

**University of Nevada, Reno**

**The Act of Judging in Nigeria:  
A Matter of Interpretation and Judicial Discretion**

**A thesis submitted in partial fulfillment of the  
requirements for the degree of Master of Judicial Studies**

**by**

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## Abstract

Since the formation of the Nigerian judiciary, courts have operated using the common law system with the doctrine of *stare decisis* (i.e., judicial precedents). This doctrine has shaped the context of judging in Nigeria, especially as strict adherence to precedent somewhat impacts the use of judicial discretion in the interpretation of statutes. Judging is not static and does not happen in a vacuum. Rather, judging should change over time and respond to context as strict adherence to precedent alone may interfere with the advancement of justice. Therefore, this thesis seeks to redefine the act of judging in Nigeria to embrace the context of social realities. Its aim is to encourage judges to interpret statutes and apply judicial discretion within important social contexts that are considerate of relevant social views, values and interests (thus interweaving law and society). This thesis examines various judicial approaches to interpretation of statutes and established canons of statutory interpretation and emphasizes that it is now more important than ever for judges to use ‘appropriate’ discretion from a social perspective when interpreting statutes. This is especially the case with ambiguous statutory provisions and constant changes in the law and society. While recommending that legal jurisprudence change as culture and social values changes, this thesis explicitly opposes judging stereotypically based on strict common law principles of precedent currently used most often in Nigeria. The contention that judges should be guided more/as much by social interests, social empathy and changing social circumstances in the interpretation of statutes – and less/as by the established canons of interpretation and judicial precedent – will hopefully engender a necessary and robust debate that could lead to a change in practice in Nigerian courts.

### **Dedication**

I dedicate this thesis to my late father and mentor, Hon. Justice Niki Tobi, JSC (RTD) *CFR (1940-2016)*, and many other judges like him (dead and alive) who dare(d) precedent to uphold substantial justice over technical justice. Their efforts caused and are still causing cultural, social, economic and political changes in Nigerian society. This is to their sometimes-misunderstood and misinterpreted resilience in taking that lonely path to justice. Some of their dissenting opinions have eventually become precedent and their judgments that attracted socio-political criticisms have all advanced legal/judicial jurisprudence in Nigeria.

May your legacies endure and thrive!

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## Chapter One: Historical Perspective of Judging in Nigeria

*“English is English. Nigerian is Nigerian. The English are English. So also, the Nigerians are Nigerians. Theirs is theirs. Ours are ours. Theirs are not ours. Ours are not theirs. We cannot therefore continue to ‘enjoy’ this borrowing spree’ or ‘merry frolic’ at the detriment of our legal system. We cannot continue to pay loyalty to our colonial past with such servility or servitude. After all, we are no more in Slavery”.*<sup>1</sup>

*Per Niki Tobi, JSC*<sup>2</sup>

### Introduction

This chapter provides a brief history of the Nigerian Judicial System, explaining the historical context of judging in Nigeria. It reviews the structure of Nigerian courts and explains the sources of Nigerian law, and how these empower judging in contemporary Nigerian Courts. Particular emphasis will be placed on the doctrine of judicial precedent and its impact on the judicial system. By the end of this chapter, my goal is for the reader to better understand the origin of judging in Nigeria and judging in Nigerian Courts.

### Brief History of Nigerian Judicial System

The judicial system of the Federal Republic of Nigeria is a hybrid of the English, American, and pre-colonial judicial systems. The history of Nigeria’s judicial system dates to the traditional colonies, which eventually formed the territory Nigeria. Prior to the establishment of common law principles of adjudication by the British in 1861, traditional Nigeria made use of customary arbitration to resolve disputes and maintain

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<sup>1</sup> *Caribbean Trading & Fidelity Corporation v Nigerian National Petroleum Corporation* (2002) 5 SC (Pt. 1) at page 21

<sup>2</sup> *Per Niki Tobi, JSC of unforgettable and irreplaceable memories, is the late father and mentor of this author. His, unique and transforming style of judging, plus his erudite judicial pronouncements in Nigeria forms the bedrock of this research.*

order society.<sup>3</sup> This traditional system of adjudication evolved over three political eras: the pre-colonial, the colonial and post-colonial, and eventually formed the bedrock of the present Nigerian judicial system.<sup>4</sup>

**Pre-colonial era.** Prior to the colonization of the entity now known as Nigeria, numerous indigenous tribes, groups or territories had their own systems of governance and judicial administration. Traditional courts applied their respective modes of judging; traditional rulers presided over disputes and resolved them according to the indigenous governing laws of the land (i.e., laws developed from the customs of the people). This system of justice was informal yet effective. Then the arrival of the British led to a more contemporary adjudicatory system in the communities.

For convenience of judicial administration, the traditional societies were divided into *chiefly* and *chiefless* societies; both types influenced the style of ‘judging’ in traditional courts. The *chiefly* societies comprised the Hausa/Fulani communities (in the Northern region) and the Yoruba/Benin communities (in parts of the Southern region). The *chiefless* societies were the Ibos, also from the southern province.<sup>5</sup> In the Yoruba communities, the *Alaafin*, who was the administrative and political head of the Oyo Empire, oversaw the empire with assistance from the council of 7 chiefs called the *Oyomesi*, headed by the *Bashorun*. The *Alaafin* in council operated as a traditional royal court, similar to Courts of superior jurisdiction today. He adjudicated serious offences like murder, treason, arson and armed robbery, while the chiefs presided over minor

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<sup>3</sup> Tobi, N (1992) *The Nigerian Judge*, A & T Professional Publishers, Nigeria: 1

<sup>4</sup> *Ibid*

<sup>5</sup> *Ibid*

misdemeanors within their respective regions.<sup>6</sup> This system operated more like courts of trial and appellate jurisdictions.<sup>7</sup> Also, in the Northern region of Nigeria, similar to the *Alaafin* was the *Emir*, which had both appellate and original jurisdiction to preside over serious offences. Subordinate chiefs known as *Alkalis*, who headed courts in different districts or zones, aided the *Emir*. Further, the *Mufti mallams* who were knowledgeable in sharia law assisted the *Alkalis* with sharia law. This system of justice in historic Northern Nigeria resembled the modern court system.<sup>8</sup>

The process of judging in the *chiefly* societies was more formal and rigid than judging in the *chiefless* societies.<sup>9</sup> Judging in the *chiefless* societies was based in institutions, which were republican in structure and in function. Niki Tobi gave an example of this when he said that in Iboland, the Council of Elders were charged with the responsibility of administering justice in accordance with the customs and cultures of the people.<sup>10</sup> So, the Council of Elders was the fountain of justice, and as a matter of practice, adult male members of the family or village first handled disputes as cases came up.<sup>11</sup>

In comparing the traditional system of judging with the English system of judging, Niki Tobi noted that unlike the English system, which was and is still individualistic, traditional systems were essentially collectivist<sup>12</sup> In other words, justice at the time of traditional systems was not enacted or perceived in abstract terms; rather it

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<sup>6</sup> Adebayo, W (2014) Yoruba Pre-colonial Political System, *opcit*

<sup>7</sup> Although not the focus of this paper, traditional means of adjudication were more effective in society, especially in the traditional administration of criminal justice

<sup>8</sup> See Edefe, *opcit*: 4

<sup>9</sup> *Ibid*: 2

<sup>10</sup> *Ibid*

<sup>11</sup> *Ibid*:4

<sup>12</sup> Tobi, N, *opcit*:7

was equated to moral standards in the society.<sup>13</sup> Hence legal technicalities were not followed in the traditional systems. Traditional courts were not established to administer technicalities of law but rather the moral content of law, as social discipline in the fabric of the polity. So, traditional courts were essentially moral courts, as they decided cases based upon local concepts of morality and also enforced the moral values of the local peoples through the decisions they reached.<sup>14</sup> Even though the system of justice in traditional Nigeria was informal, it had a formal structure of judging that was very effective, as the chiefs/family heads upheld and applied cultural values, views and social interests as they judged.

**Colonial era.** The traditional justice system, applicable to both indigenes and non- indigenes, was based largely on unwritten laws. Hence it was difficult for non-natives to understand the traditional act of judging, because it challenged foreigners when trade ties increased between locals and European traders in the region. Consequently, the British introduced Consul Courts to preside over trade disputes involving foreigners and natives, while traditional courts continued to administer justice according to the pre-colonial traditional practices.<sup>15</sup> Subsequently, when the 19<sup>th</sup> century Courts of Equity were established, they focused on commercial relations and not governance or justice issues, like the Consul Courts.<sup>16</sup> This led to a divergence of the legal system in those colonies that eventually became the Nigeria we know today.

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<sup>13</sup> *Ibid*

<sup>14</sup> *Ibid:5*

<sup>15</sup> Edefe, *Opcit:4*

<sup>16</sup> In other words, Century courts of equity assumed jurisdiction over trade disputes that was previously the role of consul courts, while the Consul courts heard cases of governance and justice issues.

The British government annexed colonies (that eventually became Nigeria); hence, Nigeria became a British colony in 1861. In other words, the protectorate of Southern Nigeria and the protectorate of Northern Nigeria were amalgamated to form one entity now known as Nigeria. As a result of this amalgamation, the British system of governance was imported into Nigeria in earnest. The Supreme Court Ordinance of 1863 established the Supreme Court in the Territory of Lagos, with both civil and criminal jurisdiction. Subsequently, the Supreme Court Ordinance of 1876 was enacted, and established the Supreme Court for the Colony that applied common law, doctrines of equity and statutes of general application, used (in England), in July 24, 1874. Thereafter, in 1887, after Lagos and other surrounding protectorates became a colony, a new Supreme Court was established under a new Supreme Court Ordinance.<sup>17</sup>

Upon colonizing Nigeria, the British system embraced and recognized the interests, views and culture of the society. Thus, in the case of *Laoye & Ors v Oyetunde*<sup>18</sup> the Committee of the Privy Council said, “*the policy of the British in this and other respects is to use for purpose of administration of the country the native laws and customs in so far as possible as they have not been varied by status or ordinances affecting Nigeria.*” Even though the British system recognized and acknowledged the traditional system outside the framework of English law and jurisprudence, English judicial practice and principles appeared to have replaced traditional practice in many

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<sup>17</sup> Tobi, N, *Opcit*

<sup>18</sup> 1944 A.C 170

respects, especially in Courts today. For example, the method of swearing in witnesses or taking oath before giving evidence reflects English influence on the system.<sup>19</sup>

**Post-colonial era.** After Nigeria gained her freedom from British rule in 1960, the political structure underwent drastic change as the three arms of government metamorphosed (i.e., the legislature, executive and the judicial arms). However, of all the arms of government, the judiciary maintained significant elements of British common law. Then a Federal Supreme Court was established as the highest court of the land. This was followed by the Judicial Committee of the Privy Council, with High Courts, Magistrate Courts and Customary or Native courts in various regions (now known as states). Clearly, from the above, the impact of the British system and hierarchy in Nigerian Courts has remained steady until this day.

Since Nigeria gained her independence, the judiciary has experienced substantial changes due to the adoption of various constitutions. In 1960, the Independence Constitution abolished criminal jurisdiction under customary law because criminal offenders could not be convicted of an offense unless the offense existed under written law. The sole exception to the written law requirement was contempt of court, for which punishment could be imposed.<sup>20</sup> The 1963 Constitution replaced the Privy Council with the Supreme Court of Nigeria, and this made the Supreme Court the highest court in the country. The 1963 Constitution also terminated Nigeria's allegiance to British rule.<sup>21</sup>

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<sup>19</sup> In traditional Nigerian courts, oaths were taken, and witnesses were sworn in by customary rituals and not with the Holy Bible or Holy Quran as is today.

<sup>20</sup> See section 21(10) of the Independence Constitution of 1960

<sup>21</sup> Tobi, *N opcit*: 12

Then the military coup in 1966 interrupted the constitutional autonomy of the judiciary and this interfered with the liberty of judges to adjudicate as constitutionally required.<sup>22</sup>

Under Decree No 17 of 1967, Nigeria was dissolved into 12 states. Subsequently, in 1976, the states were further divided into 19 states and a federal capital territory. In 1987, the states increased to 21, and to 30 states in 1991. Then in 1996, 36 states were further created from the four regions in Nigeria (North, South, East and West). These regions form 6 geo-political zones (North- central, North-East, North-West, South-East, South-South and South-West).<sup>23</sup> The categorization of these regions was based on a *federal character*<sup>24</sup> and the Nigerian judiciary is structured to fit into the federal structure of the country with equal representation of all and sundry.<sup>25</sup> That means individual states from the six geo-political zones/regions of Nigeria each has quotas in the court system, and judges are appointed according to their respective quotas.

### **The Constitutional Structure of Courts in Nigeria**

The *federal character* of the Nigerian Constitution influenced the decentralization of the Court system.<sup>26</sup> The Supreme Court is the highest Court in Nigeria, often referred as the Apex Court of Nigeria. It has both original and appellate jurisdictions and is located in the Federal capital territory.<sup>27</sup> This court is presently comprised of 15 justices,

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<sup>22</sup> The Constitution that empowered the courts was suspended by the military decree.

<sup>23</sup> Sustainable Urban Development and Good Governance in Nigeria, *opcit*:4

<sup>24</sup> This means the appointment of judges are regional-based.

<sup>25</sup> This means an equal number of courts and judges from each of the six regions represented in the federal courts

<sup>26</sup> The justices of the Courts are appointed based on the regions their states of origin are located. However, the female judges can also be appointed based on the state of origin of their husbands.

<sup>27</sup> See sections 232 -233 of the 1999 Constitution, as amended.

including the Chief Justice as head of the Court.<sup>28</sup> As the final superior Court of Appeal, the Supreme Court of Nigeria's decisions are binding on all of the other courts.<sup>29</sup>

Following the Supreme Court is the Court of Appeal with both appellate jurisdiction and original jurisdiction.<sup>30</sup> This court also acts as an intermediate between the Supreme Court and all the other courts or tribunals. The Court of Appeal has sixteen judicial divisions across the country.<sup>31</sup> Following this Court in the hierarchy are the High Courts (Federal/Federal Capital Territory and State High Courts), National Industrial Court, Customary Court of Appeal and Sharia Court of Appeal. These Courts, also known as lower courts, were all established by the Constitution. They exercise mostly original jurisdiction and minimal appellate jurisdictions.<sup>32</sup> State High Courts also exercise considerable appellate jurisdiction, like the Customary Courts of Appeal and Sharia Courts of Appeal that are appellate Courts. The Constitution did not establish some lower courts such as the Magistrate Courts and special courts family or juvenile courts, but section 6(5) of the Constitution empowers the legislatures to establish other courts as may be required by law. As a result, Magistrate Courts, District Courts, Area Courts, Customary Courts, Juvenile Courts, Corona Courts, etc. were created. Section 6(5) of the Nigerian Constitution resembles Article III of the Constitution of the United States that

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<sup>28</sup> Although section 230 of the Constitution states the National Assembly can appoint such number of justices in the Supreme Court not exceeding 21

<sup>29</sup> See section 233(1) of the Constitution

<sup>30</sup> See sections 239 (1) & 240 of the Constitution

<sup>31</sup> Abuja, Akure, Benin, Calabar, Ekiti, Enugu, Ibadan, Illorin, Jos, Kaduna, Lagos, Makurdi, Owerri, Port Harcourt, Sokoto, Yola

<sup>32</sup> See sections 251, 154, 262, 267 & 272 of the Constitution

established the Supreme Court of the United States, and also grants Congress the option to establish “such inferior courts” as it sees fit.<sup>33</sup>

Therefore, the ‘Superior’ Courts of record as stated in the Nigerian Constitution are: the Supreme Court; the Court of Appeal; the Federal High Court; Federal Capital Territory High Court, Abuja; State High Courts; National Industrial Court; Customary Court of Appeal of the FCT; Customary Courts of Appeal and Sharia Courts of Appeal of FCT; and Sharia Courts of Appeal. The ‘Inferior’ courts include tribunals and special courts including Magistrates’ and District Courts; Juvenile Courts; Customary and Area Courts; and Courts Martial and Public Complaints Commission.<sup>34</sup>

The bifurcation of judicial jurisdictions in Nigeria was based on geographic/cultural alignments, similar to the history of the federal judiciary of the United States of America. Although the Nigerian Federal Constitution is not modeled after the US Federal Constitution, both documents have some similarities. Since its origins in 1789, the court system in the U.S has embodied the federal character of the government as established by the U.S. Constitution. The Supreme Court of the United States guarantees the authority of the Constitution and federal law throughout the nation, while a system of federal and state trial courts, organized within state borders, reflects the legal traditions of each judicial district and facilitates citizen access to federal justice. The decentralized federal judiciary helps ensure that individual federal courts have a strong local orientation, while at the same time it united a geographically dispersed nation

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<sup>33</sup> See section 1, Article 3 of the American Constitution

<sup>34</sup> See section 6(1) of the Constitution

within a consistent system of federal law.<sup>35</sup> However in contrast to most other federal systems of government, the United States preserved parallel systems of federal and state courts, thus further protecting the local orientation of much of the nation's legal affairs.

### **The Sources of Nigerian Law**

A combination of the pre-colonial, colonial and post-colonial periods of history eventually produced the sources of Nigerian law that have largely influenced the operation of the judicial system. The sources of Nigerian law define judging in Nigeria, impacting the judiciary and transforming it across eras of history. This transition still influences approaches to judging in Nigeria. These sources are as follows:

- 1. The Constitution of the Federal Republic of Nigeria**, a written constitution, is similar to the American Constitution. Nigeria's Constitution is a significant deviation from the British Constitution, which is unwritten.<sup>36</sup>
- 2. The Federal and State Legislation.** The National Assembly and State Houses of Assemblies are constitutionally empowered to make statutes that have the force of law in the country.
- 3. Customary laws**, developed from the customs, traditions and usage of the Nigerian people, or society. These customary practices are categorized into the ethnic practices and the native law and Muslim or Islamic laws.
  - **Ethnic practices and native law** were customary to the indigenes before the advent of the British. These laws were the traditional practice of governance in

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<sup>35</sup> History of the Federal Judiciary

<sup>36</sup> See section 6 of the Constitution established the judicial arm of government

Nigeria (*chiefly* and *chiefless* societies). Each ethnic entity had its own system of governance. Though unwritten, customary ethnic practices or “informal laws”, were adopted in customary courts. Presently, customary/Area Courts are established in states across the country to hear matters under ethnic practices and native law.<sup>37</sup> The Courts administer the appropriate customary law in the land where the court is situated.<sup>38</sup> Customary courts have similar jurisdictions as the regular ‘English courts’, but like the Magistrate Court, they do not take priority as regular courts in the judicial system.<sup>39</sup> Hence section 280 (1) of the Constitution states that “*There shall be for any state that requires it, a customary court of Appeal for that state.*” Thus, customary courts have taken the back seat in judicial practice. Customary Courts are not strictly bound by the Rules of Evidence or technicalities like regular Courts; rather, they are bound by the Rules of Natural Justice, Equality and good conscience.<sup>40</sup> Judges of these Courts are not necessarily lawyers; neither are they required to be knowledgeable in law.<sup>41</sup>

- **Muslim or Islamic, law**, is applicable only in the Northern part of the Country where a majority of Muslims resides. This law is based on Islamic religion and clearly stipulated in the Holy Quran and the teachings of the prophet Mohammed. Section 275 of the Constitution states that “*There shall be for any state that requires it, a Sharia Court of Appeal for that state.*” There is a distinction

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<sup>37</sup> Section 6(5) (j) of the Constitution

<sup>38</sup> See *Dada v. Faleye* (2007) ALL FWLR (Pt. 349) 1134 at 1146 Paras. A - B (CA)

<sup>39</sup> This shows that customary courts are not as significant to the society as regular courts

<sup>40</sup> See *Ekweghiariri v Unachukwu & Ors* (2013) LPELR-22074(CA)

<sup>41</sup> See *Oke v Nwizi* (2013) LPELR-21252(CA)

between the Sharia Court of Appeal and the regular Court of Appeal; the Sharia Court of Appeal is not restricted to the issues raised by the parties before them.<sup>42</sup>

**4. Judicial Precedent/Case Law<sup>43</sup>** prevails when courts must abide by or follow earlier decisions, where the material facts are the same. For instance, British common law guided Nigerian laws while Nigerian courts relied on precedent set by common-law courts. Judicial precedent emanates from case law– the body of principles and rules of law. Over the years, courts have, through their decisions, formulated precedent that establishes principles of law to guide specified legal situations.<sup>44</sup>

**5. International Law, Customs, Treaties, and Conventions;** by virtue of Nigeria's affiliation with other nations, she is a member state with respect to numerous international laws enacted by the UN, ECOWAS etc. According to *Per Wali, JSC in Ibidapo v. Lufthansa Airlines<sup>45</sup>* “Nigeria like any other Commonwealth county, inherited the English common law rules governing the municipal application of intentional law. The practice of our courts on the subject matter is still in the process of being developed and the courts will continue to apply the rules of international law provided they are found to be not order-ridden by clear rules of our democratic law. Nigeria, as part of the international community, for the sake of political and economic stability, cannot afford to live in isolation. It shall continue to adhere to, respect and enforce both the multilateral

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<sup>42</sup> See *Nasi & Ors. v. Haruna* (2001) LPELR-7023(CA)

<sup>43</sup> This topic will be discussed in detail below

<sup>44</sup> *Idahosa, C.O* (2016) *The Doctrine Of "Stare Decisis" And Judicial Precedent: The Need for Lower Courts to Be Bound by Decisions of The Superior Courts of Record, opcit*

<sup>45</sup> (1997) LPELR-1397(SC) at PP 30-31, paras G-C

*and bilateral agreements where their provisions are not in conflict with our fundamental law.”*

International laws have impacted the approach or mode of judging, depending on the choice/personality of the specific judge involved and the nature of the case.<sup>46</sup> In *Abacha & Ors v. Fawehinmi*<sup>47</sup> the Supreme Court stated that courts will not interpret a statute with the intention to violate rules of international law. In other words, the courts ought to construe statutes in a manner to avoid conflicts with international laws. This is one of the reasons why some judges adopt international perspective in the act of judging. However not all Nigerian judges agree to defer to the influence of International law in judging.<sup>48</sup> Also, in the absence of Nigerian precedent in a given case, judges are at liberty to apply foreign law from a jurisdiction similar to Nigeria, where necessary.

**6. English Common Law**, consists of the Received English Law and English Law (Statutes).

- **The Received English law** consists of the common law, the doctrine of equity, statutes of general application in force in England on January 1, 1900, statutes and subsidiary legislation on specified matters; and
- **The English law (statutes)** made before 1st October 1960 was extended to Nigeria, but it is yet to be repealed. These laws made by the local colonial legislature are treated as part of the Nigerian legislation.

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<sup>46</sup> Some judges cite international laws in their decisions more than indigenous laws.

<sup>47</sup> (2000) LPELR-14(SC)

<sup>48</sup> See *Olafisoye v Federal Republic of Nigeria* (2004) 4 NWLR (Pt 864) 580,

English Common Law and tradition formed the basis of the Nigerian judicial system. Nigeria adopted several British laws from her interactions with Britain. Hence, the reception of English law through colonization established several legal principles from the Common Law of England that Nigerian courts still apply to date. Although some of these laws did not satisfy Nigeria's legislative scrutiny, the English law has had a tremendous influence on the Nigerian legal system, and it forms a substantial part of Nigerian law. According to section 45 (1) of the Interpretation Act, *the common law of England and the doctrines of equity and the statutes of general application which were in force in England on 1st January 1900 are applicable in Nigeria, only in so far as local jurisdiction and circumstances shall permit.*<sup>49</sup>

According to Ojomo, the administration of justice in Nigeria has, since its early inception, sought to make a distinction between customary and non-customary jurisdictions and the extent of that distinction has become modified over time.<sup>50</sup> Yet the greatest change has occurred with the non-customary system that has become more sophisticated over time, with a wider coverage; the customary system has become more limited.<sup>51</sup> For instance the strict rule of pleadings and provisions of the Evidence Act are not applicable to Customary Courts. This is because Area and Customary Courts are vested with the jurisdiction to hear and determine only cases under native law and custom.<sup>52</sup> Accordingly, customary courts still adhere to customary practices and are not strictly bound

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<sup>49</sup> The Interpretation Act, Cap 123, Laws of The Federation (LFN), 2004.

<sup>50</sup> *Opcit*: 9

<sup>51</sup> *Ibid*

<sup>52</sup> Customary laws of various communities in Nigeria have their own system which the people adhere to. It is based on these customary laws that Customary/Area Courts determine the evidence in a case.

to apply the Evidence Act in determining evidence,<sup>53</sup> while non-customary courts (principally all other courts in Nigeria) apply the Evidence Act to all cases. An example is the transmutation of means of acquiring evidence from an analog age to a digital age where the use of computers and electronic generated evidence is the order of the day.

Despite the influence of English law, the Nigerian legal system, that is adversarial in nature, is very complex due to legal pluralism.<sup>54</sup> Legal pluralism, which was prevalent during the former colonies, may have existed alongside the traditional legal system in Nigeria. This is evident in the Nigerian legal system where customary law and practices exist side by side with the inherited English legal system. However, Idem opines that the resolve of courts that rules of pleadings and the Evidence Acts are inapplicable in the Area, Customary or Native Courts is a positive development because it is an attempt by the Courts to free our indigenous law, i.e. customary laws, from the ‘straight jacket’ made for them by our erstwhile colonial masters.<sup>55</sup>

According to *Per* Abiru, *JCA*<sup>56</sup>, with the advent of colonialism, Western countries transported and transplanted their brand of law and legal mechanisms to the different territories they annexed. So, they enforced these laws and legal mechanisms in

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<sup>53</sup> Idem, U.J. (2017). The judiciary and the role of customary courts in Nigeria, *opcit*: 41 According to Idame “Prior to now, for a customary law to have a binding effect, it must be a custom that has been judicially noticed as provided for in Section 14(2) of the Evidence Act 1990 (as amended)... A custom may be judicially noticed by the court if it has been acted upon by a court of superior or co-ordinate jurisdiction in the same area to an extent which justifies the court asked to apply it in assuming that the person or the class of persons concerned in that area look upon the same as binding in relation to the circumstances similar to those under consideration.”, *Ibid*:41

<sup>54</sup> Legal pluralism is the existence of multiple legal systems within one geographic area. It occurs when different laws govern different groups within a country or where, to an extent, the legal systems of the indigenous population have been given some recognition, as was the case with the received English Common law in Nigeria and the establishment of the Privy Council as English Courts in Nigeria.

<sup>55</sup> Idem, *opcit*:42

<sup>56</sup> Justice of the Court of Appeal, Nigeria (Akure Branch).

those territories without much regard for existing customary laws that were hitherto prevalent in the communities.<sup>57</sup> For instance an offence like bigamy still exists in the Criminal Law of many States in Nigeria, even when being married to more than one wife was (and still is) a cultural norm. This clearly demonstrates that Nigerian Courts still rely on foreign or English authorities whilst construing provisions of Nigerian statutes that have English equivalents. In other words, in spite of independence of the legal system since 1963 within a sovereign Nigerian nation, the English system of justice still has significant impacts on Nigerian courts.

Nonetheless, the legal framework changed from the British parliamentary model to a presidential model, which is similar to the American system. The American judicial system like Nigeria had her own share of British Common Law. By the 17<sup>th</sup> and 18<sup>th</sup> centuries, English governmental institutions had been transported to American colonies and court systems were eventually established, and in their institutional form resembled English tribunals.<sup>58</sup> Following the American revolution, respective states and the Federal Government adopted the English system.<sup>59</sup> In the 1760s, it became apparent to Americans that the colonial judges who were expected to follow English Common law, were abusing their discretion.<sup>60</sup> Then the nineteenth century saw the American courts of law come into their own form of judicial power as judges shouldered sole responsibility for interpreting and applying law.<sup>61</sup>

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<sup>57</sup> Abiru (2018) *The Law as It Is – The Place of Social and Moral Values in Contemporary Nigeria* at p.3

<sup>58</sup> Stumpf, F.F. (2008). *Inherent Powers of the Court*, NJC Press, USA.P.5

<sup>59</sup> Hine, K, D, (1997) *The Rule of Law is Dead, Long Live the Rule: An Essay on Legal Rules, Equitable Standards, and The Debate Over Judicial Discretion*, *opcit*: 1772

<sup>60</sup> See *fn* 51

<sup>61</sup> See *fn* 52, *Ibid*: 1773

## Judicial Precedents/Stare Decisis<sup>62</sup>

Judicial precedent was not part of Nigeria's traditional legal system; however, it is one of the oldest legal principles that Nigeria inherited from the English legal system. Thus, the British Common law principle of *stare decisis* or judicial precedent influenced the act of judging in Nigeria. The doctrine of judicial precedent is the foundation upon which the common law system is erected in Nigeria. The common law doctrine of stare decisis states that once a court has decided a legal issue, subsequent cases presenting similar facts should be decided in conformity with the earlier decision.<sup>63</sup> Judicial precedent or stare decisis is the principle of law on which a judicial decision is based.<sup>64</sup>

The general principle in common law systems, like Nigeria and the United States, is that similar cases should be decided so as to give similar and predictable outcomes. The principle of precedent is the mechanism by which that goal is attained. So, courts are generally required to abide by precedent and not counter status quo. In *National Electric Power Authority v. Onah*<sup>65</sup>, the Supreme Court of Nigeria defined stare decisis as to stand by your decision and the decisions of your predecessors, however wrong they are and whatever injustice they inflict.<sup>66</sup> The doctrine of stare decisis was also explained in the case of *Osakwe v federal College of Education (Technical) Asaba*<sup>67</sup> as abiding by former precedent where the same or similar points came up again for litigation.<sup>68</sup>

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<sup>62</sup> Although these terms are slightly different, for the purpose of this thesis, we will use them as one and the same; to mean the dependence of a court on the decision of a superior court.

<sup>63</sup> See *People v. Bing*, 76 N.Y.2d 331, 337-338 (1990).

<sup>64</sup> Olong, A.M (2007) *The Nigerian Legal System, An Introduction*, Malthouse Press Limited, Nigeria. P 21 (1997) 1 NWLR (Pt. 484), Page 680 at 688

<sup>65</sup> *National Electric Power Authority v. Onah* (1997) 1 NWLR (Pt. 484), Page 680 at 688

<sup>67</sup> (2010) NWLR (pt. 1201) at 34

<sup>68</sup> Also see *Moghalu v Ngige* (2005) 4 NWLR (pt. 914)

Therefore, the doctrine of judicial precedent is dependent on settled judicial hierarchy, as decisions of higher courts are generally binding on lower courts in the hierarchy. By the general principle of stare decisis a lower court is bound by the decisions of a higher court.<sup>69</sup> Hence, and to recap again to support a better understanding of the system, the hierarchy of Nigerian courts, from the highest Court of record to the lower Courts, is as follows:

1. The Supreme Court of Nigeria<sup>70</sup>
2. The Court of Appeal<sup>71</sup>
3. The Federal High Courts<sup>72</sup>
4. The High Court of Federal Capital Territory, Abuja<sup>73</sup>
5. The Sharia Court of Appeal of Federal Capital Territory, Abuja<sup>74</sup>
6. The Customary Court of Appeal of Federal Capital Territory, Abuja.<sup>75</sup>
7. State High Court<sup>76</sup>
8. The Sharia Court of Appeal of a state<sup>77</sup>
9. The Customary Court of Appeal of a state<sup>78</sup>
10. The Magistrate Court

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<sup>69</sup> *Idris v. A.N.P.P. (2008) 8 NWLR (Pt.1088) 1 at 75, paras. E-H*

<sup>70</sup> This court is established by section 230(1) of the Constitution, is the highest court of record in Nigeria and its decisions binds the court of Appeal and all other courts in Nigeria as affirmed in the case of *Dairo v U.B.N PLC (2007)16 NWLR (pt.1059) 99 at 159*

<sup>71</sup> See section 237 of the Constitution

<sup>72</sup> See section 249 of the Constitution

<sup>73</sup> See section 255 of the Constitution

<sup>74</sup> See section 260 of the Constitution

<sup>75</sup> See section 265 of the Constitution

<sup>76</sup> See section 270 of the Constitution

<sup>77</sup> See section 275 of the Constitution

<sup>78</sup> See section 280 of the Constitution

11. Area Courts or District Courts of various grades, Customary and Native Courts  
The National Industrial court, Investment and Securities Tribunal Court Martials are special courts.

