

University of Nevada, Reno

The Role of the Nigerian Judiciary in a Democracy: A Judge's Dilemma

A dissertation submitted in partial fulfillment of the
requirements for the degree of Doctor of Philosophy in
Judicial Studies

by

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Abstract

Judging in Nigeria seems to be changing with the advancements in society. Like a circle, judges' decisions impact society, while social cultural changes and perceptions influence, or should influence, judicial decisions. The complexity of the Nigerian society makes it eminent that judicial roles catch up with society's changes to make the law more relevant to the Nigerian people in its present democratic dispensation. The reality of the present democratic dispensation in Nigeria, and many other countries worldwide, creates such scenarios that generate a gulf between society and the law. This gulf puts judges in dilemmas of protecting the competing interests of the society, law, and the government, as judges are accountable to the established law they uphold, and then to the justice system they represent. Also, judges are accountable to the government that appointed or elected them to the office, and then to the mutual and conflicting interests or welfare of the society they are obligated to serve, thereby creating a conflict between substantial justice and procedural justice. Thus, in attempts to determine the above interests (all deserving of intricate, yet unified implementation), judges get sandwiched between their imprecise, yet indispensable and required judicial roles, and the expectations of the law and society. Therefore, this dissertation argues that an inadequate understanding of judicial roles affects and influences judicial performance, social interests/welfare, and eventually democratic development, thereby creating a dilemma for judges. Whether social change impacts, or should impact, judicial roles to be more society-oriented is the essence of my proposed

socio-judicial theory that attempts to address the quagmire judges encounter in performing their judicial roles. As revolutionary and controversial as this theory might be for Nigeria, I am optimistic it is the way forward for her judicial system. Thus, this dissertation outlines and defends my argument that revamping judicial thinking to embrace a more realistic socio-judicial perspective will make law and justice relevant to the Nigerian society and avoid circumstances where the courts are unresponsive to societal context.

Dedication

To the irreplaceable and unforgettable memory of my father,

Hon. Justice Niki Tobi (1934-2016),

who kindles my socio-judicial consciousness, and to all persistent Nigerian (*socio-judicialists*) judges (serving, retired, and deceased), who despite the judicial dilemmas,

dispense justice “*socio-judicially*.”

May all your legacies persist for posterity and promote Nigeria’s democracy.

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Executive Summary

This executive summary overviews the main components of this dissertation and comprises four parts: the first gives an overview of this research; the second explains the research questions, goals, and methods; the third narrates the purpose of this dissertation; and the fourth part gives a temporal context of this dissertation – highlighting the unfortunate impact of the pandemic on the Nigerian judiciary and this research.

Research Overview

Society is the essence of democracy, and the judiciary is the primary agent of democracy. However, as society changes or develops, some aspects of law, statutes, courts and judicial procedures remain static and irrelevant to society. Thus, the significance of the courts as the primary agent of democracy appears to be fading, and it seems society questions the relevance of courts in Nigeria, as the Nigerian society (this research will show) has little or no confidence in the Nigerian judge. However, the fading worth of the courts in society is not necessarily because judges are insignificant, it is (as this research will argue), because social perceptions (and sometimes judicial perceptions) of the judiciary is often based on ignorance or misconceived information, and undue expectations of what the judiciary does or/and should be doing in a democratic Nigerian society.¹

¹ Part of the public misunderstanding/negative impression of judges is because some judges do not understand their roles in society and they fail to realize that the act of judging metamorphosizes with the changes or advancements in society, and this change impacts their judicial roles. For the judiciary to embrace her role in society, judges should consider social

Judging in Nigeria is typically understood as settling disputes between parties. However, over time the changes in society, social values, interests and views with different ‘corresponding’ actions of judges show that judging in Nigeria is much more than just settling disputes and interpreting statutes. Thus, my choice of the aphorism “actions speak louder than words”² to describe the functional role of the Nigerian judiciary in a democracy. The act of judging in Nigeria, in reality, exceeds statutory/legal/judicial requirements and somewhat falls short of the expectations of society that judges have all the answers.³

The void in explicit definition of the role of judges in any Nigerian statute and the scarcity of research that emphasize the value of defining judicial roles, sandwiches judges between these imprecise, yet indispensable roles or judicial requirements, and expectations of the law and society – both deserving of intricate, yet unified attentions and implementations.⁴ Hence this research argues that an inadequate understanding of judicial

changes.

² www.collinsdictionary.com

³ Ari Tobi-Aiyemo, *The Act of Judging in Nigeria: A Matter of Interpretation and Judicial Discretion* (Master’s thesis) from University of Nevada, Reno (2019). Available from https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwit0aKJzK_wAhXBITQIHafmCTYQFjACegQIAhAD&url=https%3A%2F%2Fsearch.proquest.com%2Fopenview%2F3dafdbc31287ba95a243aa2a36913ff%2F1%3Fpq-origsite%3Dgscholar%26cb1%3D18750%26diss%3Dy&usg=AOvVaw2piUQMiyBVR_YgVgTLL-Ay

⁴ Society expects so much of judges that they blame and ridicule the courts for the outcome of

roles affects and influences judicial performance; social welfare; creates a dilemma for judges; and will eventually impact Nigeria's democracy.

Therefore, this research challenges the 'real' act/process of judging in Nigeria and suggest an 'ideal' judicial process that will embrace social values in Nigeria.⁵ It highlights the influence of social norms and values on judicial decisions and further states the constraints of these social norms and values to the determination of just (society-oriented) judicial verdicts. This research emphasizes the vital role of the judiciary in democratic development, and stresses that the imprecise role of the judiciary—concerning what judges do or not do, creates confusion in society.

Accordingly, this dissertation is an off-shot from my thesis that discussed the act of judging in Nigeria as a matter of discretion and interpretation of statutes. While my thesis explains the status quo in Nigeria's judiciary today, this dissertation questions how this act of judging that translates to judicial roles, impact society and judges. Hence my thesis is the actual position, while my dissertation is the ideal position.

cases when judges have no blame. For example, most people do not know the difference between judging and prosecuting. Thus, when a criminal case turns contrary to society's perception of justice, they blame and castigate judges. They assume the judge is responsible for an unjust decision when the judge (unfortunately), only acted on the actions or omissions of the prosecution.

⁵ Socio-judicial justice or 'socio-judicialism' or 'socio-judicialize.'

Research Questions/Goals

This research seeks to find answers to nuances embedded in the imprecise roles of judges in a democratic society. Thus, in twelve chapters, I will attempt to answer the following and related questions in the Nigerian context:

1. What is the role of the judiciary in democracy today?
2. How does society perceive the courts and what is the purpose of law in society?
3. Do judges make laws— is judicial review the same as judicial lawmaking?
4. What is the essence and purpose of courts in society?
5. What is the concept of justice, and what does justice mean to society?
6. Is the role of the judiciary to uphold justice best served by judicial activism or through judicial restraint?
7. Do judges understand their roles as umpires to uphold ideal democracy?
8. What dilemmas do judges encounter in judging in Nigeria?
9. Does empathy in judging exceed the role of judges or breach the rule of separation of powers or even the Ethical Code of Judicial Conduct?
10. Does the doctrine of separation of powers hinder the free exercise of judicial discretion/roles?

Dissertation Methods and Informant Data

This dissertation adopts a non-empirical research methodology. I reviewed archived legal documents, judges' biographies, autobiographies, scholarly books, peer-reviewed

articles, newspaper articles, legal research blogs, and other electronic media. In addition, I also took the committee's suggestion to include informant interviews in an effort to validate themes that emerged in my literature review and through my own experience as a Nigerian judge.⁶ My approach was to triangulate information as a means of validation – to ascertain if my informant views correlate with mine. My choice of judges to interview was based on court structure and availability. I decided to take two judges from each court level (serving and retired) for a total of eight informants, so that have a balanced view and diverse experiences.⁷ I included retired judges because they are freer to give their opinions and perspectives on history, while serving judges can comment more on the present situation – but with more reservations (e.g., “Do not quote me...”).

Informant interviews were conducted by email and phone over a five-month period from December 2020 to April 2021. Generally, interviews were extremely difficult to schedule given the pandemic, the international component (i.e., U.S.A versus Nigerian time zones); technology limitations (e.g., internet connectivity), and other logistics (e.g., judicial workload, transfer of judges, judge bereaved, judges' courthouse burnt). Some of my informants preferred to answer the questions I had sent to all of them via email in writing,

⁶ I practiced in the judiciary of Lagos State, Nigeria (the greatest cosmopolitan city in Africa) for about twelve years, retiring in May 2019.

⁷ The Supreme Court, The Court of Appeal, The High Court, and The Magistrate court. Upon request of several of the informants, identifiers have been changed or omitted to protect identity.

while some preferred, I ask the question and they respond verbally. Typically, each discussion lasted approximately one to two hours, although several were broken up into multiple sessions over many weeks. To guide these interviews, I developed ten questions in collaboration with several committee members that followed a semi-structured interview format.

Semi-Structured Informant Interview Protocol

Thank you for agreeing to give me information on a topic that touches on the fundamentals of judicial development – judges in a democracy. Please note that the information being collected is to **guide** my thinking/hypothesis. I promise you, **it will not be analyzed or reported in any personally identifiable way (except if you give express approval)**. In other words, I am merely asking you as an expert informant in the system (based on your years of experience), to tell me how the system operates currently and how it might operate better. Eventually, I will aggregate perspectives into supporting my argument/ideas and suggest a way forward in the interest of the justice system.

1. What is the role of the judge in the Nigerian judicial system? What does independence of the judiciary mean within this system?
2. How do the Nigerian people perceive judges/courts/judiciary? Positive or negative? If negative, how can judges help improve citizens' perceptions of the courts?

3. Is justice perceived in the eyes of the people or is justice defined by constitutional mandates of lawmakers, or both? If both, how do you reconcile or “fit” the opinion of justice in the people’s eyes with the constitutional mandates from the lawmakers?
4. What impact has social media and technology had on judging in Nigeria?
5. What is “judicial activism”? How common is it in Nigeria?
6. What role, if any, should empathy play in judging? Could artificial intelligence or robots substitute for judges? Why or why not?
7. What type of case would be an example of a challenging or controversial case you had to decide in our Nigerian courts? Why?
8. How is the term “judicial precedent” defined in Nigeria? What are the advantages and disadvantages as to “judicial precedent”?
9. Could judicial precedent be a threat to judicial independence? Why or why not?
10. What types of stress or health concerns do judges encounter in Nigeria?

Response Themes in Interviews

Upon completion of informant interviews, I reviewed notes against my dissertation outline/hypotheses and identified themes across responses. Themes that emerged during the discussions and contextual quotes, when particularly elucidating, are presented below by question number:

1. Judicial independence is the judge's liberty or “discretion” to decide without fear of manipulation of any form. The role of judges is to adjudicate. A judge's role is to

serve the community in the pivotal role of administering justice according to law.

2. Nigerians do not trust the judiciary. Nigerians think we [judges] are “a joke...”

“They burnt my court and I lost everything.”

3. The public sometimes interprets “justice”, and at other times, it is what the law says that is justice. “The police as prosecutors in courts have not helped in this regard as they give the court a bad name.” “Nigerians do not understand justice as we interpret it...”

4. Some judges felt they should not be on social media, while others argued for social media access. Several also noted that with the pandemic, technology has become more beneficial to the courts; so social media is a way for judges to disseminate information. “Technology has come to stay, and our judiciary will never remain the same again, so judges must shape up to the high demands of our times.”

5. Judicial activism should not exist as it is against the ethos of the profession. However, at least one informant reflected “Judicial activism; I do not even know how to define that. I have used it but it is just a judge using her initiative when there is no particular law or principle applied. It is a decision that is new...”

6. All judges agreed that empathy should not play any part in judging. They all reiterated the status quo that sentiments have no place in law. Only one judge responded to the query about AI or other technology supporting or replacing judges

by simply stating “certainly not...”

7. Three high-profile cases were consistently noted. The first was the Ladoja’s case, the second was the Bode George Case, and the third was the Al Mustapher case.

8. All respondents referred to the cases I had already cited and defined precedent as abiding by the prior decision of the superior court. They opined that precedent could slow down the development of the law and cause injustice in some instances. Specifically, one informant stated “judicial precedents is a decision by judges on issues that are yet to be decided on; it could be the high court. It is the same definition worldwide. The Google [definition] is the same definition in Nigeria.”

9. Respondents opined that it depends on the case, with one noting judicial precedent is not a threat to judicial independence.

10. Judges do experience health issues; usually backaches and many problems with their necks and arms because of the long hours they sit.

In collating all respondents’ answers and comments, it is clear that their perspective on the Nigerian justice system is consistent with mine as a former Nigerian judge and existing literature on the topic. Several also agreed that an aspirational role for judges should include their role as an agent of social change. In addition, in conducting informant interviews I got to know about recent news in the judiciary and the challenges some of these judges faced, some of which I knew only second hand from my father many years ago. Finally, from the informant interviews, I am confident that my assertions are not

demonstrably biased or unfounded, and not based solely on my personal views and experiences. As I talked with my informants, I realized my perspective is not uncommon – but that I should remember that I am privileged to highly confidential information about the Nigerian judiciary.

Some Interview Highlight

Interviews included an informant who wrote a book about some of his dilemmatic encounters in the judiciary. One informant noted how she had experienced attempted intimidation and manipulation in the course of adjudicating, including a time when she was accused of bribery because she decided on a case contrary to public opinion.⁸ Another expressed his frustrations on performing his judicial role, and gave an instance of when he did not have sufficiently clear evidence in the case and spent a long night reviewing survey plans on his office floor to better understand the materials.⁹

One informant talked openly about how his social life is restricted, stating “[F]rom day one there are certain social clubs and things that you do that you have to give up. They said we should avoid contact sports, as it exposes us to members of the public, so I stopped playing football and cricket...”¹⁰ Also, on the issue of conflicting precedent, one said,

⁸ Informant 2 in discussion with the author April 2021.

⁹ Informant 3 in discussion with the author December 2021.

¹⁰ Informant 4 in discussion with the author January 2021.

“The issue of precedent is a major, major problem. When you see something that will bring about injustice, and when you try to dance around it and you can’t find a way, it can be very, very disheartening. I am [being] very, very frank with you... it affects your sense of justice as you see that this is not right, but you are bound by it.”¹¹

In regard to judges and social media, informants were split on whether or not the judiciary should engage in those types of platforms. One informant shared a story where a judge recused himself from a case in which a party was unknowingly photographed with him at a social function and he feared that it may be posted on social media, and used against him, as the party unknown to him appeared in court the next day.¹² When asked if he thought the judge did right by recusing himself, the informant answered: “In Nigeria it was right to do, but abroad he could get away with it. You must take your social environment into consideration to determine what is proper and what is not proper. So, you must know what is right or wrong in the environment which you find yourself as a judge.”¹³

In terms of judicial health, one informant talked about his colleague retiring because of back pain, which developed from sitting too much on the bench.¹⁴ Another noted stress

¹¹ Ibid

¹² Ibid

¹³ Ibid

¹⁴ Ibid

as a public mob had burned down her courtroom, and she was in the middle of trying to handle her cases remotely with few resources.¹⁵ An informant who was part of the panel of justices that presided over a high-profile case about the assassination of a democratic leader [Kudirat Abiola], narrated a failed assassination attempt on her life because of her role in that case.¹⁶ Lastly, one informant recalled one of the most painful aspects of her judicial career when she said, “They [the public] accused me of taking \$2 billion for [a] case... The most painful of these allegations was when [another judge] approached me in an elevator... and said that “one of the cases you will deliver judgment, the person is ready to drop heavy bread....” [bribe]. When I said I do not do such things, the judge said, ‘Aha! But, what about the \$2 billion they said you took in the Al Mustapha case?’”¹⁷

Ultimately, the information I gathered from talking with these eight judges is a major resource for supporting my argument that judicial roles create dilemmas for Nigerian judges. This informant perspective is woven throughout this work to highlight particularly important points in my arguments.

The Purpose of this Dissertation

A research on judicial practice and procedures; judicial codes and conducts; judicial

¹⁵ Informant 5 in discussion with the author December 2021.

¹⁶ Informant 2 in discussion with the author April, 2021.

¹⁷ Ibid

administration; judicial roles; judicial life and challenges is long overview in Nigeria's democratic society (as I believe in many other countries). The literature on these areas is quite scarce. Although in recent times, there has been more literature and arguments surrounding courts and society, very few of these works or literature are specifically about the dilemma judges encounter in executing their roles, and very few of these literatures are about the Nigerian society.

In Nigeria, there is no existing literature on this research topic. This dissertation is the first literature in Nigeria that discusses the roles of judges, judges' dilemmas and the intricacies of judicial practice from informant perspectives. Hence, the herculean task this author encounters in this research. Therefore, this research became necessary and expedient to set the pace for further research to develop Nigeria's judicial jurisprudence.

Specifically, this author who is a firm believer of the court's role as agents of social change in a democracy, rides on the platform of this research to introduce a theory she created—socio-judicialism. This socio-judicial theory aims to challenge and revamp judicial thinking and philosophy in Nigeria to embrace empathy and establish social and sociological perspectives in judging. Based on the changes and developments in our world, this dissertation hopes to inspire Nigerian judges to perform their roles in line with relevant social interests, views, and principles related to their particular societies, so that Nigeria's democracy will be society-oriented/ people-focused.

There seems to be a gap between the courts and society as Nigerians appear to

question the significance of the courts in society and the relevance of judges to Nigeria's democracy. Okogbule states that while the Nigerian legal order may have been put in place to achieve access to justice, courts sometimes constitute formidable obstacles to the promotion and protection of human rights and access to justice.¹⁸ Unfortunately, some of these obstacles Okogbule mentions – allegations of corruption, delay in trials, inadequate judgments, are the result of administrative neglect of the judiciary, and not necessarily the judges' fault. Thus, people often misunderstand legal procedures, and they perceive/interpret justice differently from legal/judicial interpretation in courtrooms.

Accordingly, this research's driving force is (primarily) an accumulation from this author's over eighteen years of legal practice — twelve of which were on the bench as a magistrate. Another driving force is this author's first-hand experience of over thirty-five years as a daughter of a great professor of law who moved from academia to the judiciary and served the Nigerian judiciary from the high court to the court of appeal and then to the supreme court of Nigeria in a total of twenty-five years. Thus, my private and public life shaped this research.

From private practice as a lawyer, to public practice as a magistrate, I saw the gap between the rule of law, courts, justice, and the community. This gap, I have come to

¹⁸ Nlerum S. Okogbule, "Access to Justice and Human Rights Protection in Nigeria", *International Human Rights Journal*, Vol 2, Issue 3, (2005): 94-113 at 97-98.

understand, also affects society's perception of judges, and puts judges under pressure to perform or underperform, which creates a dilemma. Eventually, this performance becomes somewhat counter-productive in society because of society's misconceptions of judges.

Before I joined the bench, I practiced as a *pro bono* attorney at a non-governmental organization that focused on advancing citizens' economic, social, and cultural rights. Hence, I interacted with the public in urban and rural areas (especially deprived groups like women, children). These interactions inevitably also established my constant interactions with the courts, and I became more familiar with the court system, in addition to my close experiences with my late father's judicial career. I made several appearances in magistrate courts, high courts, and the Court of Appeal of Lagos State. The several encounters I had in filing court papers to prepare for a case and then litigating the case from trial to post-trial gave me a first-hand view of social perception of justice and the judiciary. Further, my close relationship with my late father, attending his court session, arguing on high-profile local and international cases, attending conferences, brainstorming, interacting with very senior judges with him; and watching how the judicial role took a toll on him through the years (to his death) showed and gave me a clear picture of the Nigerian judges' life, behind the scenes.

However, my personal encounters, experiences, assertions and conclusions in this dissertation are not solely based on personal observations. I also had interactions with all cadre of judges, chief judges of various states in Nigeria, justices, chief justices, senior and

junior lawyers, court officials, police, and prison officials, which confirmed my concerns about the public's ignorance of the justice system.¹⁹ Nevertheless, my arguments in this research find strong backing and support from the informant interview that covers real life experiences of eight Nigerian judges who like my late father and I have similar – and in some case worse – judicial encounters.²⁰

Following my appointment as a magistrate judge, my interactions with the same group of people — attorneys, the community, and senior judicial colleagues — gave me an insider view. In addition, literature and news reports about judicial inadequacies, especially concerning high-profile cases, show the extent of societal ignorance and misconceptions on judicial procedures that consequently creates dilemma for judges.

I realized that judging in Nigeria seems to be changing with the advancements in society — local and international. Like a circle, judges' decisions impact society, while social culture, changes, and perceptions somehow influence or should influence judicial decisions.²¹ The complexity of the Nigerian society makes it eminent that judicial roles should catch up with society's changes to make the law more relevant to the Nigerian

¹⁹ The next topic, ending this chapter, gives an overview of a follow-up informant interview verifying my suspicions, experiences, and conclusions regarding the courts and the Nigerian society.

²⁰ See part one above.

²¹ See diagram 1 in chapter one.

people. However, whether social change impacts or should impact judicial roles is the essence of this dissertation. As revolutionary and controversial as this view is, it is the way forward for democracy anywhere. Thus, my belief that revamping judicial thinking to embrace a more realistic socio-judicial perspective will make law and justice relevant to the Nigerian society.

A Temporal Context of this Dissertation

This research is conducted during one of the most impactful eras of global history – the Covid-19 pandemic. This pandemic did not only cause global distress but also judicial distress. Judges may not have been named as front-line workers in this pandemic, yet the pandemic has impacted them, in ways that many front-line workers may recover from, while the courts will still be grappling with the genuine, ingenuine, and somewhat frivolous lawsuits. In other words, after the vaccine and treatment or prevention mechanisms are scientifically established and settled, courts may still be hearing cases that may result from this pandemic's concerning torts of negligence, invasion of privacy and breach of confidentiality, and constitutional claims.

Nigerian courts like most of their counterparts across the underdeveloped world have had to fashion a new thread to comply with the eminent technological and financial demands that showed up with the pandemic. The judiciary is continually faced with the

complying with technology requirements. Unfortunately, this caused a lot of hardship as some judges had judicial assistants and tech- assistance in the courtrooms, hence they did not need to be tech-savvy, but with the lockdown and everyone operating from their homes, most judges could not cope, and this staled many trials. Bamidele said

The Covid-19 pandemic is generally noted to have a negative effect on all spheres of life and the court would expect to witness a massive spring forth of cases ranging from force majeure clauses in contracts, employment relations, inability to execute contracts due to the lockdown, lease and tenancy disputes owing to inability to pay rent, approvals of mergers and acquisition owing to inability to meet up with Federal Competition and Consumer Protection Commission (FCCPC) thresholds by corporate bodies, declaration of solvency, winding up proceedings, and cases of gender violence and assault during the lockdown.²⁵

Although the pandemic came with many threats to judicial administration, it was not all negative. The courts had no choice than to apply alternative means to disseminating information to the public. The pandemic necessitated the emergency computer trainings for judges, most of who had no prior training because they were relying on court staff. Thus, a silver lining of sorts as people can still have remote hearings. The Lagos Multidoor Courthouse in Nigeria that is affiliated to the Lagos state high court, is the first on-line dispute resolution Centre in Africa because of the pandemic.²⁶ The pandemic has

forward&usg=AOvVaw1IP6H1Wty5ZDrpKfCp8iuM

²⁵ Bamidele, opcit

²⁶ Informant 5 in discussion with the author April 2021.

encouraged more cases been settled out of court.²⁷

Nevertheless, the negative effects of the pandemic in Nigeria outweigh the positive because of the pre-existing lack of resources, constitutional restrictions,²⁸ procedural/evidential procedures²⁹ and financial dependence in the judiciary.³⁰ Most unfortunate to the pandemic's impact on the judiciary is the judges that died from the pandemic.

²⁷ Ibid

²⁸ Since the Constitution makes it mandatory that all trials in court must be public hearing, many judges do not want to go on with virtual trials as lawyers are arguing that such trials will be unconstitutional.

²⁹ The remote admission of evidence/exhibits is an issue that most courts are faced with.

³⁰ The on-going JUNSUN strike is demanding financial autonomy for the judiciary.

SECTION ONE: JUDICIAL ROLES

So much is expected from a trial judge because so much power is vested in him by the law and those that inhere in him a Judge *qua judex*. He is therefore expected to perform his judicial functions clearly to the glare of the public and for the consumption of the public. He should on no account allow the public doubt his personal integrity and fidelity of purpose in whatever he does within and outside court, as his life relates to his judicial functions. His public actions and utterances are watched by the entire populace, and not only by the litigants who are his immediate clientele, so to say. A judge should in his own character be beyond reproach or, at any rate, should have disciplined himself that he is not himself a breaker of the law. He should always remind himself or better still have at the back of his mind and conscience that as a judge, his actions and inactions are on trial. While by his very nature of humanity, he is a human being, the public looks at him as a superhuman being who cannot or who should not commit any wrong or outrage. He has a duty to hold the balance between the two competing parties. He is called upon to discharge a very difficult, delicate and at times fragile duty. He can hardly be heard to defend himself in public if he is censored or criticized for his judicial actions and inactions.³¹

³¹ Niki Tobi, *The Nigerian Judge*. Nigeria (Nigeria, AT&T Professional Publishers, 1992), 71-72.

Chapter One: Introduction

This chapter gives an overview of this research and lays the foundation for this dissertation's argument that society's inadequate understanding of judicial roles affects and influences judicial performance, social interests, and eventually democratic development. This chapter comprises definitions of key terms; it describes the Nigerian society; it gives historical perspectives of the Nigerian judiciary; and discusses the impact of history on the role of the Nigeria's judiciary.

Definition of Terms³²

Often, some judges are inadvertently under the impression that litigants understand the procedures and terminologies that courts apply when judging. Some judges often ignore the fact that the public they serve know little or nothing about courts and the law. The public is often oblivious that the context of words in judicial/legal parlance sometimes differs from their regular usage in society. Also, Nigeria's judicial system is a hybrid of traditional African pre-colonial practices, the English common law, and parts of the American judicial system, making it expedient to define specific terminologies and clarify the meanings of unique words within the Nigerian context.

The keywords of this research are role, judiciary, Nigeria, democracy, and dilemma.

³² My choice of words will be as elementary as possible because society is the first target audience for this research. Therefore, the reasonable man on the streets can read this dissertation and understand the judiciary more than what the media depicts.

Other relevant terms/concepts that equally give a better understanding of the topic are judge,³³ judicial discretion, judicial review, judicial activism, judicial precedent, judicial independence, and society (Nigeria). Where necessary, I will give brief histories of these terminologies.³⁴

The English language is one of semantics. With the socio-technological advancements across the world, words now carry different meanings. In different nations, people interpret these words differently under different circumstances. Depending on the usage contexts, some words connote their original, historical, or legal meanings. Thus, one cannot ignore the importance of precision in legal writing. Therefore, this section is vital for better comprehension of this research to avoid any misconceptions or misrepresentations in effectively communicating this dissertation's intent.³⁵

Role

The word "role" means different things to different people. To some, it means responsibility, function, duty, obligations, assignments, norms, and values. Generally, it is

³³ Sometimes the word court and judiciary are used interchangeably.

³⁴ This explanation will achieve my goal to steer further research, as I believe inquiries in these areas are gray. Very few people write about the judiciary worldwide. Moreover, in particular, very few judges have time or wish to write about their roles. It may have something to do with the conservatism or ethics of the career.

³⁵ The definitions are also to give direction to the larger topic.

used interchangeably with responsibility, duty, or functions. Role is a word that people use generically. Roget's International Thesaurus defines the role as "capacity, function, occupation."³⁶ These words that define role reflect the widely accepted meaning of role in Nigerian society. Webster defines role as a character assigned or assumed, a function or part performed primarily in a particular operation or process.³⁷ Role is also defined as a proper or customary function.³⁸

From a sociological context, role is the rights, obligations, and expected behavior pattern associated with a particular social status.³⁹ An appropriate definition of role, in the context of this dissertation, is that role is a socially expected behavior pattern usually determined by an individual's status in a particular society.⁴⁰ The emphasis in both definitions of role is on personal status versus social status; while a person defines the role in one instance, society defines role in another instance. Accordingly, both the judge's status and the people/social expectations define or should determine Nigeria's judiciary roles.

³⁶ Roget's International Thesaurus (fourth ed) R.L. Chapman, R.L. (New York: Harper & Row Publishers).

³⁷ Merriam-Webster Dictionary.

³⁸ Dictionary.com

³⁹ Dictionary.com

⁴⁰ Ibid

These judicial roles mean more than duties, responsibilities, or statutory stipulations. Therefore, for this dissertation's purpose, I define the role of the judiciary as a combination of judicial powers/jurisdiction, judicial duties, routines, principles, norms, ethical conduct—all characterized as socially expected behavior patterns of judges in society.

Judiciary

Webster dictionary defines judiciary as a system of courts of law, the judges of these courts, and a branch of government in which judicial power is vested.⁴¹ It is also the branch of government responsible for interpreting laws and administering justice.⁴² According to Duru, the judiciary is the government arm, which in a democratic system is vested with judicial power to construe and apply the law.⁴³ In Nigeria, judiciary also means courts, judges, or a body of judges. Judiciary and courts are often used interchangeably.

Contrary to some arguments, judiciary in Nigeria does not consist of the bar/lawyers;⁴⁴ neither is it made up of the police or the prison system. Although these

⁴¹ Merriam–Webster

⁴² Black's law Dictionary: 924

⁴³ Duru, Oyekachi Wisdom “The Role and Historical Development of the Judiciary in Nigeria” (2012)
https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwjLnoPgcToAhUDF6wKHV5wBoMQFjAAegQIARAB&url=https%3A%2F%2Fpapers.ssrn.com%2Fso13%2FDelivery.cfm%3Fabstractid%3D2142928&usg=AOvVaw1euM9Y5rw6aut79L_PTv5X

⁴⁴ Ibid

personnel and institutions are actors in the judiciary/the court system, they do not make up the judiciary. The judiciary is made up of judges and only judges. Judges represent the judiciary, as there is no judiciary without judges. In other words, the judiciary is an institution of judges with both adjudicatory and administrative roles. The judges' collective actions impact the social perception of the judiciary, so the collective of Nigerian judges make up the Nigerian judiciary.

The judiciary is a system of judges and the individual judge who adjudicates and settles conflicts according to the law, in the interest of the people of the Federal Republic of Nigeria. The Nigerian Judiciary comprises one supreme court in the Federal Capital Territory of Nigeria, Abuja, courts of appeal divisions, state and federal high courts, sharia and customary courts, national industrial courts, magistrate and area courts, all in designated states/jurisdictions across the country.⁴⁵

Judge

This word judge is both a noun and a verb. First as a verb, it means to have or develop an opinion about something or someone, usually after careful thoughts.⁴⁶ It also means to decide the winner or results of a competition.⁴⁷ It is the verb judge that

⁴⁵ See discussion on the history of the Nigerian judiciary on page 52.

⁴⁶ Cambridge dictionary

⁴⁷ Ibid

implies the role of judges. As a noun, a judge is “a public officer, appointed to preside and administer the law in a court of justice. A judge is also the person in control of proceedings and the decision on questions of law or discretion.”⁴⁸ Judges are often also called triers of facts, the court or the bench.⁴⁹ Since a body of judges and courts make up the judiciary, it is safe to conclude that the judiciary is analogous to judges. According to Ebiowei Tobi (JCA), “...a court is the person officially assembled under the authority of law at the appropriate time and place, for the administration of justice. It can be an official assembly, legally met together for the transaction of judicial business. It can also be referred to as a judge or judges sitting for the hearing or trial of cases.”⁵⁰

A more comprehensive definition of judge should accommodate sociological factors from socio-judicial interactions and experiences between the public and various courts, Accordingly, I define judge as a public officer appointed by the government (or elected by the people), with powers to adjudicate disputes, decide litigated questions, hear and determine social, political, economic, cultural, and legal matters with reasonable

⁴⁸ Black’s Law Dictionary, (2nd ed).

⁴⁹ Ibid: 916

⁵⁰ Justice Ebiowei Tobi “Overcoming Long/Unnecessary Court Adjournments – My Thoughts”, Delivered at the Stakeholders Roundtable on Justice Reform in Delta State (March 6, 2018).

discretion for the ultimate benefit and interest of society.⁵¹ Before I proceed further, I will take a necessary detour, as I believe that it is fundamental to state for this research, that judge also includes magistrates in the Nigerian context. This clarification is necessary because the Nigerian judiciary does not consider magistrates as judges/judicial officers, even though magistrates perform similar roles and some regions call them *Adajo*, meaning judge in Yoruba language.

Judicial Discretion

Judicial discretion, or legal discretion, is the exercise of judgment by a judge or court, based on what is fair under the circumstances and guided by law's rules and principles. According to the Black's Law Dictionary, judicial discretion is the power of the court to act unhampered by legal rule.⁵² Judicial discretion is also the power of the court to grant a remedy or admit evidence or not as the court thinks fit.⁵³

Every judge applies a level of discretion in decision making, but the levels of

⁵¹ My socio-judicial theory inspired this definition.

⁵² Black's Law Dictionary (94th ed) p. 553
<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjfg6mo2ZLwAhXC454KHeALCvQQFjABegQIBBAD&url=https%3A%2F%2Fwww.latestlaws.com%2Fwp-content%2Fuploads%2F2015%2F04%2FBlacks-Law-Dictionary.pdf&usg=AOvVaw1oqs2znSg5-urKnvDIRmJ8>

⁵³ Oxford Dictionary of law (9th ed.) 2008. Oxford University Press. Print ISBN-13: 9780198802525. opcit: 271

discretion may differ from one judge to another. The exercise of judicial discretion embodies the crux of judges' decision making, and it constitutes a primary and exclusive place in judges' roles. Many rules of procedure and evidence provide for some element of discretion.⁵⁴ As my thesis states, the act of judging is one of discretion — it is primarily the exercise of judicial discretion as judges interpret or review statutes.⁵⁵ The complexity of the Nigerian society makes the exercise of judicial discretion an extremely necessary and intricate affair. It also makes it challenging for judges because judicial discretion is not straightforward, its application is often relative.⁵⁶ In *Folorunsho v Folorunsho*,⁵⁷ the Court said judicial discretion applies to the discretionary action of a judge, bound by the rules and principles of law, and not arbitrary, capricious, or unrestrained. So, judicial discretion is either fettered/restrained or unfettered/unrestrained.

Judicial Dilemma

A dilemma is simply any difficult or perplexing situation or problem.⁵⁸ It is usually an unpleasant or undesirable choice, a situation or a problem involving such

⁵⁴ Ibid

⁵⁵ Ari Tobi-Aiyemo. opcit

⁵⁶ It differs from one judge to another judge.

⁵⁷ *Folorunsho v Folorunsho* (1996) 5 NWLR (pt450) 612 at 620, G-H

⁵⁸ Dictionary.com

difficult choice; a difficult or persistent problem or an argument presenting two or more equally conclusive alternatives against an opponent.⁵⁹ It is also a situation requiring a choice between equally undesirable alternatives. So, judicial dilemma is a situation where judges, in the act of judging or exercising discretion, face two conflicting or equally desirable alternatives to achieve justice in a case but get caught between law and morals, which may mean injustice to either of the parties and to society at large.

Judicial Precedent

The doctrine of judicial precedent is the foundation upon which the Common Law system exists in Nigeria. Judicial precedent was not part of Nigeria's traditional legal system; however, it is one of Nigeria's oldest legal principles inherited from the English legal system. The doctrine of judicial precedent is often used interchangeably with *stare decisis*, as the same principles apply to both concepts in Nigeria. Although these principles overlap, there is a slight difference. While judicial precedent means that previous judicial decisions and laws embedded therein are followed by lower courts,⁶⁰ *stare decisis* means to adopt and apply principles of law that have already been decided and not deviating even

⁵⁹ Merriam-Webster

⁶⁰ E.A. Ikegbu, S.A. Duru, E.U. Dafe, "The Rationality of Judicial Precedent in Nigeria's Jurisprudence." *American International Journal of Contemporary Research* Vol. 4, No. 5 (May 2014) 150

if they do not align with a judge's decision.⁶¹ This principle directs courts to stand by their decisions and those of their predecessors, especially decisions of superior courts, no matter how wrong the decisions appear and no matter the injustice that their application may inflict on parties.⁶² According to Ogbuagu, JSC *stare decisis* means to abide by former precedents where the same points come again in litigation. It presupposes that the law has been solemnly declared and determined in the former case. So, the judges of subordinate courts cannot change what has been determined. Thus, under the doctrine of *stare decisis*, lower courts are bound by the theory of precedent.⁶³ The doctrine of *stare decisis* is an indispensable corollary to judicial precedent, while the doctrine of judicial precedent is dependent on settled judicial hierarchy, as decisions of higher courts are generally binding on lower courts.⁶⁴

The general principle in Common Law systems, like Nigeria and the U.S.A, is that similar cases should be decided to give similar and predictable outcomes. The principle of precedent is the mechanism by which we attain that goal. So, courts are generally required

⁶¹ Ibid: 156

⁶² Taiwo Osipitan, "Supreme Court of Nigeria and Stare Decisis. (University of Lagos, Nigeria, 2018).

⁶³ *Osakue v F.C.E., Asaba* (2010) 10 NWLR (Pt. 1201) at P. 34.

⁶⁴ George. A. Oguntade *Justice and Lawyering: Preserving Nigeria's Nascent Democracy* (Lagos. Nigeria, Adroit Global Concepts Ltd, 2020) 4.8

to abide by precedent and not to counter the status quo. However, the exception to the general rule as the Nigerian Supreme Court states is that where it is necessary, courts should not hesitate to overrule previous decisions and depart from previous decisions.⁶⁵ The Apex Court also states that it can overrule its own decisions where its previous decision was given wrongly or reached *per incuriam*.⁶⁶

Precedent has come a long way in the history of Nigeria's judicial practice, and it is here to stay. Even though it frustrates the place of discretion fundamentally, nothing can take the place of precedent in Nigerian courts. However, despite its fundamentally indispensable value to case law in Nigeria's legal/judicial order, unjustified adherence to precedent stifles the advancement of justice or the essence of judging in Nigeria.⁶⁷ Nonetheless, courts have the opportunity to reform precedent through the medium of judicial review.

Judicial Review

Judicial review is a court's power to analyze legal/administrative actions or decisions, or a court's power to invalidate the other branches of government (i.e., legislative and executive actions) according to constitutional dictates. It is also the court's

⁶⁵ Johnson v Lawanson (1971) 1 All NLR P. 56; Maclean v Inlaks (1980) 8-11 SC 1.

⁶⁶ Ibid

⁶⁷ Ari Tobi-Aiyemo, "The Act of Judging...", opcit: 31

review of a lower court's or an administrative body's factual or legal findings.⁶⁸ Through judicial review, courts control individual decisions taken by administrative and other decision-making bodies.⁶⁹ Friedman defines judicial review as the power of courts to measure, against the constitutional standard, what other branches of government do.⁷⁰ According to Professor Nwabueze, “Judicial review is the power of the court in appropriate proceedings before it to declare a governmental measure either contrary or in accordance with the Constitution or other governing law, with the effect of rendering the measure invalid or void or vindicating its validity...”⁷¹ In general terms, judicial review refers to judicial control of the government's other arms.⁷² I define judicial review as the judge’s role in governance and society that determines and legalizes administrative actions and laws as constitutionally democratic.

Judicial review influences judicial advancement and democratic development in

⁶⁸ Ibid: 924

⁶⁹ Ibid: 221-222

⁷⁰ Lawrence, M. Friedman, *Law in America, A Short History*. (New York: Modern Library, 2004) 11

⁷¹ Ben. O. Nwabueze, *Judicialism in Commonwealth Africa* (London: C. Hurst & Co. Ltd., 1977) 229.

⁷² C.A. Ogbuabor “Expanding the Frontiers of Judicial Review in Nigeria: The Gathering Storm” *The Nigerian Juridical Review*, Vol. 10 2011-2-12) 4.

many countries across the world. After World War II, many countries felt intense pressure to adopt judicial review. Although judicial review had been relatively uncommon before World War II, by the early 21st century, more than 100 countries had expressly incorporated judicial review into their constitutions.⁷³ Judicial review is not incorporated into the constitutions of Nigeria and the United States. Technically, it is not supposed to be operative in both Nigeria and the U.S. courts. However, the idea of judicial review was established from the influence of U.S. constitutional ideas in the famous case of *Marbury v Madison*.⁷⁴ In Nigeria, judicial review exists in controversy, as the courts adhere to the traditional form of interpreting statutes according to the letter, yet some judges deviate from the conventional method of interpretation to a more realistic form according to social interests and principles.

Nonetheless, judicial review has indeed expanded the power of Nigerian judges like it did American judges. It appears to be what links judges to social change, hence the assertion that judicial review is the mechanism by which judges make policies and laws.⁷⁵ Most judges avoid taking the route of this controversy of judicial review, even if it is

⁷³ According to encyclopedia Britannica, some observers concluded that the concentration of government power in the executive, substantially unchecked by other agencies of government, contributed to the rise of totalitarianism regimes in Germany and Japan in the era between World War 1 and World War II.

⁷⁴ *Marbury v Madison*, (1803) 5 U.S. 137

⁷⁵ Detailed discussion on this claim is in chapter ten.

required to attain justice in the case. One of the reasons is because a certain level of judicial review is termed or interpreted as judicial activism.

Judicial Activism

Judicial activism is a mechanism to the exercise of judicial review or a description of a particular judicial decision. A judge is generally required to decide constitutional issues and invalidate legislative or executive actions.⁷⁶ Judicial activism has no precise definition. It operates as a judicial decision or philosophy, but its use can be confusing because it bears several meanings, depending on the context. Even if authors agree on a meaning's intention, they will frequently not agree on whether it correctly describes a given decision.⁷⁷ Some scholars argue that a judge is a judicial activist by merely overturning a prior decision.⁷⁸ Others argue that since the primary function of the court is to re-interpret elements of the constitution and to assess the constitutionality of laws, such actions could

⁷⁶ Kermit Roosevelt "Judicial activism." Encyclopedia Britannica, October 16, 2019.

<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=11&cad=rja&uact=8&ved=2ahUKEwiz4bbjwLfoAhWaPM0KHbwxCrMQFjAKegQIAhAB&url=https%3A%2F%2Fwww.britannica.com%2Ftopic%2Fjudicial-activism&usg=AOvVaw3YnidREdAEP6mtS6fSt2Eq>

⁷⁷ Ibid

⁷⁸ Constitutional scholar David Strauss defined judicial activism to take these forms: The act of overturning laws as a constitutional, overruling judicial precedent, and ruling contrary to a previously issued constitutional interpretation.

<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwixmNLAh4HsAhUKd98KHT0ICCMQFjANegQIBRAB&url=https%3A%2F%2Flegaldictionary.net%2Fjudicial-activism%2F&usg=AOvVaw13TuT5idxThzJ-SJofX5Lo>

not be called judicial activism.⁷⁹ Thus, the meaning of judicial activism will keep evolving with the introduction of new judicial jurisprudence.

A clearer definition is that judicial activism is the practice in the judiciary that relates to protecting or expanding individual rights through decisions that depart from established precedent.⁸⁰ It is a practice that is independent of or in opposition to supposed constitutional or legislative intent.⁸¹ I believe that judicial activism is a judge's subjective interpretation of the law, often based on social empathy and socio-judicial perspectives of the constitution and other statutes. It often includes judicial rulings that are on socio-judicial perceptions and personal opinion rather than on existing law.

The concept of judicial activism in Nigeria has its origin in English Common law, and particular influence from the judicial practice of the U.S.A. that initially started the debate about the constitutional review in terms of broad versus strict interpretation of the constitution.⁸² Since the enactment of Nigeria's 1963 Constitution and under the 1979 and 1999 Constitutions, the judiciary has been established as an independent branch of

⁷⁹ See fn 64

⁸⁰ Merriam Webster Law

⁸¹ Ibid

⁸² Ibrahim Imam "Judicial Activism in Nigeria: Delineating the Extend of Legislative-Judicial Engagement in Law Making." *International and Comparative Law Review*, vol 15, no. 1, (2015):109-127. DOI:10.1515/iclr-2016-0030, at p. 112

government in Nigeria's constitutional democracy.⁸³ Specifically, after the declaration of the Federal Republic of Nigeria as an independent state, the Supreme Court of Nigeria exhibited forms of judicial activism in the cases of *Adegbenro v Akintola*⁸⁴, *William v Majekodunmi*⁸⁵, *Council of University of Ibadan v Adamolekan*⁸⁶, and *Lakanmi v Attorney General of Western Nigeria*⁸⁷. These cases established what I call socio-judicial breakthroughs in Nigeria.⁸⁸ In the U.S.A., the first Supreme Court bench identified with judicial activism was the Warren Court.⁸⁹ Between 1953 and 1969, while Chief Justice Earl Warren presided over the Supreme Court, the court made some of the most famous legal decisions in U.S. history, such as *Brown v. Board of Education*⁹⁰, *Miranda v. Arizona*⁹¹,

⁸³ Ibid

⁸⁴ *Adegbenro v Akintola* (1962) 1 All NLR 442

⁸⁵ *William v Majekodunmi* (1963) 2 SCNLR 26

⁸⁶ *University of Ibadan v Adamolekan* (1967) NSCC 210

⁸⁷ *Lakanmi v Attorney General of Western Nigeria* (1970) NSCC 143

⁸⁸ This is a practice that combines social and judicial factors for the benefit of society.

⁸⁹ The Warren Court created landmark decisions that had a large impact on America's socio-legal jurisprudence in the 1950s and 1960s.

⁹⁰ *Brown v. Board of Education*, 347 U.S. 483 (1954).

⁹¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

Engel v. Vitale,⁹² and *Gideon v. Wainwright*.⁹³ The records state that American historian Arthur M. Schlesinger, Jr., introduced the phrase *judicial activism* in a 1947 article in *Fortune Magazine*.⁹⁴

The fact that judicial activism does not have a consistent definition makes it difficult (in some instances), to specifically identify an activist judge. Spitzer opines that the term judicial activism relies heavily on how someone interprets the constitution, as well as someone's opinion on the role of the Supreme Court in the separation of powers.⁹⁵ Spitzer also mentioned procedural activism as a form of judicial activism,⁹⁶ such as when a judge's ruling addresses a legal question beyond the scope of the legal matters at hand.⁹⁷

⁹² *Engel v. Vitale*, 370 U.S. 421 (1962)

⁹³ *Gideon v. Wainwright*, 372 U.S. 335 (1963)

⁹⁴ *Encyclopedia Britannica*, opcit

⁹⁵ Elianna Spitzer, "What is Judicial Activism?" (updated June 22,2020)
<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=23&ved=2ahUKEwiz4bbjwLfoAhWaPM0KHbwxCrMQFjAWegQIAxAB&url=https%3A%2F%2Fwww.thoughtco.com%2Fjudicial-activism-definition-examples-4172436&usg=AOvVaw10qkX8z3ffNkxFf2IuIyA1>

⁹⁶ *Ibid*

⁹⁷ One of the most famous examples of procedural activism is *Scott v. Sandford*. The plaintiff, Dred Scott, was a slave in Missouri who sued his master for freedom. Scott based his claim to freedom on the concept that he had spent ten years in a non-slave state, Illinois. Justice Roger Taney delivered the opinion on behalf of the court. Taney wrote that the court did not have jurisdiction over Scott's case under Article III of the U.S. Constitution. Scott's status as a slave meant that he was not formally a citizen of the United States and could not sue in federal court. Despite ruling that the court did not have jurisdiction, Taney continued to rule on other matters

Unfortunately, the Nigerian judiciary frowns on judicial activism because it is seen as a threat to precedent. Opposing judicial activism is a significant threat to judicial independence⁹⁸ because it restrains the judge from acting in the just interest of the society.

Judicial Independence

Judicial independence is another concept that is often misconstrued. In layman's terms, judicial independence simply connotes judges' / the judiciary's liberty to perform their diverse roles and responsibilities to uphold justice. In addition, judicial independence is, to a certain extent, the judge's ability to deviate from the status quo or precedent on justifiable grounds. An aspect of judicial independence is where judges consider the surrounding circumstances of a case and decide that the best justice will be served in the case if they deviate from the established precedent. To an extent, judges should enjoy their independence as individuals with legal/judicial minds that have been tried and tested by the governing bodies that appointed them into office.

The judge's independence should also reflect the independence of the institution of the judiciary that comprises different judges in the court system. In other words, one judge's independence reflects the independence of all judges. The judiciary is the fabric that

within the Dred Scott case.

⁹⁸ Section two contains detailed discussions on the dilemma this term or concept constitutes in the judiciary.

upholds democracy. Hence if judges and the court system are not free from external, legislative, governmental, or societal influence, the justice fabric becomes weak and eventually tears up the foundation of democracy. Judicial independence defines an ideal democracy. The near impossibility of achieving complete independence of the judiciary in Nigeria constitutes a judicial dilemma and eventually makes democracy in Nigeria a myth.

Democracy

Democracy means government by the people or rule of the majority. Democracy is a government in which the supreme power is vested in the people and exercised by them directly or indirectly through a system of representation usually involving periodically held free elections and a political unit with a democratic government.⁹⁹ The most accepted definition of *democracy* is Abraham Lincoln's definition — democracy is the government of the people, by the people, and for the people.¹⁰⁰ I define democracy as the contributory power of the people to rule over their affairs and enjoy the benefits of such a rule. Therefore, democracy is all about the people.¹⁰¹

Society

⁹⁹ Merriam-Webster

¹⁰⁰ President Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863), in *This fiery trial: the speeches and writings of Abraham Lincoln 184, 184* (William E. Gienapp ed., 2002).

¹⁰¹ I believe that judicial interpretation should be in the ultimate interest of the people in a society.

Society is a body of individuals living as members of a community or the body of human beings generally associated or viewed as community members.¹⁰² A society is made up of an organized group of persons associated together for religious, benevolent, cultural, scientific, political, patriotic, or other purposes. Society is also a highly structured human organization system for large-scale community living that usually furnishes protection, continuity, security, and national identity. Such a system is usually characterized by its dominant social, economic, cultural, or political class or form.¹⁰³ A more appropriate definition of *society* for this research is that society is a community, nation, or broad grouping of people having common traditions, institutions, and collective activities and interests.¹⁰⁴ In other words, society is a large group of people interacting in a defined territory sharing a common culture.¹⁰⁵ It is part of a community, a unit distinguishable by particular aims or standards of living or conduct, or a social circle/a group of social circles, having a marked identity.¹⁰⁶ For example the people, the culture, the government, the media, various organizations and the judiciary make up the Nigerian society.

¹⁰² Dictionary.com

¹⁰³ Ibid

¹⁰⁴ Merriam-Webster Dictionary

¹⁰⁵ Sociologydictionary.org

¹⁰⁶ Ibid

Society is the essence of democracy, and the judiciary is the primary agent of democracy.¹⁰⁷ The courts exist for society. So, if the public does not benefit from the impact of courts, then courts are not relevant, which is not (and should never be) the case. So, the public should benefit from the impact of courts. The impact of judicial pronouncements on society produces social change and distinguishes judges (who are also human beings) from computers (machines).¹⁰⁸

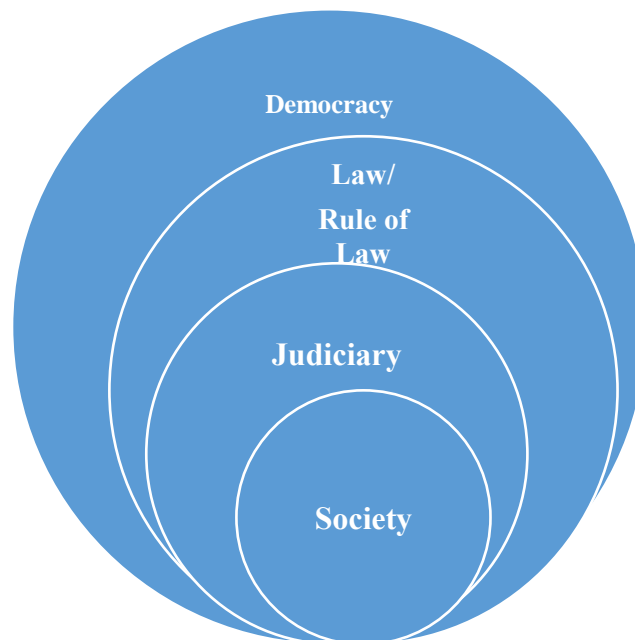


Diagram 1: The Connection between Judiciary and Democracy

¹⁰⁷ See my definition of democracy in page 46.

¹⁰⁸ The ideal and real culture are sociological concepts. The real culture includes the practices and norms that culture follows. The real culture includes the culture that exists in the present and on-going practice or way of life. The ideal culture includes the practices, values, or norms that society should follow or desire to achieve. It refers to those goals that society considers ideal or worth aiming for.

The Connection Between Judiciary and Democracy¹⁰⁹

This onion-ring diagram's outer layer shows democracy as the bigger picture and society as the substratum of democracy. The rule of law and the judiciary eventually connect society to democracy. The next layer from outside the ring is the rule of law — it characterizes democratic governance in any society. The connection between the judiciary and democracy is the rule of law that the judiciary upholds. Diagram one also shows society as the smaller or inner circle, the somewhat ignored piece in democratic governance. Just like society, judiciary is another hidden or ignored character of the democratic circle and cycle.

In a democracy, the judiciary transmits the rule of law to society. Thus, the judiciary is supposed to act as an intermediary between the law/the rule of law and society. Unfortunately, this is not always the case in Nigeria. The introduction of the British system of justice inadvertently disconnected the Nigerian judiciary from Nigerian society's traditions and culture.¹¹⁰ Hence the court system in Nigeria is more foreign than indigenous. Nigeria's principal courts operate the British Common Law system,¹¹¹ while

¹⁰⁹ This diagram illustrates the connection between democracy and society. It attempts to illustrate a spiral relationship or connection between society, judges, law, and democracy. It presents an incomplete picture of what should exist and not necessarily what exists in essence.

¹¹⁰ The introduction of English law as a source of Nigerian law displaced customary laws.

¹¹¹ The principal courts are the Supreme Court, the courts of appeal, the high courts and magistrate courts

the traditional courts that are now the minority courts maintain some aspects of cultural practice with the foreign procedure.¹¹²

Brief History of the Nigerian Society

Nigeria is a large country along the Gulf of Guinea. She occupies a vast region in Western Africa and is the seventh most populous country in the world.¹¹³ She has a territorial size of 923,768 square kilometers (almost twice the size of the state of California).¹¹⁴ She is Africa's most populous country, with a population estimated at about 214,028,302, as of July 2020.¹¹⁵ Nigeria is a multinational state of four major regions, the North, South, East, and West that were subsequently divided into six geo-political zones. Nigeria has more than 250 ethnic groups that speak over 400 distinct languages with a wide variety of cultures. The three largest ethnic groups in Nigeria are the Yoruba in the western region, the Hausa-Fulani in the northern region, and

¹¹² The traditional courts include the customary courts, area courts, sharia court (to an extent)

¹¹³ National Planning Commission, Annual Performance of the Nigerian Economy 2010, full text available at: <http://www.npc.gov.ng/vault/ECONOMY.pdf>

¹¹⁴ Ogunfolu Adedokun Olatokunbo, "Can Socioeconomic Rights Ameliorate the Accountability Deficit in the Nigerian State", PhD Diss. (Cornell University, 2013)
<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiMmJT Csv7qAhUolHIEHXrGBdYQFjARegQIChAB&url=https%3A%2F%2Fcommons.cornell.edu%2Fbitstream%2Fhandle%2F1813%2F34197%2Fao26.pdf%3Fsequence%3D1%26isAllowed%3Dy&usq=AOvVaw341nGE8LjCZozyFDFhKofh>

¹¹⁵ Africa: Nigeria – (April 27, 2021) The World Factbook, Central Intelligence www.cia.gov

the Ibo in the eastern region. These regions together comprise 60% of Nigeria's population. Nigeria's official language is English, so all courts communicate in the English language. Nigeria is a circular state that guarantees freedom of religion. The two major religions are Islam and Christianity. Muslims are mostly from the northern region, and Christians are mostly from the southern region.

Nigeria is a constitutional democracy. She was a British colony until her independence in 1960. After independence, Nigeria spiraled through checkered political eras of coups and military rule until 1999. Then Nigeria adopted a new constitution in 1999 and transitioned to the present civilian administration, which is her most consistent civilian rule since her independence.¹¹⁶ The uniqueness of the Nigerian society impacts Nigeria's democracy and defines the judiciary's/judges' roles.¹¹⁷

Furthermore, Nigeria is Sub Saharan Africa's largest economy. She has lustrous vegetation and agricultural resources, yet she relies extensively on oil as her primary source of foreign exchange earnings and government revenue. Unfortunately, over-reliance on oil revenue has caused socio-economic/socio-political unrest and security challenges in Nigeria.¹¹⁸ The oil revenues have been squandered through decades of corruption,

¹¹⁶ Ibid

¹¹⁷ I will propose that the nature of Nigeria should redefine the role of judges in society.

¹¹⁸ Ari Tobi-Aiyemo, "Chapter Nineteen– Security and the Rule of Law in Nigeria: The Role of the Nigerian Judiciary" Routledge Handbook on Democracy and Security. (1st Ed) Weinburg, L,

mismanagement, disregard for rule of law, and human rights abuses. At different stages in over fifty years of independence, Nigeria experiences long-standing conflicts from oil exploration and exploitation in the Niger Delta region, ethnic and religious tensions, terrorism, and kidnappings worldwide.¹¹⁹ Therefore, her government struggles to institutionalize democracy and reform her petroleum-based economy.

Nigeria's democratic struggles and diverse socio-economic issues threaten the fundamentals of the rule of law, stifle judicial independence, affect judicial decisions, and thereby trample on the essence of democracy. Thus, Nigeria's judiciary faces the daunting task of upholding an abused democracy, especially as justice in Nigeria is often in the eyes of the beholder (the public/the society).¹²⁰ Accordingly the Nigerian society impacts judicial roles. In one of my informant interview sessions, Informant 4 said: "... You must take your social environment into consideration to determine what is proper and what is not proper. So, you must know what is right or wrong in the environment which you find yourself as a judge."

Brief History of the Nigerian Judiciary

The Federal Republic of Nigeria's judicial system is a hybrid of the English,

Francis, E, Assoudeh, E. (eds) (London, Routledge, December 22, 2020.17

¹¹⁹ Ibid

¹²⁰ The interpretation of justice takes diverse forms based on diverse, evolving social situations.

American, and pre-colonial judicial systems. The history of Nigeria's judicial system dates back to the traditional colonies, which eventually formed Nigeria's territory. Before the British established common law principles of adjudication in 1861, traditional Nigeria made use of customary arbitration to resolve disputes and maintain order in society.¹²¹ This traditional adjudication system evolved over three political eras: the pre-colonial, the colonial, and post-colonial eras, which eventually established the Nigerian judiciary.¹²²

Pre-Colonial Era

Before the colonization of the entity now known as Nigeria, numerous indigenous tribes, groups, or territories had their own governance and judicial administration systems. Traditional courts applied their respective modes of judging; traditional rulers presided over disputes and resolved them according to the land's indigenous governing laws (i.e., laws developed from the customs of the people). This system of justice was informal yet effective. The traditional courts operated a trial by ordeal system that produced a beneficial criminal justice system.¹²³ The arrival of the British brought a more contemporary adjudicatory system to the local communities, which eventually led to jettisoning the traditional trials by ordeal and other customary practices. For convenience of judicial

¹²¹ Niki Tobi, *opcit*: 1

¹²² *Ibid*

¹²³ Taslim. O. Elias, *Nature of African Customary Law*. (London, Manchester University Press (1952): 234. See also P.A. Talbot, *The Peoples of Southern Nigeria* 111. pp 622-3.

administration, the traditional societies were divided into chiefly¹²⁴ and chiefless¹²⁵ societies; both types influenced the style of judging in traditional courts.¹²⁶

The traditional system of judging was essentially collectivist while the English system was and still is individualistic.¹²⁷ Justice at the time of traditional systems was equated to moral standards in the society and not enacted or perceived in abstract terms.¹²⁸ Hence, traditional systems ignored (legal) technicalities. For example, the rigid standard of proof in the Evidence Act does not necessarily apply to proceedings in traditional courts (Customary or Area Courts), but they are only to be guided by it.¹²⁹ Customary courts were not established to administer technicalities of law but rather the moral content of the law. In other words, customary courts were essentially moral courts that based their decisions on local concepts of morality and also enforced the moral values of the local people through

¹²⁴ The chiefly societies comprised the Hausa/Fulani communities (in the Northern region) and the Yoruba/Benin communities (in parts of the Southern region).

¹²⁵ The chiefless societies were the Ibos, also from the southern province.

¹²⁶ Ibid

¹²⁷ Niki Tobi, *opcit*: 7

¹²⁸ Ibid

¹²⁹ Jacob Idem, Udosen, "The Judiciary and the Role of Customary Courts in Nigeria" *Global Journal of Politics and Law Research* Vol. 5, No. 6, (November 2017): 34-49, . European Center for Research Training and Development UK (www.eajournals.org) P. 41

the decisions they reached.¹³⁰

Colonial Era

The traditional system of justice was mainly based on unwritten laws. It applied to both the indigenous and non-indigenous people. Eventually, it became difficult for non-natives to understand the traditional judging system, especially as foreign trade ties increased between local and European traders in Nigeria. 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.¹³¹ Subsequently, when the 19th century courts of equity were established, they focused on commercial relations and not governance or justice issues, like the consul courts.¹³² This led to a divergence of the legal system. The British government annexed colonies that eventually became Nigeria in 1861, when the southern protectorate and the northern protectorate were amalgamated to form the entity now known as

¹³⁰ Ibid: 5

¹³¹ Edefe Ojomo, "History of the Nigerian Legal System" Introduction to Law, JIL 001 Lecture Notes. University of Lagos November 2012): 4

¹³² In other words, Century courts of equity assumed jurisdiction over trade disputes that were previously the role of consul courts, while the Consul courts heard cases of governance and justice issues.

Nigeria.¹³³

Upon colonizing Nigeria, the British system embraced and recognized society's interests, views, and culture. Thus, in the case of *Laoye & Ors. v Oyetunde*¹³⁴ 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 English law framework and jurisprudence, English judicial practice and principles appeared to have replaced traditional practice in many respects. Hence Nigerian courts today practice more of the British law and custom than the traditional values of morality. An example of such English influence on the courts is oath-taking or swearing in witnesses before evidence.¹³⁵

Post-Colonial Era

After Nigeria gained her independence from British rule in 1960, the political

¹³³ Niki Tobi, *opcit*

¹³⁴ *Laoye & Ors. v Oyetunde* (1944) A.C 170

¹³⁵ 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. These oaths were connected to ancestral spirits that the people before the traditional courts were more afraid of than the consequences of the imported written English laws.

structure experienced drastic changes, and the three government branches (i.e., the legislature, executive, and the judicial arms), changed. However, the judiciary was the only branch of government that maintained significant elements of British rule– the Common Law, while the legislature and executive arm of government embraced independence in the governance system. Hence, a federal supreme court was established as the highest court. Then the Privy Council, with High Court, magistrate courts, and customary or native courts in various regions (now known as states) were also created. Since Nigeria’s 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 offenders could not be convicted of an offense unless the offense existed under written law. The 1963 Constitution created the Supreme Court of Nigeria to replace the Privy Council. That was when the Supreme Court became the highest court in Nigeria. The 1963 Constitution also (allegedly) terminated Nigeria’s allegiance to British rule.¹³⁶

Accordingly, judges had somewhat established roles according to the Constitution to adjudicate disputes. In 1966, the military coup changed the governing structure in Nigeria and interrupted the judiciary's constitutional autonomy. Thus, instead of applying constitutional requirements/principles, judges had to interpret and apply decrees. The

¹³⁶ Niki Tobi opcit: 12

military government interfered with the liberty of judges to adjudicate according to constitutional requirements.¹³⁷ The Nigerian judiciary is structured to fit into the federal structure of the country with equal representation of all regions.¹³⁸ That means each state from the six geo-political zones/regions of Nigeria has quotas in the court system, and judges are appointed according to the respective quotas of each state/region.

The Constitutional Structure of Courts in Nigeria

The federal character of the Nigerian Constitution influenced the decentralization of the court system.¹³⁹ The Supreme Court is the highest court in Nigeria, often called the Apex Court. It has both original and appellate jurisdictions and is located in the Federal Capital Territory, Abuja.¹⁴⁰ Presently, the Nigerian Supreme Court has 15 justices, including the chief justice of Nigeria who is the head of all courts.¹⁴¹ As the final superior court of appeal, the Supreme Court of Nigeria's decisions are binding for all the other

¹³⁷ The Constitution that empowered the courts was suspended by the military decree.

¹³⁸ This means an equal number of courts and judges are represented from each of the six regions in the federal courts.

¹³⁹ The justices of the courts are appointed based on the regions their states of origin are located in. However, female judges can also be appointed based on their husband's state of origin.

¹⁴⁰ See sections 232 -233 of the 1999 Constitution, as amended.

¹⁴¹ Section 230 of the Constitution states the National Assembly can appoint such number of justices in the Supreme Court not exceeding 21.

courts.¹⁴² The Supreme Court hears appeals directly from the Court of Appeal. These appeals may either be cumulative appeals from the lower courts in the hierarchy or directly from the courts of appeal, as also a court of the first instance.¹⁴³ The Nigerian Supreme Court like its U.S.A counterpart is Nigeria's policy court.¹⁴⁴

Next in the hierarchy is the court of appeal with appellate and original jurisdictions.¹⁴⁵ This court is an intermediate court between the Supreme Court and all the other courts or tribunals. The Court of Appeal has seventeen judicial divisions across the country.¹⁴⁶ It hears appeals directly from any of the other lower courts that are also superior courts of record, i.e., the high courts (federal/federal capital territory and state high courts), national industrial court, customary court of appeal and sharia court of appeal.¹⁴⁷ These courts are all courts of coordinate jurisdiction following the court of appeal. The Constitution arranged them in the following order: the Federal High Court; the Federal

¹⁴² See section 233(1) of the Constitution.

¹⁴³ A court of first instance is usually a trial court or the court where the case was first mentioned or heard

¹⁴⁴ Informant 2 in discussion with the author April 2021

¹⁴⁵ See sections 239 (1) & 240 of the Constitution

¹⁴⁶ Abuja, Akure, Benin, Calabar, Ekiti, Enugu, Ibadan, Ilorin, Jos, Kaduna, Lagos, Makurdi, Owerri, Port Harcourt, Sokoto, Yola, Gombe.

¹⁴⁷ The Sharia court is the Islamic/religious court that hears matters relating to the Muslim religion.

