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Importance of Judicial Discretion and Its Extent to Exclude Prejudicial Evidence in Criminal Justice System

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Abstract

Judicial discretion has a very wide application in the criminal justice system and to exercise it by the judge in a trial is an important aspect of the legal order. The extent of reasonable and appropriate exercise of judicial discretion in excluding prejudicial evidence is very important to ensure fairness of the justice and to avoid injustice to the accused in a criminal trial. Sometimes when law cannot provide appropriate and specific guidelines to avoid injustice to the accused it may be provided by the standard principles of justice and due process, judges creative and interpretive role within constraints of rational thought, not in a subjective sense, but consideration of the facts of each case through exercising judicial discretion.

Introduction

Judicial discretion is a very broad concept and it exists in almost every branch of legal system. The concept of judicial discretion differs from deciding a question by applying a fixed rule of decision in the way that the decision-maker is able to decide between alternative courses of action. Although judicial discretion exists in almost every branch of legal system yet it is widely applied in the criminal justice system. In the criminal justice system, police, prosecutors, judges and jury may exercise a degree

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of discretion. To exercise a judicial discretion, judges' decisions must be based on the "rule of law". Although Judges' have wide judicial scope to exercise discretion in many contexts[1] in the criminal justice system but in this article I will center my attention on the importance and problems of the existence of judicial discretion. But my objective will be limited to discuss the extent of exercising judicial discretion in excluding prejudicial evidence in the criminal justice system so that the fairness of justice can be ensured to the accused in a criminal trial.

2. Judicial Discretion: Nature and Definition

The term "judicial discretion" is not defined in any codes or statutes but it has more than one meaning and indeed means different things in different contexts. The word 'discretion' mainly means a discreet or prudent manner by which one is able to act or make a decision according to one's own choice. Judicial discretion is a science of understanding, to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colorable glosses and pretences, and not to do according to their wills and private affections.[2] To exercise discretion by the judge is an important aspect of the legal order. Judicial discretion means where appropriate, a judge is allowed to decide a case within a range of possible lawful alternatives. According to Keith Hawkins, "Discretion is a central and inevitable part of the legal order. It is central to law because contemporary legal systems have come increasingly to rely on express grants of authority to legal and administrative officials to attain broad legislative purposes. It is inevitable because the translation of rule into action, the process by which abstraction becomes actuality, involves people in interpretation and choice....

[1] For example, to stay proceedings, variation in punishment and sentencing and granting parole to the offenders.
[2] Whartsons Law Lexicon, 14th Ed.p 546

It is in the everyday discretionary behavior of judges, public officials, lawyers, and others that the legal system distributes its burdens and benefits, provides answers to questions and solution to problems."[3]

According to Galligan, discretion is any power entrusted to an official which leaves the decision-maker with 'some significant scope for setting the reasons and standards according to which the power is to be exercised, and for applying them in the making of specified decisions.'[4] The term "Judicial discretion" means the power of the judges to make some legal decisions according to their discretion within a range of possible solutions. But Aharon made more clear definition, who defines discretion as the power given to a person with authority to choose between two or more alternatives when each of the alternatives is lawful. Therefore, it can be said that judicial discretion means the power the law gives the judge to choose among several lawful alternatives.[5] Hart and Sacks made a similar definition: "Discretion means the power to choose between two or more courses of action each of which is thought of as permissible."[6] Judicial discretion, then, means the power the law gives the judge to choose among several alternatives, each of them being lawful. This definition assumes that the judge will not act mechanically, but will weigh, reflect, gain impressions, test and study. Yet this conscious use of the power of thought does not define judicial discretion it only suggests how the judge must act within the framework of his

[3] Hawkins, Keith, The Use of Legal Discretion: Perspective from Law and Social Science, in: The Use of Discretion, Keith Hawkins,(ed), Clarendon Press: Oxford, 1992, p 11.

[4] Galligan, D.J., Discretionary Powers: A Legal Study of Official Discretion, Oxford: clarendon, 1986.

[5] Barak, Aharon, Judicial Discretion. Yale University Press, New Haven and London, c1989 at p 7.

