

**ADMINISTRATIVE JUSTICE**  
**WITHIN THE FRAMEWORK OF THE 1999 CONSTITUTION\***

Section 6 of the Constitution of the Federal Republic of Nigeria, 1999 (the 1999 Constitution), provides that the judicial powers of the Country shall be vested in the Courts established by the Constitution and under the Laws of the National and State Assemblies.

Section 36 (1) of the same Constitution provides that:

**“in the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a Court or tribunal established by law and constituted in such a manner as to secure its independence and impartiality.”**

It appears, therefore, that the adjudicatory powers in the Country are primarily vested in the regular Courts.

However, in view of the complexity of modern administration, it has become inevitable that a great deal of adjudicatory powers are exercised by various administrative bodies or tribunals which perform judicial and quasi-judicial functions<sup>1</sup>

These tribunals may be classified into three main categories, to wit:-

- (i) Statutory tribunals like the Rent Tribunals in the States, Industrial Arbitration Panel established under the Industrial Disputes Act,<sup>2</sup> Investment And Security Tribunal established under the Investments And Securities Act, 2002.
- (ii) Administrative entities like Governors, Ministers, Commissioners, Head of government Departments and Local Authorities who in the discharge of their executive functions also take decisions that are judicial or quasi-judicial in nature; and
- (iii) Domestic tribunals which are mostly concerned with disciplinary processes like the Accountants Disciplinary Tribunal created under section 11 of the Institute of Chartered Accountants Act,<sup>3</sup> the Legal Practitioners' Disciplinary Committee set up under section 10 of the Legal Practitioners Act<sup>4</sup> and the Medical and Dental Practitioners Disciplinary Tribunal created by Section 15 of the Medical and Dental Practitioners Act.<sup>5</sup>

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1. B.O. Iluyomade & B.U. Eka, Cases and Materials on Administrative Law in Nigerian (Ife, Obafemi Awolowo University Press 1980) p.129
2. Cap 432 Laws of the Federation of Nigeria 1990
3. Cap 185 Laws of the Federation of Nigeria 1990
4. Cap 207 Laws of the Federation of Nigeria 1990
5. Cap 221 Laws of the Federation 1990

Administrative tribunals have become a conspicuous feature of governance. Indeed, as observed by Professor Ben Mwabueze:<sup>6</sup>

**“It is often necessary under modern practice of government to enable administrative authorities to decide matters of a judicial or quasi-judicial nature”**

Various reasons have been put forward to justify the increasing recourse to administrative adjudication in modern governance. According to Hood Phillips and Jackson,<sup>7</sup> “the reasons why Parliament increasingly confers powers of adjudication on special tribunals rather than on the ordinary courts may be stated positively as showing the greater suitability of such tribunals, or negatively as showing the inadequacy of the ordinary courts for the particular kind of work that has to be done.” Some of the specific reasons include the expert knowledge required in respect of some matters which are outside the training of the lawyers who man the regular courts. The reasons also include the cheapness, the speed, the flexibility and the informality which are often required in respect of the various subjects covered by the tribunals.<sup>8</sup>

These tribunals are constituted by persons who may be experts in their own field but in most cases lack the requisite judicial or legal training for the adjudicatory function they perform.<sup>9</sup> Nevertheless, they are increasingly required to determined matters involving legal/constitutional rights of individual citizens.

In view of the growing importance of administrative adjudication in modern governance on the one hand and the need to observe the rule of law as required in any democratic society on the other, it is necessary to examine the basis for the existence and operation of these tribunals within the framework of the present Constitution. Attempt will be made to examine the constitutional/legal safeguards to ensure that their procedure accords with certain established norms like the rule of natural justice and fair hearing. Attempt will also be made to examine the judicial control of these tribunals to ensure that they remain within the framework of the organic law of the land, which is presently the 1999 Constitution. Finally, we shall try to examine the basis and the justification, if any, for the limitation of the powers of these tribunals in relation to cases where allegation of crimes is involved.

### **Constitutional basis for Administrative Adjudication in Nigeria.**

One of the most enduring legacies of British Colonial administration in Nigeria is the use of administrative tribunals in respect of almost every aspect of public affairs. Ironically, administrative adjudication was never a prominent feature of English public law tradition. As observed by Professor Wade,<sup>10</sup>

**“tribunals are mainly a twentieth-century phenomenon, for**

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6. Constitutional Laws of the Nigerian Republic (London, Butterworth, 1964) pp.390-391

7. O. Hood Phillips and Jackson, Constitutional and Administrative Law, 8<sup>th</sup> ed. (London, Sweet & Maxwell, 2001), para. 30-005 p. 686.

8. Ibid.

9. Iluyomade and Eka *op.cit.* p. 130

10. Wade, Administrative Law pp 739-740

**it was long part of the conception of the rule of law that the determination of questions of law – that is to say, questions which require the finding of facts and the application of definite legal rules or principles – belonged to the courts exclusively”**

However, by the time the British Colonial administration left Nigeria in 1960, the use of administrative tribunals in dealing with various judicial and quasi-judicial situations had become fully entrenched not only in England but also in Nigeria.<sup>11</sup>

The continued use of these tribunals has been recognized and preserved by all the Constitutions so far adopted by post-independent Nigeria.<sup>12</sup>

Section 36 of the 1999 Constitution, having provided in its subsection (1) that every person shall be entitled to fair hearing within a reasonable time by a court or tribunal established by law and constituted in such manner as to secure its independence and impartiality, continues in its subsection (2) as follows:

**“Without prejudice to the foregoing provisions of this section, a law shall not be invalidated by reason only that it confers on any government or authority power to determine questions arising in the administration of a law that affects or may affect the civil rights and obligations of any person if such law –**

- (a) Provides for an opportunity for the person whose rights and obligations may be affected to make representations to the administering authority before that authority makes the decision affecting that person; and**
- (b) Contains no provision making the determination of the administering authority final and conclusive.”**

It is apparent from the above provision that the 1999 constitution recognizes and allows the administrative determination of questions that may touch on the civil rights and obligations of individuals provided that the party affected is “given the right to make representations to the administrative tribunal and provided that there is freedom of recourse to the regular courts after the administrative determination.”<sup>13</sup>

Commenting on this provision, Professor Ademola Yakubu<sup>14</sup> observed that “(s)ection 36(2) of the 1999 Constitution clothes the proceedings before administrative bodies or tribunals with legality once the requirement of hearing is observed. Thus, it could be said that trial of issues or determination of contentious issues is not the prerogative of the Courts alone.

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11. See P.A. Oluyede, *Nigerian Administrative Law* (Ibadan, University Press 1988) p.215

12. See S 22 1963 Constitution, S.33 (2) 1979 Constitution and S36(2), 1999 Constitution.

13. See Osita Mnamani Ogbu, Fair hearing, *Domestic Tribunals and Allegations involving a Crime*, *Nigerian Bar Journal* Vol 1 No2, April 2003, p.236

14. John Ademola Yakubu, *Constitutional Law in Nigeria*, (Ibadan, Demyax Law Books 2003) p. 377

Where a tribunal or administrative body has been lawfully constituted, it may hear and determine cases or grievances especially with respect to those who are subject to the jurisdiction of such a tribunal or trial body”

It was held in *Obi V Mbakwe*<sup>15</sup> that S.33(2) of the 1979 Constitution (which is identical to S.36(2) 1999 Constitution), was conceived to facilitate a smooth running of the administrative machinery by allowing agents of the executive to determine the rights of people in accordance with certain laws that might be made from time to time.

It must be pointed out that the Constitution of Nigeria in this respect is not out of tune with international standards. The wording of the South African Constitution, 1996 in its Article 34 is instructive:

“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a Court, or where appropriate, another independent and impartial tribunal or forum”  
(underlining supplied)

Also, the European Court of Human Rights, while commenting on Article 6 of the European Convention on Human Rights which is similar in its terms to S.36 of the 1999 Constitution held that there is no requirement that every dispute involving civil rights and obligations must be heard by the regular courts.<sup>16</sup> In line with this, the House of Lords in England, in *R. (Alconbury Developments Ltd.) v. Secretary of State for the Environment, Transport and the Regions*,<sup>17</sup> rejected a claim that the powers of the Secretary of State under the Town and Country Planning Act 1990, the Transport and Works Act 1992, the highways Act 1980 and the Acquisition of Land Act 1981 to make decisions on planning applications and orders are incompatible with the said Article 6.

Article III of the Constitution of the United States of America provides that:

**“(t)he judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the Supreme and inferior Courts, shall hold their Offices during good behaviour, and shall at stated times, receive for their services, a compensation, which shall not be diminished during their Continuance in Office.”**

It was recognized that Article III “unambiguously enunciates a fundamental principle -- that the "judicial Power of the United States" must be reposed in an independent Judiciary. It commands that the independence of the Judiciary be jealously guarded, and it provides clear institutional protections for that independence.”<sup>18</sup>

Nevertheless, it has come to be accepted that Art. III does not require all determinations of rights to be made by regular courts as long as the power of

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15. (1985) 6 NCLR 783 at 793; See also *L.P.D.C V Fawehinmi* [1985] 2 NWLR p.301

16. See *Le compte, Van Leuren and De Meyere*, series A No 43 cited in Robertson, *Human Rights in Europe; A study of the European Convention on Human Rights* (Manchester; Manchester University Press, 1993) p.92.

17.[2000] 21 W.L.R. 1389, HL.

18. See *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* 458 U.S. 50 at 61[1982]

judicial review is preserved in the regular courts created under the Article.<sup>19</sup> Adjudication by tribunals, commissions or other administrative agencies are recognized in the United States especially in relation to public rights.<sup>20</sup>

### **Judicial control of administrative and statutory tribunals**

One of the conditions for the existence of administrative tribunals within the framework of the Constitution, as we have seen above, is the requirement that the decisions of such tribunals must not be final or conclusive. It is in line with this that the position has long been established, that an administrative tribunal, no matter how highly placed is inferior to the High Court and is always subject to the supervisory jurisdiction of the High Court. According to Awogu J.C.A. in *National Electoral Commission (N.E.C) V Nzeribe*<sup>21</sup>:

**“A tribunal, no matter how highly clothed with power is still a tribunal and so an inferior Court and subject to the supervisory jurisdiction of a superior Court of record, such as the High Court of Lagos.”**

Accordingly, proceedings before an administrative or statutory tribunal may be challenged at the High Court on certain grounds. Prominent among these is want or excess of jurisdiction, denial of natural justice or fair hearing and error of law in the conduct of the proceedings by the tribunal.<sup>22</sup>

It is settled law that a tribunal or other body with a limited jurisdiction acts ultra vires if it purports to decide a case falling outside its jurisdiction. Such proceedings will be a nullity and will be set aside by the courts.<sup>23</sup> Therefore a tribunal must act within the four corners of the statute creating it.<sup>24</sup> Rule of natural justice with its twin pillars of audi altarem partem and nemo iudex in causa sua which are inherent in S.36 of the 1999 Constitution must be observed by these tribunals as failure may render their proceedings null and void.<sup>25</sup> Also, failure to follow the rules and procedure laid down by the enabling statute or an error of law in the proceeding before a tribunal may be fatal depending on whether the defect is fundamental or not.<sup>26</sup>

