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'DO JUDGES MAKE LAW?' A CURSORY LOOK AT THE RECURRING QUESTION

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ABSTRACT

It is well established that the long-standing principle of Separation of Powers assigns the functions of governance, namely lawmaking, law execution, and law interpretation, to the Legislative, Executive, and Judicial arms of government, respectively. Each branch is expected to operate independently, free from undue interference by the others. Theoretically, the law-making power for the maintaining societal peace and order lies solely with the recognized legislative bodies present, in Nigeria, this refers to the National Assembly, at the Federal level and State Houses of Assembly, at the state level. However, in practice, the reality is more complex. Due to concepts such as judicial review, checks and balances, the development of case law and the doctrine of stare decisis, the roles of the judiciary and the legislature often appear to overlap. This necessary encroachment by the judiciary into the realm of lawmaking has been the subject of intense debate for centuries. While some argue that judges are merely interpreting existing laws, others contend that they are intruding into legislative territory and accuse them of judicial activism. A more nuanced perspective holds that the effective functioning of the judiciary is inherently connected to aspects of legislative activity. Amid these varying viewpoints, judges themselves have taken both affirming and dissenting positions, leaving the enduring question, do judges make laws? open to interpretation. This work explores both the practical and legal perspectives on whether judges create law, drawing on statutory and judicial authorities as well as relevant scholarly arguments.

Keywords: Law-making, Courts, Laws.

1. INTRODUCTION

The concept of Law is at the heart of governance. A nation can be described as a group of individuals residing within a defined geographical territory, governed by a recognized legal system and a structured government, tasked with the creation, enforcement, and interpretation of laws. The very concept of governance is fundamentally hinged in the idea of law; it is therefore very impossible or highly improbable to define or expatiate on the issue of government and governance effectively without referencing law or legal principles.

For any society to function properly, the laws of such as society must be enacted, implemented, and interpreted to the understanding of the people, and actualization of justice. In early historical periods of man, these three essential functions, of which are; legislation, execution, and adjudication, were often fused and concentrated in a single

authority or body. It was believed expansively, that unity of authority was necessary for effective governance. This belief was epitomized by King Louis XIV of France, who declared, *"L'état, c'est moi"* ("I am the state"). Such absolute rule inevitably bred tyranny, as scholars have pointed out: allowing lawmakers to also enforce the laws opens the door for self-serving governance [dictatorship], where those in power might tailor laws to benefit themselves and evade accountability. This no doubt led to tyranny since as scholarly opinion puts it: "It is foolhardy to give to law-makers the power of executing law, because in the process they might exempt themselves from obedience and suit the law (both in making and executing it) to their individual interest"[1].

This autocratic model persisted until the Renaissance, when emerging philosophical and scientific thought gave rise to the doctrine of the *separation of powers*. This principle advocated for the division of governmental responsibilities among three distinct institutions: The Legislature, the Executive, and the Judiciary. These came to be known as the three arms of government, each expected to operate independently, free from inappropriate interference.

Under this model, judges, serving as impartial arbiters within the Judiciary, were assigned the responsibility of interpreting laws. The Legislature, composed of elected representatives of the people, was entrusted with drafting and enacting laws. Legislators endeavor to ensure that laws are written with clarity and foresight, addressing both current realities and potential future scenarios. However, achieving complete precision and comprehensiveness in legislation remains a challenge. As a result, courts frequently face the task of resolving ambiguities, interpreting vague expressions, and addressing gaps where legislation is silent, often due to rapid societal changes or advancements in science and technology.

Moreover, the inherent limitations of language and human foresight can result in legislative provisions that do not clearly reflect the lawmakers' intent. In such instances, judicial interpretation becomes essential to correct or clarify the law. Statutes also commonly use subjective terms such as "reasonable time" or "inordinate delay," which require courts to determine meaning based on the context and circumstances of each case.

This ongoing process of judicial clarification, correction of legislative oversights, interpretation of vague expressions, and the "filling in of gaps" has led to the development of *case law*. This body of law, established through judicial decisions, becomes binding under the doctrine of *stare decisis*, which requires courts to follow established precedents in future cases with similar facts. The emergence of case laws, and the increasing significant role played by judges in shaping legal outcomes and decisions, has sparked an ongoing debate over whether judges, in effect, also function as lawmakers?

According to the long-standing doctrine of the separation of powers, the Legislature is responsible for making the law, the Executive for enforcing it, and the Judiciary for interpreting it. This framework acknowledges a fundamental truth about human nature: no individual is all-knowing, perfectly wise, or capable of predicting the future with complete certainty. Even legislators entrusted by the people with the task of

[1] Aihe D. 0 et al "Cases and Materials on Constitutional Law in Nigeria"(University Press Plc, Ibadan,1979)132

building a better society, are not immune to error. Mistakes are an inevitable consequence of our human limitations, and legislation is no exception.

When such errors occur in lawmaking, who is responsible for addressing them? That role falls to the judge, an impartial figure tasked with ensuring justice and granting fair hearing to all who come before the court. Legislators, being neither omniscient nor clairvoyant, cannot foresee every societal development or technological breakthrough. Often, rapid social change and scientific innovation move faster than the legislative process can respond, especially when lawmakers are occupied with other urgent and complex issues. In such cases, it is the Judiciary that steps in to interpret unclear provisions, address legislative oversights, and ensure that the law evolves in tandem with society. To cover for this the House of Lords essayed ex cathedra: "The courts having discovered the intention of Parliament ... must proceed to fill in the gaps. What the legislature has not written, the courts must write'[2].

This however must be done having due regards to or appreciate the affectionate admonition that: "The judge should never while exercising his interpretative jurisdiction, be permitted to wear the cloak of an oracle or be upgraded to a demagogic fuehrer but should always remain a dispenser of justice"[3].

In the Nigerian milieu and under Nigerian law, the Constitution clearly allocated Judicial Powers and interpretative functions as regards the law to the Courts[4] and allocates quasi-legislative powers to the courts in certain sections[5]. Legal scholars and jurists have long debated the question of whether judges, in fact, make law. Opinions on the matter remain divided, some affirming the notion, others firmly dissenting, leaving the issue unresolved and the question persistently recurring. To address this ongoing debate, there is a pressing need for clear and unambiguous understanding of key legal concepts such as case law, judicial review, judicial activism, *stare decisis*, and related doctrines. These concepts lie at the heart of any meaningful attempt to answer the question. This work seeks to provide that clarity and contribute to a deeper understanding of the judicial role in the development of law.

2. THEORETICAL FRAMEWORK

2.1 Natural Law Theory

In the context of the law and practice of receivership in Nigeria, the "Natural Law Theory" holds relevance as a philosophical framework that underpins legal principles and norms governing receivership proceedings. Natural law theory posits that there are inherent moral principles and universal truths that govern human conduct and form the basis of legal systems.[6] Here's how the Natural Law Theory relates to the topic:

[2] Awa Kalu "Do judges make laws?" Vanguard Newspaper (Nigeria 21st March 2003) 51

[3] Kayode Eso "Interpretation of statutes in Nigeria" in Further Thoughts on Law and Jurisprudence. Pp. 310-311.

[4] S.6, Constitution of the Federal Republic of Nigeria 1999

[5] S.46(3), s.236 and s.248 of Constitution of the Federal Republic of Nigeria, 1999

[6] Himma K.E., Natural Law in encyclopedia of philosophy online:<http:// www.lep.utm.edu / nationals on their precise expression of this claim diverging on question such as how exactly moral norms are related to human nature and how nature itself is to be understood and described.

