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JUDGE MADE LAW IN THE SUPREME COURT DECISION IN AGF V AG ABIA STATE ON DIRECT PAYMENT OF FEDERAL ALLOCATION TO LOCAL GOVERNMENT COUNCILS

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Abstract:
The Supreme Court of Nigeria in the recent case of Attorney General of the Federation v Attorney General of Abia State interpreted section 162(5)-(8) of Constitution of the Federal Republic of Nigeria, 1999, according to the respected court, purposefully and progressively, and granted the relief for direct payment by the Federal government of federal allocation to local government councils, in disregard of the literal interpretation of the Constitution's provisions requiring same to be paid through the states. In doing so, the court lamented that over the years, states have run the councils as their parastatals, and that in defiance of court decisions. This paper examined the relevant constitutional provisions interpreted by the court; decided cases that appertain to the question and the opinion of legal philosophers related to the subject and concluded that while the interpretation handed down by the Supreme Court is populist and responsive to public opinion, it detracts from the doctrine of separation of powers. The respected court remade the Constitution. Judge made law could be good but it is fraught with its own problems. The problem the Supreme Court sought to assist to solve is however hinged upon more fundamental dysfunctions that require solution through constitutional amendment, legislative intervention and enhancement of the rule of law. This paper suggests the constitutional and legal measures that ought to be adopted to enhance the rule of law, as the meaningful ways to solve the problem.

Keywords*:* Constitution of Nigeria, 1999, Constitutional Interpretation, Legal Realism, Sociological Jurisprudence, Purposive Interpretation, Direct Payment of Federal Allocation to Local Government Councils

1. Introduction

One of the sore points in Nigeria's experience in constitutionalism is the deliberate and shameful emasculation of local government council administration by state governments, among other ways, by the diversion of federal allocations to local government councils by the states. The consequence of this is that the system of democratically run local government is a sham. The leeway for the abuse of the system was laid by the way Constitution of the Federal Republic of Nigeria, 1999 (CFRN 1999) subordinated the running of the councils to the states. Part of the problem however is attributable to corruption and constitutional praxis and culture that is not in accord with the rule of law. The courts of the land recognise this, such that even one of the respected

Justices of the Supreme Court saw the solution in the metaphysical exercise of "hope and pray,"[1] since the constitutional provision does not admit of an interpretation that could solve the problem.

In AGF v AG, Abia State,[2] the Attorney General of the Federation (AGF) on behalf of the Federal Government commenced an originating summons in the Supreme Court, seeking among other reliefs, for federal allocation to be paid directly to local government councils, bypassing the states. The Supreme Court in a majority judgment obliged the Federal Government, obviously ignoring the literal interpretation of the relevant provisions of CFRN 1999 on the issue.

This paper examined the interpretational approach of the Supreme Court in the suit and locates legal realism at work. While the immediate result of that approach is populist and gladdening in the short run, it offends the time tested democratic doctrine of separation of powers, which is fundamental for building a desirable modern nation-state. Setting aside an inevitable literal interpretation portends some danger to the judicial system. The concern of the Supreme Court requires constitutional amendment, legislation and other non-judicial measures, to address it.

2. **The Concept of Constitutional Interpretation**

The decision in AGF v AG Abia[3] was based on the interpretation of provisions of CFRN 1999. A constitution is also a statute but it is not an ordinary statute. In a state in which the rule of law applies, the constitution is the fundamental law of the land and is legally recognised as a higher norm than other laws. Although it is arguable whether in a democratic state the grund norm (or basic norm or alpha norm[4]) is the constitution or rather rests on the people themselves,[5] a debate which is not within the scope of the subject of this paper, it is not in doubt that the constitution is given prime recognition above the other laws of a state.[6]

In interpreting a statute, including a constitution, lawyers recognise the principles of interpretation applicable to all statutes (the constitution, principal statutes and subsidiary statutes). The literal rule is the basic rule of

[1] (2016) 16 NWLR (Pt. 1005) 265, *per* Onnoghen, JSC
[2] (2024) 17 NWLR (Pt. 1966) 1
[3] Ibid
[4] See A A Owolabi, 'The Search for Nigerian Grundnorm – A Critical Apraisal' Nigerian Current Law Review, (1996) 183
[5] Chris Anyanwu, 'Of Sovereignty, Grundnorm, Authochtonous Constitution, Conferences and the Stability of a Decolonised State,' in M M Gidado, C U Anyanwu, A O Adekunle(Eds.), *Constitutional Essays in Honour of Bola Ige; Nigeria Beyond 1999: Stablizing the Polity through Constitutional Re-Engineering* (Chenglo Limited, Enugu, 2004) 11, 15 Chris Anyanwu's view seems to find support in the statement of Uwaifo, JSC in AGF v Guardian Newspapers Ltd. (2001) FWLR (Pt. 32) 87, 115A
[6] See Rabiu v The State (1981) 2 SCNLR 293; s. 1(1)(3), CFRN 1999

interpretation. The reason for this is hinged on the rule of law doctrine of separation of powers. Montesquieu postulated on the separation of the executive, legislative and judicial powers of government:

> When the legislative and executive powers are united in the same person, there can be no liberty… Again, there is no liberty if the power of judging is not separated from the legislative and executive. If it were joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control: for the judge would then be the legislator if it were joined to execute power, the judge might behave with violence and oppression.[7]

The importance of the arms of government not overreaching their bounds was expressed by Merkl as an important feature to achieve the rule of law:

> Rather than having one unified government authority turn into natural hunger for more power upon the liberties of the people, the separate branches were meant to turn upon one another thereby restraining one another expansion and leaving the people to enjoy their liberties.[8]

The need for checks and balances in the exercise of government power makes it imperative for the judiciary not to whimsically go beyond the literal interpretation of the constitution or to turn out an interpretation that could not be deemed to be the intention of the makers of the constitution. Consequently, the first line principle of interpretation of the constitution is to give effect to the literal meaning since judicial power-not executive or legislative powers-is what is granted to the courts.[9]

However, as Chinwo has noted:

> Notwithstanding the efforts of the lawmaker or drafters, in the making of a statute or a constitution to make words, phrases, clauses and sentences in it clear and understandable, disputes still do and often arise as to their meaning. This arises out of several reasons, including:
>
> 1. Internal conflicts or inconsistencies between the provisions in the constitution.
> 2. Presumptuous claims of benefits of provisions resisted by others.

