

LEGAL EFFECTS OF THE ABUSE OF DISCRETIONARY POWERS BY JUDICIAL OFFICERS*

Abstract

In the absence of existing legislative promulgation, the Nigerian Courts attempt to create fresh rules and theories which are having no exact or direct link or root to any existing enactment, in-order to fill the vacuum left by legislation. This attempt invariably clothes the courts with discretionary powers which are not provided for statutorily. 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 to prevent abuse. In exercise of power to grant or refuse applications whether pre-trial, interlocutory or post-trial by a court, it is however subject to the unfettered discretionary power of the arbiter. Thus, this limitless discretion must take into account the competing interest of parties to justice and must be exercised constitutionally, judicially and judiciously. This paper's aim and objective is to examine and evaluate the boundless powers of the judicial authority which are sometimes abused, or misapplied; vis a vis the gradual simultaneous growth of the legal effects of the abuse of such judicial discretionary authority. Finally, recommendations are proffered on how to checkmate the further abuse of discretionary power by judges, and a position is taken as to whether discretionary power should be limitless and unfettered.

Keywords: Discretion, Powers, Judges, Abuse, Applications, Courts, Effect, Judicially and Judiciously.

1. Introduction

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.¹ These methods adopted over the years has invariably created enormous power of qualifying laws where necessary, and making additions to laws where needed in order to make the law work. In such exercise, the courts in disguise make fresh enactment having no trace to already existing statutory provisions. By the invocation of this power the judges formulate what they consider most appropriate depending on the circumstance and fact of each case but deny taking the statutory function of the Legislature.² The statutory function of the Legislature is to make laws which are expected to be interpreted by the Judiciary; however the Legislature cannot possibly envisage all circumstance that would warrant promulgation of laws, as such the court is saddled with quasi-legislative powers to make laws incidental to the exercise of its judicial function and to bridge the lacuna created in the Statute Books. In the process of enacting, interpreting and applying such laws, the court finds itself in a state of exercising absolute and unfettered discretion. The Constitution of the Federal Republic of Nigeria 1999 (Amended 2011) expresses that judicial powers shall extend, notwithstanding anything to the contrary in the Constitution, to all inherent powers and sanctions of a court of law.³ These inherent powers founded in convention and practice of our legal system are often regulated either by law, or by the same conventions, practices and principles of law; they are 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. However, 1999 Constitution fell short of indicating clearly the extent to which the courts are to exercise these boundless inherent powers. Thus, this has invariably allowed for abuse, or misapplication; hence the gradual simultaneous growth of the legal checks and limitations to such judicial discretionary authority.

2. Discretionary Powers

Discretion is understood to be the freedom to act at pleasure, the power of making free choices unconstrained by external factors.⁴ Judicial discretion or discretionary powers of judges is the power or right to make official decisions using a bit of moral reasoning and dictate of self judgement to choose from unprecedented

*By **Abayomi Oluwaseun AKANLE**, Lecturer, Department of Public Law, Ekiti State University, Ado -Ekiti. Ekiti State. Email: sheunsmail@yahoo.com. Phone No.: 08033718997

***Kemisola Busayo AKANLE**, Lecturer, Department of Business and Industrial Law, Ekiti State University, Ado-Ekiti, Ekiti State. Email: Kemisola17@gmail.com. Phone No: 08033861070.

¹Kana A.A, 'Perspectives and Limits of Judicial Discretion in Nigerian' *Journal of Law, Policy and Globalization*, Vol.29, 2014, p.1 available at <http://www.iiste.org> retrieved on 18th August, 2016.

² *Attorney-Gen. v. Butterworth* (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. wherein Lord Denning M.R. 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.

³Section 6(6)(a) of the Constitution of the Federal Republic of Nigeria, 1999 (amended 2011). This provision confers enormous powers on the court of law, leaving the courts the wide leverage to determine the extent of its powers.

⁴De Smith S.A and Evans J.M, 'De Smith's *Judicial Review of Administrative Action*' (4th ed.) 1980, p. 278

acceptable alternatives. It is the power of judicial officers to make decisions on some matters without being bound by precedent or strict rules established by Statutes. Where the judge has an area of autonomy, free from strict legal rules, in which the judge can exercise his or her judgment in relation to the particular circumstances of the case⁵ On appeal, a higher court will usually accept and confirm decisions of trial judges when exercising permitted decisions; unless capricious showing a pattern of bias, or exercising discretion beyond his or her authority.⁶ Discretionary power is a term applied to the discretionary action of a Judge or court, and means 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 is 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.⁷ This freedom to decide and act may be unfettered or fettered. The word ‘unfettered’ means unchecked, unhampered and unrestrained, whereas, the word ‘fettered’ denotes checked, restrained, and hampered. The Appellate Court in most cases serves as the determining court to establish whether the discretionary power of a court is unfettered (if upheld) or fettered (if overturned).⁸