[6] H. Hart and A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 162(Tentative Edition, 1958).

discretion. Indeed judicial discretion is neither an emotional nor a mental state. It is, rather, a legal condition in which the judge has the freedom to choose among a number of unlawful acts. Therefore, there must be more than one possible and lawful courses of action by which the judge can choose the one that most appeals to him.[7]

3. Theoretical problem regarding the existence of judicial discretion

Law recognizes and judges exercise judicial discretion although there is theoretical debate about the existence of it. Different legal theorist expounded judicial discretion from different theoretical aspects. Roscoe Pound, the main proponents of sociological jurisprudence, was the passionate supporter of judicial discretion. According to Pound there are four different kinds of elements in a legal system-rules, principles, conceptions and standards and he contends that legal standards were introduced precisely to give judges a "margin of discretion".[8] Pound identifies certain areas of the law, such as property and commercial law, where legislation is effective and where the 'mechanical application of statutes is possible. In other areas of law, such as the law of torts and criminal law which involves the weighing of human conducts moral aspects, their mechanical application may not ensure desired outcomes of disputes.[9] In the latter areas, where moral conduct is being appraised, a wide measure of discretion for the judges not only is necessary, it is also desirable. However, for Pound, judicial discretion is not unguided or arbitrary action rather it is founded upon reason and principles of justice.[10] According to H. L. A. Hart,

[7] Supra note 5, pp 7-8.
[8] Pound Roscoe, An Introduction to the Philosophy of Law, New Haven: Yale University Press, 1922, pp 56-57.
[9] Ibid, p 69.
[10] Ibid, p 70.

judicial discretion is unavoidable feature of law as he observes that generality of language makes it impossible completely to specify how the law must apply in every particular fact situation. Hart describes law as 'open-textured' that is surrounded by the "penumbra of uncertainty". By the expression "open-textured", he means that law has a core of determinate meaning and a penumbra of indeterminate meaning.[11] Hart strongly suggests that the law is determinate when, and only when, reasonable disagreement about it is absent. In other words, when the identification and implication of a rule of law are uncontroversial, there is no judicial discretion. But when law is controversial, when it is possible to develop plausible arguments on both sides of a legal question and a decision can not be made mechanically but must involve weighing reasons on both sides, then the law must be regarded as indeterminate in the sense that there is scope for judicial discretion. According to Hart, "In every legal system a large and important field is left open for the exercise of discretion by the courts and the other officials in rendering initially vague standards determinate, in resolving the uncertainties of statutes, or in developing and qualifying rules only broadly communicated by authoritative precedents".[12] For Hart, there are three reasons for indeterminacy. First, language of law may be itself indeterminate: words contain a centre core of certainty of meaning but invariably also a 'penumbra of doubt'.[13] Secondly, rules use very general standards, for example, a safety system of work. And thirdly, there is indeterminacy inherent in the common law system of precedent.[14] Hart also expounds theories of 'easy case' and 'hard case' and

[11] Hart, H.L.A., "problems of Philosophy of Law" in: The Encyclopedia of Philosophy, New York, 1967, Vol. 7, pp 268-72.
[12] Hart, H.L.A., The Concept Of law, Oxford University Press, Second Edition, 1994, p 136.
[13] Hart, H.L.A., Positivism and the Separation of Law and Morals, 71 Harvard Law Review, 593, 607-09(1958), Also See note 10 above.
[14] Ibid.

distinction between them are relevant to his proposition of judicial discretion. According to Hart, discretion in easy cases like in routine cases of legal rules, judges do not exercise discretion. In that type of case, the rule is applied as a matter of routine, as a deductive syllogism leading to a unique rule. On the other hand, in hard cases e.g., in case of indeterminacy, inconsistency,or ambiguity in law, judges can decide such cases only by adding determinate content to the law, and by engaging in "creative judicial activity" that amounts to legislation. According to him, in case of hard cases, judges exercise discretion in proper sense.[15] Professor Ronald Dworkin and those who share his view takes a narrow view on judicial discretion .According to Dworkin, judges has no judicial discretion because each legal problem has only one lawful solution. In their opinion, even in the hard cases, the judge is never free to choose among alternatives that are all inside the bounds of the law. According to this approach, even in hard cases, the legal norm directs the judge, forcing him to choose one of the possibilities, and only that one. According to Dworkin, the hard cases, consequently, are not hard, and the judicial discretion in them is not discretion in the sense in which judges are using the term. The hard cases are complicated, and they require study and weighing, but at the end of the study and on the basis of the existing normative guidelines, they have only one lawful solution. This approach attempts to "take rights seriously". These rights do not follow from judicial discretion, but rather they direct judicial discretion. Our rights, in hard cases, are not in the hands of judges; rather, the judges must, in hard cases, recognize our rights. According to this approach, law is closed system that contains a solution to every difficult problem and that leaves no room for judicial discretion.[16] According to D.J.Galligan, a central feature of

