Taming the Unruly Horse of Rules of Interpretation: A Review of *Marwa & Anor v Nyako & Ors*

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Abstract

The duty of courts is to interpret laws to give effect to the intention of the parliament. The means of actuating this is diverse and intricate due to the possibility of words gaining uncertain meaning depending on usage and unforeseeable social-political circumstances. The most important of these rules are the literal, golden and the mischief rules of interpretation. There is also the purposive approach to the interpretation of statutes. In an attempt at analysing the desirability of these rules of interpretation and how they have been applied by our courts, this article examines the case of Marwa & Anor v Nyako & Ors in light of other decisions of our courts and discovers that the rules of statutory interpretation as well as the tools of statutory construction have been applied without much adherence to any specific determinant principles in choosing which rule of interpretation or tools of construction to use in each case. This article concludes that there is a gradual erosion by the courts from interpretation of statutes toward construction of statutes, which though may suffice for political as well as social exigencies, but would definitely adversely affect judicial precedence and judicial consistency on which our legal system is built.

1. Introduction

Even though the "intention of the legislature"[1] is what the courts are to discover and apply to cases brought before them, the practical substance

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[1] The courts have always used the words 'will,' 'intention,' or 'purpose,' of the legislature interchangeably even though they do not mean the same thing and this is responsible for the uncertainty of the exact rule employed in each case

of that phrase is nebulous as well as slippery, leaving the courts with little or no option than to rather search for the true meaning of the words and expressions utilised by the legislature. That has been the unenviable task of the Nigerian courts since the dawn of the 4th Republic, especially as it regards interpreting and applying the Constitution of the Federal Republic of Nigeria, 1999.

This is not unexpected in a growing democracy, especially, one with a Constitution largely believed to have been foisted on the people.[2] As such, the courts have been actively involved in deciding landmark constitutional cases affecting the polity. Prominent amongst these constitutional issues that have come up for judicial interpretation are the questions of the tenure of political office holders, legislative powers of the respective federal and state legislatures and issues bothering on the determination of electoral matters, to mention but a few. While also drawing inferences from cases relating generally to statutory interpretation, this article, in demonstrating the pattern of constitutional interpretation prevalent in our courts, concentrates on cases decided on the issue of the tenure of political office holders.[3]

2. Tenure of Office under the Nigerian Constitution

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of interpretation. See *Awolowo v Shagari & Ors* (1960-1980) LRECN, 162 at 203, para A, *per* Obaseki JSC. See the English cases of: *No-Nail Cases Property Ltd v No-Nail Boxes Ltd* (1944) 1 KB 629 at 637, *Ealing London Borough v Race Relation Board* (1972) AC 342 at 360. See the American case of *In re Compliant of Rovas v SBC Michigan*, 482 Mich (2008) 90, 99. See also, Quintin Johnstone: "An Evaluation of the Rules of Statutory interpretation,"*3 University of Kansas Law Review 1 (1954) Kensas Law Review*, Available at: http://www.digitalcommons.law. yale.edu/fss, visited 28/07/2012.

2 J. Ihonvbere: "Principles and Mechanisms of Building a People's Constitution: Pointers for Nigeria" in M.M. Gidado, C.U. Anyanwu and A.O. Adekunle (eds.) *Constitutional Essays Nigeria beyond 1999: Stabilizing the Polity through Constitutional Re-Engineering in Honour of Bola Ige*, (Enugu: Chenglo Limited, 2004), p. 99 at 103-104, cited in J.F. Olorunfemi: "Whether the Assent of the President is Required for Constitutional Amendment in Nigeria," *Law and Policy Review*, Vol. 1, 2011, pp. 1-34 at 2.

3 In particular, *Marwa & Anor v Nyako & Ors* (2012) 6 NWLR (Pt. 1296) 199, otherwise known as "five governors' case."

Political offices, in the legislative and executive cadre in Nigeria, are creations of the Constitution and that being the case, the tenure of office, circumstances in which the holder would be held to have vacated office and as well as when the right of the holder thereof would be said to have extinguished are cognisable under the law as discussed hereunder.

2.1 Tenure of Office of Executive Office Holders

The 1999 Constitution recognises at the state level elected executive officers in the cadre of the State Governor and the Deputy Governor and at the federal level, the President and the Vice President respectively.

As regards the office of the President, section 135 (1) of the 1999 Constitution provides that subject to the provisions of the Constitution, a person shall hold the office of President until the occurrence of certain events. Firstly, until his successor in office takes the oath of that office; secondly if he dies whilst holding such office; thirdly, till the date when his resignation from office takes effect; or fourthly, if he otherwise ceases to hold office in accordance with the provisions of the Constitution.[4]

Section 35 (2) further provides that subject to the provisions of subsection (1) of the same section, the President 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 President under the Constitution, he took the Oath of Allegiance and the Oath of Office; and in any other case, the person last elected to that office under the Constitution took the Oath of Allegiance and Oath of Office or would, but for his death, have taken such oaths.

By virtue of section 35 (3) thereof, the tenure of four years provided by the section may be extended if the Federation is at war in which the territory of Nigeria is physically involved and the President considers that it is not practicable to hold elections. In such cases, the National Assembly may, by resolution extend the period of four years mentioned in subsection (2) therein from time to time; but no such extension shall exceed a period of six months at any one time.

As regards the office of the Vice President, section 142 (2) of the 1999 Constitution provides:

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4 Section 35 (1) (a)-(d), 1999 Constitution.

> The provisions of this Part of this Chapter relating to qualification for election, tenure of office, disqualification, declaration of assets and liabilities and oaths of President shall apply in relation to the office of Vice-President as if references to President were references to Vice-President.

For the office of the Governor of a State, the Constitution in section 180 made provisions as regards the tenure of office for the governor in words with the same effect with that of the office of the President, while the effect of section 187 (2) as it regards the office of the Deputy Governor is *mutantis mutandi* the provisions of section 142 (2) affecting the office of the Vice President.

2.2 Tenure of Office of the Legislature

For the National Assembly, section 68 provides that a member of the Senate or of the House of Representatives shall vacate his seat in the House of which he is a member in the following circumstances.

(a) he becomes a member of another legislative house;
(b) any other circumstances arise that, if he were not a member of the Senate or the House of Representatives, would cause him to be disqualified for election as a member;
(c) he ceases to be a citizen of Nigeria;
(d) he becomes President, Vice-President, Governor, Deputy Governor or a Minister of the Government of the Federation or a Commissioner of the Government of a State or a Special Adviser.
(e) save as otherwise prescribed by this Constitution, he becomes a member of a commission or other body established by this Constitution or by any other law.
(f) without just cause he is absent from meetings of the House of which he is a member for a period amounting in the aggregate to more than one-third of the total number of days during which the House meets in any one year;
(g) being a person whose election to the House was sponsored by a political party, he becomes a member of another political party before the expiration of the period for which that House was elected;

> Provided that his membership of the latter political party is not as a result of a division in the political party of which he was previously a member or of a merger of two or more political parties or factions by one of which he was previously sponsored; or
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> (h) the President of the Senate or, as the case may be, the Speaker of the House of Representatives receives a certificate under the hand of the Chairman of the Independent National Electoral Commission stating that the provisions of section 69 of this Constitution have been complied with in respect of the recall of that member.

For the House of Assembly, the Constitution provides in section 109 (1) for the same circumstances as applicable to the National Assembly.

It should be stated at this point that there is an amendment to the provisions of sections 135 and 180 of the Constitution with the insertion of 2A to both sections, which reads:

> In the determination of the four year term, where a re-run election has taken place and the person earlier sworn in wins the re-run election, the time spent in the office before the date the election was annulled, shall be taken into account.

