



Judicial Discretion And Its Application Under The Nigerian Legal System

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ABSTRACT

An exercise of discretion is an act or deed on the personal judgment of the person exercising it and in accordance with his conscience and should be free from and unfettered by external influence or suggestions. Judicial discretion is the exercise of judgment by a judge or court based on what is fair under the circumstance and guided by the rules and principles of law. The exercise of discretion may either be judicial or judicious, it is judicial, if it is exercised in accordance with the enabling statutes while it is judicious when it carries or conveys the intellectual wisdom or prudent intellectual capacity of the judge as *Judex*. However, whichever of the two approaches, the exercise must be based on a sound and sensible judgment with a view to doing justice to the parties. Instances of judicial discretion and its application under the Nigerian legal system form the bedrock of this study.

The principal key terms are judicial and judicious discretion, principles guiding same in Nigerian courts, challenges and remedial approaches.

Keywords: Judicial Discretion, Nigerian Legal System, Nigerian courts

INTRODUCTION

Discretion is that freedom or power to decide what should be done in a particular situation. The general meaning of the word “discretion” includes analysis, appraisal, assessment, choice, consideration, contemplation, designation, determination, discrimination, distinction, election, evaluation, examination, free decision, free will, freedom of choice, liberty of choosing, liberty of judgment, license, option, optionality, permission, pick, power of choosing, review, right of choice, sanction, self-determination suffrage¹.

Judicial discretion then is the exercise of judgment by a judge or court based on what is fair under the circumstance and guided by the rules and principles of law. It is a courts power to act or not to act when a litigant is not entitled to demand the act as a matter of right. Every discretion be it judicial and judicious must be based on prudence, rationality, sagacity, astuteness, considerateness and reasonableness and these principles were as enumerated in our courts in the following cases **Akinyemi v Odu’a Investment Co Ltd**² supra, **University of Lagos v Aigoro**³, **Onuorah v Okafor**⁴, **Ekwuno v Ifejika**⁵ and **Egbunike v Muonweokwu**⁶.

An exercise of discretion is an act or deed on the personal judgment of the person exercising it and in accordance with his conscience and should be free and unfettered from an external influence or suggestions. Judicial discretion means the power exercised by judicial umpires acting in official capacity and in the manner which appears to be just and proper under a given situation. It must not flow from or be

¹ Akinyemi v. Odu’a Investment Coy Ltd (2012) 17 NWLR pt. 1329, p.609.

² (2012) 17 NWLR pt. 1329, p.609.

³ (1985) 1 NWLR 1 p143.

⁴ (1983) 2 SCNLR 244.

⁵ (1960) SCNR 320.

⁶ (1962) 1 SCNLR 97.

bound by a previous decision of another court in which a decision was exercised. It is in short, an antithesis of the doctrine of *stare decisis*. There is no hard and fast rule as to the exercise of judicial discretion by a court because if it happens then, discretion will become fettered as in the following court decisions: **UBN Plc v Astra Builders WA Ltd**⁷, **Odusote v Odusote**⁸, **Anyah v African Newspapers of Nigeria Ltd**⁹.

In any event **Dworkin**, distinguishes three different senses in which a judge must be said to have discretion;

- (i) a judge has discretion when she examines judgment in applying a legal standard to a particular case;
- (ii) a judge has discretion when her decision is not subject to reversal by any other authorities; and
- (iii) a judge has discretion when her decision is not bound by any legal standards.

The **Dworkin's** discretion thesis is highly committed to the third sense of discretion which he refers to as strong and vital. In **Dworkin's** view, the thesis that Judges have discretion only in the sense that they exercise judgment is trivially true, while the thesis that Judges have discretion in the sense that their decisions are not subject to being reversed by higher authorities is false because even the Supreme Court which is the highest court in some situations do reversed their judgment whether it is based on discretion or not but as far as it was discovered that such decision creates an abuse of discretion by the application of wrong legal standard. There are guidelines to exercise of discretion which must not be outside the bound of reasonableness. Discretion is akin to judicial-law making. It brings to bear the question, how constitutional is judicial law-making? *Section 4 of the 1999 Constitution of Federal Republic of Nigeria* (as amended)¹⁰ assigned law-making functions to the legislature and dolls out the principle of separation of powers in practice. It may be an encroachment for the judiciary to purport to exercise law making powers.

The merit or otherwise of '*judicial creativity*' was examined and it was apparent that there is need for a balance to avoid 'judicial recklessness' which can arise if judges were given unfettered power to exercise their discretion in cases before them, or judicial tepidity as a consequence of rigid adherence to precedent, or literal interpretation, that may result in injustice to those who seek refuge in the alter of justice.

