

Perspectives and Limits of Judicial Discretion in Nigerian Courts

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Abstract

The paper examines the judicial power of discretion, the meaning, the perspective of the use, and certain legally stipulated limitations to the exercise of the power by judges; by asking the question of whether in certain circumstances, where the laws fail to provide definite solutions for matters before the court, and the courts embark on interpolation in order to identify and apply related concepts and rules to arrive at a decision, amounts to making laws?, A fact which judges often deny, yet seldom create fresh rules and theories in order to fill the vacuum left by legislation. After all, a court would not simply throw out a case simply because there is no law that directly regulates the subject for which the court is called upon to decide.

Introduction

It is often argued that judges exercise enormous powers, the extent of the power is mostly imbedded deep in the law, leaving both the judge and lawyer appearing before the judge prancing about the exact scope of interpretation of the law. The prime duty of the judiciary as a constitutional arm of the Government is to through the Courts interpret laws enacted by the Legislature. Judges interpret these laws all the time even when no clear guidelines or parameters or laid down procedure of interpretation are handed down by the legislature. In the situation, the court finds itself in a state of absolute and unbridled discretion; whereby the judge must make findings and deliver a decision no matter what it takes even when the law is blurred on the core of the link between the law and the question for determination or facts before the court. This boundless powers of the judicial authority are sometimes abused, or misapplied; hence the gradual simultaneous growth of the checks and limitations to such judicial discretionary authority.

Common Law and Judicial Discretion

The common law has its origin in the middle Ages of the England, and developed from mainly judicial customs and traditions that made up the local systems, and was common to the whole of England. But long ago these local systems disappeared², and for centuries the phrase “the common law” has meant the basic law of the land which was developed by the judges of the old common law Courts³. Its distinctive characteristic is that it is almost entirely a development of the judges; its principles are to be discovered in previous cases, and not in a comprehensive code, such as the Code Civil of France,⁴ or the Nigeria’s Penal Code or Criminal Code⁵.

The notion that the rules of the common law are derived from previous cases therefore not made by the judge instant is dismissed as unsatisfying; especially when enquiring as to the ultimate source of the rules expounded in the previous cases, there must at some time have been a first case for which previous rulings gave no guidance. The previous and initial ruling is usually the discretionary brainchild of a Judge.

Nevertheless, and even by the common law standards, the judicial system is designed in a manner that certain limitations are always placed in the way of the courts, to define, refine, qualify and regulate the exercise of such powers, through the law, practice or convention; what is clear however is that no legal power or assigned authority is without limit.

Interpreting the Constitution and other Legislation

Constitutions and most codified legislation are usually framed by adopting a concise and compact approach to the issues it addresses or covers. The respective sections or parts of the written laws are a summary of the intendment of the framers of such a law, the court is thereby conferred with the onerous task of appropriately interpreting the intention of the framers, and properly applying the law to achieve the desired result. This is complex tasks which require the judge to add flesh to the rather bare provision of the law to cloth the law with its intended objective, and also, design for the law a model for practical application. This task once carried out by a

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² With the Norman Conquest of England in the year 1066, the invading Normans united all the axles and settlements around the mainland England under one rule, the common law were the laws that were generally acceptable by all the classes and settlements and applied by the Common Law Courts.

³ The Court of Kings Bench, the Court of Common Pleas, and the Court of Exchequer.

⁴ See A. E. W. Park *The Sources of Nigerian Law* (1986) Lagos AUP Limited.

⁵ once a law is codified the Courts are restricted to interpretation and application to facts only, as against the classic english law when Common Law was substantially a development of the Courts.

superior court, continues to be abided by lower courts, coordinate courts, and subsequent similar cases by the same superior court.

The doctrine of judicial precedence or case law requires the court to adopt all means possible towards applying legislation by deploying methods that enable the law to work or add what may be missing in the law to bring it in tune with reality of applicability. It is this enormous power of qualifying laws where necessary, and making additions to laws where needed in order to make the law work that provokes the question that is asked; in that situation what was the source of the rule applied by the judge? In relation to common law Park explains;

A formal answer that is occasionally given by the judges of common law courts in the past was that the rule to be applied originates in the “common custom of the realm”. That is, however artificial and modern judges no longer employ it as a justification for their decision upon “cases of first impression”. The generally acceptable principle however is that; in the last analysis the decision of the judges do not merely expound rules that existed before, but rather themselves create the principles of common law. Nevertheless it should be concluded from this that all case law is in fact legislation disguised as the exposition of pre-determined rules. The judges hardly ever admit themselves to be making new law; it is rare indeed for a judge to be as frank as was Lord Denning M.R. in the case of **Att.-Gen. v. Butterworth**¹ wherein the learned Jurist confirmed that “it may be that there is no authority to be found in books, but if this be so all I can say is that the sooner we make one the better.”²