3. Rationale for Providing for Tenure of Office for Political Offices under the Constitution

The rationale for providing in detail for the tenure of office under the Constitution is not far-fetched. It is to forestall instances in which somebody may hold unto power beyond the stipulated time or to prevent somebody from being forced out of office before the expiration of his tenure. In other words, security of office is paramount in the mind of the framers of the Constitution. Providing for tenure of office is a constitutional as well as legal guarantee that the holder of the office cannot be removed from office except in circumstances specifically stipulated by law. It has been reasoned that:

> Without security of tenure, an office-holder may find his or her ability to carry out their powers, functions and duties restricted by the fear that whoever disapproves of any of their decisions may be able to easily remove them from office in

> revenge. Security of tenure offers protection, by ensuring that an office-holder cannot be victimised for exercising their powers, functions and duties. It enables the democratic or constitutional methodology through which an office-holder comes to office not to be overturned except in the strictest and most extreme cases.[5]

4. Rules of interpretation of Statutes

Generally described, rules of statutory interpretation include legal principles developed to discover the meaning of statutes. They have been referred to as rules of thumb that aid the court in determining the meaning of legislations. The doctrine of parliamentary supremacy dictates that the courts must concede that the legislature means in a statute what it says and says in a statute what it means, literally. Statutory interpretation therefore is succinctly the process by which a court looks at a statute and determines what the legislature intend by it.

Rules of interpretation are principles upon which the words of a statute are legally analysed to discover the intent of the legislature. These rules are adopted to make the judge's duty of reaching a clear and unambiguous understanding of a statute, much easier. The four basic rules are hereunder discussed.

4.1 The Literal Rule

Also known as the plain meaning rule and reputed to be the first, preferred rule of interpretation, this rule simply suggests that words used in a statute should be given their plain, literal meaning. In the words of Chief Justice Tindal in *Sussex Peerage:*[6]

> … the only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and

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5 See, Security of Tenure, Wikipedia, the free Encyclopedia, available at: *en.wikipedia.org/wiki/Security_of_tenure*, visited 15/07/2012; see also, Justice Manning of the supreme court of Michigan, in *Carleton v People*, 10 Mich. 259.

6 (1844) 1 Ci & Fin 85.

> ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver.

In *Awolowo v Shagari*,[7] the Appellant had approached the court for the judicial interpretation of the meaning of two-thirds of 19 states of Nigeria as provided for in the electoral law. The Supreme Court interpreted the law literally and reached a verdict that two-thirds of 19 states is 12 2/3, and that if 13 states was intended, the law would have stated so in clear terms even though the same constitution also never provided for 12 2/3 states.

That this rule of interpretation can lead to absurdity and indeed does lead to absurdity is further exemplified by the English case of *Fisher v Bell*,[8] where the English Restriction of Offensive Weapons Act of 1959, section 1 (1) made it an offence to "manufacture, sell, hire, or offer for sale or hire, or lend to any other person, amongst other things" an offensive weapon. The defendant had a flick knife displayed in his shop window with a price tag on it. The Statute made it a criminal offence to "offer" such flick knives for sale. His conviction was overturned based on the ground that goods on display in shops are not "offers" in the technical sense but an invitation to treat.

Several other cases similar to this case on their decision go to show that a slavish adherence to this rule may sometime produce an undesired outcome, even though it is the principal canon to guide the interpretation of statutes.

4.2 The Golden Rule

The rule was first mentioned in *Becke v Smith*[9] 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

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7 See note 1 above. See also, *Adegbenro v Akintola* (1963) 3 WLR 63 PC; *Hope Democratic Party v Obi* (2011) 18 NWLR (Pt. 1442); *FRN v Dariye* (2011) 13 NWLR (Pt. 1265) 521.

8 [1961] 1 QB 394.

9 (1836) 2 M&W 195 *per* Justice Parke.

> 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.

Almost two decades later in *Grey v Pearson*,[10] the philosophical jurisprudence behind this rule was stated to the effect that where the literal interpretation of a statute will lead to absurdity and ambiguity, the Judge is at liberty to utilise the golden rule. Lord Wensleydale stated in that case that:

> In construing… statutes… the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid the absurdity and inconsistency, but no farther.

The restriction on this rule is that the degree of absurdity or ambiguity necessary to warrant the exercise of the golden rule is determined on a case-by-case basis by the presiding judge. In *Adler v George*,[11] under the English Official Secrets Act 1920, it was an offence to obstruct a member of the armed forces "in the vicinity" of a prohibited place. The defendant was actually in the prohibited place, rather than "in the vicinity" of it, at the time of obstruction. The courts had to determine whether "in [the] vicinity of" included on/in the premises. Applying the golden rule of interpretation, the court held that in the vicinity did include "on" or "in" as well. It would be absurd for a person to be liable if they were near to a prohibited place and not if they were actually in it. The defendant's conviction was therefore upheld.

4.3 Mischief Rule

Also known as, the rule in *Heydon's Case,*[12] the rule was propounded in that case as follows:

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10 (1857) 6 HL Cas 61, 106; 10 ER 1216, 1234.

11 [1964] 2 QB 7, see also, *Awolowo v Federal Minister of Internal Affairs* (1962) LLR 177; *University of Ibadan v Adamolekun* (1967) All NLR 213.

12 (1584) 76 ER 637.

> For the sure and true interpretation of all statutes, four things are to be discerned and considered:-
> - 1st. What was the common law before the making of the Act?
> - 2nd. What was the mischief and defect for which the common law did not provide.
> - 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth.
> - 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato 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.*[13]

Driedger[14] describes it as follows:

> A statute is to be so construed as to suppress the mischief and advance the remedy, thus giving the courts considerable latitude in achieving the objective of the legislature despite any inadequacy in the language employed by it.

In *Smith v Hughes*,[15] the defendant was charged under the Street Offences Act 1959, which made it an offence to solicit prostitution in a public place. The defendant was soliciting from within private premises through windows or on balconies, so that the public could see the defendant without entering into the streets. The court applied the mischief rule holding that the activities of the defendant was within the mischief of the Act, and soliciting from within a house, is soliciting and molesting of the public, therefore it is the same as if the defendant was outside on the street.[16]

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13 The mischief rule saw further development in *Corkery v Carpenter*[1951] 1 KB 102.

14 E.A. Driedger, *Construction of Statutes*. (Canada: Butterworth & Co. (Canada) Ltd., 1983), p. 1.

15 [1960] 1 WLR 830.

16 See also, *Royal College of Nursing of the UK v DHSS*[1981] 2 WLR 279.

The essence of the mischief rule is that where it appears that there is defect in the language used in a statute, the court cannot fold its arm, hence the judge can result to considering the mischief it was passed to remedy.

4.4 Purposive Approach

This rule evolved to give statutory or constitutional provisions an interpretation that best suits the purpose for which the law was enacted. Called by various names in different common law jurisdictions;[17] it has been argued that this rule evolved as a convenient substitute for the hitherto existing rules of interpretation, to wit: the mischief rule;[18] the literal rule and the golden rule.[19]

Obaseki JSC (as he then was) seemed to have alluded to this approach when he opined in *Awolowo v Shagari & Ors*[20]that the three rules have been said to:

> Have been fused so that we now have just one rule of interpretation, a modern version of the literal rule which requires the general context to be taken into consideration before any decision is taken concerning the ordinary meaning of the words.

