"BRIDGING THE LEGAL, MORAL AND SOCIAL INTERPRETATION OF LAW"

Being a Lecture Delivered on Behalf of the Honourable, the Chief Justice of Nigeria, Hon. Justice Mahmud Mohammed, GCON, by Hon. Justice Ibrahim Tanko Muhammad, CFR, on the occasion of the Second Justice Anthony Aniagolu Memorial Lecture Series, Holding at Godfrey Okoye University Convocation Arena on 27 October 2016 at 12:00 PM.

I. PRAYER

Oh Lord, we are weak and imperfect, make us to be among the righteous and direct all our affairs through the right path. Oh Lord, enrich me with knowledge, adorn me with piety and beautify me with health and knowledge and ease my tongue so that I can be properly understood.

II. PREAMBLE

I feel greatly honoured to be given the privileged task of serving as guest lecturer at this august occasion. We are here to celebrate the memory and legacy of a distinguished Jurist, trail blazer and legal luminary, in the person of the late Hon. Justice Anthony Aniagolu, JSC, whose unrivalled contribution to the Nation's jurisprudence and administration of justice, is certainly worthy of note and recognition.

It is on record that his lordship Justice Aniagolu, JSC was a colossus, serving his nation as a member of the Federal Electoral Commission of Nigeria from 1958 to 1965. In 1963, he became the Chairman of Eastern Nigeria Festival of Arts Committee. In 1975, his lordship was made acting Chief Judge of the East Central State, and upon the creation of Anambra State in 1976, became the pioneer Chief Judge of the State from 1976 to 1978 and was a justice of the Nigerian Supreme Court from 1978 to 1987. When the Nation needed an erudite leader to lead the dialogue on our system of Government in 1988, his lordship was chosen and went on to creditably chair the Constituent Assembly, which was selected to propose a draft constitution for Nigeria's Third Republic.

I must confess that as a young lawyer and Magistrate on the Bench, I was inspired by legal personalities such as his lordship, whose sound judgments helped to forge a strong Judiciary, which continues till this day, to benefit from the contributions of our forbears such as Justice Aniagolu. He dispensed Justice with a sense of decency, integrity and industry, which made us all proud of being lawyers and jurists.

His lordship has left an indelible mark upon the Courts and is still missed by the Nigerian Judiciary. It is my earnest prayer that the Almighty God will continue to grant him rest from his labours while comforting his family with the solace to bear the irreplaceable loss of their patriarch, though five years later.

I wish to express my gratitude to the Vice Chancellor of the Godfrey Okoye University, Reverend Father Professor Christian Anieke for the kind invitation. An examination of the ultra modern facilities and cleanliness of the Campus tends to show that, doubtless, Reverend Father Anieke is not only a consummate professional and cleric, but also an administrator ***par excellence*** and an academic of some repute. I am also thankful to the Organising Committee and the family of late Justice Aniagolu, for counting me worthy of this honour. I greet all the dignitaries here gathered and duly observe all protocols.

III. INTRODUCTION

I am particularly delighted by the choice of this topic, ***"BRIDGING THE LEGAL, MORAL AND SOCIAL INTERPRETATION OF LAW"***, which acts as a confluence for the three primary motivations that propel and sometimes challenge the interpretations made by Judges in any Court. Needless to say, the chance to address you all on a topic which arouses passions within us all and, I am sure, within all members and indeed friends of our noble legal profession, is certainly welcome, especially as the Nation strives to define a new paradigm for law and order as well as restructure itself to meet the desire for justice.

No doubt, recent acts of disorder and insurgency in the nation have highlighted the difficulties that surround the law, enforcement of that law and indeed the interpretation of the law. In the course of this lecture, I will be defining some of the operative terms of the Lecture topic, while also putting forward a narrative that revolves around the issues and policy options that we all need to be particular about. Suffice it to say that this Lecture will be restricted to the evolution of the Judiciary, an evaluation of the various jurisprudential views of the purpose of the Law and the manner in which it should be viewed and applied. I must of course add the caveat that some of the issues raised in this lecture are of a philosophical nature but nevertheless tie into the dialogue, which I hope to generate with this paper.

Now, in the course of my presentation, it is essential to start with us gaining an insight into what law is. The nature of all laws presupposes that law is a unique socio-political phenomenon, utilised to control human behaviour to the attainment of an imagined or real purpose. A discussion on the philosophy of law also assumes that law possesses certain features, and it possesses them by its very nature, or essence, as law, whenever and wherever it happens to exist.

