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Judicial Activism: Usurpation of Parliament's and
Executive's legislative functions, or a Quest for Justice
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Dedication

To my mum and dad, brothers and sisters- for being such a caring, loving and wonderful family, you've always been there for me, I owe you a lot.

To my two little angels, Sybel and Nicole- you are the beacons of my life. My sincere apologies for being away from you, but thanks for your perseverance during the time I was away from home.

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1.0 Chapter one “Introducing the Concepts and Issues Behind”

1.1 Introduction

The inherent uncertainties associated with the use of language make written documents an imperfect means of communication. Successful communication in writing is contingent upon several factors, including clarity of thought and expression on the part of the writer; the ability of the recipient to comprehend material that may be unfamiliar or complex; as well as the recipient’s background knowledge and goodwill. Written communications that are addressed to a small known audience permit the author to make assumptions in relation to these matters, but documents addressed to the public at large are necessarily more problematic (Pearce & Geddes, 2006, p. 3).

Drafters of legislation face real difficulties of communication. As well as being applicable to the general public or at least to a large group within it, legislation often deals at length with complex matters. The chance of not foreseeing every possible contingency or circumstance that might arise is therefore vastly increased. Even if the drafter may try to foresee all the vagaries of human conduct and attempt to provide for them, it seldom happens that the drafter will contemplate all the cases that are likely to arise under the legislation, and therefore the language used seldom fits every possible case (*Scott v Legg*, 1876, p. 42).

Unfortunately, the complexity of the task of drafting legislation in turn presents enormous problems for the courts. But no matter how obscure an Act of Parliament or other legislative instrument might be, it is the inescapable duty of the courts to give it some meaning (Pearce & Geddes, 2006, p. 5).

Of course it has been observed that in an ideal world, the intended meaning of every legislative proposition would be expressed with such clarity beyond doubt from the natural meaning of the words used, and would cover every contingency so effectively that interpretation would be straightforward and the only task for the courts would be to apply their terms; and thus, there would be no need to have any rules of interpretation for statutes (Greenberg, 2008, p. 605). Unfortunately, in the real world, this is not the case; courts facing the interpretation of ambiguous or obscure provisions must use the well-worn tools of statutory interpretation to arrive at a result (*Smith v Smith*, 2006, p. 79).

The cardinal rule for the interpretation of legislation is that it should be construed according to the intention expressed in the language used. This common law rule of interpretation states that if the language of a statute is precise and unambiguous, there will be no need to expound those words in their other senses since the intention of Parliament can only be read from the words of the statute themselves (*Vacher & Sons Ltd v London Society of Compositors*, 1913, pp. 121-23). This traditional view of statutory interpretation holds that judges are neutral and objective when they interpret statutes (Graham, 2009, p. 2); that their function is to interpret legislation “according to the intent of them that made it,” and that intent is to be deduced from the language used (*Capper v Baldwin*, 1965, p. 61), even-handedly and honestly. As Tindal CJ observed in *Warburton v Loveland* (1832, p. 489) ‘where the language of an Act is clear and explicit, we must give effect to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the legislature.’

It must be recognized however that so enormous is this duty of interpreting legislation that several questions arise that equally pose enormous challenges to the courts when trying to determine and

give effect to the intention of Parliament. For instance, what should a judge do when, in trying to determine the intention of Parliament, finds that a statutory enactment, honestly and properly interpreted, is unjust? How should a judge deal with a dilemma of a conflict between law on the one hand and justice on the other? (Olivier, 1998, p. 172-73). Should a judge be at liberty to override or ignore that law in order to ensure that justice is done?

Furthermore, this concept of statutory interpretation gets more complicated when courts are asked to interpret constitutional provisions (Ntaba, 2008, p. 252). To begin with, the provisions of most national constitutions, like other laws, are often ambiguous, vague, contradictory, insufficiently explicit, or even silent as to constitutional disputes that courts must decide. Additionally, they sometimes seem inadequate to appropriately deal with developments that threaten principles and values the constitution was intended to safeguard, developments that its founders and drafters either failed, or were unable to anticipate. How judges resolve these problems through interpretation is problematic and controversial, mainly because legitimate interpretation can be difficult to distinguish from illegitimate change (Goldsworthy, 2006, p 1). Again, unlike some other laws, the interpretation of the constitution touches vital political and social questions with far-reaching repercussions (Okere, 1987, p. 788), such that judges believed to have improperly changed a constitution while interpreting it are vulnerable to criticism for usurping the prescribed power of amendment belonging to Parliament, violating their duty of fidelity to law, flouting principles of democracy (such as separation of powers), and straying beyond their legal expertise into the realm of politics (Goldsworthy, 2006, p 1).

But then the questions still remain, how should judges interpret the constitution? Should the interpretation of the constitution be governed mainly by its 'letter' or by its 'spirit'? To what extent should written and unwritten (abstract) principles and values be recognized and given effect when interpreting the constitution?

In attempting to answer these questions, this thesis will examine the concept of judicial activism: a competing theory to the concept of judicial restraint in as far as the judicial attitude to the interpretation of the constitution is concerned. Under judicial restraint, the law is interpreted literally in that words of a statute are construed according to their ordinary, plain or natural meanings however absurd the consequences of such interpretation and whatever the hardship or perceived injustice that may be occasioned thereby; whereas judicial activism is to the effect that while it is a useful rule in the construction of statutes to adhere to the ordinary meanings of the words used, where such interpretation occasions injustice, it behooves the courts to construe the words in a manner so as to avert the imminent injustice (Dakas, 1998, p. 65).

The discussion in this thesis however advocates the concept of judicial activism, and intends to demonstrate that courts that employ this concept in their interpretation of legislation ensure that not only justice is done, but also help to achieve social transformation. Thus, the central argument in this thesis is that judicial activism is a necessary tool for attaining justice and achieving social transformation.

1.2 Methodology

As referred to in the Introduction, this thesis contends that judicial activism is a necessary tool for attaining justice and achieving social transformation. In analyzing this hypothesis, the thesis intends to examine the concept of judicial activism in relation to the courts' role of interpreting legislation, particularly focusing on the courts' function of interpreting the Constitution.

In this regard, the thesis will refer to and examine views of other authors whose works form part of a large and available body of literature in the areas of legislative drafting, statutory interpretation, law, policy and politics, human rights, and jurisprudence, among other subject areas. Their works offer better insights into the concepts of judicial activism, justice, the intention of parliament and separation of powers, as well as other issues that have been identified in the thesis and are relevant to the discussion and the analysis of the thesis's hypothesis.

More specifically, in analyzing whether courts that are activist in their interpretation of legislation usurp the legislative function of Parliament and the Executive, or whether an activist approach to the interpretation of legislation is necessary for the attainment of justice and social transformation; the thesis will, first and foremost, examine modes of constitutional interpretation obtaining in RSA and Nigeria. Here, the thesis will focus on examining selected judicial decisions on different approaches to statutory interpretation employed by superior courts in RSA (i.e. the Supreme Court and the Constitutional Court) before and after 1993 (the year the country attained constitutional democracy), and then compare them with the approaches employed by superior courts in Nigeria (i.e. the Federal High Court, the Court of Appeal, and the Federal Supreme Court) before and after 1999 (the year the country reverted to constitutional democracy). Besides examining the judicial

decisions, the thesis will also examine constitutional provisions governing the interpretation of the Constitution (Bill of Rights) and legislation as provided for in the Constitution of RSA and that of Nigeria.

Secondly, the thesis will proceed to make a comparative examination of judicial approaches to technicalities in the interpretation of the Constitution. In this regard, the thesis will examine the principles that have been laid down by the superior courts in RSA and Nigeria in as far as the construction of technicalities in the Constitution are concerned, as well as examining selected judicial decisions by the courts to see how they have actually applied those principles.

Finally, the thesis will make a comparative examination of how the courts have interpreted socio-economic rights enshrined in the Constitution of each of the two countries, specifically focusing on the rights to *health* and *housing*. In this regard, the thesis will analyze the constitutional provisions providing for these rights in the 1996 Constitution of RSA and the 1999 Constitution of Nigeria; and then proceed to analyze selected judicial decisions on how the courts have interpreted these rights.

1.3 Justification

There are several reasons why it has been considered necessary to look at the concept of judicial activism and examine, through a comparative analysis, how the employment of this concept by courts helps to attain justice and achieve social transformation.

First and foremost, due to its widespread effects on law and society, the concept of judicial activism has been a controversial and a hotly debated topic over the years (Lewis, 1999-2000, p. 121) by, among others, academics, politicians, the media, judges and attorneys. These and other commentators have written extensively, either questioning the legitimacy, necessity and impact of judicial activism, or justifying and advocating for courts to be more activist (or creative) in their interpretation of legislation.