This order of arrangement of the hierarchy of courts, implies that lower courts are bound by the decision of the Supreme Court in that order.

Judicial precedent can be binding or persuasive. According to Murgan, Kwagyang and Azeez Bello,<sup>79</sup> the doctrine of *stare decisis* is said to be binding on lower courts from higher courts, and persuasive between one high court and another high court or between courts of coordinate jurisdictions.<sup>80</sup> In other words, binding precedent is one that must be followed by the lower court, while persuasive precedent is one that the court is not obliged to follow. The *ratio decidendi* of a case, also known as the reason for the decision of the court, is what establishes binding precedent.<sup>81</sup> And any other reasonings that do not ‘necessarily’ relate to the facts in issue are known as *obiter dictum*, or the persuasive precedent.<sup>82</sup> Thus, the Supreme Court admonished that even though an *obiter dictum* is not regarded as the binding precedent, an *obiter dicta* of the Supreme Court should not be disregarded as they are strong pointers to the probable direction of the law.<sup>83</sup> This point in discussed further in Chapter Two.

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<sup>79</sup> Judicial Precedent and the prevention of contradictory judgments. Journal of Humanities and social science, Vol. 20 Issue 2Ver. IV(Nov.2015) PP65-75.

<sup>80</sup> *Ibid*: 71

<sup>81</sup> *Amobi v Nzegwu & Ors (2013) vol. 12 MJSC Pt. 1 at page 1*

<sup>82</sup> *Ibid*

<sup>83</sup> *Ifediora v Umeh (1988) 2 NWLR page 5 at 13 and Buhari v. Obasanjo (No.3) (2004) 1 W.R.N. Page 1 at 46*

## The Impact of Precedent on Nigerian Judicial System

This doctrine of *stare decisis* has both positive and negative impacts on the judicial system. The positive impacts of judicial precedent include the following:

- It saves judicial time.
- It prevents arbitrariness in judicial decisions.
- It checks against abuse of discretion.
- It assists lawyers to predict the decision of courts in similar cases.
- It somewhat encourages uniformity in judicial decisions.
- It predicts the relevant and applicable laws to the case.
- It upholds respect, hierarchy and compliance to status quo.
- It creates economic reliance where business and individuals rely on the court for interest. It also creates government reliance as it provides guidance to government officials on appropriate actions to take with respect to a given statute.

Precedents are established as guides to future conduct. *Per* Abiru, *JCA*, aptly put it as follows: “ *if progress be desirable, if the growth of the nation, in the perfect development of constitutional government, as well as in the stability of its institutions, be a desideratum, these objects can certainly not be attained by a disregard of the principle of stare decisis.*”<sup>84</sup> Also in *Ojukwu v. Agupusi & Anor*,<sup>85</sup> the Court of Appeal stated that precedent obviates stability and enhances consistency and coherent corpus juris as well as presents continuity and manifest respect for the past decisions in our legal order.<sup>86</sup> The

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<sup>84</sup> See *Adeyemi & Ors. v O. Achimu/Ndic/Assurance Bank Ltd & Ors (2015) LPELR-24379(CA) pp.43-47*

<sup>85</sup> *(2014) LPELR-22683(CA) per Agube, JCA, at pp 41-41, paras F-A*

<sup>86</sup> *Ibid*

Supreme Courts also said precedent ensures equality of treatment of litigants before the courts and spares the judges the stress and drudgery of re-examining rules and principles of law where they can afford some degree of predictability and stability from already existing legal order.<sup>87</sup>

Similarly, in the American case of *Payne v. Tennessee*,<sup>88</sup> “*stare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.*” Also, in *Hilton v. S.C. Pub. Rys. Comm’n*,<sup>89</sup> “*Adherence to precedent promotes stability, predictability, and respect for judicial authority.*”

The negative impacts of judicial precedent include the following:

- It hinders flexibility in judicial decision.
- It is rigid and does not allow for easy transition or easy transformation.
- It focuses more on technical justice than substantial justice.
- It focuses more on compliance with precedent rather than the quality of law.
- It focuses more on the impact of the precedent on the law, than the impact of law on the society, as the laws were created for the benefit of society.
- Its stereotypical structure weakens or restricts the power of judicial independence and judicial discretion.

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<sup>87</sup> See also *APC & Ors. v In Re: CPC & Ors (2014) LPELR-24036(SC), Adegoke Motors Ltd v Adesanya (1989) 3 NWLR (pt109) at 266,*

<sup>88</sup> *501 U.S. 808, 827 (1991)*

<sup>89</sup> *502 U.S. 197, 202 (1991)*

Sanni (2016), gave a detailed account of facts that affect judicial precedent as follows:

*“(i.) Age: Generally, the greater the age of a precedent, the greater would be the reluctance of the court to disregard it even where the reasoning in it is not sustainable or convincing.*

*(ii) The status of the court and its composition are also of essence as to the value of the case as a precedent. In Nigeria, the decisions of Supreme Court Justice (sic) are accorded great weight.*

*(iii) The adequacy of law report is another factor that affects the weight of precedents. Early cases are often inadequately reported due to lack of modern standards of law reporting. In fact, some law reports concentrate on reporting judgments of certain specific courts thereby indirectly causing greater weight to be attached to such judgments. Example of this can be found in Nigeria where emphasis is concentrated on reporting judgments of only the Court of Appeal and the Supreme Court thereby deliberately omitting reporting sound judgments of the High Courts (State or Federal).*

*(iv) The history of a precedent is also very significant in determining its weight. First, the extent to which such precedent has been applied in later cases and approval of such precedent by jurists will definitely affect the weight attached to it. Second, whether the case was fully argued on the particular point taken or relevant authority cited also affect the weight attached to such precedent. Judgment given on merit of the case is likely to have more weight than judgment devoid of pleading or strict principle of law. Third, subsequent courts are responsive to argument based on the unjust or absurd consequences resulting from a previous case. This factor is often linked with a change in social condition which renders the earlier decision obsolete.*

*(v) Where the court is unanimous in a given judgment, more weight is likely to be given to such judgment than where there is a dissenting judgment. The situation becomes complex where circumstances change, making the precedent inappropriate to modern condition.”<sup>90</sup>*

Sanni’s last point, offers leeway to deviate from status quo, allows for change and leaves room for flexibility with precedent. Where circumstances of the case change, the situation becomes complex and inappropriate under modern conditions, thereby leaving judges with the challenge of ‘reconciling’ the law with the complex situation of cases and

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<sup>90</sup> “Introduction to Nigerian Legal Method, Ile Ife OAU Press Limited: 187 -188, Cited from Idahosa, Doctrine Of “Stare – Decisis” And Judicial Precedent: The Need for Lower Courts to Be Bound by Decisions of The Superior Courts Of Record, *opcit*

modern conditions in society.<sup>91</sup>This highlights the hypothesis of this thesis that will be addressed in Chapter Four. The value or impact of society cannot be underestimated in the act of judging because society forms the bedrock of the existence of courts. The Appeal Court in *Dasofunjo v. Ajiboye*<sup>92</sup> stated that the function of Courts is to do justice between parties by settling their disputes, and anything short of that defeats the spirit of the law and the Constitution. Accordingly, where the justice rendered by the courts is not understood or appreciated as just by the parties or society, the essence of the Constitution will be defeated, and this will make a caricature of Nigeria's democracy.

In addition to the observation above, there are three pragmatic challenges that adherence to precedent creates in contemporary Nigeria. **The first** is that precedent loses its relevance to prevailing social views, culture, values and interests. Often precedent becomes stale and undeveloped with regard to some areas of law, compared to the pace of advancement in the legal society. Hence, while society develops, the Court's adherence to precedent restricts the advancement of the judicial/legal system. This creates a vacuum in the law; one that needs to be filled through statutory interpretation. The inevitable risk is the tendency that following past precedent may lead to stereotyped procedures that frustrate justice and stultify progress.<sup>93</sup> Olong states that precedent perpetuates injustice; encourages rigidity in the judicial process; and prevents progress and the spirit of experiment.<sup>94</sup>

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<sup>91</sup> This creates a dilemma for the judge, one that eventually affects the act of judging.

<sup>92</sup> (2017) LPELR-42354(CA) see also *Engineering Enterprise Contractor Co. of Nigeria v. Attorney-General of Kaduna State* (1987) 1 NSCC 601

<sup>93</sup> Olong, A.M (2007) Nigerian Legal System, *opcit*:26

<sup>94</sup> *Ibid*: 30.

**The second** challenge created by strict adherence to precedent is that sometimes the judicial philosophy of the lower court judge may conflict with the precedent (i.e. the judicial philosophy of the higher court judge or the precedent establishing judgement), and this puts the lower court judge in a dilemma to either apply discretionary powers and follow his/her philosophy to ensure justice is done in the case, or to abide by precedent and maintain stability in the law.<sup>95</sup> If the former option is applied, the lower court stands the risk of facing the wrath of the apex court. A vivid example is the case of *Dalhatu v Turaki*<sup>96</sup>, where *Per* Katsina Alu, JSC in strong terms condemned a trial judge who departed from the decision of the Supreme Court, as follows:

*“The conduct of the learned trial judge I.U. bello is to say the least most unfortunate. This is the highest and final court of appeal in Nigeria. Its decisions bind every court, authority or person in Nigeria. By the doctrine of state decisis, the courts below are bound to follow the decision of the Supreme Court. The doctrine is sine qua non for certainty to the practice and application of law. A refusal therefore by a judge of the court below to be bound by this court’s decision, is gross insubordination (and I dare say such a judicial officer is a misfit for the judiciary).”*<sup>97</sup>

**Thirdly**, precedent also creates a pragmatic challenge amongst superior courts. For instance, there are conflicting precedents from the Supreme Court and sometimes the Courts of Appeal, which often affect adherence from the lower courts. In other words, there are varied opinions on a point of law that confuse lower courts on which precedent to adopt. By law, where precedents conflict, the lower Courts are bound to follow the more recent precedent even if the older one is more relevant to the interests of justice. In

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<sup>95</sup> Murril, B.J (2018) Modes of Constitutional Interpretation *opcit*:22-23

<sup>96</sup> (2003) 15 NWLR (pt 310) at 336

<sup>97</sup> *Osakwe v Federal College of Education Asaba, (supra)*

the case of *Osakwe v Federal College of Education Asaba*<sup>98</sup> the Supreme Court held that where there are two conflicting decisions of the same high court, the lower court is bound to comply with the latter or latest decision of the high court even if it was reached *per incuriam*. Then in *Bronik Motors Ltd & Anor v. Wema Bank*,<sup>99</sup>, the Supreme Court enumerated that it can deviate from its previous decision where there is a breach of justice, on ground of Public Policy; and where the retention of the decision will amount to a perpetuation of injustice. The apex court further stated in *Abdulkarim v. INCAR Nigeria Ltd*<sup>100</sup> that although it will respect its previous decisions as a court of last resort (not bound by precedent), it will not hesitate to overrule any decision of its own which was reached on wrong principles, as that is the only way to keep the stream of justice pure.<sup>101</sup>

Nevertheless, the only deviation from this fundamental doctrine of order in judicial hierarchy is the concept of distinguishing the case.<sup>102</sup> This means the court can only deviate from a superior court's decision if the material facts of the cases are different.<sup>103</sup> Thus, where a judge is faced with such 'similar' yet different cases the judge must point out an essential difference between the present case and an earlier one in facts, and use such difference as justification for departing from the decision of the earlier case.<sup>104</sup> Hence judges must lay emphasis on such distinction(s) and give reasons as to

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<sup>98</sup> *supra*

<sup>99</sup> (1983) NSCC P.225

<sup>100</sup> (1992) 7 SCNJ P.366

<sup>101</sup> *Ibid*

<sup>102</sup> This is an exception to the general rule of precedent

<sup>103</sup> See *Janus v Am. Fed of State County*, Cited from Murrill, *ibid*:11

<sup>104</sup> *Ibid*

why they are unable to abide by precedent.<sup>105</sup> So, judges who choose to distinguish cases should support their opinion rather than make bare declarations that the facts of the case are different.<sup>106</sup>

Nonetheless, even given the concept of distinguishing cases, there are issues that arise as a result of complicated matters. One challenge is the possibility that no facts or situation in two cases are absolutely identical. There are numerous cases with identical facts yet minor differences, yet judges are required to resolve cases in similar ways with respect to another seemingly similar case. *Per* Niki Tobi JSC observed in *Oladeji (Nig.) LTD v. Nigeria Breweries PLC*<sup>107</sup> that “*Factual distinctions or differences in cases can only avail a party when they are germane or material to the stare decisis of the case....This means that the facts that give rise to the principle of stare decisis are the material facts, devoid of or without the unimportant details. This also means that the facts need not be on all fours in the sense of exactness or exactitude.*”

Where conflicts arise with application of precedent, it is fundamental to distinguish cases. When a lower court is unable to justify its departure from the rule on the basis of distinguishable facts, Tobi states that it is judicial rascality, as it will be tantamount to distinctions of the facts of case where no distinction exists.<sup>108</sup> However there may be instances where the decision of the higher court seems inappropriate or unjust under the circumstances of a given case.

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<sup>105</sup> This may either be on the ground that that facts of the earlier case are different from the facts of the case in hand, or that the decision is too wide, considering the issues before that court.

<sup>106</sup> *Ibid*

<sup>107</sup> (2007) 5 NWLR (Pt. 1027) P. 415 at P. 436.

<sup>108</sup> Tobi, N, *opcit*:79

The rule on precedent in Nigeria is somewhat similar to that of the United States, but in the United States, adherence to precedent is more flexible. In *Citizens United v FEC*,<sup>109</sup> the American Court confirmed that abiding by its prior decision supports the legitimacy of the judicial process and fosters the rule of law. Hence, the significance of precedent was emphasized in *Vasquez v. Hillery*<sup>110</sup>, as follows: “*The important doctrine of stare decisis is the means by which we ensure that the law will not merely change erratically but will develop in a principled and intelligible fashion. That doctrine permits society to presume that bedrock principles are founded in the law, rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.*”

However, in the U.S., overruling incorrect precedents may occasionally be necessary to rectify egregiously wrong decisions or to account for changes in society.<sup>111</sup> Where adherence to precedent affects the justice of a case or society, the court can overrule precedent. A ready example is the case of *Brown v Board of Education*,<sup>112</sup> where the court held that the segregation of public schools by race violated the Equal Protection clauses of the Fourteenth Amendment. In addition, the Supreme Court of the U.S., states that the decision to overrule precedent must be based on strong grounds that extend beyond the court’s mere disagreement with the merits of the prior decisions’ reasoning.<sup>113</sup>

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<sup>109</sup> 558, U.S 310, 378 (2010)

<sup>110</sup> 474 U.S. 254, 265-66 (1986)

<sup>111</sup> Murrill, *opcit*:7

<sup>112</sup> 347 U.S. 483

<sup>113</sup> Murrill, *opcit*:11

Also, by a 2018 decision in *Janus v American Federation of State, County and Municipal Employees*,<sup>114</sup> the U.S. Supreme Court outlined factors to be considered when the court decides to overrule (constitutional) precedent. These factors include: the quality of the precedent's reasoning, the workability of the rule the precedent establishes, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision/interest at stake. In other words, the court's reasoning was whether the precedent had been abandoned by subsequent legal developments and whether overturning the precedent would threaten the legitimacy of the judiciary.<sup>115</sup> Nigerian courts incorporated the 'spirit' of *Janus*' case in the case of *Board of Customs and Excise v Bolarinwa*,<sup>116</sup> thus:

*"It is not sufficient to say that the facts are different. A Magistrate who does not intend to apply a decision of the High Court must state:*

- (1) The ratio decidendi of that decision;*
- (2) The facts proved in that decision; and*
- (3) Show by judicial reasoning in the body of the judgment, in what manner the High Court decision is different from the case before him."*

Courts balance a lot of "non-dispositive factors" in deviating from precedent.<sup>117</sup>

Therefore any Court, even the High Court, can deviate from precedent, if justices distinguish the case and back up their opinion rather than make bare declarations that the facts of the case are different. The later can resort to abuse of judicial discretion.<sup>118</sup>

The U.S. Courts also have expressed some concern that if precedent is overruled on grounds of mere disagreements with prior decisions reasoning, the Court's legitimacy

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<sup>114</sup> 585, *U.S. \_\_\_\_\_* (2018), No.16, 1466, slip opt at 43-35

<sup>115</sup> Walker, *opcit*

<sup>116</sup> (1968) *NMLR 350 at 352, Per Thompson J*

<sup>117</sup> Walker, J.M (2016) *The Role of Precedent in United States: How Do Precedents Lose Their Binding Effects? opcit*

<sup>118</sup> This will be discussed in chapter three

may suffer. Similarly, the Nigerian Supreme Court states that where it is necessary, proper and just to depart from previous decisions, courts should not hesitate to overrule its previous decisions,<sup>119</sup> The Nigerian Supreme Court also states that it can overrule its own decisions where its previous decision was given wrongly or reached *per incuriam*.<sup>120</sup>

Based on several factors discussed, Nigerian courts have experienced inconsistencies in adhering to precedent. Unfortunately, the lack of uniformity, inconsistencies, and conflicts in the Courts affects the reputation of the judiciary and the legal profession. This has a ripple effect on society, whereby these conflicting decisions of the apex court creates confusion that trickles to lower courts and eventually to society. This frustrates the place of discretion. This indicates looming trouble. The lower courts cannot afford to breach precedent, so in a situation where old precedent outweighs the new and at the same time challenges the justice of the case, lower court are trapped in a cage of frustration. This is one delicate quagmire the judiciary cannot afford to ignore in this democratic era of chaos in the Nigerian judiciary.<sup>121</sup> Unfortunately, the consequences of such inconsistency fall back on society.<sup>122</sup>

Generally, despite its disadvantages, *stare decisis* is firmly rooted in Nigeria's Legal System and in other common law jurisdictions. Precedent is a fundamental doctrine of order that must be complied with to avoid arbitrary abuse of discretion. Therefore, the

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<sup>119</sup> *Johnson v Lawanson* (1971) 1 All NLR P. 56; *Maclean v Inlaks* (1980) 8-11 SC 1.

<sup>120</sup> *Ibid*

<sup>121</sup> The recent conflicts and abuse of rule of law that has been incessant in the country for the past three years, i.e. the disregard and disrespect the arrest and prosecution of senior justices without due process, the suspension of the Chief Justice of Nigeria, etc.

<sup>122</sup> As the African proverbial phrase: When the elephants(courts) fight (disagree), it is the grasses(society) that suffers.

judge of a lower court must abide by the previous decisions of the higher court, as the decision of a superior Court is binding on an inferior court and the inferior court has no discretion in the matter but to follow the decision of the superior court. And whether the inferior court believes otherwise, is immaterial.<sup>123</sup> Also in the American case of *Alleyne v. United States*,<sup>124</sup> Associate Justice Sotomayor<sup>125</sup> stated “*We generally adhere to our prior decisions, even if we question their soundness, because doing so ‘promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.’*”<sup>126</sup> Although this principle is a bedrock principle in the American legal system, it is not an “inexplorable command”.<sup>127</sup> According to Judge Walker<sup>128</sup>, “*The doctrine is a principle of policy and not a mechanical formula of adherence to the latest decision.*”<sup>129</sup>

Previously, during the tenure of Chief Justice Marshall, American courts had preferences for adherence to precedent, now the courts have sought to strike a balance between maintaining a stable body of consistent jurisprudence while at the same time preserving some “mechanism for error correction.”<sup>130</sup> Thus in the US, precedent is entitled to respect and deference, since the court considers the principle of *stare decisis* as

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<sup>123</sup> See *Ola Animashaun v. A.G Lagos State & 5 Ors*, (Unreported) Appeal No. CA/L/1046/2015 delivered on Monday, 19<sup>th</sup> November 2018.

<sup>124</sup> 570 U.S. 99, 118 (2013)

<sup>125</sup> Justice of the Supreme Court of the United States of America

<sup>126</sup> Also, in *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986) (“[T]he important doctrine of stare decisis [is] the means by which we ensure that the law will not merely change erratically but will develop in a principled and intelligible fashion. That doctrine permits society to presume that bedrock principles are founded in the law, rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.”).

<sup>127</sup> Walker, J.M (2016), *opcit*

<sup>128</sup> Senior circuit judge, U.S Court of Appeals for the Second Circuit

<sup>129</sup> Walker, J.M, *opcit*

<sup>130</sup> Murrill, B.J (2018) *opcit*:5

discretionary “principle of policy” to be weighed and balanced along with its views about the merits of the prior decision and several pragmatic considerations.<sup>131</sup>

Even though precedent frustrates the place of discretion, fundamentally, nothing can take the place of precedent in Nigerian courts. Precedent has come a long way and it is here to stay. There are rules that are meant to be obeyed within the order of the judicial system. However, just as in every aspect of human life, when a rule is excessive, it breaches its essence of compliance. Hence, in this case, where the rule is not relevant, it ridicules the essence of justice. Rules are made to ensure compliance and a safe society, just as precedents are meant to ensure compliance and a just society. When these rules are adhered to without regard for surrounding circumstances, they lose their essence and non-compliance kicks in.

Therefore, in concluding this chapter, it is clear that even though the Nigerian judicial system originally emanated from traditional Nigerian society, the jurisprudence of Nigerian case law came from the British Common Law through the adoption of the doctrine of precedent. So, despite the fundamentally indispensable value of precedent to case law in Nigeria’s legal/judicial order, ‘unjustified’ adherence to precedent stifles the advancement of justice– the essence of ‘judging’ in Nigeria. Accordingly, incessant changes in society and constant development of the law impact the interpretation of statutes in Nigeria. Accordingly, a review of the rules of interpretation and the principles judges apply in adopting these rules will further elucidate the impact and extent to which precedent directs the act of judging in Nigeria.

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<sup>131</sup> *Ibid*:6

## Chapter Two: Judicial Interpretation in Nigeria

*“A judge by the very nature of his judicial function gets into contact with statutes every day in court. He is faced daily with the interpretation of statutes coming before him. In some cases (most cases actually) the particular statute had earlier been interpreted by judges of the superior courts. In such cases the job of the judge of the inferior court is much easier. He simply uses the decided cases on the particular statute if it is appropriate in the circumstances of the case before him. This is the whole essence of stare decisis. There are however certain cases where statute had not received judicial interpretation. The statute is coming to the court for the first time for the interpretation of the judge. The judge must exercise his interpretative jurisdiction to vindicate the intentions of the legislator. He has no jurisdiction to interpret the statute the way he feels it should be. He has no power to re-write a statute. All he has to do is to interpret the statute to bring out its intended meaning and no more.”<sup>132</sup>*

Niki Tobi

### Introduction

This chapter focuses on the central role of judges in interpreting laws/statutes. It analyzes the legal framework for interpretation of statutes in Nigeria and reviews case law, showing how Nigerian judges interpret statutes. The next section will state the classic canons or rules of statutory interpretation applied in Nigeria. Then an attempt will be made to classify various principles of statutory interpretation. Principles that guide the application of rules of interpretation are gleaned from several decided authorities. At the conclusion of this chapter, readers will comprehend the approach(es) judges adopt in interpreting statutes, i.e. the how, the why and the when of judicial interpretation in Nigeria. Although judicial approaches to interpreting statutes may overlap with rules or principles, they operate in isolation.<sup>133</sup>

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<sup>132</sup> Tobi, N (1992) *The Nigerian Judge*, *opcit*:218

<sup>133</sup> Rules of interpretation are slightly different from principles of interpretation

## Legal Framework for Interpretation of Statutes

The judge's role in interpreting statutes is not specifically stated in any statute in Nigeria. However, based on the regulations, which establish and govern the judiciary, as outlined in the introduction,<sup>134</sup> a core function of judges is to settle disputes and these disputes are governed and ruled by statutes which only the court is empowered to construe in line with particular cases and controversies. Judges do this through interpretation. Ukeje aptly states that the importance of interpretation of legislation and the applicable rules and principles of law cannot be over-emphasized, and that a good understanding of the rules and principles of law is an indispensable tool for the legal draftsman.<sup>135</sup> Judicial pronouncements about statutes are generally the final word on statutory meaning and will determine how the law is carried out—at least, unless the legislature amends the law.<sup>136</sup> As Chief Justice John Marshall stated in *Marbury v. Madison*<sup>137</sup>: “It is emphatically the province and duty of the judicial department to say what the law is.”<sup>138</sup> Hence, the most prominent and challenging task of the judge is interpreting statutes.<sup>139</sup>

Without rules or procedures set up to guide judges in interpreting statutes, case law provides the only legal framework governing statutory interpretation.<sup>140</sup> From the

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<sup>134</sup> See page ii

<sup>135</sup> Ukeje, R.N (2018) *Intrinsic and Extrinsic Aids to the Interpretation of the Constitution, Statutes and Private Documents*. ECOWATCH Publications (Nig) Ltd, Lagos, Nigeria. P.4

<sup>136</sup> Brannon at p.2

<sup>137</sup> 5 U.S. (1 Cranch) 137 (1803)

<sup>138</sup> Cited from Bannon, *ibid*:2

<sup>139</sup> This onerous task requires judges to decipher the intention of lawmakers and mentally transmute into the minds of the framers and ‘repeat’ what the drafters had in mind when drafting the specific statute, even given circumstances that are completely different from the reason that established the said intention of the drafters.

<sup>140</sup> Even the Interpretation Act does not state how judges can interpret statutes.

British common law system of *stare decisis*, Nigerian judges are creating their own ‘common law’ of statutory interpretation.<sup>141</sup> In 1965, the Court in *Okumagba v Egbe*<sup>142</sup> held that courts ought to find out the intention of the legislature/law makers while interpreting the provisions of a statute.<sup>143</sup> This rule has remained a central tenant throughout Nigeria’s rapidly changing times.<sup>144</sup>

The legal framework of interpretation of status in Nigeria was established in the celebrated case of *Chief Awolowo v Alhaji Shagari*,<sup>145</sup> where the Supreme Court extensively discussed the rules/canons (and principles) of interpretations as follows:

*“A statute should always be looked at as a whole. Words used in a statute are to be read according to their meaning as popularly understood at the time the statute became law. A statute is presumed not to alter existing law beyond that necessarily required by statute. It is necessary to emphasize that a decision on the interpretation of one statute generally cannot constitute a binding precedent with regard to the interpretation of another.*

*The three rules of statutory interpretation which dominate the historical perspective are:*

- (1) The Mischief Rule*
- (2) The Literal Rule and*
- (3) The Golden Rule.*

*They have been useful aids in the interpretation of statutes in common law countries for centuries. It has been said that they have been fused so that we now have just one rule of interpretation, a modern version of the literal rule which requires the general context to be taken into consideration before any decision is taken concerning the ordinary meaning of words. The Mischief rule is now used to explain what was said by Parliament, not to change it as the time of Heydon's case.... The object of the statute is relevant on all occasions not only when the meaning is doubtful as was said in the Sussex Peerage case (1884)CL and Fin 85 at p. 143 (6-8 E.R.)The golden rule can only be invoked when there is internal*

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<sup>141</sup> See *A.G Abia State v A.G Federation (2002) 3 S.C 106 at 164*, (there is no special provision in the constitution giving to the court any power of interpretation greater than that which flows from the ordinary rules of construction). *Per Kutigi, JSC*

<sup>142</sup> *(1965)1 All NLR 62 at 65*

<sup>143</sup> See Tobi, E JCA in *Ola Animashaun v Attorney General of Lagos State & Ors at p.29*

<sup>144</sup> Also, in *Ugwu v Ararume (2007)12 NWLR (pt1048) 367 at 498*, the court said the function of the court is to interpret legislation according to the intent of those who made it.

<sup>145</sup> *(1979) 6-9 S.C 51*

*disharmony in the statute, not in cases in which a literal interpretation would produce results which are absurd or inconvenient for other reasons .... There is need to emphasis the point that the proper application of the Literal rule does not mean that the effect of a particular word or phrase, clause or section is to be determined in isolation from the rest of the statute in which it is contained. The Golden Rule allows for a departure from the literal rule when the application of the statutory words in the ordinary sense would be repugnant to or inconsistent with some other provisions in the statute or even when it would lead to what the courts consider to be absurdity. The usual consequence of applying the Golden rule is that the words, which are in the statute, are ignored or words which are not there are read in.... It should be emphasized that when the Golden Rule is used as a justification for ignoring or reading in words, resort may only be made to it in the most usual cases .... There are some dicta flatly denying that the courts have any power to reject the natural and grammatical meaning of a word or phrase on the ground that it leads to some result which cannot reasonably be supposed to have been intended by the legislature .... The words used in the statute must not be given a meaning they cannot by stretch of imagination bear .... The duty of a court is to interpret an Act of Parliament so as to give effect to its intention. the court does not claim the right to order Parliament or its draftsman to observe the rules which judges laid down .... The ordinary meaning of words is a question of fact. It is however very far from being an ordinary fact for legal purposes as it is the subject of judicial notice and the decisions on them become binding precedents so far as the construction of the statute in question is concerned. This question of fact so far as law of statutory interpretation is concerned is not one which evidence can be called on each side .... when it is agreed or contended that statutory words have a technical meaning, evidence with regard to that meaning is unquestionably admissible and it is generally preferred to information gleaned from other sources such a dictionaries.”*

### **The Canons/Rules of Statutory Interpretation in Nigeria<sup>146</sup>**

The basic common law rules that guide courts in the interpretation of statutes are referred to as the canons or rules of interpretation. Nigerian courts adopted and have applied these classic rules of interpretation from history.<sup>147</sup> The set of rules are the literal

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<sup>146</sup> It is imperative to note that rules of interpretation are different from principles of interpretation although they are often used interchangeably. See subsequent discuss on principles of interpretation in this chapter.

<sup>147</sup> See chapter 1

rule, the golden rule, the mischief rule, the *ejusdem generis* rule and, in recent times, the purposeful approach.<sup>148</sup>

**The literal rule.** This is the starting point of statutory interpretation in Nigeria. Also known as the plain meaning rule, it simply states that the words of the statute best declare the intention of the law giver, hence they should be the first point the interpreter must consider. Where the words of a statute are plain, clear and unambiguous, the Court shall give effect to their literal meaning.<sup>149</sup> The general principle under this rule is that words used in a statute are to be construed in their usual grammatical sense.<sup>150</sup> This rule posits that the primary responsibility of the Court in the application and interpretation of the law in cases is to determine the intent of the legislature from the words used in the statute. In *Okumagbae v Egbe*,<sup>151</sup> the Supreme Court declared that once the meaning of a word in a statute is clear, a judge is bound to give effect to it.<sup>152</sup> Under this rule, a judge cannot and should not defect to another meaning outside the clearly stated meaning in the statute. Similarly, in *Sebelius v. Cloe*,<sup>153</sup> the American Supreme Court held that if the language of the statute is plain and unambiguous, it must be applied according to its terms.

It is settled law that the literal interpretation of the statute should be followed unless following it will lead to absurdity and inconsistency with the provisions of the

<sup>148</sup> As propounded by Lord Denning, M.R.

