

FROM LITERALISM THROUGH TRADITIONAL TO CONTEMPORARY  
FUNCTIONALISM: THE ROLE OF A CONSTRUCTOR IN A WORLD OF  
LEGAL EXPRESSIONS

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## INTRODUCTION

Jurists are not usually preoccupied with language and its use order than as an ancillary consideration in deciphering statutes and general legal consultation. There are two basic significations of crisis both in the use of language to make law as well as using the philosophy of language to decipher the nature of laws as well as its terminal purpose. While Bentham's<sup>1</sup> "Legal Positivism" was grounded on language as the representative peak of the existence of laws, it became difficult to justify in view of the natural law theorists who showed that language was somewhat not as important in validating laws. True to type, Bentham stated that his "signification of volition" must have attendant to it, "motives" of "pleasure and pain", a controversial theme whose attendant argument still rages.

Thus, the language of law must be interpreted in an interpretive world. This would seem to be quite a simple endeavour as the primary duty of the judge is to decide matters that come before him. In deciding these matters, he must decide them and not essentially expound on the law i.e. decide on the existing law and not create new laws. Accordingly, he finds the law; finds the facts and applies the law or assemblage of signs to the facts by the use of some rather basic aids.

These "assemblage of signs" do however come with their own problems as so astutely expressed by The Preface to Maxwell on the Interpretation of Statutes written by P. St. J. Lanigan<sup>2</sup>, when it stated thus:

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<sup>1</sup> For he defined Law as "an assemblage of signs declarative of a volition conceived or adopted by the sovereign in a state, concerning the conduct to be observed in a certain case by a certain person of class or persons, who in the case in question are or are supposed to be subject to his power..." see Jeremy Bentham, *Of Laws in General*, 1782, H. L. A. Hart ed., London, Athlone Press, 1970.

<sup>2</sup> 12<sup>th</sup> ed. (London: Sweet and Maxwell), p. v

“Maxwell might well be sub-titled ‘the practitioner’s armoury’; it is I trust not taking too cynical a view of statutory interpretation in general and this work in particular, to express the hope that counsel putting forward diverse interpretations of some statutory provisions will each be able to find in Maxwell dicta and illustrations in support of his case”.

This was quoted with “approval”, though wiser counsel might suggest that that word is “disdain”, in *Awolowo v. Shagari*.<sup>3</sup> But the supposition that law is not always rooted in language is created. And it has been posited<sup>4</sup> that while silence can convey a volition backed by a threat of force (just by saying or writing nothing), it can only be a means of communication when circumstances give it meaning. But a large chunk of law are written even though those words sometimes lack in exactitude.

The foregoing might lend some suggestion as to why interpretation of statutes has provoked such interest since the idea of legislation came into being. And it has grown more sensitive following the enthronement in England of Parliament’s supremacy. This was as distinct from the days when an Act of Parliament could be annulled and subjected to the control of common law if it was perceived to be against common right or reason, or repugnant or impossible to be performed, as Sir Edward Coke held in *Bonham’s Case*.<sup>5</sup> In relation to common law then an Act of Parliament took back seat. Nowadays it is said of the courts that “we sit here as servants of the Queen and the Legislature”. See Willes, J in *Lee v. Bude Ry*.<sup>6</sup> As the sovereignty of Parliament has been thus enthroned, so has legislation, Parliament’s product, been on the ascendancy as the predominant source of law over the others. Consequently, interpretation of statutes has gained immensely in stature. Thus from a liberal course the new stature of Parliament appeared to have given it new deference and respect in the courts culminating in a literal course.

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<sup>3</sup> (2001) F.W.L.R. (Pt. 73) 53, p. 88-9.

<sup>4</sup> “Law and Language”, Stanford Encyclopedia of Philosophy, December 5, 2002. It also stated that “a law, therefore, is not an assemblage of signs, and law is not necessarily made by the use of language and every legal system requires norms that are not made by the use of language. Laws are not linguistic acts, or even communicative acts. They are standards of behaviour that can be communicated (and may be made) by using language.” See <http://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=law-language>

<sup>5</sup> (1610) 8 Co. Rep. 118a

<sup>6</sup> (1871) L.R. 6 C.P. 582)

There are suggestions in some quarters that the pendulum may once again be swinging in other directions. One such view is that while the literal view may be said to be the default position, a more functional approach (Mischief or Golden) will be employed especially where the legislation seeks to advance and implement a social policy such as the outlawing of sex discrimination (see *Pickstone v. Freeman*)<sup>7</sup>. Another is that there is a movement towards combining both the letter and the spirit rather than each exclusively of the other:

“First it was the spirit and not the letter, then the letter and not the spirit, and now the spirit and the letter”<sup>8</sup>

But in the opinion of this work, there is little substantial evidence of it. In England though, one might conclude that with the coming of the European Union and the whittling down of Parliamentary supremacy, this may well be the course for the immediate future.

#### **THE INTENTION OF THE LEGISLATURE**

A statute is to be interpreted “according to the intent of them that made it” according to Lord Evershed M.R. citing Maxwell on Interpretation of Statutes in *Prince of Hannover v. Attorney General*<sup>9</sup>. That means the legislature. According to a view, dilatory suppositions will do little in the way of help.<sup>10</sup>

The intention of Parliament has therefore become the hackneyed refrain in every effort to interpret a statute though, to look at some interpretative adventures, one might be tempted to ask whether the exercise is just a play on words, some chicanery of some sort. *Stock v. Frank Jones (Tipton) Ltd.*<sup>11</sup> is one example. There the court interpreted “dismissal of employees who take part in a strike” as excluding “dismissal of employees taking part in a strike”.

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<sup>7</sup> (1988) 2 ALL E.R. 803

<sup>8</sup> see E.A. Driedger: *The Construction of Statutes*, pp. 63-4 as produced by Cross, Sir Rupert: *Statutory Interpretation* (London: Butterworths, 1976) p. 18

<sup>9</sup> (1956) 188, 201

<sup>10</sup> “The essence of the law lies in its spirit, not in its letter, for the letter is significant only as being the external manifestation of the intention that underlies it. Nevertheless in all ordinary cases the courts must be content to accept the *littera legis* as the exclusive and conclusive evidence of the *sententia legis*. They must in general take it absolutely for granted that the legislature has said what it meant, and meant what it has said” (P.J. Fitzgerald: *Salmond on Jurisprudence*, 12<sup>th</sup> ed., London, Sweet and Maxwell, 1966 p. 132-3).

<sup>11</sup> (1978) 1 WLR 231

But it is easy to see why, for in the words of Lord Denning<sup>12</sup>

“The English language is not an instrument of mathematical precision”.

To that is added that it is quite possible that Parliament may not have expressed its intention accurately in the words chosen even though there is a presumption that the words employed express the intention of Parliament. Therefore what the courts are looking for is the meaning of the words employed which in the real world may in fact be different from the intention of Parliament.

Something akin to that may have agitated the mind of Lord Reid in *Black-Clawson International Ltd. v. Papierwerke Walldhof-Aschaffenburg Ag*<sup>13</sup>, when he added his jigsaw:

“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”.