While in very rare situations, judges in fact make what may appear like fresh enactment having no exact or direct link or root to any existing enactment, where the connection to an existing enactment is more or less constructive or remote, the vast majority of cases of the law administered by the judges is perfectly well established beforehand, and decision of the judge is not more than an application of it to particular facts, having little or no effect on its contents. And even when the courts invoke their discretion by establishing new rules or alter old ones, they do not in general feel themselves free to declare openly that since no existing rule precisely covers the case, they are going to formulate the one they consider most appropriate. Instead they undertake a subtle and highly skilled process of considering the law on analogous subjects, and combining various features from some or all of them, to produce a fresh rule exactly applicable to the issue before them. Occasionally, they may take a rule a little further than it has been taken before, so helping to create a new principle of law, but such cases are highly exceptional, and furthermore most of the judges take a strict view of the limits within which they can make these extensions and modifications.

These powers of judges well founded in convention and practice of our legal system is often regulated either by law, or by the same conventions, practices and principles of law. The powers are generally regarded as discretionary powers of judges or discretion of courts mainly because the judge has ample right to decide as he wishes and only guided by conscience and the basic principles of rule of law.

Thus, it is imperative to briefly delve into these well laid out conventions, practices and established principles of law, to populate and amplify the regulations and defined limits, as adumbrated, for the exercise of these discretionary powers.

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 agencies³. 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; been that legislations will always require first time interpretation by the courts of law to be understood and also for judicial precedence to be formed, so also the courts will have to reach a decision anyway when faced with an issue whether legislation properly covers the issue 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 the courts as enunciated in all statutes is the interpretation of an existing law. Yet, an “unquantifiable” power lies in the judges’ hands where the law is silent

¹¹ (1962) 3 W.L.R. 819 at 832 cited in Park, *The Sources of Nigerian Law* (London: Sweet and Maxwell Ltd, 1986) at page 6.

² *ibid*.

³ Advanced English Dictionary and Thesaurus on Android Operating System.

on a matter before the court. Aptly, the first time scenario offers ample discretion in giving life to the legislation and amplifying the intention and mindset of the framers and makers of the legislation in question. In that situation; What was the source of the basis of the interpretation adopted? And/or the source of the rule applied by the judge where no law covering the subject of analysis exist?¹ The judge is bound to decide anyway, discretion is invoked and conclusions are drawn from somewhat related rules, or the set of facts as presented is somehow married to the law or laws that are closest in meaning to it.

That is the expanse of judicial powers. The discretionary powers of judges arise in the final analysis in filling up gaps not fully covered by existing legislation or providing flesh and proper interpretation of an existing legislation. In the vast majority of cases the law administered by the judge was perfectly well established beforehand, and his decision was no more than an application of it to particular facts having little or no effect on its contents, but discretion craves in determination of applicability of a specific previous decision on a new case. In the grant of injunctive and equitable reliefs across all nature of cases, the judge enjoys enormous powers in the grant or refusal.

As such, the controversy that rages on is no more the question of whether indeed judges are armed with such discretions, but what are the limits of the exercise of such discretionary powers, the parameters for implementation.

Conceptual Framework

The resolution of a matter based on the discretion of the court must depend on the facts and circumstances of each case². This takes us to the need to briefly examine certain avenues of judicial discretion and peculiar parameters guiding the exercise of such powers in each incident, situation and case, approaching the argument from juxtaposed angles of anti and pro judicial discretion at this stage would afford us the benefit of the assimilating the respective contexts. This is best understood from the varied definitions offered by scholars and lawyers.

Isaacs³ explains that on matters of discretion of the court, lawyers are often confronted with two series of dicta that are repeated with but little variation almost as a matter of course. First, there is that group which decries discretion as the rule of tyranny and would limit it in every possible way. A distinction is drawn between discretion in the ordinary sense and judicial discretion, which is said to be “legal” or regulated by rule.

... discretion herein is the art of being circumspect, wary and discrete in a bid to arrive at a reasonable and plausible judgment.⁴

Black’s Law Dictionary⁵ has this to say;

Judicial and legal discretion. These terms are applied to the discretionary action of a Judge or court, and mean discretion bounded by the rules and principles of law, and not arbitrary, capricious, or unrestrained. It is not the indulgence of a judicial whim, but the exercise of judicial judgment, based on facts and guided by law, or the equitable decision of what is just and proper under the circumstances. It is a legal discretion to be exercised in discerning the course prescribed by law and is not to give effect to the will of the judge, but to that of the law. The exercise of discretion where there are two alternative provisions of law applicable, under either of which court could proceed. A liberty or privilege to decide and act in accordance with what is fair and equitable under the peculiar circumstances of the particular case, guided by the spirit and principles of the law.⁶

