

**LIVING ORACLES OF THE LAW
AND THE FALLACY OF
HUMAN DIVINATION**

SIXTH JUSTICE IDIGBE MEMORIAL LECTURE

Delivered by

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Introduction

I very much appreciate the great honour done to me by the Dean of Law and members of the Faculty Board of Studies by inviting me to deliver the Sixth Justice Chukwunweike Idigbe Memorial Lecture. To be allowed to join the illustrious company of Honourable Justice Kayode Eso, Honourable Justice Chukwudifu Oputa, Honourable Justice Karibi-Whyte, Professor David Ijalaye and Mr Charles Uwensuyi-Edosomwan, SAN is for me a cause for celebration. This celebration is heightened by the fact that the lecture is in honour of a justice that is widely acknowledged as the best legal mind that ever sat at the judicial bench of this country. I was privileged to have interacted with the late jurist on so many occasions. At a time when many budding lawyers found pleasure in the lure of legal practice, he endorsed my quest for higher intellectual attainment and pursuit of a career in the academia. I was there in London at his dying moment and when he finally gave up the ghost. Such was my adoration of this legal colossus and one that indisputably was my mentor and role model. I was also here when the Faculty Board under the leadership of Professor Itse Sagay SAN endorsed the proposal to have established in his honour a memorial lecture series in the class of Chichelle, Chorley and Hamylin lectures in Britain and the Storrs Lecture in Yale University, USA. You can therefore understand how excited and proud I am to be here today to deliver this sixth Justice Idigbe Memorial Lecture. But beyond all these, I am truly honoured to be back to this great citadel of learning that gave so much to me and made me what I am today. I will always be indebted to University of Benin.

I have chosen as the title of my lecture "LIVING ORACLES OF THE LAW LAND THE FALLACY OF HUMNA DIVINATION."

Terminological Analysis

Broadly speaking, an oracle is the medium through which a god reveals his purpose about the immediate or distant future. It is also widely believed that the place where people go to ask the advice of the gods about the future is called an oracle. What appears interesting about the oracle's answers is that they are never couched in a straight or unambiguous language. A lot of deciphering of their pronouncements had to be done for an understanding of the message. Scripturally, the 'law of God' as given to Moses was described as oracles by Stephen in the era of Roman imperialism about 45 AD. In Acts 7:38 it says:

This is he who was in the congregation in the wilderness with the angel who spoke to him at Mount Sinai, and with our fathers: he received living Oracles to give to us.

It is not in dispute that from time immemorial people have generally regarded an infallibly wise person or a prophet as an oracle.^{1[1]}

But the fundamental question that has to be answered is, Who are the living oracles of the law? The phrase living oracles of the law is probably traceable to ancient times. In the Judaic tradition, the law was on occasion referred to as 'living oracles.' Its divine character was reinforced by the idea that the law had been made known through angels. Blackstone was however the first person to use the phrase in reference to judges. In his commentaries, he was categorical that in the English tradition the judges are the living oracles of the law. He was firmly of the view that the English common law was the handiwork of judges and judges gloss it in future judgments.

^{1[1]} For an extensive analysis of the term oracle from a theological perspective see generally, Braithwaite, T, *The Jurisprudence of the Living Oracles*, Benin City, Ethiope, 1987.

Blackstone's reference to judges as the living oracles of the land is understandable given the fact that the English legal tradition is one dominated by judges. This position is reinforced by R C van Caenegem in his brilliant treatise *Judges, Legislators and Professors*^{2[2]} where he posits as follows:

In England, from the second half of the twelfth century down to the great reforms of the nineteenth, the judges made and controlled the common law, regarding legislation as an interference and a nuisance and bothering very little about jurisprudence.

Start by contrast, in Italy, where the academic study of the Roman digests laid the foundation for an intellectually rich study of law, professors of law were the spokespersons of law, holding out interpretations of the *corpus juris*. The continental European situation is the result of the central role of the interpretation of the code of the Emperor Justinian. Roman based legal science was the province of professors. Here, judges were relegated to the background.

It is understandable why the emphasis in England is on judges and not academics. English law was based on custom, revealed by precedents, the judges reconciling precedents in the practice of the courts, and not the jurists, were the oracles of the law. Young people who wanted a career in law did not go to a university to lean law-book texts and hear the professors' interpretation of the meaning of those texts. They went instead to live in one of the Inns of Court, where they listened to barristers and judges and learnt the law by seeing it in action in the courts. To learn the law was to engage in an apprenticeship witnessing the practice of the courts and learning the pleas.