Waldron lends his voice:

“It is often said, as though it were a truism, that anything we interpret must necessarily be conceived as a product of someone’s intention ... But though they indicate a place for referring to intentions – the intentions of language-users as such – in any comprehensive account of what is going on, they provide no warrant for the view that, simply because a particular piece of legislation has a linguistic meaning, it must embody a particular intention attributable to a language-user”.<sup>14</sup>

Michael Zander offers a second reason why interpretation is an absolute necessity:

“Secondly, a legal document speaks not only to the present but is usually intended to cope with the future. That indeed

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<sup>12</sup> see *Seaford Court Estates Ltd. v. Asher* (1949) 2 K.B. 419 at 499

<sup>13</sup> (1975) 1 ALL E.R. 810 (H.L.)

<sup>14</sup>Waldron, Jeremy: Legislators’ Intentions and Unintentional Legislation, *Law and Interpretation: Essays in Legal Philosophy* ed. by Andrei Marmor, pp. 339-40

is normally its chief function. But the draftsman's capacity to anticipate the future is necessarily limited".<sup>15</sup>

Indeed for the draftsman is not the All-Knowing God.

Notwithstanding, it appears that the concept of the "intention of the Legislature is here to stay with us till infinity. Heidi M. Hurd concludes that:

"For as long as the law is accorded the sort of authority that it has historically claimed, intentionalism will necessarily be accorded that sort of respect that it does not deserve".<sup>16</sup>

Ronald Dworkin holds that all understanding is a matter of interpretation because:

"Law is an interpretive concept, any jurisprudence worth having must be built on some view of what interpretation is"<sup>17</sup>

Not everyone thinks though that it is necessary to look for the intention of the Legislature. Hurd<sup>18</sup> submits that it is empirically impossible to detect intentions or normatively undesirable to abide by them.

Thus the question – how can one interpret without knowledge of the legislature's intention? Minus the legislature's intention those writings are akin to "seagull tracks in the sand" or "mere marks on paper". Hurd replies that "we are free, that is, to invest such marks with a meaning distinct from that contemplated by their authors if so doing better enables us to act on the balance of reasons for action"<sup>19</sup>, read moral reasoning into them and "recognize that the law itself, as distinct from its authors, has a claim to authority".<sup>20</sup>

Still, to look at the complexities of interpretation and the hair-raising problems ranging from spelling mistakes, bad drafting, errors and slips to ambiguities and absurdities, one suspects that judges (at least some) would have abdicated their role and responsibility but for one injunction, that espoused in *Adeyemi v. A-G*,

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<sup>15</sup> The Law-Making Process, 2<sup>nd</sup> ed., (London: Weidenfeld and Nicolson) 1985, 35

<sup>16</sup> Interpreting Authorities: Law and Interpretation: Essays in Legal Philosophy ed. by Andrei Marmor, p. 405

<sup>17</sup> see Law's Empire (Cambridge, Mass: Harvard University Press, 1986) p. 50 as reproduced by Patterson, Dennis: Law and Truth (New York and Oxford: Oxford University Press, 1996) p. 86

<sup>18</sup> (op. cit)

<sup>19</sup> ibid. p. 426

<sup>20</sup> ibid. p. 432

*Ekiti State*<sup>21</sup>:

“If the general provisions of a statute is ambiguous, it is the duty of the courts to give meaning to that ambiguous expression” (underlining supplied).<sup>22</sup>

Thus the courts are duty bound to stay and interpret even when the words are a collection of incomprehensible mumbo jumbo. This should extend sympathy (which they rarely get) to the courts. The rigorous, painstaking, innovative but tedious attempt at interpretation contrived by Lord Browne-Wilkinson in *Pepper (Inspector Of Taxes) v. Hart*<sup>23</sup> is a good reference point.

This lack of set rules alone accounts for new and newer rules still at each turn. For instance, it is well acknowledged that the words must be taken in their plain meaning unless there is some ambiguity. If they are technical words then in their technical sense. Yet when Lord Denning M.R. held, in his Court of Appeal judgment before he was overturned by the House of Lords, that:

“Another thing to remember is that the statute is directed to the medical profession – to the doctors and nurses who have to implement it. It is they who have to read it and to act upon it. They will read it – not as lawyers – but as laymen. So we should interpret it as they would”<sup>24</sup>

...room is left for doubt as to whether these are not entirely different principles. It would appear to be an altogether new rule, an innovation. The operative words “terminated by a registered medical doctor” are clearly plain. In their technical sense, if any, they have a very ascertainable connotation. Why would the court interpret these words as the doctors and nurses would and not, for instance as the reasonable man would? But the erudite law lord always had groundbreaking opinions that were ahead of their times. Will this one prove to be? Given the antecedents it may be decades down the line before an answer turns up.

The question at the back of the mind of every lawyer and legal scholar should be – how can some order be introduced into the highlighted mayhem?

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<sup>21</sup> (2002) F.W.L.R. 1835, 1874

<sup>22</sup> Salmond further buttresses this view: “Where there is a genuine and perfect intention lying behind the defective text, the courts must ascertain and give effect to it; where there is none, they must ascertain and give effect to the intention which the legislature presumably would have had, if the ambiguity, inconsistency or omission had been called to mind. This may be regarded as the dormant or latent intention of the legislature, and it is this which must be sought for as a substitute in the absence of any real and conscious intention” Op. cit.

<sup>23</sup> (1993) 1 ALL E.R. 42

<sup>24</sup> See *Royal College of Nursing of the U.K. v. Department of Health and Social Security* (1981) A.C. 800 at p. 805

## THE RULES OF INTERPRETATION

Though everyone has some gift for interpretation, gossips, conspiracy theorists, everyone, the courts have formulated two means of arriving at the intention of the Legislature (for that is the appropriate terminology since in Nigeria for instance, there is no parliamentary sovereignty as is known in the United Kingdom but a sovereign, supreme Constitution that proclaims itself so and to which the National Assembly is subject). One is the literal rule – the principle that the courts ought not to go beyond the natural and ordinary meaning of the words which must be construed in their usual grammatical sense even where the consequences may be absurd or hardship may result or the words themselves may be loose and inexact. Maxwell calls it “the dominant rule”.<sup>25</sup> The other is the liberal or functional interpretation – the principle that a statute must be seen in the light of its spirit rather than the letter. Thus if the consequences will be absurd, then the courts must construe the legislation in such a way that the purpose of the legislation is served and the absurdity avoided. Then there is the middle course approach which is now the popularly held one – the courts must first interpret the words literally but when they find the occurrence of any ambiguity, must turn to the functional or liberal approach.

Several decisions have offered a roadmap for how a judge must proceed. Lord Denning<sup>26</sup>:

“A judge should ask himself how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out. He must then do as they would have done. A judge must not alter the material of which the Act is woven but he can and should iron out the creases”.

Contrast that with Lord Simonds<sup>27</sup>:

“The duty of the court is to interpret the words the legislature has used; those words may be ambiguous, but even if they are the powers and duty of the courts to travel outside them on a voyage of discovery are strictly limited”.

