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Attorney General of the Federation v. Attorney General of Abia State & Ors (2024) LPELR-62576(SC): Was the purposive interpretation justified?

ABSTRACT

As has been the tenor of its pronouncements over the years, the Supreme Court ("the Court"), like every other court established under the Constitution of the Federal Republic of Nigeria 1999 (As amended) ("the Constitution"), has to interpret the law as it is, and not to make new laws or amend existing laws especially where the words used are clear and unambiguous.[1] The functions of making new law or amending existing laws are within the remit of the legislature. This position has the universally accepted principle of separation of powers at its foundation.[2] However, in the recent landmark decision by the same Supreme Court in *AG, Federation v AG, Abia State & 35 Ors SC/343/2024* delivered on 11 July 2024 ("the decision") which made extensive pronouncements on the fiscal autonomy of local governments, the Court appears to have deviated from its agelong emphasis on the literal rule of interpretation in the face of clear and unambiguous provisions of the Constitution and paid greater deference to the purposive approach to interpreting its provisions. This article would attempt to highlight legal reasons why, despite the good intentions behind its decision, there was no immediate necessity for the Court to heavily rely on the purposive approach. The legal reasons that would be proffered would revolve around issues pertaining to the jurisdiction of the Court, the principle of separation of powers being intrinsically part of the basic structure doctrine, and the application of the literal rule of interpretation, *inter alia.*

Summary of the decision

The Court by a majority decision[3], decided *inter alia,* on the following key issues:

a) Whether the Federation can validly pay directly to Local Government Councils the amount standing to the credit of Local Governments in the Federation Account, since the States have for over two decades persistently refused to pay the money to the Local Government Councils?
b) Whether the governance of Local Government Areas by States using appointees or officers of States such as Local Government Caretaker Committees, Interim Councils and administrators amounts to governing or

taking control of the government of a Local Government Area, a part of Nigeria, contrary to section 7 (1) of the Constitution and therefore a violation of section 1 (2) of the Constitution.[4]

On the first issue, the major thrust of the Plaintiff's case was that funds standing to the credit of Local Government Councils ("LGCs") were being withheld by the State Governments. The Court agreed with this claim by the Plaintiff although the affidavit evidence adduced did not show that that position applied to all the Defendants.[5]

The majority decision of the Court on the first issue outlined above can be summarized thus:

(i) The Court, upon tracing the legislative history, noted that it was the practice pre-1999 that the LGCs collected their monthly allocations directly from the Federation Account.

(ii) The new procedure adopted was intended to avoid logistical challenges.

(iii) That the Constitution could not have intended by Section 162 (5) and (6) that States should retain money distributed by the Constitution to the third tier of government (LGCs) who are the owners of the money and use it for their benefit. This, according to the Court is because if the states retain and use the money and do not pay it to the LGCs, it will defeat the Constitutional provision in 162 (3) that money in the Federation Account be distributed to each of the three tiers of Government. On the application of Section 162 (5) and (6), the Court held that those provisions merely provided for a method or procedure of getting the amount distributed to the LGCs under Section 162 (3)[6]

On the second issue on caretaker committees, the Court citing *Ajuwon* v. *Governor of Oyo State*[7] held that by the provisions of Section 7 of the Constitution, the only constitutionally recognized form of LGCs governance is through democratically elected councils.

There is a considerable force in the dissenting judgment of Abiru JSC who aptly pointed out that the dispute as to whether funds can be paid directly to the LGCs by the Federal Government, is between States and the LGCs and not the business of the Plaintiff or the Court. The Learned Justice also eruditely observed on the issue of Section 162 (5) and (6) that the said sub-sections do not allow for direct payment of funds from the Federation Account to the LGCs, and that ordering direct payments to the LGCs with the effect of bypassing the States would be an invitation for the Court to engage in judicial legislation and undermine the foundation of federalism established in the Constitution.[8]

What the purposive rule of interpretation entails

The Court in *Marwa v Nyako*[9], pronouncing on what the purposive rule of interpretation entails, enthused that the objective of the purposive approach is to give effect to the legislative purpose of the enactment by interpretation of the words to accord with such purpose[10]. An author[11] has noted that "as a matter of constitutional theory, purposive interpretation is routinely rejected as either an empty phrase that offers no alternative to established theories of constitutional interpretation or a dangerous doctrine that provides no basis for distinguishing between justified and unjustified interpretations of constitutional rights."[12] The application of the purposive interpretation is not alien to our jurisprudence[13]. In fact, the Courts in the interpretation of the provisions of the Constitution generally adopt a purposive approach and tend towards a broad or liberal interpretation of the provisions of the Constitution.[14] Indeed, the Court's reliance on the purposive interpretation in its decision would have been without blemish had there been no exception to the theory of purposive interpretation. The exception to the purposive interpretation theory is that it ought not to be applied where something in the text of the Constitution indicates that a narrower interpretation will best carry out the objects and purpose of the Constitution.[15]

Critique

Our critique of the decision is two-pronged, firstly, on the first-instance jurisdiction of the Court to resolve the questions for determination and secondly, on the Court's interpretation of the provisions of Section 162(5) & (6) of the Constitution.