Law, however, is also a normative social practice: it purports to guide human behaviour, giving rise to reasons for action. However, Law is not the only normative domain in our culture; morality, religion, social conventions, etiquette, and so on, it also guides human conduct in many ways which are similar it. Therefore, part of what is involved in the understanding of the nature of law consists in an explanation of how law differs from these similar normative domains, how it interacts with them, and whether its intelligibility depends on other normative orders, like morality or social conventions.

IV. EXAMINING THE MORAL INTERPRETATION OF THE LAW

The law is, in part, a reflection of the morals of every society and has historically formed the mould from which our earliest laws were sculpted. In the earliest discovered law- the Code of Lipid-Ishtar 1868-1875 BC[1], we see an attempt to introduce a sense of restorative justice to the crime of common theft where for instance we see the provision that ***"If a man entered the orchard of (another) man and was seized there for stealing, he shall pay ten shekels of silver"***.

By contrast, we see a more Mosaic retributive approach much later on in humanity's history especially in the middle ages of our history and up until relatively recently. Based on the oldest of jurisprudence, it was echoed by famous philosophers in the 19th Century[2]and posits that a person who commits a crime must be punished so as to send out a message to the public as to society's repugnance at the deviant behaviour which the sanction seeks to punish. In order words, ***"an eye for an eye, tooth for a tooth"***[3]. This policy, which was a darling of past governments in Europe and the Americas of the 1980s and turn of the century, has its basic code defined as follows:

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[1] A law discovered in the Code of Hammurabi, the ancient king of Babylon, Mesopotamia, which can be accessed via http://avalon.law.yale.edu/ancient/hamframe.asp , accessed on 05 October 2016 at 09:04am

[2] Please see: Kant, Immanuel "Metaphysics of Morality" referred to in Pages 174-175 of Martin, Jacqueline (2005) "THE ENGLISH SYSTEM", 4TH EDITION, Hodder Arnold Publishers. See also: Andre, C and Velasquez S, (2008) "The Just World theory" Santa Clara University, retrieved on 31/08/2012 from http://www.scu.edu/ethics/publications/iie/v3n2/justworld.html

[3] Deuteronomy 19:17-21. This equates with Islamic Law provision in Quran Chapter 5:45, which stipulates, equally, an eye for an eye, tooth for tooth.

"A retributive theory of Criminal Punishment proposes reduced judicial discretion in sentencing and (proposes) specific sentences for criminal acts without previous regard to individual defendant[4]"

More recently, prominent philosophers and legal theorists including John Finnis and Michael Moore have argued for the idea that legal punishment is (at least partly) justified.[5] This is premised upon the notion that the wrongdoer, in this case a thief, has done some act that gave him undue advantage over the wronged and therefore needed punishment to redress that balance and discourage further deviation from the established law, which provided that moral balance.

There can be a number of issues about the relationship between morality and law in a pluralistic, and nominally secular democracy like Nigeria. Among them are whether legislation should reflect moral principles, whether judges should interpret laws in light of moral values and principles, whether laws should enforce morality, whether laws are binding if they do not reflect moral principles, whether it is moral or not to disobey bad laws, and what gives law its authority, but to name a few.

Sometimes morality is confused with religion and that may not necessarily be untrue. Indeed, the Code of Hammurabi begins with a rendition of vainglorious praise for the gods of his time, along with an attempt to claim a divine mandate for his rules, hence at least proving that the Code itself is a repository of the society's morals at this time. However, for purposes of this paper, it will not matter whether someone's moral principles are based on religious doctrine or commands or not. The important traits will be the soundness, and perceived soundness, of any moral principles, not their genesis.

In interpreting the law, a Court is guided by what I recently called *"the law as is and as it ought to be"*. Nevertheless, when we are faced with incidents that sear our conscience like a hot knife, then how do we expect our courts to react? Permit me to give a practical example.

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[4] West's Encyclopaedia of American Law2008, 2nd Edition, copyright by The Gale Group Inc, USA

[5] Article by Rodgers, Miriam "On Retributive Justice" accessible on http://oxford.academia.edu/MiriamRodgers/Papers/112975/On_Retributive_Justice, accessed on 4th September 2012

In the event that there is a sexual assault on the campus of a University and the victim is seriously injured or the assault involves multiple assailants, then what role should morality play in the mind of a Judge? For obvious reasons, there will be anger in the society, indignation by civil rights groups and a demand for justice to be done. The law prescribes stiff penalties but also affords sufficient discretion to the Judge to determine the quantum according to the law.

