

SEPARATION OF POWERS AND THE PURPOSIVE APPROACH TO THE INTERPRETATION OF THE 1999 CONSTITUTION*

“The literal method is now completely out of date. It has been replaced by the “purposive approach” ... In all cases now in the interpretation of statutes we adopt such a construction as will “promote the general legislative purpose” underlying the provision.”
– Denning, L.J.

“The days have long passed when the Courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The Courts must adopt a purposive approach which seeks to *give effect to the true purpose of the legislation.*” - Griffiths, L.J.

Introduction

This contribution examines the Purposive Approach to the interpretation of the Constitution and the fear on the part of a few writers that it may offend the doctrine of the separation of powers. The article begins with the definition of Government and the doctrine of the Separation of Powers, points out some imperfections in the 1999 Constitution of Nigeria and the judicial response aimed at solving this problem by resorting to the purposive approach.

Government: Functions and Powers

Government is a machinery for conducting or running the affairs of a country or State. In this sense government means the act of governing or governance. On the other hand, the institution established to carry out the day-to-day administration of the State or Country may be referred to as the Government. In this sense, for instance, the executive is referred to as the Government. But the truth is that there are three arms, which constitute a government in modern democratic societies or systems.

These are the Legislature, the Executive and the Judiciary. In Nigeria, these three arms of Government came into existence at the same time and by the same act of creation under the 1999 Constitution. They are triplets born the same day or deemed to be so, by virtue of sections 4, 5 and 6 of the Constitution. Accordingly, in Nigeria, no one arm of government is superior to the other, neither is any subordinate to the other. Each organ is independent within its own sphere of influence. This is also the position under the American constitutional arrangement. Under the Constitution of the United States of America, Articles I, II and III thereof created the Legislature, Executive and the Judiciary respectively.

The functions of government are basically three, namely, Law-making (Legislation); law-enforcement or execution and administration of justice (interpretation of laws and settlement of disputes). These functions are assigned to the three arms of government under the 1999 Constitution. Section 4 vests the legislative powers of the

* Oshio, P.E., Professor of Law, Barrister, Solicitor and Legal Consultant, Dean, Faculty of Law, University of Benin, Benin City, Nigeria.

Federal Republic of Nigeria in the Legislature (the National Assembly, a bicameral legislature, consisting of a Senate and a House of Representatives at the Federal level and the legislative powers of a State of the Federation in the House of Assembly of the State, a unicameral legislature.

Section 5 vests the executive powers of the Federation in the President at the Federal level and the executive powers in a State in the Governor of the State.

Section 6 vests the judicial powers of the Federation and a State therein in the Judiciary consisting of the Courts established for the Federation and the States by virtue of the provisions of the Constitution.

The Doctrine of Separation of Powers

Though arguments for separation of powers in government may be gleaned from ancient and medieval theories of government, the French author, Montesquieu, is credited with the first modern articulation of the doctrine of separation of powers. Montesquieu improved on an argument of Locke in his book, Second Treatise on Civil Government, who in his postulates for democracy, insisted on the separation of the King, representing the Executive, from Parliament, representing the Legislature.

Montesquieu, who showed great concern for liberty and feared concentration of powers in one place in his book, The Spirit of Laws, thought that it was the presence of liberty under the British Constitution that was responsible for the constitutional arrangement showing the three arms of government at work within three separate departments. He then added a third arm, the Judiciary, to Locke's earlier postulate, namely, King and Parliament.

However, students of the British constitutional arrangement know that there is no water-tight separation of powers in Britain in reality. Rather, there is some fusion of powers in the system. For instance, the Lord Chancellor presides over the House of Lords as a Legislative chamber and also as the highest Court of appeal. In other words, the Lord Chancellor is the head of the Judiciary, a senior member of the Cabinet and a legislator! Thus, his activities cut across the three arms of government. There is also fusion of powers in the British Cabinet. Under this Parliamentary system, the Cabinet, which is the executive, is drawn from among members of Parliament and this government, which usually commands the majority, virtually controls the votes in Parliament. However, from October 2009 under the Constitutional Reform Act 2005, the United Kingdom will have a separate Supreme Court. The Act provides for the separation of the Appellate Committee (the Supreme Court) from the Legislature (Parliament) and the Executive (Government).** This will draw British constitutional arrangement closer to Montesquieu's theory, which finds more relevance under the constitutional arrangement in the United States of America and Nigeria.

However, even in the United States of America, the division of the three arms of government is not absolute, as in some cases, their activities overlap. For instance, Congress which is the Legislature can impeach the President, the executive. The Vice President (executive) is the President of the Senate (Legislature). The President has power to veto legislation passed by Congress and this is a legislative power. Justices of the Supreme Court (the Judiciary) are nominated for appointment by the President and are screened for confirmation by the Senate before taking their oath of office.

As a Presidential system of government, Nigeria follows closely the United States arrangement. Although the 1999 Constitution vests the legislative, executive and judicial powers on the three separate arms of government respectively, the division of powers is not meant to encourage isolation of any arm of government, for no one is an island to

** (see www.justice.gov.uk)

itself. Thus a system of checks and balances is desirable and feasible rather than an absolute separation of powers, which is impracticable. The powers may be distinct but not really separate. This is evident under the Nigerian constitutional arrangement. The President has power to veto any bill passed by the legislature but the legislature can impeach the President. Also, the President's nomination for appointment as Supreme Court Justices is subject to confirmation by the Senate. The legislature exercises oversight functions including the power over public finance and the power of investigation. On the other hand, the courts exercise the power of judicial review over executive and legislative actions.

In essence therefore, separation of powers in its practical operation involves a sharing of the powers of government, a system of checks and balances which allows each arm of government to defend its position in the constitutional framework of government. It needs flexibility, understanding and cooperation among the arms of government with each arm recognizing the limits and enforcing them. In this way, the purpose of government is fulfilled through the contribution from all the arms of government as partners in progress.¹

The 1999 Constitution

The Constitution of a nation is the *fons et origo*, not only of the jurisprudence but also of the legal system of the nation. It is the beginning and the end of the legal system. In Greek language, it is the alpha and the omega. It is the barometer with which all statutes are measured. In line with this kingly position of the Constitution, all the three arms of Government are slaves of the Constitution...in the sense of total obeisance and loyalty to it. This is in recognition of the supremacy of the Constitution over and above every statute, be it an Act of the National Assembly or a law of the House of Assembly of a State ...All the arms of Government must dance to the music and chorus that the Constitution beats and sings, whether the melody sounds good or bad.²

The 1999 Constitution of Nigeria attempts to provide what may be regarded as basic and rather comprehensive legal framework for true federalism. This Constitution has improved on the 1979 Constitution of Nigeria in seeking to promote federalism both in its classical formulation as a tool for achieving the much needed unity in diversity. The features include, amongst others, a Supreme Written Constitution, a pre-determined distribution of authority between Federal and State Governments, a provision for an amending process with the active participation of both levels of government, some measure of financial autonomy for States and the judiciary exercising powers of judicial review. While providing for separation of powers among the three arms of Government – the Legislature, the Executive and the Judiciary, the Constitution also provides for division of powers among the Federal, State and to lesser extent, the Local Governments. The Constitution thus provides for three tiers of Government with fairly well-defined functions and powers. However, despite these efforts, the Constitution appears to be replete with imperfections in many respects. The constitutional provisions on Local government System are less copious and have given rise to conflicts, confusion

1. Oshio, P.E. "Between God and Man: Perfecting a Litany of Imperfections in Nigerian Legislation", Inaugural Lecture Series 96, University of Benin, 2008, August 7, 2008

2 Per Niki Tobi J.S.C. in *Attorney-General of Abia State v. Attorney-General of the Federation* (2006) 16 N.W.L.R. (pt. 1005) 265, 389.

and questions as to the limit of legislative competence of the State or Federal legislature.³

The Local Government System

Section 7 of the 1999 Constitution provides:

“(1) The system of local government by democratically elected local government council is under this Constitution guaranteed; and accordingly, the Government of every State shall, subject to section 8 of this constitution ensure their existence under a Law which provides for the establishment, structure, composition, finance and functions of such councils.”

