The Court of Appeal and the Case of the Five Governors:
The Unanswered Question

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Introduction

Change is changeless. This is often expressed in the popular saying that change is the only permanent thing in nature. In other words, change is an unchanging changer! Yet, surprisingly, many people (if not the majority of people) are often ill-prepared for change and therefore exhibit negative attitude to change. So it is with the law even today. A very important feature of law is that it is both conservative and dynamic. Although law is a profession which relies heavily on precedents, it nevertheless admits of some changes in response to unforeseen supervening and present challenges. In the case of *Attorney-General of the Federation v. Abubakar (2007) 10 NWLR(Pt.1041) p.1 @ 171-172)* the Supreme Court of Nigeria observed (per Aderemi JSC):

"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… after all, law has a very wide tentacle and must find solution to all man-made problems."

Also, in *Amaechi v. INEC (2008)5 NWLR (Pt. 1080) p. 227 @ 315)* Oguntade JSC quoted with approval the dictum of Lord Denning M.R. on this score in the case of *Packer v. Packer (1958) p.15 @ 22* where the Law Lord had declared:

"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."

Very unfortunately, a number of Judges in our hierarchy of Courts below the Supreme Court of Nigeria do not seem to fully grasp this very significant feature of the law but rather slavishly and rigidly adhere to the doctrine of judicial precedents and relish only on the strict constructionist approach to the interpretation of statutes and the Constitution. That approach has been faulted for its inability to respond to new legal challenges where surrounding circumstances ought to be considered in order to do substantive justice in a particular case. In *Pepper (Inspector of Taxes) v. Hart (1993) 1 ALL E.R.42,* the House of Lords, England (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."

The failure to appreciate this flexibility in statutory interpretation and adopt a **Purposive Approach** accounted for the much-criticized decision of the Federal High Court, Abuja Division in the case involving five Governors for the determination of their tenure after a re-run election. Regrettably, this decision has recently been upheld by the Court of Appeal. It is submitted that both decisions are wrong in law and indefensible for the reasons to be discussed presently.

The Purposive Approach

The purposive approach is the modern approach to the mischief rule, but it is wider in scope than the mischief rule. It has a somewhat chequered history in England. Lord Denning, by far the strongest and the most persistent advocate and exponent of this approach during his time at the Court of Appeal, seized every opportunity to advance the approach. From his *"homely metaphor of ironing out the creases."* in *Seaford Court Estates Ltd v. Asher(1949) 2 K.B.481)* to "*filling in the gaps and making sense of the enactment"* in *Magor and St Mellons Rural District Council v. Newport Corporation(1952)* 2All E.R.839), until the Law Lord declared the literal method to be completely out of date in *Nothman v. Barnet Council* thus:

"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".

The approach has since been embraced in many other jurisdictions in the world.

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 purpose of the legislation. It enables the court to consider not only the letter but also the spirit of the legislation. It promotes attainment of substantial justice as it dispenses with excessive legalism and slavish adherence to the doctrine of judicial precedents.

In Nigeria, the Supreme Court stated the position a long time ago in *Nafiu Rabiu v. The State(1981) 2 N.C.L.R.293 @ 326* (per Udo Udoma JSC):

"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,… 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"

And in the recent case of *Amaechi v. INEC (supra,)* the Supreme Court emphasized the need to adopt this approach to do *substantial justice* untrammelled by legal technicalities in a number of dicta. It is submitted that if Justice Bello had adopted this approach in this case, he would not have come into this error.

The Case of the Five Governors

The relevant provisions of the Electoral Act 2006 on this score are as follows:

*"Section 147(1) Subject to subsection (2) of this section, if the Tribunal or the Court as the case may be, determines that a candidate who was returned as elected was not validly elected on any ground, the Tribunal or the Court shall **nullify** the election.*

(2) If the Tribunal or the Court determines that a candidate who was returned as elected was not validly elected on the ground that he did not score the majority of valid votes cast at the election, the Election Tribunal or the Court, as the case may be, shall declare as elected the candidate who scored the highest number of valid votes cast at the election and satisfied the requirements of the Constitution and this Act."

The relevant paragraphs of the Rules of Procedure for Election Petitions contained in the First Schedule to the Act are as follows:

27(1) At the conclusion of the hearing, the Tribunal shall determine whether a person whose election or return is complained of or any other person, and what person, was validly returned or elected, or whether the election was void, and shall certify the determination to the Resident Electoral Commissioner or the Commission.