As late as 1882 (when he became the Vinerian Professor at Oxford) Dicey set out his inaugural lecture in the form of a question: "Can English Law be Taught at the Universities?" He meant the question rhetorically, for he believed that not only could it be so taught, but that it must be in order to make it more rational, consistent and adaptable to new social developments. But there were many – and there still are some individuals who consider that the common law is best learnt in practice and that university level courses are only a gloss on the real learning process.^{3[3]} I do not intend to pursue this inquiry further. What however appears incontrovertible is that the English legal tradition (which we received into our legal system) still considers judges as the living oracles of the law. It is against this background that I propose to examine the extent to which judges in common law jurisdictions (particularly in Nigeria) have lived up to their godlike status. But before that it is critical to examine those attributes that put our judges within the bracket of oracles.

The Judge as an Oracle

The judge is the central figure in the judicial system and the administration of justice. Starting with his appointment, he is deemed to possess numerous attributes far beyond that of mere mortals. It is therefore understandable why he should be addressed as "My lord." He is the Chief Priest of the temple of justice and all who worship in that temple not only defer to him but perceives him as a symbol of justice. His words are law and commands absolute obedience. He holds the power of life and death and dispenses justice without fear or favour. Like Caesar's wife, he is not only expected to be above board but to a large extent detached from the society in which he lives. He is expected to retain the confidence of the public in the administration of justice by his honesty, impartiality and devotion to the cause of justice. The judge at all times is expected to be an embodiment of courage, an impartial arbiter and an acutely independent-minded

^{2[2]} Chapter in *European Legal History*, 1987, 69.

^{3[3]} In 1890 University of London became the first university to create a Bachelor of Laws as an undergraduate degree.

gentleman. He holds the balance of the scale of justice. In the estimation of the public, he certainly cut the picture and image of an oracle.

Late Honourable Justice Ephraim Akpata in his paper “Judicial Ethics – Discipline Within the Judiciary, Including Comportment”^{4[4]} argued for a higher standard of discipline for judges when he posited as follows:

Judicial officers should cultivate and maintain a high standard of discipline which is essential for effective discharge of the burdensome responsibilities of a judge. The high standard of conduct of discipline required of a judge may be innate in a number of judges. Nonetheless, it is necessary that every judge have at the back of his mind at all times the discipline expected of him in the performance of his functions so that the wheel of justice may turn smoothly.

Honourable Justice Omololu Thomas in his paper “Judicial Ethics – Philosophy of the Judiciary”^{5[5]} highlighted what may be considered as the positive attributes of a judge. According to him:

Whilst a judge is not supposed to be an angel or a recluse he should know his friends and restrain himself from being a ‘man-about-town’ – a socialite. It is not a crime for him to attend clubs but he would be better off if he would find himself financially embarrassed, and should be very cautious in swearing to affidavits lest he finds himself in a situation where he is summoned as a witness and liable to be cross examined.... Every judge ought always to act in a manner befitting his high office, and to administer justice without fear or favour, ill-will or affection towards all and sundry who come before him and according to law, irrespective of his status.

Where judges live up to the tenets prescribed above then they qualify to be classified as living oracles of the law. In the course of this lecture, I propose to examine the attitude, behavioural pattern and pronouncement of judicial officers with a view to determining the extent to which they have been able to achieve the very high standards expected of them by the public.

The Spirit of Justice

John Rawls in his authoritative work *A Theory of Justice*^{6[6]} articulated what can be summarized as an intuitive conviction of the primacy of justice in any civilized society. In his opinion,

Justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well arranged must be reformed or abolished if they are unjust. Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason justice denies that the loss of freedom for some is made right by a greater good shared by others. It does not allow that the sacrifices imposed on a few are outweighed by the larger sum of advantages enjoyed by many. Therefore in a just society the liberties of equal citizenship are taken as settled; the rights secured by justice are not subject to political bargaining or to the calculus of social interests. The only thing that permits us to acquiesce in an erroneous theory is the lack of a better one; analogously, an injustice is tolerable only when it is necessary to avoid an even greater injustice. Being first virtues of human activities, truth and justice are uncompromising.

^{4[4]} 1989 *Judicial Lectures*, Continuing Education for the Judiciary, Lagos, MIJ Professional Publishers, 29.

^{5[5]} Ibid p 27.

^{6[6]} Oxford University Press, 1983, p 3.