Capital Territory High Court, Abuja; the State High Courts; National Industrial Court; Customary Court of Appeal of the Federal Capital Territory; Customary Courts of Appeal and Sharia Courts of Appeal of FCT; and Sharia Courts of Appeal. The above courts are also known as lower courts. They exercise mostly original jurisdiction and minimal appellate jurisdictions.¹⁴⁸

The federal and state high courts have coordinate jurisdictions. The former also exercise considerable appellate jurisdiction, like the customary courts of appeal and sharia courts of appeal.¹⁴⁹ These courts hear appeals from the lesser lower courts that were created by legislative power pursuant to section 6(5) of the Constitution. This section empowers the legislatures to establish other courts as may be required by law. Such courts are magistrate courts, district courts, area courts, customary courts, family courts, juvenile courts, corona courts, etc. The Constitution did not specifically establish these courts.¹⁵⁰ It is for this reason that the Nigerian judiciary does not consider magistrates as judges/judicial

¹⁴⁸ See sections 251, 154, 262, 267 & 272 of the Constitution

¹⁴⁹ See section 6(1) of the Constitution

¹⁵⁰ The 'superior' courts of record as stated in section 6(1) of the Nigerian Constitution are as follows: 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.

officers. Section 6(5) of the Nigerian Constitution is similar to Article III of the Constitution of the United States that established the Supreme Court of the U.S.A, and also grants Congress the option to establish “such inferior courts” as it sees fit.¹⁵¹

Although the Nigerian Federal Constitution is not modeled after the U.S.A. Federal Constitution, both Constitutions have similarities. The bifurcation of judicial jurisdictions in Nigeria was based on geographic/cultural alignments, similar to the history of the U.S.A.’s federal judiciary. Since its origins in 1789, the U.S.A.’s court system has embodied the federal character of the government as established by the U.S.A. Constitution. However, unlike the Supreme Court of Nigeria, the Supreme Court of the U.S.A. is the only court created by the Constitution.¹⁵²

The Impact of History on the Role of the Nigerian Judiciary

History contextualizes the role of the Nigerian judiciary, as the history of Nigeria affects the justice system.¹⁵³ No doubt, the historical context of judging in Nigeria has shaped the roles of the Nigerian judiciary. Across stages of Nigeria’s checkered history, the undefined roles of the judiciary/judges have metamorphosed. Judges in the pre-colonial era

¹⁵¹ See section 1, Article 3 of the American Constitution

¹⁵² Article III of the U.S.A. Constitution authorized Congress to pass laws establishing a system of lower courts.

¹⁵³ One can deduce (or should deduce) the role of any person, institution, document, organization, system, or government from their history.

executed the role of upholding traditional values, views, and morals. These customs formed the rule of law that guided the judges or elders/chiefs/alkalis. Hence the customary procedures they enforced were adequate because the judicial system based its *modus operandi* on cultural morals.

A contemporary Nigerian judiciary evolved in the colonial era. The courts of equity established a new judicial system—the English Common Law. They focused on commercial relations to tackle the traditional system's defects and accommodate foreign investors that did not understand the indigenous customs and tradition.¹⁵⁴ The establishment of the British courts accommodated the operations of the native courts, as long as they were not repugnant to natural justice, equity, and good conscience.¹⁵⁵ Although the introduced British legal system recognized and acknowledged the traditional system, English judicial practice and principles gradually replaced traditional practice in Nigerian courts. The colonial era created the title of judge. Thus, the traditional leaders in the various regions that eventually made-up Nigeria were known as judges because they practically enforced the same duties (i.e., settling disputes between individuals and communities). Accordingly, British courts governed the courts' jurisdiction (i.e., appeals from the courts in Nigeria went

¹⁵⁴ Edefe, opcit: 3-4

¹⁵⁵ Ibid: 4

to the judicial committee of the Privy Council) as a court of last resort.¹⁵⁶

Following Nigeria's independence, the interruption of military rule gave rise to executive lawlessness, ouster clauses, abuse of power, flagrant disregard for the rule of law, and the supreme military authorities eventually curtailed judicial independence.¹⁵⁷ Thus, the Nigerian judiciary adopted a somewhat defensive role. The courts were defensive of the rule of law, and despite the military decrees at that time, judges were still bold and courageous to make decisions that were anti decrees. Eso, JSC in *Governor of Lagos State v Ojukwu*¹⁵⁸ said, "It is a very serious matter for anyone to flout positive order of a court and proceed to taunt the court... The essence of the rule of law is that it should never operate under the rule of force or fear. The use of force... is an attempt to infuse timidity into court and operate a sabotage of the cherished rule of law. It must never be."

Furthermore, a crucial aspect of history that impacts judges' roles and that should indeed shape judicial discretion is the Constitution's preamble. The preamble of the 1999 Constitution depicts the spirit of the Constitution and presumably the Nigerian people.¹⁵⁹ The history of the judiciary is connected to the Constitution. History's impact on the

¹⁵⁶ Sani, A.M. "The Nigerian Judiciary, Trends Since Independence, p. 222

¹⁵⁷ Ibid: 223

¹⁵⁸ *Governor of Lagos State v Ojukwu* (1986) 1 NWLR 621

¹⁵⁹ The Constitution of a country, which governs the laws and government of any country, spans from that country's history.

judiciary evolved from pre-colonial through to post-colonial eras. The Nigerian judiciary has moved from the judicial system where traditional rulers and community heads conduct trials-by-ordeal to the strict legalistic court structure of trials by foreign deposition. Now the judiciary is at the borderline of constitutional democracy, with judges sometimes thinking outside the box. Hence, the English legal system's influence on our colonial judicial system transformed the role of judges from upholders of moral values (unwritten rules/laws) to guardians of a written constitution. This transformation introduced a more advanced and sophisticated style of judging with some influence of traditions, especially in sentencing when judges still adopt the retributive eye-for-an-eye method of punishment.

Although it seems like the courts have jettisoned the pre-colonial traditional way of settling disputes, the history, customs, and tradition of Nigeria consciously or unconsciously still impact judicial decisions even today. For instance, Nigeria did not adopt the jury system practiced in England. Judges, like pre-colonial chiefs/community heads, are in charge of the entire trial process, from the hearing to judgment and sentencing.

Chapter Two: The Roles of the Judiciary in a Democracy

An organization's purpose often dictates/defines the role of that organization and determines its impact on society. If judges fail to realize and fulfill their roles, they will inadvertently neglect, misuse or abuse their roles. Thus, judges must be clear with themselves and the public about their purpose and roles in order to effectively serve and impact the community. Similarly, when the community does not understand judges' roles, they often criticize the court system based on their unrealistic expectations, which eventually leads to a disregard of the value of courts in society. Hence, defining or redefining the roles of judges, as the case may be, is fundamental to the judiciary and the Nigerian society.

Therefore, this chapter comprises three parts. The first part examines the statutes or laws in Nigeria that govern the judiciary and directs judicial roles. The second part examines the social perception of judicial roles. The third part discusses the 'ideal' role, and the 'real' role of judges – analogous to the sociological/anthropological concepts of the 'ideal and real culture.'¹⁶⁰

Statutes that Attempt to Define the Roles of the Nigerian Judiciary

The review of the fundamental laws that govern judicial administration in Nigeria shows that no law expressly defines judges' roles in Nigeria. Hence, society presumes these

¹⁶⁰ In defining the real and ideal roles of the judiciary, I will classify them into social categories gleaned from case law and the personal experience of the author.

roles and interprets them based on the statutes that govern judicial administration.¹⁶¹ The vague stipulations give the impression that such important statute on judicial duties overlook the impact of judicial roles on judges conducts and duties. Thus, judges are left to ‘improvise’ and ensure that justice is not just done, but also seen to be done.¹⁶² This unclear stipulation creates a dilemma in adjudicating, as society may erroneously presume the judiciary's role from different judges' haphazard duties that may or may not indicate an appropriate perception.

The Constitution of the Federal Republic of Nigeria, 1999 (As amended 2011) (CFRN)

Section 6 of the 1999 CFRN established the Nigerian judiciary. It provides as follows¹⁶³:

....6(6) The judicial powers vested in accordance with the foregoing provisions of this section-

¹⁶¹ The first is the Constitution of the Federal Republic of Nigeria, 1999 (as amended in 2011), which establishes the judiciary. The second statute is the Code of conduct for judicial Officers, revised in 2016. This law outlines the ethical duties and conducts of judges. The Rules of the various courts also guide the practice and procedures in those courts: the Supreme Court Rules 1999, the Court of Appeal Rules 2016, the Federal High Court Rules 2019; and the Magistrate Court Rules 2009. All the High Courts of the 36 states have their respective Uniformed Rules, applicable to the states which are similar to the Federal High Court Rules. I am using the Federal High Court Rules here because it is the uniform rule used by inferior and superior courts when the need arises. For example, in election petition matters. Then there are subsidiary statutes like the Fundamental Rights (Enforcement Procedure) Rules of 1979, which expands on section 46 of the 1999 Constitution, on the enforcement of fundamental human rights.

¹⁶² *Oteju v Magma Maritime Services Ltd* (2000)1 NWLR (pt.640) 270 at 342, D-E

¹⁶³ I underlined for emphasis

(a) shall extend, notwithstanding anything to the contrary in this Constitution, to all inherent powers and sanctions of a court of law;
(b) shall extend to all matters between persons. or between government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person;
(c) shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution....

A relevant question from the above section is: what are these “judicial powers?” The CFRN doesn’t define “judicial powers,” so everyone presumes judicial powers only means to adjudicate. This presumption is correct to an extent, but judicial powers in a democracy include much more than adjudication. It has metamorphosed with socio-technological advancements, changes in society and democratic demands. These factors with socio-technological advancements in the Nigerian society redefines judicial powers and roles, into diverse dimensions. Thus, the courts seek assistance from other sources such as case law, foreign decisions, international treaties and the unique discretion of individual judges, to define “judicial powers.”¹⁶⁴

The court in *Ijezie v. Ijezie*,¹⁶⁵ defined judicial powers as the authority of the court to adjudicate upon and decide any matter that is within its jurisdiction. Also, in the U.S.A

¹⁶⁴ *Mbanefo v Molokwu & ORS.* (2008) LPELR-3696(CA) p. 36, Para A-E

¹⁶⁵ *Ijezie v. Ijezie* (2014) LPELR-23773(CA) p. 20, para-C-E

case of *Muskrat v United States*,¹⁶⁶ the court defined judicial powers as the right to determine actual controversies arising between diverse litigants instituted in courts of proper jurisdiction. In order to get a better understanding of how judicial powers defines the role of judges or vice versa, we will analyze section 6(6)(a) & (b) of the Constitution, which reads that judicial powers: “(a) shall extend, notwithstanding anything to the contrary in this Constitution, to all inherent powers and sanctions of a court of law;(b) shall extend to all matters between persons or between government or authority and to any person in Nigeria,” By section 6(6) (a), judicial powers shall extend to all inherent powers and sanctions of a court of law, notwithstanding anything contrary to the Constitution. This expression could also read “*in spite of any other provision of the Constitution contrary to section 6....*” In other words, section 6(6) (a) means that judicial powers shall extend to all inherent powers and sanctions of the court, regardless of any other provision of the Constitution that opposes or contradicts such powers. Another expression from subsection (6) (a) that explains judges’ role is “*inherent powers of the court.*” What are the inherent powers of the court? In *Universal Oil Ltd & Anor v. NDIC*,¹⁶⁷ the court defined inherent power (or jurisdiction) of court as that power which a court of law exercises to do substantial justice in any matter before it, under certain peculiar

¹⁶⁶ *Muskrat v United States*, 219 U.S. 346, 361(1911)

¹⁶⁷ *Universal Oil Ltd & Anor v. NDIC* (2008) LPELR-5068

circumstances. Black's Law Dictionary defines inherent powers as powers over and beyond those explicitly granted in the Constitution or reasonably to be implied from express grants.¹⁶⁸ This definition depicts the judiciary's unlimited powers in a democracy— first as the Constitution grants and second, as society implies, or as other statutes may direct?

The Constitution, the various courts' rules, or other subsidiary statutes also do not expressly state the court's inherent powers. Courts invoke their inherent powers to supplement the express jurisdiction or powers conferred on them. They only serve to lubricate the statutory jurisdiction to make it work.¹⁶⁹ The Constitution imbues the court with enormous wide and inherent powers that are exercisable at the courts discretion to do justice.¹⁷⁰ It is trite that the exercise of such discretion must not be whimsical or lackadaisical without due care and attention.¹⁷¹ In other words, it should be judicial and judicious, having regard to all the facts and materials placed before it and also the circumstances relating to the case. Thus, no court has the inherent power to do anything that is not constitutionally or statutorily empowered. In *Erisi & 2 Ors. v Idika & 2 Ors.*,¹⁷²

¹⁶⁸ Black's Law Dictionary 782 (6th ed. 1990).

¹⁶⁹ N.I.I.T. Zaria v. Dange (2008) 9 NWLR (Pt.1091) 127 at 147-148, paras. H-B (CA)

¹⁷⁰ Ikechukwu v. Nwoye & Anor (2013) LPELR-22018(SC)pp. 9-10, para F-A

¹⁷¹ Ibid

¹⁷² *Erisi & 2 Ors. v Idika & 2 Ors.* (1987) All NLR 529 at 546/547,

the Supreme Court gave an outline of inherent powers as follows:

- 1. Powers that enable the Court to exercise the jurisdiction the Constitution conferred on it effectively.*
- 2. It includes all powers and sanctions which a court ought to exercise in order to do justice.*
- 3. It is the power that is essential to the very existence of the Court as an institution charged with the dispensation of justice.*
- 4. Courts can't effectively administer justice without their inherent powers.¹⁷³*

Accordingly, inherent powers supplement the statutory powers of the court. And they are indispensable in defining the court's roles in the administration of justice. In other words, the requirement or need for courts to meet the ends of justice dictates their inherent powers.¹⁷⁴ *Adigun v A.G of Oyo State*,¹⁷⁵ stated that the court's inherent powers can be invoked in the interests of justice to supplement the statutory jurisdiction where such jurisdiction's exercise was likely to create injustice. The court's inherent power is an indispensable adjunct in the delivery of justice (when the existing procedure is silent, and courts should only invoke it to promote the ends of justice).¹⁷⁶

Although no court can add to or extend its jurisdiction, the nature and circumstances

¹⁷³ See also *Tubonemi & Ors v. Dikibo & Ors* (2005) LPELR-7519(CA)

¹⁷⁴ *Universal Oil Ltd & Anor v. NDIC* (supra)

¹⁷⁵ *Adigun v A.G of Oyo State*, (1987) 2 NWLR (Pt.56) 197". Per KARIBI -WHYTE J.S.C. (P. 24, para. F)

¹⁷⁶ *Abacha v State* (2001) 3 NWLR (pt.669) 35 at p. 45, para. F

of the case can expand a court's inherent powers. Inherent powers are an elastic use of discretion.¹⁷⁷ They 'refine' the role of judges in democracy. An example of the exercise of such inherent power is in the interpretations of section 6 (6) (c) of the Constitution. This section states that judicial powers "shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution..." Subsection (6) (c) is contrary to subsection (6)(b) which states that judicial powers "shall extend to all matters between persons or between government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person." If by this section, the courts powers extend to all actions and proceedings for the determination of any question regarding the civil rights and obligations of any person, then the fundamental objectives and directive principles of state policy in chapter II of the Constitution, are civil rights and obligation of every Nigerian and any person (even a non-Nigerian) who is in Nigeria. Therefore, if the Constitution restricts a court of justice from adjudicating on these principles of state policy, the essence of that court is worthless.

Fortunately, the Nigeria courts have long ignored section (6)(6) (b) in some cases.

¹⁷⁷ Thus, with the inherent powers of a court, one can argue that judicial discretion is unfettered.

This is primarily because society's advancements make it expedient for courts to justify a somewhat non-justiciable provision of the Constitution. Also, international law and foreign judicial systems influence judging in Nigeria. Thus, courts apply discretion and fashion ways to interpret this provision in the interests of justice to benefit society. In *Okogie v A.G of Lagos State*,¹⁷⁸ the plaintiffs challenged the abolition of private primary/elementary schools in Lagos state, contrary to freedom of expression in the Constitution. The defendant argued that the said abolition was in furtherance of and in conformity with section 18 of the Constitution, which enjoins the government to provide equal educational opportunities. The court held that the directive principles of state policy have to conform with and run as subsidiary to the fundamental rights under chapter IV of the same Constitution.

It appears these inherent powers of the court are a blank check that the drafters of the Constitution expect judges to cash in the interest of justice. Like branches of a tree, judicial powers have spread out to accommodate more roles in Nigeria's democracy, and I dare to say that the drafters of the CFRN intended it to be so. In other words, the drafters expect the judiciary to 'modernize' or update judicial powers and for courts to define or redefine their roles according to the spirit of the Constitution that is amenable to social changes.¹⁷⁹

¹⁷⁸ *Okogie v A.G of Lagos State* (1981) 1 N.C.L.R. 218

¹⁷⁹ The spirit of the Constitution of any country should not be static, it should change with the

The Code of Conduct for Judicial Officers of the Federal Republic of Nigeria (Revised,) 2016(COC).

The COC, which is similar to the ABA Model Code of Judicial conduct, addresses the duty, conduct, and behavior of judicial officers. These duties include: the judges duty to avoid impropriety,¹⁸⁰ duty on judges personal and social relationships,¹⁸¹ duty to uphold the Constitution, ¹⁸² duty to abstain from involvement in public controversies, ¹⁸³ duty regarding judges’ personal and fiduciary interest, ¹⁸⁴ judges responsibilities on non-judicial activities,¹⁸⁵ and administrative duties.¹⁸⁶ However, the COC does not directly specify judicial roles; rather it suggests three broad objectives: that judges should be loyal and faithful to the Constitution and the law; that judges should uphold the course of justice; and that judges should acquire and maintain professional competence. These provisions did not define these roles and does not give details on how

times and diverse cultures, societies and personalities

¹⁸⁰ Rule 1

¹⁸¹ Rules 2 & 8

¹⁸² Rule 3

¹⁸³ Rules 6 & 5

¹⁸⁴ Rule 7

¹⁸⁵ Rules 9 & 10, 13, 14, 15,

¹⁸⁶ Rules 11&12

courts should enforce these roles.

The Supreme Court Rules, 1999 (SCR). This SCR focuses on the Supreme Court of Nigeria's practice and procedures. The rule provides for the duties of the apex court, but none of the thirteen provisions stipulate the Supreme Court's role. The closest reference to roles is Order 16 Rule 10, which mentions the court's powers to accelerate hearing in exceptional cases in the interest of justice, and Order 8 Rule 12, which states the general powers of the court relating to the trial and proceedings. Although the SCR does not clearly state the role of the apex/final appellate court of Nigeria, the Supreme court's justices perform more roles than the Constitution expressly stipulates.

The Court of Appeals Rules, 2016 (CAR). Like the SCR, the CAR focuses on practice and procedure in the Appeal court. It has 21 Orders stating different procedures judges should adopt in proceedings. The most relevant provision of the CAR to this research is Order 4 Rule 4, which states as follows:

The powers of the Court ...may be exercised notwithstanding that no notice of appeal or Respondent's notice has been given in respect of any particular part of the decision of the court below, or by any particular party to the proceedings in that court, or that any ground for allowing the appeal or for affirming or varying the decision of that court is not specified in such a notice; and the Court may make any order, on such terms as the Court thinks just, to ensure the determination of the merits of the real question in controversy between the parties.

This provision gives the court of appeal (CA) latitude over cases that do not comply with the requirement to file a notice of appeal, as long as the court thinks it just to determine

the matter. It compliments section 6 of the Constitution that contains courts' inherent powers. Order 4 seems to instigate the justices of the CA to apply their inherent powers, in ways the SCR does not instigate SC justices. The provision gives the judges' power to hear appeals without a notice of appeal, on such terms as the court deems fit. Accordingly, the CA justices are free to make orders on such terms as they think to ensure the determination of the merits of the real question in issue between the parties. This indicates the intent of the drafters – they expect judges to apply 'judicial and judicious' discretion in determining the merits or controversy before the court.¹⁸⁷ This role is fundamental and probably the most potent role of any court in Nigeria – the role to 'jettison' due process if the judge deems it fit in the interest of justice.

The Federal High Court (Civil Procedure) Rules, 2019(FHCR). Like other courts' Rules, the 58 sections of the FHCR contain the practice and procedures that guides judges in the federal high court. It is the central rule that most appellate courts apply, and its provisions are similar to the rules of the state high courts. Other than Order 57 (1), which states the chief judge's powers to issue practice directive on the new rules, the FHCR still

¹⁸⁷ See *Mojekwu v Mojekwu*, where the Supreme Court held that the judgment of the Court of Appeal was outside the issues raised on appeal. The judge of the Court of Appeal is covered by this provision, as long as his decision would determine the real merits of the case pending, which was one of discrimination against a daughter from inheriting her father's estate because she is female. By the land's customary laws, women do not inherit because they are chattels to be inherited too.

does not define the specific role of the court.

The Magistrate Court Rules (MCR) 2009. The MCR is the 24 Orders document that guides the magistrate courts' judges' practice and procedures. Similar to the rules of superior courts above, it merely states how magistrate-judges should handle proceedings from judgment to conclusion stage. This law also does not have any provision that clearly defines the role of the judge.

Social Perception of Judicial Roles

The Nigerian society presumes judges have specific roles, and these presumptions influence the cases they file to seek redress.¹⁸⁸ The reasons people go to court adds up to define what they presume and expect of the judiciary's roles. People go to court for more reasons now than before. Previously people went to court only to settle disputes, but today people approach the courts to solve social problems, clarify statutory issues and 'define' or shape laws/policies. Litigants file suits for reversal of antiquated statutes, enforcement of laws, nullifying of customary practices demanding mandatory enforcement of the Constitution. The list increases with the constant changes in society.¹⁸⁹

Despite the prominent role of the judiciary to adjudicate or settle disputes, the types

¹⁸⁸ What are these assumed roles? What are the reasons people go to court? What do people expect from courts when filing suits?

¹⁸⁹ Social role

of cases litigants file in court imply that they expect the courts to do more than just adjudicating. In other words, the different reasons people approach the courts explain the kinds of lawsuits they file.¹⁹⁰ Thus, the cases individuals, families, communities, corporations, and governments file, indicate their expectations of judicial roles.¹⁹¹

The following are the main factors that influence social perceptions of judicial roles.

The Connotative Meaning of the Adjective ‘To Judge’

The word ‘judge’ gives the society an arbitrary perception of judges’ roles. Since the word means to adjudicate, the automatic interpretation of judges' role is to resolve, settle, and decide disputes. According to the court in *First F. Ltd. v. NNPC*,¹⁹² the traditional role of a judge is to ensure that courts resolve disputes according to the law and rules of procedure.

The Laws or Statutes that Govern or Direct Judicial Duties, Powers and Responsibilities.

The public deduces the role of judges from the laws/statutes that establish the judiciary/courts. For example, section 6 (6) (b) of the Constitution states that the court's

¹⁹⁰ Some file suits for personal reasons, communal reasons, corporate reasons, governmental reasons—demanding the courts to settle personal or public conflicts that may arise from social, economic, political, cultural, religious, financial, or administrative conflicts.

¹⁹¹ Social perception of judicial roles depends on the type of litigant and the nature of the filed case.

¹⁹² *First F. Ltd. v. NNPC* (2007) Vol. 4 WRN 105 at 147 Lines 5 - 15 (CA)

role extends to all matters between persons, governments, and authorities and determines citizens' civil rights and obligations. Also, subsidiary legislation gives specific guides on the role expected of the judge in a particular case. An example is the Administration of Criminal Justice Act that gives judges the discretion to apply non-custodial sentences.

Case Law

The rulings, orders or judgments of courts help define the role of judges. Judges express their personal and collective judicial experiences in case law, which often stipulates their roles, and society presumes these roles from such judicial pronouncements. *Eze v. Lawai*,¹⁹³ explains the judge's role as an umpire and not a contender or contestant.

The Types of Litigants

The person, group, or class that files a case in courts often dictates the judges' jurisdiction and discretion. For example, the type of litigant affects the mitigating factors judges consider before sentencing such litigant. I.e., a judge may not sentence a 'minor' convict as they will an adult.

Individual Litigants. When an individual has a conflict with another individual, corporation, community, or government, they approach the court to intervene and settle the dispute. The role of the court to settle individual disputes is straightforward. However, these personal reasons may range from social to

¹⁹³ *Eze v. Lawai* (1997) 2NWLR (487) 333 p. 345 para F

economic issues. An example is a case of reinstatement from a wrongful dismissal.

[For example, *Alu v Eze*.]

Communal Litigants. These are a group of people with a common interest. They seek redress on issues relating to the common good of their community. Thus, where a person is not a member of that community, they may not have a *locus standi* to initiate the lawsuit. An example is the Niger Delta community's lawsuit against oil spillage in their communities. [For example, *MASOP v Shell*.]

Corporate Litigants. These are groups of people with a commercial interest and business benefits. They seek redress in courts for somewhat personal and communal interest. Their business is beneficial to the business owner(s) and the community/ consumers who benefit from its 'services.' Thus, the judge's role in respect of the corporate litigant may differ from the communal and individual litigant. Courts tend to apply more discretion with corporations than with an individual, as the former is not as complex as the latter. [For example, *First Bank PLC v Ighu*.]

Governmental Litigants. This entails suits by or against the government (federal/state/local or legislature/executive/judiciary). It determines social, political, or economic conflict. Often, such cases entail policy regulation, statutory interpretation, conflicting laws, electoral issues, governance, and the rule of law.¹⁹⁴

¹⁹⁴ The superior courts usually determine such cases.

[For example A.G Federation v A.G Lagos State.]

The Nature of the Case

The kind of case or class of cases people file also determines the court that will hear the case and the judge's role in the case — these cases focus on some factors in society that affect every day human events.

Private or Public Cases. These are cases that individuals, communities, governments, private sectors, or public sectors file. The private cases are often between individuals or regarding private property. Some private cases are class actions that groups file together as representatives of a larger sect. Public cases involve the community, groups, and public institutions.

Social, Economic, Political Cases. These cases can be classified into socio-economic, socio-political, cultural, and religious cases that bother on communal, social, political, national or democratic development.

Criminal or Civil law Cases. These are the two primary categories of lawsuits. Most cases pending before the court fall into either or both of these two categories—criminal cases arising from crimes or offenses against society.

Civil cases are suits requiring remedy regarding a breach of duty.¹⁹⁵

¹⁹⁵ Thus, other supposed classes of cases like family law cases, Constitutional law cases, international law cases, business law cases, environmental law cases all fall under criminal or civil cases, or sometimes both.

Reasons People go to Court.

The reasons people go to court also reflect the social perception of the roles of judges. Their expectation of the role of judges determines the cases they file in court. Hence people may go to court to seek what they believe only the court can give. The reasons people go to court include, but are not limited to the following:

To settle or resolve disputes. For example, individuals could ask the court to resolve a land conflicts between them and the government.

To get clarification on any confusing or conflicting laws/statutes. The public believes that judges have the sole function of giving adequate and fair interpretations to the law. In *Obayiuwana v. Minister of Federal Capital Territory & Ors.*¹⁹⁶the parties approached the court to interpret section 44 of the Land Use Act which states five different ways of serving any notice the Act requires.¹⁹⁷

To enforce compliance with a policy, law, regulation, or order. This is a prominent reason people go to court in Nigeria. The aggrieved parties approach

¹⁹⁶ *Obayiuwana v. Minister of Federal Capital Territory & Ors.* (2009) LPELR-8202(CA)

¹⁹⁷ See also *The Minister of Works & Housing v. Shittu* (2007) LPELR-8751(CA) where the court interprets section 39 (1) (a) & (b) of the Land Use Act and *AG Rivers State & Anor v. Ohochukwu & Anor* (2003) LPELR-7203(CA) the court interpreted sections 39 and 40 of the Land Use Act

courts to force parties that disregard court orders, to comply with the law.

People go to court to enforce their constitutional rights.

To recover property and restore the status quo. Recovering property in certain situations is to comply with due process. That is why some suits are 'undefended'—as the defendant is not necessarily defending or opposing the suit. This reason is not the same as settling disputes, as anyone can approach the court to recover a property from a person or government without conflicts.

To enforce due process. People usually apply to the court for an order demanding compliance with due process.

To 'change' policy. This indispensable role is often denied and creates many controversies because some researchers believe that it is the court's duty to make laws. Some cases filed in court imply the parties want judges to change the law to favor their case. The controversies do not change the fact that now (in a democracy and with the socio-technological changes), more than ever, people, governments, communities, and corporations go to court to seek policy changes.¹⁹⁸

To solve technical issues. Sometimes judges deal with technical procedures that are legally rigid in a case. Some legal procedures put technicality above substantial

¹⁹⁸ In Nigeria, there are many policies on the selfish political interest of previous administrations that subsequent administration's approach the court to change.

justice, and such technical issues may be confusing to litigants.

To seek justice. The quest for justice is the principal reason people go to court, to obtain justice, as they interpret and understand justice.¹⁹⁹

Publications/ Media Reports.

The public obtains knowledge of judicial roles from publications and media reports. Print or audio media has much influence on the Nigerian community. When people listen to the news, and read the papers or media blogs, they presume judicial roles from reported news or cases, even when the news is unreliable.

Litigants, Counsel, and Other Court users' Perspectives.

Regular court users, attorneys, and litigants, interpretation of judges' roles also influences the social perception of judicial roles. Some of these persons confuse judicial duties with judicial roles. Thus, their expectations often put pressure on judges to act as super-humans when they are not.

The Judges Relationship with the Public

The way judges relate with the litigants that appear before them gives the litigants/public an impression of judicial roles.²⁰⁰ These impressions may or may not be relevant to the case, but it may make sense to the litigant and, therefore, be relevant to

¹⁹⁹ Chapter ten will discuss social perceptions of justice as a dilemma to judges' roles.

²⁰⁰ Niki Tobi, *opcit*: 14

judicial administrations.²⁰¹ Such relationship inside and outside the courtroom creates social perception. For example, if the judge appears fair to a litigant during and after proceedings, the litigant's perception will be that the court is a place of justice. If litigants perceive judges as unjust, they will presume judges are biased and the court is a place of injustice.

The above factors are the various ways that the Nigerian public perceives judges. The above factors imply that Nigerians inadvertently see judges as agents of social justice/social change, and intermediaries between the law and society.²⁰² Professor Ray capped the social perception of judicial roles/ expected behavior patterns as follows:

You are the link between our government, our laws and our people. ... You are the face of our justice system to the citizens who appear before you. ... To many, you are the face of fairness in our society. You perform a most important role — that of decision maker. ... You serve our society as a teacher.... You are life-long learners. ... Finally, you are community role models. ... We appreciate the roles you play, on and off the bench. The responsibilities and powers you have, give you a high profile in our society, and we appreciate the dignity with which you live your lives. These seven roles make your jobs incredibly important to our society and, I hope, worth the sacrifices you make.... I hope that you, too, have come to know the satisfactions of making order out of chaos and solving the important problems we bring before you. You truly are our “Royal Wisepersons”, and I thank you for performing this role so well.”²⁰³

²⁰¹ See Niki Tobi’s extensive quote in section one

²⁰² This perception of judges’ roles is not just Nigerians’ perception. Other jurisdictions have socially expected behavior patterns that they deduce as judges’ roles.

²⁰³ Douglas E. Ray “The Seven Important Roles Judges Play in Our Society.” The University of Toledo College of Law Transcript, (2010):24-25

As Ray observes about the American society, Nigerians also perceive courts as watchers and fixers; reviewers of government actions; legitimizers of government powers; trustees; empathizers; the determinant of truth; careful legal analyst; unbiased decision-makers; teacher and guide; the face of the justice system, representatives of the people; jacks of all trade and masters of all; continuous learners, and ‘wise persons.’²⁰⁴ However, the dilemma is that the socially perceived judicial roles do not necessarily reflect judges’ ‘real role’ of in the Nigerian society; they somewhat reflect the ‘ideal role.’ Although Nigerians believe that judges' role is adjudicatory (i.e., the real role), what they expect from judges exceed adjudication (i.e., the ideal role).²⁰⁵ It appears that the people are not satisfied with the real role of judges; they expect judges to perform ideal roles that reflect ‘true justice.’ This can be somewhat dilemmatic for the judge whose ‘real roles’ may often clash with their ‘ideal roles.’

The “Real” and “Ideal” Roles of the Judiciary

I gleaned this classification of the real and ideal roles from the sociological/

https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=6&ved=2ahUKEwjGjajOndfoAhUTH80KHak-DVwQFjAFegQIAxAB&url=https%3A%2F%2Fwww.utoledo.edu%2Flaw%2Falumni%2Ftranscript%2Ftranscript10.pdf&usg=AOvVaw2sM7rcVjeasTkIk-wu_uxJ

²⁰⁴ I will discuss such cases/judicial dilemmas in the second section two of this dissertation.

²⁰⁵ We will discuss this detail shortly under the title of social perception of judicial roles.

anthropological concepts of real and ideal culture.²⁰⁶ The ideal culture is the standard or value system that society hopes to uphold or embrace. It is the norm that society aspires to have.²⁰⁷ While the real culture is the norm in the society. Anthropologically, it is how culture is in society; it is what is going on in everyday life, the regular social norms.²⁰⁸ However, since people may not always live up to expected social standards and aspirations despite their best efforts, society inevitably resorts to the reality on the ground. This is what advances the real culture. For instance, monogamy may arguably belong to society's ideal culture, while the real culture may tolerate polygamous unions.²⁰⁹ Thus, there is an apparent gulf between the ideal and real cultures of society. While the ideal culture is respect for the rule of law and promoting an independent judiciary, the real culture is a flagrant abuse of the rule of law and disregard for judicial independence.²¹⁰ The judiciary's real and ideal roles are their actual and notional roles.

²⁰⁶ Akhileshwar Prasad Dubey, *Modernity and the Problem of Cultural Identity*. India: Northern Book Centre, 2008:9

²⁰⁷ *Ibid*

²⁰⁸ *Ibid*

²⁰⁹ *Ibid*

²¹⁰ Also, in the U.S.A. the ideal culture could be equality, liberty, and justice. In contrast, the real culture depicts inequality for a specific class, sector, and race.

The Real Roles of the Judiciary

The judiciary's real role is the current noticeable role that judges execute—the role that society identifies as judicial. This role is the *status quo*—the socially perceived roles and jurisdiction stated in the Constitution and other subsidiary laws. These are the roles that even judges presume. These 'real' roles guide the action of the judge, to comply strictly with rules and precedents. Just like the anthropological concept, it is the role that society most identifies and accepts as typical. Examples of these roles are adjudicating, interpreting the law, and determining the law. I categorize the real roles of the judiciary into traditional, democratic, constitutional, and administrative roles—each with their subcategories.

Traditional Roles of the Judiciary

This role is the conventional role that exists from history—before the creation of the Nigerian judiciary. It has been there from pre-colonial, colonial to post-colonial eras, and has not changed. It is the conformist approach. It refers to the role of judges within the courtroom. The traditional role comprises the adjudicative and interpretative roles.

The Adjudicative Role

The adjudicative role is the role that implies the definition of the name 'judge.' It means to adjudicate or judge a matter. This role is also popularly known and referred to as dispute settlement. Anyone who thinks about judges, courts, or the judiciary connects them to the adjudicatory role of settling disputes between parties, which is the primary role of

Judges. In *Chief Ken Nnamani v. Chief Uche Nnaji & Ors*,²¹¹ Ebiowei Tobi, JCA stated that the role of the court is to adjudicate on disputes or issues joined by the parties.

The Interpretative Role

The interpretative role is the role that automatically complements the adjudicatory role of the Judge. In adjudicating, the Judge has to interpret the law that governs the conflict before the court. In *Cotecna Intl Ltd. v. Ivory Merchant Bank Ltd*,²¹² the court decided that as the role of the legislature is lawmaking, the role of the judiciary is interpreting the law. Therefore, the courts must give the words their ordinary meaning where a statute's language is clear, unambiguous, and not subject to an alternative interpretation.

Democratic Role

The judiciary plays vital roles in democratic governance as democracy uniquely impacts adjudicating and implementation of the law. This role evolved in Nigeria through different stages of history. The court is a *sine qua non* of democracy. It exists to ensure that democracy thrives in every society. So, it is the responsibility of judges to uphold and sustain democratic tenets in adjudicating and interpreting laws. 'Real' democracy portrays the interest of the people and reveals a connection between law and society. The courts'

²¹¹ *Chief Ken Nnamani v. Chief Uche Nnaji & Ors* (1999) LPELR-6575(CA) Per Tobi, JCA

²¹² *Cotecna Intl Ltd. v. Ivory Merchant Bank Ltd* (2006) LPELR-896(SC), p. 13, para. B-D, per Tobi, JCA

democratic roles are: to defend the principles of democracy, and citizens' rights.

Defending the Principles of Democracy. The courts as agents of democracy have a fundamental role in defending the principles of democracy, which include fairness, equality, liberty, representative governance, free speech. These principles embolden democratic governance. Hence the courts are ‘blind’ to status, class, race, sex, or any group. So, they hear and determine the rights of the ‘good,’ the ‘bad,’ and the ‘ugly’ in society. From securing the rights of vulnerable minorities to defending the rights of alleged terrorists, Nigerian courts continue to uphold and defend Nigeria’s democracy. In upholding the democratic creed of equality and fairness, without prejudice, fear or favors, courts regularly invalidate antisocial laws, anti-government procedures and policies, discriminatory practices against vulnerable groups, corruption at all levels of government, land disputes, socio-economic deprivations.²¹³

Defend the Rights of the People. Paramount in upholding democracy is the court's role to defend human rights. As democracy is all about the people and how they govern their affairs. *Minere Amakiri v R.M. Iwowari*,²¹⁴ affirmed that “the courts are the watch-dogs of these rights and the sanctuary of the oppressed....” From history, Nigerian courts grappled with protecting the rights of Nigerians enshrined in chapter

²¹³ The courts must settle decide for the benefit of society.

²¹⁴ *Minere Amakiri v R.M. Iwowari* (1974) 1 RSLR 5 (PHC222 73)

two of the Constitution. In *Okogie v A.G Lagos*²¹⁵ and *Adewale v Jakande*,²¹⁶ the courts affirm that though the fundamental Objectives of State Policy in chapter two of the Constitution may not be justiciable, they are fundamental rights of the citizens that the government must protect. The court's protective role metamorphosed over Nigeria's checkered history from the 1960s to the late 1990s. Thus, courts influenced by the flagrant disregard for the Constitution and consistent abuse of human rights did not mince words defending citizens' rights.

Constitutional Role

This role complements the democratic role, as it focuses on the Constitution, which is the bedrock of democracy. A Constitution is 'supposedly' the conscience of citizens of any country. The judiciary, as the loudest cheerleader of democracy, has an inherent role in defending the Constitution. Thus, it is only the courts that can interpret the Constitution for society's benefit. This role reiterates the indispensable power of judges in upholding and sustaining the Constitution. This role is about aligning constitutional/statutory interpretation with the spirit of the Constitution that the preamble to the Constitution states. The preamble of every Constitution carries the Constitution's spirit, and it implies the drafters' intentions. The spirit of the CFRN as in the preamble should always guide judicial

²¹⁵ *Supra*.

²¹⁶ *Adewale v Jakande* (1989)1 N.C.L.R. 268

interpretation at every stage of a trial. This constitutional role is comprised of the custodian role and the determining role.

The Custodian Role

The custodian role is the guardian role of the judiciary. The public considers the judiciary as the guardian of the Constitution and the democratic process.²¹⁷ Every other law that guides and governs the judiciary or judges, gleans their authority from the Constitution, which is the ground norm. *PDP v. Saror & Ors*,²¹⁸ states that the court as custodians of the Constitution must interpret it with a liberal approach, when necessary, to reflect the intention of the draftsman, so as to achieve its purpose.

In *Attorney General of Bendel State v. Attorney General of the Federation*,²¹⁹ the Supreme Court held that courts, being guardians of the Constitution, shall always rise to declare any purported infraction of the Constitution null and void. Trachtman, argues that the most significant role the judiciary plays in our society extends well beyond interpreting statutes. The Supreme Court serves as the ultimate interpreter and protector of our most fundamental rights, set out in the Constitution.²²⁰ According to Aka-Basorun, “The role of

²¹⁷ Duru, opcit: 7

²¹⁸ *PDP v. Saror & Ors* (2012) JELR 35915 (CA),

²¹⁹ *Attorney General of Bendel State v. Attorney General of the Federation* (1983) 3 NCLR 1 at 40

²²⁰ Micheal G. Trachtman, *The Supremes’ Greatest Hits: The 37 Supreme Court Cases That Most*

the judiciary is that of guardian of the Constitution. This role... put the judiciary in a taller and stronger position than the executive and, or legislature. For an organ which alone can pronounce the acts and deeds of the legislature and executive unconstitutional, illegal, null and void, and of no effect, must by implication be the supervisor of the other arms of state and must of necessity be the supervisor of the supervised.”²²¹

The Determinant Role

The determinant role is the role that determines the law. This role shows how judges eventually arrive at a final decision. This can also be called the courts' ‘statutory’ role. The law is what the courts say it is. To determine means to reach or firmly resolve a decision after due consideration of the law, surrounding facts, and circumstances. Under this role, the judge ventures on a voyage to determine the law in every case. It is a voyage of many dimensions that takes the judge from the public domain of the pre-trial stages,²²² through trial rudiments²²³ and final arguments. Then the voyage ends in a private domain where the judge withdraws to ‘solitary confinement’ with books, law reports, and other resources to arrive at a fair verdict.

Directly Affect Your Life. New York: Sterling Publishing Co. Inc., 2006. 10

²²¹ A. Aka-Basorun “The Supreme Court and the Challenges of the 90’s” Cited from Sani at p. 230

²²² Considering of documents and any pre-trial hearings/preliminary objections

²²³ Taking of evidence/ testimonies, and counsel addresses.

Specifically, the role of determining the law is the judges' decision-making process. The courts can only determine the law through understanding the case, facts, parties, arguments; defining and interpreting the relevant statutes that applies to the case, and then decisively resolving the facts in issue according to the law. It is analogous to medical scientists' procedures in a laboratory, where the scientists collect samples of tissues or body fluids to record normal or abnormal findings; then studies the blood samples (maybe for transfusions) and reports or discusses their findings with physicians.

Similarly, judges²²⁴ collect or gather evidence – documentary, oral, circumstantial evidence (as the law requires),²²⁵ and record their findings for and against the parties involved.²²⁶ Judges examine various statutes/laws applicable to the facts in issue,²²⁷ and in the final analysis, they discuss/report their findings as final judgments accessible to the public.²²⁸ Thus, only the judge who has the facts of the case and the applicable laws would know the extent of discretion suitable to the pending case. Like scientists, judges examine the law and the facts of the case through their 'microscopic' evidential lenses in the

²²⁴ Similar to laboratories as their abodes of thinking.

²²⁵ Similar to collecting samples of tissue and body fluids.

²²⁶ Similar to recording normal or abnormal findings.

²²⁷ Similar to studying blood samples.

²²⁸ Similar to informing or presenting the results of their findings with physicians.

courtroom.²²⁹ Just like specific amounts of fluid may be too excessive for a scientific experiment, extreme or excessive judicial discretion ‘may’ also be detrimental to the justice in a case. Just as scientific or laboratory findings are not always accurate, the conclusions on the analysis of evidence and the facts of a case may not always be as precise as justice demands.²³⁰

Determining the law is a fundamental role when judges clearly explain the meaning of the specific provisions of the statutes.²³¹ The court’s interpretation of a statute becomes part of the law in the relevant area and establishes a precedent that guides and governs subsequent cases.²³² This function of determining the law covers all aspects of judicial roles in a democracy. The daily dealings in the courtroom are about determining the law. The facts before the court are always bound by law, which enjoins the courts to determine it

²²⁹ In the same way, two eyes cannot use one microscope to view objects, so also individual judges have to use their discretion to consider and analyze evidence.

²³⁰ The Judge's decision is primarily from the evidence presented before him/her. So, where the evidence is not sufficient, as is often the case with partial police investigations in criminal cases, such decision will be inaccurate, and the justice of the case may be defeated

²³¹ Duru, *opcit*: 8

²³² One of the sources of Nigerian Law, which is also a source of American Law, is case law or judicial decisions. Case law is also known as a body of judge-made law, which consequently becomes precedent.

Administrative Roles

The administrative roles of the court cover judicial administration and ‘political’ administration. This role sets an ambiance for judicial independence and the social perception of judicial integrity. The administrative roles of judges, when exercised appropriately, gives society a secure perception of the integrity of the judiciary. Thus, judges perform administrative roles through their relationships in and outside the courtroom. This administrative role helps to define judicial roles and their essence in democratic governance.²³³

Political Administrative Role

The Nigerian judiciary plays a “watchman” role in the polity²³⁴ and shapes Nigeria’s political scene. Traditionally, the judicial branch serves as a check on the other branches' powers and keeps the government from serving its interests above those of society. The court in *Oruobu v. Anekwe & Ors*,²³⁵ held that courts have supervisory jurisdiction over the exercise of legislative powers. So, the legislature shall not enact any law that ousts or purports to oust the courts' jurisdiction. In other words, the judiciary acts like a ‘big brother’ to the other arms of government. Thus, when there is a dispute between

²³³ These administrative roles are not the same as the administrative roles stated in the Code of Conduct.

²³⁴ Duru, *opcit*: 2

²³⁵ *Oruobu v. Anekwe & Ors* (1997) 5 NWLR (Pt. 506) 618 at 634-635.

the legislative and the executive arms, both branches approach the court to settle and resolve the dispute.

Shehu opines that although the judiciary is a creation of the Constitution and positively granted powers, which transcend the Constitution, the judiciary assumes superiority over the other branches of government through its power to review.²³⁶ The role of Nigerian courts in politics is a significant aspect of the development of Nigeria's democracy. This role has not only challenged the value of courts in society, but it also disturbingly questions the integrity of Judges as unbiased umpires dedicated to fairness and justice.

The administrative role of the judiciary cuts across substantive and procedural laws and policies. According to Yusuf, while judicial inclinations have not quelled the controversies many political cases generate, they have nonetheless shaped the direction of power contestations at intra-individual and inter-governmental levels in the country.²³⁷

²³⁶ Ajepe Taiwo Shehu "Judicial Review And Judicial Supremacy: A Paradigm Of Constitutionalism In Nigeria" ICLR, Vol. 11, No. 1. (2011): 48.

https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiNqOPHxrDwAhVOHjQIHZYcCa4QFjADegQIBBAD&url=http%3A%2F%2Ficlr.upol.cz%2Fwp-content%2Fuploads%2F2016%2F06%2Ficlr_1_2011.pdf&usg=AOvVaw0j3gdFy05BahSGRqBY091q

²³⁷ Hakeem.O. Yusuf, "The judiciary and political change in Africa: Developing transitional jurisprudence in Nigeria." *International Journal of Constitutional Law*, Volume 7, Issue 4, (October 2009,): 654–682, <https://doi.org/10.1093/icon/mop027> at p. 657

With new or “rehabilitated” constitutional powers, the judiciary progressively assumes a critical position in governance through the dynamics of transitional constitutionalism.²³⁸

Judicial Administration Role

This is the role where judges safeguard judicial independence/integrity. It encompasses the life of the judge inside, and outside the courtroom. This role covers two areas. The first is the relationship that judges have with themselves. The second is the relationship judges have with the public/the government.²³⁹ The administrative role of judges differs based on the hierarchy and jurisdiction of the court. It follows the sequence of the most senior court to the most ‘junior’ court.²⁴⁰ The court in *Idiok v. State*²⁴¹ states that the trial court's role is to hear evidence, evaluate evidence, believe or disbelieve witnesses, make findings of fact based on the evidence/credibility of the witnesses who testified, and decide the merits of the case based on such findings. However, an appellate court will disturb the findings of fact by the trial court where such findings are unreasonable or perverse and not a result of proper exercise of judicial discretion. According to justice Karibi-Whyte, the judicial role of an appellate court is to superintend, review and correct

²³⁸ Ibid

²³⁹ These relationships impact public perception of judicial roles.

²⁴⁰ See Hierarchy of courts topic

²⁴¹ *Idiok v. State* (2008) ALL FWLR (Pt.421) 797 at 811 paras. A-B SC.

any trial court's errors.²⁴² It is to see whether the trial court applied the applicable law or adhered to the proper procedure in arriving at its decision. Similarly, *Arisons Trading & Engineering Company Ltd. v The Military Governor of Ogun State & Ors*²⁴³ states that the appellate courts will also interfere with the lower court's decision where there is ample evidence that the court failed to evaluate the evidence or make correct findings on the issue.

This administrative role of judges arouses empathy in the judge. Such empathy may arise when judges grant bail to suspected offenders, issues arrest warrants to suspects or persons who 'jump bail', endorses legal documents like deeds of assignments, and many other quasi-judicial duties. All of these roles require judicial discretion to apply empathy depending on the circumstance surrounding each case. The diagram below illustrates the categories of judicial roles.

²⁴² *Olanrewaju v. The Governor of Oyo State & Ors.* (1992) 9 NWLR (Pt. 265) 335 at 362

²⁴³ *Arisons Trading & Engineering Company Ltd. v The Military Governor of Ogun State & Ors.* (2009) LPELR-554(SC)

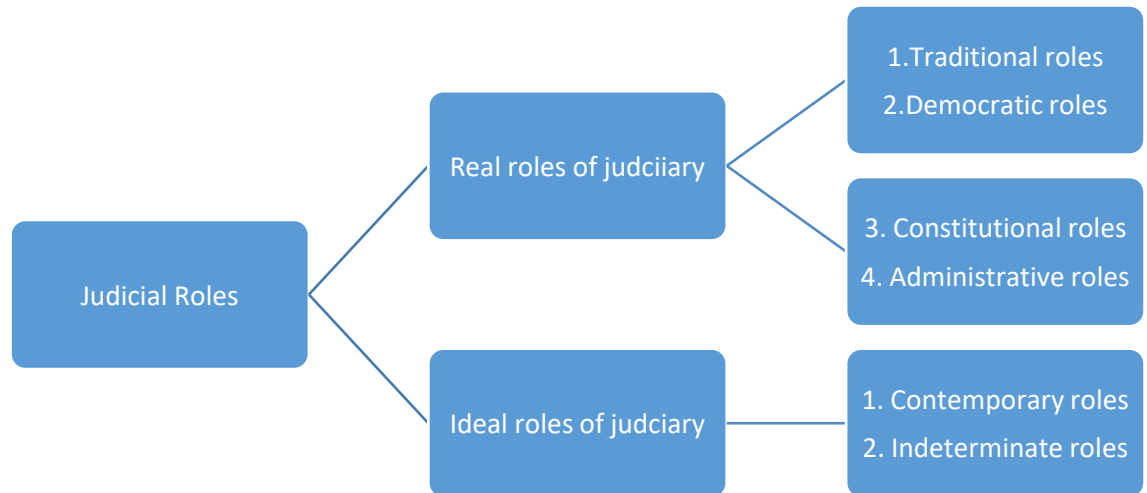


Diagram 1: Categories of the Real and Ideal Roles of the Judiciary

The Ideal Roles of the Judiciary

The ideal role is what the judiciary or judges profess to execute or the role both judges and society believe the judiciary should fulfill. They are the obscure/invisible roles of judges. These roles are not glaring to society or even judges, but nonetheless are expected. Judges perform these ideal roles inadvertently in the course of judging. They transcend the activities, actions, responsibilities, and duties of judges in the courtroom. These roles portray the judiciary in every section or sector of society from private to public and interprets justice to society. The judiciary's ideal role is the most relevant role for democratic development. It shows how relevant law is to society, as it is flexible with constant social changes, and it interprets public perception of the courts. I categorize the ideal role of the judiciary into the contemporary and indeterminate roles.

Contemporary Roles

Contemporary judicial roles are relevant to the current and modern issues that affect society. This role spells the humanness of the law. It acknowledges the realist perspective of judging as opposed to the conformist approach. Under this category of judicial roles, judges act as an intermediary between the law and citizens. According to Duru, the judiciary stands between the government and the citizens, as the last hope of the common man, the hope of the hopeless, the defender of the defenseless, and upholder of the rule of law.²⁴⁴ This intermediary role of judges is often ignored, yet it is the fundamental role that depicts the judiciary's value in a democracy— one that bridges the gap between society and the law.

Section 17 of the Constitution, which outlines social objectives of the state, contains the contemporary roles of the courts in Nigeria. This provision provides that the state order shall ensure equal rights, obligation and opportunities for the citizens, security, impartiality and independence of the courts, secure adequate welfare and livelihood for all citizens without discrimination. Subsection 2(e) enjoins courts to secure and maintain court's independence, impartiality, integrity, and easy accessibility in furtherance of social order. This provision does not state the role in promoting social order, but from case law, we can glean that the Constitution expects the courts to ensure that the state complies with the role stated in subsection (3) (a)–(h). No doubt, the judiciary has impacted society in various

²⁴⁴ Duru, *opcit*: 9

sectors. Trachtman agrees that the Supreme Court has the authority to decide, once and for all, what essential laws mean when applied to the real-life situations that arise after laws are enacted.²⁴⁵ This contemporary role further creates the social and economic roles.

The Social Role

The social role is the function of the courts that defines and protects the rights, duties, norms, expectations, and behaviors of individuals according to the Constitution's and society's interests. Judges' roles to comply with procedural and evidential rules of court is more than presiding over trials. It involves promoting fairness and protecting individuals' rights, duties, norms, and expectations before the courts. This is also called the refiner's role, as the judiciary refines society's diverse sectors through judicial pronouncements. For example, the judiciary has refined the Nigerian society through education and culture.

Educational Role

Judges reform society through this role. Education has a multidimensional function within the community. It enlightens individuals, promotes social inequality and develops knowledge, personalities, and other aspects of the society. The social, political, and economic status of every individual depends on the right to education.²⁴⁶ Section 18 of the Constitution directs the government to ensure equal and adequate educational opportunities

²⁴⁵ Trachtman, *opcit*: 9

²⁴⁶ When people read judicial opinions or judgments of the court, they get informed on the judge's roles and the law's precise position.

at all levels. Thus, courts somehow align the educational sector with the democratic principle of equality. In *University of Abuja v. Ogunsakin*,²⁴⁷ the Court of Appeal held that the government should ensure equal and adequate educational opportunities at all levels of the society, and that failure in this regard did not confer any person the right to invoke the powers and sanctions of a court of law to ensure their observance since the matters listed in the said section is not justiciable by section 6(6) (c) of CFRN.

The Cultural Role

The cultural role is a significant impact in the Nigerian society, as the courts consistently redefines cultural/customary practices in Nigeria, especially as it relates to discriminatory cultural practices against women. In the celebrated case of *Mojekwu v Mojekwu*,²⁴⁸ the Court of Appeal held that the sex of a child should not determine the right of the child to inheritance.²⁴⁹ Also, in *Ugbene v. Ugbene & Ors*,²⁵⁰ the court held that no matter the circumstances of the birth of a female child, such a child is entitled to inheritance from her late father's estate.²⁵¹ According to the court in *Chiduluo & Ors v. Attanse &*

²⁴⁷ *University of Abuja v. Ogunsakin*, Unreported, Appeal No. CA/A/614/2011, decided on 6/11/2013

²⁴⁸ *Mojekwu v Mojekwu* (1995)

²⁴⁹ Although this case was overturned on appeal by the Supreme court, the principles were subsequently upheld in several other cases where the same Supreme Court reiterated that the discriminatory culture that women could not inherit their late fathers' property was null and void.]

²⁵⁰ *Ugbene v. Ugbene & Ors* (2016) LPELR-42110 (CA).

²⁵¹ The said custom of the Egede people and the Ibo's is inconsistent with the Constitution. It is

Anor,²⁵² it is now settled law that the Ibo native law and custom which dis-entitles a female from inheriting her late father's estate conflicts with section 42 of the Constitution. Also in *Onyibor Anekwe & Anor v. Mrs. Maria Nweke*,²⁵³ the Supreme Court described such practice, "... as barbaric, and the height of insensitivity, shameful, unacceptable and a custom that only belonged to the stone age."²⁵⁴ Similarly in, *Okonkwo v Okagbue*,²⁵⁵ the court held that a woman to woman marriage, which is common in the Ibo culture, is an aberration, repugnant to natural laws, and a revulsion to public policy. It is obscene.²⁵⁶

Social Order Role

This social role of the courts also includes the court's influence on police reforms. Courts have a role to define and curb police powers and authority. The changes in our times have made it expedient for courts to assume this role. The Nigerian police force, like the

repugnant to natural justice, equity, a good conscience, and Nigeria's current public policy.

²⁵² Chiduluo & Ors v. Attanse & Anor (2019) LPELR-48243(CA).

²⁵³ Onyibor Anekwe & Anor v. Mrs. Maria Nweke (2014) LPELR-22697.

²⁵⁴ Also, in *Ukeje & Anor v. Ukeje*, the court found that the Ibo native law and custom which dis-entitles a female from inheriting in her late father's estate is void as it conflicts with sections 42 (1) and (2) of the 1999 Constitution.

²⁵⁵ *Okonkwo v Okagbue* (1994) 9 NWLR (pt308) 301

²⁵⁶ See also *Meribe v. Egwu* (1976) LPELR 1861 SC

American police is presently on the spotlight—accused of abusing and overreaching their Constitutionally acclaimed powers. Thus, their abuse of power is detrimental to life and security, and has caused unwarranted deaths of men, women and children in both countries.²⁵⁷ The role of courts in police reforms include but are not limited to ensuring that the police uphold the Constitution, respects the human right of the community, pursues justice and fundamentally the court’s role in police reforms is to interpret policies to comply with constitutionally required community-based standards and interests.²⁵⁸

Economic Role

This role in the judiciary’s context interprets the laws that affect the input and output of cash flow in a market economy. It addresses environmental concerns, protects property rights, foreign business investments, provides for national wealth and security. Most cases filed in courts have economic undertones. Every country's judiciary has the fundamental yet obscure role of instigating economic development through judicial pronouncements that advance business law's jurisprudence.²⁵⁹ The role of the judiciary

²⁵⁷ Unfortunately, this central institution mandated to enforce law and order in Nigeria is a major distraction for illegal acts and disorder in society.

²⁵⁸ Ari Tobi-Aiyemo “The Courts and Police Reform in Otsego County: Thinking Outside the Box.” (Otsego county Taskforce Biweekly meeting, Oneonta, New York, 2021.)

²⁵⁹ Socio-economic law is the aspect of the law where legal processes affect and shapes economic activities. It examines how contemporary social development increases or declines because of the local or regional, or global economy.

impacts the national economy. That is why in some states in the U.S., such as Ohio, Michigan, Alabama, Florida, and Oklahoma, judges are being evaluated on the economic impact of their decisions.²⁶⁰

This economic role is a ‘judicial’ necessity for the 21st century. It is an indispensable factor in Nigeria’s foreign trade ties with the rest of the world. At the rate, the world is advancing (interwoven in trade relations and economic interdependence), it is no longer secure for judges to separate their role of adjudicating from the role of socio-economic engineering—which involves applying social, economic/ political knowledge in their decisions to instigate desired changes in society.²⁶¹ In the context of this discussion, socio-economic engineering is a combined role of the interdisciplinary fields of sociology, economics, and political science.²⁶²

²⁶⁰ Henry. N. Butler “Judicial Decisions Can Affect Economy” The Oklahoman (1998)
https://www.google.com/search?client=safari&channel=mac_bm&source=hp&ei=N1gmX5WELrLv_Qbaq4moCg&q=how+courts+influence+the+economy+in+your+country&oq=how+courts+influence+the+economy&gs_lcp=CgZwc3ktYWIQARgAMggIIRAWEB0QHjIICCEQFhAdEB4yCAghEBYQHRAeMggIIRAWEB0QHjIICCEQFhAdEB46DgguELEDEMcbEKMCEJMCOgcIABADEIsDOgsILhDHARCjAhCLAZoOCC4QsQMqXwEQowIQiwM6CAgAELEDEIsDOgsIABCxAXCDARCLAZoFCAAQiwM6CAgAELEDEIMBOgsILhCAXDHARCjAjoCCAA6BQgAELEDOggILhDHARCvAToCCC46BQguEIsDOgQIABAKOgYIABAWEB46CAgAEBYQChAeOggIABAIEA0QHIDwCFi7PGCCYmgAcAB4AIABjwGIAb8YkgEFMjIuMTCYAQCgAQGqAQdnd3Mtd2l6uAEC&scient=psy-ab#

²⁶¹ Richard. N. Posner, "The Role of the Judge in the Twenty-First Century," Boston University Law Review 1049 (2006):1049

²⁶² Frank L. Michelman, “Socio-economic rights in Constitutional Law, Explaining America Way.” International Journal of Constitutional Law, Volume 6, Issue 3-4, (July-October 2008):

Socio-economic issues like property rights, employment law, intellectual property, and many other economic-related areas play a significant role in national/global market economies. Disputes often arise from these areas of human existence. The disputes are either between individuals, between corporations, between governments or between individuals and governments, between individuals and corporations, or even between corporations and governments. Thus, in almost all countries, the final forum for resolving disputes that arise from such socio-economic relations is through courts. Thus, a well-functioning court system is crucial for economic growth in Nigeria or any other country in the world.

Michelman argues that performance in the economic field involves complexly designed and coordinated government action in the forms of taxes, transfers, subsidies, and policy instruments affecting markets, industries, families, education, health, internal and external trade, and the monetary system. Hence, the choices to be made are subtle, technical, interactive, uncertain, subject-to--experience, and endlessly debatable. It is unclear how courts of law can inject themselves into such matters with much credibility or authority.²⁶³ Idigbe thinks differently. He argues that courts have a role in promoting business recovery under the existing insolvency framework in Nigeria.²⁶⁴ For example, under the Company

663–686, <https://doi.org/10.1093/icon/mon013>

²⁶³ Ibid

²⁶⁴ Anthony Idigbe, “Using Existing Insolvency Framework to Drive Business Recovery in

and Allied Matters Act (CAMA), a court can intervene in receivership proceedings by appointing the receiver or another person as the manager of the business or any of the assets of the company.²⁶⁵ Courts also have the discretion to attach such terms and conditions to any orders and add or limit the broad powers of such receiver.²⁶⁶

Indeterminate/Evolving Roles

These developing roles unfold with the changes in times and seasons. They evolve with revolving social patterns. Some aspects of the traditional roles may fall under indeterminate roles depending on the social perception. They unfold as new issues evolve in society, demanding judicial backing or support for enforcement. An example is the corona virus. The courts' indeterminate roles take three forms: the international role, the jurisdictional role and the social change role.

The International Role

These roles extend beyond the borders of a country. Socio-economic circumstances necessitate judicial roles to enforce fundamental rights and interpret trade ties between countries. They warrant judges to perform specific roles in adjudicating. An example is the

Nigeria: The Role of the Judges” (Federal High Court Judges Conference. The Advocate 30th Edition. 2011): 88

²⁶⁵ See section 209 (5) of CAMA

²⁶⁶ See section 209 (3) of CAMA

case of *Kiobel v Royal Dutch Petroleum Co.*,²⁶⁷ where the plaintiff citizens of Nigeria filed a suit under the Alien Tort Claim Act (ATS) alleging that the defendant in collaboration with the Nigerian government violated customary international law. The U.S. Supreme Court reviewed the ATS to determine whether it applied to the plaintiff's claim. The court held that the presumption against the U.S.A. law's extraterritorial application applies to claims under the ATS, and nothing in the text, history, or purpose of the statute rebuts that presumption. Thus, even where a claim “touches and concerns” the U.S.A.'s territory, it must do so with sufficient force to displace the presumption against extraterritorial application.

The world has become a global village. The transmission of aid from one government to the other and the exchange of ideas have created a unique government that dictates global governance. We live in a world where goods, services, technology, information, and capital flows through one nation's border to another. We are in a world of internet connections, cyber-bullying, cyber-terrorism, electronic money transfers, cryptocurrencies, social media relationships, inter-racial and inter-racial marriages. A typical political climate of democracy governs the world with similar governing principles by different governments.²⁶⁸

²⁶⁷ *Kiobel v Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013)

²⁶⁸ Ari Tobi-Aiyemo, “International Law in a Borderless World: The Role of the Judge.”(the International Law and Organizations Seminar, State University of New York, Oneonta. 2019): 4

By Nigeria's diplomatic ties to other countries, Nigerian courts have a role in global economic justice. A common thread that links all nations is the maintenance of human rights. International law protects human rights, and the court has to ensure these laws are respected and safeguarded nationally and internationally. Judges must ensure that human rights reflect the global standards as stipulated in the United Nation's (UN) Conventions. This international role assures the foreign government of the safety of Nigeria's shores and borders for diplomatic ties. According to Abul-Ethem,²⁶⁹ "One of the vital ways to keep human rights safe is by preserving the prevailing role of the judiciary. Standards developed by the judiciary have a significant beneficial effect of making the lives of people better and the accomplishment of the government's goals easier."²⁷⁰

Foreign investors are more likely to invest in a stable democracy, often determined by sociologically active courts. According to Oguntade, "It is also important to bear in mind that the world we live today has become one global village. We live in a world of internet and advanced modern technology in which the judgments given in a national court are in a question of minutes being disseminated all over the world. A fair and sound judgment that is free from corruptive influence edifies a country and its global standing.

²⁶⁹ Fahed Abul-Ethem, "The Role of the Judiciary in the Protection of Human Rights and Development: A Middle Eastern Perspective." *Fordham International Law Journal*. Volume 26, Issue 3 2002 Article 8, (2002):761-770

²⁷⁰ *Ibid*

On the other hand, a weak and unsound judgment reflects the state of the maturity of the judicial process in a country. A country identified as home to a weak and corrupt judiciary soon loses international respect and becomes an anathema to the international business community.”

Judges impact international law through their unique approaches to judging, including the attitudes, notions, viewpoints, ideas, values, and beliefs they adopt. Judges adopt various approaches to interpret international law.²⁷¹ They influence the development and advancement of international law based on their notions and discretion.²⁷² Thus, this international role introduces a collaborative role, by which national courts cooperate with international courts to dispense justice that will be favorable to both countries.²⁷³

Jurisdictional Role

The jurisdictional role is the role unique to a specific type or levels of court. The powers of the court determine the jurisdiction of the court. In legal parlance jurisdiction is another name for the strength or power of a court. The jurisdiction/powers of courts in Nigeria, especially lower courts, change with the demands of the changing times. There

²⁷¹ Ibid: 9

²⁷² Ibid: 10

²⁷³ In other words, a Nigerian court collaborates with courts in the United Kingdom or the United States, even where there may be conflicts of laws, to arrive at just decisions, and to ensure compliance with the generic understanding of justice.

are various administrative reasons that increase or expand the jurisdiction of lower courts. Every state has different reason for increasing the jurisdiction of lower courts. For some it is to reduce the workload of higher courts. For example, the Lagos State Judiciary has increased the civil jurisdiction of magistrates on three occasions since 2015. However, the jurisdiction/powers of superior courts or courts of record are bound by the Constitution. Therefore, such jurisdiction can only change with a constitutional amendment. Thus, change of jurisdiction changes the role of courts.