The bone of contention before the Supreme Court in *Attorney-General of Abia State & Ors. v. Attorney-General of the Federation*⁴ was the competence of the National Assembly to legislate on the Tenure of Local Government Chairmen, and, indeed, on election to Local Government Councils.

Specifically, the argument that the National Assembly could legislate on the tenure of the Local Government Chairmen was rejected by the Supreme Court. Section 7 of the Constitution did not expressly provide for tenure to be included in State law on Local government, most probably because, this had already been included under the existing law which established the existing local government councils – Local Government (Basic Constitutional and Transitional Provisions) Decree of 1998. Unfortunately that law had been repealed by the Constitution of the Federal republic of Nigeria (Certain Consequential repeals) Decree, 1999, and it was sought to argue that the National Assembly could legislate on local government as an incidental matter under item 68 of the Exclusive Legislative list. This argument was rejected by the Supreme Court. It was held that the power to establish local government under section 7 of the Constitution also implies the power on the part of the State Legislature to make provision for tenure of the office holders particularly where, in this case, the Constitution is silent on tenure. Secondly, under section 4 of the Constitution the State legislature is empowered to make laws on any matter not in the Exclusive Legislative list. Since tenure of Local Government Chairmen was neither in the Exclusive nor Concurrent Legislative lists, it was therefore a residual matter on which the State Legislature is entitled to make law exclusive of the National Assembly. It is submitted that this decision is sound in law.

A related issue was the provision for election into Local Government Councils which the National Assembly had made in the Electoral Act 2001, relying erroneously on the Concurrent Legislative List, items 11 and 12 of Part II of the Second Schedule to the Constitution. The Supreme Court also held that the National Assembly could not rely on these items to make provision for Local Government elections, an area which was expressly reserved for the States by virtue of Sections 4, 7 and 8 of the Constitution. We agree entirely with this decision.

Creation of New Local government Areas

³ Oshio, P.E. “The Local Government System and Federal/State Legislature Competence Under the 1999 Constitution”, *Journal of Constitutional and Parliamentary Studies, India* (2004) Vol. 38, Nos. 1-4, p. 159-173).

⁴ (2002) 6 N.W.L.R. (pt. 763) 264

Section 8 of the Constitution expressly gives power to a State house of Assembly to create new Local Government Areas under its laws. The procedure is well laid down in the section. Similar powers are also vested in the State Legislature of the purpose of boundary adjustment of any existing Local Government area with the procedure clearly outlined.

However, in the spirit of cooperative federalism section 8(5) and (6) enacts the involvement of the National Assembly in the process. Under subsection 5 the National Assembly is empowered by an Act to make consequential provisions with respect to the names and headquarters of the Local Government Area as provided in section 3 and part II of first Schedule to the Constitution. Indeed, this is expressly excluded by the provisions of section 9(2) aforesaid. Section 8(6) enjoins the relevant State Legislature to make adequate returns to the National Assembly to enable it enact the Act as prescribed under section 8(5). Very unfortunately, this otherwise simple matter has been unnecessarily, unduly and needlessly politicized. In the case of *Attorney-General of Lagos State v. Attorney-General of the Federation*⁵ President Obasanjo suspended and withheld the constitutionally guaranteed statutory allocation to the Lagos State for its Local Government probably to punish the State for creating additional Local Government Areas. It took the intervention of the Supreme Court to declare the action of the President unconstitutional, illegal, null and void. The Court held that the Lagos State Government has the power to create new Local Government Areas but that the new Local Government Areas will only operate after consequential amendment by the National Assembly of the list of the Local Government Areas in Part I of the First Schedule to the Constitution by virtue of Section 8(5) thereof. It is submitted that it is mandatory on the National Assembly to act under section 8(5) once the State legislature submits adequate returns under section 8(6) unless the exercise by the State is a violation of the Constitution. A direct amendment of the Constitution to this effect is hereby advocated.

Executive Immunity

Another area of imperfection is Section 308 of the Constitution⁶. The constitutional provision conferring immunity on the Chief executive of a State or Federation is not new in Nigeria. However, the interpretation of the provision is not as easy as it would appear at first sight.

Section 5 of the 1999 Constitution vests the executive powers of the State and Federation respectively on the Governor and the President. To prevent these officers from being inhibited in the performance of their executive functions by fear of civil or criminal litigation during their tenure of office, section 308 of the Constitution contains provisions clothing them with immunity from civil or criminal proceedings, arrest, imprisonment and service of court processes.

The persons covered by this immunity are the President, Vice-President, Governor and Deputy Governor. It is also clear that the period covered by this immunity is the period during which he is in office and he is required to perform the functions of the office and during that period only.

Nigerian Courts have had occasions to explain the rationale for, and nature of, the executive immunity under our constitutional arrangement. In the case of *D.S.P. Alamiyeseigha v. Chief Saturday Yeiwa*,⁷ the Court of Appeal explained that the

⁵ (2004) 18 N.W.L.R. (pt. 904) 1.

⁶ Oshio, P.E. "The Scope of Executive Immunity under the 1999 Constitution" *Journal of Constitutional and Parliamentary Studies, India*, (2001) Vol. 35, Nos. 3-4, p. 65-91.

⁷ (2001) F.N.W.L.R. (pt.50) 1676, 1692 adopting *Eso, J.S.C. in Obih v. Mbakwe* (1984) 1 S.C.N.L.R. 192, 211

purpose of conferring immunity on the executive is to prevent the executive being inhibited in the performance of his executive functions by fear of civil or criminal litigation arising out of such performance during his tenure of office. In *Tinubu v. I.B.M. Securities Ltd.*⁸ the Supreme Court described the provision as a policy legislation designed to confer immunity from civil or criminal process on the public officers named in section 308(3) and to insulate them from harassment in their personal matters during the period of their office. The Attorney-General of the United States explained the nature of similar immunity conferred on the American President. In the case of *Attorney-General Stanbery in Mississippi v. Johnson*⁹ he stated as follows:

“It is not upon any peculiar sanctity belonging to him as an individual, as is the case with one who has royal blood in his veins; but it is on account of the office that he holds that I say the President of the United States is above the process of any court or jurisdiction of any court to bring him to account as President. There is only one court or quasi-court that he can be called upon to answer to for any dereliction of duty, for doing anything that is contrary to Law or failing to do anything which is according to Law, and that is not this tribunal but one that sits in another chamber of this Capital.”

