AN EXAMINATION OF THE ROLE OF THE JUDICIARY IN LAW MAKING IN NIGERIA

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CERTIFICATION

Be it certified that this dissertation titled "**An Examination of the Role of the Judiciary in Law Making in Nigeria"** is the original work of PATRICK CHINEDU EBOH with **Matric No:. PG/NLS/1900019**. It is further certified that this thesis has not been submitted either in part or whole to this University or any other academic institution for any degree or programme, and that all the sources used have been duly acknowledged by proper references.

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DEDICATION

This research work is dedicated to my parents, my brother and his family for their unquantifiable loves.

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LIST OF ABBREVIATIONS

AC	Appeal Court
AG	Attorney General
AHRLR	All African Human Rights Law Reports
AIR	All India Reporter
All NLR	All Nigerian Law Reports
ARSCP	Arizona rules of Small Claims Procedure
CA	Court of Appeal
CCHCJ	Certified Copies of High Court Judgment
CFRN	Constitution of the Federal Republic of Nigeria
EWCA Civ	England and Wales Court of Appeal Civil Division
ER	Exchequer Report
FRN	Federal Republic of Nigeria
ILM	International Legal Materials
KB	Kings Bench
LPELR	Law Pavilion Electronic Law Report
MJSC	Monthly judgments of the Supreme Court
NCLR	Nigerian Constitutional Law Report
NILDS	National Institute for Legislative and Democratic Studies
NSCC	Nigerian Supreme Court Cases
NSCQR	Nigerian Supreme Court Quarterly Law Reports
NWLR	Nigerian Weekly Law Reports
Paras	Paragraphs

SC	Supreme Court
SSO	Senate Standing Orders
UILR	University of Ife Law Reports
US	United States
USA	United States of America
WRN	Weekly Reports of Nigeria

ABSTRACT

The general purpose of this research work was to analyze the Role of the Judiciary in Law Making in Nigeria. The basic objectives of this research were to understand or explore the Role of the Judiciary in Law Making; to understand the impacts and challenges of judicial decisions to law making, and to understand the statutory interpretation aids and approaches of courts to law making. The statement of the problem was how can judicial participation in law making through interpretation and application of other laws contribute to the realization of the goal of good governance. The outcome of this research was important to the Nigerian society as it would improve the understanding of the Role of the Judiciary in Law Making in Nigeria, the various approaches to statutory interpretation and their significances to policy making. The researcher used the doctrinal research methodology with the aid of statutes, case laws, textbooks, articles and journals, internet materials and opinion of scholars. The rationale for using this methodology was because it focuses on a thorough enquiry of legal concepts, values, principles and existing legal texts such as statutes, case laws and other legal sources. It is also concerned with an analysis of legal doctrines and how they have been developed and applied. The research contained introduction of the research topic, background, statement of the problem, aim and objectives, significance of the study, research questions, limitations to the research, methodology and organization layout of the research and other chapters, ranging from one to five. At the conclusion of this academic exercise, the researcher found out that the judiciary has contributed immensely to law making through its interpretive role. In spite of the contributions, cautions should be exercised to avoid judicial rascality or hiding under the guise of interpretation to execute ulterior (personal, political or economic) purpose which might be at variance with the intentions of the legislature. The implication of these findings is it would serve as a useful catalyst to law reform. It would also impact on the judicial contributions to law making for good governance in Nigeria. Based on the foregoing findings, the researcher recommended the following: that drafters pay close attention or take cognizance of the interpretive approaches courts adopt in statutory interpretation so as to draft laws that will reduce the legislative – judicial frictions; that an understanding of the attitudes and thought processes of courts will help to synergize the relationship of the legislature and judiciary as partners in the collective pursuit of good governance; that legislations should be drafted in simple, plain, unambiguous and direct language in other to reduce the difficulties that are inherent in statutory interpretation; that legislations should indicate their primary purposes and communicate them in simple and direct words, and that interpretation or definition provisions be drafted in clear terms so as to make explicit the nature or scope of the key words or phrases that were used in them.

CHAPTER ONE

INTRODUCTION

1.1 Background to the Study

The general purpose of law is to regulate human behavior by protecting lives and properties in the society. Human behavior is the potential and expressed capacity of individuals or groups in response to stimuli. It is the sum total of the overt and covert expression of human intention. Understanding of the psychology of human behavior, that is to say, a study of the science of human behavior, is paramount for human behavior regulation. For instance, motivation, emotion, personality, classical conditioning and stress, including nature (genetic make-up) and nurture (environment) are important factors in considering human behavior generally. The idea of law as the basis for regulating human behavior stems from the cause and effect theory of human existence and as an instrument of social control, owing to the social contract whereby people relinquish some of their rights and freedom to the state in consideration for protection of lives and properties. The absence of law in a society will result to anarchy and survival of the fittest, hence the need for law.

The basic function of the state (government) is good governance through the provisions of the basic necessities of life, harmonious and orderly society where justice and fairness reign. In the course for the advancement of human progress and good governance in the society, the state has developed various public policies of priorities and institutions to harness them in other to attain its primary purpose. One of the major manifestations of public policy is through the law making processes. Basically, there are various branches of government charged with the responsibilities of harnessing and attaining the purpose of the state, namely, the legislature, executive and judiciary. These institutions of the state enjoy separate and autonomous but interwoven relationship. Generally, the law making powers of the state resides in the

legislature. The executive implements and enforces the law. The judiciary adjudicates and interprets the law. In the course of the exercise of its interpretive power, the judiciary make pronouncements or decisions which become binding on all and sundry. This becomes the basis of judicial precedent also known as judge-made laws (*stare decisis*). The court uses various approaches to interpretation in seeking the meaning and intention of the legislature which contribute to law making. Also, the court through its judicial powers such as mandamus, prohibition, review and injunction may steer or redirect the legislature to properly carry out its constitutional obligation(s).

Legislations are usually written in general or abstract terms to be applied in specific situations. More so, the meaning of words used in a legislation depends on the context, time and place they are used and might change over time. Moreover, the need to keep the law abreast with social realities, as an instrument of social engineering (control), might affect the interpretations which courts might give it. For these reasons and many more, the legislature may ensure that legislations are enacted in general or wide terms that are enough to cover unforeseen situations. As such, vague or ambiguous words used in a legislation might be the result of a compromise from the legislature to the courts to give them the meanings or interpretations that will best suit the intended purpose or execution of the policy priority.

There are disagreement among scholars with respect to the nature and scope of the role of the judiciary in law making. Textualists posit that courts do not make law owing to the separation of powers theory of law. They believe that the interpretive role of the court is to judicially and judiciously explore the direct and literal meaning of the texts of the law. Purposivists posit that courts should adopt an interpretation approach that will achieve the purpose of the legislation.

Aside these, the interpretation which courts give to legislation would have serious implications to its implementation or enforcement. However, there is the concerned issues (challenges) of

the nature and scope of judicial interpretive role to law making. Hence, this research work provides an insight into the role of the court in law making in Nigeria.

1.2 Statement of the Problem

In a constitutional democratic system of government, separation of power is a *sine qua non* for good governance. The doctrine of separation of powers requires the division of government powers among the various branches or institutions of government, namely, the legislature, executive and judiciary, in other to guarantee their independence. Sections 4, 5 and 6 of the 1999 Constitution of Nigeria provided for the division of government powers among the legislature, executive and judiciary. The legislature is charged with the obligation of making laws for the maintenance of peace, order and good government of the country. The executive is responsible for the enforcement of law for the maintenance of peace, order and implementation of government policies for good government of the country. The judiciary is charged with the duty of interpreting laws and adjudicating or settling disputes between persons, institutions or organizations.

There is generally no rigid system of separation of powers among the various institutions of government. Each of these institutions interdepends on one other in other to be efficient and effective in the pursuit of the collective good governance of the people. Similarly, in the course of the court discharging its constitutional interpretation duties, it makes pronouncements which become binding on all and sundry (judicial precedent). This raises the question of how can judicial participation in law making through interpretation and application of other laws contribute to the realization of the goal of good governance.

1.3 Research Questions

This research work attempts to answer the following research questions:

1. What is the role of the judiciary in law making?

2. To what extent does judicial decision impact in law making?
3. How can one understand the challenges of judicial decision in law making?
4. What are the statutory interpretation aids and approaches of the court in law making?

1.4 Aim and Objectives of the Study

The aim of this research work is to analyze the Role of the Judiciary in Law Making in Nigeria. The following are the objectives of this work:

1. To explore or understand the role of the judiciary in law making.
2. To explore the impact of judicial decision in law making.
3. To understand or explore the challenges of judicial decision in law making.
4. To understand the statutory interpretation aids and approaches of the court in law making.

1.5 Significance of the Study

The outcome of this research work is very important to the Nigerian society and the world at large in understanding the role of the Judiciary in Law Making. It would also improve the understanding of the various approaches adopted by courts in statutory interpretation and their significance in policy and law making. It would also help to highlight some of the impacts of judicial decisions to law reform in the society.

1.6 Scope and Limitation of the Study

The concept of judicial precedent (judge-made law) is of serious concern. However, the scope and extent of the theoretical coverage of this research work was a study of the role of the Judiciary in Law Making in Nigeria.

This research work suffered some limitations or setbacks such as paucity of research materials on the defined area of study. However, the research used internet materials to supplement the

available materials. The researcher also suffered some setbacks arising from poor or inadequate supply of electricity. There is serious electricity issues in Nigeria which constitutes a hindrance to sustaining the energy supply of electric gadgets that are used in assessing internet materials. In an effort to overcome this, the researcher made use of “power bank” to charge and sustain his electric gadgets as a supplement to the inadequate electricity supply. Also, the researcher was confronted with the issue of poor internet accessibility. To overcome this, the researcher did most of his internet browsing in the night.

1.7 Research Methodology

The research method employed by the researcher in the examination of the research topic is doctrinal. Doctrinal research method is concerned with the analysis of the legal doctrine and how it has been developed and applied[1]. It is research that is carried out on a legal proposition or propositions by way of analyzing the existing statutory provisions and cases through logic (reasoning)[2]. It is concerned with finding the law, analyzing it and deducing logical inference from it.

Legal doctrines basically help to clarify ambiguities within rules, placing them in a logical and coherent structure while describing their relationship to other rules. The determination of which rules of law to be applied in a particular situation is made easier by the existence of legal doctrines such as offer, acceptance, negligence, consideration, estoppel and so on. Doctrinal legal research helps to improve the substantial part of the law by enriching legal contents and interpretation of statutory provisions[3].

Kharel highlighted some of the purposes of the doctrinal research methodology which are to construct new legal theories, principles and doctrines, to test them and add new knowledge in

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[1] Amrit Kharel, Doctrinal Legal Research < https://www.researchgate.net/publication/323762486_Doctrinal_Legal_Research> accessed on 24th January, 2022

[2] *ibid*

[3] *ibid*

the legal profession; to maintain continuity, consistency and certainty of law; to resolve frequent client matters as the outcomes are more predictable due to its focus on established sources; to develop a theory that tries to explain how law or areas of law fit together; to critically examine the judicial opinions, conflicting decisions of courts and suggest the resolution to those conflicts; ; to expose uncertainties and contradictions within a body of law, legal practices or institutions and attempt to relate them to larger psychological, social, or philosophic difficulties[4].

The rationale for using this methodology is because it focuses on a thorough enquiry of legal concepts, values, principles and existing legal texts such as statutes, case laws and other legal sources. Unlike the non- doctrinal, it does not require the use of interview or questionnaire.

The researcher also used primary and secondary sources of data collection, namely statutes, internets, articles, case laws, textbooks (legal literatures) and other scholarly materials on the subject matter. Also, the researcher presented various views sourced from different literature on the subject of this research work and appraised them. The rationale for using the primary and secondary source of data collection is because the research is doctrinal. As such, it requires an analysis of legal principles in relation to existing statutes.

1.8 Organizational Layout

This research work is organized into five Chapters for a better understanding of the subject matter of the research.

Chapter One deals with the general introduction of the nature and scope of the research such as Background of the Study, Statement of the Problem, Aim and Objectives of the Study, Research Question, Significance of the Study, Scope and Limitation of the Study and Research Methodology, Chapter Outline. The purpose of this Chapter is to give a general introduction or information regarding the research topic. It equally states the underlying problem(s) or

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[4] *ibid*

issue(s) that necessitated this research, which is to analyze the role of the judiciary in law making. The aim of the research is to explore or understand the role and challenges of the judiciary to law making. The methodology used in the research is doctrinal because the research is basically to analyze legal principles and existing laws which are relevant to the chosen topic. The data collection method is primary and secondary such as statutes, case laws and other legal materials.

Chapter Two focuses on the Literature Review and this includes Legal and Conceptual Frameworks, Historical Development of Judicial Precedent (Judge made law) and Theoretical Framework. The general purpose is to introduce the legal principle of the research and the relevant laws while also looking at the relevant theories and literature.

The research reviews the literature of scholars which are relevant to the research. The legal framework summarizes the laws that are relevant to the topic while conceptual framework defined the context in which some words or phrases are used; the nature and scope of key words or phrases used in the research. There is also a historical account of the development of judicial precedent. The theoretical framework focuses on the divergence views or jurisprudences that are relevant to the research topic.

Chapter Three discusses the structure, strategies and tools of the judiciary in performing its role in the law making process. The general purpose is to explain or explore the structures, strategies and tools of statutory interpretation that are relevant to judicial law making. These strategies and tools helps courts to decipher the meaning or intention of a legislation. Some of them are literal, golden, mischief and purposive rules. There are also internal and external aids to statutory interpretation and legal maxims.

Chapter Four dealt with the Application of the Role of The Judiciary in Law Making and Lessons.

The general purpose is to explain the practical ways in which judicial decisions have impacted in the development of laws and how best to control judicial law making. It analyses of the Role and Impact of the judiciary in law making process. It also looks at some of the notable cases on how judicial decisions have impacted on law making and the principles of law that were enunciated in them. It also explore the desire of Drafters' Cognizance of the Rules of Interpretation of Statutes.

Chapter Five contains the findings, conclusion, and recommendations. The general purpose of this chapter is to summarize the research work, the findings, and recommendations and how the conclusion flow logically from the chapters (premises). The aforementioned will confirm that the aim or general purpose of the research was achieved.

CHAPTER TWO

CONCEPTUAL, LEGAL AND THEORETICAL FRAMEWORK, HISTORICAL DEVELOPMENT AND LITERATURE REVIEW ON THE ROLE OF THE JUDICIARY IN LAW MAKING

This chapter focuses on the conceptual, legal and theoretical framework of the role of the judiciary in law making, including the historical development of judicial law making and a review of related literature.

2.1. Conceptual framework

a. Judiciary and judicial decision: Judiciary is used interchangeably with court. It could be referred to as judicial body, depending on the context. It is the law interpretive and adjudicatory organ of government. It is a creation of a statute, namely, the Constitution or any other enabling statute. The judiciary under reference in this research work is restricted to the judicial bodies or courts which are established by the Constitution[1] or any other enabling legislation to carry out judicial functions. It does not extend to the activities of administrative bodies or agencies that perform quasi- judicial functions.

The rules that court adopts in arriving at a decision may be called cannons of interpretations or rules of construction (interpretation). Also, judicial decision used in relation to this research is as defined by section 318 of the Constitution, as any determination of that court which includes judgment, decree, order, conviction, sentence or recommendation[2].

b. Law and Law making: Law is any system of rules and regulations created to regulate human behaviour, whether written or unwritten. It includes those principles of acceptable

[1] s. 6 of the Constitution of the Federal Republic of Nigeria 1999 (as altered).
[2] s. 318 of CFRN 1999

behaviour which are binding on the people as a means of ensuring sustainability, orderliness, harmony and peace for the good of the society. The scope of the law that as used in this research work includes any instrument which regulates human conduct in the society. It also includes enactments as defined by section 318 of the Constitution[3] such as subsidiary instruments.

Law making which is the process of making law is used in the broad sense to include any instrument or decision which is binding, such as judicial decisions. As such, it is not limited to legislative law making through the bill process.

2.2. Legal Framework

a. Constitution of the Federal Republic of Nigeria 1999 (as altered): Constitution is the organic law which provides for the basic rules of governance of any organization. In this work, Constitution refers to the Constitution of the Federal Republic of Nigeria except otherwise stated. Section 1(1) of the Constitution provided for the supremacy of the Constitution and its binding force on all authorities and persons throughout the Federal Republic of Nigeria. Section 1(3) reaffirmed the supremacy of the Constitution by declaring any law or governmental action that contravenes with the Constitution or inconsistent with the spirit of the Constitution as null and void to the extent of the inconsistency. Section 1(2) provides that the Federal Republic of Nigeria shall not be governed, nor shall any person or group of persons take control of the government of Nigeria or any part thereof, except in accordance with the provisions of this Constitution[4].

As the fundamental rule of governance, the Constitution provides for the various powers and functions of the various arms of government, namely; the legislature, the executive and the judiciary. The legislature is assigned the duty of law making for the good governance of the

[3] s. 318 of CFRN 1999
[4] s. 1 (1)- (3) of of CFRN 1999

country. The executive is the law implementing and enforcing organ of government. The judiciary is the organ that interprets the law and adjudicates on matters brought before it[5].

b. The Courts and Rules of Courts: Section 6 of the Constitution vested the judicial powers of the Federation and states in the courts. It equally provided for the inherent jurisdictions of courts to interpret laws and determine questions on the rights and duties or settle disputes between citizens, organizations or bodies. It also guaranteed the discretionary powers of courts in the judicial and judicious exercise of its powers.

The Constitution also guaranteed the powers of courts to make rules for regulating their practices and procedures[6].

This constitutes the fundamental enablement for the making of delegated legislations by court.

The court as an institution has contributed immensely to the development of laws. This could be seen from many scholarly and activist decisions of courts[7].

2.3. Historical development of judicial precedence (judge-made law) in Nigeria

The historical development of judicial precedent is traceable to the common law of England and law reporting. The common law of England originated from the practices of courts in England, dating back to 1066 following the Norman conquest of England under King Harold. Before the Norman Princes William's conquest of England, the system of law in England was based on local community customs which were applied in their respective courts[8].

The Norman's conquest of England influenced the English law. Being gifted with great administrative skills, the Normans integrated the various customs of England which led to the

[5] See s. 4, 5 & 6 of CFRN 1999

[6] See generally ss. 236, 248, 254, 259, 264, 269, 274, 279 &284

[7] *Donoghue v Stevenson* (1932) AC 562

[8] Joy O Adesina, *Theories of Interpretation*, (Being a Lecture Handout/Note on Statutory Review & Interpretation of Statute, National Institute for Legislative and Democratic Studies, NILDS)

development of common law[9]. The local administrators of England (*Curia Legis*) who are those the Normans delegated authorities to as the representatives of the king of Normandy, employ the customary laws of the people of England in the adjudication of matters brought before them. Because the administrators usually do Assizes, they started applying a body of rules in the entire country which led to the eradication of local community customs as the applicable law[10]. Before then, after the administrators were done with their Assizes[11], they returned back to debate the customs they had met, accepted and retained the reasonable ones among them while discarding the unreasonable ones among them. The application of these accepted or retained customs became common all over the country and became known as common law. As such, common law refers to those rules and principles of law that were developed in England by the common law courts[12].

Common law developed to became a very rigid system of law. This rigidity arose because of its great reliance on deciding cases according to consistent principles and rules which ensures that similar facts and circumstances yields similar and predictable results in a patterned precedence (*stare decisis*).

The need for a system that will contain or report these precedents brought about law reports. Back then, the main sources for the history of common law were the Year Books and the Plea Rolls. The plea rolls were the official court records for the courts of Common Pleas and King's Bench. J Hanna reflected on the history of judicial precedent thus:

> ... In England the history of precedent is bound up with the history of law reporting.
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> Decisions cannot be precedents without reliable publication. English law reporting

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[9] *ibid*
[10] *ibid*
[11] Is a court which formerly sat at intervals in United Kingdom to administer the civil and criminal law
[12] *ibid*

may be divided into four periods: (1) 1272 to 1537, the time of the year Book; (2) 1537 to 1765, characterized by the reports of Plowden and Coke; (3) 1765 to 1865, the year of the authorized reports; and (4) the modern period since 1865….[13]

Speaking on the history of judicial precedent and law reporting, William stated that the history of judicial precedent is intimately bound with the history of law reporting as there can be no strict regards for precedents without a reliable and accurate system of law reporting.[14]

The system of law reporting of judicial precedent continued to evolve and exist till date. In Nigeria, the history of judicial precedent is also rooted in the common law of England. Nigeria being a former British colony inherited the English legal system and its major feature of common law which depends mostly on judicial precedent and law reporting[15]. Some of the law reports in Nigeria are:[16]

2.4. Theories of Statutory Interpretation

The legislature is the organ of government that is charged with the constitutional duty of making law for good governance[17]. Through the process of law making, the state (federation) could identify some basic public policy priorities that it intends to attain or achieve. On the other hand, the judiciary is the organ that is responsible for interpreting law made by the legislature and

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[13] J Hanna, *The Role of Precedent in Judicial Decisions*, 2 Vill L Rev 367 (1957) 374.