- Moral Foundations: Natural law theory suggests that there are fundamental moral principles inherent in human nature, independent of positive law or human legislation.[7] These moral principles, such as justice, fairness, and equity, provide a normative foundation for evaluating the legitimacy and ethicality of legal rules and institutions, including receivership proceedings.
- Justice and Equity: Natural law theory emphasizes the importance of justice and equity in legal systems, guiding the formulation and application of laws to ensure fairness and the protection of individual rights.[8] In the context of receivership, principles of justice and equity may inform the distribution of assets, the treatment of creditors, and the balancing of competing interests among stakeholders.
- Protection of Property Rights: Natural law theory recognizes the inherent right to property as a fundamental aspect of human dignity and autonomy. In receivership proceedings, the protection of property rights, including secured creditors' rights to enforce security interests and realize assets, is consistent with natural law principles of property ownership and contractual freedom.
- Fiduciary Duties and Trust: Natural law theory emphasizes the importance of trust, integrity, and fiduciary duties in interpersonal relationships and governance structures. In receivership, receivers owe fiduciary duties to various stakeholders, including creditors, shareholders, and the company itself, reflecting natural law principles of trustworthiness and loyalty in fiduciary relationships.
- Common Good: Natural law theory emphasizes the pursuit of the common good, promoting the welfare and flourishing of society as a whole.[9] In receivership proceedings, the resolution of corporate insolvency aims to achieve the common good by preserving economic stability, protecting creditor rights, and facilitating the orderly resolution of financial distress for the benefit of all stakeholders.

While natural law theory provides a theoretical framework for understanding the moral foundations of law and governance, its application in receivership proceedings must be balanced with considerations of legal precedent, statutory provisions, and practical constraints. Nonetheless, an appreciation of natural law principles can inform ethical decision-making and contribute to the promotion of justice, equity, and the common good in receivership practice within the Nigerian legal context.

2.2 Positivist Theory of Law

In the context of the law and practice of receivership in Nigeria, the "Positivist Theory of Law" provides a relevant perspective on the legal framework governing receivership proceedings. Positivism emphasizes the importance of positive law, or man-made law, as the primary source of legal authority, distinct from moral or natural principles.[10] Here's how the Positivist Theory of Law relates to the topic:

[7] Fuller L., *Anatomy of the Law* (Praeger New York, 1971) 63.
[8] Freeman M., Lloyd's, *Introduction to Jurisprudence* (6th edn, Sweet & Maxwell, London, 1994)
[9] Wigwe C.C., *Jurisprudence and Legal Theory* (Published by Readwide Publishers, Osu- Accra, Ghana, 2011), P. 205
[10] Wigwe C.C., *Jurisprudence and Legal Theory* (Published by Readwide Publishers, Osu- Accra, Ghana, 2011), P. 224

- Legal Validity: According to positivism, the validity of legal rules and institutions derives from their recognition and enforcement by authoritative legal sources,[11] such as legislation, judicial decisions, and administrative regulations. In the context of receivership, the legal framework governing receivership proceedings is primarily derived from statutes such as the Companies and Allied Matters Act (CAMA) and other relevant legislation, supplemented by judicial precedents and administrative guidelines.
- Statutory Authority: Positivism emphasizes the importance of statutory provisions as the primary source of legal authority in receivership proceedings. The powers, duties, and procedures governing the appointment and conduct of receivers are established by positive law, with courts and administrative bodies interpreting and applying these legal rules in accordance with established legal principles.
- Judicial Interpretation: Positivism recognizes the role of judicial interpretation in clarifying and applying legal rules to specific factual circumstances. Courts[12] play a central role in interpreting statutory provisions related to receivership, resolving disputes, and providing guidance on the application of positive law principles to receivership proceedings through their decisions and judgments.
- Enforcement of Legal Rights: Positivism underscores the importance of legal institutions, such as courts and regulatory agencies, in enforcing legal rights[13] and obligations in accordance with positive law. In receivership proceedings, legal rights and remedies available to creditors, debtors, and other stakeholders are enforced through legal mechanisms prescribed by positive law, ensuring the orderly resolution of financial distress and the protection of legal interests.
- Legal Certainty and Predictability: Positivism promotes legal certainty and predictability by emphasizing the clarity and accessibility of legal rules and procedures. In receivership practice, adherence to statutory provisions and established legal principles enhances certainty and predictability in the application of receivership law, facilitating the efficient resolution of corporate insolvency and the protection of stakeholders' rights.

Understanding the positivist perspective on law provides valuable insights into the legal framework governing receivership proceedings in Nigeria, highlighting the role of positive law principles, statutory authority, and judicial interpretation in shaping receivership practice and ensuring the orderly resolution of corporate insolvency within the Nigerian legal system.

2.3 Realist Theory of Law

The "Realist Theory of Law" offers a perspective on the law and practice of receivership in Nigeria that emphasizes the influence of social, economic, and political factors on legal decision-making and outcomes. Realism posits that legal rules and institutions are shaped by societal realities, power dynamics, and pragmatic considerations, rather than abstract legal principles alone. Realism highlights the need to consider the practical realities and policy implications of receivership law, ensuring that

[11] Section 1 (1) CFRN 1999
[12] CAMA 2020, s.6
[13] CAMA 2020, s. 46

legal rules and institutions are responsive to the complex challenges of corporate insolvency within the Nigerian legal system.

3. THE LEGAL AND INSTITUTIONAL FRAMEWORK

It also examines the fundamental question of what function the judiciary, particularly judges, serves within the broader framework of governance. The answer lies in the doctrine of the separation of powers, which assigns the judiciary the primary role of interpreting laws. Beyond this essential task, the judiciary also plays a crucial role in reviewing the actions of both the legislature and the executive, ensuring that their conduct remains within the bounds of the Constitution.

3.1 The Legal and Institutional Framework

The judiciary is one of the three arms of government in Nigeria, alongside the legislature and the executive. Its primary responsibility is the interpretation of the law, adjudication of disputes, and the safeguarding of justice. The Nigerian judiciary operates within a clearly defined legal and institutional framework, which is largely established by the 1999 Constitution of the Federal Republic of Nigeria (as amended), as well as various statutory provisions and judicial precedents. The 1999 Constitution is the supreme legal authority regulating the structure, powers, and functions of the judiciary.

The constitution[14] vests judicial powers in the courts and establishes their hierarchy. It also provides for the composition, jurisdiction, and procedures of the different courts.[15] In addition, several statutes such as the Supreme Court Act, Court of Appeal Act, Federal High Court Act, and respective State High Court Laws supplement constitutional provisions by prescribing jurisdictional details and procedural rules. Procedural regulations such as the Supreme Court Rules, Court of Appeal Rules, and the High Court Civil Procedure Rules also guide court processes.

The Nigerian judiciary is organized into superior courts of record and inferior courts. The superior courts of record are established directly by the Constitution under Section 6(5), and their proceedings are formally recorded. At the apex of the hierarchy is the Supreme Court of Nigeria, provided for in the Constitution[16], and headed by the Chief Justice of Nigeria (CJN). The Supreme Court is the final appellate authority in the country and has the ultimate power of constitutional interpretation.

Below the Supreme Court is the Court of Appeal, established under Sections 237 to 248[17] and led by the President of the Court of Appeal. It serves as the intermediate appellate court, hearing appeals from the High Courts, the National Industrial Court, and certain election tribunals, while also possessing original jurisdiction in specific election petition matters, such as presidential election disputes.

The next level comprises several courts of coordinate jurisdiction: the Federal High Court, established under Sections 249 to 254[18], with jurisdiction over matters on the Exclusive Legislative List such as admiralty, banking, intellectual property, and

[14] Constitution of the Federal Republic 1999 [as amended]
[15] Section 230-296 Constitution of the Federal Republic 1999 [as amended]
[16] Section 230-236
[17] ibid
[18] Section 230-236

immigration**;** the State High Courts and the High Court of the Federal Capital Territory, which have general jurisdiction over civil and criminal matters; and the National Industrial Court of Nigeria (NICN)**,** established by Section 254A[19], which has exclusive jurisdiction over labour and employment-related disputes. At the same level, there are the Sharia Court of Appeal (both at State and FCT levels), established under Sections 260 and 275[20], which deal with Islamic personal law matters, and the Customary Court of Appeal (State and FCT), established under Sections 265 and 280[21], which handle disputes relating to customary law.

Beneath the superior courts of record are the inferior courts, which are not established by the Constitution but by federal or state legislation. These include Magistrates' Courts, Area Courts, Customary Courts, Juvenile Courts, and various special courts or tribunals. Their jurisdiction is generally limited and subject to appeal to the superior courts.

The judiciary's institutional framework also includes bodies responsible for the appointment, discipline, and administration of judicial officers. Chief among these is the National Judicial Council (NJC), established under Section 153 and Paragraph 20 of Part I of the Third Schedule of the Constitution[22]. The NJC plays a critical role in safeguarding judicial independence by recommending appointments and removals of judges, as well as enforcing disciplinary measures. At the federal and state levels, the Federal Judicial Service Commission and the State Judicial Service Commissions assist in matters relating to the staffing and administration of the judiciary. The Chief Justice of Nigeria serves as the head of the judiciary nationwide.

