

**AN EVALUATION OF THE JUDICIAL CONTROL OF ADMINISTRATIVE /  
LEGISLATIVE DISCRETION IN NIGERIA\*\***

**Abstract**

*This article examines the judicial control of administrative discretion in Nigeria. The paper focuses on the discretionary powers in all the tiers of the Nigerian Government with a view to evaluating the process and effectiveness of utilisation of discretionary powers in Nigeria. The article then examines how the Judiciary has helped control discretionary powers in Nigeria including Judicial review, Order of Mandamus and Certiorari as well as the challenges the Judiciary faces in controlling discretionary powers including, legislative restrictions and the improper institution of matters before the courts. It was found that not all aspects of administrative governance are contained in the regulatory statutes. The paper then recommends ways to check some of the challenges faced in the course of judicial control of discretionary powers particularly the amendment of laws that restrict judicial control of some of the administrative discretionary powers.*

**1. Introduction**

The exercise of discretionary powers in Nigeria is a pertinent administrative duty of all of the three tiers of government in Nigeria. However, not all aspect of administrative governance is within the purview of the statutes set out to regulate them. The administrators in charge are then saddled with the duty of filling the gaps and using their discretion for the effective running of things. For example, a decision by a Chief Judge of a High Court to transfer a matter from one court to another without stating his reasons is a display of judicial discretion. Discretion has been defined as the freedom or authority to make judgments and to act as one sees fit, in other words, free exercise of power as regards the ability to choose from different ways to achieve a particular goal or result.<sup>1</sup> Administrative discretion thus means choosing from various available alternatives but with reference to rules of reasons and justice and not according to personal whims.<sup>2</sup> Invariably, in all systems of jurisprudence, it is an accepted norm that the Courts will not interfere with the action pursued by such authorities in the exercise of their administrative discretion.<sup>3</sup> It cannot be expected of the Courts to have the time and competence to judge each and every matter, let alone substitute its wisdom for that of the authority concerned. Again, this does not mean that the Courts will not interfere at all.<sup>4</sup> They will not allow discretionary power

---

\* **Rilwan F. Mahmoud** Lecturer of the Department of Public law, Faculty of Law, University of Ilorin, Nigeria LL. B, LL. M (University of Ilorin), BL (Nigerian Supreme Court), Ph. D Candidate (University of Kwazulu-Natal, South Africa).08061657374, mahmoudesq@yahoo.com

<sup>1</sup> R M Ravitej ‘Control of Abuse of Administrative Discretion: Judicial Trends’  
[www.manupatra.co.in/newsline/articles/upload/2f200227-e95a-408D-biea-77efe9702c36.pdf](http://www.manupatra.co.in/newsline/articles/upload/2f200227-e95a-408D-biea-77efe9702c36.pdf) Last accessed on 8th March 2015.

<sup>2</sup> A T Shehu, ‘Constituency Control of Legislators: Lesson from Nigeria’  
<http://papers.ssrn.com/sol3/papers.cfm?abstractid=1678535> Last accessed on 18<sup>th</sup> May 2015.

<sup>3</sup> *Ibid.*

<sup>4</sup>R M Ravitej ‘Control of Abuse of Administrative Discretion: Judicial Trends’  
[www.manupatra.co.in/newsline/articles/upload/2f200227-e95a-408D-biea-77efe9702c36.pdf](http://www.manupatra.co.in/newsline/articles/upload/2f200227-e95a-408D-biea-77efe9702c36.pdf) Last accessed on 8th March 2015.

to assume the garb of arbitrary power.<sup>5</sup> The Courts have to ensure that discretion is exercised strictly within the conditionality laid down by the law while exercising such discretion.<sup>6</sup>

Today, the question of control of discretionary power is perhaps the most crucial and critical problem of modern administrative law. Discretion implies individual will, choice or freedom to decide. In legal usage, it connotes personal autonomy in judgement and assessment.<sup>7</sup> Discretion is often used when referring to powers delegated within a system of authority to an official or set of officials, where they have some significant scope for settling the reasons and standards according to which that power is to be exercised, and for applying them in the making of specific decisions<sup>8</sup>. Central to this is the idea that within a defined area of power the official must reflect upon its purposes, and then settles upon the policies and strategies for achieving them. It is, therefore, pertinent that two principal variables must coincide to produce discretion: the scope for assessment and judgement left open to the decision maker by the terms of his authority, and the surrounding attitudes of officials as to how the issues arising are to be resolved.<sup>9</sup> In the context of public administration, administrative discretion has been defined to mean:

[T]he freedom of choice or judgment with which an executive officer or an administrative agency is entrusted in order to ensure the constant and complete effectuation of the legislative policy in any situation which might arise in connection with the enforcement of the statute.<sup>10</sup>