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<sup>25</sup> Maxwell, 12<sup>th</sup> ed. 1969, op. cit.

<sup>26</sup> Seaford Court Estates Ltd.. V Asher (1949) 2 K.B. 418, 499

<sup>27</sup> Magor & ST. Mellors Rural District Council v. Newport Corp. (1952) A.C. 189, 190-1

Notwithstanding, the implication of the foregoing is that first and foremost the literal rule must be applied. Nigerian authorities are not lacking in this area. Obaseki J.S.C observed in the case of *Awolowo V. Shagari*<sup>28</sup> that the three rules have been useful aids in the interpretation of statutes in common law countries for centuries and applied the above quoted English decisions. Applying the *Awolowo* case<sup>29</sup> Mohammed J.S.C.<sup>30</sup> held:

“The rule of construction of statutes is that they should be construed according to the intent of the legislature which promulgated the Act. If the words of the Statute are in themselves precise and unambiguous then no more can be necessary than to expound those words in their natural and ordinary meaning.”

The Supreme Court has also held (see *Ugu v. Tabi*)<sup>31</sup> that once the words and intendment of a statute are clear and unambiguous there is no need to revert to history for aid to its construction.<sup>32</sup>

But the literal rule has its obvious limitations in that in a lot of cases the object of the legislation suffers in deference to its literal interpretation. *Whitley v. Chappell*<sup>33</sup> was one such instance. By a certain law it was illegal to impersonate any person entitled to vote. The defendant had however impersonated a dead person who, by the very reason of that fact, was not entitled to vote. Therefore the defendant was acquitted completely negating the purpose of the law which was aimed at combating rigging.

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<sup>28</sup> *Supra*.

<sup>29</sup> *Supra*.

<sup>30</sup> *Owena Bank (Nig.) Plc. v. Nigerian Stock Exchange Ltd.* (1997) 7 SCNJ 160, 170

<sup>31</sup> (1997) 7 SCNJ 222, 229)

<sup>32</sup> They were a rehash of the now commonly acknowledged basic rule of interpretation which was laid down in *Sussex Peerage* case by Tindal, CJ: “The only rule for the construction of Acts of Parliament, is that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in that natural and ordinary sense. The words themselves alone do, in such a case, best declare the intention of the lawgiver. But if any doubt arises from the terms employed by the legislature, it has always been held a safe means of collecting the intention, to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which, according to Chief Justice Dyer, is “a key to open the minds of the makers of the Act, and the mischiefs which they intend to redress”.

<sup>33</sup> (1868) 4 L.R. Q.B. 147

In the most strident criticism of the Literal Rule, Professor H.L.A. Hart<sup>34</sup> has opined that it is based on the faulty premises that the words of a statute have plain ordinary meanings separate from their context. Zander<sup>35</sup> sets out the other misgivings about the Literal Rule which include that:

- a. What is usually referred to as the dictionary meaning is rather a misnomer considering that the dictionary often provides a number of alternative meanings;
- b. The plain meaning approach cannot be employed for general words which are capable of bearing several meanings;
- c. Frequently courts say the meaning of a word is plain and then proceed to disagree on its interpretation. The prime example of this complication in Nigeria is the *locus classicus* of *Anwolowo v. Shagari*<sup>36</sup> in which each of the justices on the panel held the relevant provision of the law to be unambiguous and yet somehow came up with three separate views on its interpretation.<sup>37</sup> This ambiguity was further complicated by the other conclusion of Justice Obaseki that there were two possible meanings conveyed by the words of the provision.<sup>38</sup>
- d. Interpretation usually comes up in contests between two parties with two contending meanings proposed. Usually then the contest is not decided by the plain meaning but by one of two contending meanings that is not necessarily the plain one.

In a further reference to its difficulties, Odgers<sup>39</sup> raises the same question of differences in perception.

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<sup>34</sup> "Positivism and the Separation of Morals", 71 Harvard Law Review 1958, p. 593, 607 as cited by Zander (op. cit. p. 49)

<sup>35</sup> Op. cit.

<sup>36</sup> Supra.

<sup>37</sup> The lead judgment by Fatai-Williams CJN held one view while the concurring judgment of Obaseki JSC also held a view of the section that was more in tandem with the other view expressed by the minority judgment of Eso, JSC (at p. 135).

<sup>38</sup> At 119.

<sup>39</sup> Odgers, Charles E.: Construction of Deeds and Statutes (4<sup>th</sup> ed.) (London: Sweet and Maxwell, 1956) p. 313 raises the same question that permeates all the rules of interpretation – one man's meat is another man's poison – thus, "If the words are plain, there is of course no difficulty and no necessity to involve any canon of construction. What does create a difficulty ... is the question, when are the words plain? What is plain to one mind may be just the reverse to another. If the words are plain, the first thing to do is to consider the object and scope of the Act" (Italics supplied).

This paper could even go as far as to say that if the words are plain, nothing else must intercede, not even the object, not even the scope of the Act. Once these begin to enter the frame, the so-called plain words may not be so plain after all. For this may account for why frequently the courts “say the meaning of a word is plain and then proceed to disagree on its interpretation” as Zander<sup>40</sup> submits above.

Further leading to a germane question to be examined by this paper - why do the literalists concede to the description “interpretation” when going by the plain and ordinary meaning the words should hardly need expounding? There is certainly a case for a misnomer presented here.

Yet, dubious as this sounds, the proponents of the Literal Rule continue to trumpet that it promotes certainty of the law.

#### **TRADITIONAL FUNCTIONALISM: INHERENT DIFFICULTIES**

The main rules of the functional approach are the Mischief Rule as formulated in the *Heydon's Case*<sup>41</sup> and the Golden Rule. Both rules have been referred to by Maxwell as the “other main principles of interpretation”.

The Golden Rule was attributed to Lord Wensleydale by Lord Blackburn in *River Wear Commissioners v. Adamsom*<sup>42</sup> but there is evidence that it was first used by Jervis C.J. in *Mattison v. Hart*<sup>43</sup> though it was finessed in *Becke v. Smith*<sup>44</sup>

The Golden Rule permits a departure from the ordinary meaning of the words if they would be repugnant to or inconsistent with some other provision in the law or when it would result in absurdity. In expounding these rules Parker C.B. said in *Mitchell v. Torrup*<sup>45</sup>:

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<sup>40</sup> Op. cit.

<sup>41</sup> 76 E.R. 638

<sup>42</sup> (1877) 2 App. Cas. 743, 764-5

<sup>43</sup> (1854) 14 C.B. 357, 385

<sup>44</sup> (1836) 2 M. & W. 191 at 195, to the effect that the courts ought to adhere “to the ordinary meaning of the words used and to the grammatical construction unless that is at variance with the intention of the legislature to be collected from the statute itself, or leads to any manifest absurdity or repugnance in which case the language may be varied or modified so as to avoid such inconvenience, but no further.”

