

AN EXAMINATION OF THE ROLE OF JUDGES IN INTERPRETATION OF STATUTE TO DISCOVER THE INTENTION OF THE LEGISLATURE: MYTH OR REALITY

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Abstract:

The legislature makes the law but it is the role of judges to interpret the words of legislature. The judges in the course of interpreting the law have a measure of discretion and creative power in the manner in which they interpret law. Legislature can include words that have more than one meaning or words whose meaning changes depending on its context. It can lead to a lack of clarity or precision and the language or words used can create obscurity, ambiguity, meaningless and failing to achieve the purpose which it is aimed simply through being badly drafted. As a result, judges need to provide legislation with effective meaning through interpretation which can be restrictive, literal, permissive and purposive. Language is indeterminate and innately vulnerable to the unsettling play of deconstructive forces. It is argued that words have no essential meaning, instead, words are constantly shifting variable with capacity to impede communication and derail the interpretive processes. This raises the obvious question whether judges their duty of interpretation of statute to discover the intention of the legislature, is a myth or reality.

1.Introduction

This writes up examines the role played by Judges in the interpretation of statutes in an effort to discover the intention of the legislature. First, the question as to whether judges do make law or are merely passive oracles who declare the law in actual decisions shall be examined. Secondly, it shall be examined whether or not what comes out of the process of judicial interpretation is the 'intention' of the legislature or the 'will' of the judiciary and then draw a conclusion.

Definition of Terms

(a) Statute:

A statute has been defined as a written law as laid down by Parliament or the law made by the State Houses of Assembly." The term is often used to refer to Public Act of Parliament, that is, an Act which affects the public at large as distinguished from one which only or chiefly affects personal, private or local interest. A statute therefore is an enactment made by the Legislature (Parliament). Such enactments are called Acts of Parliament.

The power of interpreting such enactments is vested in the judiciary, which is the Courts.

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(b) Intention:

Intention has been defined as the purpose, aim or desire with which an act is done. It is the goal or purpose behind a specific action or set of actions. The phrase 'intention of the legislature or parliament' would therefore mean the purpose, aim or meaning which the legislature attaches to the words of a statute. The intention of the legislature is embodied in the words used in the statute. It is what the courts intentionally set out to discover in the process of interpreting statutes.

The primary duty of the Courts in interpreting statutes is to declare the sense of the law embodied in them. If every word had only one meaning this task would have been easy. While interpreting statutes, the courts more often than not announce that they are trying to discover 'the intention of the Legislature'. Lord Simon stated thus:

"Courts interpret statutes with a view to ascertaining the intention of parliament expressed therein. But as interpretation of all written materials, what is to be ascertained is the meaning of what parliament has said and not what parliament meant to say."¹

Application of Juridical Technique

Courts have evolved various rules and maxims to assist them in the difficult task of interpretation of statutes. These rules are not creation of the legislature. The rules and maxim of interpretation are both technical and dynamic requiring the application of different rules for different cases and it is for the courts to decide on which rule or maxim to apply in appropriate cases. Thus, the application of juridical technique by judges renders them as policy makers with a will or intention of their own, for in deciding upon any rule at any decision, the judges must do so with a conception of their own. What guide the judges, whether solitude or multiplicity of factors used can be said to be the intention of the court, and that of the legislature.

The word 'intention' is used as a term of art for it is intention as manifested by the word used.² Some words used in statutes represent such vague standards that the task of interpreting them may be likened to that of making subsidiary legislation. For instance, section 35 (7) of the Constitution of the Federal Republic of Nigeria 1999 provides:

*"Nothing in this section shall be construed -
(a) In relation to subsection (4) of this section as applying in the case of a*

person arrested or detained upon reasonable suspicion of having committed a capital offence".

In the above constitutional provision, for instance, there is no definition of what amounts to 'reasonable suspicion'. Yet, it is the duty of the Court to discover the intention of the framers of the Constitution from the words. In some cases, it is obvious from the statutes that the legislature has used a wrong word and that the intention of the Legislature as discovered from the statute cannot be given effect unless the mistake is corrected. Obvious lacuna in statutes also arises. However, this task of interpretation could be made easier through statutory definition, for example, the Interpretation Act of 1964 operates as a standing legal dictionary of some of the most important words used in some Acts of Parliament. For instance, the Act provides that unless the contrary appears, words imputing masculine gender include females;³ the expression "Person" include body corporate or incorporate.⁴