*(2) If the Tribunal or Court has determined that the election is invalid then, subject to Section 147 of this Act, where there is, an appeal and the appeal fails, **a new election** shall be held by the Commission*

(3) Where a new election is to be held under the provisions of this paragraph, the Commission shall appoint a date for the election which shall not be later than 3 months from the date of the determination."

The two issues which arise from these provisions are (1) the determination of **the effect of nullification** of the election of a Governor who had already been sworn-in and (2) the correct interpretation of a **new election**

On the issue of nullification by the Court of Appeal, two positions are distinguishable. First, under section 147(2) of the Electoral Act 2006, where the election is nullified and the opponent of the Governor is declared as the validly elected candidate, the decision of the Court of Appeal is final and the opponent must be duly sworn-in as the new Governor (e.g. Governors Obi, Oshiomhole, Mimiko, Aregbesola etc. cases fall within this category.)

However, where the election is nullified and a re-run election is ordered by the Court of Appeal a different legal situation would arise. Here, the decision of the Court of Appeal cannot be said to be final in the real sense of the word. This is because an order for a re-run by the combined effect of Section 147(1) and paragraph 27(2) of the First Schedule of the Act is an exhibition of judicial doubt and it is tantamount to a reference or transfer of the case to the electorate for final determination. The electorate is the legitimate authority which will decide whether or not the Governor had been validly elected. The decision of the Court of Appeal is not final in this important respect. Rather, it is the verdict of the electorate to confirm or reject the earlier victory at the polls that is final. It is the electorate that elects a candidate and not the Courts. Neither the 1999 Constitution nor the Electoral Act has empowered any Court to do so. In this kind of situation, the decision of the Court of Appeal is only final in one important respect, namely, that there is no further appeal to the Supreme Court. Adopting the purposive approach and having regard to the surrounding

circumstances, the phrase: *"shall nullify the election*" under Section 147(1) of the Electoral Act 2006 simply means *"shall declare the election inconclusive."*

On the second issue, it is submitted that a re-run (new) election within the Act is not entirely new: there are no new party primaries, no new candidates and the election is limited to the same contestants. A re-run election is merely the conclusion of the election which was inconclusive. The purpose of an election is to produce a winner. An election is not conclusive when it has not produced a winner. That is why a re-run can only be ordered where the Court of Appeal doubts the verdict of the electorate as to the true winner. An election is not validly concluded or conclusive where a winner has not emerged or the election fails to produce a winner. Accordingly, an order for a re-run is an admission by the Court of Appeal that the election is inconclusive. Adopting the purposive approach therefore, nullification of the election followed by an order for a re-run in this context means a declaration that the election is inconclusive with an order to conclude the election and produce a winner. Accordingly, where a candidate who had earlier been declared the winner and sworn-in as the Governor wins in a re-run, his victory is the confirmation or ratification by the electorate of its earlier verdict which the Appeal Court had doubted and had failed to uphold.

It is submitted that the Federal High Court misconceived the law and was in error in relying on the earlier decision of the Court of Appeal which had nullified the election when, in fact, that decision had been consequentially set aside by the electorate when it returned the Governors as duly elected in the re-run and therefore confirmed their earlier victory at the polls. The electorate having confirmed its earlier choice/election by returning the Governors in the re-run, the earlier decision of the Court of Appeal had, in consequence, been spent, abated and cannot stand as a foundation for any subsequent judgement. That decision had ceased to be good law from the time the Governors were re-elected in the re-run. Accordingly, *"you cannot put something on nothing and expect it to stand."* (*UAC v. Mcfoy*). This is one sense in which an election petition case is *sui generis.*

The Issue of Tenure under the 1999 Constitution

Section 180(1) of the 1999 Constitution provides as follows:

"Subject to the provisions of this Constitution, a person shall hold the office of governor of a State until when his successor in office takes the oath of that office; or he dies while holding that office; or the date when his resignation from office takes effect; or he otherwise ceases to hold office in accordance with the provisions of this Constitution."

Section 180(2) of the Constitution provides as follows:

"Subject to the provisions of subsection (1) of this section, the governor shall vacate his office at the expiration of a period of four years commencing from the date when, in the case of a person first elected as governor under this Constitution, he took the oath of allegiance and the oath of office; and the person last elected to that office took the oath of allegiance and the oath of office or would, but for his death, have taken such oaths."