On the one hand, those that question and criticize the concept argue that a judge should not concern himself or herself with the end and purpose of the law. They believe that a judge should take the law as he or she finds it and not as it ought to be, because it is not the business of courts to fill in gaps in statutes as legislation is the exclusive preserve of the legislature (Dakas, 1998, p. 66). On the other hand, those that support the concept assume that every piece of legislation has a purpose; and more specifically, that a Constitution is a charter whose essence must be rooted in the dynamics of society. They also believe that judges have a creative function and cannot therefore afford to just mechanically follow the rules laid down by the legislature, but that they must interpret the rules so as to reconcile them with the wider objectives of justice (Bhagwati, 1992, P. 1263).

While this debate continues, it must be pointed out that the discussion in this area has generally been restricted to simply examining whether courts that employ this concept transcend their judicial boundaries into the realm of the legislature or the executive. Little attempts have been made at analyzing the phenomenon of judicial activism by focusing on the traditional role of courts which is to interpret legislation with a view to giving effect to the intention of the legislature,

whilst at the same time ensuring that their interpretation of the legislation accords with principles of justice, as the attainment of justice is, without doubt, the fundamental goal of any process of judicial adjudication. Again, despite the fact that there's available a wide ranging body of literature examining the concept of judicial activism, it appears that no substantial work has been done at discussing this concept in a comparative manner by examining judicial attitude to statutory interpretation as employed by superior courts in two different jurisdictions. This thesis therefore intends to contribute to the ongoing debate by providing readers with an analytical examination of the concept of judicial activism through a comparative examination of judicial approaches to the construction of the Constitution.

Furthermore, it has been decided to examine how courts in RSA and Nigeria have interpreted socio-economic rights provided for in the Constitution of each of the two countries basically for two reasons. Firstly, there's generally an apparent nexus between denial of socio-economic rights to members of society and the conflicts or instability in Africa and elsewhere (Agbakwa, 2003, p. 38). Secondly, the judiciary has in recent times been at the epicenter of the debate concerning its role in policy or governance issues, especially in transitional societies. Both in RSA and Nigeria, being countries transiting from authoritarian regimes (i.e. apartheid governments in RSA, and military regimes in Nigeria), the judiciary has attempted to play an active and direct role in these areas, of course with diverse outcomes. However, there has been little focus on the nature of the judicial role in the process of social transformation through the interpretation of socio-economic rights, such as the rights to *health* and *housing* in these countries- "health" and "housing" being some of the most basic human needs, yet controversial as regards their realization amid vast socio-economic inequalities and limited governmental capacity. Thus, it has been decided to examine the

work of courts and their socio-economic rights jurisprudence in RSA and Nigeria, an area which has hardly been a staple of comparative legal scholarship generally. Furthermore, by examining the work of the courts in this area, this thesis also hopes to draw the attention of both policy makers and drafters of legislation to the difficulties that courts encounter in interpreting socio-economic rights and policies that, though sound, but may be difficult to implement in real life.

Finally, RSA and Nigeria have been chosen for the comparative analysis because- firstly, both countries generally share a history characterized by gross violations of human rights and injustices, perpetuated by apartheid regimes through the use of repressive legislation in RSA; and, by the use of draconian pieces of legislation and stringent decrees enacted and enforced during periods of authoritarian military regimes in Nigeria (Mubangizi, 2004, p. 36; Yusuf, 2008, pp. 207-10). Secondly, both countries are former British colonies and therefore share some aspects of a legal system that is based on the common law tradition; a tradition which in many ways is dominated by judge-made law and statute law. Finally, despite their dark political, legislative and constitutional history, each of the two countries has now a democratic Constitution which has been the subject of interpretation by courts in these countries. It is therefore hoped that these factors will provide an excellent and interesting opportunity to examine the Constitution of each of the two countries and then compare judicial attitudes to constitutional interpretation by superior courts in the two countries.

1.4 STRUCTURE

This thesis is divided into five Chapters in order to provide a logical sequence in the discussion and examination of concepts and issues referred to in the Methodology.

Chapter one basically introduces the concept upon which the thesis is based. It thus gives an insight of what the discussion in the thesis will be like, by providing the methodology of how the hypothesis will be proved; the reasons why it has been decided to look at the concept of judicial activism, the interpretation of socio-economic rights, and the bases for comparing RSA and Nigeria. Chapter two discusses the concepts of judicial activism, justice, the intention of Parliament and separation of powers, and examines how these concepts relate to the court's function of interpreting legislation. Chapters three and four are the parts of this thesis that critically analyze the issues that are central to the thesis; thus, Chapter three analyzes modes and principles of constitutional interpretation and examines how superior courts in RSA and Nigeria have employed these modes and principles in constitutional interpretation. Again, Chapter four analyzes how superior courts in the two countries have interpreted social-economic rights provided for in the Constitution of each of these countries. Chapter five is the last part of the thesis that basically looks back to the critical issues examined in the thesis, and then provides conclusions drawn from the discussion.

1.5 SOURCES

The discussion in this thesis has been supported by different sources of literature. The thesis has made substantial references to secondary sources that include authored as well as edited books in the areas of legislative drafting, human rights, law and politics, jurisprudence, among others. Additionally, the thesis has also relied on various pieces of legislation; international/regional human rights instruments; judicial decisions; essays; journal articles and other pieces of academic work (both published and unpublished) by various authors. These different sources have greatly

helped in clarifying the various concepts and issues that have been identified in the thesis, as well as in developing the arguments that have been advanced in the thesis and most importantly, in the analysis and proving of the hypothesis

Finally, the research and writing of this thesis has, to a large extent, been facilitated by technological advancements in that it has substantially been supported by information sourced from the internet, as well as from materials that are available from electronic law libraries.

2.0 Chapter two “A Look at the Concepts”

Apart from the concept of judicial activism, there are other concepts that are related to the hypothesis in this thesis. These concepts include the concept of justice, intention of parliament and separation of powers.

A general discussion of these concepts is very important especially because these concepts have a direct bearing on an equally important issue in this discussion- the judicial function of interpreting legislation. An understanding of these concepts will thus assist in putting the analysis of the hypothesis into a proper context.

2.1 The many faces of “Judicial Activism”

There is little consensus on the meaning of the term ‘judicial activism’. Generally, the term has been used to refer to various types of conduct engaged in by judges in response to challenges they feel they face. The starting point for these challenges however, at least in countries such as RSA

and Nigeria which somehow owe their political institutions to the United Kingdom, is that the judiciary is only one arm of government. The second arm is a democratically elected legislature, supposedly representative of the citizens; and the third is the executive which is responsible to the legislature. The judiciary is, strictly speaking, neither representative nor responsible (Dickson, 2008, p. 1) in the sense of the other two arms of government. It is therefore believed that judges are ill-suited to deal with the broadest issues of public policy on account of their unrepresentative character, and are thus said to be aliens in the domain of social reality (Dakas, 1998, p. 66).

Whether these beliefs or observations are well founded and therefore justifiable, remains a subject of intense debate. Suffice it to say that more academically, the activist label has been used as a descriptor for opinions in which judges, among other things, overturn the will of the people by striking down legislation; unconstitutionally infringe on the other arms of government; or reach an interpretation that exceeds a text's original meaning or its plain language (Roberts, 2006-2007, p. 574). However, these seemingly simple formulations of the term judicial activism may potentially cause more confusion than clarity. For example, if one was to define "judicial activism" as an action in which a court strikes down legislation, then most courts the world over quite often engage in judicial activism. But assume that Parliament passes a piece of legislation that is unconstitutional, striking down that piece of legislation would be considered an act of judicial activism in terms of this definition; yet that action would as well be an instance of the court properly and lawfully exercising its judicial role of safeguarding and interpreting the Constitution.

Despite the fact that 'judicial activism' is a term without consensus, the sense in which the term is going to be used in this thesis is that, while it is indeed a very useful rule in statutory construction

to adhere to the ordinary meanings of the words used, but where such construction is likely to occasion an injustice, it is the responsibility of the courts to construe the words in a manner that is intended at averting any imminent injustice, and ensure that justice is done.

2.1.1 Judicial Activism vs Judicial Restraint

Judicial activism is normally contrasted from judicial restraint (also known as judicial conservatism or legal minimalism), in that the latter is based on the declaratory theory of the judicial function which assigns a passive role to the courts, namely, to declare what the law is but not to make it, in strict accord with the doctrine of separation of powers and the principle of judicial passivity. Proponents of judicial restraint seek to ascertain the purport of the law through the sole medium of the words used because they assume that the legislature has said what it meant and meant what it said (Okere, 1987, p. 788). Under this approach therefore, the law is interpreted literally in that words of a statute are construed according to their ordinary, plain or natural meanings, however absurd the consequences of such interpretation and whatever the hardship or perceived injustice that may be occasioned thereby (Dakas, 1998, p. 65).

2.2 Justice

It is often said that the primary duty of any court of law is to do “justice”. Put differently, it is believed, and rightly so, that in any society that upholds the rule of law, the fundamental goal of any process of judicial adjudication is to attain ‘justice’. But then, this brings us to the important question- what is “justice”?