3. Discretionary Powers in Civil and Criminal Proceedings

The 1999 Constitution has made elaborate provision on the powers of court to hear and determine civil and criminal matters.⁹ The courts in most cases are clothed with either original or appellate jurisdictions in exercise of its constitutional duties; and in discharging these functions, the judges discretionary powers are put to use. In both civil and 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, costs, stay of execution and adjournment of proceedings etc. However, it should be noted that the circumstance under which the court would exercise its discretionary powers in civil and criminal cases are utterly different because the facts, nature and technicality of each proceedings allows a Judge to bring his individuality and personal initiatives into the proceedings.¹⁰ It is not impossible that such powers are more likely to be abused.¹¹

Scope of Discretionary Powers in Criminal Proceedings

The exercise of judicial discretion by judges in criminal cases is enormous. Judges are granted judicial discretion to act in certain circumstances in criminal cases without strict adherence to the rules. This could be pre-judged by public sentiments against criminal offenders, demeanour of accused persons, safety of the accused and perpetual criminal act of the accused. There are instances of committing a crime which in the ordinary sense is bailable but for the safety of the accused or the victim, the court may decide to refuse bail

⁵Keith Hawkins, ‘The Use of Legal Discretion: Perspectives from Law and Social Science’ in Keith Hawkins (ed), *The Uses of Discretion*, 1992, p.1, Hawkins has observed discretion is ‘the space ... between legal rules in which legal actors may exercise choice’.

⁶According to West’s Encyclopaedia of American Law, 2nd Edition, Copy Right 2008, THE GALE GROUP, INC. available at <http://www.ask.com> retrieved on 16th October, 2016. In Australia, judges have also developed principles for the review by appellate courts of discretionary decisions and this indirectly regulates the exercise of discretionary powers. The leading authority in this regard is *House v The King* (1936) 55 CLR 499. This case established that appealable errors committed in the exercise of discretion include: acting upon a wrong principle; allowing extraneous or irrelevant matters to guide the discretion; mistaking the facts and failing to take account of a material consideration. However, it will not be enough that the appellate court would have exercised the discretion differently. Instead, the discretion must involve an error of law which has led to ‘an unreasonable or plainly unjust’ result, or has involved a ‘substantial wrong’, before the discretion will be taken to have been improperly exercised by the lower court.

⁷Black’s Law Dictionary, 5th Edition, p.419. Jowitts Dictionary of English Law defines discretion as: ‘man’s own judgment as to what is best in a given case, as opposed to a rule governing all cases of a certain kind.....So a judge or court often has discretion in making orders or imposing conditions on litigants, e.g as to payment of costs, relaxing rules of practice, etc.

⁸*Buhari v. Obasanjo*, (2003) F.W.L.R. pt 187, 202 at 218 Ratio 26. Where Niki-Tobi JSC said ‘It is a misnomer to invariably describe the exercise of discretionary power of a court as unfettered. The moment a trial court is called upon to exercise its discretionary power in accordance with enabling law, it is not correct to say that the court has unfettered discretion in the matters... The moment a discretionary power exercised by a trial court is quashed by an Appellate Court; the discretion is no more unfettered. The discretion can only be unfettered if it cannot be quashed on Appeal.’

⁹Section 272(1) of 1999 Constitution.

¹⁰In a rape case for example, where an accused person has been alleged of raping a minor and the presiding judge is a female, the sentiment of gender affiliation and personal initiative would no doubt take toes on the decision of such a judge in granting orders that is at the discretion of the judge, whereas in a civil matter involving a female litigant, a female judge may not be sentimental in granting or refusing application that is subject to the discretion of the judge.

¹¹ Ibid.

for such an offender, this logical reasoning of the judge may be acceptable, but legally speaking is definitely not adhering strictly to the rules on bailable offences. In criminal proceedings, the discretion of judges begins from issuance of summons for the attendance of an accused person in court where there is a complaint before the court. Summons are normally utilised for lesser offences and in instances where the person whose appearance is being sought is not likely to refuse to appear. A court has absolute discretion in deciding whether to issue summons to appear or a warrant of arrest or to reject the complaint.¹² This exercise of discretion by judges in criminal proceedings extends further to filing of information or preferring a charge in the High Court¹³, granting/refusal of bail application¹⁴, search warrant, admission of evidence, contempt of court and allocutus and Sentencing¹⁵. Thus, it is evident from this wide range of discretionary power in criminal proceedings that discretion by judges is based on instinct and intuition instead of reasoned decisions and as such abuse is inevitable.

Scope of Discretionary Powers in Civil Proceedings

The exercise of discretionary power in civil proceedings does not defer from what is obtainable in criminal proceedings. However, the areas of law in which judges exercise discretion in civil proceedings may be limited but not restricted to the granting or refusal of applications. Applications such as pre-trial, interlocutory and post-trial applications are granted or refused at the absolute discretion of the court which should be exercised judicially and judiciously.¹⁶ The most common of these applications is the injunctive applications such as interim, interlocutory, perpetual, Mareva injunction and Anton Piller Order. 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. It is worthy to note that discretion in civil proceedings is easier to exercise than in criminal proceedings, this is as a result of the less complicated nature of civil cases and which requires less instinct and intuition from a judge. Although discretionary power needed for granting of cost and adjournment may not totally be without the intuition of the judge. The evaluation of the amount to be awarded as cost based on the application of a party is at the wings and caprices of the judge and it is most times measured by the circumstance and event (cost follows event) in each case. Thus, on most occasions the cost awarded is appropriate while in others may be grossly inappropriate or excessively outrageous. Therefore where awarded cost is grossly inappropriate or excessively outrageous, the discretion power of such a court is in question. Also, 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, the discretion must be exercised at all times on the materials placed before the court and the peculiar circumstances of the particular case. However, despite these guiding principles and evidence before the court, a judge still has the unfettered discretion in his court either to grant or refuse an application for an adjournment.