Discretionary power means the power to choose between different options, when each option is viable within the framework of the law. Where there is no choice, there can be no discretion. Thus, when the language of a legal text mandates the court to act in a certain way, the court has no choice and has to act accordingly.⁷

The word “discretion” when applied to judicial officers, is defined in Black Law Dictionary, as meaning:

"A power or right conferred upon them by law of acting in certain circumstances, according to the dictates of their own judgment and conscience, uncontrolled by the judgment or conscience

¹ Park, *The Sources of Nigerian Law* (Lagos: Sweet & Maxwell 1963)

² See *Senate President v. Nzeribe* (2004) 41 W.R.N 39 at 45.

³ Nathan Isaacs, “The Limits of Judicial Discretion” vol 32 *The Yale Law Journal*, No 4 (Feb., 1923), pp. 339-352.

⁴ See *Ezinwa V. Agu* (2003) 33 W.R.N 38 at 35 (Per Fabiyi, JCA).

⁵ 5th Edition at page 419.

⁶ Black’s Law Dictionary

⁷ Kapeliuk D.’ “The Limits of Judicial Discretion: Emotive Dispositions of Israeli Courts in Implementing the New York Convention” vol 24 *Ohio State Journal of Dispute Resolution* January 4, 2009.

of others. It connotes action taken in light or reason as applied to all facts and with view to rights of all parties to action while having regard for what is right and equitable under all circumstances and law."¹

It follows, therefore, that a judicial officer saddled with the responsibility of exercising discretion is required to arrive at the decision in every case or situation based on the facts placed before him in the very case and apply the applicable law. His decision is therefore likely to vary from case to case since the circumstances in each case may vary. The question of stereotype or strict application of the rule of judicial precedent would not be of importance.

Judicial discretion is a very broad concept because of the different kinds of decisions made by judges and because of the different limits placed on those decisions. Section 6 (6) of the Nigerian Constitution² confers enormous powers on the court of law, leaving the courts the wide leverage to determine the extent of its powers; Section 6 (6) states;

The judicial powers vested in accordance with the foregoing provisions of this section -
(a) shall extend, notwithstanding anything to the contrary in this constitution, to all inherent powers and sanctions of a court of law³

The Nigerian courts pursuant to this ample licence have over the years carved a domain of operation for themselves, formulating the basic principles of law and developing the Nigerian legal system based on respective documentary and historical sources and obviating the necessity of additional enactments to support the judicial evolution and adventures⁴.

In practice, the constitutional powers of the Nigerian Courts are largely similar to that of the United States of America (US). Article III, Section 2, of the U.S. Constitution also grants the judiciary broad power, which extends "to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made." Judges' decisions must be made based on the "rule of law," which, in the United States, derives not only from statutes passed by Congress but also from the tenets of the Constitution. In addition, Common Law, or judge-made law, provides limits based on the principle of Stare Decisis, which holds that a court's decision in a particular case must comport with the Rule of Law as they have been determined by that court or by other, higher-level courts, in previous cases. Legal conclusions that do not fit within the prescribed limits of both statutory and common law may be overturned by a reviewing court if that court determines that the conclusions were an abuse of judicial discretion⁵.

At a certain period in time, the sentencing of those convicted of crimes the US was almost entirely within the discretion of judges. Judges could take into account various mitigating factors (circumstances reducing the degree of blame or fault attributed to the offender) and craft a punishment that most appropriately fit the crime. For example, a first-time petty offender convicted of shoplifting might be sentenced to Parole and community service under the US system.⁶ Similarly, the Nigerian Courts usually consider seriously the plea for mitigation of sentence of a first offender; the courts would often reduce the sentence to barest minimum for such offenders.

The US, in order to curb the limitless discretion of **judges** and the arbitrary use of the power in such circumstances, introduced what they called the Federal Sentencing Guidelines. With the implementation of Federal Sentencing Guidelines and with mandatory minimum sentencing legislation, which was passed in both US Congress and the US states, judges no longer had the broad latitude to make the sentence that fits the crime and the defendant. In some states, first-time offenders have been sent to jail for life for the possession of large amounts of controlled substances. Many federal judges in US must incarcerate parole violators for minor parole violations because the guidelines specifically direct them to and severely limit their sentencing choices. A judge's failure to abide by the sentencing guidelines in issuing a sentence would constitute an abuse of judicial discretion.⁷

¹ Blacks Law Dictionnary 6th edition, 1990, page 466

² Constitution of Nigeria 1999 (as amended).

³ Ibid, Section 6 (6).

⁴ See for Instance S. 45 (1) of the Interpretation Act, Laws of the Federation of Nigeria, 1990, which empowers the High Courts to apply the common law of England, the doctrine of equity together with the statutes of general application in the resolution of disputes among Nigerians.