Proceedings before the tribunals may be challenged by application to the appropriate High Court for judicial review asking for an order of Certiorari (removing the proceedings before the tribunal to the High Court for review, and if bad, to be quashed), Prohibition (preventing the tribunal from exceeding or continuing to exceed its jurisdiction or infringing the rules of natural justice) or Declaration and Injunction. Where the challenge is against any of the fundamental rights guaranteed by the Constitution, it can also be by way of application for enforcement of fundamental right at the appropriate High Court under the Fundamental Rights (Enforcement Procedure) Rules made pursuant to S.42 of the 1979 Constitution which is now S.46 in the 1999 Constitution.

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19. Ibid. at 80; See also, *Crowell v. Benson*, 285 U.S. 22 (1932), and *United States v. Raddatz*, 447 U.S. 667 (1980)

20. Ibid

21. (1991) 5 NWLR (P 192) 458 of 472

22. See *Anisminic Ltd. V Foreign Compensation Commission* [1969] 2 A.C. 147.

23. Ibid

24. See *Okoroafor V Miscellaneous Offences Tribunal* [1995] 4 NWLR pt.387 pg. 59; *Soleye v. Sonibare* (2002) FWLR (pt.95) 221.

25. *Orugbo V Una* (2002) 9-10 S.C. 60 at 69

26. See *R. v. Minister of Health, ex. parte Yaffe* [1930] 2 K.B. 98

In addition to the supervisory jurisdiction, most of the laws creating these tribunals provide for appeals from their decisions to one regular Court or the other. For instance, by S.12(5) of the Institute of Chartered Accountants Act, appeal lies against the decision of the Accountant Disciplinary Tribunal to the Court of Appeal. Similar, provision is contained in section 16(6) of the Medical and Dental Practitioners Act.<sup>27</sup>

It was a common feature of the Decrees by military governments setting up administrative tribunals to contain ouster clauses and make the decisions of these tribunals final and conclusive. This was in an attempt to shield these tribunals from judicial control.

However, even in the dark days of military dictatorships, the courts have subjected such provisions to rigorous tests and have not hesitated to intervene in appropriate cases. In *A –G Federation v. Guardian Newspapers Ltd*,<sup>28</sup> Uwaifor JSC held that:

“In this case even if the two instruments (Decrees No.8 and No.12 of 1994) are effective as Decrees, the Federal High Court ought not to have declined jurisdiction at the stage it did without further inquiry. The ouster of jurisdiction of a Court does not preclude it from exercising jurisdiction to interpret the ouster clause itself or to determine whether or not the action in question comes within the scope of power or authority conferred by the enabling statute”

Also, in *Miscellaneous Offences Tribunal v. Okoroafor*,<sup>29</sup> Ogwuegbu JSC said:

“The Courts should not throw in the towel on the mere mention of an ouster provision. The proceedings of the tribunal can be impeached in the High Court of Lagos State as was done in this case, notwithstanding the ouster provision, where the procedure laid down for the commencement and conclusion of proceedings of the tribunal was not complied with. There was disobedience by the tribunal to observe the procedural rule. It is for the Court to determine whether this procedural rule as to commencement and conclusion of proceedings is mandatory, in which case disobedience will render void or voidable what has been done, or as directory, in which case disobedience will be treated as an irregularity not affecting the validity of what has been done”

Whatever the position might have been under the military dictatorship, such ouster/finality clauses in relation to tribunals have no place within the framework of the present Constitution. According to S.4(8) of the 1999 Constitution, the National Assembly or a House of Assembly shall not enact any law that ousts or purports to oust the jurisdiction of the courts.

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27. See also S 12(6) of Legal Practitioners Act

28. (1999) 5 SC (Pt 111) 59 at 213

29. (2001) 9 – 10 SC 92 at 114

## **Tribunals and the right to natural justice and fair hearing**

Another condition for administrative adjudication within the framework of the Constitution as contained in S.36(2) of the 1999 Constitution, is that any person whose rights and obligations may be affected by administrative adjudication must have an opportunity to make representation to the administrative body concerned. This is a preservation of the right to fair hearing.

It has long been established that administrative tribunals are bound to observe the principles of natural justice and right to fair hearing in the discharge of their judicial and quasi-judicial functions.<sup>30</sup>

According to the learned authors, Iluyomade and Eka:<sup>31</sup>

“it is difficult to define in precise language what natural justice means or what is its actual content. There is no doubt that its origin lies in natural law theory. We may therefore attempt to say that natural justice connotes an inherent right in man to have a fair and just treatment at the hand of the rulers or their agents. As a negative concept, it acts as a modern “natural Law” limitation on the powers of the State. Hence, the decisions affecting the rights of the citizens must not be made without first giving those affected a fair hearing (*audi alteram partem*) and the decision-maker must not be a party to the dispute or interested in the subject-matter of the decision or otherwise biased (*nemo iudex in causa sua*)”

There is no doubt, that the concept of natural justice is implied in the provision of S.36 of the Constitution which provide for fair hearing.<sup>32</sup>

Though the Supreme Court<sup>33</sup> has in a number of cases equated fair hearing with the rule of natural justice, the fair hearing provision of the Constitution seems to go beyond the narrow principle of natural justice. In *Orioge v. A-G Ondo State*<sup>34</sup>, the Supreme Court stated that the two principles of natural justice are inherent in the constitutional provisions for fair hearing but that the provision goes beyond the rule of natural justice.