[7] C Montesqleu, *The Spirit of the Laws* (1748) ,Thomas Nugent (Trans.) (Hafner Publishing Co., New York, 1949) in H Barnett., *Constitutional and Administrative Law* (6th Ed., Rontledge – Cavendish, Okon, 2006) 92

[8] Paul Merkl, *Political Continuity and Change* (Harper and Row Publishers, New York, 1967) 296 in D I O Ewelukwa, 'The Rule of Law in Action' The Nigerian Judicial Review (2000-2001) 1, 15

[9] See S.6(1), CFRN 1999

3. Deliberate neglect of the clear meaning of provisions to serve selfish interest of the claimant.
4. Ambiguous statement of provisions.
5. Bonafide misunderstanding of some provisions
6. Existence of inchoate provisions which may depend on some other legislative, executive or even judicial action to be effective.
7. Provisions which are clearly unenforceable as they are on the face of the document.[10]

Though some of the reasons for lack of clarity as stated by Chinwo are extraneous and rather behavioral attitude in litigation, the author made the point that inchoate provisions, internal conflicts and unenforceable provisions could create doubts and disputes as to the meaning of words used in a constitution. In any event, proceeding from the premise that an unavoidable literal grammatical meaning must be given to the words of the constitution-since the courts are not empowered to make law and do not pretend to do so[11]-other interpretation principles have been developed by the courts. The application of these principles may dispense with a literal interpretation for justifiable reason(s). An expansive expression of the principles for the interpretation of CFRN 1999 have been stated to be:

(a) Effect should be given to every word used in the constitution
(b) A constitution nullifying specific claims in the constitution should not be tolerated.
(c) A constitutional power shall not be used to attain an unconstitutional result.
(d) The language of the constitution, where clear and unambiguous, must be given its plain and evident meaning.
(e) The CFRN is an organic scheme of government to be dealt with as an entirely and therefore a particular provision should not be severed from the rest of the constitution.
(f) While the language of the constitution does not change, the changing circumstances of the progressive society for which it was designed can yield new and further import of its meaning.
(g) A constitutional provision should not be construed in such a way as to defeat its evident purpose.
(h) Under the constitution granting specific power, a particular power must be granted before it can be exercised.

[10]Chukwuma A J Chinwo, *Principles and Practice of Constitutional Law in Nigeria* (2nd Ed., Princeton & Associates Publishing Co. Ltd., Lagos, 2006) 50
[11] Tofowomo v Ajayi (2024) 7 NWLR (Pt. 1938) 427, 458-459 H-B, *per* Agim, JSC

(i) Declaration by the National Assembly of its essential legislative function is precluded by the constitution.

(j) Words are the common signs that we make use of to declare their intentions to one another, and when the words of a man express his intentions plainly, there is no need to recourse to other means of interpretation of such words.

(k) The principles upon which the constitution was established rather than the direct operation or literal meaning of the words used should measure the purpose and scope of its provisions.

(l) Words of the constitution are not to be read with stultifying narrowness.

(m) Constitutional language is to be given a reasonable construction and absurd consequences are to be avoided.

(n) Constitutional provisions dealing with the same subject matter are to be construed together.

(o) Seemingly conflicting parts are to be harmonised, if possible so that effect can be given to all parts of the constitution.

(p) The position of an article or clause in the constitution influences its construction.[12]

Other principles are

(q) The court looks at the constitution as a wholesome document when interpreting a part of it.[13]

(r) The courts do not adopt an interpretation that defeats the purpose of the constitution.[14]

In the mix is that certain provisions may be considered as directory and not imperative.[15] Whatever principle(s) is/are stated to under guard a constitutional interpretation, the search is for the true intention of the constitution makers. No court takes upon itself to undo what the law maker has done or to do what the lawmaker has not done.

It may be queried if indeed there is a valid separate concept of constitutional interpretation as different from approach to interpretation of statutes generally. Did the courts really mean to establish exclusive principles of constitutional interpretation? What makes a constitution to differ from other statutes is that it is the fundamental

[12] See AGF v AG Abia State (2024) 17 NWLR (Pt. 1966) 1, 147F-148G. See also AG Bendel State v AGF (1982) 3 NCLR 1; Marwa v Nyako (2012) 6 NWLR (Pt. 1296) 199; AGF v Abubakar (2007) 10 NWLR (Pt. 1041) 1; Mobil Producing Ultd. V Monokpo (2001) FWLR (Pt. 49) 1516; Okogie v AG, Lagos State (1981) 2 NCLR 337; AT Ltd. V A.D.H (2007) 15 NWLR (Pt. 1056) 118

[13] PDP v INEC (2001) FWLR (Pt. 31) 2735

[14] Ibid

[15] AGF v AG Bendel State (2002) FWLR (Pt. 65) 448

law that stands above other laws of the state. Statutory provisions that conflict with it are invalid.[16] It does not particularly seem that any of these stated principles would not apply when ordinary statutes are interpreted.