In the United States this year, a famous University's star swimmer and Olympic hopeful, Brock Turner was convicted of sexually assaulting a fellow student while drunk. He was convicted of this offence but was sentenced to only six months imprisonment, with a mandatory order to register as a sex offender for life and face three years of supervised probation. As if this was not enough, after three months he was released, though disgraced and unable to ever represent his country in swimming. However, it bears reminding that this is a young man with his life ahead of him. He had a scholarship and was probably set to become a success in life.

It is impossible to know how any other person would have acted if they were the Judge but clearly this offended the moral sentiments of the society and led to criticism of the Judiciary. However, one should ask the question that "***when we pass judgment, are we obliged to bridge a moral gap, or do justice?***", in other words, should justice be premised on what society considers as just? Is the society sufficiently equipped with the facts necessary to make such Judgment calls? What if the culprit has shown remorse and promised restitution, should he then be harshly punished as the retributive model of punishment posits? Doubtless the parents of the victim or other persons sympathetic to him or her would rightly think so.

So how does the Judge bridge this gap? Well there are a few considerations that must be borne in mind. Firstly, some laws are managerial or administrative in that they institute behaviour for procedural purposes that could, from a moral or socially useful point of view, have been written in a different way so as to accommodate others. The common example is traffic rules about which side of the road one is to drive on or prescribing a ban on hawking on the streets. It does not matter from a moral standpoint, which law a country adopts as long as the choice of law is made among equally right (e.g., safety) options, though once chosen by law, it is generally prudent, and morally obligatory without some good reason to the contrary for us to abide by the choice. So it would not be morally wrong for a Judge to punish a person

who drives on the wrong side of the road in an emergency, though it may be said to be morally right to have offended that law because of the emergency. As such, there are laws that are not based on morality, in terms of their specifics. They are moral because they are a way of promoting social benefits of a certain kind in an optimal way. As such, a Judge should not adopt a restrictive, retributive interpretation but must look at creating a new morality in promoting adherence to that law through punishment.

Secondly, some laws are immoral, usually because they are unfair but sometimes because they are counterproductive or harmful; in some cases, egregious and reprehensible. Many apartheid laws in South Africa were morally wrong and this is largely agreed. More recent is the declaration of martial law made by the President of the Philippines, Rodrigo Duterte in his drive to rid his country of drugs. Some may consider his actions immoral, inhumane, draconian etc. but the latest survey by Cable News Network (CNN), President Duterte got an "Excellent" rating in the 3rd quarter[6].

However, there have also been government programs or policies set up by law that simply mistakenly harmed the people they were intended to help, such as aspects of our Criminal Procedure laws and rules, which are so old that they have ended up trapping people in custody under archaic holding charges, which harm justice rather than assisting society to do it.

Similarly, a legal system with a lack of adequate laws can also engender a wrong or immoral consequence even if the contents of particular laws are not unjust. For example, laws concerning evidence and procedure in courtrooms often lead to acquittals of obviously guilty defendants, and sometimes to convictions or continuing sentences and punishment of known or likely innocent ones. There is no reason to believe that just because a law passes, it is for the best or that it is right or moral, even if the people passing it think it is as usually the full extent of a law is not realised until it is tested.

Third, not all morality is enshrined in law because law is in a sense "incomplete". Many unfair and wrong business practices are not anticipated and therefore not made illegal until someone invents and uses them in a way that clearly mistreats others. These practices are wrong and immoral from inception, but not illegal until the law "catches up" with them. As such, the

[6] Please see: http://cnnphilippines.com/world/2016/10/11/sws-duterte-third-quarter-survey-excellent-rating.html, accessed on 12 October 2016

law must provide for a wrong for there to be a solution. This was the situation our courts were faced with when they had to decide the consequence of the death of a candidate in an election, where such a candidate was ahead in election, according to votes cast? One must not forget that in the Kogi State example, the Courts did not have a statutory prescription as to what steps to take. In that event, the Court had to act as I will explain in my submission in the course of this lecture.

Fourthly, not all morality should be enshrined in law, because enforcing some morality would be far worse than not enforcing it. There are some cases where even if a moral breach is bad for society, the social costs of trying to enforce morality in such cases would be worse than even the bad breach. Hence, martial law is not the sort of thing democratic societies generally tend to have, even if it would make streets safer; confessions cannot be coerced; and guilt must be proved by the prosecution beyond reasonable doubt, even if guilty people sometimes go free, because we have made the decision that it is better to free the guilty in cases difficult to prove reasonably than to risk convicting the innocent. Again, a guiding principle seems to be that the law should not try to enforce moral principles where the enforcement efforts are much worse than the breach of principles would be, even when the original infraction itself is grave.

