

SOUNDING THE DEATH KNELL OF THE PUBLIC OFFICER PROTECTION ACT/LAW IN NIGERIA

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ABSTRACT

The Article is an in-depth examination of the public Officer Protection Act and Laws operating in the Federal Republic of Nigeria in the light of the fact that the original legislation was enacted as an Ordinance in 1916. The rationale for the enactment of the legislation, the policy and constitutionality, are all discussed for a better understanding of the need for the continued existence or repeal of the legislation.

The jurisprudence evolving from the courts' interpretation of the legislation is critically appraised and analyzed. The judgments reveal the injustice and hardship that the operation of the Public Officer Protection Act and Laws had occasioned. Moreover, the broad interpretation of who is a public officer beyond natural persons to artificial public institutions has elasticated the scope of the Act and Law beyond its original legislative intendment. The courts' broad interpretation of acts done in pursuance of public duty and distinction between continuance of damage or injury and continuing effect of damage and injury goes against the principles of interpretation that postulates that limitation statutes ought to be construed restrictively against the one who seeks to have benefit of such limitation.

Recent development in some states where the Public Protection Law were repealed and re-enacted without the limitation, and the proposal by the Nigerian Law Reform Commission are seen as the pointers for sounding the death knell of the Public Officer Protection Act/Law.

The article recommends the repeal of the Public Officer Protection Act before or immediately after the centennial observation of its anniversary on 21st September 2016.

1.0. Introduction

The Public Officer Protection Act has its origin rooted in Nigeria's colonial history when it was enacted as an Ordinance with the sole objective of protecting public officials from legal action for their tortious act done in the course of the official duty, after a limitation period of three months. However, the protection of the Act at the Federal and Laws at the State level within the Nigeria Federation have brought about absurd and unjust results, as seen from several judicial interpretations and decisions. For example, a Public School Teacher who flogged his students and hit one on the eye and blinded her was held by the Supreme Court to

be protected by the Public Officer Protection Law.¹ Consequently, calls for the repeal and abrogation of the Act/Laws have not only dogged the continued existence of this piece of anachronistic legislation, but it has actually been repealed and abrogated in some States of the Nigerian Federation.²

Recently the Nigerian Law Reform Commission organized a Conference to fully consider the legislation and the verdict was for its repeal and abrogation at the Federal level.³ This was followed by a proposal to the National Assembly through the Speaker of the House of Representatives to have the Act repealed and abrogated. Hence this article is aimed at thoroughly examining the legislation, the judicial interpretation of its provisions, the purport and impact of the legislation as applied, and the rationale for its repeal and abrogation.

2.0. Public Officers Protection Act/Laws

The Public Officer Protection Act “provide for the protection against actions of persons acting in the execution of public duties”, and commenced as a colonial Ordinance on 21st September 1916. The origin of the Act is the English Public Authorities Protection Act of 1893 which applied to Nigeria as a statute of general application until it was repealed by the Public Officers Protection Act 1916.⁴ The provisions of the Public Officer’s Protection Act are the same with that of the Public Authorities Protection Act of 1893.

The idea of limiting the time within which to sue public officers for acts done in the discharge of their public duties or responsibilities predates our colonial history. It dates back to the feudal era in English history when the divine right of the king was in full force.⁵ Gradually, the king waived his privilege of giving consent to have his officers sued. By the end of the 15th century, the idea that the king’s agent could be held liable was beginning to be recognized. Two hundred years later, the doctrine to the effect that the king’s command affords no immunity to officers of the king developed. High officers of the state and all their subordinates must answer before the ordinary law for any wrong act committed by them. Initially no time limit was required for instituting an action against a public officer but later on, a statute of limitation dealing with common law actions was enacted in 1623. Also, there were protective provisions otherwise known as the special protections requiring notice of action within a limited time and imposing a period of limitation for bringing an action after the accrual of the cause of action against a public authority or officer. The purpose of the notice was to give the defendants an opportunity to tender amends. In 1893, these special protections, especially those relating to periods of limitation were consolidated in the Public Authorities Protection Act of 1893.⁶ This statute was made applicable to Nigeria as a statute of general application until it was repealed by the enactment of the Public Officers Protection Act of 1916. However, the 1916 Act adopted verbatim the provisions of section 1 of the English Act of 1893.

The comparative jurisprudence on the material difference between the two Acts as construed by the courts has always been until recently,⁷ that while the purpose of the English Act was to protect public authorities in their corporate personality when engaged in the discharge of public responsibilities imposed by the

¹*Ekeogu v. Aliri* (1991) LPELR-1079 (SC); (1991) 3 NWLR (Pt.179) 258

²Abia, Ebonyi and Rivers States repealed the 1963 Public Officers Protection Law that was applicable throughout the former Eastern States of Nigeria and replaced it with the individual state Public Officer Protection Law.

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⁴Cap. P41 Laws of the Federation of Nigeria, 2004. See B.O. Iluyomade and B.U. Eka, *Cases and Materials on Administrative Law in Nigeria*, 2nd Edition reprint 1997 (Obafemi Awolowo University Press) 507

⁵Frederick F. Blachly & Miriam E. Oatman, *Approaches to Governmental Liability in Tort: A Comparative Survey*, 9 *Law and Contemporary Problems* 181-213 (Spring 1942)

⁶ *ibid.*

⁷ Compare the court’s reasoning in the Supreme Courts decision in *Ibrahim v Judicial Service Committee, Kaduna State* (1998) 12 SCNJ 255; (1998) 14 NWLR (Pt. 584) 1.

parliament,⁸ the Nigerian Act is aimed at protecting public officers in the discharge of their duties. This was the observation of the Supreme Court in the case of *Rufus Ali Momoh v. Afolabi Okewale and Anor* where Udoma JSC stated thus:

“... it seemed to have been overlooked that there is a difference between the titles of the two Acts. The Nigerian Act is entitled “Public Officers Protection Act”, whilst the English statute bear the title of “Public Authorities Protection Act”. The aims, objectives and purposes of the two Acts are also different. The intention of the British parliament in enacting the English Act was to protect public authorities engaged in the discharge of responsibilities imposed upon them by parliament. The Nigerian law was aimed at protecting public officers in the discharge of public duties.”⁹

According to Iluyomade and Eka¹⁰ the state usually assumes some measure of liability of defending actions brought against its servants for torts committed by them in the course of their duties, and it is in this regard that the public officer enjoys a limited form of protection in the form of, the provision of period of limitation of action against public officers in the statute. The Public Officers Protection Act that has enjoyed almost a century of continuous existence has been reproduced in the Public Officer Protection Laws of the States.¹¹ Section 2(a) of the Public Officer Protection Act Cap. P41 LFN 2004 provides as follows:

2. Where any action, prosecution, or other proceeding is commenced against any person for any act done in pursuance or execution or intended execution of any Act or Law or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, Law, duty or authority, the following provisions shall have effect-

Limitation of time.