Generally, it has been observed that concepts filled with human rights, equality, and political and religious implications are often difficult to define (Sanchez & Wray, 1994, p. 25). The concept of justice is not an exception as it is the subject of competing interpretations and demands (Tay, 1981, p. 5). Indeed, most dictionaries do not provide a single definition of the word justice, for the word does not lend itself to confinement. *Black's Law Dictionary*, for instance, defines the word in several ways, including 'the proper administration of laws', and jurisprudentially, 'the constant and perpetual disposition of legal matters or disputes to render every man his dues' (Black, 1990, p. 864). This definition resembles the classic definition of the word justice in the Latin phrase *suum cuique*, which literally means 'to each man his due' (Dicken, 1974-1975, p. 316).

Despite the fact that the concept of justice appears to be vague and a subject of competing interpretations, it suffices to say that for purposes of this thesis, the discussion of the concept will be in relation to the fundamental duty of any judge in any society that upholds the rule of law, which is to do 'justice according to law' in every given case.

But even then, the paradox of expecting a judge to apply the law and at the same time do justice is that law and justice do not always coincide (Olivier, 1998, p. 173). In actual fact, law can at times be used to achieve an injustice. Again, laws may be perceived to be just for a particular individual or group and not others- apartheid South Africa is a case in point here where a vast majority of laws were considered the right thing by the apartheid government and its minority white supporters. For them, the justice brought about by the enforcement of those pieces of legislation was not doubted (Warmelo, 1988, p. 167). On the contrary, most black South Africans and a minority of white South Africans found the same laws unjust and anathema. The situation in South Africa was not unique to that country only, as this is usually the case in jurisdictions where parliamentary laws or dictatorial decrees reign supreme, and Nigeria is a classical example here

where, almost all military governments pursued policies and created laws by statute or decree that often resulted in enormous divergence between law and justice.

From the above discussion therefore, it can be seen that no matter how the concept of justice is defined or perceived, justice is a concept that is relative to changing society- a sense of justice is a developing thing. It takes on new dimensions of meaning as man moves forward and upward on his course of evolution (*McRuer*, 1969, p. 6). But one thing that is certain is that when courts talk about 'justice according to law', they refer to justice with its concomitant emphasis on fairness and impartiality in the adjudicatory process; and judiciousness and reasonableness in the exercise of judicial and administrative discretions, respectively (*Okpaluba*, 1992, pp. 125-26).

2.3 The intention of Parliament

While the purpose of construing legislation is said to be the search for the intention of the legislature, it is very important to remember that this is to some extent an artificial concept, and is certainly to be kept distinct from the search for the motive or aims of individual players, however important, in the legislative process (*Greenberg*, 2008, p. 607). As observed by Lord Nicholls of Birkenhead in *Regina v Secretary of State for the Environment, Transport and the Regions and Another, Ex p. Spath Holme Ltd* (2001, p. 395)-

The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the "intention of Parliament" is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members...of either House. These individuals will often have widely varying intentions. Their understanding of the legislation and the words used may be

impressively complete or woefully inadequate. Thus, when courts say that such-and-such a meaning "cannot be what Parliament intended", they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning.

From a reading of the above quotation, it is clear that even though courts often say that they look for the intention of Parliament, this is not quite accurate. What courts actually do is to seek the meaning of the words which Parliament used (*Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg*, 1975, p. 613).

Thus, even though the phrase 'intention of legislature' may signify anything from intention embodied in positive enactment to speculative opinion as to what the legislature probably would have meant, although there has been an omission to enact it- it must be emphasized that in a court of law, what the legislature intended to be done or not to be done can indeed only be legitimately ascertained from that which the legislature chose to enact, either in express words or by reasonable and necessary implication (*Salomon v A. Salomon & Co. Ltd*, 1897, p. 38).

2.4 Separation of Powers

Basically, the doctrine of separation of powers forbids any of the three arms of government- the Legislature, the Executive or the Judiciary- from usurping the powers of the other. Put simply, the whole idea of separation of powers means that none of the three arms of government should exercise the whole or part of another's powers.

This doctrine has been there for so many years. However, to ensure by constitutional means that none of the three arms exercises the powers of the others, modern Constitutions specifically

provide for the separate powers and functions of each of the three arms, and clearly forbid any one of them from exercising the powers of the other, except to the extent provided by the Constitution itself. For instance, the Constitution of RSA separately vests the legislative authority of the Republic in Parliament and Provincial Legislatures (*Constitution of RSA, 1996, s 43*); the executive authority in the President, which is exercised together with other members of Cabinet (*Constitution of RSA, 1996, s 85*); and finally, it vests the judicial authority in the Courts (*Constitution of RSA, 1996, s 165*). Similarly, the Constitution of the Federal Republic of Nigeria separately vests the legislative powers of the Federation in the National Assembly or House of Assembly (*Constitution of Nigeria, 1999, s 4*); the executive powers in the President, which may be delegated to the Vice-President, Government Ministers or public officers (*Constitution of Nigeria, 1999, s 5*); and finally, it vests judicial powers in the courts (*Constitution of Nigeria, 1999, s 6*).

It must be pointed out however, that even though the national Constitutions specifically and exclusively provide for the separate powers and functions of each of these arms, the same Constitutions do authorize the Legislature to delegate some of its powers to the Executive to make subsidiary legislation. However, this delegation does not amount to abdication of its functions; the Legislature still maintains the supreme legislative authority.

Theoretically, neither of the three arms is superior to the other, nor is it supposed to override the authority of the other. However, it must be mentioned that in jurisdictions such as RSA and Nigeria, where there is constitutional supremacy, the judicial powers of the courts extend to the review or scrutiny (through interpretation) of the exercise of the powers and functions of the Legislature and the Executive.

Although the Judiciary possesses these enormous interpretative powers, it must be emphasized that in carrying out its interpretative role, the Judiciary must desist from stepping out of its judicial boundaries and venture into the legislative realm of the Legislature or the Executive, as it is not within the powers of the Judiciary to legislate. Admittedly, the Judiciary at times faces the difficult task of interpretation between pure politics and law, especially when carrying out its constitutional interpretive role. Be that as it may, the Judiciary must still strive to maintain a normative balance between the two; failing which, the exercise of its interpretative mandate will no doubt be construed as a naked usurpation of the legislative powers of the other two arms of government under the thin guise of interpretation, and thus a breach of the doctrine of separation of powers.

3.0 Chapter three “Modes and Principles of Constitutional Interpretation”

3.1. Modes of Constitutional Interpretation

Table 1 below shows modes of constitutional interpretation as employed by courts in RSA, before and after 1993, as well as those employed by courts in Nigeria, before and after 1999.

Table 1

Country	Mode of Interpretation	
	Before 1993	After 1993
RSA	Literal, text based Approach	Contextual and purposive based Approach (es)
Nigeria	Before 1999	After 1999
	Constitution to be read as a whole; Natural and ordinary meaning rule; Broad, liberal Approach.	Broad, liberal Approach

As pointed out in the Introduction, at the centre of the debate on judicial activism lies the question of the courts' approach to constitutional (statutory) interpretation.

Before the 1993 'interim' Constitution of South Africa, courts in that country preferred the literal, textual approach to statutory interpretation- a positivist approach to statutory interpretation that required judges to determine the will of Parliament in the interpretation of statutes without analysis of the motivation for the rules, and also to reject policy considerations in the adoption of positive legal rules. These aspects of positivism allowed judges to apply and legitimate the harshest of statutes with no personal or institutional blame for the inevitably unjust outcomes (Haynie, 2003, p. 16).

However, the literal, textual approach to statutory interpretation changed dramatically since the inception of democracy in 1993, when it had been replaced by a contextual, purposive approach (Molamu, 2004, p. 42).

Even though it has been observed by some authors that the argument between the literal and purposive approaches is often more academic and semantic than of substantial practical relevance (Greenberg, 2005, pp 31-46); this thesis contends that the argument between these approaches is of significant importance simply because the two approaches are fundamentally different in as far as the interpretation of the Constitution is concerned. More particularly, contrary to the literal approach, the essence of a purposive approach to statutory interpretation involves identifying the core values underlying the inclusion of a particular right in the Constitution (i.e. the Bill of Rights) and adopting an interpretation of the right that best supports and protects those values. This purposive approach to statutory interpretation was clearly demonstrated by the Constitutional

Court in three of the first cases to come before the Court under the 'interim' Constitution. The first was the case of *S v Zuma and others* (1995, para. 15), where the Constitutional Court quoted part of the Canadian Supreme Court case of *R v Big M Drug Mart Ltd* (1985, pp 395-6) as follows-

"The meaning of a right...guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood...in the light of the interests it was meant to protect...This analysis is to be undertaken, and the purpose of the right...in question is to be sought by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right..., to the historical origins of the concept enshrined, and where applicable, to the meaning and purpose of the other specific rights...with which it is associated within the text of the Charter. The interpretation should be...a generous rather than legalistic one, aimed at fulfilling the purpose of a guarantee and the securing for individuals the full benefit of the Charter's protection."