<sup>45</sup> (1766) park 237

“In expounding Acts of Parliament where words are expressed, plain and clear, the words ought to be understood according to their plain and natural signification and import, unless by such exposition a contradiction or inconsistency would arise in the Act by reason of some subsequent clause from whence it might be inferred the intent of Parliament was otherwise.”

Cross suggests that Parke, B., in *Becke v. Smith*<sup>46</sup> may have applied the word “absurdity” to mean no more than repugnant to other clauses in the statute but that his subsequent dictum in *Grey Pearson*<sup>47</sup> is less easily susceptible and that this latter dictum is the most commonly cited today:

“I have been long and deeply impressed with the wisdom of the rule now, I believe, universally adopted, at least in the courts of law in Westminster Hall, that in construing wills and indeed, statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid the absurdity and inconsistency, but no farther”.

In conception then the rule was never meant to be independent of but supplementary to the Literal Rule.

The Golden Rule has been applied in more illustrative ways. In *Keene v. Muncaster*<sup>48</sup>, in order to park in a certain way, permission was required by law from a policeman in uniform. But the defendant was himself a policeman in uniform. He deemed that he needed no permission then. But it was held, avoiding that absurdity that permission had to be requested from someone else.

In a Nigerian case, *Izozo v. Monye*<sup>49</sup>, for the purposes of a re-hearing *de-novo* ordered by a Magistrate under the powers conferred by section 53(b) of the Western Nigeria Customary Courts Law, the phrase “*before any Magistrate’s Court*” in the section was held not to embrace the court of the Magistrate who ordered the re-hearing.

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<sup>46</sup> *Supra*.

<sup>47</sup> (1857), 6 H.L.Cas. 61, 106

<sup>48</sup> (1980) 6 TR 377

<sup>49</sup> (1962) 2 ALL NLR 148

In *Ebiri v. Board of Customs & Excise*<sup>50</sup>, section 2 of the Criminal Procedure Act Cap. 43 provided: (a) which on conviction may be punished by a term of imprisonment exceeding two years, or (b) which on conviction may be punished by imposition of a fine exceeding 200 pounds or (c) which is not declared by the written law creating the offence to be punishable on summary conviction”. It was held that the second “or” in the definition was a mistake for “and”. This is well in accord with the principle that the court can correct a defective *sententia legis*. On the other hand, in *Okumagba v. Egbé*<sup>51</sup> a certain regulation of the Parliamentary Election Regulations provided

“Every person ... (b) before or during an election knowingly or recklessly publishes any false statement of the withdrawal of a candidate at such election for the purpose of promoting or procuring the election of another candidate shall be guilty ...” the judge held that “I have adopted the word “any” as did the Chief Magistrate in place of “another” because I find that it not only harmonises with the context but satisfied the spirit and scope of the statute”.

It was held that the office of the judge is to state the law not to legislate; the substituting of “any” candidate for “another” candidate was an act of legislation; and the argument from absurdity, which ought to be used with great caution was misapplied to bend the regulation to a sense it could not bear.

Lord Esher’s famous dictum<sup>52</sup> is often put forward as a flag waving proposition for the Literal Rule. In his words:

“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 the question whether the legislature has committed an absurdity. In my opinion the rule has always been this – if the words of an Act admit of two interpretations, then they are not clear; and if one interpretation leads to an absurdity and the other does not, the court will conclude that the legislature did not intend it to lead to an absurdity, and will adopt the other interpretation”.

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<sup>50</sup> (1967) NMLR 35

<sup>51</sup> (1965) 1 ALL NLR 62

<sup>52</sup> in the case of *R. v. City of London Judge* (1892) 1 Q.B. 273, 290

The optimist insists that the glass of water is half-full while the pessimist insists that it is half-empty. In the same vein this paper, after further research, may prefer to view it as the proposition of a watered down golden rule of interpretation to be applied only where there are two competing interpretations one only of which leads to an absurdity. And is the Nigerian decision in the case of *Yabugbe v. C.O.P.*<sup>53</sup> merely a proponent of this watered down Golden Rule of interpretation as it appears in tandem with the above? In that case certain police officers unlawfully assaulted the victim and were prosecuted for the offence and convicted. One of the convicts appealed on the ground that he was charged outside the three months limitation period of prescribed by the Public Officers' Protection Law. The Supreme Court held that the provision talked of prosecution and not criminal prosecution and that the word "prosecution" within that context meant "the institution and carrying on of civil legal proceedings. This is made apparent by subsequent use of the words "plaintiffs" and "defendants" in the explanatory sub-sections and the complete absence of the words "prosecution" and "accused" in these sub-sections. It further held that "in constructing a word in a statute which is capable of having two meanings the court should adopt that construction which will not defeat the intention of the lawmaker. It could not have been the intention of the state to shield or protect public officers from criminal prosecution for criminal offences committed by them in the guise of performing their official duties by limiting the time to initiate prosecution to only three months".

Lord Diplock, clearly not an ardent fan of the Golden Rule of interpretation, in *Dupont Steels Ltd And Sirs*<sup>54</sup> has held that:

"Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguity as an excuse for failing to give effect to its plain meaning because they consider that the consequences of doing so would be inexpedient, or even unjust or immoral".

The decision in *Richard Thomas & Baldwin Co Ltd.*<sup>55</sup> clearly went against Lord Diplock's admonition then for the words "in motion or in use" were themselves plain and unambiguous. Or so they would appear. In that case the Factories Act contained a clear and unambiguous provision requiring the fencing of machines when "in motion". It was held that this meant "*mechanical propulsion*" and excluded being moved by hand and that at the time of the accident the machinery was not in motion or in use but for repair, and accordingly there was no obligation to fence

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<sup>53</sup> (1992) 4 SCNJ 116, 129

<sup>54</sup> (1980) 1 WLR 142

<sup>55</sup> 1955 A.C. 321

it. It was an interesting case in which several connotations were given to “in motion or in use”. Lord Oaksley held that a machine is not “in motion” if it is not in motion for the purposes for which it was intended. Lords Porter and Tucker held that a machine is not “in motion” when it is turned by hand and there is no motion in the prime mover. And Lords Reid and Keith held that “in motion” imports a continuing state of motion lasting or intended to last an appreciable time”. Since they came to the same decision it is not out of place to conclude that they came to the market by several varying routes.

The absurdity must be such that the court is compelled to deviate from the literal meaning of the words. Critics have said that for this reason alone, its impact has been minimal reflecting only in comparatively few cases. Thus, the Golden Rule has not gone unassailed.<sup>56</sup>

The purport is the same as Lord Denning M.R. proposed in the *Royal College Of Nursing Case*<sup>57</sup> before he was overruled:

“I think that the Royal College are quite right. If the Department of Health want the nurses to terminate a pregnancy, the Minister should go to Parliament and get the statute altered. He should ask them to amend it by adding the words ‘or by a suitably qualified person in accordance with the written instructions of a registered medical practitioner’. I doubt whether Parliament would accept the amendment. It is too controversial. At any rate, that is the way to amend the law: and not by means of a departmental circular”.<sup>58</sup>

Lord Denning does raise some questions there. Does this statement of law proceed from the same judge who besought the court to ask what Parliament would have done had they come across this ruck and to do what they would have done (see the *Seaford Court Estates case*<sup>59</sup>)? Is there not justification then in the proposition that although judges who have often been adherents of the functional

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<sup>56</sup> Lord Bramwell holding, familiarly that: “It is to be remembered that what seems absurd to one man does not seem absurd to another ... I think it is infinitely better, although an absurdity or an injustice or other objectionable result may be evolved as the consequence of your construction, to adhere to the words of an Act of Parliament and leave the legislature to set it right than to alter these words according to one’s notion of an absurdity” (underlining supplied). see *Hill v. East and West Indian Dock Co.* (1884) 9 App. Cas. 448, 464-5

<sup>57</sup> *Supra*.