<sup>149</sup> See *Ogbunyiya v. Okudo* (1976) 6-9 Sc.32; *Ogunmade v. Fadairo* (1972) 8-9 SC.1; *Global Excellence Communications Limited & Ors v. Mr. Donald Duke* (2007) LPELR-1323(SC); *Lawal v GB Ollivant* (1972) 2 S.C. 124; *Okotie-Eboh v. Manager & Ors.* (2004) LPELR-2502(SC); *Adejumo v Military Governor Lagos State* (1972) 3 SC 45; *Agwuna v. AG, Federation* (1995) LPELR-258(SC)

<sup>150</sup> See *R v Bangaza* (1960) 5 FSC 1

<sup>151</sup> *supra*

<sup>152</sup> Tobi, N, *The Nigerian Judge*, *opcit*: 218

<sup>153</sup> 569 U.S. 369 (2013)

statute at stake. This was the opinion in *Onashile v Idowu*<sup>154</sup> where the court reiterated that if the literal interpretation of the statute would lead to the result which the legislators would never have intended, the courts must reject the interpretation and seek for some other interpretation.<sup>155</sup> Also, in *Ola Animashaun v Attorney General of Lagos State & Ors.*,<sup>156</sup> *Per* Tobi, E JCA, states that the duty of the court generally is to interpret the law by applying the literal rule of interpretation, and it is only when the application of this rule of interpretation will lead to absurdity that a court is then allowed to look at other rules of interpretation-- the Golden and the Mischief Rules of interpretation, among others.<sup>157</sup>

The notion is that words used in a statute which are not applied to any particular science or art are to be construed as they are understood in common language. However, the exception to the general rule is that the judge can only seek internal aid within the statute or external aid from other similar or relevant statutes, when the literal meaning may result in ambiguity or injustice, so as to resolve the ambiguity or injustice.<sup>158</sup> This rule, which is mostly applied by the Nigerian courts and the Constructionist school of jurisprudence, has not made a progressive impact on justice in many cases. Rigid adherence to the literal approach may inevitably result in a situation where the construction cannot be adapted to the current needs of the society and may give rise to

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<sup>154</sup> (1961) All NLR 313

<sup>155</sup> *Oshio, opcit*: 16

<sup>156</sup> (Unreported) Appeal No: CA/L/1046/2015, delivered on 30/10/2018

<sup>157</sup> *Ibid*:30

<sup>158</sup> See *Mobile v F.B.I.R* (1977) 3 S.C 53

decisions completely out of step with the spirit of the Constitution or any law for that matter.<sup>159</sup>

**The golden rule.** Nigerian courts adopted a version of the Golden Rule in the English case of *Becke v Smith*,<sup>160</sup> where Judge Parke stated “it is a very useful rule in the construction of a statute to adhere to the ordinary meaning of the word used, and to the grammatical construction, unless it is at variance with the intention of the legislature to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified so as to avoid such inconvenience, but no further.” In *Ejike Okoye v Commissioner of Police*,<sup>161</sup> Per Kekere-Ekun, JSC held that “The golden rule of interpretation of statutes is that where the words used in a statute are clear and unambiguous, they must be given their natural and ordinary meaning unless to do so would lead to absurdity or inconsistency with the rest of the statute.”<sup>162</sup> This rule provides courts with an alternative when literal interpretation would lead to absurd results.<sup>163</sup>

The Golden Rule enables judges to alter the meaning of a statute, to fit what is assumed to be the intent of the statute. According to Ukeje,<sup>164</sup> the court in applying the golden rule gives words used a secondary meaning they are capable of bearing, with the aim that the lawmakers would not have intended an unreasonable result.<sup>165</sup>

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<sup>159</sup> Sokefun, J & Njoku, N.C (2016) *The court System in Nigeria: Jurisdiction And Appeals*, *opcit*:11

<sup>160</sup> (1936) 150 E.R 724 AT 736

<sup>161</sup> (2015) LPELR, SC 279/2011

<sup>162</sup> See also *SPDC (Nig) Ltd v KATAD (Nig) Ltd (2006) 1 NWLR (PT.960) 216 PARA D-G*

<sup>163</sup> In *R v Princewill (1963) 2 All NLR 31* where the words to be interpreted are ambiguous it is the courts duty to interpret the words in such a manner as to avoid absurdity.

<sup>164</sup> Ukeje (2018) *opcit*:39

<sup>165</sup> Also in *Bronik Motors Ltd & Anor v. Wema Bank (1983) 1 SCNLR 296*, Per Idigbe, JSC stated that “where a judge is of the opinion that the application of the words of an enactment in their ordinary meaning

**The mischief rule.** The Mischief rule was established in *Heydon's case*<sup>166</sup> by the Barons of the exchequer in 1584. Pursuant to the decision in *Heydon's case*, the mischief rule is predicated on four factors: 1) the common law as it stood before the legislation in question was enacted, 2) the mischief and defect that gave rise to the legislation, 3) the remedy provided by the legislation, and 4) the rationale for the legislation.

In cases where the mischief the law is supposed to cure, is unclear; the court can look outside the statute for aid in construction. Therefore, in order to interpret a statute properly it is necessary to consider how the law stood when the statute to be construed was passed; what the mischief was for which the old law did not contemplate or provide; and the remedy provided by the statute to cure the mischief or defects.<sup>167</sup> In *A.G Lagos State v Mamman Keita*<sup>168</sup> Per Ekyegh, JCA applied the mischief rule in interpreting the *Administration of Criminal Justice Law, 2011*.<sup>169</sup> Hence, the duty of the Court is to adopt an interpretation that will suppress the mischief and promote the remedy within the true intent of the legislation.<sup>170</sup>

To better understand the mischief a law may be designed to prevent, Eig states that courts may consult explanatory documents to gain a better feel for context or to shed light on particular language in a statute. In the U.S, courts may consult legislative

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would produce an absurd result which cannot reasonably be supposed to have been the intention of the legislature, he may apply the words in any secondary meaning which they are capable of bearing.”

<sup>166</sup> 3 Co. Rep. 7a at 7b

<sup>167</sup> See *Balogun v Salami (1963) 1 All NLR 129*

<sup>168</sup> (2016) LPELR-40163 (CA) 15-16

<sup>169</sup> *Wilson v A.G of Bendel state (1985) 1 N.W.L.R (pt. 17) 572* “to arrive at a reasonable construction of a statute, the court is entitled, following the Rule in *Heydon's case* to consider how the law stood when the statute was passed. what the mischief was for which the old law did not provide and the remedy which the new law has provided to cure that mischief.”

<sup>170</sup> Tobi, N *opcit*:221

history.<sup>171</sup> A proper construction frequently requires consideration of a statute's wording against the background of its legislative history and in the light of the general objectives Congress sought to achieve.<sup>172</sup> In *Shell Oil Co. v Iowa Dep 't of Revenue*,<sup>173</sup> the court reiterates reliance on legislative history for guidance on broad congressional purposes.

**The ejusdem generis rule.** This rule is coined from the Latin maxim "*ejusdem generis*", which means "*of the same kind of nature.*"<sup>174</sup> In other words, when words in a statutory text are flanked by restricted words, the meaning of the general words are taken to be restricted by implications of the meaning of the restricted words.<sup>175</sup> On the application of this rule, the Supreme Court held in *Ehuwa v Ondo State I.E.C & Ors*<sup>176</sup> as follows: "*I think this is where the Ejusdem generis rule should apply. The rule simply means that in interpreting the provisions of a statute, general words which follow particular and specific words of the same nature as themselves take their meaning from those specific words.*" The *ejusdem generis* rule helps to confine the construction of general words within the genus of special words which they follow in a statutory provision or in a document.<sup>177</sup>

**Purposeful approach.** This rule is an approach to statutory and constitutional interpretation under which common law courts interpret an enactment in the light of the

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<sup>171</sup> Eig (2014) M.E (2014) Statutory Interpretation: General Principles and Recent Trends, *opcit*:47

<sup>172</sup> See *Wirtz v Bottle Blowers Ass'n*, 389 U.S. 463, 468 (1968)

<sup>173</sup> 488 U.S. 19,26 (1988)

<sup>174</sup> Ukeje, *opcit*:48

<sup>175</sup> *Ibid*:49

<sup>176</sup> (2006) 10 NWLR (pt1012) 544 at 595, paras A-C

<sup>177</sup> *Fawehinmi v. I.G.P & Ors* (2002) LPELR-1258(SC) 36, Per Uwaifo, JSC

purpose for which it was enacted.<sup>178</sup> This rule of interpretation was established by Lord Denning.<sup>179</sup> It is developed from the use of the purpose clause commonly found in statutes, a clause that may help the reader interpret the statute in the event of any uncertainties in the statute.<sup>180</sup> It is essential that in interpreting the words of a statute, the Court must consider the object of the statute.<sup>181</sup> The Court must guide itself with the essence of a provision in giving meaning to words of that provision. Once an interpretation meets the purpose of the provision of an enactment, then it is fine, and it is irrelevant that other possible interpretations of the provision exist. So said the court in *Rivers State Government v Specialist Konsult*.<sup>182</sup> Also, in *A.G of Lagos v A.G Of federation & 35 Ors*,<sup>183</sup> Per Uwaifo JSC reiterated this principle as follows:

*" this court is entitled to take account of and use such material or information which it considers will help it to determine the true intendment of a statutory or constitutional provision in a purposive interpretive approach; or which will lead it to access the correctness of a meaning it has, through the usual canons of interpretation, given to such a provision. This is particularly so of a provision which is either ambiguous or seems to have become controversial. "*

The advantages of the purposive approach are numerous in defining the justice system– the approach enables the court to consider not only the letter but also the spirit of the legislation.<sup>184</sup> Oshio opines that perhaps the greatest advantage of the purposive approach is the prevention of excessive legalism through undue adherence to the doctrine

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<sup>178</sup> *Garba Kyos & Anor v Kwaturu & 41 Ors (Unreported APPEAL NO CA/K/EPT/SHA/01/2015*. At p.16 Delivered September 21, 2016

<sup>179</sup> *Seaford Estates Ltd v Asher, Denning (1947)2 K.B 481.498*. It is recent rule adopted by Nigerian courts

<sup>180</sup> Ukeje, *opcit*:56

<sup>181</sup> *Elabanjo v Dawodu (2006) 15 NWLR (Pt 1001) 76 at 138H*

<sup>182</sup> *(2005) 7 NWLR (Pt 923) 145*.

<sup>183</sup> *(2003) 35 W.R.N97*

<sup>184</sup> Oshio, *Ibid*: 20

of judicial precedent, whereby the case before the court must be decided in accordance with the principles laid down in an earlier case regardless of the different surrounding circumstances.<sup>185</sup> After strict adherence to conservative approaches, even English Courts have become comfortable with the purposive approach. The House of Lords in *Pepper (Inspector of Taxes) v Hart*<sup>186</sup>, stated “*The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts must adopt a purposive approach which seeks to give effect to the true purpose of the legislation.*”<sup>187</sup> Also, Lord Denning stated that the literal method is now out of date; it has been replaced by the purposeful approach which will promote the general legislative purpose underlying the provision.<sup>188</sup>

It appears the purposive approach is the rule most applicable to the realist judge.<sup>189</sup> This thesis highlights and describes some purposive techniques and approaches judges can apply to judging, in order to ensure greater justice in society.<sup>190</sup>

As judges carry out the onerous task of applying canons of statutory interpretation, they encounter several challenges. It appears there is no single, all-encompassing canon of interpretation that is binding. Hence *Per Fatayi-Williams, JSC* observed that “*Some of these canons of interpretation take the form of broad principle only; consequently, a common feature of most of them is that they are of little practical*

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<sup>185</sup> *Ibid*:28

<sup>186</sup> (1993) 1 All E.R 42

<sup>187</sup> Cited from Oshio, P.E, *opcit*:1

<sup>188</sup> See *fn* 168

<sup>189</sup> In the case of *Ameachi v INEC*, the court seemed to have adopted the purposive approach of judicial interpretation. A more detailed argument will be discussed in chapter 4

<sup>190</sup> A sure benefit of judging

*assistance in settling doubts about interpretation in particular cases. This is partly due to vagueness but also because in many cases, where one canon appears to support a particular interpretation, there is another canon, often on equal status which can be invoked in favor of an interpretation, which could lead to a difficult result.*"<sup>191</sup> Similarly in the United States, some judges are also critical of canons of interpretation.<sup>192</sup>

### **Basic Principles of Interpretation of Statutes in Nigeria**<sup>193</sup>

As courts follow the rules/canons of interpretation of statutes in Nigeria, some basic rules establish standards courts can adopt for interpreting statutes. These standards are principles somewhat intertwined with, or often referred to as rules/canons of interpretation by courts in some instances, yet there are minor differences.<sup>194</sup> These principles are like a compass that directs courts down the right path of statutory interpretation. They are preliminary conditions that resonate in the mind of judges and assist them in applying the appropriate canons of interpretation; they direct judges to the right approach to adopt in a given case.

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<sup>191</sup> See *Awolowo v Shehu Shagari* (1979)6-9 SC51 at 64

<sup>192</sup> See Posner, R.A & Gluck, A.R (2019) *Statutory Interpretation on the Bench: A Survey of Forty Two Judges on the Federal Courts of Appeal*, *OpCit* "The younger judges, who attended law school and practiced during the ascendance of textualism, are generally more formalist and accepting of the canons of construction, regardless of political affiliation. The older judges are less focused on canons, take a broader view of their delegated authority, and appear to grapple more with questions of judicial legitimacy"

<sup>193</sup> These principles as will be outlined are coinages of this author gleaned from various cases.

<sup>194</sup> In *Tejumade A. Clement & Anor v. Bridget J. Iwuanyanwu & Anor* (1989) LPELR-872(SC), *Per Oputa, JSC* explains that principles are wider than rules. Rules apply in all or nothing dimension. Either decision falls within the antecedent portion of the *Rue*, in which case it must be dealt with as the Rule dictates or it does not, in which case it is unaffected by the rule. Principles merely inclines a decision one way but not conclusively. As principles are distilled from the facts of the case in which they were promulgated; as principles draw their inspiration and strength from the very facts which framed the issues for decision, it follows that when the facts are not similar, the principle need not apply or be applied to the new case. See also *Adegoke Motors Ltd. v. Dr. Babatunde Adesanya & Anor* (1989) LPELR-94(SC)

According to *University of Lagos & Ors. v. Professor Luke Uka Uche*,<sup>195</sup> it is the duty of the court whilst construing the statutory provision to have regards to basic principles depending on the words and phrases used in the statute.<sup>196</sup> Therefore, it has become a standard requirement for Nigerian courts to adhere to these basic principles whilst interpreting statutory provisions. In fact, the courts have laid down these principles in numerous cases discussed below. *Per* Obaseki, JSC summarized most of the principles in the case of *A.G Bendel State v A.G federation*<sup>197</sup> as follows:

*" In the interpretation of statutes and construction of our 1979 Constitution, one must bear the following principles of interpretation in mind:*

- 1. Effect should be given to every word;*
- 2. A construction nullifying a specific clause will not be given to the construction unless absolutely required by the context;*
- 3. a constitutional power cannot be used by the way of condition to attain unconstitutional result;*
- 4. The language of the Constitution where clear and unambiguous must be given its plain evidence meaning;*
- 5. The Constitution of the federal Republic of Nigeria is an organic scheme of government to be dealt with as an entirety; a particular provision cannot be severed from the rest of the Constitution;*
- 6. While the language of the Constitution does not change the changing circumstances of a progressive society for which it was designed to yield new and fuller imports to its meaning;*
- 7. A constitutional provision should not be construed so as to defeat its evidence purpose;*
- 8. Words are the common signs that mankind makes use of to declare their intention one to another and when the words of a man express his meaning plainly and distinctly and perfectly, there is no occasion to have recourse to any other means of interpretation;*
- 9. The principles upon which the constitution was established rather than the direct operation of literal meaning of the words used, measure the purpose and scope of its provisions;*

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<sup>195</sup> (2008) LPELR-5073(CA)

<sup>196</sup> See *Ugwu v Arurume* (2007) 31 WRN 1 at 60-61

<sup>197</sup> (1981) S.C 1

*10. Words of the constitution are therefore not to be read with stultifying narrowness.*"<sup>198</sup>

Although the above case made specific reference to the Constitution, some of the established guiding principles are also applicable to the interpretation of all statutes.<sup>199</sup> In addition to these principles the courts have suggested more recent principles to direct courts in statutory interpretation.<sup>200</sup> The Court in *Agbaje v Fashola*<sup>201</sup> stated the following principles for judges to bear in mind when interpreting statutes: a) a liberal approach to the interpretation of the constitution or statute should be adopted; (b) the court must employ care and take the circumstances of the people into consideration; (c) the historical facts which are necessary for the comprehension of the subject matter may be called in aid; and (d) the mischief which the legislation was made to deter is arrested"<sup>202</sup> Also the Court in *P.D.P. v. Ugba & Ors*<sup>203</sup> added more principles<sup>204</sup>: (1) it is the intention of the Legislature that should be sought, and same is to be ascertained from the words of the statute alone and not from other sources. (2) the court is not concerned with the results of its interpretation, that is, it is not the court's province to pronounce on the wisdom or otherwise of the statute but only to determine its meaning. (3) The court must not import into legislation words that were not used by the legislature and which will give a different meaning to the text of the statute as enacted by the Legislature. (4) The court must not

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<sup>198</sup> Although these principles were specifically on the interpretation of the Constitution, which has a slightly more onerous interpretative procedure, it may equally applicable to other statutes.

<sup>199</sup> For example, numbers 3,5,6,9 &10 are peculiar to interpretation of the Constitution

<sup>200</sup> These recent principles have not been itemized by any court in such a way that they are all categorized for proper guidance. This thesis is a first attempt at collating these principles and categorizing them as is.

<sup>201</sup> (2008) All FWLR (pt.443) 1302 at 1337 B-C

<sup>202</sup> This position was restated in the case of *Skye Bank v. Iwu* (2017) LPELR-42595(SC

<sup>203</sup> (2011) LPELR-4838(CA) Per Onyemenam, JCA pp 28-29 paras A-A

<sup>204</sup> Shortened as different from Obaseki's

bring to bear on the provisions of a statute its prejudices as to what the law should be, but rather should interpret the law from the clear words used by the Legislature (5) the court must not amend the statute to achieve a particular object or result.<sup>205</sup>

Furthermore, Ijaiye<sup>206</sup> also suggested the following principles of interpretation:<sup>207</sup>

- The language of the Constitution must be given its plain meaning;
- The provisions of the Constitution must be read together as a whole;
- Words of the Constitution must be given broader interpretation;
- The provisions of the Constitution should not be interpreted to have retrospect.<sup>208</sup>

The principles stated above, though not enacted by the legislature as Ijaiye recommends<sup>209</sup> are based on case law, which courts have established and applied as law in numerous cases. Hence, there is no need for legislative intervention.

This thesis summarizes some basic principles gleaned from haphazard principles cited in numerous cases, to guide statutory interpretation. They are as follows:

**Drafters' intention principle.** This principle, basically similar to the literal rule of interpretation, aims at ascertaining the true intention of the legislature. According to *Federal University of Technology, Akure & Anor v. Asuu*,<sup>210</sup> courts should not import words into legislation contrary to the intention of legislators. Hence where the words used in an enactment are clear and unambiguous, and they are accorded their ordinary and

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<sup>205</sup> see also *Basinco Motors Ltd v. Woermann-Line & Anor.* (2009) LPELR-756(SC)

<sup>206</sup> He recommends that to avoid judges applying different conflicting personal nuances and predilections, the legislature should indicate in an enactment the principles that must be used in its interpretation.

<sup>207</sup> Ijaiya, H.O (2017) Constitutional Approach to Interpretation of the Constitutions in Nigeria, Australia, Canada and India, 145

<sup>208</sup> *Ibid*187

<sup>209</sup> See note 77

<sup>210</sup> (2013) LPELR-20323(CA)

grammatical meanings without any colorations, it depicts the true intention of the drafters.<sup>211</sup>

**Holistic principle.** This means that the relevant provision of the statute to be interpreted should be read together with the rest of the statute.<sup>212</sup> According to Sokefu & Njoku, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, and the intent of the parliament.<sup>213</sup> Words in themselves do not exist in a vacuum; they exist along with other words which must all be considered in their totality.<sup>214</sup> *Ibrahim v. Mohammed*<sup>215</sup> states that as a rule of interpretation, statutes should be read together with all related provisions as well as the whole of the statutes.<sup>216</sup> The courts also state that it is imperative when interpreting a section of an Act, to read the entire subsections together, in order to discover the intention of the legislators in enacting the said provisions under the section.<sup>217</sup>

In addition, *per* Muhammad JSC, stated in *Akpangbo-Okadigbo v. Chidi & 7 Ors.*<sup>218</sup> “Lest we forget, it is a cardinal principle of interpretation that provisions of a

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<sup>211</sup> Also, in *Attorney General, Federation v Attorney General, Lagos State*(2013) 16 NWLR (Pt 1380) 249, the Court states that in interpreting a statute, a court must not give the statute an interpretation that would defeat the intention and purpose of the law makers and should not read a particular provision of the statute in isolation, rather the whole statute should be read so as to discover the intention of the law makers.

<sup>212</sup> In *A.G Federation v Alhaji Atiku Abubakar* (Appeal No. CA/A/21/07, delivered on 5th April, 2007) "one of the basic principles of interpretation of all Constitutions and statutes is that the lawmaker will not be presumed to have given a right in one section and take it in another.

<sup>213</sup> Sokefu & Njoku, *opcit* :18

<sup>214</sup> *Ibid*

<sup>215</sup> (2003) LPELR-1409(SC) at 23

<sup>216</sup> In *Skye Bank v. Iwu* (2017) LPELR-42595(SC) the Supreme Court reiterates interpretation of a statute is a holistic endeavor.

<sup>217</sup> See *Eboreime v. Olagbegi & Ors* (2018) LPELR-44816(CA). Also, in *Olatunbosun v. Odunjo & Ors* (2016) LPELR-40542(CA) the Court reinforced the purport of interpreting a statute together with the entire and not in isolation.

<sup>218</sup> (2015) LPELR-25464 (SC) 28

*statute should not be read in isolation. To avoid violence, the provisions must be read together. Thus, in ascertaining the true meaning of the provisions of a statute, the statute must be read as a whole.*"<sup>219</sup> Similarly in *P.D.P v I.N.E.C*<sup>220</sup>, Per Uwais CJN held " it is settled that in interpreting the provision or section of a statute or indeed the Constitution, such provisions or section should not be read in isolation from the other parts of the Constitution; in other words the statute or Constitution should be read as a whole in order to determine the intendment of the makers of the statute or the Constitution.<sup>221</sup> Similarly, in the American case of *United Sav. Ass'n of Tex v Timbers of in wood Forest Assocs Ltd*<sup>222</sup>, Scalia, J stated that Courts should refrain from interpreting statutes in isolation.

**Constitutional alignment principle.** Under this principle, courts are to ensure that the canon of interpretation applied in a case, aligns with the spirit of the Constitution of Nigeria. Judges have the duty to avoid an interpretation that would raise serious doubts about the constitutionality or legality of a statute, so they must ensure that the interpretation given, aligns with the Constitution. In *Abegunde v. The Ondo State House of Assembly & Ors*,<sup>223</sup> the Court of Appeal held that the general principle of law that governs interpretation of our Constitution or any statute is the interpretation that will serve the interest of the Constitution / statute or best carry out its objective and purpose. In

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<sup>219</sup> See *Obayuwana v. Governor Bendel State & Anor. (1982) 12 SC. 147 and Action Congress (Ac) And Anor v. INEC (2007) 12 NWLR (PT. 1048) 222 at 259.*

<sup>220</sup> (1999) 7 S.C (pt11)30

<sup>221</sup> Also, in *Odutela Holdings v Ladejob (2006) 12 NWLR (ot.994) SC 321*, the courts held that when a section has more than one subsection all must be read carefully to ascertain whether it should be interpreted conjunctively in line with the principles of construction of statutes with many subsections.

<sup>222</sup> 484 U.S 365, 371 (1988)

<sup>223</sup> (2014) LPELR-23683(CA)

*Nwali v. Ebsiec & Ors*,<sup>224</sup> one of the principles suitable to the Constitution's *sui generis* nature is that it be given a benevolent, broad, liberal and purposive interpretation. To promote its underlying policy or purpose, a narrow, strict, technical and legalistic interpretation must be avoided.

**Principle of precedent.** This principle reiterates adherence to precedent in the interpretation of statutes. The judge, by professional calling, relies on precedent in the decision of cases in court.<sup>225</sup> The judge is almost a slave to precedent, if not completely slavish to it, and so when the precedent is not followed, the judge feels (or is) humiliated.<sup>226</sup> In *Dalhatu v. Turaki*<sup>227</sup>, *Per* Katsina - Alu *JSC* stated the Supreme Court is the highest and final Court of Appeal in Nigeria. Its decisions bind every court, authority or person in Nigeria. Thus, a refusal by a Judge of the court below to be bound by such decision is a misfit in the judiciary.

**The strict adherence principle.** This means the court should abide strictly by the meaning of words used in a statute and not add to or remove language from the statute. In *Awolowo v. Shagari & Ors*<sup>228</sup> *Per* Fatayi-Williams, the Court stated that anybody called upon to interpret any kind of statute should not, for any reason, attach to its statutory provision, a meaning which the words of the statute cannot reasonably bear.<sup>229</sup> However,

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<sup>224</sup> (2014) LPELR-23682(CA)

<sup>225</sup> See *Kobia Osumanu v. Kofi Amadu & 2ors* (1949) 12 WACA 437; *A.G Ogun State and Anor v. Dr. L.C. Egenty* (1986) 1 C.A. (pt. 11) page 162; *Nwangwu v. Nwangwu* (2000) Pt. 2 FWLR Page 273.

<sup>226</sup> Niki Tobi, *The Nigerian Judge*, opcit:42

<sup>227</sup> (2003) 15 NWLR Pt. 843 page 310 at 323

<sup>228</sup> (1979) LPELR-653(SC) P. 22 para B-C

<sup>229</sup> The Court of Appeal supported this point in *Mwana v U.B.N* (2003) 28 W.R.N 62 when *Per* Muhammed JCA said " if the words of the statute are in themselves precise and unambiguous, no more is necessary than to expand those words in their natural and ordinary sense, as the words themselves in such case best declare the intention of the legislature.

if the words used are capable of more than one meaning, then the person interpreting the statute can choose between those meanings, but beyond that must not go. In *Kolawole v Alberto*,<sup>230</sup> the Court stated that it is a well-known principle of construction that where the legislator uses words differently from those originally used, the legislator is to be presumed to have intended a different meaning. Every statute that is applicable to the case in court requires interpretation or construction. When the words of the statute are clear and unambiguous, they are interpreted as is, but if the words or the entire statute is ambiguous and vague, the courts attempt to construct a meaning that defines the original meaning or intention of the drafters.<sup>231</sup> Nigerian courts have warned against courts going on a voyage of discovery in interpretation of statutes.<sup>232</sup> In *Johnson v. Mobil Producing (Nig) Unlimited*,<sup>233</sup> the Court stated that a court is not entitled to read anything into or remove anything from statutes unless there are adequate grounds to justify the inference that the legislature intended something which it omitted to express.

**Contextualizing principle:** This means the words in a statute should be used within the context of the specific situation or particular case. In *Tinubu v I.M.B Securities*,<sup>234</sup> *Per* Karibi-Whyte, *JSC* held that the interpretation of the Constitution should be guided by the facts of the case. The meaning of a word can only make sense based on the facts that accompany it. Thus, words best explain the statute's meanings within a context of facts or evidence and not in isolation.

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<sup>230</sup> (1989) 1 N.W.L.R (pt98) 382

<sup>231</sup> *Per* Karibi Whyte *JSC*, *ibid*

<sup>232</sup> See *A.G Abia State v A.G Federation* (2006) 16 NWLR (pt. 1005) 265.

<sup>233</sup> (2010) 7 NWLR (Pt 1194) 462

<sup>234</sup> (2001) 8 NWLR (PT 740) 192

In *Federal Republic of Nigeria v Osahon*<sup>235</sup> the Supreme Court stated that where a statute makes the meaning of a provision difficult to discern properly, it is the indispensable right of the court to explore deeper and to try to make sense out of it in the context of the primary law so that on its operation, following the construction of the Court, it will have meaning which it eventually wears and which would help to promote law to optimize the cause of justice and the advancement of sociological jurisprudence of the rule of law. This principle was adopted in *Nigerian Navy v. Lambert*,<sup>236</sup> when the Supreme Court held that in the interpretation of statutes which restrict the citizen's rights, any doubt, gap, duplicity or ambiguity as to the meaning of words used in the enactment should be resolved in favor of the person who should be liable to the penalty or a deprivation of his right.<sup>237</sup>

**The Legislative history principle.** This is an instance where courts seek more than the strict application of plain meaning and refer to legislative history to confirm the plain meaning of a statute or to rebut it. The Supreme Court stated that to properly ascertain the mischief in a legislation, it is sometimes helpful to look into the history of the legislation.<sup>238</sup> On the interpretation of the 1979 Constitution, *Per Nnanami, JSC* suggested: “should *there still be any lingering doubts as to the proper meaning of section*

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<sup>235</sup> (2005)25 NSCQR512 at537

<sup>236</sup> (2007) LPELR-2026(SC)

<sup>237</sup> See also *Nwosu v Imo State Environmental Sanitation Authority & Ors.* (1990) 2 NWLR (pt.135) 688 at 723; *Peenok Investment Ltd. v Hotel Presidential Ltd.* (1982) 12 SC 1 at 25

<sup>238</sup> *Ifezue v Mbadugha & Anor* (1984) LPELR-1437(SC)

230 (1) (b), I would suggest that it is legitimate to look back at history of the process which brought the 1979 Constitution, and particularly section 230 into being.”<sup>239</sup>

Also, in *Nkwocha v Governor of Anambra State & Ors*,<sup>240</sup> where Per Eso, JSC cited the American case of *Knowlton v Moore*,<sup>241</sup> the Nigerian Supreme Court emphasized that it is a legitimate principle of interpretation for the history of legislation to afford some assistance in determining the proper meaning of the legislation. In *Green v. Bock Laundry Machine Co.*, Justice Scalia agreed on the appropriateness of consulting legislative history for the limited purpose of determining whether what appeared to be an absurd meaning of a key statutory term was indeed considered and intended. Also, in *Thunder Basin Coal Co. v. Reich*,<sup>242</sup> the Court held that “*the legislative history of the Mine Act confirms its interpretation.*”<sup>243</sup>

**Drafters’ error principle.** Judges must always remember that no human is infallible. Therefore, there must be an expectation that statutes may include drafting errors that are likely to create ambiguities in the law. Although according to the law it is not the role of judges to correct such errors, yet judges may comment on them to create an avenue for possible legislative amendment. So, ‘like the hero who saves the day’, the judiciary interprets the statute using any of the appropriate canons of interpretation, to

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<sup>239</sup> *Bronik Motors Ltd & Anor v WEMA Bank Ltd* (1983) LPELR-808(SC) at p.60

<sup>240</sup> (1984) LPELR-2052(SC)

<sup>241</sup> 178 U.S. 41 (1900)

<sup>242</sup> 510 U.S. 200, 209 (1994)

<sup>243</sup> However, in *Darby v. Cisneros*, 509 U.S. 137, 147 (1993) (“Recourse to the legislative history of S.10(c) was considered unnecessary in light of the plain meaning of the statutory text, when the Court considered the legislative history, nevertheless, and found nothing inconsistent between it and the Court’s reading of statutory language.”)

save society and government from the ‘villain’ of unnecessary ambiguous statutes or statutory errors.

In *United States v. Locke*<sup>244</sup>, the Court dealt with a drafting error in a statute that required the claimant to file "prior to December 31." And even though Congress meant to say, "on or before December 31," the Court held that dates have a plain meaning. It was the legislature's responsibility to be more careful, not the court's job to rescue Congress from its error.<sup>245</sup>

**The clear boundaries principle.** This is when the court, according to the doctrine of separation of powers, maintains its limits within the confines of the court and does not encroach on legislative function. This principle was gleaned from the case of *SETRACO (Nig) Ltd v. Kpaji*,<sup>246</sup> where the courts stated that courts are guided by a clear boundary beyond which they cannot enter. That is to say that while the courts have powers of interpretation of law, it has no license to veer into the legislative arena or to constitute itself into the legislator, however harsh or unsatisfying the piece of legislation may be. This is because once the words are plain and unambiguous, the court is duty bound to give effect to those words and not interpret the law as it ought to be.