These propositions seem to create additional burden for judges in the discharge of their judicial functions. In this regard, a judge is expected to have an acute sense of justice. The search for the truth should also be his guiding philosophy. However, fundamental issue that is often overlooked in assessing judicial appreciation of the theory of justice is that a judge may possess an acute sense of justice and yet may not fully appreciate where the spirit of justice resides. Justice Chukwudifu Oputa in his lecture titled "Access to Justice"^{7[7]} painted a clear picture of how a judge should access the spirit of justice. According to the respected jurist:

The judge should appreciate that in the final analysis the end of law is justice. He should therefore endeavour to see that the law and the justice of the individual case he is trying go hand in hand. The spectacle of law triumphant and justice prostrate indeed. To this end he should be advised that the spirit of justice does not reside in formalities, not in words, nor is the triumph of the administration of justice to be found in successfully picking a way between pitfalls of technicalities. He should know that all said and done, the law is, or ought to be, but a handmaid of justice, and inflexibility which is the most becoming robe of law often serves to render justice grotesque. In may 'fight' between law and justice the judge should ensure that justice prevails – that was the very reason for the emergence of equity in the administration of justice. The judge should always ask himself if his decision, though legally impeccable in the end achieved a fair result. 'That may be law but definitely not justice' is a sad commentary on any decision. Justice according to the law should therefore be the bounden duty not only of judges but also of practicing lawyers and legal academics as well.

The ultimate thrust of his paper is to determine whether our judges have been able to access the spirit of justice in their various pronouncements. This certainly will go a long way in addressing what I advisedly refer to as the fallacy of human divination. Before then, permit me to highlight some contradictions in our administration of justice system.

Adherence to Precedent

A fundamental contradiction in the perception of judges as living oracles of the law is the strict adherence by judges to the jurisprudential doctrine of judicial precedent. It is a basic principle of the administration of justice that like cases should be decided alike. This is enough to account for the fact that, in almost every jurisdiction, a judge tends to decide a case in the same way as that in which a similar case has been decided by another judge. There are instances when the doctrine of precedent has been criticized for its coercive nature especially in circumstances where judges are obliged to follow a previous case although they have what would otherwise be good reasons for not doing so.^{8[8]}

The strongly coercive nature of the doctrine of precedent is due to rules of practice, called rules of precedent and these are designed to give effect to the far more fundamental rule that English law (and by extension Nigerian law) is to a large extent based on case law. In a system based on case law, a judge in a subsequent case must have regard to these matters.

Perhaps there is every need to revisit the whole doctrine of judicial precedent especially as it applies to the Nigerian legal system. Firstly, it may not be totally correct to say that Nigerian law is to a large extent based on case law. With the constitution as the apex law in the hierarchy of laws, closely followed by statutes, case law as originally conceived under the common law has long ceased to be the foundation of our law.

^{7[7]} Paper delivered at University of Ife in June 1988.

^{8[8]} See generally Cross, R, *Precedent in English Law*, 3rd ed, London, Clarendon Law Series, 1979.

Secondly and more significantly is the denial of creative endeavour (which is the hallmark of oracular divination) on the part of judges (especially those of court of first instance) in judicial determination of issues before them. A judge cannot therefore be conveniently tagged an oracle of the law when all that he does is to blindly accept an existing decision which he possibly does not agree with it. This denial of creative 'divination' is well highlighted in the dictum of Honourable Justice Niki Tobi JSC in *Okpala Okpu*^{9[9]} where he reasoned as follows:

Learned counsel for the appellants described or called the decision in *Taiwo* as archaic on the ground that it was decided about thirty years ago, and therefore should not be followed. A case does not lose its value as judicial precedent in common law system (if I may so namely restrict my experience) on the ground of age. As a matter of law, a case which has survived the test of judicial precedent is recognized as stable, if decided by the highest court of the land, and will receive the adoration of the lower courts until overruled by the highest court. But until it is overridden, it represents the state of the law, the older a case the [more] mature it is and this court and all the courts below and this court and all the courts below are bound to follow it, and not throw it in the dust bin. I should allow myself to draw an analogy that in English courts, cases that were decided one or two centuries ago are followed by the House of Lords and the courts below; what then is in thirty years?

The question that seem to confront us is whether the rule of adherence to precedent ought to be abandoned altogether or judges should stand by the errors of their brethren before, whether they relish them or not? Benjamin N Cardozo^{10[10]} preferred a middle of the road approach when he posited as follows:

I am ready to concede that the rule of adherence to precedent, though it ought not to be abandoned, ought to be in some degree relaxed. I think that when a rule, after it has been duly tested by experience has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment. If judges have woefully misinterpreted the mores of their day or if the mores of their day are no longer those of ours they ought not to tie, in helpless submission the hand of their successors.

Wheeler J in *Divy v Connecticut Co*^{11[11]} expressed the tone and temper in which problems of adherence to judicial precedent should be met:

That court best serves the law which recognizes that the rules of law which grew up in a remote generation may, in the fullness of experience, be found to serve another generation badly, and which discards the old rule when it finds that another rule of law represents what should be according to the established and settled judgment of society.