(a) the action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within three months next after the act, neglect or default complained of, or in case of a continuance of damage or injury, within three months next after the ceasing thereof:

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

The Public Officer Protection Act and Laws containing above provisions have been interpreted to amount to limitation statutes and not outright protection of public officers against tort actions that do not deny the right of access to court to litigants.

⁸*Bradford Corporation v Myers* [1916] 1 AC 242. See C.S. Emden, “The Scope of the Public Authorities Protection Act, 1893”, 39 L. Q. Rev. 341 (1923). The English Public Authorities Protection Act, 1893 was repealed by the Law Reform (Limitation of Actions, etc) Act 1954. Although the British Act was identical in terms with the Public Officer Protection Act, 1916, of Nigeria, however, whilst in the English Act the limitation period was six months, under the Nigerian enactment the limitation period is three months.

⁹ (1977) NSCC 365

¹⁰*supra*

¹¹Section 2 of the Public Officers Protection Law, Vol.6 Cap P26 Laws of Lagos State 2003, that provides: “Where any action, prosecution or other proceedings is concerned against any person for any act done in pursuance or intended execution of any Act or Law or of any Public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, Law, duty or authority, the following provisions shall have effect;

a. the action, prosecution or proceedings shall not lie or be instituted unless it is commenced within three months next after the act, neglect or default complained of, or in case of a continuance of damage or injury **within three months next after the ceasing thereof.** (emphasis mine)

2.1. Policy and Constitutionality

The public policy for imposing limitation period on the right of access to court of a litigant or preconditions for the exercise of right of access to court, so that claims to rights may not be exercised in perpetuity as, *inter alia*:

- (a) long dormant claims have more of cruelty than justice in them;
- (b) the defendant must have lost the evidence to disprove the stale claim;
- (c) persons with good cause of action should pursue them with reasonable diligence;
- (d) those who go to sleep on their claim should not be assisted by the court in recovering their properties; and
- (e) that there should be an end to stale demands.¹²

The public policy focuses on the operational process of the government, including storage of documents and records, the management of its public officers that are prone to transfers and high turn-over due to disengagement from the civil/public service, and the burden of being able to produce documents and personnel to effectively defend “stale claims” instituted against the government. However, can this rationale of colonial origin still be tenable in modern day Nigeria as to limit the period within which to institute a tort action against the government to three months? Especially as the English Public Authorities Protection Act was repealed by the Law Reform (Limitation of Actions, etc) Act 1954, thereby removing such protection by limitation of action by statute against tort actions against public authorities, and in effect making the government of Nigeria to be “more royal than the Queen”. Ironically, the decision of the Supreme Court in *Ibrahim v Judicial Service Committee, Kaduna State*¹³ has even further expanded the protection of the Public Officer Protection Act/Law to include public authorities (unwittingly incorporate the repealed English Public Authorities Protection Act into the Public Officer Protection Act.).

On the constitutionality of the Act, in *Kolo v A-G., Federation*¹⁴ after going through the principles established by several cases, the Court of Appeal held, per Oduyemi JCA thus:

I am convinced beyond doubt that the Public Officers Protection Act, Cap. 379 Laws of the Federation of Nigeria 1990 which provides for the lapse of a right of action which has not been exercised within a given period of time and such similar legislations including those which prescribe the giving of pre-action notice to certain statutory bodies before commencing litigation against them to enable such statutory bodies give second thoughts to their former decisions with a view of changing such decision and come to an arrangement with the plaintiff are not in contravention of the fair hearing provisions of section 36 of the 1999 Constitution.

The constitutionality of the Public Officer Protection Act/Laws can thus be said to be beyond doubt.

3.0. Scope

In *Central Bank of Nigeria v. Ukpong*¹⁵, the Court of Appeal in the course of interpreting section 2(a) of the Public Officers (Protection) Law, Cap 106, Laws of Oyo State, 1978 which is *impari materia* with section 2(a) of the Public Officers Protection Act, laws of Kaduna State opined that: "There are two conditions precedent to the application of section 2(a) of the Public Officers (protection) Law. The two conditions are:- (a). it must be established that the person against whom the action is commenced is a Public Officer or a person acting in the execution of public justices within the meaning of the law; and (b) the act done by the person in respect of which the action is commenced must be one done in pursuance of execution of any law,

¹²*Kolo v A-G., Federation* [2002] 45 WRN 53 at 70 – 73 per Oduyemi JCA (CA).

¹³ (1998) 12 SCNJ 255; (1998) 14 NWLR (Pt. 584) 1.

¹⁴ *supra*

¹⁵(2006) 13 NWLR (pt. 998) 555 at 559

public duty or authority or in respect of an alleged neglect or default in the execution of any such law or authority".

The question of who is a public officer and whether his act was done in pursuance of execution of any law, public duty or authority, must be resolved before the limitation period will apply.

3. 1. Who is a Public Officer?

The Public Officer Protection Act does not define who a public officer is. The long title states the objective of the Act, which is for the protection of persons acting in the execution of public duties. Earlier decisions of the Nigerian courts, including the Supreme Court,¹⁶ followed the English common law interpretation of a public officer thus: "a public office holder is an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public."¹⁷ This conforms to the definition of a public officer in the Interpretation Act Cap 149 LFN 1990, that "a public office holder is an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public."