<sup>58</sup> *Ibid* at p. 805

<sup>59</sup> *Seaford Courts Estates Case* (*supra*).

rule and those who have been strict literalists have been caught on the odd occasion applying the other rule and that they do not adhere to any particular rule choosing instead to adopt from case to case the rule which will best suit the course of justice; or is it their singular notion of utopia? To which Lord Denning would have replied that he did ask himself what Parliament would have done and came to the conclusion that Parliament would not have amended it it being too controversial. That in itself sparks off a chain reaction all its own. Did Lord Denning, when he came up with that dictum in the *Sea Court Estates Case*<sup>60</sup> have in contemplation a court pre-empting the legislature? The same question Lord Wilberforce must have asked himself before delivering his rebuke in the *Royal College of Nursing* case<sup>61</sup>. For His Lordship had no way of knowing what the parliamentary attitude to an amendment would be.

It is often said that the court must not legislate but must wait for the Legislature to amend the laws. In reality everyone knows that Parliament often sits around doing nothing but upbraiding each other. Perhaps for fear of this, courts take it upon themselves to liberally construe statutes rather to wait for that opportune moment when Parliament on its own volition may amend the law. Perhaps the time has come for a constitutional framework that requires the courts to refer cases of ambiguities to the legislature for its response within a certain time frame. Then how goes the duty of the court to interpret even where there are proven ambiguities? Must cases be stayed until Parliament amends the laws or may judgments continue to be rendered in the interim based on the defective law? Will the intention of the legislature not be skewed by the legislature's possible interest in the result of a particular litigation? How does it affect the time held principle that laws are to be made not for individuals but for the generality? And how does it affect the presumption against retroactivity?

Zander<sup>62</sup> himself points out one omission of the Golden Rule which is – how does the court proceed when it finds an absurdity? In spite of this, Zander<sup>63</sup> opines:

“Admittedly, the golden rule does at least have the saving grace that it may protect the court from egregious foolishness”.

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<sup>60</sup> Ibid.

<sup>61</sup> See *infra*.

<sup>62</sup> *Op. cit.*

<sup>63</sup> Ibid.

The Mischief Rule was formulated in this scientific formulation in *Heydon's Case*<sup>64</sup>:

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:

- 1<sup>st</sup>. What was the common law before the making of the Act,
- 2<sup>nd</sup>. What was the mischief and defect for which the common law did not provide,
- 3<sup>rd</sup>. What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth, and
- 4<sup>th</sup>. The true reason of the remedy;

...and then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*"

It was then advanced by *Re Mayfair Property Co.*<sup>65</sup> that to construe a statute, the courts must 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 remedy provided by the statute to cure the mischief".

Always, in the view of the *Heydon* decision<sup>66</sup>, the statute must be construed in such a manner as to "suppress the mischief and advance the remedy". However it would appear that when a statute has been enacted for the purpose of suppressing one kind of mischief, the rule will not be applied for the purpose of defeating an unstated mischief unknown to that statute. In *Gorris v. Scott*<sup>67</sup> a statute provided that animals carried on board ship should be restrained in pens. The defendant

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<sup>64</sup> Supra.

<sup>65</sup> [1898] 2 Ch. 28 at 35

<sup>66</sup> Supra.

<sup>67</sup> (1874) L.R. 9 Exch. 125

carrier had failed to do this and the plaintiff's sheep had been washed overboard in a rainstorm. Had they been penned this would have been avoided. Nevertheless the court dismissed the plaintiff's suit for the reason that the statute had been enacted for the purpose of stopping the spread of infection from one owner's animals to another's and could not be applied to remedy a totally different mischief i.e. preventing sheep from being washed overboard during a storm.

Illustrations abound where the Mischief Rule has been applied. One such case is *Corkery v. Carpenter*<sup>68</sup> where a bicycle was held to be a "carriage" for drunk in charge of carriage laws, to stop the mischief of drunks plying the highway. In *Smith v. Hughes*<sup>69</sup> a prostitute solicited from inside a building to the street. A private building was held to be a street or public place for the purposes of the Act to avoid the mischief of harlotry.

Settled it would appear but the subject throws up more controversies than can at first be imagined. The case of *I.B.W.A Ltd. v. Imano Nig, Ltd. & Anor.*<sup>70</sup> is illustrative. In that case a Senior Advocate of Nigeria appeared for the 1<sup>st</sup> defendant a limited liability company of which he is a director. On appeal the appellants raised a preliminary objection on the grounds that he was not entitled to appear for the 1<sup>st</sup> defendant by dint of Rule 31(b) of the Rules of Professional Conduct for Legal Practitioners. The Supreme Court dismissed the appeal holding that the rule was clear and free from ambiguity that only directors who received fees as such were disentitled from appearing and that in applying the mischief rule the construction of a statutory provision will not be strained to include cases plainly omitted from the natural meaning of the words of the statute. Sound judgment it would appear. That is until Agbaje JSC expresses the following restrained reservation<sup>71</sup>:

"As I have just said the proviso is clear beyond a peradventure. It can of course be justifiably criticized that it has without just cause discriminated between legal practitioners who are directors and are being paid director's fees and legal practitioners who are directors and are not being paid director's fees. For the likelihood of conflict of interest in a legal practitioner who accepts a brief from a company of which he is a director of that company but from the very fact that he is a director simpliciter of the company. However I am satisfied on the authorities that this criticism

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<sup>68</sup> (1951) 1 K.B. 102

<sup>69</sup> (1960) ALL ER 161

<sup>70</sup> (1988) 7 SCNJ (Pt. II) 326

<sup>71</sup> At p. 337

which in my view cannot be faulted is not a warrant for any court to extend, praying in aid the mischief rule, the provisions of section 31(a)(i) of the rules to a situation the provisions plainly do not cover, namely prevention of a legal practitioner who is a director of a company and who is not in receipt of director's fees from accepting a brief from his company".