[15] Fletcher P. George, Basic Concepts of Legal Thought, Oxford University Press, 1996, New York, p.56-57.
[16] Supra note 5, p 28.

discretion is a degree of autonomy in judgment within a defined context which is vested in the decision-maker sine he has authority to give reasons for his decision.[17] According to him, discretion has come to connote rather autonomy in judgment and decision. To have discretion means to have a sphere of autonomy within which one's decisions are in some degree a matter of personal judgment and assessment. Galligan claims that judicial discretion occurs in three situations: the way that the judges justify their decisions when the legal standards are indeterminate and unsettled in meaning, or where there appear to be gaps in them. When a judge in the course of deciding a case finds that the meaning of legal rules is unclear or uncertain or that there are gaps in them, he must exercise discretion and make policy choice in settling the meaning or filling the gap.

A second aspect of judicial discretion occurs where judges assume authority to overturn or depart from established legal doctrine. This may occur in one of two ways: firstly, the court may depart from settled doctrine in order to achieve equitable result. Secondly, the court may overturn a particular doctrine in a more general way in order to bring the law into line with prevailing attitudes or circumstances, or in order to initiate a legal development that seems desirable.[18]

The third situation of judicial discretion occurs when judges are given delegated powers expressly by statutes or regulation, or pursuant to common law doctrines.[19] In such situation, judicial discretion refers to the legal decisions which a judge must make in interpreting, applying, settling, and changing the law.[20]

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[17] Galligan, D.J., Discretionary Powers, Clarendon Press, Oxford, 1986, p 7.
[18] Ibid, pp 37-40.
[19] Ibid, p 37.
[20] 20. Ibid, pp 44-45.

The convincing theory on judicial discretion has been propounded by John Bell. He argues that in exercising judicial discretion, judges take recourse to policy arguments with regard to the particular area of law in question. He defines policy arguments, as substantive justifications to which judges appeal when the standards and rules of legal system do not provide a clear resolution of a dispute. He also contends that policy arguments do not have to be used in every case, which comes before a judge. They are confined to 'hard cases', where there is no settled answer. He characterizes judicial discretion as 'judicial creativity' which can be given any of three senses. Firstly, all interpretation and rule -definition is 'creative' in the sense that the judge has to state something, which has not been expressed before. Secondly, 'creativity' may be defined as making a choice of the values to be applied where there is no consensus on what is appropriate standard for the situation in question. In a third, more restricted sense, 'creativity' may apply to situations in which the judge simply gives effect to his personal views where there is no settled legal answer to the question before him. John Bell gives emphasis on second sense of judicial discretion in the form of creativity and considers it as the most appropriate circumstances in which judicial discretion can be exercised.[21]

4. Judicial Discretion: Scope and Limitations

The above discussions reveals that there is some degree of disagreement as to the nature and scope of judicial discretion among the jurists yet it must be mentioned that judges not only apply and interpret law but also exercise discretion in resolving dispute. The exercise of judicial discretion is an inherent aspect of judicial independence under the doctrine of separation of powers. It involves a degree of legitimate choice of judges and that

[21] Bell John, Policy Arguments in Judicial Decisions, Oxford, Clarendon Press, 1983, pp 30-31.

legitimate choice must be based on reason and justice and should be confined within the confines of certain legitimate restrictions or limitations. Ahron distinguished discretion as narrow and broad discretion. According to him, when discretion is narrow, the number of lawful options is small, although it never drops below two; the number of options is large, when discretion is broad. Another distinction which concerns not the number of options but rather the degree of liberty that the law imparts to the person exercising discretion. This distinction focuses on the procedural and substantive tests that must be considered in the choice among the various options. Ahron also made distinctions between absolute and limited discretion. According to him, when the method of decision and the number and character of the factors is left to the subjective determination of the exercise of discretion, who may decide in whatever way appears best to him, according to any consideration he likes, holder of authority wields absolute discretion. On the other hand, when number and nature of considerations is not left to the subjective decision of the person with discretion, and he is not permitted to decide however he sees fit, but rather is restricted in terms of both the form of the decision and the scope of the factors he may take into account, then it is said the authorized person has only a limited discretion.[22]