One cannot seriously criticize the decision without commenting on the Court's interpretation of the provisions of section 162 (5) & (6) of the Constitution[16] which provides that: Each States shall maintain special account to be called "State Joint Local Government Account" into which shall be paid all allocations to the local government councils of the state from the Federation Account and from the Government of the state. However, it must first be determined whether the Court had the jurisdiction in the first instance to resolve the questions brought before it for determination, as jurisdiction is *primus interpares.*[17]

Jurisdiction:

The first sub-issue is whether there is a dispute between the Federation and the States.

In the case of *AG Abia State v. AG Federation & Ors*[18] the Supreme Court held as follows:

> "Section 232(1) of the Constitution provides that: "The Supreme Court shall, to the exclusion of any other court, have original jurisdiction in any dispute between the Federation and a State or between States if any in so far as that dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends. It is clear from the above that for the original jurisdiction of this court to be invoked in a civil action: (a) the action must be between the Federation and the State(s) or between States, and there must be a dispute between the Federation and a State or States; (b) the dispute must involve a question of law or both, and (c) the dispute must pertain to the

existence or extent of a legal right."[19]

It is also crucial to mention here, that the dispute was between the State Governments and the Local Government, and as such, does not fall within Section 232 (1). By an operation of the *expressio unius est exclusio alterius* rule of interpretation, a dispute not falling within the circumstances mentioned Section 232 (1) of the Constitution and Section 20 of the Supreme Court Act automatically excludes the Supreme Court's exercise of jurisdiction over such disputes.

The second jurisdictional issue worth addressing is **whether the reliefs sought by this action can be granted in the absence of necessary parties to it**. The decision of the Court in *AG Lagos State v AG Federation & Ors.*[20] provides the answer. In that case, the Court held that since the declaration sought would affect the interest of beneficiaries, their non-joinder to the action vitiated the claim.[21] In the case under review, it was not contested that the beneficiaries are the LGCs. It follows, therefore, that the reliefs were not grantable by the Court, since the Court lacked the jurisdiction to entertain the claim or to grant the reliefs sought in the absence of the beneficiaries who were necessary parties to the suit.

The elephant in the room on the issue of jurisdiction is **whether the Plaintiff enjoys the *locus standi* to institute the action.** Recently, in *President, FRN v National Assembly*[22], the Court, citing numerous authorities apt on the point, affirmed the age-long principle that to invoke the original jurisdiction of the Court, the Federation as Plaintiff must show that it has such right or interest which is affected or is likely to be affected by the action complained of. In the decision under review, it was the interest of the LGCs that were sought to be protected. Also, in the decision under review, the Court cited *AG Kaduna v AG Federation* [2023] 12 NWLR [Part 1899] 537 (The Naira Re-design Policy Case) to justify its novel attitude, that it shall assume jurisdiction when there is "any dispute" or "any question" whatsoever between the Federation and States or between States stating that the terms "any dispute" or "any question" are general and wide-reaching. Again, in the decision under review, the Plaintiff was not the beneficiary of the reliefs sought. From the facts, the persons whose funds were withheld were the LGCs, and the persons who withheld the funds were the Defendants. Therefore, relying on the reasoning of the Court in the *President, FRN v National Assembly* Case, and upon reliance on the litany of decisions cited therein, the parties to the dispute in the case under review ought to have been the States and the LGCs and the Plaintiff lacked the *locus standi* to institute the action.

On the interpretation of sections 162 (5) & (6)

The Court's approach of relying on the legislative history and overlooking the clear wordings of Section 162 (5) and (6), while proceeding to hold that those provisions merely provided for a method or procedure of getting the amount distributed to the LGCs under Section 162 (3), is a usurpation of the powers of the legislature in failing to give effect to the clear wordings of the law, because the provisions of those sections are clear and unambiguous. They are not absurd or "unworkable"[23]. The Court used the term "unworkable" for the procedure prescribed in the provisions of section 162 (5) and (6) when indeed, some states adduced evidence that the provisions have already

been met. This was also alluded to in the dissenting Judgment of the Hon. Justice Abiru.