The succinct proposition of this rule is that the court, instead of relying solely on the text of the statute in interpreting it, could, if

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17 For example, American jurist Richard Posner uses the term purposivism, see, R. Posner: "Pragmatism versus Purposivism in First Amendment Analysis," *Stanford Law Review*, vol. 54, No. 4, Apr., 2002, pp. 737-752; Canadian jurist Ron Bouchard refers to it as purposive construction, see, R. A. Bourchard: "Living Separate and Apart is Never Easy: Inventive Capacity of the PHOSITA as the Tie that Binds Obviousness and Inventiveness in Pharmaceutical Litigation," *University of Ottawa Law & Technology Journal,* (January 2007) (Canada); Israeli jurist Aharon Barak uses the term purposive interpretation, see, A. Barak, *Purposive Interpretation In Law.* (Princeton, New Jersey: Princeton University Press, 2005), p. 7. The term modern principle in construction was coined by Canadian jurist Elmer Driedger, see E.A. Driedger, *Construction of Statutes,* (2nd ed.), (Canada: Butterworth & Co. (Canada) 2d ed., 1983), p. 83.

18 F.A.R. Bennion, *Statutory Interpretation,* (3rd ed.) (London: Butterworth & Co., 1997), pp. 731-750.

19 Driedger, above note 14 at p. 87.

20 Above, note 1 at 200.

necessary, go outside the wordings of the statute to consider extraneous and extrinsic materials that constituted the pre-enactment stage of the legislation, including early drafts, committee reports, white papers, etc, and every other available tool with which the court could detect or discover the purpose for the statute or the social good it sought to achieve.

The purposive approach is essentially the construction of statutes combining what the Israeli Jurist, Aharon Barak, referred to as the subjective and objective elements.[21] In his opinion, the subjective elements include the intention of the author of the text, while the objective elements include the intent of the reasonable author and the legal system's fundamental values.[22]

The philosophical basis for accepting this rule has been drawn from the writing of several authors in various common law jurisdictions. In Canada, the postulation of Driedger,[23] that

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament

has been the dominant and prevailing rule of statutory interpretation and have been relied upon in several Canadian Cases.[24]In Israel, the position

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21 Above, note 14 at p. 88.

22 *Ibid*. Barak has not only written in support of purposive interpretation but also applied it while serving as a Justice to the Supreme Court of Israel in such cases like CA 165/82 *Kibbutz Hatzor v Assessing Officer*, 39(2) P.D 70.

23 Above, note 14 at p. 87.

24 See for example, Justice Dickson in *R. v Big M Drug Mart Ltd.*,[1985] 1 S.C.R. 295 where he held that: "[T]he proper approach to the definition of the rights and freedoms guaranteed by the *Charter* was a purposive one. The meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect." See also *Bell ExpressVu Limited Partnership v Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42. See further, R. Sullivan, *Sullivan on the Construction of Statutes.* (5th ed.), (Toronto: LexisNexis Canada, 2008), p. 1.

obtainable in Canada have been cited and followed.[25] In New Zealand, the Interpretation Act specifically provides that Acts should be interpreted according to their purpose.[26] This is also true of the United States.[27]Bandy concludes that: "....purposivism focuses on understanding the law in relation to both the people who passed it and the people who must live with it."[28]

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25 J. Greene: "On the Origins of Originalism," *Texas Law Review*, Vol. 88 (August 2009), *Columbia Public Law Research*, Paper No. 09-201; Barak, above note 14 at p. 85; F.B. Cross, The Theory and Practice of Statutory Interpretation (Stanford: Stanford Law Books, 2008); L. Weinrib: "The Canadian Charter as a Model for Israel's Basic Laws," *Constitutional Forum*, Vol. 4, No. 85, 1993.

26 Section 5(1) of the Interpretation Act 1999, which provides: "The meaning of an enactment must be ascertained from its text and in the light of its purpose," text of the Act available at: www.legislation.govt.nz/act/public/1999/.../096be8ed8_05291fc.pdf, *visited 27/07/2012; see also*, R. Scragg, *New Zealand's Legal System: The Principles of Legal Method* (2nd ed.), (Oxford: Oxford University Press, 2009), chapters 4-5.

27 P. Michell: "Just Do It! Eskridge's Critical Pragmatic Theory of Statutory Interpretation: A Review," 41 *McGill L.J.* Vol. 4, pp. 713-738 at 721, full text available at: http://www.lawjournal.mcgill.ca/documents/41.Michell. pdf, *visited 23/07/2012;* M. Rosensaft, "The Role of Purposivism in the Delegation of Rulemaking Authority to the Courts" (March 2, 2004), *Bepress Legal Series*, Working Paper 160, available at: http://law.bepress.com/expresso/eps/160, *aw.bepress.com/cgi/viewcontent.cgi?article =1388&context.., both visited 24/07/2012;* A.R. Gluck: "The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism" 119 *Yale L.J.* 1750-1862, p. 1764, full text available at: http://lsr.nellco.org/cgi/viewcontent.cgi?article=1074&context ...pllt, visited 29/07/2012.

28 J. M. Bandy, "Interpretative Freedom: A Necessary Component of Article III Judging," 61 *Duke Law Journal* 651-691 (2011). http://scholarship.law.duke.edu/dlj/vol61/iss3/3.scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1520...dlj, visited 28/07/2012; F. Liu, "*Astrue v Ratliff* and the Death of Strong Purposivism," 159 *U. PA. L. Rev.* Penumbra, 167 (2011), text available at: www.pennumbra.com/essays /02-2011/Liu.pdf - United States, visited 27/07/2012; see also, *Medellín v Texas*, 128 S. Ct. 1346 p. 1362, text available at: www.scotusblog.com/wp-content/uploads/2008/03/06-984.pdf, visited 23/07/2012.

In the United Kingdom, the approach was recognised and applied in *Pepper v Hart*[29] where it was held thus:

> My Lords, I have long thought that the time had come to change the self-imposed judicial rule that forbade any reference to the legislative history of an enactment as an aid to its interpretation. The ever increasing volume of legislation must inevitably result in ambiguities of statutory language which are not perceived at the time the legislation is enacted. The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. 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 now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted. Why then cut ourselves off from the one source in which may be found an authoritative statement of the intention with which the legislation is placed before Parliament?

It was their view that if the primary legislation is ambiguous, and if certain criteria are satisfied, courts may refer to statements made in the House of Commons or House of Lords in interpreting the legislation.[30]

The purport of the case is therefore that the purposive rule would only be utilised when there is ambiguity in the statute, requiring clarification that could only be achieved through the importation of

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29 [1993] AC 593.

30 Steyn has argued that the application of that approach in England court be limited to instances in which ministerial statements in parliament can be shown to be inconsistent with arguments made by government before the courts on the meaning of the legislation. He cautioned that any attempt to broaden the interpretation of the decision will definitely raise serious constitutional objections. See, J. Steyn: "*Pepper v Hart; A Re-examination,*" *Oxford Journal of Legal Studies*, V*ol. 21*, No. 1 (2001), pp. 59–72.

extraneous materials into the wordings of the statute to give it effective meaning.

Even though, comparatively, the purposive approach has been recognised and utilised in interpreting statutes in most common law countries, it must be observed that it fails to recognize the separation of powers between the legislator and the judiciary because it goes beyond the words within a statute in arriving at a decision.[31] The implication is that the judge, instead of concentrating on interpreting the statute with the aid of the canon of interpretation, rather goes on a voyage of discovery, searching for extrinsic social as well as legislative links as aids and thereby reconstructing what the intent of the legislature would have been in making the law and if the intent would not suffice what the social values commend.

The significance of this approach as a canon diminishes given that the courts rely wholly on tools of construction rather than rules of interpretation. Based on this very reason, it follows no distinctive pattern, and as shall been seen in this article, may result in different opinions, depending on the stance of the court utilising it, and in emerging democracies could be subject to political manoeuvring and uncertain social disputation, thereby whittling down the sacrosanct doctrine of judicial precedence.