The contention of the counsel for the respondents had been that counsel was not competent to appear because of the mischief which the restriction placed on a legal practitioner who is also a director of his client company sought to prevent which he put forward on the authority of Orojo's Conduct and Etiquette For Legal Practitioners.<sup>72</sup>

Pray, is the absurdity in a preference for counsel in receipt of fees as director and one not highlighted by His Lordship himself not one of those to be considered in applying an interpretation other than the literal one? Perhaps the absurdity is not compelling enough. If that were the case, did His Lordship not identify the mischief that the law sought to avoid to wit as identified in Orojo's book? The Court probably came to the right decision. If not, the Court would not have been helped by the hazy state of the law. But be that as it may, it calls into question precisely what principles were applied here taken side by side with *Corkery v. Carpenter*<sup>73</sup> Or *Smith v. Hughes*.<sup>74</sup> In the former a bicycle was clearly not a "carriage" in the plain meaning of the word but was extended to combat the mischief of drunks on the highway. In the latter a street or public place in its plain meaning clearly did not contemplate a private building. Yet the court brought a private building within its ambit to combat the mischief of harlotry. Yet in *Imano's case*<sup>75</sup> the Supreme Court, though it acknowledged it, was not prepared to extend the meaning of a director acting as counsel to include one not in receipt of fees to combat the mischief of "the embarrassment of conflict as between that court to whom he owes a duty as counsel on the one hand, and his employer as a client on the other, and to ensure he can perform his duties with the independence and impartiality demanded of counsel" even though there was the likelihood of the mischief regardless.

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<sup>72</sup> p. 20 as "to save him the embarrassment of conflict as between that court to whom he owes a duty as counsel on the one hand, and his employer as a client on the other, and to ensure he can perform his duties with the independence and impartiality demanded of counsel". According to counsel, the likelihood of the occurrence of the mischief exists whether or not the legal practitioner who is a director in a company is in receipt of fees or not as a director.

<sup>73</sup> *Supra*.

<sup>74</sup> *Supra*.

<sup>75</sup> *Supra*.

The above judgment has been highlighted at such great length to emphasise what could be one of the failings of the application of the Mischief Rule. The reservation expressed by Agbaje JSC has been utilized in those two English cases to reach what would amount to the reverse of the verdict reached in the Imano case. This in itself raises an altogether different question – in its application, is there sometimes a confusion in the minds of jurists whether what they are applying is a rule to a statutory provision or a rule to a statute?

Lord Diplock in *Dupont Steels Ltd And Sirs*<sup>76</sup> has held, perhaps with a certain element of dogma, that even if the omission from the plain and unambiguous statute was inadvertent – and that if Parliament had foreseen the *casus omissus*, it would have certainly adopted a cause of action other than the literal interpretation of the statute – the courts should still follow the plain interpretation that is also evidently contrary to Parliament’s intention. Hence the Mischief Rule can only be followed when there has been some ambiguity. This also waters down the ambit of the Mischief Rule.

Nevertheless, Zander<sup>77</sup> opines that the Mischief Rule is a very great improvement on the other two<sup>78</sup> for “language cannot be properly understood without some knowledge of the context”.

As for where the courts will look to discover the mischief, these include earlier statutes, judicial decisions, general historical backgrounds, government publications, parliamentary debates, international conventions, Law Commission Reports, presumptions and subordinate principles of interpretation etc. It has been held in *Cooperative And Commerce Bank Plc. v. A-G, Anambra State & Anor.*<sup>79</sup> that it is quite legitimate to interpret an instant statute under construction by reference to other earlier statutes in the same group of legislations in order to determine the course and content of the legislation under consideration. There the Supreme Court adopted the definition of “privatization” under the Privatisation and Commercialisation Act Cap. 369 of 1990 in setting whether the Appellant was being privatized by an offer of shares to the public and held to the contrary. *Eze v. Federal Republic Of Nigeria*<sup>80</sup> was one instance in which the mischief was extracted from earlier judicial decisions.

The Mischief Rule has seen its application in Nigerian courts. In *FEDECO v. Goni & Anor.*<sup>81</sup> section 64(1)(g) of the 1979 Constitution provided that where a person

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<sup>76</sup> Supra.

<sup>77</sup> Op. cit.

<sup>78</sup> Ibid at p. 97.

<sup>79</sup> (1992) 10 SCNJ 137

<sup>80</sup> (1987) 2 SCNJ 76 at p. 82-3

<sup>81</sup> (1983) 10 S.C. 78

whose election to the legislative house was sponsored by a political party becomes a member of another political party before the expiration of the period for which that house was elected, he would have to lose his seat in that house. Under its proviso, if his membership of the new party occurred because there was a division in the political party which sponsored him or there was a merger of two or more political parties including the party that sponsored him, he does not lose his seat. For the purpose of disqualification of a candidate to the office of governor section 166(1)(a) incorporated the provisions of section 64(1)(g). It was contended that section 64(1)(g) envisaged a situation of division into two and not a subsequent fragmentation of one of the two factions. The Supreme Court in rejecting this submission held, per Anigolu, JSC that:

“The mischief which the framers of the Constitution wanted to avoid was carpet-crossing which, from our constitutional history, in the not distant past, has bedevilled the political morality of this country. They had however to allow for a situation where a political party, by reason of internal squabbles, had split into one or more factions. A split or division could arise without any fault of the members of a political party, resulting in a member rightly or wrongly, finding himself in a minority group which may not be big enough, or strong enough, to satisfy the recognition, as a separate political party. Of the Federal Electoral Commission ... Such a situation is entirely different from the fraudulent and malevolent practice of cross-carpeting politicians of yester-years who, for financial consideration or otherwise, crossed from one political party to another, without qualms and without conscience. Such a practice had to be discouraged by the framers of our Constitution if political public morality of our country was to be preserved”.

That in itself raises one question – given that justice must not only be done but must be seen to be done, and given that the mischief must be gathered from a source, is it advisable, not to mention allowable, to proffer a mischief such as this was, without evidence of the source from which the mischief was gathered? There is no evidence that the court drew the mischief from the deliberations of the Constituent Assembly or the Constitution Review Committee or other *travaux préparatoires*. Lord Diplock referred (see the *Fothergill* decision<sup>82</sup> to “identifiable sources that are publicly accessible” (underlining supplied). To that, is suggested

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<sup>82</sup> *Fothergill v. Monash Airlines* (1981) AC 251

that in order for the imagination of the court not to run completely wild while substituting its objectives for those of the society, “identifiable sources” there, in this work’s own application of the Golden Rule, must mean “identified sources”.

On the other hand, it would appear to come within the parameters laid down in *Anolowo v. Shagari*<sup>83</sup> that the court “is to take judicial notice ... of other matters generally known to well informed people” (underlining supplied). This seems to find support in the words of Lord Wilberforce (see the *Royal College Of Nursing* case<sup>84</sup>) who counselled that regard must be heard “to the state of affairs existing, and known by Parliament to be existing, at the time” (underlining supplied).

Even so, what is one man’s mischief may not be another man’s.