Commenting on the distinction between the scope of natural justice and fair hearing, Lord Denning stated in *Breen v. A.E.U*<sup>35</sup> that:

“It will be seen that they are analogous to those required by natural justice but not necessarily identical. In particular, a procedure may be fair although there has not been a hearing of the kind normally required by natural justice. Conversely, fairness may sometimes impose a higher standard than that required by natural justice. Thus,

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30. See *Board of Education V Rice* (1911) A C 179; *Ridge V Baldwin* (1964 AC 40

31. *Op Cit* p. 131.

32. See P.A Oluyede *op. cit* p.465

33. See e.g. *Aiyetan V Nifor* (1987) 3 NWLR (Pt 59) 48 ; *Garba V University of Maiduguri* (1986)1 SC 12

34. (1982)3 NCLR 349

35. (1971)2 Q.B.175 at 191

the giving of reasons for decisions, is probably not required by natural justice, but, it has been said may be required by fairness because the giving of reasons is one of the fundamentals of good administration”.

Whatever may be the distinction between these concepts, both natural justice and fair hearing require some basic standards in any judicial or quasi judicial determination. For instance, in *Orisakwe v. Governor of Imo State*<sup>36</sup>, it was held that if the right to fair hearing under the Constitution and under the rules of natural justice is to be any real right, it must carry with it a corresponding and equal right in the person accused of any misconduct to know the case which is made against him. He must know the evidence in support, not merely bare and unsupported allegations, and then, he must be given the opportunity to contradict such evidence or incriminating evidence.

As far as domestic tribunals are concerned, the procedural rules enacted under the enabling statutes which create the tribunals, in most cases, require the tribunals to observe natural justice and the right to fair hearing.

For instance, rule 1(2) of Chartered Accountants (Disciplinary Tribunal and Assessors) Rules made pursuant to the Third Schedule to the Institute of Chartered Accountants Act provides that a party may appear before the Tribunal either in person or through a legal practitioner acting as counsel. Rule 2 provides for service of hearing notices on all the parties. Rule 4 provides that the provisions of the Evidence Act or Law in force in the state where the tribunal is sitting shall apply to any proceedings before the tribunal while rule 6 provides that the proceeding of the Tribunal shall be in public unless otherwise directed by the Tribunal. Provisions similar to the above are contained in rules 4(2), 6, 9 and 12 of the Legal Practitioners (Disciplinary Committee) Rules made pursuant to the Second Schedule of the Legal Practitioners Act<sup>37</sup>.

The tribunals are bound to abide by the rules and the enabling statutes.<sup>38</sup> The effect of failure of these tribunals to abide by the requirement as to fair hearing or natural justice is that their decision will be null and void and will be set aside by the Court. In *Orugbo v. Una*<sup>39</sup>, Tobi JSC held that

“the fair hearing principle entrenched in the Constitution is so fundamental in the judicial process or the administration of justice that breach of it will vitiate or nullify the whole proceedings, ... Once an appellate court comes to the conclusion that there is a breach of the principle of fair hearing, the proceedings cannot be salvaged as they are null and void ab initio. After all, fair hearing lies in the procedure followed in the determination of the case, not in the correctness of the decision. Accordingly, where a court arrives at a correct decision in breach of the principle of fair hearing, an appellate court will throw out the correct decision in favour of the breach of fair hearing.”

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36. (1982) 3 NCLR 743 See also *Soleye V Somibare* (2002) FWLR (pt 95)221

37. See also Rules 6,7 and 11 of the Medical and Dental Practitioners (Disciplinary Tribunal and Assessors) Rules made pursuant to the Second Schedule of the Medical and Dental Practitioners Act.

38. See *Okoroafor V Miscellaneous Offences Tribunal* breach of it will vitiate or nullify the whole proceedings”

39. (2002) 9-10 SC 61 at 69



## Components of fair hearing in relation to proceedings before a tribunal.

It is now beyond doubt that administrative tribunals are bound to observe the right to fair hearing in the discharge of their judicial or quasi-judicial functions. The question is whether fair hearing for this purpose means oral or trial-type hearing in public as the case with the regular Courts. This point has long been generating judicial interest.

In *R V Director of Audit, Western Nigeria, Ex parte Oputa*<sup>40</sup>, the Director of Audit surcharged certain Councilors and gave notice of the surcharge to them in a letter which included a notice that they have a right to appeal to the minister. They exercised the right of appeal through their Solicitor who addressed to the minister a petition of appeal setting out in detail the facts and the legal grounds on which they rely. Based on these, the minister took a decision refusing the appeal. When the decision of the minister was challenged in court on the ground that they were denied fair hearing, the Court held that fair hearing for this purpose does not necessarily mean oral or trial-type hearing as in the regular court and that it was enough that they were given the opportunity to present all the materials they intended to rely upon. The court dismissed the case. On appeal, the Federal Supreme Court, in dismissing the appeal concluded as follows:-

“I have considered the cases referred to by counsel for the appellants, but I do not think that they assist the appellants. In this case, the petition did not consist merely of points of appeal, but (as the judge pointed out) set out in detail the explanation of the appellants and the ground of law on which objections was taken to the decision of the Director of Audit. The petition was forwarded to the ministry on the 18<sup>th</sup> December, 1959, without any intimation that the appellants wished to supplement the documents and no further submission were received before the decision of the minister was communicated to the appellants on 13<sup>th</sup> February 1960. All relevant documents were forwarded to the Minister, and there is nothing to show that the Director of Audit made further representation which required a further explanation from the appellants. For the reasons given in this judgment, I agree with the decision of the judge who heard the application and consider that there has been no denial of the principle of natural justice”

Also in *Lagunju v. Olubadan in Council*<sup>41</sup>, a privy Council decision, it was stated that

“Due enquiry is not necessarily public enquiry, but it does imply that the parties to the dispute should be given an opportunity of being heard by the Governor as judge between them, and therefore, that the date on which the inquiry is to take place should be intimated to them and that they should be invited to attend and state their case.”