[14] William Holdworth, *The History of Judicial Precedent*, IV 48 L Q Rev 230 (1932) v Period 1535 – 1765) 230.

[15] Emmanuel Nnaji Nnamani, *Application of Stare Decisis and Judicial Precedence in Lower Courts in Nigeria*, at the National Workshop for Area/Sharia/Customary Court Judges, 18- 22nd March, 2019) 3 & 4.

[16] Nigerian Law Reports (NLR); All Nigerian Law Reports (All NLR); Federal Supreme Court Reports (FSCR); Nigerian Monthly Law Reports (NMLR); University of Ife Law Reports (UILR); Nigerian Weekly Law Reports (NWLR); All Federation Weekly Law Reports (All FWLR); Supreme Court of Nigeria Judgment (SCNJ); Western Region of Nigeria Law Reports (WRNLR); Eastern Region of Nigeria Law Report (ERNLR); Northern Nigerian Law Report (NRNLR); Nigerian Supreme Court Cases (NSCC); Midwestern Nigeria Law Reports (MWNLR); All Electronic Law Reports (AELR); Law Pavilion Electronic Law Report (LPELR).

[17] s. 4 of CFRN 1999

adjudicating on disputes relating to or involving the rights and duties of the people. The province of interpretation is the discovery of the intention or public policy priorities of the legislature as expressed in statutes.

The discovery of the intention of the legislature is not a simple exercise or process. This is because statutes are generally written in general term which will be required to be applied to specific situations, both present and futuristic[18]. Also, the meaning of words used in a statute depends on the context in which they are used which might change with time[19]. Aside these reasons and many more, the thought processes of men differ for so many reasons which may be influenced by nature (biology or genetic), nurture (environment or sociology), personality differences and motivation. Because these challenges are inherent in statutes, courts have evolved several theories in aid to statutory interpretation. They are purposivism, textualism, pragmatism, intentionalism and convergence or hybrid theory. The predominant theories are purposivism and textualism. As stated earlier, the province of judicial duty of statutory interpretation is the discovering of the intentions of the legislature and giving effect to them.

Whichever theory the court might rely on or resort to in interpreting statute, they share the same goal of faithfully interpreting statute as enacted by the legislature[20]. This goal is founded in the belief that the Constitution expressly makes the legislature the supreme law maker[21]. As such, statutory interpretation should respect the legislative supremacy of the legislature by only giving effect to legislative intentions[22]. Thus, courts should not act as free radicals, instead they should

[18] C Valerie, *Statutory Interpretation: Theories, Tools and Trends*, (Congressional Research Service, 2018) 1.
[19] *ibid*
[20] *ibid*, 10.
[21] s. 4 of CFRN 1999
[22] *ibid*

strive to work as faithful agents to the legislature; observing the hallowed constitutional doctrine of separation of power[23]. Brannon succinctly put the view thus:

> The predominant view of a judge's proper role in statutory interpretation is one of 'legislative supremacy'. This theory holds that when a court interprets a federal statute, it seeks to give effect to the intent of Congress'. Under this view, judges attempt to act as 'faithful agents' of Congress. They are not free to simply substitute their policy view for those of the legislature that enacted the statute. This belief is rooted in the constitutional separation of powers; in the realm of legislation, the Constitution gives Congress, not courts, the power to make the law[24].

Institutional competence which bequeaths certain organs of government with special skills or abilities for certain policies and decisions is at the heart of separation of power and statutory interpretation[25]. The legislature has equally and effectively exercised or asserted its legislative supremacy in many ways. For instance, the rule in *Smith v Selwyn*[26] was overruled by an Act of the Parliament.

Purposivism or Intentionalism:

Purposivists argue that, **"legislation is a purposive act, and judges should construe statutes to execute that legislative purpose"[27].** Purposive theorists often focus on the legislative process, taking into account the mischief that the legislature sought out to address by making the legislation

[23] *ibid*
[24] VC Brannon, *op cit*, 4.
[25] JO Adesina, *op cit*, 1.
[26] *Smith v Selwyn* (1914) 3 KB 98
[27] RA Katznann, *Judging Statutes* 31 (2014) cited in VC Brannon, *op cit*, 11.

and inquiring on how the legislation achieved its primary goal[28]. They argued that courts should interpret ambiguously worded statute in a manner that is faithful with the legislature's purpose. The major proponents of purposivism are Henry Hart and Albert Sacks. According to them, **"the benevolent presumption…. that the legislature is made up of reasonable men pursuing reasonable purposes reasonably"[29].** However, they admitted that the benevolent presumption will be negatived if a contrary intention is unmistakably expressed in the text of the statute[30].

Purposivism proponents further belief that legislative supremacy will be best observed by paying attention to the legislative process. Since it is legislature that has the constitutional mandate to make laws, courts are enjoined to look at how legislature actually works[31]. In the case of *Ohanenye & Ors v Ohanenye & Sons Ltd*[32], the court stated:

> ... The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at many extraneous materials that bear on the background against which the legislation was enacted[33].

To preserve the integrity of statutes, courts are also enjoined to pay attention to how legislature communicated its purposes or intentions through texts and other reliable accompanying materials that make up legislative history[34]. Brannon noted as follows:

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[28] *ibid*
[29] Henry Hart & Albert Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 1182 (William N Eskridge, Jr & Philip P Frickey eds, 1994) cited in V C Brannon, *ibid*.
[30] *ibid*, 12.
[31] *ibid*
[32] *Ohanenye & Ors v Ohanenye & Sons Ltd* (2016) LPELR 40458
[33] *supra*
[34] V C Brannon, *op cit,* 12.

> When courts construe statutes in ways that respect what legislators consider their work product, the judiciary not only is more likely to reach the correct result, but also promotes comity with the first branch of government[35].

In an effort to discover legislative purpose, purposivists rely on the legislation's policy context and evidence of any documentation which a reasonable person that is conversant with the circumstances will regard as suppressing the mischief and advancing the remedy. This they regarded as reasoning by example and inquiring on whether various specific applications of the statute enhances its general purpose[36]. Thus, the courts should strive and ascertain first the mischief the legislature intends to remedy and then inquire whether the suggested interpretation can achieve that purpose[37]. Hart and Sack put it thus:

> "that judges should seek to achieve consistency of solution … to make the results in the particular cases respond to …. some general objective or purpose to be attributed to the statute. Judges should look for interpretations that promote coherence and workability[38].

However, purposivism has been criticized for its bogus assumptions, as it is likely impossible to find one common intention underlying any given statute. More so, courts are not well equipped to understand the rigors and complexity which legislative process has on the final legislation, given the internal contradiction and unreliability of legislative history[39]. Also, purposivism can be easily manipulated or influenced, creating room for courts to ignore the text of statute to promote their

[35] *ibid*
[36] *ibid*
[37] *ibid*, 13
[38] *ibid*
[39] *ibid*

ulterior motives which they might disguise as honest believes to achieving what they regard as the statute's purpose[40].

a. Textualism:

The texualists inquire for meaning in the text of the statute and ascribe to the text the meaning that it has from its beginning, while rejecting any judicial speculations on legislative purpose which is external to the text of the statute[41]. The textualists focus on the words or text of a statute, emphasizing the text over any extraneous purpose that was not expressly stated[42]. According to them, courts are enjoined to read the words and texts of a statute in the manner any member of the legislature would have read them, since they (words) emanate from them (legislature). They seek for the meaning a reasonable man will give or ascribe to the text of the law when placed along with the entire statute[43].

The textualists are concerned with the statutory purpose only to the extent that it could be garnered from the words or text of the statute only. As such, they focus on the statutory structure of the legislation and how the words when heard would sound in the mind of a skilled and objectively prudent (reasonable) user of such words[44]. They equally have a different view on how best to respect legislative supremacy. To them, courts can best respect legislative supremacy when they follow the rules that prioritize and emphasize the words or text of the statute only[45].

There are several common justifications for textualism. First, textualism restricts judicial discretion, thereby limiting the propensity of courts to filtrate the texts of the statute with their own

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[40] *ibid*
[41] Katharine Clark & Matthew Connolly, *A Guide to Reading Interpreting and Applying Statutes,* (The Writing Centre: Georgetown University Law Centre, 2017) 1.
[42] VC, Brannon, *op cit*, 13.
[43] *ibid*
[44] *ibid*
[45] *ibid*, 14.

policy priorities. Secondly, limiting and confining the interpretive duty of courts to what can be fairly discern from the words or texts of the statute alone will encourage more precision in legislative drafting and law making. This will boost the certainty of law. Thirdly, textualism is the principled and coherent way of statutory interpretation because any exercise in search of legislative intention or purpose will be in futility as there is no such clear and real discernable legislative intention[46]. Adhering to the text of a legislation will help to checkmate judicial encroachment of the law making powers of the legislature.

However, textualism has been criticized for some of its pitfalls. The fact that statutes are usually drafted in general terms which are to be applied to specific situations draws criticism to textualism[47]. Also, words are inexact symbols, in which their meaning depends on the context in which they are used and might change over time. Simply put, the meaning to be ascribe to words depends on time and place.

Textualists are further criticized for being over formalistic in their approach in discerning the meaning of statutory text thereby ignoring the fact that courts have been delegated by law (the Constitution) interpretive authority[48]. Also, opponents of textualism sometimes claim that the legislature makes law, bearing in mind the interpretive authority of courts and an expectation that courts will pay attention to the legislative process together with the purpose of the statute when applying it to specific situations[49].

b. Hybrid or Convergence Theory:

Hybrid theory is based on the combination of the textualism and purposivism. In practice, many courts do not necessarily identify any particular theory as the one which they subscribed to. Rather,

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[46] See generally K Clerk & M Connolly, *op cit*, 11.
[47] Valerie C, *op cit,* 1
[48] s. 6 of CFRN 1999.
[49] See generally VC Brannon, *op cit*, 15.

they often adopt some elements of purposivism and textualism in their decisions[50]. As such, the court may begin with the legislative history of the statute and then proceed with an explanation of the problem that the legislature encountered when it first made the disputed statute, the original version of that statute and the subsequent amendments or new statutes that sought to remedy the mischief and finally narrow it down to the statutory text of the legislation, the ordinary meaning of the words used in the statute, rules of grammar or grammatical construction and context. In such a situation, courts are likely to begin with the analysis of the legislative history, purpose and post-legislation practice and other extra-textual evidence, and juxtapose them with the text of the statute to ascertain the most compelling of the theories. In other cases, the courts may simply analyze a theory and reject it as not compelling[51].

2.3.Literature Review

Quite a number of scholarly works have explored the role of judiciary in law making from different contexts and have made different submissions. These scholarly works contribute in our understanding of the role of the judiciary and how the argument in this dissertation is presented. An example of such scholars is DT Adem[52].

Adem started the topic with the necessity of drafters to be familiar with the rules of statutory interpretation as it is the process the court uses in reading and applying legislation especially when a dispute or doubt arise over the meaning of a legislative provision. The author defined interpretation of statutes as those rules of canons of construction which the courts used in drawing inferences about the meaning of the language used in legislation. They are guides and not rigid

[50] *ibid,* 16.

[51] *ibid*, 17

[52] DT Adem, *Legislative Drafting Manual,* (1st edn, Lewis Nexis, 2014) 247-251

rules, but knowing them will assist the drafter in envisaging all practical scenarios that the drafter will encounter. The author distinguished between cannons of interpretation, rules of language and statutory tools as various guidelines or rules that courts adopt in the interpretation of statutes. The cannons of interpretation are literal rules, golden rule, mischief rule and purposive approach. The rules of language and statutory tools as various guidelines or rules that courts adopt in the interpretation of statues. The cannons of interpretation are literal rules Golden rule, mischief rule and purposive approach. The rules of language are *Ejusdem generis rules, Nosciitur a sociis, Expression unis est exclusion alterius,* rules of rank and interpretation of the constitution. The statutory tools are various presumptions such as the presumption that legislation is in compliance with the constitution; presumption that legislation does not operate outside its territory, presumption of *mens rea* in criminal cases and so on. The author stated that the strict application of the literal rule has caused the courts to say that the literal rule of interpretation should always be followed even it would lead to hardship. He also stated that the golden rule started as a result of the complete departure from the notion that the literal rule should be applied strictly even if its application will lead to absurdity, inconsistency or repugnancy. That the golden rule may be applied to modify the words used in a statute in other to avoid absurdity, inconsistency or repugnancy. The mischief rule is the rule which seeks to discover the intention of the legislature. He posited that where the application of the literal rule will create ambiguity, the intention of the legislature should be resorted to by looking at the law generally as it was before the statute that is being interpreted, the mischief which the statute is intended to remedy and then, the statute is interpreted in a way that suppressed the mischief and advance the remedy.

The author however, did not discuss the aids to statutory interpretation in details in order to highlight the advantages and disadvantages. His reference to the mischief rule as the cannon of

interpretation that seeks the intention of the legislature is misleading. This is because, all the cannons of interpretation are aimed at discovering the intention of the legislature. Also, he did not discuss the theories of interpretation such as textualism and purposivism which made it difficult to ascertain the theory he relies on. Also, the author did not discuss directly the impact or role of judiciary in the law making process through the process of interpretation of statutes. Aside these observations, the author touched lightly on the impact of statutory interpretation to the law making process.

Another scholarly work is that of Naman Jain.[53] The work is comprised of an abstract, research problems, research questions, hypothesis, methodology, literature review of the work of two authors, table of contents, general discussion on the topic, conclusion, bibliography and other miscellaneous issues. The writer defined interpretation as the art of discovering the true meaning of a law by giving the words of the law their natural and ordinary meaning. It is the process of determining the meaning of the words used in a statute. According to the author, courts rely on any of the rules of interpretation that will produce an outcome or result that satisfies their senses of justice in the cases before them. He noted that it is not possible to predict with certainty or mathematical precision which interpretation approach that will be followed in a particular case. He noted some of the general rules to be followed while using any particular approach for the interpretation of statutes, namely;

i. The word “or” is generally used in the disjunctive sense while the word “and” is used in the conjunctive sense;
ii. The rule that same word should have same meaning in other legislations in other to ensure consistency, that is to say, presumption of consistency in the statute.

[53] Naman Jain, *Approaches to Interpretation of Statutes,* (Alliance School of Law, Alliance University, 2010) 1-16.

iii. The non-obstant clause which authorizes the legislator to use the rule as a device to give priority to specific provisions over contradictory provisions.

iv. The *casus omissus* rule which literally means omitted case. By this rule, it serves as a solution to dealing with a particular situation which was not specified in the law; and so on.

v. The *ejusdem generis* rule which requires words of the same type or kind to be considered in the same category.

vi. The *Noscitur a socii* which states that the meaning of a word can be deduced from other words surrounding it.

vii. *Expressio unis est exclosio alterius* rule which states that the express mention of a thing is the exclusion of another.

He classified the interpretation approach basically into two namely, literal approach or plain rule of interpretation and purposive or targeted or focused or objective based approach. As regards the literal rule, he posited that the words of a law must first be understood in their natural, ordinary, popular sense and grammatical meaning. The trend is for courts to implement the intention and presumptions of the legislator as contained in the words themselves. He highlighted some of the advantages of adopting the literal interpretation approach which is to ensure consistency, certainty, lack of judicial use of interpretation to project or execute a political, personal or selfish purpose, avoid unnecessary usurpation of legislative powers by the courts.

He also highlighted some of the criticisms of literal rule which consists of a logical failure arising from ambiguity, inconsistency and incompleteness, and the fault arising from absurdity and irrationality.

On the other hand, the purposive approach which he also called the principal of modern construction which courts adopt to seek meaning, purpose and the general intention of the

legislator especially when a literal approach will lead to absurdity, irrationality or gross injustice. In applying the purpose rule, courts may take into consideration such things such as legislative history or background including committee reports, the previous mischief that the new legislation intends to suppress while at the same time enhancing the remedy and so on. He criticized the purposive rule as amounting to usurpation of power and contrary to the doctrine and spirit of separation of power.

However, the author did not specifically discuss the impact of judicial interpretative approach to legislation or law making process. There were so many grammatical errors in the work that confuses meaning and intention of the author.

Aside these points, the work offered a good insight in the discourse of the nature and scope of interpretation of statute.

Another scholarly work is that of Katharine Clark and Matthew Connolly[54]. The author started by observing that in whatever establishment or institution that one finds itself (himself or herself), one may be likely required to analyze and interpret statutes. An understanding of the tools and techniques of statutory interpretation will help the interpreter (the person) to understand the possible implications a statute may have on someone's client's interests. He went on to list three basic preliminary steps that one should take before attempting to interpret a statute, namely: reading the statute, understanding your client's goal and the confirmation that the statute is still good law by ascertaining whether the statute or parts of the statute have been repealed or invalidated, or whether the statute has been amended, or whether there are any court decisions that

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[54] Katharine Clark and Matthew Connolly, *A Guide to Reading, Interpreting and Applying Status (sic)[54]*, (The Writing Centre, Georgetown University Law Centre, 2017) 1 – 13.

can guide the interpreter's analysis of the statute. There are several tools of statutory interpretation. These tools are classified into four categories, namely: the text of the statute, legal interpretations of the statute, the context and structure of the statute. Some of the techniques of interpretation of statute have been used so often that they have become "formalized" into "canons of construction". While these canons of construction may not be particularly useful for discerning or ascertaining the meaning of a statute, many courts still find them persuasive, and use them to justify and provide support for a particular interpretation of a statute.

Under the text of the statute (statutory text), there are the statutory definition, plain meaning, commonly used terms and relevant canons of construction. Statutory definitions set forth and define the key terms used in the statute. It suggests that legislatures intended for a term to have a specific meaning that might differ in important ways from its common usage. Under the plain meaning, there is the ordinary or reasonable understanding, dictionary definitions and common law, definitions. For ordinary or reasonable understanding, courts generally assumes that the words of a statute mean what an ordinary or reasonable person would understand them to mean. Dictionaries are very helpful in interpreting the meaning of statutory language. Also, words that have a technical or an industry- specific meaning can have a meaning in common law that is widely understood and accepted. Some terms are commonly found in statutes and often used purposely to define the scope and function of the statute. They include: "and, or", "may, shall", "unless, except", "subject to …, within the meaning of", "for the purpose, if then…., upon, before/after, provided that...", "notwithstanding", "each/only, every/any/all". Other relevant canons of construction include: omitted–case canon, general–term canon, negative–implication canon and presumption of non-exclusive "include". There is also the legal interpretation rules such as judicial interpretations through case law, agency interpretations through regulations, rule of lenity,

presumption against change in common law, the context and structure rule, which comprises of cross-reference and companion statute rule, the whole Act rule, presumption of consistent usage and meaning variation, rule to avoid surplusage, associated words canon, *ejusdem generis,* related-statutes, preamble or purpose clauses, legislative history, supremacy of text principle, presumption against ineffectiveness. The author classified the theories of statutory interpretation into three major theories; textualism, intentionalism, and pragmatism. The textualists look for meaning in the governing text, ascribe to that text the ordinary meaning. The intentionalists not only examine the statutory text and structure but also consult legislative history to determine the underlying purpose of the legislature when it enacted the statute. The pragmatists use tools of statutory interpretation to achieve a result that appropriately balance a number of factors, including predictability and certainty, economic efficiency, fairness and public interest.

The author did not discuss the impact of interpretation of statute to the doctrine of separation of power and any remedial position. He did not also discuss the challenges of statutory interpretation as regards the concept of legislative supremacy of the parliament.

However, the work provided a good insight in the discourse of statutory interpretation.

There is also the scholarly work of Valerie C Brannon[55]. The author used the hypothetical statement of **"No vehicles in the park"** to illustrate the challenges and difficulties that are involved in the interpretation of statute. To him, a statutory provision that appears at first unambiguous can bring about difficulties when applied in real world or situation. The meaning of words generally depends on the context in which they are used and that might change over a period of time. This

[55] Valerie C Brannon, *Statutory Interpretation: Theories, Tools and Trends*, (Congressional Research Service, 5th April 2018) 1-16

is because, words are inaccurate or imprecise symbols of meaning and it is difficult to achieve a definite meaning in everyday communication. These inherent difficulties of language are strengthened in the creation of statutes which are drafted by a more complicated governmental process and are likely required to be applied to a variety of unseen circumstances.