A statute may contain an interpretation section which explains the meanings of the words used in that particular statute. For instance, section 208 (1) of the Air force Act, 1964 interprets "Air signals" as used in the Act to mean "any message, signal or indication given by any means whatsoever, for the guidance of aircraft or a particular air-craft."⁵

¹ . Farrel V. Alexander (1977) A.C. P.81. See also Savana Bank V. Ajilo (1987) NWLF 312 p.42

² . Supra

³ . Section 14 (a) and (b)

⁴ . Section 18 (1)

⁵ . See the interpretation of the term "Instrument" in S. 4 (1) of the Insurance (Miscellaneous Provisions) Act, 1964 (1960) F.S.C. 1. See also Adegbenro V. Akintola (1962) All NLR 465, and R.C. V. Hinshy (1980) A.C 788

The common law provides three main principles for the interpretation of statutes, viz: the literal rule, the golden rule and the mischief rule. These are known as the Canons of statutory interpretation. These are more or less rough guides rather than strict immutable rules.

The Literal Rule

This rule holds that a judge must give words in enactments their literal or ordinary meaning. That is, words must be construed in their usual grammatical sense. This rule tends to support the general notion that in interpreting statutes, the Judges regard themselves as bound by the words of the statutes when these words clearly govern the situation before the Court. The word must be applied with nothing added and nothing taken away. The general rule is that the court can neither extend the statute to a case not within its terms nor curtail by leaving out a case that the statute literally includes. The rule stands for the proposition that words in statutes should be given their literal meaning and even if injustice appears or results, it is not for the court to remedy it since such lapses can only be cured by parliament through subsequent enactment. This stand was aptly illustrated in *R. V. BANGAZA*⁶ where the Federal Supreme Court had to interpret section 319 (2) of the Criminal Code which provides that:

Where an offender who in the opinion of the court has attained the age of seventeen years has been found guilty of murder, such offender shall not be sentenced to death but shall be ordered to be detained..."

Interpreting this section in its literal sense, the Court rejected the view that the relevant age was the age at the time of the commission of the offence and held that the

relevant age was the age at the time of the conviction.

Thus, in the light of this interpretation, where an offender under that provision was under the age of 17 years when he committed the offence, he must be sentenced to death unless the verdict was given before he attained the age of 17 years.⁷

Also, if the words to be construed are used in relation to a trade or business, they are to be given their usual meaning in the trade or business. This is clear from the case of *FISHER V. BELL*⁸. The Act in question was the RESTRICTION OF OFFENSIVE WEAPONS ACT, 1959. This statute makes it an offence to offer for sale flick-knives. The defendant in this case had displayed in the shop-window a flick-knife and he was charged with offering it for sale contrary to the Act. The Court had to interpret the words "Offer for sale" which it did in relation to the law of contract and held that display of items in a shop window was not an offer for sale. The rule of interpretation was well summed up by Lord Diplock when he said:

"...when parliament legislates to remedy what the majority of its members at the time perceive to be a defect or a lacuna in the existing law..., the role of the judiciary is confined to ascertaining from the words that parliament has approved as expressing its intention, what the intention was, and to giving effect to it. Where the meaning of the statutory words is plain and unambiguous, it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its

⁶ . (1980) 5 F.S. C. 1

⁷ . This Law has however been amended by the Criminal Justice (Miscellaneous Provision) Act, 1966

⁸ . (1961) 1 Q.B. 394; (1960) All E.R. 731

*plain meaning because they themselves consider that the consequences of doing so would be in expedient, or even unjust or immoral...*⁹

According to his Lordship, this principle applies even though there is reason to think that if parliament had foreseen the situation before the court, it would have modified the words it used. If this be the case, it is for parliament not for the judiciary, to decide whether changes could be made to the law as stated.

2. The Mischief Rule

The mischief rule also known as the Rule in *HEYDON'S CASE*¹⁰ states that to interpret a statute properly it is necessary "to consider how the law stood when the statute to be construed was passed, what the mischief was for which the old law did not provide and the mischief that the statute was intended to remedy, the Act or law is then construed so as to suppress the mischief and advance the remedy."¹¹

The particular utility of this rule depends to some extent upon the means that courts are entitled to employ in order to ascertain what mischief the Act was intended to remedy. Thus, a true historical investigation would take into account press agitation, party conferences, governmental pronouncements and debates in parliament. But all these are ignored as a result of the rule excluding evidence of political history of a statute. In practice therefore, the Judge generally divines the object of a statute

merely from perusal of its language in the light of his knowledge of the previous law and the general knowledge of general conditions in the society. What the judge makes use of in applying the Mischief Rule, therefore, is largely his own sense of divination. For instance, in *AKERELE V.I.G.P.*¹² the Court had to interpret the word "accuse" in section 210 (b) of the criminal code. Rejecting the argument that the word meant making of formal accusation by swearing to an information under oath, Ademola J (as he then was) said:

"It appears to one that the short history behind this chapter of the code is to prohibit indiscriminate accusations of witchcraft and to stop the practice of trial by ordeal and the like by making them punishable".