Further elaboration was given in *Asogwa v. Chukwu*¹⁸ (the Court defined a Public Officer as:- "The term Public Officer referred to in the interpretation Act can only be described to be referable to those enjoying employments with statutory flavour as reflected in section 318 (1) of the 1999 Constitution". Similarly, in *Chief John Eze v. Dr. Cosmas I. Okechukwu*¹⁹ the Court opined that a "public officer, in my view is a holder of a public office. He is in the public sector of the economy as distinct and separate from the private sector. He is entitled to some remuneration from the public revenue or treasury. He has some authority conferred on him by law. He also has a fixed tenure of office that must have some permanency or continuity. Above all, a public officer has the power to exercise some amount of sovereign authority or function of government. The Sovereign authority may be great or enormous. It may be little or small. There should be that element of sovereign authority. So too the exercise of government function in lieu of sovereign authority. There should be that element of government function. All the above characteristics must be present to vest in a person the status of a Public Officer. In other words, they must co-exist in person". In *Governor of Ebonyi State & ors v. Isuama*²⁰, the Court of Appeal in the course of interpreting section 318 of the 1999 Constitution of the Federal Republic of Nigeria vis-à-vis determining the issue of whether the Governor of Ebonyi State was a Public Officer opined that:- "In the instant case, neither the Governor of Ebonyi State nor Ebonyi State House of Assembly and the National Judicial Council can be considered as a Public Officers".

However, the Supreme Court in *Ibrahim v Judicial Service Committee, Kaduna State*²¹ held that, with "the greatest respect, I cannot pretend that I fully appreciate learned counsel's contention in this area of his argument. In the first place although the title of the relevant law implies a law to protect "public officers" and not "Public offices", it is beyond argument that government positions such as Attorney General, Permanent Secretary Inspector General of Police e.t.c although Public Offices" they are none - the -less "Public officers" in law. I cannot, with respect, accept that the Attorney-General, Permanent Secretary or the Inspector General is not a "Public Officer" as known to Law". The Supreme Court's interpretation can be justified based on the provisions of section 2(a) of the Public Officer Protection Act/Law that employs

¹⁶*Obiefuna v. Okoye* (1961)1 ALL NLR 357; *Rufus Ali Momoh v. Afolabi Okewale and Anor* (1977) NSCC 365

¹⁷*R v. Bembridge*(1783) 3 Doug KB 32; *R v. Whitaker*(1914) KB 1283

¹⁸2003) 4 NWLR (pt. 811) 540 at 551 per Aboki JCA (CA)

¹⁹(1998) 5 NWLR (pt. 548) 43 at 73

²⁰(2004) 6 NWLR (pt. 870) page 511 at 516

²¹(1998) 12 S.C.N.J 255 at 272

“person” as opposed to “public officer” used in the long title of the Act/Law. Indeed, *Iguh JSC* in the leading judgment made the following pronouncement:

“...As I have repeatedly stated, the words of the Section of the law under the interpretation are clearly not in themselves ambiguous. There is also nothing in either the long or short title as against the full context of the legislation, which suggests that any special meaning is to be given the words “any person” in that law other than their ordinary and plain meaning...”²²

In *Ibrahim Case* the plaintiff, an Upper Area Court Judge in Kaduna was wrongfully retired from office on 8/02/1985. On 28/04/1986, he sued the Judicial Service Committee of Kaduna State for the wrongful retirement at the Kaduna State High Court. The defendants (Judicial Service Committee) raised a preliminary objection that the case was statute barred. The plaintiff in response argued that the Public Officer Protection Act applies only to public officers and does not protect a public institution (Judicial Service Committee of Kaduna State). This argument was rejected and the court held that the case was statute- barred. He appealed to the Court of Appeal that equally dismissed the matter on the ground that it was statute- barred. The plaintiff dissatisfied, appealed to the Supreme Court. The Supreme Court rejected the argument that the Public Officers Protection Act applies only to public officers and held that the Act applies to both a public officer and public institution and consequently dismissed the case as being statute-barred.

The ratio of the *Ibrahim Case* has been followed and applied in subsequent cases. The word ‘Person’ was defined in the case of *Kasandubu v. Ultimate Petroleum Ltd*²³ to mean both artificial and natural persons and includes sole or public bodies-corporate or incorporate. More striking and illuminating on the word ‘person’ is the decision of the Supreme Court in the case of *University of Jos v. Ikegwuoh*,²⁴ where it was held that ‘any person’ used in section 2 of the Act is not limited only to natural persons or human beings or persons sued in their natural names, but includes artificial persons, public bodies or body of persons, whether sued by their official titles or not. Indeed, the case of *Kolo v A-G., Federation*²⁵ was held by the Court of Appeal to be “on all four” with the fact of the subject of the *Ibrahim case*.

The interpretative jurisprudence on who is a public officer under the Public Officer Protection Act/Law can therefore undoubtedly be stated to cover public officers and public institutions. Clearly, the intendment of the Act as expressed in the long title to protect “public officers” can arguably be said to have been overreached by the literal interpretation approach of the courts that has now resulted in the overboard extension of the meaning of a “public officer” to “public offices” and “public institutions” by the courts. This therefore calls for law reform, to either repeal the Act/Law as was done in England to the Public Authorities Protection Act, or to narrow the scope of its application in conformity with the intendment of the Act and change “person” to “public officer”.

No doubt the imposition of the limitation period of three months has unduly provided a shield and an escape route to many public officers to the detriment victimized public/civil servants and other members of the society who are not public officers. It is therefore not surprising therefore that some States like Abia, Ebonyi and Rivers, repealed the 1963 Public Officers Protection Law that was applicable throughout the former Eastern States of Nigeria and replaced with the individual state Public Officer Protection laws. One important feature of the new Public Officers Protection Laws of these states is the removal of the three

²²*ibid*

²³(2008) 7 NWLR (Pt. 1086) CA 274; see also *Adio Suleiman v. Kwara State Polytechnic* (2006) LPELR-11648(CA)

²⁴ (2013) 9 NWLR (Pt. 1360) 478

²⁵[2002] 45 WRN 53 at 66 – 67 per Oduyemi JCA (CA)

months limitation period for public officers and making the limitation period to be the same with that of private individuals respectively.²⁶

In Ebonyi State for example, sections 42 and 44 of the Public Officers Protection and Limitation Law provide as follows -

Section 42 “Notwithstanding anything contained in any other enactment or rule of law to the contrary all action to which this law applies howsoever arising against the state or against any state public authority or officer thereof, for anything done intended or omitted to be done in pursuance or execution of any such act, duty or authority or in respect of any neglect or default in the execution of any such authority shall be commenced within same period of time after the cause of action arose as if such action were brought by or against a private individual.”