Though the Mischief rule was the earliest rule of interpretation historically the literal rule came to be mentioned as the rule and the mischief rule as the exception to it. Being the earliest rule then it stood independent of the Literal Rule and statutes were interpreted in the first instance by it. There are those who still hold that, as originally conceived, the Mischief Rule must not be the fallback rule in the event of an ambiguity. Lord Halsbury was not one of them and he had some harsh words for that proposition in *Leader v. Duffey*<sup>85</sup>:

“All these refinements and nice distinctions of words appear to me to be inconsistent with the modern view, which is I think in accordance with reason and common sense, that whatever the instrument, it must receive a construction according to the plain meaning of the words and sentences therein contained. But I agree that you must look at the whole instrument inasmuch as there may be inaccuracy and inconsistency: you must, if you can ascertain what is the meaning of the instrument taken as a whole in order to give effect, if it be possible to do so, to the intention of the framer of it. But it appears to me to be arguing in a vicious circle to begin by assuming an intention apart from the language of the instrument itself and having made that fallacious assumption to bend the language in favour of the presumption so made”.

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<sup>83</sup> Supra.

<sup>84</sup> Supra.

<sup>85</sup> 1888 13 App. Cas. 294, 301

This was, pardon the language, malevolently put for the pre-requisite search for the mischief which the law seeks to cure can hardly amount to a “fallacious assumption”. Neither can a discovery that the clause would result in an absurdity.

Thus, the sufficiency or otherwise of each of these rules of interpretation have provoked virulent concern in every common law jurisdiction.

There is then the question whether these rules apply when constitutions are being interpreted.

## THE FUTURE

What are the possibilities if the path is to be cleared for more result oriented statutory interpretation? There are in existence other minor rules of interpretation that some suggest will in the near future become some of the main rules. This effort will consider two.

One is the “purposive” approach whose main difference from the Mischief Rule is that it does not place such a huge reliance on what the mischief in the previous law was. There is usually a reference to a “more purposive approach” which is not to be confused with the “purposive” rule. The former refers to every genus of the liberal or functional approach to interpretation as distinct from the Literal Rule. The latter however would seem to be an improvement of the Mischief Rule.

Lord Reid, apparently canvassing this “purposive” rule has sometime held that to apply the words literally is to defeat the obvious intent of the legislature. To achieve the intent and produce a reasonable result however, some violence must be done to the words. In a relatively recent case, Lord Griffith has held that:

“The days have passed when the courts adopted a literal approach. The courts use a purposive approach, which seeks to give effect to the purpose of the legislation” (see *Pepper (Inspector of Taxes) v. Hart*<sup>94</sup>).

Apparently applying this purposive rule, Lord Wilberforce has held in *Royal College Of Nursing Of The U.K. v. Department Of Health And Social Security*<sup>95</sup> that:

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<sup>94</sup> Supra.

<sup>95</sup> Supra.

“In interpreting an Act of Parliament it is proper, and indeed necessary, to have regard to the state of affairs existing, and known by Parliament to be existing, at the time”.

He added that:

“Leaving aside cases of omissions by inadvertence, this being not such a case, when a new state of affairs, or a fresh set of facts bearing on policy comes into existence, the courts have to consider whether they fall within the Parliamentary intention”<sup>96</sup>.

He was ruling that a method of abortion (in the third trimester, the introduction via catheter into the interspace between the amniotic sac and the wall of the uterus of an abortifacient drug called Prostaglandin which aids uterine contractions in most cases resulting in the expulsion of the foetus after a period of between 18-30 hours), which was clearly not permitted under the Abortion Act 1967 (in that the Act contemplated only abortion by surgical operation) was nevertheless legal because the method was in accordance with the policy of the Act (as distinct from the policy of Parliament) which were two-fold: first, to broaden the grounds upon which abortion may be lawfully obtained and second, to ensure that the abortion is carried out with all proper skill and in hygienic conditions. He however admonished however that:

“There is one course which the courts cannot take; they cannot fill gaps; they cannot by asking the question ‘What would Parliament have done in the current case if the facts had been before it?’ attempt themselves to supply the answer, if the answer is not to be found in the terms of the Act itself”.

This was clearly a direct castigation of Lord Denning’s proposition for the court to ask itself what Parliament would have done were it in the court’s shoes. It does sound ludicrous of course that Lord Wilberforce, nay the Court, was upholding the dissenting opinion at the Court of Appeal by Brightman L.J. that in a case in which there was “maximum nurse participation” (the Act did not contemplate it) owing to the role of the nurses at several stages of the abortion process:

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<sup>96</sup> At p. 822.

“I am disposed to ... read section 1(1) as meaning that a person shall not be guilty of an offence under the law relating to abortion ‘when treatment for termination of a pregnancy is carried out by a registered medical practitioner’. Such a construction does not in my opinion involve adding any words at all to the statute. I think it is what the section means on its true construction in the context in which the words are found”<sup>97</sup>

it is fallacious and factually incorrect to rule that substituting the rather ambiguous and prolix words ‘when treatment for termination of a pregnancy is carried out by a registered medical practitioner’ for a clause that makes abortion a criminal offence unless the pregnancy was “terminated by a registered medical practitioner” does not in his opinion “involve adding any words at all to the statute”. It is difficult to agree that this construction was found in the terms of the statute ironically something Lord Denning had just been accused of complicity in.

The decision in that case suggests that courts employing the purposive approach are merely engaged in exercising legislative functions for in that case the words had been clear and unambiguous – abortions were to be carried out by “a registered medical practitioner”. But the Department of Health sought to show that there was some absurdity in requiring a medical practitioner to be present at every stage of a process that could last all of thirty hours when some of those stages were indeed meant to be carried out by competent nurses. On the other hand it may be suggested on the authority of *Attorney General v. Edison Telephone Co.*<sup>98</sup> that the courts are forever willing to recognize new inventions and developments in science in their judgment. In that case, the Telegraph Acts of 1863 and 1869 were held to cover the telephone.

Sir Rupert Cross is also credited with formulating the Contextual Approach<sup>99</sup> – which were set down as:

- a. That the judge should give effect to the ordinary (or technical where appropriate) meaning of words in the context of the specific statute. Thus the extent of the meaning of the words must be determined by the context of the Act;

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<sup>97</sup> At p. 809.

<sup>98</sup> (1881) 6 Q.B.D. 244

<sup>99</sup> <http://www.richinstyle.com/masterclass/fonts.html#back2>

- b. If wordings would give an absurd result, then the courts can apply any secondary meaning;
- c. The court may read in the implied ellipsis. But it has limited power to add, alter, remove words to avoid unintelligible or absurd or unworkable or unreasonable clauses or clauses that are irreconcilable with the rest of the statute. If words have been inadvertently used, it is legitimate for the courts to substitute what is apt to avoid the intention of the legislature being defeated;
- d. In applying the rules the court may employ interpretative aids and presumptions.

These are just two of the several approached envisaged to be in greater use in the future. In Nigeria, however, the approach that logically appears to have the historical antecedents to supplant literalism would appear to be purposivism. This is largely accounted for by the fact that the Nigerian courts have rather regularly interpreted statutes in the light of their purpose. In *Conde v. Minister of Western Region*<sup>100</sup> it was held that only such provisions as are necessary to achieve the express manifest intention and objects of the legislature, or to prevent their frustration, may be implied into a provision. However, in *Western Nigeria Finance Corp. v. Nigeria Fishing Co. & 2 Ors.*,<sup>101</sup> section 14 (a) of the Finance Corporation and Local Loans Board Law (Cap. 37) Laws of Western Region of Nigeria provided in part:

“Where in the opinion of the Corporation- (a) a person (other than a local Loans Board) is engaged in or about to engage in an enterprise in the region, and (b) that the enterprise is calculated to further the economic development of the Region, the Corporation may make advances or guarantee loans to that person ...”

