

**BETWEEN GOD AND MAN:
PERFECTING A LITANY OF IMPERFECTIONS
IN NIGERIAN LEGISLATION**

PROFESSOR P. EHI OSHIO

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**An Inaugural Lecture Delivered at the
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By

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DEDICATION

I dedicate this Inaugural Lecture to the Almighty God for His manifold Grace and unspeakable gift and mercies in my life. By His grace I am what I am. In Him I live, and move, and have my being. Without Him I am nothing and can do nothing. He giveth to all life and breath, and all things. (Acts 17:25, 28).

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Admittedly, several people have contributed in one way or the other in the course of my academic career and it is impossible to acknowledge all of them due to limited space. Accordingly, if I do not reflect your name in this space it is not that your contribution is not important.

I must acknowledge my parents through whom the Almighty God brought me into existence on this planet earth. My father, Oshio Okoh instilled in me the much-needed severe, Spartan self-discipline that have since me through all the difficulties and vicissitude of life. It is impossible to forget my sweet mother even for a moment, Madam Atupele Oshio, though physically out of my sight, she lives forever more. Her agape love was a great foundation I needed for success in life. Out of the abundance of her poverty through great sacrifice she sponsored my primary education. When in 1972 I dramatically announced my adventure to Benin City in search of employment, my mother wept soberly, proceeded to a local Thrift in the village where she borrowed the sum of Ten Pounds and gave it to me as my portion in life – sweet mother! Fortunately, her constant prayers for my success in life was answered even before she took her exit to be with the Lord. I remain eternally grateful.

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I am grateful to the University of Lagos for granting me the privilege of working while in the LL.B. Degree Final Year Programme. It was a rare demonstration of magnanimity by such an institution in Nigeria.

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My Pastors – Pastor W.F. Kumuyi, Pastor Francis Ighalo, Pastor Emmanuel Obe, Pastor Joshua Esho, Pastor John Dada, Pastor Peter Obrifor (late) and others deserve special acknowledgement for their immeasurable and invaluable spiritual contribution to my life and endeavours. “It is the Spirit that quickeneth, the Flesh profiteth nothing...”

I am grateful to Professor E.A.C. Nwanze, Vice-Chancellor, University of Benin. What a Lucky man! It was during his tenure that my appointment as a Professor of Law was announced. I give you my blessing as a Minister of the New Testament.

To all my colleagues in the Faculty of Law, and, indeed, all staff of the Faculty, I express my appreciation for the usual cooperation, in addition to my unprecedented Third Term as Dean. May God bless you all. Indeed, my appreciation is due to the entire University of Benin Community for the lovely and conducive atmosphere and friendly disposition. I love you all.

Finally, for all the love, cooperation and sacrifice, my appreciation goes to my loving wife, Mrs. Lucy Ediruke Oshio, a virtuous woman whose price is far above rubies; my heart doth safely trust in her; she will do me good and not evil all the days of her life; she openeth her mouth with wisdom and in her tongue is the law of kindness. Many daughters have done virtuously, but thou excellest them all!! (Proverbs 31, adapted).

BETWEEN GOD AND MAN: PERFECTING A LITANY OF IMPERFECTIONS IN NIGERIAN LEGISLATION

Prologue

I have to make a few prefatory remarks before I venture into this Inaugural Lecture if only to justify the choice of my topic for this Lecture.

When I joined the staff of the Faculty of Law in 1985, the Faculty was still very young, about five years old. It was administered as one unit; there was no departmentalization of the Faculty and there was no emphasis on specialization. We taught any course assigned to us and I readily accepted responsibility to teach any course. I also personally thought that I would only be in academics for a short period and then switch to a greener pasture in the profession. I never thought of making a career in academics, particularly as the salary was very poor. That notwithstanding, I worked hard as I believed that what is worth doing at all, is worth doing well.

However, within a period of five years, I had accumulated a sizeable number of publications and I was promoted Senior Lecturer, a career position. Added to this, the idea of departmentalization of the Faculty had also already started although not too aggressively. The need for specialization came with the idea of departmentalization of the Faculty.

Finally, in the year 2000 when I had the privilege of serving the Faculty as the Dean, I insisted on full departmentalization of the Faculty. With a circular letter entitled: "Departmentalization and specialization for Academic Growth" I summoned a Faculty Board meeting at which the decision for full and functional departmentalization was taken. With the cooperation of the Vice-Chancellor, we accomplished the task. Under this arrangement, I moved to the Department of Business Law, although, I had had some considerable research and publications in some other areas of the law,

notably Land Law. At any rate, I do not subscribe to the kind of specialization that would make an expert completely ignorant in other areas of the same profession. Even though I am in Business Law, I am sufficiently well-informed in other areas of the law. After all, I am a Legal Practitioner and I do accept briefs in any area of the law.

However, when I received the Vice-Chancellor's invitation sometime ago in April this year to deliver my Inaugural Lecture as a Professor of Business Law, the thought of a topic to cover most of my research efforts gave me some great challenge. "But there is a God in heaven that revealeth secrets" (Dan. 2:28). I finally settled for the subject of legislation which cuts across different areas of the law. The topic is apposite since most researches in law would normally begin with reference to one statute or the other as a primary source of law.

Unfortunately, Legislation is not taught as a course in any of our law Faculties at present as is done in some other countries. I am aware that few Faculties offer Conveyancing and Legal Drafting the latter of which is also taught for a short period at the Nigerian Law School. However, I believe that something more needs to be done in this area of the law, given the importance of legislation as a source of law.

The topic of this Inaugural Lecture is: **"BETWEEN GOD AND MAN: PERFECTING A LITANY OF IMPERFECTIONS IN NIGERIAN LEGISLATION"**.

Introduction

This Lecture begins with the definition of Government and Legislation, examines a litany of imperfections in our legislation and the role of the judiciary, an arm of government, in attempting to perfect the imperfections by using various canons of interpretation of statutes. Thereafter, a comparison between divine and secular legislation is undertaken before the conclusion.

Of Government and Legislation

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

As Justice Crabbe explained:

"... if the doctrine of separation of powers is understood to mean that the separate arms of government could not have partial control over some parts of the other, there would be difficulties. But if the doctrine is understood to mean that the whole of the powers of the Legislature, the whole of the powers of the Executive and the whole of the powers of the Judiciary are not possessed nor exercised by the same person or authority, then there is merit in the blending of certain functions of each of those arms; a blending that produces the checks and balances which, in turn, produce substantial consensus that, in its turn is necessary for good government. Human nature being what it is, "the passions of men will not conform to the dictates of reason and justice without constraint."

It must be borne in mind that 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 each of the arms of government as partners in progress. Indeed, as we come to legislation, we will soon discover that there are many actors in the process even though the legislature as an arm of government must take responsibility for law-making.

Legislation

In one sense legislation means the act or function of law-making such as is reserved for the legislature under our Constitution. But in another sense legislation is a law made by the legislature, an enactment of the National Assembly or State House of Assembly, which is the final product of the legislative process. In Nigeria, this may be referred to as an Act of the National Assembly, a State Law or the Law of a State, a Statute or an enactment. Broadly speaking, this will include delegated legislation, statutory instruments or by-laws. In this sense, legislation is a major source of law in Nigeria. Other sources of Law in Nigeria include English Law, Customary/Islamic Law and Judicial Precedent or Case Law

The importance of legislation as a source of law in a country or State cannot be over-emphasized. In contrast to the Common Law and Principles of equity, which are judge-made and customary law in Nigeria, legislation is normally codified and documented in a statute. This gives it the very important features of certainty and predictability and, therefore, it is preferable to other sources of law. The Report of the Renton Committee in England once summarized the importance of legislation as a source of law thus:

“There is hardly any part of our national life or of our personal lives that is not affected by one statute or another. The affairs of local authorities, nationalized industries, public corporations and private commerce are regulated by legislation. The life of the ordinary citizen is affected by various provisions of the Statute book from cradle to grave. His birth is registered, his infant welfare protected, his education provided, his employment governed, his income and capital taxed, much of his conduct controlled and his old age sustained according to the terms of one Statute or another. Many might think that as a nation we groan under this overpowering

burden of legislation and ardently desire to have fewer rather than more laws. Yet the pressure for ever more legislation on behalf of different interests increases as society becomes more complex and people more demanding of each other. With each change in society there comes a demand for further legislation to overcome the tensions which that change creates, even though the change itself may have been caused by legislation, which thus becomes self-proliferating.”

Nowadays legislation as a source of law has become dominant and the volume of legislation in many countries far out-number other sources of law. And, there is always the pressure for more legislation in modern societies, from forces operating with these societies – administrative, cultural, economic, political, social e.t.c. Government’s response to such pressure, in most cases, would likely result in the introduction of more legislation. Also, as society changes, there is also demand for changes in legislation and this would often result in more legislation. Thus, legislation has increased in volume the world over. As Oputa J.S.C. pointed out:

“In a changing society like ours the courts and the procedures of adjudication cannot afford to remain static. The law never remains static. The law of life is grow or die. In the interest of greater efficiency in the administration of justice in our country, some of the old and well established procedural rules and practices will have to be reviewed and altered and new ones in keeping with the society’s onward march, enacted.”

The purpose of legislation is to regulate the society and thus ensure law, order and justice for the common good of the society. Indeed, the development of law in a society is a reflection of the need to establish certain standards of conduct intended as a safeguard for the general welfare of the society as a whole. Without legislation, society will be brutish, wild and ungovernable.

The Process of Legislation

The act of legislation takes a process in Parliament (the National Assembly or State House of Assembly in Nigeria) as provided in the Constitution. However, we are more concerned here with the Partners involved in the process of law-making, even though the ultimate responsibility for the final product rests with the Legislature.

A very important observation is that most of the Bills passed by the legislature in Nigeria are normally sponsored by the executive. Some of these bills are passed without much input from the legislature and the latter sometimes fails to detect and supply the deficiencies in the bill. Such legislation is simply government policy transformed into law. The statute thus enacted, represents in legislative form, a policy of the Executive as enshrined in the Bill presented to the legislature for the purpose of passing it into law. Of course, under the Nigerian Law, the Bill passed by the legislature does not become law until the executive assent, although where he refuses his assent, the bill may become law if the legislature passes it with a two-thirds majority. However, the act of assenting or refusing assent to a Bill by the executive is part of the legislative process. Thus, the executive is also actively involved in the process of transforming a bill into legislation.