My position is that the course of law and justice is best served where the creative element in the judicial process finds its opportunity, power and expression regardless of pronouncements of the past. This clearly captures the sentiments of Justice Cardozo when he said:

As the years have gone by, and as I have reflected more and more upon the nature of the judicial process, I have become reconciled to the uncertainty, because I have grown to see it as inevitable. I have grown to see that the process in its highest reaches is not discovery but creation; and that the doubts

^{9[9]} [2003] 5 NWLR 215 para A-D.

^{10[10]} *The Nature of the Judicial Process*, Yale University Press, 1977, 150.

^{11[11]} 89 Conn 74, 99.

and misgivings, the hopes and fears, are part of the travail of mind, the pangs of death and the pangs of birth, in which principles that have served their day expire, and new principles are born.

`Oracles' and the Adversarial Process^{12[12]}

At the apex of the adversarial system lies the traditional picture of courts of common law jurisdiction – an arena wherein a contest is waged between parties in which one emerges the winner. In this picture, the judge is a mere umpire and his decisions are based on the performance of the disputants before him.^{13[13]} This does not cut the image of a man in search of the truth. It does not in any way elevate him to the status of an oracle with the sense of justice, which compels adoration and reverence.

There is always a tendency to compare the adversarial system (which we practice) with the inquisitorial system that operates in Continental Europe or civil law systems. Here the judge actively controls the proceedings and makes his or her own inquiries (hence it is known as inquisitorial system). A major criticism of the adversarial system is its relevance on the assumption that the parties lawyers are reasonably well matched in terms of skill and that they perform their tasks conscientiously.

Lord Denning in *Jones v National Coal Board* argued unsatisfactorily that the object of the judges in the adversarial system is also to find out the truth. What he failed to address was that in the adversary system the judge in his quest for the truth is restricted to the material presented by the parties, in whose production he has played no part and which he cannot argue. In the inquisitorial system, however, the judge can find out what he wants to know. Simply put the judge of the adversarial system is confined and the inquisitor of the inquisitorial system is not. It is therefore a cardinal fallacy of our system of administration of justice that the living oracles of our law cannot on their own determine the truth in the dispute but rather relies on the contrivances and subterfuges of the parties in the dispute.

Should I advocate that at this point in time, our trial process should be tailored towards the inquisitorial system? May be not. What I would rather canvass for is a reform in our administration of justice system that would restructure our trial process in a way that would bring about an amalgam of both the inquisitorial and adversarial systems. Such a hybrid system would undoubtedly confer on our judges the power and authority to search and find the truth – the truth which is the whole essence of justice.

Concept of Justiciability

One aspect of our law where judges have shown little imagination in divination is in the interpretation and application of the concept of justiciability. Students of advanced constitutional law will easily appreciate the doctrine of political question, the concepts of judicial self-limitation and judicial restraint as integral parts of the concept of justiciability. What is critical to this discourse however is an assessment of the level of judicial creativity or lack of it that has been brought to bear in the evaluation of the true import of chapter 2 of the Constitution on fundamental objectives and directive principles of state policy.

Since the provisions of the directive principles of state policy was incorporated into the Nigerian Constitution in 1979, many legal analysts have watched in vain to see how the judiciary could give bite and vitality to that chapter of our Constitution. When

^{12[12]} See generally Devlin, P, *The Judge*, Oxford University Press, 1981, chapter 3. See also Zander, M, *Cases and Materials on the English Legal System*, 2003.

^{13[13]} Lord Denning's dictum in *Jones v National Coal Board* [1957] 2 KB 63.

India introduced the state policy provisions into its Constitution (drawing from the 1937 Constitution in Eire), its unenforceability was clearly made manifest in early decisions of the Indian courts. The 1951 decision of the Indian Supreme Court in *State of Madras v Champakam*^{14[14]} is quite illustrative of the non-justiciability of the directive principle of state policy provisions. But India has since moved away from this decision. Engineered by the judicial creativity and intellectual vibrancy of the highly acclaimed Justice Bhagwati the Government of India was left with no option than to revisit its policy position on education in India. It is crucial to state that it never required constitutional amendment to achieve this feat. It only took an inspired divination by the living oracles of the law in India.

That Nigerian judges have not been able to walk the paths of India since 1979 has compelled some legal scholars to urge that some sections of chapter 2 of the Constitution be transferred (elevated) to chapter 4 in order to make them enforceable. What this suggests is the realization by many of the desirability to give potency to some of the provisions of chapter 2 on fundamental objectives and directive principles of state policy.