Statutory provisions are usually written in general terms, which may worsen the difficulty of applying them to specific situations. Hence, statutes are often drafted to address "categories of issue or conduct". It is possible that the enacting legislature may have sought to ensure that the statute would be general enough to capture the situations it could not foresee, or may have intended to delegate the interpretative authority to the agency or body that is charged with enforcing the statute. Similarly, ambiguous or vague language of a statute might be the result of compromise from the enacting legislature.

Also, a statute might be silent with respect to a particular application because legislature simply did not anticipate the situation. As a constitutional duty, when a statute becomes the subject of a dispute in a court, judges usually must interpret the law whether it is ambiguous or not. Judicial pronouncements about statutes are generally regarded as the final word on statutory meaning of the provision and also determine how the law will be carried out unless legislative acts amend it. In attempt to resolve the meaning of a statute, judges have taken a variety of approaches. However, the two predominant approaches or theories of statutory interpretation are purposivism and textualism. The proponents of these two theories both generally shares the goal of adhering to the legislator's intended meaning except that they disagree over how best to achieve that goal.

Understanding the approaches that govern how judges read statutes is essential for the legislature to legislate most effectively since judicial opinions interpreting statutes necessarily shape the way in which they are implemented. The predominant view of judicial role in statutory interpretation

is that of "legislative supremacy" of the parliament. As such, judges are regarded as "faithful agents" of the legislature and are not free to simply substitute their policy view for those of the legislature that enacted the law. This belief is founded in the constitutional doctrine of separation of powers. Because the actual intent of the legislature that made law is usually unknown or unknowable with respect to the precise situation presented to the court, the court resorts to different approaches in seeking meaning or discovering the intent of the legislature. Purposivists argue that legislation is a purposive act, and judges should construct statutes to execute that purpose. They often focus on the legislative process, taking into account the problem that the legislature was trying to solve by enacting the law and asking how the statute accomplished that purpose. The two major proponents of purposivism, Henry Hart and Albert Sacks, advocated the "benevolent presumption". According to them, **"… legislature is made up of reasonable men pursuing reasonable purpose reasonably".** They noted that there is a caveat to this presumption, which is that this presumption should not hold if the contrary is made unmistakably to appear in the text of the statute. They also believe that judges can best observe legislative supremacy of the parliament by paying attention to the legislative process. They argue that to preserve the integrity of legislation by the parliament, judges should pay attention to how legislature makes its purposes known, namely, through the text and reliable accompanying materials constituting legislative history. In contrast, the textualists focus on the words of a statute, emphasizing text over any unstated purpose. They argued that courts should read the words of statute or text as any ordinary member of parliament would have read them. They look for the meaning that a reasonable person would gather from the text of the law, placed alongside the remainder of the body of the law, they look at the statutory structure and hear the words as they would sound in the mind of a skilled, objectively reasonable user of words. Textualists believe that, **"judges best respect legislative supremacy**

when they follow rules that prioritize the statutory text." The modern approach to the interpretation of statute is that, the application of a particular canon in any case depends on the context. The use of canons is founded on reasoning.

However, the author did not discuss extensively the concept of legislative supremacy of the parliament juxtaposed with the concept of judge-made law; the challenges and solutions.

Aside this observation, the work provided a good insight into the nature, scope and theories of statutory interpretation.

There is equally the erudite work of Lord Hodge[56]. The learned author started the discussion by observing that judge-made law is an independent source of law in common law system. He further observed that while statute law now impacts on many areas of private law, large chunk of private law remains predominantly the product of judicial decision, that is, judge-made law. Similarly, parliaments had also used statute to codify rules or principles which judges had made through judicial decisions in order to make them more accessible. The author also noted that the law of obligations in torts and contract are essentially judge-made. For instance, judges have been responsible for determining the boundaries of the tort of negligence, manufacturers' liability to the ultimate consumer and negligence misstatements, and limiting the circumstances in which there is liability in negligence for causing pure economics loss and where the injury suffered is psychiatric damage. Also, the extent of the damage for which a negligent person is liable is determined by judge-made rules on remoteness or otherwise of damage. The area of property law and the law of succession in England and Wales were predominantly the domain of judge-made law. He equally discussed some of the innovations of judge-made law in line with the changing social realities. He

[56] Lord Hodge, *The Scope of Judicial Law-making in the Common Law Tradition,* (Max Planck Institute of Comparative and International Private Law, Humburg, Germany, 28 October, 2019) 1 – 18.

cited the case of *in Re Spectrum plus Ltd*[57] were the court observed that, for centuries, judges have been charged with the responsibility of keeping laws abreast of current social conditions and expectations.[58]

Some of these areas of innovations include the development of the law of negligence in the case of *Donoghue v. Stevenson***,** also known as "**the neighborhood principles"**, the extension of the obligatory scope of the doctrine of vicarious liability through the principle called "enterprise risk", in the area of medical negligence, development of a right of privacy, the development of the law of breach of confidence to protect reasonable expectations of privacy between private parties, the development of a new form of injunctive relief called Aton Piller Order or civic search warrants which provide a right to search premises and seize evidence without prior warning in order to prevent the destruction of evidence in disputes about confidential information or intellectual property, and worldwide freezing orders and so on. These innovations in response to changing social attitudes extend to the criminal law especially in the area of abolition of the rule that a married person cannot commit rape against each other. He observed that these innovations or innovative approach to a perceived social ill reflects changing social attitudes. Some authors have different names to it such as judicial creativity, fundamental attribute of pragmatism and so on. However, it was observed that in exploring innovative ideas that will soothe the dynamics of the society, that judges are advised to have regards to common sense, legal principle and public policy. Also, judicial decisions should be justified by the law as it is by using existing legal principles. As such, changes to the law should be derived from existing legal materials by applying established principles and legal values in new contexts. The author observed that there are

[57] *Re Spectrum plus Ltd* (2005) 2 AC 680, para 32
[58] *supra*

limitations or limits to the extent and scope of judge-made law. Although there is no consensus as to where the boundary to judicial law-making lie, some of them are as follows: the separation of power doctrine, legislative sovereignty of parliament, adaptation of common law to changes in commercial practice and social values; the declaratory theory of common law which posits that a judicial decision, even when it is in reality innovative, is stating what the law has always been (fairly takes rule); the doctrine of judicial precedent (*stare decisis)* which obligated lower courts to abide by a precedent set by a superior court and so on.

The author did not discuss how parliament has effectively exercised or asserted its legislative supremacy. For instance, the rule in *Smith v. Selwyn* was overruled by an Act of the parliament. Similarly, the judgment of the Supreme Court in *Lakanmi v AG Western State*[59] was overruled by a military decree by the then military government.

Aside these observations, the work provided useful insight in the necessity for judicial law making and scrutiny (control) of same.

Another erudite work is that of Emmanuel Nnaji Nnamani.[60] The paper was aimed at putting in the proper perspective, the role of *stare decisis* and judicial delivery in grass root oriented courts such as Area/Sharia/Customary courts. The work is comprised of Introduction, the Meaning of Judicial Precedent, the Nature and Constituents of Judicial Precedent, *Ratio Decidendi*, its Meaning and Scope in Judicial Precedent, How to Decipher *Ratio Decidendi*, Identifying the *Ratio Decidendi* (sic) in a court consisting of more than one judge in a *coran* (collegiate court), *Obiter*

[59] (1971) 1 UILR 201.
[60] Emmanuel Nnaji Nnamani, *Application of Stare Decisis and Judicial Precedent in Lower Courts in Nigeria*. Being a paper presented at the National Workshop for Area/Sharia/Customary Court Judges, (18th – 22nd day of March, 2019) 1-24.

Dictum, Distinguishing, Hierarchy of Courts and Judicial Precedent and Conclusion. The author adopted the definitions proffered by other authors and scholarly materials such as dictionaries.

According to the author, judicial precedent (also known as *stare decisis*) simply means that similar case should be treated in a similar manner. It is one of the attributes of the common law system. The whole essence of which is that questions ought to be decided today in the same manner as they were decided in the past. It requires one to abide by a former decision where the same points come up again in litigation.

According to the author, *stare decisis* is the abbreviation of the Latin phrase *"stare decisis et non quieta movere*" which means "to abide by a former decision where the same points come up again in litigation". On the nature and constituents of judicial precedent, the author posited that judicial precedent has the nature and character of the judge–made law. This is because, case law is one of the sources of law in common law systems whose origin is traceable to the United Kingdom. Most modern states who were colonized by the United Kingdom inherited the English common law tradition which practices judicial precedent. Some of these includes the common law and equity principles and Statutes of General Application and so on. He also identified the reasoning or point in the former case that is required to be followed in the latter case as the *ratio decidendi* (rational for decision), which he distinguished from *obiter dictum.* He also observed that a case may be distinguished from another as to furnish the court the opportunity not to follow a particular precedent in adjudicating on the case before it. He equally examined how to decipher *ratio decidendi* of a case for it to constitute a binding precedent. Paramount to judicial precedent is the hierarchy of courts which the author stated, starting from the apex courts to the lowest courts, namely, Supreme Court, Court of Appeal, High courts, Customary courts and so on. The author concluded by reiterating the importance of judicial precedent and the need for lower courts to pay

attention to decisions of superior courts of record which binds them, so that they follow them regularly and by so doing attain substantial justice in their proceedings.

The author did not discuss the implications of judicial precedent to the doctrine of separation of power and the challenges it pose to the doctrine. It also did not examine the possible means of checking and balancing of judicial precedent in other to ensure that it does not erode completely the law making power of the legislature.

In spite of these observations, the author rightly observed that judicial precedent is a source of law and is in accord with the realistic view of law as nothing more than prophesies of what the court would say.

There is also the scholarly work of Tanzum Mozammel[61]. Tanzum defined judicial precedent or binding precedent as being founded on one of the most fundamental aspect of any legal system by which all similar cases must be treated similarly. He stated that precedent is based on the notion of "*stare decisis et non quieta movere*" meaning "to stand by decision and not to disturb that what is settled". In common law system, a huge part of law is made of decided case, that is, judge made law or case law. This decision by judges which carry the authority of law upon pronouncement is binding on later judges to ensure certainty and fairness within the system. In common law system, the judges are saddled with the responsibility of declaring the law while the parliament is to make the law. *Stare decisis* has two aspect, one concern the hierarchy of courts, the place of a court within the structure of decision making, and the other one that concern the precedential weight or status on a particular decision. As regards the precedential weight, it is the *ratio decidendi* (the main reason for the judgment) which is binding. Persuasive precedent like *obiter dictum* is not

[61] Tanzum Mozammel, *Doctrine of Judicial Precedent*, Ongoing 2nd Year LLB (Hons), University of London) 1-5.

absolutely binding but may be applied depending on factors like rank of the court in the hierarchy and the prestige of the judges involves. He recognized the difficulty of analyzing the *ratio* from a judgment which the judge could do widely or narrowly. In modern view, the *ratio decidendi* of a case is what a court will determine in a later case. What will constitute the *ratio decidendi* for the later court is a matter of analysis, judgment and argument, taking into consideration the material facts of the case, the judge's mission, vision, opinion and his believe in the adoption or extension of same. The general rule is that decisions of higher courts are binding upon themselves. However, there are controversies surrounding the binding effect or otherwise of judicial precedent. In the case of London *Tramways v London County*, the court held that the House of Lords or now the Supreme Court is the highest authority in the English legal system to interpret the law and its decisions are binding on lower courts. However, in response to the need to developing the common law in conformity with the changing social and economic changes, Lord Gardiner LC in 1986 introduced the Practice Statement of 1986 where he argued that House of Lords is allowed to depart from its own previous decisions only when it appears right to do so. But Lord Reid suggested that for such a departure to take place, broad issues of justice, public policy or question of legal principles must be involved. Lord Denning argued that whilst certainty is a good thing, too much of rigidity and strict application of the doctrine of precedent would lead to a very robotic and dogmatic legal system, with no proper development of the law whatever.

The author suggested methods the judges may use to release themselves from the clutches of binding precedent. One of them is through the process of distinguishing cases which involves re-interpreting the *ratio decidendi* of the earlier case and re-classification of parts of the decision so that what was once considered to be part of ratio, and so strictly binding, becomes obiter and so persuasive only. The other instance when the court is not bound to follow its previous decision is

where it is in conflict, it must decide which to follow. Also, the court is not bound to follow its decision if there is a conflict between its decision and that of a superior court. The author stated that judicial precedent is judge made law. Back in 18th century the view of judges' role was merely declaring the existing laws. But in the 21st Century the view has changed. He observed that it conflicts with separation of power.

However, the author did not observe the guidelines of proper referencing of materials used or cited in his work. He did not discuss the scope of judicial precedent in relation to law making and the challenges to it. He did not address the issue of conflict of judicial precedent (judge-made law) with the doctrine of separation of power and any possible solution to it to ensure good governance and proper checks and balances.

Aside these observations, the work offered a good insight in the discourse of the challenges of judicial precedent in relation to law making.

Another scholarly work is that of Halimadoma Kutigi[62]. Kutigi started by observing that a discussion of Nigerian Legal System will not be possible without reference to the British Legal System because Nigeria was a dependent territory of Britain. Despite Nigeria gaining independence, much of her laws derived their origins from Britain and as such was modeled after the British common law system. The writer further observed that judicial precedent is a central concept in common law. He defined *stare decisis* as the practice of the courts looking up to past similar issues to guide their decisions. It is a Latin expression that means **"to stand by things decided".** The doctrine of judicial precedent or case law, being a fundamental doctrine in the

[62] Halimadoma Kutigi, *Ratio Decidendi and Judicial Precedent,* (Being a paper presented at the National Workshop for Legal and Research assisted by and at the National Institute on Monday, 15 July, 2019) 1 – 19.

common law system, applies in Nigeria and as such, one of the sources of law in Nigeria. He classified judicial precedent into two folds, namely; material source and composition. According to the learned author, the material source of judicial precedent is embedded in cases decided by court. In terms composition, as applicable to Nigeria, it consists of the principles of common law and the doctrine of equity. He stated that the whole essence of judicial precedent is that it is a law developed or evolved by courts. He provided three types of precedents, namely original, binding and persuasive. Original precedent occurs when a point of law in a case has never been decided before, such that whatever the judge decides will form new precedent for future cases to follow. Binding precedent refers to when a decision of a higher court is binding on a lower court within the hierarchical structure of the court. Persuasive precedent is a precedent which is not binding on a court but which may be applied. He distinguished *ratio decidendi* from *obiter dictum*. While *ratio decidendi* is the reason for the decision, *obiter dictum* is something said by the way. *Ratio decidendi* of a case is the principle of law on which a decision is based and is binding. *Obiter dictum* which may be a speculation about what the court's decision would have been if the facts of the case had been different, is not binding on subsequent cases because it was not strictly relevant to the matter in issue in the original case. However, an *obiter dictum* may be of persuasive authority in later cases and may further graduate to a binding precedent. The learned author discussed another related Latin words which is ***"per incuriam"*** which translated to **"through lack of care"**. *Per incuriam* refers to a judgment of a court which has been decided without reference to a statutory provision or earlier judgment which would have relevant. There are two essential elements to the application of precedent: a court hierarchy and accurate law reporting. The doctrine of judicial precedent only operates where there is a hierarchy of court. The hierarchical operation of judicial precedent happens in two ways, namely, vertical and horizontal. For a vertical operation,

a court is bound by the earlier decision of all courts higher than itself in the hierarchy. For horizontal operation, courts are bound by their own earlier decisions and earlier decisions of a concurrent court of the same level, whether past or present. However, in the case of *Bronik Motors Ltd & Anor v Wema Bank*[63], the Supreme Court enumerated conditions under which it can deviate from its earlier decision. They are: where there is a breach of justice, on grounds of public policy and question of legal principle such that the retention of the decision will amount to a perpetuation of injustice. As regards law reporting, the author noted that law reporting is the bedrock of judicial precedent. It provides the source of case law precedents. He equally highlighted some of the advantages and disadvantages of judicial precedent. He distinguished overruling a previous decision from reversing. Overruling is the procedure whereby a court higher in the hierarchy sets aside a legal ruling established in an earlier case. It can occur when the earlier court did not correctly apply the law or because the later court considers that the rule contained in the earlier case is no longer desirable. Courts are reluctant to overrule longstanding precedents even when they may no longer accurately reflects contemporary practice or moral. On the other hand, reversing is a procedure by which the decision of a lower court was declared incorrect and consequently reversed, thereby instructing the lower court which tried the case to dismiss the original action, retry the case or change its judgment. Because courts are reluctant to use the procedure of overruling of an earlier decision, they now resort to distinguishing of cases as a way of avoiding binding precedent. Thus, the court may treat an earlier case as having different material fact from the case before it and therefore, not binding. Material facts are those facts in a case which have legal consequences. What is reasonably distinguishable depends on the facts and circumstances of the particular case and the particular court.

[63] (1983) All NLR 272

However, the author did not discuss in details the challenges to judicial precedent and the possible solutions to them, if any. He also did not discuss the scope of judicial precedent (judge–made law) in relation to the constitutional doctrine of legislative supremacy of the parliament. In spite of these observations, the work offered useful insight in the discourse of the nature and scope of judicial precedent.

There is the erudite work of Timothy Capurso[64]. Capurso described judicial decision–making as the corner–stone of the American justice system. The process of how judges reach their decisions has been a subject of debate among scholars, lawyers and litigants for centuries. The major proponents of American legal realism are Oliver Wendell Holmes, Joseph Bingham, Jerome Frank, Eugene Ehrlich, and Karl Llewellyn. They posit that judges determine the outcome of a lawsuit before deciding whether the conclusion is, in fact, based on an established principle. They rejected the idea that a judge begins with some rule or principle of law as his premises, applies the premise to the facts and then arrives at the decision. They maintained that the decision of courts or opinions written by the courts are inaccurate depiction of actual thought processes which occurs in a judge's mind. As such, judges really decide on cases by feelings and not by judgment; judges' encounter forms the basis for a judicial conclusion by creating an emotional impulse. Judicial decisions are affected by the judge's view of public policy and by the personality of the particular judge rendering of the decision. Social, political, economic and cultural movements, coupled with the judge's individual temperament, personal impulse and lifelong experiences, create a predisposition whereby certain judges are inclined to arrive at certain decisions. Haines listed some of the factors which are most likely to influence judicial decisions. They are:

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[64] Timothy J Capurso, *How Judges Judge: Theories on Judicial Decision Making,* University of Baltimore Law, Vol. 29, No. 1, Article 2. Available at <https//scholarworks.law.ubalt.edu/lf/vol29/iss1/2> accessed 19 January, 2022.

1) "Direct influence" which include:
    a. Legal and political experience;
    b. Political affiliations and options; and
    c. Intellectual and temperament traits;
2) "Indirect influence" which includes:
    a. Legal and general education; and
    b. Family and personal associations, including wealth and social status.

On these unique idiosyncrasies, he said thus:

> … a judge's racial antagonism, his or her affection or animosity for a particular group or individual, a judge's economic or political prejudices, or even a singular experience or memory – 'may affect the judge's initial hearing of, or recollection (sic) … the credibility which the judge will attach to the witness's testimony[65].

Similarly, the conscious desire of the judges to be admired as someone who is not prejudiced against a particular class or group of persons in a particular case. Therefore, the written option of the judge is perceived as being a mere intellectualization or justification of the judge's desires. By so doing, judges do not discover and apply the law, but, rather, make the law. Their mathematical formula or equation for judicial option (decision) is S x P = D. S stands for Stimuli, multiplied by the judge's personality (for P) which produced the Decision (D).

On the side are the formalists who maintained that every judicial opinion is capable of being broken down into a three-part equation or mathematical formula, consisting of: the rules of law (R), the facts of the case (F) and the decision of the judge (D). This is represented by the formula R x F =

[65] *ibid*

D. they belief that judicial decisions are the products of two fixed elements: the facts and the rule of law. First, there is the existence and ascertainment of the actual facts of the dispute before the court. Second, the implicit assumption that the process of factual and legal case analysis is arrived at by a straight forward and air tight piece of deductive reasoning. These make a judge's decision predictable.

In the actual sense, the thought processes of the court are comprised of both the elements of realistic and formalists, namely, logic, legal experience, precedent, preparation of the lawyer, result-oriented, equity, constructionism and so on. What generally influence a particular judge may not necessarily influence another judge. The same thing also applies to how lawyers think of judges' decisions.

The author did not discuss the extent of judicial decision approaches in relation to the constitutional law doctrine of separation of power and legislative supremacy of the parliament.

The author reckoned with the impact of perception to judicial decision. It also offered useful insight in the understanding of judicial decisions and the factors that influence it (perception).