Then comes the role of the legislative Draftsman who also plays a very important role in the "legislative process." Where it is a government/executive Bill, it would normally be drafted by government draftsmen. Other Bills will be drafted by the draftsmen in the legislature. Some government bills are passed into law without any significant input from the legislature. After the debate in Parliament and the Bill is finally passed into law, the draftsman has to put it into writing using words, which as much as possible, he thinks express the true intention of the legislature. The final Bill does not return to the floor of the House for verification but left for the President of the

Senate or the Speaker of the House to vet before the Clerk of the House forwards the bill to the Executive for assent. Would this final product not be regarded as the work of the draftsman and the officers of the House - the President, or Speaker and the Clerk of the House? This is regrettable. It is suggested that the final product should be placed before the House for verification before it is forwarded to the executive for his assent. In this way it will certainly be more appropriate to hold the legislature solely responsible for any imperfection in the legislation.

A LITANY OF IMPERFECTIONS IN NIGERIAN LEGISLATION

Vice-Chancellor, Sir, most of my research efforts in law started with one statute or another. This is because, statutes constitute a very important primary source of law. From my experience so far, a great number of legislation in various aspects of law in Nigeria contain inadequacies and imperfections too numerous for comfort.

Let me begin from the beginning. I must start with land law, for the law of land is the first law of the land. This admits of no controversy. The first man on earth, Adam, was not concerned at the beginning with commerce or business and the like. The first area of divine-human relationship for which law had to be made was in respect of the enjoyment of the fruits of the land. This was in the first Book of Moses called Genesis. Permit me to highlight this story by quoting from the Holy Bible (King James Version) Genesis Chapters 1 and 2.

"So God created man in his own image, in the image of God created he him; male and female created he them.

And God blessed them, and God said unto them, Be fruitful, and multiply, and replenish the earth, and subdue it: and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth.

And the Lord God formed man of the dust of the ground, and breathed into his nostrils the breath of life; and man became a living soul.

And the Lord God planted a garden eastward in Eden; and there he put the man whom he had formed.

And out of the ground made the Lord God to grow every tree that is pleasant to the sight, and good for food; the tree of life also in the midst of the garden, and the tree of knowledge of good and evil.

And the Lord God commanded the man, saying, of every tree of the garden thou mayest freely eat.

But of the tree of the knowledge of good and evil, thou shall not eat of it: for in the day that thou eatest thereof thou shall surely die."

(Genesis Chapter 1:27-28; 2:7-9, 16-17.)

Unfortunately, man soon breached the law of God as Adam, tempted by his wife Eve, yielded and took the forbidden fruit. Thus, land recorded yet another "first" for the first human breach of God's law was in respect of the enjoyment of the fruits of the land!

Land Law

Vice-Chancellor Sir, my research efforts in law started with land law. I accumulated more than twelve well-researched learned articles in this area within a period of five years while teaching the course.

The Land Use Act

The Land Use Act 1978 is the dominant statute in land law in Nigeria at present. The Act has been described as the most revolutionary piece of legislation in Nigeria, with the introduction of a notable change (for better or for worse) in Nigeria's land tenure system. However the Act, from all indications, is also the most controversial piece of legislation in Nigeria at present. It introduced a uniform State ownership of

land throughout the country - the Rights of Occupancy System. The latter is a possessory interest in land.

Section 1 of the Act vests all land comprised in the territory of each State in Nigeria in the Governor of that State to hold such land upon trust for the common benefit of all Nigerians. Section 5, empowers the Governor in respect of land whether or not in an urban area to grant statutory rights of occupancy to any person for all purposes. Section 6 empowers the local governments, where appropriate, to grant customary rights of occupancy in respect of land in non-urban areas to any person. The Governor thus assumes responsibility for allocating land in urban areas exclusively, while the responsibility for allocating land in non-urban areas of the State is shared between the Governor and the local governments. These authorities are assisted by the Land use and Allocation Committee and the Land Allocation Advisory Committee respectively. The responsibility for granting consent or approval to alienation of rights of occupancy, and the power to revoke rights of occupancy in appropriate cases, are similarly shared between the Governor and the local governments.

By these provisions, the Act abolished individual ownership system in favour of a uniform State ownership system otherwise appropriately called the rights of occupancy system. It is submitted however, that the provisions just highlighted only abolished the pre-existing tenurial system; they do not go so far to abolish existing interests in land. By sections 34 and 36 of the Act citizens' existing interests in land are transformed into rights of occupancy and preserved, so that in place of a citizen's former ownership right, is now his occupancy right. The Governor in his official capacity of a trustee by virtue of section 1 is not beneficially entitled to the land, but must administer it for the use and common benefit of all Nigerians (including the Governor in his private capacity) in accordance with the provisions of the Act.

It has been asserted that the effective implementation of this system would accomplish the following objectives:

1. Eliminate the bitter and often physically injurious controversies known to be generated by prior land tenure systems;
2. Streamline and simplify the management and ownership of land in the country;
3. Assist each citizen, irrespective of social status, to realize the ambition and aspiration of owning the place where he and his family might live securely and peacefully, and,
4. Enable the government to bring under control the use of land nationwide and thereby facilitate planning and zoning programme.

The Act and Agricultural Development

The importance of agriculture especially in a developing country cannot be over-emphasized. It had been the mainstay of the Nigerian economy since the colonial period. Apart from subsistence farming which catered for the food needs of the local population, Nigeria had exported cash crops in the past.

Unfortunately, the blessings of the oil boom have diverted our attention from agriculture in the past decade with the consequent neglect of it. In recent times however, we appear to realize the need to switch our attention once again to agriculture.

No meaningful agricultural revolution is possible without focusing adequate attention on two important areas, namely, (i) the availability of land and (ii) credit facility. Positive legislation in these areas is necessary to achieve the desired goal. We examined these two aspects of agricultural development in our article (*Oshio, P.E.*

"Agricultural Policy and the Nigerian Land Use Decree: the Conflict" Journal of African Law, University of London (1985) Vol. 30, No. 2 p.130-142).

Availability of Land For Agriculture

The claim has been made that one of the objectives for the promulgation of the Land Use Act, 1978 was to make land easily available for agriculture with a view to increased mobility of labour, capital and managerial resources into agriculture. Certain provisions of the Act, it is claimed, were calculated to encourage large scale farming in the interest of rapid agricultural growth.

This claim appears not to have been well founded on available evidence. For instance, there is no specific reference to agriculture in the terms of reference of the Land Use Panel from whose recommendations the Act emerged. And the Act does not stipulate to what use land should be employed. Rather, it only contains provisions on the prevention of hoarding of land. Unfortunately, Section 34 specifically reduces an individual holding to half an hectare of underdeveloped land in an urban area from the commencement of the Act.

Nor does the Act contain any specific provision aimed at making land available for agriculture. Only general references to agricultural purposes are made in the Act. Indeed, section 36 which deals with deemed rights of occupancy over land being used for agricultural purposes on the commencement of the Act appears to constitute an impediment to agricultural development by its subsection 5 which prohibits alienation of lands been used for agricultural. Surely, this provision does not encourage the use of agricultural land as security for credits by way of mortgage or charge, which would provide the farmer with the needed capital and specialized labour without which no meaningful agricultural production can be realized.

It is surprising that no effort was made to use as examples statutes on agriculture in other jurisdictions. A notable example is Britain where a specific statute, the Agriculture Act, 1947 harmonises government policy of encouraging agriculture with statutory provisions to achieve better results. The Act defines agricultural lands and empowers the appropriate Minister to designate further lands for the purpose of the Act. It makes provisions for good estate management and good husbandry, guaranteed prices and assured markets for agricultural produce. Another statute, the Agricultural Holdings Act, 1948 regulates letting and dealings in agricultural lands as defined by the 1947 Act. These, together with the Agricultural Credits Act, 1928 provide a sound foundation for effective agricultural growth in England.

The Act and pre-existing land tenure systems

Prior to the Act, Nigeria operated under a plural system of land tenure – English Law, Customary Law, State Lands Law, and The Land Tenure Law of Northern Nigeria.

The Received English Law

Leases And Mortgages

We examined the position of Leases and Mortgages under the Act in two separate articles. (*Oshio, P.E. "Existing Leases and the Rights of Occupancy System in Nigeria" Indian Socio-Legal Journal (1989) Vol.15 p.111-124; and Oshio, P.E. "Mortgages under the Rights of Occupancy System in Nigeria," Journal of African Law, University of London (1989) Vol. 33 No. 1, p.19-30).*

Our research shows that the right of occupancy introduced by this Act is not a fee simple interest or a lease or a licence or a mere right of occupation under English Law. It seems that the Act deliberately avoids the use of the term "lease", preferring instead the term "sub-lease." Sections 21 and 22 permit alienation of rights of occupancy by way of sub-leases subject to the requisite consent, while section 23 also makes

provision for creation of sub-underleases from sub-leases of rights of occupancy subject to the requisite consent being obtained. All these seem to indicate that a right of occupancy is similar to a lease, especially as a sub-lease cannot be created out of an interest which is not a leasehold. Indeed, some of the terms in a Certificate of Occupancy are similar to those found in leases. Furthermore, like a lease, a right of occupancy actually granted by the Governor is for a fixed period. However, in some important respects, the two interests differ.

What can be concluded from all these is that a right of occupancy under the Land Use Act is similar to a lease in some important respects but differs from it in others: it is analogous to a lease, though not a lease.

The question who is entitled to the right of occupancy into which existing interests in land have been transformed by the Act must be answered pursuant to a proper construction of the transitional provisions of the Act. This is problematic when applied to lessor/lessee and mortgagor/mortgagee.

In respect of land in urban areas, section 34 provides that where the land is developed the person in whom it was vested immediately before the commencement of the Act is deemed to be the holder of the statutory right of occupancy over the land.