In *A.G Bendel State v A.G Federation and 22 Ors*,<sup>247</sup> Per Fatayi Williams, JSC held that courts of law in Nigeria have the power and indeed the duty to see to it that there is no infraction of the exercise of legislative power, whether substantive or procedural, as laid in the relevant provisions of the Constitution. Nevertheless, that does

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<sup>244</sup> 471 U.S. 84 (1985)

<sup>245</sup> *Ibid*

<sup>246</sup> (2017) LPELR-41560(SC) Per Peter-Odili, JSC, PP 25-26 paras D-A

<sup>247</sup> (1983) NCLR 1 at 40

not mean the courts will exceed their statutory required role. Also, in *Dickson v. Sylva & Ors*,<sup>248</sup> the court states that a court cannot, while interpreting a statute, embark on judicial legislation. The court ought to expound and not expand the law, i.e. to decide what the law is and not what it ought to be; it should tow the path of objectivity and not be subjective.<sup>249</sup>

**The equity principle.** The principles of equity should prevail over any rule of technicality in the mind of the judge when interpreting statutes.<sup>250</sup> In *Nafiu Rabiu v The State*,<sup>251</sup> *Per* Udo Udoma, *JSC* stated that where the issue is whether the Constitution has used an expression in a wider or narrow sense, the court should always lean where the justice of the case so demands – to the broader interpretation unless there is something in the context or in the rest of the Constitution to indicate that the narrow interpretation will best carry its object and purpose. In explaining the value of equity, *Per* Abiru, *JCA* stated that there is a presumption against the legislature intending what is unreasonable and inconvenient in the interpretation of statutes. Thus, it is trite to say that commonsense must be applied in construing statutes and the construction agreeable to justice and reason must be adopted. Thus, where words used in an enactment are open to two interpretations and one construction will lead to an absurdity while the other would give effect to what commonsense shows was obviously intended; it is the construction that accords with

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<sup>248</sup> (2016) LPELR-41257(SC) *Per* Kekere-Ekun, *JSC* P.78, para C -F

<sup>249</sup> With all due respects, this writer disagrees with this statement, as judges the role of judging entails both expounding and expanding the law, in spite of how we look at it. However, to avoid deviating from our focus, details of this will be reserved for future.

<sup>250</sup> *A.G Lagos v A.G Federation*, “in interpreting the Constitution, we should avoid technicality”. *Per* Uwais, *CJN*

<sup>251</sup> (1981)2 NCLR 326

common sense that must be applied.<sup>252</sup> Merely technical rules of interpretation of statutes are to some extent inadmissible when interpreting the Constitution to defeat the principles of government entrenched therein.<sup>253</sup>

**International law compliance principle.** This principle guides the court to ensure interpretation is in compliance with international law. In *Abacha & Ors. v Fawehinmi*,<sup>254</sup> the Supreme Court stated that there is a presumption that a statute will not be interpreted so as to violate international law. In other words, courts will not construe a state so as to bring it into conflict with international law.

### **Judicial Approaches to Interpretation of Statutes**

Judicial approaches to judging are the attitude, viewpoint, ideas, values and beliefs judges adopt in interpreting statutes. As a result of the challenges to interpreting statutes, judges adopt various approaches to aid statutory interpretation. These approaches depict the personal or collective philosophies of the individual judge or a group of judges (as laid down in precedent). Philosophies of judging also mean schools of statutory interpretation. Different schools of statutory interpretation regard statutory text differently.<sup>255</sup> In interpreting statutes, judges apply practical standards of rather bare provisions of the law to the facts of a given case, to ensure that the intended design/objective of the drafters captures the facts before them, in order to make sense of justice in a given case. Accordingly, their assessment or review of the case follows principles that direct or influence modes of interpretation. More influential to the interpretative

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<sup>252</sup> Abiru, *ibid*: 17

<sup>253</sup> See *Rabiu v State (1981) 2 NCLR 293 at 326*

<sup>254</sup> (2000) LPELR-14(SC)

<sup>255</sup> *Eig, M.E (2014) opcit*

tactic of the judge is the philosophy adopted in the interpretation, which is often based on the perception of the judge or on precedent.<sup>256</sup>

Generally, there are four modern jurisprudential theories of judicial decision making. They are positivism,<sup>257</sup> moralism,<sup>258</sup> formalism<sup>259</sup> and realism.<sup>260</sup> Positivism and moralism are diametrically opposed; formalism and realism are polar opposites.<sup>261</sup>

However in Nigeria there are two major approaches to interpretation of statutes; the formalist (constructionist, textualist or originalist) approach, and the realist (purposive or proactive) approach. Formalism is a philosophy that restricts statutory interpretation to the exact text of the law.<sup>262</sup> The aim of the formalist judge is to appear not to legislate from the bench. Formalist judges believe that they can use established forms of logic, based on fundamental common-law principles, to determine the meaning of any statutory text.<sup>263</sup> Strict construction of a statute is that which refuses to expand the law by implication or equitable consideration; strict construction confines its operation to cases which are clearly within the letter of the statute as well as within the statute's spirit or reason.<sup>264</sup> It is not to defeat the manifest purpose of the Legislature, but so as to resolve all reasonable doubts against the applicability of the statute to the particular case.<sup>265</sup>

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<sup>256</sup> No doubt these philosophies are gleaned from precedent.

<sup>257</sup> According to the positivist, "law" is what the law says and nothing more. It is simply rules.

<sup>258</sup> To the moralist "law" is what is right. It is simply morality and justice.

<sup>259</sup> To the formalist, the application of law is mechanical.

<sup>260</sup> To the realist the application of law is dynamic

<sup>261</sup> Hine, K, D (1997), *The Rule of Law is Dead, Long Live the Rule: AN Essay on Legal Rules, Equitable Standards, and The Debate Over Judicial Discretion*, *opcit*: 1779

<sup>262</sup> Scalia, the arch formalist of statutory and constitutional interpretation

<sup>263</sup> Brannon, *opcit*:6

<sup>264</sup> Black's Law Dictionary (8<sup>th</sup> ed.), *opcit*

<sup>265</sup> *Ibid*

Realism is driven by intellectual discovery and social improvement. It theorizes that courts should adhere to interpretations that advance the importance of moral ideas and values in human society.<sup>266</sup> For legal realists, there is “no single right and accurate way of reading one case.”<sup>267</sup> Realists believe that interpretation should be guided by a sense of the purpose of the text being interpreted, if the purpose is discernible, rather than by the literal meaning of the text.<sup>268</sup> The realist judge has a distaste for legal jargon and wants judicial opinions as far as possible, to be readable by non-lawyers.<sup>269</sup> According to Hines, “*the proponents of traditional realism and critical Legal studies, the “law” is what the law says. Judicial pronouncements and legislative directives provide the building blocks for judicial decision making. But what the law “says” is unclear. Ambiguities, contradictions and exceptions in the positive law leave room for (and indeed) selective interpretation. For these scholars, the ultimate application of law is dynamic and indeterminate*”<sup>270</sup> Unfortunately, it is this belief in the indeterminacy of legal decision-making that leads realist scholars to reject rule of law.<sup>271</sup>

The formalist and realist approaches are most prominent in the United States of America. In Nigeria the most prominent approach judges adopt is the liberal approach.<sup>272</sup> This approach, also termed ‘equitable construction’, ‘loose construction’ or ‘broad interpretation,’ applies interpretation in light of the situation presented, which tends to

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<sup>266</sup> Monahan J & Walker, L (2002) Social Science in Law: Cases and Materials, *opcit*:24

<sup>267</sup> *Ibid*: 7

<sup>268</sup> Posner, R.A (2013) Reflections on Judging, Harvard University Press, USA, *opcit*:120

<sup>269</sup> *Ibid*

<sup>270</sup> Hine, K, D, *opcit*: 1781

<sup>271</sup> Smithburn, J.E (2006) Judicial Discretion, *opcit*:49

<sup>272</sup> The difference may just be based on nomenclature

effectuate the spirit and purpose of the legislation.<sup>273</sup> The liberal approach is interpretation according to what the reader believes the author reasonably intended, even if, by inadvertence, the author failed to think of how his/her words may be perceived, interpreted or understood.<sup>274</sup> Hence, such text carries a narrow meaning, compared to originalism.<sup>275</sup> Liberalism takes a convenient spot somewhere in between formalism and realism.<sup>276</sup>

Ijaiye proposed another approach—the proactive approach.<sup>277</sup> According to him, this approach to constitutional interpretation confers more certainty to the purpose of legislation, based on the fact that no words have a single and definite meaning without drawing from the values, bias, perceptions, prejudice and training of the interpreter (the judge). This approach does not confer an additional duty on the judge; rather judges still act within their judicial enclave. They are urged to look beyond the literal meaning of the words being construed to make sure that the policy object of the enactment is not defeated.<sup>278</sup>

In any event, the Supreme Court instructs that the liberal approach be adopted.<sup>279</sup> According to *Per Udo Udoma JSC*, the approach of the Courts to the construction of the Constitution should be, and so it has been, one of liberalism, as it is not the duty of the courts to defeat the obvious ends of the Constitution under the guise of interpretation.<sup>280</sup>

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<sup>273</sup> Black's law Dictionary, *opcit*: 942

<sup>274</sup> Also termed mixed interpretation. Blacks 4<sup>th</sup> edition Henry Campbell Black, M. A. P.2399

<sup>275</sup> Henry Campbell Black, M. A. Blacks 4<sup>th</sup> edition 2400

<sup>276</sup> Although liberalism adheres more to the strict constructionist approach to precedent.

<sup>277</sup> Ijaiye, *opcit*

<sup>278</sup> *Ibid* :183

<sup>279</sup> The liberal approach could also be seen as a formal approach/formalism, as they have the same meaning but different terms.

<sup>280</sup> See *Rabiu v State (1981) 2 NCLR 293 at 326*

In *Ali v. Albishir*<sup>281</sup>, Courts were enjoined to adopt a liberal approach and in so doing to give the provisions an interpretation that portrays the intentions of the framers of the documents.<sup>282</sup> Also in *Abubakar v A.G. Federation*<sup>283</sup>, in the interpretation of the provisions of the Constitution or any Act, the duty of the court is to adopt a literal interpretation which means that, where the provisions of a statute are clear and unambiguous they require no resort to any cannon of construction; they must be read in their plain and ordinary words which best give their meaning.

The rules and/ or principles of interpretation appear intertwined or dependent on one another and Nigerian courts have come to terms with this fact. Hence the liberal approach. Duxbury stated that “*All that is certain is that some so-called realist, despite their opposition to the tradition of legal formalism, did not, in their writings extricate themselves once and for all from the clutches of that tradition. Legal realism, we might say, was not entirely anti-formalist; for legal formalism, often heavily disguised, persisted under the realist banner.*”<sup>284</sup> However, Brannon opines that although judges have taken a variety of approaches to resolving the meaning of a statute, proponents of formalism and realism theories generally share the goal of adhering to Congress’(legislature’s) intended meaning but disagree about how best to achieve that goal.<sup>285</sup>

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<sup>281</sup> (2008) 3 NWLR (Pt. 1073) 94 at Pp. 130-131, paras. H-A

<sup>282</sup> See *NURTW & Anor v. RTEAN & Ors.* (2012) LPELR-7840(SC)

<sup>283</sup> (2007) 3 NWLR (pt. 1022)601

<sup>284</sup> Duxbury (1995) *Patterns of American Jurisprudence*, *opcit* :64

<sup>285</sup> Brannon V.C (2018), *Statutory Interpretation: Theories, Tools, and Trends*, *opcit*:2

Therefore, the approaches or philosophies of judges in interpreting law depends on the type/hierarchy of court, nature of the case, the principle of interpretation required in the case or even the person of the judge. The approach to interpretation of statutes is similar across board. However, Breyer<sup>286</sup> puts it aptly as follows:

*“most judges start in the same way. They look first to the statute’s language, its structure, and its history in an effort to determine the statute’s purpose. They then use the purpose (along with the language, structure, and history) to determine the proper interpretation. Thus far, there is agreement. But when the problem is truly difficult, these factors without more may simply limit the universe of possible answers without identifying a final choice. What then? At this point, judges tend to divide in their approach. Some look primarily to text.... Other judges look primarily to the statute’s purposes for enlightenment.”*

There have been cases in which Justices of the Supreme Court have agreed that the statutory provision in conflict is plain, but have disagreed over what that plain meaning of the statute is.<sup>287</sup> For example, some judges are more sanguine than others in their ability to interpret statutory text without resort to the “extrinsic” aid of legislative history. Some judges limit themselves to a narrow focus on the clarity or ambiguity of a particular statutory phrase. Others look more broadly to statutory context for insight into phrases that may seem ambiguous in isolation, and, inevitably, tensions may arise between apparently clear language and perceived intent.<sup>288</sup> In other words, they argue about abstract labels for their doctrines to hide the biases they don’t want to admit having.

Ultimately, Nigerian courts are enjoined to discountenance frivolity and adopt a liberal approach to avoid construing law to produce an outcome where one section

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<sup>286</sup> Breyer, S (2005) *Active Liberty, Interpreting Our Democratic Constitution*, Vintage Books, New York, USA, *opcit*: 86-

<sup>287</sup> See *Corley v. United States*, 556 U.S. 303 (2009)

<sup>288</sup> Eig, M.E (2014) *opcit*:44

defeats the intent or purpose of another.<sup>289</sup> Also, the Court in *Standard Trust Bank Plc v. Olusola*<sup>290</sup> summarizes that the duty of the court in the interpretation of any Act, is to adopt a liberal interpretation. However, where a literal interpretation of the provisions of a statute will result in absurdity or injustice, the court may seek internal aid or external aid. The internal aid is within the body of the statute itself and the external aid is from statutes that are in *pari materia* with the statute being construed in order to avoid absurdity or injustice.

Practically, over time in Nigerian courts, the problem which has been realized is that strict adherence to precedent or the literal rule of interpretation has at times led to absurd and unjust consequences. This is where discretion comes in (hopefully) to save the day and mitigate the injustice caused by rigid adherence to precedence.<sup>291</sup>

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<sup>289</sup> See *Ugoji & Ors v. Iwuagwu* (2013) LPELR-20810(CA)

<sup>290</sup> (2007) LPELR-4978(CA)

<sup>291</sup> Judicial discretion has evolved into the framework for statutory interpretation in other English-speaking countries that apply common law.

### Chapter Three: Judicial Discretion in Nigeria

*“It is now a notorious principle of law that as courts of equity that we are, we should not pursue technical and abstract justice at the expense of dealing with the merits of the matter, but rather ensure that substantial justice is done to the parties. The primary function of any court of law is to do justice to the parties and where any procedural rules antithesis to justice and fair play, maneuver that harsh rule of law in pursuit of justice. If in the course of pursuing justice, the court errs, it has ‘erred’ in the right direction.”<sup>292</sup>*

*Per Niki Tobi, JCA*

#### Introduction

This chapter defines the meaning and scope of judicial discretion in Nigeria. It reviews case law on judicial discretion in Nigeria and examines how judges apply discretion in extenuating circumstances of a given case, especially in the absence of precedent. Then we attempt to frame five basic principles that guides judges’ exercise of discretion. The constraints to judicial discretion and the significance of judicial discretion will be outlined. Upon concluding this chapter, readers will appreciate the impact of judicial discretion on Nigeria’s judicial jurisprudence.

#### What Is Judicial Discretion?

Black’s Law Dictionary<sup>293</sup> defined judicial discretion as the exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not act when a litigant is not entitled to demand the act as a matter of right.<sup>294</sup>

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<sup>292</sup> *Busari v Ose (1992) LPELR-14981(CA) Per Niki Tobi, JCA (as he then was)*

<sup>293</sup> Black’s Law Dictionary, *opcit*:1405-1406

<sup>294</sup> See *Akinyemi v Odu’a Inv. Co. Ltd (2012) LPELR 3270(SC) 39*

According to Abhulimhen-Iyoha, judicial discretion is the power to make a choice between alternative courses of action or the right to make official decisions using reason and judgment to choose from acceptable alternatives.<sup>295</sup> The Supreme Court in *Celtel Nig B.V v ECONET Wireless Ltd & Ors*<sup>296</sup> held that discretion knows no bounds and in its general usage, it is that freedom or power to decide what should be done in a peculiar situation.<sup>297</sup>

A more befitting definition for this thesis as stated in *Airhiavbere v. Oshiomhole & Ors*:<sup>298</sup> is that discretion of a Court or judge is the power or right conferred by the law, on a Court to act in certain circumstances, according to the dictates of the judge's or court's own judgment and conscience, uncontrolled and unfettered by the judgment or conscience of others.<sup>299</sup> Also, in *UBN Plc. v. Astra Builders (W.A.) Ltd*<sup>300</sup>, the court states that an exercise of discretion is an act or deed based on one's personal judgment in accordance with one's conscience, free and unfettered by any external influence or suggestions. *Per Adekeye JSC* defined the exercise of judicial discretion as an antithesis to the doctrine of stare decisis.<sup>301</sup>

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<sup>295</sup> Abhulimhen-Iyoha, A (2015) *Judicial Discretion of Judges in Criminal Cases in Nigeria: Prospects and Challenges*; 2-3

<sup>296</sup> (2014) *LPELR* 22430(CA)

<sup>297</sup> "It is indeed a type of amour, speaking metaphorically, which a judge should and ought to employ judicially and judiciously whenever the need arises". See *Ajuwa v. SPDC Ltd.* (2011) 18 *NWLR* (Pt.1279) 787. See also *Odusote v. Odusote* (1971) *All NLR* 219; *Olatubosun v. Texaco Nigeria Plc* (2012) 14 *NWLR* (Pt.1319) 200; *Achi v. Ebenighe* (2014) 4 *NWLR* (Pt.1397) 380.

<sup>298</sup> (2012) *LPELR*-19787(CA)

<sup>299</sup> See *Suleiman v. Commissioner of Police* (2008) 3 *SCNJ* 1 at 9 – 10; *Johnbull Adams Nig. Ltd & Ors. v Isoko Community Bank Ltd* (2013) *LPELR*-20730(CA)

<sup>300</sup> (2010) *LPELR*-3383(SC)

<sup>301</sup> *Ibid*:28

Judicial discretion is a very broad concept because of the different kinds of decisions judges make and the different limits placed on these decisions.<sup>302</sup> A judge is constantly called upon to exercise his/her discretionary power in the judicial process.<sup>303</sup> And sometimes, in the absence of any direction in our laws, the court is faced with a play-doo or clay-like situation where the judge molds his or her own view, ideas or perception of the law and gives it an appropriate interpretation. Such molding is judicial discretion—where the judge interprets statutes the way the judge thinks it should be (it is about what the judge perceives as right and just), given the prevailing circumstances in a given case.<sup>304</sup> The choice of deciding which canons of interpretation to apply in any set of circumstances is a discretionary measure of the court which should be exercised judiciously and judicially.

Judicial discretion is a very vital tool to the due administration of justice. Going by its purpose and usefulness, it is clearly a sacred power which grants the judge unfettered opinions in appropriate and deserving cases. However, such discretion must be within the confines of the law, in order to arrive at a just decision. Thus, it is an opportunity for the judge to prove his/her judicial oath of office. According to section 6(6) (a) of the 1999 Constitution, "*the judicial powers vested in accordance with the foregoing provisions of this section-shall extend, notwithstanding anything to the contrary in this Constitution, to all inherent powers and sanctions of a court of law....*" Pursuant to this provision, Nigerian courts take the latitude to carve an inch to guide their

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<sup>302</sup> Kana, A.A (2014) Perspectives and Limits of Judicial Discretion in Nigerian Courts, *opcit*: 160

<sup>303</sup> Tobi, N *opcit*:128

<sup>304</sup> Which could also be social interests and views

use of discretion. Accordingly, Judges have formulated basic principles based on respective “documentary” and historical sources to support judicial evolution and adventures.<sup>305</sup> An example is section 45 (1) of the Interpretation Act that empowers the courts in Nigeria to apply the Common law of England, the doctrine of equity together with the statutes of general application in resolving disputes in Nigeria.

Practically, the Constitutional powers of Courts in Nigeria are similar to that of the United States of America (U.S). In the case of *U.S v Noriega*<sup>306</sup> the court noted that trial judges have broad discretion to take steps to ensure that Sixth Amendment rights of criminal defendants are protected.<sup>307</sup>

The concept of discretion even in its legal usage implies power to make a choice between alternative courses of action, therefore where and when it is tested, it follows that there is really no absolute answer to the solution of the problem. As *Per Adekeye JSC* stated above<sup>308</sup>, “...*there is no hard and fast rule to the exercise of a judicial discretion by a court for if that happens a discretion becomes fettered.*”<sup>309</sup> The discretionary power of a judge is power other than the inherent power.<sup>310</sup> Judicial discretion can only be exercised in accordance to the requirements of law and the justice

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<sup>305</sup> See *fn 289*

<sup>306</sup> *917 F.2d 1543 (11<sup>th</sup> Cir. 1990)*

<sup>307</sup> Although the Court also noted that the discretion the court wrote includes steps that might negatively affect First Amendment interests.

<sup>308</sup> See *fn 300*

<sup>309</sup> See *Iwuju v Federal Commissioner for Establishment and Anor (1985) LPELR-1568 (SC)*

<sup>310</sup> “*which means that power which is itself essential to the very existence of the court as an institution. They are the powers the court is born with, more or less and such powers can only be exercised in respect to matters within the court’s jurisdiction*” Tobi, *ibid*: 124-125

of the case. So, the judge is not at liberty to act according to his judgment willy-nilly.<sup>311</sup> In other words, judicial discretion is not a judge's free ticket to act as he or she pleases.

### **Five Basic Principles of Judicial Discretion in Nigeria**

These define what judges consider or should consider when applying their discretion, so as to arrive at a just determination. Since there is no law that specifically guides a judge's use of discretion,<sup>312</sup> or codifies the way judges should exercise discretion, case law has created guiding principles which the trial court may consider in exercising their discretion. These principles are fundamental to the act of judging. So, Courts rely on a plethora of judicial pronouncements that defines the scope of discretion (although still with some form of restraints). In *Tell Communications Limited v. Colonel Mohammed Buba Marwa*,<sup>313</sup> the court states that since no authority can be said to be binding in exercise of a judicial discretion, certain principles and guidelines have been established to be taken into account in the process.

Judge Zonay offered ten guidelines to aid judges make discretionary decisions. They are: (1) to establish the record; (2) to apply the correct law; (3) to consider different ways to exercise your discretion; (4) to consider doing nothing; (5) to consider the equities of the situation; (6) to consider the results of your decision; (7) to take time to think over any decision; (8) to clearly and logically explain your decision; (9) do not unnecessarily look back; (10) do not make a decision just because you can.<sup>314</sup> His guidelines, although

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<sup>311</sup> *Ibid*

<sup>312</sup> Even the Constitution does not give the courts guidance on how to weigh or measure discretion.

<sup>313</sup> (2005) LPELR-6148(CA)

<sup>314</sup> Zonay, *opcit*.

generic, were fashioned after the Courts in the United States. Nevertheless, they are also applicable to Nigerian courts, as reflected below. Accordingly, five basic principles gleaned from numerous Nigerian cases are as follows:

**1. Discretion must be equitable and fair:** this is the most important of all the principles, as it basically caps up and defines the context of judging, which is hinged on the rules of equity, justice and fairness. This is similar to Judge Zonay's 5<sup>th</sup> guideline—to consider the equities of the situation and 6<sup>th</sup> Guideline—to consider the results of your decision.<sup>315</sup> The Court in *Onovo & Ors v. Mba & Ors*<sup>316</sup> explained that discretion means equitable decision of what is just and proper under the circumstances, or a liberty or privilege to decide and act in accordance with what is fair and equitable under the peculiar case guided by the principles of law.<sup>317</sup> And in *Obidiegwu Onyesoh v. Nze Christopher Nnebedun & Ors*<sup>318</sup> the Court said that an overriding principle in the exercise of discretion by a court is to maintain a balance of justice between parties and bearing in mind the right of parties.

**2. Discretion must be bona fide:** even though the judge has freedom to exercise his /her discretion at will, it is fundamental that the judge applies such discretion on bona fide reasons. The judge's discretion must be genuine and not ingenuine. According to Judge Zonay, judges should clearly and logically explain their decision and should not unnecessarily look back on a decision already taken.<sup>319</sup> In *Etokhana v. Progress Bank of*

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<sup>315</sup> *Ibid*

<sup>316</sup> (2014) LPELR-23035(SC)

<sup>317</sup> See *Artra Industries Nigeria Ltd v. The Nigerian Bank for Commerce and Industries* (1998) 4 NWLR (Pt. 546) 381 SC; *Doherty v. Doherty* (1960) 1 All NLR 299

<sup>318</sup> (1992) LPELR-2742(SC)

<sup>319</sup> *Ibid*, guidelines 8 & 9

*Nigeria Plc.*<sup>320</sup>the Court emphasized this principle thus: “*It is well settled that if judicial discretion has been exercised bona fide, uninfluenced by irrelevant considerations and not arbitrarily or illegally by the lower court, the general rule is that an appeal court will not ordinarily interfere.*” Also, in *Okon Bassey Ebe v. Commissioner of Police*,<sup>321</sup>the Supreme Court held that the exercise of that discretion must be honest and in the spirit of the statute, otherwise, any act so done will not find solace in the statute and such a discretionary act must be set aside.

**3. Discretion must not be arbitrary or illegal:** as discussed earlier, judging in Nigeria is an act of precedent,<sup>322</sup> therefore the judge in exercising discretion when judging should not think randomly. The revered duty of the judge in dispensing justice is to be confined to the dictates of the law. As Judge Zonay puts it, judges should take time to think over any decision; they should not unnecessarily look back; judges should not make a decision just because they can, and judges should apply the correct law<sup>323</sup>

In *Onovo & Ors v. Mba & Ors*<sup>324</sup> discretion must be governed by rule not by humor, it must not be arbitrary, vague and fanciful, but legal and regular. The Court in *Alhaji Isiyaku Yakubu Ent Ltd v. Tarfa & Anor*<sup>325</sup> states thus: “*In law such an arbitrary exercise of discretion by a court, which is both a court of law and of justice as the court below, cannot be allowed to stand. Therefore, the consequential order, which I liken to a*

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<sup>320</sup> (1997) LPELR-6258(CA)

<sup>321</sup> (2008) LPELR-984(SC)

<sup>322</sup> See chapter 2

<sup>323</sup> *Opcit: Guidelines 7,9,10 &2*

<sup>324</sup> *supra*

<sup>325</sup> (2014) LPELR-24223(CA)

*raging bull in a China shop, having been made without any foundational basis or jurisdictional competence is perverse and must be set aside in the interest of justice.”*

**4. Discretion must be confined to the facts and circumstances of the case:** the discretion of a judge in any case must relate to material and relevant considerations of the particular case and not to extraneous considerations.<sup>326</sup> Discretion is dependent on the nature or type of case; therefore, the exercise of a court's discretion depends upon the peculiar facts and circumstances of each particular case.<sup>327</sup> Hence, it is the court exercising its discretion, which depends upon the peculiar circumstances of the case before it, that can limit the exercise of that discretion.<sup>328</sup> Again this reiterates Judge Zonay’s principle; to consider doing nothing; to take time to think over any decision; to clearly and logically explain your decision.<sup>329</sup>

In *Chief Nicholas Banna v Telepower Nigeria Ltd*<sup>330</sup> it was held that an appellate court cannot substitute its discretion in the administration of justice for that of the trial court and because discretionary power is exercised within the confines of the facts of the case, the trial judge who is the judge of facts, is in the best position to exercise such discretion.

**5. Discretion must be “judicially and judiciously” exercised:** The two most important words in the discus on discretion in Nigerian courts are the words: judicial and judicious.

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<sup>326</sup> However, the exception to this rule is that where such extraneous considerations may lead to a just determination of the material issues, the judge may, within the dictates of the law so apply.

<sup>327</sup> See: *ICAN v. Attorney Gen. Federation* (2004) 3 NWLR (Pt. 859) 186; *Oduote v. Oduote* (1971) 1 All NLR 219; *Udeze v. Onuniju* (2001) 3 NWLR (pt. 700) 216; *Oyekanmi v. NEPA* (2000) 15 NWLR (pt. 690) 414; *Nicon Hotel Inter. S. A. v. Nicon Hilton Hotels & Anor.* (2007) 7 NWLR (pt. 1032) 86 at 113 - 114.

<sup>328</sup> *Ibid*

<sup>329</sup> *Opcit*, guidelines 4,7, & 8

<sup>330</sup> (2006) 7 SCNJ 182

The Court states in *Mercantile Bank (Nig) Plc v. IMESCO Enterprises Ltd*<sup>331</sup> that the discretionary powers of the court must be exercised judicially and judiciously.<sup>332</sup> Also in *Amos Motors Nigeria Limited & Anor v. Agboola*<sup>333</sup> the courts held that just like all discretionary powers the court has to act judiciously and judicially, taking into consideration the peculiar facts of a case. The guiding principle in this respect is that the discretion, being judicial, must at all-time be exercised not only judicially but also judiciously on sufficient materials.<sup>334</sup>

The words “*judiciously and judicially*” have become compound aphorisms in Nigerian legal parlance. They basically rule the discretionary ‘world’ of judges. They have aroused quite some controversy because of the imprecise definition— such definitions are based on the idiosyncrasy of the individual judge concerned. Thus, various courts in exercising their discretionary powers, have made attempts at defining the concept: *Judiciously and judicially*. In the case of *Eronini v Iheuko*,<sup>335</sup> the Supreme Court had defined the phrases "Judicial" and "Judicious " thus:

*"Acting judicially imports a consideration of the interest of both sides and weighing them in order to arrive at a just or fair decision." Page 60. "Judicious means: a) proceeding from or showing sound judgment; b) having or exercising sound judgment; c) marked by discretion, wisdom and good sense." page 61. These requirements cannot be said to have been met in the exercise of a judicial discretion if there is no record of reasons which would form the basis of how a trial court arrives at a given decision for it to be called a sound judgment marked by discretion, good sense and wisdom. There is the need and duty on courts not only to state that they are exercising a discretion but to clearly record how and why the discretion was exercised in a particular way or manner for it to be capable of being said to have been exercised both judicially and judiciously."*

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<sup>331</sup> (2016) LPELR-41203(CA)

<sup>332</sup> See *Odusote v. Odusote* (1971) 1 NWLR (PT. 228), *Offordile v. Egwuatu* (2006) 1 NWLR (PT. 961) 421.

<sup>333</sup> (2012) LPELR-8011(CA)

<sup>334</sup> See *Etokhana v. Progress Bank of Nigeria Plc.* (1997) LPELR-6258(CA)

<sup>335</sup> (1989) 2 NWLR (101) 46 at 60 and 61, Per GARBA, J.C.A (Pp. 64-65, paras. B-D)

Also, in *Enakhimion v Edo Trans Services*<sup>336</sup> the Court states that "... *discretion is said to have been exercised well and judicially and judiciously when it is based only on the materials placed before the court and not extraneous or whimsical considerations. Every exercise of a discretionary power must aim at the attainment of substantial justice.*"<sup>337</sup> Judicial and judicious discretion is that power of a Judge or court directed by sound judgment in determining the right of litigation where such right is not absolute. It is not to give effect to the will of the Judge but to that of the Law. It is the liberty of the Judge to decide and act in accordance with that which is fair and equitable under the peculiar circumstances of the particular case, guided by the spirit of the Law.<sup>338</sup> Judge Zonay's guides to establish the record; to apply the correct law also fits in here.<sup>339</sup> A more simplified definition was in *Enemuo & Anor v. Ezeonyeka & Ors*,<sup>340</sup> that an exercise of discretion judicially is one exercised according to the law and judiciously means one exercised on the peculiar facts and circumstances of a case."

In *Tell Communications Limited v. Colonel Mohammed Buba Marwa*<sup>341</sup> the courts held that any application for injunction calls for the exercise of discretion of the judge seized with the matter and the judge must exercise such discretion judiciously and judicially. All judicial discretion must be exercised according to justice and common sense and upon clear proof that a tort has been committed. A court exercising judicial

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<sup>336</sup> (2006) All FWLR (pt391) 1683 at 1696

<sup>337</sup> This research poses the question: what amounts to "substantial justice", as this term is as generic as it is semantic?