Discretionary powers do not emanate vacuously, they are created, expressly or impliedly, directly or indirectly, and conferred on a person or agency for general or specific purposes. This process occurs within the legal order which bestows legitimacy on the exercise of such discretion.<sup>11</sup> The question whether the exercise is arbitrary or not is a matter entirely different rather, what is essential is that public administration revolves around the exercise of discretionary Powers which are simply the products of the legal order.<sup>12</sup> But discretion poses a dilemma: it is necessary but problematic, particularly in the context of the complexities of modern welfare states and the idea of the rule of law.<sup>13</sup>

## 2. Discretionary Powers in An Administrative Context

Administrative decisions often include the exercise of discretion. Discretion exists when the decision-maker has the power to make a choice about whether to act or not act, to approve or not approve, or to approve with conditions.<sup>14</sup> The role of the decision-maker is to make a judgement

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> D J Galligan, 'Discretionary Powers: A Legal Study of Official Discretion' Oxford: Clarendon Press. 1986 pp21-22.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> R M Cooper, 'Administrative Justice and the Role of Discretion.' *The Yale Law Journal*, 47(4), 577-602. <http://dx.doi.org/10.2307/791857> Last accessed on 3<sup>rd</sup> June 2015.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> M Holzer,, & K Yang, 'Administrative Discretion in a Turbulent Time: An Introductio'n. *Public Administration Quarterly*, 29(1/2), 128-139. 2005.

<sup>14</sup> D J Galligan, 'Discretionary Powers: A Legal Study of Official Discretion' Oxford: Clarendon Press. 1986, pp 21-22..

taking into account all relevant information. For public sector decision-making, legislation generally provides the lawful authority for action to be taken and for decisions to be made.<sup>15</sup> Public sector decision-making may be undertaken as part of fulfilling responsibilities to ensure the efficient and effective management and performance of a public authority.<sup>16</sup>

Legislation often compels a decision-maker to act in a particular way. Where the words 'shall' or 'must' are used in legislation, there is usually no discretion available to the decision-maker.<sup>17</sup> For example, if the legislation states that an application must be received by a specific date, the decision maker must refuse the application if it is not received by that date.<sup>18</sup> However, where the legislation uses the word 'may', the decision-maker is given a discretionary power to deal with a matter and has a choice to make. This choice will often involve an element of judgment about the decision.<sup>19</sup> The legislation sets out who is given the power to make certain decisions, for example, a Chief Executive Officer (CEO).<sup>20</sup> These powers, including powers to exercise discretion, may be delegated to others under a power of delegation in the legislation. Usually, the power of delegation cannot be delegated.<sup>21</sup> Delegations are generally recorded in writing in a register, instrument or notice and may need to be set out in a Government Gazette.<sup>22</sup> Before taking action or making a decision, the decision-maker should check to ensure they have the power to take the action or make the decision and the limits of any discretion that can be exercised.<sup>23</sup>

### **3. Administrative Agencies and Exercise of Discretion**

The proliferation of administrative agencies is explainable in terms of the complex structure of modern welfare states. Government's principal function is no longer restricted to the traditional provision of security and protection of life and properties (the minimalist state function); today, the government has become a major provider of essential services, venturing into businesses and other fields that were hitherto considered as falling within the private domain.<sup>24</sup> With this expansion in governmental spheres and functions came the necessity for delegation of authority which invariably involves the vesting of discretionary powers on public bodies. Therefore, public authorities and corporations are increasingly being recognized as necessary instruments for public administration.<sup>25</sup>

Administrative tribunals came about because there seemed to be no other practical way of carrying on the affairs of government and discharging the duties and obligations which an

---

<sup>15</sup> M Holzer, & K Yang, 'Administrative Discretion in a Turbulent Time: An Introduction' . *Public Administration Quarterly*, 29(1/2), 128-139. 2005.

<sup>16</sup> *Ibid.*

<sup>17</sup> A T Shehu, 'Constituency Control of Legislators: Lesson from Nigeria'  
<http://papers.ssrn.com/sol3/papers.cfm?abstractid=1678535> Last accessed on 18<sup>th</sup> May 2015.

<sup>18</sup> *Ibid.*

<sup>19</sup> Exercise of discretion in administrative decision making  
[www.ombudsman.wa.gov.au/publications/documents/guidelines/exercise-of-discretion-in-administrative-decision-making.pdf](http://www.ombudsman.wa.gov.au/publications/documents/guidelines/exercise-of-discretion-in-administrative-decision-making.pdf) last accessed 10<sup>th</sup> February 2014

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

<sup>24</sup> J Badamasiuy and M Bello, 'An Appraisal of Administrative Justice and Good Governance in Nigeria' *Journal of Politics and Law*, (Vol. 6 No. 2) 2013