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40. (1961) All NLR 659

41. (1950) WACA 406.

The House of Lords in England has expressed similar view in *Lloyd v. McMahon*,<sup>42</sup> where it held that the maxim *audi altarem partem* does not mean that a person must be heard orally.

The above decisions seem to accord with the language and spirit of S. 36(2) of the 1999 Constitution which is the Constitutional basis for administrative adjudication in this country. All that is required by way of fair hearing under that section is that the person to be affected by the decision must have an opportunity to make “representations” before the adjudicating body. There is no indication that such representation can only be by way of oral or trial type hearing as in the regular courts.

We also submit that it is not part of the requirement of S. 36(2) that the proceedings before a tribunal must be held in public as is required in respect of proceedings before the regular courts. S.36(3) provides that “(t)he proceedings of a court or the proceedings of any tribunal relating to the matters mentioned in subsection (1) of this section (including the announcement of the decision of the court or tribunal) shall be held in public.” It is apparent that the requirement of public hearing under this provision is referable only to the courts or tribunals under S.36(1) and not to the tribunals under S.36(2).

Rule 6 of Chartered Accountants (Disciplinary Tribunal and Assessors) Rules<sup>43</sup> provides for public hearing of the entire proceedings unless otherwise directed by the Tribunal. Rule 12 of the Legal Practitioner (Disciplinary Tribunal and Assessors) Rules provides that the proceedings of the committee shall be held in private, but its finding and direction shall be pronounced in public. We submit that the two proceedings are nevertheless consistent with S.36 (2) of the 1999 Constitution.

It appears, therefore that the components of fair hearing in respect of proceedings before the regular courts though similar are not identical with the components of fair hearing in proceedings before administrative tribunals.

It is submitted, that fair hearing before a tribunal will largely depend on the facts and circumstances of each case. For instance, in proceedings before a tribunal where the complainant and his witnesses have given oral evidence, there cannot be fair hearing unless the respondent is given equal opportunity to make oral Representation, call witnesses and cross-examine the complainant and his witnesses. On the other hand, where the decision is based on documentary representation, it may be enough if the respondent is given the opportunity of making his own written representation.<sup>44</sup>

Notwithstanding the above distinction, we submit that there are certain components which must be present in any judicial determination either by the regular court or by an administrative tribunal. As observed by Galadima JCA in *Nwanegbo v. Major Oluwole & Anor*:<sup>45</sup>

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42. [1987] A.C. 625 HL; See also *R v. Army Board, ex parte Anderson* [1992] Q.B. 169.

43. See also rule 11 of the Medical and Dental Practitioners (Disciplinary Tribunal and Assessors) Rules.

44. See *ex parte Oputa* Supra

45. (2001) 37 LRN 101

“in any judicial inquiry, ‘hearing’ or ‘opportunity to be heard’ in order to be fair must include the right of the person to be affected:

- (a) to be present all through the proceedings and hear all the evidence against him,
- (b) to cross examine or otherwise confirm or contradict all the witnesses that testify against him
- (c) to have read before him the nature of all relevant material evidence including documentary and real evidence prejudicial to the party
- (d) to know the case he had to meet at the hearing and have adequate opportunity to prepare for his defence; and
- (e) to give evidence by himself, call witnesses, if he likes and make oral submission either personally or through a counsel of his choice if he so desires.

It must be emphasized again that the application of each of the above requirements will depend on the facts and circumstances of each case. As Tobi J.S.C. stated in *Orugbo V Uno*<sup>46</sup>

“fair hearing is not a cut and dry principle which parties can, in the abstract, always apply to their comfort and convenience. It is a principle which is based and must be based on the facts of the case before the court. Only the facts of the case can influence and determine the application or applicability of the principle. The principle of fair hearing is helpless or completely dead outside the facts of the case”

### **Fair hearing before an investigating panel and fair hearing before a disciplinary tribunal: are they the same?**

Most<sup>47</sup> of the enabling statutes setting up the domestic tribunals in this country provide for two bodies: an Investigating Panel and a Disciplinary Tribunal.

Section 11 of the Institute of Chartered Accountants Act<sup>48</sup> provides that:

“(1) There shall be a Tribunal to be known as The Accountants Disciplinary Tribunal (in this Act hereafter referred to as “the Tribunal”), which shall be charged with the duty of considering and determining any case referred to it by the Panel established by the following provisions of this section or any other case of which the Tribunal has cognizance under the following provisions of this Act....

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46. (2002) 9-10 SC 61 at 69

47. But not all the statutes. For instance, Legal Practitioners Act creates only one body i.e. Legal Practitioners Disciplinary Committee which performs the dual roles of investigation and trial.