However executive immunity does not preclude judicial review of administrative or executive action pursuant to the exercise of judicial powers vested on our courts by virtue of section 6 of the Constitution.

A very fine point of law is whether an executive, while enjoying immunity under section 308 will be allowed to sue in his personal capacity. In the case of *Tinubu v. I.M.B. Securities PLC*¹⁰, Karibi-White J.S.C. in a dictum, held that the executive will not be allowed to institute personal actions during the period of office while enjoying absolute immunity under Section 308.

Quite unfortunately however, the Supreme Court overruled this dictum in the recent case of *Global Excellence Comm. Ltd. V. Duke*¹¹ thus approving the inequity in section 308. It is submitted that this section needs amendment to bar the executive from instituting legal proceedings in his personal capacity while enjoying absolute immunity, for “those who live in glass houses should not throw stones and equality is equity”.

Vacation of Office of the President or Governor

The provisions of Sections 142-145 and 186-189 of the Constitution which relate to election and vacation of office of the President or Governor are far from satisfactory. A misinterpretation of these provisions by President Obasanjo had led him into the grave error of declaring the seat of his Vice-President, Atiku Abubakar vacant and this gave rise to the novel case of *Attorney-General of the Federation v. Abubakar*¹². The protracted sour relationship between the President and his Vice eventually led the Vice-President, while still holding that office, to resign from the People’s Democratic Party on whose platform he was elected and joined another party, the Action Congress. For this reason the President declared his seat vacant having regard to his own interpretation of the relevant provisions of the Constitution. The Supreme Court held unanimously that he had no power to do so under the Constitution. The office of the Vice-President and,

⁸ (2001) 16 N.W.L.R. (pt. 740) 670, 708

⁹ 71 U.S. 475, 484 (1867)

¹⁰ Supra

¹¹ (2007) 16 N.W.L.R. (pt. 1059) 22

¹² (2007) 10 N.W.L.R. (pt. 1041) 1.

indeed, of the President, may only be vacated by impeachment or personal incapacity of the holder of the office under sections 142-144 or through his voluntary resignation. This decision of the Supreme Court is sound in law.

However, the provisions are unsatisfactory when considered together with some other provisions of the Constitution especially in respect of elected legislators. For instance, under sections 68(1)(g) and 109(1)(g) and subject to the proviso therein a member of the National Assembly or State Assembly shall vacate his seat if, being a person whose election was sponsored by a political party, he becomes a member of another political party before the expiration of the period of his office as a member.

Unfortunately, there is no equivalent of these provisions in respect of the Governor, Deputy Governor, President and Vice-President. This is very unsatisfactory and it is submitted that the Constitution ought to be amended to provide for this. A State Governor or Deputy Governor or President or Vice-President who leaves his political party for another should be equally made to resign or vacate such office.

Gubernatorial Election Petitions

Another crucial provision of the Constitution in this regard is Section 246(3) of the Constitution making the decision of the Court of Appeal final in respect of appeals arising from gubernatorial election petitions. This is very unsatisfactory given the importance of election petitions. Indeed, from our experience so far, many decisions of the Court of Appeal in different areas of the law had been reversed and corrected by the Supreme Court. It is equally true today that the Court of Appeal has given different conflicting decisions even in cases with similar facts on election petitions. This being the case, we suggest that this provision should be amended to enable a petitioner pursue his appeal to the Supreme Court for final determination. I am aware that this suggestion, if implemented, may have the effect of casting heavier burden on the Supreme Court in terms of cases. This need not constitute a hindrance. It is therefore suggested that section 230(2) should be amended to increase the number of Justices of the Supreme Court from 21 to 31 to enable the Court cope with the cases.

Indictment and Disqualification from Election

Another equally unsatisfactory provision is section 182(1)(i) under which a person is disqualified for election to the office of Governor of a State if he has been indicted. Section 137(1)(i) contains equivalent provision in respect of the President.

This provision has been abused by politicians in public offices who set up spurious tribunals/panels to "indict" their political opponents in order to bar them from contesting elections into public office. Hence, the Supreme Court of Nigeria rightly in our view, gave this provision a rather strained and narrow construction using the purposive approach in *Amaechi v. INEC*.¹³ It is suggested that this provision should be amended in line with this decision of the Supreme Court.

Judicial Intervention for the Efficacy of the Constitution

Since the process of law-making is by no means perfect it is not often the case that the Constitution is entirely perfect. Difficulties may still arise in relation to the Constitution despite the rigorous constitution-making efforts. The problem of language must be recognized as a paramount consideration. In drafting the text, the draftsman uses words which he thinks precisely express the intention of the Legislature. But he may not be entirely successful because the English Language is not an instrument of mathematical precision.

¹³ (2008) 5 N.W.L.R. (pt. 1080) 227

Lord Denning explained the problem thus:

“Whenever a statute comes up for consideration, it must be remembered that it is not within human powers to foresee the manifold set of facts which may arise and even, if it were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were...”¹⁴

This partly explains some reasons for ambiguities in the Constitution. Added to this is the problem of drafting errors which may lead to some difficulties in interpreting the Constitution. Given this situation, the need for a specialized arm of government arises whose function is the correct interpretation of our Constitution – the Judiciary.

The Function of the Judiciary

The judiciary is the arena of last resort to which we must turn to deal with the difficulties which may arise in the search for the correct interpretation of the Constitution. The primary function of the courts is to interpret the law and not to make or change it. In Nigeria, this is pursuant to the judicial powers vested in the courts by virtue of section 6 of the 1999 Constitution. The powers of the Court are derived from the Constitution and not at the sufferance of any other arm of the government of Nigeria. The function of the courts is *jus dicere* not *jus facere*. This has been emphasized by the Supreme Court of Nigeria over and over again: “The duty of the judiciary is to interpret the provisions of the relevant laws and Constitution, not to amend, add to or subtract from the provisions enacted by the legislature... the main function of a Judge is to declare what the law is and not to decide what it ought to be.”¹⁵

The traditional view is that the purpose of interpretation of statutes is to discover the intention of the legislature or parliament. A judge, in interpreting the provisions of any enactment, must get at the intention of the legislators. The primary concern of the courts is the ascertainment of the intention of the legislature or law-makers. This intention is to be found in the words used in the statute and nowhere else. Where the words are clear and unambiguous the court must give the words their plain literal meaning. In doing so the court must confine itself to the words used within the four corners of the statute and recourse is not generally allowed to extrinsic materials such as parliamentary history, debates, policy statement behind the enactments etc. One of the strongest proponents of this strict constructionist position in England was Lord Simonds who held the view that in construing enacted words the court was not to be concerned with the policy involved or with the results, injurious or otherwise, which may follow from giving effect to the language used. In other words, where the language of a statute is clear and unambiguous, it is not the function of the courts to so construe so as to prevent or mitigate any harshness which it may or may not be thought to occasion. That were better left to parliament to consider and the courts must not assume a corrective power over parliament. It follows also that it was not the function of the courts to apply the principles of right and wrong or justice or fairness to interfere with the construction of legislation. “The duty of the court”, said Lord Simonds, “is to interpret the words that the legislature has used; those words may be ambiguous, but, even if they are, the power