⁵ The Free Dictionnary, Farlex visited on the 27th January, 2013.

⁶ ibid

⁷ Ibid

In view of the leverage allowed the courts by the Nigeria's Constitution to exercise judicial discretions; The courts have over time evolved a perspective of the exercise of judicial discretion to be governed and regulated by case law, which requires that such discretion must be exercised judiciously and judicially.

Meaning of Judicial and Judicious

On what constitutes judicial and judicious, the Court in the case of **African Continental Bank v. Nnamani**¹ held;

The exercise of the court's discretion is said to be judicial if the Judge invokes the 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 to doing justice to the parties.

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.²

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. In civil cases courts exercise discretion in many respects, most common of which is in grant or refusal to grant injunctions and adjournment of proceedings etc. We shall discuss a few of the instances in this paper.

Bail

The decision to grant or not to grant an application for bail is at the discretion of the Court. However, such discretion must be exercised judicially and judiciously having regard to the right of the accused person to his liberty until he is proven guilty to the crime alleged, and the need for the society to be protected from the grievous criminal act. See the case of **Dokubo-Asari v. FRN**³. See also the case of **Bulama v. Federal Republic of Nigeria**.⁴ The exercise of discretion by the court in the grant or refusal of bail to an accused is governed by several factors which are not necessarily consent as they do change with changing circumstances and time. They cannot be regarded as immutable and applicable for all times. See **Bulama v. FRN**.⁵ The Supreme Court in the case of **Adamu Suleiman v. Commissioner of Police, Plateau State** held;

It is submitted in reply, in the respondent's brief that the criteria that should guide the courts in deciding whether to grant or refuse an application for bail are well laid down by this court in numerous decisions of this court, particularly in **Dokubo-Asari v. Federal Republic of Nigeria** (2007) All FWLR (Pt. 375) 558; at 572; and **Bamayi v. The State** (2001) FWLR (Pt. 46) 956 at 984. It is also argued that the bailability of an accused depend largely on the weight the judge attached to one or several of the criteria open to him in any given case. The court below in this case is said to have exercised its discretion judicially and judiciously when it dismissed the appellants' appeal having regard to the facts tendered in the case.

It is further submitted that the presumption of innocence does not make the grant of bail automatic since there is always the discretion to refuse bail if the court is satisfied that there are substantial grounds for believing that the applicant for bail pending trial would abscond or interfere with witnesses or otherwise obstruct the course of justice. The crucial factor is said to be the existence of substantial ground for the belief that he would do so.

Also, since the issue of grant or refusal of bail is a discretionary matter, previous decisions are not of much value. They are therefore said not to be binding but can only offer broad guidelines as each exercise of discretion depends on the facts of each case.

It is therefore settled that the decision whether to grant or refuse an application for bail involves exercise of judicial discretion in every case. The criteria to be followed in taking such a decision as laid down by courts include;

- (i) the nature of the charge;
- (ii) the strength of the evidence which supports the charge;

¹(1991) 4 NWLR (Pt. 186) 486

² On the principles of exercising discretion by the court, see generally *University of Lagos v. Olaniyan* (1985) 1 NWLR (Pt.1) 156 at 175. *Williams v. Williams* (1987) 2 NWLR (PL54) 66; *Agbolohun v. Balogun* (1990) 2 NWLR (Pt134) 576.

³ (2007) 12 NWLR (pt. 1048) 320 SC.

⁴ (2004) 12 NWLR (pt 888) 498, CA.

⁵ *Supra*.

- (iii) the gravity of the punishment in the event of conviction;
- (iv) the previous criminal record of the accused, if any;
- (v) the probability that the accused may not surrender himself for trial;
- (vi) the likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him;
- (vii) the likelihood of further charge being brought against the accused; and
- (viii) the necessity to procure medical or social report pending final disposal of the case.¹

SENTENCING

The Black's Law Dictionary² defines sentence as "judgment formally pronounced by the court or judge upon the defendant after conviction in a criminal prosecution, imposing punishments to be inflicted".

The Nigerian Law Dictionary³ defines sentencing as the judgment of a court pronounced, especially in a criminal proceeding, in respect of the nature of sanctions to be imposed after an accused person has been adjudged guilty of the offence he is charged for.

The Oxford Concise Law Dictionary 7th Edition defines sentence as the "judgment of a court particularly in an ecclesiastical or criminal cause".

A sentence of the court can be defined as a definite disposition order issued by a court or other competent tribunal against a person standing trial, at the conclusion of a criminal trial, subsequent to finding of guilt against him and must be an order⁴ which is definite in its nature, type and quantum⁵. The Criminal Code and the Penal Code as well as the offence-creating statutes specify the quantum of sentence while the sentences themselves find their legitimacy in the Criminal legislations applicable at the states and federal levels as well as the Probations of Offenders Law in the case of probation orders made in the Northern States⁶.