5. Rules Guiding Constitutional Interpretation

Zander,[32] analysed that statutory interpretation becomes necessary as a result of three basic reasons: the complexity of statutes in regards to the nature of the subject, numerous draftsmen and the blend of legal and technical language which can result in incoherence, vague and ambiguous language. Anticipation of future events may also lead to the use of indeterminate terms. The impossible task of anticipating every possible scenario also leads to the use of indefinite language. Judges

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31 A. E. Fahey: "*United States v O'Hagan*: The Supreme Court Abandons Textualism to Adopt the Misappropriation Theory," *Fordham Urban Law Journal*, vol. 25, Issue 3 1997, full text available at: http://www.ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1980&context.., visited 29/07/2012.

32 M. Zander, *The Law-Making Process*, (Cambridge: Cambridge University Press, 2004), p. 128.

therefore have to interpret statutes not only to discover the intent of the legislature, but because of the gaps in law.[33]

The Supreme Court has, in different fora, proposed an exposé of what constitutional interpretation portends. Commencing from what is regarded as the pivotal case, *Nafiu Rabiu v Kano State,*[34] the Supreme Court had at different times highlighted, though not absolutely in consistent terms, what should be the guiding principles in constitutional interpretation. In *Rabiu's case*, the Supreme Court postulated that constitutional interpretation should be done liberally in order not to defeat the obvious ends of the Constitution. In *Broniks Motors Ltd. v Wema Bank Plc*,[35] Nnamani JSC, went further to reason that even though a constitutional instrument should be interpreted to give effect "to the language used, recognition should also be given to the character and origins of the instrument." This stance of the apex court on the liberal interpretation of the Constitution underlines most of the court's pronouncements on the issue. The possibilities arising from the liberal interpretation of the Constitution is that apart from the fact that sections may not be interpreted in isolation of other provisions of the Constitution, aids of construction may be employed when and if necessary to effect constitutional interpretation.[36]

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33 *Ibid*., at pp. 128-129.

34 (1982) 2 NCLR 117, per Udo Udoma JSC.

35 (1983) 6 SC 158 at 195.

36 See also: *A-G Abia State & Ors v A-G Federation* [2002] 6 NWLR (Pt. 763), *Aqua Ltd. v Ondo State Sports Council* (1985) 4 NWLR (Pt. 91) 622; *Tukur v Govt., Gongola State* (1989) 4 NWLR (Pt. 117) *517; Ishola v Ajiboye* (1994) 6 NWLR (Pt. 352) 506 referred to, pp. 485-486, paras. G – F. In *A.G Bendel v A.G Federation & 22 Ors.,* [2003] 3 NWLR (Pt. 806) 107, Obaseki JSC (as he then was) propounded a twelve-point rule of constitutional interpretation as follows: (1) Effect should be given to every word used in the Constitution; (2) A Constitution nullifying a specific clause in the Constitution shall not be tolerated, unless where absolutely necessary; (3) A constitutional power should not be used to attain an unconstitutional result; (4) The language of the Constitution, where clear and unambiguous must be given its plain and evident meaning; (5) The Constitution of the Federal Republic of Nigeria is organic scheme of government to be dealt with as an entirety, hence, a particular provision should not be severed from the rest of the Constitution; (6) While the language of the Constitution does not change the changing circumstances of a progressive society for which it was designed, it can yield new and further import of its meaning; (7) A Constitutional provision should not be construed in such a way as to defeat its evident purpose; (8) Under the Constitution granting specific powers, a

In *Ishola v Ajiboye*,[37] the Supreme Court adopted the tools stated in A-*G Bendel's case* and in addition, supplemented the twelve points above stated with four additional tools to work with in constitutional interpretation. In that case, Ogundare JSC stated as follows:

1. Constitutional language is to be given a reasonable construction, and absurd consequences are to be avoided;
2. Constitutional provisions dealing with the same subject matter are to be construed together;
3. Seemingly conflicting parts are to be harmonized, if possible so that effect can be given to all parts of the Constitution,
4. The purpose of an article or clause in the Constitution influences its construction.

Notwithstanding the elating effect of these points on constitutional interpretation, it is noteworthy that the pronouncements in those cases merely highlighted tools necessary for constitutional interpretation and do not in any way lay down a systematic principle or canon by which constitutional interpretation may be subjected to certain rules in given circumstances. The dilemma of when exactly to interpret the Constitution liberally and when to desist from so doing was imminently understood and captured in the case of *INEC v Musa*,[38] when the court reasoned per Niki TobI JSC (as he then was) that:

> The golden and main rule of the interpretation of statutes, including the Constitution, is the intention of the law-maker. Once the intention of the law-maker is clear, resort cannot be

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particular power must be granted before it can be exercised; (9) Declaration by the National Assembly of its essential legislative functions is precluded by the Constitution; (10) The words are the common signs that men make use of to declare their intentions one to another, and when the words of a man express his intentions plainly, there is no need to have recourse to other means of interpretation of such words; (11) The principles upon which the Constitution was established, rather than the direct operation or literal meaning of the words used, should measure the purpose and scope of its provisions; (12) The words of the Constitution are, therefore, not to be read with "stultifying narrowness."

37 *Ibid*.

38 [2003] 3 NWLR (Pt. 806) 72 at 214, paras B-F.

> made to any liberal interpretation of the Constitution. This is because a liberal interpretation of the Constitution beyond and above the intention of the law-maker will amount to the Judge making law.

In other words, where liberal interpretation would amount to the judge making law, he should desist from liberal interpretation. However, the court conceded that there are instances in which the Judge may make law when it further held that:

> While there is a vibrant debate as to whether the Judge should make law, it will be against the principle of separation of powers for the Judge to make law where the intention of the lawmaker is clear. Perhaps the Judge could be involved in making the law if the intention of the law-maker is not clear and he is in a difficult position in the circumstances of the case before him. In such a circumstance, since he cannot adjourn the matter for the legislature to make a law to place the situation on his hands, he could make the law.[39]

However, the learned jurist still sensed the danger inherent in liberal interpretation of the constitution when he stated that:

> Liberalism in the interpretation of the Constitution is good, but too much of it, or better, excess of it, like excess of everything could be bad and dangerous, If a liberal interpretation of the Constitution will do grave injustice to one of the parties, this court should be loath in taking that course. In other words, this court should keep its borders of interpretation of the Constitution closed if opening them will result in destroying the intention of the makers of the Constitution. This court cannot add one extra word outside the intention of the makers of the Constitution where the constitutional provision is obvious and clear. I realise that learned Senior Advocate for the 1st appellant is taking us on a long and apparently difficult, journey in the interpretation of some sections of the Constitution and if we follow him, it will be difficult for us to retrace our steps in other cases in the

39 *Ibid.*

> future. We cannot embark upon such a dangerous journey. No.[40]

In other words, the court seemed to have returned to the very starting point on the issue of constitutional interpretation, that is, the first and preferred rule is the literal rule. This leaves all other rules and tools to circumstances arising from ambiguity. In *Global Excellence Comm. Ltd v Duke*[41] Onnoghen JSC postulated thus:

> Bearing the above words of wisdom in mind particularly as the words used in section 308 of the 1999 Constitution are very clear and unambiguous, I hold the view that they ought to be given their plain and simple meaning as the said words speak for themselves, particularly as they clearly demonstrates the intention of the framers of the Constitution which is clearly not to place any disability on the persons mentioned under subsection 3 of section 308 of the 1999 Constitution, including the respondent, from instituting or continuing any civil action against any person or persons during their tenure of office.