The court therefore interpreted the word in the light of this history

3. The Golden Rule

The Golden Rule was established in *BECK V. SMITH*.¹³ It states:

*"it is a very useful rule in the construction of the statutes to adhere to the ordinary meaning of the words used, and to the grammatical construction unless that is at variance with the intention of the legislature to be collected from the statute itself, leads to manifest absurdity or repugnance, in which case the language may be varied or modified so as to avoid such inconvenience but no further."*¹⁴

The Golden Rule allows the Court to prefer a sensible meaning of an absurd

⁹ . *Dupont Steels Ltd. V, Sirs* (19800 1 WLR p.1257; (1980) 1 All E.R. 519

¹⁰ . *Re Mayfair Property Company* (1898) 2 Ch. 28 at 35

¹¹ . *Ibid*

¹² . (1955) 1 NLR 37

¹³ . (1936) 2 M. & W. 191

¹⁴ . *Ibid*

meaning where both are linguistically possible. It does not matter that the absurd meaning is the more natural and obvious meaning of the word. According to Lord Reid, "where a statutory provision in one interpretation brings about a startling and inequitable result, this may lead the court to seek another possible interpretation which will do better justice."¹⁵ His Lordship stated this principle more emphatically in LUKE V. IRC¹⁶ when he said.

"It is only where the words are absolutely incapable of a construction which will accord with the apparent intention of the provision and will avoid a wholly unreasonable result that the words of the enactment must pre- vail".

Although it has been argued that the question of absurdity cannot influence a decision in any type of case except the one enumerated above, nevertheless, the courts sometimes act on a second principle stated by Sir Rupert Cross in the following words:

*"The Judge may read in words which he considers to be necessarily implied by words which are already in the statute as he has a limited power to add to or ignore statutory words in order to prevent the provisions from being unintelligible or absurd or totally unreasonable or unworkable or totally irreconcilable with the rest of the statute."*¹⁷

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The decision in the COUNCIL OF UNIVERSITY OF IBADAN V. ADAMOLEKUN¹⁹ illustrates this point. In that case the Supreme Court had to determine whether an Edict made by the Military Governor of the then Western Nigeria could be declared void by the Court. By virtue of section 3 (4) of the Constitution (Suspension and Modification) Decree 1966, where an Edict was inconsistent with a Decree, the Edict was void to the extent of the inconsistency. Although Section 6 of the Decree is consistent with the literal Rule, literal interpretation of the section would lead to absurdity. If the court could not declare an Edict void even though the Edict was void by reason of its inconsistency with a Decree, the court would face the problem of applying two inconsistent laws to the same facts until a declaratory Decree is made. The Court read the Decree as a whole and held that an Edict could be declared void by the Court by reason of its inconsistency with another Decree.

It is noteworthy that Judges in the course of interpreting statutes or trying to construe to bring out the intention of the legislature also use maxim of statutory interpretation. These maxims include *Noscitur a sociis*, *Expressum facit cassare tacitum* and *Expressio unius est exclusio*

¹⁵ . (1963) A.C. at 577

¹⁶ . Ibid

¹⁷ . Statutory Interpretation (1976)

¹⁸ . Statutory Interpretation (1976)

¹⁹ . (1967) All NLR 213 P. 224 See also Awolowo V Federal Ministry of Internal Affairs (1962) CLR 177

alterius and Ejusdem Generis. Noscitur a sociis means that a word is to be judged by the type of grouping in which it is found no other interpretation should be given or attached to it other than the way it is used. The legislature in its wisdom normally legislate with the fact of current law in place and the Judge is to interpret the statute as it stands. The wordings of a statute is considered by a Judge on how it stands when it was enacted.

