion in any case at all should not be encouraged by the

32. (1758-1794).
33. 91729 – 1797).
34. Indeed, at the risk of sounding unduly allegorical, one can further liken this attitude to Portia's admonition of Shylock, in Shakespeare's *Merchant of Venice:* to take his pound of flesh but shed no blood of Venice!

Supreme Court, especially as it is not covered by the Constitution. Rather, the Court should boldly and courageously remain assertive and stay on the side of justice all the times. That takes us to the Second point, which is that our legal system has no provision for advisory opinion. It is only judicial power that has been conferred on the courts in section 6 of the constitution, to decide between parties in (concrete) 'flesh and blood' cases and no more.

Writing about the attributes of judicial power, Ben Nwabueze has stated that its essential attribute is the ability of a judge to give coercive, final, authoritative and binding decisions in all cases brought before him. A panel that lacks these attributes is not engaged in the exercise of judicial power[35]. To this end, an advisory opinion cannot be the product of a valid exercise of judicial power. It is therefore submitted that at the time the apex court was giving its advisory opinion in *Adigun's case* it was no longer exercising judicial power but , probably, moral exhortation. And, as stated earlier, this is too lame and hortatory to be accorded any recognition by the executive arm of government. However, its value may be seen from the perspective of a call for legislative amendment by the legislature, in virtue of the very serious flaw that has been observed in the course of application of the subsisting statute.

Discretion as a Veritable Tool in *Jus Dare*

But, perhaps the most enduring attribute of judicial power is the discretion which a court has in meting out justice in given cases. And, it is in its interpretative jurisdiction that the court has the greatest latitude of discretion to exercise in the interest of justice. Honourable Justice Oputa, in addition to his 'fig tree' theory of statutory construction earlier mentioned, has again supplied a clue to the ideal mindset of a judge in deploying the rich potential of

35. See, Nwabueze, B. O.: *Judicialism in Commonwealth Africa* (Nwamife Publishers, Enugu 1975) Chapter 1.

judicial discretion. According to the great jurist and creative thinker,

> The law will have little relevance if it refuses to address the social issues of the day. Legislators make laws in the abstract but the courts deal with the day to day problems of litigants and attempt to use the laws to solve these problems in such a way as to produce justice….[36]

Having regard to the foregoing submission, it is further submitted that the lamentations of the Supreme Court in the case under review is simply unhelpful. It could have done better. It should have exhibited courage and be creative. It should have taken into account the higher imperatives of justice and fill in the gap in order to make the law functional. It could not have been the intention of the legislature to unjustifiably shut the door against injured persons who, on account of their injury, are incapable of excising their statutory right. A very helpful clue to understanding the mind of the legislature in this regard could be discerned from the proviso to section 2(a) of the Act, which reads:

> Provided that if the action, prosecution or proceeding be at the instance of any person for cause arising while such person was a convict prisoner, it may be commenced within three months after the discharge of such person from prison.[37]

But if in England the courts are abandoning undue adherence to judicial restraint in the mould of *jus dicere* in favour of *jus dare*, how much more a responsibility thrust upon the shoulders of

36. Address presented at the NBA National Conference, Enugu, August, 2003.
37. See also *Ekemode v. Alausa* (1961) 1 All NLR 135 and *Atiyaye v. Permanent Secretary* (1990) 1 NWLR 129 728, which illustrate the fact that public acts worthy of protection under the Act must not only be carried out in the course of execution of a public duty so to do but must bear clear indices of bona fides.

judges in less developed countries(such as Nigeria), with a myriad of socio-economic problems. More over legislation in these climes could be quite slow, so that, as the Honourable Justice Oputa rightly observed, it is the courts that are often, ultimately confronted with these social justice issues, which primarily is the prerogative of the legislature to encapsulate in the statute law. Indeed, they often arise *ex tempore* or *ex improviso*, in the course of proceedings. The brand of purposive construction of statutes being advocated here is sometimes referred to as "judicial activism". It has been variously defined and so are there differing reactions to its legitimacy and efficiency[38]. For our purpose the definition supplied by *Blacks' Law Dictionary* will help to bear out the point being made here. It is defined as a:

> Judicial philosophy which motivates judges to depart from strict adherence to judicial precedents in favour of progressive and new social policies, which are not always consistent with the restraint expected of appellate judges. It is commonly marked by decisions calling for social engineering and occasionally these decisions represent intrusion into legislative and executive matters.[39]

One of the main objections to activism in the judicial arena is that if fully adopted is capable of eroding the high ground on which the glorious doctrine of the separation of powers is erected. But it is submitted that the situation has not been proved in practice to be so grave ever since activism was embraced by courts in America, India and Australia.[40] A measure of activism was

38. See, Kirby, M: *Judicial Activism* (Thompson, Sweet & Maxwell, London, 2004) Chapter 1.
39. 7th Edition.
40. See, Kirby, *op cit*, also, generally, Kirpal, B. N *et al* (eds): *Supreme but not Infallible: Essays in honour of the Supreme Court of India* Oxford University Press, New Delhi, 2004, S. K. Verma, *et al* (eds): *Fifty years of the Supreme Court of India* Indian Law Institute, New Delhi, 2003, Gleeson, A.M: "Global

required in the cases reviewed in this essay. It would be recalled that Lord Griffith expressed the same fear in his admonition of Lord Denning. It would also be recalled that the Mischief rule which English courts relied on to put the statute law in its proper perspective became increasingly viewed with suspicion owing to accident of history.[41] The same kinds of questions which the English judge had to ask under the mischief rule have resonated under the emerging theme of purposive construction of statutes. Of course, whatever the legislature provided for as a remedy, it is the office of the judge faced with the facts and confronted by the demands of justice.

> ……always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for the continuance of the mischief and *pro privato commodo*, and to add force and life to the cure and remedy according to the true intent of the makers of the Act *pro bono publico*.[42]

influences on the Australian Judiciary" (2002) *22 Australian Bar Review 184*, Gleeson, A.M. "Judicial Legitimacy" (2000) *20 Australian Bar Review 4*, Scalia, A. A: *A Matter of Interpretation: Federal Courts and the Law*, Princeton University Press, Princeton, 1997, Wilker, J: "Judicial Tendencies in Statutory construction; Differing Views on the Role of the Judge (2001) *58 New York Survey of American Law*. It should not be assumed that the writer has adjudged adherence to judicial activism as a flawless phenomenon. It has its weaknesses, challenges and paradoxes. See, for example, case analysis and views expressed by scholars such as Hutley, F.C: "The Legal Traditions of Australia as Contrasted with those of the USA" (1981) *55 Australian Law Journal 63*, Hutchinson, A. C: "Heyden' Seek: Looking for Law in the Wrong Places(2003) *29 Monash University Law Journal 85*, Perry, J: "Have the Judges Gone Too Far?: Courts Versus the People" (2003)15:*14 Judicial Officers' Bulletin* (NSW) 25.

41. Circumstances that led to the establishment of Parliament as the supreme law-giver as mentioned earlier on.
42. See, *Lord Hayden's Case*(1584) 76.ER 637.

In contemporary context, the "subtle inventions" to be suppressed in order to combat the mischief could rightly be conceived as developments that occurred subsequent to the passage of an Act, and in respect of which the legislature could never have anticipated. Viewed from such a perspective, Lord Denning intoned

> Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold set of facts which may arise, and even if it were, it is not possible to provide for them in terms free from all ambiguity… A judge, believing …to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsman has not provided for this or that, or has been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give "force and life" to the intention of the legislature. That was clearly laid down by the resolution of the judges in *Hayden's Case*, and it is the safest guide today… Put into homely metaphor it is this: A judge should ask himself the question: if the makers of the Act had themselves come across

> this rock in the texture of it, how would they have straightened it out? He must then do as they would have done. A judge must not alter the material of which it is woven, but he can and should iron out the crispness[43].

