CONCEIT OF FAIR HEARING UNDER THE NIGERIAN LAW

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DEDICATION

This thesis is dedicated to my father, late Alkali Ali Mahmud, a Native Court Judge, who laid a concrete foundation for my religious as well as secular education and instilled in me a sense of justice and fairness; and to my mother, Hajia Aishatu Idris, who picked up the gauntlet after the demise of my father and nurtured me through the most critical years of my life.

C E R T I F I C A T I O N

This is to certify that Muhammed Habib Aliyu a student of the LL.M. Programme, Faculty of Law, Ahmadu Bello University, Zaria, Nigeria has worked under my close supervision and duly completed his thesis on Concept of Fair Hearing Under the Nigerian Law.

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They said: "Glory to thee: of knowledge we have none, save what Thou Hast taught us: in truth it is Thou Who art perfect in knowledge and wisdom".

(THE QUR'AN: II: 32)

قالوا سبحانك لا علم لنا إلا ما
علمتنا إنك أنت العليم الحكيم

ABSTRACT

Justice and fairness is the basis of the relationship between government and its citizens. It is in fact the pivot around which all civilised social existence revolves. History has taught man that in restive moments and times of social stress the quest for justice assumes greater dimension and significance. Presently, most developing societies, such as Nigeria, are passing through these restive moments. These societies are continually engaged in the search for a viable polity wherein justice and fairness shall rein supreme. The task has been made more daunting in a situation where coup de etats, sudden and frequent change of governments have become endemic. The not result, therefore, is that the citizen is aflicted with a feeling of impotency and hopelessness regarding the assertion of his fundamental rights.

This is precisely the juncture at which law should step in to play its role of social engineering by balancing conflicting social interests. The province of governmental executive action must be legally and precisely defined vis-a-vis the citizens' fundamental rights. In this regard, the concept of fair hearing, as a universal standard of morality in public affairs should serve as a reference point. The efficacy of the concept of fair hearing lies in the fact that it is available to the guilty as well as the innocent citizen. Even a condemned armed robber is entitled to a fair trial under the law. This being the case, it is the more necessary that the citizen and all concerned with public affairs should understand what the concept of fair hearing entails and its rules embody. This thesis should therefore be regarded as a modest attempt in this direction.

In line with the title of the thesis tho method of presentation is one in which the whole corpus of Nigerian Law, Constitutional, Statutory nd Case law is examined to determine the extent to which the Concept of fair hearing is reflected in thoir operation, using the previsions of section 33 of the 1979 Constitution of the Federal Re **public** of Nigeria as the point of reference.

Chapter One deals with the nature, scope and underlying objectives of fair hearing. No attempt will be made to offer any general definition of the Concept of fair hearing. **Rather** a descriptive analysis of the principle embodying the Concept is prefered. This is in realisation of the inherent limitations a generalised defintion suffers from.

In Chapter Two attempt is made to trace the origin and development of fair hearing. The philosophical background as well as the Common Law origin of fair hearing is described. Its modern development and recognition in municipal as well as International Law as a fundamental right is demonstrated by reference to some modern Constitutions and International Conventions. The intention here is to highlight the Universal nature of the Concept as a principle of morality.

Chapter Three discusses the application of fair hearing in civil proceedings in Nigeria. An indepth analysis of section 33 of the 1979 Constitution of the Federal Republic of Nigeria is made. The emphasis hore is to demonstrate the efficacy of the application of the Concept by reference to decided cases. Principles that facilitate the actualisation of the Concept such as lucus standi and independence of the judiciary are also discussed in this Chapter. The last part of the Chapter discuses fair procedure and its requirements. The application of tho Concept of fair hearing in

Criminal Proccodings in Nigeria is examined in Chapter Four. The provisions of section 33 in relation to Criminal trial as well as the various provisions of the Criminal Procedure Code and Criminal Procedure act pertaining to fair trial are thoroughly examined with reference to decided cases. To this end, the Chapter is dividud into two parts. Part I deals with 'Fairness of Substantive Criminal Law[1], while Part II deals with the requirements of 'Fair Trial'. Throughout this Chapter the discussion centred around the provisions in subsections 4 to 13 of Section 33 of the 1979 Constitution of the Federal Republic of Nigeria. In this Chapter the relevant provisions of the Evidence Act have also been examined.

Chapter Five discusses the application of fair hearing in administrative proceedings. The decision making processes of administrative authorities, government and public functionaries arc examined in order determine the extent to which the requirements of fair hearing are complied with.

There are circumstances in the adjudicatory process where the rules of fair hearing do not apply. For instance, it is a requirement of fair hearing that trials are hold in public. But this requirement may be waived in a situation where the principle of 'State Privilege' applies. Also in a Contempt proceedings, some requirements of fair hearing may not be strictly observed. All these are regarded as exceptions to the rules of fair hearing. They are discussed in Chapter Six. Also discussed in this Chapter is the general restrictions *on* Fundamental flights in Section 41 of the 1979 Constitution of tho Federal Republic of Nigeria to see the extent to which the provisions of section 33 of the same Constitution are affected by those restrictions.

Chapter Seven discusses the Concept of fair scaling under the Military regime. attempt is herein made to examine tha extent to which the rules of fair hearing are observed in a revolutionary situation such as exists in a military regime. Legislative activities of Nigerian Military refines are examined to see the extent to which fair hearing, as a democratic Concept, is reflected in the various decrees and edicts tho Military enacted. Of far greater interest is the analysis of the composition and adjucatory procedure of the Special Military Tribunals that are tho feature of all Military regimes in this country. Can their procedure ensure a fair trial to the accused person? To what extent are the provisions in Section 33 of the 1979 Constitution of the Federal Republic of Nigeria observed by the Military Tribunals? These and other questions have been examined in this Chapter.

Chapter Eight deals with tho Conclusions reached as a result of our discussion of the various issues highlighted in relation to the application of the Concept of fair hearing under the Nigerian Law. This is rather a summary of the major observations made regarding the application of the Concept of fair hearing in Nigeria.

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CHAPTER ONE

INTRODUCTION

1. NATURE DEFINITION AND SCOPE OF FAIR HEARING

(a) FAIR HEARING - ITS MEANING

The intractability of definition generally makes any attempt to define fair hearing unattractive and futile. Defining essentially involves the substitution of a word or words for another set of words, and these further words may and generally will stand in need of additional explanation. It follows that when what is to be discussed is a highly complex concept such as fair hearing the vital consideration is not so much the form of words chosen as a definition but the accompanying elucidation of the manner in which those words are to function in all the diverse contexts and circumstances in which they may be used.[1] Again definition can be unduly restrictive especially when dealing with an ever-expanding concept such as fair hearing. Granted that fair hearing may not be easily amenable to abstract definition nonetheless it is imperative to note that the concept has to do, inter alia, with the mode or procedure by which justice is dispensed in a court of law or tribunal. In other words it is a procedural safeguard aimed at ensuring that trials and enquiries are fairly conducted so as to "keep the streams of justice pure and clean".[2] Consequently our method will be a

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1. LORD LLOYD OF HAMPSTEAD: INTRODUCTION TO JURISPRUDENCE, pp. 46-47 4rd Edition (1979).

2. LORD DENNING: DUE PROCESS OF LAW: PREFACE at page V, 1980.

functional exposition of those principles that are traditionally regarded as the Constituents or essential ingredients of fair hearing. This will, hopefully, enable us have a lucid perception of the concept thus illuminating our understanding of what is exactly meant by fair hearing in all its ramifications.

Right from the onset, fair hearing must be distinguished from the concept of Natural Justice with which it is sometimes erroneously confused. While Natural Justice is made up of two rules, namely: right to be heard and rule against bias, fair hearing on the other hand is composed of numerous rules, principles and concepts that are never exhaustive. In essence any rule or principle the aim of which is to ensure fairness of procedure by means of which legal rules are enforced may be brought under the universal umbrella of the concept of fair hearing. Thus natural justice is just one particular aspect of fair hearing.

As a fundamental right, fair hearing has been entrenched in all the Nigerian Constitutions, pre and post independence. Yet nowhere was a definition of it ever provided and neither was any ever proffered in the decided cases. Thus in the case of WHYTE v. POLICE[3], Morgan, C.J.N. observed in exasperation that:

> "There is no definition in the Constitution as to what Constitute a fair hearing within the meaning of section 22 (1963 Constitution) and it is difficult, perhaps impossible to give a comprehensive definition that would cover all cases".

However, the learned Chief Justice went on to state that inspite

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3. (1966) (S.C.N.) N.M.L.R. 215 at 216.

of the absence of any definition "it can hardly be said that an accused has not had a fair hearing as intended by the Constitution when the court followed the procedure laid down for such hearing and has not violated the principles of natural justice"[3(a)]. Similarly in the recent case of CHIEF GABRIEL I. ONIGBE v. THE GOVERNOR OF ONDO STATE[4], OKOJO C.J. of Ondo State High Court remarked that although there is no definition as such for fair hearing in the Constitution it must involve the observance of natural justice.

Some writers have relied on the Supreme Court's decision in WHYTE v. POLICE as quoted above, to put forward the untenable proposition that "what is tantamount to a fair hearing may not necessarily satisfy the principles of natural justice which seem to have a wider scope"[5]. It is the present writer's submission that contrary to these writers opinion the decision under reference lends credence to the view that fair hearing is much wider in scope than natural justice. For it is clear from the quotation referred to above that mere compliance with rules of natural justice is not enough to satisfy requirements of fair hearing. The procedure laid down for such hearing must be strictly complied with. Equally erroneous is the view sometimes expressed that there is a difference between fair trial and fair

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3(a) (1966) N.N.L.R. 215 at 216.
4. (1982)3 N.C.L.R. 349.
5. Niki Tobi: Criminal Procedure and Evidence in Nigeria, p. 7 Published by Law Times Press of India, 1980.

hearing. For instance in the case of ISYAKU MOHAMMED v. KANO N.L.R.[6], the defence Counsel tried to draw a distinction between fair hearing and fair trial before the Supreme Court of Nigeria. Making a ruling on the Counsel's submission the Supreme Court held:

> "It has been suggested that a fair hearing does not mean a fair trial. We think a fair hearing must involve a fair trial and a fair trial of a case consists of the whole hearing. We therefore see no difference between the two".

This ruling of the Supreme Court was the correct position of the law, and was based on a sound interpretation of the Constitutional provision on fair hearing in section 22(1) and (2) of the 1963 Constitution. Same interpretation is valid for section 33(1) and (4) of 1979 Constitution.

What, if one may ask, is the true test of fair hearing? In other words, when could it be said that the court has given an accused a fair trial? Answer to this important question was suggested by the Supreme Court while delivering its judgement in ISYAKU MOHAMMED v. KANO N.L.R. thus:

> "The true test of a fair hearing, it was suggested by a Counsel, is the impression of a reasonable person who was present at the trial, whether from his observation justice has been done in the case. We feel obliged to agree with this".[7]

What sort of criterion should we use in arriving at the reasonable man's test? Should the test be a subjective or an objective one? These questions are eminently important

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6. (1968) 1 All N.L.R. 424 at p. 426 as per ADEMOLA C.J.N.

7. As Per ADEMOLA C.J.N. at p. 426.

because the 'reasonable man' is vague and hence difficult of a precise legal meaning. Should the reasonable person be a judge, a counsel or a layman who is present in the court? What of the accused person himself? Answers to these all important questions may not readily come by. It is the belief of this writer that the problem of identifying the 'reasonable man' cannot be determined in isolation. It can only be done in relation to a given case, considering the facts and circumstances at the material time. Whoever this reasonable man is, must, in the opinion of the present writer, be a disinterested person who has witnessed the whole proceedings from beginning to end. His impression of the fairness of the manner in which the trial was conducted would determine whether or not the accused has had a fair trial. The test is therefore an objective one.

Credence was lent to this view by the Supreme Court itself. This was in the case of RALPH G.JI v. THE STATE,[8(a)] where the Supreme Court held that the test of a fair trial must rest on a fair view of a 'dispassionate visitor' to the Court who had watched the entire proceedings. Whereas in IBYAJU MOHAMMED'S[8(b)] case the test was from the point of view of a 'reasonable man', in RALPH G.JI[8(c)] it was 'a dispassionate visitor'. In the more recent case of CHIEF G.NI F.MOHINMI v. LEGAL PRACTITIONERS DISCIPLINARY COMMITTEE,[9] Mr. Justice Ademola Johnson of the Lagos High Court employed the reasonable man's test when considering the question of bias. The use of the

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8(a) (1975) 5 S.C.N. 61
8(b) (1969)1 All N.L.R. 424.
8(c) (1975)5 S.C.N. 61.
9. (1982) 3 N.C.L.R. 349.

two terms interchangeably need not create any confusion as one commentator tried to imply.[10] It only means that the reasonable man must be a dispassionate visitor to the Court who is disinterested in the actual outcome of the trial.

(b) SCOPE OF FAIR HEARING

It is no exaggeration to say that the Common law system is today revered and admired the world over principally because of the humaneness and fairness of its procedural safeguards. The Common law courts and other judicial tribunals have, in the course of time, evolved and developed a complex system of Criminal and Civil Procedure as a distinct branch of the law the fairness and sophistication of which will be difficult to match by any other system of law. From the days of the ancient writs and choses in action to the present days of summons, motions and pleadings courts have perfected a system of procedure that is largely fair and just with which to guide the operation of the adjudicatory process. In addition to Criminal and Civil Procedure the observance of which has been made statutorily mandatory upon the regular courts, there exist as well many other rules or principles the observance of which ensure procedural fairness in the administration of justice. Rules of natural justice, presumption of innocence, requirement of notice, adequate disclosure, public hearing etc. are all different manifestations of the concept of fairness as practicalised in law courts and other judicial tribunals.

When the regular courts were faced with the problem of how to control and limit the discretionary powers of

10. Niki Tobi: Criminal Procedure and Evidence in Nigeria p. 9 Law Times Pros 1980.

modern governments as exercised by public Authorities and Administrative tribunals they did not hesitate to extend the scope of their own notion of fair procedure to those bodies. The moment it is ascertained that the functions a public authority is called upon to discharge are judicial or quasi-judicial in nature then the courts would impose upon it the duty to observe certain rules that ensure procedural fairness in the discharge of those functions. But where the proceedings of a public authority are purely administrative its decision is virtually exempt from judicial control. The courts thus drew a clear distinction between judicial and administrative proceedings for the purpose of judicial review on grounds of procedural fairness. However, when the discretionary powers of public authorities experience phenomenal growth, especially in the later part of the 19th Century, the law courts changed their restrained attitude towards them. Consequently, the scope of the concept of fairness as reflected in the rules of natural justice, ultra vires, unreasonableness, good faith etc. became widened in such away as to make it applicable to virtually any decision of a public authority which adversely affects the legal rights or status of a complainant. "The courts are willing to intervene to protect a complainant having some right or even some legitimate expectation which it will not be fair to deprive him of without a hearing".[11] Thus fair hearing was transformed into an important tool for the control and limiting of the discretionary powers of government.

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11. Schmidt v. Secretary of State for Home Affairs (1969) 2 Ch. 149.

A further widening of the scope of the concept of fairness on a significant scale was the decision in R. v. GAMING BOARD, EX PARTE BENAIM.[12] The Gaming Board tried to gain exemption from the duty to observe rules of natural justice as it was, according to it, discharging a purely executive function. In rejecting the Board's claim the Appeal Court held that even though it was not possible "to lay down rigid rules as to when the principles of natural justice are to apply nor as to their scope and extent yet the Board has a duty to act fairly".[13] As a result of this decision even where administrative bodies are not statutorily required to observe rules of natural justice or to act judicially they may nonetheless be required to act fairly. It follows therefore that the 'duty to act fairly' is a new device by the Courts to extend the scope of the concept of fairness to virtually all types of administrative proceedings irrespective of whether they are acting judicially or not. Consequent upon these positive developments in administrative law, the duty to observe procedural fairness has been made mandatory upon anyone who decides anything. Hence the scope of the concept of fairness has become so wide as to make it applicable to bodies the nature of whose functions and proceedings are anything but judicial.

The concept of fairness together with those rules and principles generally associated with it have been given Constitutional expression in most modern States. Thus the normative status of the Concept has been so much enhanced in modern times that it is now regarded as one of the fundamental

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12. (1970) 2 Q.B. 417.

13. Per LORD DENNING, p. 430.

rights the Constitutional guarantee of which is the hall mark of every democratic nation-state. A country may be said to have adhered to the Concept of the Rule of Law if fair hearing has been given the Constitutional primacy it deserves. All the Constitutions that were at one time or the other, operative in Nigeria have had fair hearing entrenched as one of the fundamental rights. The most recent expression of it is in section 33(1) of the 1979 Constitution of Nigeria. As a fundamental rights it guarantees to every person in Nigeria the right to a fair hearing in the determination of his civil rights and obligations, including any question or determination by or against any government or authority within a reasonable time by a Court or tribunal established by law and constituted in such manner as to secure its independence and impartiality. A careful appraisal of the whole gamut of the provision in Section 33, together with all the subsections thereunder, will reveal the fact that the concept of fairness has been given wider scope under the Constitution compared to what it is under the Common law. For instance independance of the judiciary has been made a requirement of fair hearing under the Constitution the demands of procedural fairness under the Constitution does not begin and end within the Courtroom only. Fair hearing impliedly seeks to limit the law making powers of the Legislature by refusing to accommodate any law made with retroactive effect.[14] It also declares invalid any law which purports to exempt the decision of a tribunal from judicial review or appeal as by making any such decision final and conclusive.[15] Considering the practical importance of the principles encompassed within the meaning and ambit of

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14. Section 33(8), Constitution of the Federal Republic of Nigeria, 1979.
15. Section 33(2)(b), Constitution of the Federal Republic of Nigeria, 1979.

fair hearing in section 33 of the 1979 Constitution it will not be too far away from the truth to assert that the concept is in fact an armor for the protection of the other fundamental rights guaranteed by the Constitution. A testimony to the recognition of fair hearing as a universal ideal is the fact that almost all the members of the United Nations Organisation, irrespective of idealogical differences, are signatories to the Universal Declaration of Human Rights in which fair hearing has been made prominent. As a matter of fact the provision in Section 33 of the 1979 Constitution has been lifted almost verbatim from the provisions of the U.D.H.R.[16]

2. UNDERLYING OBJECTIVES

The need for fairness in the administration of justice by Courts of law and other judicial tribunals cannot be over-emphasised. The practical significance of procedural rules that have been evolved for the purpose of carrying out the enforcement of legal rights has been acknowledged by all and sundry. As a matter of fact procedural rules are as important as the substantive rules themselves. Because when the procedural rules are somewhat defective the resultant enforcement of substantive rights is likely to occasion a substantial injustice. The ultimate impact of defective or unfair procedural rules is the stultification of the efficient operation of the machinery of justice. This invariably leads, inter alia, to a total denial of individual liberties that are the cornerstone of a democratic society. Procedural rules, like justice itself, must not only be fair and just, but must be seen to be so. Fair hearing therefore

16. See Article 10 United Nations Universal Declaration of Human Rights.

is a concept evolved by the courts primarily as a yardstick for measuring the fairness of the procedure by means of which legal rights are enforced. In the determination of a citizen's civil rights and obligations fair hearing is essential as well as indespensable. It is the sine qua non for the protection of individual liberties. Substantive rights can only be vindicated through a procedure that is fair and just. Justice JACKSON of the United States Supreme Court observed that "procedural fairness and regularity are the indespensable essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied".[17]

The importance of procedural fairness is more apparent when viewed against the backdrop of our adversary system of litigation, the complexity of which can be disentangled only by a specially trained mind. The problem is even more compounded in a situation where majority of the populace are unlettered. Imagine an illiterate person faced with a Courtroom situation with all the intimidating and unfriendly countenance of the judges, the harrassment of cross-examination and the alien language spoken by men draped in alien costume. In such a situation the illiterate litigant is a total stranger surrounded by unfamiliar circumstances which gives rise to an embarrassment known only to himself. Now imagine this horrifying scenario of the Court were it to operate without procedural safeguards. Without the presumption of innocence it is difficult to see how an accused person can exonerate himself of the Charges against him? Without the right to an interpreter what would become of an accused person who does

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17. In Shaughnessy v. United States, 345 U.S. 206.at 210.

not understand the language of the Court? Again, supposing an accused does not enjoy the right to be informed promptly of the offence for which he is being charged, how were he to prepare his defence? All of these underscore the importance of procedural safeguards in the adjudicatory process. Justice FRANKFURTER put it succinctly when he said that "the history of liberty has largely been the history of the observance of procedural safeguards".[18]

There is another dimension to the underlying objective of the Concept of fairness. In its modern form it is used as a ready tool for limiting and curtailing the discretionary powers of government as exercised by the executive and public authorities. The need to curtail the excesses of administrative bodies has long been felt. The primary object is to prevent governmental power from encroaching on the liberties of the individual. Thus the Courts do find in the Concept of fairness a yardstick with which to measure the justness of the procedure for exercising administrative powers. No matter how extensive and discretionary the powers conferred on Ministers and Public Authorities it is now possible to require them to be exercised in a manner that's procedurally fair. In underlining the importance of fair procedure in administrative proceedings, Professor Wade observed that "as governmental powers continually grow more drastic, it is only by procedural fairness that they are rendered tolerable".[19]

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18. In McNabb v. U.S. 318 U.S. 332 (1943)(S.C. OF U.S.A.) at p. 342.
19. WADE, H.W.R.: Administrative Law, p. 393, (4th Edition).

CHAPTER TWO

ORIGIN AND DEVELOPMENT OF THE CONCEPT OF FAIR HEARING

1. PHILOSOPHICAL BACKGROUND

The quest for justice, orderliness and fairplay in the affairs of men has throughout the history of human civilisation occupied a central position. Legal thinkers of different epochs and creeds have had to grapple with the problem of the nature and essence of justice. But the origins of the modern concept of natural justice must be traced back to the works of Greek philosophers and Roman jurists. They were the first to discover the necessity to establish a political Community on the basis of some objective principles of justice and morality. These principles are universal and they depend on the essential nature of man. This does not however, refer to man in his primordial condition, but to man as the rational being. Therefore these principles are discoverable only by man's reasoning faculty. This they called natural reason. The fruits of this intellectual endeavour came to be known as the theory of natural law. Thus the theory of natural justice is a derivative of the theory of natural law and the latter depends on natural reason for its essence and validity.

It was Plato's idealist philosophy that set the pace for all subsequent speculation on the nature of justice. He reaffirmed as 'a priori' that the primary purpose of law is justice. Plato's enquiry led him to the proposition that justice can be attained only if the Community or State is headed by what he called a philosopher-King whose wisdom can be trusted to ensure fairness and justice in society. Like Plato, Aristotle too believed that human society must be organised on the basis of fairness and equality. Aristotle

dwelled extensively on the idea of justice and divided it into several categories the most important of which were 'natural justice' and 'conventional justice'. According to him natural justice is justice in accordance with natural law and natural reason, the essence and principles of which are universal. Conventional justice, on the other hand, is justice in accordance with conventional law and conventional law is man-made law. This categorisation was to become a watershed in the philosophical development of the concept of natural justice.

From the days of the pioneers of speculative philosophy to the present the search for some higher ideals and principles of morality which would serve as a source for the validity and essence of law has been an engaging enterprise to legal reformers of every epoch. The notion of justice, fairness and equality is a recurring theme in all legal thoughts. Inspite of the vehemence of positivists in their rejection of the notion of law with a moral content their writing is replete with concepts and ideas the abstractness of which equals or even surpasses the very notions they sought to repudiate. Their method of studying law on the basis of its formal validity notwithstanding, concepts such as utilitarianism has as much a moral undertone as Justice. Radbruch, a confirmed positivist, was forced to reconsider his views having realised that positivism had powerfully contributed to the horrors of Nazi regime in Germany. His reflections led him to accept the notion that the fundamental principles of humanitarian morality were part of the very concept of legality and that no positive enactment or statute could

be valid if it contravenes basic principles of morality.[1] Radbruch's volte face confirms St. Augustine's rhetorical question: "Without justice what are states but robber-bands enlarged"?[2] Even a dichard positivist like Hans Kelsen who believes that absolute justice is "an irrational ideal, an illusion, one of the eternal illusions of mankind", could not but admit that "the view that moral principles constitute only relative values does not mean that they constitute no value at all".[3]

Thus it is that moral principles such as justice and fairness continue to play an important role in giving law a moral content. For instance retroactive laws attract our moral outrage because they lack that moral content that is essential to the validity of laws. To condemn a man unheard is as immoral as killing him without a justifiable cause. It was this concern with the moral content of the law that led the Court of King's Bench to hold that to condemn a man without hearing was contrary to "the laws of God and man, and that even God himself did not pass sentence upon Adam before he was called upon to make his defence".[4] In answer to the critics of the concept of natural justice LORD REID observed

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1. Finch, J.D. Introduction to Legal Theory 3rd Ed., pp. 68-69. (1979).
2. Quoted in Finch, J.D. Introduction to Legal Theory, (1979) 3rd Ed. p. 72.
3. Kelsen, H.: What is justice? (1971) Univ. of Califonia Press, Chap. I p. 21.
4. R. v. University of Cambridge (1723) 1 Str. 557, 567.

that:-

> "In modern times opinions have sometimes been expressed to the effect that natural justice is so vague as to be practically meaningless. But I would regard those as tainted by the perrenial fallacy that because something cannot be cut and dried or nicely weighed or measured therefore it does not exist. The idea of negligence is equally insusceptible of exact definition and natural justice as it has been interpreted in the courts is much more definite than that".5

2. (a) COMMON LAW ORIGINS

In the preceeding discussion it has been shown how philosophers, through the ages, tried to grapple with the phenomenon of justice in society by attempting to find the basis of law in some higher principles of morality and ethics, the result of which is the development of concepts such as natural justice which are today regarded as the hallmark of any civilised society. Next will be a discussion of the Common law judges' contribution to growth and development of the concepts of natural justice and fairness.

The concept of natural justice as developed in the common law courts consists of two rules: the right to a hearing and rule against bias. It is intended here to attempt to trace the Common law origins of each of these rules separately for purpose of clarity. But, first, attempt shall be made to establish the source from which Common law judges derive their authority to enforce the observance of these rules. The effective starting point in history was 1215 A.D., the year in which MAGNA CARTA or Great Charter of Liberties was issued - by King John. An important provision of this Charter

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5. Ridge v. Baldwin (1964) A.C. 40 at p. 64.

declares:-

> "That no man, of whatever estate or condition that he be, should be put out of his land or tenements nor taken nor imprisoned, nor disinherited, nor put to death, without being brought to answer by the due process of law".[6]

Then came the year 1628 A.D. when the PETITION OF RIGHTS was enacted in which it was provided that no subject shall be detained without being charged with any "offence to which they might make answer according to law".[7] It was also in the Petition of Rights Act that the writ of Habeas Corpus was instituted as a remedy against unlawful arrest. Thus it is from these great legal documents that the common law judges derive the inspiration to enforce the observance of rules of natural justice.

2. (b) RULES OF NATURAL JUSTICE

(i) AUDI ALTERAM PARTEM

The first instance of the application of this rule by a court of law was the BAGG'S Case[8] which was decided in 1615. One James Bagg, a Chief Burgess of Plymouth was removed from office for singularly unbecoming conduct. The Court decided that Mr. Bagg should be re-instated because his removal was without notice or hearing.

The next significant application of this rule was in 1723 in the case of R. v. UNIVERSITY OF CAMBRIDGE[9] where the University had stripped one Mr. Bently of his degrees on account of his misconduct in insulting the Vice-Chancellor. The court

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6. Quoted in WADE, H.W. Treasure of the Rule of Law, 1965 at p. 438.
7. Ibid. at p. 441.
8. (1615) 11 CO. REP. 93b.
9. (1723) 1 Str. 557.

of King's Bench issued mandamus compelling the University to re-instate Dr. Bently because no notice was given to him to make his defence as required by "the laws of God and man; and that even God himself did not pass sentence upon Adam, before he was called upon to make his defence". This is an example of the philosophical notion of natural justice as divine and eternal.