But the courts would seem to be minded to consider a special approach to interpretation of the constitution:

> Constitution is to establish a framework and principles of government, broad and general in terms intended to apply to the various conditions which the development of our several communities must involve, ours, being a plural dynamic society therefore, mere technical rules of statutes are to some extent inadmissible in a way as to defeat the principles of government enshrined in the constitution. And where the question is whether the constitution has used an expression in a wider or narrow sense, in my view, the court should whenever possible, and in response to the demands of justice lean to the broader interpretation'[17]

The 'living tree' doctrine[18] has been referred to as specific to constitutional interpretation, and the statement of Nweze JSC in Saraki v FRN[19] suggests that the literal meaning of the words used in a constitution could be dispensed with in preference for the principles upon which the constitution was established. However, in none of these cases did the court mean that the clear, literal interpretation could be jettisoned, unless the intention of the law maker can be justified in doing so. But the words of Dickson C.J in Hunter v Southern Inc,[20] adopted in Marwa v Nyako[21] and AGF v Abubakar[22] are more daring:

> The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations…A constitution by contrast is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power.[23]

Although, the courts seem to believe that there is a special approach to interpretation of the constitution, it does not seem that any of the principles stated for interpretation of the constitution is peculiar. Statutes and constitutions all have their purpose and policy objectives; "every legal document including the constitution

[16]See S. 1(1)(3) CFRN 1999; Amaechi v INEC (2008) 5 NWLR (Pt. 1080) 227, 296 D-E
[17]*Per* Udoma JSC in Rabiu v The State (1981) 2 SCNLR 293, 326
[18]Edward v Canada (1932) AC 124
[19](2016) 3 NWLR (Pt. 1500) 531, 831, 832
[20](1984) 2 SCR 145
[21](2012) 6 NWLR (Pt. 1296) 199
[22](2007) 10 NWLR (Pt.1041)1
[23](n 20)146 per Dickson CJ

has a purpose without which it is meaningless."[24] Thus, it is not acceptable that those purposes and values would be overlooked in interpreting an ordinary statute, as different from when the constitution is interpreted. It is acknowledged however that the constitution, apart from being a fundamental statute, is normally difficult to amend. Any undesirable consequences decipherable from a literal interpretation may be difficult to cure if the courts do not intervene. It appears then that the only thread upon which the concept of separate constitutional interpretation hangs is not on the prolix principles stated by the Supreme Court, but on the silent recognition that something needs to be said to justify departure from the clear literal meaning of a constitution, and justify the intervention of the court rather than allow the society to live with the undesirable consequence of a literal interpretation. The question of the validity of a rule of constitutional interpretation however requires a deeper juridical probe. Nevertheless, courts do not do anything suggesting that they do make law in constitutional interpretation or statutory interpretation.

3. Theory of Judge Made Law and its intersection with Sociological Jurisprudence and Purposive Interpretation

One of the impacts of the principles of separation of powers, an important guard post of modern democratic governance, is that judges do not accept that they make law. If judges accept that they make law, they would be seen as 'coupists' of some sort, who sabotage the constitution and the state, using the power of interpretation. What the courts readily accept is that they interpret the law and the constitution to actualise the intention of the lawmaker. This is what is within the courts' constitutional powers.[25]

However, the language of the law is not always clear, and even to the ordinarily educated, the law of language is sometimes not certain to those who use it.[26] Besides, the legislature does not always foresee future problems that may arise in interpreting the language used or in not making clear provision for some situations that may arise. This often happens in interpreting a constitution, especially given that constitutional provisions are very often tested in courts. A good example is the Supreme Court decision in Amaechi v INEC,[27] which declared the appellant deemed to be elected Governor, although appellant's name was not on the ballot. This was on the basis that his party won the election. The seeming anomaly arose from the inability of the CFRN 1999 and the Electoral Act 2006[28] to be clear on what happens if an improperly substituted candidate in an election, succeeds

[24](n 21)
[25]See S. 6(1), CFRN, 1999
[26]See T A Endicott, *Law and Language*, Stanford Encyclopaedia of Philosophy<https://plato.stanford.edu/enteries/law and languages/2002> accessed 14 February, 2007
[27](2008) 5 NWLR (Pt. 1080) 227
[28] Act No. 2, 2006

in proving his case against the person who was improperly substituted by his political party as eligible to run in his place. The Supreme Court came up with the jurisprudence that elections are primarily contested by political parties, not by candidates. This approach may present a problem if there is a juridical examination of whether the electorate vote for political parties rather than their candidates.

Furthermore, the ability of judges to avoid the operation of the principles of *stare decisis* and the reality that the same word may mean different things in different circumstances,[29] and other factors, permit the judge to fill in the missing 'gaps' without acknowledging that a new law is being made. This is always dressed in the robe of discovering the intention of the legislature.

The reality that judges do make law finds support in the thoughts of the American Realist School of jurisprudence who have company in the Scandinavian School of realists. While the former acknowledge the influence of social conditions in shaping what the judges pronounce as law, the latter accept the pronouncement of judges rather than any definite extra-legal explanations as what makes law. According to Ludstedl,[30] encouragement to obey the law comes from the social welfare needs of the society.

To different extents, these shades of legal realism are valid. The court responds to changes in social conditions in the society while filling the gaps created in the language of the law while posturing as merely pronouncing the intention of the law maker. The statement of the Supreme Court that: "While the language of the constitution does not change, the changing circumstance of the progressive society for which it was designed can yield new and further import of its meaning,"[31] acknowledges the influence of societal changes on the interpretation of the courts.

