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KAMPALA INTERNATIONAL UNIVERSITY LAW JOURNAL (KIULJ) is the official journal of the School of Law, Kampala International University. It is a peer-reviewed journal providing distinctive and insightful analysis of legal concepts, operation of legal institutions and relationships between law and other concepts. It is guided in the true academic spirit of objectivity and critical investigation of topical and contemporary issues resulting from the interface between law and society. The result is a high-quality account of in-depth assessment of the strengths and weaknesses of particular legal regimes with the view to introducing reforms. In furtherance of the requirements of advanced academic scholarship, the Journal places high premium on originality and contribution to knowledge, plain and conventional language, and full acknowledgment of sources of information among other things. It is superintended by a Board of respected academics, lawyers, and other legal professionals.

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Scope

Kampala International University Law Journal (KIULJ) is the official Journal of the School of Law, Kampala International University, Uganda. It is a peer-reviewed Journal providing an objective and industry focused analysis of national and international legal, policy and ethical issues. The Journal publishes well researched articles that are in sync with sound academic interrogation and professional experience on topical, legal, business, financial, investment, economic and policy issues and other sectors.

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FROM THE EDITORIAL SUITE

The primary objective of the **KAMPALA INTERNATIONAL UNIVERSITY LAW JOURNAL (KIULJ)** is to provide as platform for a robust intellectual discourse, through the publication of incisive and insightful articles and other contributions from a variety of scholars, jurists and practitioners across jurisdictions. The desire to accomplish this objective guides the choice of the materials being presented to the reading public in every edition. The peer review and editing processes of the papers that are finally selected for publication are equally influenced largely by the pursuit of this goal.

To this end, articles from seasoned scholars and practitioners in each edition address a wide spectrum of issues from different branches of the law, such as, International Criminal Law, Law of International Institutions, Environmental Law, Human Rights Law, Medical Law, Oil and Gas Law, Constitutional Law, Corporate Governance to mention but a few. You will, no doubt, find these scholarly works a worthy contribution to knowledge in their respective fields.

On behalf of the Editorial Board, I wish to appreciate all our reviewers, internal and external, for their constructive criticisms, comments and suggestions. These go a long way to enrich the quality of the papers published in this Journal. The various contributors who painstakingly addressed the observations and suggestions of the reviewers, thus facilitating the achievement of the purpose of the review process also deserve our commendation.

We also, with a grateful heart, acknowledge the interest our teeming readers have continued to show in the succeeding editions of the journal just as we assure them of our readiness to give them the best always. We equally thank our editorial consultants for their useful advice and comments that have contributed to the continuous improvement of the quality of the journal. Legal practitioners and scholars are hereby informed that contributions to our journal are received on a rolling basis. They should feel free to send in their manuscripts and ensure they comply with the submission guidelines as spelt out in the Call for Papers obtainable from the journal's website (www.kiulj.kiu.ac.ug). All contributions should be addressed to the Editor-in-Chief and forwarded to the email addresses supplied in this edition.

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EROSION OF THE PHILOSOPHY OF POSITIVISM THROUGH JUDICIAL ACTIVISM: EMERGING TREND IN THE PRINCIPLE OF JUDICIAL PRECEDENT IN NIGERIA

IGBONOH A JOSHUA, PhD*

Abstract

Positivism, regarded as a reaction to the weaknesses of Natural Law, is a philosophy that denies the reality of metaphysics, regarded as unintelligible and scientificably untestable aprori or the ought standard. This is the basis on which Austin insisted that law and other indices of value judgments have no meeting point thus informing Kelsen's pure theory of law. This also forms the basis on which the Nigerian Constitution claims superiority over every other law, voiding all other contrary norms, and the principle of separation of powers under the Nigerian Constitution. However, recent judicial activism by Nigerian Courts seem to challenge the timeless values of positivism, including the principles informing judicial precedent and limiting judicial function to interpretation of Statutes. This paper by doctrinal approach found that although the trend, the world over, seems to move from whether Judges make laws to how far they should make incursion into legislative function yet the extent to which Nigerian Courts now go may challenge Constitutional framework of the Nigerian State. The paper thus warns and recommends that Nigerian Courts must thread this new path cautiously, by avoiding politically sensitive terrain that may complicate the already embattled image of Nigerian Judges.

Keywords: Erosion, Philosophy, Positivism, and Judicial Precedent.

Introduction

An outright description of positivism as a jurisprudential school of thought opposed to natural law, inspired by the Renaissance which denies the reality of the metaphysical entities, underscoring the belief that reality is only measurable on the basis of facts and factual phenomenon,[1] will no doubt generate the question: what is jurisprudence?