In conclusion, the researcher observed that scholars are divided on the exact role and impact of the judiciary in law making. There are the realists who maintained the view that law (legislation) is nothing other than what courts declare it to be. There are those who agree that judicial decisions also impact on the meaning and implementation of the legislation. This the courts do through their interpretive roles. There are equally disagreements among scholars on the best approach to statutory interpretation and the best theory to adopt. This disagreement arose from the inherent challenges with legislations which are made in general terms to be applied in specific situations. The opinion of these scholars offer useful guides to the researcher in attaining the primary aim and objectives of this research.

CHAPTER THREE

THE STRUCTURES, STRATEGIES AND TOOLS OF THE JUDICIARY IN PERFORMING ITS ROLE IN THE LAW-MAKING PROCESS

This chapter focuses on the conceptual, legal and theoretical framework of the role of the judiciary in law making, including the historical development of judicial law making and a review of related literature.

3.1 Separation of Powers

Man is a political animal. According to Awopeju Ayo, **"Whenever we have more than one man, there is politics because politics can be found in church, in a family, in a trade union, school, community, and state among others"[1].**

Because of the interaction among men in the pursuit of their policy priorities, hence the need to set a mechanism to check mate or resolve this inevitable conflict which might arise from such interactions. One of the mechanism put in place for resolving this conflict is through the doctrine of separation of power among the various institutions or actors of public policy. Separation of power is the division of governmental powers among the various institutions or branches of government as a preventive measure against tyranny and abuse of power. It is the division of powers and the functions of government, namely; the legislator, the executive and the judiciary, to act as a check and balance one another in other to prevent excessive and abusive use of power[2]. Under the constitutional law doctrine of separation of power, one branch

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[1] A Awopeju, Towards Better Public Administration: Public Administration Review, Vol. 7 No. 2, 2010) 116. Cited in Yusuf-Habeeb Munirat, *Public Policy and Administration Governance,* (being Lecture Note/Handout in Lecturer Note on GLC 802, for LLM in Legislative Drafting, National Institute for Legislative and Democratic Studies, NILDS)

[2] Ese Malemi, *The Nigerian Constitutional Law,* (3rd edn, Princeton Publisher Co., 2012) 65.

of government is generally not allowed to encroach or exercise the powers and functions of another branch of government[3].

The origin of separation of powers dated back to thousands of years and traced its development through many notable philosophers such as Aristotle, Thomas Aquinas, Machiavelli, John Locke and Baron de Montesquieu[4].

The modern conception of separation of powers developed largely during the enlightenment era of 17th and 18th century among Enlightenment thinkers, namely; John Locke and Montesquieu. Locke thought that was convenient to separate the legislative and executive powers of government so that legislature can act quickly and at intervals while the executive can constantly be at work[5]. In his book, "Second Treatise on Civil Government," he observed thus:

> It may be too great a temptation to human frailty, apt to grasp at power, for the same persons who have the power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they made, and suit the law, both in its making and execution, to their own private advantages[6].

Baron de Montesquieu succinctly put the doctrine of separation of powers as understood today. According to him,

> Political liberty is to be found only when there is no abuse of power. Experience shows that every man invested with power will abuse it by

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[3] *ibid*
[4] ME Glassman, *Separation of Powers: An Overview,* (Congressional Research Service, January 8, 2016) 3.
[5] Ese Malemi, *The Nigerian Constitutional Law, op cit,* p. 65.
[6] *ibid*, 66.

> carrying as far as it will go... To prevent this abuse, it is necessary from the nature of things that one power should be a check on another…. When the Legislature, Executive and Judiciary and Judicial Powers are united in the same person or body… there can be no liberty. Again there is no liberty if the judicial power is not separated from the legislative and executive…. There would be an end of everything if the same person or body, whether of the nobles or of the people, were to exercise all three powers. [7]

Ese Malemi observed that,

> …. concentration of power in the same person or body would no doubt lead to tyranny, because power corrupts and absolute power corrupts absolutely. Power needs to be clearly limited for it to be safely exercised. Power is nothing without control. Likewise, speed in a motor vehicle is nothing if brakes cannot be applied when necessary. Power without control is like a motor vehicle without a brake[8].

3.1.1. Theories and Justifications of Separation of Power

There are arguments among scholars on the philosophy of separation of power. Basically, there are two major theories of separation of power, namely: the division of labour in politics theory and the liberty theory.

a. **The Division of Labour in Politics Theory:** The proponents of this theory argue that separation of power in government developed from Adam Smith's theory of division of labour. According to this school, there should be division of powers for two basic reasons, namely:

i. To ensure specialization or expertise, and

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[7] Baron de Montesquieu, *The Spirit of Law,* (Espirit Des Lois, Chapter xi). Cited in Ese Malemi, *The Nigerian Constitutional Law, op cit,* 66; *Lakanmi & Anor v. AG Western State* (1971) 1 UIR 202.
[8] (Ese Malemi, *ibid,* 66).

ii. To ensure greater efficiency in government[9].

Separation of powers enables the various institutions of government acquire specialized capacities and also take advantage of the capacities of others in addition to their own.

b. **The Liberty Theory:** The proponents of this theory argue that liberty of citizens is the primary and real reason for the doctrine of separation of powers[10]. In the case of *Myer v USA*, Justice Louis Dembtiz Brand said thus:

> The doctrine of separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary powers. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among the three departments, to save the people from autocracy[11].

Similarly, in *USA v Brown*[12], Earl Warren CJ observed that **"the separation of power under the American Constitution was obviously not instituted with the idea that it would promote government efficiently. It was on the contrary, looked at as a bulwark against tyranny**[13]".

The doctrine of separation of powers is a deliberate regulatory step to prevent abuse of powers. Ese Malemi, succinctly put it thus,

> "The separation of powers is not a question of mere convenience, nor is it an accident of political history, but a deliberate regulatory step to prevent tyranny, by separating the powers of government, conferring them on different persons

[9] *ibid*, 69.
[10] *ibid*, 70
[11] *Myer v USA* (1962) 272 US 52
[12] *USA v Brown* (1965) 381 US 434
[13] *ibid*

> and making each arm of government to act as a check and balance on the other.…[14]

3.1.2 Checks and Balances

According to Alexander Hamilton and others, **"Men are not angels, and left unrestrained they will tend to abuse power"[15].** The inevitability of abuse of powers when concentrated on the same body of persons brought about the need for separation of power. However, there is no watertight or absolute system of separation of power applicable to any political governance.

The doctrine of checks and balances is a constitutional law concept which constitutes the various organs of government as necessary watchdogs on the exercise of the powers of one another as a preventive measure against tyranny, excesses and abuse of powers; by a means of checking and balancing their powers. The doctrine is not a means of political or constitutional face off and isolation. Instead, it is a means to good governance and efficiency. Tej Bahadur Singh expressed the view thus:

> Montesquieu's 'separation' took the form, not of impassable barriers and unalterable frontier, but of mutual restraints, or of what afterwards came to be known as 'checks and balances'. The three organs much act in concert, not that their respective functions should not ever touch one another. If this limitation is respected and preserved, "it is impossible for that situation to arise which Locke and Montesquieu regarded as the eclipse of liberty – the monopoly, or disproportionate accumulation of power in one sphere[16].

[14] Ese Malemi, *The Nigerian Constitutional Law, op cit,* 71.
[15] Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers,* (Clinton Rossiter, ed., New York: Penguin, 1961) 322.

[16] Tej Bahadur Singh, 'Principle of Separation of Powers and Concentration of Authority' (1996) *Institute's Journal* 1996, 1-2.

Similarly, Mathew Glassman observed that,

> The Constitutional structure does not, however, insulate the branches from each other. While the design of the Constitution aims to prevent the centralization of power through separation, it also seeks the same objective through diffusion. Thus, most powers granted under the constitution are not unilateral for any one branch, instead they overlap. The court has the power to review actions of Congress or the president, and Congress may by super majority, remove judges or the president from power[17].

3.1.3 Kinds of Separation of Powers

There is basically two kinds of separation of powers, namely; vertical and horizontal separation of powers.

i. **Vertical Separation of Powers**: This is the separation of powers among the three organs of government; the legislature, executive and judiciary. The legislature is the law-making organ of government. The executive is the law implementing and enforcing organ of government. The Judiciary interprets the law and adjudicates on disputes.

ii. **Horizontal separation of powers:** This is the division of governmental powers among the various federating units or constituents of the state such as federal, state and local government, depending on the system of government.

3.1.4 Constitutional Basis for Separation of Powers in Nigeria

Nigeria operates a federal and presidential system of government with a clear system of separation of powers at the horizontal and vertical levels. Under the Nigerian Constitution, governmental powers are distributed among the various branches and units of government.

[17] Mathew Glassman, *Separation of Power: An Overview*; (Congressional Research Service, January 8, 2016) 1.

Section 4, 5 & 6 of the Constitution provided for the legislative, executive and judicial powers of the government[18].

Section 4 of the Constitution provided for the law-making powers of the legislature. Section 5 vested in the executive the powers of implementing and enforcing laws. Section 6 provided for the judicial (adjudicatory and interpretative) powers of the judiciary. Similarly, section 5 (1) & (2) and section 7 of the constitution divided governmental powers among the various component or federating units of the federal, state and local government. Explaining the doctrine of separation of powers as contained in the Nigerian Constitution, Obafemi Awolowo stated thus:

> Under our Constitution, the three organs of government are separate and distinct both in respect of the functions which they perform, and of the functionaries who are entrusted with the performance of those functions. In other words, under our Constitution, no government functionary belongs to more than one organ. This is one of the three well known forms of separation of powers, and functionally the neatest of them all …. Our own form of separation of powers is fashioned after the American system. The ideal of this system is the provision of effective checks and balances in the government structure itself. By the adoption of this form, absolutism, oligarchy of any kind is outlawed; true democracy is entrenched in the Constitution. In other words, each of the three organs is obligated to keep within and guard its bounds of authority… But does this all means that each must operate in a watertight compartment regardless of considerations for each of the two?… Whilst the judiciary must be detached and independent from the other two organs and be

[18] See Constitution of the Federal Republic of Nigeria, 1999 (as altered)

manifestly seen to be so, the legislature and the executive must work in close and harmonious collaboration with each other, if the welfare of the people is to be truly and effectively served… It is quite clear that the objective of the legislature and the executive are one and the same – to promote and serve the best interest of the people. If they work at cross purposes or refuse to co-operate and collaborate with each other, the interests of the people would be seriously endangered. This point is reinforced on the ground of plain commonsense. When two persons or agencies are charged with joint responsibility to achieve a common objective, the two of them must constantly seek a consensus or, in the event of disagreement, one of the two must be allowed to have the last say. If each of the two, in the absence consensus, claims the right of last say then, the common objective will either be unattainable[19].

The Constitutional principle of separation of power is very sacrosanct in Nigeria legal system, such that any arrangement to the contrary which contravenes the provisions or spirits of the Constitution will be null and void, to the extent of the inconsistency[20].

3.2. The Law-making powers of Legislature

The legislature is the law-making organ or arm of government. It is the body charged with the primary duty of making laws, rules and regulations in other to ensure peace, stability, order, good governance and growth. It is also a vocal point in the discussions about policies, programmes and ideas and the place where important decisions are made.

[19] Obafemi Awolowo, *Separation of Powers among the Three Arms of Government*, (Voice of Courage) 172 – 175.
[20] s. 1(3) CFRN 1999

The legislative arm is also referred to as Parliament. Nigeria as a country operates a bicameral legislature system made up of the National Assembly which comprises of the Senate and House of Representative at the Federal level, and a unicameral legislature system made up of Houses of Assembly at the State level, and finally a unicameral system at the local government level made up of the councilors. Section 4 of the Constitution sets out the primary functions of the legislature. A combined reading of section 4(1) & (6) vested the legislative power of law making in the country in the National Assembly and House of Assembly respectively to make laws for the federation and the state[21]. Similarly, section 4(2) & **(7)** guaranteed the powers of the National Assembly and Houses of Assembly to make laws for the peace, order and good government of the federation or the state in the manners prescribed[22]. In *Ahmad v SSHA*[23]**,** the court held that:

> The organic structure created by part II of Chapter 1 of both the constitution of the federal Republic of Nigeria, 1979 and the 1999 are three organs of powers of the Federal Republic of Nigeria. Of these powers, legislative powers are vested in the legislature at both the Federal and State levels respectively. Judicial powers, both at the Federal and State levels are vested in the courts established for the Federation and the States under section 6 of the Constitution[24].

It is generally the duty of the legislature to formulate policies for good governance. Law making or legislation generally passes through different drafting and legislative processes. The drafting

[21] s. 4(1) & (5) of CFRN 1999.

[22] s. 4(2) & (7) of CFRN 1999

[23] *Ahmad v SSHA* (2002) 44 WRN 52 @558 paras F-H

[24] *supra*

process usually begins with a policy initiator (instructor)[25] briefing and instructing a drafter to draft a legislation that will reflect the policy priorities of the initiator.

Thornton provided instructive five stages of the drafting process, namely, understanding instructions, analyzing instructions, designing, composition and development, and scrutiny and testing of the draft. The drafter must always ensure that the draft legislation complied with the instructions of the policy initiator. Some of the check list of compliance or guidelines for a legislative drafter are:

i. That the draft achieves all the objectives of the instructions given by the initiator.
ii. That the legislative draft generally fits into a body of law.
iii. That the language of the draft are clear and unambiguous.
iv. That the legislative draft communicates in the simplest, plain and precise terms the intentions of the instructor.
v. That the draft comply with the basic requirements of the laws especially the constitution, in form and substance.
vi. That the draft is coherent and logical.
vii. That the draft cover or address all the subject matters relating to it.
viii. That the spellings, punctuations and styles adopted in drafting is consistent, accurate, structured, logical and in accordance with the form of the jurisdiction.
ix. That the draft is up to date with the social dynamics or realities of the society.
x. That the draft addresses matters of jurisdiction, vires (powers and duties), statutory limitation, existing laws, legislative functionality and practicality; taking cognizance of efficiency and accuracy, ultra vires, delegation of power, fundamental rights and human rights provisions (inalienable rights) and so on.

[25] the legislature for members for legislative bills, or the executive for executive bills, or a private person for private bill.

When the draft or legislation has successfully passed through the various drafting stages and legislative processes, it becomes a law upon the assent of the executive or veto of the legislature, as the case may be. Hence, it becomes the product of the policy initiator[26] who takes credit or discredit for same.

On the other hand, the legislative process of law making for the National Assembly and House of Assembly is provided for in Chapter V Part I and II of the Constitution[27]. Before a law can be made, a bill must be presented before the parliament, National Assembly or State Houses of Assembly, as the case may be. A bill is a draft copy of a proposed law which is presented before the parliament for deliberation. Section 58 of the Constitution provides thus: **"The power of the National Assembly to make law shall be exercised by bills passed by both the Senate and the House of Representatives and, except as otherwise provided by sub section (5) of this section, assented to by the President**".[28]

Section 62(4) of the Constitution provides that the power of the National Assembly to appoint a Committee of the House shall not extend to authorizing the House (National Assembly) to delegate to such a Committee the power to decide whether a bill shall be passed into law or determine any matter which it is empowered to determine by resolution under the provisions of this Constitution[29]. Section 60 of the Constitution guaranteed the power of National Assembly (Senate and House of Representatives) to regulate its own procedure including the summoning and recess of the House. Pursuant to the foregoing provision in section 60 of the Constitution, the Senate arm of the National Assembly enacted the Senate Standing Orders 2015 (as amended)[30]. Chapter XI of the Order provided for the "Categories and Procedure on

[26] In this case, the legislature who moved the motion and debated it until it was assented to as a law.
[27] Chapter V Part I and II of CFRN 1999
[28] s. 100 of CFRN 1999
[29] *ibid,* s. 103 (3) for House of Assembly.

[30] SSO 2015 (as amended)

Bills", that is to say, the various stages of bills or legislative process. Order 79(1) provides that every bill shall receive three readings previous to its passage, which readings shall be in different day, unless the Senate unanimously directs otherwise and the president of the Senate shall give notice at each reading whether it is first, second or third[31].

A bill could be executive, member or private bills[32]. A bill is said to be read the first time upon the short title of the bill being read aloud by the Clerk at the sitting of the House[33]. At the conclusion of the first reading of a bill or on any subsequent stage of a bill, a day to be names by the Committee on Rules and Business shall be appointed for next stage[34]. The next stage is the second reading of the bill for a possible debate on the general merits and principles of the bill[35]. After the second reading of the bill, it will proceed to the committee stage, a standing committee or committee of the whole Senate, as the case may be[36]. When possible recommendations and amendments have been made after the second reading and committee stage, the bill will proceed to a third reading. Generally, once a bill has passed the third reading stage, no amendment can be introduced to it unless in certain circumstances. In such a situation, a senator who wishes to amend or delete any provisions contained in the bill or introduce any fresh provision may give notice of his intentions on the order for third reading to move "that the bill be recommitted"[37]. After a bill has passed the third reading stage, there shall be produced a printed clean copy of it, signed by the Clerk of the House/Chamber where it emanated and endorsed by the Speaker or Senate President, as the case may be[38]. The next

[31] Or 79(1) SSO 2015 (as amended)
[32] *ibid,* or. 76 (a) – (c).
[33] *ibid,* or. 78 (6).
[34] *ibid,* or. 79(2).
[35] *ibid,* or. 80(10-(3)
[36] *ibid,* or. 81
[37] *ibid,* or. 86(1) and (2).
[38] *ibid,* or. 86(5) & (6).

stage is obtaining the concurrence of both House of Representative and Senate, and then Presidential assent[39].

3.3. The Judiciary and Law-Making Powers of the Court

The judiciary (court) is the organ of government that is charged with the duty of interpreting laws and adjudicating on the rights and duties of people, citizens, government and organizations in other to ensure peace, order and good governance in the country. It is the arm of government that is saddled with the great responsibility of checkmating legislative and executive abuses or excesses. Section 6 of the Constitution generally provided for the judicial or adjudicatory powers of court to determine issues bothering on the rights, duties, powers, functions and obligations of people including governments, institutions, companies, individuals and so on[40]. Section 6(5) of the Constitution listed the various courts, namely:

a) The Supreme Court of Nigeria;
b) The Court of Appeal;
c) The Federal High Court;
d) The High Court of the Federal Capital Territory, Abuja;
e) A High Court of State;
f) The Sharia Court of Appeal of the Federal Capital Territory, Abuja;
g) A Sharia Court of Appeal of a State;
h) The Customary Court of Appeal of the Federal Capital Territory, Abuja;
i) A Customary Court of Appeal of a State;
j) Such other courts as may be authorized by law to exercise jurisdiction on matters with respect to which the National Assembly make laws; and

[39] See generally Or. 86 – 88.

[40] s. 6(1) – (6) of CFRN 1999

k) Such other courts as may be authorized by law to exercise jurisdiction at first instance or on appeal on matters with respect to which a House of Assembly may make laws.

Pursuant to section 6 (5) (i) of the Constitution of the Federal Republic of Nigeria (Third Alteration) Act 2010, the National Assembly added the National Industrial Court in the list of courts contemplated in section 6(5)[41]. Also, pursuant to section 6(5) (j) and (k), various tribunals and courts has been established such as Area, Magistrates and Customary Courts.

3.4. The Law-Making Powers of the Court

There has been a great controversy or debate among scholars on whether courts (judiciary) can make law(s). Apart from the delegated legislation, serious question has arisen as to the nature and scope of the powers of the courts in relation to law making. Generally, section 4 of the constitution entrusted the law making powers of the state or federation on the legislature. Section 6 of the Constitution provided the foundation for the interpretive and adjudicatory powers of courts.

The fulcrum of this research work is on the role of the judiciary in the law making process. The judiciary contributes a lot to law making through the following means: delegated legislation, judicial review, judicial precedent and statutory interpretation.

3.4.1. Delegated Legislation

Delegated legislation which is also called subsidiary or subordinate legislation or statutory instruments are those instruments or legislations which are made under a delegated authority. It widely extend to other instruments such as rules, regulations, orders, notification, bye- laws,

[41] s. 6(6) (cc) of Constitution of the Federal Republic of Nigeria (Third Alteration) Act 2010.

policy decisions, directives and proclamations[42]. It is a legislation made by a body or person other than the legislature pursuant to powers conferred on it by an enabling statute. The Constitution generally vested the law making authority on the legislature to the exclusion of others under the principle of separation of powers[43]. In the case of *Ahmad v SSHA[44],* the court held as follows:

> The doctrine of separation of powers has three implications:
>
> a) That the same person should not be part of more than one of these arms or division of government.
>
> b) That one branch should not dominate or control another arm. This is particularly important in the relationship between the executive and the court.
>
> c) That one branch should not attempt to exercise the function of the other….Nor should a legislature make interpretative legislation, if it is in doubt it should head for the court to seek an interpretation"[45].