These early applications of the rule were mainly in connection with removal from office without notice or hearing. The rule was aimed at Justices of the Peace who were in those times the principal administrative officials. But later on, the application of the rule was extended to cover religious matters. For instance in CAPEL v. CHILD[10], a Bishop was empowered by statute to remove a Vicar and appoint another where the Vicar neglected his duties. It was held that the Bishop was under an absolute duty to give the Vicar notice and opportunity to be heard before removing him. This case is an indication of how far the Common Law Judges were prepared to go in applying the rule. Soon after the judges began to apply the rule to bodies such as voluntary societies and clubs. Thus in DAWKINS v. ANTHROBUS[11(a)], it was held to be an implied term of each members contract of membership that he could not be expelled without a fair hearing. It was also observed that; "This rule is not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individual"[11(b)]. Similarly in a case involving Trade Union members LORD DENNING observed that; "These bodies, ... which exercise a monopoly in an

10. (1832) 2 Cr. and J. 588. 11(b). Wood v. Wood (1874) L.R. 9 Ex. 190.
11(a) (1881) 17 Ch.D. p. 615

important sphere of human activity, with the power of depriving a man of his livelihood, must act in accordance with elementary rules of justice. They must not condemn a man without giving him an opportunity to be heard in his own defence".[12]

The 19th and 20th centuries were marked by an unprecedented proliferation of public authorities being established by both the Local and Central Governments in Britain. The necessity was therefore felt for the Courts to keep these public authorities under close surveillance in order to ensure that they adopt fair procedure in the discharge of their functions, particularly where legal rights or interests are affected adversely by their decision. Accordingly, the Courts generally held that "a party is not to suffer in person or in purse without an opportunity of being heard"[13]. Thus the rule was made applicable to all public authorities irrespective of the nature of their functions whether administrative or judicial.

An important decision which was to have far reaching repercussions in the development of the rule was delivered in the case of COOPER v. WANDSWORTH BOARD OF WORKS.[14] The facts were that under an Act of 1855 it was provided that no one might put a building in London without giving seven days notice to the Local Board of Works, and that if anyone did so, the Board might have the building demolished. A builder nevertheless began to erect a house in Wandsworth without having

12. In Abbot v. Sullivan (1952) K.B. 189 at 198.
13. Painter v. Liverpool Gas, Oil and Light Co. (1836) 3 Ad. E. 433 at 448-49.
14(a) (1863) 14 C.B.(N.S) 180.

given due notice. When his building had reached an advanced stage the Board of Work sent men who went and demolished it. The board's action was purely administrative. Nevertheless, the builder challenged the board's action successfully on the ground that the board had no power to act without first asking him to defend himself.

The significance of this decision lies mainly in what the judges had to say in their judgements concerning the potential scope of the application of the audi alteram rule. ERLE C.J. said in his judgment:

> "I think the board ought to have given notice to the plaintiff and to allow him to be heard. I cannot conceive any harm that could happen to the district board from hearing the party before they subjected him to a loss so serious as the demolition of his house; but I can conceive a great many advantages which might arise in the way of public order, in the way of doing substantial justice, ... that they should hear the party before inflicting upon him such a heavy loss. It has been said that the principle.... is limited to judicial proceedings, and that a district board ordering a house to be pulled down can not be said to be doing a judicial act ..... I do not quite agree with that ..... I think the appeal clause would evidently indicate that many exercises of the power of a district board would be in the nature of judicial proceedings".[14(b)]

In his own judgment which is equally important WILLIS J. said: "I apprehend that a tribunal which is by law invested

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14(b). IBID. at p. 194.

with power to affect the property of her majesty's subjects, is bound to give such subjects an opportunity of being heard before it proceeds; and that the rule is of universal application and founded on the plainest principles of Justice".[14(c)]

The judgement of BYLES J. summarised the previous decisions on the rule and concluded that the rule was implied in every statute that gives powers to such boards as Wandsworth: "It seems to me that the board are wrong whether they acted Judicially or Ministerially. I conceive they acted Judicially because they had to determine the offence, and they had to apportion the punishment as well as the remedy. That being so, a long course of decisions beginning with Dr. Bentley's case,[15(a)] and ending with some very recent cases, established that although there are no positive words in a statute, requiring that the party shall be heard yet the justice of the Common Law will supply the omission of the legislature".

The decision in this case is significant in at least two respects: One is that it has reaffirmed the universality of the audi alteram rule; and secondly, it has been established that the rule is implied in any statute granting powers to public authorities.

Another important milestone in the development of the audi alteram rule under the Common law of England was a 1911 House of Lord's decision in the case of BOARD OF EDUCATION v. RICE,[15(b)] the House was called upon to decide whether the Board

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14(c) Ibid, at p. 190.
15(a) See R. v. CAMBRIDGE UNIVERSITY (1723)1 Str. 557.
15(b) (1911) A.C. 179.

of Education had properly determined a dispute between a body of school managers and Local Education Authority. The Authority had refused to pay teachers in the church schools at the same rate as teachers in the Authority's own schools. Teachers gave notice to leave, and the managers complained that the Local Authority were failing to keep the schools effecient, as the Education Act required. A public enquiry was held which favoured the managers; but the Board of Education decided in favour of the Local Authority. The House of Lords quashed the decision of the Board and ordered a proper determination of the dispute. In his judgement Lord Loreburn made a further confirmation of the universality of the rule in the following words:-

> "Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of state the duty of deciding or determining questions of various kinds. ..... In such cases ..... they must act in goodfaith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything. But I do not think they are bound to treat such a question as though it were a trial..... They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view".15(c)

However the development of the rule in the Common law was not all plain sailing. There were times when application of the rule suffered some serious set back. The Courts for one reason or the other, but mainly on grounds of public policy, deliberately refrained from applying the rule where it clearly ought to apply. To this end an artificial dichotamy was created between

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15(c). Ibid. at p. 211.

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a Judicial Proceeding and an Administrative proceeding. The rule was made applicable to a Judicial Proceeding only. There the Courts would apply the rule only where the public authority concerned was under a duty to act judicially. But where the public authority's functions were purely administrative then it was virtually exempted from the rigour of the rule.

For instance, only four years after the bold affirmation of the rule in BOARD OF EDUCATION v. RICE[16], the House of Lords in LOCAL GOVERNMENT BOARD v. ARLIDGE[17], held that a government department determining a housing appeal was not obliged to divulge an inspectors report to the appellant, even though the report might well have contained relevant statements prejudicial to his case which he might have wished to challenge.

For many decades after this decision the House exhibited a negative attitude towards application of the rule to decisions of public authorities upon which there was a duty previously to observe the rule. Reasons for this deliberate retardation of the development of the rule was not all that clear. But perhaps it may not be altogether unconnected with the emergency situation just before and after the 2nd World War, when government departments were given extensive powers by Parliament, most of which were discretionary, in order to enable them deal with the prevailing situation. The courts, therefore might have rightly felt that government departments needed the least interference in their efforts to prosecute the war. Alternatively, the courts might have initially viewed the rapid

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16. IBID.

17. (1915) A.C. 120.

proliferation of administrative bodies with suspicion and apprehension, hence the courts' eagerness to curtail their powers. But that several years thereafter the courts might have been forced to accept the existence of administrative bodies as an inevitable phenomenon of modern government, and hence the reluctance to impose a duty upon these bodies to observe the rule.

For instance in R. v. LEMAN, EXPARTE, VENICOFF[18], the Home Secretary had been empowered by legislation to deport an alien whenever he deemed this to be in the public interest. When a deportation order was challenged on grounds that the rule was not observed, the court decided that the Minister was not acting judicially so he needs not observe the rule as he was only exercising a purely executive functions. The court in arriving at its decision took into consideration the wide scope of the Home Secretary's discretionary powers and the emergency situation as well as the practicability of giving prior notice in such a case.

This lamentable situation persisted until the early sixties when the House of Lords decided to positively change its retrogressive attitude towards the audi alteram rule. This was in the case of RIDGE v. BALDWIN[19], which was decided in 1964. This case was a real land mark, a turning point in the development of the audi alteram rule. The facts are as follows:-

The Chief Constable of Brighton had been tried and acquitted on a criminal charge of conspiracy to obstruct the course of justice. Two other police officers were

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18. (1920) 3 K.B. 72.
19. (1964) A.C. 40. See Stevenage Case FRANKLIN V. MIN. OF TOWN AND COUNTRY PLANNING (1948) A.C. 87 and R. KRUSE V. JOHNSTONE (1951) N.C. 66.

convicted, and the Judge reprimanded the Chief Constable for bad leadership. There upon the Brighton Watch Committee, without giving any notice or hearing to the Chief Constable, dismissed him from office. His solicitor then applied for a hearing and was allowed to appear at a later meeting of the Committee. The Committee confirmed their previous decision, but by a vote of nine to three (not unanimous as the previous meeting). The Chief Constable exercised his right of appeal to the Home Secretary who dismissed the appeal. The Chief Constable then turned to the courts of law as a last resort, claiming a declaration that his purported dismissal was null and void since he had not been given any notice of the charges against him nor was he given the opportunity for his defence. The declaration was refused by the High Court. He appealed to the Court of Appeal which also refused to grant the declaration by a unanimous decision. But it was awarded by the House of Lords by a majority of four to one.

The House held that the dismissal by the watch Committee was not only a breach of the rule of natural justice, but was also contrary to the expressed provision of the statutory regulations governing police discipline, which in cases of misconduct require notice of the charge and opportunity to defend oneself. The subsequent hearing given to the Chief Constable's Solicitor was itself violative of the rule since even then no charges were revealed to him.

This decision is significant in many respects, the most important of which is the high-lighting and repudiation of the major demerit afflicting previous decisions which confined the applicability of the rule to Judicial proceedings only and not to administrative proceeding. Moreover, the House reached its

decision only after an extensive review of the authorities on the subject at bar. In his leading judgement LORD REID rightly observed that:- "The authorities on the applicability of the principles of natural justice are in some confusion". This is so because in most previous decisions the court would refuse to apply natural justice if the act is purely administrative.

While LORD REID set the pace in repudiating the dichotamy between judicial and administrative act it was LORD DENNING who dealt the final fatal blow to it. This was in 1970 in the case of R. v. GAMING BOARD, Exparte Benaim and Kaida.[20] Lord Denning in reviewing the older decisions said; "At one time it was said that the principles (of natural justice) only apply to judicial proceedings and not to administrative proceedings. That heresay was scotched in RIDGE v. BALDWIN.[21] At another time it was said that the principles do not apply to the grant or revocation of licences. That too is wrong. R. v. METROPOLITAN POLICE COMMISSIONER EXP. PARKER AND NAKKUDA ALI v. JAYAVARTINE[22(a)] [22(b)] are no longer authority for any such proposition".

As a result of the final demise of the artificial dichotomy the courts had to find means of widening the scope of the applicability of the principles of natural justice. A means was found for doing so in a later line of cases which lay down that powers of a purely administrative nature must be exercised FAIRLY; meaning in accordance with

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20. (1970) 2 Q.B. 417 at 430.
21. (1964) A.C. 40.
22(a)(1953) 1 W.L.R. 1150,
22(b) (1951) A.C. 66 (revocation of licences).

natural justice "which after all is fairplay in action".[23]

This development dated back to 1967 in the case of Re H.K. (an infant)[24(a)] where an immigration officer at London Airport had refused to admit a boy from Pakistan on the ground that he appeared to be well over the age of sixteen, under which age he would have been allowed to enter with his father. Lord Parker C.J., held that even if an immigration officer is not in a judicial capacity or quasi-judicial capacity he must nevertheless act fairly, and he observed:-

> "That is not as I see it, a question of acting or required to act fairly. Good administration and an honest or bona fide decision must as it seems to me, require not merely impartiality, nor merely bringing one's mind to bear on the problem, but acting fairly".

This dictum was quoted with approval by Lord Denning in R. v. GAMING BOARD in which he said; "I think that the Board have a duty to act fairly".[24(b)] Also in a similar development but unrelated facts Lord Denning remarked that; "I am clearly of the opinion that the inspectors must act fairly. This is a duty which rests on them, as on many other bodies, even though they are not judicial or quasi-judicial, but only administrative".[25] This was in relation to an inspector appointed by the Board of Trade to make a report on the affairs of a Company, the Pergamon Press. The directors of the Company claimed that the inspectors should conduct the inquiry as if it were a judicial inquiry in a court of law since they were being charged with an offence. The above dictum was made while accepting the directors' claim.

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23. Lord Reid in RIDGE v. BALDWIN (1964) A.C.40, 77-79.
24(a) (1967) 2 Q.B. 617 at 630-631. 24(b) (1970)2 Q.B.417 at 430.
25. In re Pergamon Press, (1971) Ch. 388 at 399.

From thenceforth the principle of natural justice that a party must be given an opportunity of being heard became so widely applied that its observance is now a duty upon anyone who decides anything.

(ii) RULE AGAINST INTEREST AND BIAS

In the foregoing discussion attempt has been made to show how Common law judges established that natural justice demands that those whose interests may be affected by an act or decision should be given adequate opportunity to be heard. Another fundamental rule of natural justice is that the body or tribunal that is to decide or determine the matter must itself be properly constituted in a manner as to be disinterested, independent and impartial. This is known in the Roman maxim as NEMO JUDEX IN CAUSA SUA, meaning a man cannot be a judge in his own cause.

Like the audi alteram rule this rule also has a very ancient begining. It has been said that as early as the 14th Century Common law judges were said to be incompetent to decide cases to which they were themselves parties.[26] For instance Bracton wrote that a judge was not to hear a case if he was suspected of partiality because of consanguinity, affinity, friendship or even enemity with a party or because of his subordinate status towards a party or because he was or had been a party's advocate. It is important to note that at the time when Bracton was writing this statement this rule had not yet been recognised by the Common law. There is strong evidence to suggest that Bracton might have spear-headed the move for the incorporation of this rule into the common law.

26. See S.A. de Smith, Judicial Review of Administrative Action p. 249 -(4th Ed.)

Perhaps he had been inspired by the practice of the English ecclesi-astical courts who had long been in the habit of observing the rule.

The common law recognition of this rule was not without some opposition especially from the common law judges themselves. They specifically objected to the notion that a judge might be disqualified on grounds of bias in the discharge of his duties as a judge. There was this general notion that judges were men of unimpeachable character and a kind of supermen who were above the normal pettiness of ordinary mortals. They had sworn to administer impartial justice, therefore they should be above suspicion like ceaser's wife. This initial scepticism towards the rule was typified by the bold ascertion of Justice Coke that Judges and Justices, unlike jurors, could not be challenged for bias. Also Blackstone came to the defence of his brethren when he remarked that:- "For the law will not suppose the possibility of bias or favour in a Judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea".[26(a)]

However, this initial reluctance to enforce the rule against bias did not extend to a situation where direct pecuniary or proprietory interests could be clearly established. On that ground no one would object to the rule being enforced against the Judge. For instance in SIR NICHOLAS BACON'S CASE[26(b)] and EARL OF DARBY'S CASE[26(c)], it was recognised that the common law did not permit a judge to determine a matter in which he had a direct pecuniary or proprietory interests. But the modern affirmation of the rule which signified its total acceptance as a common law rule was in the famous Case of DR. BONHAM[26(d)] decided by no less a person than Justice Coke

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26(a) BLACKSTONE'S COMMENTARIES, iii, at p. 361.

26(b) (1563)2 Dyer 220b.

26(c) (1613)12 CO. REP. 114.

26(d) (1610)8 CO. REP. 113b at 118.

himself, his initial scepticism not notwithstanding, where he said the rule was so fundamental that it can prevail even over an Act of Parliament.[27]

It should, however, be noted that the first few decisions on the rule were based on the presence of direct pecuniary or proprietory interests in the matter before the court which amounted to actual bias. But the modern principle that a judge is automatically disqualified from adjudicating the matter whenever there is a real likelihood that he might be biased was not unequivocally established until 1866 in the case of R. v. RUND CANAL CO.[28(a)] This case is regarded as the locus classicus on the subject. Lord Chancellor Cottenham had affirmed a number of decrees made by the Vice-Chancellor in favour of a canal company in which Lord Cottenham's decrees were reversed by the House of Lords on account of his pecuniary interest in the company, even though it was nowhere shown that his decision was influenced by his interest as a shareholder. LORD CAMPBELL stated the rule thus:-

> "No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern, but, my Lords, it is of the most importance that the maxim that no man is to be a judge in his own cause, should be held sacred..... And it will have a most salutary influence on tribunals when it is known that this high Court of last resort in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that account a decree not according to law, and was set aside. This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interests, but to avoid the appearance of labouring under such influence".[28(b)]

The significance of this decision lies in its being a catalyst for further development of the rule against bias in the common

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27. This decision is contrary to Supremacy of Parliament, hence no more good law.
28(a) (1866) L.R. 1 Q.B. 230. 28(b) (1852) 3 H.L.C. 759 at 793.

law. The next recent affirmation of the rule as a cardinal principle of common law justice was in the case of R. v. SUSSEX, Exp. McCarthy[29(a)] where LORD HEWART made his famous and oft-repeated statement that "it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done". In this case a Solicitor was acting for a client who was suing a motorist for damages caused in a road accident. The same Solicitor was also acting clerk to the justices before when the same motorist was convicted of dangerous driving and he retired with them when they were considering their decision. The fact that the clerk's firm was acting against the interests of the convicted motorist in other proceedings was held to invalidate the conviction even though it was proved that the justices had not in fact consulted the clerk and that he had scrupuluosly refrained from saying anything prejudicial. The essence of the rule was expressed by Lord Hewart thus:-

> "The question therefore is not whether in this case the deputy clerk made any observation or offered any criticism which he might not properly have made or offered, the question is whether he was so related to the case in its civil aspect as to be unfit to act as clerk to the justices in the criminal matter. The answer to that question depends not upon what actually was done but upon what might appear to be done. Nothing is to be done which creates even a suspicion that there has been an improper interference with the cause of justice"[29(b)]

This rule is undoubtedly of the highest significance in the adjucatory process. One would shudder to think what would have become of the whole machinery of Common Law Justice in the way of public confidence if this rule were not recognised and given its due importance within the legal system. Therefore, it is elementary justice that no man who is himself a party to

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29(a) (1924) 1 K.B. 256 at 259.

29(b) Ibid at 259.

a proceeding or who has any direct pecuniary interest in the outcome is qualified at common law to adjudicate in that proceeding. Professor de Smith has stated the modern law when he says that "if it is alleged that the adjudicator has made himself a partisan, or is to be suspected of partisanship, by reason of his words or deeds or his association with a party who is instituting or defending the proceedings before him, the courts will not hold him to be disqualified unless the circumstances point to a real likehood or reasonable suspicion of bias".[30] In other words more suspicion of bias is not enough. There must exist a reasonable suspicion or real likelihood of bias regard being had to all the circumstances surrounding the matter.

The observance of this rule is incumbent upon any one who discharges a judicial function. But the question arises whether its observance is equally mandatory upon persons or bodies discharging purely administrative or ministerial functions. Professor de Smith has expressed some reservations on the applicability of the rule to such bodies exercising purely administrative or ministerial duties.[31] The present writer is of the view that the learned Professor's opinion may be tenable only where such a ministerial body is called upon to determine a dispute between objectors and its parent ministry. In such a situation it will be naive to expect such a ministerial body not to favour itself. After all it is only logical to expect

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30. See S.A. de SMITH: 'Judicial Review of Admin. Actions' - (4th Ed.) p. 251.

31. See above. See also Nwabueze B.O. 'Judicialism in Commonwealth Africa' pp. 221-2., 1977.

it to defend its ministerial policy in the face of any objections. Such a body may not even be independent. But where, on the other hand, the administrative or ministerial body is called upon to settle a dispute between two or more groups of objectors then it is quite possible for it to assume an impartial posture. An example is the case of BOARD OF EDUCATION v. RICE[31(a)] in which the Board was called upon to determine a dispute between teachers in church schools and Schools Managers. However, it is imperative to bear in mind that everything depends on the circumstances of each case.

3. MODERN DEVELOPMENT OF CONCEPT OF FAIR HEARING IN THE CONSTITUTIONS OF NIGERIA AND THE UNITED STATES

From the abstract philosophical origin of the concept of fair hearing as rooted in higher principles of justice and morality we have seen how the concept was refined, developed and systematised through the efforts of the common law jurists as to become a cardinal principle of the English Legal system. The next stage in the development of this concept is its recognition as an important principle of Constitutionalism. The concept readily found universal acceptance amongst the community of nations to an extent that it is incorporated in to almost all Constitutions of modern States. Moreover, it had, in some of these Constitutions, been not just incorporated but entrenched specially as an inalienable and fundamental human right. The concept of the rule of law and Constitutionalism find expression in concrete terms through the application of the concept of fair hearing in the ordinary courts of the Land. Nigeria, like any other modern nation state, has on several occasions given expression

31(a) (1911) A.C. 179.

to this concept in all its Constitutions, from independence to date.

In the 1963 Constitution of Nigeria the concept was entrenched in section 22 of Chapter III as a fundamental right guaranteed by the Constitution. The 1979 Constitution made similar provision on the concept in section 33 of Chapter IV. Section 33(1) guarantees to every person a fair hearing in the determination of his civil right and obligations before any court or tribunal in Nigeria. This includes any question or determination by or against any government or authority in the country. The court or tribunal is under a constitutional duty to determine the matter within a reasonable time. Such a court or tribunal must be established by law. This excludes trial by ordeal where tribal communities organise courts to try suspected witches and other tribal offences. It is pertinent to note that the right to fair hearing has been guaranteed to every persons, Nigerian and non-Nigerian alike, resident in Nigeria. It is also a constitutional requirement for such a court or tribunal to be constituted in such a manner as to secure its independence and impartiality. The requirement of fair trial applies, mutatis mutandis, where a person is charged with a criminal offence. It is to be noted that all Common law principles that go towards the actualization of the concept of fair hearing have also been adequately taken care of in the section under review.

The right to fair hearing has also been given adequate expression under the due process clause of the American Constitution. Admittedly the due process clauses in the American Constitution cover much more ground than the fair

hearing provisions in the Nigeria Constitution, but both serve the same purpose. Amendment V of the American Constitution states that "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law". Amendment VI also states that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of accusation; to be confronted with the witness against him, to have compulsory process for obtaining witnesses in his favour, and to have the Assistance of Counsel for his defence".

It has earlier been stated that the due process clause is much wider than fair hearing as entrenched in the Constitution of Nigeria. This is so because whereas fair hearing is restricted to review of procedure, the due process is applied not only to procedural review but to substantive review as well. As a matter of fact, due process is divided into two aspects; substantive and procedural. The procedural due process is where a court reviews a law in order to determine its procedural fairness, i.e. to determine whether or not a government entity has taken an individual's life, liberty or property without the fair procedure or due process required by the Constitution. It merely involves a judicial assessment

of a decision making process to determine its fairness in relation to an individual. Substantive due process on the other hand involves a judicial determination of the compatibility of the substance of a law or governmental action with the Constitution. The court here is more concerned with the constitutionality of the law rather than with the fairness of the process by which the government applies law to an individual. Also section 2 of the Canadian Bill of Rights 1960 provides for the fair hearing of disputes between its citizens.

4. FAIR HEARING IN INTERNATIONAL LAW

The concept of fair hearing in its various aspects has been recognised and given expression in many international instruments and conventions. Article 10 of the Universal Declaration of Human Rights which was adopted by the General Assembly of the United Nations in 1948, provides that:

> "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him".

Inspite of its non-binding nature, the declaration at least serves as a significant universal standard of justice the principles of which are held sacred by all democratic and civilised nations all over the world.

The European Convention on Human Rights came into force in 1953. Certainly the inspiration for its adoption was derived from the U.N. Universal Declaration of Human Rights aforementioned. The European Convention goes a step further in that it has made its provisions justiciable and aggrieved individuals may address petitions to the European Commission of Human Right for determination.

Another important development in the international recognition of the concept is the recent realisation of the need by African Countries to have an African Charter on Human Rights under the auspices of the O.A.U.

"In the quest for justice under the Rule of Law there has been no more spontaneously acceptable idea than the principle embodied in the maxim audi alteram partem"[32]. In parallel with the human rights movement the rule of law has been the subject of much International discussion spearheaded mostly by the International Commission of Jurists. Thus under its auspices in New Delhi, India, in 1959 Lawyers from several countries formally declared that the rule of law is a dynamic concept which should be employed to safeguard and advance the political and civil rights of the individual in a free society. This is now known as the New Delhi Declaration on the Rule of Law. The Declaration recognises the need for adequate controls against abuse of power by the Executive, the essentials of fair criminal procedure and the maintenance of an independent judiciary.

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32. See JACKSON P.; Natural Justice, p. 7 (1973).

CHAPTER THREE

FAIR HEARING IN CIVIL PROCEEDINGS

1. CIVIL RIGHTS AND OBLIGATIONS - MEANING OF

The general import of Section 33(1) of the 1979 Constitution of Nigeria is to guarantee to every person in Nigeria the unfettered right to seek redress in Court "for the determination of any question as to his civil rights and obligations"[1]. An important question that has to be resolved is the exact meaning of civil rights and obligations under Section 33(1). Admittedly there is a severe dearth of authorities on this issue. This is a very serious lacuna in the Law in Nigeria especially having regard to the constitutional significance of this term. The general tendency of the Nigerian Courts is to avoid any attempt at defining the term at all, and content themselves with a description of it in relation to specific instances only. The first serious attempt at determining what amounts to a 'civil right' was made by the Supreme Court of Nigeria in the case of MARCHANTS BANK LTD. v. FEDERAL MINISTER OF FINANCE[2].

In this case the issue that came up for consideration was whether a licence granted under the Banking Ordinance for the purpose of carrying on banking business came within the meaning of civil rights in the context in which it appeared in the 1954, Constitution, the provisions of which were somewhat similar to corresponding provisions in all subsequent Constitutions of Nigeria.

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1. Governor of Bendel State v. Obayuwana (1982)3 N.L.R.206.
2. (1961)1 All N.L.R. p. 598.

In challenging the purported revocation of such licence by the Minister of Finance pursuant to his powers under section 14 of the Banking Ordinance, the appellant contended that the licence granted to it amounted to a civil right within the meaning of the 1954 Constitution therefore by virtue of clause 5 of the 6th Schedule of the said Constitution the Bank was entitled to have that right determined or revoked only "by a court or other tribunal established by law" in accordance with the said Constitution. In rejecting the appellant's contention TAYLOR F.J. observed:-

> "On the first issue, and without in any way, attempting to define that most controversial term 'a right', or in this case a 'civil right', it seems to me that it can not be contested that the appellant Bank has not by virtue of the Banking Ordinance, a right to carry on the business of Banking within the terms of that Ordinance. Further, that so long as the revocation takes place within the exercise of the powers granted under section 14 of the Ordinance the appellant Bank cannot be heard in effect to say that though it acquired the right by virtue of the fifth clause to the Sixth Schedule of the 1954 Constitution it can only be revoked in the manner provided for the determination of a person's "civil rights and obligations".[2(b)]

The learned Supreme Court Judge referred to the Canadian case of CITIZENS INSURANCE CO. OF CANADA v. PARSONS[3] as authority to show that in the determination of what is a civil right, the important point to bear in mind is the context in which it appears. Consequently the learned Judge concluded that "from the context in which the words 'civil rights and obligations' appear, from the matter that the Sixth Schedule purports to deal with, it is clear that a right or licence to do banking business under the Banking Ordinance does not come within the meaning of 'civil rights'".