<sup>25</sup> *Ibid.*

increasingly complex social organization made it necessary for the government to perform<sup>26</sup> Therefore, agencies with discretionary powers emerged out of administrative expediencies and the near impossibility of any branch of the government to perform all the necessary functions.<sup>27</sup> Thus, they are created to augment the increasing expansion of the functions of government. A public authority on the other hand, is an administrative body entrusted with functions to perform for the benefit of the public and not for private profit.<sup>28</sup> These include institutions established under the constitution or any statutory instrument with the principal aim of discharging or superintending any government activities, functions or businesses.<sup>29</sup> Therefore, any person working for these institutions is a public officer. Once a person is entrusted with administrative authority to make a decision he becomes a public officer and the manner of exercising the authority conferred could have enormous consequences on general public administration. An administrator may perform pure administrative plus quasi-legislative and quasi-judicial functions.<sup>30</sup> Implicit in the nature of the powers conferred on, and *exercised* by, public bodies or their agents is the exercise of discretion.<sup>31</sup> It is through discretionary powers that most legislative and executive policies are translated into concrete results. The administrator has a will of his own in the choice of means for accomplishing his work.<sup>32</sup>

On the contrary, some scholars are staunchly opposed to ‘judicial meddling’ in the field of administration and maintains that ‘administrative discretion is the lifeblood upon which the entire administrative process feeds; without its vitalizing contribution the machinery of administration would degenerate into an impotent force with neither purpose nor direction’.<sup>33</sup> Although there is obvious potential for the misuse of administrative discretion, it is undoubtedly of immense significance in modern governance and it is recognised as a means to an end where the ends are the desires of the legislature.<sup>34</sup>

#### 4. The Rule of Law and The Control of Administrative Discretion

The essence of accountability mechanisms in public administration is to control or check excesses and avoid arbitrary use of discretion. There are broadly three accountability mechanisms: political accountability that relates to or belongs to the political realm within the state; managerial accountability that relates to the internal, often pyramidal, administrative structure within a particular public or private institution; and legal accountability or what we may refer to as judicial remedies that relate to the legal and constitutional structures within the state.<sup>35</sup>

<sup>26</sup> Rosenberry ‘Administrative Law and the Constitution’ 23 *AM. POL. Sci. REV.* 32. 1929

<sup>27</sup> *Ibid.*

<sup>28</sup> L Hailsham, *Halsbury’s Laws of England* (Vol. 1, 4th ed.). London: Butterworths. 1973

<sup>29</sup> M Holzer, & K Yang, ‘Administrative Discretion in a Turbulent Time: An Introduction’. *Public Administration Quarterly*, 29(1/2), 128-139. 2005; A T Shehu, ‘Inherent Power: An Examination of Executive Powers of the President under the Constitution of the Federal Republic of Nigeria 1999’, *Kogi State University Bi-Annual Journal of Public Law* 2009 124-134.

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

<sup>31</sup> *Ibid.*

<sup>32</sup> N A Giannattasio, ‘The Discretionary Function Exemption: Legislation and Case Law’. *Public Administration Quarterly*, 29(1/2), 201-229. 2005

<sup>33</sup> R M Cooper, ‘Administrative Justice and the Role of Discretion.’ *The Yale Law Journal*, 47(4), (1938). Pp.577-602.<http://dx.doi.org/10.2307/791857> Last accessed on 3<sup>rd</sup> June 2015.

<sup>34</sup> N A Giannattasio, ‘The Discretionary Function Exemption: Legislation and Case Law’. *Public Administration Quarterly*, 29(1/2), 201-229. 2005

<sup>35</sup> J L Mashaw, ‘Recovering American Administrative Law: Federalist Foundations,’ 1787-1801. *The Yale Law Journal*, 115(6), 1256-1344. <http://dx.doi.org/10.2307/20455655>

These forms of regulation are based upon some elements of the rule of law that is: stability in legal relations, rationality in decision-making, fair procedures and residual category consisting of moral and political principles.<sup>36</sup>

The stability of legal relations depends on ‘official actions being governed by a system of reasonably clear, settled and binding standards’ derivable from statutes, case law or subsidiary legislation, rationality in decision-making entails restraining official discretion through principles intrinsic to human rationality.<sup>37</sup> The most rudimentary requirements of political morality are that in exercising discretionary powers, officials should comply with standards of rationality and morality, therefore, no exercise of official discretion should be left to the personal whims and caprices of an individual; a safeguard is required to avert abuse and arbitrary exercise of powers.<sup>38</sup> Actions which do not meet these threshold requirements are arbitrary and may be considered a misuse of powers.<sup>39</sup>

The basic principles of procedural justice are encapsulated in the twin pillars of natural justice: *audi alterem partem* (hearing both sides) and *nemo iudex in causa sua* (rule against bias) and are essential to the determination of disputes in administrative matters.<sup>40</sup> It must be noted that as a practical matter, the judiciary is no more fitted to enter the specialized fields of public administration, nor endowed with the technical competence necessary to solve the intricate problems arising in connection with the enforcement of modern legislative policies, than are the legislative bodies which were forced to delegate such functions to specialized tribunals.<sup>41</sup> One of the most serious impediments to the orderly development of a sound system of administrative justice is the assumption that the judiciary is the only agency of government which possesses the capacity to govern.<sup>42</sup>