The exigencies of life have made it difficult or impossible for the legislature to legislate in all or every aspect of human endeavours, hence the need for delegated legislation[46]. Delegated legislation can only be made if the enabling statute or primary legislation has delegated the requisite enabling authority to the body or organization which must not exceed the authority delegated to it[47]. In the case of *Williams v MA Majekodunmi[48]*, the court held that: "**the fact is that the laws of Nigeria begin with the primary laws passed by the legislature itself, and then go to give the subsidiary legislation made by persons or bodies authorized by the**

[42] DT Dadem, L*egislative Drafting Manual*, (1st edn, LexisNexis Publisher, 2014) 119
[43] *Abaribe v Abia State House of Assembly* (2002) 14NWLR (Pt. 788).
[44] *supra*
[45]. *supra*

[46] *Singh v State of Punjab*, AIR A (1979) SC 321
[47] *ibid*
[48] *Williams v MA Majekodunmi* (1962) WRNLR 174 @ 178

legislature to supplement its enactment."[49] The Constitution authorized the various courts in Nigeria to make rules for regulating their practices and procedures[50]. Pursuant to this power, the various courts enacted their various court rules such as Supreme Court Rules, Court of Appeal Rules, Federal High Court Rules and National Industrial Court Rules, high court rules of various states and Federal Capital Territory, Abuja and so on. They provided for such issues as place of instituting proceedings, Form and Commencement of Action, Indorsement of Claim of Address, Issue of Originating Process, Service of Originating Process, Appearance, Summary Judgment, Parties, Pleadings, Filing of Written Address, Evidence, Interlocutory applications, Affidavit, Judgment, Probate and Letters of administration, Cost and so on.

The delegation of powers to the court to make subsidiary legislations to regulate their proceedings is not a short road to abdication from duty. The Constitution enjoined all the arms of government to discharge their duties effectively and efficiently[51]. Also, the legislature cannot purport to do by means of delegated legislation what is not permissible to it to do[52]. In *SPDCN Ltd v Ajuwa*[53] the court held that the National Assembly cannot exercise any power not specifically conferred on it and cannot purportedly enjoy the privilege of judicial inherent powers neither can it exercise judicial powers like awarding damages. Also, the court further stated that the court has no judicial powers to make any law or amend the Constitution to create an exception by extending the powers of the legislature to the adjudicatory powers of awarding damages[54]. Similarly, the Court held that the National Assembly cannot delegate its law making functions to a Joint Committee of the National Assembly[55]. The doctrine of *Delegatus non potest delegare* (a delegate cannot delegate) is to the effect that a delegate cannot sub-delegate

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[49] *supra*
[50] See genereally ss. 236, 248, 254, 259, 264, 269, 274, 279 and 284 of CFRN 1999.
[51] See the various oaths of offices.
[52] *SPDCN Ltd v. Ajuwa* (2015) 14 NWLR (pt 1480) CA 403
[53] *supra*
[54] *supra.*
[55] *supra.*

its functions and powers unless otherwise authorized or permitted to do so by the instrument or authority delegating the power to it[56]. Also, a delegate cannot exercise a power or an authority beyond the express or implied authority given to him[57].

Through the process of delegated legislation, courts have contributed immensely to the policy or law-making process.

3.4.2. Judicial Precedent

Judicial precedent also known as case law (*stare decisis* or judge-made law) is one of the ways in which courts have contributed immensely to law making. The legal realism theory led by Oliver Wendell Holmes sees law as the prophecies of what the courts will do in fact, and nothing more pretentious[58].

Judicial precedent is a principle or rule established in a previous case which is binding or serves as an authority for reaching a similar decision in subsequent cases. It is a notion which required similar cases to be subsequently treated similar. In the case of *Clement v Iwuanyanwu*[59]**,** Per Oputa JSC (as he then was) defined a precedent, inter alia, as an adjudged case or decision of a higher court considered as furnishing an authority or example for a subsequent similar or identical question arising on similar question of law. Obilade defined judicial precedent as **"judicial precedent or case law consists of law found in judicial decisions. A judicial**

[56] See *Attorney General of Bendel State v. Attorney General of the Federation* & 22 *Ors* (1982) 3NCLR.
[57] *AG Abia State v AG Fed*eration (2002) 9NSCQR 670; *AG Bendel State v AG Federation* (1981) 1 All NLR 85; *Ahmad v SSHA* (2002)15 NWLR (Pt 791)539
[58] Anthony D'Amato 'A New (and Better) Interpretation of Holmes' s Prediction Theory of Law' Northwestern University School of Law (2008), a-damato@law.northwestern.edu < https://scholarlycommons.law.northwestern.edu/facultyworkingpapers/163> accessed on 6th January 2022

[59] *Clement v. Iwuanyanwu* (1993) 3NWLR (Pt 107) 54

precedent is the principle of law on which a judicial decision is based. It is the *ratio decidendi* (literally, the reason for the decision[60].

The whole essence of judicial precedent is to treat similar cases of today in the same manner as they were treated yesterday[61]. The doctrine of judicial precedent is a central concept or one of the attributes of common law. It is one of the sources of Nigerian law, often referred to as case law[62]. Case law is defined thus: **"case law refers to that body of principles and rules of law which over the years, have been formulated or pronounced upon by the courts as governing specific legal situations"[63].**

Judicial precedent is based on the Latin expression, "**s*tare decisis et non quieta movere*"** which means "**to stand by a decision and not to disturb that which is settled".** In *Osakwe v Federal College of Education (Technical) Asaba*[64], the Nigeria Supreme Court, per Ogbuagu JSC (as he then was) defined *stare decisis* as:

> *Stare decisis* means to abide by the precedent where the same point came again in litigation. It presuppose that the law has been solemnly declared and determined in the former case. It does preclude the judges of the subordinate courts from changing what has been determined. Thus, under the doctrine of stare decisis, lower courts, are bound by the theory of precedent[65].

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[60] AO Obilade, The Nigerian Legal *System,* (Ibadan: Spectrum Law Publishing, 1990) 11 cited in HD Kutigi, *Ratio Decidendi and Judicial Precedent*, being a paper presented at the National Workshop for Legal and Research Assistants by the National Institute on Monday, 15th July, 2019) 2

[61] Emmanuel Nnaji Nnamani, Application of Stare Decisis and Judicial Precedence in Lower Courts in Nigeria, at the National Workshop for Area/Sharia/Customary Court Judges, 18 – 22nd Day of Mary, 2019.

[62] HD Kutigi, *op cit*, 2.

[63] JO Asein, *Introduction to Nigerian Legal System,* (Ibadan: Sam Bookman Publishers, 1998) 67

[64] *Osakwe v. Federal College of Education (Technical) Asaba* (2010) 10 NWLR (pt 1201) 1; *National Electric Power Authority (NEPA) v Onah* (1997) IWWLR (pt 484) p. 680 @ 688

[65] *supra*

Judicial precedent or *stare decisis*, **"requires that the principle of law on which a court bases its decision in relation to the material facts or issues before it must be followed by a court of coordinate jurisdiction or a court lower in hierarchy in future similar case"[66].**

3.4.2.1. Nature and Scope of Judicial Precedent

Judicial precedent has the nature and character of judgment-made law which is one of the sources of common law system of United Kingdom. Most of the former British colonies including Nigeria inherited the English legal system and its major feature of common law that is based on judicial precedent[67]. Kutigi, succinctly put it thus:

> In terms of material sources, judicial precedent is embedded in case decided by courts; and in terms of composition, at lease in the Nigerian Legal sense, it consists of the principles of common law and the doctrine of equity. The whole essence of judicial precedent is that it is a law developed or evolved by courts. This therefore poses a serious challenge to the common law on the claim that judges of the common law courts do not make law, whereas the doctrine is no doubt well entrenched in its system[68].

Judicial precedent in Nigeria context refers to the binding effects of decided cases of various courts in Nigeria and certain foreign countries that practice common law and principles of equity[69]. It is a principle that is anchored on the hierarchy of courts. Thus, whether decided cases are binding or merely persuasive authority to subsequent proceedings depends on the

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[66] ON Ogbu, *Modern Nigeria Legal System*, (Enugu: CID JAP Press, 2007) 130.
[67] EN Nnanani, *op cit*, 3-4.
[68] HD Kutigi, *op cit,* 4.
[69] EN Nnamani, *op cit,* 4.

hierarchy of the deciding court in relation to the court called upon in subsequent proceedings to abide or apply the decided case[70].

3.4.2.2. Types of Judicial Precedent

Precedent may be original, binding or persuasive. It can also be declaratory, absolutely authoritative or conditionally authoritative. It can also be vertical or horizontal.

i. **Original Precedent:** An original precedent arises where a new law is created and applied in a legal matter. It occurs when a point of law in a matter has never been decided before, such that whatever the judge decides constitutes a new precedent for subsequent cases[71].

ii. **Binding Precedent**: Binding precedent is a doctrine which required lower courts to be bound by the decisions of a higher court within the hierarchical structure of the courts[72]. As such, it requires that when a court is trying a case, it will have to ascertain whether a similar issue has been decided upon. Where a similar issue exists and is decided upon by a court of equal or higher hierarchy it, the court is required in the present case to follow the principle (precedent) established in the earlier case.

iii. **Persuasive Precedent:** A persuasive precedent is a precedent that is not binding on a court, as a court is not required to follow it but takes it into consideration in deciding a case before it. Kutiji, gave instances of persuasive precedent thus:

> The following are some examples:
>
> i. Decisions of courts lower in the hierarchy. For instance, the Court of Appeal may follow a High Court decision, although it is not bound to do so.
>
> ii. Decisions of foreign courts. These are usually cited where there is a dearth or total lack of local authority on a point.

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[70] *ibid*
[71] HD Kutiji, *op cit,* 4
[72] *ibid*, 4-5.

iii. *Obiter dicta* of courts higher in the hierarchy.

iv. Persuasive authority may also be found in legal writing in textbooks and periodicals, where there is no direct authority in the form of decided cases[73].

In *FRA Williams v Daily Times (Nig.) Ltd*[74], the court held that the decisions of courts of co-ordinate jurisdictions are persuasive in nature. Similarly, in *Yahaya v. State*[75], the court held that English authorities are merely persuasive to Nigerian court.

iv. **Declaratory Precedent**: A Declaratory precedent is one which declares an existing principle (precedent) in a legal matter. It seeks to apply an already existing principle in a subsequent matter.

v. **Absolutely Authoritative Precedent**: is a precedent which requires a court to compulsorily follow the principle or the judicial decision in a case. In an absolutely authoritative precedent, the subsequent court is bound to follow the decision of the previous court even if it finds it to be a wrong judgment. For instance, all courts in Nigeria are compulsorily bound by the decisions of the Supreme Court.

vi. **Conditionally Authoritative Precedents**: A conditionally authoritative precedent occurs where a precedent is generally absolutely authoritative but could be disregarded in certain special circumstances such as where the decision was wrong or contrary to law and reason.

Judicial precedent operates in two ways: vertical and horizontal. Vertical precedent occurs when a court is bound by the prior decision of all the courts that are higher than it in hierarchy[76]. Horizontal precedent occurs when courts are bound by their own prior decisions and those of

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[73] HD Kutiji, *op cit*, 5.
[74] *FRA Williams v. Daily Times (Nig.) Ltd* (1990) 1WRN 1@p. 29
[75] *Yahaya v. State* (2002) 11WRN 1 SC
[76] *Osom v. Osom* (1993) 8NWLR (pt 314) 678; *Okonji v. Mudiaga Odge* (1985) 10 SC 267.

a court of concurrent jurisdiction[77]. For instance, every division of the Court of Appeal is bound by its previous decisions or decisions of another division[78].

3.4.2.3. *Ratio Decidendi* and *Obiter Dictum*

It is necessary to ascertain what is binding in a judicial precedent. When giving a decision in a case, the court sets out the facts, the law applicable to the case and then deliver a decision on the case. It is not all the aspects of the decision in the earlier cases that are relevant in determining the principle decided in the case[79]. *Ratio decidendi (ratio decidendum* in the singular) is a Latin expression which means the reason for the decision. It is the principle of law on which a decision is based. It demonstrates the very essence of a decision[80]. Dias defined *ratio decidendi* in three folds. First, it the reason for the decision. Secondly, it is the rule of law that was proffered by the court as the basis for the decision. Third and lastly, it is the rule of law which others regard as being of binding authority[81]. Salmond sees ratio decidendi as the rule of law that was applied by, and acted on, by the court or the rule which the court regarded as governing the case[82]. Ilochi Okafor defined *ratio decidendi* as, **"the principle of law, based on material facts of the case, on which the case has been ultimately decided"[83].** When a court delivers a judgment in a case, it sets out the facts which it finds to be material and established on evidence, then it applies the law to those facts and arrives at a decision, for which it gives the reason *(ratio decidendi)*[84]. The importance of ratio decidendi lies with the ultimate connection of the facts of the case upon which the relevant principle of law applied. This is because, it is on these facts that subsequent courts can find the necessity to distinguish

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[77] HD Kutigi, *op cit,* 13.
[78] *ibid; Usman v. Umaru* (1992) 7NWLR (PT 94) 377.
[79] See HD Kutigi, *op cit*, 5.
[80] EN Nnamani, *op cit*, 6.
[81] RWM Dias, *Jurisprudence*, (5th edn, London. Butterworths, 1985) 140.
[82] Salmond, *Jurisprudence*, (12th edn, Bombay: N. M Tripathi Private Ltd, 2001) 176 -177.
[83] Ilochi Okafor, 'The Appellate System of Justice in Nigeria' in TO Elias ed, *Nigeria Essay in Jurisprudence* (Lagos, MIJ Publishers, 1993) p.314.
[84] HD Kutigi, *op cit*, 6.

a supposedly binding decision on the ground that the fact in the previous case are dissimilar with the facts of the subsequent case[85].

On the other hand, an *obiter dictum* (*obiter dicta* in plural) is a Latin phrase which means a word said while travelling or along the way[86]. It is an important pronouncement of a court in a decision which was not the basis upon which the decision was reached or the issues and facts in the case were resolved[87]. In the case of *AIC Ltd v NNDC*[88], per Edozie JSC (as he then was) said that the word "obiter" simply means in passing, incidental or cursory. Similarly, in *Abacha v Fawehinmi*[89], the Supreme Court remarked that an *obiter dictum* is what a court says in his decision that goes beyond what is necessary to decide the particular case. It is an expression of opinion that was made in delivering a decision by a court which is not necessary for the decision and as such cannot constitute the *ratio decidendi* (reason for the decision) of the case.

Since *obiter dictum* is not the reason for the decision, it is not binding and cannot constitute the subject (matter) of an appeal[90]. However, it may serve as a persuasive authority to subsequent courts in case where the facts are similar with the factual basis for an *obiter dictum*. This is because, a previous court or superior court in deciding a case before it, may go on a speculation about what its decision would or might have been if the facts of the case (factual circumstance) had been different[91]. The persuasive effect of an *obiter dictum* depends on a consideration of certain factors. Philips succinctly highlighted the factors thus:

> That weight to be given to an *obiter* depends on the following factors: the ranks of the court, the prestige of the judge, whether there were different *ratios* for

[85] EN Nnamani, *op cit*, 7.
[86] HD Kutigi, *op cit*, 7.
[87] *Ibid,* 15
[88] *AIC Ltd v NNDC* (2005) 11NWLR (pt 937) 563
[89] *Abacha v Fawehinmi* (2002) 6 NWLR (pt 660) 228
[90] *supra*
[91] HD Kutigi, *op cit*, 7.

the same decision, whether the action was opposed or the point was argued by counsel; the reliability of the reporter[92].

A persuasive *obiter* may sometime crystalize into a binding decision. In *Oshodi & 2 ors v Eyifunmi*[93], per Okey Achike JSC (as he then was) remarked thus: **"If a judge is a luminary of high standing, his *obiter dictum* may, in due course, crystallize to good law. However, if it is the contrary, the *dictum* will sooner than later be ignored completely"[94].**

3.4.2.4. Distinguishing of Cases

Distinguishing of cases is another important feature of judicial precedent. As stated earlier, it is the *ratio decidendi* in a case that is binding. Distinguishing of cases occurs when a court has to decide whether the facts or issues decided in the previous case, which is considered a precedent, are similar or relatively the same with the material facts or issues before it, upon which it is called upon to follow in arriving at its decision[95]. Ogbo stated thus:

> Where a previous decision is cited to a court in a future case as a binding precedent, the court has a duty to examine the facts of the instance case in relation to the facts of the previous case sought to be relied on as a precedent. Where the court finds some material different in the facts of the two cases, the court may distinguish the previous decision and will therefore not follow it[96].

Material facts are those facts which the court regarded as relevant in arriving at its decision. They are those facts which have legal consequences. While material difference occurs when the facts canvassed or proved in the previous decision which formed the basis of its decision

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[92] OH Philips, *A First Book of English Law*, (6th edn, London: sweet & Maxwell, 1970) 194-195.
[93] *Oshodi & 2 ors v Eyifunmi* (2000) 3NSQR, 320
[94] *supra*
[95] E N Nnamani, *op cit*, 17.
[96] ON Ogbu, *op cit*, 156.

are substantially different from those before the subsequent court. The rationale for distinguishing cases is that where cases are not the same or at lease similar, the basis for the subsequent court to follow the precedent in a previous case ceases to exist and as such judicial precedent and its binding effect will be inoperative[97]. In the case of *Kenon & 4 Ors v Tekan & 5 Ors*[98], the Supreme Court held, inter alia, that for a previous decision to be binding on a subsequent court, the facts and issues that were pronounced upon by the previous court must be same or similar with the facts and issues in the subsequent case. However, the facts need not be absolutely the same[99]. To this effect, the Supreme Court in A*detoun Oladeji v Nigeria Breweries Plc*[100], per Niki Tobi JSC (as he then was) stated as follows:

> Factual distinctions or differences in cases can only avail a party when they are germane or material to the stare decisis of the case. Stare decisis … is based on a certain state of facts which are substantially the same …. This also means that the facts needs not to be in all four in the same sense of exactness or exactitude. There can hardly be any two cases where the facts are exactly the same, and the doctrine of *stare decisis* which has been built by the judicial system over the years does not say that the facts must be exactly the same. Thus, there could be inarticulate differences that will not necessarily hinder the application of the doctrine[101].

Distinguishing of cases has to do with the identification of the material differences between the facts and issues which informed the reasoning (*ratio decidendi*) of the previous case from the

[97] EN Nnamani, *op cit*, 17.
[98] *Kenon & 4 Ors v Tekan & 5 Ors* (2001) 14NWLR (pt 732) 45 @ 89
[99] EN Nnamani, *op cit,* 18.
[100] *Adetoun Oladeji v Nigeria Breweries Plc* (2007) 5NWLR (op 1027) 415
[101] *supra*

subsequent case, as to make the decision in the previous case not binding on the subsequent case[102].

3.4.2.5. Law Reporting and Judicial Precedent

Efficient and effective system of law reporting is *sine qua non* for judicial precedent. Law report is a published record of the decisions of courts that are cited for use as precedent in subsequent cases[103]. It usually contain such matter as the name of the parties, the title of the case, the name of the court and the judicial division, the part, volume, year, page, a brief statement of the facts and its history, the issues for determination, a brief summary of the case, legal arguments as canvassed by the counsel or parties, an analysis of the facts and the legal arguments, the opinion of the court in relation to the legal conclusion and judgment.

Law report provide the basic source of judicial precedent. It is the bedrock of judicial precedent[104]. It is through law report that the subsequent court will be able to know or study the facts and issues decided upon in a previous case and how to relate it to the one before it.

3.4.3. Judicial Activism

Judicial activism is one of the veritable instruments for the observance of democracy and rule of law. It involves a practical and proactive approach to the interpretation of laws in accordance with the ever revolving circumstance of human existence. In the case of *Attorney General Bendel State v Attorney General of the Federation*[105], Obaseki JSC (as he then was) said:

> While language of the Constitution does not change, the changing circumstances of progressive society for which it was designed can yield a new

[102] EN Nnamani, *op cit*, 19; ON Ogbu, *op cit,* 157.
[103] HD Kutigi, *op cit*, 15.
[104] *ibid*
[105] *Attorney General Bendel State v Attorney General of the Federation* (1981) 10 SC 179–180

> and further importance to its meaning. Thus, principles upon which the Constitution is designed rather than the direct operation or literal meaning of the words used should measure the purpose and scope of its provisions[106].

Many a time courts indulge into judicial activism in an effort to discern the intention of the legislature in other to give effect to them or attain the justice of a case. On the relevance of judicial activism to the dynamics of the society, Hon Justice Michael Kirby observed thus:

> Nostalgic dreams of judges without choices, devoid of creativity, abhoring all 'activism' may be found in fairy stories. But for judges, lawyers and citizens who are obliged to live in the real world, it is necessary to face up to the requirements of judicial choice. Choice about the meaning of a constitutional text, choice about the interpretation of ambiguous legislation, choice about the application, extension, confinement or elaboration of old principles of the common law to new facts, circumstances and times[107].

