“What is the argument on the other side? Only this, that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before, we shall never get anywhere. The law will stand still whilst the rest of the world goes on, and that will be bad for both.”

Lord Denning in Packer v. Packer

EDUCATIONAL RESOURCE PROVIDERS
CASE LAW AS A SOURCE OF NIGERIAN LAW – DO JUDGES MAKE LAW?

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By virtue of the doctrine of separation of powers and checks and balances it is not the duty of the judiciary to make laws. The 1999 Constitution in sections 4-6 provided for the legislature to make laws, the executive to exercise executive powers and the judiciary to exercise judicial powers to determine questions of civil rights and obligations.

However as we found out earlier, common law is referred to as judge made laws because it was created by the itinerant judges in England. Therefore the controversy exists as to whether the courts do indeed make new law or whether law making is strictly reserved for the legislature. Judges have often insisted that they do not make law directly and there are two views on this question- the declaratory and the creative views.
THE DECLARATORY THEORY OF JUDICIAL FUNCTION

• Blackstone’s is considered the originator of the Declaratory theory. He wrote that the judge is "sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one. William Blackstone, Commentaries on the Laws of England vol. 2,

• According to this theory the law has always existed and judges merely discover the law as they are faced with different situations. Thus in any new case they derive the appropriate rule logically from already pre-existing legal principles. In other words, judges never make or create new law
DECLARATORY THEORY

• Blackstone’s theory has been adopted by some judges and theorists as reflected in the following holdings;

• Lord MacMillian in Read v.Lyons (1947) A.C 156 “Your Lordships’ task in this House is to decide particular cases between litigants and your lordships ARE NOT CALLED UPON TO RATIONALIZE THE LAW OF ENGLAND. That attractive, if perilous field, may be left to other hands to cultivate”

• Lord Esher in *Willis v Baddeley* [1892] 2 QB 324 “There is no such thing as judge-made law, for the judges do not make the law, though they frequently have to apply existing law to circumstances as to which it has not previously been authoritatively laid down that such law is applicable”
THE CREATIVE THEORY OF JUDICIAL FUNCTION

• The second opinion views the law as the will of the justices and accepts that judges do make law

• Bentham’s in volume V of his WORKS wrote contemptuously of judge made law but acknowledged that judges do make law "It is the judges that make the common law, just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it and then beat him. This is the way you make laws for your dog, and this is the way judges make laws for you and me."

• John Austin regarded the declaratory theory as “the childish fiction employed by our judges that judiciary or common law is not made by them, but is a miraculous, something made by nobody, existing, I suppose from eternity, and merely declared from time to time by the judges”. He agreed that judges make Judicial law
THE CREATIVE THEORY OF JUDICIAL FUNCTION (contd.)

• Lord Reid wrote “there was a time when it was thought almost indecent to suggest that judges do make law- they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin’s Cave there is hidden the Common law in all its splendour and that on a judge’s appointment there descends on him knowledge of the magic words Open Sesame... But we do not believe in fairy tales any more” – The Judge as Law Maker (1972) 12 J.S.P.T.L (NA) 22

• Justice Holmes poked fun at Blackstone’s theory when he stated that “The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi-sovereign that can be identified - dissenting opinion in Southern Pacific Company v. Jensen, 244 United States Reports 205 at 222 (1917).
CREATIVE THEORY OF JUDICIAL FUNCTION (contd.)

• Lord Denning was the consummate believer in the creative theory. He was responsible for tagging passivist judges who were not willing to recognize a new cause of action as “timorous souls” while activist creative judges he called “Bold spirits” (Candler v Crane, Christmas & Co [1951] 2 KB 164). The following are his statements lauding the virtue of creative judicial law making

• “What is the argument on the other side? Only this, that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before, we shall never get anywhere. The law will stand still whilst the rest of the world goes on; and that will be bad for both. Packer v. Packer [1954] P. 15 at 22.
“What is the argument on the other side? Only this, that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before, we shall never get anywhere. The law will stand still whilst the rest of the world goes on; and that will be bad for both.