2(b) Ibid. p. 602.
3. 7 App. Cases 96.

The Supreme Court decision in this case has to be viewed in the Context and circumstances in which it was delivered. In this instance, the Court was called upon to decide whether a right acquired under and conferred by a statute, to wit, Banking Ordinance, was to be revoked by reference to the conferring statute which made express provision for such revocation or should such an acquired right be revoked in the manner provided for the determination of a person's civil rights and obligations' under the Constitution. The Appellant's arguement goes like this: We have, by the grant of a licence, acquired a civil right to carry on banking business, therefore we are entitled to have that licence (right) determined or revoked only "by a court or other tribunal established by law in accordance with the Constitutional provision relevant thereto. In other words, the appellants are urguing upon the court to ignore the Minister's statutory powers of revocation under the Banking Ordinance in favour of the Constitution, whereas at the same time they are not challenging the validity of the Banking Ordinance as contrary to or inconsistent with the Constitution. No doubt there is a serious flaw in the appellant's arguement. The appellants did not even alleged that the Minister did not comply with the requirements of the Ordiance as regards revocation. All they were querreling with was that the Ordinance had made the Minister the final arbiter whereas the 1954 Constitution made the courts or a tribunal established by law the final arbitar in respect of a person's'civil rights'.

This arguement stems from an erroneous interpretation of the Constitutional provision. Clause 5 of the Sixth Schedule of the 1954 Constitution provides that:-

"In the determination of his civil rights and obligations a person shall be entitled to a fair hearing within a reasonable

time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality:

Provided that nothing in this sub-paragraph shall invalidate any law by reason only that it confers on any person or authority power to determine questions arising in the administration of a law that affect or may affect the civil rights and obligations of any persons".

Now assuming that the licence granted the Bank is a civil right (which I think it is) obviously the Bank is entitled to have that civil right determine or revoked by a court or other tribunal in accordance with the constitutional provisions quoted above. However, in this particular instance and in so far as this particular civil right was confered by the Minister pursuant to his powers under the Banking Ordinance, the appellant/Bank's position falls within the purview of the proviso to Clause 5 of the Sixth Schedule of the Constitution. The purpose of the proviso is to give validity to any law, such as the Banking Ordinance, which confers upon any person/or authority (e.g. a Minister) power to determine question that may affect a person's civil rights arising in the process of administering that law. The effect of the priviso, to my mind is not to make determination by such a person or authority final or conclusive, or in the words of the appellant's Counsel making the Minister the final arbiter. It will be more appropriate to read the proviso as allowing determination by person or authorities subject to an agrieved person's right to have such rights and obligations determined on the merit or reviewed on appeal by a court or other tribunal. Any contrary reading of the proviso would have the effect of rendering the constitutional guarantee superfluous. No wonder therefore the Supreme

Court had to reject the appellant's Counsel submission as incorrect.

But on the other hand it would appear that the Supreme Court's reasoning that the licence granted to the appellant Bank was not a civil right was equally erroneous. The confusion manifested in the reasoning would have easily been avoided had the court construed the constitutional provision in clause 5 of the Constitution together with the proviso thereto in the same manner suggested above. In other words the honourable court should have viewed the appellants' right to carry on banking business as a civil right conferred by the Banking Ordinance which is open to determination not only by a court or tribunal but by a Minister. Since such determination is permissible under the proviso to clause 5. This would, it is submitted,/enabled the court to dismiss the appeal as it did while at the same time holding the appellants right as a civil right within the meaning of clause 5 of the Sixth Schedule of the Constitution.

The chief merit of the approach to the interpretation of what is a civil right under the Constitution as suggested here is to make it possible for any legal right to be regarded as a civil right falling within the purview of the constitutional provision. It is believed that this would strengthen the constitutional guarantee of a person's right of having his civil rights and obligations determined by an independent and impartial court or tribunal, and not just by a Minister or other governmental authority whose impartiality and independence may be in doubt. This approach is quite in accord with

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4. See Nwabueze B.O. Julicialism in the Commonwealth p. 220-221 1977.

the liberal spirit recently noticeable among Supreme Court Judges in the area of constitutional interpretation. For instance, SIR UDO UDOMA J.S.C. in NABIU ABIU v. THE STATE[5] observed:

> "I do not conceive it to be the duty of this court so to construe any of the provisions of the constitution as to defeat the obvious ends the constitution was designed to serve where another construction equally in accord and consistent with the words and sense of such provisions will serve to enforce and protect such ends".

Similarly in an evident display of liberalism, FATAYI WILLIAMS C.J.N., stated that "any person, whether he is a citizen of Nigeria or not, who is resident in Nigeria or who is subject to the laws in force in Nigeria, has an OBLIGATION to see to it hat he is governed by a law which is consistent with the provisions of the Nigerian Constitution. Indeed, it is his CIVIL RIGHT to see that this is so".[6]

2. LOCUS STANDI

The term locus standi denotes legal capacity or right to institute proceedings in a court of law in order to assert a legal right. In other words, the court in any given case that comes before it, must first of all determine whether or not the plaintiff should be allowed to institute proceeding in respect of the particular matter which is the subject of the dispute between the parties. Generally a person can only bring an action of any kind before a court if he has some interest in the matter of which he complains. It is this interest which gives rise to locus standi. In OLAWOYIN v. ATTORNEY-GENERAL OF NORTHERN NIGERIA,[7] the appellant one Mr.

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5. (1980) 8-11 SC. 130 at p. 149.
6. See Adesanya v. President (1981) 2 N.C.L.R. 358.
7. (1961) All N.L.R. 269.

Olawoyin sought a declaration that Part VIII of the Northern Nigeria Children and Young Persons Law of 1958 which prohibits political activities by juveniles and prescribes penalties on juveniles and others who are parties to certain specified offences was unconstitutional. He alleged that the law had contravened the provision of the Constitution which guaranteed fundamental right relating to private and family life, freedom of Conscience and freedom of expression.

The learned trial judge, Chief Justice Brown of Northern Nigeria, dismissed the application on the ground that no right of the plaintiff was alleged to have been infringed and that "it would be contrary to principle to make the declaration asked for in vacuo". On appeal, the Supreme Court affirmed the trial court's decision on the ground that the appellant did not satisfy the requirement laid down in MASSACHUSETTS v. MELON[8] in that he failed to show that he has sustained, or is immediately in danger of sustaining some direct injury as a result of the enforcement of the law which he seeks to challenge. In other words the appellant did not have sufficient interest to bring the action.

Similarly in ADEGBENRO v. ATTORNEY-GENERAL FOR NIGERIA,[9] the plaintiff sought a declaration that the Emergency Powers Act, 1961, was unconstitutional on the grounds that the Act had affected his interest by preventing him from discharging his functions as the duly appointed Premier of Western Region. However, at that time the question whether he was validly appointed Premier was pending in court. The Supreme Court decided that unless the pending proceedings were decided in

8. 262 U.S. 447 (1923).
9. (1962) 1 All N.L.R. 150.

his favour he could not establish sufficient interest on the existing facts to entitle him to sue.

What would have amounted to sufficient interest as to entitle the plaintiffs to sue in these two cases is not easy to discern from the Supreme Court's reasoning. Take, for instance, OLAWOYIN'S CASE[9(a)], would the fact that the appellant's apprehension of coming into conflict with the Law not amount to an interest sufficient to entitle him to challenge the Constitutionality of such a law? Even if the appellant did not wish to educate his children politically would the fact that he was a politician and Secretary of a political party not give rise to an interest in the Constitutionality of a law promulgated primarily for the purpose of restricting political activities? It was indeed astonishing that the court did not find convincing the appellant's Counsel's submission that the making of a law which makes an offence of something that a person was constitutionally entitled to do was sufficient to enable him come to court for a declaration. Take the other case of ADEGBENRO[9(b)] for another example. On the basis of the facts in that case if the Supreme Court says the appellant does not have sufficient interest in the matter to entitle him to challenge the Constitutionality of the Emergency Act then one wonders if there could be any other person in the whole world whose interest would be sufficient enough to satisfy the court's standard. It is not at all surprising that the Supreme Court's decisions in these two cases came under serious criticism from several quarters. Clearly one is left with no other impression than to regard those decisions as amounting to an abdication of the Supreme Court's traditional as well as Constitutional mandate

9(a) (1961) 1 All N.L.R. 269. 9(b) (1962) 1 All N.L.R. 150.

and obligation of protecting the Constitutional rights of Nigerians. Prof. Kasunmu while reviewing these decisions remarked: "It is to be hoped that the doctrine of locus standi will not be allowed to operate as a deterent to the exercise of protected rights".[10] It is the humble submission of this writer that adopting a restrictive approach to the application of the technical rules of locus standi will be contrary to the letter and spirit of the right to be heard as enshrined in the Nigeria Constitution.

However, it was not until a new Constitution was adopted in 1979 that one began to witness a radical break from the past. As a matter of fact by this period most other Common Law jurisdictions have adopted a very liberal attitude towards the doctrine of locus standi. In Nigeria the return of party politics under the new Constitution opened the floodgate of litigation in the various courts all over the country. In PAUL ISAGBA v. BENSON ALEGBE,[11(a)] the plaintiff sought in the Benin High Court an order by way of a declaration that the defendants who are members of the Bendel State House of Assembly have lost their seats in the House because they have been appointed members of Bendel State House of Assembly Service Commission. In a preliminary objection the defendants argued, inter alia, that the plaintiff has no locus standi to institute the suit because he lacks sufficient interest in the matter and that mere interest is not enough to entitle him to the relief sought. The defendant's Counsel relied on Olawoyin's case[11(b)], to butress his contention that the plaintiff was a mere busy body and meddlesome litigant.

10. See KASUNMU, Supreme Court of Nigeria, p. 122 (1978).
11(a) (1980) 2 N.C.L.R. p. 424. 11(b) (1961)1 All N.L.R. 269.

In accepting the plaintiff counsel's submission OMOSUN J. of the Bendel High Court, had this to say:-

> "The plaintiff is a citizen of Nigeria. He has alleged that the defendants have contravened the provision of the Constitution. It is suggested he has no locus standi, that he is a meddlesome litigant and that he has no sufficient interest to enable him bring the action. His interest cannot be quantified in terms of Naira and Kobo but certainly like all Nigerians he would like to see the provisions of the Constitution being observed. To adopt the view that he has no sufficient interest would lead to chaos. I cannot contemplate what would happen if violations of the Constitution go unchecked. It means that anyone can with impunity violate the Constitution and no one can say so because his private rights have not been injured.... Every citizen of this country has sufficient interest to see that it is not violated".[12]

Similarly - Justice Balogun of the Lagos High Court declared that:

> "The courts have recognised the competence of a private individual to assail the Constitutionality of legislative and executive measure in the absence of an established legal right ..... thus impliedly recognising his sufficient interest or special interest to do so where the plaintiff asserts an invasion of his Constitutional rights or where the measure is impugned as being violative of some general Constitutional limitation on legislative power".[13]

The liberal approach exemplified in the decisions referred above later culminated in an eminently radical restatement of

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12. Ibid. at p. 432.

13. CHIEF S.A. BALOGUN & ORS. v. ATTORNEY-GENERAL OF LAGOS STATE AND ORS. (1981)2 N.C.L.R. 589 at p. 615.

the law on locus standi by the Supreme Court of Nigeria. This was in the now famous case of ADESANYA v. THE PRESIDENT OF FEDERATION OF NIGERIA[14], Adesanya, a Senator, instituted an action against the President of Nigeria challenging the President's appointment of Mr. Ovie-Whiskey as Chairman of the Federal Electoral Commission. He was confirmed by the Senate. In the confirmation process Mr. Adesanya objected to the appointment saying that it violated certain provisions of the Constitution. He then went to court seeking a declaration and injunction. The Lagos High Court declared the appointment unconstitutional. The President and Ovie-Whiskey appealed to the Federal Court of Appeal. At the Appeal Court the President of the Court raised the issue of whether or not Senator Adesanya had locus standi to have instituted the action at all. At the request of the Counsel for the respondent the issue of Adesanya's standing was referred to the Supreme Court under section 259(3) of the Constitution. The Supreme Court converted the reference into full appeal. In his submission to the Court, the learned Attorney-General of the Federation contended that since the plaintiff had no personal interest in the matter he had no locus standi to bring the action where the relief sought would confer no tangible benefit on him.

Before delivering the unanimous judgment of the Court Mr. Fatai Williams C.J.N. observed that the issue of who has locus standi is very crucial to the interpretation of the provisions of the 1979 Constitution. He then went on to frame the issues before the Supreme Court in the following questions: "If in

14. (1981) 2 N.C.L.R. 358.

a developing country like Nigeria with a written Constitution a legislative enactment appears to be ultra vires the Constitution or an act infringes any of its provisions dealing with fundamental rights, who has locus standi to challenge its Constitutionality? Does (or should) any member of the public have the right to sue? Or should locus standi be conferred to persons whose interests are liable to be specially affected by its operation, or an Attorney-General who is a functionary of the Executive Branch?"

Having framed the issues thus:, the Honourable Chief Justice then delivered his epochal, revolutionary judgment:

> "I take significant cognaisance of the fact that Nigeria is a developing country with a multi-ethnic society and a written Federal Constitution, where rumour mongering is the pastime of the market places and the Construction sites. To deny any member of such a society who is aware, or believes or is led to believe that there has been an infraction of any of the provisions of our Constitution, or that any law passed by any of our legislative Houses, whether Federal or State, is unconstitutional access to a court of law to air his grievances on the flimsy excuse of lack of sufficient interest is to provide a ready recipe for organised disenchantment with the judicial process".14(b)

The Honourable Chief Justice went on to say: "In fact, a close scrutiny of its (Constitution) very detailed provisions will convince anyone that reliance on the decisions, whether British, Canada, Australia or America, given in a different social and political context, will only lead to restrictive rules of locus standi which, in the interest of the need for a total compliance with the provisions of our Constitution, I find it difficult to accept or countenance". He further stated that even in those countries of the Common Law having written Constitutions the present trend is to liberalise the

14(b) Ibid at 375.

application of the rules of locus standi, and that only the House of Lords in England still views locus standi in its restrictive sense, but then that is because Britain does not have a written Constitution. And in explaining the disadvantage of such restrictive approach in this country the learned Chief Justice says:

> "In the Nigerian Context it is better to allow a party to go to court and to be heard than to refuse him access to our courts. Non-access to my mind, will stimulate the free for all in the media as to which law is Constitutional and which law is not".

A few months after the decision in ADESANYA'S CASE[15(a)] the Supreme Court was once again faced with a similar problem of locus standi in the case of BENDEL STATE v. THE FEDERATION.[15(b)] The plaintiff, the Government of Bendel State, was challenging the Constitutionality of Allocation of Revenue (Federal Accounts etc.) Act 1981 on the grounds that the mode and manner by which the National Assembly had exercised its legislative power in passing the Act was not in accordance with the procedure laid down in the Constitution. On the question of Plaintiff's locus standi the Honourable Mr. Kayode Eso F.S.J. said: "On constitutional issues ..... let there be a floodgate. The Constitution can only be tested in the courts and it is access to the courts for such tests that will give satisfaction to the people for whom the Constitution is made .... It has to be accepted that our Constitution has undisguisedly put the judiciary in a pre-eminent position, a position unknown to any other Constitution under the Common Law".

15(a) (1981)2 N.C.L.R. 558.

15(b) (1982)3 N.C.L.R. 1.

The implication of the Supreme Court's decision in ADEGANYA'S CASE[15(c)] is quite far reaching. It has, among other things, completely exocised and buried the ghost of OLAWOYIN'S CASE[15(d)]. Olawoyin is no longer good law in Nigeria. The Supreme Court has flunged its door wide open to any citizen of Nigeria who is aware or who believes, or is led to believe, that there has been an infraction of any of the provisions of the Constitution or that any law passed by any of our legislative Houses, whether Federal or State is unconstitutional.

One other important aspect of locus standi under the 1979 Constitution is in relation to the enforcement of provisions of Chapter IV dealing with fundamental human rights. Section 42(1) of the Constitution states:

> "Any person who alleges that any of the provisions of this chapter has been, is being or likely to be contravened in any State in relation to him may apply to a High Court in that State for redress".

To provide for a special way of enforcing the fundamental rights is meant to stress the importance attached to these rights. It is felt that access to court for the enforcement of human rights by any agrieved person should not be left to the vageries of general jurisdiction of courts. Therefore special jurisdiction especially provided by the Constitution and conferred on the High Courts is felt to be highly desirable and essential to the protection of these rights.

Section 42(3) confers on the Chief Justice of the Federation Special Law making power to make rules for the practice and procedure to be followed by the High Courts whenever application of section 42 is in issue. Under

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15(c) (1981)2 N.C.L.R. 358.
15(d) (1961)1 All N.L.R. 269.

previous Constitutions provisions similar to section 42 were made. But under the 1963 Constitution the power of making rules for the procedure of enforcing the right was confered on Parliament and not the Chief Justice as it is under the 1979 Constitution. The present writer believes that it is more preferable to confer any law making power on the legislature rather than the Chief Justice. However, it should be noted that the provision in section 42 of 1979 Constitution is much wider in scope than under any previous Constitutions. It is therefore an improvement upon the former. Section 42 of 1979 Constitution is intended to cover instances of contravention of any of the rights in the past, the present as well as the future. This is illustrated in the decision in DR. BALLEY v. THE PRESIDENT OF NIGERIA[16]. This is a decision of the High Court of Lagos State delivered by Justice Ademola Johnson where he observed: "It appears to me that by its language the provision in section 42 of the Constitution is meant to bring a ray of hope for redress to a citizen who complains that his fundamental right has been infringed in the past, continues to be infringed and/or likely in the future to be infringed". It appears therefore that section 42 is intended to operate retroactively.

3. FAIR HEARING IN THE DETERMINATION BY A COURT OR TRIBUNAL

Every person in Nigeria has been guaranteed the right, in the determination of his civil rights and obligations, to a fair hearing by a court or other tribunal established by law and constituted in such manner as to secure its independence and

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16. (1982) 3 N.C.L.R. 658.

impartiality.[16] In other words under the Nigerian Constitution of 1963 and 1979 a court is not properly constituted for the purpose of determining a person's civil rights and obligations unless it is established by a law passed by either a State Legislature or the National Assembly. Such a court must in addition to the above requirement be constituted in such a manner as to be independent and impartial. A tribunal may also determine a person's civil rights and obligations if it satisfied the a forementioned criteria. In the ATTORNEY-GENERAL, OYO STATE & OTHERS vs. L.O. ADEYEMI (ALAFIN OF OYO) & 5 OTHERS,[17] the constitutional status of Tribunals in relation to determination of rights and obligations under section 22(1) of the 1963 Constitution was considered by the Federal Court of Appeal.[18] In this case a Boundary Commissioner was appointed to demarcate the boundary between Ogbomosho and Oyo Communities. He made his decision on 29th January 1971. It was confirmed by an Appeal Tribunal on the 12th of September, 1973. Subsequently, an action was brought in the High Court to declare both decision and confirmation unconstitutional in that, inter alia, the jurisdiction vested in the Boundary Commissioner is contrary to section 22(1) of the 1963 Constitution.

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16. Section 33(1) 1979 Constitution. See also section 22(1) of 1963 Constitution.

17. (1982) 3 N.C.L.R. 846.

18. Section 22(1) of 1963 Constitution is in pari materia with section 33(1) of 1979 Constitution.

The learned trial judge after construing section 22(1) of the Constitution held:

> (1) "That the tribunal presided over by the Boundary Commissioner in so far as it is not a High Court of the State is not competent to adjudicate upon dispute between Communities as to the boundaries between them.
>
> (2) That the Tribunal presided over by the Bondary Commissioner can qualify as a Subordinate Court of the State but the Law or Edict under which it was established to determine the boundaries between Communities is for the reasons I have given in this judgement ultra vires the Constitution of the Federation of Nigeria"18(a)

Consequently he declared the decision of the Boundary Commissioner given on the 29th January 1971 and confirmed by the Appeal Tribunal on 27th September, 1973 as being illegal and unconstitutional.

However, when the matter reached the Federal Court of Appeal, the appeal court had no problem setting aside the judgment of the learned trial judge. In holding that the powers vested in the Boundary Commissioner and the Appeal Tribunal are not unconstitutional MR. JUSTICE AKEEM J.C.A. had this to say:

> "It appears to me that the language of section 22(1) is plain enough as to lead to the conclusion that apart from the "courts" of the land tribunals properly constituted, that is whose independence and impartiality are guaranteed in the manner they are brought into being can lawfully and legitimately adjudicate upon and decide issues involving the civil rights and obligations of the persons or persons concerned in its proceedings. It is beyond question that such tribunals like the "regular courts" must ensure that the parties are given a fair hearing within a reasonable time"18(b)

18(a) (1982)3 N.C.L.R. 846 at 854.

18(b) Ibid at 861.

Similarly, MR. UCHE OMO J.C.A. stated more forthrightly that:

> "Section 22(1) of the 1963 Constitution is also authority for the proposition that the Constitution does not preclude tribunals from determining the civil rights and obligations of an individual. The only limiting factor is that such a court or tribunal must be constituted in such a manner as to secure its independence and impartiality".[18(c)]

It is however important to bear in mind that a tribunal even after satisfying the constitutional criteria contained in section 22(1) of the 1963, can only have jurisdiction to determine matters pertaining to civil rights and obligation of the parties before it. The constitutional provision did not contemplate a situation where a tribunal would have jurisdiction in criminal matters. Section 22(2) 1963 stated that where any person is charged with a criminal offence, he shall, unless the charge is withdrawn, be entitled to a fair hearing within a reasonable time by a court". The subsection did not make mention of a tribunal, the effect of which is to vest jurisdiction in criminal matters in the regular courts of the land to the exclusion of any tribunal. This issue came up for consideration in the case of DR. O.G. SOFEKUN v. CHIEF N.D.A. AKINYEMI.[19]

The appellant was an employee of the Western State of Nigeria Public Service Commission. By the Public Service Commission Regulations 1963 the Commission was empowered to institute disciplinary proceedings against a public officer and to dismiss such an officer if his conduct warranted it. The Commission was also empowered to institute or continue disciplinary proceedings in charges of criminal offences

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18(c). Ibid at 872.
19. (1981)1 N.C.L.R. 135.

notwithstanding the fact that police action was being taken before a court of Law.

The plaintiff appellant who was a medical doctor was tried by an investigation panel set up by the Commission and found guilty of, inter alia, unlawful and indecent assault on one Mis C. Barlow by the Conduction of a vaginal examination of the said Miss Barlow in an unorthodox and improper manner under the pretext of conducting a clinical examination.

Consequently the plaintiff was dismissed from service by the Commission. The plaintiff successfully maintained an action at the Ibadan High Court for a declaration that his purported dismissal from the services of the Western State was invalid, illegal, ultra vires, null and void, and of no effect. The learned trial judge went on to make an order which was not asked for by the defendant and in respect of which no finding was made by the investigating penal, that the plaintiff being an erotomanic should not conduct clinical examination of a female patient without a senior female nurse being in attendance. The defendants appealed against this judgment and the Federal Court of Appeal gave judgment in their favour and dismissed the plaintiff's claim. It is from this decision that the plaintiff/appellant appealed to the Supreme Court.

Learned Counsel for the appellant argued that the Regulations were unconstitutional and hence invalid. He pointed out that the effect of the Regulations was to provide that even where a criminal offence was disclosed, the Commission could proceed to investigate the alleged offence committed by one of the State's public officers without waiting for the court's decision on the issue of criminal culpability and may even still proceed to disciplinary action inspite of an acquittal

by the court. The total effect of this, the learned Counsel contended, is to usurp the functions of the court as laid down by section 22(2) of the Constitution. Therefore not having left the decision to the court before acting, counsel finally argued, rendered the Commission's decision null and void.

In accepting the submission of learned counsel for the appellant, F.F.AYI .ILLIAMS S.J. observed:

> "Moreover, because of the mandatory provisions of the subsection, it seems to me that once a person is accused of a criminal offence, he must be tried in a 'court of law' where the complaints of his accusers can be ventilated in public and where he would be sure of getting a fair hearing as set out in subsections (4) to (10) of section 22 of the Constitution of the Federal Republic of Nigeria. No other Tribunal, Investigation panel or Committee will do".19(a)

It is however noteworthy that the position is radically different under the 1979 Constitution. Section 33(4) provides that:

> "Whenever any person is charged with a criminal offence, he shall unless the charge is withdrawn be entitled to a fair hearing within a reasonable time by a COURT or TRIBUNAL".

Clearly the intention here is to make it possible to create tribunals having jurisdiction in criminal matters, with all the trappings and the adjucatory powers of a regular court of law. The temptation is great for one to argue that the vesting of criminal jurisdiction in bodies other than the ordinary courts of the land severely offends against the Rule of Law. This, however, need not be the case, if adequate safeguards against any possible abuse or encroachment on the liberty of parties appearing before such bodies have been made. As a matter of fact the 1979 Constitution has made it catego-

19(a) Ibid at 146.

rically clear that all the procedures provided therein for the purpose of ensuring fairness in the adjudicatory process and to which all regular courts must mandatorily be subjected apply mutatis mutandis to any tribunal established by law in Nigeria. Afterall the words 'Court' and 'tribunal' may mean one and the same thing. In the case of the ATTORNEY-GENERAL v. L.O. DAWKI[19(b)] referred to above UCHE OHC, J.C.A., quoted Jowitt's Dictionary of English Law as having defined the word tribunal to mean "a court of Justice".

It is to be noted that a court martial is not regarded as a regular court for the purpose of section 33 except in matters concerning the Nigerian Armed Forces. In other words court martial has jurisdiction only over members of the armed forces of Nigeria. The trial by a military court of persons not subject to Military Law is, therefore unconstitutional and unlawful.

The definition of a court or tribunal within the meaning of section 33(1) also excludes an administrative tribunal. An administrative tribunal is one the powers of which do not include adjudication or determination of persons' civil rights and obligations but a mere fact finding body. Reason being that, like determination by a Minister or Ministry officials, it is very difficulty for such administrative bodies to be independent even if they appear to be impartial. Therefore determination by such bodies is clearly prohibited under section 33(1)[20]. What the section contemplates are statutory or judicial tribunals such as the Legal Practitioners Disciplinary Tribunal, Medical Council Disciplinary Tribunal ejusdim

19(b) (1982)3 N.C.L.R. 846.

20. See Nwabueze, Judicialism in the Commonwealth, pp.219-220 (1977).

generis. What principally distinguishes these statutory tribunals with ordinary Courts of Law is the fact that they are invariably limited in their jurisdiction. They lack the general jurisdiction to exercise judicial power inherent in Courts of Law. This distinction must always be born in mind when discussing tribunals in Nigeria.

4. INDEPENDENT AND IMPARTIAL COURT OR TRIBUNAL

Section 33(1) guarantees to every person the right to have his civil rights and obligations determined by a court or tribunal established by law and constituted in such manner as to secure its independence and impartiality. The section contains a lot of procedural safeguards all geared towards ensuring the right to a fair hearing to every person in the determination of his civil rights and obligations. But these safeguards will remain largely worthless if the court or tribunal that is to enforce them is in any way dependent or partial in the discharge of its judicial functions. Therefore, it is of paramount importance that judges whose duty is to administer justice in the Courts of the land must be free from any form of influence or external interference by either the executive or the legislative branch of government.

(a) INDEPENDENCE OF THE JUDICIARY

The question of the independence of the judiciary assumes special significance when examined within the context of a Constitution whose hallmark is the doctrine of separation of powers. "There is no liberty . if the power to judge is not separated from the legislative and executive power."[21] Where the

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21. MONTESQUIEU, Spirit of the Laws. Book XI, Ch. 6 quoted in VILE, Constitutionalism and Separation of Powers p. 90.

legislature or the Executive performs functions that are constitutionally assigned to the Judicature then there exists a real interference or usurpation such as to deprive the judicature of independence in the discharge of its judicial functions.