The role of a trial judge or a court of the first instance is different from an appellate court's role. Moreover, even among appellate courts, we have the lower, central, and higher appellate courts. The lower appellate courts are the state or federal high courts. The central appellate court is the Court of Appeal (CA), and the higher appellate court is the Supreme Court of Nigeria (SC). Trial courts have jurisdictional roles that differ from one court to another. These roles may not necessarily apply to other trial courts. The magistrate court is 'technically' the lowest court on the level of courts under the common law.²⁷⁴ The Magistrate Court Law limits magistrates' jurisdiction to hearing only civil cases that do not exceed ten million naira.²⁷⁵ In criminal cases, magistrates shall have jurisdiction and

²⁷⁴ Other courts are lower than the Magistrate courts, such as the Area and customary courts, but the Magistrate courts are the main court hearing majority bound by the common law rules. So, for this paper, the Magistrate court is our lowest trial court.

²⁷⁵ Section 28 Magistrate Court Law

powers for summary trials, and not jurisdiction to hear murder cases. On the conviction of any person accused of any such crime, the magistrate shall sentence a person to a prison term not exceeding fourteen (14) years.²⁷⁶ By Section 28 (7) of the Magistrate Court Law, “Subject to the provisions of any other Law, a Magistrate shall not exercise original jurisdiction in any cause or matter which raises any issues as to (a) the title to land, and (b) the validity of any devise, bequest or limitation under any will or settlement.”

The high courts (federal, state, or industrial high courts) are also courts of appeal with somewhat limited jurisdictions.²⁷⁷ The federal high court (FHC) generally has exclusive original jurisdiction in civil and criminal cases, and appellate jurisdictions concerning specific matters under the Constitution.²⁷⁸ The high court of a state also has concurrent jurisdiction with other courts of coordinate jurisdiction such as the FHC, national industrial court (NICN), and the High Court of the Federal Capital Territory,

²⁷⁶ Section 29 (1) (2) (5)

²⁷⁷ The civil jurisdiction of the Federal High Court is under Section 251 (1) of the 1999 Constitution, section 7 (1) of the Federal High Court Act 2004 (as amended). Section 251 (2) of the 1999 Constitution, as amended, prescribes the Federal High Court's criminal jurisdiction including powers regarding treason, treasonable felony, and allied offenses.

²⁷⁸ M.A, Lateef “Jurisdiction of Courts in Nigeria”

https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjV85LS27DwAhUNup4KHclZAsYQFjAAegQIBRAD&url=https%3A%2F%2Fwww.researchgate.net%2Fprofile%2FMisbau-Lateef%2Fpublication%2F336903157_JURISDICTION_OF_COURTS_IN_NIGERIA%2Flinks%2F5db9f943a6fdcc2128f0c696%2FJURISDICTION-OF-COURTS-IN-NIGERIA&usg=AOvVaw3MBKOrIFwJyWkob1dNweV

Abuja.²⁷⁹ An interesting provision of the FHCA that somewhat defines the role of the FHC is section 7 (9) of the FHCA. By this section, the FHC is a Superior Court of Record. It may exercise supervisory jurisdiction through a judicial review over inferior courts or tribunals about acts and omissions of persons, bodies, and institutions on subjects within the FHC jurisdiction.²⁸⁰ Also, by the provision of section 28 of the FHCA, the FHC is vested with an appellate jurisdiction to hear and determine appeals from tax cases, decisions on customs, immigration and prison services, civil and criminal cases transferred from magistrate courts and decisions of any other body established under any statutes on matters over which the FHC may exercise such jurisdiction.

The NICN is another trial court with a unique role, has coordinate jurisdiction with the FHC, and the various state high courts.²⁸¹ Generally, section 254 (C) (1 – 4) of the 1999 Constitution (as amended) states that the NICN has jurisdiction, to the exclusion of other courts of coordinate jurisdiction, to adjudicate over civil and criminal cases, matters relating to labor, industrial trade union and industrial relations; environment and conditions of work, health, safety and welfare of labor; matters related and incidental to labor. By section 254C (3) and (4), the NICN also has appellate and supervisory jurisdiction over

²⁷⁹ Ibid

²⁸⁰ Ibid: 27

²⁸¹ Section 254 (a) of the 1999 Constitution (as amended)

decisions or arbitral tribunals or commissions. ²⁸²One of this courts' indeterminate roles focuses on socio-economic guarantees. It appears that the above provisions place a daunting role for economic development on the NICN.

The CA of Nigeria plays a unique and strategic role in the Nigerian polity. I consider this court as the most powerful court in Nigeria.²⁸³ This court has both original and appellate jurisdictions. Section 239 (1) and (2) of the 1999 Constitution (as amended) states its original jurisdiction on the validity of the office of the president/vice president and on electoral petition matters.²⁸⁴ When the CA presides as a tribunal for the presidential election petition, the court has the original jurisdiction, as the court of the first instance. In other words, only the CA, while sitting as the presidential election petition tribunal, has the exclusive original jurisdiction to hear and determine election petition and other related matters concerning the office of the president or vice president and any question as to

²⁸² Lateef, *opcit*: 34

²⁸³ This may be judicial blasphemy, but I will explain subsequently.

²⁸⁴ (1) Subject to the provisions of this Constitution, the Court of Appeal shall, to the exclusion of any other court of Law in Nigeria, have original jurisdiction to hear and determine any question as to whether – (a) any person has been validity elected to the office of President or Vice-President under this Constitution; or (b) the term of office of the President or Vice-President has ceased; or (c) the office of President or Vice-President has become vacant. (2) In the hearing and determination of an election petition under paragraph (a) of subsection (1) of this section, the Court of Appeal shall be duly constituted if it consists of at least three Justices of the Court Appeal.”

whether such offices have become vacant.²⁸⁵ *Obasanjo v. Yusuf*,²⁸⁶ affirmed that “the court of appeal as the presidential election petition tribunal has original jurisdiction to hear and determine presidential election petition vide section 239 (1) of the Constitution and consequently to hear all matters related to the election.”²⁸⁷

The SC is presumably the most powerful in Nigeria, but I respectfully disagree. Even though it is the highest court of the land, and the final appellate court, the SC has limited original jurisdiction and somewhat limited appellate jurisdiction, which is often determined by the interest or willingness of parties to further file their appeals from the CA to the supreme court. Many factors like money, time, and statutes can frustrate appeal or further litigation to the SC. That is why some litigation end their cases at the CA level. Also, the extent of the court's limitation is restricted to the records forwarded from the trial courts through the central appellate court. These records determine the SC’s analysis and eventual verdicts. Section 232 of the 1999 Constitution states that the SC has original jurisdiction over “any dispute between the Federation and a state or between states if and in so far as that dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends.... ”

²⁸⁵ Lateef, *opcit*: 17

²⁸⁶ *Obasanjo v. Yusuf* (2004) 9 NWLR (Pt. 877) 144

²⁸⁷ See Section 240 of the 1999 Constitution (as amended), which provides for the appellate jurisdiction of the CA,

The appellate jurisdiction of the SC is generally a superior administrative and supervisory role. As the final appellate court in Nigeria, this court exercises unopposed authority in all civil and criminal cases over the other courts.²⁸⁸ Therefore it is its role to manage and monitor the procedures of the courts below and ensure that they comply with the constitutional requirement of achieving justice. The SC's managerial role needs to harmonize with the other courts' unique jurisdictions to accommodate deviation from precedent in the interests of justice and society. This conveniently takes us to the role of the SC in creating and preserving precedent. What the SC decides becomes law and should be taken as gospel even if it is against the interest of justice, or so it seems.

The courts also determine the outcome of any social, national, and international controversies or conflicts. From an international perspective, where the parties so choose, they may file a further appeal to an international court. Under international laws and Nigeria's federal laws, the judgments of international courts are enforceable in Nigeria. An example is the case of *Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights v. Nigeria*²⁸⁹ SERAC alleged that the Nigerian National Petroleum Corporation (NNPC), in a joint venture with Shell, while carrying out oil drilling

²⁸⁸ See section 233 (5) & (6) of the Constitution.

²⁸⁹ *Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights v. Nigeria* (2001) AHLR 60 (ACHPR 2001); See also Henkin, Louis, et al *Human Rights: 2003 Supplement* (New York: Foundation Press, 2003): 70-81.

in Ogoniland in the Niger Delta area of Nigeria, had violated numerous provisions of the African Charter on Human and People's Rights.²⁹⁰ The African Commission on Human and People's Rights, Banjul held the Nigerian government liable for violating the economic and social rights of the Ogoni community of the Niger Delta regions of Nigeria, and asked the Nigerian government to compensate the communities.

Social Change Role

This role is the most relevant role of the court in the present democratic dispensation in Nigeria and globally. This intermediate role of social change is controversial yet indispensable. Categorically, judges are agents of social change. The courts have considerable powers to change/reform an entire society. These opportunities present themselves as litigation in every given case, and somewhere, between the lines of the claims and proceedings is society's silent plea or echo demanding the courts to use their powers to create social change.²⁹¹ These changes occur in legislation, institutions, groups or communities, governance, culture, religion, education, technology, science, politics, to mention a few.

²⁹⁰ These were the rights to life, environment, disposal of wealth and natural resources, as well as the rights to food and shelter.

²⁹¹ Social change is the change that occurs over time in human relations or interactions that modify cultural and social institutions, with real sometimes long-term consequences for society

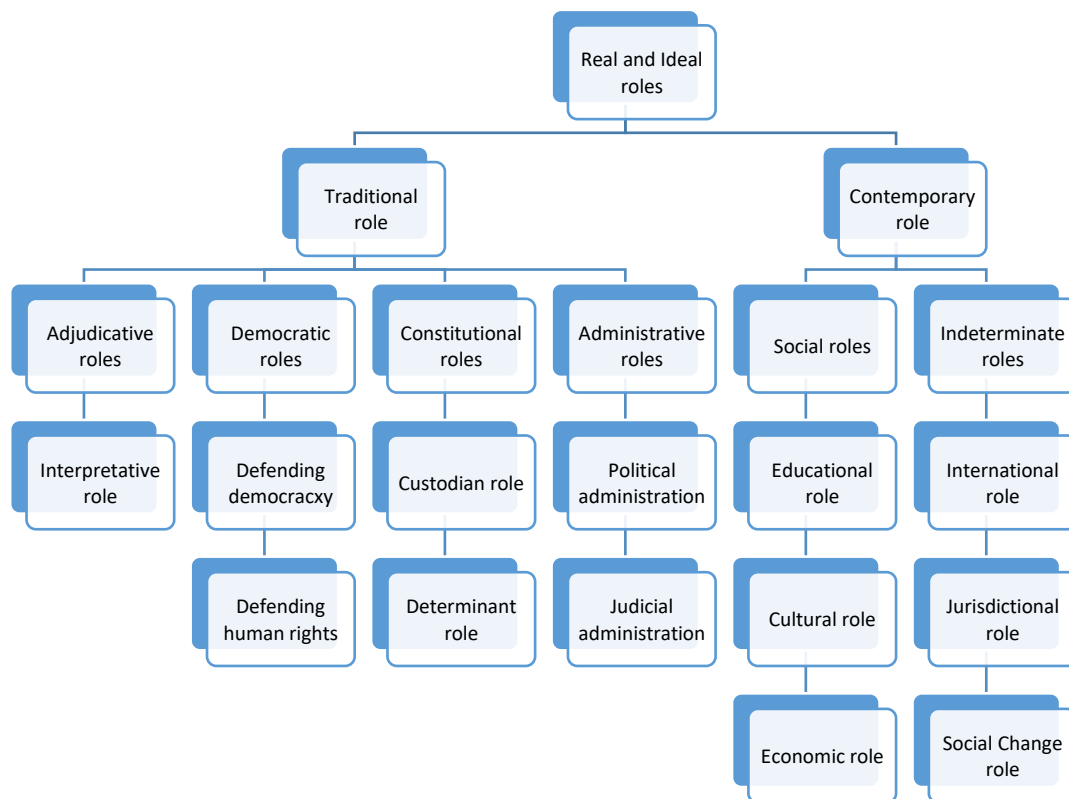


Diagram 2: The Classification of the Ideal and Real Roles of the Judiciary

The role of judges inadvertently changes as cultures and society advances.²⁹² Barack argues that social changes sometimes lead to a situation in which a statute passed in a context of a certain reality and that was constitutional at the time of its enactment becomes unconstitutional in light of a new social reality.²⁹³ Thus, the fate of our democracy depends on judges understanding and fulfilling their roles amidst the societal changes. However, if statutes are stale, and do not comply with social changes, judicial

²⁹² Aharon Barack, *The Judge in a Democracy* (New Jersey Princeton University Press, 2008):8-9

²⁹³ *Ibid*

roles are restrained, and judges encounter dilemmas in interpreting stale and irrelevant statute to ensuring justice in the case.

SECTION TWO: JUDICIAL DILEMMAS

The job of a judge is a very difficult one. The performance of his job affects the entire community, and this makes the job more difficult and demanding. While his main duty is to interpret the law in the context of the facts presented by the parties before him, he has to resort to his senses and conscience all the time. He has to police his own conduct. He has to watch his own conduct, particularly as it relates to the immediate community of his jurisdiction. He cannot do things merely to please himself. He cannot also do things merely to please his immediate community. On the contrary, he should perform his duty within the confines of the law and the immediate dictates of his conscience.²⁹⁴

²⁹⁴ Niki Tobi, *op. cit.* 234

Chapter Three: Legislative/Interpretative Dilemma

This chapter will state the practical dilemmas legislation creates for judicial roles, and the dilemma judges experience when interpreting the legislation. The Constitution and other secondary legislation guide judges in applying and interpreting the law. However, where the law is inadequate to resolve the pending dispute or issues before the court, a gap emerges: one that the courts must fill up through fair interpretations, as a matter of obligation. Thus, judges encounter dilemmas in adopting the appropriate principle to interpret such inadequate laws to benefit society. Judges also encounter dilemmas in interpreting the words and phrases to accommodate the changes in social circumstances from when the law was enacted, so that the law can be relevant to society. Therefore, in discussing these dilemmas, this chapter will examine how the major canons and principles of statutory interpretation hinder judicial performance and judges' roles in achieving justice and explain how the doctrines of separation of powers and checks and balances define or restrict judicial roles.

Legislative Dilemma

The legislative dilemma is about the legislation. When a statute/legislation is inexistent or inadequate in addressing a case (i.e., when no provisions in the law relate to the case), judicial interpretation becomes complex and somewhat frustrating for judicial

roles.²⁹⁵ Statutes are created to solve social problems; accommodate social needs; protect human rights; dictate policies, guidelines and procedures; secure public interest; ensure social compliance; and maintain law and order. These problems cannot be solved when the laws become obsolete/ineffective as society advances. The law loses its relevance, value, or efficacy in society, and society tends to disregard such laws. Consequently, this disregard may resort to disorder and chaos in society. Some aspects of the legislative dilemma are:

Inexistent Legislation

A judge encounters a dilemma where no statute or law exists to regulate the case or where the law is inadequate in the specific case. Thus, where no law relates to the case, judges improvise to determine, understand and/or 'define' the law vis-a-vis the facts in issue to arrive at a just decision.²⁹⁶ Therefore, judges are bound to find ways to ensure justice for the parties. For example, when the Nigerian Evidence Act had no provision on how judges should handle electronically generated evidence, some judges applied unfettered discretion to decide cases involving internet technology and cyber-related crimes. For example, due to the pandemic, informant 5 and informant 6 had to apply their discretion to examine evidence virtually as opposed to citing it when it is tendered by the applying party.

²⁹⁵ Barack, op. cit. 4-5

²⁹⁶ Ibid

Lack of Legislative Foresight

This dilemma manifests when the legislature did not foresee the potential effects of impacting the future of the community that the law applies. Thus, the drafters often fail to put into consideration the controversies likely to arise with changes in times. Examples are technological advancement, emerging communal diversities and unforeseen scientific disruptions like a pandemic. When such circumstances arise before the court, judges attend to the case immediately by attempting to find a way through the law's provisions to give a just decision.

Drafters' Errors

Statutes drafted by human beings are bound to have errors—either fundamental or minor errors. Some of these errors are the unnecessary verbose words. Many laws in Nigeria are unnecessarily wordy that sometimes it is difficult to read, comprehend and interpret. Despite the several legislative stages,²⁹⁷ some laws still have errors that depict different meanings from the rest of the law.²⁹⁸ These drafting errors are likely to create ambiguities in the law. Accordingly, it becomes incumbent for courts to intervene and interpret the statute and save society from the consequences of erroneous statutes.

Political Motive

²⁹⁷ Chapter 10 will mention and discuss these stages.

²⁹⁸ Ukeje, R.N., op. cit. 213

Different governing powers assume office with selfish political ambitions that often guide specific vital legislation drafting. For example, the Proposed Protection from Internet Falsehood and Manipulation Bill 2019 (social media Bill) attempts to empower the government to cut off internet access or block specific social media platforms such as WhatsApp, Facebook, and Twitter, at its discretion.²⁹⁹ Nigerians strongly opposed this bill through several protests. According to Adeboye Adegoke, this bill is a backdoor approach to silence critical voices against the government.³⁰⁰

Change in Government

The transition of Nigeria from several military regimes—back and forth, to the present democratic regime, and the transition from one democratic regime to another may have affected Nigerian laws. Also, changes within the leading government have affected statutory enactments/amendments. The lack of continuity tends to affect judicial interpretation of the drafters' intention and the judge's comprehension of the statutes. Therefore, judges encounter dilemmas in attempting to discern the drafters' intention in the interest of justice.

Legislator's Agenda

Every legislator has an agenda for their legislative office, which may be personal,

²⁹⁹ www.aljazeera.com

³⁰⁰ Ibid

communal, or national. Some may have selfish agendas to sponsor, support, or pass a bill to capture their interests. Such interest may pertain to groups such as tribal/ethnic, age, gender/sexual orientation, and political party affiliations. Under such circumstances, a proposed bill's/law's wordings bear a specific interest and desire, possibly ignoring other equally relevant interests in the proposed bill/law. In interpreting such laws to favor the left-out party or minority as it appears, the courts will experience a dilemma.

Interpretative Dilemma

The interpretative dilemma relates to specific provisions, words, and phrases within the statutes. In interpreting the words or provisions of statutes, judges encounter various forms of challenges in applying the relevant principles or canons of interpretation. No law dictates the specific canon or principle of interpretation that judges should adopt in interpreting any statute, just as no specific law defines the judge's role in interpreting statutes. The central task of the judiciary is to say what the law is by interpreting it. However, in the course of interpretation, certain factors that determine the judges' perception of the law create a judicial dilemma. These factors are:

Judges' Demeanor

Every judge's individuality is the first factor that determines that judge's approach to interpreting the law. The level of judge's understanding or comprehension of legislation

guides their perception of the law.³⁰¹ Contrary to public perception, judicial interpretation is often the judges' unique perspective of the law and the facts before the court. To interpret a word means to give it a personal view from the readers' or observers' perspective or level of understanding. According to *Dickson v. Sylva & Ors*³⁰² for a court to decide what the law is and not what it ought to be, it should tow the path of objectivity and not be subjective. This requirement in interpreting laws creates a dilemma of unrealistic social expectation because judges are inadvertently subjective in interpreting laws.

Judicial Discretion

The discretion of a judge affects every decision they make. The judge's personality shows how the judge perceives the facts and the law together. Discretion is often subjective, unpredictable, and 'unfettered', depending on the nature of the case, the type of court, the judge's personality, and the applicable statutes. Where discretion is unpredictable, the interpretation level can be affected, as every judge interprets statutes from personal and likely biased perspectives. Niki Tobi argues that a Nigerian judge's discretion is fettered.³⁰³ Smithburn also states that judges' discretion in the United States is fettered.³⁰⁴ However, I

³⁰¹ Barack, op. cit. 11

³⁰² *Dickson v. Sylva & Ors* (2016) LPELR-41257(SC)

³⁰³ Niki Tobi, opcit

³⁰⁴ J.E. Smithburn, *Judicial Discretion*. (Reno, Nevada: NJC Press. 2006)

argued in my thesis that judicial discretion can be unfettered.³⁰⁵ Thus, determining whether discretion is fettered or unfettered creates a dilemma for the judge faced with circumstances that demand appropriate discretion within the confines of the law. Hence, the exercise of discretion is distinct and unpredictable in the interpretation of statutes.

Canons and Principles of Interpretation

Nigerian judges like their British counterparts adopt principles and canons of interpretation to interpret statutes. When judges are interpreting laws, they are at liberty to choose which canons of interpretation best applies to the statutes.³⁰⁶ Adhering to the canons of statutory interpretation has hindered judges from achieving justice in certain instances. Hence the supreme court observed in *Awolowo v Shagari*³⁰⁷ that the canons of interpretation are rough guides rather than strict immutable rules. According to Ukeje, the fundamental canons of interpretation are the literal rule, the golden rule, the mischief rule, and the *ejusdem generis* rule.³⁰⁸

As a general rule in judicial interpretation in Nigeria, the starting point is the **literal rule**. This rule postulates that words of a statute best declare the drafter's intention. As such,

³⁰⁵ Ari Tobi-Aiyemo, *The Act of Judging*, opcit

³⁰⁶ Reseline N. Ukeje, *Intrinsic and Extrinsic Aids to the Interpretation of the Constitution, Statutes and Private Documents*. (Lagos, Nigeria: Ecowatch publications (Nig.) Ltd, (2018): Ivii

³⁰⁷ *Awolowo v Shagari* (1971) 6-9 S.C. 1

³⁰⁸ Ukeje, *ibid*: 35

judges should give the statutes their plain and ordinary meaning, except that plain meaning makes the statute vague and ambiguous.³⁰⁹ Therefore, if giving the statute its ordinary meaning will lead to absurdity, the next logical step is to attempt a secondary meaning that may depict the drafter's intention. This secondary meaning is the **golden rule**. It permits the modification of the literal sense of the statutes' words if the original meaning is absurd.³¹⁰ Next is the **mischief rule**, which enjoins the court to trace the mischief or defect which the old law did not meet, and the remedy the enactment is intended to cure.³¹¹ Then the ***ejusdem generis rule*** means that in interpreting the provision of a statute, general words which follow particular words of the same nature assume the same meaning as the specific words.³¹²

The court's application of any of these canons follows the purpose of interpretation and the principle that the specific judge decides to adopt to interpret laws. The general and paramount principle is the legislative intent. The first question judges ask before and while interpreting statutes is: “what is the intention of the legislature?”³¹³ Different principles

³⁰⁹ See *K.S.I.E.C v P.D.P* (2005) 6 NWLR (pt920)39, *Ehuwa v Ondo State I.E.C & Ors* (2006) 10 NWLR (pt1012) 544 at 588 paras F-H

³¹⁰ *SPDC (Nig) Ltd v KATAD (Nig) Ltd.* (2006) 1 NWLR (pt960) 216 paras D-G

³¹¹ *A.G Lagos State v Mamman Keita* (2016) LPELR-40163 (CA) 15-16 paras. E-A

³¹² *Ehuwa v Ondo State I.E.C & Ors* (supra)

³¹³ *Kure v K.S.L.G.S.C* (2003) 3 NWLR (pt807) 337, para-E-F

guide the courts to determine the intent of the legislature. In my thesis, I categorized these principles as: drafters' intention principle;³¹⁴ the holistic principle;³¹⁵ constitutional alignment principle;³¹⁶ principle of precedent;³¹⁷ strict adherence principle;³¹⁸ contextualizing principle;³¹⁹ legislative history principle;³²⁰ drafters' error principle;³²¹ clear boundaries principle;³²² equity principle;³²³ and the international law compliance principle.³²⁴ These principles, gleaned from case law, show that literal interpretation in

³¹⁴ It posits the pure grammatical meaning of the statute.

³¹⁵ This means that the relevant provision of the statute to be interpreted should be read together with the rest of the statute.

³¹⁶ Courts should ensure to aligns the canons of interpretation with the spirit of the Constitution.

³¹⁷ This principle means adherence to precedent in the interpretation of statutes.

³¹⁸ 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.

³¹⁹ This means the words in a statute should be used within the context of the specific situation or particular case.

³²⁰ 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.

³²¹ This is when the court interprets a statute considerate of unnecessary ambiguous statutes or statutory errors.

³²² 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.

³²³ The principles of equity should prevail over any rule of technicality in the mind of the judge when interpreting statutes

³²⁴ This principle guides the court to ensure interpretation is in compliance with international law.

some cases is insufficient –especially if the society has advanced, since the law’s enactment.

According to Idigbe, by the constitutional requirement vesting courts with the statutory power of interpretation, courts are meant only to ascertain the legislature's intention.³²⁵ It is a tough job to gauge the intentions of the drafters of our laws with all the above principles.³²⁶ As is typical of human beings (that judges are), there would be diverse views in understanding the meaning of a statute or intention of the drafters, as the English language is a matter of semantic. Some people see the meaning of words from one angle and interpret them narrowly. In contrast, others see words from several angles and give them broader interpretations. In other words, some statutory words may appear to have a plain meaning, while others have to be in a context to capture the drafters’ intent. Like liquid, words take the form of their ‘container.’ They assume the meaning the user or observer gives them.

The Non-Justiciability Limitation³²⁷

Chapter 11 of the CFRN restricts the courts from adjudicating on the fundamental objectives and directive principles of state policy. This provision creates some form of ‘frustration’ for Nigerian courts because, as beautifully crafted and directional as it is, this

³²⁵ Idigbe, *opcit*: 84

³²⁶ When you 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

³²⁷ The CFRN contains some provisions that appear idle and fancy but supposedly ineffective.

provision is non-justiciable under section 6(6).³²⁸ Despite the incessant human rights abuses in Nigeria, this constitutional limitation stands as an impediment to judicial interpreting of the law.³²⁹ Several cases have challenged the constitutionality or relevance of that provision vis a vis social, economic, and cultural rights like the right to housing, food, health, etc. The case of *A.G. Ondo State v A.G. Federation*³³⁰ reiterated the position of Nigerian courts that chapter II of the Constitution is non-justiciable.³³¹ This controversy has attracted so many lawyers and non-governmental organizations' attempts to make the courts enforce the rights under chapter II as human rights. Although some of these attempts have succeeded, the legislature still delays amending these provisions.³³² In such circumstances, some judges have upheld that the rights under chapter II of the Constitution

³²⁸ See the explanation in chapter 2 of this dissertation.

³²⁹ This chapter contains the Fundamental objectives of State policy which stipulate what we have come to understand as third-generation rights (right to housing, right to food, right to a healthy environment, right to clean water, right to economic development, right to self-determination, etc.)

³³⁰ *A.G. Ondo State v A.G. Federation* (2002) 9 NWLR (pt. 772)

³³¹ This means that the rights stipulated in this provision cannot be enforced in courts, as the Constitution does not recognize them as rights. The question then is, why is it in the Constitution when it is not enforceable? NGOs in Nigeria have devised several tactics to address this democratic quagmire.]

³³² This hesitation may be due to bureaucratic procedures- budgetary issues, selfish political ambitions, government change, and lack of political will.

are human rights. They have applied their discretion and interpreted chapter II of the Constitution as equivalent to Chapter IV. Meanwhile, chapter IV of the Constitution, which provides for Fundamental human rights,³³³ is similar to the Bill of Rights, and it is justiciable and enforceable in courts.

Therefore, when interpreting these provisions, courts attempt to define or ‘re-define’ these non-justiciable rights and relate them to the justiciable rights in chapter IV to arrive at the justice of a given case.³³⁴ This limitation has put the courts in an awkward situation, as they often have to devise means of settling disputes arising from chapter II of the Constitution.

Ouster Clause Restrictions

An ouster clause is a provision that limits the court’s jurisdiction over a matter and thereby deprives an aggrieved party of a just remedy. In *Abaribe v Speaker Abia State House of Assembly & Anor*³³⁵ the court held that an ouster clause is a clause in the provision of a statute that ousts the court's jurisdiction, and such an ouster clause may be absolute or limited. Absolute in that there is the total exclusion of jurisdiction and limited exercise,

³³³ This provision states the first-generation rights—the right to life, right to dignity of the human person, freedom of speech, freedom of religion, Etc.

³³⁴ Ari Tobi, “A Right to Adequate Housing.” The Guardian national daily Newspaper (December 2, 2003)

³³⁵ *Abaribe v Speaker Abia State House of Assembly & Anor* (2002) 14 NWLR (Pt. 788)466

where the exercise of jurisdiction is excluded only in certain situations.

Ouster clauses in the Constitution and other statutes do not only restrict judges' interpretative role, but they also frustrate litigants and the justice of any case. For example, in sections 6(6) (a) and (b), the CFRN enables the courts with judicial powers, but then under sections 6(6) (c) and (d), the same Constitution restricts these judicial powers.³³⁶ Also section 4(8) of the CFRN provides that legislative powers by the National Assembly shall be subject to the jurisdiction of the courts, yet section 143(10) states that “no proceedings or determination of the panel or of the National Assembly or any matter relating thereto shall be entertained or questioned in court.”³³⁷ *Micheal Dapianlong v Chief Joshua Dariye & Anor*,³³⁸ held that “the Ouster clause provision in Section 188(10) Constitution of the Federal republic of Nigeria 1999 will only come into effect if the provisions of Section 188 (1-9) has been complied with in an impeachment proceeding. These provisions are contradictory.

³³⁶ This provision ousts the Jurisdiction of every Court in Nigeria to entertain any issue or dispute the directives and fundamental objectives of the State policy enshrined in chapter 2 of the Constitution.

³³⁷ See also section 188 (10): “No proceedings or determination of the panel or of the House of Assembly or any matter relating to such proceedings or determination shall be entertained or questioned in any Court.”

³³⁸ *Micheal Dapianlong v Chief Joshua Dariye & Anor* (2007) ALL FWLR (PT 373) 1 at 46 Paras. A- C (CA)

Niki Tobi argues that the greatest enemy of judicial power is the ouster clause.³³⁹ Once the phraseology of the ouster clause is tight and conclusive it becomes a complete and total embargo to the exercise of a judge's judicial power.³⁴⁰ A judge cannot assume jurisdiction in the face of an explicit ouster clause. Since the judge has no jurisdiction, the judge must helplessly tell the litigant the law's position.³⁴¹ So, where an ouster clause arrests the powers of the court to hear a matter, the litigant's case is pronounced dead upon arrival. These are some of the reasons the public has wrong perceptions of courts. They have no clue about the restrictions of ouster clauses. All they want is justice from the court, and as far as they know, the court is unjust in relying on 'some' ouster clause to deny them 'fair hearing.'

The Doctrines of Separation of Powers, and Checks and Balances

Separation of powers is the fundamental way our government balances power so that one part of the government does not overpower another. The idea is that each branch of government has its roles and areas of authority. The doctrine of separation of powers posits that in order to preserve political liberty and prevent abuse of power, the legislative, executive and judicial powers should be vested in various arms of government, operated

³³⁹ Niki Tobi, *op. cit.* 131

³⁴⁰ *Ibid*

³⁴¹ *Ibid*

with checks and balances as provided for under the CFRN.³⁴²

Checks and balances, is a doctrine that automatically follows the principle of separate powers of various branches of government. It is a mechanism for ensuring that each of the arms of government supervises and checks one another against possible abuse of powers.³⁴³ Courts often use the power of judicial review as checks and balances to control public bodies' administrative actions. The general rule is that although the courts will not interfere in regular legislative and executive affairs, they will declare as unconstitutional any legislative and executive actions or affairs that breach or contravenes the Constitution.³⁴⁴ The doctrine of separation of powers inhibits judge's independence to check on the legislative and executive powers by invalidating legislation/legislative acts through the checks and balances mechanism. The doctrine of separation of powers appears to challenge and restrict the judiciary's expanding judicial roles. It appears that judicial interpretation clashes with legislating when judges adopt an approach of interpreting to determine the justice of the case.³⁴⁵

³⁴² Idigbe, *opcit*

³⁴³ Francisca O. Anyim-Ben, Samuel. N. Okereke, Ngozi Chijioke, "The Doctrine of Separation of Powers and Checks and Balances in Nigeria Executive-Legislative relationship." *Nnamdi Azikiwe Journal of Philosophy*. Volume 9, No 1 .2017: 77-84 at 79

³⁴⁴ It appears that the courts declaration of a legislative/executive action as unconstitutional is often misinterpreted as interference with legislative powers

³⁴⁵ From the eleven principles of interpretation, I stated above, the equity principle seems to conflict with the other principles, especially the clear boundaries principle. This is because even if

So from one angle the Supreme Court is saying that courts cannot interfere with legislative procedures while interpreting a statute,³⁴⁶ and from another angle the same Supreme Court states that mere technical rules of interpretation of statutes are inadmissible as they defeat the principles in the Constitution.³⁴⁷ In other words, “In our organic law, where the Supreme Court in particular watches with hawk-like guard on the kind of laws passed by our legislature, it will be remiss on its part to ignore an enactment that actually seeks to invade the preserve of the judiciary.”³⁴⁸ The point is during judicial interpretation, the doctrine of separation of powers and checks and balances conflict. The judicial role in checking on the other branches of government is often misunderstood as encroaching into a legislative arena of law-making. If the essence of separation of power is to prevent tyranny and the accumulation of legislative, executive, and judicial powers on the one hand, and the essence of checks and balances is to check the other branches of government, then any restrictions will perpetuate injustice. Consequently, the judicial role as chief custodians of the law and democracy will be lost between these two concepts. Hence the judicial

the legislation is unjust, ineffective and unsatisfactory, the courts are estopped from ‘veering into the legislative arena, to apply justice to the case.

³⁴⁶ See *Dickson v. Sylva & Ors* (2016) LPELR-41257(SC) Per Kekere-Ekun, JSC P. 78, para C - F

³⁴⁷ *Dapianlong v Dariye* (2007) 4 S.C. (ptIII)118 at 176 and 177

³⁴⁸ *A.G Adamawa State v A.G. Fed* (2005) 18 NWLR (Pt. 958) 581 t 667 para E-F

dilemma on what to do—check the legislative and executive branches of government, or refrain from making any form of review.

Semantics of Words

The English language is quite complex because of its semantic approaches and interpretations. So, judges have different understandings and give different interpretations to verbose legislation.³⁴⁹ They resort to external aid from books and dictionaries, especially where there is no precedent. The problem of language must be recognized as a paramount consideration in judicial interpretation. Some reasons that the words in statutes create a dilemma for judges are:

- 1) Where words are susceptible to more than one meaning or interpretation, the word becomes ambiguous.
- 2) If the provision, word, or statute being interpreted is incompatible or contradicted by any other provision of the said statute or a different statute or even the Constitution.
- 3) Where the subject matter is strange to and inapplicable to the relevant times.

As a result of these reasons judges encounter challenges in judicial interpretation.

Basic human instincts to the interpretation of any word on its own could be

³⁴⁹ All eight Informants mentioned that they use all of these methods where necessary to determine some cases. The discussions with the author were between January, March and April 2021

misunderstood, as interpreting words is a matter of semantics. It is the hearer's perception on the one hand and the talker's view 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 which side the viewer sees. It is all about perception. This was Barack's view when he said judges interpret statutes from their individual views.³⁵⁰ Similarly, interpretation is all about the view of the judge and the perception of the society. Even some lawyers misunderstand judicial decisions. Their perception and that of society differ from the judge's.³⁵¹ Hence the aphorism that the English language is a matter of semantics.³⁵² Niki Tobi, JSC stated in *Federal Republic Of Nigeria v Mike Ameachi*,³⁵³ that “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.” Thus, Imam,³⁵⁴

³⁵⁰ Barack, op. cit. 105

³⁵¹ Ari Tobi-Aiyemo, *The Act of Judging in Nigeria...* opcit: 119-120

³⁵² As the complexity of a simple English word may mean different things to different drafters, so is judicial interpretation among judges. Judges ponder on several factors.

³⁵³ *Federal Republic of Nigeria v Mike Ameachi* (2004)1 SC (ptII) 27 at 25

³⁵⁴ Ibrahim Imam, “Judicial Activism in Nigeria: Delineating the Extend of Legislative-Judicial Engagement in Law Making.” *International and Comparative Law Review*, Vol. 15 No. 1(2015.):109-127

opines that rather than rely on predetermined meanings, the laws' spirit admits shifts of meaning in words.³⁵⁵ Also in *PDP v. Sherrif & Ors*,³⁵⁶ Rhodes-Vivour, *JSC* stated that “the law is long settled that “*may*” is not always “*may*.” It may sometimes be equivalent to “*shall*.”

On a final analysis, as judges carry out this enormous task of interpreting status, they encounter several challenges. In determining whether the statutes govern the facts in issue or whether either of the parties has proven their case, judges have to analyze the law and determine how favorable it is to the parties' cases. In such analysis, judges adopt various interpretative principles/approaches. Thus, they encounter a dilemma if interpreting the law with its original meaning could lead to an unjust decision and spell injustice to the society. Courts also encounter a dilemma as they give deference to the legislature's intention because a departure from the intent is presumed as a usurpation of the legislative function by the judiciary. However, if judges interpret the law strictly as the legislation requires, society perceives the courts as unjust, where the laws are flawed, for instance with ouster clauses. When they interpret the legislation based on social reality, they get criticized as usurping legislative powers and they are often called judicial activists. The objective of separation of powers and checks and balances is to ensure good governance. However, it

³⁵⁵ Ibid, 120

³⁵⁶ *PDP v. Sherrif & Ors* (2017) LPELR-42736(SC) (P. 54, Paras. A-B),

appears that the doctrine of separation of powers is ineffective with the indeterminate role of the judiciary, coupled with the troubling political dispensation in Nigeria, where executive lawlessness, threats to judicial Independence have become the order of the day.

Chapter Four: Political and Governmental Dilemmas

The idiom "do not bite the hands that feeds you" is the subtle threat that captures the essential point in this chapter that will discuss the political and administrative pressures judges encounter (from politicians and chief executive officers/leading government) in the course of their judicial roles. These politicians/ political parties head the executive and legislative branches of government that decide on and disburse the budget for judicial administration and judge's welfare. Accordingly, this chapter will examine the political and governmental actions that generate judicial dilemmas. It will discuss how these political pressures affect the judiciary's independence vis-a-vis the courts/judges' appointments, promotions, disciplining, financing, and service conditions of the courts/judges.

Political and Governmental Actions

Democratic governance in Nigeria thrives on the administrative role of the judiciary. According to Yusuf, the judiciary's role in the political transition has been an essential factor in holding Nigeria together as a political entity.³⁵⁷ Nevertheless, these political transitions produce governmental actions that have created dilemmas for good judicial administration. I categorize these actions as follows:

Political Instability

³⁵⁷ Hakeem O. Yusuf, "The judiciary and political change in Africa: Developing transitional jurisprudence in Nigeria." *International Journal of Constitutional Law*, Volume 7, Issue 4, (October 2009):654–682, <https://doi.org/10.1093/icon/mop027> at. P. 656]

As I stated in chapter one, the complexities of Nigeria's checkered political history impact judicial roles in different dimensions. The prolonged military rule and epileptic democratic rule experienced in the country is a mitigating factor against the judiciary's optimal performance in protecting human rights.³⁵⁸ According to Husein and Akanbi, the judiciary faces external challenges in the protection of human rights, which includes the political instability in Nigeria, especially between the post-independence period of 1960 up till 1999.³⁵⁹ Although military rule has become a past issue in Nigeria as there has been relative political stability since the 4th Republic in 1999, the present civilian government is still quite unstable. This instability impacts judicial roles as election petition cases flood the courts on a regular basis.³⁶⁰

Executive Lawlessness

Incessant abuse of the rule of law has become constant with the Nigerian government. The present dispensation has, on several occasions, shown disrespect for the rule of law and, by extension, the judiciary. Hence, it portrays the judiciary as a powerless and biased branch that cannot 'check and balance' the executive. An example is the disregard of due process when the president of Nigeria unlawfully suspends and

³⁵⁸ Husein, F.A, Akanbi, K.O. "Judicial Attitudes to Fundamental Rights Protection in Nigeria." p. 51

³⁵⁹ Ibid

³⁶⁰ Ibid

subsequently dismisses an incumbent chief justice.³⁶¹ This shows a flagrant breach of the Constitution and an affront on democratic tenets. This executive lawlessness attracted international criticisms and interventions.³⁶² Specifically the EU³⁶³, UK³⁶⁴ and US³⁶⁵ have criticized the suspension and subsequent dismissal of former Chief Justice Onnoghen.³⁶⁶ Another example of how the executive breached the rule of law was in the rearrest of the Nigerian activist/journalist Sowore within the FHC Abuja premises, barely twelve hours after the court granted him bail on a charge of treasonable and money laundering felonies.³⁶⁷

³⁶¹ Vanguardngr.com (June 28, 2019)

<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjGjfrhjvVuAhXBxFkKHYyxBsQQFjACegQIAhAD&url=https%3A%2F%2Fwww.vanguardngr.com%2F2019%2F01%2Fonnoghen-buharis-action-amounts-to-executive-lawlessness-atiku%2F&usg=AOvVaw0BXtW-6Jwaf1abFWpY1i2T>

³⁶² www.bbc.com (Jan 28, 2019)

https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjZ-6HSh5vvAhXNG80KHab_DisQFjADegQIAhAD&url=https%3A%2F%2Fwww.bbc.com%2Fnews%2Fworld-africa-47027752&usg=AOvVaw1P-7aQytn6eZuoakOIA6L

³⁶³ "The decision to suspend the chief justice has led to many Nigerians, including lawyers and civil society observer groups, to question whether due process was followed," said the EU Election Observation Mission in a statement., BBC reports: Ibid.

³⁶⁴ The British High Commission also expressed "serious concern over the suspension". In a statement it said: "It risks affecting both domestic and international perceptions on the credibility of the forthcoming elections." BBC reports: opcit

³⁶⁵ The US embassy said it was "deeply concerned" at the decision to replace Justice Onnoghen "without the support of the legislative branch on the eve of national and state elections". BBC reports: opcit

³⁶⁶ Ibid

³⁶⁷ www.vanguardngr.com (December 9, 2019)

Disregard for Court Orders

One of the most fundamental roles of the judiciary is upholding human rights. Since military reign, Nigerians have experienced significant forms of security threats that have resulted in incessant human rights abuses such as the violation of the rights of the Niger Delta communities, the murder of Ken Saro-Wiwa, unlawful detention of criminal suspects, etc.³⁶⁸ These human rights abuses have generated several court orders requesting the government or perpetrators to adhere to the constitutional requirements.³⁶⁹ However, these court orders are constantly ignored. This disregard of court orders is more disturbing in a democratic government where the rule of law should thrive.

The disregard of court orders is an incessant ordeal that judges face in performing their roles. It has been going on since the military era. In *Chief Abimbola Davies and Others*

<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiilufOsP7uAhVrEFkFHx3qAlgQFjAAegQIARAD&url=https%3A%2F%2Fwww.vanguardngr.com%2F2019%2F12%2Fsowores-arrest-judiciary-battered-than-never-before-sans-lament%2F&usg=AOvVaw3-nTI08vSNB-11So3O2RGx>

³⁶⁸ Ari Tobi-Aiyemo, *opcit* 297-298, see fn 118.

³⁶⁹ In the case of *SERAP v Federal Republic of Nigeria*, JUDGMENT ECW/CCJ/JUD/18/12, The Court held that the Federal Republic of Nigeria had violated Articles 1 and 24 of the African Charter on Human and Peoples' Rights by their failure to protect the Niger Delta environment from degradation. Also, in *SERAC, et al v Nigeria* Comm. No. 155/96 (2001). The Commission found that Nigeria violated Article 16 (right to health) and Article 4, 14, 22,24 (right to a clean environment) of the Charter. Years after these court declarations, the Nigerian government is still in violation of these international treaties.

v National Electoral Commission (NEC),³⁷⁰ the government disregarded the court order restraining the NEC from conducting the presidential election of June 12, 1993, until the courts settle the allegations of corruption. Despite the wide publicity given to this court's orders stopping the elections, the executive government was in utter defiance, basing their defiance on section 19(1) Decree No. 13.³⁷¹ Nevertheless, in *Government of Lagos State v Ojukwu*,³⁷² the court emphasized that the rule of law still reigns despite the military governance. Kayode Eso, *JSC* held as follows: "By virtue of the Constitution (Suspension and Modification) Decree, No. 1 of 1984, a good number of the provision of the Constitution were suspended.... The military government had the power and still has to put an end to the existence of that provision. It has not done so and that must have been advisedly, for it does intend that the rule of law should prevail...."

Executive Privilege

The inherent privilege and powers that the Constitution gives to the chief executive officer constitutes a dilemma to judicial roles. For example, the ouster clauses depict the impression that the government and its agents/agencies are above the law. An example of

³⁷⁰ Chief Abimbola Davies and Others v National Electoral Commission (NEC)

³⁷¹ The devastating consequence of that election still lingers in Nigeria today. Also, in the case of *Shugaba Darma v Ministry of Internal Affairs* (1981) NCLR 25 the then civilian government refused to comply with the order of the court.

³⁷² *Government of Lagos State v Ojukwu* (1986) 1NWLR 18, at 621.

such dilemmatic provisions in section 174(1) (c) CFRN, which provides that the Attorney General (AG) of the Federation shall have the power to discontinue at any stage before judgment is delivered, any such criminal proceedings instituted or undertaken by him or any other authority or person. This provision gives the AG unrestrained discretion to favor an interim government. Despite section 174 (3) CFRN, which states that the AG shall have regard to public interests; the interests of justice (in exercising and preventing abuse of court process); the power to discontinue a case, the reality is that the AG, being a political appointee will not bite the hands that feeds him/her. So, suppose the government agency is likely or 'obviously' liable for an offense or wrong act, still, the court is bound to grant the AG's application to discontinue a suit filed against the government or their agencies. Meanwhile, the public that is often ignorant of such legal procedures either blames the judge that gives such order to discontinue, the case and they often accuse judges of being corrupt or ignorant.

Furthermore, section 308 CFRN says, "No civil or criminal proceeding shall be instituted or continued against a person holding the office of the president, vice president, governor or deputy governor during his period of office." This provision ousts the court's power to entertain any matter involving the chief executive officer because of their immunity. Thus, where an executive leader commits offenses like looting public funds, killings, human rights violations, indulges, and other corrupt practices, they are immune from prosecution until they leave the office. This provision applied even when there was a

pending prosecution before they occupied the executive office. Since the court has no jurisdiction to entertain the matter, the judge will grant the discontinuance order until such president, vice president, governor, or deputy governor leaves the executive office. Unfortunately, the public also has no idea of such statutory and judicial procedures.

Legislative Monopoly

The legislature has the constitutional mandate as the lawmaker, so they challenge the role of judicial interpretation. This legislative role thrives on the doctrine of separation of powers and misinterprets the judiciary's judicial review role as legislating. Hence, in attempting to avoid allegations of usurping legislative powers, some judges disregard applying substantial justice in interpreting statutes, and they apply technical justice instead. Thus, Ijaiye opines "...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. ... 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 are not defeated...."³⁷³

Administrative Superiority

In the constitutional hierarchy, the legislature is the first in the governmental

³⁷³ Hakeem Olasukanmi Ijaye, *Constitutional Approach to Interpretation of the Constitutions in Nigeria, Australia, Canada and India, Nigeria*. Lagos: Malthouse Press Ltd, (2017): 182.

hierarchy, considering they make the laws that govern the government and the country. Then the executive that executes the laws, is the next in the hierarchy. The judiciary is the third and last in the hierarchy of government, with the role of interpreting the laws. Hence it appears that the legislative and executive arms of government show a demeanor of entitlement, that presupposing that they are superior to the judiciary.³⁷⁴ Their demeanor of “we are the leading government, so we call the shots,” is a subtle threat to judicial roles because they control the judiciary's budget. Therefore, the executive performs all sorts of acts that contravene the Constitution. An example is the Department of State Security's (DSS) illegal raid of the residences of seven supreme, federal, and high courts judges on unfounded allegations of corruption.³⁷⁵

The Effects of Political/Governmental Actions on the Judiciary

The above unconstitutional actions of the various government entities frustrate judicial roles in significant ways that cause repercussions to democratic governance in Nigeria. These actions impact judicial independence in diverse ways. They also impact public perceptions of judges/the judiciary's integrity.

³⁷⁴ I argue in subsequent chapters that the judiciary is not a docile branch.

³⁷⁵www.vanguardngr.com
https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwj0NWtq_7uAhWNI-AKHVZ_De0QFjAEegQIBxAD&url=https%3A%2F%2Fwww.vanguardngr.com%2F2016%2F10%2Fanti-corruption-crackdown-dss-recovers-over-n360m-in-3-judges-homes%2F&usg=AOvVaw2kwNjUOeBYueg_sPZx6a7h

Judicial Dependence

This is the opposite of judicial independence. It implies that the judiciary depends on the executive arms of government to survive. The executive is responsible for the administration of the judiciary in the following ways:

Appointments/Promotions. The appointment or promotion procedure for judges differs depending on the court.³⁷⁶ The chief executive officer of the state or federation appoints the federal courts' justices. At the same time, the chief judges of various states appoint the judges of the lower courts. The Constitution and other enabling statutes provide for the procedure of appointing judges.³⁷⁷ Under sections 231, 238, 250, and 271 CFRN, the National Judicial Council (NJC) is the ultimate advisory body that recommends candidates to the president for appointment to the federal courts and to state governors for appointment to state courts.³⁷⁸ The federal and state judicial service commission (SJSC) advises the NJC on judicial appointments to federal and state courts.³⁷⁹ By sections 231,

³⁷⁶ In Nigeria judiciary, the appointment and promotion of judges may mean one and the same thing in certain courts. For example, the promotion of a judge from the lower court to the higher court is called and appointment. In certain respect they are used interchangeably.

³⁷⁷ Niki Tobi, *op. cit.* 23

³⁷⁸ The Commonwealth. 2015 *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice* (London: The British Institute of International and Comparative Law (2015): 175-176.

³⁷⁹ See Third Schedule, Part I (13), Part II (6) of CFRN

238, 250, and 271 of CFRN, the federal senate must confirm supreme court judges' appointment and the heads of the federal court of appeal. The House of Assembly of that state must confirm the high courts and the chief judge of a state.³⁸⁰ Therefore, because the apportionment or promotion of judges to a higher court is at the whims and caprice of the executive, there is a subtle, unspoken phrase—do not bite the hands that feeds you. Thus, judges that dare to go contrary to this phrase may encounter threats of disciplinary actions, outright dismissal, or denial of adequate conditions of service.

Dismissal/Discipline. The president or government of the states has the power to dismiss the judges that they appoint. The president or state government also has the power to exercise disciplinary control over such judges.³⁸¹ So, where judges flaunt the subtle standing order, the government marks them for disciplinary actions or outright dismissal.³⁸² Unfortunately, the executive can discipline or dismiss a judge at their convenience, with or without NJC's or SJSC's recommendation.³⁸³ The unfair reality with some of these disciplinary actions or dismissal is that some judicial disciplinary actions are with political

³⁸⁰ Ibid

³⁸¹ See

³⁸² Informant 1 narrated how he was denied promotion as chief judge of a state because of his decision in a previous case.

³⁸³ This was what happened when the president suspended and dismissed the former chief justice Onnoghen

vendetta.³⁸⁴ In other words, a chief executive officer who has an axe to grind with a particular judge or panel of judges may leverage on misconduct to discipline or dismiss the judge. Thus, the discipline or dismissal may be valid in a certain respect but invalid in another respect. In such circumstances, the government may already possess or go fishing for valid ethical/constitutional grounds of misconduct to justify the disciplinary action.

Nevertheless, the process or procedure the chief executive adopts could be unconstitutional. An example is the suspension and eventual removal of Nigeria's former chief justice Walter Onnoghen.³⁸⁵ Some see the disciplinary actions and charges against the former head of the judiciary and subsequent dismissal just before elections as politically motivated.³⁸⁶ The suspicion was that the president ensured the discipline and eventual

³⁸⁴ For example, if the judge gave a decision in a previous case against the government, they may use appointment or promotion to get back at the judge.

³⁸⁵ [www.bbc.com](https://www.bbc.com/news/world-africa-47027752)
https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwi4_-6QsYDvAhWJmuAKHUvjCmUQFjACegQIARAD&url=https%3A%2F%2Fwww.bbc.com%2Fnews%2Fworld-africa-47027752&usg=AOvVaw1P-7aQytnc6eZuoakOIA6L

³⁸⁶ According to BBC news, the suspension came less than 24 hours before Mr. Onnoghen was scheduled to swear in members of election tribunals. "The decision to suspend the chief justice has led to many Nigerians, including lawyers and civil society observer groups, to question whether due process was followed," said the EU Election Observation Mission in a statement. The US embassy said it was "deeply concerned" at the decision to replace Justice Onnoghen "without the support of the legislative branch on the eve of national and state elections". The British High Commission also expressed "serious concern over the suspension". In a statement it said: "It risks affecting both domestic and international perceptions on the credibility of the forthcoming elections.

removal of the then chief justice to avoid his involvement in choosing the election petition panel.³⁸⁷ However, the government alleged that they fired the former chief justice over allegations of corruption and non-declaration of assets.³⁸⁸ The controversy surrounds the motive for this disciplinary action. Of course, the records will never include the 'real reason' for disciplining or dismissing a judge.

Judicial Welfare. This includes the conditions of services that apply to judges as they serve the community. The most important aspect of judicial welfare is the financial security associated with the judges' budget, tenure, financial empowerment, and welfare. Even though judicial appointments are permanent until the mandatory retirement age, a judge that constitutes a threat to the chief executive or the governing party can be set-up for early retirement.³⁸⁹ Judges have no security of tenure. Although judges' salaries are protected against reduction while they are in office, no law regulates the amount to pay judges and how often to increase their salaries. Therefore, the wages and increase of judges' wages are

³⁸⁷ Ibid

³⁸⁸ Guardianng.com
https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwihpp-31YDvAhVqg-AKHcVVB0oQFjAKegQIAhAD&url=https%3A%2F%2Fguardian.ng%2Fnews%2Fwhy-i-fired-ex-cjn-walter-onnoghen-buhari%2F&usg=AOvVaw1yBSkcK92EIF0Ddu7Nx_DN

³⁸⁹ Informant 1 narrated how he was denied appointment because they said he was a religious fanatic that will stick to the rules, and he will not allow them to take bribe

at the discretion of the executive and legislative arms.³⁹⁰ Therefore, to ensure that the administration of justice does not experience any inhibitions or suffer any reverse, the judiciary head, especially the state chief judges should be in a cordial relationship with the executive governors as there is no option in the matter. Realistically, Niki Tobi opined that the judiciary's head who has the temerity to take confrontational posture with his chief executive has himself to blame, as the chief executive, the human being he/she is will undoubtedly react in the same ungenerous spirit.³⁹¹ Thus, there will be a stalemate, and the result is that the judiciary/the administration of justice will suffer, and the final victim is democracy. Presently, the judiciary staff union of Nigeria (JUSUN) has been on a national strike since early April 2021 demanding the implementation of the constitutionally enshrined financial autonomy for the judiciary.³⁹²

Allegations of Bias

The public perception of the Nigerian judiciary is that judges are corrupt.³⁹³ Most of these allegations are unfounded and born out of ignorance of judicial roles, the

³⁹⁰ Ibid

³⁹¹ Ibid

³⁹² <https://www.dailytrust.com>
https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwj7Lr-_prwAhVbPn0KHZkzBnYQFjABegQIAhAD&url=https%3A%2F%2Fdailytrust.com%2Fcall-off-strike-now-governors-tell-judicial-workers&usg=AOvVaw01C7Mz2Dd1OFyPCrBdmzNi

³⁹³ Tobi, N, opcit: 340

legal/judicial process, and unreliable/incomplete media reports. It is quite typical and convenient for Nigerians to accuse judges who preside over a case or give the verdicts in a high-profile case as corrupt and biased, especially if the verdict is against popular public demands or expectations. For example, in *Abubakar v Yar Adua's*³⁹⁴ high-profile political case, the presidential election was challenged.³⁹⁵ However, the Supreme Court upheld the election of the then-president Musa Yar Adua. Husein and Akanbi alleged that the executive influenced the supreme court because most judges upheld the election despite the president's 'admission' that the election was flawed.

Therefore, where the judgment is contrary to the desires of the ruling political party or public opinion, such a party as a human can react in unpleasant ways, as Niki Tobi opines. Oguntade argues that some cases generate a lot of political interest and research interests. Because of the bitterness endemic in the way we practice our politics, party interests override the ends of justice in politicians' calculation.³⁹⁶ They stultify the regular progress of a case to its early conclusion.³⁹⁷ All sorts of gimmicks are employed to see that a particular judge does not try a case to the end because they believe that the judgment in the

³⁹⁴ *Abubakar v Yar Adua* (2008) 12 SCNJ 217

³⁹⁵ This case will be analyzed as one of our cases throughout this research. The chapters that follow will give detailed analysis.

³⁹⁶ Oguntade, *op. cit.* 10.5

³⁹⁷ *Ibid*

case will go against them.³⁹⁸ Informant 2 gave an unfortunate narrative of how her life was threatened because of the Kudirat Abiola case.³⁹⁹ She also narrated a failed assassination attempt on her because of the same case.⁴⁰⁰ It is sad to see that in all these attempts to hinder the case's progression to its end, lawyers/Attorneys Generals (and even judges' colleagues) are the tools parties use to approach the court in attempts to frustrate the case.⁴⁰¹ They weave intrigues against a judge, and write baseless petitions, and make scandalous allegations openly in court.⁴⁰² They also make attempts to intimidate the judge.⁴⁰³

It is antithetic to democratic tenets, for courts to live in fear of executive or legislative reactions in performing their judicial roles. These actions will rile democracy. In upholding democratic principles, somehow, judges will have to bite the finger that feeds them, and they should not fear repercussions from there. Courts must adjudicate without

³⁹⁸ Informant 6 in discussion with the author February 2021.

³⁹⁹ Informant 2 in discussion with the author April 2021.

⁴⁰⁰ Ibid

⁴⁰¹ Ibid

⁴⁰² Informant 2 narrated how she was accused of taking a bribe in an attempt to intimidate her to recuse from the case, which she had taken over from the previous judge who handled the case, because the judge was also intimidated and could not go on with the case. (In discussion with author April 2021).

⁴⁰³ This author has experienced several threats, petitions and all sorts of attempts to intimidate her.

fear or favor. In *Nguroje & Anor v. El-sudi & Ors*,⁴⁰⁴ the courts held that a dissatisfied candidate in an election case has every right to approach the Court for redress. The courts have jurisdiction to examine and interpret legislation to see if the political party complied fully with the legislation. The Court will never allow a political party to act arbitrarily or as it likes.⁴⁰⁵

Politicians often attempt to influence the judicial process, as the concentration of more power in the government's executive arm encourages this process.⁴⁰⁶ More so, the legislative and executive powers' legal structure does not give the judiciary the required independence to effectively discharge its functions, especially in protecting people's rights against the government. The judges' integrity and personal independence are neither guaranteed nor assured in Nigeria because the executive collaborates with the legislature and sees the executive as the authority that can hire and fire judges at will.⁴⁰⁷ Thus as Husein and Akanbi argues “consequently, the lack of security of tenure of office, life and economy securities make it difficult for the judiciary through the courts administered by

⁴⁰⁴ *Nguroje & Anor v. El-sudi & Ors*

⁴⁰⁵ *Ibid*

⁴⁰⁶ Informants 2 and 5 gave narratives of how the government through the Attorney Generals had on several occasions attempted to influence case before them. Also, Informant 4 said once the government sent his friend/old school mate to influence

⁴⁰⁷ F.A. Husein, K.O. Akanbi, *Judicial Attitudes to Fundamental Rights Protection in Nigeria* p. 51

judges to make independent decisions without inference from other arms...’⁴⁰⁸

Accordingly, it is safe to conclude that such political pressures from the current administration threaten judicial independence. Although these political pressures does not involve judges direct involvement in political parties, as Nigerian judge are non-partisan and not elected as some judges in the U.S.A, yet there is no guarantee that Nigerian judges are free from the political influence of party affiliations.⁴⁰⁹ Just like the U.S.A, a judge appointed by a republican government would be more conservative, while a judge appointed by a democratic government would inevitably be more liberal in their approach to the judicial process, so also the Nigerian judge, although discreetly. If judges who has a conservative mindset decides to be liberal, they may feel society’s expectations of judicial roles restrict or constrains judges’ liberty to apply substantial justice in a given case.

Hence, a dilemma ensues on what society expects concerning a given case, especially election petition cases in Nigeria with a political undertone or agenda. According to Ugochukwu, although there may be sufficient justification for judicial intervention to resolve significant political stalemates in a country like Nigeria, the prevalence of corruption and prebendal politics makes this a double-edged sword requiring both caution and deliberation.⁴¹⁰ He argues that the judicialization of politics in Nigeria might be fuel

⁴⁰⁸ Ibid

⁴⁰⁹ As citizens they are entitled to have political parties that they prefer to vote.

⁴¹⁰ Basil Ugochukwu, “The Pathology of Judicialization: Politics, Corruption and the Courts in

for judicial corruption, on the one hand, as judges' direct exposure to politically charged cases could make them fertile ground for grand corruption. On the other hand, judges have an equally vital role to play in construing corrupt behavior, a role they cannot fulfill if they are battling the same menace of the allegation of being corrupt.⁴¹¹

Courts encounter dilemmas in resolving some of the most significant political cases in society—from settling electoral disputes; determining the nation's leadership; increasing judicial scrutiny of core executive prerogatives; and diversity issues multicultural citizenship; to redefining democratic governance.⁴¹² The judiciary, particularly the appellate courts, has been inundated with "political" cases and has become a strategic actor in policy/decision-making at a level unprecedented in Nigeria's history.⁴¹³ Hence judges often encounter difficulties in considering the competing interests of all parties. The interests of litigants/the public; the government that appointed them into the office and determines their welfare; the competing interest of the justice system judges represent; and society's expectations at large—all constitute judicial dilemmas. Judges experience this

Nigeria” *The Law and Development Review*, Vol. 4: No. 3, Article 4, (2011):59-87) at 59
<http://www.bepress.com/ladr/vol4/iss3/art4>

⁴¹¹ Ibid: 60

⁴¹² Ibid: 63

⁴¹³ Ibid

dilemma because litigants do not understand the *modus operandi* of legal/judicial procedures and the litigation process.

Chapter Five: Litigation/Procedural Dilemma

Litigation is a complex process with diverse components. Judges often face dilemmas in the litigation process because many people (including some lawyers) do not understand the judicial proceedings' *modus operandi*. Judges are bound to adhere to judicial procedures like *nolle prosequi*, *stare decisis*/judicial precedent, and they must comply with the statute and legal principles that accompany these procedures. Besides these procedures and litigation principles, judges also apply a level of judicial discretion in decision-making on a case-by-case basis. If adhering to the required legal principle or judicial procedure will constitute an injustice to the case, most judges resort to judicial discretion. Hence, they encounter predicaments in the application of discretion.

An example is when a judge has to apply the rules of evidence in the absence of precedents, and there is no choice of legal procedure to follow. So, the judge, rightly or wrongly, relies heavily on discretion.⁴¹⁴ Accordingly, this chapter will discuss case law and explain the conflicts judges encounter in applying precedent. It will emphasize how case law affects judges' roles and their discretion to do justice in a case. It will also analyze the decisions/pronouncements of some cases and explain how judges' discretion constitutes a dilemma during trials.⁴¹⁵

⁴¹⁴ This happened in a case I sat over before the Evidence Act of Nigeria was amended to include electronic generated evidence. I used my discretion according to the only available section on documentary evidence and interpreted it to suit the pending case.

⁴¹⁵ Informant 5,6 and 7 in separate discussions with the author, February, January and March

The Dilemma of Judicial Precedent

Precedent is a fundamental doctrine of order that judges must comply with to avoid arbitrary abuse of discretion. Precedent gives birth to case law—the body of principles and rules of law courts formulate or establish over the years.⁴¹⁶ Katsina-Alu JSC (as he then was) in *Dalhatu v. Turaki*,⁴¹⁷ emphasized the need to follow and apply precedent as follows:

This Court is the highest and final court of appeal in Nigeria. Its decisions bind every Court, authority or person in Nigeria. By the doctrine of stare decisis the Courts below are bound to follow the decisions 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 below to be bound by this court's decision is gross insubordination (and I dare say such a Judicial officer is a misfit in the Judiciary).

Comments like this intimidate or threaten lower court judges who may have good reasons and perhaps chances to ensure justice to the case through deviating from precedent as the law requires.

The rule on precedent in Nigeria is somewhat similar to that of the U.S.A. However, in the U.S.A, adherence to precedent is more flexible, as courts balance many “non–

2021(respectively)

⁴¹⁶ Justice C.O. Idahosa, “The doctrine of Stare decisis and judicial precedent: the need for lower courts to be bound by decisions of the superior courts of record.” (Conference of All Nigerian Judges of the lower Courts, 21-25 November 2016)

⁴¹⁷ *Dalhatu v. Turaki* (2003) 15 NWLR (Pt. 843) 310 at 336. at p. 336, paras. E-G.

dispositive factors” in deviating from precedent.⁴¹⁸ In *Alleyne v. The United States*,⁴¹⁹ Associate Justice Sotomayor⁴²⁰ 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.’”⁴²¹ Judge Walker⁴²² adds that although this principle of precedent is a bedrock principle in the American legal system, it is not an “inexplorable command.”⁴²³ Hence, in the U.S.A, overruling incorrect precedents may occasionally be necessary to rectify egregiously

⁴¹⁸ John M. Walker, *The Role of Precedent in United States: How Do Precedents Lose Their Binding Effects?* Stanford Law School: Traditional Commentary No. 15(2016)
<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwi56bSk6LDwAhWTup4KHcTODnoQFjAAegQIBBAD&url=https%3A%2F%2Fcgsc.law.stanford.edu%2Fcommentaries%2F15-john-walker%2F&usg=AOvVaw3tlVfRof4bjWp7lzqqhRAu>

⁴¹⁹ *Alleyne v. The United States* 570 U.S. 99, 118 (2013)

⁴²⁰ Justice of the Supreme Court of the United States of America

⁴²¹ Also, in *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986) “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.”

⁴²² Walker, *opcit*

⁴²³ *Ibid*

wrong decisions or to account for changes in society.⁴²⁴ The U.S.A Supreme Court states that the decision to overrule precedent must be on substantial grounds that extend beyond the court's mere disagreement with the merits of the prior decisions' reasoning.⁴²⁵ The celebrated American case of *Brown v Board of Education*,⁴²⁶ where the court held that the segregation of public schools by race violated the Equal Protection clauses of the Fourteenth Amendment, is an example of substantial grounds to overrule precedent.