Fundamental constitutional principles guide the operation of the judiciary. These include the independence of the judiciary, the rule of law, the doctrine of *stare decisis* (binding precedent), and the right to fair hearing guaranteed under Section 36[23]. Judicial decisions in landmark cases such as *Governor of Lagos State v. Ojukwu*[24] have reinforced the judiciary's role as a check on the other arms of government.

In essence, the Nigerian judiciary is a constitutionally entrenched arm of government with a clear hierarchical structure, ranging from the Supreme Court at the apex down to the Magistrates' and Customary Courts at the base. Its powers and functions are firmly rooted in the 1999 Constitution, complemented by statutes, procedural rules, and case law. Through its institutions, particularly the National Judicial Council, and guided by constitutional principles, the judiciary plays an indispensable role in upholding justice, protecting rights, and maintaining the rule of law in Nigeria.

4. INTERPRETATION ASCERTAINING THE INTENTION OF THE LEGISLATURE

Statutory law originates from the legislature, which enacts legal provisions using specific language. However, disputes, misinterpretations, and confusion often arise regarding the application of these statutes. At such times, the courts are called upon to

[19] ibid
[20] ibid
[21] ibid
[22] Section 230-236
[23] ibid
[24] (1986) 1NWLR [pt.18], 621.

interpret the law, a duty grounded in constitutional authority and developed through judicial precedent. In *Martin Schroder & Co. v Major & Co. (Nig.) Ltd*, the court clearly emphasized: "The duty of the court is to arrive at the true intention of the legislature (the sententia legis) based on the letters of the statute (litera legis) which are merely the external manifestations of the former."[25] This statement underscores the judiciary's responsibility to discern legislative intent, which is understood to reside in the language of the statute[26]. The words of a law are thus treated as outward expressions of the legislature's underlying intention. Although legal definitions can be subjective and influenced by individual perspectives[27], Fitzgerald offers a compelling and widely accepted definition of statutory interpretation: "The process by which the courts seek to ascertain the meaning of the legislation through the medium of authoritative forms in which it is expressed."[28] The "authoritative forms" refer to the precise wording of the statute itself. Interpretation, therefore, revolves around how these words are understood in context. Two primary scenarios may arise in this process, each tied closely to the clarity or lack thereof, of the legislative language.

In the first scenario, where the statutory language is clear and unequivocal, the courts apply the literal rule of interpretation. The clarity of the wording is taken as a reflection of the clarity of legislative intent. Judges, in such instances, are expected to interpret the statute based on its plain and ordinary meaning, even if this leads to hardship or unjust results. This strict application of the literal rule was evident in *Bronik Motors v Wema Bank*[29], *Ugwu v Ararume*[30], and the landmark case of Awolowo v Shagari[31] where the courts did not depart from the statutory text despite potentially harsh outcomes.

In the second scenario, where the words of the statute are ambiguous, vague, or logically inconsistent, the court is compelled to adopt a liberal or purposive approach to interpretation. In such cases, the judiciary goes beyond the literal wording to discover the broader legislative purpose. The courts may modify the scope of the statutory terms either expanding or narrowing them to align with the intent of the law, but always within the confines of its spirit.

A comprehensive discussion of this interpretive approach is found in *Abioye v Yakubu,*[32] where the Nigerian Supreme Court outlined the principles guiding statutory interpretation. This more flexible method was powerfully endorsed in the constitutional case of *Nafiu Rabiu v The State*[33], where Udo Udoma JSC declared: "My Lords, it is my view that the approach to constitutional interpretation should be, and so it has been, the one of liberation."

[25] (1989)2 NWLR 1 at p 12.
[26] Ifezue v Mbadugba (1984)1 SCNLR 427; Udoye v State (1967) NMLR197; Onasile v Sami (1962)1 All NLR 272 and Maizabo v Sokoto Native Authority (1957)2 FSC 13.
[27] Federal Republic of Nigeria v Mike Amaechie (2004)1 SC(pt II)27 at 25
[28] Fitzgetald F.J Salmond on Jurisprudence (12th ed London, Sudan and Maxwell 1979)p. 132.
[29] (1983)1 SCNLR 296;
[30] (2007)7 MJSC 1
[31] (1979) 6 – 9SC 51
[32] (1991) 5 NWLR pt 190 at 130. See further Awolowo v Saraki (1966) I all NLR 178; Yerima V Bornu Native Authority (1968) I All NLR 410; AG Ondo State v AG Federation (1983) 2 SC 269; Olawoyin v Commissioner of Police (1961) All NLR 203
[33] (1981)2 NCLR, 293

His view suggests that constitutional interpretation should not be rigid or literalist, but dynamic and attuned to justice and evolving societal needs. **Obaseki JSC** echoed this sentiment in Adesanya v President of the Federal Republic of Nigeria[34], reinforcing the judiciary's role in interpreting the Constitution with flexibility and purpose.

Whatever method of interpretation is applied, whether literal or liberal, it is crucial to remember that, although statutory language is the starting point, the core objective of interpretation is to uncover the legislature's intent. The words of a statute are the vehicle, but the real destination is legislative purpose. This fundamental principle was affirmed by Kayode Eso, JSC in the case of Awolowo v Shagari: "In all cases of interpretation of statute, the interpretation should be according to the intent of them that made the law."[35]

5. TOOLS FOR ASCERTAINING THE INTENTION OF THE LEGISLATURE

In fulfilling their interpretive role, judges rely on a variety of aids both conceptual and practical, to help discern the meaning of legal texts. These tools include abstract concepts such as canons of construction, legal maxims, and presumptions, as well as tangible resources like intrinsic (internal to the statute) and extrinsic (external sources such as legislative debates) materials. While these aids are often referred to as "rules," they are more appropriately regarded as guiding principles rather than rigid directives.[36] Supporters of these interpretive tools argue that their usage provides structure and limits judicial discretion, thereby reducing the risk of judicial legislation. Critics, however, contend that since judges ultimately decide which tools to apply and how, these tools may merely conceal judicial creativity rather than restrain it.

5.1 Use of the Common Law Rules of Interpretation

The common law tradition provides several foundational methods of statutory interpretation: the literal rule, the golden rule, the mischief rule, and the more modern purposive approach. Each of these originates from English common law and has been adopted in varying forms across Commonwealth jurisdictions. Like the other interpretive aids, these rules serve primarily as guidelines, leaving room for judicial discretion.[37]

(a) The Literal Rule:

The literal rule instructs that statutory terms must be given their ordinary, grammatical meaning. This rule was clearly laid out in the Sussex Peerage Case, where Tindal CJ observed: "If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expand these words in their natural and ordinary sense. The words themselves alone do in such a case best declare the intention of the lawgivers."[38] In cases where the statute involves technical or trade-specific language, those words are interpreted based on how they are commonly understood within the relevant field. Though the literal rule developed in Britain, its influence spans across jurisdictions, including the United States, where it is known as the Plain Meaning Rule, and

[34](1981) 5 Sc 112 at 176
[35] (1979) 6 – 9SC 51
[36] Obilade, A.O. The Nigerian Legal System (Spectrum Law Publishers, 1979) 57
[37]Introduction to Nigerian Legal System. p 46.
[38] (1844) II CI and F 85 at p143

was discussed at length in Rector**,** Holy Trinity Church v United States.[39] In Nigeria, numerous cases have affirmed its applicability. Nevertheless, strict application of the literal rule can produce unjust or illogical outcomes, especially when legislative language does not anticipate complex real-world scenarios. One stark example is *R v Bangaza*[40], which dealt with Section 319(2) of the Criminal Code concerning the death penalty for offenders under the age of 17. The court interpreted the provision to mean that the relevant age is that at the time of conviction, not the time of the offence. This meant that two individuals, both aged 16 at the time of committing murder, could receive different sentences simply based on when their trial concluded, an outcome that illustrates a clear inequity in justice.