The significance of judicial activism in the interpretation of law cannot be over emphasized[108]. Considerably, the bulks of laws are contained in sterile documents and as such must require an active judiciary to imbue it with life. Oputa JSC (as he then was) succinctly put this point when he stated thus;

> The law will have little relevance if it refuses to address the social issues of the day. Legislators make laws in the abstract but the court deals with the day to day

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[106] *supra*

[107] M Kirby 'Judicial Activism: Power without Responsibility? No, Appropriate Activism conforming to duty', 30, *Melbourne University Law Review*, 577–578, (2006)

[108] P C Eboh 'A New Dimensional Approach to the study of the Legal Justiceability or Enforceability of Chapter II of the Constitution on Fundamental Objectives and Directives Principles of State Policy' presented on the 12th day of August, 2019. < https://unzik-edu.academia.edu/EbohPatrickChinedu> accessed on 21st January, 2022.

> problems of litigants and attempts to use the laws to solve these problems in such way as to produce justice.[109]

Similarly, in the case of the *Federal Republic of Nigeria v Osahon,* the Supreme Court stated thus:

> It is instructively posited that the words used in legal instruments may sometimes be abstract, or that their meaning indeterminate when applied to various concrete circumstances, or that the application of law requires an intervening act of interpretation, of which the precise nature and significance is largely undefined and contested[110].

Judicial activism serves as a legitimate way of checkmating the excesses of government under the constitutional doctrine of checks and balances and separation of powers[111]. For instance, Kayode Eso, JSC (as he then was) lambasted the executive rascality of the then Military Governor of Lagos State that illegally and unconstitutionally ejected or tried to eject Chief Chukwuemeka Odumegwu Ojukwu, in the following words:

> I think it is a very serious matter for anyone to flout a positive order of a court and proceed to taunt the court further by seeking a remedy in a higher court while still in contempt of the lower court. It is more serious when the act of flouting the order of the court, the contempt of the court, is by the Executive under the Constitution of the Federal Republic of Nigeria 1979. The Executive, the Legislature (while it lasts) and Judiciary are equal partners in the running of a successful government... The organs wield powers and one must never exist in

[109] C Oputa, 'Toward Greater Efficiency in the Dispensation of Justice in Nigeria, in Law Justice and Stability in Nigeria, Essay in Honour of Justice Kayode Eso' (JSMB, Ibaddan, 1993)
[110] *Federal Republic of Nigeria v Osahon* (2006) 4 MJSC 1 at 57–58
[111] I Imam 'Judicial Activism in Nigeria: Delineating the extend of Legislative-Judicial engagement in Law making' ICLR 2015, Vol 15 No 15

> sabotage of the other or else there is chaos. Indeed there will be no federal government. I think, for one organ, and more especially the Executive, which holds all the physical powers to put up itself in sabotage or deliberate contempt of the other is to stage an executive subversion of the Constitution it is to uphold. Executive lawlessness is tantamount to a deliberate violation of the Constitution. When the Executive and the Legislature together and which permits the judiciary to co-exist with it in the administration of the country, then it is more serious than imagined[112].

P C Eboh summarized the importance of judicial activism in the following words:

> It is the researcher's view that a vibrant, proactive and independent judiciary is necessary in other give full effect to the provisions of Chapter II of the Constitution. This is necessary in other to interpret laws in the manner that will meet the dynamics of the society. For instance, it will be otiose or obsolete to argue in this modern era that the right to education or health is not legally enforceable. Argument of that nature might be tolerated in some decades or generations past, but not in this current generation. It is recommended that Nigeria courts should borrow leaves from the scholarly precedents set out in the earlier pronouncements of activist Justices of the Supreme Court in many cases such as *Military Governor, Lagos State & ors v. Chief Emeka Odumegwu Ojukwu supra; Director of SSS v. Olisa Agbakoba* (1999) 3 NWLR (Pt.595) 340 SC; *FRN V Osahon* (2005) 25 NSCQR 512; *Lakanmi v. Attorney General Western Nigeria* (19700) LPELR SC58/69[113].

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[112] *Military Governor, Lagos State & ors v Odumegwu* Ojukwu (1986) All NLR 233
[113] P C Eboh, *op cit*

3.4.4. Interpretation of Statutes

Statute is a written law that is made by the legislature that sets out the general proposition of law[114]. In the case of *Ugwu v. Ararume[115]*, the Supreme Court defined a statute thus: **"A statute is the will of the legislature and any document which is presented as a statute is an authentic expression of the legislative will"[116].**

Interpretation is the primary function of a court, just as statute is the starting point for interpretation[117]. The interpretive duty of the court is primarily anchored on the existence of a statute made by the legislature. This found expression in the Latin expression ***"indicium est quasi juris dictum"*** which means "**judgment, as it were, is a declaration of law".** This raises the question or argument as to whether courts make law or can make law. In the case of *Dokubo Asari v FRN[118]*, the court held as follows: **"Courts do not make laws. They interpret laws. Courts cannot amend the Constitution. Courts cannot suspend the Constitution or any part thereof".** Similarly, in *Cotecna Int'l Ltd v IMB Ltd[119]*, the Supreme Court, Per Niki Tobi JSC (as he then was) stated thus: **"As the role of the legislature is that of making laws, or law making, the role of the judiciary is that of the interpretation of the laws".**

Since the primary duty of the court is to interpret statute, it will be expedient to understand or define the concept of statutory interpretation and the necessity of it. Interpretation of statute is the art of discovering the true meaning of a statute. It is the process of determining the true meaning of the words used in a statute[120]. It is the exercise of discovering the meaning of words and expressions used in a legislation to enable courts apply them in the determination or

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[114] Joy Adesina, *Meaning of Statutes*, (Being a Lecture Handout/Note on Statutory Review & Interpretation of Statute, NILDS, Second Semester 2016/2017session) 1.
[115] *Ugwu v Ararume* (2007) 12 NWLR (pt 1048) p. 367 @ 498 paras A - C
[116] *supra*
[117] RN Jain, 'Approaches to Interpretation of Statute (2010)' *Submitted to Alliance Universities, New Delhi*, 5
[118] *Dokubo Asari v FRN* (2007)12NWLR 9pt 1048) p. 320,
[119] *Cotecna Int'l Ltd v IMB Ltd* (2006) 9NWLR 9pt 985) p. 275
[120] N Jain, *op cit*, 1.

adjudication of the matters before them[121]. In the case of *Blacklawson Int'l Ltd v Papierwence Aschaffen Burg*[122], Lord Reid Stated thus: "**We often say that we are looking for the intention of parliament; but that is not quite accurate. We are seeking the meaning of the words which parliament used. We are seeking not what parliament meant, but the true meaning of what they said"**[123]. Similarly, in the case of *Savannah Bank (Nig) Ltd v Ajilo*[124], per Obaseki JSC (as he then was) succinctly express the opinion thus: **"The discovery of the intention of the law maker as conveyed by the words of the statute is what the search is all about when the court embarks on statutory interpretation."** Also, in the case of *AG of Bendel State v AG of the Federation*[125], per Obaseki JSC (as he then was) expressed the view that: **"Words are the common signs that men make use of to declare their intentions to one another"**. The need for statutory interpretation arises because words used in a legislation do not generally mean the same thing to the generality of the people. Also, biological make up (genetic/nature) and environment (nature) may influence one's perception or understanding of things. Adesina succinctly demonstrated the importance of statutory interpretation in the following words:

> Statutory interpretation is indeed necessary as words used in a statute tend to carry meanings different from the everyday usage of the same words. At times, the words used in an enactment carry plain meaning and are easy to comprehend by any one reading the provision. Some other times, the words are ambiguous or vague and carry different connotation to different people. At the same time, the words at the time of the enactment may mean one thing and years later connote something different. Example of words carrying different meaning at

[121] JO Adesina, *op* cit, 1.
[122] *Blacklawson Int'l Ltd v Papierwence* Aschaffen Burg (1975). AC591 @ 613
[123] *supra*
[124] *Savannah Bank (Nig) Ltd v Ajilo* (1989) 1 NWLR (pt 97) 305
[125] *AG of Bendel State v. AG of the Federation* (1981) 10 SC1

different time include the following: Remorse-a word which in time past meant compassion but today means repentance or contriteness; Let- which in time past meant prevent or bar but today means allow.

Since words are not the perfect means of expression of intention, that is subject to ambiguity, unforeseen and inevitable circumstances such as technological inventions makes it difficult to apply the law the way it is, or the law as it is may contain some uncertainties due to some interest or compromise.

With the reasons listed above amongst others, the need arises for interpretation of statutes by the court since they aid in the implementation of these laws.

Put differently, statutory interpretation is necessary because legislations often are drawn up by draftsmen using general terms that must deal with both the present and future situations. Yet the draftsmen's capacity to anticipate the future is often limited. Also, words themselves do not usually have static meanings, as their usage changes with time. In fact, even the best of legislation is not often without ambiguities. And a statute not properly interpreted may occasion a miscarriage of justice, thus working undue hardship on an innocent citizen. …

The year was 1958. A Professor of Law going by the name H. L. A. Hart created a hypothetical situation which has endured to this day illustrating the necessity to interpret statute. Professor Hart posted a notice "No vehicle in the park"

Looking at the statement on the surface, it appears too straightforward and unambiguous for anyone to complain about. However, a closer look at the sentence is what has thrown Legal philosophers into an irresistible pandemonium centuries after the hypothesis was created. Myriad of questions

> has flown, is still flowing from this seemingly straightforward and innocuous statement some of which are: "What about bicycles? Strollers? Skate boards? Toys-cars? Air-planes? Wheel-chairs? An Ambulance? Hair clip? Handbags ? etc[126]

In any organization or institution that one finds himself, it is likely that he will be required to analyze and interpret statute. An understanding of the tools and techniques of statutory interpretation will help one to understand the possible effect a statute may have on him or others[127].

Words are imperfect symbols of meaning and it is difficult to achieve one certain meaning. The meaning of words depends on the context in which are used and they change over period of time[128]. The inherent difficulties associated with "words" are also found in statutes which are usually written in general terms. This makes it difficult for the courts to apply the general provisions or words of the statute to specific issues or situations[129]. However, an understanding of the theories that govern how courts interpret statutes will equally aid the legislature in making effective legislations. K Clark and M Connolly stated the preliminary steps to statutory interpretation thus:

> There are three important preliminary steps you should take before attempting to interpret a given statute:
>
> 1. Read the Statute: The primary language of the statute should always serve as the starting point for any inquiry into its meaning. To properly understand and

[126] JO Adesina, *op cit,* 3-4.
[127] K Clark and M Connoly, *A Guide to Reading, interpreting and Applying Statute*, (The Writing Centre, George Town University Law Centre, 2017) 1
[128] Valerie C Brannon, *Statutory Interpretation Theories, Tools, and Trends,* (Congress Research) 1.
[129] *ibid*.

interpret a statute, you must read the text closely, keeping in mind that that your initial understanding of the text may not be the only plausible interpretation of the statute or even the correct one.

2. Understand your client's goals: Make sure that you have a firm grasp of your client's goals and the underlying facts of your client's legal problem so that you will be able to determine which statutes are relevant to your case[130].
3. Confirm the statute is still good law. Be sure Sherardize or Key Cite the statute to determine:

(a) whether the statute or parts of the statute have been repealed or otherwise invalidated;

(b) whether the statute has been amended; and

(c) Whether there are any court decisions that can guide your analysis of the statute.

There are various aid and tools to the interpretation of statute, namely; literal, golden, mischief and purposive rules and so on.

a. Literal Approach

Literal interpretation is also known as the ordinary or plain language rule of interpretation. It is the interpretation of a statute in its plain, ordinary, direct, unequivocal and natural meaning. It requires the understanding of a statute in their natural, ordinary or popular sense[131]. Courts generally assume that the legislature uses common words in their popular or plain meaning as also used in the common speech of men[132]. It requires courts to give the words a statute the

[130] Katharine Clark and Matthew Connolly, *A Guide to Reading, Interpreting and Applying Statutes*, (The Writing Centre, Georgetown University Law Centre, 2001) 1.
[131] N Jain, *op cit*, 5.
[132] See F Frankfurther, *Some Reflections on the Reading of Statutes*, 47 Colum: L REV 630, 663 (1958) cited in VC Brannon, *op cit*, 19.

meaning which an ordinary or reasonable person would understand them to have[133]. In the case of *Ibrahim v Barde*[134], per Uwais CJN (as he then was), the court stated thus:

> It is a cardinal rule of the construction of statutes that statutes should be constructed according to the intention expressed in the statutes themselves. If the words of the statutes are themselves precise and unambiguous, then no more is necessary than to expound the words in their natural and ordinary sense. The words of statute do alone, in such a case, best declare the intention of the law maker[135]**.**

The literal rule of interpretation is anchored in the Latin expression ***"Verbis wet non est recelendum"*** which means **"From the words of the law, there must be no departure has to be kept in min**d**".** It follows the maxim **"***Absoluta sentantia expositore***"** which translates to **"*Absolute sentence need no expositor"***, that is to say, plain language does not need an interpreter.

The meaning of a word may be influence by its context. This is expressed in the maxim *noscitur a sociis* which means that the meaning of an unclear word or phrase can be determined by the words immediately surrounding it, that is to say, by its associate[136]. Sometimes, courts are equally confronted by the challenge of defining or ascertaining what is the ordinary meaning of a word or phrase. Brannon posited that:

> Judges may use a wide variety of materials to gather evidence of a text's ordinary meaning. In many cases, 'simple introspection suffices, as judges are English speakers who presumably engage in everyday conversation like

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[133] K Clark & M Connolly, *op cit*, 3.
[134] *Ibrahim v Barde* (1996) 9NWLR (pt 474) 513
[135] *supra*
[136] N Jain, *op cit,* 5.

> the rest of the general public. Judges also turn to dictionaries to help inform their understanding of a word's normal usage. Judges may then have to choose between multiple definitions provided by the same dictionary or turned to books to discover a word's ordinary meaning, drawing from works… Finally, judges may look for evidence of normal usage elsewhere in the law, such as in judicial decisions or in other governmental materials[137].

The literal rule prevents a court from changing the language of the law with the aim or intention of aligning it with its beliefs about what is fair and reasonable[138].

b. Golden Rule:

Sometimes, courts may depart from the literal or plain rule of interpretation where it will occasion injustice or lead to a miscarriage of justice. In the case *Awolowo v Shagari*[139], per Kayode Esq JSC (as he then was) stated thus: **"where the words are used in special context in connection with a usage of a trade or profession, the literal rule may not be applied"**. The golden rule of interpretation can be used to avoid the effect of a literal interpretation where a plain construction will lead to absurdity, inconsistency, miscarriage of justice or against public policy. It seeks to interpret a statute according to the legislative intent, by making a holistic examination of the text of a statute and the context in which it is used. In *Warburton v Loveland*[140], per Burton J, observed thus:

> I understand that this is a rule in the construction of methods, in the first case, the grammatical meaning of the words must be followed, if it contradicts or is inconsistent with the stated purpose of the statute, or contains any

[137] V C Brannon, *op cit*, 20.
[138] N Jain, *op cit*, 8.
[139] *Awolowo v Shagari* (1979) NSCC 87
[140] *Warburton v Loveland* (1828) 1 Hud & B 623 @ 648

negligence, retaliation, or inconsistency, the grammatical meaning should be modified, expanded, or abbreviated….[141]

Similarly, in *Becke v Smith*[142], per Parke J stated as follows:

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

The rule of golden interpretation can be applied in a narrow or wider manner, depending on the one which generally reflects or communicates the intention of the legislature. It may be applied in the narrow sense where there is some absurdity or ambiguity in the words used in the statute[143]. In the case of *R v. Allen*[144], the defendant was charged with bigamy under section 57 of the Offences against the Person Act 1861. Under that section, it was an offence to marry while someone's spouse is still alive and not divorced. The court held that the word "marriage" could not in the context of the section mean "become legally married" since that could never apply to someone who is already married to someone else. In other to achieve the intention of the legislature, the court interpreted marry" as meaning to go through a second ceremony of marriage.

[141] *supra*
[142] *Becke v Smith* (1832) 150 ER 724 @ 726.
[143] *R v Allen* (1872 – 1873) L R 8 @ B 69.
[144] *supra*

On the other hand, the wide interpretation mat be used to avoid an obnoxious result which is against the principles of public policy[145]. In the case of *Re Signsworth*[146], a man murdered his mother and then committed suicide. The court was invited to interpret section 46 of the Administration of Estates Act, 1925 which entitled the child of a deceased who died intestate to inherit substantially from the deceased property. The members of the deceased mother challenged the provision as the children of the deceased son stood to inherit substantially from the deceased mother's property. The court, relying on the golden rule of interpretation, prevented the children of the deceased son from inheriting and profiting from the crime of their deceased father on the grounds of public policy. Per Pat Acholonu JSC (as he then was) succinct summarized the purpose of the golden rule in *ADH Ltd v AT Ltd* [147] thus:

> The dictates of the principle or the doctrine of Golden Rule in statutory interpretation imposes on the court the duty to give a construction that seeks to liberate and expand the horizon of the law to make it a living law that would cater for the future. I believe that where a provision in a statute is liable to be construed either in the positive or in the negative form or connotation, then it is definitely more beneficial to adopt the interpretation that is more in tune with the public (wish, will) and benefit[148].

c. Mischief Rule:

The inadequacy of the literal and golden rule of interpretation brought about the need for the mischief rule. The mischief rule is a rule of interpretation which sets out to determine the exact scope and extent of the mischief that legislation aims at redressing, and helping courts to interpret the legislation in such a manner which will suppress the mischief while also enhancing

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[145] *Re Signworth* (1935) Ch 89.
[146] *supra*
[147] *ADH Ltd v AT Ltd* (2006) 10NWLR (pt 989) 635
[148] *supra*

the remedy. In the case of *Onyeanusi v Miscellaneous Offences Tribunal*[149], per Uwaifo JSC (as he then was) stated as follows:

> In order to properly interpret any statute, it is as necessary now as it was when Lord Coke reported Heybon's case to consider how the law stood when the statute to be considered was passed, what the mischief was for which the old law did not provide and the remedy provided by the statute to cure that mischief[150].

When applying the mischief rule, the court is mainly inquires whether the legislature in making the legislation intended to remedy a particular mischief, even though a literal application of the legislation might suggest otherwise or not cover that intention. Mischief rule gives more discretion to the court than the literal and golden rule. It gives the court justification for going behind the actual wording of the legislature in an effort to consider and ascertain the mischief which the legislation aimed at rectifying.

Mischief rule originated from Heydon's case[151]. In that case (Heydon's case), the court listed four conditions for the application of the mischief rules as follows:

> And it was resolved by them, that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law, four things are to be discerned and considered:
>
> 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.

[149] *Onyeanusi v Miscellaneous Offences Tribunal* (2002) 12NWLR (pt 781) 227
[150] *supra*
[151] Heydon's case (1584) 76ER 637 at the Exchequer of Pleas Court, Coke J

> 3rd What remedy the parliament hath resolved and appointed to cure the disease of the commonwealth.
>
> And, 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 intentions and evasions for continuance of the mischief, and pro private commando, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono public[152].

The mischief rule as established in the Heydon's case was considered and applied in the case of *Smith v Hughes* [153]**.** In that case, the defendant prostitutes were calling to men in the street from balconies and tapping on windows. Under the Street Offences Act 1959, it was an offence for prostitutes to loiter or solicit in the street for the purpose of prostitution. When charged under the provision, the defendants argued that they were not "in the street" as required by the statute. The court applied the mischief rule to find them guilty on the ground that the purpose and intention the statute was to address and remedy the mischief of harassment from prostitutes.

d. Purposive interpretation approach:

Purposive approach also known as the focused or objective-based approach is the modern and latest principle of statutory interpretation. The purposive approach is traceable to Lord Denning in what he called **"European Pattern"** in the case of *HP Bulmer Ltd & Anor v J Bollinger SA & Ors*[154]. In that case, Lord Denning stated thus: **"No longer must they examine the words**

[152] *supra*
[153] *Smith v Hughes* (1960) 2ACCER 859
[154] *HP Bulmer Ltd & Anor v J Bollinger SA & Ors* (1974) EWCA Civ 14

in meticulous detail. No longer must they argue about the precise grammatical sense. They must look to the purpose or intent".