Sentencing is a very broad field accommodating different approach and ideas. Also, sentencing is an exercise of a discretionary power that is little guided in a country such as Nigeria. Hence, the power presents "sentencers" / judges with a very wide playing field and accommodates individual inclinations and approaches or solutions to the same problem. The differences in approaches, however, become a problem in society when it presents the criminal justice system as irrational, inconsistent and unjust. The relative recent concern with sentencing practice beyond the legal provisions undergirding it has paced by other experts aside lawyers and judges who have drawn attention to the importance of questioning both sentence legislation and sentencing practice as well the philosophies or logic upon which these rest.⁷

Offenders are guaranteed fair hearing under the Constitution of Nigeria.⁸ It is also settled law that no one can be punished for an offence unless it is contained in a written law.⁹ Personal liberty¹⁰ of citizens is also guaranteed and can only be lost or taken in due execution of sentence or order of court after conviction and the finding of guilt.

The provisions in laws that criminalize acts provide sanctions for breach of the laws and commission of such acts or omission provided therein. The sanctions are defined and stipulated and the judge is expected to comply

¹ See *Bamaiyi v. The State* (2001) 8 NWLR (Pt. 715) 270; *Dokubo-Asari v. Federal Republic of Nigeria* (2007) All FWLR (Pt. 375) 558; *Abacha v. The State* (2002) 5 NWLR (Pt. 761) 638; *Ani v. The State* (2002) 1 NWLR (Pt. 747) 217; *Ekwenugo v. Federal Republic of Nigeria* (2001) 6 NWLR (Pt. 708) 9; and *Eyu v. The State* (1988) 2 NWLR (Pt. 78) 607.

² 5th Edition

³ Nchi . I., *Nigerian Law Dictionary*, Published by Greenworld Publishing Company Limited (Jos-2000)

⁴ The term Order here refers also to sentencing but mainly refers to order made after conviction as against other types of orders that may be made by the court in the course of the trial. See Section 248, Criminal Procedure Act, Cap C41 LFN, 2004, Similarly, Section 305, Criminal Procedure Code, Cap 30 of the LFN, 1963 which interchangeably uses the phrases "any sentence or order of a Criminal Court".

⁵ A. A. Adeyemi: "Administration of Justice in Nigeria: Sentencing, in Yemi Osibanjo and Awa Kalu (Eds.) *Law Development and Administration in Nigeria*, (Lagos: FMOJ, 1990), P109. And cited in Peter A. Anyebe: *Sentencing in Criminal Cases in Nigeria and the Case for Paradigmatic Shifts*. Published in www.nials-nigeria.org/journals/peter. last visited on the 11th /7/13.

⁶ P. A. Anyebe: "Sentencing in Criminal Cases in Nigeria and the Case for Paradigmatic Shifts. Published in www.nials-nigeria.org/journals/peter. last visited on the 11th /7/13.

⁷ Ibid.

⁸ Section 36 1999 Constitution as amended.

⁹ See Section 36 (12) 1999 Constitution as amended.

¹⁰ Section 35 of the 1999 Constitution as amended.

with the injunctions spelled out in both the descriptive aspect, and the punishment part of the provision. A punishment provision in a criminal law presents itself in two ways; the first is where the quantum of sentence is fixed by law, where the discretion of the court is fore-closed on account of fixed provision of the law, as in most capital crime provisions carrying death penalty, once guilt is established the punishment must be carried out in full. The second is the type of provision laded with discretional opportunity for the judge.

Sentences Fixed By Law

Where the quantum of sentence is fixed by law, the discretion of the court is foreclosed on account of fixed provision of the law, as in most capital crime provisions carrying death penalty, once guilt is established the punishment must be carried out in full. Hence, after an accused is convicted of an offence, the judge must pass a sentence on him. The sentence passed must be one prescribed for the offence under the statute creating it¹ and the judge cannot differ. There are also certain non-capital offences with fixed minimum sentence.

Death Sentence

Under Nigerian criminal law various offences are punishable by death across the Federation including murder,² treason,³ and treachery,⁴ conspiracy to commit treason,⁵ directing and controlling or presiding at an unlawful trial by ordeal which results in death⁶ and armed robbery.⁷ More recently, kidnapping has been added to the list in Abia, Imo and Akwa Ibom States⁸ and oil theft and crude oil bunkering in Rivers and Enugu State. The introduction of Sharia based criminal law in some states in Northern Nigeria has widened the number of capital offences to include adultery, sodomy, lesbianism and rape.⁹

Where the death sentence is prescribed against a convicted felon, the sentence is mandatory. The judge has no discretion in the matter, after an accused has been found guilty of a capital offence; the only sentence open to the court to impose is that of death which the highest punishment in the array of punishments under Nigerian law.