## **5. Tiers of Government in Nigeria and The Utilisation of Discretionary Powers**

The functions of these tiers of government complement the others in such a way that in the end, the distinction between functions becomes intertwined at times.<sup>43</sup>

### **5.1 Legislature’s Purview**

The aim of the Legislature is to make laws for the society for the good of the people.<sup>44</sup> Under the Nigerian constitution, proposals for law come before the National Assembly in the form of Bills which are either private or public, but majority of the public Bills coming before the National

---

<sup>36</sup> D L Galligan, ‘Discretionary Powers: A Legal Study of Official Discretion’ Oxford: Clarendon Press.21-22 1986.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> A T Shehu, & M M Akanbi ‘Rule of Law in Nigeria’ *Journal of Law, Policy and Globalization* Vol 3, 2012

<sup>40</sup> *Garba v University of Maiduguri* (1986) 1 SC 12

<sup>41</sup> R M Cooper, ‘Administrative Justice and the Role of Discretion.’ *The Yale Law Journal*, 47(4), (1938). Pp. 577-602.<http://dx.doi.org/10.2307/791857> Last accessed on 3<sup>rd</sup> June 2015.

<sup>42</sup> Cooper, R. M.. “Administrative Justice and the Role of Discretion.” *The Yale Law Journal*, 47(4), (1938), 577-602.<http://dx.doi.org/10.2307/791857> Last accessed on 3<sup>rd</sup> June 2015; *Wednesbury Corporation V. Ministry of Housing and Local Government* No.2 (1966) 2 Q.B.275 R Mullender, ‘Judicial Review and the Rule of Law’ 112 *L.Q.R.* ,1996, p 182.

<sup>43</sup> A T Shehu, ‘Part III Foundations of Constitutionalism: The True Foundation of Judicial Review: A view from Nigeria’ 2010 <https://litigation-essentials.lexisnexis.com/webcd/app?action=documentdisplay&crawlid=1&doctype=cite&docid=2+jindal+global+l.+rev.+212&srctype=smi&srcid=3b15&key=6ed7ed70018381aec66e8a3dbfad85b7>

<sup>44</sup> A T Shehu, . ‘The Enforcement Of Social And Economic Rights in Africa: The Nigerian Experience’ *Afe Babalola University: Journal of Sustainable Development Law and Policy* Vol. 2 Iss. 1, pp. 101-120 2013

Assembly are usually the Executive Bills.<sup>45</sup> The constitutional provisions on legitimating the system do not make a proposal for legislation exclusive to members of the parliament. All the Constitution requires is that such a proposal must come before either of the two Houses of the National Assembly and when passed into law by that House where the proposal is initiated it shall be forwarded to the other House.<sup>46</sup> Furthermore, where it is passed into law by that House it shall become an Act of the National Assembly and it shall be presented to the President for his assent.<sup>47</sup>

## 5.2 Appropriation Function

Appropriation in the context of administrative law includes all matters of budgeting for the state the execution of which is the responsibility of the executive arm of government.<sup>48</sup> However, the Legislature decides on the formulas and policies in which such appropriation functions should be dispensed of.<sup>49</sup> The executive is in charge of revenue collection and by that, it is the only department of government that has the knowledge of what comes into the treasury from all forms of government sources of revenues.<sup>50</sup> Also, the Executive arm is in charge of the various ministries and other agencies and departments of government.<sup>51</sup> Thus the executive is in practice the custodian of public purse with all the information appertaining thereto. Ironically, in appropriation procedure, the legislature plays a key policy role as if policy formulation other than legitimating for implementation is part of lawmaking.<sup>52</sup> During the appropriation process, ministries, agencies and other departments of government are called upon by the Legislature to defend their respective budgetary proposals.<sup>53</sup> This Legislature's power over appropriation is not peculiar to Nigeria; it is almost all over the World, and indeed one of the earliest and oldest functions of the parliament.<sup>54</sup>

## 5.3 Confirmatory Function

The Legislature also conducts confirmatory functions in matters of appointments to several offices. The President, by virtue of his constitutional powers, is empowered to appoint Ministers who form members of his Cabinet, subject to confirmation by the Senate. The President thus in practice only nominates members of the cabinet; no nominee becomes a minister unless and until the nomination is confirmed by the Senate.<sup>55</sup>

This is to ensure that the President complies with constitutional provisions relating to the appointment of Ministers and to make the ministers responsible not only to the President but also to the people. The ministerial appointment is administrative and does not involve lawmaking, yet the constitution requires confirmation by the Senate of Nigeria. This is thus a norm of

<sup>45</sup> A T Shehu, & M M Akanbi 'Modeling Separation For Constitutionalism: The Nigerian Approach' 2012

<sup>46</sup> Section 58(2) Constitution of The Federal Republic of Nigeria Constitution, 1999.