Discretion, Judicial Discretion and Separation of Powers

Discretion is understood to be a liberty to act at pleasure; the power of making free choices unconstrained by external agencies. By judicial discretion it presupposes that the courts enjoy powers to act at pleasure and without external influences and constraints. The question of discretionary powers of courts is well and long settled, in fact beyond the question of exercise of legislative interpretative powers to the suggestion that, in the last analysis, the decision of judges do not merely expound rules that existed before, but rather themselves create new principles of law. This is because the statement that rules of law as being derived from existing legislation or previous cases is unsatisfying, reason being that legislations will always require first time interpretation by the courts of law to be understood and also for judicial precedent to be formed. So also the courts will have to reach a decision anyway when faced with an issue whether legislation properly covers it or not and whether an earlier task of interpreting the legislation has been carried out or not. By the principle of separation of powers, the basic responsibility of courts as enunciated in all statutes is the interpretation of an existing law: an "*unquantifiable*" power lies in the judges' hands where the law is silent.

Meaning of Judicial and Judicious

On what constitutes judicial and judicious, the court in the case of *African Continental Bank Ltd v Nnamani*¹¹ held that the exercise of the court's discretion is said to be judicial if the judge invokes the

⁷ (2010) 5 NWLR pt (1186) p 1.

⁸ (1971) 1 All NLR pt (1) p. 219.

⁹ (1992) 6 NWLR pt 247 p. 317.

¹⁰ *Section 4 of the 1999 Constitution of the Federal Republic of Nigeria (as amended).*

¹¹ (1980) JELR 33940 (SC).

power in his capacity as *judge qua law*. In other words, an exercise of a discretionary power will be said to be judicial, if the power is exercised in accordance with the enabling statutes. On the other hand, an exercise of a discretionary power is said to be judicious if it carries or conveys the intellectual wisdom or prudent intellectual capacity of the judge as *judex*. In this second situation, the exercise of the discretion must be replete with such wisdom and tenacity of mind and purpose. The exercise must be based on a sound and sensible judgment with a view of doing justice to the parties. Here, the judge's disposition about life is brought to play and his mindset and view about life as he has to use his discretion prudently in the absence of any guiding principle where the law is silent. See **Offor v State**.¹²

*But, discretion is discretion, whether it wears any of the two qualifying expressions mentioned above (judicious and judicial), only when it is exercised by the court according to law and good judgment. Discretion is not discretion if its exercise is based on the court's sentiments or premeditated pet ideas on the matter, completely outside the dictates of either the enabling law or good judgment, as the case may be*¹³. In criminal cases, judges exercise enormous discretion; from the commencement of the trial to the end, prominent of which is in the grant of bail and sentencing.

Like other judicial remedies pending, a good guide on judicial discretion generally is found in the *dictum* of **Udoma, JSC** in the case of **Odusote v Odusote**¹⁴ where he volunteered as follows:

'In matters of discretion, no one case can be authority for another; and the court cannot be bound by a previous decision to exercise its discretion in a particular way, because that would be in effect putting an end to the discretion'. Also in **Ali v COP**¹⁵ **Anyebe, J** held that:

*'Granting of bail pending the determination of an appeal before this court is, under Section 34(2) of the Criminal Procedure Code upon which this application is founded, a matter of unfettered discretion of the court bearing in mind that where a judicial discretion is to be exercised, as Reed CJ, put it in Kehinde v Commissioner of Police*¹⁶ *it is to be done according to the rules of reason and justice, not arbitrary, vague and fanciful, but legal and regular'*.

The idea of bail pending appeal being an issue of judicial discretion stems from the very words of the statutes empowering the courts to exercise the discretionary power to grant it. By the use of the permissive word 'may', the whole issue of bail pending appeal was put within the discretion of the judge. Thus, the decision whether or not to grant an application for bail pending appeal is entirely that of the judge, his only obligation being that he should exercise his discretion judicially and judiciously. Also, he is to give reasons for the manner he had chosen to exercise the discretion.

According to **Uwaifo, JSC** in **Gen & Aviation Services v Thahal**:

*'There is always the need for a court exercising discretion to give reason in justification of the exercise. See Solanke v Ajibola*¹⁷. *There can hardly be any justifiable reason for exercising discretion upon imprecise facts. It is the nature and strength of facts made available to the court that provide the tonic for the proper exercise of discretion. Admittedly, the exercise of discretion upon known facts involves the balancing of a number of relevant considerations upon which opinions of individual judges may differ as to their relative weight in a particular case. See Birkett v James*¹⁸. *But that will not necessarily affect the justness of the exercise of the discretion, so long as the facts are available and reasonably appreciated*¹⁹.

¹² 18 NWLR pt 1333 p421.

¹³ On the principle of exercising discretion by the court, see *General University of Lagos v. Olaniyan (1985) 1 NWLR Pt. 1p. 134*.

¹⁴ (1971) NMLR 231 see also *Abatcha v COP (1998) 1 LRCNCC 97 at 100H*.

¹⁵ (2002) JELR P44479 CA.

¹⁶ (1973) NWLR 182.

¹⁷ (1968) 1 All NLR 46 @ 54.

¹⁸ (1978) AC 297 @ 317D.

¹⁹ (2005) 1 CNQLR 107.

Cases Where the Court Applied or not Applied Discretion

In **Hope Uzodimma v Emeka Ihedioha**²⁰ appellants contested that the Supreme Court judgment was obtained by fraud of the respondents who misled the court to holding that 213, 495 votes were unlawfully excluded from their votes. Sadly, the Supreme Court held that they could not reverse their decision in line with Constitutional provisions, even when fraud was proven. However, *C.C. Nweze JSC* in his dissenting opinion held that a constitutional provision should not be used as an instrument of fraud. Clear from this case, justice should have served if discretion was applied.