The exception to the general rule is that where adherence to precedent affects a case's justice or social justice, the court can deviate from precedent. The first is that the Supreme Court can reverse its previous precedent. In *Bronik Motors Ltd & Anor v. Wema Bank*,⁴²⁷ the Supreme Court stated that it could deviate from its previous decision: where there is a breach of justice, on the grounds of public policy; and where the retention of the decision will amount to a perpetuation of injustice. The second exception when the court can deviate from precedent is under the doctrine of distinguishing the case. Under this

⁴²⁴ Brandon J. Murrill. The Supreme Courts Overruling of Constitutional Precedent. (2018):7 Retrieved from Congressional Research Service: https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=21&cad=rja&uact=8&ved=2ahUKEwiPsLm_urLgAhVGmeAKHfpIAMgQFjAUegQICBAC&url=https%3A%2F%2Ffas.org%2Fsgp%2Fcrs%2Fmisc%2FR45319.pdf&usg=AOvVaw2o-4aTrsVN3_-rWmirTqSet

⁴²⁵ *Ibid*, 11

⁴²⁶ *Brown v Board of Education* 347 U.S. 483

⁴²⁷ *Bronik Motors Ltd & Anor v. Wema Bank*, (1983) NSCC P. 225

principle, the judge shows that the recent case is different from the precedent. Distinguishing the case means pointing out an essential difference between the present case's facts and the previous case and using such difference as justification for departing from the superior court's decision in the earlier case.⁴²⁸ In distinguishing, specific factual differences exist which justify the court not to follow the decision in the earlier case while still accepting that the decision in the case is a good law.⁴²⁹ Thus, any court in Nigeria can deviate from precedent if the judge justly distinguishes the case and supports their opinion rather than make bare declarations that the facts of the case are different.⁴³⁰

Ongoing in Nigerian courts is the controversy on conflicting precedents. The courts have experienced inconsistencies in adhering to precedent because judges of lower courts, especially the court of appeal, get entangled with two or more conflicting precedents and are at crossroads on which of them to apply in a pending case. Thus, judges encounter dilemmas in applying conflicting precedent. Although the courts have made attempts to solve this problem by the exceptions above, the dilemma persists. Also, some judges still encounter a dilemma in distinguishing the case, and it resorts to abuse of judicial

⁴²⁸ Justice Idahosa, *op. cit.* 6

⁴²⁹ *Ibid*

⁴³⁰ Osipitan, *opcit*

discretion.⁴³¹

The Reasons Judicial Dilemmas Persist

The Lack of Uniformity

Judicial dilemmas persist when there is no uniformity in establishing the precedent,⁴³² and in applying the precedent.⁴³³ Precedents are supposed to have basic uniform principles on similar cases, and the application should follow the same principle of the previous case. Unfortunately, the judge's individuality and diverse discretion inevitably influences how different judges apply conflicting precedents based on their unique perception. When faced with two conflicting precedents, some judges apply the precedent they consider most valuable to the case (or even the most convenient for the particular judge presiding in the case).⁴³⁴ The dilemma this conflict creates impacts legal practice, that solving it creates more dilemmas.⁴³⁵ Hence, former Chief Justice Dahiru

⁴³¹ Chapter three will discuss this in detail

⁴³² The first is when the court that established the precedent does not have a common voice. i.e., the Supreme Court.

⁴³³ The second is when the lower courts lack uniformity in the application of the precedent.

⁴³⁴ In *GTB Plc v. Fadco Ind. Ltd* (2007) 7 NWLR (Pt. 1033) 307 at p. 325, the judge in deciding between two precedents said "I am fully aware of the fact that I am bound by the decision of the Supreme Court but it is the Law that in this kind of situation, I am allowed to choose which to follow between the two decisions."

⁴³⁵ More discussion in chapter 6 on ethical and judicial dilemmas

Musdapher expressed his concerns as follows:

I must mention that quite a number of judgments from the Court of Appeal and a few from the Supreme Court appear to have created some confusion amongst practitioners and the general public.... We have witnessed a lot of confusion regarding the proper application of the principle of judicial precedent. The creation of several divisions of the Court of Appeal has also led to the unintended problem of conflicting judgments at the appellate court. Such judicial contradictions have a tendency to lead not only to confusion in judicial precedent but could cause untold hardship to litigants in their quest for justice. These conflicting judgments not only confuse counsel but the public as well, further leading to uncertainty regarding the public perception of our ability to guarantee unequivocal justice. This portrays the judicial process as a game of Russian Roulette where any outcome is possible.⁴³⁶

The Conflict in Applying Diverse Precedent

Judges often experience conflicts about which precedent to apply. The Supreme Court's diverse views and opinions on the application and deviation from precedent create confusion for lower courts judges to follow. The resolution of inconsistent decisions of the Apex Court has also provided the platform for further conflicts.⁴³⁷ Osipitan mentioned two views that govern the resolution of conflicting precedent. The first states that a later decision is presumed to have impliedly overruled previous decision(s) of the Court, and

⁴³⁶ www.thenigerianvoice.com (June 18, 2012)

<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjnotS994bvAhXIXM0KHe0bAC8QFjAAegQIARAD&url=https%3A%2F%2Fwww.thenigerianvoice.com%2Fnews%2F92722%2Fconflicting-judgements-in-the-nigerian-courts-and-the-cjn0.html&usg=AOvVaw0l3u3X5WhgtjYJjpkbsbrfw>

⁴³⁷ Osipitan, op. cit. 9

the second argues that a judge of a lower Court can choose which of the conflicting decisions of the Supreme Court to apply to the case before it.⁴³⁸ Osipitan opines that most of the Supreme Court's decisions favor the principle that a later decision will impliedly overrule the court's previous decisions when the court's decisions on the same issue conflict.⁴³⁹ In *Osakue v. FCE Asaba*,⁴⁴⁰ Ogbuagu, J.S.C. held that "It is now settled that where there are conflicting judgments of this Court, the lower court or courts is or are bound by the later decisions and must follow and apply it." However, *NEPA v Onah*⁴⁴¹ held that in the event of conflicting decisions, the lower court or a court of co-ordinate jurisdiction is free to choose between the decisions which appear to it to be correct."

Specifically, in *GTB Plc v. Fadco Ind. Ltd*,⁴⁴² Ba'aba, J.C.A. had asserted that:

I am being faced with two conflicting decisions of the Supreme Court of Nigeria. One supporting the Respondent, the other supporting the position of the appellants. I am fully aware of the fact that I am bound by the decision of the Supreme Court, but it is the Law that in this kind of situation, I am allowed to choose which to follow between the two decisions.

Unfortunately, despite what appears to be the Supreme Court's consensus, as

⁴³⁸ Ibid

⁴³⁹ Ibid, 10

⁴⁴⁰ *Osakue v. FCE Asaba* (2010) 10 NWLR (Pt. 1201) P. 1 at 34.

⁴⁴¹ *NEPA v Onah* (1997) 1 NWLR (Pt. 484) p. 680 at p. 689; see also *Okoli Chime & Anor. v Ofili Elikwu & Anor* (1965) N.M.L.R. p. 71.

⁴⁴² *GTB Plc v. Fadco Ind. Ltd* (2007) 7 NWLR (Pt. 1033) 307 at p. 325.

Osipitan argues, the lower courts are still divided in their application of precedent. Hence, the *Osakwe Court*⁴⁴³ emphasize as follows:

Those who think they are very knowledgeable ... if they have listening ears, let them hear and take care. I have gone this far because the learned justices of the Court of Appeal in the University of Ilorin v Adeniran (supra) who claim or assert to be torn between the two judgments of this court” should please take note and come to terms with the principles or doctrines of stare decisis, precedents and hierarchy of courts, which are clear and unambiguous. They are an indispensable foundation. For the umpteenth time, where there appear to be conflicting judgments of this court, the later or latest will or should apply and must be followed if the circumstances are the same.

Dilemma on When to Apply the Precedent in a Case

It is one thing to know which conflicting precedent to apply in a case, and it is another thing to know when or how to apply a particular precedent. In *Mene Kenon & 2 Ors v Albert Tekan & 5 Ors*,⁴⁴⁴ Ejiwunmi, JSC, endorsed that an earlier decision should only be binding in a later case “on all fours,” i.e., where all facts and issues are similar to the earlier case. However, Niki Tobi JSC in *Oladeji (Nig.) LTD v. Nigeria Breweries PLC*⁴⁴⁵ stated 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 and that the facts need not be on all fours in the sense of exactness or exactitude. Osipitan agrees with the later view of the two

⁴⁴³ *Osakwe v Federal College of Education* (2010) 3 SCNJ p. 529

⁴⁴⁴ *Mene Kenon & 2 Ors v Albert Tekan & 5 Ors* (2001) 14 NWLR (Pt. 732) 45 at 89.

⁴⁴⁵ *Oladeji (Nig.) LTD v. Nigeria Breweries PLC* (2007) 5 NWLR (Pt. 1027) P. 415 at P. 436.

views that the same supreme court established.⁴⁴⁶ However, Informant 4 argued that the justice of the matter should be the determinant factor in applying precedent. In facing several frustrations in this regards a justice of the court of appeal, informant 4 said: “The issue of precedent is a major, major problem. When you see something that will bring about injustice, and when you try to dance around it and you can’t find a way, it can be very, very disheartening. I am [being] very, very frank with you... it affects your sense of justice as you see that this is not right, but you are bound by it.”⁴⁴⁷

Dilemma in Diversity of Discretion

The conflicts in precedent frustrate the lower court judges' discretion in deciding to apply an unjust precedent where an existing precedent outweighs or challenges the case's justice. Judicial discretion is a significant cause of judges' dilemma because the judge's unique personality influences their role. Applying discretion in a case is not an easy task for judges. Judicial discretion while upholding democratic tenets can be confusing for some judges, especially when it requires strict constructive interpretation. In today's democracy, the judge's discretion has become spontaneous under the guise of technologically advanced cases filed in courts. For instance, judges may face a dilemma in considering a defendant's hardship if the defendant is sentenced to confinement or fined a massive sum of money.

⁴⁴⁶ Ospitan, op. cit. 4-5

⁴⁴⁷ Informant 4 in a discussion with author March 2021

The judge wants to ensure justice in the case, and also that people are accountable for their actions. Amidst all this, the judge also appreciates the realities of life and considers mitigating factors, where necessary. However, the extent and limit to the use of discretion hinders a lot of judges, especially trial judges, in giving just decisions. Lower courts seem to have a subtle fear of superior courts in applying precedent. For instance, where there are no precedents to follow, or when there is likelihood to apply the distinguishing the case principle, the judge who is not a federal judge holds back and often is hesitant to improvise or apply their discretion.

Therefore, in applying discretion, judges encounter dilemmas as their discretion is rooted in historical precedent (to maintain procedural/ judicial principles). Judges' discretion also depends on their highly intuitive individualistic judgments and philosophies in a complex and continually changing society. According to Trachtman, supreme court justices decide these issues and the myriad of other questions that define our rights and lifestyle through a process that is both rooted in historical precedent and at the same time highly intuitive and dependent on individual value judgments and philosophies.⁴⁴⁸ In the U.S.A., for instance, judges experience discretionary dilemmas in a situation where judges in different judicial jurisdictions apply various principles of law according to their discretion. An example is in the application of the principles in the cases of *Frye v United*

⁴⁴⁸ Trachtman, opcit: 10

States,⁴⁴⁹ and *Daubert v Merrell Dow Pharmaceuticals*.⁴⁵⁰ Several states in the U.S.A. continue to apply the *Frye* general acceptable tests, while some others that seem to have adopted the *Daubert* standard have still not applied it uniformly. Another dilemma is when a state or municipal law stipulates principles/ standards that differ from federal law. For example, the state of Alaska legalizes the use of marijuana for personal use while federal laws say the use of marijuana is illegal.⁴⁵¹ Nigeria has a central government. Federal and state laws are the same, and the federal laws are binding to all states.

This lack of uniformity and conflicts in previous judicial decisions is one delicate quagmire that question the Nigerian judiciary's reputation. This does not just constitute a dilemma, on the judges, but also on lawyers who advice their clients on what the law is, and on the society who must be guided by the position of the law. Eventually, this causes a ripple effect of chaos, and the consequences of such inconsistency fall back on society.⁴⁵²

⁴⁴⁹ *Frye v United States*, 293 F.1013

⁴⁵⁰ *Dauber v Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1994)

⁴⁵¹ Baret, S. Medical Marijuana and Federal Law

<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjcr934r6LwAhVLPn0KHfKQBtAQFjAAegQIBhAD&url=https%3A%2F%2Fwww.criminaldefenselawyer.com%2Fresources%2Fcriminal-defense%2Ffederal-crime%2Fmedical-marijuana-federal-laws.htm&usg=AOvVaw0mgRFIkI31qirqqG-c7XoC>

⁴⁵² As the proverbial African phrase: When the elephants (courts) fight (disagree), it is the grasses(society) that suffer.

The Nigerian judiciary cannot afford this dilemma. This process by the author will be a further basis for her theory

Procedural Dilemma

This dilemma usually occurs during and after the hearing of a case. It is the process that judges apply to arrive at a just decision. Every trial has its unique procedure that the court adopts to ensure justice. Specific principles are laid down for the court to follow. These procedures may not be as stringent as adhering to precedent, but they ensure due compliance in the administration of justice. Examples are procedural issues, evidential issues, judicial process, preliminary or adjunct applications, and issues related to the trial or hearing. Since litigation is an extensive area, I will briefly discuss three out of the several litigation areas that imply judicial dilemma. They are— evidentiary litigation, the dilemma of no precedent, and random procedural dilemma.

The Dilemma in Evidentiary Litigation/Evidential Dilemma

As I argued previously, the courtroom is like a science laboratory where only the judge, like the scientist, has a mastery of the ‘specimen’ they examine. Therefore, no observer can understand, or give a precise prediction of the court’s thinking, as the judicial microscope is available to only one set of eyes—the judge’s.⁴⁵³ Hence the record or verdict is the individual judge's perception or perspective of the facts and law.

⁴⁵³ Even within a panel, every judge gives his/her own unique perspective of evidential analysis.

During the hearing, when the parties present their case and the judge analyzes evidence, only the individual judge sees the loopholes from both parties' arguments. Only the judge can make conclusions from those loopholes.⁴⁵⁴ The details that litigants fail to state in their testimonies or evidence are, most of the time, the gaps that destroy or build their case. Small details can either build or destroy the merits in a case. In certain cases, the evidence parties present in court, tend to be more convincing than the 'truth', and this constitutes a dilemma for the judge who has to consider evidence over truth because that is what the procedure requires. For example, Informant 2 said she faced this dilemma in handling a high-profile case which was glaring to the public that the defendant committed the offense, but she had to comply with the rules of evidence. In her judgment, she said:

This case highlights the detachment that must be present between cold hard facts and sentiments in the sense of "a feeling or opinion prevailing among a group of people"...In the aftermath of the monumental tragedy, the Respondent made a number of tactical errors in the investigation of the case and the prosecution of the accused person who allegedly conspired to murder Alhaja Kudirat Abiola....What is even more disheartening is that the Respondent elected not to prosecute the said Barnabas Jabila (a.k.a. Sgt. Rogers), who actually confessed to pulling the trigger and shooting Kudirat Abiola in the forehead on the said day...This may have been seen as a very strategic move but trial finally commenced..., over 13 years after Kudirat Abiola was shot and killed; by that time, a lot of water had passed under the bridge and witnesses had recanted and changed their accounts on what actually transpired in this case. The end result is that the prosecution found itself with a very weak case that was riddled with holes because the nuts and bolts that should have been tightened during the investigation had become loose or fallen out completely, so the prosecution was not able to

⁴⁵⁴ Judges are like scientists who are transfixed on the microscope and can see or deduce the molecules that others without the microscope can't see.

prove its case beyond reasonable doubt.⁴⁵⁵

Also, the reality of moral expectations clash with the evidence/the expectations of the law-giving judges a harder task to decide between evidence and ‘truth’ from society’s perspective. This is one of the most challenging roles of judges where they may or may not agree with the public opinion on the apparent truth about a high-profile case. However, the law enjoins them to consider and decide on the evidence presented during the hearing of the case, which most of the time contradicts the popular opinion.⁴⁵⁶ Informant 2 condemned the trial judge (who was caught up in a dilemma) in the above case of *Al Mustapher v State*,⁴⁵⁷ further stated in her judgment that: “the learned trial judge fell short of this standard because he closed his eyes to the cold facts before him and allowed himself to be swayed by sentiments and political insinuations in his own interpretation of the evidence before him.”

Another example is the case of *Abubakar v Yar Adua*.⁴⁵⁸ Some criticized the judges that decided this case, alleging that the executive influenced the judges to favor the respondent. It was a public opinion that the election was flawed. Indeed, in his inaugural speech, the president-elect said the election had its shortcomings. Hence, the critics of the

⁴⁵⁵ *Al Mustapher v. State* (2013) 17 NWLR (pt. 1383) at p. 350

⁴⁵⁶ Detailed discussion on the personal dilemma in chapter 8

⁴⁵⁷ *Supra*

⁴⁵⁸ *Supra*

judgment and the judges expect the court to automatically base its judgment on the said extra-judicial speech. Unfortunately, judicial procedures are not as straightforward as many think. Judges see things differently under their judicial microscopes. I will view the said inaugural speech of the then president-elect with our judicial microscope. It reads:

We acknowledge that our election had some shortcomings. Thankfully we have well-established legal avenues of redress, and I urge anyone aggrieved to pursue them. I also believe that our experiences present an opportunity to learn from our mistakes. Accordingly, I will set up a panel to examine the entire electoral process with a view to ensuring that we raise the quality and standard of our general election and thereby deepen our democracy. ⁴⁵⁹

The majority of the Supreme Court's decision upheld the above criticized presidential election despite the notoriety of the first line of the above speech where the then president-elect said "...our election had some shortcomings..." Hence, Husein and Akanbi argued that the executive greatly influenced the judiciary, and the judiciary denied the nation the right to elect a leader of its choice. If Husein and Akanbi had the privilege of viewing and analyzing the case through judicial microscope, they would know that the executive did not influence judges, but the judges only followed judicial procedure within their discretion's limits. First of all, it is an established rule of evidence that he who asserts must

⁴⁵⁹ Husein, F.A, Akanbi, K.O.) *Judicial Attitudes to Fundamental Rights Protection in Nigeria*. 52

prove.⁴⁶⁰ Another rule of evidence is that suspicion is not the same as evidence.⁴⁶¹ The court made it clear in *Odock v State*,⁴⁶² that “instincts, assumption and sentiments have no role to play in adjudication. They are not good premises for adjudication and the court should not indulge in them.” A judicial analysis of that inaugural speech does not give the court definite evidence to conclude that the assertion “*some shortcomings*” meant the election was null and void. The court needed more proof than such assumptions to declare an election void. It is a clear principle of law in election petition cases that the onus is on the petitioner to prove that the election was flawed. It is not for the petitioner to depend on the weakness of the respondent’s case. The word “shortcomings” could mean anything.⁴⁶³ It will amount to judicial interference for judges to hold the election flawed based on an extra-judicial speech without evidence in court to support it.

Therefore, in *General Muhammadu Buhari v Independent National Electoral*

⁴⁶⁰ See *Owena Mass Transportation Co. Ltd v Okonogbo* (2018) LPELR –45221 (CA) and *Aderemi Aderounm v Federal Republic of Nigeria*

⁴⁶¹ This was the position of the court in the case of *Al Mustapher v State* (supra)

⁴⁶² *Odock v State* (2007) 7 NWLR (Pt.1033)369 at 399, D&F

⁴⁶³ Judges also consider how much of such shortcoming the petitioners prove in their case, and how fundamental if proven, such “shortcomings” were to the crux of the case and the election? The speech urged the aggrieved parties to seek redress, which is a constitutional entitlement. His conclusion that he will set up a panel to examine the entire electoral process to raise the quality of the general elections, so as to deepen democracy does not mean that the flaw was fundamental to flawing the entire elections, neither is that action or statement tantamount to an admission of wrong. Hence, he stated that the experience presents an opportunity to learn from our mistakes.

Commission (INEC) &4 Ors,⁴⁶⁴ the court submitted succinctly that the burden of proving non-compliance with the Electoral Act was on the petitioner. The first burden was for the petitioner to establish substantial non-compliance with the Electoral Act principles. However, the flawed election was upheld because the petitioner could not prove how non-compliance affected the election results. The reasoning of the justices in the above case hinged on the grounds of public policy. Nullifying the election and keeping a nation in anarchy for any brief time would be against public interest.

The Dilemma of No Precedent

Judges are often afloat and ignorant on what to do in a pending case, where no precedents exist. Hence, they are not sure of the procedure to follow in the case. This lack of knowledge makes them unprepared for the case and constitutes a dilemma. Judges may be lords of the law, but the human element of not knowing it all leaves room for a level of ignorance regarding certain aspects of law without precedent. As society develops, it requires legal/judicial advancements, but statutory development tends to be slow in Nigeria due to the legislative bureaucracy. Hence, the slow rate the legislature amends statutes, hinders judicial advancement and judges are at crossroads with no law or precedent to guide the proceedings.

At the advent of the new millennial with technological advancements, where

⁴⁶⁴ General Muhammadu Buhari v Independent National Electoral Commission (INEC) &4 Ors (2008)12 SCNJ Pt1 at 1

computers started to replace typewriters and fax machines, Nigerian courts were still operating in obsolete systems of documentation and exhibits. Meanwhile, litigants had started bombarding the courts with scientific documents and computer-generated exhibits. The rest of the Nigerian society had advanced to computer-generated evidence while courts were still lingering with papers and files. It was until 2011 that Nigeria Evidence Act recognized and incorporated computer-generated evidence.

Before 2011, courts had conflicting decisions and views on the admissibility of computer/electronically generated documents—some courts ruled against electronic evidence's admissibility. Other courts endorsed admissibility of computer-generated documents as documentary evidence.⁴⁶⁵ According to Posner, "...the continued rapid advance in science is going to make life difficult for judges. We live in an age of breakneck technological change that will thrust many difficult technical and scientific issues on judges, for which very few of them (of us, I should say) are prepared because of the excessively rhetorical emphasis of legal education and the weak scientific background of most law students..."⁴⁶⁶

Random Procedural Dilemma

⁴⁶⁵ *Eso West Africa v Oyagbola* (1969) NMLR 194; *Yesufu v ACB* (1974) SC. P. 1 at 16; *Anyeabosi v RT Briscoe* (1987) NSCC P. 805; *Trade Bank v Chami* (2003) 13 NWLR (Pt. 836) 158; *UBA V Sani Abacha Foundation for Peace and Unity* (2004) 3 NWLR (Pt. 861) 516.

⁴⁶⁶ Posner, op. cit. 1049

This dilemma covers every aspect of the judge's actions during and after the hearing—from oath-taking, evidence, opening, and closing arguments to final verdicts and sentencing/ post-judgment motions. One aspect is judges' dealings with *pro se* litigation often create a dilemma on the balancing act to ensure that all parties receive and observe the fair hearing. So, most times, the judge is either too lenient or too firm in dealing with *pro se* litigants, and there is no justice when the scale of justice tilts either way. Another aspect is on the application for *nolle prosequi*. The public does not understand the principles that govern an order of *nolle prosequi*. All they know is that a judge has set free a suspect or notorious criminal that deserves to be prosecuted and punished.⁴⁶⁷

Also, judges face dilemmas regarding media publicizing pending lawsuits—on whether or not to make gag orders in high-profile cases. An example is the George Floyd murder trial—Judge, where judge Peter Cahill warned attorneys or officials from making public comments about the merits of the case, possible evidence, or guilt or innocence, but he did not issue a formal gag order.⁴⁶⁸ Another litigation process that constitutes a dilemma

⁴⁶⁷ My masters in judicial studies course mate in one of my classes narrated how her community in Albuquerque, New Mexico, criticized her for granting an order for *nolle prosequi*. They accused her of releasing a criminal that deserved to be in jail, back into the society.

⁴⁶⁸ www.cnn.com, (June 29, 2020)
<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiWmIOxwo7vAhULUK0KHdfvBPwQFjAEegQIBxAD&url=https%3A%2F%2Fwww.cnn.com%2F2020%2F06%2F29%2Fus%2Fgeorge-floyd-officers-chauvin-court%2Findex.html&usg=AOvVaw2Nv7QB3m6QBV3nN5jKuBAM>

for judges, though not applicable to Nigeria, is the jury selection process, which is wearisome. As an unbiased umpire, the judge encounters attorneys who use every tool in their power to manipulate the jury selection process in favor of their client. However, the judge has to maintain a balance and fair persona.

In conclusion, the litigation process and the procedures that accompany it continue to steer controversies on conflicting precedents and established principles, which questions the judicial process's *modus operandi* and creates a dilemma for judges who must ensure justice is done and seen as done. These procedural concerns threaten the court's credibility and question the ethical roles of judges in society. Hence the rhetorical question—how can a judge distinguish between their procedural and ethical roles?

Chapter Six: Ethical Dilemma/Judicial Dilemma

The Code of Conduct for Judicial Officers of the Federal Republic of Nigeria (COC), which applies to all Nigerian judges/judicial officers, stipulates specific judicial expectations, and ethical conducts.⁴⁶⁹ Some of these expectations are unrealistic because judges are human that are part of a larger society, so expecting them to live as islands and super-humans is impracticable and dilemmatic.⁴⁷⁰ Therefore this chapter will examine how judicial administration and ethical requirements frustrate judicial independence; and how institutional challenges create a dilemma for successful judicial administration. The highlight will be the judicial organization's dilemma that even when the judiciary has so much power the government restricts these powers. In addition, the chapter will precisely state the Court of Appeal's (CA) frustrations in applying precedent.

Judicial Independence and Ethical Requirements

According to the preamble of the COC, “an independent, strong, respected and respectable judiciary is indispensable for the impartial administration of justice in a

⁴⁶⁹ The rhetorical question from chapter five, concerning how judges balance their judicial roles with ethical and judicial expectations, creates a dilemma for judges. Judicial codes of conduct guide and regulate judges' conduct.

⁴⁷⁰ These judicial expectations are social perceptions of who judges are and judges' role in society.

democratic State....⁴⁷¹ Thus, judicial independence is one of the most desired concepts in democracy, and it is an indispensable requirement of the judiciary's role in Nigeria's democracy. Democracy thrives when the judiciary is independent. The rule of law prevails, and democracy succeeds in a society where judges can exercise their judicial roles without fear or favor. The judiciary's role in upholding democracy and benefiting from democratic tenets at the same time constitutes a dilemma for judges because judges enforce the rights of citizens. However, courts often disregard their personal and cooperative rights/independence.⁴⁷² For instance, judges often ignore their right to privacy, association, and freedom of expression.

Judicial independence has two categories: the judge's independence and the judiciary's independence. Oko agrees that the judiciary should enjoy both personal and institutional independence.⁴⁷³ The judges' or personal independence deals with the judge's individuality. In contrast, the judiciary's or institutional independence pertains to the

⁴⁷¹ This preamble is an integral part of the COC, and its provisions can be enforceable as the specific rules in the Code.

⁴⁷² This is a talk for another forum, but it often seems as though judges are just there to enforce human rights and sacrifice their human rights. [explain more – not clear]

⁴⁷³ Okechukwu Oko, "Seeking Justice in Transitional Societies: An Analysis of the Problems and Failures of the Judiciary in Nigeria." *Brooklyn Journal of International Law*, Vol 31 (2005): 9-82, at 20

judiciary's administration or different judges' collective experiences.⁴⁷⁴ These personal and collective/institutional independence are fundamental to democracy in Nigeria. It gives judges a sense of security and build's society's confidence in the judiciary. This public confidence also creates an enabling environment for justice to thrive in a democratic society.

Judges/Personal Independence⁴⁷⁵

The judges' independence includes their fundamental right as individuals and citizens, who are entitled to the constitutional liberty and entitlements available to every Nigerian citizen. Barack defined personal independence as the judges independence from relatives and friends, independence from the litigating parties and the public, independence from fellow judges and judges responsible for managing the system (including the president or chief judge of the court), independence from office holders in all the other branches of government.⁴⁷⁶ The Constitution does not exempt judges from enjoying their fundamental rights to liberty, freedom of expression, freedom of movement, freedom of association, etc. However, under their judicial roles to uphold justice and defend democracy, judges inadvertently sign-up to 'waive' some of these rights.⁴⁷⁷ The specific dilemmas

⁴⁷⁴ Singular and plural independence

⁴⁷⁵ More details in chapter 8 under personal dilemma

⁴⁷⁶ Barack, opcit: 78

⁴⁷⁷ I do not think many judges have a hint of an idea what they signed up for – a life of seclusion and loneliness

judges encounter on a personal level are:

The Code of Conduct's Dilemma. This dilemma ensues from some restrictive provisions of the COC, which requires judges to adhere to specific standards in compliance with the law and society's expectations of the office of the judge. It appears that the public dictates the conduct of judges to ensure that judges live up to their expectations. In other words, it appears that judges in Nigeria work and live for the law and the public, in sacrifice of personal rights and interest. Their sacrifice represents the connotative meaning of public service. In expressing his frustration and dilemma informant 4 said: "[F]rom day one there are certain social clubs and things that you do that you have to give up. They said we should avoid contact sports, as it exposes us to members of the public, so I stopped playing football and cricket..."⁴⁷⁸

The second part of the COC's preamble reads that: "it is the duty of every Judicial Officer to actively participate in establishing, maintaining, enforcing, and himself observing a high standard of conduct that will ensure and preserve transparently, the integrity and respect for the independence of the judiciary. The judicial duties of a judicial officer, which include all the duties of his office prescribed by law take precedence over all his other activities..." This preamble requires judges to be self-sacrificing. It depicts judicial roles as possessive and all-consuming. It takes priority over the judge's private and

⁴⁷⁸ Informant interview

public life, which are the judge's activities in and out of office. Rule 1(1)⁴⁷⁹ states that as members of the public expect a high standard of conduct from judges, a judge must ask himself or herself the question "How might this look in the eyes of the public?" It appears that the Nigerian judges have no life, as most judges live a life of isolation. Under the heading "The Judge's Life of Isolationism" Niki Tobi opines that "A judge's life of isolation means so much to the judge and his work. It extends to keeping less friends and acquaintances. The COC requires them to live for society in and outside the courtroom. Hence, the COC give the picture of judges as a recluse, a state of mind that eventually has repercussive effects on judicial productivity."⁴⁸⁰

Rule 1 (2) A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities both in his professional and private life.⁴⁸¹ It is easier to avoid the appearance of impropriety in professional life, than in private life, as the judge cannot determine the public's view on his/her private life. The aphorism beauty is in the beholder's eyes, applies on the flip side, and what a judge considers proper may be impropriety to

479 Propriety and the appearance of propriety, both professional and personal,

480 Monica K. Miller, Jenny Reichert, Brian H. Bornstein, & Grant Shulman" Judicial stress: the roles of gender and social support," *Psychiatry, Psychology and Law*, 25:4, (2018): 602-618.
DOI: [10.1080/13218719.2018.1469436](https://doi.org/10.1080/13218719.2018.1469436)

481 Rule 1.5 A Judicial Officer must avoid social relationships that are improper or may give rise to an appearance of impropriety or that may cast doubt on the ability of a Judicial Officer to decide cases impartially.

some public observers. For example, getting involved in activities in their child's school may be impropriety for some public observers.

Rule 1 (7) A judge shall not engage in gambling as a leisure activity. Every vocation has an official persona and a leisure/private persona. It creates room for diversity, which is a necessary fact of life.⁴⁸² Unfortunately, the vocation of judges interprets life to be the same in and outside the courtroom. The judge's life constantly living in the public eye can be stressful; it is like taking work home.⁴⁸³ If judges have fun gambling for leisure, it should not be a problem as long as they play within their private space, and they have fun away from stressful work.

By Rule 4(2),⁴⁸⁴ where society implicates judges in an allegation of bias and corruption, they are es-stopped from defending them. This rule goes contrary to sections

⁴⁸² The officials dress in a certain way for official purposes, and then after work hours, their dressings change, and they are more relaxed and casual. That is human nature, as no man is isolated.

⁴⁸³ More discussion in chapter 8

⁴⁸⁴ A Judicial Officer shall be bound by professional secrecy with regard to his deliberations and to confidential information acquired in the course of his duties. Accordingly, confidential information acquired in the Judge's judicial capacity shall not be used or disclosed by the Judge for any other purpose not related to the Judge's judicial duties.

34(1)(a),⁴⁸⁵37,⁴⁸⁶39⁴⁸⁷ of the CFRN, and it contradicts Rule 5 of this Code which reinforces the freedom of expression.⁴⁸⁸ By Rule 6 (c),⁴⁸⁹ when society criticizes a judge, the better and wiser course is to ignore any scandalous attack or criticism outside the courtroom rather than exacerbate the publicity by initiating proceedings. This provision attempts to control the judge's reaction to allegations that indict his/her personality. It presupposes that the judge should ignore scandalous attacks and criticisms, yet the judiciary does not speak up for judges to vindicate them from such wrong allegations. So, hindering judges from defending themselves is a dilemma that restricts their freedom of expression.⁴⁹⁰

⁴⁸⁵ Right to dignity of human person-no person shall be subject to degrading treatment

⁴⁸⁶ Right to privacy and family life

⁴⁸⁷ Right to freedom of expression

⁴⁸⁸ Rule 5 COC. Like any other citizen, a Judge deserves freedom of expression, belief, association, and assembly. However, in exercising such rights, a Judge shall always conduct himself to preserve the judicial office's dignity and the impartiality and independence of the judiciary. Accordingly, a Judge shall act with such restraint as is necessary to: a) maintain public confidence in the impartiality and independence of the judiciary; xb) avoid involvement in public discussion or discourse if his or her involvement could reasonably undermine confidence in his or her impartiality; c) avoid such occasions and circumstances where such involvement may unnecessarily expose the Judge to political attacks or be inconsistent with the dignity of a Judicial officer; and/or d) adhere strictly to political silence.

⁴⁸⁹ The convention of political silence requires the judge concerned not to reply to a public statement ordinarily. Although the right to criticize a Judge is subject to the rules relating to contempt, these rights will not suppress or punish criticism of the judiciary or a particular judge.

⁴⁹⁰ Rule 9.4.c. A judge should be circumspect about becoming involved in personal litigation. Personal litigation must be a last resort. The expectation can be unrealistic as the

Rule 8(2) “A Judge will need to take special care to ensure that his or her judicial conduct or judgment is not even subconsciously influenced by the judges’ close relationships.”⁴⁹¹ How does an individual determine their subconscious, when section 38 CFRN gives judges freedom of thought and conscience? This code expects too much from judges than they can afford to give as regular human beings.

Rule 11⁴⁹² (iii) “A Judicial Officer on becoming aware of reliable evidence of unethical or unprofessional conduct by another judicial officer or a legal practitioner should immediately take adequate steps to report the same to the appropriate body seized with disciplinary powers on the matter complained of.” Having a judge tell on another judge is an unrealistic expectation in Nigeria. However, if it happens, it creates an avenue for judicial strife and hostile working environment for the judges and the public.

By Rule 12 (2) “A Judicial Officer disqualified by the terms of Rule 12(1)(c) or Rule 12(1)(d) may, instead of withdrawing from the proceedings, disclose on the record the basis of his disqualification. If based on such disclosure, the parties, their representatives and/or their legal practitioners, independently of the Judicial Officer’s

judges ...depends on the nature of the case or allegation that is against him or her.

⁴⁹¹ The judge’s family, friends, and social, civic and professional colleagues with whom he or she associates regularly, communicates on matters of mutual interest or concern, and shares trust and confidence, are in a position to improperly influence, or to appear to influence,

⁴⁹² Responsibility in regard to discharge of administrative duties.

participation, all agree that the Judicial Officer's relationship is immaterial or that his financial interest is insubstantial, the Judicial Officer shall continue to participate in the proceeding." This requirement for judges to recuse themselves from a case has raised criticism, as the public may not be aware of the above provision that permits judges to continue with the case as they deem fit. However, if the matter does not turn out as one of the parties envisaged, the party that agreed to the judge continuing with the case turns around to object and steer criticism that the judge should have recused.

Rule 15(1) states that "A Judicial Officer while in service shall not publish any book or cause another person, group of persons, publishing house, whosoever, acting on his behalf to publish any book until he ceases to be a Judicial Officer where such publication may infringe in any manner the Code of Conduct for Judicial Officers."⁴⁹³ This provision is vague, and it limits the judge's freedom to express his/her thoughts. The judge is one of the most misunderstood professionals in the world.⁴⁹⁴ Therefore publications from judges

⁴⁹³ Rule 15.2 Where a Judicial Officer while in service publishes any book or causes another person, group of persons, publishing house, whosoever, acting on his behalf to publish any book, he shall ensure that such publication is not used or prohibit such publication from being used, in any manner or form as a means of raising funds, beyond the normal cover or market price of such publication; or, as donation or gift to him or to anyone on his behalf; or, to any cause related to or connected with him.

⁴⁹⁴ One of the problems that this research observes, is that no literature talks about judges' role and how such roles create dilemmas for judges in society. Most of the existing research is from journalists, political scientists, lawyers, or court users who know little or nothing about judicial practice's intricacies.

will enlighten the public and avoid any misconceptions. However, with such a vague and restrictive provision, the judge's research bar limits the area he/she can write on.

Judges' Human Rights Dilemma. Judges are expected to restrain themselves when their most fundamental rights to liberty, dignity of human persons, freedom of expression and association are violated. These provisions restrict judges from expressing themselves freely. It puts judges in a vulnerable and undefended position where society constantly misunderstands them. The COC restricts them from saying or writing anything to vindicate themselves; plus, the judiciary does not give a press statement to vindicate such judge when the public slanders the judge. This dilemma is that judicial restraint is a threat to judicial independence. It was a common view from all informants that judges are left alone to protect and defend their own integrity. In the words of one of them: "it is like we are being used; we are only good for the job. When we get in trouble, or we are wrongly accused the JSC looks the other way. In fact, when they (lawyers or litigants) write their frivolous applications and you are called to spend valuable judicial research time responding and giving claims, it is like you are writing a judgment in itself. When the JSC discovers you are not liable to whatever allegations in the petition, they do not even write you to inform you, the matter just dies down, my dear you know these things now..."⁴⁹⁵

⁴⁹⁵ Informants 6 shared this view and informant 7 confirmed the sad but true fact that the NJC has so much they are dealing with on a daily basis regarding frivolous petitions against judges of both lower and higher courts.

Indeed, I recall one occasion as the presiding magistrate in Adeniran Ogunsanya Magistrate Court 4, a lawyer had written over twenty paged petitions against me. I was confused because that court was one of the busiest courts in Lagos State and I had pending trials, ruling, judgment, bail applications. Reading through the petition with the exhibits attached to respond was like preparing for a trial where you have been falsely accused and already condemned. It did not only distract my proceedings, but it also delayed pending trials. Since my integrity was at stake, the pending cases, parties or even the court was not as important at that time. All my efforts time and resources both in the office and at home (over the weekend) was to prepare an adequate response to vindicate myself.⁴⁹⁶ This aspect of petitions against judges is another aspect of judicial dilemma.⁴⁹⁷

Judiciary's/Institutional Independence

This is the freedom of the collective and combined efforts of judges in the judiciary. It compromises judges and the administration of the judiciary. According to Barack institutional independence is designed to build a protective wall around the judicial branch

⁴⁹⁶ After I responded the JSC summoned me for a hearing at the high court before the administrative judge. When I got there and appeared before the code of Conduct tribunal, the presiding judge asked why I was summoned after such an extensive and detailed response that obviously vindicates me and shows from the records of the court that the attorney was only aggrieved because I ruled against his motion for stay of proceedings. This unfortunate incidence affected cases in my court and delayed a lot of trial. Other than the time spend in responding with over twenty pages too with exhibits to prove, the day I appeared before the JSC tribunal, I cancelled all trials because I drove over miles from Surulere to Ikeja high court.

⁴⁹⁷ I glean this judicial dilemma from Informants 1,5,6,7 and 8 in their discussions with me December and January 2021

that prevents the legislative and executive branches from influencing the ways judges realize their roles as protectors of the Constitution and its values.⁴⁹⁸ This institutional dilemma has two aspects, internal and external.

The Internal Dilemma. The internal dilemma is a judge-to judge dilemma where judges relate in their judicial or extra-judicial capacities. This challenge affects judges in their internal dealings with themselves and their interactions with their staff. Under this kind of dilemma, we have the hierarchy factor and the seniority pressure.⁴⁹⁹

The Hierarchy Dilemma. The hierarchy dilemma is where administrative/head judges try to manipulate or influence the judges that work under their supervision, to act favorably regarding a pending case. The Nigerian judiciary is a very respectful institution with tenacious hierarchy. The hierarchy of courts is fundamental to judicial roles in Nigeria. Thus, situations arise where judges of higher courts attempt to control, threaten or intimidate judges from lower courts on a pending case of interest to the higher court judge. Circumstances arise where the junior judge is 'punished' when they refuse to comply with directions from the supervisory/senior judge or when such judge offends an executive authority.

⁴⁹⁸ Barack, *op. cit.* 80

⁴⁹⁹ The second category of the judge-to-judge dilemma may not necessarily be within the court; it may be a social or educational setting where interactions between two judges can be dilemmatic to the judges' independence and freedom of expression]

Although not many judges engage in such manipulated acts, it exists in many judicial districts across Nigeria. An example is *Z.O Ibrahim Esq. v ASP Konofu*,⁵⁰⁰ an attorney filed a complaint against a police officer before a chief magistrate court. The police officer who was on bail failed to appear in court. Hence, upon the attorney's application, the magistrate issued a bench warrant (i.e., a warrant of arrest to appear in court by the next hearing date). However, the state commissioner of police, accompanied by other police officers, appeared in open court to castigate the magistrate for daring to issue an arrest warrant against a police officer (as if police officers are above the law). Consequently, the police complained to the chief judge. The chief judge, without prior investigation, staled the proceedings before the magistrate and issued a query to the said chief magistrate for issuing an arrest warrant against a police officer.⁵⁰¹ The chief judge further transferred the chief magistrate to a remote district of the court.⁵⁰² This practice affects judicial independence and the primary role of achieving justice in any case and in society.

The Seniority Dilemma. The seniority dilemma is when a judge who is biologically older in age mounts pressure on a biologically younger judge to give a favorable decision

⁵⁰⁰ *Z.O Ibrahim Esq. v ASP Konofu*, Case no. MCO/29c/2009

⁵⁰¹The Nigerian Bar Association (NBA) gave a press conference titled “Abuse of Administrative Power in Kwara State, Nigeria.

⁵⁰² Also cited in (Husein, F.A, Akanbi, K.O.) *Judicial Attitudes to Fundamental Rights Protection in Nigeria* at p. 53

to a case that the older judge has interest. Nigeria is a country of cultural deference. Like I argued in chapter one, the Nigerian social settings influence the judiciary. The courts, like many other institutions in Nigeria, incorporate the African culture of respect. Hence, inadvertently judges respect one another based on biological ages. So even if the judge is higher in the hierarchy, they show respect to the supposed lower court judge who is biologically older. Although it is not a statutory or procedural requirement that younger judges respect biologically older ones, it has become an established practice over the years. So much that some chief judges abuse their authorities and treat judges serving under them as “headmaster and pupils,”⁵⁰³ and also requires them to pervert justice, against the ethics and the younger judge's principles.⁵⁰⁴

The External Dilemma. This dilemma is outside the judiciary institution, between judges and external forces like society and the government. The factors that comprise external dilemma include intimidation of judges, accusations of bias or false allegations of corruption, manipulations.

The Intimidation/Manipulation of Judges. The intimidation/manipulation of judges is a subtle way that society, litigants, the government, ruling party, or chief executive officer attempts to control the judiciary/judges concerning cases, especially a pending high-profile

⁵⁰³ James Ogebe, op. cit. 43

⁵⁰⁴ Ibid

case.⁵⁰⁵ The relationship between the government and the judiciary makes it much easier for government officials to manipulate judges. Judges depend on good relations with the government for many of their benefits like housing and transportation.⁵⁰⁶ According to Oko, judges live with the anxiety that government officials who are unhappy with their decisions could make life difficult by denying them decent housing and transportation.⁵⁰⁷ In talking about governments attempts to diminish judiciary's independence, a former judge said: "One of the whips used by civil servants to force judges to "behave" is in the allocation of residential quarters . . . the mere fact of making judges rely on the bureaucratic civil servants as to where to put their heads, with their families, is bad enough. And to hope that judges subjected to such pressures could still be generally independent of their officialdom is an illusion."⁵⁰⁸

Other than the government's attempts at intimidating judges, litigants also attempt to intimidate judges in subtle (sometimes inadvertently) ways that gives the judge a bad image that gives the public a wrong perception of courts. According to Oguntade, "When a litigant

⁵⁰⁵ Okechukwu Oko, *Seeking Justice in Transitional Societies: An Analysis of the Problems and Failures of the Judiciary in Nigeria*, 31 *Brook. J. Int'l L.* (2005), p. 37

⁵⁰⁶ Niki Tobi, *opcit*: 329-331

⁵⁰⁷ Oko, *opcit*

⁵⁰⁸ Cited from Oko: *Ibid.*

loss a case before, say for an instance a Magistrate, he may perceive that the judgment is wrong and that the court has been partial in its adjudication. Such sour litigant spreads the word around that the court has not impartially adjudicated. He forgets that the administration of the justice is done through a hierarchical system.”⁵⁰⁹This, society’s misconceptions of judges continuously weaken judicial performance.

The Appointment/Elevation Dilemma. The appointment/elevation dilemma exerts pressure on judges. This pressure from the executive inhibits judge’s ability to approach their duties with the level of objectivity and independence necessary to secure a fair trial. 510 Judge’s face consequences of either ostracism, delay, denial of promotion/appointment or being shortlisted for national and international training’s/ conferences if they refuse to abide by executive demands. Ogebe narrated how the governor of the state denied him elevation/appointment as chief judge even though he was acting chief judge and next in hierarchy for appointment in Benue State judiciary.⁵¹¹ Instead a younger judge in the hierarchy was sworn in as chief judge because of a decision

509 Oguntade, op. cit. 1.2.2

510 Oko, op. cit. 38

511 Ogebe narrated that the public labeled him an enemy of the Tiv people because the Commission of Enquiry he headed (Ogebe’s Commission of enquiry) recommended removing many Tiv people (the majority tribe in Benue State). Thus, the state governor, who was very friendly with him, became hostile. Besides, some other community members who resent him because he refused bribery and will be an obstacle to their future corrupt practices, also conspired against him.

on a committee of enquiry that Ogebe headed.⁵¹² Also informant 2 narrated how the military government refused to appoint new supreme court justices because he was upset with the decision of the existing Supreme Court justices to recuse themselves from hearing a case based on allegations of bias.⁵¹³

The Federal Character Dilemma. The last category of the external dilemma is the federal character dilemma. The appointment and promotion of judges to the federal courts in Nigeria are based on the concept popularly known as federal character.⁵¹⁴ This concept attempts to give all regions across the country equal opportunities for judicial placing in federal appointments in the CA and the SC. This federal character requirement has constituted many dilemmas within the judiciary and introduces different dimensions that question judicial integrity. One of such is the gender dimension, where married women choose between their states of origin or their husbands' states of origin to serve a judicial office or court district. Informant 2 narrated how several female justices like herself were appointed as a judge from their states or their husbands' states of origin.

Therefore, a female judge's appointments and elevation to higher courts depends on either her state of origin or her husband's state of origin. This dilemma may affect the

⁵¹² Ogebe, opcit: 48

⁵¹³ The erstwhile military leader General Sani Abacha

⁵¹⁴ See chapter one

appointment of male judges who can only claim their states of origins. Accordingly, the female judge has more option for appointments/elevation than the male judges. Hence, discriminatory allegations arise within the judiciary as such options are not uniform across the board. Ogebe argues that the federal character consideration in appointment has done considerable damage to the quality of justices appointed to the SC. A few of such appointments made to the Supreme Court constituted a liability on the system.⁵¹⁵

Institutional Challenges Dilemma

This dilemma entails the challenges that the judiciary encounters in judicial administration and governance. Several social factors contribute to the judiciary's successful governance, and judges need these factors to perform their roles adequately. These factors constitute a dilemma for judges because they are beyond the judge's control. I categorized and named them as inadequate facilities dilemma, and the second is the court's support staff dilemma.

Inadequate Resources/Facilities Dilemma⁵¹⁶

The inadequate resources dilemma is about the inadequate facilities within the court system. Judges need some basic facilities to perform their roles, but several factors are responsible for the unavailability of these facilities. For example, conducive working

⁵¹⁵ Ogebe, opcit: 80

⁵¹⁶ Inadequate facilities, untrained staff, malicious and dubious attorneys who attempt to buy time for their case or to frustrate the case.

environment, manpower, adequate equipment, and stationery are bare essentials for operation. These facilities are not always available to judges due to financial constraints or executive manipulations. The judiciary's reliance on the executive for budgetary support and determination has not helped matters. Consequently, in the absence of these facilities to ensure adequate judicial administration, judges encounter institutional challenges such as delays in commencing and concluding trials.⁵¹⁷ Most of the time, when there is a delay in the trial, society blames judges without considering the procedural, legal, or administrative reasons (beyond judges' control), that cause delays in proceedings.⁵¹⁸

Court's Support Staff Dilemma

Most court support staff are apathetic, untrained/unskilled and corrupt. Even though Rule 10 of the COC mandates judges to ensure that their court staff does not solicit or receive gifts, loans, bequest, favor, benefits, advantage, or bribe, the court staff connivingly violates these provisions.⁵¹⁹ Some court staff goes to the point of using the name of the judge/judges to demand bribes from attorneys, alleging (falsely, in most cases) that they

⁵¹⁷ Ojo, op. cit. 39

⁵¹⁸ Ibid: 39/42

⁵¹⁹ According to informant 8, corruption amongst court staff is drastically affecting justice in many courts. She said: "the JSC is tired of the series of reports about corrupt court staff, unfortunately we do not know what to believe as these magistrates themselves can be very careless and too trusting of their court staff."

are acting on behalf of the judge.⁵²⁰ Other staff demand incentives to fix an earlier date for trial of an attorney's case. These staff put the judge in a dilemma of not being able to vindicate himself/herself, as judges are often in their chambers and does not know what is happening outside. They do not even know that the parties and the public assume they have taken a bribe because their support staff lied that they asked for it.⁵²¹ In such a situation, the media publishes false and unverifiable news about judicial corruption. Niki Tobi lamented that the impression of the litigating public on the Nigerian judge is rather unfortunate, as most litigants think that all Nigerian judges take bribe or get corrupted in one way or another in the enforcement of the judicial process.⁵²² Thus, this dilemma consequently affects the integrity of the judge/judiciary and the justice system's public trust.

The Judiciary's Dilemma

The judiciary's dilemma where the judicial branch of government inadvertently stifles her overwhelming constitutional powers at the expense of democratic governance and development. The judiciary is the most potent force of any democratic government. However, some legal scholars like Hamilton believe that the judiciary is the weakest of the

⁵²⁰ This author and about three of the informant judges have had personal experiences with their court staff in this regard. Unfortunately, some of these staff

⁵²¹ In one of the magisterial jurisdictions that I presided, I covered for a colleague who was in leave and her court registrar had actually tweaked her judgment and forged the magistrate's signature on it.

⁵²² Niki Tobi, *The Nigerian Judge*: op. cit. 340

three government branches.⁵²³ I disagree. Even though Nigeria's political/judicial environment makes it seem so, the judiciary is the indispensable factor that defines democracy. However, this judicial 'strength' could be torpid because of what I call "*judicial mediocrity*." Judicial mediocrity implies that although judges are aware of their prominent role or inherent powers in democracy, yet they often shy away from applying it when necessary. Instead, most judges would rely on 'technical' precedent.⁵²⁴ Respectfully, some judges have become passive and somewhat timid in applying their inherent powers to advance social change. Hence, the argument that judges are not agents of social change, when in fact judges impact social change. Most of my informants do not agree that judges are agents of social change.

Unfortunately, it appears that most judges may not understand the powers they possess.⁵²⁵ This obliviousness creates what I call "*judicial identity crisis*," which connotes that the judiciary or judges do not fully comprehend their role in society and thus fail to appropriate the inherent powers they possess to deliver un-disputable justice in a given case. Judicial identity crisis exhibits a lack of judicial independence', i.e., judges exhibit a lack of confidence to make fair decisions to a case or society. The difference between

⁵²³ Alexandra Hamilton, *The Federalist* No. 78 (1988)

⁵²⁴ What is the value of a judge in society, if not to enhance social change for the utmost benefit of the populace?

⁵²⁵ The first and prominent force that sustains democracy

judicial mediocrity and judicial identity crisis is that with the former, judges do not fully exercise or apply the power that the Constitution grants, while with the latter, judges do not even recognize the powers that the Constitution gives them.⁵²⁶

The “*mediocre judge*” recognizes their inherent powers but chooses to either disregard or restrict its application. They are complacent and feel safer in an uncontroversial position or role. They hesitate or fear to create a precedent. They do not want to be tagged as judicial activists or as judicial rebels. The “*identity crisis judge*” does not recognize their inherent judicial powers; they only pursue precedent and concur with other judges' existing arguments/submissions. They do not perceive when to create a precedent in a deserving case in court. Neither judicial mediocrity nor judicial identity crisis is valuable to the Nigerian judiciary or Nigeria's democratic development. Both limit the ‘extensive’ powers of the judiciary as the most powerful government arm in a democracy and creates a dilemma.

The Nigerian judiciary is like a lion in the jungle of democracy that allows the size⁵²⁷ of the elephant (the executive arm of government) to intimidate judges. Hence, Hamilton's argument that the judiciary is the weakest arm of government is not justifiable. The roar of the courts in appropriate circumstances restores order to the jungle of

⁵²⁶ The inherent powers that supersede even the Constitution.

⁵²⁷ The financial and political strength of the executive arm of government

democracy. The judiciary is the most vital organ of government in any democracy. The judiciary's strength is in the impact and indispensability of judicial opinions/ interpretations in every established rule of law. Society and the government depend on judges' pronouncement to determine the rule of law because judges rule the law. The courts' most significant judicial review power (most prominent in the American judiciary) indicates the judiciary's strength that no other organ of government can challenge. Hence, it is an institutional dilemma where judges as indispensable agents of democracy with such powers are often at the government's mercy and are unable to perform their democratic roles optimally.

The Court of Appeal Dilemma

The CA is the intermediate court between the high courts, the sharia court of appeal, the customary court of appeal, and the SC.⁵²⁸ In other words, appeals from the subordinate courts are heard by the CA before they reach the SC for final adjudication.⁵²⁹ Constitutionally speaking, the CA is the most powerful court in Nigeria. The Constitution gives this court vast inherent powers that no other court has. Hence the bulk of the act of judging, which is interpreting statutes and applying 'unfettered' discretion, falls on the CA. This is because the Nigerian supreme court has her hands full and may not

528 Ogebe, op. cit.

529 Ibid, 53

have the opportunities to hear all matters that influence judicial policy like the CA does. The SC decides only cases that reach them from the CA. Most cases end in the CA as their final appellate court. Hence the bulk of the work resides with the CA. The power allotted the supreme court as an apex court is one of influence and not so much power. In other words, the edge that the Supreme court has is that it is a policy court.⁵³⁰

By her jurisdiction, practices, procedures, roles, the CA is the most impactful and powerful court in Nigeria. Unfortunately, the supreme court, whose powers are limited to a final determination of appeals only, limits these powers. The CA has similar powers equivalent to the powers of United States' supreme court.

Reasons the CA is the Most Potent Court in Nigeria

- Order 4 Rule 4 CAR supplements sections 6 of the CFRN, empowering the CA with the most potent role/discretion over matters.
- It is the only superior court of record that has huge original and appellate jurisdictions.
- Its inherent powers on electoral cases create a niche that gives it a certain control in electoral matters.
- Most of the precedent that the Supreme Court established were decisions that originated from the CA, and the SC eventually upheld.

⁵³⁰ Informant 2

- It is the final appellate court for some cases. Most lawsuits end at the CA stage and never make it to the SC.

As the court in the center of a barrage of appeals and most likely the final stop for more than 50% of cases, the CA may be under much pressure to achieve justice by any means legally or statutorily possible. Unfortunately, this court faces strange cases that challenge its jurisdiction, and judges have to deviate from precedent.⁵³¹ However, the SC is not very empathic of the CA's enormous roles.⁵³² In *Olanrewaju v. The Governor of Oyo State & Ors.*,⁵³³ Karibi-Whyte said the judicial role of an appellate court is to superintend, review and correct any errors made by the trial court. It is to see whether the trial court applied the applicable law or adhered to the proper procedure in arriving at its decision.

One salient area that the Court of Appeal encounters a dilemma in achieving its role in democracy is compliance/non-compliance with precedent. In creating a new precedent or exercising broader discretion, the CA needs judicial courage and perseverance. Persistence is the crucial factor here; when a judge is persistent, someday his or her

⁵³¹ Informant 3 agrees that the court of appeal handles the bulk of judicial work in Nigeria, and so they are pressured with the precedential dilemma than other courts. Informant 3 discussion with author December 2020.

⁵³² Niki Tobi enjoins senior judges to be easy on criticizing or reprimanding judges of lower courts. See Niki Tobi: op. cit.

⁵³³ *Olanrewaju v. The Governor of Oyo State & Ors.* (1992) LPELR-2570(SC) at p. 99-20,

idiosyncratic yet just perception will prevail. As long as the judge applies justice, a dissenting view will eventually become the *ratio decidendi* in the future.⁵³⁴ 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 Court of Appeal; nonetheless lower courts should not hesitate to state and interpret the law as they see fit with society-oriented discretion.⁵³⁵ It is the appellate court's primary responsibility to create a new precedent relevant to society's changing times, views, and interests.⁵³⁶ Although lower courts may not create a precedent, they can exercise discretion in their records to ensure justice.⁵³⁷ The bulk of the responsibility here is on the apex court to review lower courts' decisions, considering social interests, stipulated law, or an abuse of discretion, and uphold the best decision that serves the case's justice.

Appellate courts can only review precedent that is before them. So, to this 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 or establish a new

⁵³⁴ Dissenting views have eventually become the locus in some cases in Nigeria

⁵³⁵ Ari Tobi-Aiyemo, *op. cit.* 138

⁵³⁶ The supreme courts holding in *Abdulkarim v. Incar Nigeria Ltd* (*supra*) on overruling its own decision to keep the stream of justice pure caps up my point.

⁵³⁷ Appeals are based on substances from the lower court, so lower court judges or trial court judges have a foundational role to play here.

precedent (if the case goes on appeal).⁵³⁸ Therefore, trial judges need to be detailed in their judgments and give concrete reasons for their decisions.⁵³⁹ 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.⁵⁴⁰ At a 2013 refresher course for judges, Justice Umeadi, said thus:

.... The judges made known their frustrations and complained that because of the principle of stare decisis they found themselves bound to follow the precedent on the issues even though it worked hardship. Uwais CJN (as he then was) did not agree with them and reminded all of us that as High Court Judges it was our judgment that the Court of Appeal and the Supreme Court act upon. So, wherever there is a gap we should fill it with our judgments. He said if the cases of Pre-action Notice came before us, we should be courageous enough to distinguish the existing legal authorities to fit into the peculiar circumstances upon which we had been called upon to decide. That way the Court of Appeal and the Supreme Court would back us. That perhaps if the Court of Appeal refuses to back us the Supreme Court could restore it. He urged us that it was the only way the law could grow and not for us to continue to wait for what the Court of Appeal or the Supreme Court would say on every issue.⁵⁴¹

Therefore, part of the CA's dilemma, which extends to the SC, is that the trial judge

⁵³⁸ Informants 3 and 4 discussions with author December 2020.

⁵³⁹ Ari Tobi-Aiyemo, *op. cit.* 134-135

⁵⁴⁰ Hine, K, D (1997) *op. cit.* 1788

⁵⁴¹ Hon. Justice P. N. C. Umeadi – “Judgment Writing: Practical Hints”, in Hon. Justice Umaru Eri, OFR (ed.) – Judgment Writing and Judgment Delivery (National Judicial Institute: Abuja), 2013 125 at 135 – 136.

has first-hand knowledge of the detailed facts. Thus, where the appellate judge is not on the same agenda of ensuring substantial justice as the trial judge, a dilemma ensues, as the appellate judge who unfortunately has the final say on the matter would pursue technicality rather than substantial justice.⁵⁴² The court's ardent dependence on stale precedent interferes with the judge's independence to the detriment of social justice. 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."⁵⁴³

Nigerians do not see the judiciary as independent, and this perception stifles the trust between society and the judiciary.⁵⁴⁴ Breyer opines that a public that does not understand the judiciary, its role in protecting the Constitution, and the related need for judicial independence, may act in ways that weakens the judiciary and eventually frustrates judge's institution.⁵⁴⁵ Informant 4 said Nigerians do not trust the judiciary. He said: "they think

⁵⁴² Informant 4 stated how this is frustrating to the court of appeal judges in his discussion with author March, 2021.

⁵⁴³ Murrill, *op. cit.* 5

⁵⁴⁴ Informant 5, *op. cit.*

⁵⁴⁵ Stephen Breyer, *Active Liberty, Interpreting Our Democratic Constitution*. New York: Vintage Books. (2005).: 218

we [judges] are “a joke...” In support of this assertion, Informant 5 said “they burnt my court and I lost everything.”⁵⁴⁶

In summary, judicial administration and ethical requirements frustrate judicial independence; thereby justifying, society’s misconceptions about courts. Also, personal and institutional challenges continuously weaken judicial performance and create a dilemma for successful judicial administration. Thus, the application and reliance on stale or irrelevant precedent fuels public distrusts for judges, because such unjust precedent is often devoid of contemporary social precepts, interests and concerns. Consequently, where precedent is not relevant to social advancements and change, injustice ensues in society and creates a social dilemma in the judicial process.

⁵⁴⁶ In October 2020, the oldest judicial building in Nigeria—the Lagos Igboere High Court was burnt down, following hoodlums’ invasion and looting. See <https://guardian.ng.com> https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwix_IidlK3wAhUjHzQIHSC7A1cQFjAEegQIBBAD&url=https%3A%2F%2Fguardian.ng%2Fnews%2Flawyers-kick-as-hoodlums-invade-loot-burn-lagos-court%2F&usg=AOvVaw3Ndu2z4qfZZBNA2D5Jx7ws

Chapter Seven: Social Dilemma

Judges owe a duty to the larger society in which they operate as adjudicators, to ensure their verdicts reflect contemporary social factors, interests, and views. Their judgments should be fair and relevant, to the larger society's overall interest, so that they can instill or enable public confidence in the judiciary.⁵⁴⁷ Thus, this multidimensional social dilemma covers many aspects of the judge's role in a larger society/community, of which judges are a part—they use the same public facilities, and they understand the realities of life like everyone else. Thus, judges often encounter a dilemma when the laws of COC (indirectly) require them to disregard their humanity under the guise of objectivity and judicial ethics.⁵⁴⁸ Therefore, this chapter will categorize some social dilemmas from contemporary social factors like culture, media, social order, economy, and undefined situations that judicial roles impact. It will also examine how constant changes in society and statutory requirements create a dilemma in decision-making.⁵⁴⁹

Contemporary Social Dilemmas

Society has divine expectations of judges, which create a false image that puts

⁵⁴⁷ Oguntade, op. cit. p. 4.6

⁵⁴⁸ My argument is by no means advocating that a judge be less objective. Objectivity is the essence of adjudicating.

⁵⁴⁹ I will examine how the judge's consideration of economic, or socio-cultural factors influences their decision-making.

judges are under pressure to gratify.⁵⁵⁰ Unfortunately, contrary to public perception and expectations, judges are fallible humans, and they use the same public facilities.⁵⁵¹ Some of the contemporary factors that create a dilemma for judges in Nigeria include socio-cultural, law and order, media, economic, health and international factors.

Socio-Cultural Dilemma

The Nigerian culture that is part of a larger African culture has dimensions of customary practices that contradict statutory requirements and ethical requirements. One of such culture is partying, dancing and spraying of money on celebrants.⁵⁵² Niki Tobi captures this dilemma that many Nigerian judges still practice. He said:

Nigerians love dancing... they also love to show their affluence and this they overtly execute by spraying money all over the place. Should a judge dance in public? Should a judge spray money in public? A judge could dance in public on formal occasions... but a judge must dance with all the moderation, whether it is the English waltz, the South American tango or the Nigerian dances. It is unethical for a judge to dance recklessly and unguardedly... A judge must decently take his steps. He should stop when the ovation is loudest. He should on no account out-dance the ovation. It is disgraceful.... Spraying of money is a typical Nigerian pastime. Nigerians like it. They indulge in it, particularly the affluent class... on no account should a judge spray money in public unless in compelling domestic circumstances like on the occasion of the death

⁵⁵⁰ Detailed explanation in chapter 8 under the heading “The humanity of judges”

⁵⁵¹ They visit the same malls, stores, hospitals, markets and parks that everyone visits

⁵⁵² Tobi, N., op. cit. 85-86

of a parent or uncle, or the like....⁵⁵³

The above ethical requirement takes the social component of natural human reactions and the enjoyment of their culture and environment. This restriction has been hard for Nigerian judges to comply with, as many have argued it is unreasonable and highhanded. Most of my informants believe it is impracticable because the Nigerian cultural practices are part of the Nigerian judge and restricting judge's enjoyment of such cultural practices outside their judicial work is unreasonable to judges freedom of expression.⁵⁵⁴

A fundamental aspect of the Nigerian culture that creates judicial dilemma is the patriarchal culture. The African patriarchal culture is quite discriminatory against the female gender. Hence, pre-colonial laws and practices applied to post-colonial Nigeria have constantly breached section 42 of CFRN, which guarantees the right to freedom from discrimination. Thus, as the law clashes with cultural diversities and requirements, judges who must render justice in the case encounters a dilemma in balancing the particular challenges and frustrations of such culture that they belong. The judges who try to deviate from such cultural status quo gets castigated and is tag as an 'activist judges.'⁵⁵⁵

⁵⁵³ Ibid

⁵⁵⁴ About six informants shared the opinion that prohibiting judges from dancing and spraying money as culturally required was "...pushing the ethical thing a little too far..."