Part of the powers of the National and States Assemblies under the 1979 Constitution is the regulation of their proceedings and conduct of their members during sessions. A member may be summarily tried and punished for misconduct and the Assembly's decision may not be open to review by the courts. A member of the public, not being a member of the Assembly, may also be tried for contempt of the House. But it is not settled whether such a person can have the right to appeal to a court of law. Similarly in exercising its investigatory powers pursuant to section 82(1) of the 1979 Constitution either of the House of the National Assembly may constitute itself into a court of law. To this end section 83(1) confers on the House power to procure evidence, and examine witnesses and administer oath. Warrant may also be issued to compell the attendance of any person and where such person summoned fails to appear he may be fined and any fine so imposed shall be recoverable in the same manner as a fine imposed by a Court of Law.[22]

Though the exercise of these judicial powers by the legislature may be regarded as usurpation of the functions of the judiciary and therefore a potential source of interference and friction yet such powers are exercisable only for the purpose of enabling it to make laws with respect

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22. Section 83(1)(d) of 1979 Constitution of Nigeria.

to any matter within its legislative competence and to correct any defect in the existing laws.[23] It necessarily follows that these quasi-judicial powers can only be exercised for the purpose for which they were specifically granted. Therefore anything done contrary to these expressed purposes shall be ultra vires the Constitution. Courts of law can intervene under their power of judicial review of legislative actions in accordance with section 4(8) of the Constitution which states that the exercise of legislative powers shall be subject to the jurisdiction of courts of law and of judicial tribunals established by law. The section goes further to state that the National Assembly or the State House of Assembly shall not enact any law that ousts or purports to oust the jurisdiction of a court of law or a tribunal.

A fact which must be acknowledged is that in an age of all pervasive government, exercise of some quasi-judicial powers by public authorities and other agencies of government must of necessity be tolerated if only to ensure the smooth running of the governmental machinery. The only caveat, though, is to ensure that decisions of such bodies that affect the civil rights and obligations of parties appearing before them are made subject to review by the ordinary courts of the land. Be that as it may, there are some specific matters concerning the judiciary in relation to which interference by the Executive may constitute a serious threat to the rights and liberties of the citizens.

(ii) MODE OF APPOINTMENT OF JUDGES

Section 211(1) of the 1979 Constitution confers upon the President the power to appoint any person to the office of the

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23. Section 82(1)(a) of 1979 Constitution of Nigeria.

Chief Justice of Nigeria in his discretion subject only to confirmation of such appointment by a simple majority of the Senate. The intention of the provision is clearly to afford Mr. President the opportunity to choose a person with whom he thinks they can work harmoniously. Therefore the requirement of Senate confirmation would appear to be just a mere formality. The appointment of other justices of the Supreme Court shall also be made by the President. But unlike the Chief Justice, their appointment shall be on the advice of the Federal Judicial Service Commission and subject to approval by a simple majority of the Senate.[24] There is a significant difference between the appointment of the Chief Justice and the rest of the Supreme Court Judges. Noticeable here is a severe curtailment of the President's discretion. The President can only make the appointment after being advised by the Federal Judicial Service Commission in that regard. Even then such appointment must be approved by the Senate. Approval is more weighty than mere confirmation. What is the composition of the Federal Judicial Service Commission? It consists of the following:

(1) Chief Justice of Nigeria - Chairman
(2) President of Federal Court of Appeal
(3) Attorney-General of the Federation
(4) Two persons from a list of four lawyers of not less than 15 years at the Bar recommended by the Nigeria Bar Association.
(5) Two other persons of unquestionable intergrity and who are not lawyers nominated by the President.

The Federal Judicial Service Commission shall also have the power to advise the President in appointing the President of the Federal Court of Appeal. Furthermore it has the power

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24. Section 211(2) 1979 Constitution of Nigeria.

to recommend to the President persons for appointment to the office of:[25]

(1) Justices of the Federal Court of Appeal

(2) Chief Judge of the Federal High Court

(3) Judges of the Federal High Court

(4) Chairman and members of the Code of Conduct Tribunal.

Part II Section B.8 of the THIRD SCHEDULE established the State Judicial Service Commission.

A careful study of the composition of this Commission will reveal the inadequacy of safeguard against possible interference with the independence of the judiciary by the Executive branch. This situation is brought about by the preponderant presence of executive appointees. The Attorney-General is an influencial member of the Executive as Minister of Justice. Moreover, the Attorney-General, the Chief Justice and the President of Federal Court of Appeal owe their appointments directly to the President. In addition to these two more other persons not being lawyers are appointed to the Commission by the President. The Commission is therefore dominated by the President's men. With the exception of the Chief Justice and President of the Appeal Court the rest are most likely to be politicians whose interests may not coincide with the interest of the fair and impartial administration of justice. Professor Akande observed that "the presence of the Attorney-General on this body can be viewed as an example of the lack of rigid separation of powers".[26] The situation is all the more

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25. Third Schedule, Part I, Section 7 to the 1979 Constitution of Nigeria.

26. See AKANDE: Introduction to Nigerian Constitution, Sch. 3, (1982) Sweet & Maxwell.

serious when it is realised that in accordance with section 146 of the Constitution one third (i.e. three in the case of Federal Judicial Service Commission) shall form a quorum for a valid meeting. In an attempt to secure the independence of the Commission section 145 of the Constitution provides that in exercising its powers of appointment the Commission shall not be subject to the direction or control of any other authority or person. Having regard to the defects inherent in the composition of the Commission as highlighted above to what extent can this attempt succeed?

In order to remedy the inherent defects in the composition of the Federal Judicial Service Commission, the following amendments are hereby recommended:

(1) The office of the Attorney-General should be strictly judicial, while a separate person is appointed Minister of Justice.

(2) The composition of the Federal Judicial Service Commission should be enlarged to include the following:

(a) Chief Judges of States High Courts

(b) Chief Judge of Federal High Court

(c) Grand Kadis of States Sharia Courts

(d) Presidents of State Customary Courts.

(3) The two non-legal practitioners to be nominated by the House of Representative and confirmed by the Senate instead of being nominated by the President.

(iii) <u>SECURITY OF TENURE</u>

Section 256 of the Constitution enumerates the circumstances in which a judicial officer shall be removed from office. A

judicial officer can only be removed for inability to discharge the functions of his office or for misconduct or contravention of the Code of Conduct. Who determines the inability of a judicial officer? In what manner is such a determination made? Answers to these questions will provide important clues in determining whether or not the Constitution has made adequate provisions to secure the independence of the judiciary. Because if removal of judicial officers has been made easy the tendency is for them to discharge the functions of their offices in such a manner as to avoid displeasing the person or authority having the power to remove them. Section 256 provides two methods of removing judges:

(1) In the case of the Chief Justice of the Federation, he is removable by the President on a prayer which must be supported by two thirds majority of the Senate. In the case of a State Chief Judge, Grand Kadi or President of State Customary Court they are removable by the Governor acting on an address supported by two thirds majority of the State House of Assembly.

(2) Any judicial officer other than those mentioned above may be removed either by the President or the Governor, as the case may be, acting on recommendation of either the Federal Judicial Service Commission or S.J.J.C., as the case may be.

It would appear that the tenure of judges in the first category is more secure in that their removable is done with the active participation of the legislature with all the advantages this procedure entails. On the other hand removal of judges in the

second category is to be done on a mere recommendation by a body made up of no more than seven or six members. The disadvantage the second category of judges would suffer is all the more serious considering the fact that only two or three members of the Commission is required to form a quorum. More intriguing is the position of the President of the Federal Court of Appeal vis-a-vis the procedure for his removal. For purposes of removal he has not been considered important enough to be included among those whose removal is to be initiated by the legislature. Even more anomalous is his membership of the Federal Judicial Service Commission, the body whose power includes recommendation for his removal. This is an obvious and flagarant violation of the principle of natural justice that a man shall not be a judge in his own cause. Whenever the opportunity presents itself this anomaly should be removed and make the removal of all judges a purely legislative affair. This is in the firm belief that the legislature is in a better position to be more dispassionate and circumspect in its handling of the issue of removal than any other body. Furthermore, before a judge is removed the whole Nigerian public is made aware, through debates on the floor, of the grounds for his removal. Thus the possibility of victimisation is eliminated, and the independence of the judiciary is enhanced and secured.

(iv) RETIREMENT

In accordance with the provisions of section 255 of the Constitution a judge may voluntarily retire when he attains

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27. The trend in most modern Constitutions is to make removal of judicial officers a legislative affair. See Constitutions of U.S...., India and Canada.

the age of 60 years and he shall compulsorily retire at the age of 65. This, it is submitted, does not go far enough in insulating the judges from the vagaries of everyday living such as to enable them remain impartial and independent of any extraneous considerations in discharging their functions. There is really no compelling reason to fix retirement age for judges at all. For instance, all the three Nigerian Chief Justices that have retired at the age of 65 are still very much active and in full control of their mental and physical capacity. Former Chief Justice Elias has just been re-elected President of the International Court of Justice at the Hague at the age of over seventy. In view of this, therefore, it is submitted that judges of the Supreme Court, Federal Court of Appeal, Federal High Court and at the State level, the Chief Judge, Grand Kadi, President of the Customary Court and all High Court Judges should be appointed for life subject only to the grounds for removal as provided in section 256 of the Constitution. When a judge does not have to think of his retirement, except where he voluntarily requests to be relieved, the likelihood is for him to discharge his function without fear or favour. There is nothing novel about this arrangement in the Common law jurisdictions. In England and Australia judges at the top echelon of the judiciary are appointed for life. The Constitution of the U.S.A. contains no provision for retirement of judges.

One other consideration which is believed to enhance the independence of the judiciary is the question of remuneration of judicial officers. The present writer does not subscribes to the view that fabulous salary per se will curtail the temptation to succumb to bribery and corruption. Experience has shown that, more often than not, material or pecuniary

reward rather tends to corrupt the conscience and arouse man's tendency for greed and insatiable urge for material affluence. Of course, one is not unmindful of the need to insulate judges from falling into any financial anxiety or embarassment; but this should not be stretched beyond reasonable limits. The diginity, honour and prestige that go with the status of a judge coupled with the respect and reverence bestowed by the public are enough and infact more enduring and satisfying than material affluence. Rather the judges' own perception of his social significance, his personal intergrity, calibre and training combine to make a stronger armour against any tendency on his part to succumb to bribery and corruption. "The quality of justice depends more upon the quality of the men who administer the law than on the content of the law they administer. Unless those appointed to the Bench are competent and upright and free to judge without fear or favour, a judicial system, however sound its structure may be on paper, is bound to function poorly in practice".[28]

(b) IMPARTIAL COURTS OR TRIBUNAL (S.25)

The two terms - 'Independence' and impartiality are related to each other in so many ways. As a matter of fact a dependent court or tribunal must inveriably be partial in the discharge of its functions. In a country like Nigeria having a written Constitution the role of the Courts and their relationship with the government in power assumes special significance. Courts, in addition to their other traditional functions assumed the role of an arbiter between the three

28. See SCHWARTS, The American Constitutional Law, (1955), p. 130, 5th Ed. West.

influenced by extra-legal considerations, by political or sectional interests; that it was intended not to uphold the law but to reppress interests opposed to the Government .... It began to look as if the courts were actively aiding the politicians in the persecution of opponents and in the perversion of the Constitution. Confidence in their ability to decide political issues impartially was consequently undermined, and the position was eventually reached where there was a general disinclination to take political complaints to them".[31] The learned Professor therefore concluded that "the situation represented a real tragedy in Nigeria's experiment in Constitutional government".[32]

Another aspect of bias which is equally insidious, is where the judge is himself interested in the matter before the court. This is expressed in the rule that a man shall not be a judge in his own cause. In the case of ALAKIJA v. MEDICAL DISCIPLINARY COMMITTEE[33], the Supreme Court of Nigeria held that the decision of the Medical Disciplinary Committee that the appellant's name be removed from the Medical register for a period of two years could not stand because the enquiry was conducted in a manner contrary to principles of natural justice in that the registrar, who was in fact the prosecutor, took part in the Committee's deliberations.

The rule against bias is so strictly enforced that actual bias need not be proved. A real likelihood of bias suffices to warrant setting aside any decision reached contrary

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31. NWABUEZE, B.O.: Constitutionalism in the Emergent States at pp. 146-147 (1973).

32. IBID. p. 147.

33. (1959) 4 F.S.C. 38.

to the rule. The courts in Nigeria have construed section 33(1) accordingly. The case of CHIEF G.NI F.MOHIGHA v. L.G.L PRACTITIONERS DISCIPLINARY COMMITTEE,[34] typifies this commendable approach. The applicant is a legal practitioner as well as an author. In 1981 he published a book titled 'The Nigerian Constitutional Law Report, Volume I. A review of the book was published in the West African Magazine on its front page. In the same year the second volume of the Reports was published and in it was a discussion on Locus Standi in which the stand of the Attorney-General of Nigeria in the case was attacked. On the 3rd of December 1981, the applicant received a letter dated the 1st of December 1981, from the Office of the Attorney-General of the Federation calling the attention of the applicant to the advertisement contained in the West African Magazine of 23rd March 1981 and requesting him to show within 14 days why he should not face the Legal Practitioners Disciplinary Committee on the matter. On the 3rd December 1981, before receiving a reply from the applicant, the Office of the Attorney-General had referred the matter to the Committee alleging professional misconduct against the applicant.

The Attorney-General of the Federation is the Chairman of the Legal Practitioners Disciplinary Committee. The Attorney-General directed that the applicant should appear before the Committee to answer the charges on 25th January 1982. The applicant instead went to court and file an application under the Fundamental Rights (Enforcement Procedure) Rules 1979 alleging that his fundamental right to fair hearing under section 33(1) of the 1979 Constitution had been contravened or was likely to be contravened. His major complaint was that

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34. (1982) 3 N.C.L.R., p. 719.

the composition of the Committee did not secure the independence and impartiality of the Committee which was to try him in that the Chairman of the Committee - the Attorney-General of the Federation, was both the complainant and the prosecutor. He alleged that as a result of the role played by the Attorney-General in bringing the complaint and charges to the Legal Practitioners Disciplinary Committee there was a real likelihood of bias on his part as Chairman of the Committee in the consideration and determination of the said complaint and charges.

It came to light in the course of the proceedings that at the executive meeting of the Nigeria Bar Association held at Calabar on the 25th April, 1981, the Association expressed strong views against the applicant in respect of the 'West Africa Magazine publication. Amongst the members who later constituted the Legal Practitioners Disciplinary Committee to try the applicant were Mr. Adetunji Fadaire, the President of the Nigerian Bar Association, Mr. Idowu Sofola, the Secretary and Mr. Njemanze who were present at the Executive meeting of the NBA of 25th April, 1981 at Calabar.

After an extensive examination of the law in both England and Nigeria the Honourable Mr. Justice O.A. Johnson of the Lagos High Court held that:

(1) The facts and circumstances were sufficiently capable of creating fear and suspicion in the mind of the applicant as to the question of a fair trial.

(2) The position of the Attorney-General as Chairman of the Committee and as complainant and prosecutor offends against the principles of natural justice and raises a substantial issue of real likelihood of bias in the said Committee.

(3) The vice attached to the Chairman of the Committee is deemed to be the vice of the whole Committee.

(4) The functions of the Committee, a creation of the Legal Practitioners Act 1974 are quasi-judicial in that the Committee can inflict punishment.

(5) The Disciplinary Committee set up to adjudicate on the charges against the applicant is a breach of the provision of section 33(1) of the Constitution as being constituted in such manner as to be unlikely to secure its independence and impartiality.

(6) The membership of Mr. Adetunji Hadeiro, Idowu Sofola and Mr. Njemanze of the Committee worsened an already bad situation and showed a great likelihood of bias against the applicant.

On appeal to the Supreme Court, Oputa J.S.C. said that the Attorney-General has "eroded that brittle bond of confidence which is of the essence of adjudication"[35]. This decision was followed in the more recent case of GARBA AND ORS v. UNIVERSITY OF MAIDUGURI where the Supreme Court decided that the role of the Deputy-Vice-Chancellor as victim of the students rampage and Chairman of the investigation Panel created a real likelihood of bias.[36]

While considering 22(1) of the 1963 Constitution of Nigeria, the language of which is in pari materia with section 33(1) of

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35. L.I.D.C. v. FAWEHINMI (1985) 2 N.W.L.R. 300 at 391.

36. (1986) 1 N.W.L.R. 550. See EX PARTE OLAKUNRIN (1985) 1 N.W.L.R. 652, where an attempt was made by Supreme Court to apply the rule to chieftaincy matters, but the reasoning therein was not very clear.

the 1979 Constitution, BRETT, C.J.N. observed that the principle that 'a judge must be impartial' is accepted in the jurisprudence of any civilised country and there are no grounds for holding that in this respect the law of Nigeria differs from the law of England".[37]

5. FAIR HEARING

In the determination of his civil rights and obligations a person shall be entitled to a FAIR HEARING within a reasonable time by a court or other tribunal established by law.[38] What is the precise content of the right to a fair hearing? OBASEKI J.S.C., contended that fair hearing means "a trial conducted according to all the legal rules formulated to ensure that justice is done to the parties to the cause".[39] Therefore these legal rules constitute the precise content of the right to fair hearing. They are rules that set minimum standards of procedural fairness in adjudication by not only courts of of law stricto sensu but other bodies as well whose decisions affect the civil rights and obligations of parties before them.

The right to a fair hearing guaranteed by the Constitution must be given within a 'reasonable time'. According to OBASEKI J.S.C.,[40] "reasonable time' must mean the period of time which,

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37. In OBADARA & O.S. v. PRESIDENT IBADAN DISTRICT GRADE B CUSTOMARY COURT (1964) 1 All N.L.R. 336 at p. 344. See also DEDUWA v. OKORODUDU (1976) 1 N.M.L.R. 136.

38. S. 33(1) of the 1979 Constitution of Nigeria.

39. AKIOKI v. ELEMO (1983)1 S.C.N.L.R. at p. 24.

40. IBID. at pp. 24-25.

in the search for justice, does not wear out the parties and their witnesses and which is required to ensure that justice is not only done but appears to reasonable persons to be done. In other words the whole conduct of the proceeding should not be unreasonably prolonged. Because unreasonable delay envariably occasions a miscarriage of justice, contravenes the fair hearing provision of the Constitution and vitiates the whole proceedings. Justice delayed is justice denied and may even under certain circumstances be worse".[41] However, the requirement of reasonable time in respect to civil matters might not be as weighty as in criminal trial. This certainly has much to do with the severity of the penal sanctions of the criminal law. Thus what may be regarded as unreasonable delay in a criminal trial may not necessarily be so in a civil proceeding.

Be that as it may, just as undue delay is abhored so is undue haste and speed. The case of PAUL UNONGO V. APER AKU,[42] illustrates the point aptly. Both the appellant and the respondent contested the Governatorial election of 1983 in Benue State. The respondent was declared the winner. The appellant challenged not only the result of the election but the Electoral Act of 1982. He contended that sections 129(3) and 140(2) of the Electoral Act are unconstitutional as they contravene his right to a fair hearing. The gist of the provision in the two sections of the electoral Act is that any proceeding in respect of election petition shall be disposed off by the court not later than 30 days from the date of the election and any such petition not so disposed off shall be time barred and deemed null and void. After considering the relevant

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41. See L.N.L v. ERINLE, S.C. 109/70 decide on 1/9/72 (unreported)
42. (1983) 2 S.C.L.R. 332.

provisions of the Electoral Act in relation to the Constitution, the Supreme Court decided that sections 129(3) and 140(2) of the Act are indeed inconsistent with and contrary to Fundamental Right to 'Fair Hearing' under section 33(1) of the Constitution in that they are capable of depriving a person of a fair hearing within a reasonable time by a court in the determination of his civil rights or obligations. Honourable Justice Bello in his judgment remarked that "the old adage that delay of justice is denial of justice has the same force as the maxim that hasty or hurried justice is also a denial of justice".[43]

(i) RIGHT TO A PRIOR NOTICE

It is a general requirement of fair hearing that persons liable to be directly affected by a proposed administrative act, decisions or proceedings be given adequate notice thereof. This requirement is very crucial to the fairness of any judicial or quasi-judicial proceeding. Adequate notice will afford the aggrieved persons opportunity to prepare their own case and to answer the case they have to meet. It will enable them make representations on their own behalf or appear in person at the hearing or inquary. A number of Nigerian authorities have highlighted the importance of notice in ensuring procedural fairness especially in proceeding by administrative bodies. In the case of CHAIRMAN OF THE BOARD OF INLAND REVENUE v. JOSEPH MACLEAN AND SONS LIMITED,[44] the defendants did not deliver to the Federal Board of Inland Revenue a return of income in respect of either of the financial years 1958/59 and 1959/60. The Board, purporting to act under section 55(3) of Income Tax Ordinance, assessed the defendants to pay £1,200 tax and £60 penalty for

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43. Ibid. at p. 335.
44. (1961) N.R.N.L. 232, S.C. (1962).

the year 1958/59 and same for the year 1959/60. No payments in respect of these assessments have been made by the Defendants. KEMBO, J.G. S.P.J. of the High Court of Northern Nigeria held that neither of these two assessments upon which the claim is based was made in accordance with law because in neither case has the plaintiff proved that the defendants were given a notice in writing requiring them, within the period limited by the notice, to deliver a return of income in accordance with section 47(1) of the Ordinance. On appeal, the Supreme Court upheld the High Court's decision saying that notice is an indespensable procedural requirement the absence of which vitiates the Board's decision.

However, even where the requirement of notice is not statutory as in the above case the Courts are always ready and willing to supply the omission of the legislature. In OWOLABI AND OTHERS v. PERMANENT SECRETARY MINISTRY OF EDUCATION,[45] the plaintiffs are Managers of St. Peter Blessed School, Agege. The respondent, Permanent Secretary, Ministry of Education, ordered the transfer of financial administration and the staffing of the school to the Local Education Officer, Ikeja in accordance with powers conferred on him by section 58 of the Education Law of Western State of Nigeria. The plaintiffs complained that they were not given an opportunity of being heard and that the Respondent therefore failed to observe the rules of natural justice in that they were not given adequate notice to a meeting held in the Ministry of Education in which the decision to divest the plaintiffs of the responsibility of running the school was taken. Respondent contended that he had sent letters to the plaintiffs to attend the meeting on the 2nd of December, 1968 with his officials in the Ministry. The

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45. (1969) Suit No. IK/4M/69, High Court, IKEJA (unreported).

plaintiffs had not been able to attend the meeting and wrote a letter informing the Respondent of their inability to attend the meeting fixed for the 2nd of December 1968, because they would be appearing in a case in the High Court, Ikeja. The plaintiffs asked in their letter that another date be fixed for this meeting as early as possible. The letter inviting the plaintiffs to the meeting of the 2nd December 1968, Monday, was written on the previous Saturday, the 30th day of November, 1968. Their reply dated the 2nd of December, was not received in the Ministry until the 3rd of December, a day after the meeting was to have been held. Between the 30th November and 2nd December there is only one clear day and this happened to be a Sunday.

ADEOBA., J. held that the inability of the plaintiffs to attend the meeting at which the inquiry was held cannot be said to be due to their fault. The Respondent ought to realise the difficulty that could be involved in getting a letter written on a Saturday Calling a meeting for the following Monday at 9.00 a.m. to reach the addressee before the meeting is held and also the likelihood of the addressee being unable to attend such meeting because of the short notice. "I do not think that the applicants have been given sufficient and adequate notice of the meeting and thereby, an opportunity of presenting their case or being heard".

This case illustrates the point that mere notice may not suffice and that a notice must be adequate and sufficient before it satisfies the requirement of procedural fairness. Notice must be properly served on the person entitled to it. Only in special circumstances would substituted service be allowed. In BENEO v. L.E.D.B.,[46] the statutory notice for the compulsory acquisition

46. (1970) S.C., Suit No. 229/70 (unreported).

of the plaintiff's property was not served in accordance with law and because of this the plaintiff averred that the purported acquisition was invalid. Section 75(1) of the Lagos Town Planning Act provides that any notice made thereunder shall be served by delivering the same to such person or at his place of abode to some adult member or servant of the family, or if his present abode is not known to be posted to the address of his last known place of abode or by fixing the notice on the premises to be acquired and in respect of which the notice is being served. The defendants produced copies of the notice which they contended had been served on the occupiers and also published in the West African Pilot of 17th January, 1967 and in the Daily Times of 19th January, 1967.

The Supreme Court held that the Lagos Town Planning Act does not say that the notice should be served on the occupiers, rather it prescribes that it should be served on the owners. The Supreme Court went on to hold that the evidence does not show whether in fact there was any service at all. Therefore the purported service was patently bad in law hence the property does not vest in the defendant unless and until a notice is properly addressed and served in the fashion prescribed by the Act.

(ii) ADEQUATE DISCLOSURE

A party must have an adequate opportunity of knowing the case he has to meet. He must also have adequate facility of answering any allegations against him and of putting his own case. The particulars of any prejudicial allegations must be given to him prior to the actual hearing so as to enable him prepare his answers. He must be given the opportunity to

controvert, correct or comment on every piece of evidence or information that may be relevant to the decision. Where a material is divulged only at the hearing then the proceeding should be adjourned to afford the party to whom the material is prejudicial to consider and meet it. Non-disclosure of an evidentical material to a party who is likely to be prejudiced by it is a breach of fair hearing. This is so irrespective of whether the material in question arose before, during or after the hearing. In CHIEF EZE S.B.C. ORISAKWE v. GOVERNOR OF IMO STATE AND OTHERS,[47] the plaintiff's certificate as a recognised Chief was withdrawn by the Governor. Under the relevant Chieftaincy Law, the Commissioner charged with Chieftaincy duties must have set up an inquiry before advising the Governor to withdraw recognition whenever allegation of grave misconduct were made against a recognised Chief. In this case, several such allegations were made against the plaintiff. Without complying with this aspect of the law, the Governor withdrew recognition from the plaintiff. The Governor acted on a different recommendation of a panel which was not set up by the Commissioner and which did not investigate any of the allegations made against the plaintiff.

Honourable Chief Judge OPUTA of the Imo State High Court held that even if the panel was properly set up under the relevant law the rules of natural justice require that the plaintiff be made aware of these serious charges and be given an opportunity to defend himself. The panel must inform the plaintiff of the charges against him, and hear his defence thereto

47. (1982)3 N.C.L.R. 743.

before arriving at any decision. The learned Chief Judge went on to hold that:-

> "If the right of fair hearing under section 33(1) of our 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 the bare and unsupported allegations - and then he must be given the opportunity to contradict such adverse or incriminating evidence. This is the right of fair hearing and nothing short of it will suffice".[48]

The right to adequate and full disclosure is particularly important as procedural safeguard in proceedings of quasi-judicial authorities whose tendency to base their decisions on undisclosed reports has been noted. A relevant illustration of this point is the case of DENLOYE v. MEDICAL AND DENTAL PRACTITIONERS DISCIPLINARY TRIBUNAL.[49] The appellant in this case has complained against the decision of the M.D.P.D.T. which has found him guilty on five counts of infamous conduct in professional respect and has ordered the removal of his name from the Medical Register. Under section 12 of the Medical and Dental Practitioners Act, 1963, complaints against a medical practitioner as to his conduct should normally be first investigated by a body known as the Medical and Dental Practitioners Investigating Penal, and it is the duty of this Panel to decide, after due investigations have been carried out, whether or not there is a prima facie case to go before the Tribunal. In the instant case the Investigating Panel first met at Ikeme on 7th August, 1967 and received evidence from some persons. All members of the panel and their Counsel were

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48. See also KANDA v. GOVT. OF MALAYA (1962) A.C. 322 at 337, see also p. 758 of present report - IBID above.
49. (1968) S.C. 91/1968 - unreported.

in attendance and conducted the investigations by calling witnesses neither the practitioner whose conduct was under investigation nor anyone on his behalf was invited to be present. It was not until the 11th of October, 1967, that he was summoned to appear before the Investigating Panel. The evidence taken prior to this date was not made available to the practitioner or his Counsel and when it was asked for by Counsel, the Chairman of the Panel refused to produce it. He stated categorically that it was confidential and for the exclusive use of the Panel.