In a seeming attempt at closing the "border of interpretation" referred to by Tobi JSC as quoted above, Onnoghen JSC stated:

> I had earlier in this judgment reproduced some of the important principles of law guiding the courts in interpretation of our constitution and as can be gleaned therefrom there is nothing like the principle of equity, fairness, social justice and equality in the conduct of judicial affairs as canons of interpretation of the Constitution. The submission of learned counsel for the appellants in that respect, though very persuasive on moral grounds, has no foundation in law and is consequently discountenanced by me. The duty of the court is not to deal with the law as it ought to be but as it is. From the words used by the framers of section 308 of the 1999 Constitution, it is clear that their intention is explicitly to confer absolute immunity on the respondent and the others therein mentioned without a corresponding disability on them to the exercise of their rights to institute actions in their personal

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40 *Ibid*.

41 [2007] 16 NWLR (Pt. 1059), pp. 43-44, paragraphs E-D.

> capacities in any relevant court of law for redress during their tenure of office, as in the instant case.

One may therefore conclude that all that is necessary and required where the provisions of the Constitution are clear and unambiguous is that the literal meaning of the words be accorded to them.

7. *Marwa & Anor v Nyako & Ors*[42] (*Five Governors' Case*): A Review

7.1. Facts of the Case

Succinctly put, the fact giving rise to this action relates to gubernatorial elections which held in Nigeria in 2007. In Adamawa, Bayelsa, Cross Rivers, Kogi, and Sokoto states following challenges to the victory of persons installed to the office of the Governor, the elections were concealed and fresh elections were ordered, in which the candidates who were earlier returned as winners were also returned as having won the re-run elections as governors.

On September 1, 2010, the appellant/3rd respondent Independent National Electoral Commission (INEC) caused to be published in national daily newspapers that it would conduct gubernatorial elections in all the States of the Federation including the aforementioned States in January 2011. Consequently, the 1st respondent and the other respondents commenced personal actions by originating summons at the Federal High Court, Abuja, seeking *inter alia*, declarations that their various tenures in office as elected Governors of the affected States would only expire after four years calculated from the time they took oath of office following the annulment of their elections and not when they first assumed office on 29th May 2007. The suits were eventually consolidated.

The matter was heard by the Federal High Court, which eventually decides that the period of four years should be calculated from the period the respective Governors took the oaths of allegiance a second time. The trial court further held that nullification of the election of the respondents had the legal effect of nullifying the oath of allegiance and the oath of office, which they all took on 29th May 2007.

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42 Above note 3.

The court relied on the principle that when an act is declared a nullity, it becomes *void ab initio* and nothing can be founded on it. An appeal to the Court of Appeal resulted in a dismissal of the appeal. Eventually when the case came before the Supreme Court, the decision was over turned.

In overturning the decision of the lower court, the Supreme Court considered the provisions of sections 176 (1) and (2), 178 (1) and (2), 180 (1), (2), (2A) and (3), 181 (1), 185 (1) and (2), of the 1999 Constitution and held *per* Onnoghen JSC, that:

> It is clear from the provisions that in the case of commencement of tenure of a person first elected, it starts with the taking of the oath of allegiance and oath of office, in this case, the 29th day of May, 2007 when the 1st respondents took their first oaths of allegiance and oaths of office. It is also important to note that the provisions of paragraphs (a) 180 (2) is clearly an alternative to paragraph (b) of section 180 (2) irrespective of the use of the word 'and' which, in reality is disjunctive and means 'or' in the context in which it appears, and that both sections 180 (1) and (2) are subject to the whole of the 1999 Constitution. The most important thing to note having regards to the provisions dealing with tenure of office of governors reproduced *supra* is that looking closely at the provisions of section 180 (2) (a), there is no room for the same person elected governor being elected again following a re-run election. A person elected following a re-run election cannot be said to have been 'first elected as governor under this Constitution' except he was not the winner of the earlier or first election. The present problem arose from the fact that the very persons who won the 'first' election also participated and won the re-run elections.[43]

The court therefore proceeded to hold that:

> It is settled law that the time fixed by the Constitution for the doing of anything cannot be extended. It is immutable, fixed like the rock of Gibraltar. It cannot be extended, elongated,

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43 *Ibid*., at pp. 283-285.

> expanded, or stretched beyond what it states. To calculate the tenure of office of the date of their second oaths of allegiance and of office while ignoring the period from 29th May, 2007 when they took the first oaths is to extend the four years tenure constitutionally granted the governors to occupy and act in that office would be unconstitutional. It is therefore clear and I hereby hold that the second oaths of allegiance and of office taken in 2008, though necessary to enable them continue to function in that office, were clearly superfluous in the determination of the four years tenure under section 180 (2) of the 1999 Constitution.

7.2 Critique of the Decision

Two issues were raised by the Supreme Court in *Marwa's case* to wit:

1. Whether having regard to the provisions of the 1999 Constitution, particularly sections 180 (1) and (2) and 182 (1) (b) thereof, the lower court was right in holding that the tenure of office of the 1st respondents commenced from the date they took their second oaths of allegiance and of office in 2008 as against the 29th day of May, 2007 when they took their first oaths of office and allegiance.
2. The second is whether section 180 (2A) of the 1999 Constitution as amended, is applicable to the facts of this case.

On the first issue, the court purportedly followed the literal rule of interpretation when it interpreted sections 180 (1) (2) and (3) of the 1999 Constitution as having the ordinary effect of intending that a person who wins a re-run election will have his tenure counted from the day he first assumed office under the cancelled election. The earlier quoted reasoning of the learned jurist, Onnoghen JSC, to the effect that:

> The most important thing to note having regards to the provisions dealing with tenure of office of governors reproduced *supra* is that looking closely at the provisions of section 180 (2) (a), there is no room for the same person elected governor being elected again following a re-run election. A person elected following a re-run election cannot be said to have been 'first elected as governor under this Constitution' except he was not the winner of the earlier or first election[44]

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44 *Ibid.*

seems, with utmost respect, to be the antithesis of a literal reading of that section of the Constitution. The interpretation given to that section of the Constitution was achieved by the court first reading an obviously conjunctive provision as disjunctive. This is achieved by the court by constructing "and" as meaning "or" in the context of the section.

One may perhaps concede to this construction if the only means of becoming a Governor or a President under the Constitution is by direct election into those offices, but unfortunately, that is obviously not the case as exposed by section 180 (1) which already makes it possible for a person occupying the position of a Deputy Governor to ascend to the office of the Governor in circumstances highlighted there under. Accordingly, the literal meaning of the "person last elected to that office..." becomes practical when the office is inherited by a person not elected to the office. In such cases, section 180 (2) (b) becomes relevant. Such circumstances arose following the death of President Yar'adua whose tenure Dr. Goodluck E. Jonathan completed and in the circumstances leading to Governor Boni Haruna becoming the Governor of Adamawa State in 1999 when Alhaji Atiku Abubakar ran as Vice President to Chief Olusegun Obasanjo. It can be argued that such successors are entitled to their full four year or eight years tenure as the case may be after the completion of the predecessor's tenure but this may not be the case if the eight-year tenure is given the "immutable" and "rock of Gibraltar" status accorded it in *Marwa's case.*

Though one may concede that the pronouncement of the Supreme Court represents the final say on all issues, it is necessary for this discourse to also examine alongside, the Court of Appeal's decision in the case, especially as the Federal High Court and the Court of Appeal based their decision on another Supreme Court decision in *INEC v Obi*.[45]

In the *Five Governors' Case*, the Court of Appeal was of the view that once an election is nullified, it becomes *null and void*, and the Oath of Office and Oath of Allegiance taken in pursuance thereto become *null*, *void* and of no effect, and thus, the rightful commencement

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45 [2007] 11 NWLR (Pt. 1046) 565 at 644-645, paras G-E.

of tenure is when the second oath, following the valid election, was taken.[46]