⁵⁵⁵ The author's late father had such an experience where one of the other judges in the three panel to decide on a discriminatory culture asked him why he should change an age-old culture that has been in existence before my late father was born (Mojekwu's case)

An example is the case of *Mojekwu v Mojekwu*,⁵⁵⁶ where the Court of Appeal pronounced as unconstitutional a cultural practice that barred a woman from inheriting her late father's estates. However, based on the '*supposed activism*' of the *Mojekwu Court*, the Supreme Court in criticizing that judgment⁵⁵⁷ stated:

I cannot see any justification for the court below to pronounce that the Nnewi native custom of 'oli-ekpe' was repugnant to natural justice, equity and good conscience...the learned justice of appeal was no doubt concerned about the perceived discrimination directed against women by the said Nnewi 'oli-ekpe' custom and that is quite understandable. But the language used made the pronouncement so general and far-reaching that it seems to cavil at, and is capable of causing strong feelings against, all customs which fail to recognize a role for women. For instance, the custom and traditions 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 by the system by which they run their native communities.⁵⁵⁸

The Supreme Court believed that the Court of Appeal's "general and far-reaching" language could lead to criticism of all other customs that exclude women. Hence, the court

⁵⁵⁶ *Mojekwu v Mojekwu* (1997) 7 NWLR p. 283 Judgment of Court of Appeal of Nigeria. The names of the parties to the case changed because, when the decision was delivered in 2004, Caroline Mojekwu, the original party to the case, had died. As a result, her daughter, Mrs. Iwuchukwu, was substituted as a party to the case

⁵⁵⁷ *Mojekwu v Mojekwu* (supra) Judgment of Court of Appeal of Nigeria. The names of the parties to the case changed because, when the decision was delivered in 2004, Caroline Mojekwu, the original party to the case, had died. As a result, her daughter, Mrs. Iwuchukwu, was substituted as a party to the case.

⁵⁵⁸ *Mojekwu v Iwuchukwu* (2004) 4. S.C. (Pt. II). 1.

overturned the Court of Appeal's decision as wrong.⁵⁵⁹ The Supreme Court based its reasoning on the knowledge of an entrenched patriarchal culture in other communities in Nigeria. So, the court was more concerned about other similar customs than the Constitutional provision against discrimination.⁵⁶⁰ Nevertheless, the Court of Appeal's reasoning focused on the Court's socio-cultural impact on public interest. This interest exceeds the immediate parties before the Court at that time in global history (when Nigerian women's voices stood out in The U.N. international forum on women empowerment in Beijing) to a larger society.⁵⁶¹ Thus, the Court of Appeal judge stated in his judgment:

All human beings—male and female are born into a free world, and are expected to participate of freely, without any inhibitions on grounds of sex: and that is constitutional. Any form of societal discrimination on grounds of sex, apart from being unconstitutional is antithetical to a society built on the tenets of democracy, which we have freely chosen as a people. We need not travel all the way to Beijing to know that some of our customs, including the Nnewi 'Oli-Ikpe' custom are not consistent with our civilized world in which we all live today.⁵⁶²

⁵⁵⁹ Ari Tobi-Aiyemo, "Mainstreaming Gender Equality in the Development of Family in a Borderless World: The Nigerian Perspective." *CMJA Gender Newsletter*, Vol. 3, issue 2, (August 2008):9

⁵⁶⁰ This is part of the dilemma of the Court of Appeal, where the Supreme Court stifles her attempt to establish a precedent.

⁵⁶¹ The Fourth World Conference on Women: Action for Equality, Development, and Peace was convened by the United Nations during 4–15 September 1995 in Beijing, China.

⁵⁶² Niki Tobi, JCA

Although the Supreme Court condemned the discretion of the Court of Appeal in the above case, ten years later, in *Ukeje v Ukeje*,⁵⁶³ the same Supreme Court reinforced the principle that it criticized in *Mojekwu's case* and voided another Igbo tradition similar to the '*Oli-ikpe*' custom that barred females from inheriting the estates of their late fathers. Also, in *Ngozi Okonkwo v. Benjamin Aforaka Okonkwo & 5 Ors.*,⁵⁶⁴ the court said that it is inconsistent with section 42 of the CFRN when a childless widow cannot inherit from her intestate spouse.

These cultural practices create challenges for judges as society advances while the laws are still static. Imam,⁵⁶⁵ argues that to achieve the object of the Constitution, constitutional interpretation requires continual updating of the Constitution in line with perceived communities and social expectations.⁵⁶⁶ Thus, the decision in *Nwodo & Anor v. Nwodo*,⁵⁶⁷ that nullifies a woman-to-woman marriage as repugnant to natural justice will

⁵⁶³ *Ukeje v Ukeje* (2014) 11 NWLR (Pt 1418) 384-414.

⁵⁶⁴ *Ngozi Okonkwo v. Benjamin Aforaka Okonkwo & 5 Ors.* (2014) 17 NWLR (pt1435) at 54 paras C-G

⁵⁶⁵ Imam, op. cit. 116

⁵⁶⁶ Ibid. He adds that judicial activism connects to the court's dynamic, creative, and objective reading of the constitutional text.

⁵⁶⁷ *Nwodo & Anor v. Nwodo* (2018) LPELR-43948(CA) held that cultural practice that allows a woman to bring another woman into the matrimonial home of her late husband who dies without a surviving son (to enable the line of succession of the late husband to continue), revolts against public policy and is repugnant to natural justice, equity and good conscience.

constitute a dilemma for Nigerian judges. Judges may nullify or sustain such marriage (not necessarily a lesbian relationship) in the light of the LGBTQ movement in society as Nigerian laws do not recognize LGBTQ rights. A more profound dilemma ensues when the prevailing cultural norms in Nigeria contradict the contemporary global norm, that judges have to interpret one way or the other.

Media Dilemma

The media and the courts are both indispensable agents of democracy. They have an interconnected relationship as vital instruments of ideal democracy, both requiring independence to function adequately. Therefore, each institution often conflicts while executing its role in sustaining human rights and upholding democracy. This long-standing clash between media and courts in Nigeria constitutes a dilemma for judges, as they try to balance the free press/free trial interests the Constitution requires.

Since the beginning of our democracy, the Nigerian media often violates the peoples' right to a fair trial through interfering with the pending proceedings in court.⁵⁶⁸ For example when journalists report a pending case without access to genuine court records, they disseminate "news" and predict the outcome of the case, putting the judge in a dilemma as to public expectation of the judgment.⁵⁶⁹ In their role as umpires of justice,

⁵⁶⁸ According to Informant 3, "The Nigerian media is a major threat to our independence..." Informant 3 discussion with author December 2020.

⁵⁶⁹ This was the case with informant 1 in his tribunal case, (Informant 1 discussion with author

while balancing the free press versus fair trial dichotomy, judges often get caught up in this problem. Current events show an emerging, consistent conflict between the Nigerian media and the Nigerian judiciary. In talking about the frosty relationship between the media and the judiciary, a former chief justice of Nigeria stated, “members of the press are often after a “scoop” and although a necessary hazard, the friction intermittently caused by this strain has at times resulted in the wider society having a wrong perception of the Nigerian judiciary.”⁵⁷⁰

Fundamental procedural issues that cause friction in the press and courts' relationship are orders of prior restraint, gag orders, contempt powers, prejudicial publicity, pre-trial proceedings and access to records, and qualified privilege. Most judges believe that prejudicial/pre-trial publicity indicates a threat to the independence of the judiciary.⁵⁷¹ It is one of the eminent dangers to our criminal justice system. It threatens the individual's presumption of innocence clause (i.e., when judges often base their decisions on the litigants' specific interests and journalists base their right to report any case on the public's

December 2020) and also with Informant 2 in the Al Mustapher case when the media accused her of accepting N2 billion Niara bribe (informant 2 discussion with author April 2021)

⁵⁷⁰ Nigeria's Judiciary 'witnessing very challenging times' – CJN Onnoghen
<https://www.premiumtimesng.com/.../217151-nigerias-judiciary-witnessing-challengin>.
 Accessed 10/2/2018

⁵⁷¹ All eight of my informants share the common view that most Nigerian judges do not trust the media.

general interests). However, balancing the Constitution's combined interests and its overlapping or conflicting provisions on national security and human rights with press rights can be confusing. There should be a balancing test that is substantial, compelling, or important to enable public competing interest to override the media rights to disseminate news.

An area where judges face a dilemma with the media is applying discretion in dealing with journalists. The above friction factors seem to revolve around individual judges' diverse application of discretion with the media. Moreover, such diversity in discretion usually frustrates journalists. Hence, they have inimical assumptions that portray judges to the public in a bad light.⁵⁷² For example, in applying their discretion to allow video coverage of the court's proceedings, judges consider various factors that the journalist may not know. Factors such as the defendant's right to privacy, the delay to the proceedings, and counsels' reactions to publicity may affect justice of the case. In the case of *Commissioner of Police v Jelili Lawal & Anor*.⁵⁷³ On a charge for a threat to life, this author entered a no-case submission because the primary evidence, which was a phone containing the text message, could not power on to show the text to prove the prosecution's case.⁵⁷⁴ The press criticized me in this case for my refusal to allow reporters to cover the

⁵⁷² This was the experience of this author in a case she handled regarding threat to life.

⁵⁷³ *Commissioner of Police v Jelili Lawal & Anor* (Unreported, MCL/2008)

⁵⁷⁴ www.vanguardngr.com (Sept. 1, 2009)

proceedings of that case.⁵⁷⁵ The media report did not report my ruling or disclose the reason that I gave for refusing media coverage.⁵⁷⁶ Another example of a judge's discretion that the public/media misunderstood is an American case, where the public accused judge Egan Walker⁵⁷⁷ of not forcing a young girl to have an abortion. The media headlines read, “*Nevada Judge Won’t Force Mentally Impaired Woman to have an Abortion.*”⁵⁷⁸ The media was not aware of the fact that the judge based his decision on medical expert's recommendations that abortion was not the best option for her, even though her parents/guardians argued that the pregnancy posed a health risk to their daughter and the baby. The

https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjg9cT02KjvAhVFhOAKHVY2BUkQFjADegQIARAD&url=https%3A%2F%2Fwww.vanguardngr.com%2F2009%2F09%2Fdrama-as-court-resumes-case-on-threat-to-ade-fayes-life%2F&usg=AOvVaw1W_9-oNoHB5BXH0ZUJ2Dj6

⁵⁷⁵ allafrica.com (March 27, 2009)

<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjg9cT02KjvAhVFhOAKHVY2BUkQFjAGegQICBAD&url=https%3A%2F%2Fallafri.ca.com%2Fstories%2F200903270073.html&usg=AOvVaw24NmUvwK1151RNQu-neVqL>

⁵⁷⁶ My reason was to keep the case outside media influence because the alleged victim was a newspaper editor who caused controversy and was likely (as he had already begun), to pre-empt my decisions in an attempt to manipulate or intimidate me.

⁵⁷⁷ Judge Egan Walker was a guest speaker at my JS 725 Class, 2018

⁵⁷⁸ abcnews.go.com (November 15, 2012)

<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjNg76n36vvAhW0GFkFHcbOCzAQFjAIegQICRAD&url=https%3A%2F%2Fabcnews.go.com%2FHealth%2Fnevada-judge-force-impaired-woman-abortion%2Fstory%3Fid%3D17729358&usg=AOvVaw0junFzHTwTqtzou4ips1nR>

press and the public were also unaware of the dilemma the judge experienced in considering the girls personal interests, diverse expert opinions, the parent's objections, and the judge's sensitivity to the national controversy on abortion rights.

Judges also encounter dilemmas with inaccurate/incomplete media coverage of courtroom proceedings. Some media reports make unethical remarks about judges, pending cases, and judgments. As a result, the society perceive courts as unfair. Ultimately, these actions threaten the judiciary's independence and create another media dilemma on the court's power to issue contempt to erring journalists. Despite the chief justice's mandate that Judges consider invoking their inherent power of contempt where there are clear violations or infractions regarding matters that are *sub judice*, judges are reluctant to use the contempt power to control court speech. Hence, the court in *Daniel v FRN*⁵⁷⁹ stated that mere publication would not amount to a contemptuous act unless it is calculated to bring a court or the judge into contempt or to lower his authority or to interfere with the course of justice. In *Agbachom v The State*,⁵⁸⁰ the court reiterated that judges should use the summary powers to punish for contempt sparingly. The courts stated that judges should act with restraint and not display an undue degree of sensitiveness about contempt.⁵⁸¹

⁵⁷⁹ Otunba Justus Olugbenga Daniel v Federal Republic of Nigeria (2013) LPELR-22148

⁵⁸⁰ *Agbachom v The State* (1970) 1 AII NLR 69 at 76

⁵⁸¹ *Ibid*

The recent spate of media threats and attacks on judges has put judges at a crossroad in their relations with the media as the media interference often threatens to distract and stall the trial process and make the job of a judge more difficult. Nevertheless, media interference has also done well for the judiciary. The media publicly exposes corruption, abuse of office, and other official misconduct, which may serve as a deterrent against official misconduct. Also, the existence and realization of other rights like the freedom of religion, thoughts, and conscience, and freedom of assembly depend on the freedom of expression and, by extension, the free press.⁵⁸² The media plays an essential role in making the government accountable and responsible to the people.⁵⁸³ Freedom of the press is not only important to see the press as an integral part of the freedom of expression, but also as part of a system of social control whereby they mediate the relationships between individual and social institutions. In this regard, the press can be a mediator between the judicial and the society through their news adequate reports of court proceedings and setting the records straight.⁵⁸⁴ Hence judges are in a dilemma on the value of the media.

⁵⁸² Press freedom is a matter of fundamental interest to the press and the public in general.

⁵⁸³ The right to freedom of expression, including the freedom to hold opinions and to receive and impart ideas and information without interference, is a sine qua non to good governance. That is respect for the rule of law.

⁵⁸⁴ Ibid: 317

The following quote of justice Ogebe who presided over the high-profile Yar “Adua,⁵⁸⁵ captures the media dilemma. It reads as follows:

In June 2007, I was asked to preside over the panel of the Court of Appeal to hear the eight election petitions filed against the election of president Umoru Yar ‘Adua...It was a tough and sensitive assignment. Although there was a lot of noise making in the press about our judgment, there was no violence as a result. I was stunned to read a false report in the Vanguard Newspapers, that Maj. General Buhari had petitioned seeking to be declared as a duly elected president. The fact was that General Buhari in his petition, prayed for the nullification of the election of the election for a new election to be conducted. There was clearly a lot of confusion and misconception by the public and the media, as to the legal issues that were before us; and much of the hue and cry was largely from people who did not appreciate the dictates of evidence-based as opposed to populist-driven or publicity-seeking adjudication.⁵⁸⁶

Okenyondo, also opines that the Nigerian society perceives the courts and riddles the judiciary with accusations and corruption convictions.⁵⁸⁷ People make such assumptions about judges from their limited personal experiences in courts and from unjustified media reports that sometimes aim to get exciting news rather than give accurate and complete reports. For example, media reports generalize the allegations of corruption against judges. They base these reports/news on partial or unverified information from an inexperienced journalist about a few judges' approaches or courtroom proceedings. Like

⁵⁸⁵ Yar Adua v Buhari (supra)

⁵⁸⁶ Ogebe, op. cit. 64

⁵⁸⁷ Okenyondo, op. cit. 1

most citizens (and unfortunately, some judges), the media do not understand judges' roles in a democracy and the intricacies of judicial practice in and outside the courtroom. This was the opinion of informant 2 who according to her has been a victim of the Nigerian media through most part of her judicial career because she presided over many high-profile cases. In her words about media relations, informant 2 said: “What have they not accused me of... they have given up on me. You build the reputation over the years....”

Economic Dilemma

The role of courts in socio-economic development exceeds mere adjudication to sustaining and preserving businesses. Hence, they encounter dilemmas in trying to balance these roles. Statutory law expects judges to do much more than adjudicating.⁵⁸⁸ The court has a discretion based on law and a sound understanding of business exigencies/commercial circumstances. For example, courts have to consider beneficial options to the company's overall interest in receivership.⁵⁸⁹ An example is when judges use their powers of appointment of receiver and manager.⁵⁹⁰ The law intends explicitly

⁵⁸⁸ All eight Informants shared different areas that they each experience judicial dilemmas—from health issues to family relationships, private life and enjoyment of public sports, etc. (in their interviews with author December 2020 to April 2021)

⁵⁸⁹ Idigbe, *op. cit.* 91

⁵⁹⁰ The Court may bring in the requisite expertise necessary to handle a delicate insolvency situation, whereby it may direct the insolvency practitioner to consider a possible rescue plan or proposal for the creditors and revert to the Court for due consideration.

that the courts could, through their appointed receiver-manager, intervene in the insolvency process. Hence such receiver-manager the court appoints could play a pivotal role in rescuing an insolvent or disputed company by acting according to the court's directions and instructions⁵⁹¹

However, there are challenges on how the judge would determine the competence of insolvency practitioners and how the judge can solve such cases without delving into the arena of the case.⁵⁹² Receivership and managership cases can be complicated because a decision not to continue with the trade or sale can amount to a breach of duty of care owed to the company. Thus, in such instances, the court's role is to navigate the lacuna in the law and determine how the different receivership interests should be delicately balanced.⁵⁹³ Judges who are not trained in business/business law often interface with business strategies that they have to improvise the required statutory procedures to ensure justice in a case.

⁵⁹¹ Idigbe, op. cit. 92

⁵⁹² Under the CAMA, there are two circumstances where a court can intervene in receivership proceedings. Section 209(5) empowers the Court to appoint the receiver or another person as the manager of the business or any of the company's assets. (the powers of the receiver appointed under the section are subject to any order made by the Court.

⁵⁹³ Anthony Idigbe, Using Existing Insolvency Framework to Drive Business Recovery in Nigeria: The Role of the Judges. paper presented at Federal High Court Judges Conference. The Advocate 30th Edition. (2011):.93

Social Law and Order Dilemma

This dilemma concerns the law enforcement agents/agencies. The Nigerian police force has been the spotlight like the American police in recent times. Both the U.S. and Nigerian police focused on reform agendas to comply with constitutional mandates for public safety. The courts have been fundamental contributors to police reform in Nigeria. For example, it is a judicial intervention in police reforms that instigated the enactment of the first ever Administration of Criminal Justice Law (ACJL), which has provisions on specific procedures on arrest and police brutality. The court's role in doing justice; upholding human rights; upholding the Constitution; and interpreting policies can constitute judicial dilemma. In interpreting the policies and standards that apply to policing and the community, courts can be an avenue to mediate between police and community.⁵⁹⁴ However, the community's lack of trust for the courts, executive interference, or hierarchical issues cumulatively create a dilemma for judges who have to balance

⁵⁹⁴ Ari Tobi-Aiyemo, "The Courts and Police Reform in New York State: Thinking Outside the box." (New York: Otsego County Taskforce, Feb. 2, 2021).

democratic interests,⁵⁹⁵ public interests,⁵⁹⁶ police interests⁵⁹⁷ and judicial interest.⁵⁹⁸ Since the police are primarily the prosecutors(prosecuting side) in most trial court proceedings in Nigeria, the public interact with these police prosecutors who are not lawyers and know very little about legal procedures. Thus, in performing their prosecuting roles in ignorance, these prosecuting police officers gives the litigants/public a very bad impression of the courts. According to informants 7 and 8 the use of police prosecutors in criminal trials in Nigeria constitutes injustice to parties who have to rely on them to win a case.⁵⁹⁹

According to Adebisi, “The judiciary serves as a counter poise to ‘executive malfeasance.’ Above every other consideration, the judiciary provides a veritable platform

⁵⁹⁵ Democratic interest upholds the Constitution and reflects the rule of law that no one is above the law. The courts have to consider the democratic interest of holding the police officer accountable, civilly or criminally

⁵⁹⁶ Public interest. The Interest of the people of the USA. The interests for public order and safety. If the public perceives that the police are getting away with constitutional misfeasance, it will cause riots and social mayhem.

⁵⁹⁷ Under police Interests, the police claim that their job are more complex if their discretion is limited. In addition, the police also have human rights, and they have families too.

⁵⁹⁸ Interest of efficient administration of justice. The courts have to protect their independence and objectivity in the interest of justice– in this context, social/communal justice. Like the American people, Nigerians blame the courts. Courts are not supposed to be influenced by the public, but they serve the people and interpret laws to reflect justice, which is the public interest.

⁵⁹⁹ See informant interview

for the ventilation and espousal of constitutionally guaranteed rights; its orders as the authoritative arbiter of what constitutes the law under the principle of the rule of law is binding on all concerned parties.”⁶⁰⁰ The courts role in police reform is quite controversial, as courts face a dilemma attempting to balance the community's rights and police officers’ rights.

Scientific/Technological Dilemma

This is the dilemma about unforeseen scientific dilemmas given changing technological circumstances. These are situations that come up with the changes in society.⁶⁰¹ Judges often have little training in science, so where society changes scientifically and technologically, judges are challenged on what to do about cases. They rely on diverse expert evidence that can be confusing. The practices or procedures that existed in the era of paper records, such as file cabinets, type-writing machines, photocopy machines, duplicate papers have advanced to the era of computer desktops, computer disks, and hard drives. Technology is one of the most significant challenges to the act of judging today. Posner opines that: “...the continued rapid advance in science is going to make life difficult for judges. We live in an age of breakneck technological change that will thrust many difficult technical and scientific issues on judges, for which very few of them (of us,

600 Adebisi, A (Judicial Reform and Transformation in Nigeria) Cited from Tobi-Aiyemo “Courts and Police Reform: Thinking Outside the Box”, opcit

601 Judges are trained with the law and in law.

I should say) are prepared because of the excessively rhetorical emphasis of legal education and the weak scientific background of most law students...”⁶⁰²

Technology is not waiting for the courts to catch up. Sometimes, courts can only achieve justice by the appropriate exercise of judicial discretion when affected by such technological advancements. Unfortunately, most judges have no training on science and technology. Thus, in situations such as a pandemic, courts encounter dilemmas with virtual hearings, procedures etc. According to informant 5: “Technology has come to stay, and our judiciary will never remain the same again, so judges must shape up to the high demands of our times.”⁶⁰³

Health Dilemma

This health dilemma covers two major areas and interests—the health and welfare of the society and also the health and well-being of judges.⁶⁰⁴ It is no longer news that clinical trial lawsuits are on the rise in many countries worldwide. The advancement of science and technology has brought a rise in health issues that people now move from surgical remedies to an alternative route of taking medications to curb specific health hazards. Hence healthcare providers, pharmaceutical companies, and clinical trial experts

⁶⁰² Posner, op. cit. 1049

⁶⁰³ See page 8

⁶⁰⁴ I will discuss the judge’s health dilemma in the next chapter

are under pressure to perform and cure complex ailments. Thus, conflicts that arise from a series of clinical studies end as lawsuits. These lawsuits include cases of negligence, a duty of care, breach of confidentiality, fiduciary duty, and invasion of privacy. Accordingly, judges vested with the primary duty to interpret the laws and policies that govern clinical trials and research institutions must be pro-active, especially as clinical trials have taken a new dimension with COVID-19. Litigants are invading the courts with justified and unjustified claims— seeking to enforce laws and policies that govern clinical research. Judges have a vital role in preventing abuse of human subjects' rights and privileges, and at the same time, prevent human subjects' abuse of the judicial process. It is the role of the judge to curb the increase of clinical trial lawsuits as rising litigation can be a threat to medical advancement and economic advancement.

Judges have a creative role in clinical trial/pandemic-related lawsuits, but such a creative role raises public criticism of the judges' roles as lawmaking.⁶⁰⁵ Fortunately or unfortunately, the judicial powers of the Nigerian judge now exceed the traditional 'simply adjudicatory' role. As society changes and advances, new forms of technology, scientific discoveries, and business techniques emanate. The medical field has received increased attention over the past couple of years due to dramatic changes in clinical research/ clinical trials. The COVID-19 epidemic has created a state of emergency that requires much of

⁶⁰⁵ Judges are criticized as usurping legislative wings to make laws

pending clinical research to take a back seat. Simultaneously, medical personnel, pharmacologists, and researchers work tirelessly to find a possible cure to the ravaging coronavirus.⁶⁰⁶ With the confusion on what drugs would be effective, the scientist engage in experiments that may result to errors. In a matter of time, human research subjects will take advantage of the legal/judicial system to seek some form of redress arising from failed or compromised clinical trials. Some of their claims may be justified or unjustified, while other claims may be justified but impracticable considering unavoidable extenuating circumstances that may be valuable to the public.⁶⁰⁷

Therefore, the dramatic changes in health care or clinical research should instigate courts to change their *modus operandi*. The procedure courts adopt in 'ordinary' medical practice lawsuits may need some adjustment when dealing with clinical trial lawsuits. This is because there is a difference between medical lawsuits and clinical trial lawsuits. While improving the well-being of the individual patient is held as the essential goal in the physician-patient relationship, that is not the case in medical research. Instead, research has a primary goal of producing new knowledge for society's good and at times requires risk to the individual.⁶⁰⁸ As Posner said judge's weak scientific background creates a

⁶⁰⁶ Bamidele, O, *opcit*

⁶⁰⁷ Some of these circumstances may be due to limitations from the social distancing or some other specials or communal issues that may likely arise

⁶⁰⁸ Furrow, *op. cit.* 1475

dilemma in their tackling cases concerning health hazards.

International Law Dilemma

International law is part of the legal system of most democratic countries in the world. Thus, one way or the other, most countries' laws incorporate international laws. For example, one of the Nigerian law sources is international law, customs, treaties, and conventions. International laws have impacts the approach or mode of judging in Nigeria, depending on the specific judge's personality and the nature of the case.⁶⁰⁹ For example some judges who have had foreign education tend to rely more on international law more than judges who have had home-based education.⁶¹⁰ Nigerian courts construe statutes in a manner to avoid conflicts with international laws.⁶¹¹ In addition to the above, judges have more of an intermediate global role to implement and uphold international law. Judges influence the development and advancement of international law based on their notions and discretion.⁶¹²

I have stated that "the world is now a global village, and we are all clans and communities in it.... Whether we like it or not, we are getting to the era where the only

⁶⁰⁹ Some judges cite international laws in their decisions more than indigenous laws.

⁶¹⁰ See discuss on judicial personality and temperament in chapter 8

⁶¹¹ *Abacha & Ors. v. Fawehinmi* (2000) LPELR-14(SC)

⁶¹² Ari Tobi-Aiyemo, *opcit*: 9

option available to development, is by looking at developmental issues, which include economic social and cultural rights, through regional/international lenses."⁶¹³ Hence compliance with international law, especially when the national culture does not conflict with foreign and international standards and requirements, creates a dilemma for judges. An example is the judges who have to comply with both national and international standards face a dilemma. The admonition in *Caribbean Trading & Fidelity Corporation v Nigerian National Petroleum Corporation*⁶¹⁴ that Nigerian courts shall not continue to apply English laws to the detriment of Nigerian laws; and the decision in *Ibidapo v. Lufthansa Airlines*⁶¹⁵ that for the sake of political and economic stability, Nigeria cannot afford to live in isolation from *the international community*.

Part of the dilemma judges face is that international law impacts national/local laws differently.⁶¹⁶ Judicial interpretation is a significant challenge to judges' role in international law because of the modes of interpretation that may confuse some judges, especially as justice means different things to different individuals and societies. Questions that emerge at this point include— is there borderless justice? What criteria define justice in

⁶¹³ Ibid.

⁶¹⁴ *Caribbean Trading & Fidelity Corporation v Nigerian National Petroleum Corporation* (2002) 5 SC (Pt. I) at page 21

⁶¹⁵ *Ibidapo v. Lufthansa Airlines* (1997) LPELR-1397(SC) at PP 30-31, paras G-C

⁶¹⁶ See fn 603

international law—human criteria or legal criteria? Is global interest fairly represented in international law and organizations? Even though judges should define justice from the human perspective, as per what justice means to the people, it is not always the case, as domestic justice may not satisfy international justice criteria.⁶¹⁷

In *Abacha & Ors v. Fawehinmi*⁶¹⁸ 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, some Nigerian judges prefer to cite local laws than international law in judging.⁶¹⁹

In concluding this chapter, it is important to understand that the social role of judges creates dilemma for judges as society changes or develops, thus the laws that guide society should change as well. However, it appears that some social changes are not *pa-ri pas-su* with the law. This may be because the current laws are dormant or antiquated and are not reliable for the courts to interpret in settling disputes adequately. Hence this creates a gap between the law and the people, which constitutes an obstacle to social development.

⁶¹⁷ Chapter nine discusses the concept of justice and addresses this in detail

⁶¹⁸ *Abacha & Ors v. Fawehinmi* (2000) LPELR-14(SC)

⁶¹⁹ See *Olafisoye v Federal Republic of Nigeria* (2004) 4 NWLR (Pt 864) 580,

Unfortunately, this gap further disconnects society from the judiciary, as the public often misunderstands judicial roles and procedures. They often expect much more from judges than the law permits judges to give. Society seems largely ignorant of the unique and challenging role(s) of the judiciary in governance. Most of the public does not understand that judges are somewhat "slaves" to the law, and that they are bound by what the law says, no matter how sentimental they feel about a case.⁶²⁰ Informant 2's narrative about the trial judge in *Al Mustapher's case* is a ready example. People interpret justice from judicial actions or pronouncements of the judge. They do not understand that the law's interpretation is not always straightforward, especially with changing social circumstances, advancing technologies, varied judicial discretion, and judicial hierarchy. It appears that society does not feel judicial empathy when judges interpret the laws according to strict judicial procedures and the law's letters. So, when judges interpret statutes to conform to society's changes, needs, views, and interests, they encounter predicaments and are often called activist judges.

The courts' perceived reputation in Nigeria is not necessarily because judges are insignificant or that they fail to perform their roles in society. The society's perception was often based on ignorance/ misconceived or partial information and undue expectations of

⁶²⁰ In subsequent chapters, I will argue that judges should not be slaves to the law, but instead, they should be servants of the law. "The law is made for man and not man for the law (Mark 2:27 of the Hebrew Holy Bible). In other words, the law is to serve man's purpose in society, and judges should comply.

what the judiciary does or/and should be doing in society. Besides, different judges' unique personalities affect the social perception of justice as each judge comes to the bench with their unique individuality – making interpretation of judicial roles difficult. Society does not expect imprecision in judging. They think judges are divine, infallible beings whose decisions must be apt at all times and in all situations. Hence, the public criticisms of judges and their judgments.⁶²¹ Judges are human beings who, like everyone are fallible and susceptible to errors. Hence, displaying such human nature constitutes personal dilemma for judges.

⁶²¹ Details on this in chapter eight.

Chapter Eight: Personal Dilemmas

A judge is often in a predicament between roles as an adjudicator, interpreter-of-law, determinant of law, connection between the law and society, and “big brother” or intermediary.⁶²² All of these roles inevitably clash with a judge’s life and personality, that they have the right to enjoy as every other citizen. Judges encounter dilemmas in representing the judicial system/process that typifies the *ideal culture*⁶²³ that society desires and society's *real culture*,⁶²⁴ especially as this role may clash with their temperaments, and personal culture/beliefs.⁶²⁵ So, as much as the law expects judges to be objective, it goes without saying that every judge, whether they admit it or not, brings to the table their unique experience and idiosyncrasies that affect their judicial roles.⁶²⁶ This personal dilemma reflects the judicial experiences unique to individual judges within or outside the courtroom. A personal dilemma consists of how a judge’s temperament, life, experiences, and health/well-being affect their roles. Therefore, this chapter will (a) discuss the personality/temperament of judges; (b) examine the judicial dilemmas that

⁶²² Barack, opcit: 310-311

⁶²³ See chapter one for detailed explanation

⁶²⁴ Ibid

⁶²⁵This raises the rhetorical question on whether people feel justice from the judiciary, or are they just assuming justice exists?

⁶²⁶ Barack, opcit: 119

affect/influence judicial temperament and personality; (c) discuss the judge's humanity and how such humanity often affects or contradicts judicial roles/expectations (d) explain how judges think,

Judges' Personalities/Judicial Temperament

Judges like every human being have unique personality traits that influence their actions and impact their roles.⁶²⁷ Whether they admit it or not, every judge brings their unique experience, idiosyncrasies, and temperaments to the judiciary, which affect judicial discretion, interpretation, and decision-making approaches.⁶²⁸ The primary personality traits of openness, agreeableness, extraversion, neuroticism, and conscientiousness fall into either the extroverted or introverted categories. A judge tends to be either an extrovert or an introvert in a given environment. These personality traits affect a judge's judicial temperament, and for ethical reasons, the law requires judges to adopt a judicial temperament over their unique natural personality traits.⁶²⁹

Judicial Temperament versus Natural Personality

Judicial temperament is an indeterminate concept, yet it causes so much unrest in

⁶²⁷ These different traits or idiosyncrasies of judges may be unique to judges because of their personalities and others due to their judicial roles and temperaments.

⁶²⁸ All eight informants agreed on this assertion but six argued that personality should not show up in courts.

⁶²⁹ Informant 4 supports my assertion when he said that his lifestyle had to change after he became a judge, and he was wondering why they were not informed on such stringent rules before applying for the job.

judicial appointments in the U.S.A. and inadvertently in Nigeria. According to Rosen, “Judicial temperament encompasses a range of qualities: personality, character, upbringing and education, formative career experiences, work habits, and behavior when interacting with others.”⁶³⁰ Therefore, a judge’s judicial personality should not be different from a judge's natural personality.⁶³¹ The character, behavior, upbringing, educational, and social experiences of a judge are part of the judge's life, which may require an extrovert and sociable judge will have to be less social or extroverted in their judicial career and adopt a more introverted temperament.⁶³²

However, some arguments oppose the above claim. According to Chief justice John Roberts says: “... judicial temperament is a willingness to step back from your own committed views of the correct jurisprudential approach and evaluate those views in terms of your role as a judge. It's the difference between being a judge and being a law professor and appreciating that it’s not so much a question of analytical coherence or overview, it’s more a question of where this fits in with the Court’s established body of law.”⁶³³ Similarly, Rosen argues that judicial temperament involves judge’s willingness to “factor in the

⁶³⁰ Jeffery Rosen, *The Supreme Court, the personalities and Rivalries that define America*, (New York: Times Books Henry Holt, and Company, (2007): 8

⁶³¹ Both the judge’s personality and judicial temperament should be the same thing.

⁶³² Barack, *op. cit.* 119

⁶³³ *Ibid*: 7

court’s role” to suppress his or her ideological agenda or desire for personal attention in the interest of achieving consensus and stability.⁶³⁴ Even in the U.S.A., the established body of laws dictates judges’ roles and temperaments. According to Maroney, “When we talk about judicial temperament, then, we ought to be talking largely about emotion—both the emotional traits that sit at a person’s core and the behaviors those traits are likely to promote, given the constraints and challenges of a particular judicial environment.”⁶³⁵ Maroney mentions two fundamental psychological insights—the first is that temperament has a structural component that operates as a constraint on the possible self and is an essential determinant of behavior, particularly behavior under stress. The second is that temperament has a substantive component. It devolves essentially to trait-level patterns of emotional re-activity and self-regulation.⁶³⁶ Judge’s temperament often restrains their decision making especially in criminal and domestic cases.⁶³⁷ Eventually judges whose

⁶³⁴ Rosen, *op. cit.* 7

⁶³⁵ Terry. A. Maroney, *What We Talk About When We Talk: Judicial Temperament*- January 2018, p. 7

<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiEicvEx7HvAhWVX80KHR9LDmQQFjALegQIARAD&url=https%3A%2F%2Fwww.law.berkeley.edu%2Fwp-content%2Fuploads%2F2018%2F01%2FPaper-Maroney.pdf&usg=AOvVaw0CB7bLJuWHFTD0mBRY2r9L>

⁶³⁶ *Ibid*, 6-7

⁶³⁷ Informant 7 narrated how her role as a clergy sometimes affects her disposition during sentencing and sometimes in making attempts to encourage the parties in the case before her to settle out of court.

temperaments are unsuited for such criminal and domestic cases get burned out.⁶³⁸ Also judges temperament often constitute compassion fatigue⁶³⁹ or vicarious trauma,⁶⁴⁰ which may result to judicial impairment.⁶⁴¹

Judicial temperament can inform how we sort people into the specific judicial roles in which they are most likely to thrive, and it can shape mechanisms of judicial selection, training, support, and discipline.⁶⁴² Therefore, where a judge's judicial temperament conflicts with the judge's natural personality, the judge must, out of necessity, adopt a judicial temperament.⁶⁴³ This is why some judges experience what this author calls "judicial identity crisis." This judicial identity crisis is a reoccurring dilemma throughout

⁶³⁸ Zimmerman, I.M. Dealing with Professional Stress: Insights for Judges. Boston Bar Journal, Nov./Dec. pp. 39-40 at 39

⁶³⁹ Anne Chambers, "Judges and Compassion Fatigue: What it is and What to Do About it." The Connection Point, Practice Resources for Women Lawyers.https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjJk-zY9rDwAhWHIDQIHXd_CskQFjAAegQIBRAD&url=https%3A%2F%2Fmobar.org%2Fsite%2Fcontent%2FArticles%2FWell_Being%2FJudges_and_Compassion_Fatigue__What_Is_It_and_What_to_Do_About_It.aspx&usg=AOvVaw0rILUeQYySjJ5cv9eJYc6N

⁶⁴⁰ Jafe, G.P, Crooks C.V, Dunford-Jackson, B.L, Town, M. "Vicarious Trauma in Judges: The Personal Challenges of Dispensing Justice." Juvenile and Family Court Journal, (Fall 2003):1-9.

⁶⁴¹ A Flesh Look at Judicial Impairment. Judicature, Volume 90, Number 1 (July-August 2006): 16-24.

⁶⁴² Judicial temperaments also can affect how we construct and support the environments in which we ask our judges to work in order to maximize chances of thriving (and minimize chances of failure) given their expected range of temperaments.

⁶⁴³ All eight informants support this argument

the career of judges. It occurs in phases, depending on a judge's personality, the type of court, and the nature of cases. I believe that every judge will experience a 'judicial identity crises at one point or stage in their career.

Influences on Judges' Personality/Temperament

Nevertheless, I believe there are exceptions to the above claim. Judges do not just possess and exhibit certain personality traits or temperaments. Social factors such as culture, environment, religion, previous careers, experiences, and pedigree influence a judge's personality and judicial temperament. These social factors often dictate how judges think or act and what society expects from judges.⁶⁴⁴ However, these factors often clash and create dilemmas for judges.⁶⁴⁵

Cultural & Religious Dilemma

This dilemma operates from two dimensions: the first is from the judge's perspective on internal cultural/religious influences. The second is from external factors like the litigants' cultural/religious inclinations. Both the judge's and the public's cultural inclinations influence judicial roles. In other words, the judge's cultural background, the litigant's culture, and cultural norms in society affect cases in court.

Nigeria is a religious society, and most judges practice Christianity or Muslim

⁶⁴⁴ Barack, op. cit. 119

⁶⁴⁵ Ibid, 11

religions. A religious dilemma occurs when the litigant or community uses the judge's religious affiliations to criticize the judge. They make assumptions alleging that the judge's actions and decisions are biased because of their religion. For example, in a family dispute, if the judge tries to mediate between the parties to avoid a hearing, some parties petition the judge and say that their religious inclination against family disputes is interfering with what they desire.⁶⁴⁶ Some judges, indeed, delay hearing a case at the expense of the parties' interests because they believe that such cases between siblings, for instance, go contrary to the bible verse that says do not take your brother to court.⁶⁴⁷ Thus, instead of going on with the hearing, the judge attempts to force parties into settling out of court, which can cause delays in trials. Ogebe narrated that an eighty-paged petition was written against him alleging that Ogebe's religious convictions interfered with him performing his judicial functions.⁶⁴⁸

Ogebe's description takes us to another religious dilemma where some judges avoid hearing some cases because of their religious convictions. For example, some judges find it challenging to preside over divorce cases or refuse to give death penalty sentences based

⁶⁴⁶ Informant 7 narrated how her sincere hope to settle a dispute by the statutory provision giving her discretion was misinterpreted by litigants who petitioned her as using her courtroom to preach.

⁶⁴⁷ I Corinthians 6 King James Version of the Holy Bible

⁶⁴⁸ Ogebe, op. cit. 47

on their religious beliefs that it is against the ten commandments of God, one of which said “Thou should not kill.”⁶⁴⁹ Ogebe also described how a judge colleague did not believe in capital punishments refused to apply it in his sentencing.⁶⁵⁰ Ultimately, the differences in customs, traditions, or religions of judges, litigants, or their representations may influence a verdict or mitigate in a proceeding. Sagiv argues that judges, like every other person, hold views and beliefs about the world, society, and other persons and cultures, which stem from their own cultural perspectives. These views and beliefs are manifested in the judge’s subconscious or common sense and have an impact on their judicial decisions. This impact is especially significant in culture-related cases.⁶⁵¹ For example in an unnamed 2016 case reported by Vanguard Newspapers,⁶⁵² a father approached a Kwara State, court to seek an order to perpetually restrain the head of his family and accomplices from administering

⁶⁴⁹ Exodus 20:13 King James Version of the Holy Bible

⁶⁵⁰ Ibid, 49

⁶⁵¹ Masau Sagiv. “Cultural Bias in Judicial Decision Making,” 35 B.C.J.L & Soc. Jus. 229, 2015
https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwie-Y2tw7_vAhWidN8KHZe_DoYQFjAAegQIBRAD&url=https%3A%2F%2Fwww.digitallcommons.bc.edu%2Fcgi%2Fviewcontent.cgi%3Farticle%3D1082%26context%3Djlsj&usg=AOvVaw2617GWgOeb5YQ_ZGMte7v5

⁶⁵² <https://www.vanguardngr.com> (October 20, 2016)
https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjEq_M9oPwAhXOjp4KHfsfB24QFjACegQICBAD&url=https%3A%2F%2Fwww.vanguardngr.com%2F2016%2F10%2Fman-sues-family-over-tribal-marks-son%2F&usg=AOvVaw1jfPbHHOvr_IYytC829fUx

tribal marks on his son.⁶⁵³

Environmental Dilemma

Judges' environment entails their geographical location, home, and workplace. It also includes the people around the judge. The environmental dilemma involves the environments that the judge lived, grew up in, and worked in before the appointment at the bench and the current environment in which the judge lives. Judges assimilate personal experience from the environment they grew up and such experiences often influences the judge's life experience and background. In explaining how a judge's previous career affects their judicial role: Ogebe said about a colleague/friend, "...he did not have the temperament of a judge having been in private practice and politics prior to his appointment he found it hard to adjust. He and the chief judge were constantly disagreeing...."⁶⁵⁴

Therefore, a judge's personality and judicial temperament stems from their environment. Ogebe's experiences shows how the background of the judge affected his judicial performance and roles. People's emotions, such as love and hate, natural impulses such as hunger or fear, and intellectual premises such as art and philosophy all combine to

⁶⁵³ It is a cultural practice in some parts of a Nigeria to incite tribal marks on children at birth.

⁶⁵⁴ James Ogebe, opcit. 41. He also said the background of Chief Judge as a railway worker for many years before studying law might have influenced his "parochial approach to the profession and to peers". Op. cit. 43

influence their actions.⁶⁵⁵ Thus, a judge's background influences the judge's decision to apply domestic, international law and foreign cases.⁶⁵⁶ For example, some judges who have had foreign education tend to rely on international law more than judges who have had home-based education have a tendency to argue in favor of Nigerian decisions and laws than this with foreign educational training.⁶⁵⁷ Thus, their foreign environment influences their exercise of discretion and application of foreign cases in deciding Nigerian cases. For example, Niki Tobi who had all of his education from elementary to doctoral in Nigeria,⁶⁵⁸ argues and encourages Nigerian judges to apply local news to local situations. According to Muftau,⁶⁵⁹ the concept of justice as applied by the Nigerian courts is from a western perspective. After all, both the law makers and their executors have been educated from the western system of education. This environmental dilemma further creates dilemmas of ostracism, isolation, and insecurity. Informant 4 agrees and argues that it is

⁶⁵⁵ Zimmerman, op. cit.

⁶⁵⁶ Barack, op. cit.

⁶⁵⁷ R. Muftau, "Access to Judicial Justice in Nigeria: The Need for Some future Reforms," *Journal of Law, Policy and Globalization* Vol. 47, (2016):.144-158, at 145
https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjZk4n71sXvAhXbLc0KHWFRB5QQFjANegQIGRAD&url=https%3A%2F%2Fcore.ac.uk%2Fdownload%2Fpdf%2F234650565.pdf&usg=AOvVaw3L6t3olIyL7Sx57TU_-jLm

⁶⁵⁸ See Jennifer O. Tobi-Tukur, (ed) *Unforgettable, Irreplaceable* (Hon. Justice, prof. Niki Tobi, 1940-2016): Funeral ceremony and Biography (December 2, 2016): 5-9

⁶⁵⁹ *Ibid*, 145

unfortunate that even the ethical codes of conduct would suggest playing western games like golf and chess and prohibit domestic games like local draft and soccer or cricket.⁶⁶⁰

Ostracism Dilemma

Judges and their families go through rejection and exclusion, especially in small or enclosed towns, when the judge gives a decision that is contrary to public opinion.⁶⁶¹ In narrating his experience, Ogebe said, "...I was made a judge of the price control court....to try traders who sold essential commodities... The procedure was summary trial where most accused persons pleaded guilty. I made a lot of enemies while presiding over the court. My wife used to be harassed when she went shopping."⁶⁶² Another example from the U.S.A. involved Judge Jill Martinez of the Municipal Court Albuquerque, New Mexico. She ordered a nolle prosequi, and the press published that she dismissed the case and discharged a murderer back into society, which gave the public the impression that the decision was solely hers. This created public resentment from some parents in her child's school, who made sarcastic comments to her regarding what they assumed was an unfair autonomous decision. Unfortunately, the press did not retract the story after the court explained the law's

⁶⁶⁰ See page 11

⁶⁶¹ Informant narrated how her family member refused to talk to her or even relate with her for over a year because of a decision she gave in a case that was not favorable to him.

⁶⁶² Ogebe, Opcit: 41

correct position that a nolle prosequi is a prosecutor's plea.⁶⁶³

Isolation Dilemma

The COC implies a life of isolation for judges. The ethics of the profession demand that judges should not mingle with the public. According to Niki Tobi, a judge should isolate himself/herself as much as possible from the glare of the public, as judges by nature of their jobs should not be in certain public places.⁶⁶⁴ He further explains that “A Nigerian judge like every other Nigerian, has the constitutional right of freedom of association... to move in and out of his official residence. Though he has such constitutional freedom, the ethics of his chosen profession seem to place some restrictions on his freedom of association. A judge could be seen in public, but not every public place.” Judges' life of isolation impacts their personal life and their work. It extends to keeping fewer friends and acquaintances. Thus, Ogebe said that because the judge's job is a friendless one, as a retired judge, he visits the courts occasionally to encourage judges.⁶⁶⁵ One informant talked openly about how his social life is restricted, stating “[F]rom day one there are certain social clubs and things that you do that you have to give up. They said we should avoid contact sports,

⁶⁶³ Judge J M, JS &35 Classmate, 2018

⁶⁶⁴ Niki Tobi, opcit: 337

⁶⁶⁵ Ogebe, opcit: 317

as it exposes us to members of the public, so I stopped playing football and cricket...”⁶⁶⁶

Insecurity Dilemma

Judges are always insecure/unsafe in the environment because of the nature of their jobs in society. The people they possibly offend by their decisions often live around them. Besides, judges are also exposed to the ongoing insecurities in Nigeria.⁶⁶⁷ Their roles in adjudicating cases from these conflicts expose them and their families to more insecurity. Judges’ families are at risk for abduction and harm.⁶⁶⁸ For example, the wife and daughter of Supreme Court Justice Rhodes Vivour were kidnapped for a ransom⁶⁶⁹ before their release.⁶⁷⁰

⁶⁶⁶ See page 11

⁶⁶⁷ Corruption, Niger Delta militancy, ethno-religious conflicts, secession movements, Fulani herdsmen activities, ritual killings, political killings, and abduction for ransom

⁶⁶⁸ www.vanguardngr.com

https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwic4Pv_2LbvAhUOCM0KHRN_AcgQFjAAegQIAhAD&url=https%3A%2F%2Fwww.vanguardngr.com%2F2013%2F05%2Fkidnappers-of-justice-bode-rhodes-vivours-wife-others-pocketed-n3-m%2F&usg=AOvVaw29Dfh5VZ5GknMfOi89oWYa

⁶⁶⁹ The ransom was N3M (Three million Niara) about \$7,293.00 ransom.

⁶⁷⁰ www.vanguardngr.com

https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwic4Pv_2LbvAhUOCM0KHRN_AcgQFjABegQIAxAD&url=https%3A%2F%2Fwww.vanguardngr.com%2F2013%2F05%2Fjustice-rhode-vivours-wife-daughter-driver-regain-freedom%2F&usg=AOvVaw0mp2amPeV53ml90WT2n01I

The career of a judge is one of the riskiest jobs in the world. Judges in Nigeria, like their counterparts in the United States, face safety issues/threats regularly.⁶⁷¹ Some litigants or their families aim to kill judges or their families. According to informant 2, the then chief justice had ordered an investigation of the failed assassination attempt on her life, and the culprit confessed that even though he was hired to kill the judge, he could not because she was a kind and philanthropic judge in society.⁶⁷²

Another aspect of the insecurity dilemma is an example in the American case of Daren Mack, who murdered his wife and shot a Washoe County family court judge Chuck Weller, who presided over a bitter divorce case.⁶⁷³ Also the shooting of the son and husband of federal Judge Ester Silas of the U.S. District Court New Jersey, Newark is another of several cases on insecurity threats on American judges like their Nigerian counterparts.⁶⁷⁴

⁶⁷¹ See pages 8-12

⁶⁷² *ibid*

⁶⁷³ www.reviewjournal.com
<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwih5nL27bvAhWGbs0KHe0LBx8QFjABegQIARAD&url=https%3A%2F%2Fwww.reviewjournal.com%2Flocal%2Flocal-nevada%2Freno-man-who-killed-wife-shot-judge-wants-retrial%2F&usg=AOvVaw1jhw62COMoYkDEbXlmNnx>

⁶⁷⁴ www.nytimes.com
<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjYmrC83bbvAhXDGc0KHWSbDqQQFjARegQIIRAD&url=https%3A%2F%2Fwww.nytimes.com%2F2020%2F07%2F19%2Fnyregion%2Fshooting-nj-judge-ester-salas.html&usg=AOvVaw1YlJeifAiEsWhWO8l9q2V2>

Superhuman Expectation Dilemma

The law and the public have impracticable expectations of judges. They often place judges on a high level as if they are superhuman.⁶⁷⁵ So, judges face pressure to fulfill these high expectations of ‘divinity’ by acting in their mere human forms, which creates a dilemma. Judges put up certain temperaments or personalities to fit with such expectations.⁶⁷⁶ This illusion of unrealistic expectations also leads to distrust of the judiciary, especially when judges' humanity shows up in their act of judging. Professor Ray succinctly captures society’s unrealistic expectations of judges as follows:

You are the link between our government, our laws and our people.... We have no royalty; rather, we have a history of not trusting government. You are our watchers and fixers when government gets out of line. You bring it into alignment with our laws. We need a trusted person to review the actions of government because our government is made up of human beings who can be tired, overworked, undertrained and inattentive. Sometimes they get it wrong. We are not always a trusting people, but we trust you to get it right. Your presence in the process as judges legitimizes the exercise of power by government. ⁶⁷⁷

⁶⁷⁵ Tobin, N., op. cit.

⁶⁷⁶ All informants agree that to an extent in their roles, they have to put up appearances that are not necessarily convenient, just to satisfy the ethical requirement.

⁶⁷⁷ D.E. Ray, “The Seven Important Roles Judges Play in Our Society.” The University of Toledo College of Law Transcript, (2010): 24-25
https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=6&ved=2ahUKEwjGjajOndfoAhUTH80KHak-DVwQFjAFegQIAxAB&url=https%3A%2F%2Fwww.utoledo.edu%2Flaw%2Falumni%2Ftranscript%2Ftranscript10.pdf&usg=AOvVaw2sM7rcVjeasTkIk-wu_uxJ

Professor Ray's argument about the American society applies to the Nigerian society as well. The Nigerian people also empathize with the government more than they do with judges. He observes “Our government is made up of human beings who can be tired, overworked, undertrained and inattentive.⁶⁷⁸ Sometimes they get it wrong.” Unfortunately, it does not appear that Nigerian or American societies understand that judges are as human as the government. They suffer similar fatigue, overwork, and under-training and thus can be inattentive. Ray concludes that “[w]e are not always a trusting people, but we trust you to get it right...” is dilemmatic. Judges will not always get things right. To a certain extent, the public should trust their judiciary to deliver justice and uphold democracy but also know that judges are bound to err as humans. That is why we have appellate courts, that are unfortunately also overworked.

According to Justice Oputa, “It is not given to human justice to see and know as the great Eternal knows, the thoughts and actions of all men. Human justice has to depend on evidence and inferences.”⁶⁷⁹ These unrealistic expectations, super-hero expectation has led to series of dilemmas in judicial practice. Posner explains: “My analysis and the studies on which it builds find that judges are not moral or intellectual giants (alas), prophets, oracles, mouthpieces, or calculating machines. They are all-too-human workers,

⁶⁷⁸ All informants express opinions that agree with this assertion in their respective discussions with author March to April 2021)

⁶⁷⁹ *Ukwunnenyi v State* (1989) 4 NWLR (pt. 114) 131 at 156, D-E

responding as other workers do to the conditions of the labor market in which they work.”

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The requirement of the judicial job is a herculean task. It requires superhuman attributes, and judges attempt to be superheroes are stressing them out. The shortage of mental health facilities in Nigeria, plus the fact that judges are discreet with their health concerns, has not helped.⁶⁸¹

The Humanity of Judges

I believe that society needs constant reminders that judges are not super-humans. They may be called lords in Nigeria, but they are certainly not gods.⁶⁸² Society and law may require them to live above board like “Julius Caesar’s wife of Roman fame and reputation, but they may fail.”⁶⁸³ Lord Denning opines that it is not within human powers to foresee the manifold sets of facts that may arise, and even if it were, it is not possible to provide for them in terms free from all ambiguity.⁶⁸⁴ Judges face the everyday life

⁶⁸⁰ Richard Posner, *How Judges Think*, Massachusetts, U.S.A.: Harvard University Press, (2008):.7

⁶⁸¹ What is the joy of a career if you will not live to enjoy your impact in it? Although there are no statistics, most judges that have retired from judicial practice have died within the first several years of their retirement.

⁶⁸² In Nigeria, judges are called ‘my lord’ or ‘your lordship’

⁶⁸³ Niki Tobi, *opcit*: 74

⁶⁸⁴ *Seaford Estate Ltd v Asher* (1949) 2 K.B. 481

experiences, emotions, stress, fears, doubts, and confusions that every human being faces daily. Judges are not computers; they are human beings whom the law has given a level of discretion to apply when necessary for the justice of a given case. Judge Learned Hand captures the humanity of judges in the following quote:

[A] judge's life, like every other, has in it much of drudgery, senseless bickering, stupid obstinacies, captious pettifogging, all disguising and obstructing the only sane purpose which can justify the whole endeavor . . . But there is something else that makes it — anyway to those curious creatures who persist in it — a delectable calling. For when the case is all in, and the turmoil stops, and after he is left alone, things begin to take form. From his pen or in his head, slowly or swiftly as his capacities admit, out of the murk the pattern emerges, his pattern, the expression of what he has seen and what he has therefore made, the impress of his self upon the not-self, upon the hitherto formless material of which he was once but a part and over which he has now become the master. That is a pleasure which nobody who has felt it will be likely to underrate.⁶⁸⁵

Osipitan acknowledges the fact that as mortals, judges are not above mistakes.⁶⁸⁶

He argues that the Supreme Court's conflicting precedent on the same issues corroborates the fact that justices of the court are mortals. Consequently, society should not credit them with perfection, which Osipitan argues is the exclusive preserve of God Almighty.⁶⁸⁷ In *Samuel Ayo Omoju v. The Federal Republic of Nigeria*,⁶⁸⁸ the court explains that “judges

⁶⁸⁵ See fn 677

⁶⁸⁶ Osipitan, *opcit*: 27

⁶⁸⁷ *Ibid*

⁶⁸⁸ *Samuel Ayo Omoju v. The Federal Republic of Nigeria* (2008) LPELR-2647(SC) Per.

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.” Lord Denning admonishes that “...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....”⁶⁸⁹ In their humanness, judges encounter dilemma regarding their intuitions, implicit bias, communicating, temperaments, and philosophy to judging,

Intuitive Dilemma

Unfortunately, or fortunately, judges sometimes have intuitive feelings coupled with circumstantial evidence about the culpability of a litigant in criminal cases.⁶⁹⁰ Such intuition may eventually lead to their final decision to convict after considering relevant evidence and facts. Sometimes, shabby police investigations aid such intuitions.⁶⁹¹ From this author's personal experience of over ten years handling criminal cases in the judiciary of Lagos State, Nigeria, what most suspects, witnesses, or lawyers say as the truth is sometimes shy of the truth. However, the judge always rules based on the evidence before

Muhammed JSC

⁶⁸⁹ Cited from Tobi-Aiyemo, Act of Judging, Opcit: 137

⁶⁹⁰ Informant 4 supports this assertion in his discussion with author February 2021

⁶⁹¹ Ibid

the court.⁶⁹² Another aspect of this dilemma is that everyone sees the truth differently, depending on their perspective. What is truth is contextually bound and socially constructed, which is why intuitive feelings play a role.

Furthermore, shabby police investigations often influence judges' intuition and create dilemmas in decision-making.⁶⁹³ For example the prosecution often presents incomplete evidence that confuses the judge about the somewhat obvious culpability of the defendant.⁶⁹⁴ In other words, sometimes, the evidence before the court connects the defendant to the alleged offense with no reasonable defense to vindicate the defendant, but an improper investigation creates a loophole of “reasonable doubt.” Thus, this reasonable doubt test reverses what should have been a guilty verdict to not guilty. Under such circumstances, the public criticizes the judge, who intuitively agrees with the public that the defendant is guilty but ruled according to the evidence before him and not his judicial intuition. I should state here that intuition is not accepted as a factor to determine a judge’s decision. However, Posner argues that “judicial intuitionism is here to stay for the foreseeable future, and for the further reason that it is compelled by the institutional

⁶⁹² See the decision of Informant 2 in Al Mustapher’s case

⁶⁹³ Ibid

⁶⁹⁴ Ibid. In addition, most prosecutors in Nigeria, especially in Magistrate Courts and High Courts, are police officers, most of whom have no legal training.

structure of adjudication.”⁶⁹⁵ Posner’s argument is the dilemma in the Nigerian society, because as much as the law stipulates that judges does not allow judges to be intuitive, the reality is that judges inadvertently apply intuition in decision making.⁶⁹⁶ There is something beneath the surface that directs judges’ thinking in interpreting statutes. It is a ‘judicial instincts’ inside of every judge. It is that intuitive aspect that judge inadvertently resort to/ trusts for direction. It is the humanity of judges that no law can take away. Although judges deny it, judicial instincts inadvertently influence a judge’s decision-making.⁶⁹⁷

Implicit Bias Dilemma

Even though the law requires judges to be objective, every judge has a form or level of implicit bias inherent in their natural personality. No matter the amount or level of implicit bias training to which an individual is exposed, innate in every human is unconscious bias. Posner argues that sometimes the judge's race, religion, gender, or other personal characteristics influences judicial decisions.⁶⁹⁸ Thus, every judge has an inherent

⁶⁹⁵ Posner, *How Judges Think*, opcit: 110

⁶⁹⁶ *Ibid*

⁶⁹⁷ All eight informants agree to this assertion in their respective interviews with author January 2021.

⁶⁹⁸ Posner, *How Judges Think*, opcit: 126

bias to a certain degree or level, even though most judges deny it or are not aware of it.⁶⁹⁹ It is unavoidable. That window of discretion judges apply in adjudicating one way or another inadvertently carries a level of bias from the judge's personal beliefs.⁷⁰⁰ Justice Kanyip, says, "...each judge brings to the table his own unique style and experience. But there is a threshold below which we must not go. We can only build on our respective experiences. At the end of the day, the key thing is that justice is not only done but seen to be done. And we achieve this only with well-reasoned and user-friendly judgments."⁷⁰¹

Although the court in *Ezeugo v. Ohanyere*⁷⁰² admonished that "sentiment commands no place in judicial deliberation for if it did, our task would be infinitely more difficult and less beneficial to the society," there is an implicit sentiment in every judicial decision, even though unconscious. This creates a constitutional dilemma as the court in *Yakubu v State*, held that bias removes the concept of justice and fair hearing, thus contravening our very constitutional right and its breach in any trial nullifies the trial.⁷⁰³

⁶⁹⁹ Judges are not the only people denying the existence of implicit bias in the judiciary, the institution of the judiciary/ the Court system is also in denial.

⁷⁰⁰ It is the judge's personality that influences his/her judicial approach—whether he/she is liberal, or conservative is based on their introverted or extroverted personalities.

⁷⁰¹ Benedict B. Kanyip, "Judicial Reasoning: Some thoughts" U.S.A. Retreat of Lagos State High Court Judges. 2019: 3

⁷⁰² *Ezeugo v. Ohanyere* (1957) 6 – 7 SC 17 at 184, Per Obaseki JSC

⁷⁰³ *Yakubu v State* (2007) 9NWLR (pt.1038)1 at 19, E-F

Judges interpret statutes based on their implicit bias of what they understand as the law. Thus, even when the C.O.C. expects judges to act “subconsciously,” judges cannot deny that the natural human bias influences their decisions. *In Federal Republic of Nigeria v Mike*⁷⁰⁴ Niki Tobi, JSC said “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.”

Temperamental Dilemma/Judicial Philosophy Dilemma

As discussed above, different temperaments influence judges' judicial roles. These temperaments influence their judicial philosophy in decision-making. Ogebe talked about a judge colleague who did not have judicial temperament because he had been in private practice and politics before his appointment, but his natural personality led to frequent disagreements with the chief judge.⁷⁰⁵ According to Ogebe, Justice Idoko, a former chief judge who was influenced by his teacher training background before reading law, ensured continued legal education for judges to enhance their judicial performance. However, Idoko was weak in judicial administration because he was in private practice before the judiciary and had no civil service training. Thus, he made mistakes that led to some

⁷⁰⁴ Federal Republic of Nigeria v Mike (2004)1 SC (pt. II) 27 at 25

⁷⁰⁵ Ogebe, opcit: 43

litigation.⁷⁰⁶

Despite the canons and principles of statutory interpretation, judges' idiosyncrasies and judicial temperament often influence their judicial philosophy, and eventually their decision-making. Rosen stated that one way of exploring the influence of judicial temperament on the court is to compare the experiences of justices with very different temperaments.⁷⁰⁷ Thus, he compared the personalities of Chief Justice Fred Vinson and Chief Justice Earl Warren,⁷⁰⁸ who presided over the court's deliberations in *Brown v Board of Education*,⁷⁰⁹ in different stages. Vinson was "a former senator..., who had impressed President Truman as a canny poker player and competent secretary of the treasury⁷¹⁰...but his colleagues perceived him as an unstable advocate rather than a skilled mediator." This personality Roden argues affected Vinson's handling of the case. Hence the Vinson court could not reach a consensus in the Brown case before Vinson dies, and the justices ordered that new arguments be held.⁷¹¹ Governor Earl Warren of California

⁷⁰⁶ Ibid, 49

⁷⁰⁷ Roden, op. cit. 8

⁷⁰⁸ Ibid

⁷⁰⁹ supra

⁷¹⁰ According to Rosen, President Truman hoped that Vinson would solve the battle of personality that were then raging on the court.

⁷¹¹ Roden, ibid

who also had a political background, succeeded Vinson. Unlike Vinson, Warren had “a far more appealing personality and was far more adept at persuading skeptics and winning votes.”⁷¹² Roden explains that Warren’s personality coupled with his political background influenced his judicial temperament that enabled him to eventually influence the other judges. After the new arguments before the court, Warren clearly stated his position against segregation. Roden argues that Warren’s temperament/personality led to the unanimous decision read aloud to the spellbound courtroom in May 1954.⁷¹³

A judges’ temperament or personality influences his philosophy of reasoning (realism or constructionism).⁷¹⁴ Hence, convincing a constructionist judge to take a realist view on a case is likely to create a dilemma when the judge is between decisions. According to Justice Ogebe, in an election petition case, he had to persuade the other two justices in the panel to agree with his position.⁷¹⁵ In his words, “conviction and conscience play a large part in adjudication.”⁷¹⁶

⁷¹² Ibid, 9 “Warren was thoughtful, considerate, deferential and unpretentious on the court, and he sought out his new colleagues for advice rather than trying high-highhandedly to impose his will.

⁷¹³ Ibid, 10 Knowing the court needed to speak unanimously with one voice, Warren visited the skeptical justices, but his greatest lobbying triumph was with Stanley Reed. Warren encouraged Reed to do what was best for the country,

⁷¹⁴ Barack, op. cit.

⁷¹⁵ Ogebe, opcit: 42-43

⁷¹⁶ Ibid

The Secrecy/Incommunicado Dilemma

This dilemma comes as a hazard with the job of adjudication. It appears judges inadvertently sign up for some secrecy while taking their oaths of office. A judge in Nigeria is not to discuss a matter before him/her with any person (including their spouse), except the immediate members of his panel in the case. According to Niki Tobi, “Let him keep his secrets secret until the day of judgment. Let no human being, apart from God, know what is on his mind, on a particular case before him.”⁷¹⁷ During the recent appointment of magistrate-judges in Lagos State judiciary, Lagos State Chief Judge Alogba urged the new magistrates to keep both their oaths of office and oath of secrecy.⁷¹⁸ The average judge has a deep mind, and I dare to say that ethics expect them to go to the grave with a concealed mind. Many things happen in the court that judges are not at liberty to share, and most may never say for public consumption. This creates a dilemma for the judge, especially when relating with media.⁷¹⁹ Although discreetness suits judicial integrity, if excessive, it can harm the human mind and create dilemma for an extrovert judge than an introvert judge. For example, a judge is not supposed to talk about a pending case, so when they get burned

⁷¹⁷ Niki Tobi, op. cit. 338

⁷¹⁸ lagosstatejudiciary.org “Limit Your Social Circles” 11/25/2020. Accessed from https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjekq_zmbnvAhUbXM0KHet2BEIQFjACegQIAxAD&url=https%3A%2F%2Fagosjudiciary.gov.ng%2Fallnews.html&usg=AOvVaw3sh7flax1OyCuqvq1IQIcU

⁷¹⁹ See discussion of media dilemma in chapter 7

out or emotional fatigue from dealing with a traumatic case (trying to get a litigant through trauma), judges tend to keep such stress to themselves as they are not allowed to talk about the case. Thus, they develop secondary traumatic stress that may lead to negative outcomes for the judicial system.⁷²⁰

Another secrecy/incommunicado dilemma judges encounter is with social media. Some Nigerian and American judges use social media, despite ethical requirements/arguments that judges should not be on social media.⁷²¹ In regard to judges and social media, informants were split on whether or not the judiciary should engage in those types of platforms. In arguing against social media, Informant 4 shared a story where a judge recused himself from a case in which a party was unknowingly photographed with him at a social function and it was posted on social media immediately before the first hearing.⁷²² Muffler argues that the social media postings, tweets, and publications are damaging to judicial integrity, independence, and security.⁷²³ Social media publications are more damaging than the print and vocal media because they transmit with extreme

⁷²⁰ Jared Chamberlain, Monica K. Miller, "Evidence of Secondary Traumatic Stress, Safety Concerns, and Burnout Among a Homogenous Group of Judges in a Single Jurisdiction." *The Journal for the American Academy of Psychiatry and the Law*. Vol. 37, Number 2, (2009):.214-223 at 214.