4. Abuse of Discretionary Power

It is clear from the discussion thus far that discretionary powers which the courts exercise, no matter how logically designed and its procedures are, may be abused, and completely utilised to pervert justice.¹⁷ The recent birth of corruption in our courts has made the abuse of discretionary powers become enormous both in criminal and civil cases. It has influenced the tilt in balance to the scale of justice in proceedings that requires the exercise of discretionary power. Abuse of judicial discretion is more aggressive in criminal cases alluding to the sentimental nature attached to crime and the utmost regard giving to public opinion. A judge before whom a paedophile is brought and who has had such nasty personal experience would be holier than the Pope for such a judge not to abuse his discretionary power in sentencing such an offender.¹⁸ In

¹²Abhulimhen-Iyoha A, 'Judicial Discretion of Judges in Criminal Cases in Nigeria: Prospects and Challenges', 2015, p. 6 available at <http://www.ask.com> retrieved on 16th October, 2016.

¹³ *Fred Egbe v. Justice Adefarasin & S.O. Ilori*, (1985) 1 NWLR (PT 3) 549 at 550.

¹⁴ Section 119 Criminal Code Act of 1916 Cap. C38 LFN, 2004. *Dokunbo Asari v. FRN* (2007) 12 NWLR (pt. 1048) 320 SC.

¹⁵Okonkwo, C.O. and Naish, *Criminal Law in Nigeria*, 2nd edition Ibadan Spectrum Law Publishing, 1980, p.38; Legal scholars have stated that it is the judges that decide punishment rather than anyone else, and so since judges decide questions of guilt, they also decide the sentence; Section 382(1), (2) and 3(a) Criminal Procedure Act 1945. Cap. C41 LFN, 2004.

¹⁶ Daily Times of Nigeria Plc v. Chief Mrs A.S Kusamotu (2002) LPRLR 10993

¹⁷'*Abuse of Discretionary Power*' available at <http://www.criminaljusticedegreehub.com> retrieved on 19th November, 2016. A District Judge Mike Fuller of Montgomery, Alabama didn't live up to this creed of impartiality. Over the course of his career, it's become clear that he prefers to judge cases based upon his own interests. He's refused to try political allies, taken in large sums of money via his private company, and avoids recuing himself of duty. His antics are so renowned that they've inspired numerous newspaper columns and opinion pieces.

¹⁸In *Re Fuselier* 837 so.2d 1257, 1259 (La 2003) Judge Perrell Fuselier, of the City Court of Oakdale, Louisiana, was found to have abused his authority when he conducted arraignment in criminal cases without a prosecutor present. It involved the arrest of ten local teenagers for defacing private property with spray paint. When the teenagers appeared in front of judge

criminal cases, the criminal intent (*mens rea*) and the actual commission of the crime (*actus reus*) are majorly looked out for by the court. However, study have shown that these two major elements has found less of a place in sentencing offenders compared with public morals and the intention to get criminals off the street. Thus, the neglect and or refusal of a trial judge to take into account the necessary statutory provisions in the trial of the accused/offender, with consequent verdict of guilt and sentence on him based on upholding morals and the intention to keep sanity in the society can best be described as gross abuse of discretionary powers.¹⁹

Another familiar terrain where judges often abuse discretionary power in criminal cases is on the issue of bail applications. Judges on several occasions have made a mockery of our criminal justice system, by refusing to grant application for bail despite the fact that evidence has not been placed before the court by the prosecution to warrant refusal. There has been recent legal argument by lawyers that bail application should not be refused ordinarily if there is no cogent evidence before the court in support of the alleged crime. However, judges have hid under the guise of national security to refuse bail application where the matter is of sensitive nature.²⁰ It should be noted however that the Constitution presumes the innocence of an accused person until the contrary is proved²¹ in granting bail applications and not the sensitive nature canvassed by most judges. Failure by judges to abide by the constitution which gives them the statutory powers they exercise will in no doubt itself amount to gross abuse of power. Abuse of discretionary power by judges is not limited to the confines of criminal cases only, civil matters are not left out of this cankerworm. This menace has found its way even in superior courts, where conflicting judgments are given by courts with concurrent jurisdictions²² and frustrating injunctions are granted²³ despite the provisions in the Code of Conduct for Judicial officer.²⁴ Judicial officers have also abused their powers by ignoring decisions of superior courts.²⁵ Conflicting judgments in civil cases go to the very root of the judicial system. If the established principle that trial courts have no power to set aside their own judgment except in well-established circumstances, the principle that courts of coordinate jurisdiction cannot overrule themselves or set aside each other's judgments and that the Court of Appeal itself cannot over rule itself are all in one place, then the question is how come do conflicting judgments still rear its head in our courts? The answer is simple, every judge believes he is the lord and master of his court and that he decides what to do and how to do it. In *Osayomi & Ors v. Governor of Ekiti State & Ors*²⁶