Section 44 “Any enactment relating to the limitation of action which were enforced in the state immediately before the commencement of this law shall cease to apply.”²⁷

An action against a private individual is five years for contractual matters by virtue of section 18 of the Limitation Law of Ebonyi State. It is note worthy, that the provisions of sections 42 and 44 of the Limitation Law of Ebonyi State have been judicially tested and upheld in a judgment delivered by Owoade, JCA in Enugu Division of the Court of Appeal in the case of *Uduma v. Attorney- General of Ebonyi State*²⁸ The plaintiff was the Chief Accountant of the Ebonyi State civil service, whose appointment was dismissed in a letter dated 20/5/2009 headed “Dismissal” and signed by the Permanent Secretary Ebonyi State Civil Service. The Lower Court struck out the matter on the ground that the action was statute-barred as it did not comply with the provision of section 2(a) of the Public Officers Protection Law of 1963, whereas the plaintiff relied upon the provisions of sections 42 and 44 of the Ebonyi State Limitation Law, Cap 102 of 2009. On appeal, the Court of Appeal upheld the provisions of sections 42 and 44 of the Limitation Law of Ebonyi State and made the necessary orders remitting the matter back to the Chief Judge of Ebonyi State for reassignment and retrial by another Judge of a High Court in the State.

At the least we commend this reform approach to all States within the federation, and at best a total repeal of this archaic Act/Law is what the justice of the matter deserves.

3. 2. In Pursuance of Execution of Any Law, Public Duty or Authority

In resolving the issues of whether the action of the person was in pursuance of any law, public duty or authority, the decisions in several cases have also exposed the incongruity of the Act/Law under constitutional democracy. In *Ekeogu v. Aliri*²⁹ the plaintiff was a Primary five pupil of Community Primary School, then aged eleven (11) years, while the 1st Defendant was at the date of the incident subject-matter of this suit, a teacher at the said Community Primary School, under the employment, discipline and control of the second and third defendants. On or about the 2nd day of December, 1985, there was an incident of theft in a nearby Palm Produce depot. The thief was caught and was being beaten up by irate members of the public who gathered as soon as he was caught. The 1st defendant instructed his class pupils, including the plaintiff to go and see how thieves are treated so as to learn a lesson therefrom. The plaintiff together with other pupils in the class obliged and went to the said depot. Soon after the bell rang for resumption of classes and all the pupils, including the plaintiff began to run back towards the class. Suddenly, the 1st defendant

²⁶ Section 42 and 44 of the Limitation Law of Abia State Cap.24 of 2001, Sections 42 and 44 of the Public Officers Protection and Limitation Law, Cap. 102, 2009 of Ebonyi State, Section 43 of the Limitation Law, Cap.80, Laws of Rivers state

²⁷ Cap.102, 2009 of Ebonyi State

²⁸(2013) LPELR 21267 (CA)

²⁹(1991) LPELR-1079(SC); (1991) 3 NWLR (Pt.179) 258

picked a cane and began to flog the pupils as they ran into the classroom. As the plaintiff attempted to run into the classroom the 1st defendant aimed at her face and discharged his cane right across the face of the plaintiff. The cane landed on the plaintiff's left eye and the plaintiff cried out in pain and anguish. The plaintiff lost balance and collapsed on the floor. The 1st defendant ignored the cries of the plaintiff and continued to flog the other pupils.

On the 12th day of April, 1988, the 1st Defendant filed a motion on Notice under Order 29 Rules 1 and 2 of the High Court Rules of Eastern Nigeria then applicable to Imo State, praying the court to dismiss the plaintiff's claim on the grounds:

"That the action instituted by the plaintiff/respondent against the first Defendant/Applicant is a nullity as it is statutorily time-barred under Section 2 of the Public Officers Protection Law, Cap.106, Laws of Eastern Nigeria, 1963 as applicable to Imo State.". On the 16th day of November, 1988, the learned trial Judge (Ogu-Ugoagwu, J.) delivered his ruling dismissing the application. In his ruling he held that on the facts before him, the 1st defendant was at the material time a public servant, as defined under S.277 and the 5th Schedule to the 1979 Constitution. He also held that since the act complained of occurred on the 2nd day of December, 1985 and the suit was commenced on 20th July, 1987- "nineteen months and eighteen days after the occurrence. This action, therefore, was not commenced within the period stipulated in S.2 of the Public Officers Protection Law (supra). The cause of the action accrued to the respondent on 2nd December, 1985, when the applicant hit her left eye by flogging her with a cane, as pleaded in paragraphs 5 and 8 of the Statement of Claim. "On the issue of whether the 1st defendant was, at the material time acting in pursuance of his duty, the Judge stated as follows:-

"Was the applicant acting in the execution of his duty as a teacher when he sent the respondent and co-pupils in his class to watch the beating of a thief by irate public who had taken the law into their own hand? Was there any lesson for the respondent and other pupils to learn from the mob action of beating a thief? If yes, was the lesson beneficial or detrimental to the fledglings including the respondent who then was eleven years old? Before proceeding further I am of the considered opinion, in answer to the first question, that the applicant acted outside his official duty as a teacher when he sent the respondent and other pupils out from his class to go on their own outside the school compound to watch the commission of assault on a thief at a palm produce depot. To the second question my answer is that there was a lesson to learn but that lesson was that the pupils could take the law into their own hands without recourse to appropriate authority. Such a lesson was detrimental to the moral upbringing of the fledgling." For the reasons given I am satisfied that the applicant's act in causing permanent injury to the left eye of the respondent is a felonious act and so the applicant, though a public officer, cannot take cover under the Public Officers Protection Law, Cap.106.