48. Cap 185 Laws of the Federation of Nigeria

(3) There shall be a body to be known as the Accountants Investigating Panel (in this Act hereafter referred to as “the Panel”), which shall be charged with the duty of-

- (a) conducting a preliminary investigation into any case where it is alleged that a member has misbehaved in his capacity as an accountant, or should for any reason be the subject of proceedings before the tribunal; and
- (b) deciding whether the case should be referred to the tribunal”

The above provisions are similar to those in Section 15 of the Medical and Dental Practitioners Act<sup>49</sup>, Section 16 of the Surveyors Registration Council of Nigeria Act<sup>50</sup> as well as section 13 of the Estate Agents and Valuers (Registration) Act.<sup>51</sup>

It is apparent from the above that the role of the investigating panel is different from that of the disciplinary tribunal. The duty of the panel is simply to investigate an allegation, assemble the evidence and see whether such evidence shows prima facie case so as to justify the reference of the case to the tribunal, which has the duty of actually conducting the “trial” of the case.

It is our submission therefore, that the requirement of fair hearing at the stage of investigation by the panel cannot be the same or as stringent as that of the trial before the tribunal. It is in this regard that it is difficult to justify the decision in *Denloye v Medical and Dental Practitioner Disciplinary Tribunal*<sup>52</sup>. Here, one of the grounds on which the decision of the Tribunal was nullified was that the Investigating Panel that investigated the allegation did not strictly comply with the rule of fair hearing. It is important to note that it was conceded in the case that the Tribunal which actually conducted the trial complied with the rule of fair hearing. Criticising this decision, Honourable Justice Karibi Whyte, a retired justice of the Supreme Court has observed:

“These conclusions are so replete with strange views, reasoning and illogicalities that they must be unreservedly rejected by the profession. They are a misleading and erroneous exposition of the law. This is because, firstly, their Lordships like the appellant’s counsel, failed to recognize, or if they did, did not appreciate the legal distinction between judicial status and legal duties of the Investigating Panel and the Disciplinary Tribunal. It must however be pointed out that it appears to have been clearly recognised throughout the proceedings that the appellant was not being tried by the Investigating Panel. All that the panel was trying to do, and which duties we submit it discharged excellently, was to collect sufficient evidence for the purposes, if necessary, of prosecuting the appellant before the Tribunal. To this end, the Panel owed only the duty of fairness towards the

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49. Cap 221 Laws of the Federation of Nigeria 9 Cap 425 Laws of the Federation of Nigeria

50. Cap 111 Laws of the Federation of Nigeria

51. (1868) 1 All NLR 306

appellant in the investigation of the allegations against him. To suggest, as did their Lordships, that the appellant should have been made a partner in the investigation of the allegation against him, is hardly fair to the continued effectiveness of our accusatorial procedure. It must be emphasized that the appellant was not denying that at the trial before the Tribunal (which was the relevant time) he was not confronted with such evidence. It is, therefore wrong in law to acquit the appellant on the grounds of the conduct of the Panel, which was quite consistent with our accusatorial procedure.”<sup>53</sup>

We cannot but agree with his Lordship.

### **Adjudicatory power of domestic tribunals in respect of allegations involving crime**

In *Denloye v. Medical and Dental Practitioners Disciplinary Tribunal*<sup>54</sup>, the appellant was found guilty by Medical and Dental Practitioners Disciplinary Tribunal on five counts charged of infamous conduct in professional respect and the removal of his name from the medical register was ordered. The allegations against him involved extortion of various sums of money. When the case eventually got to the Supreme Court, it was held that where the professional misconduct of a practitioner amounts to crime, it is a matter for the courts to deal with and that it is only after the court has found him guilty that the tribunal may proceed to deal with him in professional respect.

It must be pointed out that the court in reaching the above decision relied heavily on the provisions of the English Medical Act which requires that charges of professional misconduct involving crimes should not be dealt with under the Act in the first instance but should be left to the courts. These provisions have no counterpart in the Nigerian Medical and Dental Practitioners Act. The court did not consider the fair hearing provision of the 1963 Constitution.

Nevertheless, the decision was followed almost twelve years later in the case of *Sofekun v. Akinyemi*<sup>55</sup> where the appellant was found guilty of certain acts of misconduct which are criminal in nature by the Public Service Commission of old Oyo State. The Public Service Regulations (Western Nigeria) 1963 under which the Commission acted empowered the Commission to try allegations of misconduct even where crimes are involved. Fatayi Williams C.J.N. with whom six other Justices of the Supreme Court concurred, held that once a person is accused of a criminal offence, he must be tried in a court of law in accordance with the fair hearing provisions contained in S. 22(10) of the 1963 Constitution. It was further held that the Regulation which permitted the Commission to try criminal conduct is a usurpation of judicial power by the Commission being an agent of the executive.

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53 Karibi Whyte “Natural Justice Never so Unnatural”, 1 Nigerian Journal of Constitution Law (1970) 133 at pp 142-143

54. *Supra*

55. (1980) 5-7 S.C. 1

The cases of Denloye and Sofekun were again relied upon by the Supreme Court in *Garba v. University of Maiduguri*<sup>56</sup>. In that case, some students of the University of Maiduguri were expelled sequel to a riot accompanied by destruction of property, looting and assault on persons. Their expulsion followed the senate consideration of the reports of the Disciplinary Board and an Investigation Panel set up by the Vice Chancellor. In a unanimous decision of the Supreme Court, it was held that the combined effect of subsection (1) and (4) of Section 33 of the 1979 Constitution (identical with S.36 1999 Constitution) is that when an allegation amounts to a crime under the criminal law of the land, only a court of law can hear and determine the matter.