<sup>47</sup> Section 58(3) Constitution of the Federal Republic of Nigeria Constitution, 1999

<sup>48</sup> Section 81 Constitution of the Federal Republic of Nigeria Constitution, 1999

<sup>49</sup> A T Shehu, 'The Enforcement Of Social And Economic Rights in Africa: The Nigerian Experience' *Afe Babalola University: Journal of Sustainable Development Law and Policy* Vol. 2 Iss. 1, pp. 101-120 2013

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

<sup>53</sup> H Rod, and H Martin, (2004) 'Comparative Government and Politics: An Introduction', (6th Ed.) NY: Palgrave Macmillan, 257

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

constitutionalism in Nigeria; that there is no absolute government. Further, the appointment of certain judicial officers by the executive is subject to confirmation by the Senate.<sup>56</sup> The president appoints the category of judicial officers on the recommendation of the National Judicial Council subject to confirmation by the Senate.<sup>57</sup> The role of the Senate in the appointment though confirmatory, it is mandatory and no such appointment is valid without the Senate confirmation.<sup>58</sup>

Lawmaking has little to do with the appointment of judicial officers as adjudicatory and interpretative functions are not administrative in nature.<sup>59</sup> It is, however, to make members of the judiciary be accountable to the representatives of the people and ensure that the President complies with the constitution in making the appointments.<sup>60</sup>

#### **5.4 Oversight Function**

The Legislature arm of government also has the power of necessary investigation as a form of judicial oversight.<sup>61</sup> The purpose of this is to enable it to make necessary laws with respects to any matter within its legislative competence and correct any defects in existing laws.<sup>62</sup> It may also conduct or direct to be conducted any such investigation for the purpose of exposing corruption, inefficiency or waste in the execution or administration of the laws made by the parliament, or for exposing corruption, inefficiency in the disbursement or administration of funds appropriated by it.<sup>63</sup> Interestingly, investigation in this sense entails a quasi-judicial proceeding; what the legislature does is engaging in the investigation of the executive and not lawmaking, though such exercise is for the purpose of making new laws, correcting a defect in or repealing an existing law. Certainly, any investigation is an executive function (EFCC Act, ICPC Act), yet the legislature is constitutionally competent to embark on it for the purposes provided by the constitution. This is also the case with the general legislative oversight of the Executive as in impeachment matter that is judicial in nature.<sup>64</sup>

#### **5.5 Executive Purview**

The President is vested with the executive powers of the Federation, which extend to the execution of his duties in line with the provisions of the constitution.<sup>65</sup> These powers also extend to all laws made by the National Assembly and also to all matters over which the National Assembly has the power to make Laws. However, it is pertinent to note that the constitution falls short of defining the phrase, “the executive powers of the Federation”.<sup>66</sup>

#### **5.6 Legislative Function**

---

<sup>56</sup>A T Shehu, & M M Akanbi ‘Modelling Separation For Constitutionalism: The Nigerian Approach’ 2012

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

<sup>61</sup> Section 88 Constitution of the Federal Republic of Nigeria 1999

<sup>62</sup> Section 88(2)(a) Constitution of the Federal Republic of Nigeria 1999

<sup>63</sup> Section 89 Constitution of the Federal Republic of Nigeria 1999

<sup>64</sup> A T Shehu, & M M Akanbi ‘Modeling Separation For Constitutionalism: The Nigerian Approach’ 2012

<sup>65</sup> Section 130 Constitution of The Federal Republic of Nigeria 1999

<sup>66</sup> A T Shehu, ‘Inherent Power: An Examination of Executive Powers of the President under the Constitution of the Federal Republic of Nigeria 1999’, *Kogi State University Bi-Annual Journal of Public Law* 2009, pp 124-134.

The National Assembly makes laws for the Federation, but no bill passed by the National Assembly becomes law unless the President gives his assent to it, except where the bill is vetoed by the President and the National Assembly overrides the veto.<sup>67</sup> The framers of the constitution were perhaps conscious of the President's legislative leadership and do not insist that all bills coming before the National Assembly must be private members bills alone. Technically, the constitution provides that a "bill may originate in either the Senate or the House of Representative".<sup>68</sup> To "originate" is different from initiate; "originate", in the sense in which it is used in the constitution could only mean that a bill may not necessarily be initiated in any of the Houses, it may be initiated by any person or group of persons, but it must come through or originate from either of the Houses. Thus, the President initiates most of the bills and sends them to the Legislature for consideration and possibly passes them into Laws. Essentially, the role played by the executive in the legislative process is fundamental such that it makes the executive an integral part of the lawmaking process.<sup>69</sup> Besides, the president exclusively shall issue a proclamation for the holding of the first session of the National Assembly immediately he is sworn-in after the election, and also for its dissolution at the expiration of its four-year tenure. The National Assembly can neither commence sitting nor dissolve at the expiration of its tenure without the proclamation.