This interpretation prompted a legislative amendment via the Criminal Justice (Miscellaneous Provisions) Decree No. 84 of 1966, highlighting the limits of a rigid literal approach. Similar concerns have emerged in other notable Nigerian cases such as Bronik *Motors v Wema Bank*[41], *Ugwu v Ararume*[42], *Akintola v Adegbenro*[43], *Tariola v Williams*[44], *and again, Awolowo v Shagari.*[45]

Recognizing the potential for injustice, courts sometimes choose alternative interpretive rules when literalism fails to achieve fairness. This was evident in *Mobil v Federal Board of Internal Revenue,*[46] where the court opted for a more just interpretation over strict textualism.

Critics of the literal rule argue that it is based on a flawed assumption: that words possess fixed and universally understood meanings. In reality, language is context-dependent, and statutory terms often carry multiple connotations. Therefore, rigid literalism can, paradoxically, obscure legislative intent rather than reveal it.

(b) The Golden Rule:

At times, applying the literal meaning of statutory words results in confusion, inconsistency, or outright absurdity. In such cases, the courts may turn to the golden rule, a refined version of the literal rule. As Lord Denning critically noted: "The draftsman … conceived certainty but has brought forth obscurity; sometimes even absurdity."[47]

The golden rule allows judges to depart from the ordinary meaning of words where a literal interpretation would lead to an unreasonable or absurd outcome. Instead, courts may adopt a secondary meaning, provided the words can reasonably bear that interpretation.[48] The rule was initially articulated by Parke B in *Becke v Smith*[49] and was later refined by Lord Wensleydale in *Grey v Pearson*, where he stated: "In construing 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 repugnancy or

[39] 143 US 457 (1892).
[40] (1960) 5 FSC 1.
[41] (1960) 5 FSC 1.
[42] ibid
[43](1963) AC 614; (1963)3 All ER 544
[44](1982) 7 SC 27
[45]iibid
[46](1977)3 SC 53.
[47]Denning: The Discipline of Law (London, Butter worthies, 1979) p.9
[48]Okeke v Attorney General of Anambra State (1992)1 NNLR 60 at 85
[49](1836)150 ER 724

inconsistency… in which case the grammatical and ordinary sense of the words may be modified so as to avoid the absurdity and inconsistency and no further."[50]

The golden rule has been successfully applied in several significant cases including *Lee v Knap*[51], *R v Princewill*[52], *Awolowo v Federal Ministry of Internal Affairs*[53], and *Ademolekun v Council of University of Ibadan*[54]. For example, in *R v Eze*[55], the court reinterpreted the word "or" in Section 2 of the Criminal Procedure Act to mean "and", thereby avoiding an illogical interpretation of the definition of indictable offences. This same interpretative approach was affirmed in Ejor v Inspector General of Police[56].

A particularly creative use of the golden rule occurred in *Amaechi v INEC*[57] and again in *PDP v INEC*[58], where the court was confronted with Section 34(1) and 45(1) of the Basic Constitutional and Transition Decree No. 3 of 1999. These provisions stated that a deputy governor-elect may assume the governor-elect's office if the governor-elect "dies." Although the governor-elect in this case had not died in the literal sense, the court broadened the interpretation of "dies" using synonyms from the Collins English Thesaurus, including "lapse," "dwindle," and "fizzle out", to reflect the political reality, thus allowing the deputy governor-elect to rightfully assume the position.

While the golden rule promotes judicial discretion and purposive reasoning, it has been criticized as a gateway to judicial activism, especially in scenarios where it fails to offer a concrete solution to complex legislative ambiguities.

(c) The Mischief Rule

The mischief rule is used when legislation is enacted specifically to remedy a flaw or deficiency in the pre-existing legal framework. In such instances, judges seek to interpret the statute in a way that advances the law's intended correction. The rule was formally established in the historic Heydon's Case[59], where the Lords of the Exchequer laid out four guiding questions:

- What was the common law before the statute?
- What was the mischief or defect not addressed by that law?
- What remedy was provided by the legislature?
- What was the true purpose behind the remedy?

[50](1857)6 HL Cas. 61; (1843 – 60)All E.R Rep. 21
[51](1967)2 QBD 442
[52](1962) LLR 177
[53](1963)2 All NLR 31
[54](1967) All NLR 40
[55](1950) 19 NLR 110
[56](1963)1 NLR 250
[57](1963)1 NLR 250
[58](1999)7 SC (PE 11) 30
[59] (1854)3 Co Reg. 7a.

The method was adopted in leading English cases such as *Shaw v DPP*[60], *John Calder (Publication) Ltd. v Powell*[61], and *Smith v Hughes*[62]. In Nigeria, the mischief rule has also gained considerable traction. For example, in *Ifezue v Mbadugha, Amaigbolu JSC* emphasized: "To properly ascertain the mischief aimed at by the legislation, it is sometimes helpful to look into the history of legislation."[63] This case laid the foundation for subsequent applications of the rule in Nigerian jurisprudence, including *Okumagba v Egbe*[64]*, Akerele v IGP*[65]*,* and *Balogun v Salami*[66]*.* In *Balogun*, the court examined the historical context of the Registration of Titles Act and concluded that the Act's purpose was to remove restrictions on certain family land transactions.

6. THE USE OF MAXIMS IN INTERPRETATION

Maxims are concise legal principles, often in Latin, that serve as interpretive aids in statutory construction. While not binding rules, they provide clarity and consistency in judicial reasoning. Some key maxims include:

(a) Ejusdem Generis

This maxim provides that when general words follow specific ones in a statutory list, the general terms should be interpreted in light of the specific terms,i.e., they must belong to the same class or category**.** Lord Bacon encapsulated the idea as: "Copulatio verborum indicat acceptationem in eodem sensu", coupling of words indicates that they should be understood in the same sense. Also expressed in Generalia specialibus non derogant, "the general does not detract from the specific"[67]. This principle was applied in *Nasr v Bouari*[68]*, SPDC v FBIR*[69]*,* and *Palmer v Snow*[70].

(b) *Expressio Unius Est Exclusio Alterius*

This rule means "the express mention of one thing excludes others". If a statute lists certain items, anything not listed is presumed excluded. A classic example comes from the Poor Relief Act of 1601, which taxed "land, houses… and coalmines." The specific mention of coalmines implied the exclusion of other types of mines.

(c) *Noscitur a Sociis*

This maxim translates as "a word is known by the company it keeps." The meaning of a term is derived from surrounding words that provide contextual clues.[71]

[60](1962)2 HL; (1961)1 ER 330
[61](1965) 1 ER 159
[62](1871)LR 6 QB 597
[63](1984)1 SCNLR 427
[64](1965)1 All NLR 62
[65](1955)21, NLR 37
[66](1963)1 All NLR 129
[67]See The Vera Cruz (1884) 10 App Cas 59.
[68](1969)1 All NLR 37
[69](1996)8 NWLR 256
[70](1900)1 QB 725
[71]See Garuba v FCSC (1988) 1 NWLR (pt 71) 449.

(d) *Ut Res Magis Valeat Quam Pereat*

This principle, which means "it is better for a thing to have effect than to be destroyed," is especially applied in constitutional interpretation. Where two plausible meanings exist, the one that sustains the statute should be preferred. This was adopted in *Tukur v Gongola State*[72] and *Nafiu Rabiu v The State*[73], as well as in *PDP v INEC*[74].

(e) *Contra Proferentem*

This rule applies particularly in commercial or contractual contexts. If a document's terms are ambiguous, it should be construed against the party who drafted it. It now also finds use in the interpretation of expropriatory statutes. Other maxims often applied include:

- Reddendo Singula Singulis – modifiers apply only to the nearest term.
- Leges Posteriores Priores Contrarias Abrogant – later laws repeal earlier conflicting ones.
- In Pari Materia – statutes dealing with the same subject matter should be interpreted together.