Furthermore, the provisions of Section 162 (5) and (6) are the specific provisions that create a "trust" and stipulate the creation of a joint account into which the funds standing to the credit of the LGCs may be paid, respectively. The general provision of Section 162 (3) ought to give way to the specific provisions of Section 162 (5) and (6).[24] This is typified in the maxim, *generalia specialibus non derogant* which means that general provisions do not derogate from specific provisions. Additionally, Section 162 (3) cannot be read in isolation from the provisions of Sections 162 (5) and (6)[25], as in the interpretation of constitutional provisions, the Court ought to give effect to the provisions of the Constitution rather than having it fail or being rendered useless, futile or inferior to other provisions.[26]

At best, the Court can recommend an amendment or suggest a reform like it did in *Udom v Umana* (No. 1)[27], and a host of other decisions. This is not to extinguish the doctrine of judicial activism, but to stress, that it must, be kept within reasonable bounds otherwise, as an unruly horse, per Burrough J., in *Richardson v Mellish* 2 Bing 252, which once it is ridden with unheeded caution, it may dump the rider in an unimaginable abyss.[28]

Conclusion

As infallible as the Roman Pontiff[29], the Court has again, affirmed its finality. When the Court assumes jurisdiction when it ought not to have, who can question it? An appeal lies only to God. Thankfully, the Court, again relying on this same finality, can later say it was wrong in the previous occasion to have assumed jurisdiction in the past, and the cycle goes on. The Court must, however, remember that lower courts are bound by its decisions. It ought to follow what it has done in similar situations in the past if there is no reason to depart. In this way, there can be some level of certainty of decisions that may emanate from it. The Court's role is to interpret and not make new laws. However, we shall not fail to note that an affront to this doctrine of separation of powers which is at the very core of the basic structure doctrine of the Constitution as was re-affirmed by the Court in *Cocacola (Nig.) Ltd v Akinsanya*[i] is consequentially an affront to the basic framework of our laws, and any attempt to whittle down its potency would only operate to emasculate, destroy, abrogate, change, or alter a doctrine that lies at the very core of our jurisprudence inviting anarchy. While the intention behind the outcome of the case may far outweigh the correctness of the legal procedure adopted, it is arguable that the decision only provides a pyrrhic legal remedy for a moral question (corruption) that may linger as it calls to question whether the decision does anything to allay the fear of the Plaintiff that the funds would be mismanaged nor does it guarantee that the LGs would not mismanage the funds themselves.

[1] Judicial precedents on this point are legion. One of the earliest re-iterations by The Court of this coinage by Lord Bacon in his essays on Judicature, may be found in *Okumagba v Egbe* [1965] LPELR – 25276 (SC) per Bairamian, JSC (Pp 5 – 5 Paras D - E). Other decisions in *Yare v Nunku* (1995) LPELR – 3514 (SC)*; PDP v INEC* (1999) LPELR – 24856 (SC) and many others followed suit.

[2] In *AG Abia State & Ors v AG Federation* [2003] LPELR – 610 (SC) The Court propagated this concept propounded by Baron De Montesquieu's that none of the three arms of government under the Constitution should encroach into the powers of the other. Each arm, according to The Court, is separate, equal and of coordinate department and no arm can constitutionally take over the functions clearly assigned to the other.

[3] A full court was convoked, with Hon. Justice Mohammed Garba (Presiding and concurring), Justice Emmanuel Agim (read the leading judgment), Justice Chioma Egondu Nwosu-Iheme (concurring), Justice Haruna Simon Tsamani (concurring), Justice Moore Aseimo A. Adumein (concurring), Justice Habeeb Adewale O. Abiru (dissenting), Justice Jamilu Yammama Tukur (concurring).

[4] Akinola Oladimeji, '*LG Financial Autonomy: What the Supreme Court held in AG Federation v AG Abia State & Ors. SC/CV/343/2024'* https://barristerng.com/lg-financial-autonomy-what-the-supreme-court-held-in-ag-federation-v-ag-abia-state-ors-sc-cv-343-2024-by-akinola-oladimeji/ last assessed 8 August 2024.

[5] Going against its pronouncements in *Akiti v Oyekunle* [2018] 8 NWLR [Part 1620] SC 182 that where documentary evidence supports depositions in an affidavit, such depositions are the correct position of what they seek to establish. The dissenting judgment (of Abiru JSC) painstakingly outlined the evidence led by various states including those states that showed that the LGs have always been paid.