¹⁴ Seaford Court Estates Ltd. v. Asher (1949) 2 K.B. 481, 498

¹⁵ Action Congress v. INEC (2007) 12 N.W.L.R. (pt.1048) 222

and duty of the court to travel outside them on a voyage of discovery are strictly limited."¹⁶

However, the objection to the issue of legislative intention is that it appears to assume that the intention of the legislature is an objective historical fact capable of inference from relevant evidence. This assumption is rebuttable on a number of grounds. First, is the fact that the legislature, being a composite body, cannot have a single state of mind and therefore cannot have a single intention. According to Professor Max Radin:

"A Legislature certainly has no intention whatever in connection with words which some two or three men drafted, which a considerable number rejected and in regard to which many of the approving majority might have had, and often demonstrably did have, different ideas and beliefs."¹⁷

The second reason is that the nature of general words necessarily entails an exercise of personal decision by the interpreter in every case where, as a judge, he is precluded from referring back to the user of the words (the legislators or the draftsmen) for elucidation. In consequence, this discretion becomes inevitable even if all evidence bearing on the intention is admitted and even if the user of the general words is an individual of whom a single state of mind may be ascribed or imputed. Hence, some have argued that "the courts, while paying lip service to the theory of discovering legislative intention, do in fact construe statutes so far as the words allow, in such a way as to produce results which satisfy their sense of fitness."¹⁸

But times have changed. There has been a shift in favour of a more dynamic and liberal approach to the interpretation of statutes to deal with the complexities of modern society. The courts have evolved over the years various canons or rules of statutory interpretation to be discussed presently.

The Rules/Canons of Interpretation

These rules of construction and interpretation are judge-made having been formulated over the years in their various decisions. They are different from the interpretation sections in statutes and even the Interpretation Act itself. As judges sought solutions to problems brought before them in the past, they evolved these rules to guide them in the discharge of their onerous duty of construction and interpretation of statutes. It seems that the categories of the rules are not closed and would increase as the need to meet new challenges in the interpretation of statutes would arise. Since neither society nor the law is static, there may yet arise the need to develop more rules by judges to deal with more unforeseen complexities in the future. But for now only four very important and prominent of such rules will be highlighted.

(i) The Literal Rule

This is to the effect that only the words of a statute count, those words must be construed or interpreted according to their literal, ordinary, grammatical meaning. It postulates that the intention of the legislature which passed the enactment should be

¹⁶ Magor and St Mellons Rural District Council V. Newport Corporation (1952) AC. 189 at 191; Hope V Smith (1963) 6 W.L.R. 464 at 467, Wooding C.J. approving Viscount Simon L C. in King Emperor v Benoari Lal Sama.

¹⁷ (1930 43 Harvard Law Rev. 863, 870).

¹⁸ Akande J.O. "An Assessment of the Rule of Statutory Interpretation" The Lawyer, Journal of the Law Society, UNILAG (1980) p.37.

considered in construing the statute. Accordingly, where the words are plain, clear or unambiguous, this intention is best found in the words. This rule states:

“If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver. But if any doubt arises from the terms employed by the legislature, it has always been held a safe means of collecting the intention, to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which, according to Chief Justice Dyer, is a key to open the minds of the makers of the Act, and the mischiefs which they intend to redress.”¹⁹

It is however, a necessary corollary to this rule that the words used must be interpreted in the context in which they are used in the statute as words have no intrinsic meaning except within their context. In other words “every clause of a statute must be construed with reference to the context and other clauses of the Act, so as, as far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject matter.” According to Lord Blackburn:

“I quite agree that in construing an Act of Parliament we are to see what is the intention which the legislature has expressed by the words, but then the word again are to be understood by looking at the subject-matter they are speaking of and the object-matter they are speaking of and the object of the legislature, and the words used with reference to that may convey an intention quite different from what the self-same set of words used in reference to another set of circumstances and another object would or might have produced.”²⁰

However, the literal rule alone is insufficient to deal with the varied problems of interpretation. For instance, where the words are ambiguous – if they are reasonably susceptible of more than one meaning – or if the provision in question is contradicted by or is incompatible with any other provision of the enactment, then the court may depart from the literal rule. Another limitation of the literal rule is that it fails to involve a consideration of the object or purpose of a legislation or its surrounding circumstances in the construction of a statute which may be relevant even where there is no ambiguity. Lord Denning once lamented:

“A statute is not passed in a vacuum, but in a framework of circumstances, so as to give a remedy for a known state of affairs. To arrive at its true meaning, you should know the circumstances with reference to which the words were used and what was the object, appearing from those circumstances, which Parliament has in view...But how are the courts to know what were the circumstances with reference to which the words were used and what was the object which Parliament had in view, especially in these days when there are no preambles or recitals to give guidance. In this country we do not refer to the legislative history of the enactment as they do in the United States of America. We do

¹⁹ Sussex Peerage Case, 11 CL& F.85; 8 E.R. 1034, 1057.

²⁰ Edingburgh Street Trams v. Torbaain (1877) 3 App. Cas. 58, 68.

not look at the explanatory memoranda which preface the Bill before Parliament. We do not have recourse to the pages of Hansard. All that the courts can do is to take judicial notice of the previous state of the law and of other matters generally known to well-informed people.”²¹

It is to be regretted that in the Nigerian case of *Adegbenro v Akintola*,²² an uncritical application of the literal rule led to an unsatisfactory decision by the Privy Council which had to be reversed by the legislature through a subsequent enactment.

(ii) The Mischief Rule

This rule states as follows:

“That for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered: (i) what was the common law before the passing of the Act; (ii) what was the mischief and defect for which the common law did not provide (iii) what remedy the parliament hath resolved and appointed to cure the disease of the law (iv) the true reason of the remedy. And then the office of all judges is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for the continuance of the mischief and *pro private commodo*, and to add force and life to the cure and remedy according to the true intent of the makers of the Act “*pro bono publico*”²³

Accordingly, the court laid down the rule that in the construction or interpretation of a piece of legislation the court should consider the common law as it stood before the legislation in question was enacted, the mischief and the defect that gave rise to the legislation, the remedy provided by the legislation and the rationale for the legislation. It is clear that under this rule the court must consider not only the mischief that led to the passing of the statute but must give effect to the remedy as stated by the legislation in order to achieve the purpose of the legislation.

(iii) The Golden Rule

This rule justifies a departure from the ordinary, literal meaning of the words of a statute in order to prevent a result which is absurd. It states as follows:

“It is a very useful rule in the construction of a statute to adhere to the ordinary meaning of the words used and to the grammatical construction unless that is at variance with the intention of the legislature to be collected from the statute itself or leads to any manifest absurdity or repugnance in which case the language may be varied or modified so as to avoid such inconvenience but no further.”²⁴

²¹ *Escoigne Properties Ltd. V. I.R.C. (1958) A.C. 549, 565*
²² *(1963) 3 W.L.R. 63*

²³ Heydon's case (1584) 3 co. Rep. 7a; 76 E. R. 637

²⁴ *Beck v Smith (1836) 2 M. & W. 191 (Grey v Pearson (1857) 6 H.L.C. 61; 10 E.R. 1216.*

Under this rule, if the literal interpretation of a statute would lead to a result which the legislature would never have intended, the courts must reject that interpretation and seek for some other interpretation. This rule has been criticized as capable of resulting in a situation where judges assume the function of the legislature in trying to prevent absurdity or manifest injustice.