However, in a much earlier cases of, **Awolowo v Shagari**²¹ the Supreme Court applied discretion by dismissing an appeal and interpreting *section 34 A(1)(c)(ii) of the Electoral Decree*²² literally, declaring the respondent (Shagari) as the winner because he has the highest number of votes but less than the constitutionally-required “one-quarter of the votes cast in each of at least two thirds of the states in the federation”.

However, one may argue that subjecting the facts of a case to the personal discretion of a judge may represent Austin’s painting of an “*uncommanded commander*”- which then bases the court’s decision on and makes it then not a matter of law but a matter of sentiment and the personal whims and caprices of the judge. We must note however that **Lord Denning** Master of the Rolls (MR), had said this earlier “never will a thing not be done because it has not been done before, and this court will not do a thing because it has not been done before.” This happened in the landmark case of **Central London Property Trust Ltd v High Trees House Ltd**²³ where the House of Lords established the equitable principle of *promissory estoppels* where the plaintiff sought to avoid fulfilling his promise.

It has later been stated in **Awojugbagbe light Industries v Chinukwe**²⁴ that a *situate law (lex situs)* cannot be used as an instrument of fraud. Thus, the court will not fold its arms, and watch injustice happen simply because the law is silent on a subject. Thus, the court will duly exercise its discretion to remedy the situation, the silence of the law notwithstanding.

Moreso, in the celebrated case of **Donoghe v. Stevenson**²⁵, the court rightly exercised its discretion in holding the defendant liable for negligence thereby expanding the parameters of duty of care to where they had not earlier existed.

Furthermore, the court also did justice in **Aliu Bello v. A.G Oyo State**²⁶ by providing damages where no earlier rule had provided for it on the rule of *ubi jus ibi remedium*- where there is a right, there is a remedy. The obvious question that really comes to the mind is: Can discretion be exercised only when there is a *lacuna* or absence in the law, or even when the law is clear on a provision?

Quite properly, exercising discretion when the law is clear will amount into judicial law-making and that would imply be an aberration and a total deviation from the principle of separation of powers as enshrined in *sections 4, 5 & 6 of the 1999 Constitution of Nigeria*²⁷ (as amended) where each of the component organs of the government were statutory empowered with their specific functions for the proper administration of the polity.

However, that may be true, an existing rule of law may be a reason for injustice, and the court will have a need to act outside its provisions. In **Ukeje v Ukeje**²⁸ the court declared null and void a customary rule that precluded women from inheriting a deceased person’s property. In the famous **Lakami v A.G Western Nigerian**²⁹ the court declared invalid a *Decree* that gave a panel power to seize the plaintiff’s assets without courts authority. On that premise, if the existing law is moribund or draconian, it may be an

²⁰ Appeal No. CA/OW/EPT/GOV/5/2019.

²¹ SC. 62/979.

²² *Section 34(A)(1)(c) of the Electoral Decree 1979.*

²³ (1947) KB 130.

²⁴ (1995) 4 NWLR pt. 390 p. 379.

²⁵ (1932) UKHL.

²⁶ (1986) 12 S.C.1.

²⁷ *Section 4, 5 & 6 of the 1999 Constitution of Nigeria (as amended).*

²⁸ (2014) JELR 54676 sc.

²⁹ (1970) JELR 33695 SC.

invitation to the court to repeal it by judicial action. We reminisce a famous jurists **Judge Desmond**, assertion “When these ghosts of the past come clanking their medieval claims, the proper cause for the judges is to pass through them undetermined”³⁰.

Judicial Discretion of Judges in Criminal Cases in Nigeria

Judicial discretion is the power or right to make official decisions using reason and judgment to choose from acceptable alternatives. Judges are charged with exercising judicial discretion in the discharge of judicial functions. All decisions made are subject to some kind of review and are also subject to reversal or modification if there has been an abuse of judicial discretion³¹. Judges as human beings are prone to human weaknesses. Hence, whenever the courts are exercising their judicial discretion on matters before them, the outcome of such actions cannot be totally free from the personal prejudices, whims and caprices of the “judge”. No wonder, the law is ultimately a product of what a judge deems right under different situations. Therefore, the exercise of law is completely a product of the judicial discretion of a judge. In the Nigerian criminal justice system, judges are often able to exercise a degree of discretion in deciding who will be subjected to criminal penalties and how they will be punished³². In spite of several challenges, judicial discretion remains one of the viable options available to “judges” in exercising the law in Nigeria courts in relation to criminal matters. The law regulates society and conflicts therein. Courts are created by the law as the last hope of the common man where their injuries are redressed especially when their rights are trampled upon in reality. The law is what a judge says it is and this is partly or entirely connected with his social environment, economic condition, personal thought, emotion, interest, and psychology. The reasons for giving “judges” judicial discretions are to cater for unforeseen situations in the course of adjudication and to prevent unnecessary outcomes procedurally. From the above, it is clear that judicial discretion, which the courts exercise, no matter how logically designed its procedures are, may be abused, and completely utilized to prevent justice, **Niki Tobi JSC** as he then was in the case of **Ideozu & Ors v Chief Ochoma & Ors**³³ opined that the aphorism “*unfettered discretion*” is a misnomer. The erudite jurist noted that the moment a judge is called upon to exercise discretionary powers in accordance with the enabling law or rule of court, it is not correct to say that he has an unfettered discretion in the matter otherwise the exercise would be incapable of being set aside on appeal.