The response of interpretation to present sociological conditions of the society is paramount in the thoughts of Roscoe Pound, JIhering and others. Roscoe Pound saw law as a means of social engineering to interpret law to achieve its purpose,[32] in line with JIhering's view that law is to serve the needs of human society.[33] Another sociologist thinker, Habermas added an ethical angle to the views of Pound and JIhering by stating that law must be socially effective as well as ethically justified.[34]

[29] See Garner v Burr (1951) 1 KB 31, Where it was held, contrary to popular understanding, that a chicken coop fitted with iron wheels is a 'vehicle.'
[30]Ludstendt, *Legal Thinking Revised*, 140 in Adaramola, *Jurisprudence* (4th Ed., Durban, Nexis Butterworths, 2008) 279
[31] (n 2) 148A, *per* Garba, JSC
[32] M D A Freeman, *Lloyds Introduction to Jurisprudence* (7th Edition, Sweet and Maxwell, London, 2001) 673
[33] Ibid, 662
[34] Ibid, 693

> Haberman argues that legal philosophy must recognise fundamental changes in the social environment, beliefs and values in which the law's claims to authority might ultimately be grounded.[35]

In these thoughts, sociological thinking urges on the courts to approach interpretation in response to social conditions and to infuse interpretation with ethical standards and values. According to Pound:

> …its earlier form social-utilitarianism, in common with all Nineteenth-century philosophies of law, was too absolute. Its teleological theory was to show us what actually and necessarily took place in law making rather than what we were seeking to bring about… I am content to think of law as a social institution to satisfy social wants-by giving effect to as much as we may with the least sacrifice so far as such wants may be satisfied or such effect-by an ordering of human conduct through politically organized society. For present purposes I am content to see in legal history the record of continually wider recognizing and satisfying of human wants or claims or desires through social control: a more embracing and more effective securing of social interests; a continually more effective elimination of waste and precluding of friction in human enjoyment of the goods of existence-in short, continually more efficacious social engineering.[36]

Among others, three key conclusions could be made as it concerns interpretation of laws from the above quoted thoughts of Pound. One, is that interpretation of law should not be language strict. Two; interpretation should be used as a means of satisfying social wants. Three; the role of interpreting the law to respond to social needs should be continuous in line with changing needs. These conclusions appeal to purposeful and progressive interpretation of laws to meet the current needs of the society as the Supreme Court did appeal to in AG Federation v AG Abia State.[37]

The challenge of balancing resort to certainty of literal interpretation with sociological cum purposeful and progressive interpretation, in line with current realities, is by no means a light judicial exercise in some cases.

4. Historical Background of the Mischief targeted by AGF v AG Abia State

[35] Ibid, 693
[36] Roscoe Pound, *Philosophy of Law* (Revised ed. 1954) in (n 32) 721, 722
[37] (n 2)

From the colonial days, Nigeria has had one form of local government system of administration or the other, depending on the part of the country. The colonial period hardly saw any meaningful democratisation of the system of government at any level of government. British indirect rule placed appointed British officials as district officers and commissioners to oversee the local governments, with warrant chiefs and emirs interfacing between the people and the British appointed officials who ran the bureaucracy. Elected local government councils however were put in place between 1950 and 1955.[38]

Through the period of independence in 1960 until 1976, nothing substantial was done to make government at the local level democratic and independent of the control of Regional civilian and military governments of the states of the country. A major effort came with the military- midwifed Local Government Reforms Committee of 1976 and the constitution of the Constituent Assembly for the drafting of the 1979 Constitution. Both bodies expressed concerns about the lack of autonomy of local government councils in Nigeria. The effort of these bodies foreshadowed the provisions of Constitution of Nigeria, 1979, on local governments,[39] which made improvements on autonomy of local government councils in Nigeria.

The Federal Military Government established the Dasuki Committee of 1984 and the Etsu Nupe Committee of 1993. The former recommended separation of powers in the local government system[40] while the latter recommended direct remittance from the federation account to the local government councils.[41] The efforts of these committees led to further improvement, particularly with respect to financial autonomy of local government councils, in CFRN 1999.[42]

The operation of the 1979 and 1999 Constitutions under civil rule, as it relates to local government administration, revealed the crises of lack of financial and governmental autonomy of local government councils. The law reports are replete with reports dealing with litigation relating to these matters.[43]

One of the political actors in the struggle for power over the local government system was President Ahmed Bola Tinubu. He was the Governor of Lagos State between 1999 and 2007 when President Olusegun Obasanjo

[38]Linus O Nwauzi and Onyema David Okechukwu, 'Local Government Autonomy in Nigeria; A Constitutional Dilemma' in O V C Okene, G. O. Akolokwu and G.G. Otuturu (Eds), *Legal Essays in Honour of Mary Odili* (Priceton and Associates Publishing Co. Ltd., Lagos, 2024) 44, 50
[39] See ss.7 and 162, CFRN 1999
[40] FGN, *Guidelines for Local Government Reform* (Government Press, Kaduna, 1976) 1 in I C Idoko and A. E. Obidimma, 'Local Government Autonomy Under the 1999 Constitution of Nigeria: A reality or Myth' NAU JPPL (2020) (10) 77, 80
[41]FGN, Report of the Constitution Drafting Committee (Government Press, Lagos, 1976) 148
[42] See s7, CFRN 1999
[43]Knight Frank Rutley(Nig.) v AG, Kano State (1998) 7 NWLR (Pt. 556) 1; Friday v Governor of Ondo State (2022) 16 NWLR (Pt. 1857) 585; Eze v Governor of Abia State(2014) 14 NWLR (1426) 192, *etc*

was in power. Under his governorship, the government of Lagos State created one hundred and fifty six local development areas within the constitutionally listed local government councils in the State. This prompted the FGN to seize the federal allocation of Lagos State local government councils. The suit between Lagos State and the Federal Government ended in favour of the State.[44] However, more of the problems relating to political cum financial autonomy of local government councils arise because from the strangle hold of the states on the local government system.