The first defendant, (now applicant) being dissatisfied with the ruling of the High Court appealed to the Court of Appeal, Port Harcourt Judicial Division. The Court of Appeal, after hearing argument from counsel, dismissed the appellant's appeal, holding that the act complained of was not done by the appellant in the execution of a public duty, Kolawole, J.C.A., who read the lead judgment put it as follows:-

"If the averments contained in paragraphs 6, 7 and 8 of the Statement of Claim are admitted by the appellant, the action of the appellant is beastly and without jurisdiction. What wrong did the respondent commit to necessitate such a brutal action on the part of the appellant that caused the loss of the left eye of an eleven years old pupil? If, as a result of the flogging of the respondent, death were to result, could it be said that the appellant was acting in pursuance of public duty? I do not think so. Could the appellant take cover under Section 2(a) of the Public Officers Protection Law? That will defeat the purpose of the legislation. The Public Officers Protection Law is not a licence for the commission of criminal acts under which a public officer will then seek sanctuary without answering the very grave allegations leveled against him that he is assumed to have admitted as true at the stage of the demurrer. In my view the appellant must

offer an answer as to why he did what he was alleged to have done, an act which patently he did not do in pursuance of any official duty."

Aggrieved by the decision of the Court of Appeal, the appellant has further appealed to this Supreme Court on only one ground of appeal. That ground reads:—"Error of Law" The learned Justices of the Court of Appeal erred in law when they denied the appellant protection under the Public Officers Protection Act even though the suit was filed more than three months after the incident complained about, and it was not disputed that the appellant was on official duty at the material time. In his brief of argument, appellant's counsel formulated the issue for determination as follows:- "Was the appellant engaged in official duty at the time he injured the respondent? If the answer is yes, can the nature of the respondent's injury operate to deny the appellant protection under Section 2(a) of the Public Officers' Protection Law?"

Kawu JSC who read the leading judgment, stated rightly that the only issue to be resolved was whether the two lower courts were right in their conclusion that the act complained of cannot be said to have been performed by the appellant in the execution of his public duty so as to enable him enjoy the protection of the provisions of the Public Officers Protection Law.

His Lordship then held that:

I have no doubt in my mind that on the facts of this case, both the trial court and the Court of Appeal were in error when they concluded that the conduct of the appellant was such that he should not be allowed the protection of section 2 of the Public Officers Protection Law. It is clear, on the facts that at all material times the appellant was acting in pursuance of his public duty as a teacher exercising disciplinary control over his pupils. The fact that there was or might be some default or negligence on his part in the performance of his duty should not be the basis for depriving him of the protection under the section. After all, what was in issue at that stage of the proceeding was not the liability of the appellant but whether the action was maintainable or not. I am satisfied the appellant was a public officer at the material time, that the act complained of occurred in pursuance of his duty as such public officer and that action was not brought against him within the period stipulated by law and consequently the action was statute-barred. The judgment of the Court of Appeal affirming that of the High Court that dismissed the appellant's application and directed him to file his Statement of Defence within twenty-one days is hereby set aside.

The Supreme Court's decision to set aside the concurrent findings and judgments of the trial court and Court of Appeal that the act complained of cannot be said to have been performed by the appellant in the execution of his public duty so as to enable him enjoy the protection of the provisions of the Public Officers Protection Law, is nothing more than a legalistic interpretation that failed to thoroughly examine the action of the public officer in question in order to achieve justice in the case, as was done by the trial court and the Court of Appeal. Can the action of the appellant, a teacher, who sends his pupils/class unto a public road where jungle justice was being meted out to a thief, while he stays behind in the class be reasonable said to be part of the lesson to be taught to pupils of such tender age? Can the lashing out indiscriminately to the faces of pupils with cane when the School bell rang resulting in permanent damage to the eye of one of the pupils in his class be part of the authorized duty of a teacher by the laws of our land? Hence the Supreme Court in stating that the Act was designed to protect a public officer against any action, prosecution or other proceeding; and for any act done in pursuance of or execution of any law, public duty, or authority; or for any alleged neglect or default in the execution of any law, duty or authority, merely glossed over the issues thoroughly examined by the trial court and Court of Appeal.³⁰ The apex court's decision can clearly be seen to have lead to miscarriage of justice in the matter.

³⁰Fasoro v. Milborne (1923) 4 NLR 85; Obiefuna v. Okoye (1965) All NLR 357. it does not afford protection for conduct that is criminal or acts done outside the scope of employment. See, Yabugbe v. C.O.P (1992) 4 NWLR(Pt.234) 152.

The Supreme Court should have applied the ratio in *Ekemode v Alausa*³¹ where the court held that the deliberate breaking up of canoe after its removal cannot be regarded as either necessary or incidental to the duty imposed upon the defendant by his employer for the purpose of exercising its authority. How much more the flogging of the face of a school pupil that resulted in the loss of the pupil's eye! This approach was articulated by Galadima, J.S.C, in *Attorney-General of Rivers State v. Attorney-General of Bayelsa State & Anor*³² thus: "The second exception to the application of the Act as a defence is that it does not cover a situation where the person relying on it acted outside the colour of his office or outside his Statutory or constitutional duty as claimed by the Plaintiff in this suit.

In the case of *Adigun v. Ayinde*³³ the incongruity and anachronistic nature of the Act/Law was revealed in the grim reality of the hardship and injustice that results from a strict legalistic construction of the Act/Law. The Appellant who was a civil servant with the Federal Ministry of Agriculture had an automobile accident and sustained very serious injuries in the course of a trip on an official assignment, in an official car driven by the first Respondent, a driver in the ministry. The Appellant had been rushed to the University Teaching Hospital in Ibadan, where he spent 18 months, and was further referred to a hospital in Edinburgh in the U.K. for treatment. He was paralyzed from the waist down-wards owing to damage done to his spinal cord. He spent about three years from the date of the accident, moving from one hospital to the other in search of medical treatment. His disability upon final discharge from hospital was assessed at 100%.