Principles Guiding Exercise of Judicial Discretion and Attitudes of Appellant Court thereto

Discretion, being judicial must at all times be exercised not only judicially, but also judiciously on sufficient materials³⁴. An appellate court may interfere with the exercise of judicial discretion if it is shown that there has been a wrongful exercise of the discretion.

A trial court’s discretion ought not to be interfered with by an appellate court if the exercise of the discretion is based on a correct principle of law, even though the appellate court could have come to a different decision.

Discretion however will lose its character and import if it does not “command some level of subjectivity and arbitrariness”³⁵. Where there is no error in principle, exercise of discretionary power should not be interfered with unless the appellate court is of the opinion that the exercise of power is capable of working or involves injustice.³⁶ Where a discretionary power exercised by the lower court is not based on a wrong

³⁰ Woods v. Lancet 303 N.Y. 349 (1951).

³¹ See Davis, C. Kenneth *Discretionary Justice: A preliminary inquiry* Champaign, Illinois University of Illinois (1971) p. 5.

³² J. Paquette, and D. Allison (1997) a Decision-Making and Discretion: the Agony and Ecstasy of law and administration; *Education and Law Journal* 8 (September 1997) p. 161.

³³ (2006) All FWLR pt (308) p. 1183 @ 1207.

³⁴ B. Momodu. *Encyclopedia of Nigerian Case Law Principles and Authorities* (Benin: Momodu B. Law Publishing; 2018) p. 310.

³⁵ *Murli Mirchandani & Anor. Babatunde Pinheiro* (2002) FWLR (pt 48) P. 1307 @ 1326.

³⁶ *Chief Hseghosimhe & Ors v. Chief Ogbeta & Ors* (2002) FWLR (pt 88) p. 862 @ 869.

principle of law and not arbitrary capricious or unrestrained, an appellate court will not reverse a discretionary order merely because it would have exercised the discretion differently³⁷.

Exercise of discretion by the High Court would not be substituted with appellate court's discretion unless it is not exercised judiciously or judicially. For instance, where the exercise of discretion was done arbitrarily, illegally or based on extraneous and irrelevant matters as was the issue(s) in the under listed cases.

Mrs S. Kadiya & Ors v Kadiya & Ors³⁸, Gateway Bank of Nigeria v Abosede³⁹, Prof. Chief Olatunde & Anor v Abidogun & Anor⁴⁰, Obi Eze v A.G. River State & Anor⁴¹, Dalfam Nigeria Ltd. v Okaku International Ltd & Anor⁴². The appellate court will intervene where wrongful exercise would lead to injustice **Maya v Oshuntokun⁴³, C.A. Okeniyi & Ors. v Mogaji O. Akanbi & Ors⁴⁴.**

Attitude of Appellate Court to Exercise of Discretion by lower Court and when Appellate Courts will interfere therewith

It is an essential requirement of the administration of justice that the exercise by a court of its judicial discretion should not only be respected but invariably upheld. However, such exercise of discretion may be interfered with by an appellate court where the discretion so exercised will result in injustice. See **Amed v S.M.B. Ltd⁴⁵**, see also, **Awolaye v Ogunbiyi⁴⁶.**

Where the exercise of discretion by a trial court is in issue, an appellate court is usually reluctant to interfere with the decision, except where the discretion was exercised in an arbitrary or illegal manner or without due consideration of the issue by the trial court. See **Mil. Gov., Lagos State v Adeyiga⁴⁷** see also **Williams v Hope Rising Voluntary Funds Society⁴⁸; Biocon Agrochemicals v Kudu Holdings⁴⁹; Ehidinmhen v Musa⁵⁰; R. Benkay (Nig.) Ltd v Cadbury (Nig.)⁵¹; Onyekanmi v NEPA⁵².**

However, once a lower court has exercised its discretion judiciously and judicially the appellate court cannot interfere with it even if it would have exercised its discretion differently in the same situation. See **Rabiu v Adebajo⁵³.**

An appellate court will not reverse a discretionary exercise of a lower court in arriving at a decision unless the discretion was exercised wrongly. However, the court must be guided by rules and principles of law and will only grant a party's claim when he is found to be entitled to such claims. See **Akinyemi v Odu's Inv. Co. Ltd.⁵⁴**. See also **University of Lagos v Aigoro⁵⁵; Onuoha v Okafor⁵⁶**; see also **University of Lagos v Aigoro⁵⁷; Elendu v Ekwoaba⁵⁸.**

³⁷ Ayangede v. OAUTH (2001) 7 NWLR (pt 711) p. 187.

³⁸ (2001) FWLR (pt 70) @ 1597.

³⁹ (2001) FWLR pt. 79 (p 1316) p.1347.