⁷²¹ Informants 5 and 7 say they use social media, (in their discussions with author March 2021)

⁷²² See page 11

⁷²³ John Muffler, *When Justice Fails Class*, NJC Course.

speed and reach. Also, it is hard to control or check social media postings because the judicial jurisprudence on the courts and social media is inadequate to cover the various aspects of concern to the safety of the judge and the independence of the judiciary. Social media is more damaging to judges and the judicial independence than it is to the press.⁷²⁴ The dilemma here is that judges are part of the larger society, and communication with family and friends is critical, so how does a discreet judge stay away from social media interactions and retain family ties? Also, with the pandemic lock-down, social media seems to be the new media for communication.

The argument on judges and social media is divided. One argument is that judges using social media have led to situations where those judges have been seen as biased or subject to inappropriate outside influences.⁷²⁵ Another argument is that social media can create unparalleled opportunities to expand the reach of judges' legal expertise to encompass and educate potentially vast swaths of the lay public.⁷²⁶ According to the United Nations Office on Drugs and Crimes (UNODC), most judges understand well the positive

⁷²⁴ News about court proceedings get across the world before the journalist has time to report the news. Social media has become a threat to the print press as unknown persons can use their phones to record any activity in court and send it out with a simple click. This was the situation in Sowore's case reported in chapter 7.

⁷²⁵ Fisher, K.R. *Judicial Ethics in a World of social media*. Pp. 7-13 Schoeller-Schletter, A (ed) *Impartiality of Judges and social media: Approaches, Regulations and Results* at p. 10

⁷²⁶ *Ibid*

aspects social media platforms can bring, such as openness, closeness to society, and the potential to spread the reach of their expertise and increase the public's understanding of the law. On the other hand, negative aspects stem from both what judges decide to post and from what judges may be subjected to on a specific medium, such as misrepresentation or misinterpretation of their posts, or even cyber bullying and threats to privacy and safety.⁷²⁷ Despite these arguments, some Nigerian judges still operate social media accounts. The pandemic has made it even expedient for courts. Nevertheless, the ethical restriction still stands.

Public Opinion Dilemma

Judges often face challenges in making decisions based on public opinions. The statutes infers that the law and the long-established and cherished tradition of judgeship's profession guides judges' relationship with the public.⁷²⁸ However, this relationship is sour because sometimes courts give decisions contrary to public opinion. For example, Informant noted how she had experienced attempted intimidation and manipulation in the course of adjudicating, including a time when she was accused of bribery because she

⁷²⁷ www.unodc.org (Nov. 16, 2016)

<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjx4vCJ7obwAhWivZ4KHc3QAnIQFjAAegQIAhAD&url=https%3A%2F%2Fwww.unodc.org%2Fdoha-declaration%2Fen%2Fnews%2F2018%2F11%2Fsocial-media--a-challenging-new-platform-for-judges-around-the-world.html&usq=AOvVaw0h-z6PLFUpmLhxma1yI47>

⁷²⁸ Niki Tobi, op. cit. 338

decided on a case contrary to public opinion.⁷²⁹ Justice Ebiowei Tobi captures the sentiments of the law as follows:

It is not part of the duty of the court to give decisions contrary to the law and available evidence just to satisfy some sector of persons or indeed to satisfy public opinion. The tag that "a Judge is corrupt" simply because his decision does not reflect public opinion to say the least is most unfortunate. All these press trials of people will not help any system. To condemn a judge and accuse him of corruption, without proof or evidence, simply because the decision is not acceptable to the generality of people or unpopular is most unfair and uninspiring. A judge is not seeking for popularity or going for popularity contest. He is concerned about the application of the law to the evaluated evidence.⁷³⁰

This requirement causes a dilemma for judges because it is unrealistic. Such discretion has little or nothing to do with the law as much as it focuses on the public. Judicial discretion is necessary to take care of unforeseen circumstances that may come up as society changes and as contemporary times demands. The judge will update the law through his/her discretion to be relevant to society. Niki Tobi captures the exception to the general rule, with what I consider a more realistic view:

While a judge is always expected to give judgment according to law, there may be a few instances when judgment is influenced by public opinion. While a judge is not expected to be carried away by public opinion, he can allow himself to be influenced, if the opinion is not completely outside legal position. If he has a discretion in the matter, he should be able to exercise it in favor of the public opinion, which would not throw the law into the mud....

⁷²⁹ See page 12

⁷³⁰ See fn 51 Ebiowei Tobi: 4-5

In a presentation on the role of courts in police reform (as is also the argument in this dissertation), I also argued that public opinion is vital to the court's decision and that the hands-off demeanor of the U.S. Supreme Court may frustrate police reforms if the court ignores public opinion and the outrage of the American people on racial profiling.⁷³¹ The impact of public opinion on judicial opinion is dilemmatic because of the diverse judicial views of how public opinion influence judicial decision making. Judges assume awkward discretionary positions between the public they serve and the law they uphold. For example, judges often get criticisms for unethical conduct. However, it is a dilemma that most of the time, some judge's decisions are inadvertently based on their temperament and on what they consider to be fair in the case.⁷³² In other words, these 'realists' judges disregard the law when it does not make sense to the justice of the case. There is more to judicial decision making than judges' temperaments and fairness—the evidence before the court and the procedural requirements, some of which border on technicality.⁷³³

⁷³¹ Ari Tobi-Aiyemo, *opcit*: In slide 12, I cited Associate Justice Sotomayor's dissent in *Kisela v Hughes's* case, No. 17-467. She said of the majority view of the court, "Its decision is not just wrong on the law; it also sends an alarming signal to law enforcement officers and the public... It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished."

⁷³²The personality of the judge sometimes influences his/her act of sentencing in a case. For instance, the law stipulates a prison term or an option of a fine as a penalty for offenders, and the judge gives an option of a fine that may not be commensurate to the offense.

⁷³³ See discussion on substantial and technical justice.

Nevertheless, Niki Tobi argues that society accuses the judge of being compromised or bribed, especially those who had a bad case.⁷³⁴ Under such circumstances, the judge is in a dilemma with procedural as well as ethical requirements.⁷³⁵ In other words, where the law requires certain procedures a court should follow in a case, the judge is ethically bound to comply with that procedure.⁷³⁶ However, where the law is silent or where the law permits judicial discretion, the personality of the judges comes to play, and in such a case either the judge's discretion or the rules of procedure may be contrary to public opinion.⁷³⁷ In an unfortunate high-profile case involving manslaughter in Lagos state, a chief magistrate was criticized and penalized for using his discretion to impose the maximum limit fine of N100,000 (approximately \$100.00 at that time).⁷³⁸ The public believed that it

⁷³⁴ Tobi, N, *opcit*: 340 “The Impression of the litigating public on the Nigerian judge is rather unfortunate. It is unfortunate that most litigants think that all that the Nigerian judge is capable of doing is to take bribe or get corrupted in one way or the other in the enforcement of the judicial process”

⁷³⁵ This use of discretion is a real-life case involving a close colleague in the Lagos State judiciary.

⁷³⁶ Informant 2 recalled one of the most painful aspects of her judicial career when she said, “They [the public] accused me of taking \$2 billion for [a] case... The most painful of these allegations was when [another judge] approached me in an elevator... and said that “one of the cases you will deliver judgment, the person is ready to drop heavy bread....” [bribe]. When I said I do not do such things, the judge said, ‘Aha! But, what about the \$2 billion they said you took in the Al Mustapha case?’”

⁷³⁷ Informant 2 narrated a case where she had to lean on her discretion in the absence of a statutory provision. (In her discussion with author April 2021)

⁷³⁸ The above case of Ibinabo Fiberesima raised brouhaha in the judiciary and the society.

was ridiculously lenient for an offense of manslaughter. Such cases create a defamation dilemma or corruption allegation dilemma, where the judge cannot sue for defamation or false allegations of corruption like a free citizen may do.⁷³⁹ The Nigerian public was so critical of the judiciary, so the chief judge was pressured to penalize the said magistrate.⁷⁴⁰

Judges also experience a public-pleasing dilemma where they seem to live according to societal expectations of what they should do and not do. An example is the trial judge in the Al Mustapher case who gave a guilty verdict based on public pressure, even when there was no evidence to justify the conviction.⁷⁴¹ Also there are certain places that society does not expect to see a judge, so judges do not visit such places to avoid criticisms. This dilemma has become counter-productive to judicial administration and justice. Often, the public's criticism of the judge is imprecise. One wonders whether they are criticizing judges or their judgments. Public critics are often ignorant that sometimes

⁷³⁹ www.channelstv.com

<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjh7M77m7nvAhULQ80KHa2tBLI4ChAWMAJ6BAGDEAM&url=https%3A%2F%2Fwww.channelstv.com%2Ftag%2Fibinabo-fiberesima%2F&usg=AOvVaw3GZt1zPygTRArupe--MBdQ>

⁷⁴⁰ The magistrate is well known to the author, as she served under him during her induction as a magistrate from March 2005 to June 2005. Subsequently, I presided for three years over the court he oversaw as chief magistrate. I know that his personality as a pastor and his judicial temperament affected his lenient decision in awarding a fine which turned out detrimental to the end of his career as he was accused of all sorts of allegations, paramount of which was corruption. He was accused of taking a bribe to give what the Attorney General and the public considered a ridiculous fine for a charge of manslaughter. His 'wrong' was probably a genuine exercise of discretion based on his kind and forgiving personality.

⁷⁴¹ See Informant 2's judgment highlighting this fact.

the law restricts judges' discretion, so statutory stipulations determine judicial decisions.

As Justice Ebiwei Tobi puts it:

The court is faced with a decision to make and not to please people but to apply the law to the evidence adduced. There are instances when a judge can free an accused person whom he is of the opinion, committed the offence because there is no evidence. Similarly, a court can convict a person he feels did not commit the crime if the evidence shows he committed the offence. The Judge is sometimes blackmailed by public opinion....⁷⁴²

Life or Death Dilemma/Judges Mental/Physical Health

A quote from the Holy Bible says, “A living dog is better than a dead lion.”⁷⁴³ A judge's life is an essential value to democracy as a living judge has more chances to advance and develop the law than a dead judge. That is why the American press laments that Ruth Bader Ginsberg's death is a significant loss to the U.S.A., especially with the electoral issues and imbalance in judicial philosophies in the Supreme Court.⁷⁴⁴ The Nigerian judge is not appointed for life like judges in the U.S.A. They retire at the age of 70, yet in their journey through the judiciary, they amass stress and health issues that lead to an early grave

⁷⁴² Ebiwei Tobi. op. cit. 5

⁷⁴³ Holy Bible Ecclesiastics 9:4

⁷⁴⁴ www.theguardian.com

<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjjsak9rnvAhXPs1kKH8LBBQFjAJegQIIRAD&url=https%3A%2F%2Fwww.theguardian.com%2Fnews%2Faudio%2F2020%2Fsep%2F23%2Fhow-the-death-of-ruth-bader-ginsburg-could-change-america-podcast&usg=AOvVaw0LL066u71n3UnUfKfx8-hz>

and some with terminal ailments. The isolated lives of judges contribute to the stress and health issues that accumulate over the years.⁷⁴⁵ Eventually, upon retirement, some end with a terminal diagnosis like the brain or nerve-related ailment.⁷⁴⁶ Some die soon after retiring.

The stress of the Nigerian judge starts from the date of appointment until retirement.⁷⁴⁷ The dilemma of inadequate facilities mounts pressure on judges as most write the proceedings record in long hand. Although very few states like Lagos State High Courts have stenographers, research assistants, that assist judges in court, yet all judges write or type their judicial opinions themselves. The toughest part of writing is the research and analyzing of evidence. Also due to inadequate criminal investigations, judges do more research to analyze cases. For example, in a criminal charge the police may present incomplete evidence that puts the court in a position where it has to think on circumstantial evidence. This involves putting pieces of puzzles together and streamlining with the facts and law to arrive at a just decision. According to Ladapo, a significant number of offenders have cheated the justice system by escaping punishment due to incomplete or

⁷⁴⁵ Informant 6 and 8 agreed and gave personal challenges they knew about female judge colleagues who have been stressed by the job.

⁷⁴⁶ There are no statistics yet on this assertion, but the author's late father and many other judges known to the author have died from brain ailments, and there are some still alive with such diagnosis, with little care after retirement.

⁷⁴⁷ All informants agreed to this assertion in their separate discussions with author from December 2020 to April 2021.

incompetent criminal investigations, leading to insufficient evidence upon which the courts can base a conviction.⁷⁴⁸ In *Inusa Saidu v. The State*⁷⁴⁹ the court expressed this frustration follows:

It does not give the court joy to see offenders escape the penalty they richly deserve, but until they are proved guilty under the appropriate law, in our law courts, they are entitled to walk about in our streets and tread the Nigerian soil, breathe Nigerian air as free and innocent men and women.⁷⁵⁰

Hence judges' research involves a lot of thinking to ensure that justice is served.

Furthermore, a silent killer and a threat to judicial independence is stress. Judges also deal with professional stress and judicial impairments. Also, inadequate police investigations often frustrate judicial decisions and cause more judicial stress. The clash between judges' judicial life and personal life creates judicial stress and impairs the judge's clear sense of reasoning. This is a severe issue that eventually affects judges' health and lives somewhere down the line during and after their judicial careers.⁷⁵¹ The stress builds

⁷⁴⁸ Oluwafemi Alexander Ladapo, "Effective Investigations, A Pivot to Efficient Criminal Justice Administration: Challenges in Nigeria." AJCJS, Vol. 5, #s 1 & 2, 79-94, at 83

⁷⁴⁹ *Inusa Saidu vs. The State* (1982) 4 Supreme Court Cases (S.C.). p. 41

⁷⁵⁰ *Ibid*: 71

⁷⁵¹ This was the sad story of the author's late father, who died of a brain tumor after serving the judiciary of Nigeria for 46 years, from the High court to the Court of Appeal and then to the Supreme Court of Nigeria.

up as judges take work home and have no barrier between work life and home life.⁷⁵²

Another reason judges get so stressed is that they overwork themselves. Some Nigerian judges are not as relaxed at home as expected because they often take work home and holidays.⁷⁵³ Also, due to financial needs and commitments, some judges engage in extra-judicial assignments that would generate more income.⁷⁵⁴ This results in judicial stress as well. Also, the nature of cases most judges hear exposes them to trauma too. As Marsh argues that trauma and its impact on human development and functioning has been a substantial topic of interest for judges and allied justice professionals for well over a decade, particularly because of its implications for working with injured or vulnerable populations.⁷⁵⁵

These issues accumulate and eventually affects judges' mental and physical health. Some of these health concerns from too much thinking, lots of writing, and long periods of sitting include backaches, high blood pressure, dementia, and anxiety issues stemming

⁷⁵² Jennifer Tobi-Tukur, *opcit*

⁷⁵³ Most Nigerian judges do not really enjoy their holidays or vacations because they still take case files along.

⁷⁵⁴ They are not paid well, and the C.O.C. forbids them from any private practice, so instead of taking bribes or gifts, some take advantage of the liberty given to make conference presentations and write books to get an extra income.

⁷⁵⁵ Shawn C. Marsh, "Judicial Educators' Perspective on Trauma Education for the Judiciary," *Juvenile Family Court Journal*, 70. No. 2, (2019): 55.

from intractable and challenging cases. Judges do much thinking to resolve cases, and they are not allowed to talk about that burden with anyone, only with your colleagues in the panel of the case. If the panel does not arrive at a unanimous agreement, the judges live in anxiety. Unfortunately, recently on March 7, 2021, the Supreme Court of Nigeria's sitting justice died; Justice Sylvester Ngwuta died in his sleep.⁷⁵⁶ Although there was no report on cause of death, often the task of judges leads to stress-related deaths, all eight informants argued.

The dilemma of judicial stress is often tied to the heavy workload. In Zimmerman's words:

The judge and his family often find that they are gradually less involved in informal social life. The judge learns to observe the ethical strictures about the appearance of impartiality and withdraws from many political and business association. As his status increases, an invisible wall forms, separating the judge and his family from friends and former colleagues. After that, a heavy workload ensues, and the judge truly has little time for social life."⁷⁵⁷

In terms of judicial health, Informant 4 talked about his colleague retiring because of back pain, which developed from sitting too much on the bench.⁷⁵⁸

⁷⁵⁶ www.vanguardngr.com

<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwii1s7i9rzvAhUtRTABHaa4AXgQFjACegQIAxAD&url=https%3A%2F%2Fwww.vanguardngr.com%2F2021%2F03%2Fsupreme-court-justice-sylvester-ngwuta-is-dead%2F&usg=AOvVaw2NG1ohB87Jk7099Ivcntj4>

⁷⁵⁷ Zimmerman, I.M. *Dealing with Professional Stress: Insight for Judges*, p. 39

⁷⁵⁸ Justice Niyi Onigbanjo announced his retirement from judicial service due to warnings from his doctor that his job as a judge is affecting his health, specifically his back and it was getting

Another noted stress as a public mob had burned down her courtroom, and she was in the middle of trying to handle her cases remotely with few resources.

The Democratic Mandate Dilemma

The demands of democracy and the role of judges as indispensable agents of democracy or, as Rosen puts it, “the most democratic branch,” puts the burden on judges to super-impress or over-act. The judiciary's role in upholding democracy and benefiting from democratic tenets at the same time constitutes a dilemma for judges, as their personalities often clash with their judicial roles and statutory mandates. The democratic mandate of the law is the rule of law, which connects law to society. Unfortunately, the incessant abuse of the rule of law and the divide between society and the rule of law frustrates judicial intervention.

Behind the Scenes on How Judges Think

As discussed above, I commence this last section with Posner's thought on how judges' personalities and experiences impact their think and decision-making. He said:

Judging is political. It is also “personal” in the sense that judges' personal attributes—including the background characteristics, such as race, and sex: personal traits, such as authoritarianism; and professional and life experiences, such as having been a prosecutor or having grown up in turbulent times—influence judging. Personal attributes do this indirectly as well as directly, by contributing to the formation of a judge's ideology and thus of the political inclinations

worse. See www.lagosstatejudiciary.gov.ng

that affect judicial decisions. But judging is not just personal and political. It is also impersonal and nonpolitical in the sense that many, indeed most, judicial decisions really are the product of neutral application of rules not made up for the occasion to facts fairly found.⁷⁵⁹

What judges do behind the scenes, how they think and arrive at their verdicts comprises their personalities, judicial temperaments, and philosophies. How they analyze and ponder evidence to arrive at a decision is a significant stress factor that creates a judicial dilemma.

In the private corners of their offices and homes, judges do much more than reading case files. Some of them spread out survey plans to exhibit a landed property case, on their living room floors to analyze the evidence and arrive at just decisions.⁷⁶⁰ They think through dinner about conflicting evidence or conflicting precedent. A significant part of their judicial role is the unseen or behind-the-scenes dilemma—their thinking. Judges consider many factors in arriving at their decisions. In some instances, like political cases, science cases, and technology cases that affect the larger community besides the immediate parties before the court, judges consider diverse interests. They consider the parties' interest, the communities' interest, the governments' interest, and judicial interests. Hence their thoughts move in two different directions at the same time as they think for and against each party in the case.

⁷⁵⁹ Posner, *opcit*: 369-370

⁷⁶⁰ Story of one of the judges I interviewed on a very challenging land case before him

Unfortunately, judges do not express most of these inner thoughts in their judgments or any other forum, for obvious reasons—they are not allowed to.⁷⁶¹ However, there are changing rules and values in society that may impact judicial thoughts. The values upon which a rule is based keep changing over time. As judges, we must seek to understand those changing values. According to Makoba, rules specify what is to be done by performing a particular role or function in the social group. In the latter sense, rules are thought of in terms of duty, and the conduct required by these rules may benefit some individuals while conflicting with what the person who owes the duty may wish to do.⁷⁶² Judges sacrifice their wishes for the rules of ethics and society.

Judges are not superheroes that are programmed to react automatically; neither are they magicians. Their thoughts have to comply with existing law. The law restricts them from thinking too far from the law. Posner opines that intuition in judicial decision-making was one of the scandals of legal realism.⁷⁶³ In other words, he believes that the realist's view that intuition influences judicial is one of the criticisms against the realist school of thoughts. The emphasis on the unconscious decision-making role in

⁷⁶¹ See secrecy dilemma on pages 225 -227

⁷⁶² Johnson W. Makoba, "On the Use and Application of Legal Concepts in the Study of Non-Western Societies," *International Journal of the Sociology of Law*, 20. (1992): 201-223. at p. 210

⁷⁶³ Posner, *How Judges Think*, Opcit, 112

judicial decision-making exposes the efforts to eliminate or compress judicial discretion.⁷⁶⁴ In the absence of judicial discretion, judges can as well be called machines or computers. This is a dilemma, as judges are neither machines nor equipment. However, judges must assess, review and decide on the best justice in a given case, based on diverse extenuating circumstances that arise with a changing society. The discretion of a judge should be of value to society.⁷⁶⁵

According to Posner, “intuition, emotions and preconceptions are all forms of telescoped or tacit thinking, as contrasted with explicit, logical, step-by-step reasoning, and all are influenced not only by such obvious factors as upbringing, education, the beliefs of peers, and reigning social beliefs, but also by personality.”⁷⁶⁶ Adebisi Arewa⁷⁶⁷ argues that personal idiosyncrasies in terms of ideologies, religion, political leanings, race, ethnicity, policy preferences, world view, fears, aspirations, and expectations go into judicial reasoning.⁷⁶⁸ So, somewhere and somehow, judges will have to establish a balance

⁷⁶⁴ Ibid, 114

⁷⁶⁵ Ari Tobi-Aiyemo, A, opcit: 87-88

⁷⁶⁶ Posner, How Judges Think, op. cit. 98

⁷⁶⁷ Adebisi Arewa - “Judicial Reasoning and Personal Idiosyncrasies” in Epiphany Azing and Osatohanmween Eruaga , opcit, (2013): 43-68.

⁷⁶⁸ An example of is the Court of Appeal decision of 20th May 2019 in Appeal No. CA/A/810/2017 as to morality in the law. This decision made the rounds on social media. The Court of Appeal was said to have overruled the payment of pension, gratuity, or severance allowance to political office holders, insisting that the practice was morally wrong. The report

between their personality, interests, views, the requirements of the law, the judicial office, and society's demands. This balance coupled with social interests, determines and defines the concept of justice to the Nigerian society. The dilemma is in balancing the scale where the judge's personality conflicts with their judicial temperaments and roles.

was that the court held that it is unjustifiable in the face of the nation's socio-economic reality for some few politicians, who hold office for not more than eight-year, to allocate substantial public funds to themselves name of pension and severance package. In contrast, civil servants, who committed most of their active years to the nation's service, are denied their retirement benefits. The Court of Appeal stated that it was wicked and morally wrong for political office holders and political appointees, who helped themselves to public funds while in office, to claim entitlement to pension and severance allowances. The thing to note here is that this holding is held out as the basis or reasoning of the case when in fact, it is not. The key reason behind the decision is that, as held by the Court of Appeal, the letters of appointment of the political office holders did not stipulate their entitlement to such payment. They did not produce any law or any document instrument that entitles them to such payment. The Court of Appeal would still, however, go on to decry the situation where despite the enormous monthly perquisites of office and opulence of political office holders, and the fact that in contrast, civil servants who are subjected to contributory pension schemes with many others not even being paid their pensions. These political officeholders did not work as long and hard as civil servants, quickly get paid huge severance benefits upon leaving office. To the Court of Appeal, this cannot be justified in the context of our present social realities; it amounts to gross social injustice.

SECTION THREE: THE IMPACT OF DILEMMAS ON JUDICIAL ROLES

One of the most misunderstood workers in Nigeria, if not the most misunderstood worker, is the Nigerian judge. In any litigation, one party likes him, and the other party hates him. In any litigation, one party praises his upright and straightforward attitude, and the other party may accuse him of corruption. In most litigations, the Nigerian judge is either alleged or suspected of being a bribe taker. In other words, while the party who wins does not see anything bad in the judge, as he is full of praises for him, the party who loses, sees everything wrong in the judge. Such is the fate of the Nigerian judge. Such is the predicament of the Nigerian judge.⁷⁶⁹

⁷⁶⁹ Niki Tobi, *The Nigerian Judge*, opcit:

Chapter Nine: The Concept of Justice

Justice is a subjective term. Different people, including judges, see, perceive, define and interpret justice from unique perspectives. We can define justice as fairness, neutrality, or objectivity. However, these definitions depend on each case's circumstance, on the perspective of the person(s) in question, and society. Justice, in one instance, can mean something different in another situation. Thus, different judges may uphold and interpret justice differently, in various cases or under diverse circumstances. From experience, the public sometimes perceives and criticizes judges' attempts to pursue substantial justice as excessive or overreaching their boundaries. On certain occasions, judges see justice differently from society. Consequently, to avoid being labeled as judicial activists, some judges shy away from deliberating on issues as the justice of a case demands. Instead, they stick to the status quo of rigid interpretations and decide the case contrary to social interests.

This chapter will define or attempt to redefine the concept of justice. It will explain what justice means in law or how statutes define justice and what justice means to society—stressing that society interprets justice from the courts/judges' words, demeanor, and actions. It will also examine the dilemma judges encounter when applying substantial justice over procedural justice.⁷⁷⁰ This chapter will also discuss the symbol/maiden of

⁷⁷⁰ Ari Tobi-Aiyemo, *The Act of Judging*, op. cit. 98-120

justice and the changing faces of justice in the Nigerian society.

What is Justice?

The word *justice* comes from the Latin *jus*, meaning right or law. Justice is an amorphous concept. It has no explicit definition. No statute defines the concept of justice. Justice, like the word judge, carries two meanings, as a noun and a verb. As a noun, the Oxford dictionary defines justice as “a judge or magistrate, in particular a judge of the Supreme Court of a country or state.”⁷⁷¹ As a verb, it is the quality of being fair and reasonable.⁷⁷² However, philosophers go beyond etymology and dictionary definitions to the nature of justice as a changing concept, a moral virtue of character, a desirable quality of political society, and how it applies to ethical and social decision-making.⁷⁷³

Plato defines justice as a virtue establishing rational order, with each part performing its appropriate role and not interfering with other parts' proper functioning.⁷⁷⁴

⁷⁷¹ www.lexico.com

https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjQpcKr_8PvAhXCUt8KHxc5D84QFjALegQIAhAD&url=https%3A%2F%2Fwww.lexico.com%2Fen%2Fdefinition%2Fjustice&usg=AOvVaw2IIPCBr_ChH8dwxtsG0hb0

⁷⁷² Ibid

⁷⁷³ Western Theories of Justice, Internet Encyclopedia of Philosophy (IEP)

https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjwh5-3nMPvAhXIWc0KHbsuB-oQFjAJegQIAhAD&url=https%3A%2F%2Fiep.utm.edu%2Fjustwest%2F&usg=AOvVaw3OOBSh-t66A4aed_HShhoO

⁷⁷⁴ Miller, David, "Justice", The Stanford Encyclopedia of Philosophy (Fall 2017 Edition),

Aristotle says justice consists in what is lawful and fair, with fairness involving equitable distributions and the correction of what is inequitable.⁷⁷⁵ For Augustine, the cardinal virtue of justice requires that we try to give all people their due.⁷⁷⁶ Aquinas says justice is that rational meaning between opposite sorts of injustice, involving proportional distributions and reciprocal transactions.⁷⁷⁷ Hobbes believed justice is an artificial virtue necessary for civil society, a function of the social contract's voluntary agreements.⁷⁷⁸ For Hume, justice essentially serves public utility by protecting property (broadly understood).⁷⁷⁹ According to Kant, justice is a virtue whereby we respect others' freedom, autonomy, and dignity by not interfering with their voluntary actions, so long as those do not violate others' rights.⁷⁸⁰

Furthermore, Mill⁷⁸¹ said justice is a collective name for the essential social

Edward N. Zalta (ed.), URL = https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwitgeHcm8PvAhXEAZ0JHZjiCvIQFjAAegQICBAD&url=https%3A%2F%2Fplato.stanford.edu%2Fentries%2Fjustice%2F&usg=AOvVaw2k1bJSGI_y-7cMiDZ0PrrK

⁷⁷⁵ Ibid

⁷⁷⁶ Ibid

⁷⁷⁷ Ibid

⁷⁷⁸ Ibid

⁷⁷⁹ Ibid

⁷⁸⁰ Ibid

⁷⁸¹ Utilitarian

utilities conducive to fostering and protecting human liberty. Rawls analyzed justice in terms of maximum equal liberty regarding fundamental rights and duties for all society members, with socio-economic inequalities requiring moral justification in terms of equal opportunity and beneficial results for all.⁷⁸² Also, various post-Rawlsian philosophers (the libertarian,⁷⁸³ the socialistic,⁷⁸⁴ the communitarian,⁷⁸⁵ the globalist,⁷⁸⁶ and the feminist⁷⁸⁷) develop rights-based alternative conceptions of justice. Their views focus on interpreting justice as requiring respect for all persons' dignity as free and equal, rational moral agents.⁷⁸⁸ The Justinian definition is that justice is the constant and perpetual will to render to each his due.⁷⁸⁹ From the above philosophers' definition, a common attribute of justice is equity. They all believe that justice is equal treatment of persons in social

⁷⁸² opcit

⁷⁸³ Nozik,

⁷⁸⁴ Nielsen,

⁷⁸⁵ Sandel

⁷⁸⁶ pogge

⁷⁸⁷ Nussbaum,

⁷⁸⁸ Miller, David, opcit

⁷⁸⁹ Miller, David, "Justice", The Stanford Encyclopedia of Philosophy (Fall 2017 Edition), Edward N. Zalta (ed.), URL = https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwitgeHcm8PvAhXEAZ0JHZjiCvIQFjAAegQICBAD&url=https%3A%2F%2Fplato.stanford.edu%2Fentries%2Fjustice%2F&usg=AOvVaw2k1bJSGI_y-7cMiDZ0PrrK

relationships. The court in *Merotohun v State*,⁷⁹⁰ said “law which is strictly applied and not interspersed with equity is no justice but a denial of justice....”

From a legal/judicial perspective, Lord Denning defines justice as “the measures authorized by the law so as to keep the streams of justice Pure: to see that trials and injuries are fairly conducted, that arrests and searches are properly made; that lawful remedies are readily available and that unnecessary delays are eliminated.”⁷⁹¹ In *Nyako v A.S.H.A.*,⁷⁹² the Supreme Court said justice is an attempt to discover the truth, notwithstanding our human imperfections. A more practical definition for this dissertation is Kant’s definition that justice is where respect for one’s rights and dignity does not interfere or violate others’ rights. This definition says one’s rights ends where another’s rights begin. Justice takes the context of the society that defines it.

In Nigeria, justice is defined with its attributes. According to Muftau, justice bears a tripartite connotation and performs a tripartite function in the judicial process, in the sense that it relates to the plaintiff, the defendant, and the court in a civil matter.⁷⁹³ In a criminal matter, it relates to the accused person, the state, and the court: Therefore, “it is justice, if

⁷⁹⁰ *Merotohun v State* (1992) 7 NWLR (pt. 254) 443 at 451

⁷⁹¹ *The Due Process of Law*: (Butterworths), 1980 ed, p. 5.

⁷⁹² *Nyako v A.S.H.A* (2017) 6 NWLR (pt.1562) 347, at 403,

⁷⁹³ Muftau, op. cit. 145

it covers this tripartite ramification and signification, and it is not justice if it covers only one or two of the above.”⁷⁹⁴ Aguda says that justice is nebulous as it is not a devoted follower nor an indispensable attribute of law.⁷⁹⁵ I agree. Justice takes the form that the individual, group, or society gives it. Justice in law is as the courts define it. Justice in society is as the public defines it. In *Peters v Ashamu*,⁷⁹⁶ the court said that the theory of justice rests on the premise that there must be certainty and parties to the legal duel should be in a position to know where they stand at a specific time. The UK Court of Appeal in *English v. Emery Reimbold & Strick Ltd*⁷⁹⁷ put it thus: “justice will not be done if it is not apparent to the parties because one has won, and the other has lost.” Justice, in my opinion, is a fluid concept of fairness and equality that assumes a social form of equal interests of the community it operates.

One of the fundamental problems of justice is that there is no generally accepted standard to determine justice in contemporary society. Subjectivity in the definition of justice can be attributed to vagueness,⁷⁹⁸ diverse cultures and personalities. In addition to

⁷⁹⁴ Ibid

⁷⁹⁵ Taiwo A. Aguda, *The Crisis of Justice*. Akure, Nigeria: Eresu Hill Publishers (1986):8

⁷⁹⁶ *Peters v Ashamu* (1995) 4 NWLR (pt.388) 206 at 222

⁷⁹⁷ *English v. Emery Reimbold & Strick Ltd* (2002) 1 WLR 2409 at para 16.

⁷⁹⁸ Adedeji A. Owolabi, *Problem of Justice — Nigerian Experience*. *Journal of the Indian Law Institute*, Vol. 39, No. 2/4 (April-December 1997), pp. 186-202, at 186

the Western philosophical conceptions of justice, the court's interpretation of justice creates a dilemma for judges. What a judge feels or knows from statutes may not necessarily be sufficient to determine justice in a case. Rules and principles of court practice, and the substantive law define the mode and set the limits of what efforts we are free to make to get 'justice'⁷⁹⁹

According to Niki Tobi, justice is never built on technicalities but on what is just and fair in any given situation⁸⁰⁰ The court in *Caribbean Trading & Fidelity Corp v NNPC*,⁸⁰¹ said justice is justice if only it attains the basic tenets of the litigation before the court. Justice aims to ensure that the litigation parties are fairly treated or receive a fair deal from the court without any element of bias. The court in *Hayes v Hayes*,⁸⁰² added that “justice is said to be rooted in confidence. That confidence will be lost if an ordinary but a reasonable man who enters into the citadel of justice to watch the proceedings...can reasonably breach a conclusion that the judge is biased by his comments or observations.” Hence, the concept of natural justice, equity, and good conscience is built upon a reasonable

⁷⁹⁹ *Menkita v Menkita* (2000) 8 NWLR (pt. 667) 154 at 169, A-B

⁸⁰⁰ *Okpala v Okpu* (2003) 5 NWLR (pt.812) 183 at 214, H

⁸⁰¹ *Caribbean Trading & Fidelity Corp v NNPC*

⁸⁰² *Hayes v Hayes* (2000)3 NWLR (pt.648) 276 at 294, G-H

man's perspective within a just, fair, and organized society.⁸⁰³ The reason law exists in society is to ensure justice, so the law is never an end by itself.⁸⁰⁴ Justice is a valuable commodity as it complements the rule of law.

Social Perception of Justice

The dichotomy between the Nigerian public's understanding of justice and what they see or perceive as justice coming from courts creates a judicial dilemma. The ordinary citizen is interested in seeing to it that justice is done in a particular case in which he is interested directly or indirectly; they typically are not interested in the technicalities of the law.⁸⁰⁵ On the other hand, as Aguda puts it "most of our judges are bent on applying the same technicalities of the law with their eyes shut against what the ordinary citizen will regard as justice."⁸⁰⁶ By a general consensus, all eight informant agree that the Nigerian society does not interpret and understand justice as judges interpret.⁸⁰⁷

Some people argue that the Nigerian society interprets or should interpret justice in the Nigerian context and not with the foreign English culture's perspective. One such view comes from Muftau, who argues that the concept of justice as understood above is different

⁸⁰³ *Awuse v Odili* (2005) 16 NWLR (pt.952) 515 at 541, F-G

⁸⁰⁴ Aguda, *op. cit.* 6

⁸⁰⁵ *Ibid*

⁸⁰⁶ *Ibid*

⁸⁰⁷ See page

from how an ordinary man in Nigeria conceives the same word.⁸⁰⁸ According to him, some of the reasons for the constraints that hamper the administration of judicial justice in Nigeria can be attributed mainly to justice's foreign procedures.⁸⁰⁹ For example, under section 36 (5) of the 1999 Constitution, the old standard law rule provision of the presumption of innocence states that all accused persons are presumed innocent until proven guilty. Thus, the onus is on the prosecution to prove the guilt of the accused persons. The onus is not on the accused person to prove his innocence.⁸¹⁰ Also, the prosecution must prove the guilt of the accused person beyond reasonable doubt and that where there is any form of doubt, such doubt must be resolved in favor of the accused. Judges have set many accused persons free based on the above provision, to the dismay of the larger society, who may have the impression that justice has not been done. This is because the public's perception of justice is sometimes contrary to the judge's concept.⁸¹¹ In *Terytex (Nig) Ltd v Nigerian Ports Authority*,⁸¹² the court said that a judge's intervention must be governed by the bounden duty to see that the parties enjoy a fair trial, and that justice is not only done but seen to have been done.

⁸⁰⁸ Muftau, opcit: 144

⁸⁰⁹ Ibid, 146

⁸¹⁰ Ibid

⁸¹¹ As long as society is concerned, the evidence is clear, and the court should rule on it.

⁸¹² *Terytex (Nig) Ltd v Nigerian Ports Authority* (1989) 1 NWLR (pt.96) 229 at 236, G

Thus, this fair hearing provision has led to absurdity or a perversion of justice. Osipitan, observed that “while the presumption of innocence may be ideal in developed countries because of the existence of sophisticated methods of investigation and detection of crimes, it is submitted that a strict adherence to presumption of innocence will not achieve the desired result in Nigeria.”⁸¹³ Thus, the western idea of justice, equity and fairness could mean injustice in Nigeria for different reasons. Some of these reasons include the complex society, its level of development, and technological exposures. So, defining and interpreting justice with the standard of a more advanced society may be counter-productive to Nigeria’s judicial system. Belgore affirmed to this view when he said:

Both civil and criminal proceedings is foreign and of foreign origin and we have been laboring under an illusion that an English oak planted and nurtured in a temperate climate will grow and thrive in a tropical climate. That it has endured so far is a credit to our tolerance in assimilating foreign elements however disadvantageous to our notion of justice. I think we have too long accepted that English method is the civilized way and procedure leading to justice. If that is not a colonial mentality, I do not know what it is. It is, may be, and perhaps it is good for the English, but since we are not English in thinking, in culture, in the level of education and development, even in colour, it is not. QED...The foreign procedure is strange to our culture, unfamiliar to our people, cumbersome to our system, has been more of a constraint to the administration of justice in our westernized courts than any single event.⁸¹⁴

Furthermore, it appears that if justice does not speak the language or culture of the

⁸¹³ Omojola, T.A: Law and Development (Lagos) 1987, cited from Muftau, op. cit. 147

⁸¹⁴ Muftau, op. cit. 145

specific community or society it operates in, it is not justice as far as that society is concerned. Muftau explains that some Nigerians, especially in the Northern region, do not go to court because of the courts operate the British type of justice, which is foreign to the community. Also, because of religious beliefs, many issues are settled informally without necessarily going to court. He added that rather than go to court, some of these communities prefer to settle their conflicts informally, with the famous saying that “It is God’s wish.”⁸¹⁵ According to the Supreme Court in *Arubo v Aiyeleru*,⁸¹⁶ “the justice which litigants expect in a court of law is even-handed justice reached in accordance with the law and the rules of the game.”

Social justice is fundamental to society’s perception of justice in any given case. However, Nigerian society's nature creates a challenge for the courts to interpret justice as society understands it. Niki Tobi opines, “Nigeria is a multi-lingual country with diverse, varied and various ethnic groups, cultures and traditions. The sociology of the country is not only complex but highly diverse and heterogeneous. This type of society certainly gives rise to conflict problems in laws, particularly where the legal system operates a plurality of

⁸¹⁵ Muftau, *ibid*: 153

⁸¹⁶ *Arubo v Aiyeleru* (1993) 3 NWLR (pt. 280)126 at 143, D

laws.”⁸¹⁷ Similarly, *Olowu and Others v Olowu and Another*,⁸¹⁸ states that “although Nigeria is a single nation, the presence of different and diverse ethno-cultural groupings and consequently multifarious rules of customary law, makes the conflict of laws problem inevitable.” Hence the courts can only ensure justice when they deal with these socio-cultural diversities with equal treatment unique to the people. Muftau argues that the word justice comprises all the legal rules and technicalities, but, in a layman’s perception, the word justice is simple in form. He added that because of the requirement that law should be devoid of sentiments, the laws are often bent and twisted to the disadvantage of the citizens⁸¹⁹ Hence the dilemma in determining what justice means to different communities in Nigeria. For example, the procedure for recovery of premises in Nigeria is largely regulated by statutes.⁸²⁰ Hence, the Recovery of Premises Act has made it mandatory for landlords that desire to recover their premises from tenants to strictly comply with the provisions of the statutes.⁸²¹ This law has not only frustrated landlords but has also

⁸¹⁷ Niki Tobi, *op. cit.* 160-161

⁸¹⁸ *Olowu and Others v Olowu and Another* (1985) 3 NWLR (pt 13) 372

⁸¹⁹ Muftau, *op. cit.*

⁸²⁰ Chris Wigwe, “Recovery of premises in Nigeria: An assessment of the relationship of landlord and tenant law.” *Journal of Commercial and Contemporary Law*. (2011):63-75
<https://www.researchgate.net/publication/274377789>

⁸²¹ *Ibid*

caused hardship for the landlords and public who are prospective tenants.⁸²² Wigwe expresses this frustration as follows:

In Nigeria, a landlord can only properly recover possession in one instance- when a lawful occupier voluntarily vacates. The courts can in the circumstance make an order for possession only after the landlord has properly applied the legal machinery to recover possession including the preparation and service of valid notice to quit. The law is weighed in favour of the occupier of premises who is in physical and peaceful possession with a claim of right. It is annoying and frustrating for a landlord to watch helplessly his property in the hands of an intransigent occupier. The temptation may be strong for the landlord to simply retake immediate possession of his premises. But the law forbids this. Such an occupier can be ejected therefrom in pursuance of an order of court obtained after complying with the Recovery of Premises Law provisions including the issuance of a notice to quit.⁸²³

Even the courts agree that the landlords' frustrations are justified.

Legal Justice versus Social Justice

Legal justice is the principle of law that guides the court's definition and interpretation of justice and social justice relates to the equal distribution of social rights and opportunities in society. Law is not supposed to subjugate or subvert the truth of a matter or the cause of justice⁸²⁴ So, injustice ensues when adhering to the law offends

⁸²² Landlords now put stringent conditions for leasing their properties to tenants, who desperately sign to such pre-occupation agreements to waive any rights for litigation or issues that may come up in court if a recovery of premises suit ensues.

⁸²³ Wigwe, *opcit*: 75

⁸²⁴ *Jukok Int'l v Diamond Bank Plc.* (2016) 6 NWLR (pt.1507) 55 at 80;115, A-B

social justice, and the court's role in ensuring justice becomes counter-productive. Thus, judges often encounter a dilemma in applying substantial justice over procedural justice or technicality. For example, where the rules of court or ethical requirements mandate judges to apply specific standards or procedures, judges face a predicament where the case's circumstances are such that applying the statutory requirement will result to injustice. Unfortunately, society does not empathize with the judge in such circumstances. According to Niki Tobi, "The day a court, which is also a court of justice, in the course of exercising its interpretative jurisdiction, yields or kowtows to arid legalism and abandons its primary functions of doing substantial justice, a crisis situation permeates the entire system... 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."⁸²⁵

The court's duty, either in its specific or generic sense, is to do justice, and by so doing, a court is to do substantial justice within the context of the law and evidence before it.⁸²⁶ Even though the court will not leave a victim of injustice helpless and without a remedy,⁸²⁷ instances arise where courts say that due to the strict provision of the law that

⁸²⁵ *Emesim v Nwachukwu* (1999) 6 NWLR (pt.605)154 at 169, D

⁸²⁶ Ebiowei Tobi, *opcit*

⁸²⁷ *Lau v P.D.P* (2018)

restricts their discretion, they are helpless in making what may be an unfair decision.⁸²⁸

Sodipo expressed this social perception that “Judges are to see the ends of justice. The public is losing respect for the legal system because of the slow pace, the terrible game of lawyers and the technicality decisions emanating from the courts. Many lawyers are frustrated by the weaknesses in the system.”⁸²⁹

Courts are to depict substance and justice on merit and be wary of sacrificing justice on account of a technicality.⁸³⁰ *Egbe v Yusuf*,⁸³¹ reiterates that “The flame of justice must be kept alive, be kindled and rekindled through reasoned judgments that brush aside technicalities which will be a clog in the attainment of justice.” Aguda explains that an imponderable problem of possible conflict ensues when the law and rules of procedure conflict with what the common man feels that justice demands in a case.⁸³² The rules of courts are to be obeyed, they are not to defeat the cause of justice. They are aids to the court and not masters of the court.⁸³³

⁸²⁸ In such a situation the judges is in a dilemma.

⁸²⁹ Bankole Sodipo, “Corporate Governance Failings in Financial Institutions and Director’s Legal Liability.” (The Nigeria Deposit Insurance Corporation (NDIC)/National Judicial Institute (NJI) Judges’ Conference on May 3rd and 4th, (2017):.29

⁸³⁰ *Agusiobo v Onyekwelu* (2003) 14 NWLR (pt. 839) 34 at 52

⁸³¹ *Egbe v Yusuf* (1992) 6 NWLR (pt. 245) 1 at 19

⁸³² Aguda, *opcit*: 6

⁸³³ *MHWUN v Minister of Labour & Productivity* (2005) 17 NWLR (pt.953) 120 at 147

Judges' dilemmas in interpreting and applying substantial justice and procedural justice/technicalities raises an issue on whether judicial objectivity means justice in every case. In other words, does objectivity necessarily mean fairness, or does every subjective opinion or view of a judge mean unfairness? Oguntade argues:

A judge may have all the integrity, justness and course in the world and still be unable to deliver a sound judgment. The law is a science. There are established principles which sustain the law, and a judge must have these principles embedded in his chest and at his fingerprint. In order to do justice, a judge must ensure that his judgments meet the technical requirements required by law. Due consideration must be paid to pleadings, evidence must be evaluated, and findings made, and the law must be applied to the facts as found. To be able to do this satisfactorily, a judge must be research inclined. The bench is not for lazy hands or languid hearts.⁸³⁴

Thus, judges may be objective by ethical standard, but after considering all necessary documents and the required statutory procedure, they may give what society considers as an unfair judgment. In other words, the fact that a judge is objective may not necessarily mean justice, and the fact that the judge gives a subjective opinion does not also mean injustice. The court's ultimate decision depends on the circumstances surrounding the case as a whole, coupled with the law and the evidence parties present before the court. Aguda argued that whenever there appears to be a conflict between what the law dictates and what justice demands that a judge should attempt to resolve the

⁸³⁴ Oguntade, *op. cit.* 10.01

apparent conflict in favor of justice.⁸³⁵

There is more to interpreting justice than meets the eyes. Judicial decisions adopt the reasonable man's perspective or the reasonableness test/approach or as an objective decision-making procedure. Therefore, in Nigeria and the U.S.A., the reasonable man's standard of reasonableness is a criteria courts apply to determine justice in most cases. The question is: who determines what 'reasonable' standard is? Collins dictionary of law defines a reasonable man as a judicial standard of conduct used to determine liability, especially negligence.⁸³⁶ *Olaniyan v Oyewole*,⁸³⁷ explains that "The test of a reasonable person in Nigeria courts is not that of a person whose mind and thoughts are colored by political, sectional or other primordial considerations. Such a reasonable person is one who is able to weigh his observations objectively." A reasonable man is an ordinary citizen. Hence, the standard for objectivity is what a reasonable person might be expected to do considering the circumstances and the foreseeable consequences. This standard is not entirely uniform. It is on a case-by-case basis. For example, judges expect a lower standard of reasonableness with a child, and a higher standard for professionals for people who

⁸³⁵ Aguda, *op. cit.* 7

⁸³⁶ See *Glasgow Corporation v. Muir* [1943] AC 448. See also Collins Dictionary at. p. 327

⁸³⁷ *Olaniyan v Oyewole* (2008) 5 NWLR (pt.1097) 114 at 146

possess special skill, like doctors.⁸³⁸

This reasonableness standard introduces the dimension of public opinion to adjudication. Hence public opinion of judicial decisions is vital, and though judges often disagree that public opinion influences their decisions, I believe it does.⁸³⁹ Oguntade opines that public confidence in the adjudicatory process is critical.⁸⁴⁰ In *Guardian Newspaper Ltd v A.G. Federation*,⁸⁴¹ the court held that “ Justice will lose its ethical or moral meaning, and sink to a mere charitable treatment of the enslaved and the oppressed by those in power, without the involvement of the people in designing their legal system.” The people design their legal system through their opinions. The American case of *Roe v Wade*,⁸⁴² and the consistent controversies surrounding the court’s decision in over forty years of America’s judicial jurisprudence, is an example of how public opinion influences judicial pronouncements.⁸⁴³ Also the case of *Brown v Board of Education*, is another case where public opinion influenced the American courts. Although Nigerian courts will

⁸³⁸ Oxford law dictionary, p. 409

⁸³⁹ Chapter ten will give discuss in more detail.

⁸⁴⁰ Oguntade, op. cit. 10.5

⁸⁴¹ *Guardian Newspaper Ltd v A.G. Federation* (1995) 5 NWLR (pt.398) 703 at 738

⁸⁴² *Roe v Wade*, 410 U.S. 113 (1973)

⁸⁴³ *New York Times*, op. cit.

not necessarily agree on this, public opinion influences judicial decisions.⁸⁴⁴ Hence public opinion does not only affect judges' integrity, it also can affect their decisions.

Explaining the Maiden/Statue of Justice

A common and conspicuous figure in most Nigerian courts, and in some courts in the U.S.A is the maiden of justice, also known as lady justice or statue of justice. This figure is an allegory of justice with a blindfold, a balanced scale on the left hand, and a sword on the right hand.⁸⁴⁵ Each part of the statute represents a requirement in the judicial and democratic process. This symbol inadvertently guides judges in their judicial roles. The court in *Kwajaffa v BON Ltd.*,⁸⁴⁶ emphasized: "This court, being a court of justice is a temple of justice adhering to symbol of a blindfolded woman with a scale on one hand and a sword on the other to render "justice" (not injustice) to all manner of people. Indeed, the beauty and greatness, nay the purity of justice, in all its consuming allure and essence is to ferret out from the mass of facts and law before its relevant points in order to give remedy to anyone who comes for it...."

⁸⁴⁴ Niki Tobi, *op. cit.* 338

⁸⁴⁵ www.supremecourt.com
<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjgsuXjv8TvAhWBjlkKHddXAysQFjAQegQIJRAD&url=https%3A%2F%2Fwww.supremecourt.gov%2Fabout%2Ffiguresofjustice.pdf&usg=AOvVaw2qGwnePl32o3JXGYFUMQNI>

⁸⁴⁶ *Kwajaffa v BON Ltd.* (2004) 13 NWLR (pt. 899) 146 at 183.



Diagram 3: The Maiden/Statue of Justice

The Maiden/Statue of Justice⁸⁴⁷

Justice as a female figure dates back to depictions of *Themis* and *Justicia* in ancient mythology. *Themis*, known for her clear-sightedness, was the Greek Goddess of Justice and Law. In Roman mythology, *Justicia* (justice) was one of the four virtues along with prudence, fortitude, and temperance. The conspicuous parts of this figure (the blindfold, the scale, and the sword) are the fundamental features that symbolize justice.

The Blindfold

Although the blindfold's origin is unclear, it seems to indicate the tolerance of, or ignorance to, abuse of the law by the judicial system. During the 16th century, the blindfold often portrayed justice. Today, the legal society generally accepts the blindfold as a symbol

⁸⁴⁷ This figure is in front of the Federal High Court of Nigeria, Lagos.

of impartiality. It depicts “honest” justice that does not consider any individual based on their social class related to wealth, fame, health, etc.⁸⁴⁸ The idea is that judges should apply justice without regard to status, kin allegiances, race, sex, external or internal influences. According to justice Muhammed, “...A judge is an umpire for both parties. He is not a friend to the prosecution and nor a foe to the accused. Neither vice-versa. He is after probability and credibility. Whoever wins by the weight of his evidence is and must be declared the successful litigation. That is why the lady carrying the scale of justice, in the justice emblem has her eyes covered or shut so that she can hand down deserved justice to a deserving litigant or party irrespective of whoever is involved.”

The Balanced Scales

Although there are several figures of the maiden of justice on the Internet with an unbalanced scale, traditionally, the maiden of justice carries a balanced scale.⁸⁴⁹ It means fairness and objectivity, i.e., a fair and objective consideration to all evidence, without

⁸⁴⁸ Bradly A. Knox, “The Visual Rhetoric of Lady Justice: Understanding jurisprudence through ‘Metonymic Tokens’” 2014, Vol. 6. NO 05/PG 1/1, <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjQlrnAosjvAhUUZc0KHactA9sQFjAOegQIJxAD&url=http%3A%2F%2Fwww.inquiriesjournal.com%2Farticles%2F896%2Fthe-visual-rhetoric-of-lady-justice-understanding-jurisprudence-through-metonymic-tokens&usg=AOvVaw2f9SHjcs3Bp56Fuh9KMU99>

⁸⁴⁹ An unbalanced scale will mean injustice in the traditional sense

showing bias. It requires that judges weigh evidence on its merit.⁸⁵⁰ Niki Tobi JSC, opined that: “...The scales of justice are weighed or measured in a make-shift or dummy pendulum and the trial judge, the weight measurer, so to say, takes the mark where the pendulum tilts. That will give him a rough idea as to whether injustice will be done to the respondent if the application is granted.”⁸⁵¹ The court held in *Kurfi v Muhammed*,⁸⁵² that by the nature of our adversary system, an adjudicator is expected to hold the balance between the parties evenly. Courts weigh the justice of a case by the balance of the scale. Hence the court stated in *Akinfe v The State*,⁸⁵³ that “In our system of criminal adjudication, the judge has to hold the balance between the prosecution and the defense. To do anything which gives advantage to the prosecution is to tilt the balance of justice rather fatally.”

The Sword

The sword represents judgment, punishment, enforcement, and restraint. It signifies the swiftness and finality of the judgment. It also symbolizes enforcement and respect, which means that justice stands by its decision and ruling and can take action. The sword’s visibility depicts justice as transparent. A double-edged blade signifies the enforcement of

⁸⁵⁰ Knox, *opcit*

⁸⁵¹ *Akaninwo v. Nsirim* (2008) 1 SC (PT. III) 151 at pp. 198-199

⁸⁵² *Supra*

⁸⁵³ *Akinfe v The State* (1988) 3 NWLR (Pt.85) 729 at 754

justice and judgment and also protection of the law or defense. It also means that justice can rule against either of the parties once the court reviews evidence; it should enforce the ruling and protect or defend the innocent party.⁸⁵⁴

Knox introduces another dimension about this sword of justice. He argues that the sword stands for a reading of righteousness that is embedded with Christian-like beliefs. He compares the “*Sword of the Spirit*” used in the Bible,⁸⁵⁵ to the sword of justice. He argued that “*the sword of the spirit*” represents the word of God that gives insight or defends one’s faith⁸⁵⁶ just as the sword of justice defends the law. Knox says, “...if we juxtapose Biblical denotations of the sword, and the sword as a metonymic token of *Justitia*, we can see how justice might be charged by righteousness on a spiritual level. This means justice is armed with righteousness or morality. This comparison shows how both the Bible’s “*Sword of the Spirit*” and *Justitia*’s sword are charged with offensive and defensive means.”⁸⁵⁷

The sword also depicts power, firmness, finality, and a command of respect from

⁸⁵⁴ Knox, *opcit*

⁸⁵⁵ Hebrews 4:12, New International Version “For the word of God is alive and active. Sharper than any double-edged sword, it penetrates even to dividing soul and spirit, joints and marrow; it judges the thoughts and attitudes of the heart”

⁸⁵⁶ Knox, *opcit*

⁸⁵⁷ *Ibid*

society, fear for the law, and consequences. The sword also displays the law's power and protection, and the assurance of punishment for those who violate the law. Although Knox believes the sword is not an implement of fear, I think the sword raised instills a form of public fear of the law's firmness.⁸⁵⁸ In other words, the sword says that justice is both powerful in its effect but vulnerable in its process; thus, it requires a double-edged sword of courage and restraint.⁸⁵⁹

Lady Justice encourages multiple interpretations. The interpretations keep expanding. It also means justice is blind in all circumstances of a case, but it weighs the truth, even without seeing it. So, what judges see in a case does not (or should not) determine justice. It is what judges 'feel' (by the scale) in a case that determines (or should determine) justice.⁸⁶⁰ Justice speaks from the Judge's perspective and discretion. Hence the blindfold and the scales combine to weigh the evidence before the court. *Akaninwo v. Nsirim*,⁸⁶¹ states that: "In dealing with the injustice factor, the trial judge should take into consideration the totality of the application in the light of the affidavit evidence."

Lady justice is a global phenomenon. The blindfold, scales, and sword of lady

⁸⁵⁸ Ibid

⁸⁵⁹ Ibid

⁸⁶⁰ The weight of evidence from the imaginary scale

⁸⁶¹ *Akaninwo v. Nsirim* (2008) 1 SC (PT. III) 151 at pp. 198-199

justice cumulatively represent the concept of justice in societies all over the world. To courts in many countries that operate the common law system, such as Nigeria and the U.S.A., this symbol of justice has the same connotation of impartiality, fairness and power, although the interpretations may differ. Ultimately, it is a judges' interpretation of justice that society sees. From the author's perspective, what a judge feels or knows from statutes, may not necessarily be sufficient to determine justice. Hence the need to redefine justice according to the society and times we are operate. What value is justice if it is not relevant to the place it is applied?

The Changing Phases of Justice

Justice is not an immutable and invariable concept.⁸⁶² It advances with times, environments and people. As ancient as the role of dispensing justice is, it keeps developing with society's advancements and can be relative from one person to another person; from one community to another community; from one nation to another nation; and from one time to another. The stone-age or pre-colonial eras may not interpret justice as this tech-age or post-colonial era. An example is that justice in pre-colonial Nigeria did not mean equal rights for women because at that time, the decision-making process and top leadership roles in traditional Nigerian communities were patriarchal and did not include women. Some Nigerian communities treated women as chattels.⁸⁶³ Most women lived as

⁸⁶² Aguda, *opcit*: 4

⁸⁶³ Ari Tobi-Aiyemo, "The Past, Present and Future of Women and Law in Africa:

society labeled them as second to the men who were the heads of traditional courts and ‘significant’ decision-makers in the communities.⁸⁶⁴ The post-colonial era introduced equal rights for women to a dimension that women's rights have become a top agenda for global development.⁸⁶⁵ In Niki Tobi’s famous quote in the *Mojekwu case*⁸⁶⁶ says “We need not travel all the way to Beijing to know that some of our customs, ...are not consistent with our civilized world in which we all live today,” shows the value of changing justice. The Mojekwu court realized that the times had changed and needed new precedent to comply with the civilized world and times in Nigeria and global history.

Even the lady of justice has changed from her original idea or concept. For example, the original significance of the lady of justice was that the judicial system was tolerating abuse or ignorance of aspects of the law. However, in modern times, the blindfold represents the impartiality and objectivity of the law and that it doesn’t let outside factors, such as politics, wealth or fame, influence its decisions. Also, lady justice was not originally with a blindfold.⁸⁶⁷ The blindfold only became a fixture around the 16th

Mainstreaming Inheritance Rights.” (University of Pittsburgh Center for International Studies, 2021): Slides 7, 14.

⁸⁶⁴ See *Mojekwu v Mojekwu* (supra)

⁸⁶⁵ see fn 864

⁸⁶⁶ see fn 863

⁸⁶⁷ In some parts of the U.S.A and in England, the lady of justice is without blindfold.

century.⁸⁶⁸

Furthermore, in certain circumstances, justice in Nigeria may not mean justice in the U.S. This is because of the term ‘cultural justice’, which is the cultural dimensions of justice in a particular society. For example, the liberal culture in the U.S. interprets justice for LGBTQ as equal rights. However, the conservative culture in Nigeria prohibits and criminalizes same-sex relationships. So, justice in Nigeria means protecting the community's moral culture from the ‘crime’ of same-sex relationships rather than the rights of the LGBTQ community.⁸⁶⁹ From history, same-sex relationships are considered taboo in Nigeria, and that has carried on to date. Although history has a cardinal role to play in the administration of justice,⁸⁷⁰ Nigeria may get to a place where justice is interpreted to accommodate same-sex relationships. Justice aims to ensure that the litigation parties are fairly treated or receive a fair deal from the court without any element of bias.⁸⁷¹ Even

⁸⁶⁸ LawPadi Admin “Why is the Lady of Justice in front of Nigerian Courts”
contact@lawpadi.com

<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjS0sq32tTvAhUWV80KHU6gBqIQFjAAegQIBBAD&url=https%3A%2F%2Flawpadi.com%2Fwho-is-lady-justice-and-why-is-she-in-front-of-nigerian-courts%2F&usq=AOvVaw3LezFOGGAQyywKORbk1tdA>

⁸⁶⁹ See Same Sex Marriage (Prohibition) Act, 2014

⁸⁷⁰ Duru, *op. cit.* 9

⁸⁷¹ *Caribbean Trading & Fidelity Corp v NNPC* (1992) 7 NWLR (pt.252)161 at 182, H

though it is not possible to have no element of bias in judicial decisions,⁸⁷² the court will not leave a victim of injustice helpless and without remedy.⁸⁷³

Nigerian Courts try to depict substance and justice on merit and be wary of sacrificing justice on account of a technicality.” In *Merotohun v State*,⁸⁷⁴ the CA said “Law which is strictly applied and not interspersed with equity is not justice but a denial of justice.... our courts are courts of justice not courts of technicality.”

Justice is a relative term to individuals, societies and cultures.⁸⁷⁵ What justice means to one person or culture may mean injustice to another person. In *Oyewunmi v Ogunesan*,⁸⁷⁶ the court said “Customary law is the organic or living law of the indigenous people of Nigeria regulating their lives and transactions. It is organic in that it is not static. It is regulatory in that it controls the lives and transactions of the community subject to it. I would say that customary law goes further and imports justice to the lives of all those subject to it.”

⁸⁷² See discussion on implicit bias in chapter 8

⁸⁷³ *Lau v P.D.P* (2018) 6 NWLR (pt.1608) 60 at 127, D-E

⁸⁷⁴ *Merotohun v State* (1992) 7 NWLR (pt.254) 443 at 451, F

⁸⁷⁵ Detailed discussion in chapter 10

⁸⁷⁶ *Oyewunmi v Ogunesan* (1990) 3 NWLR (pt.137) 182

Redefining the Concept of Justice?

This rhetorical question poses a rethink on whether justice is being redefined according to social perceptions and interest; or judge's understanding, perception, intuition/feeling, and judicial perception, rather than the stipulations of law. Often, defining and interpreting justice according to 'law' constitutes injustice, as the law often does not include public perception of justice. Hence the Nigerian public's understanding of the concept of justice is somewhat inconsistent. Most Nigerians interpret justice from the judge's pronouncements demeanor and actions. So, some judges do not apply the logic, morality, social justice, and substantial justice that best suits the justice and humanity of the case when they interpret and exercise discretion in any case.

Thus, judges owe a duty to the larger society in which they operate to interpret justice as society understands. Judicial pronouncements are often in the larger society's overall interest.⁸⁷⁷ A judicial system thrives when it instills confidence in the larger society through fair, impartial, and corruption-free judgments.⁸⁷⁸ Thus, if the lower courts' judgments are contrary to the interest of justice, it is essential and 'judicial' for the Supreme Court to realign the motive and intention of the judge from the lower court through the wheels of justice. This will give the court understanding of the lower court judge's thinking

⁸⁷⁷ Oguntade, op. cit. 4.6

⁸⁷⁸ Ibid

that justifies deviation from precedent, in the interest of justice.⁸⁷⁹ This deviation from precedent introduces a new phase to justice.⁸⁸⁰ Hence, the Supreme Court in the case of *Abdulkarim v Incar Nigeria Ltd*,⁸⁸¹ held that the court would not hesitate to overrule any decision of its own which are wrong principles since that is the only way to keep the stream of justice pure. However, the courts keep recycling precedent even when the precedent is no longer relevant to contemporary times, which leads to injustice.

The concept of justice keeps changing. One man's justice may be another man's injustice. What justice means to an individual may mean injustice to another individual, as what justice means to society may differ from what justice means to judges. Hence, when judges interpret justice according to statutory requirements and judicial stipulations, the public sees injustice. However, if judges interpret justice according to the culture and the society, the public will appreciate the value and benefits of justice. Miller states that justice takes on different forms/meanings in different practical contexts, and to understand it fully, we have to grapple with this diversity.⁸⁸²

⁸⁷⁹ I ventured into the unsolicited territory, appearing to be off course for a brief moment, but I am not off course.

⁸⁸⁰ It does not mean the apex court should condone 'precedential' insubordination.

⁸⁸¹ *Abdulkarim v Incar Nigeria Ltd* (1992) 7 SCNJ P. 366

⁸⁸² Miller, David, "Justice", *The Stanford Encyclopedia of Philosophy* (Fall 2017 Edition), Edward N. Zalta (ed.), URL = <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwitgeHcm8PvAhXEAZ0JHZjiCvIQFjAAegQICBAD&url=https%3A%2F%2Fplato.stan>

In recent times, especially with democratic principles, freedom of expression, and other fundamental rights; individuals, governments, and corporations instigate lawsuits to propel long overdue statutory amendments. The decision in *Motoh v. Motoh*,⁸⁸³ is that in the exercise of their interpretative jurisdiction, courts should lean where the justice of the case demands. Thus, the changing phase of justice in Nigeria's nascent democracy seems to be posing the questions: what does justice mean to society? How does the reasonable man on the street or the drug addict in his lucid moment define justice? What do children understand by justice? Is justice a way of life? Is justice based on the people's standards, culture, the community, the law, or the judge?

In analyzing the U.S.A. Supreme Court, Rosen said "it must be obvious by now that the Supreme Court has followed the public's view about constitutional questions throughout its history, and on the rare occasions that it has been even modestly out of line with popular majorities, it has gotten into trouble."⁸⁸⁴ According to the SC in *Guardian Newspaper Ltd v A.G. Federation*,⁸⁸⁵ justice will lose its ethical or moral meaning and sink to the mere charitable treatment of the enslaved and oppressed by those in power,

ford.edu%2Fentries%2Fjustice%2F&usg=AOvVaw2k1bJSGI_y-7cMiDZ0PrrK

⁸⁸³ *Motoh v. Motoh* (2010) LPELR-8643(CA)

⁸⁸⁴ Rose, *opcit*: 185

⁸⁸⁵ *Supra*

without the involvement of the people in designing their legal system. Thus, society's value in a democracy, is tantamount to the judiciary's value in a democracy. Referring back to diagram one,⁸⁸⁶ we will see a vivid description of the spiral connection from society through the judiciary on the rule of law platform to democracy. This connection is what justice means in democratic governance.