The Supreme Court, per ADEMOLA, C.J.F., held that the appellant was entitled to an adequate opportunity to know the case he had to meet and failure to supply him with a full statement of the facts or evidence upon which the Panel and the Tribunal relied was a denial of justice and a breach of the rules of natural justice. Similarly, the Supreme Court in GAMBA v. UNIVERSITY OF MAIDUGURI[50] held that fair hearing implies that a person must know what the allegations against him are and what evidence has been given in support of such allegations and must have a fair opportunity to correct and contradict such evidence.

(iii) LEGAL REPRESENTATION

Generally in any judicial proceeding a person who is entitled to appear is also entitled to be represented by a Counsel. This applies not only to court of law strictu sensu but also to proceedings of statutory tribunals unless there is an express or implied provision to the contrary. It is a serious breach of natural justice to allow one side to be legally

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50. (1986) 1 N.W.L.R. 550.

represented and refuse the opportunity to the other side no matter the nature of the proceeding. The right to legal representation in administrative proceeding is, however, slightly different from that in criminal trials in a court of law. In criminal trials the right to Counsel of ones own choice is an absolute one which does not admit of derogation whatsoever. On the other hand fair hearing in administrative adjudication demands only minimum standard of procedural fairness hence the right to Counsel may be dispensed with in appropriate circumstances. Usually, in administrative proceedings legal representation is at the body's discretion. The reason being that to allow an unfettered right to legal representation will alter the informal nature of the tribunal thereby making its proceedings too technical even to some of the tribunals members lacking in legal training. It is also feared that lawyers will tend to introduce some inappropriate adversarial element into the proceeding thus prolonging it unnecessarily. Be it as it may, much depends on the nature of the tribunals functions as well as the interests or rights of the person that is to be affected by the decision.

It should be noted that the right to legal representation discussed here is not synonimous with the right to make representation discussed [illegible] in [illegible] Chapter Five. Whereas legal representation refers to representation by a Counsel, the right to make representation, on the other hand, refers to the opportunity given to a complainant to put forward his own side of the matter in writing to the deciding authority. The right to make representation to the deciding body is a principle of fair hearing, while legal representation is not a requirement of fair hearing.

(iv) RIGHT OF CONFRONTATION AND CROSS-EXAMINATION

A party that is entitled to appear in person or be represented by Counsel is also entitled to be given opportunity to confront his accusers and cross-examine witnesses called to testify against him. Generally, even in purely administrative proceedings refusal to permit cross-examination of witnesses will amount to a denial of fair hearing. No matter the informal nature of tribunal's proceedings there will hardly be any justification to refuse a party the leave to confront and cross-examine a witness who has given oral testimony before the tribunal. The right is akin to the right of an accused person under section 33(6)(d) of the Constitution which entitles him to call his witnesses to testify on his behalf and to cross-examine witnesses called by the prosecution. In the case of DENLOYE v. M.D.P.D. TRIBUNAL,[51] the Panel investigating the allegations of professional misconduct against a medical practitioner called witnesses and received evidence that was prejudicial to the Doctor whose conduct was being investigated without inviting him or anyone on his behalf to be present. The evidence so taken was not made available to him. In quashing the decision of the Tribunal the Supreme Court held that the procedure whereby a tribunal would refuse to disclose evidence and the nature of the allegations to the accused person and in addition refuse to allow him the opportunity to cross-examine those that made the allegations against him and their witnesses was unheard of in law.

Rules relating to procedural fairness in civil matters, as discussed above, are more or less similar to the rules that ensure a fair trial to a person charged with criminal offence under section 33(6) of the Constitution. Even though the provisions of section 33(6) encompass more rules the equivalent of some of which may not

51. (1968) S.C. 91/68 unreported.

be found in respect of civil matters yet this does not detract from the fact that all these rules have been recognised as forming part of the ever-expanding concept of fairness applicable to the whole gamut of the adjudicatory-process irrespective of the nature of the proceeding. This is an indication of the resilience and flexibility of the concept of fairness. It is also an indication of the efficacy and usefulness of the concept as a procedural safeguard always ready to be employed to meet new situations and cover fresh grounds in the development of Administrative Law.

(v) REASONED DECISION AND APPEAL

Though regular courts may not be required to give reason for their decision yet same can not be said of administrative adjudication. It will be somewhat difficult to determine the fairness of an administrative decision if reasons for reaching such a decision is not given at all. For it is only by reasoned decision that it can be determined whether or not the deciding body was influenced by extraneous consideration. Without giving reason for decision it will be difficult to determine the existance or otherwise of bad faith or ill-motive. Reasoned decision is therefore a requirement of procedural fairness in administrative proceedings. The issue will be discussed at greater length in Chapter Five.

Appeal or review is a requirement of fair procedure in Nigeria. As a matter of practice all enabling statutes make provision for appeal to a reviewing or supervisory body. By virtue of the confirment of judicial powers on Courts of law by Section 6(6) of the 1979 Constitution of the Federal Republic of Nigeria a right of appeal exists from Statutory Tribunals to Courts of law on any question that affects a person's civil rights and obligations. This will be discussed more extensively in Chapter Five.

CHAPTER FOUR

FAIR HEARING IN CRIMINAL PROCEEDINGS

1. FAIRNESS OF SUBSTANTIVE CRIMINAL LAW

The Nigerian Constitution as well as other statutory enactments are replete with provisions aimed at ensuring a fair trial and fair administration of Criminal Justice in Nigeria. The 1979 Constitution, like its predecessors, contains several provisions especially in section 33 the observance of which has been made mandatory in criminal trial. Section 33(4) of the 1979 Constitution provides that:

> "Whenever any person is charged with a criminal offence, he shall unless the charge is withdrawn, be entitled to a fair hearing within a reasonable time by a court or tribunal".

This provision is more or less similar to section 22(2) of the 1963 Constitution. An important question that need to be answered from the onset is what Constitutes fair hearing. The Supreme Court was faced with this problem while considering Section 22(2) of the 1963 Constitution in the case of ISIYAKU MUHAMMED v. KANO N.A.[1] It suggested that the true test of a fair hearing was the impression of a reasonable person who was present at the trial, whether from his observation, justice had been done in the case. Also in WHYTE v. COMMISSIONER OF POLICE,[2] the Supreme Court held that a trial in which the court had followed the procedure laid down for such hearing and in which the principles of natural justice had not been violated could hardly be said to have not been fair as intended by the Constitution. On whether fair hearing is the same as fair trial the Supreme Court ruled that a fair hearing must involve a fair trial and a fair trial of a case consists of the whole hearing.[3] Similarly in ARIORI v. ELEMO, OBASEKI, J.S.C. considering the

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1. (1968) 1 All N.L.R. 424.
2. (1966) N.M.L.R. 215.
3. See ISIYAKU MUHAMMED v. KANO N.A., Loc. cit.

meaning of fair hearing under section 33 of the 1979 Constitution stated that "fair hearing must mean a trial conducted according to all the legal rules formulated to ensure that justice is done to the parties to the cause".[4]

(a) RIGHT TO TRIAL BY A COURT OR TRIBUNAL

It is the requirement of section 33(4) that the fair hearing guaranteed by it shall be provided only by a court or tribunal. It should be noted that section 22(2) of the 1963 Constitution which is the equivalent of section 33(4) of the 1979 Constitution does not mention tribunal. Perhaps the framers of the 1979 Constitution felt the need to extend the scope of the fair hearing guaranteed to an accused person to cover tribunals that exercise some criminal jurisdiction. Perhaps again the intention might have been to bring section 33(4) into conformity with section 33(1) for purposes of uniformity in drafting style. Be that as it may, the court or tribunal envisaged by the subsection must be one established in accordance with the Constitution or pursuant to an enabling law validly promulgated. The tribunal must not be the administrative type but one which exercises some criminal jurisdiction. In GARBA v. UNIVERSITY OF MAIDUGURI[5], Supreme Court held that by virtue of Section 33(1), (4) and (13) of the 1979 Constitution of Nigeria only a Court of law or judicial tribunal is competent to hear and determine a criminal charge and neither the Vice-Chancellor nor any investigation Panel has any competence in law to do so.

Section 33(4) guarantees the right to a fair hearing in its totality. If this is the case then why did the drafters of the Constitution felt the need to enumerate those procedural safeguards

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4. (1983) 1 S.C.N.L.R. at p. 24.
5. (1986) 1 N.W.L.R. 550.

that are ordinarily associated with the right to fair hearing in a separate subsection? Does it not amount to a mere tutology that after section 33(4) has provided for a fair hearing then section 33(6) comes later to enumerate the constituents of fair hearing? However, this arrangement appears to be deliberate. It is arguable that the drafters' intention for so doing is to emphasise the significance of fair hearing in criminal proceedings. That's why those procedural safeguards listed in sub-section (6) have not been listed in relation to sub-section (1) dealing with fair hearing in civil proceedings. The fact that they have been separately provided for does not mean that they do not form part of the right to fair hearinggas provided under sub-section (4). What the drafters intend to convey is that in addition to whatever procedural safeguard fair hearing may entail those rights enumerated in sub-section (6) are paramount and cannot be derogated from. The merit of this style is to make the requirement of fair trial in criminal matters categorically clear and unambiguous, that those procedural requirements listed under sub-section (6) must be strictly observed to the letter. Each and everyone of them must be adhered to independently before a trial can be said to be fair.

Sub-sections (4) to (13) of Section 33 contain all the important rights an accused person shall enjoy in Nigeria. Their observance ensures a fair trial to an accused person in a court or tribunal. An attempt will hereunder be made to appraise and analyse the application of these principles by courts of law in Nigeria.

(b) PRESUMPTION OF INNOCENCE

Section 33(5) provides that every person charged with a criminal offence shall be presumed to be innocent until he is proved guilty. This is a cardinal principle of criminal justice observed and recognised by all civilised penal systems in the world. It rests on the belief that it is preferable that ten

guilty men should go free than for one innocent man to suffer punishment. On the basis of this principle an accused person is not required to prove that he has not committed the offence. It is rather the duty of the prosecution to prove beyond reasonable doubt that the accused has actually committed the offence. An example of a violation of the principle was in the case of TULU v. BAUCHI N.A.[5(a)] This was a case of murder. After all the prosecution witnesses had given evidence and before the case for the defence, the trial court asked the accused to explain why he "committed the act" i.e. the murder, and went on to tell him that he would not be convicted until he had given reasons for his act. In quashing the conviction the Supreme Court held, inter alia, that from the question and statement it was plain that the trial court had already decided on the guilt of the accused person without waiting to hear what he had to say in his defence and that such a course was contrary to section 22(4) of the 1963 Constitution (this is similar to section 33(5) of 1979 Constitution). The Supreme Court went on to say that the question whether or not the accused committed the offence should not be decided until after all the evidence has been heard.

There is a proviso to the sub-section which states that nothing in this section shall invalidate any law by reason only that it imposes upon an accused person the burden of proving particular facts. The difference between proving particular facts and proving the offence charged must be clearly distinguished within the context of the proviso. Placing the onus of proving particular facts on the accused does not therefore in any way derogate or violate the presumption of innocence in favour of the accused. In IBEZIAKU v. COMMISSIONER OF POLICE,[6] the sub-section came up before the Supreme Court for interpretation in relation to section 160(1) of the

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5(a). (1965) N.M.L.R. 343.

6. (1963) 1 All N.L.R., 61.

Criminal Procedure Code which states that if after taking evidence Magistrate is of the the/opinion that there is ground for presuming that the accused has committed an offence which such magistrate is competent to try and adequately punished by him he shall frame a charge under his hand stating what offence the accused is being charged with and then proceed to try him. In this case the magistrate having followed the procedure as prescribed in the Criminal Procedure Code, convicted the accused person. The accused lost on appeal to the High Court and further appealed to the Supreme Court. Before the Supreme Court, the defence Counsel argued that the Criminal Procedure Code procedure violated the presumption of innocence of the accused and therefore contrary to the Constitution of 1963 section 22(4).

In rejecting the learned Counsel's submission the Supreme Court held, inter alia, that the procedure provided by the Criminal Procedure Code does not mean that the magistrate frames the charge having weighed the evidence and decided to convict. It only means that he is formulating an appropriate charge for the offence which prima facie appears to have been committed. The court also decided that section 22(4) lays down the burden of proof of guilt on the prosecution and the proviso has regard only to the burden which the accused has to prove particular facts under the common law.

(c) THE RULE AGAINST DOUBLE JEOPARDY

Section 33(9) of 1979 Constitution provides:

> "No person who shows that he has been tried by any court of competent jurisdiction for a criminal offence and either convicted or acquitted shall again be tried for that offence or for a criminal offence having the same ingredients as that offence save upon the order of a superior court".

Section 33(10) also provides that:

> "No person who shows that he has been pardoned for a criminal offence shall again be tried for that offence".

These Constitutional provisions incorporate the Common law rule against double jeopardy in criminal cases i.e. a person shall not be prosecuted and punished twice for the same offence having the same ingredients and on the same facts. This rule is given expression in the special pleas of AUTRE FOIS ACQUIT - formerly acquited and AUTRE FOIS CONVICT - formerly convicted. These special pleas have been given statutory expression in section 181 of the Criminal Procedure Act and section 224 of the Criminal Procedure Code. Section 224(1) of Criminal Procedure Code states that "a person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquited of that offence shall .... not be liable to be tried again for the same offence ....".

It is to be noted that the Criminal Procedure Code provision uses the phrase 'to be liable to be tried' whereas the Constitutional provisions says 'no person who shows', clearly suggesting that the onus is on the accused to raise and prove that the trial will result in double jeopardy.[7] Before an accused raises the plea in bar it must be proved that the earlier decision was by "a court of competent jurisdiction" as defined by the Supreme Court in GASSIMI ODIVE v. NWEKE OBOR & OTHERS.[8] Any defect in competence is fatal, for the proceedings will be a nullity no matter well conducted and decided. Also proof of previous trial is by the original record or certified copy only as provided in section 92 of the Evidence Act.

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7. See JONES J. Criminal Procedure in the Northern States of Nigeria p. 146, 2nd Ed. Zaria, 1978.

8. (1973) L.N. & R. No. 7, p. 14.

Whenever special plea in bar is made the court is bound to examine its merit and rule on it before proceeding with the case or otherwise as the case may be. Thus in COMMISSIONER-GENERAL OF POLICE v. IGBOKOJI, Brown C.J. of Western Region High Court, observed that "where there is evidence before the court which suggests that the accused has been previously convicted or acquited of the same offence, the court has a duty to enquire into the matter, and need be, may call further evidence to ascertain if it is a proper case for the exercise of its discretion in favour of the accused".[9]

The accused person must have been convicted or acquited at the earlier trial. Thus where the trial was stopped by a Nolle Prosequi, the special plea in bar can not be sustained. It is very necessary that the plea should be made by the accused himself and not by his Counsel unless the presence of the accused at the trial could be dispensed with.

(d) BAR AGAINST EX-POST-FACTO LEGISLATION

It is contrary to the concept of fairness for the State to promulgate a law that has retroactive effect. It is an important principle of criminal liability that a person shall not be punished for an act or omission which, at the time it occured was not an offence.

A law passed retroactively is also referred to as ex-post-facto legislation. This principle has been incorporated in section 33(8) of the 1979 Constitution which states:

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9. (1957) W.R.L.R., 182. The C.J's reference to the right as a mere discretion is wrong in law. The decision was made prior to the enactment of the 1960 Constitution of Nigeria.

The sub-section is out to achieve two objectives namely:-

(a) Protection against retroactive legislation.

(b) Protection from imposition of punishment heavier than what the law imposed for the offence.

For UDO UDOM J.S.C., there was no doubt as to its meaning and purport and therefore it leaves no room for any conjucture or speculation. He went on to say:- "The provisions were no doubt intended to protect a person from being prosecuted and punished for an act which when it occured did not constitute an offence"[10].

In this case the appellant was charged with the murder of his wife in 1974. At this time the applicable law in Bendel State was the Criminal Code of Western Nigeria and Bendel was then known as Mid-Western Region. The accused, if he were brought before the High Court at that time, he would have been charged under the Criminal Code of Western Region as applicable to Mid-Western Region. But he was not brought to court until sometime in 1977, when Mid-Western Region had been renamed Bendel State by virtue of Section 1 of the States (Creation and Transitional Provisions) Act 1976. Consequently, in 1977 Laws of Bendel State (Promulgation) Order came into force, and incorporated the Revised Laws of Bendel State of 1976 which in turn adopted the Criminal Code Law of the old Western Region especially section 254 which was copied verbatim.

The offence committed by the accused was punishable with death under section 319(1) of the Bendel State Criminal Code which was the same as Criminal Code of Western Region. The accused argued that he could not be punished under the Bendel

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10. GODWIN IKPEN v. THE STATE (1981) 3 N.C.L.R. 152 at p. 161.

State Criminal Code as at the time he committed the offence this law was not in existence in Bendel State, thereby his trial denied him the Constitutional protection of section 33(8).

According to the learned judge the entrenchment of such a provision in the Constitution as a fundamental right was intended to prevent retrospective legislation in the field of Criminal Law whereby an innocent act or omission or a non-criminal act when it took place might not overnight be converted into a criminal act or omission punishable under the law.

The intention of the second arm of the sub-section is to prevent the imposition of a heavier punishment for an offence which at the time of its commission could only attract a lighter punishment on conviction.[11]

(e) CONVICTION ONLY FOR OFFENCES DEFINED IN A WRITTEN LAW

Section 33(12) of 1979 Constitution provides as follows:

> ".... a person shall not be convicted for a criminal offence unless that offence is defined and the penalty therefor is prescribed in a written law ....".

The sub-section goes on to refer to written law as an Act of the National Assembly or a Law of State House of Assembly, any subsidiary legislation or instrument under the provisions of a law. Therefore, for an act to amount to a crime it must be defined and its penalty prescribed in a written law. The Corpus of crimes in Nigeria is contained in the Penal Code of Northern Nigeria and the Criminal Code in force in the Southern State of Nigeria. The two Codes contain offences that are punishable in the ordinary courts of the land. But

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11. GODWIN IKA.SI v. BENDEL STATE - IBID.

there are other offences which are the creation of statutes.

The subsection is intended, among other things, to prevent conviction for offences under the native law and custom most of which are unwritten. For instance in ..ORO v. FAGBEMI .ND ANOTHER,[12] the High Court quashed the conviction of the appellant by a Customary Court for the offence of adultery by living with another man without judicial separation which was not provided in any written law. The court hold that the conviction was contrary to section 21(10) of the 1960 Constitution, now section 33(12) of 1979 Constitution. For the same reason a conviction for an offence of invoking juju and witchcraft on a person which was not defined in any written law was quashed.[13]

In SYLVESTER OGBOMON v. THE ST..TE,[14] the appellant was charged with the offences of robbery and conspiracy. He was convicted and sentenced to death by hanging. At the Supreme Court he complained against the charge of .rmed Robbery saying that it contravened sections 33(8) and (12) of the 1979 Constitution. The cause of the complaint was the omission of "special provisions" while describing the law under which the convict was charged. The correct description of the law is "The Robbery and Firearms (Special Provisions) Act 1970".

The issue for resolution by the Supreme Court was the effect of the trial and conviction of the appellant when the statute under which he was charged was incorrectly described or stated. The Court held:

(1) That the combined reading of the provisions of sections 33(8) and 33(12) of the 1979 Constitution suggests that whereas no

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12. (1961) 1 All N.L.R. 400.
13. See UDOKU v. OMUGB. AND .NOTHER (1963) 2 All N.L.R. 107.
14. (1985) 1 N.W.L.R. 223.

person can be tried and convicted of an offence which did not exist at the time of its commission, or which is not contained in an existing law, there is no Constitutional or other prohibition against trial and conviction of a person for an offence, which is known to the law and is in existence at the time of its commission but the relevant Statute has been incorrectly stated.

(2) That a mere misdescription of the law under which a charge has been brought, does not necessarily render the offence one not known to the law at the time of its Commission.

2. FAIR TRIAL

Subsection (6) of Section 33, as earlier mentioned, has special significance to a person charged with a criminal offence as it lists certain rights which are beneficial to him, the sole aim of which is to guarantee a fair trial. Section 33(6) states that every person charged with a criminal offence shall be entitled to:-

(a) RIGHT TO A SPEEDY TRIAL

Delay has been a cog in the wheel of the machinery of justice in this country. Many an accused in Nigeria has suffered untold hardship due to unreasonable delays in the courts, contrary to the adage that justice delayed is justice denied. It is with the realisation of what delays may cause to an accused person that section 33(4) provides that the fair hearing it guarantees must be given 'WITHIN A REASONABLE TIME'. But what amounts to reasonable time is a question of fact to be determined with regard to the peculiar circumstances of each case. Regard must also be had to the court's discretion to grant or refuse adjournment and the judge's own preoccupation with proper conduct of trials. Therefore delay may sometimes

be unavoidable or even desirable. It is only when delay is "inordinate such as would be oppressive .... or injurious to the due administration of justice that it is abhorred".[14(a)] The Supreme Court in castigating a High Court Judge for an inexcusable delay in writing his judgment said that "it is well worth consideration by all courts that human recollections may lose their strength with the passage of time and that justice delayed is so bad as justice denied and may even under certain circumstances be worse" - LAWAL v. EMIRE.[15]

The Supreme Court as per OBASEKI, J.S.C. considered what amounts to reasonable time within the meaning of section 33 in the following words:

> "The reasonable time for the consideration and delivery by the court of the judgment depends only on the time an active, healthy and mentally alert judge takes to read and consider the evidence and write his judgment with full and complete consciousness of all the impressions of witnesses at the trial. A period of time which dims or loses the memory of impressions of the witnesses is certainly too long and is unreasonable. Where a period of time dims or loses the memory of impressions of witnesses, it occassions a miscarriage of justice, contravenes the fair trial provision of our Constitution and vitiates the whole proceedings".[16]

(b) RIGHT TO PUBLIC TRIAL

It is of utmost importance that trials are held in public. Justice must be seen to be done by the generality of the citizenry, in order to instil in their minds confidence in the machinery of justice. In recognition of the significance of this principle the 1979 Constitution has provided in sub-section(13)of section 33 that the proceedings of a court or tribunal in relation to matters mentioned

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14(a). See OLAWOYE, 'The Problem of Delay in the Administration of Criminal Justice' in ADEYEMI (Ed.) Nigerian Criminal Process, University of Lagos Press, (1977), pp. 152-154.

15. S.C. 109/70 decided on 1-9-1972 (unreported).

16. AMIDU v. ELEMO (1983) 1 S.C.N.L.R. at p. 25. See also EMEJIOFOR v. UKONU (1985) 2 N.W.L.R. 686.

in sub-section 4 of section 33 including announcement of decisions shall be held in public. This notwithstanding, a court or tribunal has the discretion to exclude from its proceedings persons other than the parties to the proceedings in the interest of defence, public safety, public order, public morality, the welfare of persons who are below the age of 18 years or the protection of the private lives of the parties.[17] Also where a Federal Minister or a State Commissioner satisfied the court or tribunal that it will not be in the public interest for a particular piece of evidence to be publically disclosed then the court or tribunal shall make necessary arrangement to hear such evidence in private.

In addition to the Constitutional provisions, the Criminal Procedure Code and Criminal Procedure Act also contain similar provisions. Section 225(1) of Criminal Procedure Code provides that the place in which any court is held for the purposes of inquiring into or trying any offence must be deemed to be an open court to which the public generally have access. Section 203 of Criminal Procedure Act also states that the room or place in which any trial is to take place must be an open court to which the public have access.

Justice Jones interpretes section 225(1) of Criminal Procedure Code to mean that "wherever the court sits, whether in an office or even under a tree, that place shall be deemed to be a courtroom and such place must be open to the public".[18]

The Oyo State High Court in OLALEKE ADEBAYO v. THE CONCORD PRESS LTD.,[19] considered the scope of section 33(13) and held that when in a proceeding before the Court, a party's case is based on

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17. See section 33(13)(a).

18. See Jones J. 'Criminal Procedure in the Northern States of Nigeria', Zaria p. 149, (1979).

19. (1982) 3 N.C.L.R. 434.

Cabinet minutes, it will not be in the interest of such litigant's fundamental right under section 33(1) if such minutes can not be produced and tendered in court but its production and tendering in evidence may be made in private. The court also held that when a proceeding is conducted in private session under section 33(3) of the 1979 Constitution only parties, their lawyers and court officers may be allowed in court, others like the newspapers, other media and non-parties and legal practitioners not acting for the parties will be excluded from the proceedings.

In this case the Plaintiff who was a Commissioner in the Government of Oyo State, sued for libel and the defendant pleaded justification and relied on the minutes of the Executive Council Meeting of the State. The State Attorney-General filed a certificate in court claiming privilege over the minutes on ground of public interest. The court over-ruled his claim and ordered the production and tendering of the minutes in private instead of in public.

(c) RIGHT TO BE INFORMED OF THE CHARGE

To be informed promptly in the language that he understands and in detail of the nature of the offence. The rationale in this rule is quite obvious. Where an accused does not know the nature of the offence for which he is being charged it is difficult to see how he will be able to prepare for his defence. This right is therefore the first and foremost without which all the other rights that follow thereafter will be meaningless.

(d) RIGHT TO ADEQUATE TIME AND FACILITIES FOR PREPARATION OF DEFENCE

To be given adequate time and facilities for the preparation of his defence. After having been informed of the nature of the offence for which the accused is charged the next logical step is to be given ample time and facilities for his defence. The facilities here refer to the accused's ability to have access to relevant documents and other pieces of evidence as well as witnesses.

(e) RIGHT TO COUNSEL OF CHOICE

To defend himself in person or by legal practitioners of his own choice. The importance of person's accused of crimes having the advantage of a Counsel to assist them with their defence can not be over-emphasised. An accused person has a right to have a Counsel of his own choice for his defence. The emphasis is on the words 'his own choice'. Considering the unequivocal wordings of the sub-section if it is contrasted with the provisions in section 186 of Criminal Procedure Code and section 352 of C.P.A. where the State is empowered to assign a Counsel to the accused person; can a Counsel so assigned be rightly regarded as one of the accused own choice? Clearly the Constitutional provision does not admit of this construction. In EZEA v. THE QUEEN[20], the Supreme Court after considering the provision of section 22(5)(c) of 1963 Constitution which is in pari materia with section 33(6)(c) of 1979 Constitution came to the conclusion that an important aim of the sub-section is to ensure that an accused person shall not have Counsel foisted on him but be at liberty to choose his own Counsel.

An important case concerning the interpretation of the actual scope of the right to Counsel is CHIEF AWOLOWO v. THE FEDERAL MINISTER OF INTERNAL AFFAIRS[21], the defendant, Chief Awolowo, the Leader of an Opposition Party, was charged with treasonable felony. He engaged the services of a Counsel who was a British citizen and resident in Britain, but was enrolled into the Nigerian Bar. The Counsel was however denied entry into Nigeria on the orders of the Federal Minister of Internal Affairs made in accordance with powers confered on him by section 13 of the Immigration Act, 1960. The

20. (1963) 1 All N.L.R. 245.