Fuselier, the prosecutor was not available nor were the defendants, accepted guilty pleas from each of them, fined them \$100 plus costs, and sentenced them to perform three days of community service; Stewart C.E, *Abuse of Power & Judicial Misconduct: A Reflection on Contemporary Ethical Issues Facing Judges*, 1 U. St. Thomas L.J. 464 (2003), p.473 available at <http://www.awjournalstthomas.edu.com> retrieved 19th November, 2016

¹⁹*Rufia v. The State* (2001)13NWLR (Part 731) 713, In that case the appellant along with other two accused persons were jointly charged and arraigned before the High Court of Oyo State sitting in Ibadan, for the murder of one Bolape Olaleken. At the conclusion of the trial, the court found the appellant guilty as charged, but the other two accused persons were found not guilty and were discharged and acquitted. The appellant's appeal to the Court of Appeal was dismissed. He further appealed to the Supreme Court which allowed the appeal and declared the trial null and void. It was revealed that the appellant was not properly arraigned and his plea was wrongly taken, yet the trial judge found the accused guilty and sentenced him. See also *Ashiru v. Ayoade* (2006) 6NWLR (Part 976) 405.

²⁰Oghushi A, 'Abuse of Discretionary Power in *FRN. v. Nnamdi Kanu*': *Comments*, available at <http://www.nigeriaeye.com> retrieved 19th November, 2016. Application for bail in that case was refused by both the trial court and the court of appeal despite the prosecution not been able to put forward evidence in support of the alleged crime of treason against the defendant, all that was before the court to refuse the application was a said radio station transmitter, two international passports and the fact of entry into the country by the defendant without using either of the passports.

²¹Section 36(5) CFRN, 1999 (As amended).

²²Justice Mahmud Mohammed (CJN) Rtd, 'Address delivered at the special session of the Supreme Court to mark the commencement of the 2016/2017 Legal Year and the inauguration of 22 new Senior Advocates of Nigeria', 2016. He stated that 'It can be recalled that conflicting judgments were given by a Federal High Court in Abuja and another Federal High Court in Port Harcourt over the crisis in the Peoples Democratic Party between the Ahmed Makarfi and Alli Modu Sherif's factions. Another conflicting judgment was given in the Abia State governorship tussle between Governor Okezie Ikpeazu and another PDP contender, Dr. Uche Ogah'.

²³Osita Mba O, 'Petition to the National Judicial Council against Hon Justice Ibrahim N. Buba in relation to the Illegal Perpetual Injunctions he granted to Dr Peter Odili: Gross Incompetence and Flagrant Abuse of Powers amounting to Judicial Misconduct and Violations of the Code of Conduct for Judicial Officers'; FHC/PH/CS/78/2-007, 20th November, 2009, available at <http://www.saharareporters.com> retrieved 19th November, 2016;

²⁴ Paragraph 2 Rule 2 of the Code of Conduct for Judicial Officers.

²⁵Justice Mustapha Akanbi, Former Chairman of the Independent Corrupt Practices and Other Related Offences Commission (ICPC), 'Safeguarding the Integrity of the Justice System: Corruption in the Administration of Justice,' A paper delivered at a summit on Justice Sector Reform, Federal Ministry of Justice; *Thisday Newspaper*, 19th March, 2003. Where he expressed concern over the growing trend of judicial officers ignoring decisions of superior courts, and abuse their discretionary powers. Calling on erring judges to re-examine their lives, he said the slightest suspicion by discerning members of the public that justice is available for sale, diminishes the awe and regard with which judges and the judiciary are held.

²⁶ Unreported Motion No: CA/EK/36M/2013

The Appellant filed a competent Notice of Appeal within time at the registry of the Court, the Respondent then brought an application to strike out the Notice of Appeal on the ground that the requisite filing fee for Notice of Appeal which is N5,000 according to the schedule of payment in the Court of Appeal Act 2011, was not met by the Appellant. It was the argument of the Appellant that payment of incomplete filing fee would not warrant the Notice of Appeal being incompetent, that it would have been different if the Appellant did not make any payment at all and that the court has the power under the Act to order the performance of a duty, if such duty has not been carried out in totality that is the payment of the outstanding balance on the Notice of Appeal. The Appellant supported his position with a ruling in a similar case just delivered two days before the hearing of his own matter at another division of the Court Appeal, where the Learned Justices gave a considered ruling that instead of striking out the entire Notice of Appeal on the ground that the requisite fee was not paid and delay or deny justice, the Appellant should go to the registry of the court and pay the outstanding balance. The Court of Appeal in its ruling gave a different ruling by striking out the Notice of Appeal.

It should be noted that no doubt from the ruling of the court in that case that the decisions of the court are confusing. Though it is trite that the ruling of courts of concurrent jurisdiction is persuasive on each other, however, obviously that has created lots of problems for lower courts. The grant of custody in matrimonial petitions is another area where judges exercise discretion. This exercise of power and authority is without question life altering; it can provide great protection or cause terrible harm. Certainly, some legal issues call for broader judicial discretion than others.²⁷ Custody determinations are among the most difficult and important decisions judges make in the lives of parents and children. Not only must judges balance the rights, interests, and wishes of parents, but, above all, they must ensure the safety and well-being of children.²⁸ However, the abuse of discretion sometimes is imminent.