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[1] R.N Ndubuisi, O.E. Nathaniel, *Issues in Jurisprudence and Principles of Human Rights* (Dmodus Publishers, 2002) Yaba-Lagos p.112

The word 'jurisprudence' derives from the Latin word *'juris-prudentia',* meaning knowledge of law or skill in law, concentrating on the formal analysis of legal concepts without particularity to any subject in law,[2] It is the 'lawyer's extraversion. It is the lawyer's examination of the precepts, ideals and techniques of law in the light derived from present knowledge of disciplines other than the law'.[3] After the manner of John Austin the father of English jurisprudence, it is simply referred to as "the formal analysis of legal concepts" and in its broader parlance and technical complexion, has been defined as "the science of the first principles of the civil law" devoted to form, rather than detail or substance; and analyzing the first principles of law without reference to the historical origin or development; dealing with law as it is, rather than as it ought to be.[4]

Being an analytical and philosophical arm of the law; it is expected that there must be as many views as there are philosophers on various subjects of legal analysis, which over the years have been grouped and aligned along some streamlined schools of thought like the natural law, the positivists, the historical school, the Sociological school, the realist school, the Marxist school and all their derivatives. In this paper, the focus is on the positivist school, with a view to finding a working definition and then makes some critical observations and proffer recommendations that could align the concept with contemporary needs.

Conceptual Definitions

From the topic, several concepts, including erosion, philosophy, positivism, legal activism and judicial precedent call for clarification. However, because of the extensive discussion on the philosophy of positivism and having regards to the interface of intended line of discussion with other concepts, the paper has chosen to approach this topic from the perspective of an all-embracing discussion and critique, to avoid verbosity.

It is in the light of this the paper concentrates on the definition of positivism for a start, accompanied by its critique and then, how judicial activism of Nigerian Courts has eroded the hard line views of positivists in contemporary times.

Basic Tenets of Positivism

Webster's Dictionary defines positivism as:

> A philosophical system founded by Augustine Comte, which concerns itself only with positive facts and phenomena, excluding speculation upon ultimate causes and origin.[5]

[2] J.N Samba, *Fundamental Concepts of Jurisprudence* (Bookmakers publishing Ltd. 2007)1
[3] *Ibid*
[4] F.J. Fittgerald *Salmond on Jurisprudence* (Sweet and Maxwell, 1966)
[5] M.Webster. 'Logical Positivism' <*www.merrian-webster.com*> accessed on 23-08-2021

It is a philosophical school inspired by the renaissance thinking, which denies the reality of the metaphysical, underscoring the belief that reality is only measurable on the basis of facts and factual phenomenon. As Lloyd observed:

> The Renaissance gave impetus to positivist approach, with its emphasis on secular studies of science and humanism. The empiricism associated with observation as a means of ascertaining the laws of science was attended with increasingly spectacular achievements and cast its influence, over every field of human endeavor[6]

Thus, in its materialistic views, positivism was prompted by the notion that insist on immaterial ideas, deducible from metaphysical principles which are described as uncertain, unreal and therefore lacking in objective reality.[7] Central to argument of positivism therefore, is the claim that any pursuit footed in the metaphysical is unintelligible because, there is no affinity between law and *apriori* or extraneous moral ideals. Positivism reasons that law having been enacted and posited by a properly constituted authority is autonomous and its standard or validity must therefore not be measured by some metaphysical 'ought' or standard[8]. It holds strenuously to the principle that legal rules are valid only because they are enacted by an existing political authority or accepted as binding in a given society, not because they are grounded in morality or natural law[9], It promotes the superiority of laws, made by constituted authority over and above classical natural law, thus rejecting the assertion of natural law theory that positive law is relative upon natural law. It insists that law is moral-neutral and therefore, its justness or fairness must not be measured on the standard of morality. The study of the nature of law, it posits, must be the study of law as it is and not as it ought to be[10]

Indeed, the positivists deny the concept of human rights, natural rights, natural justice, and moral ideals, which they consider as nonsense and unreal because they are issues incapable of verification, experimentation, observation or fact verification[11]. To some earliest philosophers like Hart, Bentham and Austin, positivism is a school of thought that does not believe that law derives from some higher guiding principles but a set of rules consciously developed by people for

[6] M.D.A Freeman, *Lloyds Introduction to Jurisprudence'* 8th edn. (Sweet & Maxwell, 2008)112 <*www.amazon.com/Lloyds-Intro...*> accessed on 27-08-2021
[7] *Ibid*
[8] *Ibid* at p.114
[9] Samba, *op.cit*
[10] J.M. Elegido, *Jurisprudence* (Spectrum Books, 2012)49
[11] R.N. Ndubuisi, O.E. Nathaniel, *Issues in Jurisprudence and Principles of Human Rights*, *op.cit* at 114

their own mutual benefit.[12] Indeed, scholars like Stanford subscribe to these views of early philosophers and insist that validity of a law is determined by the social facts and not the meritorious nature of the law; that "the existence of law is one thing but its merit and demerit is another so that whether it be or be not conformable on an assumed standard, is a different enquiry.[13] No wonder, Stahl asserted that "there is no law but positive law"[14]. This is why some scholars refer to positivism as the only authentic knowledge arising from actual experience, through strict scientific method and consequently, that it is the only way metaphysical speculation could be avoided to ensure the dawn of the purest form of law'.[15] To Ogwo therefore, positivism is synonymous with making, positing, postulating, stating or establishing the law whose validity is determined simply by the fact of their enactment and not on the scale of some intrinsic matters of fairness or justness.[16] Indeed, in recent times, a new crop of positivists have now arisen to assert that:

> *In its broadest sense, positivism is a rejection of metaphysics. It is a position that holds that the goal of knowledge is experience. The purpose of science is simply to stick to what we can observe and measure. Knowledge of anything beyond that, a positivist would hold, is impossible.*[17]

Looking at the anatomy of this concept, the positivists assert that it is a whole bundle of thesis, made up to *pedigree* and *separability* representing laws enacted in accordance with some social conventions and the third, which is the *discretion* thesis, associated with Judge's-made laws, not clearly founded on any particular law made by the legislature[18]. This crop of positivists so strongly deny all other sources of law, natural law in particular. Tracing law to its empirical foundation, they define law as a rule of behavior, actually made and authorized by men for other men, and not natural-based[19]. They believe that the only way to protect law from abuse of varying moral and metaphysical interpretation is to exclude it from non-fact-based concept in its interpretation because, as they assert, law is not analyzable to *aproiri* element but concrete or factual situation and therefore self-valedictory. Justifying the stand point of legal positivism, Hume said:

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[12] P. Schofield, 'Jeremy Bentham and the Origin of Legal Positivism' <*https://doi.org/10.1012/9781108636377.009*> accessed on 27-08-2021.
[13] *Ibid.*
[14] B.C. Stahl, 'Positivism or Non-Positivism-Tertium Non Datur' <*www.researchgate.net>publication>22...*> accessed on 27-08-2021.
[15] J.I. Omoregbe, *An Introduction to Philosophical Jurisprudence* (Jaja Educational Research and Publishers Ltd, 1997) p.123
[16] B. Ogwo, The Concept of Positivism: The Jurisprudential Antidote Against Natural Law, *CulL Vol.4 No.1 (2011) 95 at 95*
[17] Ibid, p.97
[18] K.E. Himma, 'Legal Positivism' <*https://www.iep.utn.edu/legalpositivism*> accessed on 2021
[19] *Ibid*

> It is impossible for normative proposition to be derived from factual proposition. We must restrict ourselves to what is, which we are acquainted with, not with what ought to be, because there is no logical justification for deriving what ought to be the case from the analysis of what is actually the case[20]

Indeed, to Raz, so far as the police or court recognize a certain norm as law, based on its official status, nothing disqualifies its enforcement[21]. The only irresistible implication derivable from this rigid theory, according to Ndubuisi, is that the validity of a positive law does not depend on its conformity with good reason, human conscience, moral arguments, or the capacity of man to distinguish between what is good or bad; in terms of values[22]. What this sums up to is that law not being susceptible to antithetical view, those in authority are empowered to enforce it by coercion, even if it is well known as obnoxious and abusing to the sensibilities of the society it seeks to govern.

As an aversion to this rather otiose standpoint in a politically pro-active world, Ogwo cited John Austin to argue, rightly in our view that to what extent the people are involved in constituting the authority (that makes these laws) also matters a lot and that the distinguishing feature of legal system is the existence of a sovereign, whose authority is recognized by most members of the society, not bound by any human superior[23]. This, no doubt is the reason the Nigerian Constitution attempts to refer sovereign authority to the people when it provides that: "Sovereignty belongs to the people of Nigeria from whom government, through this Constitution derives all its powers and authority."[24] Although this clause is inserted in chapter two of the Constitution with all its justiciability controversies, all the same, it is gratifying that its inclusion in the Constitution amounts to a recognition of the supremacy of the people in the entire socio-political arrangement.

From all these, it may be inferred if positivism is inward-looking as the law-making machinery as it is, then the process for constituting that machinery should be of great interest[25]. To ground a "people proof" law-making machinery, we submit, has a lot to do with scrutiny and ventilation of the law-making-process, to ensure that same is properly representative of the social-political-religious sensibilities of the

[20] A. Beitzinger, 'The Place of Hume in the History of Jurisprudence' *<heinonline.org/hol/landingpage/...>* accessed on 27-08-2021
[21] K. Rundle, 'Forms and Agency in Raz's Legal Positivism' *Law and Positivism, Vol.32 No.6 (Nov.2013)267 <https://www.jstor.org/stable/24572425>* accessed on 27-08-2021.
[22] Ndubuisi, *op.cit* at 122
[23] Ogwo, *op.cit* at 122
[24] The Constitution of the Federal Republic of Nigeria, 1999 S.14(2)(a)
[25] Ogwo, *op.cit*

people. It presupposes that the people intended and actually gave their mandate and submitted their sovereignty to a properly constituted organ through due process, recognized and respected by the people. To all intense and purposes, it is humbly submitted that such due process cannot be said to be properly followed in an electoral process that rapes the people's mandate and which they submit to for peace, in exchange for violence which they consider as an ugly opportunity cost, as is the case in Nigeria.