Therefore, redefining justice will mean reconnecting the judiciary with society and interpreting justice as the Nigerian public understands. However, when judges interpret the law to accommodate public opinion, the law sometimes clashes with social changes and realities. As a result, judges' good intentions are often misunderstood, as law-making and judges get criticized for usurping legislative roles.

⁸⁸⁶ Chapter one at page 58

Chapter 10: Do Judges Make Laws?

The role of the judiciary in a democracy exceeds mere adjudication. Hence in performing judicial roles, some judges tend to adopt a liberal approach in interpreting statutes. It is not uncommon for the general public to assume that judges make laws and in doing so usurp legislative roles. The argument that judges make laws is one of the most controversial in legal/judicial parlance today. It has two primary views— formalism and realism. These positions that are most prominent in American judicial jurisprudence also inadvertently guide decision-making in Nigerian courts. Therefore, this chapter will comprise four segments. The first will discuss different perspectives on this judicial controversy. The second segment will explain lawmaking in the Nigerian context and differentiate legislative lawmaking from ‘judicial lawmaking.’ The third segment will examine the impact of courts on social change, emphasizing how judicial actions’ impacts on legislative reactions, is often misinterpreted as policy making or lawmaking. The fourth segment will relate the concept of judicial review to policymaking and answer the guiding question for this chapter of whether judges make laws.

Perspectives on Judicial Lawmaking

The discourse on the perspectives on judicial lawmaking includes academic opinions, case law, and philosophies. The debate on judicial law-making is not just in Nigeria; it is a global dichotomy. The majority of judges in the USA and Nigeria believe that judges do not make laws, and the minority feel that judges make law, but they would

rather not say so.⁸⁸⁷ The status quo that guides Nigerian courts as established in the CFRN is that the judicial role is to interpret the law, while the legislature is to make the laws. Thus, Nigerian courts hold the majority view that judges do not make laws. In *Engr. Charles Ugwu & Anor. v. Senator Ifeanyi Ararume & Anor.*,⁸⁸⁸ the court held that Nigeria operates a constitutional democracy with powers constitutionally assigned to three recognized government arms: the Executive, Legislature, and the Judiciary. The legislature has to make laws that the judiciary interprets, and the executive executes.

The court in *PDP v. Saror & Ors*,⁸⁸⁹ made this clear that

... judges do not make laws or by construction of the provision in the Constitution amend the Constitution. However, as custodians of the Constitution the groundnorm of this country, the court whilst interpreting the Constitution must interpret it and apply the words liberally when absolutely necessary so as to reflect the intention of the draftsman, achieve the purpose and the rights it set out to protect....

The court creates a caveat that although judges do not make laws, under their democratic role as custodians of the Constitution, they should be liberal in interpreting statutes. In deviating from status quo, Oguntade argues as follows:

...the basic function of a Court of Law is adjudication over or settlement of disputes. The court does this by the method of interpretation of the law or application of the law as the circumstances of each case demand. Judges are generally

⁸⁸⁷ Oguntade, opcit

⁸⁸⁸ *Engr. Charles Ugwu & Anor. v. Senator Ifeanyi Ararume & Anor.*(2007) LPELR-3329(SC)

⁸⁸⁹ *PDP v. Saror & Ors* (2012)

circumspect in stating the outer ambit of the powers they exercise and are loathe to admit that they make the laws in the course of their work. The conventional assumption is that the judges apply the law as it is and not as it ought to be. But in practice, the duty of a judge in the adjudicatory system is expansive and not always so narrow as judges themselves want to proclaim. Being one of their numbers, I am familiar with the many ways by which judges extend the frontiers of the law. Sometimes, judges mold the law and occasionally change the law. But even when judges change the law, they tell all of us that they are only interpreting it.⁸⁹⁰

Oguntade's argument moves a step further from the decision of the courts above.

In his direct words "judges make laws through their judgments while loudly disclaiming that they do so."⁸⁹¹ Kanyip⁸⁹² used an analogy of James Hadley Chase' that says, "believe this... you'll believe anything," and argued that judges make laws, but the degree to which judges make laws may differ.⁸⁹³

Concerning USA courts, Eisenberg argues that "In writing opinions that will serve as precedent and in relying on precedent as a source of law, the American Supreme Court functions as a common law court. The Justices of the Court who write these opinions are unquestionably engaged in making law, not merely in applying law."⁸⁹⁴ Cardozo and

⁸⁹⁰ Oguntade, opcit: 4.5

⁸⁹¹ Ibid: 9

⁸⁹² Justice Benedict Bankwarp Kanyip, a former professor and research fellow at the Institute of Advanced Legal Studies, now the President of the National Industrial Court of Nigeria from 2019 till date.]

⁸⁹³ Ibid

⁸⁹⁴ Arthur Eisenberg "Dear Brett Kavanaugh, Justices Do Make Law" JULY 13, 2018
<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjIqMm>

Posner share similar views.⁸⁹⁵ Similarly, Salmond argues that “Judges do more at times than apply existing rules; sometimes they widen and extend a rule of Law; sometimes they device a rule by analogy with existing rule, sometimes they create entirely new principles. The Courts then have the power of developing the Law and at the same time they administer it.”⁸⁹⁶ Lord Denning, argues in *Gouriet v. Union Post Office Workers*⁸⁹⁷ as follows:

Parliament has passed no enactment on it. There is no binding precedent in our book on it and it is a new thing whenever a new situation arises which has not been considered before, the Judges have to say what the Law is. In doing so, we do not change the Law, we declare it. We consider it on principle and then pronounce on it, the Law lies in the breast of Judges.

A common point that emerges from the above perspectives is that although judges have the constitutional role of interpreting the law, they do more than interpreting the law. Salmond’s argument resonates more with the focus of this research. It states the lingering fact that judges' roles have metamorphosed in Nigeria’s democratic governance– from the strict adjudicatory role to a reformist role.⁸⁹⁸ Hence, Nigerian judges are now divided on

X4NrvAhVCGFkFHXaxCPUQFjAJegQIAhAD&url=https%3A%2F%2Fwww.aclu.org%2Fblog%2Ffree-speech%2Fdear-brett-kavanaugh-justices-do-make-law&usg=AOvVaw2pl5mZ9pAPuwutdhdI6gnf

⁸⁹⁵ We will cite their views in a more appropriate discussion

⁸⁹⁶ Fitzgerald, P.J (1966) Salmond on Jurisprudence (12th Ed) 1Sweet and Maxwell, England at p. 145.

⁸⁹⁷ *Gouriet v. Union Post Office Workers* (1977) UKHL 5; (1977) 3 ALL ER 70; (1978) AC 435.

⁸⁹⁸ Judges have always been reformist, but they are just recently bold about it than before.

the contention that they make laws. Although we do not have data yet, a limited minority,⁸⁹⁹ the realist, believes that judges make laws, while the majority, the textualists, say that judges do not make laws. A limited few, the pragmatic, are neither 'here nor there' on their position.⁹⁰⁰ Specifically, the two significant views swinging the pendulum between whether judges make laws or not are the realists and the textualists.

The Textualists and Realists Perspectives

The two fundamental theories of judicial jurisprudence are *formalism* and *realism*. These theories of judicial philosophy though not so called in Nigeria, operate in Nigerian courts. The formalist judicial philosophy is also known as textualists, formalism, textualism, or constructionism. The realist judicial philosophy is also known as realism or liberalism. These judicial theories are the most prominent philosophies of judicial thinking in the USA. However, as I noted in chapter one, Nigerian courts seem to be shifting to adopt American judicial jurisprudence in many respects. Hence some judges, through their judgments, express their judicial philosophies, even when Nigerian courts/judges do not have the brand of being realists or formalists. Nigerian courts are precedent compliant.⁹⁰¹

⁸⁹⁹ These minorities are shy to express their views for fear of been branded an activist judge. However, in my discussions with them and from reading their judgments, you can discern where they stand even when they deny it.

⁹⁰⁰ I may agree more with the pragmatic view.

⁹⁰¹ See chapter for issues on cultural influence on courts and respect for hierarchy.

The schools of jurisprudence somewhat define judge's judicial philosophy in Nigeria. These jurisprudential schools of thought inadvertently influence judges and categorize them as realists or formalist judges.

The Positivist School of Jurisprudence propounds the idea that the court's function is to interpret the law as laid down without regard to the extra-legal considerations of justice, morality, and fairness.⁹⁰² In opposition to this school, the Natural Law School of Jurisprudence conceived justice as the conformity of the law to the principles and precepts of the divine law grounded on notions of fairness, justice, and reason. This theory believes all laws in conflict with natural law must be considered void.⁹⁰³ Then the Sociological School of Jurisprudence, adopts a pragmatic approach to the theory of justice by advocating for social justice founded on principles of public expediency, social utility, and public policy.⁹⁰⁴ Finally, the Realist School of Jurisprudence propounded the idea that rules of law as contained in the statutory enactments and law books are paper rules as they have nothing to do with the natural law. They believe that real laws are contained in the court's judicial pronouncements, as stated by Jerome N. Frank.⁹⁰⁵

⁹⁰²Adedeji. A Owolabi, "Problem of Justice—Nigerian Experience." *Journal of the Indian Law Institute*, Vol. 39, No. 2/4 (April-December 1997): 186-202 at 187

⁹⁰³ Ibid

⁹⁰⁴ Ibid

⁹⁰⁵ "Rules whether stated by judges or others, whether in statutes, opinions or textbooks by learned authors are not the law but are only some among many of the sources to which the judges

These jurisprudential schools of thought that Nigerian courts operate are similar to and fall into the realist or formalist theories category. For example, positivist and natural law schools may fall under the textualist theory, and the sociological concept aligns with the realist school. This dichotomy out rightly distinguishes the liberal or pragmatic judge from the conservative or legalistic judge. The classification of judges into specific judicial philosophical schools of reasoning is unique to the American courts and not Nigerian courts because the American courts are more pragmatic than the Nigerian courts.⁹⁰⁶ Nevertheless, some Nigerian judges appear to be shifting towards the pragmatic approach, depending on the nature of the case.⁹⁰⁷ Nigerian judges apply the textualists approach of judging.

What It Means to Make Laws

Making law simply means to enact a law or to legislate. The Collins dictionary defines legislating as making or passing a law or laws.⁹⁰⁸ By section 4 of the CRFN, the lawmaking function rests in the legislature, while section 6 of the CFRN confers the function of interpreting the law on the judiciary. In the legislating field, the legislature is

go in making the law of the case tried before them.... The law, therefore, consists of decisions not rules.”

⁹⁰⁶ Tobi-Aiyemo, A opcit

⁹⁰⁷ This is what the author meant earlier by the roles of judges in Nigeria metamorphosing.

⁹⁰⁸ www.collinsdictionary.com

the senior partner. The role of the judge is secondary and limited.⁹⁰⁹ The judge has a vital role in the legislative project— one of interpreting statutes. Society cannot appropriately apply statutes unless the courts give it adequate interpretation. This is because statutes are not devoid of drafting errors and other oversights.⁹¹⁰

In Nigeria, the lawmaking power is vested in the National Assembly at the federal level with two chambers: the Senate and the House of Representatives, and the Houses of Assembly at the States level. Thus, the National and States Legislatures share the lawmaking power.⁹¹¹ The Nigerian Constitution specifically sets out the legislative process. It provides that the National Assembly's power to make laws will be exercised by bills, which can originate in either the Senate or the House of Representatives. Before a bill becomes law, it passes through eight stages: the first reading,⁹¹² second reading,⁹¹³

⁹⁰⁹ Barack, *opcit*: 4

⁹¹⁰ See chapter one on the discussion

⁹¹¹ Ngozi Efobi, and Ekop Aelek, “Legal Systems in Nigeria: Overview, Practical Law” Feb 1, 2021, [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiVqtjRntbvAhX6MikFHY9ODV0QFjAAegQIBBAD&url=https%3A%2F%2Fuk.practicallaw.thomsonreuters.com%2Fw-018-0292%3FtransitionType%3DDefault%26contextData%3D\(sc.Default\)&usq=AOvVaw1cjhnAcNX9vfQ-Dgmk1o0F](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiVqtjRntbvAhX6MikFHY9ODV0QFjAAegQIBBAD&url=https%3A%2F%2Fuk.practicallaw.thomsonreuters.com%2Fw-018-0292%3FtransitionType%3DDefault%26contextData%3D(sc.Default)&usq=AOvVaw1cjhnAcNX9vfQ-Dgmk1o0F)

⁹¹² First reading. The Clerk of the House or Senate reads the Bill's short title and tables it before the Speaker or the Senate President (whichever is applicable). Then the first reading, the Bill will be scheduled for the second reading.

⁹¹³ The second reading gives the members sufficient time to deliberate on the general principles

standard Committee stage,⁹¹⁴ report stage,⁹¹⁵ senate committee stage,⁹¹⁶ third readings,⁹¹⁷ bill stage,⁹¹⁸ and presentation stage.⁹¹⁹ The legislature, being the

of the Bill (for example, its merits and demerits). At this stage, legislators can decide to approve or reject the Bill.

⁹¹⁴ Standing Committee stage. After the second reading, and provided that the Bill was not rejected at that stage, the Bill will be passed to a Standing Committee for thorough scrutiny. The Standing Committee will conclude extensive deliberations on the Bill, which can include arranging for a public hearing and requesting contributions from experts on the subject matter of the proposed law.

⁹¹⁵ Report stage. After the Standing Committee has concluded its work, it will set a date to present its findings to the House or Senate. The Standing Committee chairman will conduct the report on the Bill.

⁹¹⁶ Committee of the whole House/Senate. At this stage, the Presiding Officer of the House or Senate will leave the Chair and take one of their assistants' place. The mace will be lowered, and the Presiding Officer will be referred to as Chairman and will call out the number of every clause in succession or the first and last number of a group of clauses. If there are proposed amendments, they will put them forward.

⁹¹⁷ Third reading. After the Bill has been reported to the Committee of the whole House or Senate, it will proceed to the third reading. Corrections and amendments can be made at this stage if some errors or oversights have occurred during the Bill's journey. If a legislator wishes to suggest an amendment, they must make a motion that the Bill be "re-committed" to the committee stage for the amendment to be included. If the motion is agreed on, the House or Senate will dissolve to discuss the amendment. After all, necessary amendments have been made, the House or Senate proceeds on the third reading and passes the Bill.

⁹¹⁸ Engrossment of a Bill. Engrossment involves producing a final clean copy of the Bill by the legal department after all of the amendments agreed to by the legislators have been made. The Bill will be drawn up in the proper legal draft format and sealed with an authenticated certificate endorsed by the Clerk of the House or Senate

⁹¹⁹ The Bill is presented to the Chief Executive (President or governor of a state) for their assent or otherwise. A Bill will not become a law until the President assents to it. Where the President withholds their assent, it can be presented to both the Senate and House of Representatives, after which it can become law provided that a two-thirds majority of each House passes it. In this case, the President's assent will not be required. The Nigerian Constitution provides for a similar

representative of the people, must ensure that the executive powers comply with the provisions of the statute or the Constitution.⁹²⁰ Unfortunately, in reality, it is not always so, as one of the threats to Nigeria's democracy is executive lawlessness and the executives continued disregard of the rule of law. Thus, the judiciary intervenes to check and balance executive and legislative actions to ensure strict compliance with the law.

Now to the judicial process of adjudication. The act of judging is a matter of interpretation and judicial discretion.⁹²¹ These attributes combine to make the judge's role in a democracy. The act of interpreting the law is not devoid of judicial discretion. As strict and legalistic the Nigerian law is, judges have the 'fettered' or sometimes unfettered discretion to interpret statutes in the interests of justice. From the perspective of different judges and authors, we know judges perform an act between judges' interpretation of laws and their exercise of discretion. This act that some call 'judicial lawmaking,' I prefer to call *'judiciating'*.⁹²² Judiciating in the context of this research means when judges apply their discretion in interpreting statutes to incorporate relevant social interests and ensure

procedure for the State House of Assembly.

⁹²⁰ Shehu opcit: 52

⁹²¹ Ari Tobi-Aiyemo, opcit

⁹²² I created this word from adjudicate and legislate. However, upon searching the internet to see if it has been used before, I noticed its been used sparingly howbeit in a different context.

substantial justice to society.⁹²³ In other words, judiciating is the court's intervening role of judicial interpretation/ judicial review.⁹²⁴ First, in interpreting the law, judges try to connote the word or phrases in contention. Then they attempt to dissect the phrase or word, seeking help from dictionaries, other statutes, or precedent. Judges also try to connect the word's perceived meaning to the rest of the statute and relate it to the facts and evidence before the court. However, in the absence of precedent, judges encounter a dilemma, and this is when they *judiciate*.

It is in the process of interpreting a word or phrase, which meaning that judges attempt to understand that they judiciate. Judges have to consider, among several other factors, the drafters' intention to come up with an interpretation to a statute. In this interpretative process, what does drafters' intention mean? How do judges interpret intention? Intention is such a relative term; it is difficult to define or ascertain. The Webster dictionary defines intention as goals, objectives, purpose, idea, target, aspiration, etc.⁹²⁵ Intentions also means "an act or instance of determining mentally upon some action or

⁹²³ how do judges come to the point or stage of judicial law-making? In other words, how do judges come to their decisions that impact legislating?

⁹²⁴ See discuss on judicial review in chapter.

⁹²⁵ www.merriam-webster.com

<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjOxdXz29nvAhUmFFkFHclmDs4QFjAJegQIAhAD&url=https%3A%2F%2Fwww.merriam-webster.com%2Fdictionary%2Fintention&usg=AOvVaw0NhyyhTpGkdtZDN1kcCGra>

result.”⁹²⁶ The various definitions show intention is an abstract word within the heart or mind of a person. This expectation of judges to ascertain drafters' intent is yet another dilemma of the unrealistic societal expectations of judges.

Judiciating may take different dimensions, depending on the nature of the lawsuit. The power of judicial review of statutes empowers judiciating. The act of judiciating derives its power from section 4(8) of CFRN that states, save as otherwise provided by the Constitution, the exercise of legislative powers by the National Assembly or by a House of Assembly shall be subject to the jurisdiction of courts of law and judicial tribunals established by law. Accordingly, the National Assembly or a House of Assembly shall not enact any law that ousts a court of law jurisdiction and of a judicial tribunal established by law.⁹²⁷ Judiciating also includes judges' unrestricted power of checks and balances, which legislative acts can also nullify.

Legislating versus Judiciating⁹²⁸

⁹²⁶ www.dictionary.com

<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjOxdXz29nvAhUmFFkFHclmDs4QFjAKegQIAxAD&url=https%3A%2F%2Fwww.dictionary.com%2Fbrowse%2Fintention&usg=AOvVaw0vR8AWenCBYrZPPvPoFp5N>

⁹²⁷ By section 1 (3) of the 1999 CFRN declares, the Constitution further provides that if any other law is inconsistent with the provisions of the Constitution, the Constitution shall prevail, and that other law shall to the extent of the inconsistency be void.

⁹²⁸ ‘Judiciating’ is the act of judicial review that is misunderstood as law making, and legislating is the legislator’s act of lawmaking

There is an apparent difference between the legislating process and the judiciating (or judicial lawmaking) process. Legislator's role of lawmaking and the judiciary role of 'lawmaking', or what I would prefer to replace with judiciating, have different procedures. Horowitz identifies six distinguishing characteristics that differentiate the adjudicative process from the legislative and administrative processes, which he believes serves as institutional limitations of the courts.⁹²⁹ In the first place, adjudication focuses and essentially deals with individual rights and duties, not necessarily with broad policy issues.⁹³⁰ Secondly, the courts have a limited range of remedies compared with the broader range of alternatives available to a legislator or an administrative agency.⁹³¹ Thirdly, adjudication is piecemeal and is more appropriate to step-by-step adjustments.⁹³² Fourthly, courts are passive and reactive and so make litigation *ex post facto*.⁹³³ Fifthly, fact-finding in litigation is ill-suited to ascertaining broad social facts concerning the general policy issues raised in individual cases. Lastly, adjudication makes no provision for a policy

⁹²⁹ Donald L. Horowitz, *The Courts and Social Policy*. Washington D.C.: Brookings (1977), 34 – 56.

⁹³⁰ *Ibid*

⁹³¹ *Ibid*

⁹³² *Ibid*

⁹³³ *Ibid*

review or monitoring of compliance and the unintended behavioral impact of decisions.⁹³⁴

Horowitz then sums up by arguing that these limiting characteristics are more or less significant depending on judicial familiarity with the regulatory area in question.⁹³⁵

Nonetheless, there are some similarities between legislating and judging, other than the fact that both judiciary and legislature use gavels in their proceedings. According to Lord Neuberger, "...judges communicate and lay down the law publicly through their judgments, in the same sort of way as Parliament lays down the law in statutes, albeit with far more reasoning."⁹³⁶ In other words, although they have different roles and processes, there exists a relationship between judging/judge-made law and legislating/legislative law. Judicial reasoning and discretion are significant aspects that impact judging because they deal with facts and conflicts that need resolution. Atiyah⁹³⁷ identified situations connecting legislating and judging. According to him, some statutes deliberately adopt an open-textured type of language and thereby delegates to the courts

⁹³⁴ Ibid

⁹³⁵ Kanyip, opcit: 58.

⁹³⁶ Lord Neuberger - "Some thoughts on judicial reasoning across jurisdictions", 2016 Mitchell Lecture, Edinburgh, 11 November 2016 at para. 2, available at <https://www.supremecourt.uk/docs/speech-161111.pdf> as accessed on 1st July 2019.

⁹³⁷ P. S. Atiyah – "Common Law and Statute Law" (1985) 48 Modern Law Review 1.

the responsibility for creative development of case law.⁹³⁸ Kanyip gives an example about taxing statutes where the word “income” is not defined, so the courts define it based on the facts applicable to the situations.⁹³⁹ Another connection between legislating and judicating is that some statutes confer discretion on the courts to resolve disputes as they think equitable. For example, section 408(e) of the Companies and Allied Matters Act (CAMA) 2014 empowers the court to wind up companies under just and equitable grounds.

As mentioned above, one aspect of judicating that people often misunderstand as legislating is the court's role of judicial review. Even though the Constitution did not expressly provide that the judiciary shall have the power to “review” legislative and executive actions, the judiciary has assumed the power without outright objection from the other arms of government. This means that the judiciary is in order or as Shehu opines, the other arms of the government accept it, because there is no court to appeal to; or simply because the legislature has no power to make any law that would oust or purport to oust the power of the courts.⁹⁴⁰ Shehu also added that another reason the other branches of government did not object to courts judicial review role is because the Constitution subjects

⁹³⁸ Cited in Kanyip, *opcit.*

⁹³⁹ *Ibid*

⁹⁴⁰ Shehu, *op. cit.* 66

the exercise of legislative powers to the judiciary.⁹⁴¹ The undeniable is that the other government arms may not be objecting because they accept the power of judicial review as a just democratic role that is more beneficial/complementary than threatening to their role.

The power of judicial review titivates the judiciary's role in democratic development by incorporating the people's will in the law and through voiding oppressive, depressive, repressive executive orders and legislative policies.⁹⁴² The judge may give a statute a new meaning, a dynamic meaning, that seeks to bridge the gap between law and life's changing reality without changing the statute itself.⁹⁴³ The statute remains as it was, but its meaning changes because the court has given it a new meaning that suits new social needs.⁹⁴⁴ The legislative process legitimizes the change in the statute. According to Barack, the court is the junior partner in the legislative project.⁹⁴⁵

Although this power of judicial review is not in the Constitution of Nigeria and that of the U.S.A., by Article III of the Constitution, the United States Supreme Court (USSC)

⁹⁴¹ Ibid

⁹⁴² Barack, 4-5

⁹⁴³ Ibid

⁹⁴⁴ Ibid

⁹⁴⁵ Ibid

possesses immense powers, and established the judicial review doctrine in *Marbury v Madison*.⁹⁴⁶ Through this case, the USSC expressed the views of a popular majority more faithfully than the people's elected representatives.⁹⁴⁷ Shehu argued that since the Constitution does not expressly provide for the power of judicial review, it could not have been the Constitution's intention to subject the exercise of executive powers to the supervisory jurisdiction of the courts.⁹⁴⁸ I believe that in addition to Barack's point above, another reason the power of judicial review seems to be succeeding in Nigeria like in the U.S.A. is because of its beneficial impact on society and social change.

Courts and Social Change

Court cases directly affect human life and exposes gaps in the law where change is necessary or overdue. These gaps then instigate the legislature to legislate or amend the specific laws. Some socio-economic changes are made possible through the court's interpretation of inadequate statutes. The court's recognition of its role to bridge the gap created between a possibly old or irrelevant statute and the new social reality creates social change. According to Barack, judges are concerned with the existing law, which must be

⁹⁴⁶ *Marbury v Maddison*, (1803) 5 U.S. 137

⁹⁴⁷ Rosen opcit: 4

⁹⁴⁸ Shehu, opcit: 69

given a new meaning.⁹⁴⁹ The court's traditional role is in realizing its primary role in a democracy as bridging the gap between law and society. Hence, when an old tool does not fit a new reality, the tool must be given a new meaning to address society's changing needs. So if the legislature does not do anything to adapt to the new reality, courts are forced to bear the responsibility.⁹⁵⁰ This judicial role in giving an old law a new interpretation that suited the social needs of the modern society is complementary to the legislature's responsibility.⁹⁵¹

Various types of socio-economic, cultural, and economic disputes come before courts – landlord and tenancy disputes, master and servant disputes, matrimonial disputes, property disputes, and political disputes – are disputes that present unique and sometimes complicated challenges with no statutory remedy; requiring the Nigerian judiciary to address them. Often, society is not bothered about the judge or the judicial process. All they want is justice, which (in some cases) is not as the law or judges define or interpret. Aligning judicial interpretation with social needs creates a dilemma for judges, especially with society's changes and changes in social needs. Barack expressed that the need for change presents the judge with a dilemma because change sometimes harms security,

⁹⁴⁹ Barack, *opcit*: 5

⁹⁵⁰ Courts today give a dynamic meaning to old provisions, in order to accommodate new needs.

⁹⁵¹ Barack, *opcit*: 5

certainty, and stability.⁹⁵² The judge must balance the need for change with the need for stability.⁹⁵³

As Society and social needs change, judges must consider whether it is appropriate to change the judicial precedent 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.⁹⁵⁴ Barack opines 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. Sometimes the change is drastic and easily identifiable. Sometimes the change is minor and gradual and cannot be noticed without the proper distance and perspective. Often, however, the legal norm is not flexible enough, and it fails to adapt to the new reality. A gap has formed between law and society. We need a new norm. The life of law is not just logic or experience. The life of law is renewal based on experience and logic, which adapt law to the new social reality. Indeed, there are always changes in law, caused by changes in society.⁹⁵⁵

Most times, the law does not just develop, and statutes are not just changed at

⁹⁵² Ibid: 11

⁹⁵³ Ibid

⁹⁵⁴ Barack, op. cit. 10

⁹⁵⁵ Ibid, 3-4

legislative instances. It is primarily judicial pronouncements that motivate or inspire legislative actions in a democracy. This will ensure justice to society. For example, there have been several judgments on the defunct Land Use Act of Nigeria, but the legislature has still not amended it.⁹⁵⁶ Thus, concerning land related cases, courts are stuck with outdated precedent that was long established in Okumagba's case regarding landed properties. Idahosa, quoted Justice A. Aboki JCA as saying:

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.⁹⁵⁷

Judges are constantly challenged with interpreting outdated or complicated laws because they will not benefit society. The fact that judges determine the scope of law presupposes that the said rule of law is not absolute. In other words, the laws are not perfect, so they may admit exceptions.⁹⁵⁸ Only courts have the role in interpreting laws and making an exception to such laws to enable social change. The British courts made such exceptions

⁹⁵⁶ Unfortunately, the Nigerian legislatures have still not seen the urgency for change, and this may be as a result of many more challenges

⁹⁵⁷ Justice Idahosa, C.O. op. cit. 1

⁹⁵⁸ Kanyip, op. cit. 27

by their interpretation in the famous British case of *Rylands v. Fletcher*,⁹⁵⁹ where the House of Lords established a new area in English Law of Torts. There was no precedent or established law,⁹⁶⁰ so the House of Lords formulated the rule by improvising from existing principles of law applicable at that period.⁹⁶¹ The House of the lord's decision brought the law in line with public reservoirs and marked a significant doctrinal shift in British history. The parties to this case had no clue whether a law existed or not. They may not even care to know if the existing law has a remedy to their case, or not. All they wanted was justice, and they got it not just for themselves, but for society and posterity.⁹⁶² Thus, in the absence of legislative remedy, the court made an exception that has brought about social change in Common Law countries. According to Kanyip, instances today exist where we may be called upon to draw analogies from statute and existing case law principles. Under such instances, society has high expectations of judges, one that judges are often under pressure

⁹⁵⁹ *Rylands v. Fletcher* (1866) 159 ER affirmed in (1868) LR 3 HL 330

⁹⁶⁰ See also the case of *Donoghue v. Stevenson* (1932) UKHL 100; (1932) AC. 562. where the court established a new tort law on duty of care.

⁹⁶¹ This doctrine was developed by the English courts and made an impact on the Common Law. The court decided that where a person who, for his purposes, brings and keeps on his land anything likely to do damage is bound to prevent its escape to avoid mischief or injury to another. Such a person is liable for the consequences of the damage caused by such escape, even if he has not been negligent. Before Ryland's case, the English courts had not based their decisions in similar cases on strict liability. They had focused on the intention behind the actions rather than the nature of the actions themselves. In contrast, Ryland's Court imposed strict liability on those found detrimental in such a fashion without having to prove a duty of care or negligence.

⁹⁶² This Ryland v Fletcher rule is one of the oldest and still relevant legal principle in Nigeria's history of tort law

to attain. The judge cannot throw up his hands, or stew indefinitely, just because he is confronted with a case in which the orthodox materials of judicial decision making, honestly deployed, will not produce an acceptable result.⁹⁶³

Judges can use their adjudicatory powers in many ways to achieve a paradigm shift in practice and procedure on collective proceedings.⁹⁶⁴ In citing Israeli Supreme Court justice Dorner, Barack cited: “social changes sometimes lead to a situation in which a statute passed in the context of a certain reality and that was constitutional at the time of its enactment becomes unconstitutional in light of a new social reality. Of course, the court will do everything it can to give the old statute a new meaning, in order to preserve its constitutionality.”⁹⁶⁵

Do Judges Make Laws?

I consider the term law making an anathema to the judiciary, as the court does not make laws. The role of courts in society is not to make laws but to interpret and link law to society. As discussed above, some believe judges legislate because the act of judging is similar to legislating as judges incorporate contemporary social realities when interpreting

⁹⁶³ Posner, *How Judges Think*, opcit: 79

⁹⁶⁴ Idigbe, opcit: 97

⁹⁶⁵ Barack, opcit

the law. Two of my eight informants argue and believe that judges make laws.⁹⁶⁶ Although one informant argues for and against, as he believes that there are instances that judges resort to law-making.⁹⁶⁷ However, the judiciary does not depend on the legislature to adjudicate. If there is no law to interpret, the courts will improvise principles like the House of Lords and base it on contemporary social norms or interests.

Making law would mean what the courts in *Araka v Egbue*,⁹⁶⁸ said “The moment a court of law intends to rewrite a statute or really rewrites a statute, the intention of the lawmaker is thrown overboard and the court changes places with the lawmaker.” So, judges can only be legislating if they rephrase the statutes with phrases outside the interpretative context. A court has no power to impact the meaning of a word by introducing something that is not in it.⁹⁶⁹ However, this is not always the case, as judges also define the law based on the circumstances of the social conflict presented in court; the canons of interpretation, and the appropriate circumstances explaining the law as it relates to the changing social interests and views.

Cardozo argues that the power to declare the law carries with it the power, and

⁹⁶⁶ See pages 8 to 12

⁹⁶⁷ Informant 3

⁹⁶⁸ *Araka v Egbue* (2003) 7SC 75 at 85

⁹⁶⁹ *Imah v Okogbe* (1993) 9 NWLR (pt. 316) 159 at 173, D-E

within limits the duty, to make law when none exist.⁹⁷⁰ This argument is the thin line that often confuses people and leads them to perceive that judges make laws. The fact that both the legislature and courts use the gavel in their proceedings does not mean they both make laws; neither does it mean that legislators also adjudicate. Also, when people are called as witnesses to testify in a legislative hearing regarding legislative investigations on government activities, does not mean the legislature is usurping judicial powers. There are similarities, no doubt. However, that does not mean that judges make laws. Oshio argues that it simply is no more than a court extending or adapting an old rule to a new situation to do substantial justice.⁹⁷¹ The courts in *Ladoja v INEC*,⁹⁷² said “Law making in the strict sense of that term is not the function of the judiciary but that of the legislature....” In other words, there is a strict sense of the term lawmaking. Could the controversy over judicial lawmaking be a nomenclature issue? Could it be that people use the word ‘making law’ for lack of a better or more generic word for the specific role judges play? In attempting this controversial question, a retired justice of the Nigerian Supreme Court said, “The simple answer to this seemingly rhetorical question is NO. But it is neither a

⁹⁷⁰ Benjamin. N. Cardozo, *The Nature of the judicial process*. U.S.A: Yale University Press, (1949):124

⁹⁷¹ Oshio, *ibid*: 22

⁹⁷² *Ladoja v INEC* (2007) 12 NWLR (pt. 1047) 115 at 189

resounding no nor an unqualified answer in the negative.”⁹⁷³ This view is a pragmatic one and arguably so. However, I still believe that what judges do is not lawmaking; it is an act between adjudication and legislation. It is, as I have termed it, judiciating. Similarly, Oguntade argues that judges do more than just apply the law as it is. They sometimes extend it and create new laws that remain binding on all until reversed or overruled by courts competent to do so.⁹⁷⁴

Some courts may argue that judges need not perform a between role but leave the legislature's supposed lawmaking role for the legislature. So said Salami, JCA in *Awuse v Odili*,⁹⁷⁵“ It seems to me that it is not part of the function of the court to make legislation. It is the function of the legislature to make law and where there is a gap in an enactment, the legislature and not the court should be invited to affect the enactment. ” It seems that the court's ruling is unrealistic as such a situation gives the judge two options, which creates a dilemma where the court will either say to the expectant litigant or public that they cannot hear the case because of legislative inadequacies, or the judge determines the case on grounds of justice. Niki Tobi responds to the above as follows:

.... there are instances when there exists neither statutes nor case law on a matter before the judge. In such instances, the judge is initially helpless, but the case before him must be decided one way or the

⁹⁷³ Oguntade, *opcit*: 4.7

⁹⁷⁴ *Ibid*

⁹⁷⁵ *Awuse v Odili* (2005) 16 NWLR (pt.952) 416 at 488, 489

other. He cannot adjourn the case and ask the Legislature to pass a statute on the point before him. He cannot fold his arms and tell the litigants that he is helpless on the ground that there is no relevant statute or case law governing the issue before him. He must do something and quickly too for that matter. He has no option in the matter. He, therefore, propounds a principle suitable to the case before him. The principle is novel. The principle is an innovation and so the judge is said to have made the law.⁹⁷⁶

The courts are like emergency units with first-aid kits to aid the legislating. At the speed society is developing now (thanks in part to technology), there is often a gap that judges have to fill that the legislature may or may not realize until the courts, by appropriate interpretation, points it out. Hence the courts instigate the legislature to amend or enact law. Judges give judicial hints to the legislators that society is not satisfied with the law. It is no usurpation when the courts say that in the interest of justice, this law is insufficient to address the case at hand, and so we adopt a principle in the interest of justice that we believe reflects the drafters' intent. Such judicial remarks invite the legislature to make amendments.

Five Reasons Judges Do Not Make Laws

Judges do not make laws because there is a difference between legislating and judicating, and specifically for the following reasons:

1) Whatever interpretation/'changes' judges make to the law are partial and limited. Courts

⁹⁷⁶ Niki Tobi: 79

make social change, while the legislature makes a comprehensive change.⁹⁷⁷

2) Judiciating results from conflicts before the judge. Barack opined that “Admittedly, judicial lawmaking, mainly through interpretation, is central to the role of a court. However, that role is incidental to deciding disputes.⁹⁷⁸ Without a dispute this is not judiciating.⁹⁷⁹

3) Judges do not go through this legislative process of passing a Bill or several legislative review stages. They analyze their evidence and relate it to contemporary social issues.

4) The legislature intentionally creates opportunities for the courts to assist the legislative process through judiciating. That is why some statutes like the CAMA stipulate procedures for courts in the process of winding down of companies. Such procedural functions are for the law courts, not the executive arm of government.⁹⁸⁰

5) Courts judicate sporadically and on a case-by-case basis, while legislators make laws systematically. Courts govern the rule of law, while legislators’ rule in law and project into the future a rule of law that has never before existed. Courts cannot and do not make laws.

Furthermore, a reason some people argue that judges make laws is because courts have enormous constitutional powers that empower them to check and balance the

⁹⁷⁷ Barack, 14

⁹⁷⁸ Ibid

⁹⁷⁹ Ibid: 13

⁹⁸⁰ *Chinweorder Chukwu Awa v. Nigeria Social Insurance Trust Fund* [2015] 60 NLLR (Pt. 211) 544.

legislative and executive arms of governments. Assuming, but not conceding, that judges legislate, they do not make laws the way the legislature does.⁹⁸¹ Also, judicating happens where a subsidiary legislation empowers the chief judge of the federal high court, for instance, to use powers to make practice directives and rules to ensure the law meets its purpose even when law reform in legislation is lagging behind.⁹⁸² Also, courts are active participants at virtually every stage of corporate restructuring, as judges have the power to drive a business rescue outcome notwithstanding the formal winding up procedure in which it is conceived.⁹⁸³ Under such circumstances, judges have made rules or laws.

Judges do not make laws and should never make laws. When there is a need and the society comes to court for redress, the courts are bound to apply justice. Cardozo argues that the power to declare the law carries with it the power, and within limits the duty, to make law when none exist.⁹⁸⁴ Though judges do not make laws, a pragmatic view would be Oguntade's view that it is neither yes nor a no. The Court's interpretative power gives it a latitude which makes it a distinct institution with the overriding power when it comes

⁹⁸¹ Carleton Kemp Allen *Law in the Making*. 6th Edition, London: Clarendon press, 1964.

⁹⁸² In this regard, the Chief Judge could issue a practice direction inquiring a rescue plan prepared by certified professionals to support any application for injunction for or pursuant to sections 539 and 540 of the CAMA, the court has supervisory and oversight powers to in corporate restructuring.

⁹⁸³ Idigbe, *opcit*: 99

⁹⁸⁴ Cardozo, *opcit*: 124

to 'making the law' relevant to society.⁹⁸⁵ Shehu sums it up as follows:

Certainly, the judiciary in Nigeria with its power of finality of decisions on interpretative and adjudicatory jurisdictions cannot be on the same constitutional hierarchy with the other organs whose actions, inactions, omissions, decisions or interpretations of the law and the constitution may be called to question before the judiciary. The legislature though enjoys legislative supremacy while the executive also has the same supremacy, the fact is still that their supremacies are still subject to the constitutional supervision by the judiciary to ensure that the will of the people of Nigeria as enshrined in the Constitution is strictly complied with by the organs, and that is the constitutionalism; the overriding judicial oversight of the political branches of government.⁹⁸⁶

Even though many laws need amendment, and the legislature may be ignorant, hesitant, unwilling, or uninterested in taking legislative actions, courts cannot and should not step into the legislative domain to take legislative actions. However, there is nothing wrong with courts (upon prompting from litigants), inspiring legislative actions and ensuring social justice. There is nothing wrong with judges inspiring policy change. That is what due governance is all about. The judiciary check on the legislative and executive branches inspires policy change. Sometimes, it is only after the intervention or prompting of judicial pronouncements that legislators see the need to update the laws to become relevant to society or comply with relevant social issues.

Unfortunately, the reality is that social vices and conflicting human circumstances

⁹⁸⁵ Shehu *opcit*: 45–75.

⁹⁸⁶ *Ibid*

helplessly sways into judicial terrain because society relies on courts in democracy (more than they rely on legislators) as the last hope of the ordinary person. Hence, this reliance, on the one hand, makes some judges resign to inspire policy change instead of leaving litigants (and, by extension, society) hopelessly helpless. On the other hand, the other judges take the bull by the horn and dare to deviate from precedent. Deviating from precedent to create new precedent in the interest of justice is not the same as making laws.

To this end, I submit that judges do not make laws or usurp legislative roles to make, amend, repeal, re-enact laws. Judges make principles out of established laws that are inadequate laws or principles. In *Mr. Peter Obi v. INEC & ors*,⁹⁸⁷ the court held that courts expound the law and not expand it. I agree; the courts expound laws that the legislature eventually expands. However, like every principle of law, I believe there are exceptions to the general rule, where some judges have attempted to change the law. I conclude that judges do not and are certainly not lawmakers. However, judging in a democracy inevitably influences expounding the law, which may lead to legislature making new laws, repealing or amending old laws. Although people misconstrue judicating as lawmaking, the judiciary can approach solving this dilemma by incorporating a socio-judicial justice in adjudicating.

⁹⁸⁷ [2007] 7 SC 268. See also *Owena Bank (Nig.) Ltd v. Nigeria Stock Exchange Ltd* [1997] 8 NWLR (Pt. 515) 1 SC and *Attorney-General of Kano State v. Attorney-General of the Federation* [2007] 3 SC (Pt. I) 59.

Chapter 11: The Concept of Socio-Judicialism/Theory of Socio-Judicial Justice

This chapter, which is the climax of my research, is where I tell the story of the impetus and implications of this dissertation's scholarship. This chapter introduces the concept of *socio-judicialism* and narrates my journey to propounding this theory. I developed this theory after nineteen years of deliberate research on the role of courts in society.⁹⁸⁸ From over three years of private practice in litigation and human rights advocacy;⁹⁸⁹ to over ten years of active judicial practice in Nigeria;⁹⁹⁰ I saw a gap between society and the law/courts. Also, as a member of the Commonwealth Magistrates' and Judges Association—who had discussed issues bothering on judicial development with judges from across the world,⁹⁹¹ I realized that judiciaries across the globe had common characteristics and experiences—society often does not understand judges' roles. Hence, judges experience dilemmas in executing their roles to the benefit of society. Over three years of graduate studies in law in Nigeria, plus six years of judicial studies in the U.S.A.,

⁹⁸⁸ However, the idea behind this theory started over twenty years ago during the author's first/second year of undergraduate studies as 'both' law and sociology student.

⁹⁸⁹ As a pro bono counsel in a frontline Non-Governmental Organization in Nigeria, Social and Economic Rights Action Centre (SERAC)

⁹⁹⁰ As a magistrate Judge in Lagos State Judiciary seating in three most complex and busy magisterial districts in Lagos state Nigeria.

⁹⁹¹ I met judges, magistrates, justices, chief justices of countries in CMJA conferences and like the NJC, we discussed topics of common interest in the Commonwealth judiciaries

unveils a clearer picture of the indispensable impact of the judiciary on society and democracy. My conclusion from this research is that judges need to be more society-oriented to achieve justice to show the value of judiciary and ensure ideal democracy.

Therefore, my narration will cover three basic segments: the first segment defines the socio-judicial theory or socio-judicialism; the second segment explains how this theory relates to the Nigerian judiciary; and the third segment discuss the feasibility and prospects of applying this theory in Nigeria. Specifically, these segments will: (a) explain the origin of socio-judicialism/ socio-judicial theory; (b) define the socio-judicial theory and its application in Nigeria's judiciary;⁹⁹² (c) Discuss the principles of socio-judicialism and relate it to judging in Nigeria; (d) Outline the relationship between this concept and social change/social justice,⁹⁹³ by relating this theory to the role of government, the role of media, the role of society/public, the role of police, and the role of judges in policy making;⁹⁹⁴ (e) Outline the strengths and constraints to this theory, and relate it to pre-existing relevant theory; (f) Outline some quotes that support and counter this theory; and (g) Analyze the prospects of the socio-judicial concept in Nigerian judiciary.

⁹⁹² I will cite case law and discuss seminal or similar theories or ideas that support this theory.

⁹⁹³ We will illustrate it in a diagram.

⁹⁹⁴ We will explain that judges should not be called policymakers, but policy engineers.

The Origin of Socio-Judicialism/Socio-Judicial Theory (SJT)

The conceptual thought of socio-judicialism started between 1995 to 2000 when I was an undergraduate sociology cum law student at the Benue State University, Makurdi (middle belt region/Northern Nigeria).⁹⁹⁵ I recall that one of the fascinating topics in my sociology/anthropology classes was the real and ideal culture of society. I recall learning that the real culture was common and practical in society versus the ideal culture which society requires and that will benefit society more. This narration got me wondering why society practiced and enjoyed the real culture for the immediate gain or pleasure, instead of the ideal that may be cumbersome to achieve/maintain, yet eventually beneficial to society. This thought inspired my undergraduate research on the colonial history of Nigeria and how the real and ideal culture affected the Nigerian legal system. Thus in my combined classes of law with social science course like sociology, anthropology, history and psychology (as major and elective courses), I observed the indispensable yet ignored place of society in Nigeria's governance/government.⁹⁹⁶ Then, I ventured a research on the topic "The Impact of Tradition on Nigeria's criminal Justice System."⁹⁹⁷ This research attempted to explain how the tradition of people affects the criminal justice system, and

⁹⁹⁵ I combined both sociology and law courses before I could qualify as a full-time law student.

⁹⁹⁶ At that time, Nigeria was still under military dictatorship regime. However, even now with democracy, the status quo that led me to ponder on this research has not changed.

⁹⁹⁷ This was a mandatory thesis required for graduation from college.

also the efficacy of the criminal justice system to curb crime, amidst the conflicts between Nigeria's real (traditional) culture and the ideal (Common law/foreign legal) culture.⁹⁹⁸ My young mind was curious and searching for how justice impacts its beneficiaries.

Subsequently, around 2003 during my private legal practice, as I made several appearances in the magistrate courts, high courts and the Court of Appeal in Lagos State Nigeria, I came face-to-face with reality. These were my first direct encounters of experiencing the real culture in Nigeria's justice system. The magistrate courts are courts of first instance/trial courts that had the closest communication with the people/community/public, as the magistrate courts handled minor social offenses and misdemeanors. So, in my pro bono private practice in a non-governmental organization/firm,⁹⁹⁹ that focused on human rights litigation, I interacted with various indigenous deprived communities. My role as staff attorney in SERAC gave me a first-hand knowledge of the Nigerian public's view of courts/judges and judicial roles. In the course of relating with clients and judges, I observed¹⁰⁰⁰ and experienced¹⁰⁰¹ the gap between law and society. I saw that most litigants

⁹⁹⁸ For example, the retributive punishment procedures like canning, stoning to death for offenses of adultery.

⁹⁹⁹ The Social and Economic Rights Action Centre (SERAC).

¹⁰⁰⁰ I realized from the perspective of a lawyer who had to approach the court on behalf of low-income community, groups or individuals.

¹⁰⁰¹ My experience as a citizen with the court and my direct and indirect communications with the judge relating to my clients and also my interactions with court staff and administrators, all gave me unique and diverse perspectives on judges, lawyers, litigants, society and the institution

(including my clients) had so much expectation that the courts were their last and only hope.¹⁰⁰² Unfortunately, the courts were not meeting these expectations not because the standards were unrealistic, but also because some judicial and statutory requirements were unrealistic, and some lawyers like litigants/the public did not understand the role of judges or judicial modes of operation. I then suspected that even judges may not really understand the implications of their roles in society and to democracy. Eventually it dawned on me that judges encounter dilemmas in attempting to perform their roles with all of the challenges that accompany their personal lives, courtroom environments, socio-political environments, international environment, cyber-space etc. Unfortunately, as a lawyer my suspicions were unconfirmed.

Consequently, the zeal to confirm my suspicions, and to impact the kind of changes in society and the judicial system instigated my interests in judicial practice. Hence, I moved to the judiciary in 2015, where I believe I could actualize my baseline vision to advance judicial development and attempt to build society's confidence and trust in courts.

of the judiciary.

¹⁰⁰² In some of our communications like in a case of Adeyemi and Marako, the elderly litigants asked questions like why is the judge taking so long to decide on this case when it is so straightforward? Sometimes they say things like “the judge must have been bribed as she constantly rejects our exhibits...” I had to explain some of what I knew and understood as the law that there were certain procedures that guide the rules of evidence and that a judge rejects evidence when it does not fulfill the stipulated requirement. I would be honest that there were some aspects of the litigation that I suspected as a lawyer that the judge had been compromised. In hindsight, it may have been some of the dilemmas I explained in previous chapters.

The bench granted me the opportunity to serve the public and relate with lawyers, litigants, society, judges, and the government with an insider perspective.¹⁰⁰³ As a magistrate with a general jurisdiction docket, actively involved in adjudicating civil and criminal cases, I met all kinds of people in my court.¹⁰⁰⁴ My experiences from SERAC influenced my judicial philosophy with a distinctive view to the humanness of law. The humane perspective I adopted in over ten years of judicial experience distinguished my court as I introduced a human face to justice.¹⁰⁰⁵ During my judicial career, I handled some cases that had no precedent and I had to improvise to achieve justice in the case.¹⁰⁰⁶

Gradually, I began to understand and see the judiciary as the loudest voice for democracy.¹⁰⁰⁷ I then discovered that judges often get sandwiched between stipulated statutory roles and societal expectations, both roles deserving intricate and unified attention. Thus, creating a gulf between what law requires (the ideal culture) and what exists or operates in society (the real culture), thereby disconnecting law from society. This got me

¹⁰⁰³ Some of these communications were in court as they appeared as witnesses. Other communications were in conferences, seminars, training or stakeholder meetings.

¹⁰⁰⁴ The poor/rich, underprivileged, exposed, old/young.

¹⁰⁰⁵ In court, I took time on every occasion to explain basic judicial procedures before hearings commenced and as much as I had the statutory liberty to do, I tried to enlighten the public by posting notices about courts procedures at the entrance of my courtroom and at conspicuous places within the courtroom.

¹⁰⁰⁶ See page.

¹⁰⁰⁷ Discriminated, underprivileged and oppressed groups in democratic governance

thinking on why the Nigerian public does not see the value of the judiciary, which is the ultimate hope for equity and rule of law in society. In other words, the people do not understand the law and when they approach the courts for interpretation of the law, even the procedure of courts are complexly in legal terminologies, making it difficult for laymen to understand? On this fact, I speak with a high degree of conviction, first as a front-row observer of my country's unfortunate experiments with rule of law in many years of democratic governance and its inevitable impact on the judicial substratum of society; and secondly as a retired magistrate/judge of over twelve years in a very busy judicial jurisdiction in Nigeria, and thirdly with six years of studious judicial studies scholarship.¹⁰⁰⁸

Subsequently, during my judicial studies expedition that started in 2016, I took the Behavioral and Social Science in Law course (JS 735). This class took me down memory lane, and I reconnected the dots from my undergraduate expedition through private practice and then to public service at the bench.¹⁰⁰⁹ The instructor of the course, played a fundamental role in this regard.¹⁰¹⁰ His teaching, strategies and rigorous assignments

¹⁰⁰⁸ Lagos State is one of Africa's largest most cosmopolitan cities

¹⁰⁰⁹ Like a puzzle, the lines of different stages of my academic experiences fit into the bigger picture in this research.

¹⁰¹⁰ I take this moment to appreciate Dr. Shawn Marsh for his input in directing my thoughts in the right direction and enabling me to create this theory that I believe will impact judicial jurisprudence globally.

created a challenging platform that set the motion for further research on court's roles in society. In one of his classes, Marsh said "People adopt roles in total institutions (courts) there are expectations of how people think feel and behave in courts. Note we are not looking at the law of the courts, but we are looking at how social sciences draw from these institutions; what social science has to offer the law; how this can be used within the legal system, to make laws."¹⁰¹¹ These words which I noted verbatim during his teaching was my 'aha! moment.'

Subsequently, the course's text– "Social Science in Law: Cases and Materials,"¹⁰¹² structured my hypothesis. Manohan's and Walker's analysis of various cases that impacted social change in America's history, nudged me to streamline my research within the social science.¹⁰¹³ Specifically, after reading their reasoning in the following quote, like Einstein, I said Eureka!

The human element in the administration of justice by judges is irrepressible. A judicial decision is a decision by the human being called a judge. The more you try to conceal the fact that judges are swayed by human prejudices, passions and weaknesses, the more

¹⁰¹¹ Marsh, S (2017) JS 735 Law and Social Sciences. Due to my training in Nigeria judiciary where judges write in long-hand, I was able to write the class notes verbatim and reproduced his comments on

¹⁰¹² John Monahan, and Laurens Walker, Social Science in Law: Cases and Materials, 8th ed. U.S.A: Foundation Press, (2014)

¹⁰¹³ This six-chapter book contained detailed, and inspiring discusses on a Jurisprudential origin of social science in law; A primer of Legal and Social Science Method; Social Science Used to determine facts; Social Science used to Make law; Social science used to provide Context; and Social Science and Litigation Strategy.

likely you are to augment those prejudices, passions and weaknesses. Our legal system has been built up about the beliefs that (1) a judge centers his attention on impersonal so-called legal rules;(20 that his decision is the product of his application of those rules to the facts of the case; and (3) as a consequence, the human element in decision-making is reduced to a minimum. These beliefs, and the attending requirement that judges should write opinions explaining their decisions in accord with this belief, enhance the evil effects of the judges' prejudices, passions and weaknesses. For, as a result, self-scrutiny by judges of their own thought-ways is often blocked and it has become compulsory and respectable for judges to give explanation of their decisions in so artificial a manner as to insure, to the maximum, the concealment from the judges and others of judicial biases and predilections, and from others of judicial laziness, ignorance, or crookedness (when such unfortunate factors exist).¹⁰¹⁴

As I read through the 99 principal cases Manohan and Walker analyzed in their text, I could identify in reality with what they meant in the above quote as there were moments in my decision-making process as a magistrate that I believed the law was unfair, or that the stipulated statutory requirement did not fit the justice of a pending case, yet I had to, (as Manohan and Walker, opined above), in so artificial a manner apply and submit on a law I did not agree served the justice of the case.¹⁰¹⁵ As my JS 735 class analyzed these cases together, Marsh made several arguments that stood out, but most directional towards my conceptual train of thoughts are the following:

1. "It is important to note what happens in the ivory tower and what indeed happens in real

¹⁰¹⁴ Ibid

¹⁰¹⁵ We will return to this discussion later in this chapter. Informant 2 also narrated her dilemma in this regard in the Al Mustapher case.

court.”¹⁰¹⁶

2. “We may not get definite answers, but it would be worth getting the science input to the legal perspective.”¹⁰¹⁷

3. “Can the social scientist predict what the judge’s role is”¹⁰¹⁸

4. “The challenge with this is that community standards have not been defined. Judicial discretion plays a major role here.”¹⁰¹⁹

5. “The law has not caught up with the times, so the opportunity to do that can be from the court. There are outdated laws, and the law should be fluid to meet the needs of the people.”¹⁰²⁰

The above words got me thinking about an objective argument that is devoid of law and its technicalities; one that focuses on society and democracy. I juxtaposed Marsh’s views with Monahan and Walkers quote above and I created the name “objectivism” Which I defined as a balance between realism and formalism. I started to research on this term as a theory I was hoping to propose to the quagmire affecting judicial roles in Nigeria, but I

¹⁰¹⁶ Day 1 of lecture JS 735 notes (Monday, January 9, 2017)

¹⁰¹⁷ Ibid

¹⁰¹⁸ Ibid

¹⁰¹⁹ Day 2 of JS 735 lecture notes (Tuesday, January 10, 2017)

¹⁰²⁰ Day 3 of JS 735 Lecture notes (Wednesday 11, 2017)

discovered that Ayn Rand (1905-1982) had propounded the objectivism philosophy.¹⁰²¹ According to Rand, the objectivism theory is based on reality existing independently of our consciousness, and that we have to use our senses and logical thinking in order to develop ideas, perceive the world, and interact with it and other people.¹⁰²² Although Rand's philosophy was not produced from a judicial perspective, it somewhat connects from a social context. There was no need to reinvent the wheel, so I started thinking of another name that captures the essence of courts and social needs and interests, a name that explains the intermediate role connecting law to society, and that combines my years of socio-judicial perceptions with Monahan and Walker's arguments and Marsh's five reasonings. Then I ventured created on the research question – what roles do courts play in the society/ what is the role of judges in a democracy?

Therefore, the basic idea of the concept originated from my JS 735 winter, 2017 class,¹⁰²³ and I only came up with the name “socio-judicialism/socio-judicial theory” in 2019 as I made recommendation for my thesis. My consideration for a name captured the

¹⁰²¹ According to Ayn Rand objectivism is a comprehensive liberal philosophy, which revolves around living on earth and focuses on the right of human beings to life and peaceful living, as well as our enormous creative and productive potential.

¹⁰²² Neera K. Badwar, “Ayn Rand,” Stanford Encyclopedia of Philosophy (2010)https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwi2xqWAhPLvAhXIHZQIHbokCowQFjAQegQIIRAD&url=https%3A%2F%2Fplato.stanford.edu%2Fentries%2Fayn-rand%2F&usg=AOvVaw1PfayPm5NVvrTTpnu_agL6

¹⁰²³ Law and Social Sciences class, January 2017.

social perspectives of law and justice and how these affects judicial roles or how judicial roles impact social perception of courts/judges. According my first proposal of this theory in my thesis read as follows:

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.¹⁰²⁴ 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-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 programmed into them.¹⁰²⁵

I named this theory after diligent, tenacious global research on major search engines that it has not been used in the context of judicial development as in this dissertation. Since 2019,¹⁰²⁶ I only became confident with this theory in spring 2020, after taking over 20 classes in judicial studies,¹⁰²⁷ and presenting it before very skeptical Nigerian judges and

¹⁰²⁴ See introductory quote of this chapter

¹⁰²⁵ Tobi-Aiyemo, *The Act of Judging*, opcit: 130-131.

¹⁰²⁶ I intend to still research until I turn in my dissertation for graduation. So My search for whether this theory exist prior to mine or whether another person has written about it within the judicial context, will continue until April 30, 2021.

¹⁰²⁷ The major ones include General Jurisdiction; Media and Courts; Judicial Writing; When Justice Fails; Theories of jurisprudence I and II; Ethics and Judging; Decision making; Scientific Evidence and Expert Testimony; Selected Criminal Evidence; Special Courts Jurisdiction Advanced; Language and Judicial Process; Criminology, Public Policy and the Courts; Medical

American judge classmates in the judicial studies program.¹⁰²⁸ The name socio-judicialism and socio-judicial theory is my coinage combining sociology and judiciary. In other words, this theory also means the sociology of the judiciary. It marries law and sociology. The ‘socio’ part of the name represents social, society, the people– the most vital factor of democracy, while the ‘judicial’ aspect represents judicial development.

Research Attempts on Prior use of the Socio-Judicial Theory

Even though I had settled for a name and know that this theory is my coinage, I continued researching after my thesis, to be sure that no theory exists defining the judicial role/dilemma context.¹⁰²⁹ I spent most part of February 2020 and all through March 2020 in conducting exhaustive searches/reviews of the literature to assess if others had proposed/named a similar theory/conceptual framework. My search continued in 2021. I also reached out to the University of Nevada, Reno Mathewson-IGT Knowledge Center and the social science Librarian replied: “...as for your search, it seems like the term "socio-judicial" is fairly rare. When I searched only that in OneSearch, I got just 369 results, 272

Legal Issues, Law and Social Sciences, Advanced Evidence,

¹⁰²⁸ Most of them, like my informants believed that I would jettison the idea of socio-judicial justice soon as they know that judicial roles are from my arguments and that judges are not agents of social change.

¹⁰²⁹ I have searched on several search engines and I this theory is not in existence prior to my thesis.

of which were journal articles”¹⁰³⁰

Furthermore, I used every name or word that connects to the theory socio-judicial; socio-legal; socio-judicialism; sociology, sociology of law; judicial sociology. Although I stumbled on few articles that mentioned socio-judicial and judicialism, the words were not used as a theory or concept, but as arguments, procedures relating to other topics in law. None of these views or arguments relate to the role of judges/the judiciary in society/democracy. However, I will discuss two views that may be closely related to this theory.

The first is a study on the judicial treatment of juvenile sexual activities, of the Juvenile court of Angers, where France, Niget, Tre`panier, and Rousseaux, mentioned socio-judicial regulations regarding sexual violence committed by youth or children. They argued that the justice system was more interested in balancing the interests of families and communities than in truly recognizing the victim’s rights.¹⁰³¹ Although this article discussed judicial roles in treatment of juveniles, the authors did not write from a personal judicial perspective. Their discussion did not address the dilemma that judges encounter in the course of the trial or whether French laws gives the judge liberty or discretion to consider the victims’ rights.

¹⁰³⁰ Professor Teresa Schultz’s email message to author. March 24, 2021.

¹⁰³¹ Niget, D., Tre`panier, J., Rousseaux, X. (2018) *The Price of Virtue: The Socio-judicial Regulation of Juvenile Sexuality in France during the first half of the Twentieth Century*

The second research is Owen's view that judges engage in social theorizing on a routine basis, and that they arrive at some of their theoretical claims through a process of theorizing that has features in common with sociological theorizing.¹⁰³² She argues that the social theorizing of judges holds up a mirror to sociological theorizing. By recognizing and examining judicial social theorizing as a form of structured, social theorizing, we aim to facilitate a clearer understanding of the social conditions enabling (and constraining) the production of social theory within the judiciary. Owen's idea is close to the SJT, as I connect sociological theory with judicial theory. However, this idea like the previous are not theoretical. In other words, the authors of both articles apply and reference the term socio-judicial as an adjective to explain a concept or research and not as a theory.¹⁰³³ In addition both authors do not discuss the life, role and challenges of judges.

Defining Socio-Judicialism

The socio-judicial theory is a multifaceted theory that covers the roles of judges in society. This theory is the realization, practicality and execution of justice in society

¹⁰³² B.R. Owens, L. Ford, L. Judicial Social Theorizing and Its Relation to Sociology. *Qual Social* 42, 229–249 (16th February 2019). <https://doi.org/10.1007/s11133-019-9409-3>

¹⁰³³ A Socio-Judicial Analysis of Ayadoha Verdict

https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjLoun2rePvAhVCn-AKHRwTDBk4WhAWMAN6BAgEEAM&url=https%3A%2F%2Feconomictimes.indiatimes.com%2Fblogs%2FUndertheinfluence%2Fa-socio-judicial-analysis-of-the-ayodhya-verdict-to-be-referred-to-henceforth-as-the-ram-mandir-title-suit%2F&usg=AOvVaw1I_gbYrvEzVQI3o2eJBLX6

according to the changes that accompany social interests, needs and traditions of a peculiar people or society. It is the realization that law has a human face, and that justice is when judicial decisions impact social change. It is the practical application of judicial role as the stipulated law and procedures would permit, to ensure social change, yet with empathy. Socio-judicial empathy is a key word in this theory as it stipulates that, judges can apply judicial empathy in dispense justice according to the law and still not breach ethical codes.

Per Pats Achoilonu, JSC in *Magit v. University of Agriculture, Makurdi & Ors*¹⁰³⁴:

It is said that the function of the court is to interpret laws made by the legislature and not to make laws. In theory that is so. But it must equally be admitted that judges are not robots (or zombies) who have no minds of their own except to follow precedent. They are intrepid by their great learning and training and can distinguish in order to render justice to whom it is due. As society is eternally dynamic and with fast changing nature of things in the ever-changing world and their attendant complexities, the court should empirically speaking situate its decisions on realistic premise regard being had to the society's construct and understanding of issues that affect the development of jurisprudence.

In reality statutes do not grant judges much liberty to consider public interests, though sometimes inadvertently they take both the law and society into consideration when adjudicating. Thus, judges often dissect literal and 'expected' or liberal meanings of the law in pending cases, to give appropriate interpretations, while also applying social perspectives in interpreting laws. This theory is about judicial interpretation corresponding

¹⁰³⁴ *Magit v. University of Agriculture, Makurdi & Ors* (2005) LPELR-1816(SC) pp. 61-61, para E-A.

with relevant times and contemporary relevant social views and interests, while taking into consideration judges' dilemmas in interpreting the law. This theory exposes the humanity of judges/the human face of law, even though the status quo in judicial parlance maintain the argument that judicial roles have nothing to do with human sentiments and perceptions (All eight informants also believe so). Hence, this theory suggests an answer to the question: how can judges balance their humanity with the societal expectations and still perform their democratic roles?

Even though the socio-judicial theory is similar to objectivism, realism, sociological and purposivists views, it is different and adds jurisprudence to the existing philosophy. This theory reinforces the philosophy that the court is a bridge between society and law, so it is pertinent that judges consider that in adjudicating. This theory specifies the role of judges to help bridge the gap between the needs of society and the law without technicalities and without allowing the legal system to degenerate or collapse into anarchy. The judge must ensure stability with change and change with stability.¹⁰³⁵ As society advances and changes, new dilemmas will ensue and so will the life, role and challenges of judges. According to Izunwa most legislation are based on circumstance. As a result, when the circumstance of time, place, understanding and perhaps eventualities that occasions the legislation changes, then the law must be modified to address the current

¹⁰³⁵ Barack, op. cit. 11

situation.¹⁰³⁶

This theory also challenges the realistic application of the *ubi jus ibi remedium* maxim.¹⁰³⁷ The principle established in this maxim causes a dilemma for judges as Nigerian law does not always provide a remedy when there is a wrong. The SJT postulates that where the law provides no remedy for a wrong, judges should improvise a remedy in the interest of justice, within statutory limits. However, it is not always realistic for judges to improvise a remedy where the law does not, because judges' roles are often misunderstood and criticized as lawmakers when they do not make laws.

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. It reinforces that judicial interpretation corresponds with relevant times and contemporary relevant social views and interests, while taking into consideration judges' dilemmas in interpreting the law. This theory exposes the humanity of judges/human face of law, even

¹⁰³⁶ Maurice. O. Izunwa, "Basic Proposal for Judiciary's Effectiveness in a Democracy: Nigeria as a Case Study." *Unizik Law Journal*, Vol. 7 No: 1 (2010): 127-340 at 336.

¹⁰³⁷ This is a fundamental right to a remedy that all legal systems historically recognize. It means 'where there is a right, there is a remedy.' In other words, where law has established a right there should be a corresponding remedy for its breach. Unfortunately, this is not always the case in Nigeria's reality. The law has not provided a corresponding remedy for the fundamental right stipulated in Chapter 2 of the Constitution. Hence, judges encounter a dilemma in attempting to justify this principle.

though the status quo in judicial parlance maintains the argument that judicial roles have nothing to do with human sentiments and perceptions.