The Court of Appeal based its decision on the Supreme Court pronouncement in *INEC v Obi*[47] where the court was of the opinion that:

> It was argued that if section 180 (2) (a) is accorded the interpretation I have given it *supra*, it would truncate the election timetable in this country. I do not buy that argument. In the first place, there is nothing in our 1999 Constitution which says all elections into political offices in this country at the Federal and State levels, should be held at the same time. If there was a provision to that effect, that would negate the concept of federalism which we have freely chosen to practice. In the second place, a Judge has a standing and abiding duty to do no more than to accord a very clear provision of section 180 2(a) of the 1999 Constitution under discussion, their ordinary, natural and grammatical meanings. I hold the strong view that 'law making,' in the strict sense of that term, is not the function of the judiciary but that of the legislature. Let there be no incursion by one arm of the government into that of the other. That will be an invidious incursion. Let me point out that no Constitution fashioned out by the people, through their elected representatives for themselves, is ever perfect in the sense that it provides a clear-cut and/or permanent or everlasting solution to all societal problems that may rear their heads from time to time. As society grows or develops, so also must its Constitution, written or unwritten. Our problems as Judges should not and must not be to consider what social or political problems of today require; that is to confuse the task of a Judge with that of a legislator. More often than not, the law, as passed by the legislators, may have produced a result or results which do not accord with the wishes of the people or do not meet the requirements of today. Let that defective law be put right by new legislations but we must not expect the *judex*, in addition to all his other problems to decide what the law ought to be. In my humble view, he (judex) is far better employed if he

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46 *INEC v. Admiral Murtala Nyako & Ors* (2011) 5 NWLR (Pt. 1262) 439.

47 Above note 45.

> puts himself to the much simpler task of deciding what the law is.

Chukwuma-Eneh puts it more pointedly:[48]

> The foregoing provisions are plain and unambiguous and so ought to be construed by giving the words used therein, their ordinary, natural, grammatical meaning. In the case of section 180 (2) (a) under which the appellant's case appears to have fallen it is clear that section 180 (2) (a) has given to the Governor a four-year tenure commencing from the date in the case of a person first elected as Governor under this Constitution (he) took his oath of allegiance and oath of office. Construing these provisions literally has not led to any absurdity; it settles the question that giving the words of the said section their natural meaning is the best way to get at the lawmakers' intention; notwithstanding its crudity that henceforth governorship election for Anambra State has to be on a different date to all other 35 States of Nigeria. The appellant having taken his oath of allegiance and oath of office on 17/3/2006 his tenure of office stands to be exhausted on 17/3/2010. It is noteworthy there is no corresponding provisions with regard to members of the National Assembly and Legislative Houses. Although attention has however, been drawn to section 135 (2) (a), a similar provision as section 180 (2) (a) relating to the President, the question agitating some minds is whether it would be construed in the same manner as section 180 (2) (a). I think it is better to wait until we get there. It is not before this court.

The major difference between *Marwa* and *Obi's* cases is that in *Obi's case*, there was no re-run election. However, the principles of law in both cases seem to be the same, i.e., nullification of an earlier election. That the decision of the Supreme Court in *Marwa's case* is in direct opposition to that of the same court in *Obi's case* can hardly be denied. In *Obi's case*, the Supreme Court was of the opinion that:

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48 *Ibid*., at pp. 693-694, para., E-A.

> When the verdict of the Court of Appeal (Enugu Division) declaring the present appellant as the rightful person to have been declared having won the gubernatorial election of April, 2003, was handed down, the effect is that the return of Dr. Chris Ngige as a person who won the election was null and void and of no legal consequence. So, Ngige's Oath taking at that time cannot be point of reference for calculating the four-year term of the appellant. Ngige was and cannot be a person first elected as Governor under this Constitution; his election having been declared null and void.[49]

Despite the undeniable similarities of fact in the two cases, and the obvious differences in verdict, the lead judgement finds no basis to distinguish or overrule this earlier decision, even though two of the Justices constituting the panels sat in both cases.

Indeed, in *Labour Party v INEC*,[50] the Supreme Court posited that:

> ... once an election is declared null and void, the law regards whatever was purportedly done in the name or guise of an election as not having taken place at all. In the eyes of the law, the election is *void ab initio*, and a fresh election is conducted as if the earlier one did not take place at all. The implication of a null act has been stated by a line of authorities to mean that it is deemed that the act never took place; the capacity of such an act to give rise to any right, responsibility or obligation if obliterated.

Accordingly, the mere fact that the acts of the incumbent are saved does not mean that the time spent in office should for any purpose be viewed as constituting time to reconcile a right. That seems to be the reasoning in *Obi's case*.

Though the court have always emphasised that constitutional provisions of a section should not be interpreted in isolation and should

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49 *Ibid*.

50 [2009] 6 NWLR (Pt. 1137) 315 at 337. See the cases of *Okoye v NCE & Co Ltd* [1991] 6 NWLR (Pt. 199) 501 at 538; *Saleh v Monguno* [2006] 15 NWLR (Pt. 1001) 26 at 74; *Amaechi v INEC* [2007] 9 NWLR (Pt. 1040) 504 at 531-2; *Dalori v Dadikwu* (1998) 12 NWLR (Pt. 516) 112 at 122; *Ishola v Ajiboye* (1998) 1 NWLR (Pt. 532) 71 at 79.

be read as a whole to determine the intendment of the framers,[51] yet it remains trite that once the provisions of a section is clear enough, no other meaning than the literal meaning will be given to the provision.

In the intriguing but yet widely celebrated case of *Amaechi v INEC*,[52] even though the Supreme Court was aware that a literal adherence to the statutes involved had the effect of producing a Governor of a State who never contested election in the real sense, the court was prepared to give the statutes their literal meaning without embarking on that "dangerous journey" that could have seen the election annulled and the call for a fresh election.

This seems to be similar to the reasoning in *A-G Federation v Abubakar*,[53] where the office of the 1st Respondent, the Vice President of the Federal Republic of Nigeria, was declared vacant because of his defection into another political party to contest for the office of the president of the Federation. The Respondent therefore as Applicant approached the court for a declaration *inter alia* that the term of the office of the plaintiff as the Vice President of the Federation of the Federal Republic of Nigeria is certain, and that the President has no power under the 1999 Constitution or any other law to declare the office or seat of the Vice President vacant, and that as such a declaration is void. Relying on several cases stressing the literal interpretation of plain words used in the Constitution, the court held that:

> The court had been called upon to hold that the vice president is presumed to have resigned by virtue of section 146 (3) (c). Although the court conceded that the constitution envisaged unity between the office of the president and the vice president, it jettisons the interpretation of section 146(3) (c) of the Constitution in such a way and manner to expound any other reason therein to include defection to other political party and held that 'any other reason' used therein is necessarily limited to reasons stated in section 146 (3) (a) and (b).

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51 See *PDP v INEC* [1999] 11 NWLR (Pt. 626) 200 at 249; *Ojukwu v Obasanjo* [2004] 7 SC (Pt. II) 117 at 124.

52 (2008) 5 NWLR (Pt. 1080) 310.

53 [2007] 20 WRN 1.

The court went further to hold that the provisions of section 109 (1) (g) of the 1999 Constitution applicable to the House of Assembly is not applicable to the office of the Vice President.

What triggered these rather contradictory or seemingly contradictory pronouncements is really the uncertain philosophy behind the interpretation of the statutes. While *Obis case* and *Labour Party's case* seem to have used the literal rule of interpretation, *Marwa's case* obviously was purposive in approach, even though in all the cases, the court agreed that there was no ambiguity in the statute.