It is submitted that "*vested*" in section 34 has its meaning in common law which regulated the relationship of the lessor and the lessee before the Act. Accordingly, the lessor who had the title to the land vested in him before the Act, is the person entitled to the deemed right of occupancy as a "holder" under section 34.

In respect of agricultural land in non-urban areas, a holder or an occupier is entitled to the deemed right of occupancy under section 36(2) provided that on the commencement of the Act :

- (a) he was in actual possession of the land, and

(b) he was using the land for agricultural purposes

These criteria clearly indicate that for land which is the subject of a lease under the sub-section, the lessee who is the occupier in exclusive possession and using the land for agricultural purposes, qualifies for the deemed customary right of occupancy. (See also section 36(4) in respect of developed land).

When read as a whole, the general tenor of section 36 is to safeguard the position of those who are in physical possession of land on the commencement of the Act, such as the lessee. Some practical problems arise from the construction of sections 34 and 36 as they affect leases created before the Act. These relate to long and short leases, as well as the continuous liability of the lessee to pay rent to the lessor.

The term of a right of occupancy has been fixed at 99 years by the various State Governments. This would surely adversely affect long leases, for instance, leases for 999 years or 3,000 years, in which the lessor's interest is in the nature of absolute ownership, at least, in terms of duration. A Certificate of Occupancy has the effect of reducing the lessor's interest to 99 years only.

Furthermore, if the Certificate of Occupancy is issued to the lessor/holder for a term of 99 years, it would be absurd to insert in the certificate the lessee's term which is far longer than 99 years as one subject to which the lessor/holder takes the right of occupancy, since the latter will determine before the lessee's term. Where the lessee gets the certificate of occupancy, the issue of his continuous liability to pay rent to the lessor would arise. This is because section 10 of the Act provides for the implied obligation of the person to whom a certificate of occupancy is issued, to pay rent to the governor. Payment of rent to the Governor instead of the lessor would in effect mean

the termination of original lease by implication, since it is unimaginable for the lessee to pay rent to the lessor and the Governor at the same time.

Moreover, in respect of long and short leases alike, where the Certificate of Occupancy is issued to the lessee, there is the problem of reverter to the lessor upon determination of the term of the right of occupancy, since the lessee is holding of the State by virtue of the Certificate of Occupancy and paying rent to the Governor and not to the lessor.

The issue of consent to alienation by way of mortgage or sublease of a deemed right of occupancy under section 34 and 36 of the Act lingered on until 1989 when the Supreme Court decided in *Savannah Bank Limited v. Ajilo (1989) 1 N.W.L.R. (pt.97) 305* decided that the consent of the Governor under section 22 of the Act was mandatory. Unfortunately, this would mean a case of double consent – at creation and alienation. We addressed this in our article (Oshio, P.E “*Farewell to the Consent controversy: Savannah Bank Ltd and others v. Ammeh Ajilo and Another,*” *Gravitas Review of Business and Property Law, (1989) Vol. 2 No. 7 p.29-36*) The implication of this decision would seem to be that double consent would be required to alienation by a lessee – the consent of the lessor and that of the Governor. The same would apply to mortgages at creation and realization of the security subject to the mortgage upon default by the mortgagee.

The related issue of whether or not consent subsequently obtained would be valid despite the provision of section 22 requiring consent to be “first had and obtained” for the transaction to be valid was not settled until 1993 when the Supreme Court answered in the affirmative in the case of *Awojugbagbe Light Industries Ltd v. Chinukwe & Anor. (1993) 1 N.W.L.R. (pt. 270) 485.*

One thing that is clear from this is that the Act, if strictly and literally interpreted, would constitute obstacles to easy creation and enforcement of mortgages. These include the requirement of “double” consent, the possibility of revocation of a right of occupancy subject of a mortgage, the total ban on alienation under section 36(5), the half-hectare rule under section 34(5) and (6) are all potential dangers to the efficacy of mortgages and subsisting leases under the Act.

We had recommended that a provision for enfranchisement of lessees of terms exceeding 99 years should be inserted in the Act. The provision should include payment of fair compensation by the lessee to the lessor, such compensation to be assessed by a committee of competent valuers to be appointed by the Governor. Subject to necessary modifications, this will be similar to the provisions of the Leasehold Reform Act, 1967 of England under which tenants of long leases were enfranchised.

There is also the need to remove by necessary amendment the discrepancies between sections 34 and 36. In particular, section 36 should be expanded to include a provision similar to section 34 (4) for the protection of the interest of the party to a lease who does not get the certificate of occupancy, to enable his interest until the lease is determined.

Customary Land Tenure System

Although there is no direct reference in the Act to customary land tenures, various sections appear to recognize the preservation of customary land law, implying its survival. Indeed, Section 1 of the Act borrows the indigenous land tenure notion of community ownership or trusteeship. The Governor’s authority under the Act is comparable to that of a village leader responsible for communal land under customary law. Analysis of the Governor’s statutory power, however, reveals direct conflict with

the authority exercised by community leaders, especially in the management and control of land.

Tenure under customary law presents problems in two important areas – **Community land/Family Land** on the one hand and, **customary tenancy** on the other. In some articles, we conducted researches into the interaction of the Act with the pre-existing tenurial system. Our research revealed a lot of imperfections and practical problems. (Oshio, P.E.: “*Indigenous Land Tenure and Nationalisation of Land in Nigeria*”, *Florida State University, Journal of Land Use and Environmental Law, U.S.A. (1990) Vol. 5, No. 2, p.685-701*; and Oshio, P.E. “*The Land Use Act and the Institution of Family Property in Nigeria*”, *Journal of African Law, University of London, (1990), Vol.34, No. 2, p. 79-92*)

Practical Problems

Community leaders still regard themselves as trustees in control of communal lands in total disregard of the Act’s rights of occupancy system. The preexisting Communal Lands Allocation Wards are still functioning effectively, even though they were to be supplanted by the Land Use Allocation and Land Allocation Advisory Committees established by the Act. Land is still being allocated, partitioned, and sold by these Wards without reference to the appropriate managing authorities designated by the Act. Where written documents are used for these conveyances, they are simply backdated to a time preceding passage of the Land Use Act, thereby circumventing its restrictions. The disadvantage of this device is that these documents purporting to transfer fee simple interest in land are no longer registrable, although they remain valid instruments conveying at least equitable interests in land. Where transferees are allowed into effective possession and erect improvements on the land, for example, the interest is as good as a legal interest. Moreover, since these documents “predate” the

Act, they are accepted as evidence of preexisting title, thereby qualifying the transferees as “deemed” holders of rights of occupancy under the transitional provisions of the Act.

Entitlement to a deemed right of occupancy under the Land Use Act depends on successful proof of preexisting title, and presentation of valid documents of title is a prerequisite to obtaining the necessary certificate of occupancy. (Section 34(3)).

These requirements are problematic to persons with customary titles that are not documented, but rather obtained by oral agreements valid under customary law. The particular Ministry/Department of Lands is often hesitant to process applications unsupported by written evidence of ownership, and in some cases, the applicants are actually advised to obtain deeds of conveyance backdated to any time before the commencement of the Act to enable processing of the applications. The Act should be amended to provide a mechanism for processing certificate of occupancy applications of persons who obtained oral customary title to land prior to the Act.

Tenure under customary law presents a more difficult problem in yet another respect – **customary tenancy**. This is the tenancy which is rooted in, and peculiar to, native law and custom. It has no equivalent in English Law. It is neither a leasehold interest nor a tenancy at will, or a yearly tenancy. The main incident of such tenure is the payment of annual tribute not rents, by the customary tenant to the overlord. In essence, the customary tenant is not a lessee or borrower, he is a grantee of land under customary tenure and holds as such, a determinable interest in the land which may be enjoyed in perpetuity subject to good behaviour on the part of the tenant. He enjoys something akin to *emphyteusis*, a perpetual right in the land of another.

The genesis of this form of tenancy can be traced to the early days of Nigeria’s history when it was not uncommon for strangers to come into a community and beg for

land either for farming or for settlement or for both. When such land was granted to the strangers by the community, our customary law would presume a conditional grant. The principles governing such grants as articulated by various judicial authorities are now well established. For instance, the land must be used for the purpose for which it was granted and for no other. The tenant shall pay yearly tributes to the grantor as an acknowledgement of the latter's overlordship; neither the tenant nor the overlord can alienate the land without the consent of the other; and the grant is usually presumed for an indefinite period subject to good behaviour on the part of the customary tenant. The interest thus secured by the tenant is one of inheritance and the land cannot revert to the overlord except upon proven misbehaviour on the part of the customary tenant, or on the rare case of the extinction of the tenant and his family.

The only real weapon in the hands of the overlord for dealing with the tenant after the grant is his power to forfeit the tenancy. To constitute a ground for forfeiture, the action of the customary tenant must be wrongful, substantial and must relate to the use of the land subject to the tenancy. Grounds for forfeiture include abandonment, denial of the overlord's title, alienation or attempted alienation of the land without originally agreed upon, withholding customary dues persistently, wanton waste and lack of effective user.

Forfeiture however, is not automatic, and misbehaviour merely makes the tenant liable to forfeiture at the will of the overlord which nowadays, if resisted, can only be enforced by reference to the courts. Our courts have often been willing to grant relief against forfeiture, such as fine, except in cases where refusal to grant forfeiture would tend to defeat the ends of justice. Whether or not forfeiture will be ordered by the court will depend on the seriousness and/or repetitive nature of the acts of misbehaviour complained of.