Expressio unius est exclusio alterius - this means that things expressly mentioned excludes those not mentioned. An example of this is that I talk about: Turbo Driving Engine in Cars and make some sweeping comment about Rolls Royce Engine. The impact of my statement is directed at Rolls Royce cars that carry Turbo Engine and not all Engines. The maxim is not so compelling a rule of law but a conscience used by the Judge to explain or make clear the probable intent of the legislature.

In-COLQUOHOUN V. BROOKS, Lapes-L.J. said:

"The maxim is a valuable servant but a dangerous master"

Expressum tacit cassare Tacitum is sometimes used in the same con-text as the Expression Unius maxim but can be taken as having a distinct meaning. It simply means that Express words put an end to implication.

The Ejusdem Generis

The Ejusdem-Generis is that maxim of statutory interpretation which allows that where particular words are followed by general words, the general words are interpreted restrictively to have a meaning that is of the same kind or genus as the preceding ones already particularized. The court in NASIR V. BOUARI (1969) 1 ALL NCR 37 was faced with the question whether

premises used partly as living accommodation and partly as a night club fell within the definition as premises used for other lawful purposes. The Court refused to give the phrase any wider interpretation beyond the particularized kinds of premises and concluded that it meant premises used for purposes similar to living or sleeping, thereby excluding night club.

In the English case of PALMER V. SNOW (1900) 1 QB.725 the Court had to interpret the provision of the Sunday Observance Act, 1677 which prohibited the doing of certain acts on Sundays. The class of people so prohibited were "tradesmen, artificers, workmen, labourers or other person whatsoever". The court held that the phrase "other person whatsoever" should be limited to persons of the same genus as these expressly mentioned and could not include farmers and barbers. The rule is to be applied cautiously only to give effect to the intention of the legislature.²⁰

The word "otherwise" as used in section 22 of the Land Use Act has been construed to mean "any of the means by which legal title or possession of real property can be transferred from one person to another." Having examined the general rules and maxims of statutory interpretation, the question now is what role do the Judges actually perform in the interpretation of statutes. Is it that of a junior partner(s) in the law-making process?

Strictu-sensu, Judges do not make laws but merely declare and apply the provision of the law to facts before them in particular cases. Generally, the duty of the Judge in interpreting statute is to ascertain

²⁰ . Board of Custom & Excise V. Vale (1970) 2 All NLR 53

the intention of the parliament (legislature) from the words used. The Courts are not entitled to fill in gaps in statutes, for as Lord ESHER MR said in the QUEEN V. JUDGE OF CITY OF LONDON Court.

"If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity. The court has nothing to do with whether legislature has committed an absurdity."

The stand point was also taken by Lord Simons in BLACK-LAWSON LTD V. PAPIEVWERKE A.G. (1975) AC. 591. But this is not completely adhered to in practice, for due to human failings, it is not humanly possible to foresee all the manifold set of facts that might arise in the future in relation to any matter being enacted upon. The difficulty in the strict adherence to the construction of statutes in line with the words is well illustrated by Professor Michael Zander. He gives the example of parents asking a baby sitter to keep the children amused by teaching them a game of cards. In the parents' absence the baby is thought how to play strip poker. There is no doubt that strip poker is a card game and also no doubt that it was not the game of card contemplated to be given as instruction to the child. One knows this not from anything the parents have said but customary ideas as to the proper behaviour and upbringing of the child. On its face, the literal rule seems to forbid this common-sense approach to statutory interpretation. Based on this, Judges do more at times than applying statutes as they stand.

The only rule for the construction of Acts of Parliament is that they should be construed according to the intents of the Parliament which passed the Act if the words of the statutes are in themselves precise and unambiguous, then no more can be

necessary than to expound those words in their natural and ordinary sense. The words themselves also do, in such a case, best declare the intention of the legislature. If however, any doubt arises from the terms employed by the legislature, it has always been held a safe means of collecting the intention to call in aid the ground and cause of making the statute and to have recourse to the preamble which is "a key to open the minds of the makers of the Act, and the mischief which they intended to redress."²¹

According to Lord Denning L.J.:

*"It would certainly save Judges the trouble if Acts of Parliament were drafted with divine prescience and perfect clarity, In the absence of it, when a defect appears, a Judge cannot simply fold his hands and blame the draftsman. He must set to work on the construction art of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy; and thus he must supplement the written words so as to give force and life to the intention of the legislature."*²²

The court favored this view as illustrated in the decision in SHAW V. D.P.P .²³. In this case the Street Offences Act was passed to control that act of soliciting in the street. Mr. Shaw published "Ladies Directory" containing the names and addresses of prostitutes. He was convicted of an offence of conspiracy to corrupt public