<sup>338</sup> *Mercantile Bank (Nig) Plc v. IMESCO Enterprises Ltd (supra)*

<sup>339</sup> See page 65

<sup>340</sup> (2016) LPELR-40171(CA)

<sup>341</sup> *Supra*

discretion in addition to the peculiarities of each situation as disclosed by the facts and evidence placed before it, is expected to consider some of the factors or principles before its discretion can properly be said to be both judicial and judicious.<sup>342</sup>

So, for discretion to be judicial and judicious, it has to be based on prudence, rationality, sagacity, astuteness, considerateness and reasonableness. See *Akinyemi v Odu'a Inv. Co. Ltd.*<sup>343</sup> Judicial discretion should be considerate of peculiar facts and evidence in a case, the interests of both parties, established principles of relevant rules and the law and showing wisdom and good sense in the deciding, one way or the other.<sup>344</sup>

The terms 'judicial' and 'judicious' have been held to be the delineation of the otherwise unfettered discretion conferred on a judge in the exercise of its judicial powers. The terms mean the employment of good judgment, restraint and caution in the application of judicial powers.<sup>345</sup>

The above five principles were aptly summarized by the Supreme Court in *Obidiegwu Onyesoh v Nze Christopher Nnebedun & Ors.*<sup>346</sup> as follows:

*“it is settled that when a judge of trial exercises his discretion in a matter before him an appellate court which has the power to review the exercise of it on appeal, ought to approach the issue from the viewpoint that the discretion is that of the court of trial and not that of the appellate court. Once it is clear that the trial court exercised its discretion bona fide and judicially, that is not arbitrarily or illegally or by reference to extraneous considerations or by failing to take any material and relevant consideration into account, the appellate court cannot interfere.”*

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<sup>342</sup> *Ibid*

<sup>343</sup> (2012) LPELR 3270(SC) 39

<sup>344</sup> In addition, this thesis adds to the list– the court in deserving circumstances should also consider the interest of society.

<sup>345</sup> *Akpughunum v. Akpughunum* (2007) ALL FWLR (Pt. 376) 746 at 758 Paras. B - D (CA)

<sup>346</sup> (1992) LPELR-2742(SC), Per Karibi-Whyte, JSC

Also, the Court in *Okon Bassey Ebe v. Commissioner of Police*<sup>347</sup> added that for judicial discretion to be properly exercised, it must be founded upon the facts and circumstances presented to the court from which the court must draw a conclusion governed by law and nothing else. And that where a judicial discretion has been exercised *bona fide*, uninfluenced by any irrelevant considerations and not arbitrarily or illegally, the general rule is that an appellate court will not ordinarily interfere.<sup>348</sup> It is a well-established principle that an appellate court, does not as a matter of course, interfere with the exercise of discretion by a trial court, unless it is not exercised in accordance to law or it was exercised in a perverse manner.<sup>349</sup> The rationale for this is stated in *Chief Nicholas Banna v Telepower Nigeria Ltd*,<sup>350</sup> where the court held thus “ *An appellate court cannot substitute its discretion in the administration of justice for that of the trial court and because discretionary power is exercised within the confines of the facts of the case, the trial judge, the judge of facts, is in the best position to exercise the discretion.*”<sup>351</sup>

However, where discretion is not properly exercised it amounts to an improper exercise of discretion or an abuse of discretion. An improper exercise of discretion is when discretion is not exercised judicially and judiciously or one that is characterized by arbitrariness.<sup>352</sup> According to the court in *Rida National Plastics Ltd v. Artee (Ind.) Ltd*<sup>353</sup>

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<sup>347</sup> (2008) LPELR-984(SC)

<sup>348</sup> *Ibid*

<sup>349</sup> see *Osakwe v FGN* (2004) 14 NWLR (Pt.893) 305 *Likita v C.O.P.* (2002) 11 NWLR (Pt. 777) 145, *Atiku v The State* (2002) 4 NWLR (Pt. 757) 265.

<sup>350</sup> (2006) 7 SCNJ 182

<sup>351</sup> Also, the extent of the fettered-ness of the Court’s discretion is from the standard of review of abuse of discretion appellate courts render.

<sup>352</sup> *Nwaukoni v. Bielonwu & Ors.* (2008) LPELR-4648(CA)

<sup>353</sup> (2017) LPELR-43132(CA)

the appellate court will only review a lower courts discretion where there is glaring evidence of improper exercise of discretion leading to obvious failure of justice.<sup>354</sup> Also, in *Williams v. Hope Rising Voluntary Funds Society*<sup>355</sup>, where exercise of discretion is found to be manifestly wrong, arbitrary and injudicious, as in the instant case, the Court of Appeal is bound to interfere and set it aside.<sup>356</sup> The court in *Emueze & Ors v. Governor of Delta State & Ors*<sup>357</sup> aptly states as follows:

*“I would want to reiterate the trite principle, that the exercise of discretion (discretionary power) by courts or Judges, is an inherent aspect of judicial independence under the well cherished immutable doctrine of the separation of powers. Contrariwise, an abuse of discretion denotes a failure to take into proper consideration of the facts and relevant laws relating to a particular matter and arbitrary or unreasonable departure from precedent and well settled judicial tradition or custom.”*

Therefore, the standard of review when the court abuses its discretion is quite stern in Nigeria courts. Where it is clear on the record that the power was not exercised judicially and judiciously, an appellate court may interfere.<sup>358</sup> Thus, a judge who exceeds his discretion, may obtain the wrath of the appellate court. See reprimanding remark of *Per Katsina Alu, JSC in Dalhatu v Turaki*.<sup>359</sup>

### **Constraints to Judicial Discretion**<sup>360</sup>

As broad and liberal as the discretion of a judge can be, it has constraints, which range from private/personal to public/ social. The private/personal constraints are the

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<sup>354</sup> See also *The Resident Ibadan Province v. Olagunju* (1954) 14 WACA 552, and *Enekebe v. Enekebe* (1964) 1 ALL NLR 102.

<sup>355</sup> (1982) 2 S.C. 145

<sup>356</sup> Such order to set aside may even lead to a mistrial or retrial, as then case may be.

<sup>357</sup> (2014) LPELR-23201(CA)

<sup>358</sup> See *Obidiegwu Onyesoh v. Nze Christopher Nnebedun & Ors.* (1992) LPELR-2742(SC)

<sup>359</sup> See chapter one

<sup>360</sup> An elaborate discuss on this will be the focus of my dissertation

external factors that influence the discretion of the judge. They include the judge's idiosyncrasies, views and biases. The public/ social constraints are the external factors that impact the judge's discretion. They include the law, judicial policies and influence of society. Some of the private constraints associated with judicial discretion are inconsistency and uncertainty, use of instinct and intuition instead of reasoned decisions, perpetuation of injustice, breach of fair hearing, miscarriage of justice, bias.<sup>361</sup> Some of the public constraints include strict adherence to precedent or stipulated principles, corruption, abuse or disregard for judicial process or powers, arbitrariness.<sup>362</sup>

Although exercise of discretion is individualistic, discretion is not exercised in a vacuum as judges' choices are influenced by their idiosyncrasies, personal views, philosophies and experiences. Judges as human beings are prone to human weaknesses, so whenever courts are exercising judicial discretion over matters before them, the outcome of such actions cannot be totally free from the personal prejudices, whims and caprices of the judge. Therefore, the exercise of law is completely a product of the judicial discretion of a judge.<sup>363</sup> Hence judges differ in their application of discretion. And as humans some of this may lead to error too, as no human being which includes judges are infallible. According to Niki Tobi, the judge is just one human being with human reactions, but he reacts calmly within the private recess of his mind.<sup>364</sup> Within that private recess, are words that carry diverse meanings in a statute. And amidst the

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<sup>361</sup> Abhulimhen-Iyoha, A, (2015) *Judicial Discretion of Judges in Criminal Cases in Nigeria: Prospects and Challenges*.*opcit*:2

<sup>362</sup> *Ibid*

<sup>363</sup> *Ibid*:3

<sup>364</sup> Tobi, *Ibid*:42

choice of verbs and tenses used in the statutes, judges face the challenge of the likelihood of ambiguous statutes with more than one grammatical principle that potentially applies to a word which may mean different interpretations, hence the court is left with a choice of which principles applies most aptly.<sup>365</sup> Smithburn, agrees and argues accordingly that the range of judicial discretion is not fully understood, as judges do not know the extent of discretion available to them.<sup>366</sup>

Bunker puts it rightly that one does not have to be a lawyer to recognize that even the clearest verbal formula can be manipulated.<sup>367</sup> Grammatically, words may carry a different meaning from the legal context it is used and thus such words assumes a different meaning in law. Words also change with time. And their interpretations determine the discretion of the judge at the particular point in time. For example, over time in the Nigerian judiciary, the word “*may*” has fluctuated in interpretation. Grammatically the word “*may*” connote a likelihood or possibility. Accordingly in the 1976 case of *Mokelu v Fed. Comm. Works & Housing*,<sup>368</sup> Per Madarikan, JSC held that “*may*” is an enabling or permissive word, in that sense, it imposes or gives a discretionary or enabling power.<sup>369</sup> Also, in *Busari & Ors v. Oseni & Ors*,<sup>370</sup> Per Niki Tobi, JCA reinforces that it is an established canon of statutory interpretation that the word “*may*” is generally permissive and not mandatory. It does not foist on a party a legal duty which must be performed, or which is not performed at the pain of punishment.

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<sup>365</sup> Eig (2014), *Ibid*: 13

<sup>366</sup> Smithburn, J.E, *opcit*:8

<sup>367</sup> Bunker, M. D. (1997) Justice and the Media *opcit*:124

<sup>368</sup> (1976) NSCC 187

<sup>369</sup> See *British American Tobacco (Investments) Ltd v. A.G. Of Lagos State & Ors* (2014) LPELR-23200(CA)

<sup>370</sup> (1992) LPELR-14981(CA) Paras B-C

With the passage of time, Nigerian courts seemed to have expanded on the meaning of the word “*may*”. For example, the Supreme Court in *Nigerian Navy & Ors v Labinjo*,<sup>371</sup> while acknowledging that the word “*may*” generally carries a permissive meaning, went on to say that in exceptional circumstance it may mean mandatory or compulsory action. In fact, depending on the circumstance, permissive words can have mandatory interpretation and vice versa.<sup>372</sup> Similarly, *Per Nnaemeka Agu, JSC* stated “*I believe that it is now the invariable practice of the courts to interpret "may" as mandatory whenever it is used to impose a duty upon a public functionary the benefit of which enures to a private citizen.*”<sup>373</sup> And this was reiterated most recently in *PDP v. Sherrif & Ors*,<sup>374</sup> where *Per Rhodes-Vivour, JSC* stated that “*The law is long settled that "may" is not always "may". It may sometimes be equivalent to "shall"* .

Similarly, in the United States, words have shifted meaning from the literal to the figurative and the changing meanings of these words have impacted American law and culture.<sup>375</sup> According to Prestidge, one of the principal tendencies of semantic change is for the meaning of a word to often shift to what the speaker believes it to mean. Individual circumstances and schema, or broader social and cultural forces may influence this.<sup>376</sup> Accordingly, Prestige observed, the words *liberty* and *privacy* have metamorphosed from their literal meaning in American legal jurisprudence.<sup>377</sup> Hence, in

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<sup>371</sup> (2012) LPELR-7868 (SC)

<sup>372</sup> See *Fidelity Bank Plc. v. Monye & Ors.* (2012) 3 SC. (PT.73).

<sup>373</sup> See *Ude v. Nwara & Anor.* (1993) LPELR-3289(SC) P.24, Paras. B-C.

<sup>374</sup> (2017) LPELR-42736(SC) (P. 54, Paras. A-B),

<sup>375</sup> Prestidge, A (2010) "Semantic Change in Supreme Context: Semantics in the Privacy Line and Originalist Interpretation," Brigham Young University Prelaw Review: Vol. 24, Article 26, *opcit*:119.

<sup>376</sup> *Ibid*: 120-122

<sup>377</sup> *Ibid*

*Griswold v. Connecticut*,<sup>378</sup> the word ‘*liberty*’ (which grammatically simply means freedom from something and ‘*privacy*’ (which grammatically carries the simple meaning of secrecy, solitude and seclusion; were given complimentary interpretation by the Supreme court. There, even though the court, did not define the word ‘*liberty*’, it established that the right to liberty protected a right to privacy within a marriage.<sup>379</sup> In other words, it appeared that courts defined *liberty* and *privacy* as conjunctive or coherent rights. Years later in *Planned Parenthood of Southeastern PA. v. Casey*,<sup>380</sup> the Court actually redefines *liberty* thus: “*At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.*”<sup>381</sup> In this case, *Liberty* and *privacy* are cited hand-in-hand as seemingly complementary rights; a product of the semantic fusion discussed.<sup>382</sup>

Therefore, in the absence of a concise and precise legislative/ grammatical definition of the word(s) in a statute, judges have to give a legal definition for judicial purposes, often not far from the grammatical meaning. And sometimes, even when the choice of the appropriate rule (statute) is reasonably clear, situations also inevitably occur that the rule maker (drafter) simply never contemplated.<sup>383</sup> In such a situation, the judge who is constrained, attempts to interpret the words therein. What is even more constraining is that the judge’s discretion changes with seasons and circumstances. Thus,

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<sup>378</sup> 381 U.S. 479 (1965)

<sup>379</sup> *Ibid.* See also *Roe v. Wade*, 410 U.S. 113 (1973, where the principle was restated

<sup>380</sup> 505 U.S. 833 (1992)

<sup>381</sup> *Ibid*:851

<sup>382</sup> Prestidge, A (2010) "Semantic Change in Supreme Context: Semantics in the Privacy Line and Originalist Interpretation, *opcit*: 130

<sup>383</sup> Bunker, *opcit*:139

how courts interpreted statutes in the past, changes with time. For example, the discretion a judge applies in a case today may change in similar circumstances years later. The examples in the above cited cases show how simple words metamorphosed on semantics.<sup>384</sup>

Furthermore, another aspect where judges face the most constraint in exercising discretion is the balancing factor. This is when judges weigh one person's interests or rights against another's or when judges attempt to balance social interest with legal/judicial requirements. In other words, where does the justice of the matter lie or to what side does the scale of justice tilt? An overriding principle in the exercise of discretion by a court is to maintain a balance of justice between parties and bearing in mind the right of parties. But since the exercise of such discretion is not absolute, and can be challenged if a party feels injured by it or can affect the parties right to freedom as to show that the discretion has not been judiciously exercised,<sup>385</sup> then it may be right to argue that judicial discretion in Nigeria is fettered.

Judges interpret these laws all the time even when no clear guidelines or parameters or procedure of interpretation are laid down by the legislative arm. In such a 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.<sup>386</sup> However, in certain cases or at certain stages of the trial

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<sup>384</sup> See *Griswold v. Connecticut*(*supra*); *Planned Parenthood of Southeastern PA. v. Casey* (*supra*)

<sup>385</sup> See *Abacha v The State* (2002) 11 NWLR (pt779) 437 at 484.

<sup>386</sup> Kana, A.A "Perspectives and Limits of Judicial Discretion in Nigerian Courts, *opcit*: 157

(depending on the process or application before the court), where the case is void of precedent and the court applies discretion judiciously and judicially to arrive at a just determination of the case, such discretion is unfettered.<sup>387</sup>

### **Significance of Judicial Discretion**

Legal decision making can never be reduced to geometric precision, as there is no doubt that all legal formulations are subject to some judicial interpretation. Nonetheless, the scrutiny structure as presently articulated leaves wide latitude for lower courts to reach almost any result with little substantive guidance from above.<sup>388</sup> Hence, every judge, especially the trial court judge has a level of discretion that he/she must exercise, no matter how fettered or unfettered, there is a tiny window of liberty in any case. No doubt, guidance from superior courts are highly necessary. Therefore, the discretion of a judge is unavoidable because law cannot anticipate every eventuality or how to decide which law may apply to a given situation.<sup>389</sup>

Judicial discretion is indispensable in the Nigeria society, which has a range of inequalities, diverse people with different tribes/race, just like the American society. So, for courts to attend to all these people and the needs of society, discretion of the court is highly necessary.

Judicial discretion shapes the jurisprudence of the court's interpretation of statutes and puts a face to the law. Thus, and very importantly, such discretion only makes sense when the parties/society understands, appreciates and acknowledges it as fair and just.

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<sup>387</sup> See *Total Engineering Services Team Inc. v Chevron Nigeria Ltd.* (2010) LPELR-5032(CA)

<sup>388</sup> Bunker, *opcit*:124

<sup>389</sup> Abhulimhen-Iyoha, *opcit*

Another value of discretion is that it operates/evolves with the times and depicts reliance to society. It states or underscores the relevance of the judiciary to social justice and democratic development-a fundamental tool in this era of somewhat ‘unrestricted’ liberties and diverse social interests.<sup>390</sup>

The discretionary powers of judges arise in the final analysis in filling up gaps that have resulted from legislative omission. There are some social issues that are not fully covered by existing legislation that needs discretion to flesh out through proper interpretation. Thus, in the absence of precedent, where there are extenuating circumstances, judges apply unfettered discretion. Such discretion eventually helps to form the basis for precedent, and eventually establishes precedent.

Therefore, judicial discretion helps to advance the law and develop legal jurisprudence. No single judge can boast of complete mastery of the law. Discretion creates the beauty of diverse knowledge and experiences from different judges because it is individualistic. As different judicial discretion with idiosyncratic judging philosophies evolves, with the times and seasons, the law develops.

Judicial discretion also saves judicial and legislative time. Where there is no precedent or guidance on what to do, the judge’s discretion can save everyone involved valuable time. A ready example is a case this author presided over in Lagos State, Nigeria: *Commissioner of Police v Jelilie Lawal & Kehinde Oyelara*.<sup>391</sup> Discretion became vital and necessary. This case involved threat to life and the cell phone which contained the

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<sup>390</sup> Where people have freedom to exercise their rights in such a way that it infringes on the rights of another. An example is the freedom of expression of the press.

<sup>391</sup> (*Unreported*), Charge No. L/8/2009.

alleged threats could not come on. Thus, this, affected her review of evidence. Hence, in the absence of a provision in the Evidence Act or any other law stipulating what to do in such instance, she exercised discretion and asked that the phone be charged before both parties in open court. Unfortunately, the phone could not come on and the court adjourned for ruling on a no case submission.<sup>392</sup>

Judicial discretion is not an absolute power; hence it has its restrictions however limited. The point is in Nigeria sometimes it appears judicial discretion is exercised within broad legal and social context that it can be taken that it is unfettered, to the extent that the judge is the determinant of what the law is. When a judge exercises his/her discretion, they have an area of autonomy free from strict legal rules, in which the judge can exercise his judgment free from technicalities, to ensure justice in relation to the peculiarities of the case before him/her.

This is a convenient space to bring in the argument on fettered or unfettered discretion of the courts. There are two classes of arguments, the first is that the discretion of judges are absolute and the second is that judges do not and cannot exercise absolute discretion. According to Niki Tobi, the moment a trial court is called upon to exercise his discretionary power in accordance with the enabling law, judiciously and judicially, it will not be correct to say that the court has an unfettered discretion in the matter.<sup>393</sup> Over the years, judicial pronouncements in Nigeria have developed and constantly made both arguments. While some judges believe judicial discretion in Nigeria is fettered, others

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<sup>392</sup> See Vanguard Newspaper (September 1, 2009), *Opcit*

<sup>393</sup> Tobi, N, *opcit*:129

believe discretion is unfettered.<sup>394</sup> Smithburn supports the later.<sup>395</sup> In *Mohammed v. F.R.N. & Ors*<sup>396</sup>, the court held that where the discretion of a judge is required to do or omit to do anything, that discretion when exercised, is not absolute. It can be challenged if a party feels injured by it or if it will affect a person's right to freedom or as to show that the discretion has not been judiciously exercised.<sup>397</sup> But in *Awani v. Erejuwa*,<sup>398</sup> it was held *inter alia* that discretion conferred upon trial courts is generally unfettered and an appellate court cannot ordinarily interfere with the exercise of the discretion unless it is shown that the discretion was wrongly exercised." This was supported by the court in *Aso Motel Kaduna Ltd. v. Deyemo*,<sup>399</sup> that it is trite law that all courts in Nigeria have unfettered discretionary power to adjourn any proceedings pending before them in order to do justice to the suit. The guiding principle is that the discretion must be exercised at all times judicially and judiciously on the material placed before the court in the peculiar circumstances of the particular case.<sup>400</sup>

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<sup>394</sup> See cases below

<sup>395</sup> Smithburn, *opcit.*: 143-234

<sup>396</sup> (2009) LPELR-8364(CA)

<sup>397</sup> *Ibid*

<sup>398</sup> 11 (1976) H SC 307

<sup>399</sup> (2006) LPELR-11596(CA)

<sup>400</sup> See *Flour Mill of Nigeria Ltd v. Ogunbayo* (2014) LPELR-24264(CA)

It is important to note that the type of court,<sup>401</sup> the proceedings,<sup>402</sup> the nature of the case,<sup>403</sup> the stage of the hearing,<sup>404</sup> all somewhat determine whether a court has fettered or unfettered discretion. For example, in *Nwannewuihe v. Nwannewuihe*,<sup>405</sup> the court has an unfettered discretion to grant or refuse as the case may be, an order of interlocutory injunction. Albeit like all other judicial discretions, the court has an obligation to exercise such discretion not only judicially but also judiciously.<sup>406</sup> Also in *Stabilini Visinoni Ltd v. Mallinson & Partners Ltd*,<sup>407</sup> the court emphasized that bottom line is that a court has an absolute and unfettered discretion to award costs or not to award them; what is paramount is to take into account all circumstances of the case.<sup>408</sup>

Further, in *Plateau State Health Services Management Board & Anor. v. Goshwe*<sup>409</sup> a court has an unfettered discretion to re-arrange an issue for determination by the parties to meet the case.<sup>410</sup> And in *Honey Crown Products Ltd v Shell Electric*

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<sup>401</sup> See *Mobil Producing (Nig) Unltd v Ajanaku & Ors* (2007) LPELR-8758(CA) "it has become trite law that all superior courts of record have unfettered discretion in the exercise of their equitable jurisdiction to stay their proceedings. The same unfettered discretion avails the appellate courts to stay not only their own proceedings but the proceedings of the courts from which the appeals pending in the appellate courts arose. This discretion must however be exercised judicially and judiciously"

<sup>402</sup> See *Awure & Anor. v. Iledu* (2007) LPELR-3719(CA) "trial courts are allowed free hand to exercise their discretion to amend any pleading any time before judgment provided no issues have been introduced."

<sup>403</sup> See *Iche v. State* (2013) LPELR-22035(CA) "a judge of the High Court trying an accused person has unfettered discretion to review the bail."

<sup>404</sup> In *IPCO Nigeria Ltd. v. NNPC* (2013) LPELR-22083(CA) this court has an unfettered discretion to allow an amendment of the Notice of Appeal at any time before the hearing of the appeal.

<sup>405</sup> (2007) LPELR-8247(CA)

<sup>406</sup> See *Falomo v. Banigbe* (*Supra*) at 695 paragraphs C - G.

<sup>407</sup> (2014) LPELR-23090(CA)

<sup>408</sup> See *Total Engineering Services Team Inc. v Chevron Nigeria Ltd.* (2010) LPELR-5032(CA) I would further wish to restate the trite law that a court has an absolute and unfettered discretion to award or refuse costs in any particular case but that the discretion must be exercised judicially and judiciously.

<sup>409</sup> (2012) LPELR-9830(SC)

<sup>410</sup> See *Awojugbagbe Light Industries Ltd. v. P. N. Chinukwe & Anor* (1995) 4 NWLR (Part 390) 379; (1995) 4 SCNJ 1; *Latinde & Anor. v. Bella Lajunfin* (1989) 5 S.C. 59; (1989) 5 SCNJ 59; *Unity Bank & Anor. v. Edward Bonari* (2008) 2 SCM 193 At 240.

*Manufacturing*,<sup>411</sup> the court held that a Judge is vested with unfettered discretion, but when such discretion is exercised erratically, it then fetters the parties before it.<sup>412</sup>

In summing up the above argument, it appears in the most part that whether a judge's discretion is fettered or unfettered varies, depending on the nature of the case. In the US, it appears discretion swings depending on the case or court. According to Smithburn sometimes discretion is fettered sometimes it is not fettered.<sup>413</sup>In family law or child custody case, for example, discretion is unfettered as the best interest of the child is what determines the level of discretion a court can apply. Although at a time in history, American courts had unfettered discretion in sentencing of persons convicted with crime as judges took into account various mitigating factors. However, with the Federal Sentencing Guidelines, and the mandatory minimum sentencing legislation, federal courts in the U.S no longer had the broad latitude or discretion to make sentences to fit crimes and the defendant as before.<sup>414</sup>In other words, the legal framework in both Nigeria and the U.S gives judges huge discretion, depending on the type of case.<sup>415</sup> Courts in the U.S have great discretion in rulings concerning the examination of witnesses, the manner in which witnesses testify as well as the actual testimony,<sup>416</sup> but it must be tempered with reason.<sup>417</sup>

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<sup>411</sup> (2013) Lpelr-20077(CA)

<sup>412</sup> See *Okoh & Ors. v. University of Lagos & Anor.* (2010) LPELR-4719(CA)

<sup>413</sup> See *Smithburn*, (2006), *opcit*

<sup>414</sup> *Kana, opcit:160*

<sup>415</sup> *Family laws cases*

<sup>416</sup> See *Louisiana v. Hayes*, 806 So.2d 816 (La. App. 2001.)

<sup>417</sup> *Montana v. Nelson*, 48 P.2d 739 (Mont.2002); *Willard v. State*, 244 Ga. App. 469, 535 S.E.2d 820 (Ga.App. 2000).

However, the discretion of judges in Nigeria appear to be somewhat unfettered in sentencing. For example, the recently enacted sentencing guidelines of the Federal Capital Territory of Nigeria<sup>418</sup> and Lagos State of Nigeria<sup>419</sup>, gives judges options to sentencing convicted felons in the absence of statutory punishment.<sup>420</sup> These Guidelines widens the judge's discretion.<sup>421</sup> For example, the provisions under the Administration of Criminal Justice Law that provides for custodial and non-custodial sentences require the court to ..penalizing concepts such as probation, parole, community service, rehabilitation, etc. unfortunately the absence or ..these facilities gives courts unfettered discretion to decide how to sentence

Ultimately, though not precise, Nigerian courts seem to have more unfettered discretion than fettered. In view of the leverage section 6 of the 1999 Constitution grants judges to exercise their discretions, and coupled with the argument on the dangers of this 'latitude' of discretion allowed a judge; courts have devised a concept/principle to regulate the extent of discretion allowed a judge, which stipulates that judicial discretion is somewhat fettered must be exercised "judiciously and judicially"<sup>422</sup> Thus Niki Tobi's argument that it is wrong to say a judge has unfettered discretion in all matters, would be appropriate.<sup>423</sup> Yet, what is equally appropriate is the submission of *Per Georgewill, JCA*,

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<sup>418</sup> *The Federal Capital Territory Courts (Sentencing Guidelines) Practice Direction, 2016*

<sup>419</sup> *Lagos State Judiciary (Sentencing Guidelines) Practice Directives, 2018*

<sup>420</sup> *See notes 109 & 110, ibid*

<sup>421</sup> *See sections 3, 12, 21, 30, 39, 48 and 57 of the FCT Sentencing Guidelines, Ibid and sections 4, 14, 24, 34, 44, 54 and 64 of the LSJ Sentencing Guidelines, ibid which both provides for discretionary and non-discretionary punishments.*

<sup>422</sup> Kana, *opcit* :161

<sup>423</sup> *See fn 377*

that an exercise of discretion, though not subject to so much hard and fast rules or fettering, loses its salt of being a discretion and thus it is best served unfettered.<sup>424</sup> Nevertheless an exercise of discretion must be founded on justice, fairness and law and not on the whims and caprice of the court with scanty or no regard to the facts of the case.<sup>425</sup> This is supported by the Court in *Anyah v African Newspaper of Nig. Ltd*,<sup>426</sup> that discretion will cease to be one if it can only be exercised in one particular form. Also in *Ozigbu Engr Co Ltd v Iwuamadi*,<sup>427</sup> the Court held that in the course of deciding on the circumstances of a case, courts are endowed with an unfettered discretion to keep up with the times and economic trend in the country and most especially with prevailing fluctuating and rather obvious decline of purchasing power of the Nigerian currency i.e. the Naira.

The bottom-line in all arguments above is that the discretionary powers of a judge are indispensable in the act of judging. Judges are neither machines nor equipment, but humans who must assess, review and decide on the best justice in a given case, based on diverse extenuating circumstances that revolve with seasons in a revolving society. The discretion of a judge should be of value to the society. It is the role of the judge to use the law for its true purpose in society—gain the confidence of society on the merits of

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<sup>424</sup> *Adelaja v. C.M.S. Grammar School Bariga & Ors* (2017) LPELR-42729(CA) at 11

<sup>425</sup> See *University of Lagos v. Aigoro* (1985) 1 NWLR (Pt.1) 143. See also *Aboseldehyde Lab. Plc. v. U.M.B. Ltd.* (2013) 13 NWLR (Pt.1370) 91 @ pp. 97 - 98; *Aroh v. PDP* (2013) 13 NWLR (Pt.1371) 235; *Thimnu v. UBN Plc. & Ors.* (2013) LPELR 22127 (CA) @ pp. 20 - 21; *Abiodun v. CJ. Kwara State* (2007) 18 NWLR (Pt.1065) 109 @ p.152; *Adeniji v. Adeniji* (2013) 15 NWLR (Pt.1376) 102 @ p. 125. In *E.F.P.C. Ltd. v. NDIC.* (2007) All FWLR (pt. 367) 793 @pp. 825 – 826.

<sup>426</sup> (1992) LPELR-511 (SC)

<sup>427</sup> (2009) 16 NWLR (PT.1116) 44 @ 79

substantial justice. As *Per Abiru*, *JCA* succinctly puts it in *Mbas Motel Ltd. v Wema Bank Plc.*<sup>428</sup>

*“We must never lose sight of the fact that justice is rooted in public confidence and it is essential to social order and security. It is the bond of society and the cornerstone of human togetherness. Justice is the condition in which the individual is able to identify with society, feel at one with it and accept its rulings. The moment members of the society lose confidence in the system of administration of justice, a descent to anarchy begins.”*

Accordingly, the view of Judicial discretion in Nigeria creates the opportunity for courts to establish or restore the confidence of society in the judicial process.

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<sup>428</sup> (2013) LPELR-20736(CA) at P. 26, Paras. E-G

## Chapter Four: The Impact of Judging on Society

*“Rules of Court are meant to be obeyed. Of course, that is why they are made. There should be no argument about that. But there is an important qualification or caveat and it is that their disobedience cannot or should not be slavish to the point that the justice in the case is destroyed or thrown overboard. The greatest barometer, as far as the public is concerned, is whether at the end of the litigation process, justice has been done to the parties. Therefore, if in the course of doing justice some harm is done to some procedural rule which hurts the rule, ..., the court should be happy that it took that line of action in pursuance of justice. This court cannot myopically or blindly follow the Practice Directions and fall into a mirage and get physically and mentally absorbed or lost. Let that day not come. ... Full opportunity should be given to parties in the interest of justice without due regard to technicalities. Gone are the days when courts of law were only concerned with doing technical and abstract justice based on arid legalism. We are now in days when courts of law do substantial justice in the light of the prevailing circumstances of the case. it is my hope that the days of the courts doing technical justice will not surface again. ...”<sup>429</sup> (emphasis added)*

*Per Niki Tobi, JSC<sup>430</sup>*

### Introduction

This chapter examines the relationship between society and courts, emphasizing the relevance of society to the act of judging: statutory interpretation and judicial discretion. It summarizes the role of courts in society and states how procedural and substantial justice evolves in judging in Nigeria. Then it defines the relevance of society to the judge’s decision-making process, emphasizing the interplay between such decision-making and society. In concluding, an attempt will be made to answer the question– what defines justice?