It was contended before the Supreme Court that the Corporation had made the loan to persons not engaged in an enterprise within the Region and therefore the loan was not recoverable. It was held that it was sufficient if the enterprise served the region and that the requirements of section 14 have to be considered against the dominant purpose for which the Corporation was established i.e. the purpose of developing the economy of the Region by increasing its revenue. The Court departed from the clear words of the statute and opted for a purposive

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<sup>100</sup> (1962) 2 All NLR 186.

<sup>101</sup> (1967) LLR 131.

construction. Also in a landmark case, *Jamal Steel Structures Ltd. v. African Continental Bank Ltd.*<sup>102</sup> the claim before the Lagos High Court was for the balance due resulting from an overdraft granted by the plaintiff to the defendant. It was argued before the High Court that it had no jurisdiction in view of section 7(1)(b)(iii) of the Federal Revenue Court Decree of 1973. The Court held that the provision must be construed *ejusdem generis* so that the words “other measures” became “other banking measures” and that thus the State High Court had jurisdiction. The Court then proceeded to adduce another reason for the interpretation it had adopted which was that “the true object and purpose of” the Decree was to ensure a more expeditious dispatch of revenue cases in the Federal Revenue Court “which the State High Courts were supposed to have been too tardy to dispose of in recent years”.<sup>103</sup> It appears that the Court had opted for a purposive approach to interpreting the provision. Also in *Balogun v. Salami & Ors.*<sup>104</sup> it appears that the Supreme Court had combined the literal and the mischief canons with the golden canon. In that case, section 10 of the Registration of Titles Act provided that a person may object to first registration on the ground that the land is family property or that it is subject to native law and custom and that he has an interest in it. The provision added that if that was not done, any claim, which might have been so put forward, shall not be entertained after such registration. Applying a literal interpretation the Court held that the rights claimed by the defendants were such as could have been put forward in opposition to the registration but that they were debarred as they had not done so and gave judgment to the plaintiffs. The Court also applied the mischief canon in holding that under the pre-existing law, the purchaser’s registration did not cure the defect and that section 10(3) “*must have been intended* to remove that bane by freeing the first registration of title from claims of that sort” (emphasis added) and that if the defendants claim succeeded, the mischief whereby some family members took money and others came forward and also laid claim would continue unabated.<sup>105</sup> It is submitted that by also giving consideration to the fact that section 10(3) could work hardship and that the Registrar had a duty to investigate the defendant’s registered title,<sup>106</sup> the Court also applied the golden rule. Most significantly in 2002, in what would amount to Nigeria’s equivalent of the English decision in *Pepper (Inspector of Taxes) v. Hart*,<sup>107</sup> the Supreme Court held in *Adevumi v. A-G, Ekiti State*<sup>108</sup> that where the main

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<sup>102</sup> (1973) All NLR 852. See also *Bronik Motors Ltd. & Anor. v. Wema Bank Ltd.* (1983) NSCC 226, 235, *Mandara v. A-G, Federation* (1984) NSCC 221 (here Irikefe JSC opted for the mischief canon) and *African Newspapers of Nigeria Ltd. v. Federal Republic of Nigeria* (1985) NSCC (Pt. 1) 405.

<sup>103</sup> At 864.

<sup>104</sup> (1963) 1 All NLR 128.

<sup>105</sup> At 134.

<sup>106</sup> At 135.

<sup>107</sup> *Supra* in that it essentially abolished the literal canon.

<sup>108</sup> *Supra*.

object and intention of a statute are clear, it should not be reduced to a nullity by a literal application of the language. Unfortunately, the Court does not appear to have settled finally for this position. As recently as 2006, the Court has held<sup>109</sup> that:

“The cardinal principle of law of interpretation is that a court when interpreting a provision of a statute must give the words and the language used their simple and ordinary meaning, and not to venture outside it by introducing extraneous matters that may lead to circumventing or giving the provision an entirely different interpretation to what the law maker intended it to be”.

## CONCLUSION

The purpose of this work has been to underline and detail the usually understated complexities of statutory construction in Nigeria in preparing the minds of legal reformers for the onerous task of review. The need for more uniform and ascertainable rules of statutory interpretation that appeals not only to the partisans but to the casual observer, cannot be over-emphasized. As it is, with the hazy field of legislation, not even the partisans can lay claim to any clear view of the field.

The functional rule of interpretation has always been assailed for empowering the judges to substitute their visions and objectives for those of society (though it is unfathomable how both the Mischief Rule and the Golden Rule, properly applied, can achieve that result). It will be a subject for consideration whether, in the event that the rules of interpretation can be made firmer than the rather loose concepts presently applicable, the judges can be given the flexibility they require for their job without the freedom that empowers them to roam freely into arenas that are properly referred to as judicial law making and proclaim that “the law is what the judges say it is”.<sup>110</sup>

The attainment of these objectives will be no mean feat for this subject has proved, owing to its peculiarities to be an area into which researchers, particularly academic lawyers, fear to go into.<sup>111</sup>

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<sup>109</sup> *Unipetrol Nigeria Plc. v. Edo State Board of Internal Revenue* (2006) NILR 73 viewed at <http://www.nig-law.org/LawReporting2006.htm> last accessed on October 11, 2008.

<sup>110</sup> Lord Devlin: *Samples Of Law Making*, p.2).

<sup>111</sup> Cross, *ibid*, at 168 “Why is it that, in the field of the general principles of statutory interpretation, the English academic lawyer does not perform his ordinary function of synthesizing and criticizing the case-law, and, where appropriate, making proposals for reform? The answer

While the reluctance of academic and other lawyers to delve into the subject of interpretation is understandable, it remains incontestable that the endeavour is one that must be attempted on several fronts. The most important starting point, it would appear of course, is that founded on the etymological interrelationship between the concept of “intention” and “purpose”.

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depends partly on the conflicting statements of principle which have been made from time to time by the courts, partly on the necessarily narrow operation of the doctrine of precedent in relation to statutory interpretation and partly on the effect of one landmark law review article”. He adds, “The point has also been made that a decision on the interpretation of one statute generally cannot constitute a binding precedent with regard to the interpretation of another statute with the result that a general rule of interpretation, unlike other common law rules, can never be rendered more specific by the *rationes decidendi* of later cases. The subject is dependent upon dicta and academics like to work with decisions”. This point has been buttressed in *Carter v. Bradbeer* (1975) 3 ALL E.R. 158, 161 where Lord Diplock observed, “A question of statutory construction is one in which the strict doctrine of precedent can only be of narrow application. The *ratio decidendi* of a judgment as to the meaning of particular words or combination of words used in a particular statutory provision can have no more than a persuasive influence on a court which is called on to interpret the same word or combination of words appearing in some other statutory provision”.