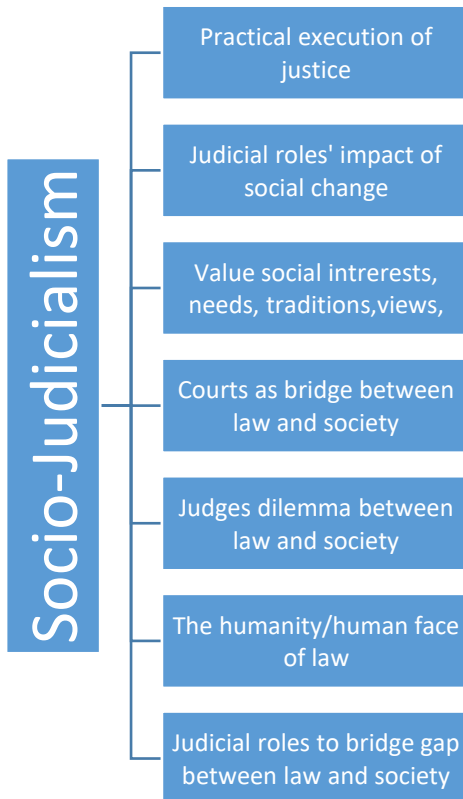


Diagram 4: Conceptual Diagram

The Five Principles of Socio-Judicialism

The Principle of Social Impact

It explains the value of society in democracy, and how judicial roles should reflect such value. *Okoroafor v The Miscellaneous Offences Tribunal*,¹⁰³⁸ states that “courts are wont to construe provisions in the statute in a manner that would be beneficial to the over-

¹⁰³⁸ *Okoroafor v The Miscellaneous Offences Tribunal* (1995) 4 NWLR (pt. 387) 59 at 75

all interests of the society and tend to view with askance any tendency to a construction that would not stand the test of justice, or which may be regarded as an affront to reason, decency and decorum.” Also, according to Chief Justice Brennan of Australia:

A judge's role is to serve the community in the pivotal role of administering justice according to law. Your office gives you that opportunity and that is a privilege. Your office requires you so to serve, and that is a duty. No doubt there were a number of other reasons, personal and professional, for accepting appointment, but the judge will not succeed and will not find satisfaction in his or her duties unless there is a continual realization of the importance of the community service that is rendered.¹⁰³⁹

The above quote emphasizes the keyword in this theory—community/society/the people. The law and statutes impact change in society, and there is no enduring social change without the court’s validation. A constant attribute of society is change. Society changes as law should inevitability change.¹⁰⁴⁰ Unfortunately as I have repeated throughout this work—some Nigerian laws are still archaic. According to Izunwa “A number of legislations in Nigeria in their present form and constructions belong to antiquity and should be changed. This is necessary for the judiciary to successfully administer justice by reference to such laws. We find such laws in the Constitution, the statutes, as in the

¹⁰³⁹ Sir Gerard Brennan, Chief Justice of Australia, addressing the National Judicial Orientation Program, Wollongong, Australia, 13 October 1996,

¹⁰⁴⁰ Barack, *op. cit.* 11

criminal code, the various Acts of the National Assembly and laws of states.”¹⁰⁴¹

This principle takes into account the changes in society, diversity in cultures. It presupposes that the courts should consider social diversities and changes in interpreting statutes.

The Humanity Principle or Socio-Judicial Empathy

Law has or should have a human face. Although the objectivity principle makes judges deny—or remember they are human and must work to remain objective, the role of judges in a democracy seems to suggest and demand judicial empathy. In six years of research on this dissertation and specifically in analyzing the maiden of justice, I searched for answers to why the statute of justice is a female and not a male figure? Or why it is Greek goddess and not a Greek god? Although I did not see any answer to this question, I take the liberty extended on this academic platform to say that perhaps the attributes of a woman as emotional, considerate and more emphatic are the exact ideal attributes of justice.

Judges feel differently about empathy in law, while some believe law should maintain its *status quo* of firmness or high-handedness, others believe as the SJ theory presupposes that law should wear a human face. About three informants agree that judges should apply empathy is adjudicating, while the other five oppose it. The *status quo* stipulates as the

¹⁰⁴¹ Izunwa, op. cit.

courts said in *Okpe v Fan Milk Plc.*,¹⁰⁴² that sentiments or sympathy have no place in law. Also, the Supreme Court says “...a court of law should not only temper justice with mercy but what is sometimes vitally important, it should also temper mercy with justice.”¹⁰⁴³ However, according to the same Supreme Court in *Omoju v. FRN*,¹⁰⁴⁴ “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 in our law. It pays to follow it as it brings invaluable dividends in any legal system anchored or predicated on the rule of law, the life blood of democracy.” Unfortunately, the diverse views of the courts on judicial empathy create a dilemma in judicial administration.

The Principle of Justice, Equity and Good Conscience

The SJT argues that the fundamental role of judges to administer justice in society is based on equity and good conscience. First of all, justice should be as the people understand it, and not as the judge understands it or as some laws stipulate. If justice is as the law or judges understand it, then when society changes, the law and the courts will be of no value to the society or the operating community, if the law remains static. Justice,

¹⁰⁴² *Okpe v Fan Milk Plc.* (2017) 2 NWLR (pt.1549) 282 at 310, B-C

¹⁰⁴³ *Kajubo v State* (1995) 1 NWLR (pt.73) 721 at 738

¹⁰⁴⁴ *Omoju v. FRN* (2008) LPELR-2647(SC)

like beauty, is in the eyes of the beholder. Hence the court held in *Fawehinmi v Akilu*,¹⁰⁴⁵ “it must be borne in mind that implicit in the judgment of any court is the fact that the public will carefully, mercilessly and pitilessly scrutinize, and methodically weigh any judgment given whether it is in accord with fair play as could be acceptable to the right-thinking members of the society.”

Secondly, equity must act for a purpose,¹⁰⁴⁶ and that purpose should be the community. According to *Oputa JSC* “... justice is not a one-way traffic...It is really a three-way traffic— justice for the appellant accused of a heinous crime of murder; justice for the victim, the murdered man, the deceased... and finally justice for the society at large – the society whose social norms and values had been desecrated and broken by the criminal act complained of...” Equity is the balance of the scale where justice spreads across both parties whether or not they win the case and then trickles down to society,. This theory presupposes that equity does not cheat society of the dividend or outcomes of a lawsuit that initiates social change.

Thirdly, SJT advocates for judges to apply good conscience in adjudication because judges’ conscience is partly of their personality that play a fundamental role in their exercise of discretion. Judicial good conscience hinges on judge’s morality in decision-

¹⁰⁴⁵ *Fawehinmi v Akilu* (1994) 6 NWLR (pt. 351) 387 at 474, B-C

¹⁰⁴⁶ *Okpala v Okpu* (2003) 5 NWLR (pt.812) 183 at 215, H

making. The court in *FDB Financial Services Ltd v Adesola*,¹⁰⁴⁷ explains it suitably that “Equity always inclines itself to conscience, reason and good faith and it implies a system of law imposed to a just regulation of mutual rights and duties of man, in a civilized society; our own society, is not an exception to that envisaged civilized society.”

The SJT carries the spirit of justice that identifies the individual, society or community as part of the substratum of democracy. In *Salami v Bunginimi*,¹⁰⁴⁸ “the spirit of justice does not reside in the formalities or words, nor is the triumph of its administration to be found in successfully picking a way between the pitfalls of technicality. After all, the law is, or ought to be but the handmaid of justice, and flexibility, which is the most becoming robe of (law), often serves to render (justice) grotesque.” According to *Buhari v Obasanjo*,¹⁰⁴⁹ “the aim of justice is to discover truth and apply same so as to give meaning to the life of the society.” How do you give meaning to society when the standard of truth means different things to different people, and what the court considers as truth based on available evidence is and may not be truth in the real sense to society?

Therefore, discovering truth as justice or truth as statutes define with evidence is another dilemma this theory proposes to address. Hence this principle explains the value

¹⁰⁴⁷ *FDB Financial Services Ltd v Adesola* (2000) 8 NWLR (Pt. 668) 170 at 182, G-H

¹⁰⁴⁸ *Salami v Bunginimi* (1998) 9 NWLR (pt.565) 235 at 243

¹⁰⁴⁹ *Buhari v Obasanjo* (2005) 13 NWLR (pt..941)1 at 281

of creating new precedent where the justice of the case requires so, according to social truth.

The Principle of the Preamble

Most people including judges often overlook this introductory part beginning of the Constitution and go straight to the main sections of the Constitution. The preamble of every Constitution wears the burdens, hopes, interests and agenda of the people. The principles of a society are entrenched in the Constitution's preamble that forms or governs that society. Thus, the preamble of the CFRN wears the spirit of the Nigerian people.¹⁰⁵⁰ The preamble expresses the drafters' intention that judges often rely on to interpret statutes. The SJT directs that in attempting to ascertain drafters' intentions while interpreting statutes, judges should study and understand the preamble of the Constitution or any other relevant statutes and comply with the language when interpreting statutes.

In so doing judges will understand the mind of the drafters through the language in the preamble. According to *Okhae v Governor Bendel State*,¹⁰⁵¹ the court cannot construe any of the provisions of the Constitution to defeat the obvious ends that the Constitution

¹⁰⁵⁰ The preamble reads: "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 solidarity, world peace, international co-operation and understanding; AND TO PROVIDE for a Constitution for the purpose of promoting the good government and welfare of all persons in our country on the principles of Freedom, Equity and justice, and for the purpose of consolidating the unity of our purpose: DO HEREBY MAKE AND GIVE TO OURSELVES the following Constitution..."

¹⁰⁵¹ *Okhae v Governor, Bendel State* (1990) 4 NWLR (pt. 144) 327 at 356

was designed to serve. The courts can only determine the obvious ends of the Constitution from the language of its preamble.

The Principle of the Living Law

When something lives, it means it has life and needs something else to survive or develop. If the law lives it means it needs support and enrichment, otherwise it can die. A law dies when it has no value in society. This principle gleams from the Bible stories where the Lord Jesus broke the law of the Sabbath and he argued that “...the Sabbath was made for man, not man for the Sabbath...”¹⁰⁵² This Bible story narrates how Jesus performed what his discretion considered just in the interest of the people – he healed different people on the Sabbath against the stipulated rules.¹⁰⁵³ Then he tried to explain to his critics the principle of the living law,¹⁰⁵⁴ that the people/society were sacred to God, not laws or rules.¹⁰⁵⁵ In other words, the law was made for man, not man for the law, so the law should

¹⁰⁵² Mark 2:28 Hebrew Holy Bible, NIV Version.

¹⁰⁵³ Mark 2:23-28 “23 One Sabbath Jesus was going through the grainfields, and as his disciples walked along, they began to pick some heads of grain. 24 The Pharisees said to him, “Look, why are they doing what is unlawful on the Sabbath?” 25 He answered, “Have you never read what David did when he and his companions were hungry and in need? 26 In the days of Abiathar the high priest, he entered the house of God and ate the consecrated bread, which is lawful only for priests to eat. And he also gave some to his companions.” 27 Then he said to them, “The Sabbath was made for man, not man for the Sabbath. 28 So the Son of Man is Lord even of the Sabbath.”

¹⁰⁵⁴ Ibid

¹⁰⁵⁵ Mark 3:1-6 “Another time Jesus went into the synagogue, and a man with a shriveled hand was there. 2 Some of them were looking for a reason to accuse Jesus, so they watched him closely to see if he would heal him on the Sabbath. 3 Jesus said to the man with the shriveled

live and operate in society as society lives and should change as society changes.¹⁰⁵⁶

Since even the Lord Jesus broke the law of Sabbath in the interest of ‘the people’,¹⁰⁵⁷ the SJT advocates that judges be flexible and comply with the new realities in society. This theory argues that if judges are strict slaves to the law, they will perpetrate injustice in society. The Supreme Court agrees in *Chinwendu v Mbamali*¹⁰⁵⁸ that the courts should always take care not to sacrifice justice on the altar of technicalities, as the time is no more when courts settle disputes on technical grounds rather than on merit. This living law principle also reiterates changes in society and stipulates that the law should recognize social needs and changes, just like the court in *Nwaigwe v Okere*.¹⁰⁵⁹ In this case, the court held:

“Husband and wife, given the changes sweeping across our society today, in so far as the rights and duties to make financial provisions are concerned, albeit in theory, are gradually moving towards equal footing base. Many wives are today more financially empowered than their husbands. And so the courts are fast moving away from the

hand, “Stand up in front of everyone.” 4 Then Jesus asked them, “Which is lawful on the Sabbath: to do good or to do evil, to save life or to kill?” But they remained silent. 5 He looked around at them in anger and, deeply distressed at their stubborn hearts, said to the man, “Stretch out your hand.” He stretched it out, and his hand was completely restored. 6 Then the Pharisees went out and began to plot with the Herodians how they might kill Jesus.”

¹⁰⁵⁶ Citation from author on maiden of justice

¹⁰⁵⁷ Holy Bible Mark 2:27

¹⁰⁵⁸ *Chinwendu v Mbamali* (1980) 3-4 SC 31 at 80-81

¹⁰⁵⁹ *Nwaigwe v Okere* (2008) 13 NWLR (pt.1105) 445 at 479, C-D

old rule whereby they virtually ordered financial provisions in favor of the wife. Law, to be useful must always reflect the norms and development stages reached in a society where it will apply.¹⁰⁶⁰

Therefore, in situations or circumstances requiring judges to fill the gap and cover up an inadequate law to benefit social interests, SJT advocates that the law takes a back seat, while society, judicial empathy/humanity, justice, equity and good conscience, the intent of “we the people” and the living law, takes the front row.

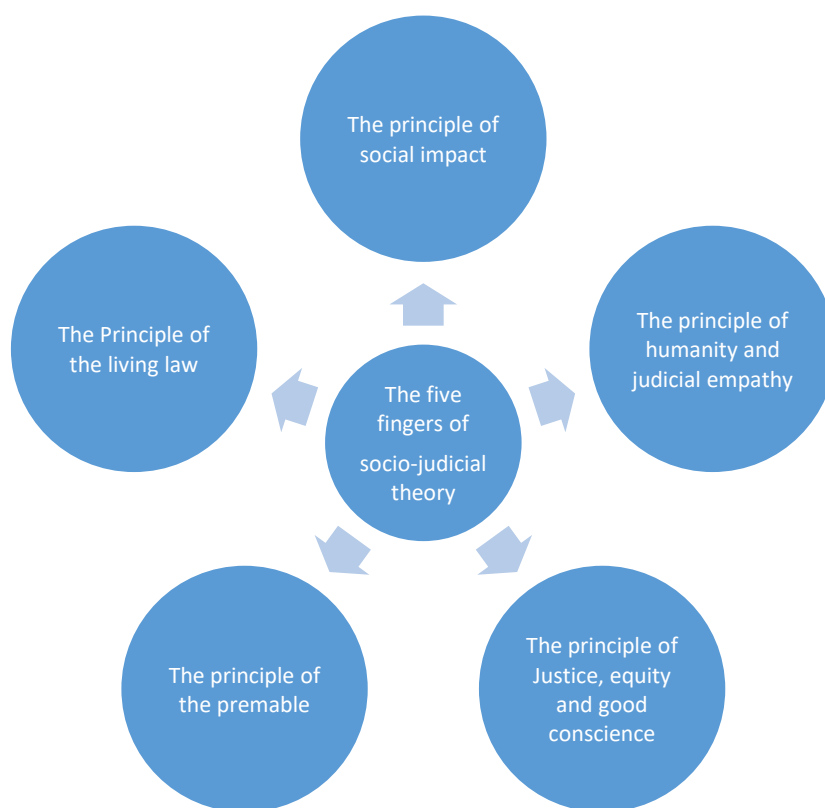


Diagram 5: The Five fingers of SJT

Socio-Judicialism in the Nigerian Judiciary

Chapter ten explained how it seems formalism defines judicial philosophy in

¹⁰⁶⁰ This decision took into consideration the patriarchal nature of the Nigeria society.

Nigerian courts. Thus, it will be appropriate to say judging in Nigeria applies the Scalia approach, which is that interpreting the law should follow its natural and textual form.¹⁰⁶¹ Most judges in Nigeria agree with Scalia's argument that the text is the law and it is the text that must be observed.¹⁰⁶² A few judges who are the exception apply the Sotomayor/Ginsburg approach of realism.¹⁰⁶³ These exceptions believe that judging should exceed the text of the law and consider social interests. The SJT like the realist school of thought believes that there is more to judging than the laws requires and that Nigerian judges should apply the 'living law' in judging. The question in this section is how does the SJT relate to judging in Nigeria or to the judiciary's democratic role in Nigeria? In answering this question, I will present case law on how the courts directly or indirectly applied or used the SJ approach in their reasoning and decision-making.¹⁰⁶⁴

First, on the value of society in judicial roles, the court in *Guardian Newspaper Ltd v A.G., Federation*,¹⁰⁶⁵ said "law in Africa must be conceived of and evaluated in terms of

¹⁰⁶¹ Antonin Scalia, "Common-Law Courts in a Civil-Law system: The Role of United States Federal Courts in Interpreting the Constitution and Laws." New Jersey: Princeton University Press, .1995):3-47, at 38

¹⁰⁶² Ibid: 22

¹⁰⁶³ The realist view opposes the formalist view of strict interpretation of statutes

¹⁰⁶⁴ I will review the above five principles of the theory and see how Nigerian courts address them.

¹⁰⁶⁵ Supra

its social purpose, function and the value system, the spirit of the time, the tempo of socio-economic and political development in the new states, and above all, the greatest happiness of the masses should be the main guiding principles underlying legal development.” Also, in *Effiom v State*,¹⁰⁶⁶ the Supreme Court emphasizes “while it is obligatory on the Courts to give meaning to the provisions of the fundamental human rights entrenched in our Constitution, the Court must balance it against the equally compelling for public justice.” The public is key to the actualization of SJT, as *Guardian Newspaper Ltd v A.G. Federation*,¹⁰⁶⁷ states that “justice would lose its ethical or moral meaning and sink to a mere charitable treatment of the enslaved and the oppressed by those in power, without the involvement of the people in designing their legal system.”

Secondly, some Nigerian judges acknowledge the human factor through their dissenting opinions, the important exercise of judicial discretion or even obiter dictums/cursory remarks about the case. There have been situations where I had to battle with my humaneness in adjudicating.¹⁰⁶⁸ Since my decision as a magistrate does not reflect

¹⁰⁶⁶ *Effiom v State* (1995) 1 NWLR (Pt..373)507 at 617, C

¹⁰⁶⁷ *Guardian Newspaper Ltd v A.G. Federation* (1995) 5 NWLR (pt. 398)703 at, F-G

¹⁰⁶⁸ In a case that required the conviction of an old woman who assaulted her unruly/criminal tenant’s son, in self-defense. The son of her tenant was accused of entering into other tenant’s homes thorough their ceilings to steal from them. These tenants made several complaints to the defendant (the old lady), who also cajoled, begged and also threatened the tenant of eviction if his son does not desist. However, in her goodness she did not want to evict the father because of his son’s ills. So, she was in a dilemma on losing her other tenants because this unruly man son would not take several warnings and also of losing her only sauce of income as a senior citizen without pension or alternative income. So, she asked some equally strong street men to evict him

precedent being a lower court's decision subject to reversal, I will cite two precedential decision that show judges' humanness and empathy and although the law requires them to adhere to stipulated rules, their human perspectives show up in their decision-making. In the first case *African Petroleum Ltd v Owodunni*,¹⁰⁶⁹ Nnaemeka Agu JSC submitted as follows:

Before I consider the first issue, I would like to make an observation. The defendant's employment with the plaintiff was terminated on the 24th of November 1977. Since then, that is for a period of fourteen years, the defendant has remained in possession of the premises he occupied essentially by reason of his employment with the plaintiff. The plaintiff has all through by itself and through its counsel, tried to get him out of the premises. But he still lives there. Since counsel came into the matter some twelve years ago, eight different notices to quit or of intention to go to court have been issued and on-two occasions notices issued and served have been canceled.... But once more the plaintiff must fail again because of its failure to serve correct and proper notices. This is sad. The law, it has been said is an ass. And the unruly ass must keep galloping along so long as litigants refuse to follow simple rules clearly laid down by statute. This is of the very nature of justice according to law: and the courts must take the blame! Be that as it may, the two courts below were right to have held the defendant's tenancy had not been determined according to law and that the defendant could remain in possession until that is done.¹⁰⁷⁰

from her premises and they assaulted him in the process. In her plea, and subsequent testimonies before me, it was clear she was ignorant of the law, but that was no excuse. The penalty for her offense was seven years imprisonment and I asked myself a few questions in considering the penalty, which was inevitably a conviction as the law required. However, I did not sentence her to prison as statutorily required. I stated my reasons in the interest of justice. This was one of the toughest cases I have handled as a judge.

¹⁰⁶⁹ *African Petroleum Ltd v Owodunni* (1991) 8 NWLR (pt.210) 391 at 416-417.

¹⁰⁷⁰ *Ibid*

In the above case, the judge expressed his humanity, as much as he believed the tenant had taken undue advantage of the law and the owner of the premises was denied justice based on technical grounds, he had to comply with the law. In the second case *Okeke v Sate*,¹⁰⁷¹ *Niki Tobi, JCA* also lamented as follows:

There could be cases where a trial judge and indeed an appellate judge may have very strong feelings that the offence was committed but that strong feeling should not be the basis of convicting the accused person. Judges have a duty in the enforcement of judicial process to reject the dictates of their inner instinctive feelings, listen, tow and obey the line and position of the law and the law alone. There are instances when the latter situation makes the law and ass but there is nothing, we can do about it as we are paid to interpret the law and not morals. On the lighter side, it is the law, which is an ass, we are not....¹⁰⁷²

In both cases, the judges' self-scrutiny shows how they sacrificed their own thought-ways to give explanation of their decisions in "so artificial a manner," that complies with the law. The essence of this theory supports the argument that judges are humans and although the law requires them to adhere to stipulated rules, their human perspectives shows up in their decision-making. In emphasizing this Aguda said:

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

¹⁰⁷¹ *Okeke v Sate* (1999) 2 NWLR (pt.590) 246 at 281.

¹⁰⁷² *Ibid*

humanly applied law than at present.¹⁰⁷³

Thirdly, Pats-Acholonu, JSC explains the third principle of justice, equity and good conscience, when said “I believe that law and justice should at all times be the mirror by which the society gauges how administration of justice devoid of all technicalities, or reliance on old hackneyed disputable mumbo expressions, is readily understandable and appreciated by a person in the street.”¹⁰⁷⁴ The pursuit of justice is yet another dilemma judges encounter in the cause of their judicial roles. The attempt to do all that they legitimately can to avoid or change a rule that impairs the doing of justice does not only frustrate judges who have to cover up an eminent gap to ensure social justice. The *Mojekwu v Mojekwu*,¹⁰⁷⁵ judgment that nullified an age-old custom that discriminated against a woman and denied her inheritance right over her father’s estate on the basis of her sex is an example of the judge applying a socio-judicial approach that empowers women’s rights to inheritance in Nigeria.

Fourthly, in explaining the principle of the preamble,¹⁰⁷⁶ the court in *Ushae v COP*,¹⁰⁷⁷ said “by its very nature a Constitution must always be construed in such a way

¹⁰⁷³ Aguda, opcit:43

¹⁰⁷⁴ Adava’s case (supra)

¹⁰⁷⁵ Supra,

¹⁰⁷⁶ Nigeria keeps changing the Constitution’s preamble based on the changing times.

¹⁰⁷⁷ *Ushae v COP* (2005) 11 NWLR (pt.937) 499 at 524, H

that it protects what it sets out to protect or guide what it sets out to guide.” The preamble speaks the language of democracy which is the most common phrase that introduces many democratic Constitution across the globe “We the People....”. Somehow, even when most Nigerian judges are ardent formalists, they inadvertently agree that society is fundamental to just adjudicating. *Ogbonna v. Attorney General of Imo State*,¹⁰⁷⁸ “it is necessary to note that the preamble to an enactment is, as it were, its preface or introduction the purpose of which is to portray the interest of the framers and the mischief they seek to remedy. It may sometimes serve as the key to open the understanding of the enactment....” Although justice Apakpa in the above judgment said the preamble is not part of the Constitution, he agreed that the preamble adds value to the Constitution when he said “there is no doubt that the preamble of a constitution or a statute has its usefulness. It usually states or professes to state the general objectives and intention of the law makers and purposes of the enactment ... In effect, in the preamble the lawmaker’s chart for themselves a path to a preconceived destination.”¹⁰⁷⁹

Furthermore, Kanyip gave a vivid explanation of how he interpreted the preamble the African Charter in *Infinity Tyres Limited v. Mr Sanjay Kumar & 3 ors*, as follows:¹⁰⁸⁰

¹⁰⁷⁸ *Ogbonna v. Attorney General of Imo State* (1992) 1 NWLR part 220: 647, 671

¹⁰⁷⁹ Ibid

¹⁰⁸⁰ *Infinity Tyres Limited v. Mr Sanjay Kumar & 3 ors* (unreported Suit No. NICN/LA/170/2014) judgment of which was delivered on 11th July 2018.

The question was whether the 1st defendant, a foreigner (an Indian to be specific), can take the benefit of The African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, which enforced the provisions of the African Charter on Human and Peoples' Rights as set out in the Schedule to the Act, Article 15 of which provides thus: "Every individual shall have the right to work under equitable and satisfactory conditions and shall receive equal pay for equal work". The Preamble to the African Charter on Human and Peoples' Rights talks of "essential objectives for the achievement of the legitimate aspirations of the African peoples" and "the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence", thus suggesting that the rights inure to Africans. My intuition told me that the Indian cannot rely on this Charter. I searched through the maze of case law authorities until I stumbled on *IGP v. ANPP*, where Her Ladyship Adekeye, JCA (as she then was) stated thus:

The African Charter is an understanding between concerned African States to protect the human rights of their citizens within the territorial jurisdiction of their countries. It is now part of the domestic laws of Nigeria and like all other laws, the court must uphold it.

I capitalized on the phrase "to protect the human rights of their citizens within the territorial jurisdiction of their countries" used by Her Ladyship and so held that "the 1st defendant cannot rely on Article 15 of the African Charter on Human and Peoples' Rights to make any claim."¹⁰⁸¹

Finally, on the fifth principle of the living law was further accentuated in *Broad Bank of Nig. Ltd v Olayiwola*,¹⁰⁸² as the court said, "it is the duty of courts to use its powers to discover the true intents of the law and do justice and not to destroy them unless the words used convey a meaning that obscure the true intentions of the statute." Also, the

¹⁰⁸¹ Kanyip, opcit: 15

¹⁰⁸² *Broad Bank of Nig. Ltd v Olayiwola* (2005) 3 NWLR (pt. 912) 434 at 458, H

court in *Houtmangracht v Oduba*,¹⁰⁸³ said “...in a young and developing democracy like ours, the court must understand certain factors that affect the society and adopt laws to social conditions and set up. It must be responsive to the needs of the time and be accommodating to be respectful not only in this country but in other countries as well.”

Prospects of Socio-Judicialism in Nigeria

This theory is extremely controversial. I am not oblivious of the impending oppositions to my propositions. There will be arguments that this theory is not feasible or testable. Many will argue (especially judges and lawyers), that it is a pseudo-theory, merely a personal opinion based on unrealistic expectations. Therefore, in accordance with Popper’s work in *Conjectures and Refutations*,¹⁰⁸⁴ I will analyze and review the SJ theory by outlining its strengths and constraints in the judiciary – whether it is a truthful or acceptable theory.¹⁰⁸⁵ Then I will conclude with a stand on the feasibility of this theory in the Nigerian judiciary and its eventual impact on democracy in Nigeria.

SJT and Popper’s Conjectures and Refutations Theory

In opining about the creation of a theory, Popper argued as follows:

The way in which knowledge progresses, and especially our scientific knowledge, is by unjustified (and unjustifiable) anticipations, by guesses, by tentative solutions to our problems, by

¹⁰⁸³ *Houtmangracht v Oduba* (1995) 1 NWLR (pt.371) 295 at 311, E-F

¹⁰⁸⁴ Popper, *opcit*

¹⁰⁸⁵ *Ibid*, 2

conjectures. These conjectures are controlled by criticism; that is, by attempted refutations, which include severely critical tests. They may survive these tests; but they can never be positively justified: they can neither be established as certainly true nor even as 'probable' (in the sense of the probability calculus). Criticism of our conjectures is of decisive importance: by bringing out our mistakes it makes us understand the difficulties of the problem which we are trying to solve. This is how we become better acquainted with our problem, and able to propose more mature solutions: the very refutation of a theory—that is, of any serious tentative solution to our problem—is always a step forward that takes us nearer to the truth. And this is how we can learn from our mistakes.¹⁰⁸⁶

From the above quote, Popper opines that our views or opinions are based on what we believe, which can be opposed with counter beliefs or reasoning. Thus, establishing a theory is like a revolving cycle where a theory emanates from the author's criticisms of preexisting beliefs and views, and consequently, the new theory, when established revolves through similar circle of refutation that creates conjectures that makes us to eventually learn from their mistakes. Popper argues that the more conjectural a theory is, the higher should be its degree of testability.¹⁰⁸⁷ Testable conjectures or guesses at any rate, are thus conjectures or guesses about reality; from their uncertain or conjectural character it only follows that our knowledge concerning the reality they describe is uncertain or

¹⁰⁸⁶ Ibid

¹⁰⁸⁷ Popper argued that admittedly, if we do not know how to test a theory, we may be doubtful whether there is anything at all of the kind (or level) described by it; and if we positively know that it cannot be tested, then our doubts will grow; we may suspect that it is a mere myth, or fairy-tale. But if a theory is testable, then it implies that events of a certain kind cannot happen; and so it asserts something about reality: *ibid*

conjectural.¹⁰⁸⁸

I believe a lot of people will argue like Popper that the SJ theory “...is a strange mixture of absurdity and truth. It is as absurd as the mistaken problem it attempts to solve; for it proves too much, being designed to prove too much.”¹⁰⁸⁹ So guided by Popper’s suggestions, I categorize my conjecture that developed from my belief and convictions as the strength of the SJT, while the refutations will be the constraints and criticisms against SJT.

The Strengths of SJT

1) The SJT emphasizes, echoes and upholds the courts’ value in society. Thus, the courts' significance as the primary agent of democracy will reappear and society will begin to appreciate the value and relevance of judges in society.

2) This theory brings to the spotlight the importance of defining the role of the judiciary/judges, which will assist judges in streamlining their primary function in democratic governance.

3) It redefines judicial roles and directs judges to focus on what is more important to democratic development.

4) This theory will enable society to understand judicial roles more and empathize with

¹⁰⁸⁸ Ibid: 117

¹⁰⁸⁹ Ibid: 95

judges who deal with diverse judicial dilemmas. Hence, people may stop questioning the judicial process, blaming and criticizing the judge/the judiciary for injustice, ignorance, or corruption.

5) This theory bridges the gap between law and society. Thus, law will be closer to the people, and they will obey it more to avoid chaos in society.

6) Judges will have more relief in executing their roles without stress and pressure to impress or satisfy a stipulated statutory requirement.

7) It enables lawmaking/policymaking, through a flexible procedure that connects with social change. Through new precedent, this SJT creates social change and development with relevant times.

Constraints/Critic of SJT

1) The status quo and rigidity of the law is an impediment to the acceptance and development of this theory. Also, the formalism approach will refute the feasibility of SJT.

2) Judicial resistance is a major impediment and likely refutation. Most of the time when change appears, the operators and probably prospective beneficiaries are the most antagonistic to change. In this regard, judges will resist its application.

3) Administrative restraints within the judiciary will refute the adoption of this theory. The judicial institution with its formalism approach and hierarchical procedure will resist

this theory as rebellious and contradictory to precedent.¹⁰⁹⁰

4) Critics of this theory will argue it is unrealistic and impracticable. Critics of this theory could also argue that the notion to redefine judicial roles as social change medium is unrealistic and impracticable, as judicial roles, in their opinion are static and straightforward.

According to Popper, this general problem of change is a philosophical problem. His raised a concern— “...how can a thing change, without losing its identity?”¹⁰⁹¹ If it remains the same, it does not change; yet if it loses its identity, then it is no longer that thing which has changed.”¹⁰⁹² Hence, critics of this theory will have the same concern as per judicial lawmaking, i.e., they may argue that applying socio-judicialism will cause judges to lose their identity as adjudicators to lawmakers.

I look forward to these refutations as they will enable further research and enable

¹⁰⁹⁰ Kanyip quoted Andrew Goodman outlined we need to take into account regarding precedent as: “Identify whether the issue is really a proposition of law or a question of fact; be aware that a court is more likely to follow precedent than depart from it, given the need for consistency; bear in mind that the law is tidal i.e. it has an ebb and flow and particular cases follow a pattern; conversely, look whether the judge is building a logical extension from an established principle; the court will rarely overturn a long-established legal concept. This is not absolute though; ask whether the case before you is on all fours with the precedent. Look out for the extent of similarity and dissimilarity of the material facts; ask whether the two cases illustrate the same principle(s); ask whether the authority is distinguishable....”

¹⁰⁹¹ This is a version of the “uncertainty principle” in quantum physics – the more precisely you measure “change” the less precisely you can measure “identity” – and vice versa.

¹⁰⁹² Popper, op. cit. 142

conjectures. According to Popper theories are our own inventions, our own ideas; they are not forced upon us, but are our self-made instruments of thought, as seen by the idealist.¹⁰⁹³

Thus, I agree with Popper that some of our theories can clash with reality; reminding us of our mistakes, which may eventually enable a review and further conjecture. The above restraints are the basic realities that check on the truth or feasibility of this theory.

The Feasibility of the SJT

This theory has been in existence in some other forms like the liberal view, realist view, the purposivists view, the pragmatic view, and the sociological view. It is not a new theory that just sprang up into Nigeria's judicial jurisprudence. The above cited cases prove how judges have applied the principles of this theory. It is no longer news that the changing circumstance 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 as judicial discretion influences judicial decisions.¹⁰⁹⁴

This theory does not expect judges to bridge every gap between law and society. I understand the many limitations, both substantive and procedural, are placed on the judges.¹⁰⁹⁵ As Barack says "on this matter as on many others, one must be realistic and

¹⁰⁹³ Ibid, 117

¹⁰⁹⁴ Ari Tobi-Aiyemo, *The Act of Judging*, op. cit. 108

¹⁰⁹⁵ Barack, op. cit. 18

understand both the judicial power and its limitations.”¹⁰⁹⁶ Therefore, liberal belief in the possibility of a rule of law, of equal justice, of fundamental rights, and a free society—can easily survive the recognition that judges are not omniscient and may make mistakes about facts and that, in practice, absolute justice is hardly ever realized in any particular legal case.¹⁰⁹⁷

Nevertheless, this theory is feasible in the Nigerian judiciary as the Nigerian courts are now more comfortable with exercising their inherent powers/roles.¹⁰⁹⁸ The most valuable role of courts in a democratic dispensation is the impact and influence judicial pronouncements have on the amendment/creation of policies and laws.¹⁰⁹⁹ Hence it was observed that the proper role of a judge is to do justice between 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

¹⁰⁹⁶ Ibid, 19

¹⁰⁹⁷ Popper, *op. cit.* 5

¹⁰⁹⁸ Five of the eight informants oppose the idea of this theory. They argue that courts will never apply empathy to judging. Three argue that empathy has always been part of judging, only expressed through discretion

¹⁰⁹⁹ An example of such policies is in Rule 1.6 of Code of Conduct of Judicial Officers of the Federal Republic of Nigeria (revised). The Code states that “A Judge shall not hold membership in any organization that discriminates on the basis of race, sex, religion, ethnicity, national origin or other irrelevant cause contrary to fundamental human rights and/or the Fundamental Objectives and Directive Principles of State Policy under the Nigerian Constitution.” This provision is an addition to the old Code that did not reference the fundamental objectives and directive principles. The inclusion is obviously because the courts have now left that place of strict adherence to the letters of the Constitution, to doing justice to the society as the circumstances and times demand

do all he legitimately can do to avoid that rule or even change it so as to do justice in the instant case before him."¹¹⁰⁰

We are in an era when robots are increasingly performing human jobs, and an era of a deadly virus has transformed judicial process in ways never imagined. We are fast moving to an era where robots will indeed take over most human jobs. Hence the law must always be up to date. However, no matter how good a law is, it is the beneficiaries of the law that determines its efficacy. So, where the law is inadequate or not as impactful in society, they approach the court for redress. Hence judges apply the socio-judicial theory to create redress and ensure justice.

So, like Jesus asked the overtly formalists teachers of the law in the second chapter of the book of Mark,¹¹⁰¹ I ask judges “which is more just to do in the interest of justice and posterity – to keep interpreting laws as if society were static and or to interpret laws from a socio-judicial perspective, where society constantly changes?”

¹¹⁰⁰ Oguntade, *opcit*: 4

¹¹⁰¹ See pages 360-361

Chapter 12: Conclusion

Whatever a judge does, he will most surely have his critics. If, in an effort to do justice, he appears to make new law, there will be cries that he is overweening and that he has rendered uncertain what had long been regarded as established legal principles. On the other hand, if he sticks to the old legal rules, an equally vocal body will charge him with being reactionary, a slave to precedent, and of failing to mould the law to changing social needs. He cannot win, and, if he is wise, he will not worry, even though at times he ruefully reflects that those who should know better seem to have little appreciation of the difficulties of his vocation. He will just direct himself to the task of doing justice in each case as it comes along. No task could be nobler.¹¹⁰²

Lord Edmund-Davis's apt observation above summarizes the inspiration for my hypothesis. His words reiterate Niki Tobi's summary of the Nigerian judge's dilemma that I quoted in section one. Thus, my assertions and arguments in the executive summary narrate this dissertation's objective, and the research methods I applied, which includes informant interviews that informs and supports my arguments. Then chapters one to eleven have tried to define judicial roles and explain the dilemmas judges encounter in performing

¹¹⁰² Lord Edmund-Davis - *Judicial Activism: Current Legal Problems*, 1975 was quoted by Chief Bolaji Ayorinde SAN in "Judicial Precedent, Law Reporting and the Need For Regulation", available at <http://webcache.googleusercontent.com/search?q=cache:AeEtOfLCrRIJ:www.mondaq.com/x/293622/court%2Bprocedure/JUDICIAL%2BPRECEDENT%2BLAW%2BREPORTING%2BAND%2BTHE%2BNEED%2BFOR%2BREGULATION+&cd=42&hl=en&ct=clnk&gl=ng> as accessed on 13th January 2015 and Enuma U. Moneke - "Judicial Law Making" in Epiphany Azinge and Osatohanmween Eruaga (2013), op. cit. at page 271.

their judicial roles in Nigerian democracy. Chapter one introduced this dissertation by defining relevant terms of this topic, to clarify the semantic of words. It also discussed the historical perspective of Nigeria and the Nigerian judiciary. Chapter two highlighted the importance of defining or redefining judges' roles in Nigeria's democracy and characterized judicial roles.

Chapter three discussed the legislative and interpretative dilemma—the first of six categories of judicial dilemmas I created. This chapter explained the practical dilemmas inadequate legislation creates for judicial roles and the dilemma judges experience when interpreting the legislation. Chapter four discussed the political and governmental dilemmas by explaining the political and administrative pressures judges encounter from politicians and executive officers/the leading government in the course of their judicial roles. Chapter five discussed litigation and procedural dilemma. It explains how adhering to legal principle or judicial procedure constitutes injustice in some instances, thereby causing predicaments for judges in applying precedent and also in exercising their discretion to do justice. The ethical and judicial dilemma discussed in chapter six examined how judicial administration and ethical requirements frustrate judges' roles in democratic governance. The social dilemma presented in chapter seven elucidated multidimensional dilemmas judges encounter in performing their 'socio-judicial' roles as part of a larger society/community. In concluding the categories of dilemmas, chapter eight discussed personal dilemmas—the predicament judges encounter in embracing their humanity while

adhering to ethical codes and statutory requirements. This chapter also discussed how judges' personal and judicial temperaments conflict with their judicial roles.

Diagram eight below summarizes the six dilemmas that judges encounter in performing their roles. It also attempts to explain how these dilemmas interconnect with judicial roles.

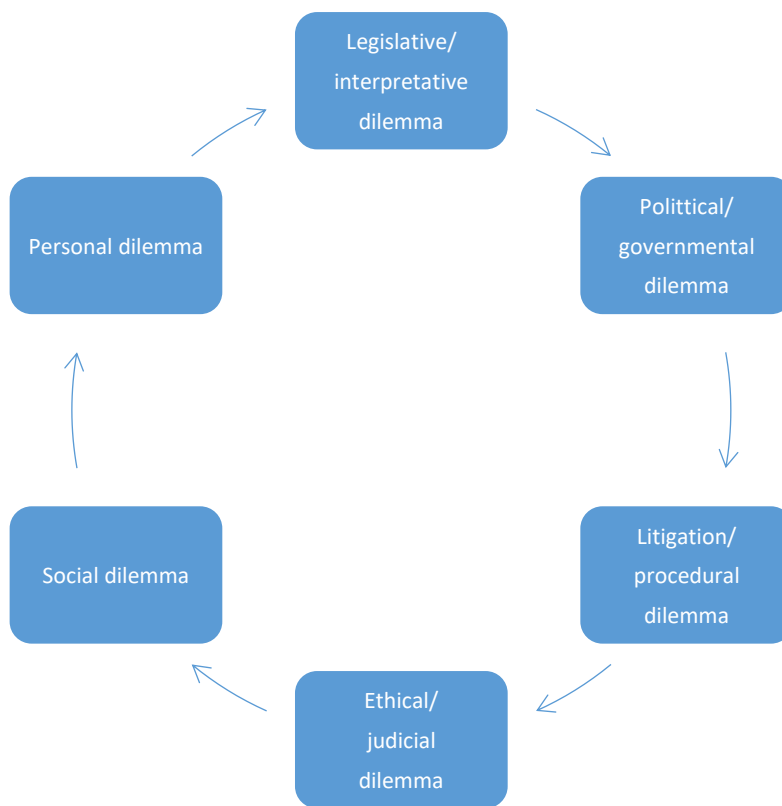


Diagram 6: The Cycle of Judicial Dilemma

This diagram displays how the various dilemmas judges encounter revolve around the same issues. From the first dilemma in chapter three to the last dilemma in chapter eight, the predicament judges encounter is all intertwined. The legislative/interpretative dilemma, where judges attempt to interpret vague statutes that may affect the executive government,

connects to the political/governmental dilemma where judicial welfare and administration depend on the same executive government. Hence judges are under pressure to take a decision contrary to the government's interests, and judges expose their welfare to a vindictive executive government. This creates a litigation/procedural dilemma. Then, judges experience ethical/judicial dilemmas where they struggle between ethical/judicial requirements in applying substantial or technical justice in a changing world. Thus, judicial requirements conflict with society's interest and further create a social dilemma, wherein judges get wedged between the personal/judicial interests, community interests, and government's interests. The above five categories of dilemmas emanate from the sixth dilemma—personal dilemma, which influences judges' decision-making, thought patterns, judicial temperaments, and eventually influences judicial roles. This chapter discussed how judges experience compassion fatigue, professional stress, traumas, and judicial impairment.

Furthermore, the third section of this dissertation that started with chapter nine captured the concept of justice and attempted to define and interpret justice from different perspectives while reiterating its dilemmatic impact on judicial roles. Then chapter ten poses the controversial question: Do judges make laws? It explained this controversy from different theoretical perspectives. Chapter eleven, the climax of this dissertation, discussed my hypothesis and formally introduced the socio-judicial theory of judging—judicial interpretation upon the execution of justice according to the social changes that accompany

social interests, needs, and traditions of a particular people or society.

Recommendations

I shall conclude by suggesting that our judges should be less formalistic and more pragmatic. I won't try to predict the future, however, except to make three rather obvious points. The first is that the continued rapid advance in science is going to make life difficult for judges. We live in an age of breakneck technological change that will thrust many difficult technical and scientific issues on judges, for which very few of them (of us, I should say) are prepared because of the excessively rhetorical emphasis of legal education and the weak scientific background of most law students....¹¹⁰³

Posner's statement above summarizes some of the points I raised in the preceding chapters. Nigerian judges do not have sufficient training for the continued rapid changes our world has experienced in the recent past. The global community to which Nigeria is highly involved and belongs has several social, cultural, economic, religious, scientific, technological, medical developments or transformations. For example, many economic businesses now operate cryptocurrency,¹¹⁰⁴ and Nigeria is a global leader in this form of economic transaction (Bitcoin trade).¹¹⁰⁵ In the health sector, clinical trial lawsuits keep

¹¹⁰³ Posner, *op. cit.* 1049 (see fn 261)

¹¹⁰⁴ A cryptocurrency or crypto, is a digital asset designed to work as a medium of exchange wherein individual coin ownership records are stored in a ledger existing in the form of a computerized database using strong cryptography to secure transaction records.

¹¹⁰⁵ www.bbc.com

<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwigiebBgvjvAhUIJTQIHVe5BEMQFjAAegQIAxAD&url=https%3A%2F%2Fwww.bbc.com%2Fnews%2Fworld-africa-56169917&usg=AOvVaw0-XDtX7IKSkpNQyPFOgpV>

emerging, and the repercussions of COVID's destructive disruptions are still unfolding in courts. On cultural/religious aspects, the emergence of the LGBTQ movement in a country like Nigeria that counters gay relationships on both cultural and religious grounds is a pending challenge for judges. Technologically, there are all sorts of cyber-related crimes like identity theft and cyber-terrorism, and robotic personalities.¹¹⁰⁶ Scientifically, there are all forms of alternative means of conception and surgeries to transform the human anatomy. For instance, courts have to be conscious of personal information and records of litigants and the how judges adjudge such cases, as advanced, high-tech crime of identity theft that threatens information networking and the very existence of our democratic values as a country. Thus, judges should be abreast with cyber technological developments and ensure the rising cases of cybercrime are nipped in the bud.

Therefore, from these global multidimensional technological developments, the judiciary must adopt a more socio-judicial approach to judging to enable the law and its interpretation to be more realistic and relevant to national and global developments. This approach will increase public confidence in judges' integrity and capacity and make courts more valuable to Nigerians. As Sir Brennan said, "It is only when the community has confidence in the integrity and capacity of the judiciary that the community is governed by

¹¹⁰⁶ Robotic personalities are an advanced aspect of artificial intelligence (AI) in which intelligent machines display characteristic human behavior. It involves a software system with the ability to interact with people emotionally and on a logical level.

the rule of law.”¹¹⁰⁷

Therefore, on the platform of my socio-judicial theory (SJT), I suggest a revamp of the Nigerian judiciary through a restructuring of judicial thinking. First of all, the SJT appeals to judges to be more empathic in their judicial approaches to decision-making. We are in a society of diverse individuals, with multiple mental and physical health issues that are not always visible to judges. The Nigerian society has consistently experienced economic recession, and deplorable state of insecurity for over ten years.¹¹⁰⁸ A World Bank report says Nigeria faces its worst recession in four decades.¹¹⁰⁹ The Punch news reports that “Nigeria’s unemployment rate is worse than America’s great depression when thousands committed suicide.”¹¹¹⁰ Also a chief medical consultant, considered an expert

¹¹⁰⁷ Sir Gerard Brennan, Chief Justice of Australia, addressing the National Judicial Orientation Program, Wollongong, Australia, 13 October 1996,

¹¹⁰⁸ <https://news.un.org> (August 2019)
<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwir2cr67f7vAhXDrZ4KHaaOCH8QFjAAegQIBBAD&url=https%3A%2F%2Fnews.un.org%2Fen%2Fstory%2F2019%2F08%2F1043581&usg=AOvVaw3eitGFwj-O-IYWGZRkMsT2>

¹¹⁰⁹ <https://www.worldbank.org> (June 26, 2020)
<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwir2cr67f7vAhXDrZ4KHaaOCH8QFjADegQIBxAD&url=https%3A%2F%2Fwww.worldbank.org%2Fen%2Fnews%2Fpress-release%2F2020%2F06%2F25%2Fnigerias-economy-faces-worst-recession-in-four-decades-says-new-world-bank-report&usg=AOvVaw1ZZb8EQKxLfQGSSrPWlwtA>

¹¹¹⁰ <https://punchng.com> (2021)
https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwj64my5_7vAhUWqJ4KHevIB58QFjACegQIBRAD&url=https%3A%2F%2Fpunchng.com%2Fnigerias-unemployment-rate-worse-than-american-great-depression-when-thousands-committed-suicide-mailafia%2F&usg=AOvVaw1sVzvI2v814HkC2LKOipWF

in mental illness, opines that the rising cases of suicide in Nigeria are beyond mental illness.¹¹¹¹ Nigeria has recorded more suicide deaths in recent times than has been in her history. This is in addition to anxiety and fear from the incessant insecurity quagmires in the country.¹¹¹² Therefore it is important for judges to bear in mind these psychological factors when dealing with people in court.

Accordingly, the SJT suggest that judges should often be mindful of litigant's "everyday challenges." Life is hard for some Nigerians, and even harder for many more Nigerians. Not many Nigerians can afford to drive to court, most depend on public transportation. It takes some over five or six hours to get to court every morning from their homes to attend their trials. Therefore, judges should be mindful of the impact of socio-economic hardship, poverty, stress, trauma, and adversity on human development and functioning as they consider making decisions concerning litigants.¹¹¹³

Thus, I propose an amendment of the Code of Conduct of Judicial Officers to

¹¹¹¹ <http://punchng.com> (October 14, 2019)
https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjQ64my5_7vAhUWqJ4KHevIB58QFjADegQIBBAD&url=https%3A%2F%2Fpunchng.com%2Frising-cases-of-suicides-beyond-mental-illness-drsale%2F&usg=AOvVaw3JdU2TcH1D3LLgLLT6TrHN

¹¹¹² In addition, most Nigerians are unemployed

¹¹¹³ For example, when litigants fail to appear in court, instead of applying the statutory requirement and issuing a warrant for their arrest, judges should give them more time. Also, on some offense of petty theft, judges should consider giving alternative penalties instead of incarceration.

include the definition of basic terms that relate to the judicial roles and the act of judging. The Code should also define judges' specific roles so that it becomes a one-stop reference material for old, new, and intending judges. Judges should identify and define their roles in Nigeria's democracy, as I summarize in diagram 7 below. It is only in understanding and embracing these roles that the judiciary's role in Nigeria's democracy can make sense to the society.

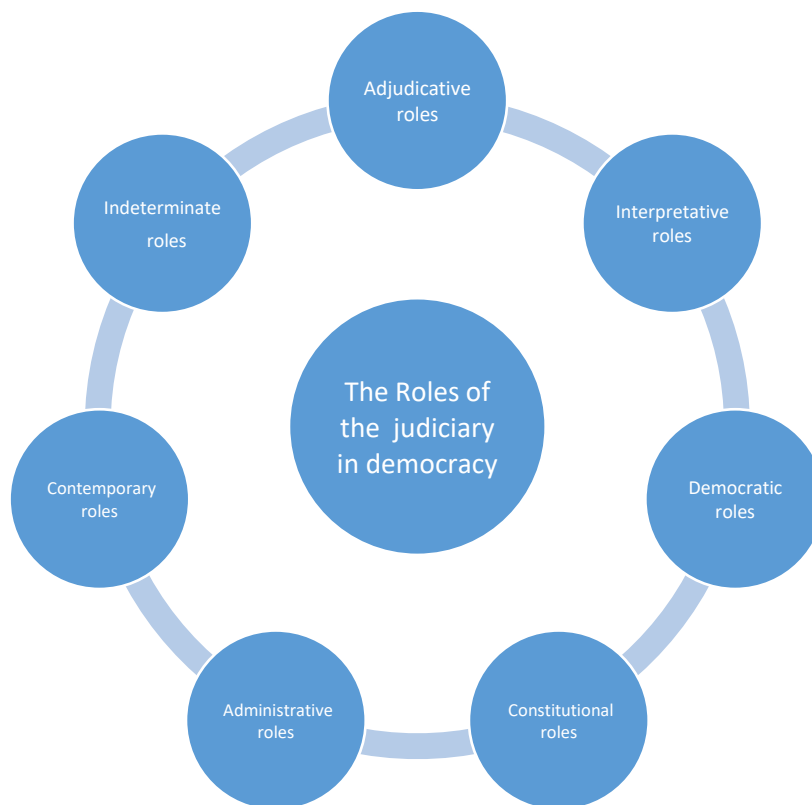


Diagram 7: The Circle of Judicial Roles in a Democracy

Consequently, I propose a national practice guide and interview booklets to be presented to every judge. This brochure should define the above (or specific) judicial roles applicable to the respective courts. Also, during appointment/confirmation interviews, the

panel of interviewers should ask the judge candidates fundamental questions that relate to their perceptions of the judiciary's role in society.¹¹¹⁴ Also, the judicial roles in diagram 7 should be stated in the judicial oath of office. In addition, judges should write out their unique oaths of office in addition to the national oath of office. This individual oath of office should state judges' unique goals and objectives for their judicial journey. Hence, judges will embrace their roles in society and eventually gain public trust.

Judges should embrace their roles as fundamental and paramount to Nigeria's democratic development. It is one thing to serve as an adjudicator, and it is more to know how that role impacts the government's survival. How judges perceive and understand their duties also determines their inputs and, eventually, social respect.¹¹¹⁵ The laws that establish and govern the judiciary in Nigeria do not expressly state the judges' specific duties after their appointments. Most judges learn about these roles and duties in the course of the job. It is mostly through case law that judges explain their understanding, 'knowledge,' comprehension and sometimes ignorance of their roles in society.¹¹¹⁶ Thus, in these times when democracy is being ridiculed globally, it is the role of the judiciary to protect, defend, and guard Nigeria's democracy by all means legally and judicially possible.

¹¹¹⁴ Questions like: In your opinion, what is the role of the judiciary in society?

¹¹¹⁵ This research will investigate examples of judicial pronouncements that state what judges do and do not do. It will outline any confusion where necessary.

¹¹¹⁶ Judicial role

The judges' role in a democracy is a mixture of law with originality and social reality in judicial interpretation. This is what socio-judicialism expresses.

Judicial interpretation should comply with relevant changes in society. Although not all social changes are relevant for judicial enforcement, the Nigerian judiciary is called to serve the Nigerian society and ensure justice according to social interests. Given society is not static but ever changing, some from previous chapters argued that the act of judging should equally change with society. This related judicial service responds progressively to social values, views, and interests. In this age of evolving technological diversities, it is most appropriate to radiate society-oriented judging, where rules of technicality take the back seat.¹¹¹⁷ Nnamani, JSC opines, "The courts are courts of law, but may the day never come when they cease to be courts of justice. Substantial justice cannot be done unless courts of justice strain to ensure that appeals are heard on the merit."¹¹¹⁸

The judiciary has a major role in interpreting the law and draws from both the original intent of the law's drafters and social reality. The judiciary is designed to inspire change in the most statutorily acceptable way possible in society. This is not to say it is the role of the judge to create statutory changes. The role of the court is complementary to legislative duties. The judiciary is more like a helper in the legislative process. Accordingly,

¹¹¹⁷ Ari Tobi-Aiyemo. *The Act of Judging*, op. cit. 105

¹¹¹⁸ *Erisi v Idika* (No. 1) (1997) 4 NWLR (Pt. 66) 503

as judges, we have to recognize the judiciary's role in a democracy to bridge the gulf between antiquated statutes from dead people (whose sacrifice and wisdom I do not undermine) and connect it to realism with the living (whose wisdom should reflect relevant social needs). Judges should give an existing law a fair 'social' meaning that fits the drafters' intentions, the present democratic dispensation, and the societal needs of the Nigerian people.

In applying the drafter's intention to interpret statutes, judges should take on a new dimension to comply with the Constitution's preamble. In other words, since the drafters' intentions are spelt out from the preamble to the constitution, judges should be able to apply the preamble to judicial interpretation.¹¹¹⁹ Although the law should adhere strictly to the Constitution, the law should move or evolve with the times and seasons, especially when vague terms in our statutes interfere with judicial interpretation. Practically, however, trial judges often feel it is wrong to make *obiter dictums* that relate to social issues, interests, or values. As long as it does not offend the rules of evidence or any other existing law, the court should consider his decision in accordance with social norms and leave it to the Supreme Court to uphold or reverse on appeal, if appealed. It took a bold appellate judge to make the decision in *Mojekwu v Mojekwu*, which the Supreme Court eventually upheld. Therefore, it is worth the try for trial or appellate judges to give detailed reasons for their

¹¹¹⁹ The judge could also display the preamble in a obvious corner of the courtroom

decisions, in the interest of justice. For instance, if you decide to use your discretion in a decision, it would be important to take your time and give detailed explanations in the ruling or judgment so that if it went on appeal, the appellate justices would appreciate the trial judge's train of thought and decide accordingly.

Most trial judges' timid approach to cases delays justice. As the saying goes—justice delayed is justice denied. Thus, judges should (as long as it is within the stipulated statutory criteria) be bold to deviate from precedent and create new precedent as the law permits. According to Kanyip, judging requires some degree of boldness.¹¹²⁰ Also, in this regard, judges should be bold to dissent as dissenting views may eventually (and has in some cases) become precedent. In *Candler v. Crane, Christmas & Co.*,¹¹²¹ Lord Denning mentioned two categories of judges: the timorous souls who were fearful of allowing a new cause of action and the bold spirits who were ready to allow it if justice so required. Therefore, I suggest that the Supreme Court should reconsider the standards for deviation from precedent. The Supreme Court should add an exception to the general rule that judges can deviate from precedent or procedure on the grounds of prevailing and compelling social changes like technological developments, scientific discoveries, health/pandemic challenges.

¹¹²⁰ Kanyip, *opcit*

¹¹²¹ *Candler v. Crane, Christmas & Co* [1951] 2 KB 164 at page 178; [1951] 1 All ER 426 at page 432.

Nigerian courts, especially the Supreme Court, should recognize the value and central role of the court of appeal in creating precedent. The Supreme Court should empathize with the court of appeals' justices because they have more pressure of trying diverse cases as courts of the first instance with their original jurisdiction and also as appellate courts. This theory is not attempting to cause judicial clash, it hopes to inspire judicial harmony. The Supreme Court's indeterminate role should be more accommodating of precedent from the court of appeal upon careful review of the intents of the appeal court justices and the law's position.¹¹²² This role is fundamental to democratic development. This dilemma of diverse precedential views between the court of appeal justices and the Supreme Court justices is the crux of injustice to judicial development. Thus, when the Supreme Court allows deviating from precedent in the interest of justice, it will ensure national development: giving more room for development of judicial jurisprudence (as we have more judges in the court of appeal) and also uphold democracy for posterity.

Judges should constantly be mindful of the evolution of law. Hence, they should be 'creative' in interpreting statutes and the law, where the need arises, and in the interest of justice. However, their creativity should be within the statutory limitations. Redefining justice according to public views or interests creates opportunities for new and relevant

¹¹²² This is especially important as not all judges give detailed reasons for their judgment, and at CA have that opportunity to hear from the trial courts and decide on the case. Hence the CA justice has more knowledge of the case than the justice of the SC.

precedent.¹¹²³ Also, judges should be versatile in global developments. They should be prepared for eventualities, the changes in times, and the environment, as these changes tend to define judicial roles. Scientific, technological, and social circumstances and situations often determine the judiciary's role in a democracy. For example, the Covid-19 pandemic has redefined the roles of judges to a certain extent. An example is that judges now determine whether a trial should be private or public as statutorily required. Also judges have more liberty and discretion to relate with litigants on a case-by-case basis. Thus, judicial roles can be considered as futuristic or future inclined. This will enable certainty in society, where the public is more confident about courts. According to Osipitan, "Justice is too precious a commodity to be allowed to be caught in the web of uncertainty. Certainty of Law attracts respect for judges and the legal profession. Disrespect and suspicion are the evident result of conflicting decisions of the court on issues which are similar."¹¹²⁴

The role of judges in Nigeria's democracy can only be achieved if all judges' "hands are on deck." This is like the African saying that it takes a village or community to raise a child, so it takes the judiciary institution as a whole to uphold democratic governance. We need to replicate the role of the few 'socio-judicialists'¹¹²⁵ (judges that are society-minded)

¹¹²³ The time is overdue to review and revise the precedent stated in of *Okumagba v Egbe* (that the judge's office is to state the law and not give it) and replace it with socially oriented and relevant precedent.

¹¹²⁴ Osipitan, *opcit*: 27

¹¹²⁵ Socio-judicialist is a person who embraces social views interest according to democratic

in Nigeria's judiciary and encourage more judges to make or ensure the role of the judiciary impacts society. In several ways, a few judges, in attempting to think outside the box, have done (and are still doing) what they consider relevant to society's prevailing interests. Unfortunately, their commendable efforts are stifled under the doctrine of precedent/*stare decisis*. Thus, the majority of judges who apply the constructive philosophy of judging reject the sociological concept. When the judiciary agrees to define or redefine the roles of judges to be more relevant to society through their practice directives or rules of courts, statutes will be enacted to accommodate these roles. This will bridge the gap between the courts and the society and democracy will thrive.

Moreover, while still bridging the gap between the public and the law, I suggest that every judicial/court district establishes a Community Relations Office (CRO), or department where judicial procedures are explained to litigants in different Nigerian languages. These offices could also have common rooms in the courthouses that show videos/staged court sessions or documentaries of court procedures and what transpires in courts and the challenges judges face during hearings. The office should give litigants pamphlets explaining courts' *modus operandi* and take litigants on a procedural tour regarding courts.¹¹²⁶

tenants of the rule of law. A judge that considers social interest as valuable to judicial development. Judges that apply the law based on the socio-judicial elements before them.

¹¹²⁶ The tour may include an introductory class on what happens in courts and how to make

Furthermore, judges should endeavor to balance the imaginary scale of justice in performing their roles. Though the judge is human and the SJT expects them to wear a human face in adjudicating, the human element in decision-making should be applied with due caution. To balance the justice scale, the judge must always be neutral and objective while adjudicating conflicts, interpreting laws, and determining laws. The SJT appreciates that judges are first humans before their appointments as judges. However, after taking their oaths of office, they abandon their personal views and interests (or so they are expected to do) for the service of democracy. So, judges must render that which they owe to “We the people” without fear or favors. Unfortunately, balancing personal and judicial interests is the thin line between justice and injustice. Suppose judges consider contemporary, relevant social values, principles, and changes to apply discretion with a socio-judicial approach; then they will define how to tilt the scale of justice to the side of democracy.

The doctrine of socio-judicialism is the way out of the judges’ dilemma of an unbalanced scale; this is the balance or equation between social reality and originality. Judges should interpret laws with the original context of the constitution or statutes (if it is just to the case) while applying discretion to relative development with contemporary social interests and values. There should be a blend between social reality and originality.

complaints or express concerns about court procedures they do not understand.

This thoughtful discretion and contextual creativity, I believe, is a more pragmatic perspective.

Ultimately, I am recommending and reiterating my socio-judicial theory of judging for application to Nigeria—that despite the dilemmas in judicial duties, judging with social empathy will aptly define the role of the judiciary in a democracy as applying justice the way people understand. People tend to comply with what they understand. The socio-judicial theory of judging is a more liberal-pragmatic approach to adjudicating will enable a more democratic Nigeria. I dare to say that this socio-judicial theory of justice is the indispensable eminent future of judicial development globally. However, it is essential to emphasize that the SJT is not condemning judicial precedent and its beneficial impact on judicial development; nor is this theory suggesting that the Nigerian court of appeal or lower courts depart from the wise, age-old doctrine of stare decisis. This theory reiterates what several erudite scholars like Niki Tobi, Kanyip, Lord Denning, Posner, Monahan and Walker, and several others have researched and conclusively opined that when society changes or advances, precedent gets stale, and the relevance of outdated precedents fades. Hence, injustice ensues in society until a more relevant precedent emerges in the interest of justice. I take the liberty to reproduce what I said in my thesis:

The rules or canons of interpretation are judge-made rules formulated over the years by judges of old, 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 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.... Hence the need to create new and more relevant precedent cannot be overstated.¹¹²⁷

I believe Nigerian judges should perform their roles in line with relevant social interests, views, and principles related to their particular societies. In this way, justice can be relevant and understood as specific to social needs and interests. After all, democracy is about society, the people, and the law that governs them. Our job description as judges is truth, justice, and fairness and anything outside these is undemocratic. The judiciary is often the least funded arm of government and the least understood, so we must exhibit integrity and transparency in our roles as judges, to rebuild the trust between the Nigerian public and courts.

We are judges, and like every Nigerian citizen, we are born free, so we also have the liberty to choose as we like, but two things we can never choose are our families and our legal or judicial challenges. These challenges appear in diverse and sometimes complex ways, and we have to deal with them judicially and judiciously. In whichever way these challenges or dilemmas appear, we must be true to the justice we represent and the society—the human beings—we are accountable to serve. Often, and unfortunately so, we may deny family where the need arises in being true to the law. As much as it hurts, this is

¹¹²⁷ Ari Tobi-Aiyemo, *op. cit.* 133-134

our fate!

Next Steps/Future Direction of this Research¹¹²⁸

The applicability of this research will be a herculean task. Many judges will push against it. That is why I intend to take baby steps. I will first take it as post-doctoral research with a few judges in Nigeria. Thus, the practical implementation of this theory will commence with defining the role of judges in society. I plan to develop a series of seminars “The Role of Judges in Society” (a.k.a. TROJIS Seminar). The simple question throughout this one-hour seminar will be: “What are our roles as judges in society?” This seminar will be the first avenue to gather feedback used to develop more insight and (hopefully) support for the SJT.

In the interim, I plan to make a proposal to the Chief judges of some states and the National Judicial Institute (NJI) on the prospective date to launch TROJIS. The objective of this seminar will be to test judges’ knowledge of their judicial roles.¹¹²⁹ I will collaborate with socio-judicialists judges (in Nigeria and the U.S.A.), to educate Nigerian judges on their roles. This seminar will be annually across all judicial districts. The judges’ responses and possible assessment of the impact of these seminars will determine the next

¹¹²⁸ This section is an addendum after my dissertation defense, pursuant to my committees’ comments for clarification of potential use of this dissertation study.

¹¹²⁹ I will send out a survey to ascertain and collate data for reference purposes. If the data shows that judges understand their roles, then I will collaborate with socio-judicialists judges to discuss the obstacles to execute their roles.

step.

My ultimate goal is to develop a practice guideline to constantly remind the society, and judges (and also educate new judges) on the roles of judges in society, and also to create a public-friendly media outlet on courts and society.¹¹³⁰

¹¹³⁰ Practice guidelines will resemble the juvenile justice guidelines or the enhanced resources guidelines available at <https://www.ncjfcj.org/publications/enhanced-juvenile-justice-guidelines/>
<https://www.ncjfcj.org/publications/enhanced-resource-guidelines/>