Non-Capital Offences with Fixed or Mandatory Minimum Sentences.

There are certain offences with minimum sentences stipulated by law, and in such instances, the court is mandated on conviction to impose nothing below the stipulated sentence. For example section 12 of the ICPC Act 2000¹⁰ provides;

Any person who, being employed in the public service, knowingly acquires or holds, directly or indirectly, otherwise than as a member of a registered joint stock company consisting of more than twenty (20) persons, a private interest in any contract, agreement or investment emanating from or connected with the department or office in which he is employed or which is made on account of the public office, and **shall on conviction be liable to imprisonment for seven (7) years.**

Most of the other provisions of the ICPC Act make such mandatory provisions by the use of the word shall¹¹ of which by the trite doctrine of statutory interpretation “the word shall connotes mandatory discharge of a duty or obligation, and when the word in respect of a provision of the law that requirement must be met”.¹²

It is a pre-supposition that where any penal provision deploys the word shall in qualifying a specific sentence, then the sentence therein must be imposed.

Discretionary Sentence

There are usually three types of situations in which a court can impose a discretionary sentence;

¹ Oluwatoyin Doherty: Criminal Procedure in Nigeria: Law and Practice. Blackstone Press Limited, 1999, page 317 also cited in P. A. Anyebe supra page 160.

² S. 319 CC and S. 220 PC. See generally P. A. Anyebe page 160.

³ S. 37 (1) CC; S. 410 PC.

⁴ S. 49 A. CC.

⁵ S. 37 (2) CC; S. 411 PC.

⁶ S. 208 PC.

⁷ S. 1 Robbery and Firearms (Special Provision) Act, Cap. R11 Laws of the Federation of Nigeria, 2004.

⁸ See Anyebe P. A. (supra) page 160.

⁹ Kano and Zamfara Shariah Penal Codes, 2000.

¹⁰ Corrupt Practices and Other Related Offences Act, 2000.

¹¹ See for instance Sections 8 to 26 of the ICPC Act 2000. Similar provisions in EFCC Act e.g S. 18 (2).

¹² Per Bode Rhodes-Vivour JSC in the case of Tabik Investment Ltd v. Guarantee Trust Bank Plc.

1. Where the law simply provides a penalty without stipulating its maximum;
2. Where the law prescribe a statutory minimum above which the court may discretionarily impose any sentence; and
3. Where the law provides a range between a statutory minimum and maximum leaving the court to exercise the discretion in any manner it deems fit and appropriate within the prescribed range.¹

The judge in exercise of discretion in the award of punishment is expected to act within a set benchmark defined by parameters that are not exactly sanctioned by law, but mostly by practice, convention and judicial precedence, with rather weak and non-binding directives stipulating conditions for exercise of discretion.²

The allocutus, mitigating and aggravating factors are all conditions that influence the exercise of discretion by a judge in awarding sentence on a convict but no law particularly obliges the judge to adopt any of this factors.

Allocutus is the statement made before the court by a felony or treason convict before his sentencing, appealing for leniency in the sentence yet to be awarded. Allocutus or plea of mitigation in certain parlance influences the mind of the judge to exercise discretion favorably. And where the judge is swayed by the plea or appeal of the convict or his counsel, a lighter or more liberal sentence is imposed. This consideration confers on the judge an ample leverage to select a sentence that is less than the maximum in favour of the most minimum provided by the law. The judge is not guided by any statutory standard for determining when to be lenient and when not. However such factors as mitigating or aggravating factor mentioned assist the judge in determining when to temper justice with mercy by exercising discretion in favour of far less than the maximum punishment provided by the law, or going lenient by imposing far less than stipulated by the law. Factors that may invoke leniency normally referred to as mitigating factors are the old age of the offender, plea of guilt without wasting the time of the court and show of remorse, membership of the same family, good character or record of been a good Samaritan etc while factors that may lead to invocation of the maximum sentence provided by the law are normally called Aggravating Factor e.g prevalence of such a crime and the need to educate and deter potential offenders, the serious nature of the offence, bad character of the offender or cruelty/callousness in commission of the crime, occupying a position of trust and using the colour of the office to perpetrate the crime as in cases of corruption by public officers etc.

Although there is the general presupposition that sentence can only be imposed in tandem with the enabling statute i.e the Constitution or the other codes, this hardly defines or refines the ambit of judicial discretion in the award of sentence. It nevertheless highlights and helps in the formulation of the judicial rule that discretionary powers of the judge or magistrate must be judicially and judiciously exercised.³ In **Abanyi v. State**.⁴ It was held that the judge has discretion but should state the factor that influenced his decision.