⁴⁰ (2002) FWLR (pt 88) 902 @ 913.

⁴¹ (2002) FWLR (pt 89) 1109 @ 1128.

⁴² (2002) FWLR (pt 96) 50 @ 526.

⁴³ (2001) FWLR (pt. 81) p. 1771 @ 1805.

⁴⁴ (2002) FWLR (pt. 84) p. 113 @ 133.

⁴⁵ (2015) 13 NWLR (pt. 1476) p. 403.

⁴⁶ (1985) 2 NWLR (pt. 10)861.

⁴⁷ (2012) 5 NWLR p. 291 (SC).

⁴⁸ (1982) 1-2 SC 145.

⁴⁹ (2000) 15 NWLR (PT. 691) 493.

⁵⁰ (2000) 8 NWLR (pt. 669) 540.

⁵¹ (2006) 6 NWLR (pt. 976) 338.

⁵² (2000) 15 NWLR (pt. 690) 414.

⁵³ (2012) 15 NWLR p. 125 (SC).

⁵⁴ (2012) 17 NWLR p. 209 (SC).

⁵⁵ (1985) 1 NWLR (pt. 1) 143.

⁵⁶ (1983) 2 SCNLR 244.

⁵⁷ (1985) 1 NWLR (pt.1) 143.

⁵⁸ (1995) 1 NWLR (pt. 1) 704.

The appellate court may however intervene where wrongful exercise of discretion would lead to injustice⁵⁹ **Okeniyi & Ors v Mogaji O. Akanbi & Ors supra**⁶⁰. It may also interfere with exercise of judicial discretion where it was based on wrong or insufficient material; where no weight or insufficient weight is given to relevant consideration; where the court acted under misconception of law or misapprehension of facts, the appellate court will intervene in the overall interest of justice. See **Akinyenmi v Odu'a Investment Company Ltd**⁶¹, **Alhaji Saleh v Alhaji Monguno & Ors.**⁶², **Alhaji Okewunmi v Mrs Sodunke**⁶³.

Generally, the appellate court will interfere with a lower court's exercise of discretion where:

- (i) The lower court took irrelevant matters or omitted to take relevant matters into consideration. **Abeki v Amboro**⁶⁴, **Odusote v Odusote**⁶⁵, **Shittu & Ors v Osibanjo & Anor In Re Adewunmi & Ors**⁶⁶ **Princewill v Usman**⁶⁷ **Ntuikidem v Oko**⁶⁸.
- (ii) Where discretion is exercised in complete disregard of the rules of natural justice. [perverse] **University of Lagos v Aigoro**⁶⁹. **Arion v Elemo**⁷⁰, **Usikaro & Ors v Itsekiri Communal Land Trustees**⁷¹, **Atake v Ajenifuja**⁷², **Salu v Egeigbon**⁷³.
- (iii) Where there is a failure by the court to exercise discretion judicially and judiciously. **Saffidine v COP**⁷⁴, **Ugboma v Olise**⁷⁵. The appellate court will also interfere with the exercise of discretion where such exercise of discretion was based on misgiven facts or under a misunderstanding of law⁷⁶.
- iv. Where it is in the interest of justice for the appellate court to interfere and the lower court's exercise of discretion did not accord with the interest of justice or in consonance with common sense. **Enekebe v Enekebe**⁷⁷ **Demuren v Asuni**⁷⁸, **Solanke v Ajibola**⁷⁹.
- v. Where the exercise of discretion palpably leads to miscarriage of Justice. **Nnubbia v A.G. River State**⁸⁰, **Igbi v State**⁸¹.
- vi. Where discretion appears to have been exercised capriciously and arbitrarily. **Ekwutosi Menkiti v Clara Menkiti**⁸², **Salaideen v Mamman**⁸³ **In Onyali v Okpala**⁸⁴, the Court of Appeal's refusal of application for the amendment of pleading on appeal was upheld by the Supreme Court on the

⁵⁹ *Maya v. Oshuntokun* (2001) FWLR (pt. 81) 1777 @ 1805.

⁶⁰ (2002) FWLR (pt 84) 113-4.

⁶¹ (2012) 17 NWLR (pt. 1325) p. 209.

⁶² (2002) FWLR (pt 87) 671 @ 687.

⁶³ (2002) FWLR (pt 97) 613 @ 643.

⁶⁴ (1961) ANLR 368.

⁶⁵ (1991) 1 NWLR (pt 711) 228.

⁶⁶ (1988) 3 NWLR (pt 83) 483,

⁶⁷ (1990) 5 NWLR pt. 150 p. 274.

⁶⁸ (1986) 5 NWLR (pt 45) p. 130,

⁶⁹ (1985) 1 NWLR (pt. 1) @ p. 143.

⁷⁰ [1983] 1 SC 13.

⁷¹ (1991) 2 NWLR PT 172 P. 150.

⁷² (1994) 9 NWLR (pt 368) p. 379,

⁷³ [1994] 6 NWLR pt. 368 p. 379.

⁷⁴ [1965] 1 ANLR 54.

⁷⁵ (1971) 1 ANLR 8.