On the 21st of January 1981 (a period of about three years) he commenced his action against the 1st Respondent and his employers, the Federal Ministry of Agriculture before the High Court in Minna. The Respondent objected to the hearing of the suit relying on the provision of the Public Officers Protection Act. The trial court upheld the objection and dismissed the suit as being statute-barred. Both the Court of Appeal and the Supreme Court respectively affirmed the decision of the trial court. Although the Supreme Court noted the injustice in the statute, nevertheless it adopted the literal and plain interpretation of the Act and held that the action was statute – barred all the same. Indeed the Panel of Justices expressed strong statements on the injustice of the case that are very instructive. JustiKaribi-Whyte JSC:

The defendant has succeeded on technicality, which is not underserved but also exposes the injustice in the protection of the public officer. It is unconscionable that a public officer should be deprived of a remedy he ordinarily would have enjoyed merely because the injury was caused by another public officer, where both of them were lawfully carrying out their duty. Again, the public officer was unable to bring action within the prescribed period because the defendants undertaking his treatment in accordance with his conditions of service. I think the 2nd and 3rd respondents should review the case with especial sympathy in the interest of the public service and the morale of serving officers, and pay to the plaintiff whatever is due to him.³⁴

³¹(1961) All N.L.R. 135; see *Fajimolu v. Unilorin* Court of Appeal (Ilorin Division) cCA/il/49/2003j Muhammad Muntaka-Coomassie, JCA. (Presided) Tijjani Abdullah1, JCA Helen Moronkeji Ogunwumuu. J.C.A. (Read the Leading Judgment) Thursday. 13th July, 2006 - On Whether good faith or malice avail or deprive defendant of special defence of limitation under section 2(a) Public Officers (Protection) Act dependent on conduct of defendant - It does not require good faith to avail a defendant of the special defence of limitation of action nor does it require malice to deprive him of the defence provided under section 2(a) of the Public Officers (Protection) Act. Similarly, the right of any person injured or wronged by the act, neglect or default is not extinguished by the good faith of the public officer.

³²(2013) 3 NWLR (Pt.1340) 123 at 149; See: *Nwankwere v. Adewunmi* (1967) NLR 45 at 49; *Anozie v. Attorney-General of the Federation* (2008) 10 NWLR (Pt. 1095) 278 at 290 - 291.

³³(1993) 8 NWLR (Pt.313) 516

³⁴(1993) 8 NWLR (Pt.313) 516 at 536-7. In like manner Belgore JSC stated that: "I share the sentiments expressed in the penultimate paragraph of the judgment that the law has been cruel to the appellant. The appellant has been caught in the strait jacket of computation of time within which to sue and legally seems to have no remedy. The remedy he cannot

With all due respect, the remedy proffered in the case fell far short of the injury and injustice occasioned therefrom. Their Lordships should have gone a step further to recommend the repeal of the Act to the legislature to prevent the perpetration of injustice under the guise of Public Officer Protection. Denton – West, JCA in *Nwaka v. Head of Service, Ebonyi State* had the courage to call a spade a spade when she gave her candid observation on the Act thus: “...it appears to me that the Public Officers Protection Act is providing an undeserved shield for public officers against ordinary citizens who as it were, may be ignorant of the provisions of the Act. It is my humble view that laws should operate to enhance the lives of citizens and not to deprive the citizenry the opportunity to ventilate his grievances especially where there is an infraction of their entitlement and constitutional right”³⁵

4.0. Exceptions

4.1. Continuance of Damage or Injury

In *Adigun v. Ayinde*³⁶ the Supreme Court was of the view that the injury referred to in the Act is the injury sustained on the day of the accident and not the continuous effect of the injury on the appellant and therefore the provision in the Act as to the continuance of damage or injury is with effect from when the accident occurred. Hence, the effect of the injury after the three months period - such as medical treatment, hospitalization and the likes - does not constitute continuance of damage or injury. The apex court in the *Adigun v Ayinde case* made a distinction between continuance of damage or injury and continuous effect of injury or damage. While the continuance of damage or injury tolls the time for the computation of the period of limitation, continuous effect of injury or damage does not. In cases of continuance of damage or injury, the Public Officer (Protection) Law permits actions to be brought on the cessation thereof outside three months. This is the position of the law as expounded by Galadima, J.S.C, in *Attorney-General of Rivers State v. Attorney-General of Bayelsa State*³⁷ thus:

In cases of continuance of damage or injury, the Act permits actions to be brought on the cessation thereof outside three months. From the Amended Statement of Claim and as equally deposed to in his Counter-affidavit, the Plaintiff averred that he continues to be deprived of the allocation he is entitled to every month and the same has not ceased. I am of the respected view that in such a situation of continuance of damage or injury which has not ceased the Defence is not available to the 1st Defendant...³⁸

enforce is that of the litigation in Court of law because his suit is statute-barred. The notwithstanding there is the inbuilt remedy against this type of situation in all civilized governments, which I believe will be available to the appellant. Administratively, from the Head of Department to the Governor in the state, or from Head of Department along communication line to Head of State at Federal level ex-gratia payments are usually made victims of this type of misfortune. I am very sure that if pursued, these legal decisions will not be a bar to ex-gratia payment once a petition is written with this judgment attached. Ibid, at p. 537. Olatawura, JSC also expressed his opinion in the following words: “This unfortunate incident occurred when the appellant was on duty. The joy of service is the benefit due to dutiful and loyal public servants after retirement. If his service is cut short through no fault of his as in this case, he should not be cast away in his hour of need. As at the time of the accident he was just 33 years of age. He is now unable to fend for himself, his wife and children. These are his dependants. To leave him without any compensation based on the usual computation will demoralize public servants. His services to the nation have been cut short by an event over which he had no control. He carries a scar, a deformity and all other disadvantages for the rest of his life. He should not be cast away like a rag no longer useful for even a dirty job. He deserves pity and compassion. I will therefore order that a copy of this judgment be sent to the 3rd defendant to consider what is due to the plaintiff whose services were terminated by the accident suffered in the course of duty. -ibid at p. 537

³⁵*Nwaka v. Head of Service, Ebonyi State* (2008) 3 NWLR (Pt. 1073) 156 at 163

³⁶*supra*

³⁷(2013) 3 NWLR (Pt.1340) 123 at pages 148-149

³⁸*ibid* See also *Arema II v. Adekanye* (2004) All FWLR (Pt. 224) 2113 at 2132

The law is that, generally, where the injury complained of is a continuing one time does not begin to run for the purpose of application of a limitation law until the cessation of the event leading to the cause of action.³⁹