It should be mentioned that a judge does not exercise absolute judicial discretion. Every exercise of discretion in the context of the law is subject to limitations placed on it by the
law. Judicial discretion exercised by law and which always derives its force from the law can never be absolute. In the words of Justice William Douglas, "Absolute discretion, like corruption, marks the beginning of the end of liberty".[23] So the exercise of discretion by judges is always limited.

[22] Supra note 5, p, 18.
[23] State of New York v. United States, 342 U.S. 882, 884 (1951).

Lord Mansfield wrote, "Discretion when applied to a court of justice means sound discretion guided by law. It must be governed by rule not by humor; it must not be arbitrary, vague and fanciful, but legal and regular". Chief Justice John Marshall took a similar position concerning the discretion enjoyed by judges:

When they are said to exercise discretion, it is a mere legal discretion, discretion to be exercised in discovering the course the course prescribed by law; and when that is discovered, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law.[24]

4.1. Limitations

The judicial discretion is not arbitrary. It must fulfill the fundamental requirements of judicial discretion. Judicial discretion is always limited within the framework of the limitations that the law places on it. There are two types of limitations on judicial discretion: Procedural and substantive.

4.1.1. Procedural limitations

The way in which a judge chooses among the options open to him is not left to his unbridled discretion. There are limitations on the procedure he must follow and on the traits he must exhibit during this process. These limitations may be grouped under the general heading "fairness". The fundamental characteristic of the process is impartiality. The judge must treat the parties equally, giving them an equal opportunity during the trial. He must not have any personal interest, however remote, in the outcome of the case.

[24] Supra note 5, p, 21.

The discretion must be based on the evidence that comes before the judge. His decision must be reasoned. The duty of giving reasons is among the most important challenges facing a judge who seeks to exercise discretion.[25] Justice Landau described this in the following words:

Judging through the use of discretion must not become arbitrary judging. There is no better tested way of avoiding this danger than the full explanation of the judgment. This kind of explanation trains the judge to think clearly and to raise his reasons- including his intuitive thoughts, to which Pound referred- above his subconscious, to the light of day, in order that they should stand the test of criticism by the appeals court, by professional, and by the general public.[26]

These are the procedural limitations on the judge's to exercise judicial discretion.

4.1.2 .Substantive limitations

The substantive limitations are those limitations that bind the judge with respect to the considerations he takes into account in the choice among the possibilities. Substantive limitations imposes upon the judge that he has a duty to exercise his discretion reasonably. The fundamental duty of the judge is to exercise his discretion reasonably. In order to do so, he must be conscious of the fact that he has discretion of the meaning of discretion, and of the various factors that he must weigh in the context of this discretion. One cannot discuss the reasonableness of judicial discretion without examining three issues: first, the normative system (the law) within whose boundaries the individual norm that

[25] Supra note 5, p.22.
[26] Landau, "Rule and Discretion in Law-Making", 1 Mishpatim 292(1968), p 303.

constitutes the object of the judicial discretion operates; second, the institutional system (the court) that activates the norm; and third, the reciprocal relations among all the institutional systems (the separation of powers) in the context of the fundamental values of the state. Of course, these three components are interconnected. Nevertheless, each of them deserves to be considered separately.[27]
Needless to say, for a reasonable exercise of judicial discretion judge must understand that he is limited in information and in means. He must realize that he must do justice and that justice must also appear to have been done. For all these requirements he must act objectively.[28]
Thus, procedural limitations and substantive limitations impose restrictions upon the judge's freedom of choice, both with respect to the manner of choosing and with respect to the nature of factors that he may take into account.