Another major question about positivism is whether there is any law that is completely devoid of moral values or content. The question then is, will it be true as Freeman put it that even the natural lawyers have recognized that the two do not altogether coincide and that there is a field of positive law, not deducible from any preexisting or pre-supposed system of natural law, and therefore, moral-neutral?[26] But would such assertion also suggest that the positivists also realize that the other side of the coin is also correct that there are some positivist laws that must be deducible from some pre-existing or pre-supposed system of natural law and therefore morally interrelated with the ethos of the society? The issue of interrelationship between the two, no doubt forms the nucleus of the riddle that calls for detail discussion in every attempt to define the point of intercession between law and morality or natural law principles and positivism.

This is where the views of exclusive positivists or hard-liner positivists like Raz must be called to question. They believe that existence and content of a law should be determined by the source and not any moral argument. The sources of law here include "the circumstances of its enactment and necessary interpretative materials such as court cases".[27] When we distance morality as source of our law in its entirety, the implication, in our view, is that we will only be making distinction between the content of moral and legal rules, thus keeping on our staple, a law or legal system devoid of moral content and therefore unenforceable by our legal system. This appears to agree with the views of the concept of inclusive positivists like Jules Coleman and Hart who assert that the rule of recognition may incorporate conformity with moral principles or substantive values as criteria of legal validity, as necessitated by the amendment of American Constitution at various times, especially regarding establishment of religion and abridgement of the rights to vote. This stand point is equally reinforced by same-sex marriage that received endorsement in Europe today, which was an abhorrent crime in Europe and America only some three decades ago but because they lost any moral

[26] M.D.A Freeman, *Lloyds Introduction to Jurisprudence* 8th *op.cit* at p. 47
[27] L. Green, 'Three Themes from Raz' *Oxford Journal of Legal Studies, Vol. 25 Issues 3* (2005)503 <*https://doi.org/10.1093/ojls/sqi025*> accessed on 27-08-2021

accommodation for that *status quo,* it was eroded. On the contrary, Nigeria's basis for recent enactment of the law against same sex marriage arose from wide consultation amongst Nigerians, 99% of which were averse to such *animus* thus pointing to imperativeness of value judgment like morality and socio-cultural values as part of the law.

This, no doubt, is the basis on which Apartheid South Africa disintegrated; and the wave of revolution that pulled down legally constituted regimes in Arab Nations gained their legitimacy in the last decade. In all the cases, the continued stay in office of those at the hem of affairs did not lapse because they fell short of the provision of any positivist law but because the sense of morality and fairness of the people had changed camp. Thus, it is futile to base validity and enforceability of any law on the fact of enactment of the said law *per se* but on its agreement with the moral or ethical acceptance of the people, at a particular time[28].This is the same basis on which Himma justified the 1st and 5th American amendments on violation of privacy and personal security and free speech[29].

This is where Austin's thesis of seeing law as a command by the Sovereign to some political inferior must be critically revisited because, the tenets of a sovereign not being "in the habit of obedience to a like superior" or indivisibility of the sovereign, will run into difficulty in a place like Nigeria where sovereignty is said to reside in the people. As Elegido opined, every society needs a sovereign in the sense that there is need for a final authority or authorities whose decision could be considered as final but that does not mean that such authority may not be subject to another as for example, that the President or members of the National Assembly are subject to their political parties in other regards.[30]

This is on the assumption that, as Elegido puts it, a smaller body, individual or institution is regarded as the sovereign in place of the electorate or general public, which, in any case, is deemed to submit its sovereignty to an elected body or various appointees or delegatees of the elected body[31]. This is where the principle of thesis of positivism relating to *separability* and *discretion* which regard laws 'made' by judges in the exercise of their judicial discretion can be accommodated. And this is where Austinian positivist thesis runs into trouble because, in each case, either the National Assembly or the court must have been appointed or elected pursuant to some laws to which they remain answerable or constitutionally limited thereby.

[28] Ogwo, *op.cit*
[29] K.E. Himma, *op.cit.*
[30] Elegido, J.M; *Jurisprudence, op.cit* at 53-56
[31] *Ibid* at p.54

Their subsequent status as 'sovereign' could not have commanded them into existence, thus showing that the thesis of the law being the command of the sovereign cannot stand. This is why Elegido describes Austinian theory as 'putting the cart before the horse'[32]

In the opinion of Ladan, not even Hart's thesis that had opportunity of improving on the pitfalls of Austin has succeeded in building an error-proof positivist ideas as long as he based them on what he regarded as 'clear and observable facts, specifically on physical facts and facts about behavior'[33]. This informs the view that the problem Hart encountered informed his opinion to stay out of the province of what may actually be right or wrong for human beings to do, or about the conditions which are actually conducive or detrimental to the full development of a community. As Elegido concluded, "this decision to avoid getting involved in substantive problems of *ethics* accounts for some serious shortcomings of Hart's jurisprudence" and by implication, the positivist School of Thought[34]