Some other consideration that judges pay attention to are the aims and objectives, or purpose that should be achieved by punishing the offender for the crime convicted. Most of the objectives are rooted in philosophy where scholars have identified and adumbrated the objects of punishment and that each sentence to aim at achieving a defined goal. Goals ranging from Retribution, educative or the utilitarian object of punishment, encompassing deterrence, rehabilitation and reform, and disablement theories. This philosophical theories define the objective of criminal law and punishment in particular, that a sentence in all situations most seek to attain a goal of either deterring the offender and other prospective offenders from committing the punishment, or permanently disabling the offender from further crimes by imprisoning him or physical amputation. Achieve a goal of rehabilitating or reforming the offender or educating the public about the existence and consequence of such a crime, or deterrence principle which seeks to deter the offender or potential offenders from committing the same crime.

In as much as this judicially formulated rule and the other considerations in exercising discretion in sentencing are meant to be served, there are no hard and fast rules on this point. Because they are not statutorily backed, there is nothing mandatory about been strict in compliance with the rules and considerations by the judges.

¹ Yomi Okubote: Current Issues on Sentencing, Custodial Reforms & The Criminal Justice Administration in Nigeria. Written in Honour of Hon. Justice Lawal Hassan Gummi, OFR.

² See the case of University of Lagos v. Olaniyan (1985) 1 NWLR (Pt.1) 156 at 175. Stating the conditions for discretionary power to be judicious and judicial.

³ Essien v. Cop 5NMLR 449 Pg 381 cited in Yomi Okubote supra page 73.

⁴ 1995 9 NWLR 369. Pg. 1.

Historically, judges have had considerable discretion over the determination of criminal sentences. Except for a few cases mostly capital offences with strict minimum sentences imbedded in the laws and imposed on conviction, most other criminal provisions in our statute stipulate maximum sentences and without a baseline for least punishments for such offences referred. Under the American legal appellation referred to as indeterminate sentencing, which allows a wide range of discretion for judges to elect to either be lenient or strict in the application of the specific provision during sentencing. While such discretion theoretically allows judges to tailor sentences to the circumstances of individual crimes and criminals, thereby achieving a sort of ex-post fairness, it also permits variation in sentences that may not be warranted by the observable facts of the case, reflecting instead the judge's own preferences and sometimes biases. The deterrent essence of punishment is defeated because judicial discretion makes it difficult for potential offenders to predict the consequences of their actions, an impediment to the deterrence function of criminal punishment¹.

Injunctions

An injunction is an equitable order restraining the party to whom it is directed from the things specified in the order or requiring in exceptional situations the performance or a specified act. In other words, the order of injunction is available to restrain a party from the repetition or continuation of the particular wrongful act complained of, with the aim of preserving the **RES** or subject matter of the case. See the case of **Adenuga v. Odumeru**² and **Odutola v. Lawal**³. Injunction is a discretionary remedy available to courts in situations where there is a clear and present danger of distortion or tempering with the state of affairs or things subject matter of a pending or determined suit.

There are different kinds of injunctions. These are namely: ex parte/ interim injunction, interlocutory injunction, perpetual injunction, mareva injunction, and Anton Piller injunction. Apart from interlocutory and perpetual injunctions, the rest have limited application and are conceived of being of extremely short duration. See the case of **G.M.C. (UK) Ltd v. Medicaire W/A Ltd**⁴. We shall there only briefly consider Perpetual and Interlocutory injunctions.

Perpetual Injunction

A court may only grant a perpetual injunction at the suit of a plaintiff in support of a right known to law or equity. The plaintiff's conduct must also be taken into consideration in determining whether or not to grant the injunction see the case of **Biyo v. Aku**⁵ and **Afrotec v. MIA**⁶.

A perpetual injunction can only be granted after a trial, when the applicant has established both his rights and the actual or threatened infringement thereof⁷. Perpetual injunction will only be ordered, whenever the tort of trespass to property is committed, under two main circumstances, namely: where there would be an irreparable damage or if the act complained of would be destructive where an injunction to restrain it is not ordered; and where a failure to exercise the jurisdiction would lead to multiplicity of suits.⁸ The grant of the relief of perpetual orders, which should naturally flow from the declaratory orders sought by the claimant in a suit and granted by the court.⁹

Interlocutory Injunction

The discretionary remedy or order of interlocutory injunction is an equitable remedy that is available to restrain the Defendant from repetition or continuance of a wrongful act in relation to the subject matter of the suit "the res" and to maintain the status quo between the parties pending the determination of the substantive suit. See the case of **C.G.C. Nig Ltd Vs Baba**¹⁰. If the Plaintiff is not restrained from his acts in relation to the res, the judgment of the court will be rendered nugatory in the event the suit is determined in favour of the applicant.