6. Importance of Application of Judicial Discretion

The importance of application of judicial discretion is necessarily important in every branch of legal system, yet it is much more important in the criminal justice system because of its wide application. Although a few number of legal philosophers have criticized the concept of judicial discretion. Dicey referred discretion as identical to arbitrariness and a hindrance to the Rule of Law.[29] Gibbon believed that 'the discretion of the judge is the first engine of tyranny'.[30] The most famous denunciation of discretion is that of Lord Camden who said: The Discretion of a Judge is the Law of Tyrants; it is always unknown; it is different in different Men; it is casual and depends on Constitution, Temper, and Passion. In the best it is oftentimes Caprice, in the worst it is

[27] Supra note 5, pp115-117.
[28] Ibid, pp 146-147.
[29] Dicey, A. Law of the Constitution, 9th edn. (London, 1945), 188.
[30] As quoted by Lord Devlin, The Judge (Oxford, 1979), 201.

every vice, Folly, and Passion to which Human Nature is liable.[31]The opposition to the concept of judicial discretion stems from the mistrust of the judges who make their decisions not on the basis of clear rules but biases, evil, and dishonest motives. Rules, on the other hand, are much more certain. However, rules can never be applied mechanically, discretion must supplement the law.[32] Any attempt to apply rules in everything that would result in the admission of gravely prejudicial evidence (though it is admissible) and thus would be a greater injustice to a party. It is to be mentioned that evidence and procedure are areas of law in which the formulation of a rule to allow for every likely contingency is particularly difficult. Even a general rule can be found that may be necessary to leave the judge with discretion to depart from it to ensure a fair trial.[33] Judicial discretion allows decision- makers flexibility to do justice. Judicial discretion is necessary to avoid potential injustice although it creates uncertainty. Thus in the criminal justice system the judges can apply judicial discretion to exclude evidence which is prejudicial but legally admissible so that the fairness of the justice to the accused can be ensured.

7. Application of Judicial Discretion to Exclude Prejudicial Evidence in criminal Justice System

It has been mentioned earlier that in the criminal justice system judges have wide scope to exercise judicial discretion in the course of a criminal trial which started on indictment and ended by the stage judge's returns its verdict. In a criminal trial there are many cases in which judges can exercise discretions for the protection of an accused and to ensure fair trial during the trial such as discretion to stay proceedings, to order separate trials of co-accused, to reject or alter a plea, to trial of the accused in his absence etc. Since my

[31] Supra note 5, p 172.
[32] http://www.Jasononline.com/Law
[33] Supra note 5, p 173.

discussion is limited within the ambit of excluding prejudicial evidence so I will give emphasis on it. At common law, there are some important cases in a criminal trial where a judge may exercise discretion to exclude evidence which is legally admissible but prejudicial on the grounds of unfairness. There may be two kinds of unfairness. The first is the unfair use of the evidence at trial. The other category of unfairness is the unfair obtaining of evidence by the prosecution. In regard to the first category of unfairness, it is the judge's duty to ensure that the trial is fair; he has discretion to reject any evidence which he considers may have the effect of rendering the conduct of the trial unfair to the accused.[34] In *Noor Mohammed v R*,[35] it was held that it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible and the decision must be left to the discretion and the sense of fairness of the judge. The existence of this discretion is usuallly found in dictum of Lord Moulton and Lord Reading in *R. v. Christie*.[36] In *R.v. Sang*,[37] Lord Diplock gave an important obiter that the trial judge has a discretion to exclude the evidence where the prejudicial effect of evidence outweighs its probative value if its admission would result in an unfair trial. The second category of unfairness where judge's can also exercise discretion to exclude prejudicial evidence will be discussed in the rest of the article.

When exercising judicial discretion, judges are required to balance the prejudicial effect of evidence against its probative value. So a question may raise that how little probative value or how great prejudicial evidence gives judges the power to exercise their

[34] Phipson &Elliot, Manual of The Law OF Evidence, 11th edn. Universal Law Publishing Co. Pvt. Ltd.1980, p 225.
[35] [1949] A.C. 182 at 192 (P.C).
[36] [1914] A.C. 545 at p. 559.
[37] [1979] 2 All.E.R. at 1230.

discretion? But it must be borne in mind by the judges that evidence which is prejudicial only in the sense that it incriminates the accused is not prejudicial for the purposes of the discretion. In *R. v. Christie*,[38] it was held that evidence should not be given if it is 'seriously prejudicial and of little value in its direct bearing of the case'. And in *Noor Mohmmed v. R*,[39] the evidence of 'trifling weight' or 'technically admissible' but of 'gravely prejudicial character' and in *Boardman v. D.P.P*,[40] Lord Salmon contemplated the exclusion of evidence of 'minimal' value. Later on a modified version emerged and evidence of considerable probative value could also be excluded provided that the prejudicial effect is substantial.