Judicial Discretion

Recall that we earlier mentioned issue relating to bundles of thesis made up of *pedigree* and *separability* representing laws made in accordance with social convention and then the issue of *discretion thesis* associated with Judges-made laws. This third thesis is where we see positivists like Austin, Hart and Hans stressing the unavoidability of judicial discretion in their analysis of the rules of positivism. As they queried, filling the gap is no doubt a necessity but who to exercise it as between the legislature and the judiciary is the major question[35]. To Himma, Judges are entitled to exercise such discretion[36]. Emphasizing such rationale, Dworkin asserted that:

> *[T]he set of these valid legal rules is exhaustive of the law; so that if someone's case is not clearly covered by such a rule.... then that case cannot be decided by applying the law. It must be decided by some officials, like a Judge, exercising his discretion, which means reacting beyond the law for some other sort of standard to guide him, in manufacturing a fresh legal rule or supplementing an old one*[37].

[32] *Ibid* at p.6
[33] M.T. Ladan, *Introduction to Jurisprudence,* (Malthouse Press Limited, 2013) pp.58-59
[34] Elegido, *op,cit*.p.65

[35] Ogwo, *op.cit* at 100
[36] K.E. Himma, 'Judicial Discretion and the Concept of Law' *Oxford Journal of Legal Studies' Vol.19 (1999)* 71-82 <*philpapers.org/re/Him.JDA*> accessed on 27-08-2021
[37] D. Jennex, 'Dworkin and the Doctrine of Judicial Discretion' *Dalhouse Law Journal Vol.14 Issue 3 Vol.5* (1992) <*core.as.uk>download>pdf*> accessed on 27-08-2021.

The *Critical Legal Studies,* a movement of radical lawyers born in the seventies in the USA continue to radicalize the contention of the realists that legal rules, principles and doctrines can never really justify the decisions of courts because according to them, each decision of a judge could have gone either way on the same facts thus equating law with politics[38]. That was why Duncan Kennedy, argued tenuously that there is no legal solution that is different from political solution and that there is no legal point of view distinguishable from "political" or "ethical" point of view[39]. They believe that the law only serves the powerful by legitimizing capitalist ideas even to those averse to it. Law they say creates false consciousness that the exported benefit from the present system or that the system is natural or inevitable[40] As Gordon put it, legitimizing function of the law makes the worker feel he cannot challenge the owner's and that he respects individual rights of ownership because the powers that such rights confer seem necessary to his own power and freedom; and that limitations on an "owner's" right would threaten him as well[41].

Thus, these Utopian thinkers argue that exercise of discretion by Judges makes them part of the cabal that ride the law whichever way they desire, to give succor to the ultimate desires of the rich, in all things. They argue that decision making is such an open-ended voyage that virtually leaves what the law is, to the discretion of the Judges but this is not true because even where allowance is made for judicial discretion, same is still guided by some narrative rules. Also, to argue without reservation that the law can never determine the outcome of any case may amount to lopsided view, after all, there are very clear situations where the Judges have no discretion to exercise. Even in the so-called "hard cases" where the Judge must exercise his discretion to adopt one of the options, the law still goes beyond the situation "to provide positive guidance for the Judge"[42]. As Finnis put it, no matter how open-ended a particular situation may seem, the Judge must still be guided by certain considerations like the need to ensure:

> *coherence with the larger whole, constituted both by initial general idea or ideas of value, commitment or principle and by the steps already taken. It is this requirement of coherence, of integrity of the system... as a set of rules and principles extending analogously over many different but comparable forms of relationship and*

[38] Elegido, *op.cit* pp.102 at 105-109
[39] R. Zereik, 'Ronald Dworkin and Duncan Kennedy: Two Views of Interpretation' <*www.cambridge.org/core/journals*> accessed on 27-08-2021.
[40] Elegido, *op.cit* at 102, 105-109
[41] C.A Albonethi, *An Integration of Theories to Explain Discretion* vol.38 (*Oxford University Press* 1999)247-266 <*https://www/jstor.org/stable...*> accessed on 27-08-2021
[42] Ibid

> *transaction.., that distinguishes legal thought from "open-ended" practical reasoning.*[43]

Wortley posits:

> *If numerous laws were perfect, if social control were automatic, legal scholarship, like the state of the Marxist, could be left to wither away. But our laws are not perfect and final, and cannot be so in a dynamic society; they are not always even intelligible, and if intelligible, not always intelligibly made...*[44]