From a pragmatic perspective, many Nigerians are convinced that some provisions of chapter 2 have given the government of the day the liberty to engage in actions that are not in conformity with the directive principles of state policy. The simple reason being that most Nigerian judges and lawyers are always eager to proclaim that the provisions of chapter 2 of the Constitution are non-justiciable and consequently unenforceable. What seems to agitate the minds of many students of constitutional law is when (if at all) can a provision under chapter 2 become enforceable. This anxiety understandably is predicated on the fact that over the years government has frittered away trillions of naira (most of them embezzled and some utilized for wholly unpatriotic endeavour) from the public treasury. Jurimetrics are eager to argue that the amount of money looted from the public treasury each year would have been enough to guarantee at least free education up to tertiary level and free quality medical services for all Nigerians. All these (by virtue of the constitution and judicial pronouncement in Nigeria) are considered the responsibility of the legislative and executive arms of government to determine.

But should that be the case? Is not possible for the judiciary to compel the other arms of government through creative interpretation to provide some of the aforementioned essential public services? When in 1980 the High Court anchored its decision on the celebrated case of *Archbishop Anthony Olubunmi Okojie & Ors v Attorney General of Lagos State*^{15[15]} on the principles of non-justiciability of provisions of the constitution on directive principles of state policy, only few legal scholars dared to criticize that judgment. The reason being that many commentators were still battling to come to terms with the whole concept of justiciability. I imagine that the euphoria that greeted that chapter of the constitution has since died down and many legal scholars are eager to revisit the interpretation and application of that chapter by the judiciary.

Perhaps it is instructive to look at the provisions of section 6(6)(c) of the 1999 Constitution – the provision that has been interpreted to cloth chapter 2 of the Constitution with non-justiciability. Section 6(6)(c) reads as follows;

The judicial powers vested in accordance with the foregoing provisions of this section (c) shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the

¹⁴[14] 1951 SCR 252.

¹⁵[15] (1981) 2 Nig Const LR 337.

fundamental objectives and directive principles of state policy set out in chapter II of this Constitution.

A critical appraisal of this constitutional provision leaves no one in doubt that what the constitution expressly provided for is an ouster clause and nothing more pretentious. That constitutional lawyers prefer to brand it as non-justiciable is not exactly correct. What is rather intriguing is that the judiciary during the military era exhibited the highest level of judicial activism by circumventing series of ouster clauses in numerous decrees. Why they have not been able to circumvent this is a puzzle to be resolved. Perhaps, this can also be attributed to the fallacy of human divination.

Secondly, it is important to note that section 6(6)(c) of the Constitution is not cast in gold. The expression 'except as otherwise provided by this Constitution' is a clear indication that in given circumstances, the judiciary can invoke its judicial powers in respect of issues relating to chapter 2 of the Constitution.

More significantly, students of constitutional construction will readily admit that section 6(6)(c) is lightly restrictive in that it precludes the court from determining whether any law or any judicial decision is in *conformity* with the fundamental objectives and directive principles of state policy. This clearly falls short of the provisions of section 13 of the Constitution, which enjoins all persons and authorities exercising legislative, executive or judicial powers to *conform to, observe and apply* the provisions of chapter 2. My thesis is that judges though precluded from questioning whether any law or decision is in conformity with chapter 2 is certainly not expressly precluded by section 6(6)(c) from determining whether or not the legislature^{16[16]} or executive has failed to *observe and apply* the provisions of chapter 2 of the Constitution. This is where judges are expected to apply judicial inventiveness or creativity. Perhaps, there is every reason for our judges to study the principles and procedure that guided Justice Bhagwati and his fellow brethren in India in positivising the provisions of directive principles of state policy in Indian Constitution.

Constitutionalism and Politicization

That the courts (judges) play a party political role in adjudication of cases is all too obvious. The most striking aspect of constitutional adjudication by judges is its vigorous use as an instrument of reform. That ideally is expected from the living oracles of the law. But a review of a host of cases will enable us determine the level of politicization of cases in Nigeria.

A good starting point is a critique of the role of the Supreme Court in activities of other arms of government. Issues to be considered range from the frequency with which the court decides constitutional issues, the extent of its interference with the legislative and executive branches, and the potential for collision and then to the more abstract issues of public policy and political expediency. When in *Attorney-General of the Federation v Attorney-General of Abia State & 35 Ors*^{17[17]} otherwise referred to as the 'Resource Control case' Honourable justice Karibi-Whyte dissented at the preliminary hearing that the case is a political case that does not require judicial determination, majority had their way and proceeded to hear the case. Many will accept that the judgment of the Supreme Court amounted to nothing. Only a political resolution of the matter by the National Assembly and the Presidency finally laid the case to rest. But the Supreme Court in my mind made its best contribution in our constitutional development

^{16[16]} The judiciary cannot be precluded from determining whether the legislature has deliberately refused to apply item 60 of Schedule II of the Constitution which enjoins it to establish and regulate authorities for the federation to promote and enforce the observance of the provision of chapter 2.