It must be mentioned that the judge's discretion to exclude evidence which is more prejudicial than probative can be applied to any type of admissible evidence. In the following, it will be discussed how in several different kinds of evidence discretion operates.

7.1 Similar Fact Evidence

It is sometimes possible to prove facts from evidence that the accused has acted on other occasions in the same way, the way he is alleged to have acted on the occasions which gave rise to the indictment is often called the similar facts doctrine. Admissibility of similar facts evidence are exceptional, because the general rule is to the contrary, i.e. that the prosecution is not allowed to reveal in any way that the accused acted similar way to what he is now accused. It is not allowable for the possibility that the accused has reformed or has only recently lapsed from lawful behavior. But as a matter of logic, similar facts evidence which is tendered by the prosecution will only be admissible if they are sufficiently similar

[38] Supra note 35, p 564.
[39] Supra note 34.
[40] [1975] A.C. 421 at 463 (H.L.).

in some significant aspect. According to Pattenden, the questions of admissibility and discretionary exclusion of similar fact evidence are almost inseparably intertwined.[41] The landmark case of this is *D.P.P v.Boardman*,[42] where the principle was authoritatively laid down by the House of Lords. Prior to its decision, the courts classified situations in which the prosecutions may wish to use similar fact evidence and laid down rules allowing it whenever a particular defence was put forward. An example would be whenever offences involving homosexual acts are alleged against an accused who is homosexual, then the jury may be told of his homosexuality. All these old categories were discarded by the House of Lords in the above mentioned case and it was held that each case should be looked at individually. It also provided that similar fact evidence would be admissible if its prejudicial effect on the accused is either justified or outweighed by its probative value in the eyes of jury's.[43] It also provided that similar fact evidence to be admitted, requires a strong degree of probative force.[44] This force must arise because the evidence as to similar facts and the fact in issue is so strikingly similar that common sense makes the similarity inexplicable on the basis of coincidence.[45] The relevance of the similar fact must be such as to exclude it would be an affront to common sense.[46] Therefore, the admissibility depends on the similar facts evidence being positively probative, i.e. extremely cogent. Unless there is a very high degree of relevance, judge may exercise his discretion and exclude similar fact evidence. But there may be cases where though the prejudicial effect of similar fact evidence is

[41] Pattenden, Rosemary, Judicial Discretion and Criminal Litigtion, Oxford [England]: Clarendon Press, 1990.
[42] [1975] A.C. 421.
[43] Supra note 31.
[44] Supra note 41, p 444 [per Lord Wilberforce].
[45] Supra note 41, p 462 [per Lord Salmon].
[46] See note 41 above, p 453 [per Lord Hailsham].

overwhelming, the probative force is so great it is sufficient to ensure conviction. No justice would be done if the evidence is admitted in those cases.[47]

The situation will be different in trials where a judge sits alone. In *Attorney General v.Siu Yuk-shing*,[48] it was held that:

"The risk of such prejudice overhearing the probative value of evidence is of infinitely less significance when a case is tried by a judge alone..... In a trial by judge alone, the exercise of excluding the evidence on the grounds of prejudice becomes somewhat unreal..... If the judge having ruled it inadmissible is to be trusted to put the evidence out of his mind he can surely be trusted to give it only its probative, rather than its prejudicial weight if he rules that it is admissible."

This approach was also followed in a number of cases.