[6] Even when The Court has held in *Inakoju v Adeleke* [2007] 4 NWLR [Part 1025] 427 (Pp. 590, paras. G-H; 697, paras. G-H); *Mato v Hember* [2018] 5 NWLR [Part 1612] 258; *Orubu v NEC* [1988] 5 NWLR [Part 94] 323, and many other decisions that where the Constitution provides for a procedure to be followed to perform an act or duty, that procedure and none other must be strictly followed. Moreso, in this case, in section 162(6) the term "shall" is used to mandate the creation of a "state joint local government account".

[7] (2021) 16 NWLR [Part 1803]

[8] Akinola Oladimeji, '*LG Financial Autonomy: What the Supreme Court held in AG Federation v AG Abia State & Ors. SC/CV/343/2024*'Supra.

[9] [2012] LPELR – 7837 (SC)

[10] Per Olufunlola Oyelola Adekeye, JSC (Pp 171 - 172 Paras D - A)

[11] Jacob Weinrib, Associate Professor, Queen's University Faculty of Law.

[12] Weinrib, Jacob, 'What is Purposive Interpretation?' (June 24, 2022). University of Toronto Law Journal https://ssrn.com/abstract=4145735 last assessed 8 August 2024.

[13] *Nafiu Rabiu v Kano State (1980) 8 – 11 SC 130 at 148 – 149;* Prof. Ben Nwabueze *Federalism in Nigeria Under the Presidential Constitution,* (1983) Sweet & Maxwell, London, p 317.

[14] *Senator Adesanya v President of Nigeria* [1981] 2 NCLR 358 at 374; *Attorney General Abia v Attorney General of the Federation* [2002] 17 WRN 1 at 185; *Attorney General Ondo v Attorney General Ekiti* [2001] 17

[15] *Tinubu v IMB Securities* (2001) 16 NWLR (Part 740) 670 at 690 paragraph E -G; Prof. Kehinde Mowoe *Constitutional Law in Nigeria* (Lagos: Malthouse Law Books, 2008) Page 41; *NNPC v Famfa Oil Ltd* [2012] 17 NWLR [Part 1328] 147 SC at page 194, paragraph C.

[16] Also, the failure to give a literal interpretation when circumstances demanded such.

[17] *Manomi v Dakat* [2022] LPELR – 57834 (SC)

[18] [2007] LPELR – 612 (SC),

[19] Per Walter Samuel Nkanu Onnoghen, JSC (Pp 10 - 10 Paras C - G)

[20] AG Lagos State v AG Federation & Ors. [2003] LPELR – 620 (SC) Per Muhammadu Lawal Uwais, JSC (Pp 90 - 91 Paras F – A)

[21] Oloriode v. Oyebi (1984) 1 SCNLR 390 at pp. 400 and 407, and the case of Green v Green (1987) 3 NWLR (Pt. 61) 480

[22] (2023) 3 NWLR (Pt. 1870) 1 (The Section 84 of Electoral Act 2022 Case) at pages 73 and 74, paragraphs B – C

[23] The necessity to apply the golden rule only arises in the event of absurdity in the strict application of the literal rule, which is indubitably not the case here. See Ibrahim v. Barde (1996) 9 NWLR (Pt.474) 513: Ojokolobo v. Alamu (1987) 3 NWLR (pt.61) 377 at 402 F-H; Adisa v. Oyinwola & Ors. (2000) 6 SC (Pt.II) 47; Uwazurike & Ors. v. A.G. Federation (2007) 2 SC 169; Nigerian Army v. Aminu Kano (2010)5 NWLR (Pt.1188) 429

[24] *Ardo v Nyako & Ors* [2014] LPELR – 22878(SC)

[25] *Skye bank Plc v. Iwu* (2017) 16 NWLR (Pt.1590) SC 24 (Pp. 86-88, Paras. *F-C; 92-93, paras. G-F; 102-103, paras. F-F; 116, paras. G-H; 121, paras. F-G, 138-139, paras. A-A)*

[26] *Skye bank Plc v. Iwu*, *ibid*

[27] (2016) 12 NWLR (Part 1526) 179

[28] *Onyekwulunne v Ndulue* [1997] 7 NWLR [Part 512] 250 per Achike JCA.

[29] In *Adegoke Motors Ltd v Adesanya* (1989) 2 NSCC 327 at 338, The Court re-echoed those evergreen words of Robert Houghwout Jackson, (who was a former Justice of the Supreme Court of the United States of America), when he held: "We are final not because we are infallible; rather we are infallible because we are final.

[30] [2017] 17 NWLR [Part 1593] 74