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<sup>429</sup> Underline for emphasis of author

<sup>430</sup> *Abubakar & Ors. v. Yar'adua & Ors. (2008) LPELR-51(SC)*

## Courts and Society

The first connection between courts and society is the obvious fact that judges are also members of the society, though they are elevated onto the mystical pedestal that is the bench and perceived as wise and beyond error. The diverse forms or principles of interpretation and the liberal exercise of discretion indicate the humanness of courts. The perception or perspective of the judge interpreting a statute or the idiosyncrasy or personality of the judge exercising discretion in such interpretation or judging affects the relationship between the courts and society. More often than not, such relationship determines the judge's discretion and the side the pendulum of justice will sway. The discretion of courts when interpreting contemporary statutes may differ when interpreting old statutes. In interpreting contemporary statutes, the Supreme Court usually feel the pulse of the society, i.e. social values, interests and perspectives. This embrace of society ensures a more realistic interpretation of a contemporary statute. Whether the statute is contemporary or medieval, the interpretation is influenced by the personality of the judge, which is usually influenced by the economic, sociological, political, environmental factors affecting the judge.<sup>431</sup>

The second connection between courts and society, which is the focus of this thesis, is the law. The law is the connecting cord between society and courts. While law is designed for social compliance and for maintaining order in society, courts have the responsibility of administering justice by exercising judicial discretion to interpret the law. So, the judge is the go-between the society and the law-makers (legislature). Thus,

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<sup>431</sup> Sokefu & Njoku, *opcit*:19

the law that is codified in statutes, are sometimes ambiguous and vague. Ambiguity in the law, provides judges with unfettered discretion in deciding the cases that come before them.<sup>432</sup>

As previously stated, drafters are not beyond error, hence the need for courts to exercise ‘judicial and judicious’ discretion to interpret these laws in the best interest of society. According to Lord Denning, it is not within human powers to foresee the manifold sets of facts which may arise and even if it were, it is not possible to provide for them in terms free from all ambiguity.<sup>433</sup>

The legislative branch enacts law according to relevant social realities<sup>434</sup> at a given time, making such realities lawful at that time. Then, eventually the statutes lose their relevance due to inevitable social changes that occur from time to time–, making realities that were lawful at one time, eventually become unlawful, and vis versa, thereby creating diverse interpretations of the law. This inevitably impacts the act of judging which evolves with time (or should evolve with the times).<sup>435</sup> It is pertinent to note that differing judicial interpretations of similar laws often affects public understanding of such laws and/or public perception of social values underpinning those laws.<sup>436</sup> Thus, where conflicts emanate from such social realities or diverse interpretations of law

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<sup>432</sup> Hine, K, D, *opcit*: 1770

<sup>433</sup> *Seaford Estate Ltd v Asher (1949)2 K.B 481*

<sup>434</sup> phenomenological level created through social interaction that transcend individual motives and actions. Examples are social norms or practices like cultural diversities; health and scientific developments and discoveries; medical and pharmacological research; media rights, free press versus fair trial, social media advancement, LGBTQ movements, women empowerment; Me Too Movements; global business networking; election campaigns etc.

<sup>435</sup> Part of the argument in this thesis is that the act of judging in Nigeria has remained static in some cases

<sup>436</sup> See discuss on precedent in chapter 1

(based on the idiosyncrasy of the particular judge), judges as well as society, get caught up, in such interpretations.

Society does not understand basic principles of law as judicial interpretation of the law is often abstract. The lack of understanding of a concept often leads to inevitable abuse. So, the fact that society does not understand the law as interpreted by courts, often leads to abuse of the law. And this has adverse effects on society, that judges are part of. This misunderstanding has led in many cases, especially criminal cases, to lose relevance in contemporary times.

Consequently, courts should uphold the law and not get caught between interpreting the law(as is) on the one hand, <sup>437</sup> and also ensuring justice, on the other hand.<sup>438</sup> This role of interpreting law and upholding justice<sup>439</sup>, reveals a competing interest between law and society, both competing for the attention/favor of the court. Thus, creating a dilemma. This dilemma of competing interest is what questions the obligation of courts in the Nigerian society- whether the obligation of the court is to the law or to society? In other words, to which side will the scale of justice tilt: law or society? Better still- are courts created to support the law or to support society? In addition, the interpretation of these laws seems abstract from social realities and most times people do not understand the justice of the case. This defeats the essence of dispensing justice, especially when society is ‘smothered’ by such abstract interpretations. Thus, where there is a disconnect in social perception of the law, it

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<sup>437</sup> From the literal meaning of the statute, the intention of the drafters as was or the legislative history

<sup>438</sup> A guarantee that both parties have had a fair and just trial

<sup>439</sup> The main focus of my prospective dissertation

inevitably means the courts have a disconnect with society or social reality. Interpretation is a natural response to conflicts that ensue from the varied nature of society. Thus, the desire to do justice should inspire judicial creativity through the use of discretion in constitutional interpretation.<sup>440</sup>

What is the real purpose of interpretation of statute? is it just to say what the legislatures thought? if that be the case, of what use is the thought of the legislatures to the needs or relevance of society? if the statute is not relevant to the society, its interpretation is of no value. ? The intent of legislatures is fundamental and should be the first step in interpreting statutes, but the court should not leave it at that, the court should focus on social interests.

The life of law is not just logic or experience, but renewal based on experience and logic, which adapt law to the new social reality, as there are always changes in law caused by changes in society.<sup>441</sup> According to professor Hart “*The time has come when it is understood again, inside the (legal) profession, as well as outside that reason is the life of the law and not just votes for your side. When that time comes, and the country gathers its resources for the realization of this life principle, the principle will be more completely realized than it now seems to be.*”<sup>442</sup>

### **The Duty of Courts in Society**

Barack rightly summarizes the duty of the judge as follows:

*“The role of the judge is to understand the purpose of law in society and to help the law achieve its purpose. But the law of a society is a living organism. it is based on a factual and social reality that is constantly changing. ... Law's*

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<sup>440</sup> Oshio, *ibid*:24

<sup>441</sup> *Opcit*

<sup>442</sup> cited from Miller, A.S & Howell, R.F, *The Myth of Neutrality in constitutional Adjudication*, at 662

*connection to this fluid reality implies that it too is always changing. Sometimes change in the law precedes societal change and is even intended to stimulate it. In most case however, a change in the law is the result of a change in social reality. Indeed, when social reality changes, the law must change too. Just as change in social reality is the law of life, responsiveness to the change in social reality is the life of the law.*"<sup>443</sup> (emphasis added)

The **first** duty of the court is to define the law. In stating what the law is, the court also has the duty to help the law achieve its purpose. The purpose of law is to ensure compliance and order in society. The courts are agents through which compliance is ensured. The law is like an island and can only be connected to the rest of society with the help of courts. Law is created for the benefit of social order, but it can be vague to the society, that is supposed to benefit from it. However, courts can only state what the law is if they understand the law.<sup>444</sup> The judge is the master of the law and as master of the law, he/she has the duty to state to society through judicial pronouncements what the law is. This was the position of the court in *AC & Anor v. INEC*,<sup>445</sup> that the court say the main function of a Judge is to declare what the law is and not to decide what it ought to be. Nothing is law until the courts declare so.<sup>446</sup>

**Secondly**, the judge is under a duty, within the statutory limits of his judicial discretion, to maintain a relation between law and morals, between the precepts of jurisprudence and those of reason and good conscience.<sup>447</sup> In performing this duty, the judge straightens out the rumples in the law. These rumples are the vague, ambiguous or unjust aspects of the law that are not clear to the courts and to society. Lord Denning

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<sup>443</sup> Barack, A (2006), *The judge in a democracy*:3

<sup>444</sup> *Ibid*

<sup>445</sup> (2007) *LPELR-66(SC)*

<sup>446</sup> Duxbury at 51

<sup>447</sup> Cardozo, B.N (1921), *The Nature of the Judicial Process*, *opcit*:135

expresses it as follows: “*A judge should ask himself the question: if the makers of the Act has themselves come across this ruck in the texture of it, how would they have straightened it out? He must then do as they would have done. A judge must not alter the material of which it is woven, but he can and should iron out the creases.*”<sup>448</sup>

This leads to the **third** duty of courts: they have the primary duty to uphold the Constitution, which makes them the custodians of the Constitution. This was stated in *Olusanya v. UBA Plc*,<sup>449</sup> that courts of record established by the Constitution as custodians of the Constitution, have the primary judicial obligation and duty to comply and ensure compliance with clear and plain provision of Constitution in the discharge of their functions of adjudication in case/matter brought before them. The Constitution is the mentor of all other laws of the land so it must be guarded jealously by the judge.<sup>450</sup> It is undesirable that a court would spuriously attempt to subvert or frustrate the clear provisions of the Constitution which it has the duty to uphold and comply with. This was aptly captured in *Nafiu Rabiu v The State*,<sup>451</sup> as follows;

*“ My lords, in my opinion, it is the duty of this court to bear constantly in mind the fact that the present Constitution has been proclaimed the supreme law of the land, that it is a written organic instrument meant to serve not only the present generation but also several generations yet unborn...that the function of the Constitution is to establish a framework and principles of government broad and general in terms intended to apply to the varying conditions which the development of our several communities must involve, ours being a plural , dynamic society, and therefore, mere technical rules of interpretation of statutes are to some extent inadmissible in a way so as to defeat the principles of government enshrined in the Constitution....I do not conceive it to be so to construe any of the provisions of the Constitution as to defeat the obvious ends the Constitution was designed to serve, where another Constitution equally in accord*

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<sup>448</sup> *Seaford Estates Ltd v Asher*, (supra)

<sup>449</sup> (2017) LPELR-42348(CA)

<sup>450</sup> See *Dingyadi v. INEC* (2011) 10 NWLR (1255) 347

<sup>451</sup> (1981)2 N.C.L.R 293, 326

*and consistent with the words and sense of such provisions will serve to enforce and protect such ends.”*

**Fourthly**, courts also have the important but somewhat controversial duty to interpret the law.<sup>452</sup> According to the courts in *PDP v. CPC. & Ors*<sup>453</sup>, a judge is hired to interpret the laws of the country which include the Constitution and statutes. In *I.G.P. v. A.N.P.P*<sup>454</sup> it was held that the duty of the courts is to simply interpret the law or Constitution as made by the legislators or framers of the Constitution. The original meaning of a statute is determined when the judge interprets the statute in its original context that is, its historical, literary and political context from the framer’s perspective. According to Per Fatayi-Williams, CJN:

*“it is our view that in most countries with common law jurisdictions such as Nigeria, it is generally accepted that it is the function of the judiciary to interpret the law with the minimum of direction from the legislature as to how they should set about the task. Thus, nearly all the principles, precepts and maxims of statutory interpretation are judge-made. Here are some examples. A statute should always be looked at as such a whole; words used in a statute are to be read according to their meanings as popularly understood at the time the statute became law; a statute is presumed not to alter law beyond that necessarily required by the statute.”*<sup>455</sup>

In interpreting statutes, most judges rely on the intent of the legislature; some rely on the original meaning of the text, while others rely on legislative history. All of these factors align the obligation of courts as a go-between law and society.<sup>456</sup> Cardozo states

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<sup>452</sup> This duty has been challenged as making law and usurping the duty of legislature

<sup>453</sup> (unreported) SC.272/2011

<sup>454</sup> (2007) 18 NWLR (Pt. 1066) 457 at 496 - 497, paras. G - E (CA)

<sup>455</sup> Awolowo v. Shagari & Ors (supra)

<sup>456</sup> Tobi-Aiyemo, (2017) The Intermediate Obligation of a Judge Vis A Vis Law and Society: “A Matter of Interpretation, *opcit.*: 1

that the power of interpretation must be lodged somewhere, and the custom of the constitution has lodged it in the judges.<sup>457</sup>

**Fifthly**, courts have a duty to create precedent to advance the law. Law is a growing concept, as what was considered law in the 16<sup>th</sup> century is not necessarily law today. For example, the law of retribution was prominent at one time but now, it is no longer law to give an eye for an eye punishment. The judges who created the common law did it to provide a solution to the social needs of their time. As these needs change, judges must consider whether it is appropriate to change the judicial precedent itself, by expanding or restricting the existing case law or overturning an old precedent. Sometimes the new social reality necessitates creating new case law to resolve problems that did not arise at all in the past, where the goal of the new case law is to bridge the gap between law and the new social reality.<sup>458</sup> According to the Court in *Dapianlong & Ors v. Dariye & Anor*,<sup>459</sup> though judicial precedent or *stare decisis* is an indispensable foundation on which to decide what the law, is there may be times when a departure from the precedent in interest of justice, would stimulate appropriate development of the law.

**Sixthly**, the most prominent duty of the court as the lay man in society understands, is to settle dispute between parties and protect the rights of citizens. A judge is the cynosure of the litigating public as well as the entire populace.<sup>460</sup> This was the holding of the court in *Oguneyehun & Ors. v The Governor Ondo State & Ors.*<sup>461</sup> The

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<sup>457</sup> Cardozo, *opcit*

<sup>458</sup> Barak, A (2006) *The Judge in a Democracy, opcit*:10

<sup>459</sup> (2007) *LPELR-928(SC)*

<sup>460</sup> Tobi, at 42

<sup>461</sup> (2007) *LPELR-4239(CA)*

courts guarantee the rights of citizens/society. Society is composed of different sectors of people, which are bound to have conflicts. When these conflicts ensue, the courts are approached to settle them.

Ultimately, the **seventh** and most important duty of the court is to do justice for the benefit of society. See *Irepodun-Ifelodun Local Government v. Balemo*.<sup>462</sup> Also, in *Davies & Ors v. Odojin & Ors*,<sup>463</sup> the court has the duty to render undiluted justice to the citizenry and this it must do scrupulously without any fear or favor, ill will or affection. This duty of the court is being questioned in this thesis, because sometimes it appears Nigerian courts pursue procedural justice under the guise of ensuring substantial justice, and this has adversely affected society.

### **Procedural or Substantial Justice**

The impact of judging on society is wrapped around two words—Procedural and substantive justice. How these words influence the act of judging viz interpretation and use of discretion in a given case, can impact on society directly or indirectly. Where the decision of the court affects social issues, views, interest, principles and custom, society has a direct impact. For example, the decision of the Court in the celebrated case of *Mojekwu v Mojekwu*,<sup>464</sup> had a direct impact on society, as the Oli Ikpe native law and custom of the Nnewi tribe was pronounced as unconstitutional by the court.<sup>465</sup> Similarly

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<sup>462</sup> (2007) LPELR-8439(CA)

<sup>463</sup> (2017) LPELR-41871(CA)

<sup>464</sup> (1997) 7 NWLR (Pt. 512) 283.

<sup>465</sup> Although this case was overturned by the Supreme Court, subsequently its principles were adopted by the same Supreme Court in cases like *Motoh v. Motoh* (2010) LPELR-8643(CA), where the court declared that customary law which discriminates against female children in terms of inheritance is repugnant to natural justice, equity and good conscience.

in the celebrated case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,<sup>466</sup> where the court pronounced on that the evidence did not meet the standard required for scientific evidence. After the case, the anti-nausea medication– Bendectin, were taken off the market as being responsible for birth defects in infants. The reaction in taking the medication off the shelves directly impacted those members of society who would have benefited from the medication during pregnancy. When courts interpret laws that eventually influence legislative amendment, such laws trickle down to impact society. Examples of such cases are *Gideon v. Wainwright*,<sup>467</sup> *Korematsu v. United States*<sup>468</sup> and *Marbury v. Madison*.<sup>469</sup> This is one of the reasons judges are considered agents of social change

Nigerian courts have made consistent attempts to distinguish between procedural or technical justice, and substantive or substantial justice. Hence, *Monye v. Abdullahi*,<sup>470</sup> states that: “*Courts of law have long moved away from the domain or terrain of doing technical justice to doing substantial justice. This is because technical justice, in reality is not justice but a pretentious caricature. It is justice with a question mark and not*

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<sup>466</sup> 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 144 (1987)

<sup>467</sup> 372 U.S. 335 is a landmark case in United States Supreme Court history. In it, the Supreme Court unanimously ruled that states are required under the Sixth Amendment of the U.S. Constitution to provide an attorney to defendants in criminal cases who are unable to afford their own attorneys

<sup>468</sup> 323 U.S. 214 was a landmark United States Supreme Court case concerning the constitutionality of Executive Order 9066, which ordered Japanese Americans into internment camps during World War II regardless of their citizenship.

<sup>469</sup> 5 U.S. 137, was a U.S. Supreme Court case that established the principle of judicial review in the United States, meaning that American courts have the power to strike down laws, statutes, and some government actions that contravene the U.S. Constitution

<sup>470</sup> (2012) LPELR-20103(CA)

*justice which is synonymous with the principles of equity and fair play. Caricatures by whatever template are not the best presentations or representations of the real entity.*"<sup>471</sup>

The Court in *Saleh v. Abah & Ors*<sup>472</sup> also stated that the current trend is where substantial justice takes the pride of place and very little time is given to matters pertaining to technical justice in our Judicial administration.<sup>473</sup> This principle was reiterated in *Ekwere v. The State*,<sup>474</sup> where the supreme court stated that substantial justice should not be allowed, wherever possible, to be overcome by procedural irregularity which could be cured by proper exercise of court's discretion.

Substantial justice was defined as justice fairly administered according to rules of substantive law, regardless of any procedural errors affecting the litigant's (substantive) rights.<sup>475</sup> It is justice according to the peculiar circumstances of the case, justice based on the equity or fairness of the case. According to *Per Niki Tobi, JSC* "*substantial justice, which is actual and concrete justice is justice personified. It is secreted in the elbows of cordial and fair jurisprudence with a human face and understanding. It is excellent to follow it in our law. It pays to follow it as it brings invaluable dividends in any legal system anchored or predicted on the rule of law, the life of blood of democracy.*"<sup>476</sup>

Procedural justice is simply justice based on stipulated procedures. It is based on the laid

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<sup>471</sup> See also *State v. Gwonto* (1983) 1 SCNLR 142; *Union Bank of Nigeria Plc. v. Ikwen* (2000) 3 NWLR (Pt. 648) 223; *Sha v. Kwan* (2000) 8 NWLR (Pt. 670) 685; *Adebayo v. Okonkwo* (2002) 8 NWLR (pt. 768) 1; *Asims (Nig) Limited v. Lower Benue River Basin* (2002) 8 NWLR (Pt. 769) 349; *Afro-Continental (Nigeria) Ltd. v. Co. Operative Association of Professionals Inc.* (2003) 5 NWLR (Pt. 813) 303.

<sup>472</sup> (2017) LPELR-41914(SC)

<sup>473</sup> See *Egbo v Agbara* (1997) 1 NWLR (Pt.481) 293 at 321; *Uwazuruike v A.G. Federation* (2013) 10 NWLR (Pt.1361) 105; *Omoju v FRN* (2008) 7 NWLR (Pt.1085) 38 at 57; *Ukiri v Geco - Prakla (Nig.)*

<sup>474</sup> (1981) LPELR-1103(SC)

<sup>475</sup> See *Basseyy v. A.G Akwa Ibom State & Ors* (2016) LPELR-41244(CA)

<sup>476</sup> See *Samuel Ayo Omoju v. The Federal Republic of Nigeria* (2008) LPELR-2647(SC)

down laws or letters of the law, while substantial justice is based more on the substance of the case rather than the letters.

It is trite law that courts have the duty to do substantial justice rather than procedural justice.<sup>477</sup> In *Alioke v. Oye & Ors*,<sup>478</sup> the Supreme Court stated thus: “*As a court of law and justice, our duty must be to look beyond procedural technicalities to do substantial justice, particularly where fair-hearing is in issue.*” In *T.M. Lewin (Nig) Ltd v. Smartmark Ltd*,<sup>479</sup> the Court also stressed that strict adherence to technical justice may still have its adherents and apostles, but the era of technical justice riding over, and above substantial justice is long gone, as substantial justice is now king!<sup>480</sup> Accordingly, for quite some time now, courts have gravitated from the regime of doing technical justice to the arena of doing substantial justice. This is in coalition with the jurisprudence of the wider world and its universal legal system.<sup>481</sup> Indeed, the need for courts of law to do substantial justice becomes more imperative when deep consideration is given to the provision of the Constitution, which is the origin of our democracy.<sup>482</sup>

Nonetheless, this thesis argues that the above consensus to do substantial justice rather than technical justice, appears more theoretical than practical, at least in some

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<sup>477</sup> Subsequently this thesis will argue that in some cases, this principle is more theoretical than practical

<sup>478</sup> (2018) LPELR-45153(SC) *Per Bage, J.S.C. (P. 24, Paras. A-B)*

<sup>479</sup> (2017) LPELR-43136(CA)

<sup>480</sup> See also *Oruobu v. Anekwe* (1997) 5 NWLR (Pt. 506) 618; *Sarakatu v. Nigerian Housing Development Society Ltd* (1984) 4 SC 26; *Odi v. Osafile* (1987) 2 NWLR (PT. 57) 510; *Deen Mark Constr. Co Ltd v. Abiola* (2002) 3 NWLR (PT. 754) 418 @ PP. 449 - 450; *Dyeris v. Mobil Oil Nigeria Limited* (2010) 1 NWLR (PT. 1175) 309; *Agu v. Nikon Ins Plc.* (2009) 11 NWLR (PT. 677) 187 @ P. 194; *Registered Trustees Of The Airline Operators Of Nigeria v. Nigerian Air Space Management Agency* (2014) 8 NWLR (PT. 1408) 1 @ PP. 30 – 31

<sup>481</sup> See *Inakoju v. Adeleke (Ladoja's case)* (2007) 4 NWLR (Pt. 1025) 423.

<sup>482</sup> *Ibid*

cases. This is because in Nigerian courts, undue reliance on precedent often conflicts with substantial justice.<sup>483</sup> Strict adherence to rules or principles of interpretation can lead to injustice in a case as the intentions and motives of the framers often changes as times change. This would be sacrificing substantial justice for technical justice and calling it equity. What a fallacy! Rules in a constantly changing world, Bunker says, are almost guaranteed to produce such dysfunctional results on at least some occasions.<sup>484</sup> This is why judicial discretion has evolved to include equity in some jurisdictions like the United states.<sup>485</sup> According to the American case of *Buckley v. City of New York*,<sup>486</sup> adherence to a precedent "should depend upon its continuing practicality and the demands of justice."

Therefore, if legislators were given the opportunity to review the laws they created with the contemporary changes in society, they may consider changing the law to align with relevant social circumstances. According to *Per Galinje, J.S.C. in Abiodun v. FRN*,<sup>487</sup> the court is more interested in substance than in form as justice can only be done if the substance of the matter is examined. Therefore, it is the duty of courts to align or realign those laws with social realities in order to achieve the aim of justice. Substantial justice is achieved when the rules of law accommodate social views, values and interests. Thus, the act of judging is not just to settle disputes between parties; judges also have the important role to uphold the essence of democracy by giving fair interpretation to statutes and just exercise of discretion. When judging, judges recap the facts of a case in a

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<sup>483</sup> This is a major dilemma that judges face. A point this writer intends to expand on for a dissertation.

<sup>484</sup> Bunker, *opcit*:139

<sup>485</sup> Smithburn, (2006), *Opcit*

<sup>486</sup> 56 N.Y.2d 300, 305 (1982)

<sup>487</sup> (2018) LPELR-43838(SC) Pp. 18-19, Paras. C-A

nutshell and align it with stipulated law, which the judge interprets with judicious discretion. But such interpretation is often based on strict adherence to legalities that adversely affects society.

As an intermediary between law and society courts are obligated to understand the function of law in society and interpret the law to achieve its purpose in society.<sup>488</sup> This means the judge may give a statute a new or dynamic meaning, that seeks to bridge the gap between law and life's changing reality, without changing the statute itself. The statute remains as it was, but its meaning changes, because the court has given it a new meaning that suits new social needs.<sup>489</sup> The essence of the courts in society is of no value if there is a gap between how society understands and interpret justice/judicial decisions and the statutory/legal definition of judging.<sup>490</sup> Often times, it appears judicial interpretation is more for lawyers and fellow judges, rather than for society.<sup>491</sup> Repeatedly, this thesis poses the question: what is the purpose of judging and how can this purpose adequately capture the intention of the lawmakers to fit a complex and changing society?

As different predominant social views interests and needs of individuals conflict with incessant changes and development in society, such interpretation of the law, clearly written in English language appears vague, irrelevant and inadequate. Thus, public view and perception of law, and the impact of judicial decisions on society becomes ineffective. Unfortunately, Judges are often confronted with these complex social realities

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<sup>488</sup> *Ibid*:2

<sup>489</sup> Barak, *opcit*: 4-5

<sup>490</sup> Again, this gap has been bridged by judicial or equitable discretion including both law and equity.

<sup>491</sup> This gap has been bridged by judicial or equitable discretion including both law and equity.

and they are expected to interpret the law in its “original context” and still uphold justice, at the same time. There is nothing wrong with interpreting a statute in its “original context’ as long as the words are clear and consistent. Unfortunately, the meaning of words in a statute evolves over time and changes the context of the statute.<sup>492</sup> Hence, a rigid approach makes such interpretation stale, that the statute becomes irrelevant or ineffective to society. In *Attorney General Bendel State v A.G Federation*<sup>493</sup> Per Obaseki, *JSC* rightly observed that where language of the Constitution does not change, the changing circumstances of progressive society for which it was designed can yield a new meaning and further import to its meaning. Even constructionist will agree that adhering strictly to literal interpretation can lead to illogical conclusions.

The court’s duty to fulfill the object and true intent of the Constitution can never be overstated, but such duty should not be detrimental to social justice. Thus, courts must always construe the Constitution in such a way that it protects what it sets out to protect, and guides what it is meant to guide.<sup>494</sup> A major part of what the constitution of any country and other statutes set to protect is as stated in the preamble of such Constitution,<sup>495</sup> which focuses on the “people”.<sup>496</sup> Society is the reason for the law and it

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<sup>492</sup> Brannon, *opcit*:9

<sup>493</sup> (1981) 10 SC 179-180

<sup>494</sup> See *Adeleke v Oyo State House of Assembly (2006) 6 NWLR (Pt 1006) 608*.

<sup>495</sup> “we the people of the Federal Republic of Nigeria, having firmly and solemnly resolved to live in unity and harmony as one indivisible and indissoluble sovereign nation, under God, dedicated to the promotion of inter-African unity, world peace , international cooperation and understanding and to provide for ourselves a constitution for the promotion of good government, and welfare of all persons in our country, on the principles of freedom, equality and justice, and for consolidating the unity of our people Do hereby make, Enact and give to ourselves the following constitution” (Emphasis added)

<sup>496</sup> “We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.” (Emphasis added)

behooves that society be the chief beneficiary of the law. This! our courts should ensure. What society experiences for the most part of the law should be concrete and not abstract. Very relevant to this point is the remark of *Per Oguntade, JSC*, that all courts in Nigeria have a duty which flows from a power granted by the Constitution of Nigeria to ensure Nigerians get the justice they deserve.<sup>497</sup>

The Nigerian judicial process is called to serve the Nigerian society and since society is not static but ever changing, the act of judging should equally change with society so as to respond progressively to social values, views and interests. Accordingly, this age of evolving technological diversities is most appropriate to radiate society-oriented judging, where rules of technicality take the back seat. In *Dapianlong v Dariye*,<sup>498</sup> the Supreme court held that mere technical rules of interpretation of statutes are inadmissible as they defeat the principles enshrined in the Constitution.

Therefore, courts have maintained over the years that Rules of court should never be interpreted in a manner that will prevent the court from doing substantial justice between the parties in the dispute submitted for adjudication.<sup>499</sup> This position is based on the firm understanding that the sole purpose of a court is to do substantial justice between the parties before it and not to adhere to technical issues that becloud the justice of a matter.<sup>500</sup> Reliance on technicalities leads to injustice, hence the consensus that a broad and liberal spirit should prevail in interpreting statutes.<sup>501</sup> Although in the process, we

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<sup>497</sup> See *Ameach v INEC (supra)* cited at page 116 of this thesis

<sup>498</sup> (2007) 4 S.C (ptIII)118 at 176 and 177

<sup>499</sup> *Adeyemi & Ors. v O. Achimu/Ndic/Assurance Bank Ltd & Ors*, supra, at p.17 Abiru, JCA

<sup>500</sup> *Ibid*

<sup>501</sup> *NEPA v. Atukpor (2000) LPELR-5931(CA)* it is trite that a liberal approach be given by the courts in the interpretation of statutes

must constantly bear in mind the objects which such provisions were intended to serve; as social circumstances and changes at that point in time, may have overtaken the intention of the provision. This was restated in *Orhiunu v F.R.N.*<sup>502</sup>: “ *A broad and liberal approach should prevail in interpreting the constitution, undue regard must not be paid to mere technical rules; otherwise the objects of the provisions as well as the intention of framers of the constitution would be frustrated.*”<sup>503</sup>

However, situations often arise, where judges resign to procedural rather than substantial justice, especially in the absence of precedent. Some judges rely on procedure to avoid judicial or social criticisms and others stick to procedure for lack of ingenuity. Therefore, in their decisions, some judges state ‘helplessness’ as the reason for the procedural option they feel stuck with. Thus, we hear expressions like “The court’s hands are tied”.<sup>504</sup> One is often tempted to ask, “who or what tied them?” The meaning of such expression is that; there is no precedent or law to back up such action with no statutory backing. So, if such decision or action is done outside the required law, such decision will incur the wrath of law (appellate courts) even when the required law is clearly unjust.

Accordingly, amidst such helplessness, some judges seek aid from foreign cases. This has raised subtle arguments against the application of foreign decisions in Nigeria courts. In *Araka v Egbue*,<sup>505</sup> the court opined that foreign authorities of the greatest

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<sup>502</sup> (2005) 1 NWLR (Pt.906) pg. 55 paras B-D

<sup>503</sup> *Ibid*, Galadima, JCA

<sup>504</sup> *Awosika v. State* (2018) LPELR-44351(SC) "...Ordinarily, this is a clear example of case in which this Court would have reversed the sentence passed on the appellant by the Court below and restore the correct sentence of death earlier passed on the appellant by trial Court. However, this Court's hands are tied for the simple reason that there is no cross appeal against the sentence of 21 years passed by the Lower Court filed by the Respondent herein. I will therefore stop at that and say no more except to say that the appellant is just lucky to have narrowly escaped the hang-man's noose." *Per* SANUSI, JSC(P. 44, Paras. B-D)

<sup>505</sup> (2003) 3 WRN 20

learning cannot supplant Nigerian case law which is rightly decided on any issue. A borrowing spree just to ensure justice is achieved in a given case cannot be wrong, if it is to enable the just exercise of discretion in interpreting law for the benefit of the society. Though foreign decisions and legal principles should not be applied in our cases at the expense of available local decisions, the judge's discretion should be the determining factor under such circumstances. More so, resort to foreign cases is constitutionally recognized. The preamble to the Constitution states "*we the people of the Federal Republic of Nigeria ..., dedicated to the promotion of inter-African unity, world peace, international cooperation and understanding...*" This presupposes that judges can resort to international authorities in the absence of precedent, if that will ensure justice in the case. In *Olafisoye v Federal Republic of Nigeria*,<sup>506</sup> Per Niki Tobi, JSC, stated thus:

*"It is well to remember not only that a foreign decision should at best be of persuasive authority in a Nigerian Court, but also that before it can even qualify as such, the legislation, substantive or adjectival, upon which it was based must be in pari materia with our own. It is dangerous to follow a foreign decision simply because its wording approximates to our own. Nigerian Courts are obliged to give Nigerian legislation its natural and ordinary meaning, taking into account our own sociological circumstances as well as other factors which form the background of our local legislation in question...."*<sup>507</sup>

Therefore, while Nigerian courts can exercise their discretion and apply foreign decision in the process of interpreting statutes, they do not have the jurisdiction to adopt foreign decisions at the expense of local decisions, even when the justice of the case so demands. Most of the time, the exercise of judicial discretion is not immutable, but

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<sup>506</sup> (2004) 4 NWLR (Pt 864) 580

<sup>507</sup> Underline for emphasis

governed by several factors which change with the changing circumstances or times.<sup>508</sup>

According to Bunker, as culture and technology changes, rules may lock in anachronisms that could be avoided by the use of adaptive standards.<sup>509</sup> The practices or procedures that obtained in the era of paper records, file cabinets, type-writing machines, photocopy machines, duplicate papers have drastically changed with the era of computer desk tops, computer disk and hard drives. Technology is one of the greatest challenges to the act of judging today. It advances by the days and ticks of the second hand of the clock, Technology is not waiting for the courts to catch up. Sometimes, when affected by such technological advancements, courts can only achieve justice by the appropriate exercise of judicial discretion.

It is no longer news that the changing circumstances in society affects the discretion of courts. This is why judicial pronouncement should never lose their touch with reality. If that happens, injustice will thrive. Judicial discretion influences judicial decisions. Judicial decisions determine the rights of the parties to an action that is before the court at a particular time in history.<sup>510</sup> So, judicial discretion or decision are not meant to be immutable laws governing the conduct of mankind and designed for the ages, such as the Ten Commandments.<sup>511</sup> They must, even though consistent with required law, change as circumstances changes to remain relevant to society. According to Roscoe Pound, law must be stable, but it cannot stand still.<sup>512</sup> Stability without change is

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<sup>508</sup> *D.Y.S. Trocca Valsesia & Co. v. Osaghae (2008) ALL FWLR (Pt.413)1313 at P. 1335, paras C - E A*

<sup>509</sup> Bunker, *opcit*:138

<sup>510</sup> Courts have more discretion in such cases because the law provides less guidance in areas where technology changes. Hence discretion is less fettered.