The case of *A.G Ondo State v A-G Federation*[54] and indeed, *AG Lagos v AG Federation*[55] accentuate the importance of a definite philosophy for the interpretation of a Constitutional provision especially in a federation. In those cases, the Supreme Court relying on the purposive approach widened the legislative competence of the National Assembly by extending their legislative competence over Chapter II of the 1999 Constitution.[56] Commenting on the case of *A-G Ondo State v A-G Federation and others*,[57] Ipaye[58] stated as follows:

> Indeed one gets a feeling that the decision of the Supreme Court was an *ex post facto* rationalization of an otherwise unfounded extension of federal legislative powers. By this decision, the Court did not purport to lay a firm and clear precedent. It all depends more on the Court's perception of the problem at hand than the natural meaning and effect of the relevant constitutional provisions.

He continued:[59]

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54 (2002) 9 NWLR (Pt. 722) 222.

55 (2003) 12 NWLR (Pt. 833).

56 Akeem Olajide Bello, "In the Anti-Corruption Case: Constitutional and other Matters Arising," *The Appellate Review,* Vol. No. 2, (December 2009/January 2010), p. 171.

57 Above, note 54.

58 A. Ipaye: "Incidental Powers and the Fundamental Objectives of State Policy as Source of Federal Legislative Jurisdiction: A review of the Supreme Court Decision in *A-G Ondo State v A-G Federation & Ors, The Appellate Review,* Vol. 1, No. 1, September 2009, pp 1-30 at 22.

59 *Ibid*., at p. 28.

> However, this writer's contention is that the primary and paramount duty of the courts should be to give meaning to the intention of the constitution makers and to offer guidance to future users of the Constitution, especially the legislative houses. In this respect, it is noteworthy that judges are not elected by and do not in any way represent the people. Their primary duty is to interpret laws, not to make them.

Our explanation for these conflicting decisions of the apex court is that there is no systematic way to determine the rules of interpretation, and as the cases are tackled on case by case basis, it becomes difficult to adhere to any specific rule of interpretation.

The second issue raised in *Marwa's Case* relates to the effect of section 180 (2A) of the 1999 Constitution as amended on vested rights. Section 180 (2A) of the Constitution provides:

> In the determination of the four year term, where a re-run election has taken place and the person earlier sworn in wins the re-run election, the time spent in the office before the date the election was annulled, shall be taken into account.

In *Uduaghan v Ogboru*,[60] determining the baseline for the calculation of when the four years tenure of the Governor who won a re-run election will be counted from, the Court of Appeal applied the provision of section 180 (2A) in reaching a verdict that it commences from the date the first Oath was taken.

In *A-G Federation v ANPP & Ors*,[61] the Court of Appeal is of the view that although there is no rule that an enactment may not be construed retrospectively, a law is said to be retrospective if it takes away any vested right acquired under existing laws or creates a new obligation or imposes a new duty or attaches a new disability in respect of transactions or considerations already past. The court was of the view that if section 182(1) (b) is interpreted retrospectively, it will impair or interfere with the 2nd respondent's vested right to contest the

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60 [2012] 1 NWLR (Pt. 1282) 521.

61 [2003] 15 NWLR (Pt. 844) 601.

gubernatorial election in year 2003 under the 1999 Constitution simply because he contested and won election to the gubernatorial seat in Kogi State in 1999.

In *Olutola v Unilorin*,[62] the Appellant Olutola, a Professor of Education, Management and Planning at the University of Ilorin, was in October 1989 removed from office as the Dean of Faculty Education by the authorities of the University on account of having being found guilty of an allegation of plagiarism made against him and 2 others. On January 13, 1993, he instituted an action at the Kwara State High Court, seeking certain declaratory reliefs, *inter-alia*, that the decision removing him was *ultra-vires* the powers of the Respondent, illegal, arbitrary, unconstitutional, null and void. Trial in the suit commenced with the exchange of pleadings and continued unabated until judgment was delivered on May 8, 1996.

During the course of trial, the *Constitution (Suspension and Modification) Decree*, 1993[3] was promulgated. It took effect from November 17, 1993. Section 230(1) of that Decree made an extensive change with regard to the jurisdiction of the State High Court and vested exclusive jurisdiction on the Federal High Court to hear and determine action or proceedings arising from the administration or management and control of the Federal Government or any of its agencies; or for a declaration or injunction affecting the validity of any executive or administrative action or decision by the Federal Government or any of its agencies.

The trial court upheld the claim of the Appellant, but the University appealed. Before hearing arguments on the appeal, the Court of Appeal raised *suo motu*, the question whether (or not) the trial court had jurisdiction to entertain or determine the matter; having regard to the provisions of Decree No. 107 of 1993 and the Federal High Court Act. After hearing counsel on the point, the Court of Appeal held that the High Court lacked the jurisdiction to hear and determine the matter and struck out the suit on that ground. The Appellant appealed to the Supreme Court, which also dismissed same. The court held that:

> It is common ground that the cause of action arose in October 1989 and the appellant filed the action on 13th January 1993.

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62 [2004] 18 NWLR (Pt. 905) 416.

> The Decree which vested in the Federal High Court the jurisdiction to entertain the matter in this appeal came into effect on 17th November 1993. *Although the action was properly filed at the Kwara State High Court in January 1993, that court had no jurisdiction to entertain the matter as from 17th November* 1993 *when Decree No. 107 was promulgated. A*ccordingly the Kwara State High Court had no jurisdiction to deliver judgment. The judgment which that court delivered on May 18 1996 some thirty months after the ceaser of its jurisdiction is a nullity *ab initio.*[63]

With due respect to their Lordships, this decision seems to contravene the laid down principle that an amendment to a law will not affect vested rights except where it has been so stated expressly. In the earlier cases of the apex court on this issue, this principle been established without controversy. In the earlier case of *Utih v Onoyivwe,*[64] the Supreme Court was of the view that the relevant law applicable in respect of a cause is the law in force as at the time the action arose. This position was reinforced in *Adah v NYSC*[65] even though in the latter case the apex court was of the opinion that the law conferring jurisdiction and that supporting the cause of action may not be co-extensive, the court held that the relevant law applicable in respect of a cause of action is the law in force at the time the cause of action arose.

It is therefore obvious that the even though there was an amendment to section 180 of the Constitution, that amendment or its purported implications are not relevant to the determination of rights already vested before the amendment was passed.

If an enactment seeks to have retrospective effects in order to destroy accrued rights under another enactment which it has repealed, such enactment must either expressly or impliedly refer to such accrued rights or the earlier enactment which it has repealed. The general rule is

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63 *Ibid*, per Tobi JSC at page 416. For a full discussion of this case, see K. Awodein: "The Supreme Court's Decision in *Olutola v Unilorin*: A Jurisdictional Landmine?" *The Appellate Review*, Vol. 1 No. 1, September 2009, pp. 31-42.

64 (1991) 1 NWLR (Pt. 166) 166.

65 (2004) 13 NWLR (Pt. 891) 639.

that the rights of the parties to an action are to be decided according to the law as it existed when the action was begun.[66]

Therefore, the amendment to section 180(2), even though a welcome development as it has expressly stated the true position, it is clear from the above that the amendment cannot be the basis of the decision in *Marwa's case.*

8. Conclusion

The general rule is that where the words used in a statute are clear and unambiguous they must be given their ordinary meaning.[67] In fact, most cases on rules of interpretation are ostensibly based on the above position of the law. Experience has however shown that the passage of time, may lead to unforeseen problems never contemplated by the legislature that a strict and complete legalism may not serve the ends of justice.[68]

The barometer with which to determine the will of the legislature or as often said, the intention or purpose of the lawmaker has been problematic. A glaring example can be found in *Marwa's case* wherein the Court of Appeal[69] while relying on the literal rule of interpretation held that a layman would wrongly interpret section 180 of the 1999 Constitution to mean that once a person is returned elected and sworn in as a governor, the tenure will run from the date regardless of whether the election was nullified. The intriguing aspect of this case is that the honourable Justices of the Supreme Court who decided *Marwa's case* and who are by no means laymen came to the conclusion the Court of Appeal had dismissed as a layman's view.