7. THE USE OF PRESUMPTIONS IN STATUTORY INTERPRETATION

Although the legislature appears to possess wide-ranging law-making powers, those powers are subject to implicit constitutional and legal constraints, often articulated through the use of legal presumptions in interpretation. These presumptions reflect the judiciary's assumption that the legislature does not intend to produce certain outcomes, unless a contrary intention is clearly expressed. The key interpretive presumptions include:

a) Presumption of Innocence and the Rule of Lenity: These dictate that an accused person is presumed innocent until proven guilty and that where a criminal statute is ambiguous, it should be interpreted in favour of the accused.[75]
b) Presumption Against Ouster of Jurisdiction: Courts are reluctant to accept that their jurisdiction has been removed unless the legislation does so in clear and unambiguous terms.[76]
c) Presumption Against Change in Existing Law: It is presumed that the legislature does not intend to alter existing common law or statutory principles unless stated explicitly.[77]
d) Presumption Against Repeal: Closely related to the above, this presumes that Parliament does not intend to repeal an earlier law unless that intention is express or necessarily implied.
e) Presumption Against the Imposition of the Impossible: Embodied in the Latin maxim lex non cogit ad impossibilia, the law does not compel a person to do what is legally or factually impossible.[78]

[72](1989)4 NWLR (pt 117) 517
[73](1981)2 NCLR, 293
[74]ibid
[75]S. 36(5) CFRN, 1999, McNally v United States, 483 US 350 (1987), Evans v United States 504 US 255(1992)
[76] Barclays Bank of Nigeria v CBN (1976) 6 SC 175.
[77]Day v Brown Rigg (1878)10 Ch D 294; Philip v Pears (1965)1 QB 76
[78]COP v Okoli (1966) NNLR 1.

f) Presumption Against Imposing Liability Without Fault: Liability is presumed to require some form of culpability, especially in criminal or regulatory contexts.
g) The "Charming Betsy" Doctrine: Derived from the U.S. case Murray v. The Schooner Charming Betsy, this principle suggests that national statutes should be interpreted, where possible, to avoid conflict with international law.[79]
h) Presumption Against Deprivation of Property: Courts presume that the legislature does not intend to deprive a person of property without fair compensation or due process.
i) Presumption Against Benefitting from One's Own Wrong: The law disfavors interpretations that would allow a party to gain advantage from their own misconduct.[80]

These presumptions serve as judicial safeguards, ensuring that the interpretation of statutes remains consistent with principles of justice, fairness, and legal continuity.

8. USE OF INTRINSIC AND EXTRINSIC AIDS IN INTERPRETATION

When interpreting statutes, courts begin with the textual provisions of the statute itself. However, where the language is ambiguous, uncertain, or leads to absurd results, judges rely on other interpretative aids. These aids are categorized into intrinsic (internal) and extrinsic (external) materials.

Intrinsic Aids: Intrinsic materials are those found within the statute itself and include:

- Preambles – These express the purpose and spirit of the legislation. Though not typically considered part of the statute, they may be incorporated to guide interpretation.[81]
- Schedules – Supplementary details attached to the statute that may clarify legislative intent.
- Headings, Titles, and Marginal Notes – While generally not operative parts of the law, these can offer context for understanding provisions.
- Interpretation Sections – These define key terms as used within the statute. For instance, Section 2 of the Evidence Act 2011 and Section 318 of the 1999 Constitution [as amended] serve this purpose.

Extrinsic Aids Extrinsic materials are external sources used when internal aids are insufficient. These include:

- Dictionaries and Thesauruses – Utilized to ascertain the ordinary meaning of words, as applied in PDP v INEC.[82]
- Interpretation Acts and Laws – These provide general rules for interpretation across federal and state legislation.
- Academic Texts and Commentaries – Legal books and scholarly opinions also help illuminate statutory language and legislative intent.
- Together, intrinsic and extrinsic aids equip the court with tools necessary for meaningful and just interpretation of statutory provisions.

[79] US (2 Cranch)64 1804
[80]See Obi v INEC (2007)II NWLR (Pt 1046) 565, Re Singsworth (1985) Ch 89.
[81] Eg S.1 of the Federal Military Government (Supremacy and Enforcement of Powers) Decree of 1970
[82] ibid

9. JUDICIAL REVIEW

As emphasized by Justice Umaru Eri, the Judiciary plays a pivotal role in the constitutional framework:

> "If one amputates the hand of the Executive, government survives. So it is with that of the legislative, but if one amputates the hand of the Judiciary, ab initio, government will be a carcass... the executive may take the initiative to propose legislation, the legislature may exercise its powers to promulgate bills into laws... but the ultimate power to expose the fallacies of legislative action and to oppose the unconstitutional thrust of the Executive lies with the Judiciary."[83]

This statement encapsulates the judiciary's duty to safeguard constitutionalism through the instrument of judicial review.[84] Judicial review is a mechanism of last resort, ensuring that neither legislative nor executive actions violate the Constitution. It enables courts to hear grievances from affected persons and invalidate any enactments or executive acts that are unconstitutional. This principle has been reiterated in several landmark decisions, including; *AG of Ogun State v AGF (2002 & 2003)*[85]*, AG of Ondo State v AGF*[86]*, AGF v AG Abia State & Others*[87]. In *AGF v AG of Abia State & Others*, the Supreme Court declared section 1(d) of the Revenue Allocation (Federation Account, etc.) Act, as amended by Decree No. 106 of 1992, invalid for being inconsistent with the Constitution.[88]. Likewise, in *Mohammed Onusagha & Ors v Kogi State House of Assembly & Ors*[89]*,* the Local Government (Amendment) Law of Kogi State (2002) was struck down, and the executive was barred from enforcing it.

However, judicial review is not boundless. As noted by Niki Tobi JSC in AGs of Abia, Delta, and Lagos States v AGF: "Courts of law, including the Supreme Court, have no jurisdiction to question the law-making powers of the National Assembly and the House of Assembly of States… the court cannot remove the power from them."[90]

The courts may only review whether a law was enacted in accordance with proper constitutional procedures, not the wisdom or merit of the law itself. Furthermore, judicial review can only be triggered by an action properly brought before the court by an aggrieved party with the requisite locus standi, as affirmed in *Adesanya v President of the FRN*[91] *and AG Lagos State v AG Federation*[92]. The court must also have jurisdiction over the matter. Despite these limitations, the power of judicial review remains central to the judiciary's constitutional role. In line with Section 1(3) of the 1999 Constitution as [amended], courts are empowered to strike down laws and actions that are inconsistent

[83]Umaru Eri "The role of the Judiciary in sustaining Democracy in Nigeria" in Judicial Integrity, Independence and Reform: Essays in honour of Honourable Justice M I Uwais, (2006) 77.
[84]Tony Momoh v The Senate (1981)1 NCLR 21
[85](2002)18 NWLR (p. 798) 232
[86](2003)12 SC 1
[87](2002) FNLR (p m) 1972
[88](2002) FNLR (p m) 1972
[89](2002)4 Sc(pt II) 1 at 61; (2002)6 NWLR (pt 764) 542
[90] ibid
[91]Cap 16 LFN 1990
[92](2002) NNLR 690

with constitutional provisions, ensuring that government actions remain subject to the rule of law.

10. SUMMARY

This article has explored the multifaceted role of the judiciary in relation to the law. While affirming that lawmaking is primarily the function of the legislature, the chapter establishes that the judiciary's primary functions are twofold:

- Interpretation of Valid Laws – This is done using established tools such as the Literal Rule, Golden Rule, Mischief Rule, along with legal maxims, presumptions, and other aids that guide courts in giving effect to legislative intent in a just manner.
- Judicial Review of Invalid Laws or Acts – The judiciary has the authority to declare legislative or executive actions null and void where they contravene the Constitution or deviate from due process.

In sum, the judiciary serves both as an interpreter of laws and as a guardian of constitutional supremacy, upholding justice and ensuring that both legislative and executive powers operate within legal boundaries.

10.1 Judicial Reactions To The Question: "Do Judges Make Law?"

The doctrine of separation of powers, as entrenched in modern constitutional frameworks, assigns the law-making function to the legislature, and interpretative and adjudicatory functions to the judiciary. However, a recurring controversy continues to plague legal discourse: Do judges, in practice, make law? While the judiciary consistently maintains its role as interpreter rather than creator of law, many argue that judicial decisions sometimes blur this theoretical distinction. This chapter addresses the fundamental and contentious question of whether or not judges, in fact, make law. It begins by examining the judicial responses to the question, some affirming, and some denying, before moving on to explore theoretical frameworks such as the doctrine of stare decisis and the practice of filling legislative gaps. This chapter contextualizes this issue within the Common Law tradition and Nigerian judicial practice, providing a well-rounded and practical analysis.