21. (1962) N.L.R. 177.

plaintiff sued for a declaration that the Minister's prohibition order was unconstitutional in as much as it violated his right of choice of Counsel given to him as an accused person under section 21(5)(c) of the 1960 Constitution (which is in pari materia with section 33(6)(c) of 1979 Constitution). The Supreme Court, in upholding the dismissal of the action by the High Court held that the section could not be read in isolation. The right the section confered on the accused is not an absolute one. There may be several impediments to its exercise, such as when the Counsel chosen by the accused is under a disability such as where the Counsel is under a lawful detention and the like. It further held that the Constitutional provision admits of a situation where a person who is not a Nigerian citizen might be refused entry in accordance with some statutory law in force. Therefore, the Minister's exercise of discretion under the Immigration Act 1960 was not unconstitutional hence not an infringement of the accused person's right to Counsel of his own choice.

In PETER UZODIMA v. COMMISSIONER OF POLICE, Justice Alhasan Idoko of the Benue High Court described the importance of the right to Counsel thus:

> "In this country we have already appreciated that the right to counsel for the poor as well as the rich is an indispensable safeguard of freedom and justice under law. Our Constitution expects that even the guilty as well as the innocent should be entitled to a fair trial".[22]

In JOSIAH v. STATE,[23] the Supreme Court held that the accused did not have a fair trial as enjoined by Section 33(6)(c) of the 1979 Constitution when the trial Court failed to assign a Counsel to an accused when he was unable to afford the services of one himself.

22. (1982) 3 N.C.L.R. 325 at p. 327.
23. (1985) 1 N.W.L.R. 125.

(f) RIGHT TO CROSS-EXAMINATION

To examine in person or by his legal practitioner the witnesses called by the prosecution before any court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to the witnesses called by the prosecution.

In other words an accused person is entitled to examine the witnesses called by the prosecution either by himself or by his Counsel. He is also entitled to the assistance of the Court in calling his own witnesses to come to court and testify on his behalf. Thus he is entitled to have the same opportunity given to the prosecution with regard to the calling and examining of witnesses in equal measure. In TULU v. BAUCHI N.A.,[24] the trial court did not allow the accused to cross-examine each prosecution witness (the trial was in a native court where legal representation was not available) as they gave evidence, but the court itself merely asked the witnesses a lot of questions. The Supreme Court held that Section 22 (5)(d) of 1963 Constitution (in pari materia with Section 33(6)(d) of 1979 Constitution) had not been observed in respect of each of the prosecution witnesses. The court, on this ground, inter alia, allowed the appeal and the conviction and sentence were accordingly quashed.

Where a defendant was not allowed to call his witnesses the Supreme Court declared such procedure wrong in law and observed that "it is a fundamental principle of the administration of criminal justice that a defendant and his witnesses should be heard before the case against him is determined and it is .... a denial of justice to refuse to hear a defendant's witness".[25]

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24. (1965) N.M.L.R. 343.

25. Mallam Sadau Kunya v. Malam Abdullahi Fagge (1956) 1 F.S.C. p. 39 (Unreported).

Whenever an accused person makes his intention to call witnesses to testify on his behalf known to the court every available facility shall be accorded him to enable him do so. However, the court will not allow an accused person to hide behind the Constitutional provision in order to stultify proceedings. A court may n t readily accede to requests for unnecessary adjournment for the austensible reason of calling witnesses. The Supreme Court in YANOR AND ANOTHER v. THE STATE,[26] held that before an accused person can be granted adjournment to call witnesses, he must satisfy the court that the witness is material to his defence, and that he has not been guilty of neglect in procuring the witnesses.

(g) RIGHT TO A FREE INTERPRETER

To have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the offence. The interpreter must be provided by the state exgratia to the accused. Section 241 of the Criminal Procedure Code of Northern States provides that when evidence is given in a language not understood by the accused it must be interpreted to him in a language he understands. It is however curious, that the Criminal Procedure Act of Southern States does not contain similar provision. This, perhaps has more to do with its English origion than anything else. It is hoped that whenever the opportunity presents itself the Act will be amended accordingly.

The Supremee Court in QUEEN v. IMADEBBOR EQUABOR,[27] held that if the accused does not ask for an interpreter the failure to supply one would not be treated as a matter of procedure and a conviction would be set aside only if it had led to a miscarriage of justice, and that if the accused is represented by Counsel, the objection must be taken at the trial in the first instance and not on appeal.

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26. (1965) 1 All N.L.R. 193.

27. (1962) 1 All N.L.R. 287.

It is respectfully submitted that the Supreme Court's interpretation of the sub-section is not quite correct. The right to have an interpreter by the accused is a fundamental right guaranteed by the Constitution. A denial of the right to ready accused is a negation of the right to a fair hearing. It is mandatory upon courts of law to provide an interpreter to an accused free of charge. Therefore the moment an appeal court comes to the conclusion that there has been a denial of this right, instead of considering whether this denial has resulted in a miscarriage of justice or not, it should simply proceed to set aside the decision of the trial court without hesitation. The Supreme Court's decision is quite regrettable, more so when it has been followed in subsequent decisions on the sub-section.

In BRAIMOH AJAYI v. ZARIA N..., [28] the Supreme Court allowing the appeal held that an appellant discharges the burden of showing that a failure of justice has taken place for want of adequate interpretation by showing "that a reasonable person who was present at the trial might have supposed that the interpretation was defective to such an extent as to deny the appellants a fair trial".

The High Court of Northern Nigeria had explained the scope of the right in the case of ZARIA N... v. AISHATU NA DAU... BAKORI in the following words:

> "An interpreter should interprete whatever is said immediately it is said sentence by sentence, he should not wait till everything has been said and then state what he remember's of it or what he thinks it was, but should interprete the whole and every part of it piece by piece and sentence by sentence. It is in that way that the court should attempt to have the evidence explained to the accused, and the proceedings, also, not only what the witnesses say, but also everything that the complainant and the court say". [29]

The Federal Court of Appeal in interpreting section 33(6)(e) of the 1979 Constitution did not follow previous Supreme Court

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28. (1964) N.M.L.R. 61 at p. 67.
29. (1964) See JONES J.: Criminal Procedure in the Northern State of Nigeria. N.N.L.R. 25 at p. 29.

decisions on similar provision in the 1963 Constitution. In MOHAMMED GWANTO AND OTHERS v. THE STATE,[30] the Appeal Court decided that "since the right to an interpreter is a fundamental right non-compliance by the court is a fundamental defect amounting to an illegality and not a mere irregularity, and where there is an infraction of a fundamental right a failure of justice results". The appeal court distinguished the decision in QUEEN v. EQUABOR, as a doubtful proposition of law and should therefore be limited to the peculiar facts of that case. In upholding the decision of the Federal Court of Appeal the Supreme Court held that interpretation is a means of ensuring proper understanding by and participation of an accused person in the trial and to enable justice to be done where the proceeding is being conducted in the language he does not understand.[31]

(h) RIGHT TO OBTAIN COPIES OF JUDGMENT

The procedural safeguards listed and prescribed under section 33(4) and (6) which ensure fair hearing to an accused person are not the only safeguards available to an accused person. As mentioned earlier, the content or constituents of fair hearing is inexhaustive and ever-expanding. Some of these safeguards are novel while others are known in the common law. An example of a procedural safeguard that is an innovation of the 1979 Constitution is the provision in section 33(7) which state that:

> "When any person is tried for any criminal offence, the court shall keep a record of the proceedings and the accused person or any person authorised by him in that behalf shall be entitled to obtain copies of the judgement in the case within 7 days of the conclusion of the case".

The advantage of this procedural safeguard to an accused or convicted person is very significant. Keeping record of the

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30. (1981) 3 N.C.L.R. 312 at p. 319.

31. The State v. S.M. Gwanto and Others (1983) 1 S.C.N.L.R. 142.

proceedings and making it available to accused person or his Counsel enables and facilitates the process of appeal. As a matter of fact the mere keeping of record of the proceedings may serve as a deterent against non-compliance with all the procedural safeguards that ensure fair trial to the accused.

(i) RIGHT TO SILENCE OR IMMUNITY FROM SELF-INCRIMINATION

Section 33(11) states:

> "No person who is tried for a criminal offence shall be compelled to give evidence at the trial".

This sub-section incorporates the right to silence or the common law rule against self-incrimination. The provision came under consideration by the Supreme Court in AGBACOM v. THE STATE.[32] On a charge of contempt, the trial judge put the accused in the witness box and examined him, although the defence contended that the trial judge was not competent to try him for the alleged contempt. Overruling the objection, the accused was convicted and sentenced to three months imprisonment. On appeal, the Supreme Court held that the trial judge erred in law by putting the accused in the witness box thereby compelling him to give evidence in his own trial contrary to section 22(9) of the 1963 Constitution. Delivering the judgment of the court LEWIS, J.S.C. said "he should not have been compulsorily put into the witness box as apart from anything else that offended against section 22(9) of the Constitution of the Federation".

Section 236(1) of the Northern Nigerian Criminal Procedure Code provides that an accused person shall be a competent witness on his own behalf in any trial or inquiry. More importantly, the accused shall not be examined as a witness except at his own request. The section also states that where the accused elects to give evidence

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32. (1971) U.I.L.R., Vol. III, 30.

he shall be warned by the court that he is not bound to give evidence, and that if he does so his evidence may be used at the inquiry or trial. But when the accused decides to exercise his right to remain silent his silence shall not be made a subject of comment by the prosecution, even though the court is at liberty to draw such inference as it thinks just. The accused where he remains silent shall not be asked in cross-examination, and if asked shall not be required to answer any question tending to show that he has committed or been convicted of or been charged with an offence other than that with which he is then charged or is of bad character. The Criminal Procedure Act (applicable to Southern States) makes similar provisions in section 287.

It is sometimes argued that section 33(11), if construed liberally, may favour the accused at the expense of the society. Where an accused does not submit himself to cross-examination by the prosecution by hiding under this sub-section many a crime may not be proved and the criminal allowed to escape punishment for his crime. It is conceded that when the sub-section is read in isolation this fear might be quite justifiable. However, this fear is easily dispelled when regard is had to section 236(1)(c) of Criminal Procedure Code where the presiding judge is allowed to make necessary inferences that appear just from an examination of the circumstances of the case. The Federal Court of Appeal considered the sub-section in the case of STATE v. NAFIU RABIU[33]. The defendant in this case was tried for culpable homicide punishable with death contrary to section 221 of Penal Code. The accused was charged with the murder of his wife by strangulation. Examination revealed, inter alia, some bruises on the victim's neck suggestive of strangulation. Also various actions and behaviour of the accused

33. (1979) Federal Court of Appeal (unreported).

when he came out of their family house where only the two of them lived, seriously implicated him. When all the surrounding circumstances of the death were considered they all pointed to him as the likely person to have killed her. The truth could only be ascertained if the accused testified and open himself to cross-examination. However, the accused elected to exercise his right under section 33(11) and refused to testify. The trial judge at the High Court declined to invoke the proviso to section 236(1)(c) of the Criminal Procedure Code in order to draw inferences from the accused's attitude. The trial judge reasoned that the inferences which could be drawn under the section does not include one of guilt and on the basis of this acquited the accused.

On appeal to the Federal Court of Appeal, the High Court's decision was quashed for being erroneous in law and the accused was found guilty of culpable homicide not punishable with death and sentenced him to four years imprisonment. The President of the Court, Mr. Justice Mamman Nasir while delivering the judgment of the court said, inter alia:

> "This is in fact the issue as to who killed the deceased in the light of the circumstantial evidence adduced by the prosecution. It was clear that the burden of giving explanation had shifted on the accused but he refused to give explanation. His statement to the Police gave no explanation as to the deceased's death .... There was also the accepted evidence that the deceased was reasonably drunk. The sum total of this in my opinion is that the deceased died while quarelling with the accused. The accused had chosen not to give any evidence in explanation of what actually happened, I think he must accept responsibility for his action".[34]

This decision was uphold unanimously by the Supreme Court.

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34. See Supreme Court decision as reported in (1981)2 N.C.L.R.293.

(j) RIGHT TO APPEAL

Beside all the procedural safeguards that aims at ensuring a fair trial to an accused person within the framework of the Concept of fair trial there might still lingers on the mind of the accused some resentment or dissatisfaction with the manner in which the trial was conducted by the trial court. Several factors may give rise to dissatisfaction with a particular trial no matter how well conducted. The Chief culprit is human fallibility. Let us take the witness as an example. When a witness testifies, what is he doing? He is reporting his present memory of something he observed in the past, something he saw or heard. But we all know that a witness is human, he is not infallible neither is he a 'photographic plate'. Even if he is entirely honest is/not nevertheless susceptible to human errors? His recollection of the past may be faulty on account of his emotional or sentimental attachment to either the parties involved or the subject-matter. The method of fact finding trial Courts use are therefore faulty ab initio. It therefore follows that the trial court will apply to the law a set of facts that are not entirely reliable. The result will be a distorted judgment giving rise to a miscarriage of justice. Also given our adversary system of litigation the accused might not be so financially viable as to afford the services of a formidable advocate. In such a case it is not inconceivable for the trial court to be easily swayed by the force of the prosecuting Counsel's advocacy to the detriment of the accused. It is an acknowledged fact that our adversary system is replete with loopholes that wrong or erroneous decisions are constantly made. All these factors/may invariably give rise to dissatisfaction in the mind of the accused person.

Mindful of this awaresome possibility the legal system creates an avenue for remedying, if not totally eliminating, errors of

judgment by trial courts. This is the significance of appeal. It is basically meant to make double sure that the accused person has had a fair trial. Even logic accepts the fact that two heads are better than one. To this end therefore appeal may be regarded as yet another aspect of the Concept of fairness. It is in recognition of this fact that the Constitution makes elaborate provision on appeal, especially as it relates to criminal matters. For instance section 33(2)(b) which preserves the power of government or any public authority to determine questions arising in the administration of a law that may affect the civil rights and obligations of any person if such a law contains no provision precluding appeal from the decision of the administering authority, may be construed as having intended the right of appeal to form part of the right to fair hearing under the section. Though the proviso refers to civil rights yet it is equally applicable to criminal matters. As a matter of fact right of appeal is more important in criminal matters where conviction results in imprisonment or execution. To underline the importance of appeal in criminal matters the Constitution has provided that in criminal proceedings appeal is as of right which is always available to an accused person. The main advantage of appeal is to provide a further opportunity for the case to be reviewed in order to determine whether there has been a miscarriage of justice during the proceedings at the trial court.

One can also posit that the provision in section 33(7) which entitles an accused person to obtain copies of the judgment in the case within seven days of its conclusion is intended to bolster and facilitate the exercise of the right to appeal by the accused person.

CHAPTER FIVE

FAIR HEARING BY ADMINISTRATIVE AUTHORITIES

The complex and pervasive nature of governmental functions in modern States give rise to a rapid growth of administrative agencies. Due largely to their newly acquired regulatory role within the overall administrative machinery, administrative authorities are today involved in the decision-making process the consequence of which usually affects or is likely to affect the civil rights and obligations of individuals. Thus, even though they are not courts or tribunals strictu sensu, yet administrative adjudication has today become an accepted feature of the machinery of government. Government Ministers, and other public officials such as immigration officers and licencing authorities, among others, do exercise, in the course of discharging their statutory duties, a lot of discretionary powers, which without adequate procedural safeguard and control, will result in arbitrariness and infringement of individual liberties. However, not being courts or tribunals exercising functions of a judicial nature, only minimum standards of procedural fairness is required of them. In this regard subsection 2 of section 33 states:

> ".... a law shall not be invalidated by reason only that it confers on any government or authority power to determine question arising in the administration of a law that affects or may affect the civil rights and obligations of any person IF SUCH LAW (emphasis mine) -
>
> (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 (underlining mine).
>
> (b) contains no provision making the determination of the administering authority final and conclusive". (underlining mine).

1. LAW ADMINISTERING AUTHORITIES

Law administering authority refers to individual Ministers or other public officials discharging a wide variety of specific powers the exercise of which is mostly regulatory, affecting the rights and obligations of persons. These powers are usually confered on the administering authority, i.e. the public official, by a statute. These powers are for the most part purely administrative entailing a tremendous amount of discretion on the part of the administering authority. For instance, the Minister of Internal Affairs has been confered with powers under the IMMIGRATION ACT 1960 to control and regulate matters pertaining to immigration such as deportation out of and admission into Nigeria of aliens. In AWOLOWO AND OTHERS v. FEDERAL MINISTER OF INTERNAL AFFAIRS AND ANOTHER[1], the plaintiffs were charged with treasonable felony contrary to section 41(b) of the Criminal Code. The plaintiffs retained the services of one E.F.N. Gratiaen Esq. who was resident in the United Kingdom, as Counsel to come to Nigeria for the purpose of defending them at the trial in court. When Mr. Gratiaen arrived at Lagos Airport he was refused entry into Nigeria by an Immigration Officer, inspite of the fact that all his papers were in order. The plaintiffs applied to the High Court for a declaration that the refusal to admit Mr. Gratiaen into Nigeria to defend them had deprived them of their constitutional right to be defended by a Counsel of their own choice and the refusal was malicious and without just cause and was therefore null and void.

The High Court per UDO UDOMA J., held, after a careful consideration of the relevant provisions of the Immigration Act, that the exercise of powers conferod on the Minister under the Act

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1. (1962) L.L.R. 117.

was totally unfettered and it was within his absolute discretion to allow or refuse any non-Nigerian entry into the country.

Another example of 'law administering authority' is the position of the Minister of Finance under the BANKING ORDINANCE, which confers powers on the Minister under section 3 to grant a licence to any Company to carry on banking business in Nigeria, or to revoke same. These statutory powers are purely administrative and therefore discretionary. In the case of MERCHANT BANK LTD v. FEDERAL MINISTER OF FINANCE,[2] the Minister's power under the Ordinance to revoke a licence was challenged as contrary to Clause 5 of the Sixth Schedule of the 1954 Constitution which guarantees to every person the determination of questions affecting his civil rights and obligations by a court or other tribunal established by law. The appellant argued that since the licence granted under the Banking Ordinance is a right then the appellant Bank is entitled to have that right determined or revoked only by a court or other tribunal established by law in accordance with the above Constitution. Therefore the purported revocation of the licence by the Minister of Finance must be declared null and void and of no effect whatsoever since the Minister is not a court or tribunal established under the said Constitution.

The Supreme Court rejected the appellant's submission that it had, by the grant of a licence to it, acquired a civil right which is only determinable by a court or other tribunal established under the Constitution. However, as submitted elsewhere in this write-up[3] that it would have been more logical had the Supreme Court construed the licence to be a civil right within the meaning of civil rights and obligations in accordance with the 1954 Constitution and then

2. (1961) All N.L.R. 598.

3. See discussion on the meaning of civil rights and obligations in Chapter 4.

proceed to consider the Minister's position as 'a law administering authority' under the priviso to Clause Sixth of the Fifth Schedule to the 1954 Constitution which states that a law shall not be invalidated by reason only that it confers on any person or authority power to determine questions arising in the administration of a law which affects the civil rights of persons if such law does not make the decision of such authority final / or precludes making representations to the administering authority.

The Court's decisions in the aforementioned cases clearly show that a person or authority other than a court or tribunal may be confered with power to determine questions arising in the administration of a law which affects the civil rights and obligations of persons provided that such person or authority has complied with the requirements of fair hearing such as giving prior notice, opportunity to make representations and appeal. These requirements of fair hearing must be provided for in the body of the law that is being administered. For instance section 14(c) of the Banking Ordinance provides that before a banking licence is revoked reasonable prior notice of such intention to revoke must be given to the bank concerned and then be given an opportunity of submitting a written statement in reply. Where it is shown that the law administering authority fails to comply with any of these requirements its decision will be declared null and void. Therefore the requirements of representation and appeal contained in subsection 2(a) and (b) of section 33 is a clear manifestation of an intention on the part of the framers of the Constitution to extend the application of rules of natural justice and fairness to purely administrative acts. Moreover, the specific mention of only two requirements i.e. representation and appeal does not rule out the neessity of complying with the other requirements of fair hearing such as notice etc. At any rate it is difficult to envisage a situation where an opportunity to make representation will avail

a complainant without simultaneously being given prior notice and disclosure of relevant facts. Another significant innovation is the provision in section 33(2)(b) which precludes the use of exclusionary clauses in statutes as a devise for ousting the courts jurisdiction of judicial review of administrative actions. The import of the provision is to invalidate any statute which attempts to cloth the decisions of a person or authority administering the law with an aura of 'finality' or 'conclusiveness'. This is in line with recent trends in English administrative law where courts view any such exemption clause with disfavour.[4] The prohibition of the use of such exclusionary formulae in statutes may therefore be regarded as a new addition to the ever-expanding corpus of the rules of fair hearing. It has also, by necessary implication, made opportunity for appeal, either to a court of law or a higher administrative authority, a requirement of fair hearing. This is an encouraging development unparalleled by any development in the English administrative law which is yet to recognise opportunity for appeal as a requirement of fair procedure.[5]

2. PUBLIC AUTHORITIES

Public authorities or corporations, collectively called 'parastatals' have become a necessary adjunct of modern governmental machinery. Some of these public authorities such as Nigerian Railway Corporation, Nigerian Ports Authority or National Electric Power Authority are really giant size each employing sometimes more staff than the Federal Civil Service itself. Public Authorities do enjoy a measure of autonomy in that they exercise some legislative powers delegated to them by their respective enabling statutes. The powers

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4. See ANISMINIC LTD. v. FOREIGN COMPENSATION COMMISSION (1969)2 A.C. 147. Also see section 14 of the English Tribunals and Inquiry Act 1971 which nullifies the effect of certain exclusionary formulae.
5. See FOULKES, D.: Introduction to Administrative Law p. 167, 4th Ed. 1976, Butterworths, London.

of the authority are exercised by the Board of Directors, and their legislation is known as 'statutory rules' or'regulations'. In the case of Local Government Authorities their legislation is called 'bye-laws'. It therefore, follows that public authorities do exercise some adjudicatory powers too. Their adjudicatory powers are mainly in connection with the enforcement of the statutory rules or bye-laws they enacted. They also exercise disciplinary control over their members of staff.

A public authority must operate within the confine of its powers as defined in the enabling statute. Where a particular procedure has been laid down in an enabling law anything done contrary to it may be a nullity. For instance in BELLO v. LAGOS STATE DEVELOPMENT AND PROPERTY CORPORATION[6] the appellant challenged the validity of a purported compulsory acquisition of his property by the L.S.D.P.C. on the grounds, inter alia, that the procedure laid down in section 45(2) of the Lagos Town Planning Act for service of notice of acquisition was not followed. The subsection provides that the vesting of the land acquired shall take place "upon service of a notice by the Board on the owner". However, contrary to this laid down procedure the Lagos State Executive Development Board served the Statutory notices on the occupiers and also published same in the West African Pilot and Daily Times.

In its judgment the Supreme Court held that "Section 45(2) of the Lagos Town Planning Act does not say that notice should be served on the occupiers. It prescribes that it should be served on the owners and therefore in this respect as well the service of the notice was bad in law".

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6. Suit No. S.C. 229/70 (1972) officially unreported but reported in ILUYOMADE and EKA 'Cases and Materials on Administrative Law' p. 102 (1980).

Similarly in CHAIRMAN OF THE BOARD OF INLAND REVENUE v. JOSEPH REZCALLAH AND SONS LTD.[7], the appellants challenged the claims of the Revenue Board of the sum of £2,520 being income tax and penalty for the years 1958/59 and 1959/60, on the grounds that they were not given the statutory notice in writing requiring them, within the period limited by the notice, to deliver a return of income in accordance with section 47(1) of the Income Tax Ordinance.

The Supreme Court held that the Board can not lawfully assess any person to tax under the Ordinance until after the expiration of the time allowed to such person for the delivery of the return provided in section 47. The Court went on to hold that "it is therefore a condition precedent that the Board must give the person the notice in writing".

Again, a bye-law or a statutory regulation is void not only for jurisdictional or procedural defects, but more fundamentally if it is repugnant or contrary to any of the constitutionally protected rights. It therefore follows that in the exercise of its statutorily confered quasi-judicial powers a public authority is under a duty to observe the rules of fair hearing and natural justice. In the recently delivered judgment of the Supreme Court which may be named the THREE PROFESSORS' CASE[8], it was held that the purported dismissal of the three professors from the service of the Lagos University was null and void because the University Council had denied the appellants a fair hearing.

In ADEDEJI v. POLICE SERVICE COMMISSION[9], the appellant who was an Assistant Superintendent of Police in the Nigeria

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7. (1962) All N.L.R. 1.

8. PROFESSORS OLANIYAN, OLAWOYE & DUROJAIYE v. UNIVERSITY OF LAGOS AND UNIVERSITY OF LAGOS COUNCIL (1985)2 N.W.L.R. 599.

9. (1968) N.M.L.R. 102.

Police Force was served with a letter by the Police Service Commission in which he was accused of corruption. He was required to make representations why he should not be dismissed for the offence. The appellant wrote a reply but was eventually dismissed. He consequently applied to the High Court for an order of certiorari to quash the dismissal. The High Court after having before it a Counter-affidavit by the respondent which contained allegations which were not in the letter which was sent to the appellant / . dismissed his application. He then appealed to the Supreme Court. It was held that "an accused person must know the name of his accuser and all what he said about him before it could be said that he was given a full opportunity of exculpating himself".[9(a)]

3. GOVERNMENT AND ITS FUNCTIONARIES

This refers to Governors, Ministers, Commissioners, Heads of Departments of Government etc. whose statutory functions are mainly administrative or ministerial but not strictly judicial. They are usually confered with a tremendous amount of discretionary powers the exercise of which is not easily amenable to judicial control by the courts. This not withstanding, the need for judicial control of administrative discretion is an indispensable shield against arbitrariness and administrative injustice. Therefore the discussion hereunder will concern itself with a consideration of the limits set by the courts upon the Government and its functionaries in the discharge of their administrative duties. Of particular relevance is the question whether or not, or to what extent are public functionaries bound to observe rules of natural justice and fairness.

However, there is a jurisdictional problem which calls for clarification right from the onset. If we may ask, from whence do courts in Nigeria derive their power to exercise judicial review of administrative action? Is the exercise of power of judicial

9(a) Ibid at 107.

review of executive actions by the courts not an aberation under a Constitution the basis of which is the doctrine of separation of powers? In England this problem does not seem to be a very serious source for concern since the Constitution is unwritten and separation of powers doctrine is not strictly adhered to. At any rate the courts in England would say judicial review is no more than an attempt by the common law courts to discover the actual intention of the legislature and thereafter compel the Crown Servant to exercise his ministerial powers in accordance therewith. Thus the exercise of ministerial powers has been subjected to the "implied limitations" set by the common law which import a duty to be "fair, candid, and unprejudiced; not arbitrary, capricious or biased; much less warped by resentment or porsonal dislike,"[10] and a duty to act fairly.

In Nigeria power of judicial review of administrative actions is derived from the Constitution. Section 6(6)(b) of the 1979 Constitution provides that the judicial powers vested in the courts in accordance with the Constitution "shall extend to all matters between persons or between government or authority and any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person".

An observable trend among Nigerian Courts is that where the administrative action is of a judicial or quasi-judicial nature a duty to observe rules of natural justice will readily be implied. Thus where the Minister or Commissioner is required to conduct an inquiry or to receive and consider objections or complaints he will be expected to give a fair hearing to all sides or at least to those

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10. R. v. ASKEW (1768)4 BURR. 2186 quoted in S.A. de SMITH, Judicial Review of Administrative Actions p. 278-320 (1979) where there is a general discussion on discretionary powers.

who are likely to be affected by his decision. Where the decision is purely administrative the Minister will nontheless be expected to act fairly. In CHIEF EZE ORISAKWE v. GOVERNOR OF IMO STATE[11], the plaintiff's certificate as a recognised Chief was withdrawn by the Governor. Under the relevant Chieftaincy law, the Commissioner charged with Chieftaincy matters must have set up an enquiry before advising the Governor to withdraw recognition whenever allegations of grave misconduct were made against a recognised chief. In this case, several such allegations were made against the plaintiff. Without complying with this aspect of the law, the Governor withdrew recognition from the plaintiff. The Governor acted on a different recommendation of a panel which was not set up by the Commissioner and which did not investigate any of the allegations made against the plaintiff.