Fifth, people disagree about moral issues. People also sometimes disagree about which laws should be created or kept, sometimes on moral grounds, sometimes on merely prudential or practical grounds where different consequences are predicted. When moral viewpoints conflict or are contradictory, law, unless it is to be contradictory itself, cannot reflect the morality of different people. For instance, in the United States, Constitutional rights will sometimes even prevent law from conforming to the wishes of a simple (even substantial) majority of people or their representatives. How can laws conform to morality when people disagree about what is morally right or wrong, or when their collective wish is "thwarted" by the Constitution and by whatever minority is sufficient to prevent amending the Constitution?

It must be noted that the Fundamental Objectives set out in Part II of the Constitution set out objectives which also have a moral dimension to it such as protection of the rights of Children. Certainly, most of the major purposes of the Constitution are to help us be law-abiding so that we are a better country, not just an orderly or merely obedient or efficient country. Hence, it would be

wrong to make laws or to try to interpret laws in court (written under the umbrella of the Nigerian Constitution, and deriving their legal authority ultimately from it) without any regard to their moral meaning, moral significance, or moral consequences insofar as these impact justice, liberty, general welfare, the common defence, and domestic tranquillity. We even notice that some of our constitutional provisions, such as Chapter IV (Fundamental Human Rights) have caveats that permit the State to derogate from some of those rights. These are rights that are so fundamental that they were referred to as:

"a right which stands above the ordinary laws of the land and which in fact is antecedent to the political society itself. It is a primary condition to a civilized existence"[7].

Distinguished Ladies and Gentlemen, bridging the gap and addressing these issues is easier said than done but I will use our illustration as an example of how one could bridge the moral gap in a clear case. The key thing to note is that our laws reflect morals and rules that we have collectively agreed to be bound by. Therefore, such a gross derivation is in itself serious and where adequately proven, must be punished so as to discourage copy cats from following such deviant behaviour. Secondly, the gap could be bridged by also considering the harm occasioned, both physically and psychologically. Thirdly, one could examine the social consequence of the act and whether rehabilitation was eventually possible for such a convict, and lastly, but most importantly, what does the law itself say? Are there any public policy rationales that prevent one from showing leniency or being strict?

In some cases, the position is not so clear. An example of disagreements that may render a purely moral interpretation insufficient will necessarily be where certain rights offend the moral sensibilities of other citizens. Let us take homosexuality for instance. This is clearly reprehensible to our organized faiths and is deemed unlawful before God and man by our traditional African culture. Despite the prohibition of same sex relations in Nigeria, the law still recognizes their fundamental human right to freely associate. It also in effect means that such acts, though criminalised, does not lessen the duty of a Court not to have the accused person's right abridged in any way.

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[7] per Eso J.S.C. In ***RANSOME KUTI & ORS V. A.G. OF FEDERATION & ORS (1985) 2 NWLR P. 211 AT 230.***

Similarly, it is becoming increasingly clear that inefficient governance, poor economic management, and adverse standards of living can in themselves give rise to crime and disorder in Nigeria. The rise of commercialism and the reduced impact of the traditional institutions has also led to the adoption of western style, liberalist ideologies, accompanied by a permissive, hedonistic culture that glorifies drug use, alcoholism and debauchery. Nevertheless, while some of the activities listed above are in fact lawful, they are morally repugnant to other members of the community. Similarly, where a Judge hears a corruption trial and at the end, finds the accused guilty as charged but proceeds to impose a sentence according to the law, which the public decries as being too lenient because of the option of a fine, what justification can such a Judge offer. Although lawful once again, does it accord itself to the morality of society?

Let me bring these scenarios closer home and ask whether the University's code of ethics is a reflection of the morality of all members of the University, regardless of tribe, tongue or faith. If the University was to mete out punishment to Students who offend this code, will it offer up a moral interpretation of the code? What if it is under political or public pressure to be lenient or to punish harshly? In interpreting that code, no doubt the University would have to bear other considerations into mind, as the merely moral interpretation will not work, as I shall show when I discuss the case of DPP v SHAW, an English case. It must also be noted that moral considerations are more likely to be principles rather than substantive laws, with the exception of the Sharia, which consists of both positive law and divinely inspired principles. Suffice it to say, there are instances where one needs to also examine the social and legal interpretations that may bridge any possible moral gaps formed.