Even though the above quotation was made by the Canadian Supreme Court with reference to the Canadian Charter of Rights, the South African Constitutional Court in the *Zuma case* endorsed the need (as expressed by the Canadian Supreme Court in the quotation) to give content to rights in the Bill of Rights by reference both to the underlying interests a given guarantee seeks to protect and to the larger purposes of the Bill of Rights and the Constitution as a whole. In other words, what the Constitutional Court did in the *Zuma case* is to concur with the view of the Canadian Supreme Court that interpretation needs to be generous and not legalistic, and that it should not just be aimed at being consistent with the purpose of the right in question, but should be aimed at fulfilling that purpose; and directed at securing the full benefit of the Bill of Rights' protection (Scott & Alston, 2000, p. 217-18).

The *Zuma case* was followed by another landmark case of *S v Makwanyane and Another* (1995, para. 13) where the Constitutional Court, in reiterating the principle put forward in the *Zuma case*

and in emphasizing the need (when interpreting a statute) to have regard to the purpose and background of the statute in question, said-

Certainly no less important than the often repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that "the context", as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background.

Again, the Constitutional Court observed in the case of *Soobramoney v Minister of Health (KwaZulu-Natal)* (1998, para. 16) that a purposive approach to the interpretation of the Constitution requires that the interpretation of the individual rights which are in issue must not be construed in isolation,

but in [their] context, which includes the history and background to the adoption of the Constitution, other provisions of the Constitution itself and, in particular, the provisions of [the bill of rights] of which [they are] part.

A closer reading of the foregoing three quotations clearly shows that the purposive approach is closely linked to a contextual understanding of the statutory interpretative process, the essence of which is that a given provision must be understood in light of the text as a whole (i.e. the Bill of Rights, and where appropriate, the entire Constitution). For this to happen, there has to be consideration of the impact of other provisions on the meaning that should be accorded to a given provision. This opens up the potential for a holistic approach of some sort, especially when the interpretative issue is whether certain interests are protected implicitly by the Constitution. By reading provisions together, greater coherence is achievable with respect to determining what is protected and what is not. Whereas an each-provision-in-isolation approach can easily result in rights (and thus people) falling through the constitutional cracks in an unprincipled way, a holistic approach to contextual interpretation is more likely to take seriously the interpretative

presumptions associated with the purposive approach (*R v Big M Drug Mart Ltd*, 1985, p 396). It is therefore clear that the purposive approach to statutory interpretation is closely linked to the contextual approach in that it helps in the identification of the overarching principles and the underlying values of a Constitution.

It must be pointed out however that recourse to the principles and values in the interpretative role of the courts in South Africa is now governed by the 1996 Constitution. Of critical importance to the interpretative role of the courts is the way the relevant provisions in section 39 of the Constitution were drafted.

To begin with, section 39 (1) (a) of the Constitution expressly states the values that must inform the interpretation of the Bill of Rights, by providing that-

When interpreting the Bill of Rights, a court, tribunal or forum-
(a) must *promote* the values that underlie an open and democratic society based on human dignity, equality and freedom. (emphasis added)

As indicated above, the care with which drafters of this provision showed in the choice of words is quite remarkable. The use of the word 'promote' connotes an assertive role for the courts and not one of passively ensuring only that its interpretations are, for instance, simply 'consistent' with democratic values. Courts are thereby recognized as having a value-forging role in interpreting generally worded and open textured provisions, a role which is a far cry from theories of adjudication which advocate seeing courts as much as possible as mere neutral appliers of pre-given legal rules (*Scott & Alston*, 2000, pp. 219-20), or mere interpreters of statutes without creative functions, a characteristic of the concept of judicial restraint.

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Again, the way section 39 (2) was drafted equally deserves some attention. This section provides that-

(2) When interpreting *any legislation*, and when developing the common law or customary law, every court, tribunal or forum *must promote* the spirit, purport and objects of the Bill of Rights. (emphases added)

Just as section 39 (1) (a), section 39 (2) equally connotes an assertive role for the courts, and clearly makes it mandatory for all courts, among other adjudicators, to promote the spirit, purport and objects of the Bill of Rights in their interpretation of legislation. In other words, what this section does really is to put an obligation on all courts in RSA to promote the values and principles underlying the Constitution.

The constitutional foundation of this new methodology was explained by Justice Langa DP in *Investigating Directorate: Serious Economic Offences v. Hyundai Motor Distributors (Pty) Ltd: Re Hyundai Motor Distributors (Pty) Ltd v. Smit* (2001, para. 21) as follows-

Section 39(2) of the Constitution means that all statutes must be interpreted through the prism of the Bill of Rights...The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognize the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterizes the constitutional enterprise as a whole.

From the foregoing discussion, it is obvious that the constitutional requirement for courts to interpret and apply legislation in a substantive (value-based and value-coherent) manner therefore means that the formalistic and mechanical interpretation that was strictly based on textual analysis of legislation in RSA is, not only outdated, but goes against the spirit of the 1996 Constitution as well (Bekink, 2007, p. 14).

On the other hand, in Nigeria, as shown in Table 1, three basic rules of interpretation have often been referred to by Nigerian courts in their interpretation of the Nigerian Constitution.

First and foremost, prior to the coming into force of the 1999 Nigerian Constitution, the principle that a constitutional document must be read as a whole had been emphasized by both the Nigerian Court of Appeal and the Federal Supreme Court. In the case of *Okogie and others v Attorney General of Lagos State* (1981, p. 348), the President of the Court of Appeal expressed the view that-

the intention of framers of the Nigerian Constitution can best be understood if the single document is considered as a whole in that every part of it must be considered as far as relevant in order to get the true meaning and intent of any particular portion of the enactment.

Similarly, the Supreme Court, in *Igbe v Governor of Bendel State* (1981, p. 195), stated that-

in interpreting the Constitution, its relevant parts should be read as a whole and not independently so as to be able to achieve a just understanding of what was intended by those provisions and to reconcile the respective interests involved and powers conferred.

Secondly, the natural and ordinary meaning rule, which says that words in a statute must be given their natural and ordinary meaning as they best express the intention of the lawmaker, had also found favour with Nigerian courts before 1999, especially the Supreme Court, where judges relied on it, not only in their interpretation of statutes, but the Constitution as well (*Ojokolobo & Others v Alamu & Another*, 1987, p. 98).

Now, in relation to the third approach of constitutional interpretation, it however appears that prior to the coming into force of the 1999 Constitution, the Federal Supreme Court had already seen the responsibility of interpreting the Constitution as something going beyond the 'letter of the law' so as to give effect to the intention of the legislature. This is reflected in one of the early cases to

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come before the Court, just a year after the coming into force of the 1979 Constitution, where the Court cautioned that mere technical rules of interpretation are inadmissible to defeat the principles enshrined in the Constitution and that in the course of the exercise of its interpretative jurisdiction, a court must, whenever feasible and in response to the demands of justice, lean to the broader and liberal approach in the interpretation of the Constitution; unless there is something in the context or in the rest of the Constitution which indicates that a narrower interpretation will best carry out its object and purpose (*Nafiu Rabiu v Kano State Government*, 1980, p. 130).

The Court's approach as shown in the preceding paragraph has continued and seemingly got more impetus with the coming into force of the 1999 Constitution because since then, judicial approach to the interpretation of the Constitution has largely been broad and liberal, and thus activist, as demonstrated by the Court of Appeal in *Orhiunu v Federal Republic of Nigeria* (2005, p. 55), where the Court stated that-

In interpreting the provisions of the Constitution, a broad and liberal approach should prevail. Undue regard must not be paid to mere technical rules; otherwise the objects of the provisions as well as the intention of the framers of the Constitution would be frustrated.

To the extent that the broad, liberal approach to constitutional interpretation as adopted by Nigeria's superior courts is aimed at identifying the underlying objects of a Constitution as well as the intention of the framers of the Constitution, it may be argued that this approach is in line with the purposive approach to statutory interpretation as adopted by the Constitutional Court of RSA, because, as discussed above, the essence of the purposive approach also involves identifying the core values underlying the inclusion of a particular right in the Constitution (i.e. the Bill of Rights) and adopting an interpretation of the right that best supports and protects those values. It should be

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remembered that in the purposive approach, the identification of the values involves consideration and reference to the larger objects of the Bill of Rights itself, and requires an interpretation that is generous rather than a legalistic or technical one- an approach that is strikingly similar to the broad, liberal approach adopted by Nigeria's superior courts.

Again, it is submitted that the approach that a Constitution must be read as a whole, also advanced by Nigeria's superior courts, is akin to the contextual approach to statutory interpretation as adopted by the Constitutional Court in RSA because, as we have already seen, the essence of the contextual approach is that a given provision must be understood in light of the text as a whole, whether it is the Bill of Rights, or where appropriate, the entire Constitution- an approach which is also employed by the superior courts in Nigeria in their quest to get to the true meaning of a constitutional provision.