This explains pivotally, why we require Judges' discretion for on-the-spot assessment to solve the riddle between the parties as readily as possible, instead of waiting endlessly for legislative intervention that may never come because of administrative bottlenecks. To expect Judges to fold their hands where the law is not specific enough, amount to restraining our judges from applying common sense in the interpretation of legal rules. We submit that excluding common sense from all that we do is to make robots out of ourselves thus causing confusion by attempting to spell out details of all that we must do. As Hart observes:

> *Judges should exercise discretion in situations in which established legal rules fail to provide a single clear answer, either for lack of specific rules relevant to the issue at stake or because the applicable rule is vague.*[45]

But, Dworkin attacks this position to the effect that exercise of discretion in such situation would amount to giving legislative power to an unelected personnel and that such law would work retroactively against the parties and depriving them of the right of organizing themselves against the requirements of the particular law. As he argued, under such a circumstance, the losing party would only be punished, "not because he violated some duty he had, but rather, a new duty created after the event"[46]

Although he conceded that borderline cases could arise that the Judge must exercise direction either way in the interest of justice but he considered such situation as unlikely. Instead, he stressed that in every case, there are settled rules of law and legal principles implicit in the rules of law which the Judge should explore to solve

[43] J.M. Finnis, "On the Critical Legal Studies Movement" *American Journal of Jurisprudence, (1985) 21 at 38.*
[44] B.A. Wortley *Jurisprudence <www.jstor.org>stable>* accessed on 01-09-2021; M.O.U. Gasioku, *Legal Research and Methodology*; (Chengbo Limited 2004) p.1.
[45] H.L.A. Hart, *The Concept of Law* (Oxford Clarendon Press:1994)47 where Hart said under certain circumstance the Court should decline exercise of discretion.
[46] R. Dworkin, 'Matter of Principle' *<www.hup.havard.edu>catalog>* accessed on 27-08-2021.

the riddle[47]. To him, a good Judge is the one who understands in depth, his legal system and distills the principles embedded in it for use in his judgments. As he explained, some of these principles are: no man shall be permitted to profit by his own fraud; no man shall be permitted to acquire property by his own crime; in the absence of fraud, whoever signs a contract without reading through it cannot be heard to renege on it etc. This *right answer* doctrine of Dworkin seems to be acceptable to scholars across the board but not so far as it denies that Judges could exercise discretion in some cases. Finnis particularly argued that there are never single solutions in any legal or moral issue as much as there are many rights and wrong solutions. He argued that:

> *a hard case is hard (not merely novel) when not only is there more than one answer which violates no applicable rule, but the answers thus available are ranked in different order, along each of the available criteria of evaluation*[48].

Be this as it may, the so-called *principle theory* is not a holistic one because even principles could compete for applicability in their moral and political soundness thus requiring discretion. It is the power of choice of the most fitting or most applicable which the Judges resort to in hard cases (and not straight forward matters) that is described as "Judicial Law-making". In doing this, the Judge must be discreet and not as vehement in departing from the existing precedent as the legislature would.

Citing Montesquieu and Hart, Ogwo argued that "exercise of discretion on the part of the Judge results in the violation of the doctrine of separation of powers" which may result in abuse of power.[49] Montesqueu's position in this regard was to the effect that:

> *Political liberty is to be formed only when there is no abuse of power. But constant experience shows that every man invested with power is liable to abuse it, and to carry his authority so far as it will go... to prevent this abuse, it is necessary from the nature of things that one power should be a check on another. When the legislative and executive powers are united in the same person or body... there can be no liberty. Again, there is no liberty if the judicial power is not separated from the legislature and executive. There would be an end to everything if the same person or body,*

[47] *Ibid.*
[48] H. Nye, 'Finnis Divided view of Law: Problems for Adjudicative Theory' <*https://doi.org/10.1080/20403313.2020.1772006*> accessed on 27-08-2021.
[49] Ogwo, *op.cit* at p.101

whether of the nobles or of the people, were to exercise all these powers[50].

From the trend, it appears that 'making law' in the parlance described by Montesquieu does not envisage exercise of judicial discretion that may result in either building up a lacuna in the law or interpreting the law in a manner that may derogate from what it is on the face of the law, as a measure to align the wordings of the law with what could be said to be the actual intendment of the legislature, in the overall circumstances of each case. It is for this reason we humbly submit that we cannot chide with the courts over 'law-making' in one breathe and subscribing to exercise of discretion in another breathe because one is the natural end product of the other. As it is therefore, the issue on ground now is no longer whether Judges exercise discretion but the extent of discretion they are expected to exercise and how far they could keep within the province of discretionary guideline. This is because, Judges are human, called to perform their function amongst humans and therefore, insisting that they must not exercise any form of discretion in the bid to interpret the laws made by humans is to expect them to transform into supermen, to be able to play their role.

In our view, the only duty on them is, no doubt, to exercise their discretion judicially and judiciously; that is, according to law and the exercise of sound judgment, based on the intellectual prowess of the Judge, without prejudice to the fact that such judicial and judicious exercise of discretion has been known to innovatively represent the ''uncertain" position of the law, in a slightly different outlook from what it was, before the judicial excursion.