At the centre of the legal controversy is the accurate construction of Section 36 of the Act as it relates to customary tenancy. We discussed this issue in our article (*Oshio, P.E. "The Enigma in Customary Tenancy" in New Frontiers in Law, (Azinge edited, Oliz Publishers (1993)).* Following the enactment of the Act, customary tenants refused to pay tributes to their overlords, insisting that Section 1 of the Act, which vests ownership of land in the Governor of each State, divested the overlords of their interests in the land, thereby terminating the landlord/tenant relationships and relieving them of obligations to pay annual tributes. Indeed, there have been local skirmishes between these two parties, and cases on customary tenancy have flooded the courts. In some instances, where the courts declared the tenants' interests in the land forfeited for breaching the terms of the tenancy, the tenants had refused to quit the land. This causes increased tension between customary law and statutory regulation, rendering the continuation of this exclusively indigenous tenancy uncertain. Then came the decision of the Supreme Court of Nigeria in *Onwuka v. Ediala (1989) 1 N.W.L.R. (pt. 96) 182*, which held that the Act did not affect customary tenancy in any way. We disagreed with this decision insisting that the tenants must be freed in my article (*Oshio, P.E. "Onwuka v. Ediala: The Supreme Court and Customary Tenancy", Justice, A Journal of Contemporary Legal Problems, Lagos, (1990) JUS. Vol. 1, No. 6, p.93-97).* This article was cited before the Supreme Court of Nigeria in the subsequent case of *Abioye v. Yakubu (1991) 5 N.W.L.R. (pt. 190) 130*, by Dr. Mudiaga Odje, SAN, but unfortunately, the court did not adopt our position.

A Vicious Circle

Within decades of the promulgation of the Act, its administration has succumbed to the same corrupt practices as those characterizing the preexisting tenure systems. Profiteering and speculative dealings in land are commonplace and have resulted in a

precipitous rise in land prices. Government functionaries inappropriately distribute lands among themselves and their close associates, thus resurrecting the ills of the State land system.

Indeed, Government now sees land as a means of raising revenue. The cost of the certificate of occupancy application form has risen astronomically. In addition, rents for rights of occupancy are constantly being increased. Even for a preexisting interest holder applying for a certificate of occupancy, the provision for waiver of rent is rarely applied. Instead, reliance is often placed on Section 10(b) of the Act, under which a certificate of occupancy is *deemed to include* a provision that the holder binds himself to pay rent to the Governor.

The inherent conflicts between the administration of the Act and the operation of preexisting land tenure systems is exacerbated by the divergence of opinion among judges, lawyers, and laymen as to the proper interrelation of the Act with the indigenous land tenures. Although the Act recognizes preexisting tenure, it fails to clearly and adequately provide for its assimilation into the rights of occupancy system. The transitional provisions of the Act do not establish deadlines for converting erstwhile indigenous titles into rights of occupancy. Consequently, preexisting title holders believe that they are free to deal with their lands according to customary law without regard to the new national land policy. Conclusively, the Land Use Act has woefully failed to accomplish the objectives claimed for it. Accordingly, it is recommended that the Act should be repealed and deleted from the statute book and the Constitution.

Agricultural Credits

Before Government legislative intervention, individual had had to compete for agricultural credits relying on their influence and ability to meet the security requirements for the loans. This had unfortunate effects on agricultural development.

Furthermore, agricultural lands in rural areas of the country were not generally considered by banks as good securities for loans because they are seldom covered by documents of title and are owned by communities or families under customary law and cannot be legally mortgaged until partitioned.

However, by the Agricultural Credit Guarantee Scheme Fund Act, 1977 (Cap A11) the Federal Government established a Guarantee Fund with an initial capital of One Hundred Million Naira (₦100,000,000) to make it easier for farmers to obtain loans from the banks. The Agricultural Credit Guarantee Scheme Fund Board established under the Act is empowered to guarantee agricultural loans to individual farmers and cooperative societies or corporate bodies. Under section 6, the Board is liable to repay to the bank/lender up to seventy-five per cent of the guaranteed sum on failure of the farmer to pay. We examined the efficacy of the system.

There appears to be heavy reliance by banks on the seventy-five per cent guarantee by the Fund Board. This may be dangerous as it could lead to lack of caution on the part of banks, for example, by accepting personal guarantee only which is not a good security.

While section 12(1) empowers the lender to proceed against the security given on default of the borrower, subsection 2 provides that "where any part of the interest or principal remains outstanding after the steps specified in subsection (1) above have been taken, *or where the recovery of any amount outstanding is impracticable*, the bank may apply, in the prescribed form, to the Board for payment and the Board shall, in accordance with the terms of guarantee, settle the claim."

First, the word "or" in this provision is disjunctive. This means in effect that a bank does not have first to pursue its remedy under subsection 1 before it can apply to

the Fund Board for repayment of the loan on the ground that it is impracticable to recover it.

Secondly, the Act made no attempt to define or even describe circumstances where recovery may be impracticable. The loophole here may be exploited by bank officials in collusion with dubious farmers to commit fraud. A simple example will suffice. Suppose that X bank grants a loan of ₦50,000.00 to Y farmer and guaranteed by the Fund Board under this scheme and Y gives personal guarantee as security. After Y has repaid 25 per cent of the loan he enters into a "deal" whereby the X bank applies to the Fund Board for a repayment of 75 per cent of the loan (which is actually the amount now outstanding) on the ground that it is impracticable to recover the amount. On a literal interpretation of the above provision, the Fund Board shall settle the claim. Neither the "bank" nor the "farmer" loses. It is feared that the sponsors of this scheme may be running it at present at great loss because of such fraudulent practices.

In an attempt to liberalise security requirements for loans under the scheme, section 10 includes such items as personal guarantee and "any other security acceptable to the bank". It is hardly difficult to see the problems attaching to this provision. In the first place, personal guarantee, if it is a security at all, is a weak one, and the recovery process often involves dilatory court proceedings and levying of execution with which banks as commercial houses are often loath to be associated. Secondly, the section leaves too much discretion to the individual banks and to what security to accept. This will lead to variation among banks as to the security acceptable for loans under the same scheme.

Suggestions

We suggest as follows:

- (1) A comprehensive legislation on agriculture comparable to a consolidation of the English Acts of 1947 and 1948 should be enacted. This should clearly take agricultural land out of the Land Use Act and make direct provisions for the use of such land for agricultural credits.
- (2) Removal of Personal guarantee as security requirement for a loan under the Scheme.
- (3) To avoid over-dependence and subsequent loss on the Government, the Fund Board created by the Act should be replaced by an Agricultural Credits Company Limited by shares to be responsible for granting loans to large-scale corporate farmers to be secured by a fixed or floating charge or both on the company's assets. The initial capital of the Credits Company would be refunded to the Government by gradual yearly instalments after a long grace period. As a company limited by shares, it could increase its capital by issuing more shares as the need arises.
- (4) The banks should be left with granting short-term credits for small-scale individual farmers on the security of their farming stocks and other assets excluding land and the guarantee of the Credits Company as to one-third of the loan granted. The advantage of this is that the risk of loss is shared between the farmer, the bank and the Credits Company. Furthermore, exclusion of the land from the security requirement ensures that the farmer has an asset with which to start again if, on his default, the farming stocks and other assets are sold by the charge.
- (5) To further ensure distribution of risk, provisions should be made for insurance companies to insure all lending on agriculture under the scheme.

- (6) We advocate adequate publicity for this scheme. Awareness thus aroused could result in more people making efforts for increased agricultural production, by acquiring shares and taking debentures in the Agricultural Credits Company or being involved as farmers on the basis of the land made available and the loans are evenly spread as against the present practice of concentrating a large proportion of the loans in the hands of a few retired civil servants and army officers.

Business Law

This consists of those aspects of law which are most closely connected with business activities. Broadly speaking, it includes the Law of Contract, the Law of Agency, the Sale of Goods Law, the Hire Purchase Law, the Law of Banking and the Law of Negotiable Instruments, the Law of Partnership, Company Law, Securities Law, Insurance Law, amongst others.

Here our research also shows a litany of imperfections in many areas of the law. There are definitional problems in the ***Companies and Allied Matters Act***. For instance, the definition section renders a very unsatisfactory definition of a company as follows:

“Company” or “existing company” means a company formed and registered under this Act or, as the case may be, formed and registered in Nigeria before and in existence on the commencement of this Act.”

This, it is submitted, is a mere description and not a useful definition, as it merely describes a registered company recognized under the Act or any Companies Act before it. (*Ehi Oshio, Modern Company Law in Nigeria, Lulupath Press, 1995*). The same problem is noticeable in the definition of a company director under the Act. In

three separate sections the Act gives three different definitions of the same word "director". Section 244(1) defines a director as "a person duly appointed by the company to direct and manage the business of the company." This surely excludes a director with apparent, ostensible authority or authority by estoppel or a holding out. Section 245(1) says that "director" shall include any person on whose instructions and directions the directors are accustomed to act". While under section 567 "director" includes any person occupying the position of a director by whatever name called and includes any person in accordance with whose directions or instructions the directors of the company are accustomed to act". The word "include" in these sections points to a description and not a definition. We have argued that given the Nigerian situation where a director may use any of his relatives or friends as cronies to commit fraud, the definition of director should be wider to include all these for the purpose of his fiduciary duty under the Act.

Accordingly, it is recommended a definition similar to the one contained in the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18, 1984 to include in the definition of a director his father, mother, wife, husband, brother, sister, son, daughter and their spouses should be adopted in our Companies Act.

Another provision under consideration is section 39(1) and (3) which relates to the *ultra vires rule*. The reform of the rule in Nigeria under the Companies and Allied Matters Act 1990 has been the subject of some misunderstanding of varying scope and degrees. More than any other provision, section 39 (3) appears to be misconstrued as rendering the doctrine ineffective or even sounding its death knell. Some writers even accused the legislature of saying one thing under section 39(1) and meaning another under section 39(3). A company exists only for the authorized objects or business

specified in the objects clause of its memorandum of association. Any business or act done or power exercised by the company outside its objects or which is not reasonably incidental to the attainment of the express object of the company is beyond the powers of the company, and, therefore, null and void. This simply, is the *ultra vires* doctrine as applied to companies, a doctrine which, unfortunately, has not been free from controversy. (*Oshio, P.E. "A Comparative Analysis of the Effect of Section 39(3) of The Companies and Allied Matters Act 1990 on the Ultra Vires Doctrine", Nigerian Law and Practice Journal (2002) Vol. 6, No. 2, p.133-144*).

This doctrine is one of the English common law principles received into Nigeria as part of our company law. It was only applicable to statutory corporations, but was finally extended to registered companies in the leading case of *Ashbury Railway Carriage and Iron Co. v. Riche*.