Also, where the continuance of damage is such that gives rise to a fresh cause of action every time it occurs, limitation law will not apply to bar action on the fresh cause of action.⁴⁰

However, in *Inspector Dominic Ibo v Nigerian Police Force*⁴¹ the Plaintiffs plea for continuance of damage or injury was rejected. The Plaintiffs were variously enlisted in the Nigerian Army in 1975 and subsequently had their service transferred to the Nigerian Police Force where they served until retirement in 2005 upon attaining the compulsory retirement age. They approached the court sometime in 2014 to seek redress for their irregular and incomplete pension payments. The defendants filed a preliminary objection to the suit on the ground that the plaintiff's suit was caught up by the 3 months limitation period under the Public Officers Protection Act. Counsel to the plaintiffs contended that the plaintiffs had suffered continuous injury/damage as a result of the actions of the defendants and thereby urged the National Industrial Court to make an exception and not apply the limitation under the Public Officers Protection Act. The National Industrial Court in its judgment delivered on 3/3/2015, upheld the preliminary objection of the defendants and dismissed the suit holding that the plaintiff's suit was caught up by the 3 months limitation period under the Act. In this case, the court ignored the defence of the plaintiff that being a pensioner is a continuous status therefore the damage of being deprived of his complete entitlement of his pension benefits also is continuous injury. This ought to be an exception to the application of the Act.

In another development the Court of Appeal considered the issue of continuous effect of injury in a case and tolled the time, although this goes against the norm established by many judicial pronouncements on the Public Officers Protection Act. In *Engineer G.F.C Ezeani v Nigerian Railway Corporation*,⁴² the plaintiff/appellant was an employee of the defendant/respondent. He was promoted to a director on 15/04/2007, on 18/04/2007 was retired from the service of the defendant/respondent on the grounds of "public interest", and on 22/04/2007, was forcibly ejected from his office by armed men. Thereafter the plaintiff/appellant petitioned the Bureau of Public Service Reforms through its steering committee. On 11/08/2008 via a letter, the Chairman of the steering committee and the Secretary to the Government of the Federation (SGF) ordered the reinstatement of the plaintiff/appellant. On 05/01/2009, the Minister, vide a letter ordered the managing director of the defendant/appellant to reinstate the plaintiff/respondent but the respondent ignored the directive. On 18/12/2009, the respondent communicated its refusal to reinstate the appellant. Dissatisfied the plaintiff/appellant went to court but he lost the case in the court of first instance on the ground that the action was statute barred as it had exceeded the limitation period under the public officers protection Act. The plaintiff/appellant further appealed and on appeal the court held among other things that the trial court failed to take into consideration the surrounding circumstances. The Court of Appeal held that when a public officer acts outside his authority or without a semblance of legal justification, he cannot claim protection under the Act. The Court of Appeal further held that the cause of action arose when the letter of 17/05/2009 from the respondent refusing to re-instate the appellant was issued but the "**injury (mental and psychological) inflicted on the appellant continued.**" The court of Appeal allowed the appeal in favor of the appellant.⁴³

³⁹*Abiodun v. Attorney General, Federation* (2007) 15 NWLR (Pt. 1057) 359; *Nigerian National Petroleum Corporation v. Mallam Idi Zaria* (2014) LPELR-22362 per Abiru JCA (CA)

⁴⁰*The Shell Petroleum Development Company of Nigeria Ltd v. Amadi* (2010) 13 NWLR (Pt. 1210) 82

⁴¹Judgment of the National Industrial Court, Calabar Division in Suit No NICN/CA/39/2014 (Unreported)

⁴²(2013) LPELR-22065 (CA)

⁴³*ibid* (emphasis mine)

4. 2. Criminal act of a Public Officer

The use of the word “Prosecution” in section 2 of the Act might give the impression that the Act provides for protection for a public officer who has committed criminal wrong in the course of execution of a public duty or authority. Some public officers have tried unsuccessfully to rely on the Act for protection in matters the commission of crime.

In *Yabugbe v C.O.P*⁴⁴ the Supreme Court defined the word “Prosecution” used in the Act to exclude criminal matters. In this case, the appellant, an Assistant Superintendent of Police at the material time of the case, 3/6/1979, was arraigned as the third accused along with two others before the Magistrates Court, Oyo. On a charge of unlawfully assaulting one Olayiwola Afolabi on 3/6/1979 and causing him harm and thereby committed an offence contrary to and punishable under Section 296, of the Criminal Code Cap.28 Laws of Western Nigeria 1956. The victim of the assault was alleged to have been arrested by the accused persons for causing obstruction with his car. He was allegedly beaten and dragged to the police station and left in a state of unconsciousness before being taken to the hospital. The victim turned out to be a senior Magistrate. In defence, the accused persons raised the maxim “*nemo judex in causa sua*” that is to say that the trial Senior Magistrate being a member of the Magistrate Association, cannot try the matter as that would amount to being a judge in his own cause. This defence was rejected and the accused persons were convicted to 12 months imprisonment without an option of fine. On appeal to the High Court, the appeal was dismissed. The court however gave each of the accused persons an option of fine of ₦250 on the ground that the appellants were first offenders. The 3rd accused further appealed to the Court of Appeal and the appeal was also dismissed. The appellant still felt dissatisfied and appealed to the Supreme Court. In the Supreme Court, the appellant raised a fresh issue to wit; that his prosecution could not stand in view of the fact that it was commenced outside the three months prescribed by the Public Officer’s Protection Law, Cap.106, Laws of Oyo State of Nigeria, 1978.