Even though Nigeria's broad, liberal approach to constitutional interpretation may be likened to South Africa's purposive approach to statutory interpretation; the same way Nigeria's rule of statutory interpretation that a Constitution must be read as a whole may be likened to South Africa's contextual approach to statutory interpretation; it must be noted however, that the Constitution of Nigeria does not contain provisions governing the interpretation of the Bill of Rights and legislation as the ones provided for in section 39 of the Constitution of RSA. Surprisingly, the Constitution of Nigeria simply provides in section 318 (4) that the "the Interpretation Act shall apply for the purpose of interpreting the provisions of this Constitution."

This seemingly minor difference has, as it will be seen in **Chapter four**, resulted in quite remarkable and substantial differences in the approaches to the interpretation of the Constitution by courts in these countries because, as already mentioned, the way section 39 of the South African Constitution was formulated clearly provides South African courts with a better framework for a flexible, and thus potentially creative and activist judicial mandate in the interpretation of the Constitution (i.e. Bill of Rights) and other pieces of legislation generally.

Be that as it may, it is submitted that in as far as the concept of judicial activism assumes that every piece of legislation has a purpose, Nigerian courts may still take advantage of the already established rules of constitutional interpretation discussed above, and be activist in their interpretation of the Constitution in order to attain justice since the established rules (apart from the natural and ordinary meaning rule) are equally consistent with an activist nature of Constitutional interpretation. Undoubtedly, courts that are activist in carrying out their interpretative roles do not simply construe legislation by mechanically and inflexibly applying the rules of interpretation, but rather they adopt a broad, liberal approach by taking into account the purpose (or objects) behind the inclusion of a particular provision in the Constitution, as well as the context or surrounding circumstances in which that provision was included in the Constitution.

3.2 No place for technicalities in Constitutional Interpretation

3.2.1 Substantial Justice vs Technicalities

It cannot be disputed that the primary duty of any court of law is to do justice. Thus, when faced with a choice between doing substantial justice and technicalities of law, courts must (if they are seriously to live up to their name as ‘courts of justice’) prefer the former to the latter. Generally,

this approach has traditionally been used in the interpretation of ordinary statutes, most notably criminal or penal codes. It therefore follows, and indeed makes more sense that when it comes to the Constitution, which is the supreme law that also provides a framework for the governance of a country and people's rights, strict adherence to technicalities at the expense of doing justice should have no place in its interpretation.

In South Africa, the significance of this approach was made evident in the case of *S v Mhlungu and others* (1995, para. 4) when petitioners, whose cases had commenced before the adoption of the 1996 Constitution, attempted to claim their rights under the 1996 Constitution. A simple response to their claim, advocated by a minority of Justices of the Constitutional Court, was to adopt a plain meaning approach (which was purely technical) and to deny their claims on the grounds that section 241 (8) of the 'interim' Constitution stated in clear language that 'pending cases shall be dealt with as if the Constitution had not been passed'. The majority of the Court however rejected this approach, arguing that constitutional interpretation must avoid 'the austerity of tabulated legalism', specifically stating that-

A Constitution is an organic instrument. Although it is enacted in the form of a statute it is *sui generis*. It must broadly, liberally and purposively be interpreted so as to avoid "the austerity of tabulated legalism" and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its Government. (*Mhlungu*, 1995, para 8).

The Court went further to observe that-

An interpretation [of section 241(8)] which withholds the rights guaranteed by Chapter 3 of the Constitution [the Bill of Rights] from those involved in proceedings which fortuitously commenced before the operation of the Constitution, would not give to that Chapter [the Bill of Rights] a construction which is 'most beneficial to the widest possible amplitude' and

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should therefore be avoided if the language and context of the relevant sections reasonably permits such a course (*Mhlungu*, 1995, para 8).

The approach taken by the Court in this case clearly demonstrates a classic example of an activist court, practically demonstrating through its generous (broad, liberal) and purposive interpretation of the Constitution, that it was aware of South Africa's legislative history whereby most of its statutory laws, prior to the enactment of the 1996 Constitution, were replete with the most disgraceful and offensive legislation which discriminated against mostly black South Africans, and arbitrarily criminalized on racial grounds perfectly harmless or legitimate activities by those South Africans.

Thus, strict adherence to the technicality in section 241 (8) would no doubt have removed the protection of fundamental rights to substantial groups of people in RSA, simply because the proceedings in which the protection of such rights were sought, had begun prior to the commencement of the 'interim' Constitution. In its adjudication of this case, the Constitutional Court was therefore clearly conscious of the possibility of this happening, in that, a citizen charged with an offence before the commencement of the Constitution could, on the literal interpretation of section 241 (8), be convicted and sentenced, even after the commencement of the 'interim' Constitution, for having contravened a law which sought to punish him or her on racial grounds, if his or her case was pending when the Constitution came into operation. It was therefore not surprising that the Court referred to this scenario as a 'plainly outrageous consequence' and thus sought to interpret the Constitution in a way that would avoid the technicality in section 241 (8) so as to do justice in the case. Equally important in the Court's interpretative approach was a reflection of its awareness of social reality in RSA, and its desire to decisively break with a past

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which perpetuated inequality, irrational discrimination and arbitrary governmental and executive action.

Another issue worth looking at in this case is a suggestion that was put forward by Kentridge AJ (one of the judges in the minority), that the legislature and the executive could avoid the 'outrageous consequence' described in the preceding paragraph by taking steps to repeal the law in question or cause the prosecution to be withdrawn. This suggestion was rejected by the Court (the majority) which rightly observed that such an approach would offer a scant comfort to the concerned accused persons, who could have no means to compel such a decision (i.e. repeal of the law or the withdraw of the prosecution), or who could be exposed to the risk of a conviction before the bureaucratic machinery of the State reacted to afford the relief sought.

Besides, it must be remembered that the Constitution of RSA was enacted to afford every person equal protection against unfair racial discrimination, therefore, the accused persons in the *Mhlungu case* were entitled to claim that right and the Court needed to protect them. As Lord Denning once opined-

...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...so as to do justice in the instant case before him. (quoted by Ijalaye, 2000, p. 26).

Courts must therefore ensure that the law is an equal dispenser of justice and must not leave anybody without remedy for his or her right. This is exactly what the Constitutional Court did in the *Mhlungu case*. It did not permit the technicality of section 241 (8) of the Constitution to leave the petitioners with no remedy and thereby denying them justice. Equally, the Court did not fold its

arms and wait for the intervention of the legislature or the executive (as suggested by Kentridge AJ), an intervention which could not be guaranteed in any case. Here, the Court was faced with litigating parties before it that sought its adjudication and the Court was obliged to administer justice and decide on the relief or remedy sought by the claimants. Besides, it must also be borne in mind that the provisions of a Constitution, especially those relating to rights of accused persons, should not be strictly and technically interpreted so as to give the impression that the Constitution is a fortified sanctuary for illegalities that cannot be cured.

The approach taken by the Constitutional Court in RSA as far as technicalities are concerned in the interpretation of the Constitution, is substantially similar to the approach taken by courts in Nigeria. In Nigeria, the rule that there is no place for technicalities in the interpretation of the Constitution was laid down by the Supreme Court in *Attorney General of Bendel State v Attorney General of the Federation and others* (1982, p. 102) where it was held that in the interpretation of the Constitution, the Supreme Court would not allow technicalities to prevent it from doing substantial justice. Making observations on technical rules of interpretation, the Court said as follows-

The jurisdiction conferred upon the Supreme Court in regard to the interpretation and adjudication on the Constitution is a special jurisdiction. The court cannot justify its usefulness in regard to this peculiar jurisdiction by being inhibited with technicalities. Such inhibition will only serve to destroy the entire constitutional purpose of the court. [This] is not [to say] that rules of court are to be completely wiped off...rules are not made for fun but made to be followed; however, in the exercise of this peculiar jurisdiction, that is, matters pertaining generally or specially to the interpretation of the Constitution, this Court cannot afford to enter into or dwell in the realm of technicalities. It is important that the Supreme Court, more than any other Court in the land, should be seen to be substantially just than merely appearing to be so.

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The position taken by the Supreme Court in this case was clearly aimed at ensuring that technicalities in the law should not be used at the expense of doing justice. According to the Court, if a plaintiff is entitled to be heard by a court, it is immaterial how he or she comes to be heard. This, the Court reasoned, is particularly important in a complex suit like the one before it which touched on matters that lied at the very foundations of the stability of the country, and that therefore the Court could not be unduly bogged down by technicalities. Thus, while affirming the importance of observing rules of court, the Court clearly stated that it is more concerned with doing substantial justice between the parties (*Attorney General of Bendel State*, 1982, pp. 112-13).

Similar sentiments were made in *Transbridge Co. Ltd v Survey International Ltd* (1986, p. 576), again by the Supreme Court as follows-

It would be tragic to reduce judges to a sterile role and make an automation of them. It is the function of judges to keep the law alive, in motion and to make it progressive for the purpose of arriving at the ends of justice, without being inhibited by technicalities, to find every conceivable and acceptable way of avoiding narrowness that would spell injustice. Short of a judge being a legislator, a judge...must possess aggressive stance in interpreting the law.