V. UNDERSTANDING THE SOCIAL INTERPRETATION OF LAW

Aristotle believed that humans flourish if they live lives of social and rational activity that expresses the human excellences or virtues under conditions of peace and prosperity. As such, the law must, by needs, be the product of such social and rational activity and any deviation therefrom is indeed the crime. Legal Positivists assert that law is, profoundly, a social phenomenon, and that the conditions of legal validity consist of social—that is, non-normative—facts. Early legal positivists such as Sir Thomas Hobbes presented the insight that law is, essentially, an instrument of political sovereignty, and they maintained that the basic source of legal validity resides in the facts constituting political

sovereignty. Later legal positivists have modified this view, maintaining that social rules, and not the facts about sovereignty, constitute the grounds of law. In other words, laws and their interpretation must be shaped by prevailing social conditions.

Most contemporary legal positivists share the view that there are rules of recognition, namely: social rules or conventions which determine certain facts or events that provide the ways for the creation, modification, and annulment of legal standards. These facts, such as an act of legislation or a judicial decision, are the *sources of law* conventionally identified as such in each and every modern legal system. By contrast, Natural lawyers deny this insight, insisting that a putative norm cannot become legally valid unless it passes a certain threshold of morality. Positive law must conform in its content to some basic precepts of natural law, that is, universal morality, in order to become law in the first place. Whatever the case may be, it is clear that social considerations do play a part in the enactment and interpretation of law.

In a situation where crime is prevalent in an area of the country such as kidnapping, for example, the recorded sentences for those offences are more likely to be stiffer, perhaps reflective of the need to deter the future commission of such crimes, which in itself is a reflection of the interpretation of law in a manner that reflects contemporary social issues, although some critics such as Marc Mauer and Malcolm C. Young would argue otherwise[8].

Laws and formal organizational rules and regulations are typically backed by specific social sanctions and designated agents assigned the responsibility and authority to enforce the rules. There are a variety of social controls and sanctions in any social group or organization which are intended to induce or motivate actors to adhere to or follow rules, ranging from coercion to mere symbolic forms of social approval or disapproval, persuasion, and activation of commitments (in effect, "promises" that have already been made). In other words, most of our laws have social aspect for them especially where they regulate procedure or set rules of conduct or best practice. An instance of this would be laws that regulate health standards (such as the National Agency for

[8] Please see: ***Incarceration and Crime: A Complex Relationship, Ryan S. King (Research Associate), Marc Mauer (Executive Director) and Malcolm C. Young (Executive Director, 1986–2005),*** accessed via http://www.sentencingproject.org/wp-content/uploads/2016/01/Incarceration-and-Crime-A-Complex-Relationship.pdf

Food and Drugs Administration and Control Act) or outlaw certain behaviour (such as the Criminal Code or the newly enacted laws outlawing homosexuality).

Furthermore, certain political and social atmospheres operate to bring about the successes of some rules, structures and the failure of others, thereby creating shifts in the prevalence of different forms. In this sense, changes to the law may be also initiated by social agents. For instance, elites may influence circumstances to "legislate" an institutional change either by abrogating certain other laws or a grassroot social movement brings about change through coming to direct power or effectively pressuring and negotiating with an established power elite. Changes may also be brought about through more dispersed processes, for example, where one or more agents of a population discover a new technical or performance strategy and others copy the strategy, and, in this way, the rule innovation diffuses through social networks of communication and exchange. An example of this is the so-called "Arab Spring".

Similarly, Joseph Raz's theory of authority posits that the law is an authoritative social institution, the *de facto* authority. However, he also opines that it is essential to law that it be held to claim legitimate authority. According to Raz, the essential role of authorities in our practical reasoning is to mediate between the accepted subjects of the authority and *the right reasons* which apply to them in the relevant circumstances. Legal authority is therefore legitimate if and only if it helps citizens to comply better with the right reasons relevant to their actions that is, if they are more likely to act in compliance with these reasons by following the authoritative resolution than they would be if they tried to figure out and act on the reasons directly (without the mediating resolution). For example, there may be many reasons that bear on the question of how fast to drive on a particular road—the amount of pedestrian traffic, impending turns in the road, etc.—but drivers may comply better with the balance of those reasons by following the legal speed limit than if they tried to figure out all the trade-offs in the moment.

In interpreting our laws, therefore, a Judge must balance the law as it is with the prevailing social circumstances. In this sense, a Judge may give effect to stated Government policy as reflected in their laws where it impacts upon the wider society as a whole. As such, a court will enforce speeding penalties because of its wider social impact upon other citizens. This is easier than can

be imagined, given the need to ensure "***the greatest good for the greatest number of people***", while doing justice. In order to best give effect to this interpretation, a Judge will need to arm himself with essential canons of legal interpretation.

VI. LEGAL INTERPRETATION OF THE LAW

I will begin with Abraham Lincoln's thoughts on 'bad law'. Lincoln was America's sixteenth president and its first to be assassinated. He was also a lawyer. In his Lyceum address, which was in defence of political institutions, Lincoln had firmly held on to a literal approach to interpreting law. According to him, ***"although bad laws, if they exist, should be repealed as soon as possible, still while they continue in force ... they should be religiously observed"***.