Judicial responses to the accusation of law-making can vary and often can be contradictory. While some judges vehemently deny engaging in law-making, others acknowledge the judiciary's creative influence, either tacitly or explicitly. In the Nigerian case of *Ugwu v Ararume,* Justice Niki Tobi strongly refuted the notion of judicial law-making, arguing: "A judge is accused of making the law where there is no statute or statutory provision on the issue. If there is no law on an issue, a judge has nothing to interpret; and if he goes on to interpret where there is no law, he will be deemed to hold water in his hands, which is physically impossible." He thus contends that judicial creativity in the absence of legislative input amounts to impossibility, not law-making.

Invoking the principle of audi alteram partem[93], (hear the other side), it is necessary to consider alternative judicial perspectives before reaching a conclusion. Indeed, several prominent jurists have emphasized the judiciary's passive role in law creation.

[93] A party cannot be condemned unheard

In *Read v Lyon & Co. Ltd,*[94] Lord Macmillan reminded the House of Lords: "Your Lordships' task in the House is to decide particular cases between litigants. You are not called upon to rationalize the law of England. That attractive, if perilous, field should be left to other hands to cultivate." Similarly, in *Okamagba v Egbe*, Bairamian FJ observed: "The office of the judge is jus dicere, not jus daren; to state the law, not to give the law."[95]

Such opinions reflect a strict constructionist view of judicial responsibility. However, there are judges who argue otherwise. Lord Denning MR, while supportive of judicial innovation, maintained in *Packer v Packer*[96] that legal development was inevitable: "If we never do anything which has not been done before, we shall never get anywhere. The law will stand still while the rest of the world moves on, and that will be bad for both."

Yet in *Gouriet v Union of Post Office Workers,*[97] the reverted to orthodoxy, "We do not change the law; we declare it." A bolder stance was taken by Lord Reid, who rejected the conservative mythos surrounding judicial passivity: "There is a persistent belief that judges do not make law. But we do not believe in fairy tales anymore."[98]

Similarly, Scrutton J, in *Ellerman Lines Ltd v Read*,[99] candidly asserted: "If there is no authority for this, it is time we made one." Judicial perspectives in Nigeria remain similarly divided. Justice Oguntade openly acknowledged the judiciary's law-making role: "We know that judges do more than just apply the law as it is. They sometimes extend it, and at other times, create new laws that remain binding until reversed or overruled by a competent court."[100] Kolajo J., echoing this sentiment, observed: "Judicial decisions and pronouncements over time, especially when affirmed by superior courts, more or less become laws."[101] However, caution was recently urged by the Supreme Court in *GEC Ltd. v Duke,*[102] where it was held that courts should not lean on equity, fairness, or social justice as a pretext to usurp legislative functions: "The duty of the court is not to deal with the law as it ought to be, but as it is." These differing views show not only a split in opinion among external commentators but also among judges themselves. To understand the judges' proper role in law-making, it will be necessary to look deeper into the nature of judicial practice, legal theory, and precedent as opposed to taking statements from judges at face value.

10.2 Doctrinal Reflection of Judges as Lawmakers

Despite the lack of judicial consensus on whether or not judges make law, two prominent doctrinal practices point compellingly to the judiciary's creative role in law-making, these are; filling in the gaps and the doctrine of stare decisis. These doctrines illustrate that judicial pronouncements often acquire the force of law through their empirical and theoretical application, thereby affirming the law-making capacity of judges.

[94] (1947) AC 156
[95] (1965) 1 All NLR 62, See also Atolagbe v Awumi (1997) 9 NWLR 536.
[96] E R 80 KB p. 226.
[97] (1982) AC 435
[98] ibid
[99] (1928) 2 KB 144 at p152
[100] Dissenting Judgments and Judicial law making" p 6
[101] An Introduction to Law' p. 11.
[102] (2007) 11 MJSC 1 at 27. See also Oshine V Australian Mutual Provident Society (1960) AC 459; A-G v Butterworth (1963)1 QB 696.

10.3 Filling in the Gaps

Legislatures, composed of fallible human actors, are not omniscient. In crafting statutes, every conceivable situation that may arise in society cannot be accounted for. As a result, statutory lacunae, gaps in the law, are inevitable. When such gaps surface in litigation, the judiciary is called upon to interpret the law in the absence of explicit legislative guidance. In such instances, judges are not merely applying existing laws but are actively involved in shaping legal rules. As Lord Denning observed in *Magor and St. Melons Rural District Council v Newport Corporation:*[103] "We sit here to find the intention of Parliament and of the ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactments by opening it up to destructive analysis."

This judicial approach moves beyond strict interpretation, demanding constructive intervention where Parliament remains silent. In Ellerman Lines Ltd v Read[104], Scrutton J affirmed the proactive role of the courts: "If there is no authority for this, it is time we made one."

Such judicial engagement in filling statutory lacunae demonstrates that judges, in practice, formulate new principles of law where necessary. As noted by legal scholars, this process often involves crafting fresh legal doctrines that extend or refine existing law[105]. Therefore, filling in the gaps represents a functional instance of judicial law-making, where courts assume a quasi-legislative role to ensure justice and legal coherence.

10.4 The Doctrine of Stare Decisis

The doctrine of stare decisis, while frequently conflated with the concept of precedent, is distinct, but not mutually exclusive. Precedent refers to prior judicial decisions, whilst stare decisis is the legal principle that mandates adherence to such decisions to maintain consistency and predictability in law. Stare decisis is relatively modern[106], compared to the broader, ancient practice of following judicial precedents, which dates back to the origins of English Common Law[107]. The principle is encapsulated in the policy that courts should stand by what has been decided and not disturb settled law[108].

Under this doctrine, the decisions of higher courts are binding on lower courts, particularly where the issues or material facts are in *Pari Materia*. These decisions derive from *judicial dicta*, which vary in their legal effect. They are broadly categorized into: *Ratio decidendi* (The binding legal principle upon which a case is decided) and *Obiter dictum* (Remarks made by a judge that, while persuasive, do not carry binding authority). Yet, even obiter dicta from superior courts may hold significant sway. In *Ifediora & Ors v Ume & Ors,*[109] Nnaemeka-Agu, J.S.C., observed: "Although what is ordinarily binding in a case is the ratio decidendi and not the obiter dictum, yet an obiter dictum by the ultimate court on an important point of law is binding on and followed by all lower courts."

[103] 2 All E R 1226.
[104] 2 All E R 1226.
[105] Introduction to Nigerian legal system' p. 67
[106] Dias RWM 'Jurisprudence' (Butterworths ,1964) p. 291
[107] Dias RWM 'Jurisprudence' (Butterworths ,1964) p. 291
[108] Elias T. O. "Judicial process in the Common Wealth"(Lagos State University press ,1999) p. 112.
[109] (1988) 2 NWLR (pt 74) p5 at 13

This statement underscores the influence and authority of judicial pronouncements, even beyond their technical classification. The practical effect of stare decisis is closely tied to the hierarchical structure of the Nigerian judiciary, which comprises of the Supreme Court (Apex Court), Court of Appeal, Federal High Court, State High Courts, and High Court of the Federal Capital Territory, Sharia Courts of Appeal, Customary Courts of Appeal, Magistrate Courts, Area Courts, and Customary Courts. The doctrine demands that lower courts follow the decisions of higher courts, ensuring consistency across the judiciary. However, exceptions to this rule were recognized in *Young v Bristol Aeroplane Co. Ltd,*[110] where a court may deviate from precedent in the following circumstances:

- Where the previous decision was given per incuriam (through lack of care).
- Where the court must choose between two conflicting previous decisions.
- Where the previous decision is inconsistent with a decision of the Supreme Court.

Further flexibility exists under Nigerian jurisprudence. In Dinsey & Ors v Wayoe,[111] the West African Court of Appeal held that higher courts may follow decisions of lower native courts on matters of customary law, provided those decisions are the only authority on the issue and are not repugnant to natural justice or existing local law. The overarching implication is clear: through stare decisis, judicial decisions acquire the force of law. For example, the principle of corporate personality established in *Salomon v Salomon & Co. Ltd,*[112] was subsequently followed and reinforced in *Lee v Lee's Air Farming Co. Ltd*[113] and other cases, thereby transforming judicial reasoning into binding legal doctrine.