The Nigerian Situation

English Legal System heavily depends on Common Law Principles, giving latitude to Judges to determine cases based on judicial precedent and the Nigerian Legal System having derived its origin from English Legal System, inherited this principle. The court is expected to decide cases, guided by pre-determined rules of Court, so that they may not engage in ordinary sentiments or bias in a manner that could either erode public confidence or give impression that Judges may be going on a coalition course with the Legislature[51]. One of the principles that keep the Courts within check and within their Constitutional ambit is the rule of precedent that takes its footing in the need to create predictability by ensuring that Courts

[50] M.J.C Vile, 'Montesquieu and Separation of Powers' <*oll.libertyfund.org/page/Montesquieu…*> accessed on 27-08-2021.
[51] As in *Stevenson v Donoghue,* (1932)A.C 562

determine similar cases in accordance with same principles.[52] This is one principle that streamline the so-called discretionary powers of the Court, to ensure that Judges do not cross the redline, into Legislative domain, just to ensure that in 'hard cases' or borderline matters, justice is still done by inferring the best of each situation, to dispense the best that the course of justice may permit in the circumstance of each case.[53] This, no doubt, is the only way the system can promote certainty and avoid possible abuse of the discretionary powers of the Court.

In spite of what looks like the rigid principles of precedent but attitude of Nigerian Courts now seem to give greater latitude to Judges to digress from precedents by engaging in some Judicial activism in interpreting Statutes to give them the desired meaning. This has been done, where the Courts are of the opinion that the law on the face of it does not convey as much meaning as could ensure justice in each case. It is interesting to note that in pursuit of such exercise of discretion, laws of different complexion from the ones originally intended by the legislatures have been known to evolve as was the case in *Stevenson v Donoglue*[54]. This is the kind of situation Ogwo describes as a "violation of the doctrine of separation of powers"[55]. Be that as it may, attitude of the Nigerian Courts appear to look the other way, as if to insist that only the end justifies the means.

Thus, in *Buhari v Obasanjo*[56] the Supreme Court in endorsing what looked like a judicial legislation held:

> *I would go even further to postulate that where the words of a statute appear shrouded in a cloak of cloudiness, making it difficult to ascertain on the surface what it has in mind, it is the duty of the system to make it workable and real. In the circumstance the Court of Appeal found itself, I believe that its construction is the best in its quest to mete out justice and not render the provision barren.*

Even the Supreme Court itself recognized the situation as a form of legislative incursion but all the same, it held that:

> In Jurisprudence, such might be described as a Judge-made law, but indeed, it is the Judge's effort to administer Justice

[52] *Ibid.*
[53] B.N. Cardozo; 'The Nature of the Judicial Process' <*www.google.com/search?client>m...*> accessed on 27-08-2021. See also *Chapman v Chapman* (1954) A.C 429 at 470.
[54] (1932) A.C 562. See also RWM Dias *Jurisprudence* 5th edn (Butterworths, 1985)138-139, and *Hedrey Byrne & Partners* (1964)AC.465 or (1963)2 All E.R 575 .
[55] Ogwo, *op.cit* at 101
[56] (2005) 50 WRNL at 289, par AchoIonu, JSC

> and in its effort to seek the truth, he would dig in, to explore ways to give an interpretation that is enabling and fertile.[57]

Whatever it means to "dig in, to explore", it is nothing but what Dworkin calls "reacting beyond the law"[58] for which Montesquie cried foul when he said:

> *....there is no liberty if the Judicial power is not separated from the Legislature and Executive. There would be an end to everything if the same person or body, whether of the Nobles or of the people, were to exercise all these powers*[59].

It is humbly submitted that since the Judge-made law appears retroactive because it seeks to amend the rules as perceived by parties at the time of their transaction, the Court must thread such terrain more courteously, to avoid sacrificing certainty on the altar of a so-called "dig in" in the quest of "an interpretation that is enabling and fertile". As Lord Devlin said, "if it does become necessary to choose between a change in the law (which is retro-active) and a real injustice caused at bar, surely the choice must be against change in the law"[60]. As his Lordship further counseled "if we are to extend the law, it must be by development and application of fundamental principles";[61] and this is more so, especially in a morally bankrupt society as we have in Nigeria where integrity of most Judges has been compromised to financial, religious and political interest; and worse still, in a society whose electoral process is front with fraud and godless violence, always enthroning self-seeking legislators that turn around to sponsor their own cronies to the bench.

In fact, the Court must not be heard to make laws where none existed; instead they should only develop existing principles. The society is full of choices and if a particular society chooses democracy, then it behooves it to abide by its principles instead of a particular arm claiming mastery as much as to perform the functions that are meant for other agencies of governance.