In *Re Brown*²⁹:-

A trial judge of the Wayne County Circuit Court decided where two small children would spend the Christmas holiday case, by flipping a coin. Rather than issuing a decision regarding the dispute, Judge Brown produced a coin, allowed the defendant to call heads or tail and flipped the coin. 'The defendant called heads, which is what appeared on the coin and Judge Brown... ordered the children to spend Christmas Eve with the defendant.'

Also the grant or refusal of an injunctive relief is at the absolute discretion of the judge. The one overriding requirement for any type of injunction is that the plaintiff must have a cause of action in law entitling him to substantive relief. In effect, an injunction is not a cause of action but a remedy. Therefore, it is generally granted only to a plaintiff or defendant who shows that he has a cause of action against the defendant or plaintiff (or in the case of a *quia timet* injunction that there would be a cause of action if the defendant were to do the act which the plaintiff seeks to restrain). In other words, an injunctive relief protects some legal or equitable right of the plaintiff or defendant in respect of which the defendant or plaintiff owes him a legal duty. However the task by judges to protect these legal rights should be exercised with caution so as not to create egregious errors of laws in the judgments.³⁰ Granting perpetual injunction (which is continuous in nature) restraining the performance of a legal duty by a statutory agency against person(s) or group of persons is an abuse of discretionary power where such injunction is without any legal basis. Admission of evidence in civil proceedings is another critical area where judges abuse their discretion. It is trite that evidence is admitted only if they are relevant to the facts in issue and admissible. However, there are situations where the court would refuse to admit evidence despite it been relevant and admissible. For example, in a Negligence case, a state appellate court ruled that the trial court did not abuse its discretion by admitting into

²⁷Schneider C.E, 'Discretion, Rules and Law: Child Custody and the UMDA's Best-Interest Standard', 89 MICH.L.REV. 2215, 2217-19 (1991). Schneider explains custody law as follows: [custody law] regulates the complex behaviour of millions of people . . . Family law tries to regulate people in the most complex, most emotional, most mysterious, most individual, most personal, most idiosyncratic of realms. It is absurdly difficult to write rules of conduct for such an area that are clear, just, and effective . . . To put the point rather differently, rules probably cannot wholly or perhaps even largely replace discretion in the law of child custody.

²⁸*Aragon v. Aragon*, 104 P.3d 756, 765 (Wyo. 2005) (citing *Leitner v. Lonabaugh*, 402 P.2d 713, 720 (Wyo. 1965)) (explaining that the trial judge is granted broad discretion in custody cases because the ultimate goal is a reasonable balance between the rights of the parents and the children's needs)

²⁹ *Re Brown*, 662 N.W. 2d 733, 736 (Mich.2003)

³⁰ *Osita Mba O, Ibid.*

evidence a posed accident-scene photograph, even though the photograph depicted a model pedestrian blindly walking into the path of the driver's vehicle with the pedestrian's head pointed straight ahead as if she was totally oblivious to the vehicle and other traffic.³¹ In upholding the trial court's decision to admit the evidence, the appellate court observed that the photograph was only used to show the pedestrian's position relative to the vehicle at the time of impact and not to blame the pedestrian for being negligent. The appellate court also noted that the lawyer objecting to the photograph's admissibility was free to remind the jury of its limited relevance during cross-examination and closing arguments. An appellate court would find that a trial court abused its discretion, however, if it admitted into evidence a photograph without proof that it was authentic. A photograph's authenticity may be established by a witness's personal observations that the photograph accurately depicts what it purports to depict at the time the photograph was taken and not the trial court. Ordinarily, the photographer who took the picture is in the best position to provide such testimony.³² Abuse of discretionary powers by judges in civil proceeding is not however limited to the instances discussed above, but for the purpose of research work we would not be discussing further on that.

5. Legal Effect of Abuse of Discretionary Powers

Distrust in the Judiciary

The reasons for giving 'judges' judicial discretions are to cater for unforeseen situations in the course of adjudication and to prevent unnecessary outcomes procedurally³³, however, these discretionary powers which may be absolute corrupts absolutely, thereby having a resultant legal effect. There has been increasing concern about the judiciary stemming out of judicial misconduct and incessant abuse of discretionary powers. The hallmark of the judiciary has been its historical posture of neutrality and impartiality towards litigants and the dispute they bring to court for resolution.³⁴ The courtrooms are regarded as the last hope of the common man where justice is not only done but should be manifestly seen to be done; once the oath taken by judges to do justice at all times is abused and litigants can properly evaluate the fairness of judicial proceedings at least as much on the basis of their tone, exercise of discretion and the respect the judge afford the parties as by the actual outcome of the proceeding,³⁵ adverse public perception are casted on the ability and fitness of the individual judge involved, and the judiciary collectively, to adjudicate matters in a fair and equitable manner, thereby eroding public confidence in the judiciary. Thus, the slightest suspicion by discerning members of the public that justice may not be served diminishes the awe and regard with which judges and the judiciary are held.³⁶