The Supreme Court of Nigeria has adopted and applied this doctrine in decided cases in Nigeria such as *Continental Chemists Ltd v. Dr. Ifeakandu; Metalimpex v. Leventis and Co. Nigeria Ltd; Okoya and Others v. Santilli and Others*, e.t.c.

At common law the effect of ultra vires was to render a contract by or with a company void *ab initio*. The rule was a "double-edged sword." If a person lent his money to the company on ultra vires business he could not recover. Indeed, in an action to recover the money the company could plead ultra vires and avoid the obligations of the contract. The converse was also true. In an action by the company against the other party to such contract, the latter could plead ultra vires to avoid liability under the contract.

Two major company law reform formulae on ultra vires are identifiable, namely, the unrestricted capacity formula as adopted by Canada, Australia and New Zealand and the restricted capacity formula adopted by the United Kingdom, Ghana and

Nigeria. The effect of the unrestricted capacity formula is to abolish the ultra vires rule. The Nigerian approach compares more with that of the Ghana and the Caribbean Community Company Law and, to some extent, that of the United Kingdom.

Our reform is achieved by a combination of formulae in some sections of the Companies and Allied Matters Act 1990 to be examined presently.

Section 38(1) vests all the powers of a natural person of full capacity in a company for the furtherance of its authorized business or objects.

Indeed, when sections 27, 38 (1) and 39 (1) are read together, the effect thereof is to retain the ultra vires rule in Nigeria.

The present legal position of ultra vires under this provision may be summarized as follows:

1. Section 39(1) retains the ultra vires doctrine. Subsection (2) strengthens this retention by providing for the protection of the rule in proceedings in court under subsection (4) or Section 300 to 313. But subsection (4) shows clearly that this retention is only as an internal doctrine, namely, to restrain the company from engaging in any unauthorized business or object or otherwise exceeding its powers. Section 40 also supports the view that ultra vires rule is now retained merely as an internal doctrine.
2. Section 39(3) however, validates ultra vires contracts. Under it, notwithstanding the provision of section 39(1) ultra vires transaction is valid *ab initio*. This apparent conflict is regrettable and unsatisfactory. We recommend a more direct provision abolishing the ultra vires rule would be preferable under the Nigerian situation so that a company is allowed to carry out any business whatsoever. This will lead to competition among the companies which will result in better service delivery and lower prices for their products as is presently

witnessed in the computer-related industry and the banking industry with the introduction of the universal banking system.

Trade Disputes and Strikes

Strikes have become endemic in the Nigerian society in recent times. This is unfortunate because, by its very nature, a strike action should be the last weapon in the armoury of organized labour to press home the workers' demands. Moreover, a strike represents a major show-down in the voluntary collective bargaining process between labour and management during a trade dispute. (*Oshio, P.E. "The Bank Customer, Bank Strikes and The Law in Nigeria", Edo State University Law Journal, (1993/94) Vol. 3, No. 1, p.83-95; Oshio & Idubor, "A Critical Appraisal of The Nigerian Concept of Trade Dispute" University of Benin Law Journal (2000/2001) Vol. 6 No. 1, p.74-102*).

Section 47 of the Nigerian Trade Disputes Act defines a trade dispute as "any dispute between employers and workers or between workers and workers, which is connected with the employment or non-employment, or the terms of employment and physical conditions of work of any person."

In the broadest sense, a strike is a deliberate concerted work stoppage. To constitute a strike in this sense, there must be a common cessation of work and the work stoppage must be deliberate. In *Tramp Shipping Corporation V. Greenwich Marine Inc.* Lord Denning M.R. defined a strike as a concerted stoppage of work by men done with a view to improving their wages or conditions of employment, or giving vent to a grievance or making a protest about something or other, or supporting or sympathizing with other workmen in such endeavour..."

Under section 47(1) of the Act,

“Strike means the cessation of work by a body of persons employed acting in combination, or a concerted refusal or a refusal under a common understanding of any member of persons employed to continue to work for an employer in consequence of trade dispute, done as a means of compelling their employer or any person or body of persons employed, or aid other workers in compelling their employer or any person or body of persons employed to accept or not to accept terms of employment and physical conditions of work, and in this definition-

- (a) “cessation of work” includes deliberately working at less than usual speed or with less than usual efficiency; and
- (b) “refusal to continue to work” includes a refusal to work at usual speed or with usual efficiency.”

The right to strike by workers is generally recognized as a legitimate means of defending their occupational interests. This right is an essential element in the process of collective bargaining. Without it organized labour is powerless to deal with management at arm’s length. As Lord Wright pointed out “Where the rights of labour are concerned, the right of the employers are conditioned by the right of the men to give or withhold their services. To protect such a right is not to approve or disapprove of its exercise in any particular withdrawal of labour. It is to recognize the fact that the limits set to the right to strike and to lock-outs are one measure of the strength which each party can in the last resort bring to bear at the bargaining table. The strength of a union’s position is bound to be related to its power and its right to call out its members, so long as any semblance of collective bargaining survives.”

The right to strike is recognized under Nigerian law, though some contrary assertions have been made. An examination of various laws in the country would reveal this fact, first, there is the common law right to strike where adequate notice sufficient to terminate the contract of employment is given. There is nothing in any

law in Nigeria which has taken away this right. "Strike is itself a part of the bargaining process. It tests the economic bargaining power of each side and forces each to face squarely the need it has for the other's contribution. The very economic pressure of the strike is the catalyst which makes agreement possible. Even when no strike occurs, it plays its part in the bargaining process, for the very prospect of the hardship which the strike will bring provides a prod to compromise. Collective bargaining is a process of reaching agreement, and strikes are an integral and frequently necessary part of that process."

Moreover, section 40 of the 1999 Constitution guarantees a citizen's right to form a trade union and to belong to any trade union of his choice for the protection of his interest, subject only to derogation by any law that is reasonably justifiable in a democratic society. It is submitted that the right to form trade unions, guaranteed in the Constitution implies the right of the trade unions, as part of the collective bargaining process, to call out their members on strike when occasion demands. Indeed, under the Trade Unions Act 1973, the trade unions are required to incorporate in their rule book or constitution a rule that only a majority decision of the members can authorize a strike action.

Various attempts have been made at different times to curb excessive use of strike actions in the collective bargaining process in Nigeria. These include outright ban on strikes during the war and subtle circumscription. Thereafter, section 17 of the Trade Disputes Act, while recognizing the right to strike, introduced both voluntary and compulsory settlement of trade disputes. Apparently recognizing the futility of a total ban on strikes, the Act only laid down the processes to be exhausted before a strike. The provisions aimed at amicable settlement of trade disputes, are to the effect that a strike action should be the very last in the collective bargaining process. Indeed,

section 42 of the Trade Unions Act 1973 concedes the right of picketing to workers during a strike action and this is in conflict with section 17 of the Trade Dispute Act.

The term 'picketing' describes the conduct of one who seeks to persuade other persons to take a certain course of action or not to do something – usually not to enter work premises or deliver supplies during industrial action. Under section 42 of the Trade Unions Act, Cap.437:

“It shall be lawful for one or more persons acting on their own behalf or on behalf of a trade union or registered federation of trade union or of an individual employer or firm in contemplation or furtherance of a trade dispute to attend at or near a house or happens to be if they so attend merely for the purpose of peacefully obtaining or communicating information or of peacefully persuading any person to work or abstain from working.”

For picketing to arise, the strike action which is supposedly circumscribed by section 17 of the Trade Disputes Act, Cap 432, must have taken place.

The question may be asked how effective these statutes have been in preventing strikes. It is common knowledge that these laws have been honoured more in their breaches than in their observance. Despite these laws, strikes have continued unabated among all categories of employees both in the public and private sectors of the economy. Our research conclusively reveals that **“workers will go on strike whatever the law may have to say or do about it,”** and to enact laws that will be difficult to enforce is to encourage mass disobedience to the law thus subjecting the law to mockery.

The only way out of strikes is for the employers to guarantee better conditions of service for the employees. For it is written “thou shalt not muzzle the mouth of the ox that treadeth out the corn. And the labourer is worthy of his reward.” (1 Tim. 5:18)

Banking Law

The Nigerian banking institution operates within a vast framework of multiple statutory regulations. The most important of the legislation affecting the banking system in Nigeria however, include the banks and other Financial Institutions Act, the Central Bank of Nigeria Act, the Bills of Exchange Act, the Companies and Allied Matters Act, the Nigerian Deposit Insurance Corporation Act, the Evidence Act, the Bankruptcy Act, etc.

Most of these statutes, the provisions of some of which are primary while others are merely complementary, clearly regulate the qualifications for the establishment of banks, the circumstances under which they may be established as well as the distinction between banks and related institutions. (*Oshio, P.E. "Statutory Control of Banks in Nigeria: An Appraisal of The Banks and Other Financial Institutions Decree", Select Essays in Law, Faculty of Law, University of Benin*).

The legal basis of the relationship between a bank and its customer is of great importance. Unfortunately, it is a matter for regret that despite the significance of this relationship, it has not been easy to formulate a comprehensive and acceptable definition of a bank. Perhaps, this is not surprising because, like many other beings, a bank is easier to recognize or describe than to define. And there is a world of difference between a description and a definition. Accordingly, when in an attempt at a definition, an author proceeds on a voyage of description, he may never arrive at a definition. This issue was examined in my article (*Oshio, P.E. "Legal Meaning of Bank in Modern Nigeria", Journal of the International Banking Law, London (2001) Vol. 4 No. 1, p.89-98*).

Earlier attempts at defining the word "bank" in Nigeria have suffered from various pitfalls. First, there is the attempt to define a bank in Nigeria with reference to

definitions in other countries, especially the unenlightening English definitions. This is completely wrong, since there is a fundamental difference between Nigeria and Britain in respect of banks. For instance, in Nigeria, only a corporate body with a valid banking licence, or which is otherwise authorized by the state, may carry on banking business (*Akwule v. The Queen*). But this is not so in Britain where banking partnerships are allowed.