It is a truism that a Court must examine the text of the law, what it addresses and also what the intendment of the law was when the Legislature enacts same. Therefore our Judges will, in the right circumstances, apply certain tenets or canons of interpretation.

The traditional Canon of interpretation is the literal interpretation. Certainly, our Nigerian jurisprudence provides a history of strict "*constructionism*", if I may coin that phrase. This attitude is based on the idea of non interference with the will of the Legislature. Indeed, the American statesman Alexander Hamilton noted ***"liberty can have nothing to fear from the judiciary alone as the legislature, not the judiciary has the power to make laws"***.

In the Nigerian case of ***ATTORNEY GENERAL OF ABIA STATE V. ATTORNEY GENERAL OF THE FEDERATION (2006) 16 NWLR (PT. 1005) 265***, for example, my learned Brothers of the Supreme Court warned against courts going out on '***an unguarded voyage of discovery***' thus seemingly giving the nod to a literal interpretation of the Constitution. Suffice it to say, I agree with their erudite determination. Certainly, it accords to common sense that laws be followed as they were enacted. Judicial activism must not be used as a cloak for retroactive or erroneous application of laws. The text of the law must be adhered to as this engenders certainty. It is this certainty that allows for fairness and fairness is an essential component of a good judgment.

However, even literal enthusiasts realise that strict literal interpretation can lead to illogical absurdities. For example, a law that punishes a person who draws 'blood in the streets' cannot extend to a surgeon who opened the vein of

a person who fell down in the street, to cite the US Case of ***K MART COPR. V. CARTIER INC. 486 US 281 (1988).*** While this may be an extreme example, it does not remove the fact that strict construction can often lead to absurd consequences. Language is, after all, in Denning's words, '***not an instrument of mathematical precision***'. As such, a Judge will apply a purposive interpretation using what lawyers term the "***Golden Interpretation***" Rule.

Like the literal rule, the golden rule gives the words of a statute their plain, ordinary meaning. However, when this may lead to an irrational result that is unlikely to be the Legislature's intention, the golden rule dictates that a judge can depart from this meaning, examining what will be the interpretation that best gives effect to the intendment of the framers of the said law. This is where consideration is given to the spirit of the law.

Nigerian jurisprudence is also rich on interpretation of statutes. We have been cautioned again and again to first begin with a literal interpretation except where the provisions are unclear. Here, the ***Mischief Rule*** is applied so that we may be able to peel back the layers of obscurity and reveal the problem that such law was enacted to address. Niki Tobi JSC's metaphor in ***GLOBAL EXCELLENCE COMMUNICATION LIMITED & 3 ORS V. DONALD DUKE SC. 313 /2006*** is helpful: "***where the provisions are unclear.... [t]he court is expected to apply a compass in a ship to navigate the waters to arrive at the intention of the makers of the Constitution***". Other judgments echo this and so it would not be necessary to expound on them.

The Nigerian Constitution, as many other constitutions, does not state the rules for interpretation. It is because a Constitution is an organic document, '***intended to endure for ages***' to be '***adapted to various crisis of human affairs***'[9]. It is not meant to be interpreted with '***stultifying narrowness***' or with a meaning that will effectuate rather than defeat its purpose[10]. Indeed, the true meaning of a legal text almost always depends on a 'background of concepts, principles, practices, facts, rights and duties which the authors of the text took for granted or understood, without conscious advertence, by reason of their common language or culture'[11]. Interpretation must therefore depend on what the Court in ***AG FEDERATION V. ABUBAKAR (2007) 10 NWLR (PT. 1041) 1*** put as the

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[9] ***MCCULLOCH V. MARYLAND, 4 WHEAT. 316 (1819) 415***

[10] ***A-G FEDERATION V. A-G ABIA STATE (2001) 11 NWLR (PART 725) 689 @ 728 -729***

[11] ***MCHUGH. J,*** in the case of ***THEOPHANOUS V HERALD & WEEKLY TIMES LTD, (1994) 182 CLR 104 AT 196***

'*circumstances of our people*', seemingly a nod to the social interpretative theory of law.

VII. BRIDGING DIVERSE YET CONVERGENT VIEWS

With these considerations in mind, it is important to consider, like Wittgenstein,[12] the following poser:

A rule stands there like a sign-post— does the sign post leave no doubt open about the way I have to go? Does it show which direction I am to take when I have passed it; whether along the road or footpath or cross-country? But where is it said which way I am to follow it; whether in the direction of its finger or (e.g.) in the opposite one?—And if there were, not a single sign-post, but a chain of adjacent ones or of chalk marks on the ground – is there only one way of interpreting them? —So I can say, the sign-post does after all leave no room for doubt?