^{17[17]}

in the landmark decision in *INEC v Balarabe Musa*.^{18[18]} By opening the political space in accepting that Independent National Electoral Commission has no right to hinder the registration of political parties, the Supreme Court only succeeded in expanding the democratic space in Nigeria.

As regards election cases, it does appear that the fallibility of some members of the judiciary did not help in enthroning the principles of judicial integrity. Many Nigerians are still wondering how in the midst of public outcry of massive rigging of election, almost 90% of cases that came before election tribunals were decided in favour of the respondent. Many legal analysts would certainly want to know whether the tribunals were greatly influenced in their decisions by the constitutional law principle of political expediency. Would the decisions have been otherwise if the incumbent President and Governors were not already sworn-in at the time judgment was given?^{19[19]} Public interest dictates that in extreme circumstances and for the sake of political stability, judges are perfectly at liberty to weigh the import and consequences of their judgment on the scale of justice? Many certainly will argue that such arbitrary exercise of discretion in dispensation of justice is a major fallacy of human divination in adjudication by the living oracles of the law.^{20[20]}

The human elements in our judges not only manifest in the occasional politicization of cases before them but in the politics of the judiciary. Professor J A G Griffith in his classic work, *The Politics of the Judiciary*^{21[21]} captured in an elegant prose the political role of the judiciary and the extent of involvement of the judiciary in the politics of the day. On the myth of neutrality of judges, Prof Griffith posited as follows:

I have said, that, traditionally, impartiality is thought of as part of a wider, judicial neutrality. Judges are seen essentially as arbiters in conflicts – whether between individuals or between individuals and the state – and as having no position of their own, no policy even in the widest sense of that word.

In denying such neutrality, I am not concerned merely to argue that judges, like other people, have their own personal political convictions and, with more or less enthusiasm, privately support one or other of the political parties and may vote accordingly. That, no doubt, is true but political partisanship in that sense is not important. What matters is the function they perform and the role they perceive themselves as fulfilling in the political structure.

Neither impartiality nor independence necessarily involves neutrality. Judges are part of the machinery of authority within the state and as such cannot avoid the making of political decisions.

Another issue that falls within the realm of the politics of the judiciary is the time-honoured principle of judicial independence. However, the emphasis here is not independence from the executive and legislature but independence from heads of courts, administrators and senior brothers on the bench. The vexed questions that have been asked are: what independence exists for a judge who acquires a reputation among his seniors for being anti-government in his pronouncements when his head of court or administrator will favour a pro-government decision? Would a strict adherence to his conviction not affect his promotion prospects? The truth, which is most evident is that, a host of judges are under immense pressure from their superiors to act or speak in court in certain ways rather than others. No judge anxious to progress in his judicial career

^{18[18]} [2003] 1 SC (pt 1) 106.

^{19[19]} The *Ngige v Per Obi* case appears to be an isolated one and does not give rise to any disputation of the doubts expressed by analysts.

^{20[20]} See generally Cox, A, *The Role of the Supreme Court in American Government*, Oxford, Clarendon Press, 1976.

^{21[21]} Manchester University Press, 1977. See also Bell, J, *Policy Arguments in Judicial Decisions*, Oxford, Clarendon Press, 1985.

would dare take decisions, which could be classified, as popular or unpopular in the eyes of the most important senior judges or heads of the judiciary. Judges therefore are ever conscious of what may become of their reputation if they decide cases one way or the other. In situations like this, judicial integrity yields to judicial dependence – certainly a characteristic that again underscores the politics of the judiciary and by extension the fallibility of the living oracles of the law.

Punishment in Criminal Trials

An issue that has again resonated in legal circles all over the world is the inability of judges to impose stern sentences upon those who deserve them. The United Kingdom seems to lead the field in the race to be the nicest man on the bench among judges. The point is that not much attention has been paid to the sentencing philosophy of Nigerian judges. For the older generation of judges, the words of Lord Goddard are ever instructive. He stated as follows;

I have never understood how you can make criminal law a deterrent unless it is punitive.

This does not appear to be the position today as most sentences are now consistently putting the victim before the criminal. But that in all honesty is what it ought to be. Our judges have never seen any need for them to really appreciate the underlining principles and philosophy of sentencing. What seems to emerge from this is an indiscriminate sentencing approach devoid of any rational or jurisprudential guide. Professor H L A Hart may have spoken their mind when he stated:

No one expects judges or statesmen occupied in the business of sending people to the gallows or prison ... to have time for philosophical discussion of the principles which make it morally tolerable to do these things. A judicial bench is not and should not be a professorial chair.