(iv) The Purposive Approach

This approach evolved from the mischief rule. It has a somewhat chequered history in England.

Lord Denning was by far the strongest and the most persistent advocate and exponent of this approach during his time at the Court of Appeal. The three earlier rules just discussed had tended to demarcate the lines of the functions of the legislature and the judiciary respectively. Thus, the proponents of the literal rule would insist that the function of the judge was limited to discover, state or declare the law and this he could do only by giving the words of the statute ordinary meaning, even in the face of absurdity or manifest injustice. However, Lord Denning had the opportunity to advocate a new approach to the interpretation of statutes in *Seaford Court Estates Ltd v. Asher*²⁵. The question before the court, as the Law Lord identified it, was whether the court should give literal meaning to the word “burden” in the Rent Act, 1920 or it was at liberty to extend the ordinary meaning of “burden” so as to include a contingent burden. In order to do justice in the case, Lord Denning had advocated the purposive approach in the following words:

“It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give ‘force and life’ to the intention of the legislature. That was clearly laid down by the resolution of the judges in Heydon’s case, and it is the safest guide today. Good practical advice on the subject was given about the same time by Plowden. ... Put into homely metaphor it is this: A judge should ask himself the question: If the makers of the Act had themselves come across this ruck in the texture of it, how would they have straightened it out? He must then do as they would have done. A judge must not alter the material of which it is woven, but he can and should iron out the creases.

In *Magor and St Mellons Rural District Council v. Newport Corporation*²⁶, Lord Denning attempted to reaffirm the above approach when he said:

“We do not sit here to pull the language of Parliament and of Ministers to pieces and make nonsense of it. That is an easy thing to do, and it is a thing to which lawyers are often prone. We sit here

²⁵ (1949) 2 K.B.481. 498. For more on this development, see Denning, L.J. *The Discipline of Law*, Butterworths, London, 1979

²⁶ (1951) 2 All E.R.839

to find out the intention of Parliament and of Ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis”.

But this did not receive the approval of the House of Lords on appeal. Lord Simonds, a strict constructionist, scotched this new approach and castigated it “as a naked usurpation of the legislative function under the thin guise of interpretation”. In 1969 however, the English Law Commission advocated an approach to judicial interpretation broader than the pre-existing approach.²⁷ Subsequently, this approach received some further impetus when Lord Diplock drew a clear distinction between the “literal approach” and the “purposive approach” and adopted the latter for the resolution of the problem in *Kammins v. Zenith Investments Ltd.*²⁸ This was followed by the express approval of Lord Denning’s position by the Law Commission (England) through the Report of the Renton’s Committee²⁹ to the effect that the Law Lords of the House of Lords were willing to adopt the purposive approach to the interpretation of statutes. The Committee noted:

“We see no reason why the Courts should not respond in the way indicated by Lord Denning. The Courts should, in our view, approach legislation determined, above all, to give effect to the intention of Parliament. We see promising signs that this consideration is uppermost in the minds of the members of the highest tribunal in this country”.

This observation of the Committee aptly captured the new rethinking by some Law Lords in the House of Lords, namely, Wilberforce, Diplock, Reid, Dilhorne, L.J.J. gleaned from some decisions of the House of Lords. These positive developments encouraged Lord Denning who, in the subsequent case of *Nothman v. Barnet Council*³⁰ adopted the same approach to do justice. Declaring the literal method to be completely out of date, the Law Lord urged judges to adopt the purposive approach. He declared:

“Faced with glaring injustice, the judges are, it is said, impotent, incapable and sterile. Not so with us in this court. The literal method is now completely out of date. It has been replaced by the approach which Lord Diplock described as the “purposive approach” In all cases now in the interpretation of statutes we adopt such a construction as will “promote the general legislative purpose” underlying the provision. It is no longer necessary for the judges to wring their hands and say: “there is nothing we can do about it”. Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it – by reading words in, if necessary - so as to do what Parliament would have done, had they had the situation in mind”.

It is interesting to note that after many years of conservatism, the English Courts have embraced the purposive approach. Any vestige of doubt as to this was completely

²⁷ *Report on Statutory Interpretation No. 21, 1969.*

²⁸ (1971) A.C.850, 881.

²⁹ *Comnd. 6053, Para.19.2*

³⁰ (1978) 1 W.L.R. 220

removed by the House of Lords in the recent case of *Pepper (Inspector of Taxes) v. Hart*³¹ where the House of Lords (*Per Lord Griffiths*) declared:

“The days have long passed when the Courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The Courts must adopt a purposive approach which seeks to *give effect to the true purpose of the legislation.*”

In this case, the House of Lords held by an overwhelming majority of six to one that having regard to the purposive approach to the construction of legislation the courts had adopted in order to give effect to the true intention of the legislature, the rule prohibiting the courts from referring to parliamentary material as an aid to statutory construction should, subject to any questions of parliamentary privilege be relaxed. Thus, the purposive approach has come to stay in England. The latter has eventually joined other countries which had adopted this approach years before. This has been the practice in the United States of America and other jurisdictions such as Australia, New Zealand, India and Nigeria.

This approach has many advantages for justice. It allows recourse by the courts to extrinsic materials like parliamentary history, official reports or records of proceedings in parliament etc. in order to properly access legislative intention. The approach takes account of the words of the legislation according to their ordinary meaning and also the context in which they are used, the subject matter, the scope, the background, the purpose of the legislation in order to give effect to the true intent of the legislation and not just the intention of parliament only. Accordingly, the purposive approach is the modern approach to the mischief rule, but it is wider in scope than the mischief rule as the approach extends to applying an imputed intention of parliament. It is the approach adopted in the interpretation of European Community legislation which merely states broad principles in the continental style and leaves the details (gaps) to be filled in by the courts. It enables the court to consider not only the letter but also the spirit of the legislation for “everything which is within the intent of the makers of the Act, although it be not within the letter, is as strongly within the Act as that which is within the letter and the intent also.”³²

In Nigeria, the Supreme Court stated the position as follows:

“My Lords, in my opinion, it is the duty of this court to bear constantly in mind the fact that the present Constitution has been proclaimed the Supreme Law of the Land, that it is a written organic instrument meant to serve not only the present generation, but also several generations yet unborn ... that the function of the Constitution is to establish a framework and principles of government, broad and general in terms, intended to apply to the varying conditions which the development of our several communities must involve, ours being a plural, dynamic society, and therefore, mere technical rules of interpretation of statutes are to some extent inadmissible in a way so as to defeat the principles of government enshrined in the Constitution. And where the

³¹ (1993) 1 ALL E.R.42

³² *Stowell v. Lord Zouch* (1969) E.R.536. See also Justice Crabbe for an adaptation of the Mischief Rule as a statement of the Purposive Approach – “The Doctrine of Separation of Powers and the Purposive Approach to the Interpretation of Legislation” 2000, Nigerian Institute of Advanced Legal Studies, Lagos.

question is whether the Constitution has used an expression in the wider or in the narrow sense, in my view, this court should whenever possible, and in response to the demands of justice, lean to the broader interpretation, unless there is something in the text or in the rest of the Constitution to indicate that the narrower interpretation will best carry out the objects and purposes of the Constitution.