### **5.7 Judicial Function**

The president has the power to appoint certain judicial officers on the recommendation of the National Judicial Council, subject to confirmation by the Senate likewise such judicial officers can be removed by the President upon such same conditions.<sup>70</sup>

### **5.8 Judicial Purview**

The Primary judicial powers of the government are vested in the judiciary and include the power to adjudicate between individuals and between persons and the government.<sup>71</sup> It also extends to the interpretation of the constitution.<sup>72</sup> Any decision given by the Supreme Court is final and binding on all authorities and persons in the federation with a few exceptions.<sup>73</sup> The effect of the decisions of the court makes it the supreme organ of government.<sup>74</sup>

## **6 Judicial Control of Discretionary Powers**

From the foregoing, the necessity of judicial control over the several discretionary powers becomes apparent. There are several methods in which the Judiciary may check the use of these discretionary powers some of which are examined below:

### **6.1 Judicial Review**

The actions or inactions of the other organs are subject to judiciary's power of review. Constitutional experience in Nigeria where the elected state officials and their unelected party

---

<sup>67</sup> *Ibid.*

<sup>68</sup> Section 58(2) Constitution of the Federal Republic of Nigeria 1999

<sup>69</sup> *Ibid.*

<sup>70</sup> Section 231, 238 and 250 of the Constitution of the Federal Republic of Nigeria 1999

<sup>71</sup> Section 6(6) Constitution of the Federal Republic of Nigeria 1999

<sup>72</sup> Section 231(1) Constitution of the Federal Republic of Nigeria 1999

<sup>73</sup> A T Shehu, & M M Akanbi ' Modeling Separation For Constitutionalism: The Nigerian Approach' 2012

<sup>74</sup> *Ibid.*



officials often engage in abuse of office, corruption, lawlessness, and lack of respect for the rule law gives support to judicial review of executive and legislative actions.<sup>75</sup> Politics in Nigeria has been largely characterized by lack of respect for fundamentals of democracy such that there is a need for balancing of power.<sup>76</sup> Federalism also requires a court system that would police the activities of member states to ensure compliance with the federating charter.<sup>77</sup> All these have been amply demonstrated in Nigeria where the constitution distributes powers among the federal government and the federating units, as can be seen below.

## **6.2 Review of Executive Action**

An example of Judicial Review can be seen in the case of *A.G. Lagos State v A.G. Federation* where it was alleged that the President withheld the statutory allocation that was due to Lagos State from the Federation Account on the grounds that the state created local government councils without compliance with the relevant provisions of the constitution.<sup>78</sup> The State, among other reliefs, sought a declaration that the President lacked the power to withhold the money due to the State from the Federation Account.<sup>79</sup> The Supreme Court, in the exercise of its power of constitutional/judicial review, declared the presidential act as unconstitutional, null and void. Unfortunately, the President did not, in spite of the Court's ruling, release the funds.<sup>80</sup> It is therefore not farfetched to state that judicial review was "designed to knit the nation together by counterbalancing the pressure exerted by federalism".<sup>81</sup>

## **6.3 Review of Legislative Action**

Judicial review is most appropriately the bedrock of democracy in Nigeria. This is because, without it, the rights and competencies of one branch of government may be, with recklessness, put in jeopardy or rendered ineffectual by another branch.<sup>82</sup> An example of this is the empowerment of the Legislature to impeach the Chief Executive on the grand of "gross misconduct".<sup>83</sup> This power of removal is vested in the legislature by the people to ensure that Chief Executives are conscious of their democratic responsibilities to the electorate and to ensure that the officeholder does not engage in any act unbecoming of the status of that office.<sup>84</sup>

Another example can be seen in the Supreme Court's intervention through judicial review in *Inakoju v Adeleke* where there was an attempted impeachment of Governor Rahidi Ladoja by a splinter of the State House of Assembly.<sup>85</sup> The removal was challenged before the State High Court, which declined jurisdiction after which the matter went before the Court of Appeal.<sup>86</sup> The Court of Appeal gave judgment against the manner in which the purported impeachment of the

---

<sup>75</sup> *Ibid.*

<sup>76</sup> S Miguel 'Squaring the Circle: Democratizing Judicial Review and the Counter-Constitutional Difficulty', <http://ssrn.com/abstract=889470>. 2010

<sup>77</sup> *Ibid.*

<sup>78</sup> *A.G. Lagos State v A.G. Federation* (2004) Nigerian Supreme Court Quarterly Report, (20): 99

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*

<sup>81</sup> S Miguel. 'Squaring the Circle: Democratizing Judicial Review and the Counter-Constitutional Difficulty', <http://ssrn.com/abstract=889470>. 2010

<sup>82</sup> D F Ologbenla, (2007), 'The Law of Impeachment and Its implication for Democracy in Nigeria' In L Olorode, (ed.) *Impeachment and the Rule of Law: The Future of Democracy in Nigeria* (University of Lagos, 1999), p.25.