Purposive approach seeks to give effect to the purpose of the legislation and is willing to consider a large number of foreign documents related to the context in which the law was enacted such as committee reports and legislative history[155]. It allow courts to go beyond the words of the images, creating an assumption in which the image is applied with what is believed to be the intention of the law maker[156]. Maxwell, succinctly put it as follows:

> When the drafting of a law, in its ordinary sense and in its grammatical interpretation, lead to a manifest contradiction of the apparent object of the determination, or to inconveniences or absurdities, difficulties or injustice, which can hardly be claimed, an interpretation may change the meaning of words, and even the structure of the sentence, which can be done by deviating from the rule of grammar, giving unusual meaning to certain words, or rejecting them altogether, on the grounds that the legislator could not have meant what their words mean, and that the changes made are just corrections of reckless language and actually convey the true meaning. When the main objective and intention of a law are not clear, it should not be reduced to a lack of competence on the part of the designer or a lack of knowledge of the law, except in cases of necessity or evidence of the language used[157].

Similarly, in the Indian case of *Tirath Sigh v Bachittar Singh*[158], the Indian Supreme Court stated as follows:

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[155] N Jain, *op cit*, 18.
[156] *ibid*, 14.
[157] PB Maxwell, *Interpretation of Statutes*, (12th edn, LexisNexis Butterworth Publications, Wadhwa Nagpur, 1969) 228.
[158] *Tirath Sigh v Bachittar Singh* (1952) 54BOMLR

> If one interpretation leads to an absurdity, while another implements what common sense should clearly show, the construction that would go against the law must be rejected, even if the same words in the same section are used, and even the same sentence must be interpreted differently. The law goes so far as to require the court to change even the grammatical and ordinary meaning of words, to avoid absurdity and inconsistency[159].

Reiterating the importance of the purposive approach, Tonye Jaja and 2 Ors stated thus:

> The inference to be deduced from this is that there is now a shift from the common law approach to interpretation of statutes, as a result, Drafters on their part need to shift from the traditional style of Drafting by including to a purposive mode of Drafting by including in their Draft a purpose clause….[160]

The authors (Tonye Jaja and 2 Ors) went on to cite with approval the opinion of GC Thornton, thus, **"Now that a purposive approach to statutory construction is routinely taken by the courts in many jurisdictions there is increased obligation on the drafters to make the aim and object of legislation clear on the face of it**"[161].

Sing J enumerated the four conditions for the application of the purposive rule namely:

a) That there is a clear and crude balance of anomalies;
b) The legislature could not have foreseen such an anomaly and could not have accepted the anomaly in the interpretation of a legislative objective of control;

[159] *supra*
[160] K Aquilina, M Donaldson & TC Jaja, *Legislative Drafting and Statutory Interpretation: Comparative Perspectives from Malta, Canada and Nigeria*, (1 edn, Progress Press, Mriehel, 2018) 136.

[161] GC Thornton, *Legislative Drafting*, (London: Butterworths) cited in K Aquilina, M Donaldson and TC Jaja, *op cit*, 136-137.

c) That the irregularity can be overcome without prejudice to the said legislative objective, and

d) The wording of the statute is subject to any changes that are necessary to correct the anomaly[162].

3.4.4.1. Other Aids and Tools of Statutory Interpretation

Courts also implore and employ other aids to statutory interpretation in an effort to decipher the true intention of the legislature and give effect to it. They are intrinsic and extrinsic aids (internal and external).

a. Intrinsic (Internal) Aids are those aids to statutory interpretation which may be found within the statute. Some of them are:

I. Long title
II. Preamble
III. Purpose clause
IV. Short title
V. Headings, parts and any other division
VI. Marginal notes, side notes, shoulder notes and references
VII. Schedules, tables, index and appendix
VIII. Punctuations
IX. Definitions and interpretation sections
X. Explanatory notes,
XI. Enacting formula or enacting clause

[162] GP Singh, *Principles of Statutory Interpretation*, (12th edn, LexisNexis Publications, Nagpur, 2010) 144; *Stock v Frank Jones (Tipton) Ltd* (1978) 1WLR 231

XII. Interpretation

b. **External or extrinsic aids** are those aids to statutory interpretation which may be found outside the statute. They include materials that are produced before, during and after the enactment of a statute[163].

i. **Material which are produced before the enactment of the legislation.** The first step will be an identification of all the relevant materials that was consulted by the legislature and a proper reflection on the agreed policy priority. This will include an examination of the following:

I. The legal context of the statute

II. Mischief that the law intended to rectify or remedy

III. The policy and mechanism that was set in place for resolving or solving the mischief, and

IV. The works that have been done by various committees and commissions[164].

The materials that were used or produced before the legislation will include:

I. The legislative history of the statute.

II. Other statutes that are related to the subject matter of the legislation;

III. Judicial decisions on the subject matter.

IV. Various report of committees and commissions including the documents that were published by the government which showed the proposed policy.

V. Explanatory memoranda that were published with the statute;

VI. Treaties that were implemented by the statute and their preparatory documentations[165].

[163] JO Adesina, *op cit,* 4

[164] *ibid*, 5.
[165] *ibid*

ii. **Materials that were produced during and after the legislation.** They include legislative debates, official statements and circulars, subsidiary legislation or instruments and committee reports of various legislative committees[166].

Courts may also use in aids legal textbooks, articles, treatises, dictionaries, publications and other scholarly materials. Apart from these cannons of interpretation, courts may resort to legal maxims in aids. They include:

i. *Causes omissus pro omisso habendus est* which means that a case which is not covered by a statute is deemed intentionally omitted by the legislature.

ii. *Expresio unius est exclusion alterius* which means that the express mention of one thing implies the exclusion of another.

iii. *Ejusdem generis:* This translates to where a general word follows an enumeration of two or more things (list of more specific terms), they apply only to persons or things of the same kind or class that are specifically mentioned.

iv. *Noscitur a socii* which means that associated words bear on one another's meaning. Thus, a word is known by the company it keeps.

v. *Reddendo singular singulis* which means that words and provisions are referred to their appropriate objects. It is a rule which states that when a list of words has a modifying phrase at the end, the phrase refers only to the last word[167].

3.4.5. Judicial Reviews

Judicial review is one of the ways in which courts contribute to law making. It is a process by which courts review the actions or activities of public body to ascertain their legality or otherwise. Section 46 of the Constitution[168] generally guaranteed the original jurisdiction of

[166] *ibid*
[167] See generally VC Brannon, *op cit*, 54 - 58
[168] CFRN 1999

high courts to hear and determine any application made pursuance to Chapter IV of the Constitution which deals with fundamental rights. According to section 46, any person who alleges that any provisions of Chapter IV of the Constitution has been, is being or likely to be contravened in any state in relation to him may apply to a High Court in that state for redress[169]. Some of the prerogative remedies of judicial review are mandamus, certiorari, prohibition, habeas corpus and so on. Through the process of judicial review, courts may checkmate legislative excesses. Court may declare legislative actions of the legislature, illegal and unlawful especially when the legislature does not comply with mandatory provisions of the law. For instance, where the required mandate quorum or voting system stipulated by law was not observed or attained. Also, where the legislature purports to delegate its lawmaking power to a committee of the legislature, court will declare the purported delegation illegal and unconstitutional[170]. Similarly, the court has equally used judicial review to declare illegal and unconstitutional legislations which are targeted against specific individuals known as legislative judgment or legislative sentence[171].

[169] s. 46(1) of CFRN 1999

[170] *Ahmad v SSHA* (2002) 15 NWLR (Pt 791) 539.

[171] *Lakanmi v AG Western State* (1971) 1UILR 201.

CHAPTER FOUR

THE ROLE OF THE JUDICIARY IN LAW MAKING

This chapter will be focusing on the role of the judiciary in law making, the impact of judicial decisions in law making including notable cases of judicial decisions.

4.1 An Analysis of the Role and Impact of the judiciary in law making process

When a legislation becomes a subject of a dispute as regards its effects on the rights and duties of the people, courts are duty bound to interpret it irrespective of whether it is ambiguous or not. Whatever the court says or whatever is the opinion of the court in that regards becomes the law. In the American Supreme Court case of *Marybury v. Madison*[1]**,** Chief Justice John Marshal expressed the view that: **"It is emphatically the province and duty of the judicial department to say what the law is".** Judicial decisions and pronouncements on legislations are generally the final words on the meaning of statutes which also determine how they will be implemented[2].

Judicial precedent or judge-made law (case law) is an independent source of law in common law jurisdictions such as Nigeria and Britain. While statute (legislation) covers many areas of private law, a bulk of private laws emanates from the judiciary through its decision[3]. Speaking about the impact of judicial decision on law making, AV Dicey in his lecture, "Judicial Legislation" stated thus: **"Judicial Legislation aims to a far greater extent than do enactments passed by Parliament, at the maintenance of the logic or the symmentry**

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[1] *Marybury v. Madison* 5 US (1 Cranch) 137 (1803)

[2] VC Brannon, *Statutory Interpretation: Theories, Tools and Trends*, (Congressional Research Service, 2018) 2.

[3] Hodge, *The Scope of Judiciary Law-making in Common Law Tradition*, (Max Planck Institute of Comparative and International Private Law Hamburg, Germany, 2019) 1.

of the law"[4]. Sometimes, the legislature used statute to codify rules that were expressed or embedded in judicial decisions. For instance the Electoral Act, 2010, Anton Piller and Mareva injunctions and legislations relating to negligence such as Factories Act, Employees Compensation Act and Labour Act and so on.

Judicial decisions have impacted immensely in property, family law and the area of laws that create obligations, be it contractual or otherwise, such as contract and tort. Hodge aptly illustrated it in the following words:

> Judges have been responsible for determining the boundaries of the tort of negligence, including, famously, a manufacturers' liability to the ultimate consumer, and negligent misstatements, and limiting the circumstances in which there is liability in negligence for causing pure economic loss and where the injury suffered is psychiatric damage. Similarly, the extent of the damage for which a negligent person is liable is determined by judge-made rules on remoteness of damage. The economic torts of inducing breach of contract, interference with trade by unlawful means, and conspiracy, which sets limits on the lawful infliction of economic harm by commercial competition, have been developed and reshaped by judicial decision[5].

The need to keep laws abreast with prevailing or current social realities, expectations and conditions may be a basis for judicial radicality. Judicial decisions sometimes are judicial response to a perceived social ill and a reflection of changing attitude of the society[6]. The proposition which says that **"law does not define a society, it reflects the society"** is an

[4] AV Dicey, Lectures on the relation between Law and Public Opinion in England during the Nineteen the Century (1905) 362. Cited in Hodge, *ibid* 1.

[5] Hodge, *op cit*, 2.

[6] *ibid*, 3 & 9.

expression that law develops the society and the society also develops the law by refining it[7]. As such, laws are made for humans and not humans made for law. This generally underscores the utilitarian philosophy of law as propounded by Jeromy Betham and the sociological approach to law of Roscoe Pound. Roscoe Pound sees law as an instrument of social engineering (social control and social change) whose main objective is the satisfaction of maximum wants (needs) with a minimum of friction. The social engineering notion of law is based on the notion that laws are used as a means of shaping the society and regulating human behavior. Similarly, the common law doctrine of **"fundamental attributes of pragmatism"** requires courts to interpret statutes in the manner that it will be workable and implementable in practice[8]. Hence, courts are enjoined to be guided by the principles of common sense, legal principle and public policy[9].

Judicial decisions have equally impacted greatly in the area of law making, including setting policy guidelines to the legislature for legal reform that reflects the social dynamics of the society. Some of these impacts could be felt in the various electoral reforms, different generations of fundamental rights including the elevation of some provisions in Chapter II of the Constitution[10] to fundamental rights, employment related laws, property, succession and estate laws, right of inheritance of women, judicial remedies of judicial review, and so on. Another notable judicial contribution to the development of law is the Anton Pillar injunction which has been codified in the Copyrights Act. There is also the Mareva injunction, promissory estoppel in High Trees case.[11]

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[7] Joy Adesina, Theories of Interpretation, being a Lecture Note/Handout in statutory Law Revision and Interpretation of Statute for LLM in Legislative Drafting, National Institute of Legislative and Democratic Studies (NILDS).

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[8] Hodge, *op cit*, 9.
[9] *ibid*, 4.
[10] Constitution of the Federal Republic of Nigeria 1999 (as alter)
[11] *Central London Property Trust Ltd v High Trees House Ltd* (1947) KB 130, 1 All ER 256

4.2 Some Notable Cases on how Judicial Decisions have impacted on law making and the Principles of Law that were enunciated in them

Below are some of the notable cases and the principles of law that were enunciated in them.

1. *Donoghue v Stevenson*[12]

The ***Donoghue v Stevenson*[13]** case was a landmark case on the neighborhood principle on negligence and manufacture's liability. In that case, the claimant suffered illness after drinking ginger beer which was manufactured by the defendant which contained the decomposed remains of snail. The court held thus:

> …the manufacturer of an article of food, medicine or the like, sold by him to a distributor in circumstances which prevent the distributor or the ultimate purchaser or consumer from discovering by inspection any defect, is under a legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health[14].

The court went further to establish the neighborhood principle in the following words:

> The rule that you are to love your neighbour becomes, in law, you must not injure your neighbour; and the lawyer's question, 'who is my neighbor?' receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then, in law is my neighbor? The answer seems to be – persons who are so closely and directly affected by my acts that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question[15].

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[12] *Donoghue v Stevenson* (1932) AC 562, 1932 SC (HL) 31
[13] *supra*
[14] *supra*
[15] *supra* @ 579, Lord Atkin.

2. *Cassidy v Ministry of Health*[16]

The case of *Cassidy v Ministry of Health*[17] was on the enterprise risk principle of vicarious medical negligence. In that case, the staff or servants of the defendant hospital forgot an operating apparatus (scissors) inside the abdomen of the claimant and stitched back the operated part. As a result of the negligence of the hospital's staff, the claimant suffered damages. When the claimant instituted an action against the hospital, it was difficult for the claimant to establish which of the defendant's servant's action or omission caused the injury. The court held the defendant hospital vicariously liable for the injury. Similarly in *Mahon v Osborne*[18], the court found the defendant liable where a swab was left inside the claimant's abdomen after an abdominal operation. The court relied on the principle of law that was enacted in the case of *Scott v London Katherine's Dock Co*[19] where the court stated thus:

> where the thing is shown to be under the management of the defendant or his servant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care[20].

A similar decision was also reached in *Osembor v Niger Biscuit Co*[21]. In that, the claimant purchased a packet of biscuits manufactured and packaged by the defendant at a supermarket. In the course of chewing a biscuit, the claimant found a decayed tooth in the biscuit she was

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[16] *Cassidy v Ministry of Health* (1951) 2KB 343.
[17] *supra*
[18] *Mahon v Osborne* (1939) 2KB14.
[19] *Scott v London Katherine's Dock Co* (1865) 159 ER 665.
[20] *supra*
[21] *Osembor v Niger Biscuit Co* (1973) 7CCHCJ71

chewing. The defendant manufacturer was held liable for the loss or injury incurred by the claimant[22].

3. *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[23]

The case of **Hedley Byrne** enunciated the principle on negligent misstatement. Hedley Byrne and Co who were an advertising agents, requested their bankers to obtain a credit reference from the defendant, which was the claimant (Hedley Byrne & Co who) bankers' banker. Sequel to the information given by the defendant, the claimant suffered some economic loss. The court held the defendant liable for the economic loss arising from its negligent misstatement. The court went on to identify four conditions which must be established in a claim of economic loss arising from negligent misstatement. They are:

a. Fiduciary relation involving trust and confidence exist between the parties.

b. The party that wants to give the information has voluntarily assumed the risk.

c. The other party relied on the information;

d. That the reliance was reasonable in the circumstances[24].

4. *Abia State University v Anyaibe*[25]

In that case, the court held that the Fundamental Rights (Enforcement and Procedure) Rules, 1979 have the same force of law as the Constitution[26] itself. The court relied on the Supreme Court decision in *Akanbi & Ors v Alan & Ors*[27] where the apex court held that, **"The legal effect is that once it is shown that the Rules are made under powers conferred by the Constitution, they would have the same force of the law as the Constitution itself"[28].**

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[22] On the enterprise risk rule, see generally *Lister v Hesley Hall Ltd* (2002) 1 AC215.
[23] *Hedley Byrne & Co Ltd v Heller & Partners Ltd* (1964) AC 465

[24] *supra*
[25] *Abia State University v Anyaibe* (1986) 3NWLR (Pt 439) 646.
[26] CFRN 1999
[27] *Akanbi & Ors v Alan & Ors* (1989) 3 NWLR (Pt 108) 118.
[28] *supra*

5. *Irene Morgan v Common Wealth Of Virginia*[29]

Irene Morgan's case was a landmark case on racial segregation. The facts of this case were that, in July 1944, the plaintiff (Irene Morgan) was arrested, while travelling from Virginia to Maryland, for violating a state segregation law of Virginia. The plaintiff who resides in Virginia had visited her mother who was residing in Maryland. On her way back to Virginia, she refused to yield up her seat to a white passenger in a "white" to the "coloured" section on a Greyhound interstate bus. She was charged and prosecuted for violating the segregation ordinance of Virginia. She was equally convicted and her conviction affirmed (upheld) by the appellate court. She further appealed to the American Supreme Court. By majority decisions of four judges with one dissenting (4:1), the American Supreme Court upheld her appeal and reversed the decisions of the lower courts (the court of first instance and the appellate court). The Supreme Court declared the Virginia ordinance illegal and went further to declare other state and local laws that enforced racial segregation in the Southern America (Jim Crow practice/law) illegal[30].

6. *Jona Gbemre v Shell Petroleum Development Company Nigeria Ltd & Ors*[31]

The plaintiff instituted this suit for himself and on behalf of (representing) Iwherekan Community in Delta State, against the defendant for environmental pollution which endangered life. The plaintiff argued that the activities of the defendant was a violation of their constitutional fundamental rights to life including dignity, healthy environment, *inter*

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[29] *Irene Morgan v Common Wealth of Virginia* 328 US 373 (1946)

[30] *supra*. See also Jewish Women's Archive, '*Morgan v Virginia*' <https://jwa.org/node/11829> accessed on January 30, 2022.

[31] *Jona gbemre v Shell Petroleum Development Company Nigeria Ltd & Ors* (2005) AHRLR 151 (NG HC 2005); Suit No FHC/B/CS/53/05, November 14, 2005. Judge: Nwokorie)

alia. The court held that the right to life as guaranteed by the Constitution includes a right to a healthy environment.

7. *Mamordhar Rao v Municipal Corp of Hyderabad*[32]

In that case, the Indian court held that the right to a pollution-free environment is part of the right to life guaranteed under Article 21 of the Indian Constitution[33].

8. *Minors Oposa v Secretary Department of Environmental and Natural Resources*[34]

In that case, a group of children, including an environmental activist Antonio Oposa, brought a suit in conjunction with an NGO (Philippine Ecological Network Inc) to stop the destruction and deforestation of the rain forest in their country. The Supreme Court upheld the claims of claimant and held thus:

> While the right to a balanced and healthful ecology is to be found under the Declaration of principles and state policies and not under the Bill of Rights, it does not follow that it is less important than any civil and political rights enumerated in the later. As a matter of fact, these basic rights need not even be written in the constitution for they are assumed to exist from the inception of humankind[35].

The court went further to state that, **"The right to a balanced and healthful ecology carries with it the correlative duty to refrain from impairing the environment. The said … right implies among other things, the judicious management and conservation of the country's forests[36]".**

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[32] *Mamordhar Rao v Municipal Corp of Hyderabad* 7, ARSCP 171 (1987).

[33] See IF Akande, Public International Law, Second Semester Notes, Department of Public Law, law Faculty, Ahmadu Bello University, Zaria.

[34] *Minors Oposa v Secretary Department of Environmental and Natural Resources* 33ILM 173(1994), Supreme Court of Philippines

[35] *supra*

[36] *supra*

9. ***MC Mehta v Union of India*** (known as Oleum Gas Leak case)[37].

The Oleum Gas Leak case was on environmental rights. In that case MC Mehta, who was a renowned lawyer in environmental law, instituted the action through a writ of petition. The fact of the case was the that Kanpur people with a population of over 2.9 million and one of the biggest cities located on the banks of river Ganga was discharging a harmful industrial effluent or wastes into the river thereby endangering aquatic and human lives. The Supreme Court of India held thus:

> Life is only possible when it exists in solidarity with nature, which nourishes and sustains us- not only with regards to physical food but also with physical wellbeing. It constitutes a right which all citizens possess to live in an environment free from contamination[38].