<sup>511</sup> Newman, T.R & Ahnuty, J.S, May 6, 2015. *New York Law Journal*

<sup>512</sup> Cited from Barak, *opcit*:11

degeneration and change without stability is anarchy. So, judges are enjoined to help bridge the gap between the needs of society and the law without allowing the legal system to degenerate or collapse into anarchy. Judges must ensure stability with change and change with stability.<sup>513</sup> judges have discretion in determining the law applicable to any case.<sup>514</sup>

In an attempt to bridge this gap and align with social expectations, the Nigerian Supreme Court in the celebrated, yet controversial case of *Daudu v. FRN*,<sup>515</sup> appears to have substantially altered a fundamental principle in our criminal justice system. This has generated so much debate and divergent opinions and interpretations.<sup>516</sup> The case is regarding the basic principle as stated under section 35(5) of the Constitution, that every person who is charged with a criminal offence shall be presumed innocent until proven guilty. However, the apex court interpreted this provision with an addendum to fit the present socio-political climate in Nigeria of constant corrupt practices.<sup>517</sup> The decision of the court is as follows:

*“Proving Money Laundering cases is a herculean task because it requires a prior establishment of the predicate offence before the money laundering aspect can be established. To obviate this problem a remedy was introduced by statutorily inferring money laundering from not only the conduct of the defendant but his lifestyle which is similar to the Proceeds of Crime Act 2002 of the UK. Even though Section 36(5) of the 1999 Constitution provides that every person charged with a criminal offence shall be presumed to be innocent until he is proven guilty, the proviso allows for shifting the burden of proof on the defendant....By Section 19(3) of the Money Laundering Act, if an accused person is in possession of*

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<sup>513</sup> *Ibid*

<sup>514</sup> Larsen, J.H (2018) How to Use Images to Draw Conclusions in Legal Reasoning:74

<sup>515</sup> (2018) 10 NWLR (Pt.1626) 169, 183 E -F (2018) LPELR-43637(SC)

<sup>516</sup> While some lawyers and politicians appear to believe that it has substantially changed the coloration and established position of our criminal justice system, others believe it has merely reinforced and restated the position of the law and did not upstage or overturn it.

<sup>517</sup> UN News (2016), *opcit*

*pecuniary resources or property which is disproportionate to his known source of income, or he obtained an accretion to his pecuniary resources or property, the burden of giving a satisfactory account of how he made the money or obtained the accretion shifts to him. The prosecution is relieved of the burden of having to prove that the money so found in his account or in his possession is proceeds from illicit traffic in narcotic drugs or psychotropic substances or of any illegal act. To explain the point further, where A is a fixed salary earner and suddenly his account is credited with an amount beyond his income or has property which his legitimate income cannot afford, the burden shifts to him to explain how he got the money with which he bought the property or the legitimate transaction he was engaged in for which the account was credited".<sup>518</sup>*

The above decision appears to be stating that any person who is richer than his known means of livelihood owes society some explanations on how he came up with such wealth. The arguments as to whether or not the judgment in *Dauda v. FRN*<sup>519</sup> overturned section 35 (5) of the Constitution, is not one for this discussion. However, the point stressed is that the socio-political culture views, interests and perspectives of the Nigerian society, influenced the discretion of the court in their interpretation of section 35(5) of the Constitution together with Section 19(3) of the Money Laundering Act in *Daudu's case*.<sup>520</sup> This is an example of an appellate court establishing a guideline for the exercise of discretion.<sup>521</sup>

The Supreme Court's introduction of this exception to the presumption of innocence principle is a social perspective of judging with the predominant needs, circumstances, views in the Nigerian society, at that point in time. This case, where the Court 'socio-judiciously'<sup>522</sup> deviated from precedent could be the fulfillment of Aguda's

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<sup>518</sup> *Daudu v FRN (supra)*

<sup>519</sup> *Ibid*

<sup>520</sup> See chapter 2 on the basic principles of interpretation of statutes in Nigeria

<sup>521</sup> Smithburn, J. Eric, *Judicial Discretion* (2006) National Judicial College.

<sup>522</sup> This coinage of the author forms the hypothesis of this thesis

age-old admonition when he said “... *In our system of criminal justice is firmly entrenched the principle that a person is presumed innocent until he is proven guilty. This is as it should be, except that we have to be very careful not to bring this principle to a pedestal whereby it is used for the unnecessary protection from the hands of justice of some evil members of society.*”<sup>523</sup>

Interestingly, with *Daudu’s case*, the Supreme Court also appears to have overruled itself in the case of *Chibuike Amaechi v. INEC*,<sup>524</sup> where *Per* Oguntade, *JSC* declared that during the trial the burden to prove guilt beyond reasonable doubt is on the accuser. Indeed, it is a subversion of the law and an unconcealed attempt to politicize the investigation and prosecution of criminal offences, to hold otherwise.

Similarly, in the American case of *Bowers v Hardwick*,<sup>525</sup> the court held that a statute criminalizing consensual homosexual relations between adults was constitutional. Then seventeen years later in *Lawrence v Texas*,<sup>526</sup> the court overturned its prior holding and stated that the Constitution bars legislation criminalizing consensual sexual relations between adults.<sup>527</sup>

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<sup>523</sup> Aguda, *Opcit*:17

<sup>524</sup> (2008) 5 *NWLR* (Pt 1080)

<sup>525</sup> 478 *U.S.* 186 (1986)

<sup>526</sup> 123 *S.Ct.* 2472 (2003)

<sup>527</sup> See also the celebrated English cases of *Rylands v Fletcher*(1868)*L.R.3 H.L.330* which established a new area of English tort law (“If a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbor, he does so at his peril. If it does escape, and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage”); and *Transco Plc (formerly BG plc and BG Transco plc)v Stockport Borough Council* (2004)*1 All ER 589 at 29*, which has considerably narrowed down the scope of liability established in *Rylands v Fletcher*, about 150 years ago (The claimant was denied the right to recover damages caused by a seriously leaking water pipe because the use of water pipes is ubiquitous and of 'daily usage.)

Three common trait cuts across the above cases. The first is that the case law changed from status quo over a period of time in history. The second is that the change in case law that eventually influenced the court's decisions was as a result of change in society. The third is that these changes emanated from the interests, views, cultures of society. In other words, it was not the law per se that influenced the discretion of the courts to decide as they did in all the cases cited above, but rather, it was relevant social realities(challenges) of the changing times or changing society. So, amidst the lingering values, interests in society, judicial discretion comes in to marry the law with justice. Accordingly, substantial justice transcends mere adherence to principles of substantive law. It speaks more to the relevance and impact of the law on the parties before the court or society at large, in the material point in time, as the case may be. For example, social views, interest and perspectives influenced the landmark decision of *Brown v Board of Education of Topeka*,<sup>528</sup> where the U.S. Supreme Court ruled that American state laws establishing racial segregation in public schools are unconstitutional, even if the segregated schools are otherwise equal in quality.<sup>529</sup> Also the transformation in society influenced the decision in *Lawrence v. Texas*<sup>530</sup> that struck out the sodomy law in Texas.<sup>531</sup> These are examples of discretion guided by what is right and equitable at the time.<sup>532</sup>

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<sup>528</sup> 347 US 483 (1954)

<sup>529</sup> See also *Roe v Wade* 410 US 113(1973) landmark decision where the US Supreme Court ruled that a state law that banned abortions (except to save the life of the mother) was unconstitutional. The ruling made abortion legal in many circumstances; *United*

<sup>530</sup> 539 US 558(2003)

<sup>531</sup> See also *United States v Morrison* 529 US 598 (2000) which held the violence against Women Act of 1994 unconstitutional

<sup>532</sup> Smithburn, J. E, *Judicial Discretion* (2006), *opcit*

Furthermore, there are some antiquated legal principles that have lost touch with social reality, yet some courts are hesitant to overrule them due to the obstinate doctrines of *stare decisis*. This is in spite of the fact that this principle of *stare decisis* allows courts to depart from precedent if the case is distinguishable.<sup>533</sup> Distinguishing cases is not as straightforward as it sounds. There are times when the nature of the case may be the same, but the times, the technology involved, the parties, scientific discovery, social perception or perspectives changes. This raises a question; whether appellate courts consider such changes under the deviation standard<sup>534</sup> in appraising lower courts adherence to the doctrine of *stare decisis*? Barak suggested that the court may not repeal an obsolete statute, but it may repeal a common law holding that has become obsolete. He added that the court may change even a non-obsolete precedent if it does not suit today's social needs.<sup>535</sup>

Consequently, if a legislation has become obsolete, a judge should be free to state so and not shy from pronouncing it as unconstitutional. In the words of Holmes “ *We must be weary of petrifying the common law into a rigid system, utterly behind the times and totally at odds with the progress of science and social change.*”<sup>536</sup> However, this is not to say judges should completely ignore precedent. However, where the justice of the case demands it, the judge can exercise his/her freedom of expression and uphold justice by analyzing the case in view of social interests. This was the position of the court in

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<sup>533</sup> See chapter 2

<sup>534</sup> See chapter 1 at pages 23-25

<sup>535</sup> Barack, *Opcit*:10

<sup>536</sup> Cited from Duxbury, *opcit*:48

*People v. Bing*,<sup>537</sup> that a court should not hesitate to overrule its precedents when persuaded by the lessons of experience and the force of better reasoning. Larsen, J captures this point in the following words:

*“Legal reasoning is more uncertain or indeterminate the less clear the law is. This is more often the case at the highest levels of appeal. At such levels, a judge's decision may be more formalistic or realistic, depending on the judge's willingness to infer, fill-in, or determine law not previously applied to a certain case...However, in inferring the law, judges are not free to disregard logical connections to precedents, statutes, and other sources of material law. Judges have more discretion in how they decide and explain their reasoning.”*<sup>538</sup>

Law and equity have now merged into a jurisprudential paradigm of discretion that allows trial courts to exercise a range of equitable discretion corresponding to the guidance provided by statutes and appellate courts, if any.<sup>539</sup> In fact, there appears to be a new paradigm on judicial discretion in the US– the combining of law and equity.<sup>540</sup> Hine argued that the idea that laws, not individuals, govern American society is at the core of most citizen's understandings of the American Judicial system, so they elect legislatures to enact laws, rather than depend solely on judge-made common law.<sup>541</sup> So, in order to maintain equity within the court system, New York enacted the Field Code (a new code of civil Procedure) which was adopted by about half the states, covering the majority of the country's population. Hence law and equity which was for much of the population formed the basis American judicial system.<sup>542</sup> Subsequently, after the turn of the 20th century, the American Bar Association led by Roscoe Pound began a push for procedural

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<sup>537</sup> 76 N.Y.2d 331, 337-338 (1990),

<sup>538</sup> Larsen, J.H (2018), *opcit.*

<sup>539</sup> Smithburn, J. Eric, *Judicial Discretion* (2006), OPcit:49.

<sup>540</sup> Hine, K, D(1997), *opcit:1774-1776*

<sup>541</sup> *Ibid*: 1770

<sup>542</sup> *Ibid*: 1776

reform in the courts of the United States. Pound argued that the then existing procedural rules hampered the judge's ability to search independently for truth and justice. This as well as the concern for public confusion caused by reliance on technicalities led to the enactment of the Enabling Act in 1934. Four years later, the US promulgated the modern Federal rules of Civil Procedure.<sup>543</sup>

The merger of law and equity is the future of the Nigerian judicial system. Judges review the law and rule by it. The law does not rule us. Even if a law is bad, it behooves on us to ensure that the judiciary remains the last hope for justice – the type of justice that the man off the street recognizes as such is justice. Ijaiye opines that a judge in his interpretative function can adjust the stated law to the applicable socio-political content sometime placing the judiciary and the judicial process in the fore front of the nation's socio-political development.<sup>544</sup> Rather it is a question of re-interpreting or re-applying already accepted basic norms within a new or chagrining socio-political context.<sup>545</sup> thus the statutory interpretation function of a judge should have beneficial interpretation which would give meaning and life to the society should always be adopted in order to enthrone peace, justice and egalitarianism in the society.<sup>546</sup>

This is a convenient point to emphasize the position of this thesis that the act of judging is influenced by society, so it is safe to say judges are agents or instruments of social change. Judges respond to the needs of society by reviewing the law and how it

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<sup>543</sup> *Ibid*: 1777

<sup>544</sup> Ijaiye, *opcit* :184

<sup>545</sup> *Ibid*

<sup>546</sup> *Ibid* :186

justly and reasonably applies to social conflict before the court.<sup>547</sup> Clearly, the actions or omissions of the courts in judicial or statutory interpretations influence statutory amendments, which is a good thing for society. Oshio argues that judges should be allowed to expound, refine and develop the law for the good of society through sound dynamic, liberal, creative interpretation. He added that if judges are not ingenious or creative, the Nigerian society will suffer.<sup>548</sup> *Per Aboki JCA*, reiterates this in the following words:

*“A Judge that is confronted with a legal problem does not have to resign helplessly where the established laws are inadequate in resolving the problem. It is a cardinal maxim of law that where there is a wrong, there must be a remedy - Ubi Jus Ubi Remedium. Judges are, therefore, encouraged to formulate fresh rules of law or to extend the existing ones to deal with novel cases by so doing they add to the corpus of existing laws through their judicial pronouncements.”*<sup>549</sup>

This approach/position was clearly reaffirmed by the Nigerian Supreme Court in the case of *Ameachi v INEC*,<sup>550</sup> as follows:

*“The primary duty of the court is to do justice to all manner of men who are in all matters before it...when the courts set out to do justice so as to cover new conditions or situations placed before it there is always that temptation, compelling one, to have recourse to equitable principles....And judges who dispense justice in this court of law and equity must always be ready to address new problems and even create new doctrines where the justice of the matter so requires.”*<sup>551</sup>

This approach is often criticized as encouraging judicial activism or creativity, which may lead to a floodgate of judicial legislation that will breach the doctrine of

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<sup>547</sup>Carter, L & Burke, T, Reason in Law (2010), *opcit*:33.

<sup>548</sup> *Ibid*: 23

<sup>549</sup> Cited from Idahosa, The Doctrine of Stare – Decisis... *Opcit*:4

<sup>550</sup> *Supra*

<sup>551</sup> *Ibid*

separation of powers.<sup>552</sup> Assuming yet not conceding that it is true that courts are encroaching into legislative terrain, it is for the benefit of the government/legislature and society as a whole and not to enrich any judicial ego. As stated earlier, society will be in a state of anarchy if courts were to leave statutes as vague or ambiguous as they sometimes appear. Denning, *L. J* conveyed this in *Seaford Estates Ltd v Asher*,<sup>553</sup> as follows:

*“It would certainly save the judge trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when defects appear in the Act, the judge cannot simply fold his arms and blame the draftsman. He must set to work on the constructive task of finding the intention of parliament and he must do this not only from the language of statute but also from a consideration of the social conditions which gave rise to it, and of the mischief it was passed to remedy, and then he must supplement the written words so as to give ‘force and life’ to the intention of the legislature.”*

The role of courts in society is not to make laws but link law and society. The act of judging appears to be judicial legislation to some, but it simply is no more than a court extending or adapting an old rule to a new situation in order to do substantial justice.<sup>554</sup> The position in this thesis is clear that judges are not law makers and do not make laws and should never make laws. In this context, the judge is like a first aid kit with the immediate necessities, like an emergency team in an ambulance. The judiciary through the act of judicial interpretation plays the role of checks and balances to declare the activities or laws of the executive or legislature unconstitutional, null and void and of no effects.<sup>555</sup> In *Magor and St Mellons Rural District Council v Newport Corporation*<sup>556</sup>

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<sup>552</sup> Oshio, *ibid*:21

<sup>553</sup> (1947)2 K.B 481.498

<sup>554</sup> Oshio, *ibid* at 22

<sup>555</sup> Sokefu, J and Njoku, *opcit*:3

<sup>556</sup> (1951)2 All E.R 839

Denning rebuffed the argument that judges make laws, when he said “ *We sit here to find out the intention of parliament and ministers and carry it out, and we do this by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis.*” Also, in a dissenting view, in *Chief Emma Onuorah Emesim v. Hon. Calista Nwachukwu (Mrs.) & Ors*<sup>557</sup>, Per Ubaezonu, JCA agrees that it is not the duty of the court to make law. It is its duty to interpret the law and the justice which that courts administer is justice according to law.

Moreover, what does it mean to make laws? Law making involves legislating or enacting a law. Judges do not go through this legislative process of passing a Bill through four stages as is the situation in Nigeria, coupled with several legislative reviews before it is passed as law. Judges only define what the law is based on the circumstances of the social conflict presented in court and in appropriate circumstances explain the law. According to Oshio, judges expound and declare the law.<sup>558</sup> This act of expounding and declaring the law vis a vis the act of judging (i.e. judicial interpretation and judicial discretion), is not a legislative venture. The judiciary is the law-giver while the legislature is the law-maker.<sup>559</sup> In any event, assuming the judiciary exceeds their limits, there can be legislative restraints— where the legislature can ignore a judicial decision that is contrary to the intention of the legislator as was done in the case of *Adegbenro v Akintola*<sup>560</sup>, where the Western Nigerian Constitution (Amendment) Law nullified the decision of the Privy Council and the federal Government eventually ratified this action. There can also

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<sup>557</sup> (1999) LPELR-6573(CA)PP.33-34, para D-B

<sup>558</sup> *Ibid*

<sup>559</sup> *Ibid*

<sup>560</sup> (1963)3W.L. R 63

be judicial restraints –where judges can personally restrain themselves and by appellate review procedures.<sup>561</sup>

In commenting on the inter-relationship in the three arms of government, Oshio states that since it is suitable and right for the legislature to correct defects of the executive in legislation, the judiciary should also not be deprived of its own contribution in this regard.<sup>562</sup> Even under the checks and balances principle, the judiciary should not be left out. The judiciary should be appreciated and acknowledged for developing the law, inspiring statutory development and not accused of making the law. If the judiciary ignores ambiguities in the law or fails to comment on them in their judgments, where appropriate, the laws will be redundant and not grow.

Further, laws that are unsatisfactory to society create conflicts that courts settle one way or the other. Judges before whom conflicts are brought for settlement are also human and tend to interpret according to his/her idiosyncrasies in accordance with canons or principles of interpretation. That inevitably leads to either a direct application of the law or an interpretation that inspires a revision of the law.<sup>563</sup>

Basic human instincts to interpretation of any word on its own, could be misunderstood, as interpreting words is a matter of semantics. It is the perception of the hearer on the one hand, and the view of the talker, on the other hand. Just like beauty in the eyes of the beholder, the words of a statute are interpreted from various perspectives and given varied interpretations. The cup may be half full or half empty, depending on

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<sup>561</sup> This could be through practice procedures, etc.

<sup>562</sup> *Ibid*:23

<sup>563</sup> Although this may be redundant, as dwelling on the old paradigm of realism and formalism may be more reliable.

which side it is viewed from, it is all about perception. Similarly, interpretation is all about the view of the judge and perception of the society. Even judicial pronouncements are misunderstood and misinterpreted by lawyers; what the judge means and what lawyers or society perceives can differ. A ready example is the pending arguments in *Daudu's case*, a decision from one court clearly written in English language yet with diverse interpretations.<sup>564</sup> The above picture is a clear collage of the act of judging in Nigeria—diverse interpretations that can only define justice with appropriate discretion, which are also diverse.<sup>565</sup>

Notwithstanding, it does not make sense to give a statute or a word in the statute its literal meaning in the face of absurdity or manifest injustice to society. What society interprets and understands as justice is justice. So, courts are to interpret these laws to spell justice to society. The relevance of courts should be more than just interpret the intent of drafters. Nevertheless, it is pertinent to note that judges do not and should not assume a corrective power over the law-makers with such interpretations.

### **What Defines Justice?**

This question can also be revised to ask: whose justice? Is justice meant for society or for the law? What criteria is used to define justice, human criteria or legal criteria? The answer is very clear: justice is defined by human criteria or should be defined with human criteria. Hence the aphorism in Nigerian judicial parlance that

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<sup>564</sup> See Adu, D et al (2018), *opcit*

<sup>565</sup> The beauty in the act of judging one may say.

justice must not only be done but must manifestly be seen to be done.<sup>566</sup> It is when society ‘sees’ justice done to the parties of the case, that the court believes justice has indeed been done to society, justice for one is justice for all. The metamorphosis of law from procedure to reality/practicality is what defines justice in society.

This transformation of the law cannot take place without society. Society is the key factor that defines justice in any given case. The duties of the court as explained above,<sup>567</sup> are focused on society. It has been stated that in interpreting statutes, the primary concern of courts is to ascertain the intention of the legislators.<sup>568</sup> If the primary purpose of interpretation of statute is just to say what the legislatures intended, of what use or value are past or possibly antiquated/irrelevant intentions of the legislatures to the present/obviously different needs of society?

Although the intention of legislators is fundamental to the interpretation of statutes, the views and interest of society should also be of primary concern to courts. The real purpose of judicial discretion is to do substantial justice. Aguda argues that there is often the possibility and even likelihood of the existence of conflict between what justice demands and what the judge believes that the law dictates.<sup>569</sup> In *Adesokan v. Adetunji*,<sup>570</sup> the Supreme Court admonished that courts should keep the scale of justice even and steady and not liable to waver with every Judge’s opinion. Unfortunately, this

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<sup>566</sup> See *The Admin. & Exec. Of The Estate Of Abacha v. Eke-Spiff & Ors.* (2009) LPELR-3152(SC), and *PDP v. INEC & Ors.* (2012) LPELR-9724(SC) conveniently adopted from the holding of Hewart C.J in the English case of *R v. Susses Justices Ex Parte Marcatchy* (1924) 1 K.B, 256

<sup>567</sup> See pages 91-96 above

<sup>568</sup> See full discuss in chapter 2

<sup>569</sup> Aguda, *Opcit*: 8

<sup>570</sup> (1994) 5 NWLR (Pt 345) 540

position cannot be realistic as discretion directs the mind of the judge. Honorable Zonay's, comment appropriately fits here. He said:

*“For centuries courts and commentators alike have wrestled with the concept of judicial discretion. Its judicious use increases fairness and can help to promote an equitable legal process by allowing the judge to consider individual circumstances in instances when the law is insufficient or silent... discretion involves situational considerations, its misuse can adversely impact the court's authority and good reputation, create a feeling of result-oriented decision making and, when abused, lead to gross injustice.”<sup>571</sup>*

Hine, argues that the problem with the current state of the jurisprudence of judicial decision making is not the embrace of discretion per se, but rather, the embrace of discretion couched in terms of the "law"<sup>572</sup> This is so true in Nigeria, as there is this artificially narrow tension between substantial and procedural justice in Nigeria courts, which demands broader exercise of discretion to tackle. Judges cannot ignore substantial justice and embrace procedural justice that may result to injustice in a pending case.

According to *Per Ogunbiyi, JSC*: *“The concept of justice is the backbone and life wire of a peaceful co-existence in any given society and it cannot therefore be underestimated.... Technicality should not therefore be used to erode or sacrifice justice on the altar of procedure.”<sup>573</sup>* The relevance of the judiciary should be more than interpreting the intent of legislature. Courts are not zombies or computers that give exactly what was typed in.<sup>574</sup> As human beings who are part of the same society, judges should apply their discretions according to relevant social interests. Oshio quoted Oputa as follows:

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<sup>571</sup> Zonay (2015), *Judicial Discretion: Ten Guidelines for its use*, *opcit*:1

<sup>572</sup> Hine, K, D (1997), *opcit*:1786

<sup>573</sup> *Dangote Gen. Textile Products Ltd & Ors v. Hascon Associates Nig. Ltd. & Anor (2013) LPELR-20665(SC)*

<sup>574</sup> It is not a garbage in, garbage out issue

*“The Judge should appreciate that in the final analysis, the end of law is justice. He should therefore endeavor to see that the law and the justice of the individual case he is trying go hand in hand. To this end he should be advised that the spirit of justice does not reside in formalities, nor in words, nor is the triumph of the administration of justice to be found in successfully picking a way between pitfalls of technicalities. He should know that all said, the law is, and ought to be, the hand maid of justice, and inflexibility which is the most becoming robe of law often serves to render justice grotesque.”<sup>575</sup>*

Therefore, justice should be defined amidst shifting socio-legal contexts, taking into consideration social interests, social empathy and changing social circumstances to decide on a case. Justice is what the courts say it is by the acceptance and confirmation of society. In other words, society has to agree to the definition of justice as portrayed by the courts. From history, the very reason for emergence of equity in the administration of justice was to ensure justice in the law. Law without justice did not and still does not make sense. Those judges who formed the Common law in England, decades and decades ago saw a need of their craving society and came up with a law that is common to the interest of community. The difference between Britain and Nigeria is that even though the British Common Law did not emanate from a written Constitution like the Constitution of the Federal Republic of Nigeria, the judges still enforced a common law that was codified in Britain and even in other Common Wealth countries. Hence with an established pattern from a written constitution. British law is molded, changed and developed from the perception of individual or group of judges to cumulate into a common law, which is the culture of the English people. Nigerian law should therefore

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<sup>575</sup> Oshio, opcit

me gleaned from Nigerian common law just as obtains in the US.<sup>576</sup> Therefore courts should not replace Nigeria customary laws with the British common law.

As much as the Nigerian court system is anchored on the common law of Great Britain, as British legal system has contributed immensely to the advancement of Nigeria's legal system, the structure and procedures of Nigerian courts reflect a Federal political structure that is similar to the American court system. It is time Nigerian courts create a common law for Nigeria valuable and considerate of our society and culture like the American. Nigeria has a lot to learn from the American courts, our supreme court should adopt the strategies the American supreme court operate as it relates to review of precedent.<sup>577</sup> So why are judges today who have the gift of life and time still hinging unto old rules and laws to solve new challenges and changes in society?

Some laws/statutes Nigerian courts have interpreted so far lack social empathy and it is the place of the judge to adhere to the historic inclinations of equity and give justice to the law. Aguda quoted Lord Denning's popular words as follows:

*“My root belief is that the proper role of a judge is to do justice between the parties before him. If there is any rule of law which impairs the doing of justice, then it is the province of the judge to do all he legitimately can: to avoid that rule or even to change it-so as to do justice in the instant case before him. He need not wait for the legislature to intervene because that can never be of any help in the instant case, I would emphasize however, the word ‘legitimately’: judge is himself subject to the law and must abide by it.”*

Judges should come to terms with the full range of equitable discretion and the fact that they influence the law and rule by it. One thing a judge must bear in mind is that

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<sup>576</sup> See introductory remark

<sup>577</sup> See chapter 2

the society does not understand court procedures and their modus operandi. Society see the court as their ‘savior’, the custodian to approach for justice. Thus, where cases are judged on procedural justice or on judicial technicalities, rather than on substantial justice, the essence of courts abate. This dichotomy between substantial and procedural justice, is the point where judges decide discretionarily (unfettered) that in spite of all, they will use the law for its true purpose.

When a law is ‘bad’ or socio-politically inappropriate, it is on the judge to ensure that in the eyes of society, courts are seen as a clone of justice. And by society, we mean the common man on the streets. When society recognizes, appreciates and acknowledges the value of the courts as just and reasonable and open to their basic needs and views, then justice is achieved.<sup>578</sup> According to the court in *Alioke v. Oye & Ors*<sup>579</sup>

*“Our duty as an Apex Court is to do substantial, justice-stark justice, based on fairness which to all intent and purposes, seeks to not only ensure fairness in dispensing justice, but which is manifestly seen and duly acknowledged by all and sundry as justice both in content and context. We are not judicial technicians in the workshop of technical Justice. The jurisprudence or logic of our reasoning is and as humanly possible, would be devoid of technicalities.... The need to do substantial justice and avoid delving into the error of technicalities is well settled. Even in cases where errors of omission or commission called blunders have been made, it is unjust to hold that because blunders have been committed, the party blundering is to incur the penalty of not having the dispute between him and his adversary determined upon the merits.”*<sup>580</sup>

The most important link between law and society is the court. Although Nigerian courts adopt a liberal approach to judging, they have not yet embraced their potential to

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<sup>578</sup> Most of the above cited cases show that, at different times in history, with different circumstances, diverse courts from separate jurisdictions, spoke more to the relevance and impact of the law to society at the material time. The interests, views, cultures, perspectives of society appear to have directed the courts discretions.

<sup>579</sup> (2018) LPELR-45153(SC)

<sup>580</sup> See also *Makeri Smelting Co. Ltd v. Access Bank (Nig.) Plc* (2002) 7 NWLR (Pt. 766) 411 at 476-417.

understand their full range of discretion and to applying it justly.<sup>581</sup> This vacuum has left society confused and courts disrespected. This travesty will continue until Nigerian courts revamp the act of judging.<sup>582</sup>

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<sup>581</sup> See Hines, *opcit*

<sup>582</sup> Tobi-Aiyemo, (2017) The Intermediate Obligation of a Judge Vis a Vis Law and Society: “*A Matter of Interpretation, opcit:1*”

## Chapter Five: Conclusion

*“As judges our main hire is to do justice in any case before us, justice is the cynosure of our judicial system. It is the alpha and omega. The basic aim of the judicial system in any democracy (if I may so naively restrict myself) is to do justice to the parties. And this is real justice, not a caricature of it. It is not even cosmetic justice....In doing justice according to law in a situation where there is an enabling statute, a court of law should allow itself or pet itself to follow the course of a liberal interpretation of the statute to accommodate the tenets of justice, while at the same time not throwing overboard the intention of the draftsman....The day a court of law, which is also a court of justice, in the course of exercising its interpretative jurisdiction, yields or kotows to arid legalism and abandons its primary function of doing substantial justice, a crisis situation permeates the entire system of administration of justice or the enforcement of the judicial process. Democracy in its shapeless and amorphous content and its twin brother, the rule of law, will be threatened in such a situation which will definitely result in anarchy. That will be a very strange and most unhappy moment for the judiciary. I hope that day does not come. I can still add this bit. The day a party who has not committed a wrong is made to suffer a reverse or victimized in the judicial process by way of such sanction, the judicial system should receive a censor from the litigating public. How this will be carried out I am not prepared to theorize here. I leave that for a most appropriate situation.”<sup>583</sup>*  
(emphasis added)

*Per Niki Tobi, JCA*

Previous chapters of this thesis have attempted to examine the act of judging in Nigeria, vis a vis interpretation of statutes and exercise of judicial discretion. Our journey started with an historical tour of Nigeria’s pre-colonial judicial system; through the influence of English common law on Nigerian legal/judicial system; then to the establishment of the Nigerian judiciary. Pursuant to our understanding of judicial interpretation as one of the primary acts of judging in Nigeria’s modern democracy, we examined five canons of statutory interpretation applied in Nigerian courts; certain basic

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<sup>583</sup> *Chief Emma Onuorah Emesim v. Hon. Calista Nwachukwu (Mrs.) & Ors. (1999) LPELR-6573(CA) pp. 23-24 para D-F*

principles of judicial interpretation gleaned from cited case law; and two main philosophies of judging in Nigeria. Based on our understanding of the negative impacts of judicial precedent, we argued that the act of judging improves through the appropriate exercise of judicial discretion. As a result, we have discussed judicial discretion in Nigeria— highlighting the principles that govern the discretion of judges; constraints upon judicial discretion; and the significance of judicial discretion in Nigeria.