The High Court of Imo State as per OPUTA C.J., held, inter alia, that the Executive power vested in the Governor in the Constitution is not absolute. Its exercise must not be arbitrary. The honourable chief judge, relying on KANDA v. GOVERNMENT OR MALAYA[12], went on to hold that "if the right of fair hearing under section 33 (1) of our 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 evidence in support - not merely bare and unsupported allegations - and then he must be given the opportunity to contradict such adverse or incriminating evidence. This is the right of fair hearing and nothing short of it will suffice"[13].

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11. (1982) 3 N.C.L.R. 743.
12. (1962) A.C. 322.
13. (1962) A.C. 322 at 758.

R. v. DIRECTOR OF AUDIT (WESTERN REGION), EX PARTE OPUTA & ORS,[14] this is an appeal from a judgment of the High Court of the Warri Judicial Division refusing an application to set aside a decision of the Minister of Local Government of Western Region.

The facts of the case are that the Director of Audit of the Western Region wrote to the appellants and some other Councillors, calling upon them to show why they should not be surcharged in respect of a sum of £138.1s.6d, and gave them two months within which to make representations in the matter. Many of the Councillors failed to reply and those who did failed to satisfy the Director of Audit that a surcharge should not be made. Consequently, the Director surcharged the Councillors and gave notice of the surcharge to each Councillor in a letter dated 11th August, 1959, which also stated that "under section 203(1) of the Local Government Law, W.R. of 1957, you have a right of appeal to the Minister of Local Government against the surcharge if you desire". The appellant exercised their right of appeal, and on 18th December 1959, their Solicitor addressed to the Ministry of Local Government a petition of appeal. The appeal set out in detail the explanation of the Councillors and the legal grounds on which they objected to the decision. The Permanent Secretary to the Ministry presented all the facts and the relevant documents to the Minister in a Ministry file, and on 13th February, 1960, conveyed to the Councillors, through their Solicitor, the decision of the Minister not to allow the appeal.

The Councillors applied to High Court for certiorari to set aside the Minister's decision on ground that the said Minister came to his decision against the applicants without hearing them and without giving them or their counsel an opportunity to be heard before he decided the appeal against them. The High Court Judge

14. (1961) All N.L.R. 659.

having carefully considered the facts and the law decided that a fair inquiry had been held and that there had been no denial of the principles of natural justice.

The Councillors on further appeal to the Supreme Court conceded that though they were not entitled to demand an oral hearing by the Minister, yet they argued that they should have been given the opportunity to supplement their notice and petition of appeal. Their Counsel submitted that the Minister should have given the appellants a further opportunity to make representations after the documents had been submitted to him by the Permanent Secretary.

The Supreme Court held that the appellants petition did not consist merely of points of appeal, but set out in detail the explanations of the appellants and the grounds of law upon which objection was taken to the decision of the Director of Audit. The petition was forwarded to the Minister without any intimation that the appellants wished to supplement the document, and no further submissions were received before the decision of the Minister was communicated to them. All relevant documents were forwarded to the Minister, and there was nothing to show that the Director of Audit made further representations which required a further explanation from the appellants. For these reasons therefore the Court considered that there had been no denial of the principles of natural justice.

4. RIGHT TO MAKE REPRESENTATION

Ordinarily, when a 'right to be heard' is spoken of it connotes oral hearing. However, it must be pointed out that when the phrase "right to be heard, is used in a legislation it includes the making of written representations. Therefore modern concept of fair hearing recognises written representations as a principle of fair procedure. In other words the Courts will readily hold that fair hearing has

been satisfied where an opportunity to make written representation to the deciding body exists.

In Nigeria the right to make written representations assumes special significance as a requirement of fair hearing. Section 33 (2)(a) of the 1979 Constitution of the Federal Republic of Nigeria provides that the decision of a law administering authority which affects a person's civil rights or obligations shall not be invalidated for non-compliance with requirements of fair hearing if an opportunity is afforded 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. In addition to being a requirement of fair hearing the right to make written representation is a statutory requirement to be observed by law administering authorities in Nigeria. It is thus used as a test for procedural fairness of administrative bodies when discharging their statutory functions. The principal distinction between it and legal representation is that the latter is entirely at the discretion of the deciding body and in most cases administrative bodies dont allow legal representation before them so as not to distort the informal nature of their proceedings. Whereas denial of opportunity to make representation in the absence of an alternative such as oral hearing may very well amount to a denial of fair hearing.

In R. v. DIRECTOR OF AUDIT (WESTERN REGION) EX PARTE OPUTA & ORS,[14(a)] the Supreme Court held that there had been no denial of the principles of natural justice since the appellant had been given the opportunity to make written representation (which they availed themselves of) to the Minister before he made his decision.

14(a) (1961)1 All N.L.R. 659.

5. REASONED DECISIONS

It has been said that it is never a principle of natural justice that reasons should be given for decisions, since there is no such rule compelling even courts of law to give reasons for their own decisions.[15] As far as courts of law are concerned the situation may be tolerable in that courts of law apply rules that are clearly defined and penalties prescribed. But in the uncertain world of administrative justice where one is confronted with the exercise of discretionary powers by government functionaries who are for the most part under no obligation to give reasons for decisions should not be lightly disregarded. One shudders to contemplate the seriousness of administrative injustice that could be perpetrated were a Minister or an administrative tribunal, having power to revoke trade licence to be under no obligation at all to state reasons or grounds upon which its decision was arrived at. It is now a generally accepted principle of Administrative Law that a court has power to interfere with the decision of a Minister if it can be shown that in reaching his decision the Minister was influenced by extraneous considerations which ought not to have influenced him or conversely failed to take into account considerations which ought to have influenced him.[16] An administrative decision can also be challenged on grounds of unreasonableness or bad faith. Now the Crucial question is how can a court of law determine whether an administrative decision was unreasonable or was made in bad faith if the maker of the decision had not given reasons for his decision? In the PADFIELD CASE,[17] it was urged that a Minister was under no obligation to give reasons for his refusal to investigate complaints brought to him by some farmers as

15. H.W.R. WADE: Administration Law 4th Ed., 1977, p. 463.

16. PADFIELD v. MINISTER OF AGRICULTURE AND FISHERIES (1968) A.C. 997.

17. IBID.

his discretionary powers in the matter were unfettered. In rejecting this submission the Appeal Court as per LORD DENNING held that "if the Minister is to deny the complainant a hearing he should at least have good reasons for his refusal. If he does not do so the court may infer that he has no good reason and mandamus would issue against him".[18(a)] On Appeal, the House of Lords upheld LORD DENNING'S judgement. It is therefore plainly logical that a person who is under a duty to act fairly must give reasons for his decision.

However, in the famous Nigerian case of AWOLOWO v. FEDERAL MINISTER OF INTERNAL AFFAIRS[18(b)], the Lagos High Court decided that the reason for refusing the plaintiff's Counsel entry into Nigeria need not be given since the Minister's discretion was obsolute. It is important to note that this case was decided in 1962 i.e. prior to the House of Lord's decisions in cases like RE H.K.[18(c)], PADFIELD CASE[18(d)] and R. v. GAMING BOARD[18(e)] in which the duty to act fairly was imposed on Ministers exercising discretionary powers. Therefore the Lagos High Court might have decided differently if the case had come up after the decisions in the above English cases were made. It is now settled law that reasoned decision is a requirement of the concept of fairness.

6. APPEAL OR REVIEW

As a general rule, a right of appeal from a decision of a court is not a requirement of natural justice. As for Statutory Tribunals, the matter depends on the provisions of the enabling Statute. In other words, no right of appeal exists from decisions of a public authority or administrative tribunal unless conferred by Statute. In Nigeria, as a matter of practice, a right of appeal to courts of law at least on a question of law, exists from decisions of Statutory Tribunals.

18(a) [1968] A.C. 997.
18(b) (1962) L.L.R. 117.
18(c) [1967] 2 Q.B. 617.
18(d) [1968] A.C. 997.
18(e) [1970] 2 Q.B. 417.

It is a recognised principle of English Administrative Law that statutory discretionary powers must be exercised according to law.[20] In other words, no matter how absolute or unfettered discretionary power is, it may still be held to be subject to implied limitations set by the Common Law. This is the basis of judicial review of administrative action. Common Law Courts have devised methods with which the exercise of discretionary power may be challenged. Review may be classified into two broad categories:- Jurisdictional and Procedural Review. A person aggrieved by the exercise of a discretionary power may contend that the body or person exercising the discretion has acted without jurisdiction. This is known as the doctrine of ULTRA VIRES. Alternatively, the aggrieved person may contend that the exercise of the discretionary power was invalid because the repository of the power, has, in the course of exercising the power, failed to observe the rules of natural justice or some other principle of procedural fairness.

A statute may expressly provide that the exercise of the discretion shall be subject to judicial review as for instance, by confering a right of appeal. But even where no right of appeal is provided the courts in Nigeria have inherent power of judicial review. More importantly, section 6(6)(b) of the 1979 Constitution states that the judicial powers vested in the Courts "shall extend to all matters between persons, or between government or authority and any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person".

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20. S.A. de SMITH: Judicial Review of Administrative Action, 1980, 4th Ed. pp. 278-280.

CHAPTER SIX

EXCEPTIONS TO THE RULES OF FAIR HEARING

1. STATE PRIVILEGE

In the discussion of those principles that are the sine qua non to a fair hearing mention was made of the Constitutional requirement for holding all criminal trials in public.[1] However, there are circumstances in which this requirement is waived. One of those exceptions which deserves separate treatment in view of its significance to the administration of justice is what is known as State Privilege. It is sometimes referred to as privileged evidence.[2]

Proviso (b) of section 33(13) of 1979 Constitution provides that:

> "If in any proceedings before a court or such a tribunal a Minister of the Government of the Federation or a Commissioner of the Government of a State satisfies the Court or Tribunal that it would not be in the public interest for any matter to be publicly disclosed, the court or tribunal shall make arrangements for evidence relating to that matter to be heard in private and shall take such other action as may be necessary or expedient to prevent the disclosure of the matter".

It is pertinent to note that this subsection does not allow absolute non-disclosure. AGUDA J. of the Western State High Court in HAMEED AREMPA & ORS v. BALOGUN,[3] outrightly rejected Counsel's submission that the privilege is an absolute one. It only allows such evidence to be heard in private. Therefore no matter how detrimental to public interest disclosure of a particular piece of evidence may be it must nonetheless be disclosed albeit in private. Even then private disclosure depends on the court's

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1. See Chapter 3 under 'Public Hearing'.
2. See OLUYEDE and AIHE - CASES AND MATERIALS ON CONSTITUTIONAL LAW IN NIGERIA p. 79 (1979).
3. (1970) Suit 1/211/65 - Western State High Court - unreported.

discretion. The important consideration therefore is whether the Minister or Commissioner concerned has proved to the satisfaction of the Court that public disclosure of the evidence will not be in the public interest. In OLALERE ADEBAYO v. CONCORD PRESS OF NIGERIA LTD.[4] the court insisted on the production of the document for examination in private in order to enable the court determine whether it will not be in the public interest to disclose it in the open court.

When proceeding is conducted in private for the purpose of receiving privileged evidence only parties to such proceeding, their lawyers and court officers may be permitted in court. Legal practitioners not acting for any of the parties to such proceedings, members of the public and journalists will be excluded therefrom.[5]

Proviso (b) of subsection 13 of section 33 of 1979 Constitution is a significant improvement on what obtained under the 1963 Constitution. Section 22(3)(b) of the 1963 Constitution dealing with private disclosure of evidence applied only to civil proceedings. The lacuna in the law was that under state privilege a document could be totally excluded from examination by the court even if its production was vital in proving the innocence of an accused person. The rationale for this anomaly is hard to decipher. Perhaps the framers of the 1963 Constitution did not envisage a situation where an accused person would require the production of for example, minutes of a cabinet meeting, to prove his innocence. If this were so then the draftsmen of the 1963 Constitution must have been unmindful of the fact that "the need to disclose is equally important, if not more important in criminal prosecution".[6] Happily this anomaly

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4. (1982) 3 N.C.L.R. 434 - Oyo State High Court, Ibadan.
5. IBID. p. 434.
6. See KASUNMU (Ed.), Supreme Court of Nigeria, p. 40 (1978).

has now been rectified in Proviso (b) of section 33(13) of 1979 Constitution which expressly states that the requirement to disclose covers criminal matters as well.

Apart from the Constitutional recognition of the doctrine of State privilege, section 166, 167 and 219 of the Evidence Act contain provisions that no one is allowed to produce any unpublished official records relating to the affairs of State, or to give any evidence derived therefrom except with the permission of the head of the department concerned who has the discretion to give or withold such records. Section 167 states that no public officer shall be compelled to disclose communication made to him in official confidence where he thinks that such disclosure will be against public interest. The negative implication of this provision is that no court of law can compell a public officer to disclose any communication given to him in official confidence no matter how vital it is to the due dispensation of justice by the court. Even more pernicious is section 219(1) which provides that a Minister or Governor of a State or any person nominated by him, may in any proceeding object to the production of any document or request the exclusion of oral evidence where he is satisfied that the production of such document / or giving of such oral evidence is against public interest. Any such objection shall be in writing, either by affidavit or certificate. Subsection 2 of section 219 goes on to provide that the objection so taken, shall be conclusive and final and the court shall not inspect the document or receive any oral evidence relating thereto.

The injustice the application of these provisions of the Evidence Act would wreak could only be imagined. It is a negation of all the known principles that guarantee a fair trial in courts of law. Not surprisingly therefore, these provisions of the Evidence

Act have come under scathing criticisms[7]. It is difficult to understand why the decision whether or not to exclude a particular piece of evidence (document) should be left in the hands of a Minister, Commissioner or a public servant for that matter, to the exclusion of a court of law whose primary function is the promotion of public interest through justice. Nothing is more repugnant to the concept of fair hearing than what these provisions of the Evidence Act import. Many judges have condemned these provisions as gross violation of section 22(1) and section 33(1) of the 1963 and 1979 Constitutions respectively. For instance AGUDA J. of the Oyo State High Court ruled that in so far as section 219 (2) of the Evidence Act purports to give a Minister an absolute discretion to prevent the court from hearing part of the evidence of one party there must be some inconsistency between its provisions and that of section 22 of the Constitution which guarantees a fair hearing to all parties before the court and to the extent of such inconsistency section 219(2) must be held to be null and void.[8] Similarly ODESANYA J.[9] of the Lagos High Court rejected outrightly the construction of section 219(2) to mean total ouster of courts' jurisdiction and held instead that by section 22(1) of the 1963 Constitution, whose provisions prevail over that of the Evidence Act, a person is entitled to 'fair hearing' in the determination of his civil rights and obligations by a Court of law and not by a government officer. He went on to state that if the court is satisfied that a provision of the Evidence Act relating to the determination of the plaintiff's rights in this case is inconsistent with this Constitutional guarantee, the Constitution prevails and

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7. See for instance NWADIALO - Modern Nigerian Law of Evidence p. 45

8. See HAMEED APAMPA v. BALOGUN, unreported, suit No. 1/244/65 20/10/70.

9. MAJA AND SONS LTD. v. U.A.C. (NIG.) LTD. (1971) 1 N.M.L.R. 157.

the provision of the Evidence Act is void to the extent of the inconsistency.

When section 219(2) of the Evidence Act came before the Supreme Court for consideration the court held that whenever a trial court is faced with the problem of section 219 the application of which would in the opinion of the trial court result in injustice, then the trial court should resort to the provision of section 22(3)(b) to enable it hear such evidence in private. This was in the case of AFRICAN PRESS LTD. v. THE ATTORNEY-GENERAL, WESTERN STATE,[10] the decision of which was handed down several years prior to the High Courts' decisions in the two cases referred above. But due to the unsatisfactory nature of the Supreme Court's decision, the High Courts refused to follow it. Although the Court's attention was drawn to the provisions' inconsistency with section 22 of the 1963 Constitution, unfortunately the court shied away from deliberating on the issue. The court should have struck down the provision of section 219 of the Evidence Act as being inconsistent with section 22 of the 1963 Constitution. In view of the clear provision of section 33(13) of the 1979 Constitution the provision in section 219 of the Evidence Act is certainly no more constitutionally valid.

2. STATE IMMUNITY

The doctrine of State immunity is one of those ancient prerogatives of the Crown whose existence persists tenaciously to this day. In England it is known as sovereign or Crown immunity. As the name suggests, it is an essential feature of a society ruled by devine kings who are ominipotent and therefore immune from the operation of the law of the land. This is based on the assumption: 'King can do no wrong'.

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10. (1965)1 All N.L.R. 12.

One marvels at the adoption and subsequent retention of this doctrine in a country like Nigeria long after a republican Constitution has been adopted. Witness the continued retention of the Petition of Rights Act after the promulgation of a Republican Constitution in 1963. Was it because the 1963 Republican Constitution had retained the parliamentary system of government? Whatever might have prompted the continued existence of this anachronistic piece of legislation it could not have been justifiable in a country whose Constitution recognises a priori that sovereignty resides in the people and not in the head of Government. Even the tinkering in the name of amendment to the Petition of Rights Act which took place in 1964 was half hearted and therefore did not substantially alter the status quo ante. The Act was amended to permit suit against the State subject to the consent of the Attorney-General. An American commentator lamented the introduction of "this English doctrine into the United States where there was no King, where the Chief of State was never sovereign, where from the beginning sovereign power resided in the people ....". This, he regards, as one of those "mysteries of legal evolution"[11].

The recent decision of the Supreme Court in RANSOME-KUTI & ORS. v. ATTORNEY-GENERAL FEDERATION & ORS.[11(a)], has explained, in a very lucid manner, the legal status of the doctrine of State Immunity as it applies in this country. The facts of the case are as follows:-

On 18th February 1977, at about mid-day, one Segun Ademola, an employee of the 2nd Plaintiff, Fela Anikulapo-Kuti, travelled in a landrover belonging to the 2nd Plaintiff and driven by one Segun Adams along Agege Motor Road. At a point on the road, a

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11. SCHWARTZ, Administrative Law p. 113 (1976).

11(a). (1985)2 N.W.L.R. 211.

Military traffic policeman stopped these two people and questioned them as to why their vehicle failed to carry a plate number in the front. They told him that the vehicle had a plate number in at the back, but the one meant for the front was inside the vehicle near the glass wind-shield. The soldier demanded the key to the vehicle, which they refused to give him. The soldier then blew his whistle to attract the attention of other Military men within the vicinity. Segun Ademola instructed Segun Adams to drive the vehicle in reverse into 14A Agege Motor Road, the property belonging to the Plaintiffs, even though the soldier was sitting on the bonnet of the vehicle to prevent its movement. Traffic built up and within a twinkle the vehicle was surrounded by soldiers. The soldiers got hold of Segun Ademola and beat him into unconciousness. Segun Adams had then escaped from the scene.

Meanwhile, several hundreds of soldiers had gathered outside the gates of 14A Agege Motor Road attempting to gain entrance. They were armed with guns. Within a few minutes they started raining stones, bottles, and other missiles at No. 14A Agege Motor Road. More soldiers soon came from the nearby barracks, and the total number rose to about 1,000. One Major Daudu was alleged to be in charge. During the ensuing pandemonium, it was alleged that one soldier, the 7th defendant, Corporal Agwu, poured petrol on the generator within the Compound while another soldier, one Lawal, struck the march, thus setting the compound ablaze. The soldiers advanced to the gate, cut down the wire fences, moved into the compound and started to throw out everybody in the house, except 1st Plaintiff Dr. (Mrs) Olufunmilayo Ransome-Kuti and the 3rd Plaintiff, Dr. Beko Ransome-Kuti. The soldiers proceeded to the main house, set it on fire and razed it to the ground. There was looting, beating up the occupants of the house and indiscriminate assault of the women of the house. Thereafter the beaten, wounded and assaulted were all marched into Army Barracks, the two brothers,

Fela and Beko, 2nd and 3rd Plaintiffs herein inclusive several of them were admitted into hospital.

The plaintiffs subsequently brought an action in the High Court of Lagos State claiming ₦25 million against the dependants jointly and severally being damages suffered by the Plaintiffs when the defendants by their servants and or agents willfully and maliciously set fire to the Plaintiffs 2 storey house at 14A Agege Motor Road on the 18th of February, 1977.

Dosunmu, J. trying the case at first instance dismissed the claim. His judgement was upheld by the Court of Appeal. Plaintiffs further appealed to the Supreme Court which equally dismissed the appeal unanimously.

Delivering the lead judgement of the Supreme Court, ESO, J.S.C. traced the historical origin of the doctrine of State Immunity both in England and Nigeria.

He explained that at Common Law, under the principle of Rex non potest peccare (the King can do no wrong) the State (or Crown) enjoys immunity from legal action and could not be impleaded in its own Court for the tortious acts of its servants. Thus, if the State did wrong it could not be sued, it was the agent or servant who committed that wrong on behalf of the State that would be lible personally.

The honourable judge went on to State that this doctrine became part of Nigerian Law by virtue of Section 45(1) of the Interpretation Act, 1958, and the various reception laws of the various States of the Federation. He observed that the Petition of Rights Act (Cap. 149) 1915 as amended in 1964 had further given the stamp of Statutory Authority to this Common Law principle in Nigeria. The learned judge finally lamented that although the

principle of State immunity from tortious liability has been abolished in England by virtue of the Crown Proceedings Act of 1947 yet the principle continued to apply in Nigeria long after the adoption of the 1963 Republican Constitution. He observed that prior to the 1979 Constitution none of the earlier Nigerian Constitutions contained provisions which could be construed as annulling the Common Law principle of State's immunity from tortious liability.

Considering the principle of State Immunity under the 1979 Constitution Justice ESO (with whom Justices Irikefe and Coker concurred) opined that:

> "Happily for the country, but this does not affect the instant case, section 6 of the 1979 Constitution which vests the judicial Powers of the country in the court has to my mind removed this anachronism.
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> Sub-section (6) of the section provides-
>
> "(6) The judicial powers vested in accordance with the provisions of this section ..... shall extend to all matters between persons, or between government or authority and any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any questions as to the civil rights and obligations of that person".
> (Italics mine)
>
> There is no equivalent of this provision in previous Constitutions. For if it had been, the importation of the expression "unknown soldier" which expression is normally revered all over the world, be it East or West, and which expression has now been turned into a joke and infelicitousness as a result of an enquiry into the identity of the vandalists that day, would not have excused the State from liability".[11(b)]

11(b). RANSOME-KUTI v. ATTORNEY-GENERAL OF THE FEDERATION (1985)2. N.W.L.R. 211 at 237.

Similar views were expressed by Justices Karibi Whyte and Oputa. Oputa, J.S.C. observed:

> "If the appellants action were instituted under the 1979 Constitution rather than the 1963 Constitution, then the Court would have had to decide whether the erstwhile State Immunity from suits founded on tort can still be maintained in view of the rather extensive and far reaching jurisdiction conferred on the courts by section 6(6)(a) of the 1979 Constitution. There is also a Chapter of the 1979 Constitution (Chapter 4) dealing with Fundamental Rights. That Chapter does not provide the answer to the problem of State Immunity from tortious claims. But section 6(6)(b) may. I say "may" because the Court is not here called upon to decide that issue and without the aid of legal arguments on both sides it is safe to use the word "may". 11(c)

In dismissing the appeal, the learned Supreme Court Judge held that the Plaintiff's case being founded upon tort, and the Common Law principle of State immunity being still applicable in Nigeria in 1977, when the cause of action arose, the State cannot be made liable for tortious acts of its servants or agents.

It is the Contention of this writer that the above quoted Obita dictum of Justices Eso and Oputa has finally put paid to the controversy as to whether the Petition of Rights Act is still an existing law in Nigeria. In other words the doctrine of State Immunity as a Common Law principle does not exist as part of the Nigeria Law since the promulgation of the 1979 Constitution. The question whether the State or any other persons or body enjoys some form of immunity is to be decided solely by reference to the provisions of the 1979 Constitution of Nigeria. Therefore, defining the judicial powers of the Federation, Section 6(6)(b) of the 1979 Constitution stated that it extends:-

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11(c) IBID.at 259-260.

> "To all matters between persons or between government or authority and any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person".

Clearly this provision gives the courts in Nigeria the power to entertain civil actions against the Government or any authority for the determination of a person's civil rights and obligations. What this provision implies is to waive the immunity the Government enjoys from law suit. No such provision was contained in the 1963 Constitution.

Furthermore, in order to make it clear that the intention is to do away with the Petition of Rights Act, the 1979 Constitution contains express provisions concerning the immunity of cetain named public office holders from suit. Section 267 provides that no civil or criminal proceedings shall be instituted or continued against a person to whom the section applies during his tenure of office. Section 267(1) provides thus:-

> (b) a person to whom this section applies shall not be arrested or imprisoned during that period either in pursuance of the process of any court or otherwise; and
>
> (c) no process of any court requiring or compelling the appearance of such a person shall be applied for or issued.

Subsection (3) of section 267 mentions the persons to whom the section applies, namely, the President and the Vice-President, Governor and Deputy Governor. These are, under the 1979 Constitution, the only persons to enjoy immunity from law suits during the period they perform the functions of their offices. They can, however, be proceeded against after they ceased to hold their offices. This, therefore is a further support for the contention that the Petition of Rights Act is not an existing law under the 1979 Constitution.

In addition to the persons already mentioned there are other government authorities that enjoy immunity under the 1979 Constitution. Section 145 of the Constitution states that in the exercise of its powers the Federal Civil Service Commission, the Federal Judicial Service Commission, Federal Electoral Commission and the National Population Commission shall not be subject to the direction and control of any authority or person. This provision has been interpreted by the Supreme Court to mean a grant of immunity from law suits to these bodies. There is also the provision in sections 132(1) and 170(10) of the Constitution that no proceeding or determination of the Committee appointed to investigate allegations of misconduct made against the President or Vice-President, Governor or Deputy-Governor, or any matter relating thereto shall be entertained in any court. This deals with the impeachment proceedings.

All the constitutional provisions alluded to are really novel, the likes of which do not exist in any of the previous Constitutions of Nigeria. The logical conclusion, therefore, is that the 1979 Constitution has intended to preclude the application of the Petition of Rights Acts and a fortiori the non-recognition of the doctrine of sovereign immunity except to the limited extent as provided in the Constitution itself. A reference to some of the decided cases under the 1979 Constitution will further buttress the submission that the doctrine of sovereign immunity has ceased to exist in Nigeria with the promulgation of that Constitution. In the case of B.A. SHITTA BEY v. FEDERAL PUBLIC SERVICE COMMISSION[13], it was contended before the Supreme Court that the principle of English Administrative Law which precluded the courts from issuing the order of mandamus against the Crown and its servants applied in Nigeria.

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12. See ADESANYA v. PRESIDENT (1981) 2 N.C.L.R. 1.

13. (1981) 1 S.C. 40 at p. 58.

Rejecting this contention IDIGBE, J.S.C. remarked:

> "I shudder to think this is so; but with great respects to their Lordships both at the court of Appeal and the High Court, I am of the view that this can not be correct ... there is no basis for its application in this country (a Republic) in respect of the respondent who, being a creature of Statute, can sue and be sued".