In the same light, Judge Learned Hand of the United States District Court stated in *U S v. Klinger.*[44]

> The issue involves the baffling question which comes up so often in the interpretation of all kinds of writings: how far it is proper to read the words out of their literal meanings in order to realize their overriding purpose? It is idle to add to the acres of paper and streams of ink that have been devoted to the discussion? When we ask what Congress "intended", usually there can be no answer, if what we can mean is what any person or group of persons actually had in mind. Flinch as we may, what we do, and must do, is to project ourselves, as best as we can, into the position of those who uttered the words and to impute to them how they would have dealt with the concrete occasion. He who supposes that he can be certain of the result is the least fitted for the attempt.

Again, in *Magor and St. Melons R.D.C. v. Newport Corp*[45], Denning stated that:

43. See, *Seaford Court Estate Ltd v. Asher* (1949) 2KB.481.
44. 199 F. 2d 645 at 648 (1952).
45. *Supra.*

> We do not sit here to pull the language of Parliament and of Ministers to pieces and make nonsense of it. That is an easy thing to do, and it is a thing to which lawyers are often prone. We sit here to find out their intention by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis.

Although Denning's progressive stance in *Seaford* received tacit approval from the House of Lords, his second attempt in *Magor* was rebuffed by the Lords (led by Lord Simmonds).[46] But posterity vindicated him when, about twenty years later, Simmonds' homily on the need for restraint became, in Lord Reid's estimation, "a fairy tale not worthy of belief any more".[47] Indeed, *jus dare* is now so well entrenched in English judicial practice that Lord Griffiths, in another passage in his speech in *Pepper (Inspector of Taxes*) recognized the fact that the courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears on the background against which the legislation was enacted. Why then cut ourselves off from the one source in which may be found an authoritative statement of the intention with which the legislation is placed before the parliament.[48]

Conclusion

Traditionally the role of the judiciary has been restricted to the "interpretation" of the law as made by the legislature. This task has always been limited to finding the intention of the law-giver and to give effect to it. It has not been the business of the court to consider whether content of any piece of legislation had out - lived its usefulness or is such as may be considered inadequate for the

46. See, *(supra).*
47. See, Lord Reid: "The Judge as the Law Maker" Presidential Address to The Holds worth Club(1975) cited in C. C. Nweze, *Op cit* p.11.
48. Magor, *supra* at p. 50.

realization of the objectives or purpose the law was made. Even if a judge felt so he was not expected to do any thing about it, but to apply its provisions to the facts presented to him for adjudication. Whether the particular litigants felt any sense of justice from the decision given was immaterial. Observable weaknesses or inadequacies in the law were expected to be remedied by the legislature whenever they could find occasion to do so. This attitude has not changed much, having regard to decisions such as *Obiefuna, Ekeogo and Adigun,* respectively. Never the less the idea that the purposive doctrine of judicial method in the mould of "judicial activism" is an ideology which is actuated by demands of social realities of our contemporary world of increasing competition, leading in turn to the widening of socio – economic gaps , is a contention that cannot be wished away.

Whatever may be the objection to its deployment does not diminish the fact that it seems to present a new horizon for an integrated approach to the dispensation of public justice; so as to circumvent the kind of needless despondency witnessed in *Adigun's.* Its complete imbibition appears imminent, because even in England the courts there have risen to the occasion, as even Lord Griffiths had long changed the tune of his song from *jus dicere* to *jus dare* in his rather revolutionary dictum in *Pepper (Inspector of Taxes).* What is required now is to create the right conditions that will assist in nurturing it to full bloom. It is hoped that the complete enthronement of activism [to formally operate beside the traditional cannons] will constitute one of the dividends of democracy in Nigeria.