The stand taken by the Supreme Court of Nigeria as seen in the foregoing cases (a stand that has been maintained even under the current Nigerian Constitution- (*Attorney General of Lagos State v The Attorney General of the Federation*, 2004, p. 53)), is proof of how courts can be judicially activist in their interpretation of the Constitution with the sole purpose of ensuring that justice is done in any case that comes before them. Objections raised on technicalities, particularly where such objections relate to procedural irregularities which are curable, should not prevent a court from getting to the heart of a matter before it and ultimately dispense justice between or among litigating parties. If strict compliance with any legal rule, be it a technical rule or otherwise, will

outrightly lead to an injustice, it is incumbent upon any court of law to adopt an interpretation that would ensure that the interest of justice prevails over that rule (i.e. that justice is given paramountcy over the rule).

Recalling that the essence of the purposive approach to statutory interpretation involves identifying the core values underlying the inclusion of a particular right in the Constitution and adopting an interpretation of the right that best supports and protects those values; it can thus be argued that an attempt to interpret the provisions of a Constitution by resort to technicalities surely goes against the essence of a purposive approach to statutory interpretation. Similarly, considering that the essence of the broad, liberal approach to statutory interpretation is to identify the underlying objects of a Constitution as well as the intention of the framers of the Constitution, resort to technical rules in the interpretation of a Constitution equally goes against the broad, liberal approach to statutory interpretation since resort to the technical rules has the potential to frustrate the objects of a Constitution as well as the intention of its framers. Courts have an honourable duty to see to it that this does not happen.

It is therefore submitted that the administration of justice must essentially be concerned with ensuring that justice is at all times done and not unnecessarily inhibited by any paraphernalia of technicalities. Courts may only be able to achieve this (i.e. administer justice) if, in their interpretation of the Constitution, they are activist by employing the broad, liberal, as well as the purposive approaches.

4.0 Chapter four “Interpretation of socio-economic rights”

Table 2 below shows constitutional provisions for selected socio-economic rights and their justiciability as provided for in the 1996 Constitution of RSA and the 1999 Constitution of Nigeria

Table 2

Country	Socio-economic Right	Placement of Right under the Constitution	Justiciability of Right
RSA	Right to Health Care	Provided under the Bill of Rights in section 27	Justiciable as provided for in section 38
	Right to Housing	Provided under the Bill of Rights in section 26	Justiciable as provided for in section 38
Nigeria	Right to Health	Provided under the Fundamental Objectives and directive principles of State Policy in section 17 (1) and (2) (c) (d)	Non-justiciable as provided for in section 6 (6) (c)
	Right to Housing (shelter)	Provided under the Fundamental Objectives and directive Principles of State Policy in section 16 (2) (d)	Non-justiciable as provided for in section 6 (6) (c)

As mentioned earlier on in the Introduction, the task of statutory interpretation gets more complicated when courts are asked to interpret constitutional provisions. As the Chief Justice of Hong Kong once observed, “a Constitution, or, for that matter, a bill of rights, states general principles and expresses purposes without condescending to particularity and definition of terms. Gaps and ambiguities are bound to arise...” (*Ng Ka Ling v. Director of Immigration*, 1999, p. 339-340).

Clearly therefore, as a judge embarks on the role of interpreting a constitutional text, the task before him or her is obviously a delicate one as the judge faces the challenge of working out where the correct balance lies between the competing concepts of judicial activism and judicial restraint discussed above.

Several factors impact upon this judicial balancing exercise, but a crucial factor here relates to the role and function of courts within the broader legal and constitutional order. The more it is felt that courts are guardians of fundamental rights that serve a central role in ensuring accountable government; that the law is not drafted in a vacuum but intended to serve a purpose; that the law must be used as an agent to facilitate social transformation or social change, among others things- the more likely courts are to take an interventionist and activist approach- broadly reading the rights themselves while narrowly construing any provisions which appear to inhibit their application. In contrast, courts that do not perceive themselves as part of a constitutional machinery which secures individuals' rights against legislative encroachment and executive abuse are more likely to take a very passive (conservative) approach to the interpretation of human rights provisions enshrined in a Constitution.

One area that poses great challenges to courts in their constitutional interpretive role relates to the interpretation of social and economic rights (socio-economic rights).

A perusal of African Constitutions shows that there are two parallel regimes of socio-economic rights existing in Africa. The first, as shown in **Table 2**, is the one represented by RSA which specifically makes socio-economic rights enforceable in the courts (*Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996, p. 744). The other regime aligns itself with most of the Western world in the claim that socio-economic rights are 'no more than pious wishes' (Ibe, 2007, p. 226). As a result, several countries in Africa have adopted an approach followed in India of placing socio-economic rights under the fundamental objectives and directive principles of state policy in their Constitutions. The

Federal Republic of Nigeria belongs to this second regime.

First and foremost, the entrenchment of justiciable social-economic rights in the Constitution of RSA embodied a commitment to addressing poverty and deprivation in a post-apartheid society. Most importantly, the Preamble of the Constitution of RSA reflects this commitment, by firstly recognizing the injustices of the past and then declaring as aims of the Constitution the establishment of a society based on social justice and human rights, and the improvement of the quality of life of all citizens (Grant, 2007, p. 7).

Despite a growing recognition that all human rights are inextricably linked and interconnected; and again, while the inclusion of justiciable socio-economic rights in the Constitution of RSA has been heralded as a mark of its extraordinary status, it has equally raised questions about how these provisions would be interpreted in a situation of vast socio-economic inequalities and limited governmental capacity (Klug, 2006, p. 307).

In spite of the lingering doubts about the role of courts in interpreting and judicially enforcing these rights, the Constitutional Court in RSA has nevertheless been at the forefront of enforcing the rights by creatively using the protections afforded by the Constitution to meet the levels of social expectation which exist in this area. The rights to *housing* and *health care* best exemplify this judicial attitude. Of particular interest is the way the provisions containing these rights are formulated in the Constitution of RSA; a formulation which clearly anticipates a relatively extensive but nuanced judicial role for their appropriate realization (Corder, 1994, p. 341), and generally, judges have lived up to this task.

The first case in which the Constitutional Court faced the task of interpreting a socio-economic right, specifically the right to *health care*- against social policy and reality, was the case of *Soobramoney v Minister of Health (KwaZulu-Natal)* (1998, p. 765). In this case, the appellant, a 41 year old diabetic man, who also suffered from chronic kidneys failure, sought to enforce the right to *health care* in rather dire circumstances, but to no avail.

Now, the right to *health care* is provided for in section 27 of the Constitution as follows-

- (1) Everyone has the right to *have access to*-
 - (a) *health care services*, including reproductive health care;
.....
- (2) The state must take *reasonable legislative and other measures, within its available resources*, to achieve the *progressive realization* of each of these rights.
- (3) No one may be refused emergency medical treatment.”
(emphases added)

In interpreting the above provision, the Constitutional Court in the *Soobramoney case* observed that “we live in a society in which there are great disparities in wealth” and that “millions of people are living in deplorable conditions and in great poverty, with a high level of unemployment, inadequate social security, and many do not have access to adequate health services.” The Court went further to point out that these conditions already existed when the Constitution was adopted and that “a commitment to address them and transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order” (*Soobramoney*, 1998, para. 8).

Despite the Court making these pertinent and practical observations, it however went ahead to deny the appellant’s claim, drawing a distinction between the right *not to be refused emergency medical treatment* in terms of s 27 (3) and the progressive realization of the right to have access

to *health care services* guaranteed in s 27 (1). In rejecting the appellant's claim of a right to *receive medical treatment*, the Court in effect exercised judicial restraint by recognizing and then declaring that certain medical decisions (in this case, the decision to limit access to a dialysis machine to those patients whose medical condition made them eligible to receive kidney transplants) are best made by medical personnel and should not be second-guessed by the Courts (*Soobramoney*, 1998, paras. 32-34).

However, four years later, the right to *health care* came again before the Court, this time amid a huge political upheaval and controversy, following the South African government's plans to combat and treat the HIV/AIDS virus, which has infected an alarmingly high proportion of South Africans, mostly poor. In the case, *Minister of Health and others v Treatment Action Campaign (TAC) and others* (2002, p. 721), the respondents had applied to the Constitutional Court (relying on the right to *have access to health care services* and the right of *every child to basic health care services*) asking the Court to require the government to provide the anti-retroviral drug Nevirapine to HIV-positive mothers and their new-born children- and not merely to have a policy to address the overwhelming HIV/AIDS pandemic within the confines of the State's resources.