Efforts made to use constitutional amendments to achieve greater autonomy, financial and administrative, for local government councils, were blocked by the states, who were and still are not willing to loosen their strangle holds. When the National Assembly made an effort to hold the states accountable, the Supreme Court in AGF v AG, State,[45] struck down the Act passed by the National Assembly to monitor the use of federal allocation to local government councils. The present federal government evinced an intention to stem the tide of misuse of federal allocation to local government councils by the States. To drive that policy objective to fruition, the federal government took out the suit in the Supreme Court with the thirty six states as defendants.

5. The AGF v AG Abia State decision on Direct Payment to Local Government Councils of Federal Allocation, its expression of Legal Realism and Lessons from Canada on Local Government Financial Autonomy

i. Facts of the Case and Decision on Direct Payment to Local Government Councils by the Federal Government

The AGF, on behalf of the FGN, took out the suit against all the state Attorneys General in Nigeria, claiming among other reliefs:

> 15. A declaration that a Local Government Council is entitled to a direct payment from the Federation account of the amount standing to its credit in the said Federation account, where the State Government has persistently refused or failed to pay it the said amount received by the State Government on its behalf.[46]

[44] AG Lagos State v AGF (2004) 18 NWLR (Pt. 904) 1
[45] (n 1)
[46] (n 2) 19

For the purpose of this paper, the 15th relief sought represents the centre piece relief which prompted the controversial interpretation of the Supreme Court. The issues raised for decision on financial autonomy were as follows:

12. Whether by virtue of section 162 (3) and (5) of the constitution of the Federal Republic of Nigeria 1999, the amount standing to the credit of a Local Government Council in the Federation Account should be distributed to it, and if so whether it can be paid directly to it?

……..

…….

15 Whether a Local Government Council is not entitled to a direct payment from the Federation account of the amount standing to its credit in the said Federal account, where the state government has persistently refused or failed to pay to it the said amount received by the state government on its behalf.

The provisions of CFRN 1999 that fell for consideration and interpretation with regard to direct payment of federal allocation to the local government councils were section 162(5)-(8):

(5) The amount standing on the credit of local Government councils in the Federation Account shall also be allocated to the States for the benefit of their local government council on such terms and in such manner as may be prescribed by the National Assembly

(6) Each state 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.

(7) Each state shall pay to local government councils in its area of jurisdiction such proportion of its total revenue on such terms and in such manner as may be prescribed by the National Assembly.

> (8) The amount standing to credit of local government council of State shall be distributed among the local government councils of that state on such terms and in such manner as may be prescribed by the House of the State.

A reading of these sections show that it is not in doubt that the clear provision of the Constitution is that federal allocations be paid, not directly to local government councils, but through the states. It seems this is the clear intention of the constitution makers by the use of word 'shall' in all the sub-sections of section 162 set out above. None of the Justices who delivered the majority judgment disputed this. Tsamani, JSC was very clear in accepting this fact:

> I am convinced that the framers of the 1999 Constitution might have had belief that the operators of the Constitution will have faith with the letters and spirit of the constitution and not observe same consistently been doing in relation to sections 7(1) and 162(5) and (6) of the 1999 constitution.[47]

The Justices appreciated that direct payment to the local government councils was not the intention of the constitution makers. It was admittedly the breach of this clear intention of the drafters of the constitution that persuaded the majority of the Justices to hold that the provision for payment through the states is directory rather than its clear mandatory import. The minority judgment was clear on that:

> These provisions are explicit and self explanatory. They do not admit, accommodate or concede the direct payment of the funds to the Local Government Council from the federation Account. This court has consistently held that where a statute provides a procedure for carrying out a duty, that procedure must be followed, and no other procedure is acceptable.[48]

The Supreme Court thus jettisoned the intention of the makers of constitution that would have produced a different interpretation and gave an interpretation that would produce a 'better' result. The reason was that states were misusing the allocation to the local government councils directed through them. The judgment of the majority Justices glossed through this reality while emphasising the breach of the provision, in order to

[47] (n 2) 175 BC. See also 203 D, *per* Tukur, JSC
[48] Ibid, 259D-E

arrive at their desired interpretation. In AG Bauchi v AGF,[49] the Supreme Court said, and quite correctly, *per* Kekere-Ekun, JSC as he then was, that:

> In interpreting the Constitution, the general principle is that such interpretation as would serve the interest of the Constitution and best carry out its purpose and objective should be preferred. The relevant provisions must be read together and not in isolation. Where the words of any section are clear and unambiguous, they must be given their ordinary meaning, unless it would lead to absurdity or would be in conflict with other provisions of the Constitution. Where the words used are capable of two meanings, the court must chose the meaning that would give force and effect to the Constitution and promote its purpose.[50]

The statement of the law here is consistent with the doctrine of separation of powers, that it is only when the literal interpretation will lead to absurdity that it will be overlooked. The provisions of section 162, CFRN 1999 prescribing that federal allocation be routed through the states is not absurd. What may be said is that the provision has given states the opportunity to flout the provisions of the Constitution. In a society where rule of law is complied with as a culture, it would not have been so. The problem is not the law but those who operate it. Indeed, reading section 162 together with sections 2(2), 4, 5 and 7, show that Constitution makers never intended to make local government councils a third their of government with similar independent status like that of the states and the Federal Government. Thus, no justifiable argument could be made that the purpose of the Constitution makers is not consistent with the provisions of section 162(5)-(8) or that inconsistency with any other section of the Constitution justifies the interpretation given for the provisions. The courts ought not to force a change in the law; the legislature would have to do that.