The decision in Garba's case has been the subject of heavy criticism from respectable quarters. To Professor Ben Nawbueze<sup>57</sup>, the decision is clearly misconceived "both because a finding of guilt for a criminal offence by a commission of inquiry or a disciplinary committee is not a conviction for that offence, and because dismissal from a position based on such a finding is not a punishment but only a disciplinary penalty. Judicial power is not usurped by a finding of guilty which does not operate as a conviction for a criminal offence and which is intended to serve merely as a basis for disciplinary action. Disciplinary proceeding and criminal trial operate on completely different plans and serve entirely different purposes."

The learned Professor cited the Privy Council decision of *Karriapper v. Wijesimba*<sup>58</sup> where a Ceylonese Legislature in 1965 vacated the parliamentary seats of certain named persons who had been found guilty of bribery by a Commission of Inquiry. The Judicial Committee of Privy Council held that the removal of the culprits from their parliamentary seats was not in all the circumstances punishment for a criminal offence as to be a usurpation of judicial power.

Professor C.O. Okonkwo<sup>59</sup>, criticizing the decision in Garba's case also submitted that where a body has power to take decision which can affect the right and obligation of others and that power is specifically conferred by statute, that body is a Tribunal established by law within the contemplation of section 33 (1) of the 1979 (now 36(1) 1999) Constitution. Such a body should be able to determine any case civil or criminal within the limit permitted by the law creating it.

According to Osita Nnamani Ogbu<sup>60</sup>:

"With utmost respect, it is submitted that the views expressed above by the learned Justices of the Supreme Court is totally misconceived and have the effect of doing violence to the plain words of Section 33 of the 1979 Constitution (now Section 36 of the 1979 Constitution). In the first place, their Lordships mixed up Section 33(1) dealing with exercise of judicial powers in civil proceedings with Section 33(4) dealing with procedural safeguards in criminal trials. Subsections (1) – (3) of Section 33 are

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56. (186) 1 S.C. 128

57. *Military Rule and Constitutional* (Ibadan) Spectrum Law Publishing 1992 p.86

58. (1976) All E.R. 485

59. *Discipline, Nigeria University and the Law* (Lagos: Nigeria Institute of Advanced Legal Studies 1996) pp.38-39

60. *Op. cit.* at p.247.

concerned with fair trial in civil cases while subsections (4) – (12) of the section concern fair trial in criminal cases. That is why the expression “entitled to a fair hearing within a reasonable time by a court or tribunal” was used both in subsections (1) and (4) of Section 33 and different provisions were made in respect of public hearing in civil and criminal matters.... Secondly, (their Lordships) failed to appreciate the purport and intendment of Section 33 (2) which enables administrative determination of questions which may affect a person’s civil rights and obligations provided the person affected is given opportunity to make representations to the administering authority, and provided that the person affected can have recourse to the court for a review of the decision of the administrative body”.

It is our humble submission that the decision of the Supreme Court that once an allegation of crime is involved, only the court can adjudicate on a matter in the first instance is fraught with grave implications for our legal system especially in view of the kind of criminal justice prevalent in our regular courts. This fact was quite appreciated by Coker JSC who stated in his concurring judgment in Garbar’s case<sup>61</sup> that:

“What if the misconduct committed by the student is of such a criminal nature and for which after due prosecution in a court of law the student is acquitted on some technical grounds? What if the misconduct of a student, beside the apparent criminal nature constitutes insubordination or willful disobedience of lawful order or instruction? Would the Vice-Chancellor be inhibited from taking disciplinary action against such a student? What if, for instance, the prosecution failed because the prosecution refused to summon necessary witnesses to testify at the trial or if a vital witness was deliberately not called or could not be found or refused to attend even though summoned? Yet, the Vice-Chancellor has before him credible evidence which seems to him to justify disciplinary action against the erring student? These are areas in which the present decision of this court one day may call for re-consideration.”

Apart from the issues highlighted by his Lordship, we hasten to add the wide discretionary powers vested in the Attorney-General of the Federation and the State under the Constitution to decide whether or not to prosecute for any offence or even to enter a nolle prosequi where a prosecution has been commenced.<sup>62</sup> Furthermore, though the law allows for private prosecution in certain cases, the procedure is highly complex and unattractive as was clearly demonstrated in the case of Gani Fawehim v. Akilu.<sup>63</sup>

Attempts have been made to ameliorate the effect of cases like Garba v. Umimaid<sup>64</sup> in some subsequent cases. For instance, Kayode Eso JSC held in Federal Civil Service Commission v. Laoye<sup>65</sup> that there will be an exception to the rule in Garba’s case where the accused person confesses to the allegation of criminal conduct. According to his Lordship:

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61. Supra at p.254

62. See sections 174 and 211 of the 1999 Constitution; See also Attorney-General Kaduna State V Hassan (1985) 2 NWLR 483

63. (1987) 4 NWLR (pt 67)797

64. Supra

65. (1989)2 NWLR (pt 106) 652 at 679

“It is not so difficult where the person so accused accepts his involvement in the acts complained of, and no proof of their criminal charges against him would be required. He has, in such a case, been confronted with the accusation and he has admitted it. He could face discipline thereafter”

In *Yussuf v. Union Bank of Nigeria PLC*<sup>66</sup> the appellant was involved in misappropriation of funds and irregular sales of travelers' cheques. He was dismissed for gross misconduct. The Supreme Court held that it is not necessary under the common law nor is it a requirement of section 33 of the 1979 Constitution that before an employer summarily dismisses his employee from his service, the employee must be tried before a Court of law where the accusation against the employee is for gross misconduct involving dishonesty beddering on criminality. Garba's and similar cases were not cited in this case.