⁷⁶ *Biocon Agrochem Ltd v. Kudu Holdings Ltd* (2001) FWLR pt. 33 p.245 @ 268-9.

⁷⁷ (1964) 1 ANLR 102.

⁷⁸ (1967) 1 ANLR 94.

⁷⁹ (1968) 1 ANLR 86.

⁸⁰ (1991) 3 NWLR pt. 593, p92.

⁸¹ (2000) FWLR pt.3, p358.

⁸² (2000) FNLR pt. 2 p. 293.

⁸³ (2000) FWLR pt. 17.

⁸⁴ (2000) FWLR (pt 3) p 495.

ground that to exercise such discretion in favour of amendment at that stage would have the effect of thwarting the ground of appeal and that would be unjust.

The Supreme Court however will not interfere with exercise of discretion unless it is manifestly wrong, arbitrary, reckless or injudicious or as **in the case of University of Lagos v Olaniyan**⁸⁵ where the court's discretion gave weight to irrelevant or unproven matter or it omitted to take into account matters that are relevant or where it exercised or failed to exercise the discretion on wrong or inadequate materials **John Akujobi Nwabueze v Obioma Nwosu**⁸⁶, **Obi Eze v A.G River State Supra**⁸⁷.

The Supreme Court would not ordinarily reverse the decision of the court below unless it is clear that it is perverse and shown to have been arrived at upon an erroneous view of the facts of the law applicable thereto; as if the court had adverted to a question properly, it might have arrived at a different decision. See **Remilekun Olaiya v Mrs Cornelia J. Olaiya & Ors**⁸⁸, by *section 272(2)*⁸⁹ of the Evidence Act, the wrongful exclusion of evidence is not sufficient to reverse the decision of a trial court where even if the evidence was admitted the result would have been the same. See **Mallam Jimoh & Co. v Mallam Akande & Anor**⁹⁰, *ipso facto* it is necessary to show that wrongful admission of evidence has affected the decision of the court differently from what it would have been if such evidence was not admitted. **Suntai & Anor. v Tukur**⁹¹.

Methods of Exercise of Judicial Power

What guides the court while exercising its discretion includes:

- i. Clear appreciation of the issues in contention between the parties;
- ii. Clear understanding of the case of each party to the dispute as put forward in the pleadings or plea and in the evidence called by it;
- iii. Trial of the case by hearing according to the Rules of Procedure;
- iv. Resolution of the issues of fact and of law involved in the case;
- v. Application of the facts and law as resolved to the issues in contention between the parties and drawing of inferences therefrom;
- vi. During the trial, invocation of any necessary and relevant inherent powers of the Court;
- vii. Decision of the case before the court and making of declarations, reaching a verdict, making consequential orders, awards, sentences, sanctions and giving any necessary directions;
- viii. Enforcement and/or execution of the judgment of the Court.

Factors Militating against the Exercise of Judicial Power

In view of the recognized importance of the judiciary in the scheme of things in a presidential democracy like our own and the very wide powers given to the courts by the Constitution itself, it have become necessary to ask the question; how has the judiciary fared in practice. It will be seen at a glance that many factors tend to militate, endanger, or completely obstruct the exercise of judicial powers by the Courts.

These may be summarized as:

1. The position, stance and performance of Attorneys-General;
2. The general difficulties of enforcement of Court's decisions;
3. The systemic importance of the judicature;
4. Complete ouster of Court's jurisdiction;
5. The doctrine of *locus standi*;
6. Non-justiciability; and

⁸⁵ (1985) 1 NWLR (pt. 156) p. 163.

⁸⁶ (1988) 9 SC 689 @ 70.

⁸⁷ (2001) 2 SC pt II 21.

⁸⁸ (2002) 5 SC pt I p. 122 @ 132.

⁸⁹ Section 272(2) Evidence Act 2011.

⁹⁰ (2002) FNLR pt. 129 p. 1532.

⁹¹ (2003) FWLR pt 157 p. 1128 @ 1146.

7. The “Housing” of the judiciary in the Constitution: The Judicial Service Commission.

Remedial Approaches

The consequences of abuse of judicial discretion in Nigeria have become so grave. How can the waters of fury be calmed? Since the courts represent the last bastion of. To prevent abuse and manipulations for personal gains, as well as guarantee that justice is always done for the good of the society and man, the under-listed should be done 1. There should be an impartial and independent judiciary. For judicial officers to successfully carry out their duties, the judiciary must be truly and completely independent. Anything that represses a judge is most likely to hamper the efficient discharge of his duties. The judiciary must not depend on the executive to live that is a threat to the independence of the judiciary. In Nigeria, Magistrates and Area Customary Courts Presidents, perform their duties with moral fear. They are mere glorified servants, who have no job security nor sure if their salaries burdened with shall bloated taxes ever be paid. The judiciary must continue to seek less assistance from the various state governors as well as the president of the country, which should be redressed now by making them judicial officers in the constitution. I hereby submit that there is complete autonomy for the judiciary, intelligent, competent and highly judges would carry out their duties uprightly, thereby ensuring that justice is done at all times. No wonder **Lord Denning** in his book, while stating the role of judge said:

“My firm belief is that the proper role of judge is to do justice between the parties before him... The constitution does not allow reasons of state to influence our judgment. God forbid it should we must not regard political consequences however formidable they might be. If rebellion were certain consequences, we are bound to say fiat justia rilat coelum⁹²

2. The immunity and independence of judges have to be preserved. Lord **Denning MR.** in the case of **Sirros v Moore⁹³** clearly stated that:

Every judge of the courts of this land-from the highest to the lowest-should be protected to the same degree... if the reason underlying this immunity is to ensure that they may be free in thought and independent in judgment, it applies to every judge whatever his rank.... Each should be able to do his work in complete independence and free from fear⁹⁴.