My Lords, it is my view that the approach of this court to the construction of the Constitution should be, and so it has been, one of liberalism, probably a variation on the theme of the general maxim *ut res magis valeat quam pereat*. I do not conceive it to be the duty of this court so to construe any of the provisions of the Constitution as to defeat the obvious ends the Constitution was designed to serve where another construction equally in accord and consistent with the words and sense of such provisions will serve to enforce and protect such ends.³³

Despite the advantages of the purposive approach some writers express the fear that such liberal approach would encourage judicial activism or creativity and this may lead to a floodgate of judicial legislation which will offend the doctrine of separation of powers. It is submitted that this fear is unfounded.

The Purposive Approach and Separation of Powers

The traditional view of the role of the judiciary in interpreting statutes is to find the intention of parliament. The issue is whether in this task of finding legislative intent the court, using the purposive approach to seek the general underlying purpose of legislation, is guilty of encroaching into the legislative arena of law-making.

Some writers are of the opinion that in using different canons of interpretation for this purpose the courts do exercise law-making powers under the guise of statutory interpretation. It is submitted that judicial activism or creativity through statutory interpretation does not really amount to law-making and therefore not a violation of the doctrine of separation of powers. Although the courts make the common law, it is not yet agreed that they make law in supplementation to statutes. Sometimes, judicial legislation is no more than a court extending or adapting an old rule to a new situation in order to do substantial justice. Since society is not static but dynamic our legal process should not be static but must change from time to time in response to societal values and aspiration. This can only be achieved through judicial creativity in the interpretation of statutes and the Constitution. In the recent case of *Attorney-General of the Federation v. Abubakar*³⁴, the Supreme Court observed:

“It has been said in one of the briefs before us that the case at hand is, by every standard, a novel one. I entirely agree; given the facts of this case and the little research I have carried out I have not come across any judicial decision relating to the peculiar facts of this case. But, no legal problem or issue must defy legal solution. Were this not to be so, the society, as usual, will continue to move ahead, law, God forbid, will then remain stagnant and consequently become useless to mankind. With this unfortunate consequence at

³³ per Udo Udoma JSC in *Nafiu Rabiu v. The State* (1981) 2 N.C.L.R. 293, 326.

³⁴ (2007) 10 N.W.L.R. (Pt. 1041) p.1 @ 171-172 (per Aderemi, J.S.C.)

the back of his mind, a Judge, whenever faced with a new situation which has not been considered before, by his ingenuity regulated by law, must say what the law is on that new situation; after all, law has a very wide tentacle and must find solution to all man-made problems. In so doing, let no Judge regard himself as making law or even changing law. He (the *judex*) only declares it (law) – he considers the new situation, on principle and then pronounces upon it. To me, that is, the practical form of the saying that the law lies in the breast of the Judges.”

In some cases where the words used in the statute are ambiguous, the courts have a discretion to choose the meaning which they consider most appropriate having regard to the context and other surrounding circumstances. If this amounts to law-making in the general sense, then judges make law. But this cannot be regarded as Law-making in the strict sense, since they do not follow the legislative process of passing a bill. This is variously called the dynamic approach, creative interpretation, judicial creativity or the liberal approach. If this is what critics mean by judicial legislation, then whatever claim might be made for the legislature judges make law, in this sense. However, put in its proper perspective, judges do not “make” the law, they only “give” the law by expounding or declaring it. But Lord Denning once asserted that this was mere theory. According to him, a statute is what the courts say it is and, “as no one knows what the law is until judges expound it, it follows that they make it.” This is not law-making function but judicial function of interpretation. However, since the legislature is responsible for enacting a statute, it is the **law-maker** but the judiciary which declares the law is only the **law-giver**. In other words, **the legislature makes the law and the judiciary gives the law**.

Perhaps, the judiciary is unfairly criticized when it is accused of usurping the legislative function in this regard. This is because, the power of the President to assent to or veto a bill passed by the legislature is a legislative power but the President has not been accused of making the law in violation of the doctrine of separation of powers!

Accordingly, it is submitted that the so-called judicial legislation is the judiciary’s contribution to the development and efficacy of the law to enable it achieve its purpose in the society for which the three arms of government are progressive partners. The function of law is to foster the orderly development of the society. The three arms of government are not in competition, they are complementary in ensuring that the laws made by the government are for the benefit of the society. The executive may contribute to this by proposing bills; the legislature may detect and supply any deficiency in the proposed bill before it becomes law. Then comes the contribution of the judiciary through interpretation – judges should be allowed to expound, refine and develop the law for the good of the society through sound dynamic, liberal, creative interpretation. Since in the inter-relationship of the three arms of government it is suitable and right for the Legislature to correct the defects of the Executive in legislation, should the judiciary be deprived of its own contribution in this regard?

In the present state of things therefore, judicial creativity in statutory/constitutional interpretation becomes inevitable to keep pace with the fast growing and changing needs of the society. Accordingly, it is a natural response to the challenge posed by the dynamic nature of the society.

The Supreme Court recently explained the same principle in *Amaechi v. INEC*³⁵ as follows:

³⁵ (2008) 5 N.W.L.R. (pt. 1080) 227 @ p.451 (per Aderemi, J.S.C.)

“...the primary duty of the court is to do justice to all manner of men who are in all matters before it. It then seems to me clear, that when the court sets out **to do justice so as to cover new conditions or situations placed before it**, there is always that temptation, a compelling one, to have recourse to equitable principles. A court, in the exercise of its equitable jurisdiction must be seen as a court of conscience. And **Judges who dispense justice in this court of law and equity must always be ready to address new problems and even create new doctrines where the justice of the matter so requires.**”

Indeed, judicial creativity through the use of discretion in constitutional interpretation should be encouraged being motivated by the desire to do justice. Oputa JSC once counselled judges on this thus:

“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... 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 any ‘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.”³⁶

Again, the Supreme Court of Nigeria, also emphasized this recently:

“In the interest of justice and fair play the Supreme Court cannot shy away from doing **substantial justice** without any undue regard to technicalities... In matters of this nature, the court will not allow technicalities to prevent it from doing **substantial justice**... This court has a standing and rigid invitation to do **substantial justice** to all matters brought before it. Justice to be dispensed by this court must not be allowed to be inhibited by any paraphernalia of technicalities... This court and indeed all courts in Nigeria have a duty which flows from a power granted by the Constitution of Nigeria to ensure that citizens of Nigeria, high and low get the justice which their case deserves. The powers of the court are derived from the Constitution not at the sufferance or generosity of any other arm of the Government of Nigeria. The judiciary like all citizens of this country cannot be a passive on-looker when any person attempts to subvert the administration of justice and will not

³⁶ Quoted by Azinge, E. “Living Oracles of the Law and the Fallacy of Human Divination” 6th Justice Idigbe Memorial Lecture, Faculty of Law, University of Benin, p.8.

hesitate to use the powers available to it to do justice in the cases before it.”³⁷

Let us illustrate the operation of judicial creativity with a few decided cases.