In *Military Governor of Imo State v. Uwauwa*<sup>67</sup> the Supreme Court held that where some of the allegations against a person are criminal while others are civil, a tribunal has jurisdiction to entertain the civil allegation based on the doctrine of severance.

Surprisingly, in *Bangboye v. University of Ilorin*<sup>68</sup> where the appellant was dismissed by the University for examination malpractice involving falsification of marks on some scripts which is clearly a criminal conduct, the High Court, the Court of Appeal and the Supreme Court held that the disciplinary proceedings against the appellant before the Investigating Panels and the Governing Council culminating in the dismissal were valid. The Courts held that, based on the state of the pleadings, the issue of the criminal jurisdiction of the Governing Council did not arise.

The appellant pleaded and tendered the charge (exhibit P6) and findings (exhibit D4) of the Governing Council. He raised the issue of the criminal jurisdiction in his final address before the trial Chief Judge and continued to raise it up to the Supreme Court, but the Courts refused to consider it on the ground that he has not pleaded it. All the Courts seemed to have forgotten that the issue of the criminal jurisdiction of the Governing Council is an issue of law which the appellant is not required to plead.<sup>69</sup> All that the appellant was required to do and which, we submit, he did was to plead facts on which the issue of law can be based. It is clear from the pleading and the evidence before the trial court that the charge against the appellant before the Council was criminal in nature.

The Courts ought to have made a pronouncement on the competence of the Council to entertain the proceedings in view of the nature of the allegations involved. We also submit that the Courts could have raised the issue suo motu being an issue that goes to the competence of the entire proceedings.<sup>70</sup>

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66. (1996)5 SCNJ 203

67. (1997) 4 NWLR 675

68. (1999) 6 SC 72 at 121

69. See *P.N. Udoh Trading Co. Ltd. V. Abere* (2001)5 SC (pt. II) 64

70. See *Dangote v. C.S.C., Plateau State* (2001)4 SC. (pt. II) 43 at 52-53.



Finally, the Supreme court has fairly recently re-emphasised the exception to the rule in Garba's case highlighted in Laoye's case. This was in Dangote v. Civil Service Commission of Plateau State<sup>71</sup> where Karibi Whyte JSC who read the lead judgment held:

“It cannot be disputed that when there is an admission of the Commission of the criminal offences alleged, the question of establishing the burden on the accuser does not arise. Accordingly, the question of violating the rights of the accused is not an issue. It seems to me preposterous to suggest that the administrative body should stay the exercise of its disciplinary jurisdiction over a person who had admitted the commission of criminal offences. The inheritable inference is that a criminal prosecution should be pursued thereafter before disciplinary proceedings should be taken. I do not think the provision of the law and effective administration contemplates or admits the exercise of such a circuitous route to the discipline of admitted wrongdoing”

The question here is what form should an admission for this purpose take and whether a confessional statement made to the police will qualify as an admission for this purpose. We submit that a liberal approach should be adopted in relation to these issues. An admission or confession which shows clearly the involvement of the person accused of misconduct should be enough for the purpose of the exception in highlighted above case. We also submit that a confessional statement made to the police or otherwise should be enough once it is voluntary and would have been admissible under the Evidence Act.<sup>70</sup>

### **Conclusion**

In view of the above and by way of conclusion, it seems beyond doubt that administrative adjudication and exercise of disciplinary powers by bodies other than regular courts are recognised and fully provided for within the framework of the 1999 constitution.

However, there are certain guiding principle and procedural rules that must be observed by these bodies in the performance of their functions in order to remain within the limit permitted by the Constitution as enunciated by the courts. We, therefore, suggest that the bodies pay close attention to these rules as failure to observe them may render their proceedings a nullity.

Firstly, in setting up a panel or tribunal, the relevant authority must ensure a strict compliance with the enabling statute as to the composition of membership of these bodies. The terms of reference must be within those recognized by the enabling statute.

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71. Supra, at 65

72. See SS.27-32 Evidence Act Cap 112

The relevant authority must also ensure that none of the members of these bodies has personal interest in the case. It must ensure that those appointed are independent to avoid likelihood of bias and a breach of natural justice.

Once appointed, these bodies must take extra care to observe the terms of the enabling statute and any regulation made thereunder. Additionally, they must strictly observe the rules of natural justice and fair hearing.

In this regard, they must give adequate notice to the affected parties, confront them with all the material evidence, giving them equal opportunity to make their own representations. They must be allowed counsel of their choice and hearing must be in public where these are provided for by the relevant regulation.

In view of the decision in Garba's case and the exception recognised in Laoye's, it is advisable that the person accused of misconduct involving any criminality should be confronted with the allegation to enable him deny or admit same. If he admits the allegation, based on the decision in Laoye's case, the disciplinary tribunal can assume jurisdiction to handle the case. However, if he denies the allegation, based on decisions like Garba's, the tribunal cannot assume jurisdiction over the case. The case must be referred to the relevant authority for prosecution in the regular court in the first instance before disciplinary action can be taken against him. In that case, the authority seeking to discipline the accused must seek the co-operation of the prosecuting authority and should be ready to make available materials that may be necessary for a successful prosecution of the case.

We can only hope that the Supreme court will have another look at and relax the rule in Garba's case to allow disciplinary tribunals to deal with all cases of misconduct and impose administrative sanctions as opposed to Criminal sanctions, whether allegation of crime is involved or not. This is important in view of the deplorable state of our criminal justice system and the frightening rate of indiscipline in our various institutes of higher learning, the various professions, the civil as well as public service for whom these tribunals are established.