In essence, the respondents in this case were contesting the rationality and adequacy of the government's policy of selecting test sites for the provision of Nevirapine to HIV-positive mothers and their new-born children. The Minister of Health challenged the application, questioning the constitutional obligation of the government to provide an 'effective, comprehensive and progressive programme' such as that argued for by TAC and others. It has to be mentioned here

that the issue before the Court contained all the hallmarks of polycentricity, which judges are reputed not to be in a position to answer and so ought to avoid. However, having conceded that-

courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences and that the ...Constitution contemplates rather a restrained and focused role for the Courts, namely, to require the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation;

the Court proceeded to hold that socio-economic rights were clearly justiciable and that the government policy in this case was unreasonably inflexible. In this case, the Court was not swayed by the State's argument that it (the Court) should confine itself to declaration of rights, but instead, the Court decided that it was under a duty to grant effective relief in all cases, which, as in this case, included an order of mandamus (i.e. requiring the government to provide HIV-positive mothers and their new-born children access to Nevirapine in public health facilities) and the exercise of supervisory jurisdiction (*TAC*, 2002, para. 124-30). Relying on the constitutional guarantee of a right to *the progressive realization of access to health care services*, the Court argued that under the circumstances of the case, in which the cost of Nevirapine and the provision of appropriate testing and counseling to mothers was less burdensome to the State, the government had a constitutional duty to expand its program beyond the test sites already planned (*TAC*, 2002, paras. 67-73).

There are two important issues that need to be highlighted in the *TAC case*. Firstly, the Court's decision marked an extraordinary reversal in its approach to health rights as seen in the *Soobramoney case*, a case in which the Court seemed to be occupied with medical prerogatives and issues of resource scarcity. Secondly, the Court's decision marked an important extension of the principles it had laid down in the *Grootboom case* (discussed below), a case in which the Court

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placed a review of the reasonableness of government policy and implementation at the center of its socio-economic jurisprudence.

It is therefore interesting to note that even though the Constitutional Court in the *TAC case* tried to balance up respect for the authority of the executive and legislative branches of government in conformity with the doctrine of separation of powers and the concept of judicial restraint on the one hand, and the urgent needs of the general public on the other, we clearly witness the Court's activist approach by prompting the executive and the legislature to come to terms with reality, in a situation where the two political arms of government appear to be inadequately alert to the social consensus around a particular social problem, in this case, problems related to the treatment of HIV/AIDS.

Now, moving on to the right to *housing*, it is section 26 of the Constitution of RSA that provides for this right in the following terms-

“(1) Everyone has the right *to have access to adequate housing*. (2) The state must take *reasonable legislative and other measures, within its available resources* to achieve the *progressive realization* of this right”. (emphases added)

The case of *Government of the Republic of South Africa and others v Grootboom and others* (2001, p. 46) is probably the most important decision as far housing rights jurisprudence in RSA is concerned. In this case, the Constitutional Court was asked to review (on appeal) the decision of the Cape Town High Court ordering government to provide emergency shelter to children (and with them their parents, the respondents in this case) following a local government's action in evicting them (as squatters) from a private land that was to be used for low income housing. In the

process of the eviction, the homes the squatters had erected were destroyed and much of their personal possessions and building material had also been deliberately destroyed. In the appeal, the government had argued that it had a logical plan for the provision of housing in an orderly and systematic manner, and that the type of order the High Court had made disrupted its plans, through privileging certain groups over those patiently waiting on the housing lists and also requiring the expenditure of scarce resources.

While the Constitutional Court acknowledged the steps that the government had taken in addressing the mammoth housing backlog; and again, even though (similar to the Court's approach in the *TAC case*) the Court emphasized that *'the precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive'* and that the Court *'will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent'*; the Court still found that the failure by government to have a policy to address the needs of emergency shelter meant that the housing policy failed *'to respond to the needs of those most desperate'* and thus was unreasonable (*Grootboom*, 2001, para. 44). The Court came to this conclusion by directly relying on the right to housing and consequently, upheld the order of the High Court.

It is thus encouraging to note in the present case that even though the Court conceded that policy matters are within the realm of the legislature and the executive, the Court realized that by entrenching the right to *housing* in the Constitution as an enforceable right, Parliament intended it to serve a purpose- in this case to address massive poverty and deprivation in a post-apartheid society- and the Court had to ensure that this aim comes to fruition and ultimately help achieve

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social transformation amongst the poor majority in society. The Court did this by plainly showing, through its interventionist and activist approach to the interpretation of the right to housing *vis-à-vis* the government's housing policy, that it was aware of the massive social need for public housing and was willing and ready to hold the executive accountable for its delivery, in the sense of at least having reasonable plans in place to begin to tackle the housing problem, as well as putting in place mechanisms for dealing with the emergency needs of those in dire circumstances.

The approach that was taken by the Constitutional Court in the *Grootboom case* was again reflected in the case of *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* (2005, p.3).

This case arose from an acute overcrowding in formal townships in east of Johannesburg, which resulted in tens of thousands of people moving into the respondent's neighbouring farm land and erecting basic shelters in which to live. The respondent's attempts to evict the squatters failed. When the matter came before the Supreme Court of Appeal, the Court realized that return of the land to Modderklip was not a feasible option, and so it ordered 'constitutional damages' to Modderklip- a kind of financial compensation for loss of use of the land and allowing the unlawful occupation to continue at State expense. The State appealed to the Constitutional Court against the decision of the Supreme Court. In dismissing the appeal, the Constitutional Court set out in detail the reasons for homelessness as a social crisis, firmly rooting it in the racist discrimination of the past apartheid regimes, while at the same time implicitly urging the Government to speed up the processes of providing basic housing. Again, the threat of land invasions, which had the capacity to be 'socially inflammable, with serious implications for stability and public peace and ...a recipe

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for anarchy' was specifically mentioned by the Court as a reason calling for an urgent action by the Government, despite the immense problems that it faced.

Once again, we see the judiciary in the *Modderklip case*, as in the *Grootboom case*, clearly conscious of the extent of social deprivation rampant in South African societies, and thus willing to acknowledge it by urging the executive arm of government to act.

It should be emphasized that by declaring a government policy irrational and inadequate as in the *TAC case*, or unreasonable or inflexible as in the *Modderklip* and *Grootboom cases*, and thus inconsistent with the constitutional guarantees to *health care* and *housing* respectively, does not conflict with the doctrine of separation of powers, but is consistent with the constitutional mandate given to courts to *promote* the values that underlie an open and democratic society based on human dignity, as well as *promoting* the spirit, purport and objects of the Bill of Rights when interpreting the Constitution. It cannot be disputed that better *health care* and *better housing* are some of the most basic human needs, the realization of which translates into respect for human dignity. Therefore, a Court that interprets the Constitution in a manner that ensures the realization of these rights does not usurp the Legislature's or the Executive's legislative authority, but helps to achieve social transformation in conformity with the values and principles underlying the Constitution, as well as the spirit and objects of the Bill of Rights.

Unlike in RSA, the rights to *health* and *housing (shelter)* are not justiciable in Nigeria as the Constitution specifically provides for them under the Fundamental Objectives and directive

Principles of State Policy in Chapter II which, according to section 6 (6) (c) of the Nigerian Constitution, are unenforceable in courts.

The right to *health* is provided for in section 17 of the Nigerian Constitution as follows-

- (3) The State shall direct its policy towards ensuring that-
- ...
 - (c) the health, safety and welfare of all persons in employment are safeguarded and not endangered or abused;
 - (d) there are adequate medical and health facilities for all persons.

A closer reading of the above provision clearly shows that what may be construed as the right to *health* under the Constitution of Nigeria is drafted or couched less broadly in that the right seems to be restricted to ensuring occupational safety and the provision of adequate medical and health facilities only. Thus, the right does not create obligations on the Government of Nigeria in respect of the underlying determinants of health generally (Onyemelukwe, 2007, p. 3); a position which is different from that obtaining in RSA due to, among other things, the assertive way in which the right to *health care* is formulated under the Constitution of RSA.

As for the right to *housing*, it is provided for in section 16 of the Constitution of Nigeria as follows-

- (2) The State shall direct its policy towards ensuring-
- ...
 - (d) that suitable and adequate shelter...are provided for all citizens.

It is perhaps important to mention at the outset that the fact that the Constitution of Nigeria does not recognize the rights to *health* and *housing* as justiciable rights, is probably the most distinguishing feature that sets apart judicial approaches to the interpretation of these socio-

economic rights between the courts in RSA and Nigeria. Because of the non-justiciable nature of these rights under the Nigerian Constitution; there isn't much jurisprudence on social-economic rights from Nigeria's superior courts, a position that is different from that obtaining in RSA.

Be that as it may, Nigeria has ratified a number of international and regional human rights instruments that guarantee the rights to *health* and *housing* as fundamental human rights, such as the African Charter on Human and Peoples' Rights (1990), and the International Covenant on Economic, Social and Cultural Rights (1966). However, even though the country has ratified these instruments, courts in Nigeria still face the challenge of interpreting and enforcing these rights because, being a dualist state, an international agreement or treaty cannot be enforced in Nigeria unless it has been incorporated into domestic law (Constitution of Nigeria, 1999, s 12 (1)).

Fortunately enough, the African Charter on Human and Peoples' Rights happens to be the only human rights instrument which Nigeria incorporated into her domestic laws through the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act (Cap. 10 of the Laws of the Federation, 1990).