This necessitated a discussion of the impact of judging on society, causing us to examine the dichotomy between technical justice and substantial justice. It appears from a number of cases that even when Nigerian courts refute procedural justice, substantial justice is still stifled due to a somewhat restricted or narrowed discretion of the Courts. As a result, we hypothesize that courts will have more impact on society if courts consider social views, interests and culture in the act of judging. We are not insinuating that Courts should make decisions based on the whims and caprices of individuals, tribes or races. Certainly not! Nevertheless, it behooves courts to deeply consider the seeming divide between the law they are called upon to uphold/interpret, and the society they are called to serve. In the words of Professor Nwanbueze,

*“ The judicial approach stands indeed in dire need of revitalization if the rule of law is to become or remain a really effective principle of government....The maintenance of the rule of Law demands that they should look beyond the formal letters of the law and engage themselves in a purposeful effort to try to distill principles of fairness and justice from the moral, ethical and other fundamental values of society... While the letters of the law are and must remain the core elements of the rule of law, their interpretation and application by the court should be informed by reason and by the fundamental values of the community”.*<sup>584</sup> (emphasis added)

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<sup>584</sup> Nwanbueze, B (2004) Constitutional Democracy in Africa, *opcit*:29-30

The primary role of Courts is to administer justice according to the rule of law. ‘Justice’ is a classic term that cannot be streamlined. It presents a broad intention that courts should uphold. According to Professor Nwanbueze: *“A narrowly positivist view of the law could only make it sterile, devoid of a proper moral content, and ... judges are eminently well placed to instill into law the necessary moral content based on the notions of reasonableness, fairness, justice, and respect for individual liberty.”*<sup>585</sup> This moral content was present, in the context of its time, in the act of judging in pre-colonial in Nigeria.<sup>586</sup> Judicial interpretation and judicial discretion should be centered on and construed in terms of justice, to ensure that the act of judging in Nigeria complies with the rule of law and democratic values. Aguda supports this statement:

*“One is bound to suggest that the sensible approach to the matter would be that whenever there appears to be a conflict between what the law dictates and what justice demands, a judge should attempt to resolve the apparent conflict in favor of justice. The ordinary citizen of Nigeria does not expect anything less than this from our judges and lawyers. If Courts lean too much on the side of legalism that may be sure path to the danger of chaos and political instability.”*<sup>587</sup>

Judges represent justice in any society, hence the title “justice” as appendages to the names of judges.<sup>588</sup> This is why society measures justice from and in relation to the actions of courts. The popular aphorism cited in many Nigerian cases, that justice should not only be done but should manifestly and undoubtedly be seen to be done,<sup>589</sup> was coined and adopted with society as its focus..<sup>590</sup> Therefore when judges ignore the justice

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<sup>585</sup> *Ibid*

<sup>586</sup> See chapter 1

<sup>587</sup> Aguda, T.A (1986) *The Crisis of Justice*, Eresu Hill Publishers, Akure, Nigeria. 7.

<sup>588</sup> Judges should justify the title in acting justly

<sup>589</sup> Adopted from the English case of *R v Rand (1988) L.R.I.Q.B 230*

<sup>590</sup> See chapter 4

contemplated by or implicit in the law, then society will be exposed to the danger of chaos and political instability. Thus, the scale of justice shifts like a pendulum, making it unstable, as courts should not get caught between interpreting the law and upholding justice, at the same time. In such a situation, only the discretion of the judge, which should be applied *socio-judiciously*<sup>591</sup> and *socio-judicially*<sup>592</sup>, can balance or stabilize the scale of justice. Therefore, to ensure the relevance of law and courts in a society, courts should balance the rule of law with doing justice to align with social interests through the just exercise of judicial discretion.<sup>593</sup> Judicial discretion is the balancing factor which courts should apply in interpreting statutes to avoid absurdity.<sup>594</sup> Applying judicial discretion/ creativity by considering cases through social lenses as well as the rule of law is fundamental to maintaining the status of equity and justice in Nigeria's justice system.

Therefore, this thesis proposes a *socio-judicial approach* to judging with a wide range of discretion. This approach suggests combining formalism, realism and purposeful philosophies of judging in the act of judging. It proposes that Nigerian courts should consider judging as a socio-judicial act. This means embracing social justice in the act of judging—as judges give effect to law and the interests of the society for which the legislatures allegedly enacted the laws. A court of law is equally a court of justice.<sup>595</sup> This socio-judicial approach to judging can only operate when judges possess a wide latitude of discretion. Where the discretion of a Court is restricted, injustice thrives. Socio-

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<sup>591</sup> This authors coinage

<sup>592</sup> *Ibid*

<sup>593</sup> This creates a dilemma for judges all over

<sup>594</sup> See *Oluwabokola v A.G Lagos State & 4 Ors(supra)* at p.39, *Per* Ebiowei Tobi, *JCA*

<sup>595</sup> See introductory quote of this chapter

judicial judging guarantees the value of judges as human beings who understand and appreciate the value of society; as opposed to computers that can only reproduce what has been programed into them.

Judicial discretion in judging is not just fundamental; it is necessary and most valuable to the development of democracies for it invokes the phrase “*We the People....*”<sup>596</sup> This is as good for the people as it is for democracies. The foundation of the judiciary determines the growth and development of any democracy, because the judiciary is the institution that solely deals with the dispensation and administration of justice in any democracy. Therefore, the effects of judicial discretion on society gives value to Nigeria’s democracy and it is this impact and value that places a demand on judicial discretion to be considerate of social views and interests in the act of judging. Sometimes, however, in Court, the interest of law takes priority over the interest of society, hence technical or procedural justice overshadows substantial justice and beclouds the discretion of the judge. In such circumstances, where a broader discretion is exercised, substantial justice will prevail over technical justice. Therefore, even when statutes<sup>597</sup> and strict adherence to precedent restrict judicial discretion, judges should use their inherent discretion of equity to do what is fair and just.

Judicial discretion is indispensable in the interpretation of statutes. Every decision, every act of judging, involves the exercise of discretion, one way or the other. The need for judges to apply their discretion in interpreting statutes from a socio-judicial

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<sup>596</sup> See the preamble to the Constitution of the Federal Republic of Nigeria and the Constitution of the United States of America.

<sup>597</sup> Some statutes give judge’s unrestricted discretion, and some others stipulate how such discretion should be applied

perspective cannot be overemphasized. Interpreting statutes from a socio-judicial perspective demonstrates the relevance of courts to society, as there are lots of gaps in the law or system that the discretion of a judge is most vital to fill. Judges need to relinquish servitude to precedent when the justice of the case so demands. Ijaiye says that

*“...courts should not shy away from their duties to fill the gaps when interpreting provisions, based on the feeble reason that rule of law and separation of powers may not be maintained. Rule of law is not all about procedural fairness. It is also about substantive fairness and interpretation of law...justice attained when a procedural fairness is accompanied by a substantive fairness. Thus, the theory of rule of law recognizes the role of judges in furthering the goal of justice and fairness through interpretation of matters that come before them. Therefore, judges should not be confined or restricted only to the contents of the laws being reviewed but should actually move out of the strict content of the law to ensure that the policy objects of the law is not defeated. The theory of the rule of law views the independence of judges not as a blanket approval of total indifference and apathy of judges to prevailing social, political and economic conditions in the society but an independence which allows judges to ensure that substantive justice supports the purpose of the legislation is done.”<sup>598</sup>*

Furthermore, this socio-judicial approach to judging attempts to deplete undue adherence to precedent (since the act of judging in Nigeria is primarily based on precedent that formed the essence of case law in Nigeria), and give a human face to judging.

Acknowledging the human factor is one very important use of judicial discretion. The human face of law will assist the Court to address the reality on ground. Aguda states as follows:

*“Ours is a “human” profession in the sense that every case that confronts us must inevitably affect some human being. Our university Law Faculties and Law School should stop teaching law as if the law is going to operate outside human beings and outside human beings, and outside the society as a whole. We need a more humanly applied law than at present.”<sup>599</sup>*

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<sup>598</sup> Ijaiye, *opcit* :182

<sup>599</sup> Aguda, *opcit*:43

In interpreting the law and exercising discretion, courts should consider the logic, morality, social justice and substantial justice that best suits the humanity of the case. The life of the law is not just precedent; it involves experience and logic.<sup>600</sup> Precedent has been recycled over time; it is time for new precedent. The time is overdue to review and revise the precedent stated in *Okumagba v Egbe* (that the office of the judge is to state the law and not give it), and to replace it with socially-oriented and relevant precedent. According to Ijaiye “*it must however be noted that the court could make corrections in a statute where the mistake on the face of a statute if uncorrected will depart from the obvious intention of the legislature or where it would otherwise, render the provision meaningless... the judge in performing its legislative function should consider the prevailing social value and context.*”<sup>601</sup>

It is important to restate the fact that this thesis does not decry the importance of judicial precedent; nor is it campaigning that lower courts depart from the wise, age-old doctrine of *stare decisis*. Still precedent gets stale as society changes and the relevance of outdated precedents fades. So, if relevant and new precedent fails to emerge, the Nigerian judiciary cannot afford to enact the injustice a not so relevant, precedent produces. The rules or canons of interpretation are judge-made rules formulated over the years by judges of old<sup>602</sup>, who sought to solve the problems they encountered in society. Judges of today can take a similar path. What is the essence of law if precedents remain static? Too heavy a reliance on precedent dispenses with and undermines the relevance of the role of

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<sup>600</sup> See Larsen, J, *opcit*

<sup>601</sup> Ijaiye, *opcit*:184

<sup>602</sup> They created these canons to establish a guide them in their duties of interpretation.

Courts in our society, because precedent can be pre-recorded and installed as program software in computers, too often downloaded verbatim to perform the act of judging as required. This software of precedents enshrined in the judicial database could potentially replace judges and ensure apt delivery of opinions, but with no human factor.

We find support in Oshio's remark: "*it seems that the categories are not closed and would increase as the need to meet new challenges in the interpretation of statutes would arise....Since neither society nor law is static, there may yet arise the need to develop more rules by judges to deal with more unforeseen complexities in the future.*"<sup>603</sup>

Accordingly, the time has come to recognize the full range of discretion., to deal with the present and prospective complexities of our time. If the judges of old could be activist creators of canons of interpretation, today's judges can be equally reformist in adding to or extending these rules to relevant social values.

Hence the need to create new and more relevant precedent cannot be overstated. It is the primary responsibility of the appellate court to create new precedent that is relevant to the times, views and interests of society.<sup>604</sup> Although lower courts are restricted in creating new precedent, they are not excused.<sup>605</sup> The bulk of the responsibility here is on the apex court to review decisions of lower courts, considering social interests, stipulated law or an abuse of discretion, and uphold the best decision that serves the justice of the case. However appellate courts can only review precedent that is before them. So, to this

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<sup>603</sup> *Ibid*: 13

<sup>604</sup> The supreme courts holding in *Abdulkarim v. Incar Nigeria Ltd(supra)* on overruling its own decision so as to keep the stream of justice pure, caps up my point.

<sup>605</sup> Appeals are based on substances from the lower court, so lower court judges or trial court judges have a foundational role to play here.

extent, the trial judge has a role to play. If the trial court fails to state core issues in his or her opinion, there will be nothing for the apex or appellate courts to affirm and or establish as new precedent (if the case is appealed). Therefore, it's essential for trial judges to be detailed in their judgments and give concrete reasons for the decisions they make. In any event, the apex court should be willing to create precedent and be more ready to overrule itself in the light of prevailing circumstances just as they did in *Daudu's case*.<sup>606</sup> Therefore, it is on the superior courts to bell the cat through judicial reviews and revise the 'distinguishing principle'<sup>607</sup> in addition to the other factors.<sup>608</sup> Courts can also depart from precedent where the justice of the case so demands or when the lower court is at liberty to apply wider discretion to the precedent that best fits the case at hand.

Judicial discretion is not consistent, as there is always a shift in judicial opinions due to varying circumstances of cases and changes in society. A dissenting opinion or obiter dictum today may eventually metamorphose to be the *ratio decidendi* in the future. Or a decision that was overturned on appeal may be upheld on appeal in the future. For example, in the Eastern region of Nigeria, under Igbo customary law, wives and daughters did not have the right of inheritance because of the customary notion that women were chattels and, therefore, objects of inheritance themselves.<sup>609</sup> This was reinforced by the Supreme Court in *Nezianya v. Okagbue*,<sup>610</sup> that under the native law

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<sup>606</sup> See chapter 4

<sup>607</sup> This is the same as distinguishing the case (the only ground the court is allowed to deviate from precedent) See chapter one at p.23

<sup>608</sup> *Ibid*

<sup>609</sup> See Tobi-Aiyemo, A (2011) Mainstreaming Gender in The Development of Family Law in A Borderless World; The Nigerian Perspective, *opcit*:10

<sup>610</sup>. [1963] All N.L.R. 358 S.C

and custom of Onitsha, a widow cannot deal with the property of her deceased husband without the consent of his family.<sup>611</sup> This principle of law took a daring turn<sup>612</sup> in the celebrated case of *Mojekwu v Mojekwu*<sup>613</sup> where *Per* Niki Tobi, *JCA*(as he was then) stated:

*“...We need not travel all the way to Beijing to know that some of our customs, including the Nnewi “Oli-Ekpe” custom relied upon by the appellant are not consistent with our civilized world in which we all live today.... On my part, I have no difficulty in holding that “Oli-Ekpe” custom of Nnewi is repugnant to natural justice, equity and good conscience.”*<sup>614</sup>

Unfortunately, upon further appeal to the Supreme Court in 2004, this decision was criticized on its “*general and far-reaching language.... which could lead to criticism of all other customs that exclude women.*”<sup>615</sup> In the lead judgment of the Supreme Court, *Per* Uwaifo, *JSC* pronounced:

*“...The learned Justice of Appeal was no doubt concerned about the perceived discrimination directed against women by the said Nnewi “Oli-ekpe custom. But the language used made the pronouncement so general and far-reaching ..., and is capable of causing strong feelings against, all customs which fail to recognize a role for women. For instance, the custom and tradition of some communities which do not permit women to be natural rulers or family heads. The import is that those communities stand to be condemned without a hearing for such fundamental custom and tradition they practice in their native communities. It would appear for these reasons that the underlying crusade in that pronouncement went too far to stir up a real hornet’s nest even if it had been made upon an issue joined by the parties, or properly raised and argued. I find*

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<sup>611</sup> See also *Nzekwu v. Nzekwu* [1989] 2 NWLR 373.

<sup>612</sup> This was two years after Nigeria joined the rest of the world for a global campaign for women’s rights at the Fourth World Conference on Women: Action for Equality, Development and Peace, convened by the United Nations 1995 in Beijing, China

<sup>613</sup> *Supra*

<sup>614</sup> *Per* Niki Tobi, *JCA* (as he then was)*Ibid*:305.

<sup>615</sup> The case involved a property dispute between a deceased man's wife and his nephew. Augustine Mojekwu, the nephew, claimed that as the closest surviving male relative of the deceased, he was entitled to inherit his house. Caroline Mojekwu, the wife, on the other hand, argued that her son, Patrick, who had passed away before her husband, had fathered an infant son who should inherit it. Mrs. Mojekwu also had two daughters, but under the Nigerian custom, they were not a consideration. Mrs. Mojekwu passed away before the Supreme Court ruled, leaving one of her daughters Theresa Nwachukwu as party in the case

*myself unable to allow that pronouncement to stand in the circumstance, and accordingly I disapprove of it as unwarranted.*<sup>616</sup>

This reasoning by the Supreme Court may be procedurally correct, but logically unjustified. The Court of Appeal, a lower court, had deviated from the precedent in *Nezianya v. Okagbue*<sup>617</sup> and discretionarily attempted to change the status quo custom that discriminated against women in Igboland. Therefore, the concern expressed by the Supreme Court was clearly based on technical justice.<sup>618</sup> Technical justice is a slave to precedent and eventually, if not controlled discretionarily, may result in injustice. According to Oshio, a rigid and slavish adherence to the literal rule, the doctrine of precedent and other legal technicalities in interpreting the Constitution or statutes in all cases, especially novel cases, would inevitably lead to injustice, which will not be the intention of law makers.<sup>619</sup> To repeat, strict adherence to precedent is affecting development of the law. The ultimate focus of the judge is to do justice in the case before the judge, so where broader discretion will ensure substantial justice, procedural justice should not stand in the way. The need for judges to apply discretion with a wide latitude in interpreting statutes will be of immense value to Nigerian society. More so the judicial and judicious discretion is overturned on appeal and even if the decision of a judge is dissenting or not of the majority view, such decisions build a bridge to similar cases that come before the Court in the future. A ready example is the *Mojekwu's case*. Although the reversal of this case stalled the advancement of precedent in this area of law for a

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<sup>616</sup> See *Augustine Nwafor Mojekwu v. Mrs. Theresa Iwuchukwu (2004) LPELR-1903(SC)*

<sup>617</sup> *Supra*

<sup>618</sup> In the U.S. also, a backlash against *Roe v. Wade* is still causing chaos.

<sup>619</sup> *Ibid*:32

length of time, justice eventually prevailed thirteen years later when the same Supreme Court in *Motoh v. Motoh*,<sup>620</sup> re-established similar precedent and in citing *Per Niki Tobi's* comment<sup>621</sup>, declared as follows:

*“I will have no hesitation in declaring such customary law which discriminates against female children in terms of inheritance to be repugnant to nature of justice, equity and good conscience. I find support in the case of Mojekwu v. Mojekwu ..., where Tobi, JCA (as he then was) said.... Accordingly, a custom or customary law to discriminate against a particular sex is to say the least an affront on the Almighty God himself. Let nobody to such a thing on my part, I have no difficulty in holding that the Oli-Ekpe custom of Nnewi is repugnant to natural justice, equity and good conscience.”*<sup>622</sup>

In creating new precedent or exercising wider discretion, the courts need judicial courage and perseverance. Persistence is the key factor here, when a judge is persistent, someday his or her idiosyncratic yet just perception will prevail. As long as the judge applies the justice in the case, at least one judge on appeal will give a dissenting view, which from antecedents, eventually become the *ratio decidendi* in future.<sup>623</sup> Although only the Supreme Court can establish judicial precedent, because they are the final court of appeal that can reverse or confirm the decisions of the lower courts; nonetheless lower courts should not hesitate to state and interpret law as they see fit with society-oriented discretion. Courts should give detailed reasons for their discretion so that the record is clear for all to know. The openness of judicial discretion will encourage public trust.<sup>624</sup>

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<sup>620</sup> *Supra*

<sup>621</sup> *Opcit*

<sup>622</sup> *Per Aboki, JCA.* (Pp. 72-73, paras. G-C)

<sup>623</sup> Dissenting views have eventually become the locus in some cases in Nigeria

<sup>624</sup> Hine, K, D (1997) *opcit*: 1788

Hine states that keeping the exercise of discretion in the open ensures the ability to monitor discretion and to keep the exercise of discretion above board.<sup>625</sup>

Again, even if overturned on appeal, eventually a decision against precedent based on socio-judicial principles will be repeated someday again and become law. *Per* Oguntade, *JSC*, in citing Lord Denning<sup>626</sup> repeated: “*what is the argument on the other side? Only this that no case has been found that it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before we shall never get anywhere. The law will stand still whilst the rest of the world goes on and that will be bad for both.*”<sup>627</sup>

It takes an innovative, risk taking judge to decide a case according to social values, to take steps to develop the law for society. Thus, where law and justice are in conflict, the judge should ensure that justice prevails. Since the ultimate focus of the judge is to do justice in the case before them, the act of judging should grow with society. According to Barack, the legal norm is not flexible enough, and it fails to adapt to the new reality, so we need a new norm to fill the gap between law and society.<sup>628</sup> Therefore, Nigerian judges should not shy away from creating a new norm where the justice of the case so demands. What is the value of judges if precedent remain static? As stated above, we may as well get computers to replace judges and then we can just download software of precedents into the judicial database to ensure delivery of opinions.

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<sup>625</sup> *Ibid*:1787

<sup>626</sup> *Parker v Parker*(*supra*)*Denning, M.R*

<sup>627</sup> See *Ameachi v INEC* (*supra*)

<sup>628</sup> Barack, *opcit*:4

Furthermore, the traditional role of the judiciary in interpreting statutes is to apply the intention of the legislature. However, no specific law stipulates that the role of the judiciary is to interpret statutes based on the intent of the legislature alone. For example, the Nigerian Evidence Act was only recently amended to reflect electronically generated evidence, long after Nigerian judges heard such cases. And they interpreted the Evidence Act with discretion.<sup>629</sup>

To this end, it is fundamental that judges understand social views and interests in the act of judging, it is important for judges to consider how society interprets and uses specific words, so judges can relate them to the circumstances of the case at hand. In other words, courts should consider how words change over time and make them relevant to society today. Words often derive their meaning from their social contexts and the problems authors intend to address. Therefore, it is important for judges to remember that text appeals to communities of listeners and they are used purposively, so meaning will change over time.<sup>630</sup> Therefore, courts should not only interpret words used in statutes with the meaning popularly understood at the time the statute became law, but also the word should be interpreted with respect to its current meaning at the time the statute is being interpreted.<sup>631</sup> Courts should appreciate the fact that the English language also evolves; the meanings of words change with time and their cultural context. For example, the word ‘paranoid’ popularly means to be characterized by or suffering from

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<sup>629</sup> See *Commissioner of Police v Jelili Lawal & Anor (Supra)* the case of this Author presided in.

<sup>630</sup> Easterbrook, F.H (2004) *opcit*:2

<sup>631</sup> This is more relevant to society

the mental condition paranoia,<sup>632</sup> but in some parts of the world like the U.S, the word ‘paranoid’ also means suspicious, distrustful or obsessed.

New words are often coined and created out of old words. That is why dictionaries have new editions. Thus, if courts are to read words according to the popular meaning understood at the time the statute became law, the word and the statute would have lost their relevance. English words are subject to semantic change as they can be used either as a verb or a noun. For example, the word ‘block’ could mean a place, an item or even an action, depending on how the user uses the word. However, ‘block’ originally meant “*a compact usually solid item or obstruction....*”<sup>633</sup> Today, the word ‘block’ popularly carries the meaning to ‘prevent or hinder access to a personal profile or social network like Twitter,’ or from viewing your profile. Hence, it is important that judges bear in mind the constant shifts in the meanings of words. The primary duty of the court is to arrive at the intention of the legislature based on the letters of the Constitution which are merely manifestations of the former.<sup>634</sup>

It is a tough job trying to gauge the intentions of the drafters of our laws when words bear different meanings.<sup>635</sup> As is typical of human beings (as judges are), there would be diverse views in understanding the meaning or intention of a statute, as the English language is a matter of semantic. Some people see meaning of words from another angle and interpret them narrowly, while others see words from several angles

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<sup>632</sup> See Google Search and Merriam Webster online Dictionary, *opcit*

<sup>633</sup> See Merriam Webster online Dictionary

<sup>634</sup> See *Martin Schroder and Co. v Major and Co. (Nig) Ltd (1989) 2 NWLR, at 12; Ifezue v Mbadagbe (1984) 1 SCNLR 427,*

<sup>635</sup> When u speak with a familiar language, people understand it as their own, and when people feel like part of a process they comply with the process, it is a cultural process

and give them a broader interpretation. In other words, some statutory words may appear to have a plain meaning, while others have to be contextualized to reach an adequate or correct interpretation. Like liquid, some words take the form of their container. Other words only assume the meaning it is given by the user or observer. This was explained in *Federal Republic of Nigeria v Mike*<sup>636</sup>. As Per Niki Tobi, JSC (as he then was) stated:

*“Definitions are definitions because they reflect the idiosyncrasies, prejudices, slants and emotion of the person offering them, while a definer of a word (concept) may pretend to be impartial and unbiased, the final product of his definition will, in a number of situations be a victim of bias.”*

Furthermore, the English word and indeed the entire English language is an omnibus space. It collects comfortable meanings into its space and makes them at home for a while; the space expands as words, interpretations and events evolve.<sup>637</sup> Over time the courts’ understanding and interpretation of words must also evolve. In the words of Lord Denning, *M.R.*:

*“Whenever a statute comes up for consideration, it must be remembered that it is not within human powers to foresee the manifold set of facts which may arise, and even if it were, it is not possible to provide for them in terms free from ambiguity. The English Language is not an instrument of mathematical precision. Our literature would be much poorer if it were”.*<sup>638</sup>

This introduces another fundamental point courts should consider – Nigerian judges should judge with Nigerian culture in mind. They should interpret laws according to Nigerian legal culture and traditions, a law that is common to the Nigerian people. Just as English law arose from the culture and Common Law of England, Nigerian common law can borrow from the culture of Nigeria with discretion. Therefore, when Judges

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<sup>636</sup> (2004)1 SC (pt. II) 27 at 25

<sup>637</sup> For example, the word mad could mean a mental condition or an emotional state of anger

<sup>638</sup> cited from Oshio, *ibid* at page 10

consider the cultural/traditional of Nigerian society, more indigenous words would replace the English words in the statutes, some of which have still not been amended since Nigeria obtained her independence from the British. Accordingly, instead of the phrase “intention of parliament”, Nigerian courts should interpret the “intention of the legislators as relevant to present social circumstances’ and let the courts consider social views and interests. Courts should also be consistent in replacing the word ‘parliament’ with ‘legislators’. If the circumstances fit, judging should be more inclusive in terms of social consideration.

The act of judging based on precedent alone will continue to expand the gap between law and society and cause injustice until the discretionary act of judging is broadened and exercised with social values and interests in mind. Cardozo explains that the rule that misses its aim cannot permanently justify its existence, as the final cause of law is the welfare of society.<sup>639</sup> The aim of courts is to do justice, so they must move away from an era when adherence to technicalities constrained the discretionary power of the court.<sup>640</sup> The law is loud enough that a court of law must exercise its discretion judicially and judiciously. In other words, judges should exercise their discretion according to the law, their intellectual wisdom as judges, and human reasoning, not arbitrarily.

The administration of justice is founded on rules and precedents and not on arbitrariness. This is because judges are human beings who are fallible. According to the

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<sup>639</sup> Cardozo, B.N (1921) *The Nature of the Judicial Process*, opcit: 66

<sup>640</sup> *Engineering Enterprises Contractor of Nigeria v A.G of kaduna State (1987)*

Court in *Samuel Ayo Omoju v. The Federal Republic of Nigeria*,<sup>641</sup> “judges are human beings and like all human beings, are bound to make mistakes and they make mistakes. The appellate system is there to correct mistakes of trial Judges.... a Judge is not a supernatural being. He is a human being and is not infallible.” Thus, although discretion should be broadened, judges should be guided to an extent since the use of discretion to interpret statutes is quite dicey.<sup>642</sup>

Accordingly, the judiciary may provide adequate guidelines to assist judges in arriving at judicious and judicial interpretations, in ways to apply wider discretion. The Supreme Court and Chief judges or head judges of various Courts should prepare judicial discretionary practice guides to direct judicial discretion.<sup>643</sup> It is pertinent that judicial discretion be codified to ensure compliance, albeit making room for checks and balances, in appropriate circumstances.<sup>644</sup> There is need for a uniform pattern or standard in the Nigerian judiciary as well. Although discretion cannot be directed or controlled, courts should as much as possible abide by shared principles in the exercise of discretion in order to achieve a close to uniform pattern of discretion.

This thesis rethinks the value of judges strictly relying on precedent and advocates a broader exercise of discretion that incorporates changing societal interests and more just

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<sup>641</sup> (2008) LPELR-2647(SC) Per. Muhammed JSC

<sup>642</sup> According to Lord Denning " it is not within human powers to foresee the manifold sets of facts which may arise and even if it were, it is not possible to provide for them in terms free from all ambiguity. (*Seaford Estate Ltd v Asher* (1949)2 K.B 481

<sup>643</sup> See this author's outline in chapter 3

<sup>644</sup> By codify we do not mean legislative intervention as we are aware of how the judiciary frowns on legislative intervention and vis versa.

decision-making. As nearly all the principles, precepts and maxims of statutory interpretation are judge-made,<sup>645</sup> judges may revise them.

Hine opines that the idea that laws, not individuals, govern our society is at the core of most citizen's understandings of the American Judicial system, so people elect legislatures to enact laws, rather than depend solely on judge-made common law.<sup>646</sup>

Courts are to remedy a bad situation and not leave society helpless. *Per Aderemi, JSC*, summarizes the above pages in *Attorney General of the Federation v Abubakar*,<sup>647</sup> as follows:

*“No legal problem or issue must defy legal solution. Were this not to be so, the society, as usual will continue to move ahead, law, God forbid, will then remain stagnant and consequently become useless to mankind. With this unfortunate consequences at the back of his mind, a judge whenever faced with a new situation which has not been considered before, by his ingenuity regulated by law, must say what the law is on that new situation; after all, law has a very wide tentacle and must find solution to all man-made problems. In so doing let no judge regard himself as making or even changing law. He (the judex) only declares it –he considers the new situation, on principle and then pronounces upon it. To me that is, the practical form of saying that the law lies on the breasts of the judges.”<sup>648</sup>*

Therefore, courts should redefine the exercise of judicial discretion to take into account relevant social views, values and interests. The influence of social norms, values and interests on judicial pronouncements should be analyzed and understood. and the role

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<sup>645</sup> *Awolowo v Shagari & Ors (supra) Per Fatayi-Williams, CJN*

<sup>646</sup> Hine, K, D, opcit: 1770

<sup>647</sup> (2007)10 N.W.L.R (PT 1041) 1 @ 171-172 (Per Aderemi, JSC)

<sup>648</sup> Laws are man-made and man is not above mistakes or errors, therefore, some provisions of statutes will be ambiguous as the drafters may not foresee future events that may arise after the enactment. Hence where such events arise and there is no legislation to aid, will the judge turn back the parties and say “ sorry my hands are tied, I do not have the answers as the law has no provision for it, let us all just wait until the Legislature through stages of readings and bureaucracy decide to alter and change the law ( that is if it is considered relevant or a legislator is willing to sponsor the Bill) then you can return to get justice.” What a judge that will be! Believe it or not that is exactly what happens when a judge dares to adhere to letters of law without due consideration of the justice to society.

of judges in appreciating the function of law in society should be emphasized.

Incorporating predominant social norms and principles in judging will help the judiciary achieve law's purpose in ordering the lives of people. The act of judging in Nigeria should grow with the Nigerian society.

Ultimately, every judge should ask the question: "*What is the essence of justice if courts fail to justify the 'justness' in the word?*" In answering this question, courts should first ruminate on the following words of Per Oputa, JSC, (as he then was): "*The judge should always ask himself if his decision, though legally impeccable in the end achieved a fair result. 'That may be law, but definitely not justice' is a sad commentary on any decision.*"<sup>649</sup> Thus we adopt Ronald Dworkin's apt admonition:

*"...judicial activity is like several co-authors. judges no longer on the bench wrote the earlier chapters. We must now write the continuation of the work; we must ground ourselves in the past while ensuring historical continuity. The chapters that we are writing become, after they are written chapters from the past. New chapters the creations of new judges, will be written in the future."*<sup>650</sup>

Accordingly, "*A Judge that is confronted with a legal problem does not have to resign helplessly where the established laws are inadequate in resolving the problem. ... Judges are, therefore, encouraged to formulate fresh rules of law or to extend the existing ones ...*"<sup>651</sup>

Finally, given the liberty of broader discretion, Nigerian judges will not *helplessly resign themselves* to seemingly hopeless situations. Instead, Nigerian judges can *write new chapters* to eventually establish new precedent for the common law of Nigeria. The

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<sup>649</sup> Quoted by Oshio, *ibid*: 24

<sup>650</sup> Dworkin, R Law as Interpretation, 60 Tex.L.Rev. 527 (1982)

<sup>651</sup> Aboki, *opcit*:113

fundamental conclusion is that appropriate exercise of judicial discretion is essential to the act of judging in Nigeria. This is because Nigerian case law—an ardent devotee to judicial precedent—is not developing at the pace of Nigerian social development and this has, at times, made law irrelevant to society, thereby creating a wide gap between law and society.

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## APPENDIX

### Acronyms

AC.....	Appeal Court
CJN.....	Chief Justice of Nigeria
ECOWAS.....	Economic Community of West African States
E.R.....	English Reports
FCT.....	Federal Capital Territory of Nigeria, Abuja
FWLR.....	Federation Weekly Law Report
J.....	Judge
JCA.....	Justice of the Court of Appeal
JSC.....	Justice of the Supreme Court
KB.....	King's Bench
LGBTQ.....	Lesbian Gay Bisexual Transgender Queer
LPELR.....	Law Pavilion Electronic Law Report
NCLR.....	Nigerian Courts Law Report
NLR.....	Nigerian Law Report
NSCC.....	Nigerian Supreme Court Cases
NWLR.....	Nigerian Weekly Law Report
Ors.....	Others
Pt.....	part
SC.....	Supreme Court
SCNJ.....	Supreme Court of Nigeria Judgments
UN.....	United Nations
U.S.....	United States
WRN.....	Weekly Report of Nigeria
WACA.....	West African Court of Appeal