7.2. Confessions

A confession is an admission by an accused person. Therefore, a confession is in principle probable against an accused person as an exception to the hearsay rule. But in order to be admissible a confession must satisfy the voluntariness requirement which the prosecution must prove beyond reasonable doubt that the confession was not obtained by fear of prejudice or hope of advantage, excited or held out by a person in authority or ....by oppression.[49] But even it is proved to be voluntarily and prima facie admissible, under common law, judges have discretion to exclude such confession. Judge's may do this either on the ground that the use of the confession at the trial is likely to be unfair (e.g. because it is unreliable, or unduly prejudicial to him) or on the

[47] Supra note 31.
[48] [1989] IWLR 236.
[49] In D.P.P v. Ping Lin (1976) A.C. 574, per Lord Hailsham p. 600.

ground that the method of getting it was unfair (e.g. a trick was used to make him speak or produce some document incriminating himself). So far as the first ground is concerned, it depends upon the judge's duty to secure a fair trial, and therefore the fact that no unfairness or impropriety was involved in the getting of the confession is immaterial. So far as the second ground is concerned, the underlying principle is that a man is not to be expected to betray himself, so if his co-operation was obtained by underhand methods, the fact that the information obtained is inherently reliable is no bar to the use of the discretion. Similarly the fact that the confession is "voluntary" is obviously no bar to excluding it on discretion. Every statement about which a judge is asked to exercise his discretion must be voluntary: if it is involuntary, the statement is completely inadmissible, and no question of discretion can arise. Nevertheless reliability and true voluntariness are factors which a judge takes into account in deciding whether to exercise his discretion.[50] In S*afar Ali v. State*,[51] it was held that confessional statement which does not give a free and full account of the occurrence indicates that it was not a true and voluntary confession.....So the conviction on the basis of such confession could not be legally sustained. In *State v. Lalu Miah*,[52] the confession which is not found to be voluntary must be rejected as inadmissible without entering into the question whether it is true. A voluntary confession obtained during an unlawful detention, real evidence discovered as a result of that confession or real evidence taken from the accused without his or her lawful consent may all be excluded on the grounds of unfairness. This reasoning is flawed because it assumes that if evidence is obtained unfairly, it follows

[50] Supra Note 33, pp 194-195.
[51] 36 DLR 185.
[52] 39 DLR AD 117.

that its admission at trial is also unfair.[53] In *R v. Sang*,[54] Viscount Dilhorne observed

Evidence may be obtained unfairly... but it is not the manner in which it has been obtained but its use at the trial if accompanied by prejudicial effects outweighing its probative value and so rendering the trial unfair to the accused which will justify the exercise of judicial discretion to exclude it. So it is the inherent power of judge to control the trial before him and to see that justice is done in fairness to the accused.

7.3. Bad Character

In a criminal proceeding, it is widely recognized that good character of an accused person is relevant and accused is allowed to prove his good character for the purpose of strengthing his innocence and a fair trial may be threatened if the judges become aware of the accused's bad character. The question whether a party to a proceeding possesses good character or bad character is generally and principally irrelevant and thus so excluded from admissibility in evidence on the ground that the business of the court is to try and adjudicate on the particular charge or cause of action before it and admits all the evidence relevant to prove or disprove that charge or cause of action. Judges always make the decision whether the accused has or has not committed the crime with which he has been charged. The general rule is that the prosecution is not allowed before verdict to adduce evidence of the accused's bad character. Despite this rigidity of the rule, there are some important exceptions where the prosecution can lead evidence of the accused's bad character, *viz*-

a. in reply to evidence of good character,

b. cases in which accused puts his bad character in issue,

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[53] Osborn Debra, Murdoch University School of Law, Vol.7. Num.4 (Dec.2000)

[54] [1980] A.C. at 276.

c. to prove facts which show accused's bad character by previous conviction i.e. similar facts evidence.

It needs to be mentioned that in a criminal proceeding good character of an accused person is relevant and the accused is allowed to prove his good character either in-chief or by cross-examination.

Apart from the aforementioned evidence, the discretion to exclude prejudicial evidence may be applied to any other evidence.

8. Conclusion

It might finally be concluded that the judicial discretion by the judges, has great importance to avoid injustice to the accused but it is to act upon the principle that every procedure is permissible unless prohibited by law. From the foregoing discussion it is revealed that sometimes exercising of judicial discretion is unavoidable because law cannot anticipate every eventuality or which law may be applied to a given situation. So what guidelines law cannot provide may be provided by the standard principles of justice and due process, judges' creative and interpretive role within constraints of rational thought, not in a subjective sense but consideration of the facts of each case through exercising judicial discretion. This is the responsibility required of the judicial function. Judicial discretion allows for the flexibility and it must be guided by judicial self-restraint which requires the judge to avoid arbitrariness. In every legal system proper use of judicial discretion is essential.