Since the African Charter Act is part of the domestic laws in Nigeria, ideally, courts in that country can enforce the rights enshrined in that Act, including the rights to *health* and *housing*. However, this proposition may present some difficulties considering the fact that, as we have seen, the rights to *health* and *housing* are not justiciable under the Constitution of Nigeria and thus unenforceable in Nigerian courts. And again, even though the framers of the African Charter on Human and Peoples' Rights intended the rights to *health* and *housing* to be enforceable in domestic courts, the

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African Charter Act, which is a domestic law, cannot override the Constitution which, according to section 1, is the supreme law in Nigeria.

In view of these observations, the question still remains- how then have courts in Nigeria relied on the African Charter Act to interpret these socio-economic rights?

In one of Nigeria's landmark cases, the case of *General Sani Abacha and others v Chief Ganni Fawehinmi* (2000, p. 228), the Nigerian Supreme Court dealt with the African Charter Act. One of the crucial issues that arose in this case was the enforceability of the Act which, as indicated above, contains socio-economic rights which are meant to be justiciable, contrary to the position in the Constitution which makes these rights non-justiciable. Even though the Supreme Court in this case was unanimous about the enforceability of the African Charter Act in Nigerian courts generally, it was somehow discouraging that the Court did not make any specific ruling on the enforceability of the socio-economic rights enshrined in the Act.

On the other hand, the Nigerian Federal High Court fairly recently dealt with a case that centred on the right to a *healthy environment*: a right that is recognized by the African Charter Act but not the Constitution, just as the rights to *health* and *housing* are. In that case, *Jonah Gbemre and others v Shell Petroleum Development Company of Nigeria Ltd and others* (2005, p. 153), the applicants sought a declaration that the constitutionally guaranteed fundamental rights to life and dignity of the person as enshrined in sections 33 (1) and 34 (1) of the Nigerian Constitution, respectively, and articles 4 (*right to life*), 16 (*right to health care*) and 24 (*right to satisfactory environment*) of the African Charter Act include also the right to a *healthy environment*. The respondent challenged the

application, contending that the African Charter Act was inapplicable, since articles 4, 16 and 24 do not create fundamental rights enforceable in courts. The Court rejected this argument and held that the African Charter Act is applicable irrespective of a lack of an enforcement mechanism, and that the rights to life and dignity of the person as recognized in the Constitution inevitably include the right to a *clean, poison free, pollution free and a healthy environment*.

The decision of the Court in this case may be significant in that it illuminates the proper application of the African Charter Act in enforcing fundamental rights, as well as its relationship with the Directive Principles (Nnamuchi, 2008, p. 23). By reinforcing the justiciable fundamental rights to *life and dignity of the person* as enshrined in the Constitution with the non-justiciable right to a *healthy environment* as provided for in the African Charter Act, the Court displayed rare activism in its approach to the interpretation of social-economic rights, as that would certainly ensure that the broadest possible remedy is granted to the applicant. However, it is worth noting that although the issue of the enforceability of socio-economic rights such as the right to *health care* was directly brought before the Court, the Court avoided declaring its position on the enforceability of these rights as enshrined in the Act.

Clearly, the foregoing discussion demonstrates that there are remarkable differences of approach in the interpretation of socio-economic rights between the courts in RSA and Nigeria. In RSA, the fact that courts have been activist, especially in their use of the concept of reasonableness to impose a level of accountability on the legislative and executive branches of government in respect of implementation of social-economic rights, has at least ensured the attainment of social justice and social transformation for the poor majority and the less privileged in society. Even though the concept of reasonableness would necessarily involve the courts in policy choices which are,

strictly speaking, properly made by the legislature and the executive, the activist approach of being able to question the reasonableness of government policies as demonstrated by the South African Constitutional Court has somehow addressed the issue of separation of powers. By casting its role as one concerned with the determination of whether government action or inaction in relation to the provision of basic human necessities (such as *housing* as in the *Grootboom* and *Modderklip cases*, and *health care* as in the *TAC case*) is reasonable or rational, the Constitutional Court has avoided the accusation of going beyond the boundaries of its constitutional role by becoming involved in decisions which are reserved for the legislature and the executive.

On the other hand, it appears that even though Nigerian courts have been activist by employing the broad, liberal approach in their interpretation of constitutional provisions generally; the courts seem to be cautious in their interpretation of socio-economic rights by not going beyond the literal letter of the law. Indeed, despite the fact that the Nigerian Constitution clearly states that Nigeria is a State based on, among others things, principles of social justice, the approach of courts towards the interpretation of socio-economic rights has so far been less than activist, mainly because of the non-justiciability of these rights.

Thus, the passive approach towards the interpretation and enforcement of socio-economic rights in Nigeria has in turn made it difficult for Nigerian courts to hold the Nigerian government accountable to take the necessary steps in ensuring the realization of these rights; in particular for the courts to question the reasonableness or adequacy of their government's policies in order to facilitate social transformation the way the South African Constitutional Court did in the *Grootboom*, *Modderklip* and *TAC cases*. It therefore appears that in Nigeria, the role of the courts

in helping achieve social transformation through its interpretation of social-economic rights, such as the rights to *health care, housing* and others would, to a large extent, be to the discretion of government.

5.0 Chapter five “Concluding the Debate”

5.1 Conclusion

Judicial activism is a noble concept and a necessary tool for attaining justice and achieving social transformation. In carrying out their constitutional interpretative role, courts must therefore employ modes of interpretation that are consistent with an activist approach to the interpretation of the Constitution. It is only those modes of interpretation that take into account the purposes or objects of the Constitution; the context and the overarching principles on which the Constitution was founded; as well as the values underlying the inclusion of a particular right in the Constitution- that are truly consistent with an activist nature of interpreting the Constitution. These modes include the broad, liberal approach and the contextual, purposive approach.

However, it must be emphasized that an activist approach to the interpretation of the Constitution should not be construed as permitting the courts to do as they please. In carrying out their constitutional interpretative role, courts must avoid overstepping their judicial boundaries and venture into the realm of the Legislature and the Executive, as that would be tantamount to usurping the legislative functions of the two political arms of government.

Of course it has been argued that courts that employ judicial activism in carrying out their statutory interpretative roles are undemocratic as unelected judges may interfere with laws or policies of

democratically elected governments. Without wishing to open up a debate on how the so-called elected legislators have at times abused their elected status and numbers to enact laws or come up with policies that may not in themselves pass the real test of democracy due to the politicization of issues that legislators are at times obsessed with in the legislative process; it suffices to state that the element of being elected alone does not make all the difference. For instance, are judges who are elected (such as those in some states in the United States of America) free to interfere with laws or tamper with government policies as they please, just because they were elected? Obviously the answer is no.

Therefore, the sheer fact of being elected or their numbers alone does not give the Executive and the Legislature the exclusive prerogative of enacting any laws, without the watchful eye of the courts. If that was the case, then the framers of the Constitution of RSA and that of Nigeria, as it is in other countries, would not have subjected the legislative and other powers of these two political arms of government to the Constitution and the jurisdiction of the courts.

Additionally, although the concept of judicial activism has been criticized in favour of the concept of judicial restraint in that the latter conforms to the democratic concept of separation of powers as compared to the former; it must be pointed out that undue reliance on the rigid concept of judicial restraint may not only defeat the ends of justice, but equally ignores another important aspect of democracy- the principle of “checks and balances” which courts are constitutionally mandated to perform in order to check legislative encroachment or excesses as well as executive abuse. Moreover, judicial restraint, with its emphasis on the literal interpretation of legislation, translates

into sterility and rigidity in the interpretation of the Constitution, whilst the Constitution itself is dynamic.

It must be remembered that the literal rule has its basis in the assumption that words used in legislation are used with precision (*Spillers Ltd Cardiff Assesment Committee*, 1931, pp. 42-43), because “such is the skill of parliamentary draftsmen that most statutory enactments are expressed in language which is clear and unambiguous and gives rise to no serious controversy” (*R (Quintavalle) v Secretary of State for Health*, 2003, p. 692). Unfortunately, it is on the basis of this assumption that advocates of the concept of judicial restraint argue that the function of a court is to look for the intention of Parliament from the sole medium of the words used in a statute and no more. However, the search for the intention of Parliament is not as easy as portrayed by the literal approach to the construction of legislation, because if such was the case then the need for courts and judging would have been superfluous.

If it is accepted that laws are neither sufficiently detailed to be able to cover every possible situation, nor is it politically feasible to avoid contradictions or inconsistencies in a Constitution- especially considering that a Constitution is a product of political compromise, often hastily and broadly drafted, vague and insufficiently explicit- then it should also be accepted that the employment of judicial activism, whilst respecting the legislative supremacy of Parliament and the policy making autonomy of the Executive, has the potential to eliminate the uncertainties, absurdities, technicalities, ambiguities, or the inconsistencies inherent in the Constitution, and that ultimately judicial activism is a necessary tool for courts to attain justice and achieve social transformation, through their interpretation of the Constitution, as well as socio-economic rights

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vis-à-vis government policies, without necessarily usurping the legislative functions of Parliament and the Executive.

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