If the Court must engage in tactical restructuring of existing laws through some form of activism in the name of seeking fairness and truth between contending parties, it is submitted all the same, that Judges should avoid controversial public debate-oriented issues like abortion, abolition of death sentence, mercy killing,

[57] Ibid at 289-290

[58] K.M. Dworkin, 'Taking Rights Seriously' *op.cit* p.17

[59] JMC Vile, 'Montesquieu and Separation of Powers' op.cit; J.A. Yakubu, *Constitutional Law in Nigeria* (Demyax Law Books, 2003)92-93

[60] P. Devlin, "Judges and Lawmakers", 39 *Modern Law Review (1976)1* at pp.10-11. Even Sir Leslie Scarman frowns at a world where barred men "frolic without raising socially controversial issues" cited in AGL Nichol (1976)39 *Modern Law Review* 554; Elegido, *op.cit*, at p.309 &312. The Constitutional question arising from S.4(a) of the Nigerian Constitution, 1999 is another issue to contend with.

[61] J.S Wright, 'Review: Law and the Logic of Experience: Reflections on Denning, Devlin, and Judicial Innovation in the British Context' *Stanford Law Review, vol.33 no.1* (Nov. 1980)179 *<https://doi.org/10.2307/1228527>* accessed on 27-08-2021.

diplomatic matters and other politically partisan matters that could draw the Court into public controversy that may point the Court as corruptly partisan. It may be rewarding to also mention that the Court should avoid areas that the legislature avoid for sociological cause or areas that require some comprehensive research and recommendation of the Law Reform Commission as a prelude to a more effective legislation. As Lord Reid said, the Court should avoid areas that "directly affect the lives and interest of large sections of the community and which raise issues which are the subject of public controversy and. on which lay men are as well able to decide as are lawyers"[62]. Indeed, if the Law Reform Commission would do its job then, the Court must afford it benefit of doubt to do what it has been set up to do.
On the basis of such reasoning, in *President of India v La Pintada Cia Navegacion S.A*[63], where the Court was faced with the need to change the rules on excusing debtors that pay their debts late of accruing interest, the House of Lords unanimously agreed that in as much as position of the law was unfairly approaching interest of such debtors but only the legislators could change the seemingly unjust rule.

Referring all these arguments back to the general principles of positivism and having regards to the positivists' insistence on the need to ensure certainty of the law, not to subject it to externalities, it is humbly submitted that Judges being human, the greater their discretionary leverage, the more the likelihood of importing individual sentiment and standard into a school of thought that had hitherto been inward-looking. In the end, it appears also that exercise of discretion as practiced in Nigeria is an affront, to the values of positivism that informs the Nigerian Legal Order destroys whatever that is left of Kelsen's pure theory of law.

Conclusion

This paper was strictly limited to a critique of the effect of judicial activism on the concept of positivism and not just another full blown attempt to explore into this Jurisprudential thought.

Thus, the work only ferreted attempts of various scholars to define the concept and then efforts of Courts to fill gaps where any exists, in the exercise of judicial discretion. The paper canvassed that in as much as it may be impracticable to restrain Judges from exercise of discretion in "hard matters" but they must thread such terrain more cautiously to avoid being drawn into the murky water of political

[62] A.A. Paterson, 'Lord Reid's Unnoticed Legacy-A Jurisprudence of Overruling' *Oxford Journal of Legal Studies* vol.1 no.3 (1981)375-390 <*www.jstor.org/stable/764365*> accessed on 27-08-2021.
[63] (1984)2 All E.R 773

controversy that usually arises between the legislature and the Executive, in the process of law-making. The paper also found and drew conclusion on the futility of positivist ideology in a democratic process that is fraught with fraud which the people accommodate only as a lame-duck opportunity cost. The paper took position to the effect that in a stage-managed electoral process as exist in most Third World countries as exemplified in Nigeria, it is difficult to find such depersonalized legislature that could be given the honour of having made law that could be adorned as truly representative of the people's mandate as to discountenance the people's moral, social and ethical Judgment, altogether. The paper argued that Judges being part and parcel of the society, their exercise of discretion must naturally reflect the moral standard of the society from which they evolved. The paper found while the positivists denounce any standard outside the law, their principle of separability may not be altogether error-proof with the wide spectrum of discretion that Judges are known to exercise. The paper argued that Judges being human, it is difficult to decipher how their individual moral standard will not be brought to bear on their decisions. This, the paper found is the reason different Judges hand down different sentencing for the same kind of offence, bordering on similar facts. It is for these reasons the paper recommends as follows:

a. That if positivism must maintain any relevance in a world where people are becoming more assertive of their freedom and personal rights, it should adopt a better human face by accommodating some natural law principles.
b. That the principle of Judicial Precedence being a time-priced one as instrument of stability and predictability, Courts should loathe displacing it in the name of judicial activism; under the guise of search for justice.
c. That in a globalized world through technological advancement where the world looks up to the Legislature for so many evolving developments, the Nigerian Legislature should show greater leadership so that the Courts may not be tempted to veer into Legislative Minefield.

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