It may be correct that a judicial bench is not a professorial chair but it is flawed reasoning that judges ought not to bother about philosophical discussion of the principles of punishments. Indeed judges should bother about the general practice of punishment. They should be able to answer such simple questions as: To whom may punishment be applied? How severely may we punish? Till our judges have developed a sense of the complexity of punishment, they may never be able to assess the extent to which the whole criminal justice system has been eroded by their inability to appreciate new beliefs about the human mind as this brings me to an observation which I consider critical to the emergence of an enviable criminal justice system. This is inextricably intertwined with the appointment and training of judges. Regardless of any argument to the contrary, the truth remains that only lawyers with elevated thought process and critical reasoning are better placed to internalize the complex philosophical theories of punishment. While this may not suggest that a judicial bench be equated with professional chair as Professor Hart earlier cautioned, it clearly endorses the position that any lawyer aspiring to be elevated to the bench, must among other qualifications possess a minimum of a Masters degree in Law. It is my submission that the idea of punishment as merely a deterrent will continue to hold sway until our judges are able to appreciate that instead of a single value or aim, (for purposes of punishment) a plurality of different values and aims should be examined as a conjunctive answer to some simple question concerning the justification of punishment. What is needed is the realization that different principles are relevant at different points in any morally acceptable account of punishment. Until these issues are internalized and practicalised by our living oracles of the law, their efforts and contributions downwards the development of our criminal justice system will continue to be viewed in many legal quarters as a cardinal fallacy of human divination.

The Prophecies of the Living Oracles

When Justice Oliver Wendell Holmes posited from the perspective of the American realist school of jurisprudence that law is the prophecy of what the courts will do and nothing more pretentious, he clearly located judges within the context of living oracles whose predictions of what the law is or ought to be is final and indisputable. But Holmes was realistic enough to acknowledge the humanity of judges, hence he devoted substantial portion of his treatise on what he termed "the inarticulate major premises of judges." Stripped of all semantics, what this simply means is that judges are influenced by their predilections and personal idiosyncrasies in determination of disputes before them. This is clearly an endorsement of the fallacy of human divination by the living oracles, for ideally the living oracles should be above human influences and fallibility.

Justice Benjamin Cardozo in his famous treatise in 1932 titled *The Nature of the Judicial Process* described the conscious and unconscious processes by which a judge decides a case. He exhaustively examined the sources of information to which he appeals for guidance and analyses the contribution that considerations of precedent, logical consistency, custom, social welfare, and standards of justice and morals have in shaping his decisions.

In developing his thesis of 'subconscious forces,' Justice Cardozo stated:

I have spoken of the forces of which judges avowedly avail to shape the form and content of their judgments. Even these forces are seldom fully in consciousness. They lie so near the surface, however, that their existence and influence are not likely to be disclaimed. But the subject is not exhausted with the recognition of their power. Deep below consciousness are other forces, the likes and dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge.... There has been a certain lack of candour in much of the discussion of the theme or rather perhaps in the refusal to discuss it, as if judges must lose respect and confidence by the reminder that they are subject to human limitations I do not doubt the grandeur of the conception which lifts them into the realm of pure reason, above and beyond the sweep of perturbing and deflecting forces. Nonetheless, if there is anything of reality in my analysis of the judicial process, they do not stand aloof on these chill and distant heights; and we shall not help the cause of truth by acting and speaking as if they do. The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by.

The cardinal tent for judges is that in the course of the discharge of their judicial functions, the twin principles of impartiality and neutrality must be upheld. Judges themselves claim this as their great virtue and only occasionally is it seen to be departed from. This again is a major fallacy for even judges themselves will readily acknowledge that their human prejudices do not always promote impartiality or neutrality. Lord Haldane as a practicing barrister in 1901 recorded as follows:

I fought my hardest for the Dutch prisoners before the Privy Council this morning, but the tribunal was hopelessly divided, and the anti-Boers prevailed over the pro-Boers. It is bad that so much bias should be shown, but it is I suppose inevitable.

D N Pitt in his autobiography told of his many political cases and one of which came before a judge of great experience and knowledge, so bitterly opposed to anything left wing that he could scarcely have given a fair trial if he had tried. In England, every practicing barrister knows before which judges he would prefer not to appear in particular cases because he believes and his colleagues at the bar believe that certain

judges are much more likely than others to be biased against certain groups like demonstrators or students, trade unionist, divorce proceedings and landlord and tenant cases. The Nigerian situation tends to suggest that judges are not only human but that some are more human than others. The truth is that it is difficult to identify the predilections or preferences of Nigerian judges. Corruption or absence of judicial integrity, the bane of Nigerian judiciary, cannot be classified as acceptable or manageable influences within the context of the subconscious forces clearly articulated by Justice Benjamin Cardozo. All these point to the fact that judges after all are human and prone to human weaknesses.