Effort have been made to amend the Constitution to achieve greater local government autonomy which the States frustrated.[51] More effort ought to be made rather that resorting to judicial law making. In another Supreme Court case of AG Kano v AGF,[52] emphasis was made on the sanctity of the literal interpretation thus:

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[49] (2018) 17 NWLR (Pt. 1648) 299. See also Ugwu v Ararume (2007) 12 NWLR (Pt. 1048) 365,498A, where the SC warning itself against judge made law said: "A statute it is always said is 'the will of the legislature'…Thus the courts declare the intention of the legislature"

[50] Ibid, 346 D-E

[51] See proposed Constitution amendment bill in F J Oniekoro, 'Local Government Administration in Nigeria: Reflections on some Constitutional Questions' in M M Gidado, C U Anyanwu, A O Adekunle(Eds.), *Constitutional Essays in Honour of Bola Ige; Nigeria Beyond 1999: Stablizing the Polity through Constitutional Re-Engineering* (Chenglo Limited, Enugu, 2004) 285, 288-296 and (n 31) 54-55, 79

[52] (2007) 3 SC (Pt.1) 59, per Kekere-Ekun, JSC as he then was

"Applying the literal interpretation to the phrase, the conclusion one must draw is that…"[53] In Ukegbu v N.B.C,[54] the Supreme Court also held that "…where the words of a statute or Constitution are clear and unambiguous, they call for no interpretation. The duty of the court in such a circumstance is to apply the words used."[55]

In the lead judgment, Agim JSC stated that:

> The purposive or teleological approach requires the court not to remain fixated on the literal and narrow meaning of the words used in the Constitution or statute in the situations mentioned above in disregard of the intention or purpose of the provisions, but go on to give the words a meaning that accords with the purpose and intention behind the words.[56]

His Lordship hinted at departing from the literal interpretation but hinged it on "intention or purpose of the provisions." But that intention is not consistent with direct payment of federal allocation to local government councils. The reference to purpose and intention of the provision, as far as the issue of direct payment of allocations was concerned, was a cloak that did not fit. It is important to note that in AGF v AG Abia State,[57] the majority judgment of the Supreme Court took a different view on matters relating to control of local government council finances. The court recognised that the Constitution subordinated local government councils to the states.[58] The court was not unmindful that local government council funds were being misused by the states and also that it was too trusting to think that the councils themselves will not misuse the funds if paid directly to them:

> Recent happenings in the country concerning funds allocated from the federation account to the state governments for the benefit of the local government councils must have advised the National Assembly to promulgate the Act in issue in an attempt to bring sanity into the system and ensure some reasonable level of development in the local government councils. However in a federation, where legislative power is constitutionally apportioned between the federal and state legislatures, such intention can only be relevant if the mischief intended to correct is within the legislative

[53] Ibid, 79 lines 13-21
[54] (2025) 2 NWLR (Pt. 1976) 283
[55] Ibid, 325 G-H
[56] (n 2) 117
[57] (n 1)
[58] Ibid, 411

> competence of the particular legislature-in this case the National Assembly-without which the good intention notwithstanding the effort becomes a mere exercise in futility, as has been found in the instant case.
>
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>
> We appear to assume that the local government councils (sic) structure or administration is manned by angels of credible or accountable political class different from the one running the state governments, which is not borne out by empirical evidence. In the circumstance we can only HOPE AND PRAY.[59]

In an earlier case, Agim, JSC who authored the lead judgment in the case under review appreciated the limit of the purposive or teleological approach thus:

> Courts cannot under the guise of discharging their Constitutional responsibility to declare and apply the law engage in legislation. This is a naked usurpation of legislative power given to the legislature. There is no doubt that the courts have very elastic interpretative jurisdiction that enables them some discretion in the interpretation and application of laws to give meaning to a provision which the wordings of that provision can reasonably bear. Such discretion are more exercisable where the words of a provision are not clear or are ambiguous or vague in meaning or the words are reasonably capable of more than one meaning. But where the words are clear, not ambiguous and obviously have one meaning, whether grammatical or technical, then the courts must scrupulously adhere to the text in the exercise of its interpretative jurisdiction. Even its adoption of a progressive application of any form of interpretative criteria including the purposive or teleological approach must be in arriving at the meaning of the clear words of the legislative provision and not in supplanting or substituting the words with words or things not in the clear provisions.[60]

This caution ought to have applied in the case under review. No doubt, it is desirable that the local government should exercise greater financial autonomy; but that was not what the makers of the constitution really intended. They conceived of local government councils under the supervision of the states. Any change in the

[59] Ibid, 429 F-G, 430 D *per* Onnoghen, JSC
[60] Tofowomo v Ajayi (2024) 7 NWLR (Pt. 1938) 427, 458-459 H-B

provision would require constitutional amendment. Notably, the intervention of the Supreme Court has not totally delivered local government councils from the clutches of the states.[61] As it stands, the principle of producing a court interpretation that is not intended by the constitution makers because its provisions are breached does not stand on any valid principle of statutory or constitutional interpretation. The danger is rather that the court will seem to be audaciously making law in order to make the law better that what the lawmakers intended. This is a dangerous precedent and a breach of the principle of separation of powers. The jurisprudence of interpreting a provision otherwise than as it ought to turn out to be, since the way it ought to be is not being complied with is faulty:

> In this case, since paying them through the states have not worked, the justice of the case demands that the local government council allocations from the federation account should henceforth be paid directly to the local government councils.[62]

The problem with section 162(5)-(8) of CFRN 1999 is not that payment is not to be made directly to the local government councils but that States received the allocations and withheld them. The judicial method of dealing with the problem is not for the court to amend the law, but to order that the law be compiled with, and if not, legal enforcement would be applied.