The confusion became apparent when the Supreme Court refused to be persuaded by the often quoted dictum of Lord Denning in

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66 See generally *Afolabi v Governor of Oyo State* (1985) 2 NWLR (Pt. 9) 129; *Adesanoye v Adewole II* [2006] VOL. 10 MJSC 1; *SPDC (Nig.) Ltd v Tiebo VIII* (2005) 9 NWLR (Pt. 931) 439; *A. G. Federation v ANPP & Ors* (2003) 15 NWLR (Pt. 844) 600.

67 See *NDIC v Okem Ent. Ltd* (2004) 10 NWLR (Pt. 880) 107; *ANPP v PDP* (2006) 17 NWLR (Pt. 1009) 467 at 46, paras. G – H.

68 See P. W. Hogg, *Constitutional Law of Canada,* (Toronto: Carswell, 2002) p. 127 cited in Bello, above note 56 at pp. 171 – 201 at p. 183.

69 In *INEC v Nyako & Ors.*, above note 46.

Macfoy v UAC[70] that "when an act is void then it is in law a nullity. It is not only bad but incurably bad." Not even the Supreme Court's earlier decision in *Labour Party v INEC*[71] that once an election is declared null and void, the law regards whatever was purportedly done in the name or guise of an election as not having taken place at all could influence the decision of the court in *Marwa*.

In *Inakoju v Adeleke*[72] the Supreme Court convincingly distinguished the earlier decisions in *Balarabe Musa v Hamza*[73] and *Abaribe v The Speaker*[74] when the Supreme Court rightly held that in construing the effect of the ouster provisions in section 180(10) of the 1999 Constitution, the whole section 180 (1-10) must be taken into account. In other words, it is only when sub-sections (1) to (9) has been complied with that sub-section (10) could be invoked to oust the jurisdiction of the court to question the removal of a governor from office.

In *A. G. Ondo State v A. G. Federation*,[75] the Supreme Court upheld the constitutionality of the Corrupt Practices and Other Related Offence Act[76] notwithstanding that corruption falls within the residual legislative competence of states when it read item 60(a) on the Exclusive Legislative List together with section 15(5) of the 1999 Constitution.[77]

According to Bello, the decision in *A. G. Ondo v A. G. Federation*[78] accentuates the importance of a definite philosophy for the interpretation of a constitution within a federal system of government

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70 (1962) AC 152.

71 (2009) 6 NWLR (Pt. 1137) 315 at 357.

72 (2007) 4 NWLR (Pt. 1025) 423.

73 [1982] NSCC 219.

74 (2002) 14 NWLR (Pt. 738) 466.

75 Above note 54.

76 Cap. C31 Laws of the Federation of Nigeria (LFN) 2004.

77 This decision has been criticized by learned scholars because of its attendant implications on the principle of federalism enshrined in the constitution. See generally, Ipaye, above note 58; P. O. Idormigie, "Division of Legislative Powers under the Constitution: Lessons from Recent Development," *Nigerian Bar Journal* (2003) Vol. 1, No. 3, p. 305 at 340; A. Oyebode, "The Anti-Corruption Act: A Necessary Instrument for Growth of our Nascent Democracy, *The Jurist,* (2002) p. 1 at 5; Bello, above note 56.

78 Above, note 54.

and that it also signals the adoption by the Supreme Court of the "national concern" dimension of the power of the National Assembly to make laws.[79]

The administration of the Oath of Allegiance and taking of Oath of Office by governors or the president as regulated by the Constitution have been given judicial approval in *Obi v INEC*[80] in determining the tenure of office of governors and the president. This is as opposed to the tenure of legislators both at the State House of Assembly and National Assembly that starts to run from the first sitting irrespective of the exact date a particular legislator was sworn in or assumed duty.[81]

It is important to note that the apex court had earlier adopted this approach when it construed section 109 (1) (a) of the 1999 Constitution when it held in *A. G Federation v Abubakar*[82] that the Vice President cannot be removed for defecting from the political party on which platform he was elected into office to another political party. According to Aderemi JSC;

> It is manifest from the above quoted constitutional provisions that the lawmakers intended to and indeed have made punishable the defection of an elected member of the political party that sponsored him, to another party before the expiration of the period for which he was elected by declaring his seat vacant. No similar provision was made for the Vice President (or) even for the President. If the legislators had intended the Vice President or even the President to suffer the same fate, they would have inserted that provision in clear terms.[83]

The relevant implication of the logic behind the above is that it is possible for the Supreme Court to have held that the Constitution

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79 Bello, note 56 at 171.

80 Above note 45.

81 See *A. G. Anambra State v A. G. Federation* (2007) 12 NWLR (Pt. 1046) 1; *Ladoja v INEC & 2 Ors*. (2007) 12 NWLR (Pt. 1047) 119; *Emordi v Alphonsus Obi-Igbeke* FHC/ABJ/CS/726/2011; *APGA & Ors. v Andy Uba* CA/E/EPT/52/2011, Adeogun v Fasogbon (2011) 8 NWLR (Pt. 1250) p. 427.

82 (2007) 20 WRN 1.

83 *Ibid*, at pp. 160-161, lines 5-20.

made oath taking and administration of Oath of Allegiance relevant for the purposes of determining the tenure of governors since the corresponding provisions for legislators did not make the taking of such oaths relevant but rather provides that recourse must be had to the date of first sitting of the State House of Assembly or the National Assembly as the case may be.

The basis of the Supreme Court decision in *Marwa's case* is that the 1999 Constitution intended that a governor of a state shall have a tenure of four years from the date he took the Oath of Allegiance and Oath of Office and nothing more, though he may spend less where he resigns or he is removed from office and that in all, a governor has a maximum tenure of eight (8) years under the Constitution.[84]

The apex court in *Marwa* was right in holding that the amendment to section 180 (2) has no retrospective effect as the cause of action arose in 2007 and 2008 respectively. The amendment became necessary as a result of the perplexities which reared its head in the Nigerian democratic system which emanated from election malpractices with the resultant effect of nullification of elections while the beneficiaries of the so-called malpractices resurfaced to continue in office after their re-run elections.[85]

However, the court held that the amendment covers the crucial scenarios in *Marwa's case* particularly so where it would not cause violence in the intended object of the constitutional plan and that it accords with the purposive approach to interpreting constitutions.[86]

The explanation that seems to us to have truly captured the main objective of adopting the purposive approach is the realization that the legislature may not be able to contemplate and provide for all circumstances that may arise. It is the view of the apex court in *Marwa's case* that the Constitution did not foresee the possibility of a person who first took Oath of Allegiance and Oath of Office to win a re-run election but the court appears not to have also taken into cognizance the fact that the Constitution never provided for the disqualification of a person who was first declared winner from participating in a re-run election. The

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84 *Ibid*, per Onnoghen JSC at pp. 280 – 281.

85 *Ibid*.

86 *Ibid*, pp. 313 – 314, paras. C – A.

purposive approach has also been adopted to hold that the Constitution never contemplated the declaration of an election to the office of a governor to be null and void when the same Constitution provides for avenue for seeking redress by aggrieved contestants either due to electoral malpractices or the return of a candidate as the winner when he ought not to be so returned.

Therefore, it may be safe from the foregoing, that what the apex court did in *Marwa's case* was to supplement written words so as to suit the prevailing political and social conditions surrounding the subject matter of the case.