In the case of *Awolowo & Ors v. Federal minister of Internal Affairs*³⁸, Chief Obafemi Awolowo standing trial for treasonable felony sought to engage the services of an English Lawyer to represent him in court pursuant to his fundamental right to be represented by “a legal practitioner of his choice “ under the 1960 Constitution of Nigeria. The lawyer was denied a right of entry into Nigeria by the Minister of Internal Affairs and the defendant brought this suit. It was held that the phrase “legal practitioner of his own choice” means one who is “not under a disability of any kind”.

In the recent case of *INEC v. MUSA*³⁹ the Supreme Court of Nigeria was prepared to accord the Constitution a liberal interpretation to protect the citizens’ right to freedom of association and peaceful assembly, in particular, the right to form or join a political party. It voided many provisions of the Electoral Act 2001 and the regulations made by the National Independent Electoral Commission (INEC) as being inconsistent with the provisions of the Constitution on the subject.

In *Obi v. INEC*⁴⁰, the appellant who won the governorship election in Anambra State was denied the seat for about three years before the Court of Appeal finally gave him judgment as the winner of the election into the office. Section 180 of the Constitution provides a tenure of four years for the Governor of the State. He took out an originating summons for interpretation of this section seeking a declaration to this effect and that his tenure had not ended. Meanwhile, the Independent National Electoral Commission conducted an election and swore in another person, Mr. Andy Uba, as Governor while the case was pending before the court. The Supreme Court granted a declaration that Obi’s seat was not vacant and ordered out the other Governor, Andy Uba, from Office to enable Mr. Obi complete his tenure of four years. In doing so the Supreme Court relied on section 22 of the Supreme Court Act, an existing Law, to cover this new situation and granted the relief to remove Uba from office, a relief which Obi could not have sought in the circumstances.

In the recent case of *Amaechi v. INEC*⁴¹ popularly known as *Amaechi v. Omehia*, a decision described by Professor Sagay S.A.N. as earth-shaking,⁴² the Supreme Court of Nigeria also employed this ingenious judicial creativity or inventiveness to achieve substantial justice. The Court based its decision on the need to do *substantial justice* untrammelled by legal technicalities when Oguntade JSC., who delivered the leading judgment of the court declared:

“I now consider the relief to be granted to Amaechi in this case even if elections to the office of Governor of Rivers State had been held. As I stated earlier, there is no doubt that the intention of Amaechi, to be garnered from the nature of the reliefs he sought from the court of trial, was that he be pronounced the Governorship candidate of the PDP for the April, 2007 election in Rivers State. He could not have asked to be declared Governor. But the elections to the office were held before the case was decided by the court below. Am I now to say that although Amaechi has won his case,

³⁷ *Amaechi v. INEC*. Supra @ p.324, 344, and 449 (per Oguntade, Musdapher and Aderemi JJ.S.C.)

³⁸ (1962) LL.R.77

³⁹ (2003) 3 NWLR (pt.806) 72

⁴⁰ (2007) 11 N.W.L.R. (Pt.1046) 565,

⁴¹ Supra

⁴² Sagay S.A.N. “The Amaechi v. Omehia Case Heralds a New Dawn at the Supreme Court” 1988

he should go home empty-handed because elections had been conducted into the office? That is not the way of the court. A court must shy away from submitting itself to the constraining bind of technicalities. **I must do justice even if the heavens fall. The truth of course is that when justice has been done, the heavens stay in place.** It is futile to merely declare that it was Amaechi and not Omehia that was the candidate of the PDP. What benefit will such a declaration confer on Amaechi? Now in *Packer v. Packer* (1958) p.15 at 22, Denning M.R. in emphasizing that there ought not to be hindrances or constraints in the way of dispensing justice had this to say:- “What is the argument on the other side? Only this, that no case has been found in which it had been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before we shall never get anywhere. The law will stand still whilst the rest of the world goes on and that will be bad for both.”⁴³

On the rationale for ordering the swearing-in of Amaechi who did not contest the governorship election, the court said:

“Having held that the name of Amaechi was not substituted as provided by law, the consequence is that he was the candidate of the PDP for whom the party campaigned in the April 2007 elections not Omehia and since PDP was declared to have won the said elections, Amaechi must be deemed the candidate that won the said election for PDP. In the eyes of the law, Omehia was never a candidate in the election much less the winner... PDP did not provide cogent and verifiable reason for the attempt to substitute Amaechi with Omehia. Not having done so, Amaechi who had acquired a vested right by his victory at the primaries and the submission of his name to INEC was never removed as PDP’s candidate. If the law prescribes a method by which an act could be validly done, and such method is not followed, it means that that act could not be accomplished. What PDP did was merely a purported attempt to effect a change of candidates. But as it did not comply with the only method laid down by the law to effect the change, the consequence in law is that the said change was never effected. In the eyes of the law, Amaechi’s name earlier sent to INEC was never removed or withdrawn... Having said that the substitution was null and void; the appellant’s position as the candidate of the PDP remains unshaken. This is so because equity looks on that as done which ought to be done or which is agreed to be done.”⁴⁴

On the allegation that Amaechi was indicted and was therefore disqualified from contesting the governorship election in the first place, the court was ready to construe section 182 of the Constitution according to the spirit rather than the letter. Under section 182 (1) “no person shall be qualified for election to the office of Governor of a State if he has been indicted for embezzlement or fraud by a Judicial Commission of Inquiry or an Administrative Panel of Inquiry set up under the Tribunals of Inquiry Act, a

⁴³ Amaechi v. INEC Supra @ p.315 (per Oguntade, J.S.C.)

⁴⁴ Ibid @ p.318, 325 and 451 (per Oguntade, Katsina-Alu and Aderemi JJ.S.C.)

Tribunal of Inquiry Law or any other law by the Federal or State Government which indictment has been accepted by the Federal or State Government.” The Supreme Court held that the respondents could not rely on the provision since they acted contrary to the purpose of the provision and abused it. The court observed that the Section could not have anticipated spurious claims of indictment as they had exhibited.

The court declared:

“Section 182(1)(i) above is in the Constitution in order to ensure that only persons of impeccable character and integrity are eligible for the office of a Governor of a State. It is to ensure transparency and high standard of probity in governance. It is not to be used as an instrument by politicians to hinder the emergence of their opponents or adversaries as Governors. Regrettably, the said provision has been used to witchhunt and victimize. It is a provision which in its application must be read and construed along with other provisions of the 1999 Constitution.”⁴⁵

Thus, the court held that the “indictment” envisaged by section 182(1)(i) , must be one which resulted from legal proceedings by an impartial tribunal in which the accused person was afforded fair-hearing as provided by section 36 of the Constitution.

Perhaps, the greatest advantage of the purposive approach is the prevention of excessive legalism through undue adherence to the doctrine of judicial precedent whereby the case before a court must be decided in accordance with the principles laid down in an earlier case regardless of the different surrounding circumstances. The approach encourages and enables the courts to fulfill the requirements of justice per excellence. We must realize that justice has two categories (1) **Procedural justice:** treating like cases alike, this is justice according to law or the letter of the law (2) **Substantial justice:** this is justice according to the peculiar circumstances of each case, justice based on equitable construction or the fairness or equity of the particular case or based on the spirit of the law and not just the letter!