Subsection (3) provides that *"if the Federation of Nigeria is at war in which the territory of Nigeria is physically involved and the President considers that it is not practicable to hold elections, the National Assembly may by resolution extend the period of four years mentioned in subsection (2) of this section from time to time, but no such extension shall exceed six months at any one time."*

It is abundantly clear from the provisions of Section 180(2) above that the Constitution limits the tenure of a Governor to four years. At the end of four years he must vacate office unless he is re-elected for another term of four years and no more. The Constitution does not provide for any extenuating circumstance for the elongation of this tenure except under subsection (3) when the Federation is at war and the President considers that it is impracticable to hold elections, in which case, the National Assembly may by a resolution extend the period of four years by six months at a time as the exigency of the situation may demand. It is submitted that the *exclusio unius rule* applies to this case, that is, the express mention of a thing precludes that which is not expressly mentioned. Accordingly, no court can read tenure elongation into the Constitution or grant it to anybody by any implication since it is not within the contemplation of the Constitution.

Secondly, since the Constitution does not provide for a second oath of office/allegiance for one term, the second oath/swearing-in of the five Governors was unnecessary surplusage and ineffectual in law. In *Balonwu v. Governor of Anambra State (2008) 16 NWLR (Pt. 113) p.236* the Court of Appeal held that a second Proclamation for the House of Assembly to commence sitting within the same term of four years was unnecessary and without legal force. It is submitted that this decision which has been confirmed by the Supreme Court applies to the second oath of office/swearing-in of the five Governors. For the avoidance of any doubt, *Obi v INEC* (2007) 11 NWLR (Pt.1046) p.565) does not apply to the case of the five Governors.

For one thing, it is distinguishable because it does not involve a re-run election and secondly, the Supreme Court limited the decision to the Governor of Anambra State.

One very important point to be made is in respect of the pronouncement of the Federal High Court that the nullification of the election by the Court of Appeal has the effect of nullifying the first oath of office and tenure of the five Governors. With due respect, this pronouncement is unconstitutional. In the first instance, there cannot be a nullification of these oaths and tenure by implication. Nullification must be express if the court is so empowered to do so and not by mere implication. Secondly, it amounts to constitutional inconsistency to hold that the decision of the Court of Appeal voiding an election under the Electoral Act 2006, a mere statute, has the effect of nullifying the oath of office duly taken under the Constitution which is the Supreme Law of the Land. Such pronouncement is tantamount to placing the Act above the Constitution and therefore null and void by virtue of section 1(3) of the Constitution.

The pronouncement is also surprising because the Electoral Act 2006 does not even empower the Court of Appeal to nullify any oath of office or tenure of a Governor. In Balonwu *v Governor of Anambra State (supra)* the Court of Appeal also held that the Court only nullified the election of Governor Ngige but not his tenure since he was returned elected by INEC and duly sworn-in by the Chief Judge of the State as Governor. All his acts as Governor were validated since there was no vacuum in government. This decision which has been upheld by the Supreme Court applies with equal force to the tenure of the five Governors. It is submitted that since the five Governors were returned by INEC as elected and duly sworn-in as Governors, their tenure subsisted and could not be nullified by implication.

Furthermore, the decision of the Federal High Court now affirmed by the Court of Appeal that their tenure from the time of their first swearing-in had been extinguished by implication seems to me to amount to an attempt to wrongly re-write the political history of these States. To the question: who were the respective Governors of KOGI, SOKOTO ADAMAWA, CROSS RIVER and BAYELSA States during the period under consideration, even a Primary School pupil would readily answer IDRIS, WAMAKO, NYAKO, IMOKE AND SYLVA. It is rather amazing that both the Federal High Court and the Court of Appeal have failed to provide a correct answer to this question in this case.

On the question what to do with the few months in which the five Governors were effectively out of office before the re-run election took place, the case of *Ladoja v. INEC* (2007) 12 NWLR (Pt. 1047) p.119 aptly supplies the answer. In that case, Governor Ladoja was effectively out of office for eleven months as a result of impeachment by the State House of Assembly which was later nullified. The Court rightly refused to grant him tenure elongation to compensate him for the eleven months even though another person was sworn-in and exercised full powers as Governor for those months but only reinstated him with full benefits as Governor for the eleven months. It is submitted that adopting the purposive approach to interpretation and having regard to all the surrounding circumstances, the case of the five Governors is a simple case of reinstatement (by the electorate) with full benefits for the three months they were effectively out of office in preparation for the re-run election. At best this period may simply be treated as a period of leave with full benefits. To hold otherwise is to indulge in excessive legalism and undue technicalities which is tantamount to an attempt to defeat the purpose and intendment of the 1999 Constitution of Nigeria!

LET ME CONCLUDE with this wise counsel of one of our erudite jurists, Oputa JSC. thus:

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