ii. Explaining the Realism in the Supreme Court's Interpretation

It is common knowledge that the constitutional praxis that has been dogging our democracy is that State Governors exercise near imperial powers in dominating the system of local government administration in Nigeria. Apart from seizing and misappropriating federal allocations to local government councils, they do not respect the constitutional requirement for democratically run local government administration.[63] Nwosu-Iheme JSC lamented the problem thus:

> This suit was principally instituted by plaintiff to curb the excesses of some recalcitrant Governors of States who run the Local Government Councils as part of their household or parastatals in their States

[61] See Adam Etete Michael and Charles Okechukwu Oparah, 'Constitutional Imperatives for Strengthening Local Government Administration as Fulcrum for Advancing Citizens' Rights and Democratic Governance'(Unpublished Article, 2025)

[62] (n 2) 118 G
[63] Ibid, 160, 161 G-B

> This is a typical example where majority of Nigerians have approached this Court crying for justice. They are telling this Court that they want to use what they have (the law) to get what they have been yearning for that is Financial Autonomy of the Local Government Councils. We shall be failing woefully in our duties if we send them back without using the instrumentality of the law to wipe away their tears. We shall not use the 1999 Constitution of the Federal Republic of Nigeria to paint the picture of helplessness since the Constitution is meant for Nigerians and not Nigerians for the Constitution.
>
> If we fail to take a firm decision now, there may never be another time or opportunity to do so[64]

This lament tells the influence of the complaints being made against the cavalier way local governments are being run by the States on the minds of the Justices. However, this problem is not because the governors are a bad breed while chairmen of local government councils are of a good breed. It is a national problem that requires a special national conference on corruption and adoption of multilateral approach to solve. From empirical evidence, local government councils have done no better in financial rectitude.[65] The strange culture of *prebendalism*, that is "a political system where elected officials and government workers feel that they have a right to a share of government revenues and use them to the benefits of their supporters, co-religionists and members of their ethnic group,"[66] is at the root of corruption by local government officials and workers. Human Rights Watch, Nwakanma and others have identified corrupt misuse of local government funds by the local government chairmen and other officials and workers through lavish and wasteful contract expenditures; withholding of allowance of local government by workers; corruption induced revenue collection outsourcing; disregard of budgetary allocation limits; sharing of local government revenue between those who collect them in the field and the senior officials; and other unwholesome practices.[67] Damning popular comments on local

[64] Ibid
[65] Human Rights Watch, *Local Government Corruption and Management in Rivers State: An Overview*<www/org/reports) 2007> accessed 20 May, 2025; Michael C Nwakanma 'Corruption in the Nigeria Local Government System: the way forward.' African Journal of Politics and Administrative Studies (10)(1) 99
[66] Michael C Nwakanma 'Corruption in the Nigeria Local Government System: the way forward.' African Journal of Politics and Administrative Studies (10)(1) 99, 104
[67] Human Rights Watch, *Local Government Corruption and Management in Rivers State: An Overview*<www/org/reports) 2007> accessed 20 May, 2025; Michael C Nwakanma 'Corruption in the Nigeria Local Government System: the way forward.' African Journal of Politics and Administrative Studies (10)(1) 99; M S Agba and Ors. 'Local Government Finance in Nigeria: Challenges and Prognosis for Action in a Democratic Era (1999-2013)' Journal of Good Governance and Sustainable Development in Africa (2014)(2)(1) 84<https://www.remss.com>assessed 22 May, 2025

government corrupt practices by both national and international voices are rife, even with reference to local government administrations records for service delivery and financial accountability with extreme words such as "sheer madness," "a disaster," a "bazaar," and such like.[68]

The majority Justices of the Supreme Court felt they should do what they can to help the nation, ignoring the deeper seated principles of separation of powers. Sociological philosophy must have weighed highly in their mind. Pound's recommendation that protection of society's interest should be unhindered and continuous as a means of social engineering[69] is instructive in this regard. But the courts must observe the limit of not pushing 'purposive and progressive' interpretation beyond their assigned role of finding the intention of the law maker. Staying within the bounds of separation of powers is also an anti-corruption technique. Besides, whatever efforts the Supreme Court has made in the interpretation in AG Federation v AG Abia State[70] will not make corruption to go away. It will only make the magnitude of corruption to be increased at the local government rung of government. The endemic corruption in the local government system has been attributed to the institutional theory-deduction that weak institutions are unable to properly operate good laws.[71] While there is need for constitutional and legal measures to enhance local government autonomy, there is also need to apply constitutional and legislative reform to curb the corruption in local government administration. The suggestion to adopt Fiscal Responsibility Act, 2007[72] and apply it to local governments[73] is a brilliant one. A Fiscal Responsibility Commission composed of independent and highly qualified members/staff, should be established to oversee local government budgetary practices and expenses. The reliance on the performance of Chairmen, Treasurers, Heads of Personnel, Internal Auditors, Local Government Service Commissions and Auditors General of Local Governments to handle local government finances has so far proved ineffective.

Another explanation for the decision in this case is that the government of the day by filing the suit, evinced its policy thrust and desire to respond to the popular wish of Nigerians for local government autonomy. Amid failure to find a political solution to the problem through constitutional amendment, and in the face of persistent refusal by the states to respect the tenets of the constitution and several court judgments on the issue, the pressure to turn out a good result through judicial law making, was a compelling support of the effort of the government. Thus, the Supreme Court interpretation was likely influenced by perceived public opinion and

[68] Ibid
[69] (n 36)
[70] (n 2)
[71] Cyracus Ezechi Ike, ' Nigeria's Local Government Autonomy: Issues and Implications for the Country's Development' Journal of Political Discourse (2024)(2)(3)(3) 48, 52
[72] Act No. 31 of 2007
[73] See (n 71) 57

the avowed policy of the federal government towards achieving greater democratisation of governance, and enabling delivery of the benefit of good governance at the grassroots.