In an application of this nature, the following factors as laid down in **Kotoye Vs CBN**¹¹; **Obeya Memorial Hospital Vs A-G., Federation**¹ and a host of cases are considered by the court, to wit:

¹ See Generally Miceli, Thomas J., supra

² (2001) 10 WRN 104 SC.

³ (2001) 11 WRN 34 CA.

⁴ (1998) 2 NWLR (Pt. 536) 86 CA.

⁵ (1996) 1 NWLR (Pt. 422) 1 CA.

⁶ (2001)6 WRN 65 SC.

⁷ See *Globe Fishing Ind Ltd v. Coker* (1990) 7 NWLR (Pt. 162) 265 SC.

⁸ See the case of *Onabanjo v. Efunpitan* (1996) 7 NWLR (Pt. 463) 756 CA.

⁹ See the case of *E.S.C.S.C.v. Geoffrey* (2006)18 NWLR (Pt. 1011) 293 CA.

¹⁰ (2003) 23 WRN 44 at 49 Ratio 6

¹¹ (2000) 16 WRN 71

1. Whether there is or are serious question(s) to be tried.
2. Whether the applicant has a legal right or interest to be protected in the suit or on the subject matter that warrants the grant of the injunctive order.
3. Whether the damages that will occur if the act is not restrained by an injunction are irreparable or are such that cannot be adequately compensated in monetary terms if the applicant succeeds at the end of the trial.
4. Whether the balance of convenience is on the applicant side and more justice will therefore result in granting the application than in refusing it.
5. The applicant is required to give an undertaking as to damages. See the case of **C.G.C. Nig. Ltd Vs Baba**².
6. Whether there is or are serious question(s) to be tried.

In order to determine the question as to whether there is a serious question to be tried the court has to look at the affidavit and pleadings and an applicant for interlocutory injunction has to only show that there is a fair question(s) to raise as to the existence of the right which he alleges. See the case of **Itex Ltd Vs First inland Bank Plc**³.

It is therefore sufficient for the applicant of interlocutory injunction to establish that there exists a question fit to be tried or adjudicated by the court to satisfy the requirement of triable issue; there lies the discretionary power, to determine whether the facts as presented indeed fulfill the conditions as stated.

Adjournments

In the consideration of application for adjournment, the court is expected to balance between two main factors (i) the need to dispose off the case without delay; and (ii) the right of the applicant to be heard without undue coercion. In balancing these factors, the court is guided by the need to do substantial justice. Unnecessary and prolonged adjournments lead to frustration on the part of the parties and ultimately miscarriage of justice. The court may therefore refuse an application for adjournment if in the opinion of the court is designed to delay or defeat justice. See the case of **State v. Duke**⁴, **Odogwu v. Odogwu**⁵ and the case of **Ndu v. State**⁶.

The granting or the refusal of an application for adjournment in a hearing is within the discretion of the court, though subject to the trite guiding principles as discussed earlier in this paper, that the discretion must be exercised at all times not only judicially but also judiciously on the materials placed before the court and the peculiar circumstances of the particular case. See the case of **State v. Duke**⁷ and **Odogwu v. Odogwu**⁸. An appellate court can only set aside the decision of a lower court for exercise of discretion in these circumstances where it is shown that the court exercised its discretion wrongly; in that it works manifest injustice against the interest or rights of the appellant, or in clear infringement of a law see also **Queen v. Onye**⁹ and **State v. Duke**¹⁰.

CONCLUSION

There is hardly any bit of the judicial function that the judge is not equipped with discretionary powers. Even where safeguards or conditions, or guidelines or what might appear like limitations to such powers exist, in the final analysis the judge is left between himself and his conscience to act accordingly by making decisions that best serves the interest of justice. This is so because in certain situations where the law clearly stipulates confines for the exercise of a judge's powers, the judge can still determine his decision in a manner he likes, the only other choice for the aggrieved party is to appeal against the decision. The most powerful tool in the hands of the judge still remains the discretionary power. It is in the exercise this power that a combination of competence and integrity of the judge is put to test. The judge's sense of justice, fairness and neutrality is exposed.

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¹ (2000) 24 WRN 138

² (2003) 23 WRN 44 at pg 50, Ratio 7

³ (2007) 14 WRN 135 at pg 140, Ratio 3

⁴ (2003) 5 NWLR (Pt. 813) 394, CA.

⁵ (1992) 7 NWLR (Ppt 253) 244, CA

⁶ (1990) 7 NWLR (Pt 164) 550, SC.

⁷ supra

⁸ supra

⁹ (1961) 1 ALL NLR 642.

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