<sup>83</sup> Section 143 of the Constitution of the Federal Republic of Nigeria 1999

<sup>84</sup> *Ibid.*

<sup>85</sup> *Inakoju v Adeleke* (2007) Nigerian Supreme Court Quarterly Report, (29): 958)

<sup>86</sup> *ibid*

Governor was carried-out. Dissatisfied with the judgment of the Court of Appeal, the splinter legislature brought an appeal before the Supreme Court.<sup>87</sup> It was a clear case of judicial review; the court was to determine the constitutionality of the procedure adopted by the splinter legislature. Supreme Court, per Justice Niki Tobi, JSC, declared the impeachment as unconstitutional.<sup>88</sup>

## 7 Means of Judicial Review

### 7.1 Mandamus

An order of mandamus is an order to compel the performance of a public duty, as a first resort where no other remedy is available when a public institution fails to perform a public duty, the civil rights and obligations of some citizens are bound to be affected, it is an order which a court of law can make as a consequential order in any deserving case before it. An example of a Mandamus is evident in the case of *Architect's Registration Council of Nigeria ( Re Majoroh ) v. Prof. M.A. Fasasi*, the Supreme Court made an order compelling the Architect's Registration Council of Nigeria to register the appellant whose right to be so registered had been upheld by the court four years earlier.<sup>89</sup> Also, in *Gani Fawehinmi v. Alilu Akilu & Anor*, the Lagos State Attorney-General refused to endorse his refusal to prosecute on an application brought by a private prosecutor.<sup>90</sup> The application was for leave to effect a private prosecution of the security officers suspected of having murdered a journalist. After a protracted challenge of the *locus standi* of the applicant, to bring a private prosecution, a Lagos High Court finally ordered the Lagos State Attorney General to do her duty. In the event, her office opted to prosecute the suspects directly.<sup>91</sup> A possible limitation of the mandamus remedy is the requirement, often strictly enforced, that there should be no other remedy equally conveniently available.<sup>92</sup>

### 7.2 Certiorari and Prohibition

This is an order issued to a court or a judicial tribunal or a private organization exercising a quasi-judicial function, to have the record of proceedings brought into the Superior Court for review, and (if bad) to be quashed.<sup>93</sup> Whenever anybody of persons having the legal authority to determine questions affecting the right of subjects and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the Courts.<sup>94</sup>

In *Gani Fawehinmi v. Legal Practitioners Disciplinary Committee*, a High Court issued an order prohibiting the disciplinary committee from sitting over changes preferred against the applicant.<sup>95</sup> The applicant contended that the body as constituted could not give him a fair hearing.<sup>96</sup>

<sup>87</sup> *ibid*

<sup>88</sup> *ibid*

<sup>89</sup> *Architects Registration Council of Nigeria In Re-Majoroh v. Prof. M.A. Fasasi* (1987)3 N.W.L.R. 42

<sup>90</sup> *Gani Fawehinmi v. Akike & Anor* (1988)2 W.L.R. (Pt. 67) 122.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*

<sup>93</sup> *Gani Fawehinmi v. Legal Practitioners Disciplinary Committee* (1985)1 N.W.L.R. (Pt. 7) 300

<sup>94</sup> *R. v. Electricity Commissioners* (1924)1 K.B. 171

<sup>95</sup> *Gani Fawehinmi v. Legal Practitioners Disciplinary Committee* (1985)1 N.W.L.R. (Pt. 7) 300

<sup>96</sup> *Ibid.*

In the case of *Garba v. University of Maiduguri*, the Supreme Court had no difficulty holding that the University disciplinary panel had exceeded its jurisdiction.<sup>97</sup> The panel had been set up to investigate alleged acts of looting and arson against the demonstrating students consequent upon which they were found guilty and rusticated. The students filed this action seeking their reinstatement arguing that the panel upon whose recommendation their dismissal was based had exceeded its lawful brief by arrogating to itself the functions of a court of law.<sup>98</sup> The Supreme Court invoked certiorari to quash the panel's decisions.<sup>99</sup>

### **7.3 Prerogative Power**

The powers exercised by the state, whether in peace or war, for the defense of the realm or the training or maintenance of the armed forces.<sup>100</sup> The prerogative powers can be applied in many circumstances including the treatment of aliens, employment of Government servants among others.<sup>101</sup> It remains the function of the court to decide whether, and to what extent, the alleged prerogative exists.<sup>102</sup>