In the recent impeachment cases, the Supreme Court of Nigeria clearly exhibited its willingness to do *substantial justice* by breaking away from slavish adherence to excessive legalism and precedent. Under the 1979 Constitution the court had held in *Balarabe Musa v. Auta Hamza*⁴⁶ that the provision of section 170(10) of the Constitution which is *impari materia* with section 188(10) of the 1999 Constitution ousting the jurisdiction of the courts in respect of impeachment of the Governor of a State was absolute prohibition, a decision criticized by Professors Nwabueze and Sagay.⁴⁷ However, in the recent impeachment cases, the courts have held that the impeachment proceedings for which the courts’ jurisdiction is ousted are proceedings which comply strictly with the procedure prescribed by the Constitution. Accordingly, where the proceedings contravene the constitutional procedure, the court can intervene in the interest of justice, since the ouster only protected legal and not illegal proceedings.⁴⁸ In the light of the above, one has no hesitation in joining Professor Nwabueze to urge the Nigerian Courts to continue in this dynamic, creative, inventive

⁴⁵ Ibid @ p.305 (per Oguntade, J.S.C.)

⁴⁶ (1982) 3 N.C.L.R. 229

⁴⁷ Sagay, S.A.N. “Nigerian Appellate Courts as a Catalyst for Democratic Consolidation and Good Governance” Third Chief Babatunde Benson Lecture, Lagos, 2007.

⁴⁸ *Adeleke & Anor v. Oyo State House of Assembly* (2006) 52 W.R.N.173; *Dapianiong v. Dariye* (2007) 27 W.R.N.1, *Ladoja v. INEC* (2007) 12 N.W.L.R. (Pt. 1047) 119; *Inakoju v. Adeleke* (2007) 4 N.W.L.R (Pt. 1025) 423.

approach in the interest of justice, for the end of law is the attainment of justice for the good of the society. The erudite Professor writes:

“The judicial approach stands indeed in dire need of revitalization if the rule of law is to become or remain a really effective principle of government. Judicial law-making should be openly acknowledged, and its scope purposefully expanded. The rule of law cannot be made effective by a rigid, doctrinaire insistence on the so-called declaratory theory of the judicial function, which asserts that, in adjudicating a case before it, the court is simply to act according to law which is supposed to exist and to be well-known; its role is to be the somewhat mechanical and passive one of merely declaring the law and applying it to the determination of the case. Whatever the issue involved, it is not to exercise any creativity by invoking any ethical notions of a just or wise decision... Such a view of the judicial function is utterly out-moded today. The maintenance of the rule of law demands of the courts a positive role, it demands that they should look beyond the formal letters of the law, and engage themselves in a purposeful effort to try to distill principles of fairness and justice from the moral, ethical and other fundamental values of the society ... While the letters of the law are and must remain the core elements of the rule of law, their interpretation and application by the court should be informed by reason and by the fundamental values of the community. A narrowly positivist view of the law could only make it sterile, devoid of a proper moral content. And judges are eminently well placed to instill into it the necessary moral content based on the notions of reasonableness, fairness, justice and respect for individual liberty.”⁴⁹

However, let me allay the fears of those very few conservatives and strict constructionists that judicial creativity or inventiveness has enough safeguards and limitations to check any potential abuse.

Safeguards against abuse of the Purposive Approach

Judicial creativity is not an unguarded principle for judicial legislation. Even judges themselves realize that there are several limitations. One such limitation is the sovereignty of the Legislature in law-making. Judicial legislation is subject to the tolerance level of the Legislature. The Legislature can nullify any piece of judicial legislation which, in its wisdom, is contrary to the intention of the legislature. This has happened twice in the history of Nigeria. In 1963, the decision of the Privy Council in *Adegbenro v. Akintola*⁵⁰ was nullified by the Western Nigeria Constitution (Amendment) Law, 1963 and the action was ratified by the Federal Government. Secondly, the decision of the Supreme Court of Nigeria in the famous *Lakanmi's case*⁵¹ was nullified by the Federal Military Government through the Federal Military Government (Supremacy and Enforcement of Powers) Decree 1970.

Another limitation is the principle of judicial self-restraint. As highly trained and disciplined professionals with legal minds which generally leads to conservatism, judges would not involve themselves in frivolous and needless exercise in judicial legislation

⁴⁹ Constitutional Democracy in Africa, Vol. 3, Spectrum, 2004, p.29-30.

⁵⁰ (1963) 3 W.L.R. 63

⁵¹ (1970) 1 U.I.L.R. 201

except where absolutely necessary in the interest of justice. Judges are well aware that judicial legislation may amount to retroactive legislation and would be inconsistent with certainty of the law. They would as much as possible bear in mind the danger of disturbing retrospectively existing interests and the need for certainty of law. Furthermore, the judiciary is conscious of the importance of the stability of the social order and the need to cooperate with the other arms of government to promote the main purpose of government enshrined in the Constitution.

Another limiting factor is the inability of the courts to initiate proceedings for the purpose of judicial creativity. Judges are passive vehicles in the administration of justice; they do not seek out cases or initiate cases to try and determine them. They must wait until a case is instituted by aggrieved persons. Thus the opportunity for judicial legislation is limited, unlike the legislature and the executive which may initiate legislation on their own.

Judicial legislation is also limited by the appellate system with its doctrine of judicial precedent. In this sense, only the highest court of the land, the Supreme Court can really effectively be involved in judicial legislation. This is because a decision of any lower court may be reversed on appeal or overruled and therefore does not serve as a good example of judicial legislation.

Indeed, judicial legislation is also limited by the wording of the statute. In this connection, the more detailed the provisions of a statute the less opportunity there is for a judge to engage in creativity in interpretation of the statute. Perhaps, this partly explains the judicial creativity in the United States of America in such cases like *Malbury v. Maddison* and others some of which involved the interpretation of such vague provisions as the "due process" clause of the Fourteenth Amendment of the Constitution of the United States of America.⁵²

Conclusion

From the foregoing critical analysis, it is clear that a Constitution can hardly be perfect in the sense that all the provisions are written in terms free from all ambiguity and it is not possible for the Constitution-makers to foresee the manifold sets of facts which may arise after its enactment. Consequently, a rigid and slavish adherence to the literal rule, the doctrine of judicial precedent and other legal technicalities in the interpretation of the constitution in all cases, most especially novel ones, would inevitably lead to injustice and this would not be the intention of the constitution-makers. Accordingly, judicial creativity and inventiveness in constitutional interpretation through the purposive approach is necessary for the attainment of substantial justice if the rule of law is to remain a really effective principle of government. The fear of few strict constructionists that this approach may offend the doctrine of the separation of powers is, it is submitted, unfounded since there are many safeguards against its abuse.

We, therefore, join other proponents of legal development to urge our judiciary to fully embrace and remain committed to the purposive approach in the interpretation of our Constitution

⁵²

Fore more on this see generally, A.O. Obilade (ed.) Due Process of Law, 1994 published by Southern University Law Center, U.S.A.. and Faculty of Law, University of Lagos.