10. ***ALIU BELLO & ORS v AG OF OYO STATE* (1986) 12 LLER 1**

In *Aliu Bello & Ors v AG of Oyo State,* the Supreme Court pronounced on the constitutional right to life a convict pending an appeal. In that case, the High Court sitting at Ibadan convicted the deceased on 30th October 1980 for the offence of armed robbery punishable under section 1(2)(a) of the Robbery and Firearms (Special Provisions) Act 1970 as amended by the Robbery and Firearms (Special Provisions) Act 1974 and the court sentenced him to death. On 12th November 1980, within the time prescribed by law for a convict to appeal his conviction, the Appellant filed his Notice of Appeal against the said conviction in the Federal Court of Appeal and a copy of the Notice of Appeal was served on the Attorney-General of the Oyo State. On 21st April 1981 a copy of the records of appeal was also served on the Attorney-General. Thereafter, during the pendency of the appeal, the Attorney-General recommended to the Governor the execution of the deceased Appellant and in consequence thereof the execution was carried out on 5th September 1981. When the

[37] *MC Mehta v Union of India* (1987) SCR (1) 819; AIR (1987) 965
[38] *supra*

appeal came for hearing before the Federal Court of Appeal on 13th October 1981, the Solicitor-General of Oyo State informed the Court of the inadvertent execution of the deceased. Accordingly, the Federal Court of Appeal struck out the appeal. Consequent upon this development, the Appellants, instituted a suit in the High Court of Oyo State claiming "₦ 100,000 as damages for illegal killing of their bread winner" against the Oyo State, hereinafter referred to as the Respondent. The Appellants based their claim on the doctrine "where there is a right, there is a remedy." From High Court, the matter proceeded to the Court of Appeal and finally to Supreme Court. The Supreme Court held:

> For the foregoing reasons although there is no statutory provision for stay of execution of a sentence of death pending the determination of an appeal in Oyo State. I hold that stay of execution must be inferred from the provisions of the constitutional rights of appeal of the convict and the appellate jurisdictions of the Court of Appeal and of this Court under sections 219, 220 and 213 of the Constitution. The Governor of Oyo State cannot lawfully order the execution of a convict who has appealed against his conviction and his appeal has not been finally determined. His execution can only be lawfully carried out after his appeal has been determined and the Appeal Court has confirmed the sentence. A premature order for the execution of the convict and his execution in compliance with the order would be unconstitutional and unlawful. Accordingly, I hold that the execution of the deceased in the case on hand is unconstitutional[39].

11. *JEGEDE V AKEREDOLU* (2021) LPELR-55481 SC

[39] Mohammed Bello JSC (as he then was)

In ***Jegede v Akeredolu*[40],** Mr. Eyitayo Jegede who was the candidate of the Peoples Democratic Party (PDP) in the election, and his party challenged the competence of Akeredolu's nomination/sponsorship for the election by the All Progressive Congress (APC), claiming that the letter conveying his nomination/sponsorship to the Independent National Electoral Commission (INEC) was incompetent, having been signed by Buni and others. They contended that by the provision of section 183 of the Constitution and Article 17 (4) of the APC Constitution, Buni acted unlawfully by being the Yobe Governor and serving as APC's Chairman at the same time, and as such, the nomination/sponsorship letter he signed for the APC, notifying INEC of the candidacy of Akeredolu and Lucky Aiydatiwa (as governorship and deputy governorship candidates) was void. By a majority judgment of four against three (out of the seven member panel), the Supreme Court upheld the candidacy of Akeredolu.

Through judicial decisions, some of the provisions in Chapter II of the Constitutions (on Fundamental Objectives and Directive Principles of State Policy) has been recognized as Third and Fourth Generation Rights and fundamental rights[41]. However, it must be observed that the interpretive authority and law making power which the courts have over time enjoyed is not unlimited. The primary and legitimate document upon which the courts must act on is the statute. Judicial decisions must find justification in the law as laid down in the statutes. Also, any changes to the law should be derived from existing legal materials by applying established principles, practical reasoning and legal values in new contexts[42]. Thus, if the judiciary has a new policy or radical policy, it can instigate a judicial bill[43].

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[40] *supra*
[41] *See Jonah Gbemre v Shell Petroleum Development Company Nigeria Limited & Ors, supra.*
[42] See generally Hodges, *op cit*, 11.

[43] See general orders 76 (c) and 78 (1) (b) of the Senate Standing Order 2015 as Amended, Federal Republic of Nigeria.

There are many opinions or suggestions on the approaches for effective restraint or control of judge –made law.

In the case of *C v Director of Public Prosecutions*[44]**,** Lord Lowry suggested as follows:

1) If the solution is doubtful, the judges should beware of imposing their own remedy.

2) Caution should prevail if Parliament has rejected opportunities of clearing up a known difficulty or has legislated, while leaving the difficulty untouched.

3) Disputed matters of social policy are less suitable area for judicial intervention than purely legal problems.
4) Fundamental legal doctrines should not be lightly set aside.
5) Judges should not make a change unless they can achieve finality and certainty[45].

Lord Walker, in his article, has criticized the suggestions given by Lord Lowry in *Director of Public Prosecution*[46]. He only accepted the third and fourth suggestions. According to Walker, as regard the first point, many of the significant changes in law has been made by a slight 3: 2 decision of the courts including the classical case of *Donoghue v Stevenson*[47]. As regard the second point, he pointed out that parliamentary activity was most times difficult to interpret. On the fifth point, finality and certainty is commendable but unattainable[48].

Tom Bingham has equally identified five situations in which courts should exercise restraint to making a new law. The situations were:

> First, where right-minded citizens have legitimately ordered their affairs on the basis of a certain understanding of the law. Secondly, where a rule of law, which is acceptable as defective, requires to be replaced by a detailed

[44] *C v Director of Public Prosecutions* (1996) AC1, 28
[45] *supra*
[46] *supra*
[47] *supra*
[48] Hodge, *op cit*, 13.

> legislative code with qualifications, exceptions and safeguards, and that code requires research and consultation which judges are not equipped to perform. Thirdly, where the question involves an issue of current social policy on which there is no consensus in the community. Fourthly, where the issue is currently being addressed by Parliament. And fifthly, where the issue is far removed from ordinary judicial experience[49].

4.3 Drafters Cognizance of Rules of Statutory Interpretation

Understanding the rules of statutory interpretation will assist the drafter to appreciate the thought processes of courts. This will help it to draft in such a manner that communicates the intentions or purpose of the legislation in a clear, unequivocal, unambiguous and explicit manner. By so doing, the legislature will be able to streamline the interpretative scope of the court, so as not to make legislation which yields a very wide interpretative discretion to the court. More so, a more precise and unambiguous legislation is preferable for an effective and efficient implementation which is necessary for good governance. It will also enhance the legislature-judicial relationship by curtailing the nagging questions of judicial lawmaking, thereby making the two organs of government (legislature and judiciary) an unavoidable and harmonious partner in the collective quest for good governance. William Dale succinctly captured it in the following words:

> (a)n Enunciation of principle gives to a statute a firm and intelligible structure. It helps to clear the guidance to the executive, explains the

[49] T Bingham, 'The Judge as Lawmaker. An English Perspective in Paul Rushworth (ed.) The Struggle for Simplicity in the Law: Essays for Lord Cooke of Thornton (1997). Cited in Hodge, *op cit*, 13

legislation to the public, and assists the courts when in doubt about the application of the provision[50].

Below are some of the issues in statutory interpretation which a drafter should take cognizance of in drafting legislation.

a. Judicial Approaches to Statutory Interpretation:

Drafters should acquaint themselves with the approaches that courts adopt in interpreting a legislation by asking themselves some internalized questions such as: What are the possible ways the courts are likely to interpret a legislation?[51] The most common of the approaches are literal and purposive approaches. Thornton summarized the significance of the purposive approach in the following words: **"Now that a purposive approach to statutory construction is routinely taken by the courts in many jurisdictions there is increased obligations on the drafters to make the aim and object of legislation clear on the face of it"[52].**

b. **Judicial Assumptions:**

There are basic assumptions which courts often make while interpreting a statutory provision. One of such assumptions is that the legislature is aware of its legislations and also meant them. This is the basis for the Latin maxims, "*expression unis est exclusion alterium"* meaning "the express mention one thing is to the exclusion of another". The same with the maxim *"verbis wet non est recelendum"* which means from the words of the law, there must be no departure has to be kept in mind. There is the presumption of *mens rea* in criminal

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[50] William Dale 'Principles, Purposes and Rules' *Statute Law Review*, Volume 9, Issue 1, Spring 1988, 15-26. Cited in K Aquilina, M Donaldson & TC Jaja, *Legislative Drafting and Statutory Interpretation: Comparative Perspectives from Malta, Canada and Nigeria*, (1st edn, Progress Press, Mriehel, 2018) 137.

[51] Joy Adesina, Meaning of Statute, being a Lecture Note/Handout in Statutory Law Revision and Interpretation of Statute for LLM in Legislative Drafting, NILDS, 11.

[52] GC Thorton, *Legislative Drafting,* (London: Butterworths. Cited in K Aquilina, M Donaldson & TC Jaja, *op cit,* 137.

offences. Likewise, there is also the assumption that provisions which are favourable to the people should be interpreted broadly while those which will affect or limit their right should be interpreted strictly.

c. Aids to Statutory Interpretation and the various Theories or Justifications

A good knowledge of the various apparatus which courts call in aid in the interpretation of statute will enable the drafter to minimize some of the issues arising from statutory interpretation. To achieve this, the drafter should be skillful in the use of grammatical expressions and the ability to communicate in the simplest language. Also, the drafter should avoid ambiguous words. For instance, the word "child" is ambiguous as it could mean an infant or someone's offspring irrespective of the age. Similarly, the drafter should endeavour to define words, terms or phrases that forms the fulcrum of the legislation. Thus, the drafter needs to internalize such questions as: What are those issues that often give rise to questions of interpretations?[53]

4.4 Public Policy and Politics in relation to law making

The basic function of the state (government) is good governance and enhancement of lives through the provisions of the basic human needs and an orderly, harmonious and just society. In the pursuit of its primary objectives or functions, states develop various public policies priorities and institutions to achieve their purposes. Policy is defined as the declared objectives that a government or party seeks to achieve while at the same time preserving the interest of the members of the society. It is a set of ideas, plans or basic principles that guides government; or as a basis for decision making[54]. Policies seek to achieve a desired goal that is considered to be in the best interest of the members of the society. Sometimes, policies that are aimed at promoting public interest may be targeted at a certain group. However, one

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[53] See Joy Adesina, *op cit*, 11.

[54] Yusuf-Habeeb Munirat, *Public Policy and Administration Governance,* (being Lecture Note/Handout in Lecturer Note on GLC 802, for LLM in Legislative Drafting, National Institute for Legislative and Democratic Studies, NILDS) p. 2.

underlying intent of those policies is to protect all members of the society by focusing upon a selected few[55]. Public policy is a purposive behaviour or course of action created by a government in response to public or real-world problem. Jenkins Williams defined policy as a set of interrelated decisions taken by a political actor or group of actors concerning the selection of goals and the means of achieving them within a specified situation where those decisions are within the power of the actors to attain or achieve[56]. These policies can be economic, political, cultural, social, ethical, historical and religious.

There are basically some essential elements of public policy. They are:

1. Public policy is a purposive or goal oriented action.
2. It consists of courses or patterns of action by governmental officials.
3. It is what governments actually do.
4. It involves some form of overt government action to affect a particular problem[57].

Public Policy initiative could take the form of developmental, regulatory, social trust, labour, housing, distributive, redistributive and constituency-based[58].

There are various actors in public policy process, namely, institutions comprising of the legislature, executive and judiciary; political parties, interest groups, experts or professionals, masses or citizens and bureaucrats. These political actors influence the public policy priorities of the state in one way or the other whether for a right or wrong purpose.

The legislature is involved in the policy process from the initiation to formulation, implementation, control and review. It manifests its policies choices in the form of constituency projects, laws (enactment of laws) which set up policy programmes and determine their content, timing, extent, personnel, mode, intensity of implementation and

[55] *ibid*, p. 2.
[56] *ibid*, p. 3.
[57] *ibid*, p. 4.
[58] *ibid*, p.6.

funding. The executive influences public policy initiation, formulation, enactment, implementation, execution, performance and modification through supervision, direction, coordination and management. The judiciary ensures that governmental actions are in conformity the law. This it does through the power of interpretation of statute and judicial review bestowed on it. The aim which is to ensure and guarantee fairness, transparency, sanity, legality, constitutionality, justice, equity and balance.

In the selection, initiation, formulation, implement or execution of public policy, a lot of lobbying and politics play out. Politics is defined by David Easton as the authoritative allocation of scarce values[59]. Harold Lasswell sees it as who gets what, when and how[60]. Nnoli Okwudiba defined politics as a process of emergence, consolidation and use of state power[61].

In the final analysis, the key interests of politics are: conflict resolution, allocation of (scarce) resources and formulation and management of policy[62]. It is conceptualized as those activities of government which are aimed at resolving conflicts that arises from the competition for societal values by the masses as well as allocating the scarce resources through various decisions that resulted from formulation of policies[63]. At the heart of politics is choice of the best among alternatives scarce resources. Lionel Robinson succinctly captured it in his

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[59] National Open University of Nigeria, School of Arts and Political Science. <https://www.bing.com/newtabredir?url=aHR0cHM6Ly9hZG1pbi5ub3UuZWR1Lm5nL3NpdGVzL2RlZmF1bHQvZmlsZXMvMjAxNy0wMy9QT0wlMjAxMTEucGRm&be=1> accessed on 27th December, 2021

[60] William Seal 'Politics: Who Gets What, When, How. By Harold D. Lasswell. (New York: Whittlesey House. 1936. Pp. ix, 264.)' American Political Science Review, Cambridge University Press, vol. 30(6), 1174-1176, December1936 <Politics: Who Gets What, When, How. By Harold D. Lasswell. (New York: Whittlesey House. 1936 ix, 264) (repec.org)> accessed on 27th December, 2021

[61] Nnoli Okwudiba, *Introduction to Politics,* (2nd edn, Pan African Centre for Research on Peach and Conflict Resolution, 2003)

[62] Yusuf-Habeeb Munirat, *Public Policy and Administration Governance, op cit,* 5.

[63] *ibid*

definition of economics which he sees as "**the science which studies human behavior as a relationship between ends and scarce means which have alternatives uses**"[64].

Some of the elements in Lionel Robinson's definition of economics are:

i. The science which studies human behavior.
ii. Scarcity or scarce resources.
iii. Scale of preference.
iv. Opportunity cost or forgone alternative.
v. Choice and so on.

Economic scarce resources, to a larger extent, influence the political dynamics and public policy priorities of the government in the area of conflict resolution, policy formulation and management. This underscores the arguments of the Marxist/Radical political philosophers that saw economics as the infrastructure that controls the super structures such as religion, politics, ideology and law and so on.

The scarcity of materials (resources) and the politics of choice, scale of preference and opportunity cost will definitely bring about conflict which Hegel describes as **"Dialectical Materialism".** Rousseau observed that man is born free, but he is everywhere in chain. This chain mainly resulted from his association with others which was primarily motivated by the need for food. According to Baron de Montesquieu, the need for food caused the timid human to associate with others[65]. Politics will exist when two or more people competes for scarce resources or societal values in other to get favorable results or advantageous outcome.

[64] Lionel Robinson, *An Essay on the Nature and Significance of Economic Science*, (2nd edn, MacMillan & Co. Ltd, 1945) p.15.

[65] National Institute for Legislative and Democratic Studies (NILDS), Abuja – Nigeria, Lesson 1, "Introduction to Economy, State and Society'.

CHAPTER FIVE

SUMMARY OF FINDINGS, RECOMMENDATIONS, CONTRIBUTIONS TO KNOWLEDGE, RECOMMENDED AREAS FOR FURTHER RESEARCH AND CONCLUSION

This chapter focuses on the summary of the findings, recommendations and conclusion.

5.1 Summary of Findings

The research work has achieved its basic aim and objectives by examining the basis, structures, strategies and tools (techniques) of judicial law making; the general impacts and limitations to judicial law making. It also, addressed the issues or questions that were raised in the research and proffered solutions, recommendations and conclusions.

The major findings of this research work are as follows:

1. That the judiciary has contributed immensely to law making and the development of the law through its various notable pronouncements in statutory interpretations. Some of them are, the neighbourhood principle of negligence in tort, promissory estoppel in contract, Anthon Piller and Marevar injunctions, negligent misstatement of facts in tort, enterprise risk principle and medical negligence and the recent or new dimensional approaches and advocacies to human and fundamental rights among others.

2. That the judicial interventions by interpreting legislations to reflect the social or societal values and social trends (social change and social reality) is necessary for an efficient and effective development of the law and the society. This is because, society is dynamic, not stagnated (stagnant). Also, it may act as a restrain to obnoxious behaviours which may be contrary to public policy by applying the golden, mischief or purposive rule to rectify a perceived social ill. For instance, the court has successfully used the mischief rule to restrain

the children of a man who murdered his mother and committed suicide thereafter from inheriting from the estate of the deceased ground mother on the ground of public policy, as it will be contrary to public policy to allow someone to benefit from his crime. Similarly, the court used the mischief rule to give a wider meaning to soliciting for customers in public places for the purpose of prostitution.

These general practices underscore the meaning of the saying that law does not make a society, it reflects a society.

3. In spite of the contributions of the judiciary to law making, there is the need to address some of the loopholes or nagging issues (questions) on the nature and scope of the interpretive powers of the judiciary. This major issue has generated debates among scholars as to whether judiciary can make laws and the extent of judicial law making, if any.

4. The work discovered that there are various challenges to judicial law making through its interpretive duty. One of the challenges was the difficulties that are inherent in statutory interpretation. This is because words or words of statute alone may not sufficiently communicate the intentions of a legislations. Similarly, the meaning of words or phrases is contextual and it also changes with time and place. Also, individual idiosyncrasies of judges, *inter alia,* such perceptions or personalities, may be influenced by nurture (environment or socialization). For instance, a judge who was a victim of armed robbery or rape may be strict on armed robbers and rapists. Equally, some judges may assert their political, economic or social interest under the guise of seeking the intention of the legislation.

5. Judicial precedent or *stare decisis* is not sufficient or enough to checkmate the scope of the interpretive powers of the court. There are other factors which may limit the operation of *stare decisis* such as judicial activism, *obiter dictum* and *ratio decidendi*, *per incuriam* and distinguishing of cases among others.

5.2 Recommendations

The researcher recommended as follows:

1. Drafters should pay close attention or take cognizance of the interpretive approaches courts adopt in statutory interpretation so as to make laws that will reduce the legislative – judicial frictions.

2. An understanding of the attitudes and thought processes of courts will help to synergize the relationship of the legislature and judiciary as partners in the collective pursuit of good governance.

3. Legislations should be drafted in simple, plain, unambiguous and direct language.

4. The legislative Bill should also indicate the primary purpose(s) of the legislation and communicate same in simple and direct words.

5. That interpretation or definition provisions be drafted in clear terms so as to make explicit the nature or scope of key words or phrases that were used in the legislation.

5.3 Contributions to knowledge

The contributions of this research work to knowledge are that it helped to analyze, explore or understand the basic role which the judiciary plays in law making. Through its interpretive powers, the judiciary has contributed immensely to the development of the law and the society.

The work also explored or revealed some of the challenges of judicial interpretations to law making especially following the doctrine of separation of powers and checks and balances. It equally proffered solutions and recommendations to these challenges.

5.4 Recommended areas for further research

There is generally little or insufficient literature on the factors that influence or determine the attitudes of court to statutory interpretations. A study or an understanding of the thought processes of courts including perception and socialization (environment or nurture) of courts may be helpful law making and statutory interpretation. This is because, courts are humans,

not aliens and could consciously, subconsciously or unconsciously be influenced by some psychological principles of motivation, emotions, classical conditioning of the mind, stress, personality, defence mechanism and so on.

5.5 Conclusion

From all indications, the judiciary plays an important role to law making through its interpretive duty. However, the judiciary is usually confronted with so many issues or challenges arising from the performance of its interpretive functions. This necessitated the debate among scholars on the extent of judicial interpretation powers. One major cause of the problem is the fact that words or phrases generally possess different meanings based on context, usage, place and time. Also, judges are not magicians with mystical powers to discern the true intentions of a legislation. Similarly, there is no stringent rule as to the interpretation approach(es) which a court must adopt in a case. Instead, it is generally left at the discretion of courts: with the inherent human biases. Equally, there is generally no evidence that courts consciously compartmentalize themselves into different schools of textualism or purposivism. Instead, the facts and circumstances of the case also determine the approach that it may adopt. Even in some cases, it may simply analyze a particular theory or more to show why it is not suitable for the case before it. In other cases, it may even argue for all the theories while choosing the one that it deems (considers) most suitable.

In the final analysis, research work has achieved its general aim and objectives in the various chapters of the work. Also, the research questions raised were equally answered and the significance of the research to the Nigerian society was revealed in the body of the work.

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