## **8 Challenges Faced in Judicial Control**

In spite of the fact that the law courts have a constitutional function of controlling the exercise of discretion, there are still some categories of discretion which are not subject to judicial control some of which are as follows:

### **8.1 Nolle Prosequi**

This refers to the discretion given to the Attorney-General to stay proceedings before judgment is given in any court of law in Nigeria.<sup>103</sup> The Attorney-General has the discretion to determine whether any criminal prosecution shall be continued or discontinued.<sup>104</sup> The power of *nolle prosequi* is vested in the Attorneys-General for the Federation and the States.<sup>105</sup> The power of *nolle prosequi* is not subject to any form of judicial control and this was affirmed by the Supreme Court in *States v. Ilori* where the court held that the Attorney-General need not give reasons for exercising this power.<sup>106</sup> The power of *nolle prosequi* is expected to be exercised in the interest of justice and to prevent abuse of legal process.<sup>107</sup> But even where the power has been flagrantly misused, the courts have no legal capacity to control such abuse.<sup>108</sup> Statutory Exclusion of judicial intervention where an act has given the discretion to exercise power on an administrative authority without making "good faith" a relevant prerequisite in the exercise of the power, the courts are always reluctant to interfere with the exercise of such discretionary power.<sup>109</sup> This situation is clearly illustrated by the decision of the court in *Yusuf v. Egbe* where

---

<sup>97</sup> *Garba v. University of Maiduguri* (1986)1 N.W.L.R. (Pt. 18) 550

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.*

<sup>100</sup> Section 5 of the Constitution of the Federal Republic of Nigeria 1999

<sup>101</sup> *Ibid.*

<sup>102</sup> *Ibid.*

<sup>103</sup> A Ige . "Constitutional And Judicial/Legal Principles And Doctrines"

[www.unilag.edu.ng/opendoc.php?sno=15947&doctype=do&doc&docname=\\$](http://www.unilag.edu.ng/opendoc.php?sno=15947&doctype=do&doc&docname=$) Last accessed on 9<sup>th</sup> February 2015.

<sup>104</sup> S. 174 of the Nigerian Constitution 1999

<sup>105</sup> *Ibid*; and Section 211 of the Nigerian Constitution 1999

<sup>106</sup> *State v. Ilori* (1983) 2 S.C. 155

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.*

the plaintiff/respondent had used the defendants/appellant who was at the material time the Inspector-General of Police for unlawful detention under the provisions of the Armed Forces and Police (Special Powers) Decree No. 24 of 1967.<sup>110</sup> The Court of Appeal reversing the judgment of the High Court held that the Public Officer Protection Law contains no qualification of “good faith” and that the court ought not to read into statute words of limitations. In the words of Kutigi J.C.A:

There is no onus on the defendant to show that he was not using the order of detention to further his own wicked motives in order to enjoy the protection afforded by the Armed Forces and Police (Special Power) Decree No. 24 of 1967.<sup>111</sup>

## 8.2 Failure to Challenge The Exercise of Discretion Within The Prescribed Time Limit

The law courts will not be able to interfere with the exercise of administrative discretion where the prescribed time for challenging the power has elapsed before an aggrieved person goes to court to challenge such discretionary power.<sup>112</sup> Thus in *Yusuf v. Egbe*<sup>113</sup> the court held that the appellant who had been detained for eleven days could not claim damages for unlawful detention as he did not commence legal action until seven months after the detention.<sup>114</sup> It was further held that once a complaint fails to bring his action within a prescribed time, the claimant’s cause of action is extinguished and it cannot be reviewed by the contention that the public officer’s wrong was not done in pursuance of his public duty failure to institute an action within the prescribed time limit renders any subsequent litigation statute barred.<sup>115</sup>

## 9 Conclusion

The exercise of discretionary powers in Nigeria is a pertinent administrative duty of all of the three tiers of government in Nigeria. Not all aspects of administrative governance are within the purview of the statutes set out to regulate them. It is submitted that administrative discretionary powers can be effectively regulated by the properly functioning administrative judicial bodies. There is no doubt that the successful implementation and utilization of discretionary powers in Nigeria can be accomplished.

---

<sup>110</sup> *Yusuf v. Egbe* (1957)2 N.W.L.R. (Pt. 56) 341

<sup>111</sup> *Ibid.*

<sup>112</sup> B O Iluyomade, & B U Eka ‘Cases and Materials on Administrative Law in Nigeria, Second Edition, Obafemi Awolowo University Press Limited, Ile-Ife, Nigeria’ 1992. O Toriola ‘Administrative Law in Nigeria, Jator Publishing Company, Nigeria’ 1997. See also, *Lakanmi v. Attorney-General Western State* (1971) U.I.L.R. 201.

<sup>113</sup> *supra*

<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid.*