Section 2 of the Evidence Act provides:

“bank” or “banker means any person, persons, partnership or company carrying on the business of bankers and also include any savings bank established under the Federal Savings Bank Act, and also any banking company incorporated under any charter heretofore or hereafter granted, or under any Act heretofore or hereafter passed relating to such incorporation” and

Section 2 of the Bills of Exchange Act which provides:

“banker” includes a body of persons whether incorporated or not who carry on the business of banking.”

These definitions are unsatisfactory as no individual, partnership or any unincorporated body can carry on banking business in Nigeria. Secondly, the assumption in these definitions that “bank” and “banker” are always synonymous is erroneous.

Unfortunately, the definition of a bank under the Banks and Other Financial Institutions Act appears to be too terse and restrictive to be meaningful or useful. It provides:

“bank” means a bank licensed under this Act.”

The first observation is that this definition is only adequate for licensed banks and would obviously exclude other categories of bank such as statutory banks which do

not need formal banking licences to operate. These are corporate bodies established under specific statutes including even the Central Bank of Nigeria, the Federal Mortgage Bank of Nigeria, the Nigerian Bank for Commerce and Industry, the Federal Savings Bank etc. The statutes under which these banks were established expressly dispensed with formal banking licences for their operation. For example, section 2 of the Federal Savings Bank Act provides:

“Notwithstanding the provisions of the Banking Act, the bank shall be charged with the general duty, and it is hereby authorized without any other licence than this Act, to carry out the following functions

It is submitted that in Nigeria, the terms “bank” and “banker” are synonymous only in some respects but not in all respects. A natural person, bank employee or one professionally qualified in banking may be appropriately called a “banker” though he cannot be a “bank” but this point, regrettably, was not appreciated by the court in that case. A good example of this distinction is to be found in the Chartered Institute of Bankers of Nigeria Decree 1990. Under the decree “banker” means any person who is registered or is entitled to be registered as a fellow, associate member or member of the Institute. This aptly refers only to a natural person.

Accordingly, an acceptable definition of a bank which would include both statutory and licensed banks may be arrived at without necessarily listing all the functions or essential features or characteristics of a bank. It is submitted that in Nigeria:

“Bank” means a corporate body licensed or otherwise authorized by the State to operate as a financial institution with the word “bank” as part of its business name and transact business as defined by its enabling statute or regulations”.

The advantage of this definition is that it covers both statutory and licensed banks and contains the elements which render it most suitable in the Nigerian context today. Accordingly, for an institution to qualify as a bank under the present state of the law of Nigeria, the following are imperatives:

- (1) It must be a body corporate, either as a company registered under the relevant Companies Act or a corporate body established under a particular statute.
- (2) It must either obtain a valid banking license pursuant to the Banking Act (licensed bank) or be otherwise authorized by the State pursuant to a specific statute to transact business as a bank (statutory bank).
- (3) It must be a financial institution *sui generis* as distinct from any other financial institution which is not authorized to use the word "bank" as part of its business name.
- (4) The business transacted by the bank must be defined either in the enabling statute or regulations.

Protection During Bank Strikes

We discussed the legal protection of the bank during strike actions in my book, *Modern Law and Practice of Banking in Nigeria*, Lulupath Press, 1995 (chapter 11). Section 42 of the Banks and Other Financial Institutions Act affords the bank some qualified legal protection from civil liability to any of its customers for the inevitable failure to honour their cheques where the bank is unable to open for business as a result of a strike by its employees, provided that the affected bank has notified the Central Bank of Nigeria within twenty-four hours of the beginning of the strike. This is a substantial qualification of the common law duty of the banker to honour its

customers' cheques if the credit in the customers' account is sufficient to cover the amount on the cheque." The Section provides:

"(1) No bank shall incur any liability to any of its customers by reason only of failure on the part of the bank to open for business during a strike.

(2) If as a result of a strike, a bank fails to open for business, the bank shall, within 24 hours of the beginning of the closure, obtain the approval of the Bank (Central Bank) for continued closure of the bank."

It is submitted that subsection 2 is too sweeping, because it seems that once notice is given to the Central Bank within twenty-four hours of the commencement of the strike the bank is protected for as long as the employees remain on strike. This simply ignores the right of the customers to their services from the bank. The only way an aggrieved customer may be able to maintain an action for breach of the bank-customer contract in case of a strike in a bank in which he keeps an account, is where the affected bank has either delayed for more than twenty-four hours or failed to obtain the requisite approval of the Central Bank. At best, such occurrence may be very rare.

Unfortunately, the interest of the bank customer is not protected during a strike action although in commercial practice, the customer ought to be regarded as the most important of the parties directly affected in a bank strike. In many ways the strike may result in damages to the customer's business or reputation. For instance, such a strike may induce a breach of contract and its attendant civil liability on the part of a customer, it may result in a huge loss to him in terms of missing a good quick business opportunity; it may lead to loss settle with its employees amicably with minimum delay.

Conclusively, these suggestions are motivated by the need for equilibrium in the legal protection for the bank, employees and the customer and the need to foster industrial peace and harmony in the economy. It has been asserted that the intransigence of banks in not meeting their workers' humble demands often results in strike actions. On the other hand, the banks assert that workers' demands are often selfish, however, it seems that workers' demand for higher salaries and wages and better conditions of service or better working conditions, if properly examined and placed in the proper perspective, need not be regarded as selfishness. Such demand may well be an index of economic growth (for instance, during oil boom in Nigeria) whereby workers demand a fair share of the improved economy. Secondly, it may be as a result of a biting inflation whereby workers' demand is merely aimed at meeting the high cost of living –a sort of economic survival. In either situation, the banks ought to consider their demands without bias and quickly too. (*Ehi Oshio, Modern Law and Practice of Banking in Nigeria, Lulupath Press, 1995*).

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." (*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*).

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 and questions as to the limit of legislative competence of the State or Federal legislature. We addressed this and related issues in our article: (*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*).

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.”

Tenure of Local Government Councilors

The bone of contention before the Supreme Court in *Attorney-General of Abia State & Ors. V. Attorney-General of the Federation (2002) 6 N.W.L.R. (pt. 763) 264* was the competence of the National Assembly to legislate on the Tenure of Local Government Chairmen.

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 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.

Creation of New Local government Areas

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). 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. 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 (2004) 18 N.W.L.R. (pt. 904)*, 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.

Election to Local Government Councils

A related issue which we discussed 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 in this case (*A-G, Abia State v. A-G, Federation*), 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.

Executive Immunity

Another area of imperfection is Section 308 of the Constitution. We examined this in our article: (*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.*

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 arrangements. The Court of Appeal explained that the 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. 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* 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*, (2001) 16 N.W.L.R. (pt. 740) 670, 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* (207) 16 N.W.L.R. (pt. 1059) 22, 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

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* (2007) 10 N.W.L.R. (pt. 1041) 1. 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, 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 – equality is equity. A State Governor or Deputy Governor or President or Vice-President who leaves his political party for another should be 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. See equivalent provision of section 137(1)(i) 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*. It is suggested that this provision should be amended in line with this decision.

Vice-Chancellor Sir, it is a litany of imperfections. I could continue! (*Oshio, P.E. "The Injured Workman, Medical Evidence and Assessment of Compensation under the Second Schedule to the Workmen's Compensation Act..." Nigeria Education Law Journal (2001) Vol. 4 No. 1, p. 1-8; "Appointment of Vice-Chancellor, Fundamental Rights and The Jurisdiction of the Federal High Court" Nigeria Education Law Journal (2002) Vol. 5, No. 1 p.122-130; "The Constitutionality and Powers of the Human Rights Violations*

*Investigation Commission (Oputa Panel)" University of Benin Law Journal (2001/2002)
Vol. 7, No. 1, p. 116-135).*

PERFECTING THE IMPERFECTIONS: THE ROLE OF THE JUDICIARY

After the Legislature and the Executive have accomplished their task in the process of law making, it is not often the case that the piece of legislation is perfect. Difficulties may still arise despite the efforts of the Legislature and the Executive in relation to the legislation. The problem of language must be recognized. 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 expression. 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. This is where the draftsman of Acts of Parliament have often been unfairly criticised. A judge believing himself to be fettered by the supposed rule that he must look to the language and nothing else laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity."

This explains some reasons for ambiguities in statutes. In trying to use the right words to convey and translate the decisions of the legislators on debated bills into statutory text, the draftsman's skill faces great test. Indeed, this test is compounded

by conflicting pressures on the draftsman for brevity in addition to the demand for detail. In compressing the language of the bill, the legislation may become more technical, complex and more difficult to understand. On the other hand, there is the pressure for detailed drafting for certainty of the legislation which may lead to a voluminous and unwieldy legislation and this in turn may lead to complexity. The choice between brevity and detail is often a difficult one for the draftsman. As Lord Macdermott pointed out, the basic cause of statutory interpretation is:

“Nothing else than the difficulty of communication – the difficulty of finding unequivocal language by which to convey the intention of Parliament. Throughout the civilized world the power of expression still lags behind the power of thought. Even the most accomplished draftsman – and today we have small cause to complain of the quality of our parliamentary draftsmen - cannot always find words in which to convey precisely what he has in mind, particularly when dealing with some obstruse or intricate subject.” *(1964 Jur. Rev. 103)*.

Added to this is the problem of drafting errors which may lead to some difficulties in interpreting the statute. Given this situation, the need for a specialized arm of government arises whose function is the correct interpretation of our legislation – 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 after the Legislature and the Executive have completed their function in relation to a piece of Legislation. 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." (*Action Congress v. INEC (2007) 12 N.W.L.R. (pt.1048) 222*).

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

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. Legislation generally does not provide for individual acts, persons or events but for acts, persons and events of a class and therefore make use, very often, of general words of ordinary speech. Usually, such general words have a hard core of meaning but are uncertain on the fringes since there is no agreement in common usage or the range of particulars to which they extend. It is this uncertain fringe of meaning which gives rise to some problems of interpretation. The mental images of legislators who voted for a bill containing a general word will exhibit the same imprecision and lack of agreement as is found in the common usage of such word. 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." (*1930 43 Harvard Law Rev. 863, 870*).

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 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 impacted. 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."

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. Neither are they based on the Interpretation Act or interpretation sections of particular statutes. Rather, they are based on concepts intended to "divine" the meaning of words, the nature and purpose of legislation and the intention of the legislature. 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. 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. 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 discussed.