²¹ . Stowell V. Lord Zouch (1969) at 354

²² . (1866) All E.R Rep. 55 at 56

²³ . Estates Ltd, V. Abner (1949) 2 K.B. 481 p.499; See also Assam Trading Company V. Commissioner of Inland Revenue (1935) All E.R. 548

morality. Though such offence was not in the Act, based on a consideration of the social conditions which gave rise to the Act, the court took it upon itself to enforce public morality. But it is unclear whether a Judge can exercise legislative function where the facts of a case have not been envisaged by parliaments, by imputing to parliament an intention which it never had. RE-SIGSWORTH.²⁴ seem to answer this question in the affirmative. In this case by the Administration of Estates Act of 1925 a child has certain rights of succession on the death of the parent (intestate). It was proved that the deceased in this case Mary Ann Sigsworth was murdered by her own son. The question was whether the son was entitled to the estates as a child of the deceased under the Act? The Court held that a child could not inherit because no one is entitled to profit from his own wrong and also a murderer cannot take under his victim's will. And Lord Denning states his opinion of the judicial role in MAGOR AND ST. MELLOWS R.D.C V. NEWPORT CORPORATION (1950) 2 ALL ER 1226

"We do not sit here to pull the language of Parliament and of Ministers to pieces and make nonsense of it. That is easy to do, and it is a thing to which lawyers are too often prone. We sit here to find out the intention of Parliament and of Ministers and carry it out and we do this better by filling in the gaps and making sense of the enactments than by opening it up to destructive analysis"

But Lord Simonds in the same case on appeal expressed a resentment against the above purposive view taken by Denning L.J. He said:

*"It is sufficient to say that the general proposition that it is the duty of the court to find out the intention of Parliament and not only of Parliament, but of minister also cannot by any means be supported. The duty of the court is to interpret the words that the legislature has used, those words may be ambiguous but even if they are, the power and duty of the court to travel on a voyage of its discovery are limited."*²⁵

He went on to comment on the fact that if the court having discovered the intention of Parliament and of ministers proceeds to fill in the gaps, that is by writing what legislature has not written cannot also be supported. According to his lordship, it appears to be a naked usurpation of legislative function under the disguise of interpretation and that this is less justifiable when it is guessing work with what material the legislature would, if it had discovered the gap, have filled it in. If a gap is disclosed, the remedy is amending the Act. And Lord Diplock taking the same view as above said:

*"At a time when more and more cases involve the application of legislation which give effect to policies that are the subject to bitter public and parliamentary controversy, it cannot be too strongly emphasized that the British constitution, though largely unwritten is firmly based upon the separation of powers; Parliament makes laws and judiciary interprets them."*²⁶

²⁴ . (1962) A.C. 220

²⁵ . Ibid

²⁶ . Duport Steel Ltd. V. Sirs Op. cit. at 157

It is thus clear that the power of the court to “fill in gaps” in statutes would only be deemed necessary to the extent that it helps to cure an absurd situation and no further as Lord Simonds puts it "... a Court would only be justified in departing from the plain words of the statutes where it is satisfied that:

1. There is clear gross balance of anomaly.
2. Parliament, the legislature, promoters and the draftsman could not have been prepared to accept it in the interest of supervening legislative objective.
3. The anomaly can be obviated without detriment to such legislative objection.
4. The language of the statute is susceptible to the modification required to obviate the anomaly.²⁷

From the foregoing, it becomes obvious that to meet the ends of justice, Judges sometimes fill in obvious gaps in

statutes and to the extent to which they do this, they can be regarded as junior partners in the law-making process. To hold that they should not “fill in” obvious gaps in statutes would seem absurd since the Courts might be faced with the situation of applying two inconsistent laws on the same facts until a declaratory pronouncement is made on the subject.²⁸ Therefore, with profound respect to Lord Simonds' and Diplocks' view, it is humbly submitted that the Judges continue to perform this role of filling in obvious gaps in statutes where and when necessary, in the course of their interpretation of statutes.

However, the courts occupy a subordinate role; that of junior partners in the law-making process. Also owing to the doctrine of separation of powers, the Judges should take care not to encroach on or

²⁷ . Stock V. Frank Jones (Tipton) Ltd. (1978) All E.R. 948 at 954

²⁸ . Council of University of Ibadan V. Adamolekun Op. cit

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