Controversial Pronouncements

The growing trend of judges ignoring decision of superior courts is the extreme abuse of judicial discretion having the colossal legal effect of judges making controversial pronouncements which has the tendency of establishing conflicting legal precedent. Controversial pronouncement is more prominent in political cases considering the fact that corruption and partisan politics has crept into the judicial system, allowing judges to form ally with political parties of interest. In an attempt to favour these interested parties, they abuse their discretionary and make pronouncement which conflict with an existing pronouncement on the same subject matter. For example the issues surrounding the leadership i.e the Ahmed Makarfi and Alli Modu Sherrif's factions and the National Convention of the People's Democratic Party (PDP) has raised a lot of dust particularly when separate courts with concurrent jurisdiction gave controversial pronouncement as to where the National Convention is to take place and who is to chair the said convention. It should be noted that once there is a pronouncement on a matter, courts with concurrent and lower jurisdictions should be wary of making contrary pronouncement as it becomes conflicting precedent for cases that have related subject matters. More so, it becomes difficult for other courts to choose which judgment to follow in matters that have related facts and principle; and once decisions is left at the absolute discretion of the judge without a law or precedent to follow sentimental rulings/judgments are inevitable.

³¹ *Gorman v. Hunt*, 19 S.W.3d 662 (Ky. 2000).

³² *Apter v. Ross*, 781 N.E.2d 744 (Ind.App. 2003).

³³ Abhulimhen-Iyoha A, *Ibid.* p.3

³⁴ Stewart C.E, *Ibid.* p.477

³⁵ *Ibid.* See also Sambhav N. Sankar, *Disciplining the Professional Judge*, 88 Cal. L. Rev. 2000, Pp. 1233, 1241-42 ;

³⁶ Justice Mustapha Akanbi, *Ibid.* For example, where a litigant applied for an adjournment before a Code of Conduct Tribunal on the ground that he has to preside over a legislative session at the National Assembly and the Chairman of the tribunal insisted that he must appear at the tribunal for hearing may ordinarily create lack of confidence in the tribunal by the applicant and the general public.

Stampeding Legal Right of Litigants

One of the canons of natural justice advocates legal right for litigants to be heard on every matter brought before the court, particularly where several applications are filed before the court by a litigant. It is not unknown to law for a litigant to file several applications where such seeks different reliefs, and as long as the law permits such, judges are not expected to use their discretionary powers to displace such legal rights (to be heard) of litigants. A situation where a counsel file several applications before a court and informs the court of the applications and in which order he intends to take them and the court in exercise of its discretion *suo motu* chose the applications that should be taken by the counsel and the once that would not be taken on the ground that it is his court implies descending into the arena to prevent the counsel from been heard. It is trite that every legal practitioner has the right to appear before and be heard by any court of law, and once the court asserts its discretion against such (which is an abuse); it displaces legal right of litigant.

Instigates Contempt of Court

In the event that judges abuse their discretionary powers and displace the legal right of counsel or litigant, a follow up legal effect of this is that it insights contempt of court. There has been argument that it is not contempt and it will never be where counsel refuses to be directed by the court as to how he should present or argue his case.³⁷ I agree with this position. However, where counsel insults or speaks disrespectfully to the judge for exercising his discretionary power; it would be regarded as contempt,³⁸ whether abused or not. Where it is manifestly seen that a judge has abused his discretionary power, there are several options readily available to a counsel to seek redress rather than acting contemptuously by insulting the judge. Contempt *in-facie* by counsel is in most cases aroused by the act of judges towards such counsel. I have been privileged to witness such an event where a counsel abused a judge when the judge attempted to stampede the counsel to moving certain applications over others. The counsel was of the opinion that the applications are his and that he has the right as to which application he intends to move and in what sequence,³⁹ and that an attempt by the court to dangle its power of discretion to deprive him of his legal right is an abuse of the judge's discretionary power. No doubt the situation blew out of hand and resulted to *in-facie* contempt.

Misrepresentation of Law

Another concern fostered by abuse of discretionary power is the frustrating effect such has on the rule of law. Perpetuation of the rule of law is unarguably embarrassed by the judicial abuse of discretionary power. The exercise of discretionary power of judges requires an objective analysis; a reasonable person should be able to find the exercise of discretion to be fair and impartial as well. This should as a matter of fact be based on the canons of rule of law, i.e. (i) Supremacy of the Law, (ii) Equality before the Law and (iii) Liberty. It should be noted there is a place for giving weight to precedents, especially in civil cases and matters of equity, and to clarify ambiguities in the black letter law, but it is an abuse of judicial discretion to treat precedents or personal intuitions as though they are laws, equal or superior to black letter law, especially when that black letter law is a written constitution.⁴⁰

Delivering Biased/ Sentimental Judgments

Prospective injustice and biased/sentimental judgment is another legal effect of the abuse of discretionary power by judges, especially when they unscrupulously deal with evidence that form the basis of their judicial determination. In every legal proceeding, the trial judge has the absolute discretion to either admit or reject any form of evidence based on whether it is relevance and admissible, or not. Before such materials may be introduced into the record at a legal proceeding, the trial court must determine that they satisfy certain criteria governing the admissibility of evidence. At the minimum, the court must find that the evidence presented is relevant to the legal proceedings. The exercise of discretion to limit the use of particular evidence with probative value or vice versa might be unfairly prejudicial to a party, misleading or confusing. Once an evidence is irrelevant and the judge uses his discretion to admit same to favour either of the parties, or reject evidence with probative value, it will no doubt affect the substantive justice of the case and in turn produce a biased and sentimental judgment most especially when the court rely on such an evidence.