(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 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.” (*Sussex Peerage Case (11 CL& F.85; 8 E.R. 1034, 1057)*).

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." (*Edinburgh Street Tramways and Torbaain (1877) 3 App. Cas. 58, 68*).

Some judges exalt this rule above other canons of interpretation. According to Lord Radcliffe:

"There are many so-called rules of construction that courts of law have resorted to in their interpretation of statutes but the paramount rule remains that every statute is to be expounded according to its manifest and expressed intention." (*Attorney-General for Canada v Hallett & anor. (1952) A.C. 427,449*).

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 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.”
(Escoigne Properties Ltd. V. I.R.C. (1958) A.C. 549, 565).

It is to be regretted that in the Nigerian case of *Adegbenro v Akintola, (1963) 3 W.L.R. 63* 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*” (*Heydon’s case (1584) 3 co. Rep. 7a; 76 E. R. 637*).

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.” (*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* (1949) 2 K.B.481. 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 (1951) 2*

All E.R.839, 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 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 (*Report on Statutory Interpretation No. 21, 1969*). 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. (1971) A.C.850, 881*. This was followed by the express approval of Lord Denning’s position by the Law Commission (England) through the Report of the Renton’s Committee (*Comnd. 6053, Para.19.2*) 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.JJ. 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 (1978)1W.L.R. 220* 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 removed by the House of Lords in the recent case of *Pepper (Inspector of Taxes) v. Hart (1993) 1 ALL E.R.42* 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." (*Stowell v. Lord Zouch (1969) E.R.536*).

Justice Crabbe recently attempted an adaptation of the mischief rule as a statement of the purposive approach thus:

"That for the sure and true interpretation of all statutes ... The office of all the judges is always to make such construction as shall solve the problems which have arisen and advocate the solution to the problems and to suppress subtle inventions and evasions which do not accord with the objects and purposes of the Act and to add force and life to the cure and remedy according to the objects and purposes of the Act, the demands of society and the dictates of common sense and justice."

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

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.

Judicial Creativity 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. In the recent case of *Attorney-General of the Federation v. Abubakar (2007) 10 N.W.L.R. (Pt. 1041) p.1*, 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 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. 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 efficiency 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 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* as follows:

“...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 the interpretation of statutes 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 in 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."

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

"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 hesitate to use the powers available to it to do justice in the cases before it." (*Amaechi v. INEC*).

Let us illustrate the operation of judicial creativity with a few decided cases. In the *Re Sigsworth (1935) Ch.89*, a husband murdered his wife who died intestate. By statute a husband has certain rights of succession on the death of his wife intestate. The question was whether the husband could claim his share of her estate in the circumstances. The court held that he was disqualified, not necessarily on the principle that no one is entitled to benefit from his own wrong. But the court extended to this case the rule in the law of will that a murderer cannot take under his victim's will, to the interpretation of the intestacy statute which contained no such provision.

In *Smith v. Hughes (1960) 1 WLR.830*, the Street Offences Act 1959 provided that "it shall be an offence for a common prostitute to loiter and solicit *in a street* or public place for the purpose of prostitution". The defendant/prostitutes attempted to evade this provision by standing on balconies or behind windows in their houses and soliciting men posing in the street by tapping on the balcony rail or window-pane, attracting their attention and inviting them into the house. They pleaded not guilty to the charge because the balconies or windows were not *in the street* as required by the Act. They were rightly convicted, the court holding that the purpose of the Act being to clean up the streets to enable people to walk along the street without being

molested or solicited by common prostitutes, it mattered not whether the prostitute is soliciting while in the street or standing in a doorway or balcony or at a window etc.

In the case of *Awolowo & Ors v. Federal minister of Internal Affairs* (1962) LL.R.77, 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* (2003) 3 NWLR (pt.806) 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* (2007) 11 N.W.L.R. (Pl.1046) 565, 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, which he could not have sought in the circumstances.

In the recent case of *Amaechi v. INEC (2008 N.W.L.R. (Pt.1080)* popularly known as *Amaechi v. Omehia*, a decision described by Professor Sagay S.A.N. as earth-shaking, the Supreme Court of Nigeria also employed this ingeniously judicial creativity or inventiveness to achieve substantial justice. In that case the appellant, Amaechi, won with overwhelming majority in the primaries and his Party (the P.D.P) on 14/12/2006 forwarded his name to INEC as governorship candidate for the April 2007 election. Soon after, when the appellant heard that his name was about to be substituted by another person, Omehia, who did not even contest the primaries at all, he went to court to stop the Party (PDP) from doing so. While the case was pending the Party indeed substituted Omehia for Amaechi and INEC accepted. Thereafter, INEC and PDP employed a lot of unconscionable delaying tactics in the case until they caused the election to be held on 14th April 2007 and Omehia was sworn in as Governor and in order to present the Court with a *fait accompli*. Omehia also filed processes asking the court to strike out Amaechi's suit before it on the ground that as Governor he enjoyed immunity from suit under section 308 of the 1999 Constitution. This argument was rightly rejected. The Supreme Court held that the substitution of Amaechi was in violation of section 34 of the Electoral Act and therefore void. The court ordered Omehia out of the governorship seat and decreed the installation of Amaechi as the true Governor of the State even though he was denied the opportunity through various subterfuge employed by INEC and PDP from participating in the election as PDP governorship candidate. The Supreme 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, 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."

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."

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 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.”

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* (1982) 3 N.C.L.R. 229, that the provision of section 170(10) of the Constitution which is *impairi 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.

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

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 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." (*Constitutional Democracy in Africa, Vol. 3, (2004), p.29-30*).

However, I must 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.

Guarding the Guards: Limits to Judicial Creativity

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 (1963) 3 W.L.R. 63* 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 (1970) 1 U.I.L.R. 201* 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 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. Hence, an American author strongly contended that the Supreme Court of the United States makes constitutional law and that it does not 'discover' it."

A GLIMPSE AT DIVINE LEGISLATION

Vice-Chancellor, Sir, permit me to start this subhead with a quotation from the Holy Book, the Holy Bible (King James Version). Ps. 19:7-11-

- "7. The law of the LORD is perfect, converting the soul: the testimony of the LORD is sure, making the wise the simple.
8. The statutes of the LORD are right, rejoicing the heart: the commandment of the LORD is pure, enlightening the eyes.
9. The fear of the LORD is clean, enduring for ever: the judgements of the LORD are true and righteous altogether.
10. More to be desired are they than gold, yea, than much fine gold: sweeter also than honey and the honeycomb.
11. Moreover by them is thy servant warned: and in keeping of them there is great reward."

It must be placed on record that the subject of divine law did not begin with the Ten Commandments, otherwise called the Decalog. Ever before Moses through whom

God gave the Ten Commandments was born, God had been ruling the world through various laws which include commandments, statutes and judgements. Divine law embraces all the needs, activities and requirements of men and women all over the world. The principles contained therein are universal. The law is eternal and immutable. Obedience to it leads to blessings but disobedience attracts punishment.

However, since we are concerned here with the subject of legislation, only an examination of the relationship between Divine Legislation and our secular legislation will be undertaken presently. Accordingly, this limits us to a consideration of only an aspect of the Divine law – The Ten Commandments.

The Ten Commandments

The Ten Commandments are generally called the **moral law** the latter reflecting its content, being rules and regulations of the manner and orderly conduct of Man. They embody the principles of our duty to God and Man. It is the supreme law which emanated from God Almighty and it expresses God's own nature and character. Accordingly, it is a testimony of God's holiness, justice, love, mercy, truth, equity and sovereignty. Of this, Paul the Apostle writes in the New Testament "the Law is holy and the commandment holy, just and good" (*Rom. 7:12*). In this connection, divine law is superior to our secular law. Any iota of doubt as to the veracity of this position was erased in the recent case of *Attorney-General of Abia State v. Attorney-General of the Federation (2006) 16 N.W.L.R. (pt. 1005) 265, 389* where Niki Tobi J.S.C. warned:

"I should say finally that any person who is at the corridors of Local Government finances or funds or in some proximity with such finances or funds or sleeping with them and sees this judgment as a victory in the sense that he has the freedom of the air to steal from the finances or funds should think twice and quickly remind himself that the two anti-corruption bodies, the Independent Corrupt

Practices Commission (ICPC) and the Economic and Financial Crimes Commission (EFCC), are watching him very closely and will, without notice, pounce on him for incarceration after due process. But that is not as serious as God's Law which says he will go to hell and he will certainly make hell. This is not a curse. God's Law does not lie because God is not a liar."

The Ten Commandments contained in the Second Book of Moses called The Exodus Chapter 20:1-17 may be summarized as follows:

1. Worship no god but me.
2. Do not make for yourself image of anything.
3. Do not use my name for evil purposes.
4. Observe the Sabbath and keep it holy.
5. Respect your father and your mother.
6. Do not commit murder.
7. Do not commit adultery.
8. Do not steal.
9. Do not accuse anyone falsely.
10. Do not desire another man's wife and his other belongings

It is generally admitted that the decalog has two natural divisions called the First and Second Tables. The First table contains the first four commandments which demonstrate and teach the personality of God and the true notions we should form of the divine nature. The Second table contains the fifth to the tenth commandments, which is a complete system of ethics and moral duties which every man owes his neighbour. Notice the inherent order in this arrangement as it teaches us the order we should observe in respect of our priorities in life. The first priority in this order is our

filial relationship: our duty to God. The second is our **fraternal relationship: our duty to Man (our neighbours).**

The Decalog is summed up in the universal principle of LOVE. It draws our attention to the grand principle of love to God and love to Man; for love is the fulfilling of the law (Rom. 13:10). The Lord Jesus Christ summarized the Ten Commandments in the New Testament as follows:

“Thou shalt love the Lord thy God with all thy heart, and with all thy soul, and with all thy mind. This is the first and great commandment. And the second is like unto it, **Thou shalt love thy neighbour as thyself.** On these two commandments hang all the law and the prophets” (*Matthew 22:37-39*).