Oputa JSC re-echoing the words of **John Marshall**, the third **Chief Justice** of the **United States of America** over a century ago, said that ‘a judge must be completely independent with nothing to influence him but God and his conscience⁹⁵’. Where immunity and independence of judges are ensured, they will be better disposed to exercise their judicial discretion impartially, without fear or favour. Where a judge is discovered to have been influenced by personal aggrandizement, pecuniary interest and other tainting extraneous things, he should not be spared, but such a judge be subjected to the relevant disciplinary action. As stated by the Court of Appeal in **Candid-Johnson v Edigin⁹⁶**

In order to sustain the immunity of a judge or a magistrate under the prosecuting statutory provisions, the offending act must be shown to have been done in good faith. In this case, the respondents reaction to the conduct of the appellant was not in good faith. Consequently, it is indefensible and cannot be protected...⁹⁷

Lord Denning MR. bluntly stated the view that “if the judge has accepted bribes or be in the least corrupt, or has perverted the course of justice, he can be prosecuted in the criminal courts”.⁹⁸

⁹² The Family Story London Butter Worths 1981 at 21.

⁹³ [1974] 3 All ER 776.

⁹⁴ *Ibid* 785.

⁹⁵ C. Oputa. “Independence of the Judiciary with Particular Reference to Appointment, Removal and Discipline”, in Law Development and Administration in Nigeria, Vol. 1 Lagos. The Federal Ministry of Justice 1990, 498.

⁹⁶ [1990] 1 NWLR (pt. 129) 659.

⁹⁷ *Ibid* 563.

⁹⁸ *Sirros v. Moore* (supra) 71.

3. There should be financial independence of the judiciary. The judiciary should have its annual budget and once it is approved, the judiciary should be given the money and be allowed to implement its own budget. The judiciary should be financially independent from the executive arm of government, both at the federal and state levels. Judiciary must seek less financial favour from the different state governors, as well as the President. It is not enough to pay the salaries and allowances of judges from the consolidated revenue fund, the judiciary should have control of the finances of the judicial arm for the necessary running costs. It is very sad that the condition of service for magistrate leaves much to be desired. They receive their salaries from the state and they are paid at the same time with other public servants. This does not augur well for the judiciary. It is greatly recommended that magistrates should be classified among the judicial officers whose salaries and emoluments are charged on the consolidated revenue fund, and so provided in the Nigerian constitution.
4. Again, the qualification of lawyers who seek appointments to become judges and the method of such appointments need to be reviewed. *Section 231(3), 238(3) and 271(3) of the 1999 Constitution of the FRN⁹⁹* (as amended) provide for the qualification of person to be appointed as judges of the Supreme Court, Court of Appeal and judges of High Courts of the states, the researcher was of the view that the number of years for a person is qualify to practice as a legal practitioner and to be appointed as a judge in Nigeria is most inadequate. With increasing level of education, at least a postgraduate degree in law (LL.M) should be among the requirements. For practicing lawyers, they must be shown to be serious minded practitioners who have done a reasonable number of contested cases at the various level of courts, while those in the magistracy who intend to be judges of the higher bench must be the ones that possess master degree in laws (LL.M), and have handled reasonable number of contested cases and whose judgment have not been frequently reversed by the appellate courts.
5. There is an urgent need to review the mode of appointment of judges. Appointment of justices of the Supreme Court, Court of Appeal and High Courts of the various states is spelt out in *section 231(2), 238(2) and 271(2) of the 1999 Constitution of the FRN¹⁰⁰* (as amended). It is a common knowledge that some appointment are made to reflect the federal character principles. With these provisions it is not unlikely that it is those persons, who can be easily manipulated by those in the executive arm and the politicians in the corridors of power that are often appointed as judges. Thus merit, experience and competence are sacrificed at the altar of mediocrity. There is therefore the need to insulate judges from the influence of partisan politics and politicians. Appointment of judges should be left completely in the hands of National Judicial Council, Judicial Services Commission of the different states and the Bar, under the leadership of the Nigeria Bar Association.
6. There exist many statutory provisions for the realization of justice in criminal justice system. Criminal Procedure Act 945 Cap C41 LFN 2004 and Evidence Act 2011¹⁰¹, amongst others stipulate provisions for criminal trial. *Sections 33-44 of the 1999 Constitution of the FRN¹⁰²* (as amended) provided for fundamental rights of the citizens. Of particular importance are *section 35 and 36*, which provide for the right to personal liberty and right to fair hearing. All that is required is religious compliance with the statutory provisions. It may be important to have a legislation to give impetus to and stimulate *section 3(2)(c)(d)(f) and (f) of the Administration of Justice Commission Act 1991 Cap A3 LFN 2004¹⁰³*, which provide *inter alia*, for speedy trial of criminal matters. This may be done by legislating a definite time in to guarantee accelerated hearing of

⁹⁹ *Section 231(3), 238(3) and 271(3) of the 1999 Constitution of the FRN⁹⁹* (as amended)

¹⁰⁰ *Section 231(2), 238(2) and 271(2) of the 1999 Constitution of the FR (as amended)*

¹⁰¹ Criminal Procedure Act 945 Cap. C41 LFN 2004 and Evidence Act 2011.