Both gap-filling and stare decisis show how, in reality, judges develop, spread, and deepen legal principles. They may reject the label of 'lawmakers' in the strict sense, yet their role in interpretation regularly produces innovations in the legal system, particularly in Common Law systems such as Nigeria's. Such practices of law confirm that judges are, for numerous purposes, co-authors of the law with the legislature.

10.5 Practical Reflections on Judges as Lawmakers

Beyond the theoretical foundations discussed, there are numerous practical scenarios that illustrate how judges move beyond basic interpretation and engage in actual lawmaking. These instances can occur when judges, in the course of deciding a case, either out of necessity or discretion, formulate new legal principles or extend existing ones to meet the demands of justice. One common situation arises when a judge is faced with a legal dispute for which there is no existing statutory or case law. In such a scenario, the judge cannot defer to the legislature or refuse to hear the case for lack of applicable law. Instead, the judge must, as Lord Denning famously stated, "fill in the gaps" by coming up with a principle that can be applied to resolve the matter. Once this principle is formulated, it may become a binding law. As Niki Tobi aptly puts it, "The principle is novel. The principle is an innovation and so the judge is said to have made law."[114] A second scenario

[110] (1944)2 All ER 293
[111] (1939)5 WACA 177, Also Angu v Attah (1916) GC Privy Council Judgment
[112] (1897) AC 22
[113] (1963) 3 All ER 420.
[114] Sources of Nigerian Law' p. 79

arises where the relevant law does exist but is insufficient to fully address the complexities of the case at hand. In such instances, the judge interprets the existing law in light of the facts and may expand or adapt it to provide a fitting resolution. This method involves applying legal reasoning to extend the scope of established doctrines, essentially creating a new legal rule on the basis of an old version of law being evolved. The third scenario concerns statutory ambiguity. When the wording of a law is ambiguous (permits multiple interpretations), the court is required to resolve the ambiguity. This may involve choosing between competing interpretations or crafting a new principle that reconciles the conflicting meanings. The role of the judiciary here transcends strict interpretation, and becomes one of creative construction.

In each of these instances, the personal values and perspectives of judges play a significant role. According to realist jurists, a judge's background, worldview, and even biases influence how laws are interpreted and applied. If a judge disagrees with an existing rule, they might downplay its significance or relevance in a case or reinterpret it entirely, thus giving rise to a new doctrine. The divergence in judicial reasoning becomes evident when judges from different cultural or historical backgrounds apply the same law in completely different ways. This is illustrated vividly in the contrasting decisions in *Edet v. Essien*[115] and *Ejanor v. Okenome.*[116] In the former, Carey J., a British judge, invalidated a customary rule assigning custody of children to the husband, declaring it inconsistent with natural justice, equity, and good conscience. Decades later, Akpovi J., a Nigerian judge, upheld a similar customary rule in *Ejanor v. Okenome*, stating:

> "I think that we should not be in a hurry in our courts to condemn the old and established customary law of the people by holding that it is contrary to natural justice equity and good conscience, where the people have all along regulated their lives by that custom."[117]

These conflicting decisions underscore how individual judicial philosophies can shape the direction of the law. As Oliver Wendell Holmes insightfully observed, "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." In the same vein, Gray emphasized that law is essentially what judges declare it to be, contending that even statutes are merely "sources of law" until judicial affirmation renders them truly operative.

Such practical illustrations of judicial innovation, both in English and Nigerian contexts, highlight the dynamic and sometimes unpredictable nature of judicial reasoning, resulting in legal developments that demand careful and comprehensive analysis.

10.6 Judicial Lawmaking under the Common Law

During the foundational era of English common law, according to history, judges were not merely interpreters of legal texts, they were the primary architects of the law. Their rulings were not just applications of existing rules but they served as a means to

[115] (1932) 11 NLR 47
[116] (1976)6 UILR p. 378
[117] (1976)6 UILR p. 378

solidify the body of common law in an age before parliamentary supremacy became dominant. These judicial contributions appear to have most expansive in the areas of contract and tort law. Lord Alfred Thompson Denning, popularly referred to as "the people's judge," remains one of the most prominent figures in this regard. His judgments often went beyond rigid legal process of the common law system, to embrace justice, fairness, and equity, thereby effectively creating new legal principles that shaped English law and influenced common law jurisdictions worldwide. Amongst these legal principles or laws created by Lord Denning are: Promissory Estoppel*, Central London Property Trust Ltd v High Trees House Ltd.*[118] Perhaps Denning's most celebrated contribution to contract law is his development of the doctrine of promissory estoppel. In High Trees case, Denning J. held that where a party makes a promise intending it to be relied upon, and the other party does rely on it, the promisor may be estopped from reneging, even in the absence of consideration. This judgment marked a significant departure from the strict common law requirement of consideration in contract formation[119]. The principle has since been applied and refined in cases such as *Combe v Combe*[120], where Denning clarified that promissory estoppel operates as a shield and not a sword.

The Duty of Care and Economic Loss: *Spartan Steel & Alloys Ltd v Martin & Co (Contractors);*[121]Denning also played a pivotal role in defining the boundaries of negligence. In Spartan Steel, he restricted recovery for pure economic loss, reasoning that unlimited liability would be impractical and against public policy. While the House of Lords later expanded negligence in Hedley Byrne & Co Ltd v Heller & Partners Ltd[122], Denning's balancing of policy and fairness illustrated how judges craft rules with significant societal consequences.

Equity and Trusts: in *Re Vandervell's Trusts***.** Denning's creative use of equitable principles is also evident in trust law. In Re Vandervell's Trusts (No. 2)[123], he interpreted the rules of resulting trusts in a way that ensured a just outcome, prioritizing fairness over technical legal formalities. This judgment exemplifies Denning's philosophy that law should serve the interests of justice rather than be constrained by rigidity. Other cases where legal principles were made by Lord Denning are in the Administrative Law and Natural Justice: *R v Northumberland Compensation Appeal Tribunal*[124], ex parte Shaw, Employment and Industrial Law: *Lister v Romford Ice and Cold Storage Co Ltd*[125]. Denning contributed extensively to the growth of modern administrative law. In this case, he broadened the grounds for judicial review by emphasizing the principles of fairness and natural justice. He stressed that administrative bodies must act lawfully and reasonably, reinforcing the accountability of public authorities. His approach laid the foundation for the robust doctrine of judicial review developed in later cases, including *Ridge v Baldwin*[126]. In Employment and Industrial Law, in the *Lister v Romford Ice and Cold Storage Co Ltd*

[118] (1947) KB 130
[119]https://www.ubplj.org/index.php/dlj/article/view/275/303#:~:text=He%20believed%2C%20first%2C%20that%20there,the%20contents%20of%20the%20document
[120] [1951] 2 KB 215
[121] [1973] QB 27
[122] [1964] AC 465
[123] (No. 2) [1974] Ch 269
[124] [1951] 1 KB 711
[125] [1957] AC 555
[126] [1964] AC 40

case, Denning's judgments shaped principles of vicarious liability and the relationship between employers and employees. Although sometimes controversial, his opinions highlighted the need to balance contractual obligations with fairness in industrial relations.

Lord Denning's legacy demonstrates that judges do not merely declare existing law but also engage in law-making through their interpretative function. His judicial philosophy, rooted in justice and common sense, reveals the inevitable role of judges as law-makers within the common law tradition. While some of his judgments were overturned or criticized for judicial activism, his contribution remains a testament to the dynamic nature of judicial law-making.

Further developments include the remedy of damages in *Hadley v. Baxendale*[127] and the establishment of the corporate personality doctrine in *Salomon v. Salomon & Co*[128]. These landmark decisions exemplify judicial lawmaking at its finest. In the law of torts, significant principles were judicially introduced: defamation law in *Yousoupoff v. MGM*[129], the concept of vicarious liability in *Rylands v. Fletcher*[130], and most notably, the "duty of care" in *Donoghue v. Stevenson.*[131] In that groundbreaking decision, the court held that a manufacturer owed a duty of care to the ultimate consumer, despite the absence of a direct contractual relationship. While judicial innovation has waned in modern England due to the expansion of statutory law, courts have occasionally ventured into lawmaking, as seen in *Pepper v. Hart*[132]. There, the House of Lords permitted reference to parliamentary materials for statutory interpretation, challenging parliamentary privilege. This bold stance has since been tempered but not reversed, with subsequent cases like *Massey v. Boulden*[133], *Spalt Holme*[134], *McDonnell's case*[135], and *Wilson v. Secretary of State for Trade and Industry*[136] showing continuing judicial engagement with legislative interpretation. Most recently, *Harding v. Wealands*[137] broadened the court's interpretive authority even further.