On the rationale and logic of the first four commandments (First table) Matthew Henry wrote:

“It was fit that those should be put first, because man had a Maker to love before he had a neighbour to love; and justice and charity are acceptable acts of obedience to God only when they flow from the principles of piety. It cannot be expected that he should be true to his brother who is false to God.” (*Matthew Henry’s Commentary in One Volume, Zondervan Publishing House, Michigan, 1961*).

The Lord Jesus Christ summarized the second table, the sixth to the tenth Commandment, in a word of one syllable in the New Testament for all to understand and practise. This is known today as the Golden Rule:-

“Therefore all things whatsoever ye would that men should do to you, do ye even so to them: for this is the law and the prophets.” (*Matthew 7:12, King James Version*).

What a wonderful standard! The correct interpretation of this is that “in all situations and circumstances of normal relationship, in all things as we relate with

others – parents and children, husbands and wives, neighbours and friends, employers and employees, sellers and buyers, professionals and clients, teachers and learners, leaders and followers, citizens and strangers, lenders and borrowers, landlords and tenants, rich and poor, privileged and less-privileged people – whatsoever ye would that others should do to you, do ye even so to them.”

“This is a precept of great value. It may be possible to forget the details of many of the commandments of God but this is easy to remember. It calls us to a gracious, godly life. It draws us from a life of selfishness to a life of Christlikeness. It teaches us not to act from selfish or unjust motives but to put ourselves in the place of the other person and ask what we would expect of him towards us. This would make us impartial, kind, considerate, just, gentle and tender.”

One great Bible expositor extolled the virtue inherent in this universal principle of the Golden Rule in the following words:

“This standard for human behaviour, if applied fairly and faithfully would banish cruelty, unkindness, theft, adultery, murder, abortion, treachery, deception, envy, covetousness – sinfulness in general. This precept will prevent unrighteousness among men. If everyone would practise this the church would be a glorious church and the world would be a better place in which to live, to work and to prepare for eternity.” (Kumuyi, W.F. Bible Study, 4 February, 2008)

The great question is how far does the Nigerian Law accommodate the universal principles contained in Divine Legislation, the Ten Commandments? Let us examine the Decalog in the context of our secular laws. A critical analysis reveals that six out of the Ten Commandments are not enforceable under the Nigerian Law. These include the first to the fifth and the tenth commandments. Indeed, our Constitution of 1999 declares a secular state and freedom of worship (sections 10 and 38). Accordingly, the

observance or breach of the first commandment in the Decalog is not the concern of the Constitution. However, of the four commandments which are enforceable in Nigeria, Adultery is only punishable under the Penal Code (s.387-388) of the Northern States; it is not a crime under the Criminal Code or under any other law in the Southern States. Even under the Matrimonial Causes Act 1970, adultery is not regarded as a crime but only a factor for the court to consider in order to establish whether or not a marriage has broken down irretrievably.

It is clear from the above that our legislation fails to follow the pattern or order in divine legislation. The law of God is the foundation of a good society. If we neglect to abide by the divine law, good government will be elusive. Little wonder that we have a litany of imperfections in our laws today because we have put the cart before the horse. The divine order is to seek first the Kingdom of God and His righteousness and all other things will be added unto us. The correct and acceptable order is the **Rule of God** before the **Rule of Law**.

Our legislators, members of the executive and all judges must be reminded of the following all-important verse of the Law of God which sets out the Almighty God as the perfect example to whom they must look for excellence in the discharge of their respective duties.

“For the LORD is our judge, the LORD is our lawgiver, the LORD is our King; he will save us.” *(Isaiah chapter 34:22)*

The three arms of government are here represented and the LORD God is the foundation of each of them – the author and the finisher. Good law-making, law enforcement and administration of justice can only be achieved through the power, authority and assistance of the one who is the Chief Law-maker, the Chief Executive

and the Chief Justice of the universe, - The Almighty God! Without Him we can do nothing.

CONCLUSION

Vice-Chancellor, Sir, in addition to my earlier suggestions in this Lecture, I would like to conclude by proffering recommendations for improved Legislation in Nigeria.

1. The Land Use Act should be repealed having failed to achieve its set objectives. Government's need for land for overriding public purposes for development has always been realized through the various State Land Laws including the Public Lands Acquisition Act and Laws which have not been repealed.
2. There is need for a comprehensive legislation on Agriculture comparatively better than a consolidation of the English Agriculture Act, 1947 and Agricultural Holdings Act, 1948 to make direct provisions on agricultural development in Nigeria. The Agricultural Credit Guarantee Scheme Fund Act should be amended in line with suggestions already proffered in this lecture.
3. The 1999 Constitution needs urgent amendment as already suggested in this lecture and, especially, to reflect the various Supreme Court decisions on some provisions of the Constitution. In this connection the current action being initiated by the National Assembly to amend the Constitution should be encouraged.
4. The institution of customary tenancy is long overdue for legislative intervention. Adjudication has failed to address the perennial problem. There is urgent need for a legislation for the enfranchisement of Customary Tenants similar to the provisions of the Kola Tenancies Act 1935 and the Epetedo Lands Act 1947.
5. I urge our courts to fully embrace the purposive approach to the interpretation of legislation as already adopted by the Supreme Court of Nigeria and now being nurtured by it in aid of the dynamic, inventive and creative interpretation to achieve substantial justice in every case that comes before the courts for adjudication.

6. There is the urgent need for our Legislature to adopt the pattern of Divine Legislation which is based on LOVE. Our reliance on the pattern from other countries has only resulted in importation of their imperfections into our legislation. The divine pattern is perfect and we have a crucial choice to make between these two sets of pattern; it is essentially a choice BETWEEN GOD AND MAN.

Vice-Chancellor, Sir, I come to the end of my Inaugural Lecture; for I must conclude while you continue. I thank you all for listening.

TO GOD BE THE GLORY.

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BIOGRAPHY OF AUTHOR

Professor Patrick Ehi OSHIO was born to Mr. Oshio Okoh and Madam Atupele Oshio on 23rd March 1953 at Idumobodo, Efandion, Uromi, Edo State. His father was a subsistence farmer who, unfortunately, did not believe in Western Education – all must go to the farm! However, young Ehi, had the favour of his loving mother who managed to sponsor him up to Primary Six in St. Paul's R.C.M. Primary School, Efandion, Uromi. He successfully completed his Primary education with a **Primary School Leaving Certificate Grade A** in 1964. In 1967 however, his former Headmaster requested him to return to school to repeat the Primary Six examination, on the ground that the Ministry of Education had promised to sponsor academically brilliant students to Secondary school based on their Primary Six performance. Although he repeated the same feat in 1967, that promise unfortunately, ended up as mere rumour and nobody was sponsored.

In 1970 one of his former Primary School Teachers sponsored him for six months in a local Typewriting Institute at the rate of ten shillings per month school fees after which he was appointed Typist in Mexico-Bay Insurance Company. Unfortunately, the company closed down within less than six months. By 16th October 1972, Professor Oshio dramatically came to Benin City in search of a job. Precisely one week after, fortune smiled on him when he secured appointment in Sparta Poultry as a Shorthand/Typist on 24th October 1972. On 8th November, 1973, he took up appointment with the State Board of Education, Benin City as a daily-paid Temporary Typist the salary of which, incidentally, amounted to less than what he was earning in Sparta Poultry. With this sacrifice, he thus secured opportunity to commence his private

study for the General Certificate of Education together with his professional external examinations in Typewriting and Shorthand.

In 1975, he obtained the General Certificate of Education (Ordinary Level) in five subjects with **Distinction, A1**, in four of the subjects including English Language. By 1980, he had secured the General Certificate of Education (Advanced Level) also in five subjects at two sittings. Armed with these qualifications, the way was clear in 1980 for Professor Oshio's admission to read Law in the prestigious Faculty of Law, University of Lagos.

Professor Oshio graduated with an LL.B. (Honours) Degree **Second Class Upper Division** in 1983. He also distinguished himself as the student with the best result in the Law of Business Associations (Company Law). For his professional Legal education at the Nigerian Law School, he enjoyed a Scholarship from Chief Gani Fawehimi, successfully completed the course and obtained the Barrister-at-Law (B.L.) **Second Class Upper Division** in 1984. He was called to the Bar as a Solicitor and Advocate of the Supreme Court of Nigeria in 1984. He obtained the Master of Laws LL.M. Degree from the University of Lagos in 1985.

In November 1985, Professor Oshio took up appointment as a Lecturer at the University of Benin. An erudite and established scholar, teacher, researcher and author, Professor Oshio has to his credit fifty-two (52) scholarly publications in a variety of legal issues and subjects consisting of books, articles in learned Journals and Conference Papers both in Nigeria and abroad. His publications are widely circulated, patronized and read. With these credentials, it is little wonder that he became the first autochthonous Professor of Law in the University of Benin a position he earned in 2003.

Professor Oshio has served in several positions in the University. At the Faculty of Law he was Head of the Department of Private and Property Law 1989-1993; Head of the Department of Jurisprudence and International Law, 1993-1997; Head of the Department of Business Law, 1999-2000 and Dean of the Faculty, 2000-2002 and 2006 to-date. A member of the University Senate, Professor Oshio served in several Committees/Panels of the University either as Chairman or member.

A strict disciplinarian and yet a compassionate lover, friend, motivator, inspirer and mentor of students, Professor Oshio received a Certificate of Merit from the Law Students Association (LAWSA) of the University of Benin as a Distinguished Leader in the 1999/2000 session. In 2004, the Students Union Government of the University also honoured him as "a rare academic staff with proven integrity who had contributed immensely to the academic advancement of the University and an outstanding Lecturer with the highest level of Students/Lecturer relationship". In the 2005/2006 academic session, the Law Students Association (LAWSA) again honoured him with another Certificate of Merit for his outstanding contribution to legal education.

Professor Oshio is a member of some professional bodies including the Nigerian Bar Association, the Nigerian Association of Law Teachers, the Council of Legal Education, the Edo State Judicial Service Commission and the World Jurist Association.

A practising Christian and a Pastor in the Deeper Christian Life Ministry, Professor Ehi Oshio is married to Mrs. Lucy Ediruke Oshio and the marriage is graciously blessed with precious children.