³⁷Hon. Justice Edokpayi M. I., *Is It Contempt of Court or Abuse of Judicial Power?* A Paper Presented in Honour of Hon. Justice S.M.A. Belgore, GCON, p. 2, available at <http://www.nigerialawguru.com>, retrieved 19th November, 2016 ... 'Counsel has a constitutional right of audience. How he chooses to present his case is his own style. It would be unconstitutional and an abuse of office for a Judge to abridge Counsel's right of audience by dangling or invoking his powers of contempt.'

³⁸ See The Dictionary of English Law 4th Edition, p. 217 for definition of 'Contempt.'

³⁹Ibid.

⁴⁰Roland J., *Abuse of Judicial discretion*, Constitution Society, available at http://www.constitution.org/abus/discretion/judicial/judicial_discretion.htm retrieved 19th November, 2016

Estranged Bar and Bench Relationship

Balancing the excesses of the Bar with the high handedness of the Bench is by no means an easy task, but parties must strike a balance and maintain some acceptable level of decorum and civility in and out of Court. However, judicial rascality of judges in exercising their discretionary power has the tendency of creating estranged bar and bench relationship. Counsel and litigant at all times intend to get justice every time they approach the bench. However, where a court or judge abuses its/his discretionary power, it may warrant lawyers boycotting such court. For example where a judge uses his discretionary power to make the production of tax clearance a compulsory pre-condition for granting bail to an accused person standing trial as against the provision of the Constitution, it is deemed to be an abuse of discretion which may warrant court boycott.

6. Legal Remedies for Abuse of Discretionary Powers

Where a trial court must exercise discretion in deciding a question, it must do so in a way that is not clearly against logic and the evidence. Consequently, the principle of independence of judges was not invented for the personal benefit of the judges themselves, but was created to protect human beings against abuses of power. It follows that judges cannot act arbitrarily in any way by deciding cases according to their own personal preferences,⁴¹ however, where they do, it may not necessarily amount to bad faith, intentional wrong, or misconduct by the trial judge. It is trite law that where there is a wrong there is a remedy; it then implies that there are remedies available to correct the error of abuse of discretionary powers. We shall be discussing these remedies.

Judicial Sanctions

The Constitution has clearly placed the power to exercise discretionary control over erring judicial officers in the National Judicial Council. Once it is clear that a certain judge has abused his discretionary power there is a set out procedure for making a complaint, disallowing interference from other arms of government.⁴² The National Judicial Council is the statutory body saddled with the responsibility of investigating and carrying out quasi-trial of judicial offences and upon its findings has the power to punish its erring members. Although this measure of control may be administrative in nature but effective as it covers dismissal of judges,⁴³ suspension of judges,⁴⁴ transfer of judges in cases of justices of the Court of Appeal from one division to another, non-promotion to the higher bench and possible prosecution of judges involved in corrupt practices.⁴⁵

Judicial Review

One of the recurrent themes in legal thought has been the need to control discretionary power of judges so that it is not abused. One method for controlling discretionary power is through judicial review. The aim of judicial review is to ensure that public officials stay within the law and do not abuse their powers.⁴⁶ Where they abuse such powers it is the duty of courts with Appellate and Concurrent jurisdiction or the court itself to review such judgment or ruling. It is trite that a court has the power to review its own decision particularly when such decision was entered into *per incuriam* (decision giving in error) and it clearly evidenced that

⁴¹Chapter 4, 'Independence and Impartiality of Judges, Prosecutors and Lawyers', Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, p. 115, available at <http://www.ibanet.org> retrieved 19th November, 2016

⁴²See Judicial Discipline Regulations, 2014

⁴³See Dismissal of Justice Mohammed Yunusa (wrote and delivered two different judgments in one case); Dismissal of Justice Olumide Felahanmi Oloyede, Osun High Court, available at <http://www.Saharareporters.com> retrieved 13th February, 2016

⁴⁴See List of judges suspended by National Judicial Council in Nigeria, available at <http://www.nigeriamonitor.com> retrieved 13th February, 2016

⁴⁵The Chief Justice of Nigeria, Justice Mahmud Mohammed, on Monday (during the special session of the Supreme Court to mark the commencement of the 2016/2017 Legal Year and the inauguration of 22 new Senior Advocates of Nigeria), declared that judges, who in the recent past in the country, gave conflicting judgments from courts of concurrent jurisdiction, were being investigated based on petitions against them. Mohammed, who promised that appropriate actions would be taken against errant judges who gave conflicting judgments. He said, 'Let me state before the court starts that cases of courts of coordinate jurisdiction, giving conflicting judgments, will be addressed. All the judges involved are being investigated and actions will be taken against them accordingly. The CJN stated that in line with the provisions of the constitution, the Judicial Discipline Regulations 2014 comprehensively sets out the procedure for making a complaint, disallowing interference from other arms of government. He added that lawyers, who wrote petitions against judges and other judicial officers directly to the President, without going through the National Judicial Council, would be punished by the LPDC; The ongoing case of Justice Adeniyi Ademola of the Federal High Court of the FCT who is been tried for judicial corruption and abuse of office is a handy example of the disciplinary measures melted out to judges; see also Rita Ofilli-Ajumogbia's case; Justice Sylvester Ngwuta's case, all available at <http://www.mondaq.com> retrieved 13th February, 2017.