As Mr Justice Jackson of the US Supreme Court pointed out in *Sacher v United States*^{22[22]}

Men who make their way to the bench sometimes exhibit vanity, irascibility, narrowness, arrogance and other weaknesses to which human flesh is heir.

Lord Hailsham further made the point that judges are subject to what he called judges disease. This according to him is "... a condition of which the symptoms may be pomposity irritability, talkativeness, proneness to orbiter dicta, [that is statements not necessary for the decision in the case] a tendency to take shortcuts."^{23[23]}

What is evident from the above is that it may have been presumptuous for Blackstone to proclaim judges as living oracles of the law. Perhaps what Blackstone tried to project in his thesis is that judges by their training and appointment should exercise a higher degree of individual responsibility than mere mortals. If that can be taken as a proper construction of the expression, then it is wrong to read any other meaning that tend to ascribe to judges any form of infallibility. Judges as judicial officers have never arrogated to themselves any air of infallibility. In 1958 Justice Frankfurter who during his lengthy tenure at the Supreme Court of United States addressed the question of the Supreme Court reversing itself in the case of *Cooper v Aaron*.^{24[24]} According to him,

Even this court has the last say only for a time. Being composed of fallible men, it may err. But revision of its errors must be by orderly process.

Hon Justice Chukwudifu Oputa may have drawn from Justice Frankfurter when in his book *The Law and the Twin Pillars of Justice*^{25[25]} he remarked:

We are final not because we are infallible, rather we are infallible because we are final. Justices of this court are human beings, capable of erring. It will certainly be shortsighted arrogance not to accept this obvious truth.... The court has the power to overrule itself ... for it gladly accepts that it is far better to admit an error than to persevere in error.^{26[26]}

I can only add that it will also amount to 'shortsighted arrogance' to cloth the living oracles of the law with al the powers of a oracles of god.

Judges and the Fall of Common Law Tradition

This brings us back to where we started. When Blackstone used the phrase 'living oracles of the law,' he was referring to the role of judges under the common law. It is not in dispute that common law is no longer influential either in the hierarchy of laws or in the development of law. Today as statutes have greatly expanded in importance and the constitution widely regarded in most jurisdictions as the grundnorms, old traditions such as oral pleadings and adversarial style of legal proceedings have come under criticism

^{22[22]} 343 US 12 (1952).

^{23[23]} Lord Hailsham, *The Door Wherein I Went* (1978) 255.

^{24[24]} 358 US (1) 195.

^{25[25]} Owerri, Government Printers, 1981.

^{26[26]} *Ibid* at p 108.

and reform and some commentators now talk of the end of the common law system. I do not intend to join in this debate. All that can be said is that it may sound simplistic for anyone to overlook the adaptability and organic nature of common law tradition. What should rather be considered is a future in which common law is positively integrated with other traditions.

My preoccupation with the waning influence of common law is to determine how the ascendancy of statutes over common law would have impacted on Blackstone's phrase, which in the main is centred on the role of judges under common law. Put in another way, would Blackstone have still referred to judges as 'living oracles' if he was alive today and common law not as 'mysterious' as it used to be?

I am tempted to answer this question in the affirmative. Judges on their own have clearly arrogated to themselves much more powers than Blackstone would have imagined. It is commonplace for judges to say that the process of interpretation of statutes is synonymous with judicial law making. They also acknowledge that where there is a gap, they are perfectly at liberty to fill in the gap. In the realm of constitutionalism, the whole idea of 'liberal construction' or 'judicial activism' is indicative of the powers of judges to go beyond the letters of the constitution to the 'spirit of the constitution.' And it is only a living oracle of the law that can detect the spirit of the constitution.

What this implies is that the perceived fall of common law in contemporary times is not enough reason to dismiss Blackstone's notion of judges as living oracles of the law. Blackstone in ascribing to judges the same powers as 'living oracles' never contemplated that the degree of fallibility of judges over the years will deteriorate so badly that the issue of judicial integrity will become a matter of intense debate that will clearly expose the fallacy of human divination for adjudication. Blackstone may have relied strongly on the oath of office of judicial officers and perhaps would have believed that they will be bound by the oath. If that has been the case, may be Blackstone would have been right. It would however appear that he never reckoned with the subconscious forces, the prejudices and the human weaknesses that militate against strict adherence to the oath of office by the living oracles of the law. Incidentally, therein lies the fallacy of human divination.

I thank you for your attention.