¹⁰² *Sections 33-44 of the 1999 Constitution of the FRN* (as amended).

¹⁰³ *Section 3(2)(c)(d)(f) and (f) of the Administration of Justice Commission Act 1991 Cap A3 LFN 2004*

criminal matters, especially cases on appeal where wrongful exercise and or abuse of judicial discretion by a trial judge constitutes the ground for the appeal.

7. Integrity is also recommended as a basic requirement a person seeking to be appointed as a judge should possess. Courageous and people with integrity should be made judges *Black's Dictionary* defines integrity as soundness of moral principle and character, as depicted by one person dealing with others in the making and performance of contracts and the fidelity and honesty in the discharge of trust¹⁰⁴. It is the primary duty of judges to do justice to all parties. Justice demands that the innocent be assured of personal liberty and also that the guilty are punished. It also demands impartiality such that the law should be the same for all. It requires only judges with uncompromising integrity to meet the dictates of justice in applying the powerful weapon of judicial discretion in criminal matters and doing justice to all parties at all times. The scriptures clearly portrays the importance of integrity in proverbs chapter **19 1** that "better is the poor that worketh in his integrity, than he that is perverse in his lips, and is a fool¹⁰⁵". As the psalmist says "let integrity and uprightness preserve me...¹⁰⁶" (**Psalm chapter 25 verse 2 8**). Also the issue of regular training and retraining of judges cannot be ignored. This can be in form of continuous legal education, workshops, seminars, symposiums, in-house training, periodic peer review etc. Regular training and retraining will help in the stimulation of knowledge and thus eliminating avoidable mistakes and abuse of judicial discretion. In the process of regular training, judges are obliged to acquire new techniques skills and problem-solving ability that will facilitate enhanced performance and a high degree of effectiveness in the discharge of their duty **Justice Chukwudifu Oputa JSS**, in his paper titled "**Judicial Ethics, Law, Justice and the Judiciary** brilliantly said that:

It is a known fact that lawyers have little respect but considerable contempt for any judge who is lacking in learning and who is not completely at home in and in charge of his court. A judge who lacks the salt of wisdom is insipid, according to Justinian. An insipid judge is not an asset to the due administration of justice. In the hands of an ignorant judge justice is sure to suffer. Hence Justinian was able to affirm that: Ignorantia iudicis est calamita innocentis – (the ignorance of the judge is the doom and undoing of the innocent)¹⁰⁷.

It is thus incumbent on each and every judge to strive assiduously to improve his judicial skills and his legal education. The life of a judge is thus one of continuous and continued reading in order to keep abreast of the changing law and avoid avoidable mistakes. It has been said that no one can calculate the aggregate amount of evil inflicted on the community by a bad decision¹⁰⁸. Regular training and retraining will enhance the judges' knowledge which certainly will impact on their exercise of judicial discretion in handling criminal cases. It will help in minimizing abuses in the exercise of judicial discretion and help in containing the trust and confidence of the people in the judiciary. The bar and bench forum should be sustained regularly to discuss issues mutually beneficial to the legal profession.

CONCLUSION

The exercise of Judicial discretion under the Nigerian legal system is for the smooth running of the system though quite often the concept is usually perceived with mixed feelings or viewed with skepticism; especially as most people often times attach political connotation to it, especially where the decision reached by the court is favourable to one individual or group based on the ethnic or political

¹⁰⁴H. Campbell, *Black Law Dictionary* 6th Edition (U.S.A West Publishing Company 1990).

¹⁰⁵ New Testament Psalms and Proverbs (Nashville, TN The Gideon International 2013). p. 616.

¹⁰⁶ New Testament Psalms and Proverbs (Nashville, TN The Gideon International 2013). p. 487.

¹⁰⁷Hon. Justice C.Oputa "*Judicial Ethics, Law, Justice and the Judiciary cited in the Nigerian Judiciary: Towards Reform of the Baston of Constitutional Democracy by (Hon Justice D. Mustapha CJN) at Advance Legal Study Lagos 2011*).

¹⁰⁸ Judicial Lecturers; *Constituting Education for the Judiciary*, Lagos, Institute of Advance Legal Studies, 1990, 37.

inclination, the other non-favoured group will usually raise concern by way of criticisms and accusations of bias on the part of the court.

There is urgent need for law reforms to keep the Nigerian citizens informed on the need for applicability of the concept to ensure stability in the system as the legislature that made the law will never cover all the foreseeable issues that may come up in the system.