The Supreme Court held on the meaning of “prosecution” as in the Public Officers Protection Law, is not applicable to criminal proceedings. The word used in the legal sense means one of three things:

- (a) A proceeding by way either of indictment or of information in the criminal courts, in order to put an offender on his trial; or
- (b) The institution and carrying on of legal proceedings against a person, not necessarily criminal proceedings or
- (c) The party by whom criminal proceedings are being instituted and carried on

The Supreme Court stated that it could not have been the intention of the State to shield or protect public officers from criminal prosecution for criminal offences committed by them in the guise of performing their official duties by limiting the time to initiate prosecution to only three months. According to Akpata, JSC:

It cannot be said to be within the contemplation of the law-makers to protect public officers against prosecution for crimes they may commit on the pretext or otherwise that such crimes were committed in the lawful execution of a public duty. It cannot be. The prosecution of the appellant was proper. The protection law is not available to him.⁴⁵

Nnaemeka-Agu, JSC expressed it poignantly thus:

I shall put this in another way. It is against public policy for government to use its machinery to shield criminals from prosecution. If the above section is interpreted to cover public servants who

⁴⁴ (1992) 4 NWLR (Pt. 234) 152 at 170-171 (SC)

⁴⁵ *ibid* at 177

commit crimes rather than limiting the prosecution to civil wrongs committed in the execution of their lawful duties, such an interpretation, in my view, fall foul of this public policy....⁴⁶

Also in *Egbe v. Yusuf*,⁴⁷ though a civil matter, the appellant's claim was for damages for false imprisonment, malicious detention, malicious arrest, injurious falsehood and conspiracy committed by the respondent for the arrest and detention of the appellant occasioned by a detention order signed by the respondent pursuant to Decree Number 24 of 1967. The respondent put up among other defences the contention that the action having been filed after three months of the alleged acts was statute-barred. The court held that the action is not statute-barred. The respondent therefore appealed to the Court of Appeal that held that the action was statute-barred. Ultimately, the appellant appealed to the Supreme Court, and the apex court dismissed the appeal. According to Belgore, JSC:

The Public Officers Protection Law is clear as to its purport. Once a public officer is alleged to have done some wrong in the execution of his public duty as such public officer, he can be sued only within three months of the action complained of. This is only in matters strictly civil. The fact that a crime is alleged does not take the civil matter out of the ambit of civil litigation. There is no time limit for prosecuting an officer for crime even if that crime was committed in course of public duty. The respondent is not being prosecuted for crime and such being a civil matter and was not commenced against him within three months of the act complained of the action is statute-barred.⁴⁸

It is clear from the Supreme Court decisions that the limitation under the Act will not serve as a defence to protect a public officer in a criminal wrong from criminal prosecution.⁴⁹

5.0. Recommendation(s) and Conclusion

The thrust of our argument is that the Act has outlived its usefulness in Nigeria. The Act will be a century old by 21st of September 2016 since its enactment in 1916, almost the same age with Nigeria as a Nation. The main purpose of the Act when it was enacted as an Ordinance was for the protection of colonial officials of her Majesty the Queen of England from being harassed with any form of action, prosecution or proceeding by native Nigerians. Meanwhile the Public Authorities Protection Act of 1893 of the United Kingdom from where the Public Officers Protection Act had its root had been repealed by the Crown Proceeding Act passed into law by the British Parliament in 1947 that gave the ordinary citizen a right of action against the Crown in tort and in contract. The Act made the Crown vicariously liable for torts committed by its servants in the course of their employment and curtailed other privileges. The law which was made to protect public officers in the performance of their statutory duties turned out to be a nightmare to private individuals seeking to enforce their rights against wrongs committed by public officers. So much was the injustice in Britain that the Act was eventually repealed in 1954.⁵⁰

The time has come for the Public Officer Protection Act to be repealed in Nigeria too, and we make bold to make the following recommendation to accomplish this objective:

⁴⁶*ibid* at 181

⁴⁷ (1992) 23 NSCC (Pt.11) 243

⁴⁸*ibid* at 251

⁴⁹It is the rule of law and equity that a wrongdoer will not be allowed to take advantage of his wrong-doing. This rule is encapsulated in the latin maxim: *nollus commodum capere potest de injuria sua propria*. SeeVinz International (Nig.) Ltd v. Morohunduya (2009) 11 NWLR (Pt.1153) 562 (CA)

⁵⁰ Peter Leyland & Terry Wood, *Textbook on Administrative Law*, 4th edition (2002 Oxford University Press) 533-534; ,Private Rights and Public Wrongs Interface: The Limits of Private Law www.unilag.edu.ng/opendoc.php

1. To repeal and re-enact the Public officer Protection Act to remove the limitation period of three months, and thereby remove the protection afforded by the three months limitation period after which the action becomes statute barred.
2. Follow the example of Ebonyi State for example, whereby sections 42 and 44 of the Public Officers Protection and Limitation Law provide as follows -
Section 42 “Notwithstanding anything contained in any other enactment or rule of law to the contrary all action to which this law applies howsoever arising against the state or against any state public authority or officer thereof, for anything done intended or omitted to be done in pursuance or execution of any such act, duty or authority or in respect of any neglect or default in the execution of any such authority shall be commenced within same period of time after the cause of action arose as if such action were brought by or against a private individual.”
Section 44 “Any enactment relating to the limitation of action which were enforced in the state immediately before the commencement of this law shall cease to apply.
3. Follow the example of the Nigerian Law Reform Commission to simply repeal the Public Officer Protection Act. A Bill for the repeal of the Public Officer Protection Act was submitted to the Speaker, House of Representatives of the National Assembly⁵¹ that simply provides:
The Public Officers Protection Act Cap P. 41 Laws of the Federation of Nigeria is hereby repealed.

In conclusion one must clearly and unequivocally express that stand for the repeal of the Public Officer Protection Act/Laws in Nigeria, as the legislation as shown above has become an instrument of injustice and impunity, contrary to the democratic tenets of rule of law, equality before the law, and accountability of government provided under the 1999 Constitution. Sounding the death knell of this anachronistic legislation is to ensure that the legislature hammers in the final nail to the casket to lay it to rest before or immediately after the centennial anniversary of the legislation, on 21st September 2016. Adieu!

⁵¹ The Nigerian Law Reform Commission submitted the Proposed Bill for the Repeal of the Public Officer Protection Act through the Committee for the Review and Reform of the Laws of the Federal Republic of Nigeria set up by the Honourable Speaker, the Report (including Proposed Bills) was submitted to the Honourable Speaker, Dogara, on November 12, 2015.