The problem is that blatant realism ensued. It is sometimes practically beneficial but it also has its problems. It often undermines the rule of law and creates problems for lawyers in being certain about what the outcome of a case would be. It may be imagined that legal counsel for the states were confident that the Supreme Court will turn out an interpretation in their favour on the issue given that in the earlier case of AG, Abia State v AGF,[74] the same court took a view that favoured them. Now, with hindsight, they should have considered that the federal government felt able to bring a suit seeking for a different interpretation and that amid outcry and a history of failure of politicians to solve the problem through constitutional amendment. A lesson in legal realism from Holmes that "the prophecies of what the courts will do in fact and nothing more pretentious are what I mean by law,"[75] would assuage their likely disbelief that the court decided the case against them. The way the matter went is a proof that judges are human and no machines and the mind of one judge, and not another, could work out a different interpretation result, depending on the circumstance. There is no blame indeed for the majority justices who were swayed by the circumstance of the case and the attitude of politicians to constitutionalism and the rule of law, notwithstanding that the interpretation also breached the same doctrine.

iii. Lessons on Local Government Financial Autonomy from Canada

Canada is a federation that could habour some lessons for legal engineering in Nigeria. As is usual with many countries, the focus of interest in government is predominantly on the provinces and the Dominion (central) government.[76] Reform has not been rapid at the local government level and the town councils are not run by angels. As far back as 1942, the local administration was described as "a heaven for itchy hands."[77] Although, the sources of finance of local councils in Canada are federal grants, provincial grants and internal revenue, there is no body similar with State-local governments joint account as established under section 162(6), CFRN 1999. The local governments have the autonomy to prepare their budgets and execute their projects without political dictation by the Dominion and Provincial governments. This independence lies more with a democratic tradition than with legal independence-because under various provincial laws, provincial ministers

[74] (n 1)
[75] O W Holmes, 'The Path of the Law' Harv. Law Review (1897)(10) 172-173 in (n 32) 821
[76] K Callard, 'Present System of local Government in Canada: Some Problems of Status, area, Population and Resources' The Canadian Journal of economics and Political Science (1951)(17)(2) 204<https://www.jistor.org/stable/137780
[77] Lawrence B Jack, 'Control of Local Government Finance in three Federal Countries: Canada, the United States and Australia: A Description and Analysis of the major Control Measures, Passed and Enforced by States and Provinces in Respect of Municipal Financial Practices' 1942<eschscholarship.mcgill.ca/concern/theses/g158bm424>accessed 21 May, 2025

oversight local governments and can issue directions and even remove them.[78] The spectrum of financial watch over their finances are budget control, audit control, control of accounting practices, statistical reporting and expenditure control. Agreed that provincial laws regulate local government finance, including oversight of expenditure, the culture of *god fatherism*[79] and unbridled corruption appears to have kept corruption in the local governments at saner levels.

6. Conclusion and Recommendations

The majority judgment of the Supreme Court in AGF v AG Abia State,[80] interpreting the Constitution to enable direct payment of allocation from the federation account to local government councils is, emblematically, beneficial for local government councils' autonomy and enhancement of democratic governance. But in doing so, the purposive interpretations principle was bandied fancifully to justify the court's decision. The primary principle of democratic governance and separation of powers that the courts do not make law, was clearly overlooked. The Supreme Court simply remade section 165(5)-(8) of the Constitution against the intention of the makers of the Constitution. It resorted to an interpretation propelled by the continuous breach of the provision of the Constitution and moved to support the effort of the government of the day to stem the tide.

The approach of the Supreme Court lacked sound legal basis, although it satisfies the yearning of Nigerians. That is not however to trust that clipping the wings of State Governors on the matter of misuse of federal allocations has solved the, perhaps, even greater problem of corruption in local governments and misuse of their own finances. Also, there are other legal and political avenues state governments may apply to keep the finances of local government councils under their control, which effectively undermine the solution the Supreme Court sought to inject. It is instructive that there is no provincial-local government joint account in Canada, unlike the State-local government joint account which is constitutionalised in section 162(6), CFRN 1999. A combination of constitutional and legal reform is required to solve the problem of lack of financial autonomy of local governments and the equally ugly problem of corruption in handling local government finance by local governments.

A national dialogue on the way out of corruption and to enhance the rule of law is overdue. Corruption is at the root of brazen disregard of the Constitution by states in running local government councils and misuse of

[78] CLGF, *Local Government System in Canada*<clgf.org.uk.default/assets/Country_profiles/Canada.pdf>assessed 26 May, 2025
[79] Wiktionary defines it as "1(Nigeria) A form of political corruption in which an influential individual hand picks another, often less influenced, to attain leadership in order to exert authority or influence. This may be due to the unpopularity of one candidate or to work around incumbency term limits." Wikipedia, https://en.wiktionary.org/wiki/godfatherism> accessed 14th February, 2025
[80] (n 2)

finance by local government councils. The malaise is endemic and goes beyond locating itself at the door of State Governors. A multifarious approach is required to enhance the rule of law. Constitutional and legal reforms are also required to reshape the administration of local government council allocation and finances, to achieve their financial autonomy and accountability. Particularly, an independent and professionalized 'Local Government Fiscal Responsibility Commission' could be the way out to check corruption in the local governments, amid other efforts needed to strengthen public institutions and democratic culture in Nigeria. There is also need have a better legal framework for enforcement of court judgments where government is involved. The helplessness in that regard, in part, is responsible for the judicial recommendation of "hope and pray"[81] and the remaking of section 162(5)-(8) of the Constitution by the Supreme Court.

[81] (n 2) 430 D, *per* Onnoghen, JSC