⁴⁶Craig P.P., 'Administrative Law', (sixth ed.) Sweet and Maxwell, 1989, p. 22.

injustice has occurred. At this stage, the court is empowered to set aside, quash every judgment in error to mitigate the harshness of judicial abuse of discretion. Judicial review may be upward or downwards depending on which side the abuse tilts to. For example with issues of granting cost by the court, which either may be excessively outrageous compared to the event or unreasonably inappropriate may be reviewed by an Appellate court or the court itself.

Exercising Administrative Fiat

The Chief Judge of a state may make rules for regulating the practice and procedure of the High Court of a State, subject to the provision of any law made by the House of Assembly of a State.⁴⁷ The implication of making rules is that the Chief Judge of a State can exercise his administrative power/fiat when and where he deems fit, to act as check on judicial officers. The Chief Judge of a State has the power to withdraw a case from a particular court and transfer same to another court through administrative fiat if there are reasonable grounds to believe that a particular judge has shown biased interest to a particular case, or as abused his discretion or there is the likelihood of him abusing his discretion. Where the abuse has already been carried out, the Chief Judge may decide to stop further hearing of such case by that particular judge and remit same to another judge to start *de-novo*. However, it should be noted that administrative fiat is not only exercised when judges abuse discretionary powers.

Appeals

The Constitution⁴⁸ expressly provides for the right of appeal to every litigant whether with the leave of court or without leave. It could then be inferred that once the decision of a court is not satisfactory to a litigant, the litigant has the right to appeal such decision to the appellate court for such decision to be set-aside. No doubt exercising discretion leads to making decision, thus, when discretion is abused, it may affect the decision of the court, and once the decision of the court is affected adversely by the abuse of discretion it becomes a ground for appeal.⁴⁹ The traditional standard of appellate review for evidence-related questions arising during trial is the 'abuse of discretion' standard. Most judicial determinations are made based on evidence introduced at legal proceedings, as such, appeal is to evaluate whether the lower court examined properly the evidence before it and to see if extraneous issues are not brought into the proceedings, thus, where the appellate court finds an improvident exercise of discretion contrary to the position of the law then it become an error of law and ground for setting aside the decision of the lower court.

7. Conclusion and Recommendations

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. The legal consequences of abuse of judicial discretion in Nigeria have become so weighty. This continuous endemic catastrophe needs to be suppressed since the courts represent the last bastion of. To prevent abuse and manipulations for personal aggrandisement, as well as guarantee that justice is done for the good of the litigants and the larger society, the under-mention is recommended.

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. Where 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. Certain discretionary powers of judges should be subject to approval. Though it is believed that judges should have unfettered discretion on every matter to be determined by them, however the writer believes that exercise of discretion on issues of injunction in particular should be subject to the approval of the Chief Judge. Granting perpetual injunction no doubt has created a lot of tension and the only way to douse this tension is to give a second eye the opportunity to evaluate the conditions for grant and see whether the discretion exercised is within the purview of the law. The Chief Judge of the High Courts should

⁴⁷ See Section 274 of the 1999 Constitution (As Amended); Sections 236, 248 254, 264 of the 1999 Constitution

⁴⁸ Sections 241 and 242 of the 1999 Constitution (As Amended)

⁴⁹Kana A.A, Ibid, p. 166

be saddled with the administrative power to approve such exercise of power. If the Chief Judge can review or assign for review cases after abuse of discretion, he should also be able to review for approval discretionary orders before it is abused. This would serve as an administrative checkmate on judicial officers abusing their discretionary powers. There is an urgent need to review the process 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 FRN (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 influenced and manipulated by those in the executive arm and the politicians in the corridors of power that are often considered for the bench. Thus merit, experience and competence are sacrificed at the altar of patchiness. 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 Nigerian Bar Association. Another major check on the discretion of judges is the use of jury system. A judge, holding office over the course of multiple cases, and selected by appointment or election, is susceptible to undue influence. A jury, chosen by sortition, or lot, for a single case, just before the case, is less likely to be corrupted, and having multiple jurors render verdicts collectively provides a check by each on the others. What they might lack in knowledge of the law is offset by their connection to the non-legal environment in which most people subject to the law must operate. It is obvious that the Nigeria legal system does not recognise the use of jury system but operate something similar at appellate courts, no wonder it is rare to see appellate courts in abuse of judicial discretion, but manifestly seen in lower courts that operate a single judge system. Writer suggests that the corum practices in appellate courts should be adopted at the lower courts since most of abuse of discretion happens at the lower court during trial. 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.