Lord Denning in *Packer v. Packer*
LORD DENNING ON CREATIVE JUDICIAL LAW MAKING

• ‘We do not sit here to pull the language of Parliament to pieces and make nonsense of it. We sit here to find out the intention of Parliament and carry it out and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis’ Magor and St Mellons v Newport Borough Council (1952) HL

• “It may be that there is no authority to be found in the books, but if this be so all I can say is that the sooner we make one the better” – Attorney General v. Butterworth [1963] 1 QB 696 at 719
WHEN JUDGES CAN VALIDLY MAKE NEW LAWS

• It is incontrovertible that judges meet new circumstances that were not contemplated by the law makers when the law was first made and in such circumstances they create new law to meet the changed conditions, which are termed original precedents.

• Thus Lord Radcliffe stated “there was never a more sterile controversy than that upon the question whether a judge makes law, of course he does. How can he help it?”

• The modern consensus is that judges do make laws and these may be in the following situations

• 1. In interpreting statutory texts with ambiguous words when he employs the various rules of interpretation like the golden rule etc. to widen or restrict the scope of the statute relevantly and contextually.

• 2. When there is a lacuna not covered by a statute or case law
“Second, there are instances when there exists neither statutes nor case law on a matter before the judge. In such instances, the judge is initially helpless, but the case before him must be decided one way or the other. He cannot adjourn the case and ask the Legislature to pass a statute on the point before him. He cannot fold his arms and tell the litigants that he is helpless on the ground that there is no relevant statute or case law governing the issue before him. He must do something and quickly too for that matter. He has no option in the matter. He, therefore, propounds a principle suitable to the case before him. The principle is novel. The Principle is an innovation and so the judge is said to have made the law” –

Niki Tobi,
NIKI TOBI JSC ON WHEN JUDGES CAN VALIDLY MAKE NEW LAWS

• According to Justice Niki Tobi “Second, there are instances when there exists neither statutes nor case law on a matter before the judge. In such instances, the judge is initially helpless, but the case before him must be decided one way or the other. He cannot adjourn the case and ask the Legislature to pass a statute on the point before him. He cannot fold his arms and tell the litigants that he is helpless on the ground that there is no relevant statute or case law governing the issue before him. He must do something and quickly too for that matter. He has no option in the matter. He, therefore, propounds a principle suitable to the case before him. The principle is novel. The Principle is an innovation and so the judge is said to have made the law” – Niki Tobi, Sources of Nigerian law, p.79
WHEN JUDGES CAN VALIDLY MAKE NEW LAWS

• Instances when judges have recognized new claims and expanded or widened the law include – Hedley Byrne co. ltd. v Hellers Partners ltd. (1961) 3 W.L.R 1225 – (Tort of negligent misrepresentation), Donoghue v Stevenson (1932) A.C 562 – (Neighbour principle for determining the existence of a duty of care in negligence), Lakanmi and Anor v. Attorney General of Western Nigeria and others (!971) 1 U.I.L.R. 201 (Application of ouster clauses), Peter Obi v. INEC (S.C. 123/2007) – (when the term of a governor begins to run). In India, Vishakha v State of Rajasthan (1997) 6 SCC 241 took judicial legislation to an unprecedented level by relying on international treaties on the subject of sexual harassment that had not been domesticated and finally providing guidelines to regulate such cases until the legislature makes a law on the Subject. And Shaw v. DPP [1962] AC 220 (the Ladies Directory Case) created the crime of conspiracy to corrupt public morals in England
LIMITS/CHECKS TO JUDICIAL LAW MAKING

• Judges while exercising their judicial functions are held in check by the following considerations so that they do not trespass into the realm of the legislature and remove the certainty for which the law is known. These considerations are

• Judges take an oath of office to defend the constitution
• Doctrine of stare decisis or precedents require judges to abide by previous decisions of higher courts
• National Judicial Council as the disciplinary body that can dismiss any judge that breaches the code of conduct for judges.
While researching a case that is being handled by your law chamber you discovered that the applicable law that regulates the transaction was made when the internet and computer communication was not yet available and the extant law will work grave injustice to your client. Your senior in the Chamber wants to pray the court to be creative in its decision and has therefore asked you to write a legal opinion on how the court will react to that prayer. Support your opinion with authorities that show that what you are praying the court to do is within the powers of the court.