There are many sign posts as to how a Judge should interpret the law as it applies to the case before him. Indeed, there are cases where the Judiciary has acted as the custodian of the morals of society as well as being a regulator of social conduct, while applying a legal interpretation to law. A case that is usually seen as representing this idea is the case of ***REGINA V SHAW***, which is widely regarded as having revived the common law offence of conspiracy to corrupt public morals. Frederick Shaw had begun production of a *Ladies Directory* in the autumn of 1959 and contained around forty ads for female prostitutes in Soho, Mayfair, Bayswater and Notting Hill, in London, while featuring some black and white photographs of the women concerned in various stages of undress. Shaw was tried on three counts, first for publishing an obscene article, second for conspiring to corrupt public morals, and third for living on the earnings of prostitutes via the ads in the *Directory*. He was convicted on all three counts and sentenced to nine months in prison.[13]

Shaw appealed against his conviction on the grounds that '***there was no such offence at common law as the conspiracy alleged***', and he also contested his conviction for living on immoral earnings. Broadly speaking, two conceptions of conspiracy to corrupt public morals were put forward at his appeal. The Crown argued that conspiracy to corrupt public morals was a single offence that grouped together particular kinds of immoral conduct over which the

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[12] LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 85 (G.E.M. Anscombe trans., 3d ed. 1958);

[13] From the records of the Central Criminal Court, CRIM 1/3467, Instructions for Indictment, 6 September 1960, R v Shaw, Corrupting Public Morals

courts had long asserted jurisdiction. These were, primarily, obscenity, procuring prostitution, keeping a disorderly house (for illicit sexual activities), public indecency and public mischief. Although these could be offences in themselves, they could also be construed as conspiracies against morality where an agreement to do them had taken place. It was that interpretation of the common law which permitted the prosecution of Shaw for arranging what was considered an illegal activity. Shaw argued to the contrary that each of these forms of conduct constituted separate offences and could not be seen as aspects of a single substantive offence known as corrupting public morals.

The main argument against the appeal was that the courts had long been *custos morum* (guardian of morals)[14]. This doctrine, it was maintained, was first articulated by Lord Mansfield in 1763 in ***R v. Delaval*** and relied on a series of cases dating back to 1663 to show that the courts had long asserted their right to prosecute conduct of various kinds held to be against public morality. In the first of these, ***Sir Charles Sedley's case***, from 1663, he had exposed himself on a balcony at Covent Garden and urinated on the people below. They also referenced the cases of ***R v. Berg, Britt, Carré and Lummies (1927)***, involving keeping a disorderly house for the purpose of corrupting those who went there by encouraging homosexual acts.[15] The Court of Appeal therefore decided in Shaw's case that all of these could be held, by analogy, to constitute conspiracies against public morals, and that therefore an offence with that name did exist. The Court concluded that it was 'an established principle of common law that conduct calculated or intended to corrupt public morals (as opposed to the morals of a particular individual) is an indictable misdemeanour'. The law reports showed that '***The conduct to which that principle is applicable may vary considerably, but the principle itself does not, and in our view the facts of the present case fall plainly within it'***. [16]At Shaw's appeal, Sedley's case was held to be evidence that the secular courts, rather than the ecclesiastical ones, had asserted a right to prosecute such conduct. Two other categories of conspiracy were used to support the decision in Shaw on the question of conspiracy against public morals: those that related to causing a public mischief and those concerning outrages against public decency. These

[14] SHAW V. DPP [1962], AC 220, 221

[15] R V. BERG, BRITT, CARRÉ AND LUMMIES (1927) 20 CR APP R 38. Please see also: R V. WELLARD [1884] 14 QBD 63

[16] Ibid at Page 221

cases were used to give force to the view that the courts had maintained an ability to punish immoral and mischievous offences as conspiracies against the public.

Here, we see the Courts not only being a custodian of morals, but giving a social interpretation of the acts that were complained of, although widely practised in the Country at the time. Nevertheless, the social ramifications as well as the moral implication bound the justices together in legally interpreting the provisions of law and statute, respectively.

In Nigeria, the *causa bellum* is currently the scourge of corruption. In tackling same, I would strongly opine that where a Judge is faced with clear cut evidence of corrupt practice or serious crimes that offend public morality or engender public discontent or opprobrium, then one is bound to be a custodian, bearing those considerations to mind in sentencing the convicted person. This is because a Judge cannot divorce his own destiny from those of the average citizen.