The judicial authority to innovate stems from their Oath of Office, which compels them to "do right (i.e. justice) to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill-will." This wording suggests a judicial mandate to prioritize justice over mechanical adherence to the letter of the law. Lord Denning captures this sentiment in his statement:

> "My root belief is that the proper role of a judge is to do justice between the parties before him. If there is any rule of law which impairs the doing of justice, then it is the province of the judge to do all he legitimately can do to avoid that rule or even to change it so as to do justice in the instant case before him."[138]

[127] (1854) 156 ER 145
[128] ibid
[129] (1934)50 TLR 581
[130] (1868) UKHL 1
[131] (1932) AC 598
[132] (1992) UKHL 3
[133] (2003)2 All ER 87
[134] (2001) 2 WLR 15
[135] (2003) UK HL 63
[136] (2003) UK HL 40
[137] (2006) UK HL 32
[138] Promissory Oaths Act, 1868 – Quoted in Philips H. Constitutional Law and Administrative Law (6th Edition) at p. 381.

Such ideals have led to a flexible application of the doctrine of precedent and further legitimize the judicial lawmaking function, especially in a jurisdiction like the UK where there is no written constitution to limit judicial discretion. Judges have defended their creative interventions on moral grounds, in the public interest, and on the basis of logic. As Lord Devlin stated in *Hedley Byrne*[139], "No system of law can be workable if it has not logic at the root of it.". Yet, legal realists challenge these justifications. They argue that judicial lawmaking is often shaped more by the personal and sociopolitical background of judges than by abstract legal principles. Factors such as upbringing, ideology, and societal context significantly influence how judges decide cases and formulate new legal norms. In summary, while English judges played a foundational role in crafting the common law, they continue to exert this influence even today, albeit within a more regulated legal environment.

10.7 Judicial Lawmaking in Nigeria

The development of judicial lawmaking in Nigeria presents a distinct contrast to the situation in England. The trend appears to be waning in England due to increasing statutory codification, while Nigerian judges seem to be gaining greater momentum in shaping the law, particularly through judicial innovation. This momentum had previously been constrained by the long period of military rule, during which legislative functions were often curtailed or replaced with decrees. Nonetheless, even under military regimes, the Nigerian judiciary managed to assert its role in protecting constitutional order and individual rights, often compensating for inadequate legislation. There are examples of this judicial creativity in landmark cases such as *Adamolekunv. Council of University of Ibadan*[140], *Adegbenro v. Akintola*[141], *and Ifezue v. Mbadugha*[142]. However, the case of *Lakanmi v. Attorney-General Western Nigeria*[143], stands out. In that case, the court upheld the supremacy of the 1963 Constitution over a military decree and went so far as to invalidate certain decrees. The court reasoned that judges are the custodians of the Constitution and bear the duty to protect it.

The Nigerian Constitution does not expressly grant judges the power to make laws, consistent with the doctrine of separation of powers, but it provides implied authority. Section 6(6)(a) states: "The judicial powers… shall extend notwithstanding anything to the contrary in this Constitution to all inherent powers and sanctions of a court of law."This provision has been interpreted to suggest that, despite the clear allocation of lawmaking authority to the legislature under Section 4(1), courts possess inherent powers which may include the authority to develop legal principles in the course of interpreting statutes. Even if this interpretation is challenged, there remains no definitive provision that explicitly prohibits such judicial creativity.

Nigerian courts have on several occasions exercised this implied authority in a manner that effectively constitutes lawmaking. For example, in *PDP v. INEC*[144], the Supreme Court creatively interpreted sections 34(1) and 45(1) of the Basic (Constitutional

[139] (1964) AC 465
[140] (1964) AC 465
[141] (1963) AC 614
[142] (1984) 1 SCBLR 427
[143] ibid
[144] (1999) SC (PTII) 30.

and Transitional) Decree No. 3 of 1999 to resolve an impasse arising from legislative gaps. This judicial intervention addressed a limitation created by the legislature and reinforced the adaptive function of the judiciary. The impetus for judicial creativity in Nigeria is largely a response to the underdeveloped and often ambiguous state of many laws. A prominent area where this is evident today is in electricity regulation. The absence of clear statutory guidance has led courts to make impactful pronouncements that have helped stabilize the legal framework despite legislative deficiencies. However, judicial activism in Nigeria has not been without controversy. Some decisions have raised concerns regarding judicial overreach. A notable example is *Amaechi v. PDP*[145], where the Supreme Court declared as winner of the Rivers State gubernatorial election a candidate who did not contest in the election. This ruling appeared to contradict constitutional provisions which specify that it is individuals, not political parties, who contest elections, and that a governorship candidate must have a running mate[146]. This position had been earlier affirmed in *PDP v. INEC.*[147]

Unlike the English system, the Nigerian judicial Oath of Office places greater emphasis on fidelity to the Constitution and existing laws. It is structured as follows: "I … do solemnly swear/affirm that I will be faithful and bear allegiance to the Federal Republic of Nigeria … I will discharge my duties and perform my functions honestly, to the best of my ability and faithfully in accordance with the Constitution of the Federal Republic of Nigeria and the law… that I will protect and defend the Constitution of the Federal Republic of Nigeria. So, help me God."[148] This solemn declaration underscores the primary obligation of judges to uphold the Constitution rather than to engage in lawmaking, thereby acting as a restraint on judicial creativity.

In line with that, courts have occasionally refrained from extending the reach of the law, even when equity or logic might have suggested otherwise. A case in point is *Ladoja v. INEC*[149], where the appellant, having been unlawfully impeached and kept out of office for 11 months, sought an extension of his tenure under Sections 180(2) and 180(10) of the 1999 Constitution. Although his impeachment was declared unconstitutional, the court rejected his plea for an extension of term. Justice Oguntade JSC, delivering judgment, observed:

> "It is settled law, that when an act is declared null and void the position is that from the angle of the law, the act never took place. It is completely wiped off and considered as extinct and deemed never to have existed. Much as one may be in sympathy with the plaintiff's cause, it seems to me that to accede to his request will occasion much violence to the Constitution. This court can interpret the Constitution but it cannot rewrite it… Section 180(2) states that tenure is completed from the date the oath of allegiance and oath of office is taken. There is no similar provision to protect a governor improperly

[145] (1999) SC (PTII) 30.
[146] S. 177 amd 179 of the CFRN, 1999
[147] ibid
[148] 7th Schedule CFRN, 1999
[149] (2007) 10 MJSC

impeached. I am therefore not ready to perform a duty which the Constitution has not vested in the court."

In addition to case law, the Nigerian Constitution empowers the judiciary to make rules concerning the practice and procedure of courts[150]. While this authority falls under the category of subsidiary legislation, it still represents a form of lawmaking, albeit subject to legislative oversight. Regardless of classification, the act of making such rules constitutes a legislative function carried out by the judiciary. Therefore, the assertion that judges in Nigeria engage in lawmaking is not unfounded. Although it may not be their core responsibility, judicial pronouncements often give rise to new legal standards and interpretations that have the force of law.

11. CONCLUSION

This article shows that just looking at judges' own opinions about whether they make laws is not enough, because their views are often divided and influenced by personal beliefs. What really proves the point is their actual work in court. Judges do not only explain the law, they also add to it and develop new rules when filling gaps that legislation has left open. Once these rules are made, they become binding through the principle of stare decisis (following past decisions), which makes them an important source of law. The chapter also compares how this happens in England and Nigeria. In England, judicial lawmaking grew out of courts approving customs in the common law. In Nigeria, however, judges have taken a more active role, especially when lawmakers are slow or the government goes beyond its powers. This shows clearly that judges, in practice, do make laws.

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[150] S. 46(3), 236, 248, 254, 259, 264, 269, 274, 279 and 284 of the 1999 Constitution of the Federal Republic of Nigeria.1999