This is why the law affords us some principal canons of interpretation, which guide the reading of the law as it stands, irrespective of the surrounding circumstances and social pressures. Like the House of Lords, now United Kingdom Supreme Court, stated in the case of ***DPP v SHAW***, we are in a unique position which makes us bound to interpret the law in accordance with the dictates of the law and good conscience.

VIII. CONCLUSION

I wish to use this medium as well to address the question- is a Judge a public servant? I make bold to state that though judges are servants of the public, they are not public servants. The tenure which we enjoy, the lengthy procedures required to remove a Judge, and our institutional separateness from the executive arm of government, are all aimed at securing our independent position. The essential obligation of a public servant is, consistently with the law, to give effect to the policy of Government. On the other hand, contrary to what you might read in the press or have conceived, the duty of a Judge is different.

The duty of a Judge is to administer justice according to law, without fear or favour, affection or ill will and without regard to the wishes or policy of the Federal, State or Local Government. Judges, by their decisions, may give effect to the will of the Legislature as expressed in Statutes, but their duty is to

be impartial in conflicts between a citizen and the State. In doing this, there may be a divergence between the will of Government and the laws and rights of citizens. Here, the Judge acts as the umpire to decide which side has prevalence over the other.

I know that most of you and the wider community may regard Judges as public servants. Judges, however, should know better. There may, on occasion, be inordinate pressure from some quarters for Judges to be treated as though they were public servants. Sometimes, politicians and public commentators express irritation or resentment at the refusal of Judges to conform to the wishes and policy of the Government. It merely reflects the institutional repugnance with independence of any organ of state. This is not surprising as independence of any kind is likely to be regarded as a threat to a government's capacity to govern effectively. This is reflected where the Government begins to regard the Judiciary as a "***headache***" or "***the trouble with Government***".

Doubtless, Government may, in some cases, be more efficient and life for those in power would be easier, if judges were obliged to show due deference to government policy. However, such efficiency is not the primary aspiration of a democratic society. Those considerations are however overridden by the demands of justice, and our community's idea of a just society is one in which the judiciary determines its cases, independently of the Government.

The image of the just judge as one who favours neither the rich nor the poor but gives a true verdict according to the evidence without partiality. It is essential for a judge to maintain, in court, a deportment which gives to the parties an assurance that their case will be heard and determined on its merits, and not according to some personal predisposition on the part of the Judge. Unfortunately, some Judges may fall short of this and modern lawyers, litigants, and witnesses, and the public generally, are much more ready to criticise judges whose behaviour departs from appropriate standards of civility and judicial detachment. This is a good thing. If Judges behave inappropriately, they should be criticised. Of course, on occasions, some judges are exposed to wrongheaded, extravagant, or unfair criticism. That is the price that has to be paid to remind all judges of the necessity to conduct themselves with dignity and decorum.

Ronald Dworkin, the foremost legal theorist, maintained that the Law consists of Rules (enacted law such as Legislation, Rules of Court, etc), which apply in an "all or nothing fashion." If the rule applies to the circumstances, it determines a particular legal outcome. If it does not apply, it is simply irrelevant to the outcome. Conversely, principles do not determine an outcome even if they clearly apply to the pertinent circumstances. Principles provide judges with a legal reason to decide the case one way or the other, and hence they only have a dimension of weight. I would posit that moral, social considerations may run through both types of law but the moral is most likely to be reflected in the principle and more social considerations in the law.

Ladies and Gentlemen, we must remember that a Judge is still a citizen of the Federal Republic of Nigeria, who shares the same fears, concerns, optimism or otherwise about the Country in general and the actions of criminally minded persons in particular. They are liable to be kidnapped, robbed and indeed murdered as several global and local examples have shown. As such, though they interpret the law as it is and not as certain sections of the society may like it, they are also swayed by the same concerns as other Nigerian are. In passing Judgment, they may wish to sentence as a deterrent, or choose to acquit in order to protect the fundamental rights of a wrongly accused person. They may choose to sentence to long terms of imprisonment for public policy reasons, or because of the impact of such crimes on the wider society. However, these considerations are bridged under the umbrella of ***Ubi Jus Ibi Remedium***- where there is a right, there is a remedy. The Law is the supreme consideration and all other considerations flow therefrom.

With these final words, permit me to once again express my sincere gratitude to the Vice Chancellor, Management and Staff of this great institution. I also wish to thank the members of the Press, invited guests and you, our distinguished ladies and gentlemen, for your rapt attention.

Thank you and May God bless all of us.