In the case of SHUGABA ABDURAHAMAN DARMAN v. MINISTER OF INTERNAL AFFAIRS,[14] ADEFILA, J. of the Maiduguri High Court reacting to the Federal Attorney-General's submission that the Minister enjoys executive immunity observed:-

> "I do not think that those principles referred to by the Hon. Attorney-General will apply in Nigeria here since, I hold the view, that the immunity enjoyed by the Crown and her Ministers is not enjoyed by the President and his Ministers in Nigeria".

3. CONTEMPT OF COURT

Generally, courts of law have an inherent power to take all reasonable steps to protect their authority and sanctity from being denigraded or belittled. To this end any act or Omission which tends to interfere or obstruct the due administration of justice is viewed with seriousness by the courts, and more often than not, the guilty person will not be left unpunished. This type of act or Omission is known as contempt of Court. The proviso to subsection (10) of section 22 (dealing with fair hearing) of the 1963 Constitution expressly confers on all courts of record the power to punish for contempt not withstanding that the act or Omission constituting the contempt has not been defined in any written law and the penalty therefor

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14. (1981) 1 N.C.L.R. 29 at p. 32.

not so prescribed. In addition to the Constitutional provision, there are detailed and elaborate provisions making contempt punishable under section 6 of the Penal Code and section 315 of the Criminal Procedure Code. Similar provisions are to be found in the Criminal Code Act and Criminal Code applicable in the Southern States of Nigeria.

It is, however, bewildering that the 1979 Constitution does not contain any provision relating to the offence of contempt. Perhaps the reason is that since all the Criminal Codes in the country have made detailed provisions relating to the offence it was felt unnecessary to make special provision for it again in the body of the Constitution. This notwithstanding, the court will always exercise their inherent power to punish for any contemptible act or omission.

Contempt of court is an offence that is in a class of its own, having pecularities not shared with other definable offences. Contempt proceeding is, without any doubt, contrary to and a breach of all the known principles that ensure fair trial in the courts. It is one proceeding in which the judge is truly a judge in his own cause. For instance where the contempt is committed in facie curie, that is, in the face of the court, the court is at liberty to punish the contemnor summarily without holding a formal trial as in ordinary criminal cases. Furthermore, the offence of contempt, not itself an offence having a penalty prescribed for it in a written law, is a gross violation of section 33(6), (8) and(12) of the 1979 Constitution. Now, the important issue for consideration is whether or not the offence of contempt may be regarded as a special exception to the

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15. See MUAZU v. INSPECTOR-GENERAL OF POLICE (1955) 15 WACA, 23.

concept of fair hearing. But the practical importance of the right to fair hearing is such that it will not admit of any exception outside the provisions relating to it as contained in the Constitution. Therefore, any attempt to derogate from the right should be viewed with the greatest caution. The need for caution has been underscored by a decision of the former Western State Court of Appeal in AWOBOKUN & ANOR. v. TOUN ADEYEMI[16], where the court held that there is no doubt that the High Court has inherent jurisdiction to punish criminal contempt summarily, but, the power should be exercised with the greatest caution and it is only to be resorted to where the administration of justice would be hampered by the delay involved in pursuing the ordinary criminal process. The honourable court also held that any person convicted of a criminal contempt of court is convicted of a criminal offence, but no one can legally be convicted of a criminal offence except he stands trial according to law for the particular offence in respect of which he is convicted. Lastly, the Appeal Court held that "it is desirable that when a contempt is not committed in the face of the court, a judge who has been personally attacked should not, as far as possible, hear the case".[17]

In the case of DR. OLU ONAGORUWA v. HONOURABLE MR. JUSTICE O. NWOKEDI[18], C.A. JOHNSON J. (as he then was) of the Lagos High Court,

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16. (1968) N.M.L.R. 289.

17. IBID. at p. 295 where the Appeal Court relied on the Indian case of SINGH v. SINGH 41 A.I.R.

18. (1982) 3 N.C.L.R. 547 at p. 550. He was delivering his judgement in a case where an application was brought to quash a warrant of arrest against the applicant, a legal practitioner, issued by the Chief Judge of Anambra State the respondent in the intant case for contempt.

cautioned that "the institution of judgeship is not a cult to be used to deprive any aggrieved party of the right to a fair hearing as required by the Constitution".

The conclusion that can be drawn from these two decisions is that even where a court decides to invoke its power to punish for contempt the requirements of fair hearing must not be lightly disregarded. This is more so where the contempt is criminal. In fact the judge against whom the contempt was committed should send the case to another judge for trial.

4. GENERAL RESTRICTIONS ON FUNDAMENTAL RIGHTS IN SECTION 41

The notion that Constitutional rights, no matter how fundamental or inalienable, are not absolute, has been accepted in modern jurisprudence. Constitutional rights must, of necessity, admit of some form of restrictions and, or derogations in response to socio-political realities of the prevailing historical conditions of a society. The idea that fundamental rights could be categorised into 'absolute' or 'qualified' has now been debunked.[19] Even so basic and fundamental a right as the right to life must admit of some exceptions. It is, therefore, in the light of this that one should approach a consideration of the provisions in section 41 of the 1979 Constitution. The section states the circumstances in which each of the fundamental rights may be derogated from. Subsection (1) of 41 provides that nothing in sections 34, 35, 36, 37 and 38 shall invalidate any law that is reasonably justifiable in a democratic society in the interest of defence, public safety, order, morality or public health or for the purpose of protecting the rights of other

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19. For an attempt to classify the rights in the 1960 Constitution see M.G. De WINTON - 'Fundamental Rights in Nigeria' in BRETT, L. (Ed.) - 'Constitutional Problems of Federalism in Nigeria.' (Times Press, Lagos, 1960) p. 43. For a criticism of this classification see DR. T.O. ELIAS: NIGERIA: DEVELOPMENTS OF ITS LAWS AND CONSTITUTION, London, Stevens & Sons, 1967.

persons. Subsection (2) states that an Act of the National Assembly shall not be invalidated by reason only that it provides for the taking of measures that derogate from the Rights in section 30 or 32 during periods of emergency. A proviso to subsection (2) of 41 precludes any derogation from the Rights in section 30 (Right to Life) except in respect of death arising from acts of war. It also precludes any derogation whatsoever from section 33(8) dealing with retroactive legislation.

It is significant to note that of all the provisions relating to fundamental Rights in the 1979 Constitution, it is only the provision in section 33(8) that has been absolutely exempted from any form of restriction. It should also be noted that section 33(8) is the provision prohibiting retroactive or retrospective legislation in Nigeria. It comes under the Right to Fair Hearing. Indeed, if there is one right which deserves to be classified as absolute it is the right not to be governed by retroactive laws. It should be realised that the right not to be governed by a law that was retrospectively enacted is not just an individual right like the rest. It is a collective right. It is a right that touches directly upon the substratum and the very basis of the constitutional foundation. It is, indeed, a right to be enjoyed by the Community as a whole without which there will be no rule of law. The moustrosity and absurdity of retroactive legislation is antithesis to the norms of a society under the Rule of Law.

It might also be wondered why the remaining provisions in section 33 have not been specifically mentioned in section 41. This does not suggest that the restrictions in section 41 do not apply to the right to fair hearing. The nature of the right to fair hearing is such that it encompasses many other rights within it. Therefore, the operation of the restrictions in section 41 may in one way or the other encroach upon some of them to the extent necessary to effectuate the objectives of the restrictions.

CHAPTER SEVEN

RIGHT TO FAIR HEARING UNDER A MILITARY REGIME

1. THE MILITARY AND THE CONSTITUTION

The second coming of the Military on the 31st of December 1983 was greeted with unrestrained euphoria nationwide. This was, perhaps, a reflection of the extent of the people's disenchantment with the then civilian Government arising from the latter's incompetence and recklessness in its handling of the national economy coupled with the disdain and contempt with which people's constitutional rights were held by the regime. But almost two years after the change of Government, have Nigerians got what they bargained for in terms of guaranteed social justice, liberty and economic well-being?

No one would doubt the fact that what took place on December 31st was a revolution. And a revolution has been defined as "an abrupt political change not within the contemplation of the Constitution"[1]. The precise effect of this was the overthrow of the 1979 Constitution and the substitution of it by a new Legal Order. HANS KELSEN has aptly described the legal position thus:-

> "From the juristic point of view, the decisive criterion of a revolution is that the order in force is overthrown and replaced by a new order in a way which the former had not itself anticipated ....."[2]

Therefore, the present Military Government, comprising the Supreme Military Council, the Executive Council and the National Council of States jointly constitute the new Legal Order for the country.

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1. See the Preamble to the Federal Military Government (Supremacy and Enforcement of Powers) Decree, 1984 (Decree No. 13). See also NWABUEZE, B.O.: Constitutionalism in the Emergent States p. 228 (London, 1973). The wording of the Preamble were lifted word by word from the decision of the Supre Cour of Pakistan in STATE V. DOSSO (1958)2 PSCRL.
2. General Theory of State and Law, p. 111.

Consequently, the 1979 Constitution, or more precisely what remains of it, because a creation of the new Legal Order and thus surbodinate to it. The provisions of Decree No. 1 The Constitution (Suspension and Modification) Decree 1984 has made this point succintly clear when it states in Section 1(1) that:

> "The provisions of the Constitution of the Federal Republic of Nigeria 1979 mentioned in Schedule 1 to this Decree are hereby suspended;"

and in subsection (2) that:

> "Subject to this and any other decree, the provisions of the said Constitution which are not suspended by subsection (1) above shall have effect subject to the modifications specified in Schedule 2 to this Decree".

The import of this provision is that those provisions of the 1979 Constitution that have not been suspended shall continue to be in force SUBJECT to this or any other decree of the Federal Military Government. The implication of this to individual liberties is quite obvious. An important feature of a Constitutional Government is that it operates within the limitations placed on it by the Constitution. This important feature is noticeably absent in a revolutionary Military Government whose powers are inherently autocratic, hence the absence of restraints or limitations on its powers. Due to this authoritarian nature, therefore, the Rule of Law as a democratic concept becomes a luxury in which such a government cannot indulge.

2. LEGISLATIVE POWERS OF THE MILITARY GOVERNMENT

A noticeable feature of the Military Government is the lack of any formal procedure for legislation. All that Decree No. 1 says is that the Federal Military Government shall have power to make laws for the peace, order and good government of Nigeria or any part thereof with respect to any matter whatsoever[3]. It then

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3. Section 2(1) of the Constitution (Suspension and Modification) Decree 1984. See also Section 1(1) of the Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 13, 1984.

goes on to define the law-making powers of the Military Governor of a State[4]. It appears that the only legal requirement in the process of law-making is the signature of the Head of the Federal Military Government in the case of a Decree and the signature of the Military Governor in the case of an Edict. In this regard section 3(1) of Decree No. 1 of 1984 simply states that the powers of the Federal Military Government shall be exercised by means of Decrees signed by the Head of State and the powers of a Military Governor to make laws shall be exercised by means of Edicts signed by him[5]. The Decrees or Edicts so made, may be made known to the public by any means the law-maker deems fit[6]. More importantly, the validity of any Decree or Edict shall not be questioned in any court of law in Nigeria[7].

As the law-making power of the Military Regime is absolute those fine democratic ideals that restrain the government from encroaching on the liberty of the individual do not readily commend themselves to it. This is the reason why AD HOMINEM legislation is common in a Military Government[8]. Professor Nwabueze has revealed that from the inception of the Military regime in Nigeria in January 1966 to September 1979 when power was handed over to civilians, there have been some 39 Decrees directed to or against named individuals or associations. This number does not include Edicts many of which, according to the learned Professor, also smacked of AD HOMINEM

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4. Section 2(1) IBID.
5. Section 3(2) IBID.
6. Section 3(3) IBID.
7. Section 5 IBID.
8. This is a form of legislative judgment penalising a named individual without giving him the advantage of a judicial adjudication of his rights and obligations.

legislation. The learned Professor went on to give a breakdown of these decrees in accordance with the subject-matter they dealt with. Arrest and detention of persons; 20 decrees, forfieture of assets; 14, dissolution of political parties and certain tribal or cultural associations and the forfieture of their assets; 2, imposition of disability and vocation of office or annulment of appointments, 2.[9] Similar trend is already noticeable in many of the decrees and edicts enacted by the present Military regime. Decrees such as Political Parties (Dissolution) Decree, 1984, Judgments of Tribunals (Enforcement, etc) Decree No. 8, 1985 and many others are clearly ad hominem in nature. The worst form of ad hominem legislation is the recently promulgated Niger State Reparation Edict of 1985 which gave a list of 56 persons and Companies including the former Civilian Governor of the State, his Deputy, many former Commissioners and other public office holders as well as businessmen who are to forfiet various sums of money and property to the State Government. This situation cannot but cause justifiable apprehension in the minds of persons trained in the fine democratic tradition of the Rule of Law. Professor Nwabueze, once again, spoke the minds of many of his ilk when he said "Ad Hominem Legislation .... becomes singularly oppressive when it inflicts punishment or disability on the individual affected without the benefit of trial by a judicial process".[10]

Another feature of Military Legislation which distinguishes it sharply from legislation by a democratically constituted legislature is the frequent resort to Ex-post facto legislation. This type of law-making could be employed to serve many ends, each of which is nefarious and oppressive. More pernicious is the use

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9. See the 'Independence Anniversary Essay in the New Nigerian of 1984.

10. IBID.

of it to interfere with a decision of a court of law, either to reverse or frustrate its effect. A good example of this was when the Western Nigeria Constitution (Amendment) Law, 1963, was passed retroactively for the sole purpose of nullifying the Privy Council decision which reversed the decision of the Supreme Court in the case of ALHAJI D.S. ADEGBENRO v. CHIEF S.L. AKINTOLA AND ANOR.,[11] similarly the Federal Military Government in 1971 promulgated a decree to nullify the Supreme Court's decision in LAKANMI v. THE ATTORNEY-GENERAL (WEST).[12] This was the famous Federal Military Government (Supremacy and Enforcement of Powers) Decree, 1970.

Almost all the legislative activity of the present Military Government has been tainted with retroactivity. As at the time of writing about thirty decrees have so far been enacted by the present Military Government since its inception on 31st December 1984, and more than half of these decrees are clearly retroactive. All the new offences created under the following Decrees are to take effect retroactively:-

(1) Recovery of Public Property (Special Military Tribunals) Decree 1984 No. 3.

(2) Public Officers (Protection Against False Accusation) Decree No. 4, 1984.

(3) Robbery and Firearms (Special Provisions) Decree No. 5, 1984.

(4) Exchange Control (Anti-Sabotage) Decree No. 7, 1984.

(5) Political Parties (Dissolution) Decree No. 9, 1984.

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11. (1963)3 W.R.L.R. 63.
12. (1971)1 U.I.L.R. 201.

(6) Special Tribunal (Miscellaneous Offences) Decree No. 20, 1984.

(7) Conterfeit Currency (Special Powers) Decree No. 22, 1984.

(8) Military Court (Special Powers) Decree No. 23, 1984.

(9) Judgments of Tribunals (Enforcement, etc.) Decree No. 8, 1985.

(10) Endangered Species (Control of International Trade and Traffic) Decree No. 11, 1985.

A particular area to which the present regime employs ex-post facto type of legislation is where it sought to invalidate the actions of the functionaries of the ousted civilian Governments. It is pertinent to note that at the time these inpugned acts were done these functionaries were discharging their legitimate Consti tutional responsibilities. Nothing could be more a travesty of justice than this. Imagine "the brutal absurdity of Commanding a man to do something yesterday"[13]. One would think that it is an elementary principle of criminal responsibility and justice that a crime should be prospective in nature so as to serve as a guide to future conduct. A retroactive law does just the opposite. An act might be morally reprehensible but that is not enough to turn it into an unlawful conduct, unless it has been formally made so prior to its Commission. Fuller has succinctly, exposed the horror of retroactive legislation thus: "Taken by itself..... a retroactive law is truly a monstrosity. Law has to do with the governance of human conduct by rules. To speak of governing or directing conduct today by rules that will be enacted tomorrow is to talk in blank prose. To ask how we should appraise an imaginary legal system consisting exclusively of laws that are retroactive, and retroactive

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13. FULLER: The Morality of Law p. 59 -(1969.) Yale, University Press.

only, is like asking how much air pressure there is in a perfect vacuum"[14]. Professor Nwabueze has observed that about 522 decrees were passed by the Federal Military Government between 16th January, 1966 and 31st December, 1978 and nearly half of them have retroactive effect, where as 46 of them created various criminal offences that were non-existent prior to the commencement of the decrees[15].

3. THE JUDICIARY UNDER THE MILITARY REGIME

A commendable aspect of the present Military Regime and one which gives it an aura of benevolent despotism is its decision to leave the judicial structure largely untouched. But the fact remains incontrovertible that the Military Government arrogates unto itself the absolute power to dismantle or modify the judicial structure of the country in any manner and whenever it deems fit. That it has chosen not to do so is highly commendable though. This, however, does not suggest total absence of interference in the discharge of judicial functions by the ordinary courts of the land.

The Military Government has made it clear that it is not prepared to tolerate a situation whereby its decrees may be challenged in courts of law. Section 5 of Decree No. 1 states that "no question as to the validity of this or any other Decree or of any Edict shall be entertained by an court of law in Nigeria". This in unmistaken terms reaffirms the unassailability and absolutism of Military legislation. The intention is to deny the courts of the land any jurisdiction to decide questions pertaining to the

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14. IBID Page 53. For a general discussion on retroactive legislation see FINCH, J.E.: Introduction to Legal Theory 3rd Ed. p. 75, Chapter III, Sweet and Maxwell, London, 1979.

15. See 'Independence Anniversary Essay' in The New Nigerian of 1st October, 1984.

validity of Decrees and Edicts. It means, in other words, the ouster of courts' power of judicial review of the constitutionality of legislation. At any rate even if the courts still retain the power of judicial review, with reference to what is the validity of an enactment to be inquired? This cannot be done with reference to the pre-existing legal Order which is the annulled Constitution. But then can't the courts measure the validity of an enactment with reference to that part of the pre-existing Constitution which has been specifically or impliedly preserved thus forming part of the ne Legal Order? It is submitted that the courts still retain the power to inquire into the validity of any enactment and decide whether or not it conforms with the unsuspended part of the Constitution unless there is an express provision ousting the courts' jurisdiction in this regard. This contention is based on the now familiar legislative style of the Military whereby if it does not want any particular piece of legislation to be inquired into it says so expressly. It therefore follows that where there is no such express ouster clause the inference is the intention to preserve the courts' power of judicial review in relation to that piece of legislation. This, however, does not give the courts the power to inquire into the legislative competence or authority of the Military Government per se. Another side of this submission is that whenever there is an inconsistency between a decree and the unsuspended part of the Constitution the decree prevails and it is to be construed as an implied amendment to that part of the Constitution. This contention is promised on the superiority and absoluteness of the legislative authority of the Military. The provisions of the Constitution (Suspension and Modification) Decree 1984 and the provisions of the Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 13, 1984, have left no one in doubt as to the Supremacy and absoluteness of the legislative

competence of the Military Government.[16]

It is, however, generally accepted that the courts can entertain any matter which seeks to challenge an edict on grounds of inconsistency with the provisions of a decree.[17] But what is not certain is whether an edict could be challenged on ground of inconsistency with the unsuspended part of the Constitution 1979, in view of the provision in section 1(1) of the Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 13, 1984 which precludes any civil proceedings in respect of any matter or thing done pursuant to any Decree or Edict. Prior to the advent of the 1979 Constitution (during the last Military Regime) any executive act purported to have been done pursuant to a decree or edict might be open to challenge in the courts in order to determine the question whether or not the inpugned act was done in accordance with the tenor of the enabling decree or edict.[18] But it is not certain whether this is still possible in view of the clear provisions in Decree No. 13 of 1984. The democratic principle that for an executive act to be valid it must be kept strictly within the four corners of its enabling law. In the previous Military regimes in this country decrees were enacted expressly confering 'unquestionability' on any acts done or purported to have been done pursuant to such decrees. 'Unquestionability' was limited to a few individual decrees then. Conferment of 'unquestionability' had never been made a general legislative practice then, contrary to what obtains presently. One, therefore, justifiably

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16. See LAKANMI'S CASE and provisions of Military Government (Supremacy and Enforcement of Powers) Decree 1970.

17. See Decision in ADEMOLEKUN v. THE COUNCIL OF UNIVERSITY OF IBADAN S.C. 378/1966 of August, 1967.

18. See the decisions in CHIEF AGBAJE v. COMMISSIONER OF POLICE OF WESTERN STATE (1969) 1 N.M.L.R. 137, and E.O. EYO v. CHIEF OF STAFF (1970) 2 All N.L.R. 16.

laments the provisions in section 1(2)(b) of Decree No. 13 of 1984 which precludes any legal proceedings to question "any act, matter or thing done or purported to be done under or pursuant to any decree or edict; and if any such proceedings are instituted before, on or after the commencement of this decree the proceeding shall abate, be discharged and made void"[19]. Further, the section goes on to state that anything done or to be done in pursuance of any decree or an edict which contravenes any provision of Chapter IV (dealing with Human Rights) of the Constitution shall not be inquired into in any court of law.

The implication of the provisions in Decree No. 13 of 1984 as far as fundamental rights are concerned is of an unimaginable monstrosity. It is unprecedented in the history of Military regimes in this country or indeed anywhere. In the case of WANG CHING-YAO AND OTHERS v. THE CHIEF OF STAFF AND OTHERS[20], the Federal Court of Appeal, per ADENEKAN ADEMOLA, J.C.A., critically analysed the provisions of Decree No. 2 and Decree No. 13 vis-a-vis fundamental rights and concluded rightly that "on the question of civil liberties, the law courts of Nigeria must as of now blow muted trumpets".[21] Relying on the decision in WANG'S CASE, UBAONU J. of Kano High Court ruled that since "the courts do not indulge in an exercise in futility, I shall therefore blow a muted trumpet"[22].

4. MILITARY TRIBUNALS

A significantly noticeable trend in the method of adjudication under the present Military Regime is the increasing use of special

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19. THE FEDERAL MILITARY GOVERNMENT (SUPREMACY AND ENFORCEMENT OF POWERS) DECREE 1984.

20. (1985) CA/L/25/85 unreported.

21. IBID. at p. 22-23.

22. IN THE MATTER OF AN APPLICATION BY DANJU GIMBA & OTHERS FOR THE ENFORCEMENT OF A FUNDAMENTAL RIGHT (1985) SUIT No. K/M. 35/85 Unreported at p. 7.

tribunals that do not fit into the mainstream judicial hierarchy of the ordinary courts of the land. The fact that special tribunals are employed to adjudicate and determine, in most cases, the criminal responsibility of the citizens without a corresponding guarantee of fair trial cannot but offend against the rule of law. Such tribunals have been set up under various decrees with power to handle various matters which range from armed robbery, contravention of exchange control regulations, currency counterfieting to ritual murder, false or disparaging statements against the Government or its officers and recovery of public property acquired corruptly etc. Some of these tribunals are presided over by judicial officers, mostly High Court Judges, but many others are being presided over by Military or Police Officers. Their membership includes mostly persons lacking in any legal training whatsoever. Moreover, these members are mostly public officers. Therefore as far as the composition of these tribunals is concerned there is no way one can talk of independence and impartiality in the discharge of their functions.

All the time honoured and cherished principles of criminal justice which ensure to the accused a fair and just trial of his guilt are irrelevant in any determination by these tribunals. Take for instance the Military Tribunal on the recovery of public property illegally acquired by the former politicians established under Decree No. 13 of 1984. Firstly, the proceedings of this tribunal is not held in public. This, therefore, does not rule out the possibility of the prosecution employing some oppresive and intimidating tactics to obtain conviction, because the restraining influence of public glare is absent. Secondly, there is no provision for appeal against any conviction by the tribunal to any superior court of law or other tribunal. Instead, a decision of the tribunal

is only subject to confirmation or modification by the Supreme Military Council grounds upon which confirmation is based are not known. The affair is shrouded in utmost secrecy.

More drastic and draconian is the conviction of persons for an act that was not an offence at the time it was committed. For example, the spending of the contingency fund by the former State Governors should never have been made an offence unless it is proved that a Governor has enriched himself therefrom. This is because a Governor has the constitutional authority to spend from the contingency fund in the promotion and maintenance of security within the State; and any such spending is not subject to auditing and shall not be accounted for.[23] Similarly, prior to the enactment of Decree No. 3 there did not exist in our Statute books an offence known as acts contributing to the economic adversity of the nation. This nebulous and undefinable offence could mean anything. The Decree itself does not say what are the acts or Omissions that may amount to or constitute the offence. Even the Code of Conduct for public officers the provisions of which are very fluid, does not contain any offence similar to acts contributing to economic adversity of the nation. What may be regarded as coming close to this is the provision in Section 1 of the Code which states that "a public officer shall not put himself in a position where his personal interest conflicts with his duties and responsibilities.[24] This is contrary to section 33(8) of the 1979 Constitution which prohibits conviction for an act or omission which did not constitute an offence when it was committed.

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23. See section 117 of the 1979 Constitution of Nigeria.

24. See FIFTH SCHEDULE TO THE CONSTITUTION 1979, PART I.

An examination of the penalty the tribunal is empowered to award also reveals the extent of its oppresive nature. It is a universally accepted principle of criminal sentencing for the law to set the maximum term of imprisonment beyond which the courts cannot impose. The reverse is the case with the Tribunal for the recovery of public property. In accordance with section 11(1) of Decree No. 3 the Tribunal may impose upon any person convicted of an offence under the Decree a term of imprisonment not less than 21 Calendar years.

Sometimes the extent to which the Military Government is prepared to go in denying Nigerians their inelienable rights is stretched to unimaginable limits. Take the case of section 33 of the 1979 Constitution the provisions of which it decided to benovelently preserve albeit in a diluted form. In this section is enshrined most of the universally recognised legal principles which ensure and guarantee fair hearing and fair trial in the adjudicatory process in any civilised system of law. It is really sad to note how the Military Government has, by the provisions of its decrees and the tribunals established thereunder rendered these principles of fairness largely worthless. One of these important principle is provided in section 33(5) of the 1979 Constitution which states that "every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty". It is sad to note that this subsection has been specifically set aside by the provisions of some of the decrees. The Military Government could have achieved its purpose under the proviso to the subsection without having to render it completely nugatory and superflous. The proviso is to the effect that "nothing in this section shall invalidate any law by reason only that the law imposes upon any such person (the accused) the burden of proving particular facts".

The right to fair hearing pre-supposes that when a person has been arrested and charged with a criminal offence he is entitled under section 33(6) of the Constitution to be informed promptly in the language he understands, the nature and particulars of the offence and to be given adequate time and facilities for his defence. This principle does not find favour with the Military Government; witness the countless number of Nigerians who have been damped into detention all over the country without having been told the nature of the offence they are being charged with, talk-less of providing them with facilities for their defence. An amendment to section 7 of the Recovery of Public Property (Special Military Tribunals) 1984 provides that "where a person is charged with an offence but the evidence establishes and attempt to commit the offence he may be convicted of having attempted to commit that offence, although the attempt is not separately charged .....".[25] Also "where a person is charged with an offence under this Decree but the evidence established the Commission of another offence under this Decree the offender shall not be entitled to acquittal but may be convicted of that other offence .....". Presumably, without the necessity of framing a separate charge in respect of the new offence! Therefore, the inference is that commencement of trial by means of a charge framed in respect of each offence as practiced in the regular courts is not a necessary procedural requirement under the Decree. Also contrary to rules of evidence the Decree has rendered admissible the evidence of an accomplice. By the provision in Paragraph 6(3) of Part II of the Schedule to the Decree the onus of proving, at any trial, that there was no enrichment shall be upon the person charged. Thus an accused

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25. Section 7A(3) of Recovery of Public Property (Special Military Tribunals) (Amendment) (No. 2) Decree No. 14 of 1984.

is already presumed guilty right from the onset.

The requirement of impartiality in the adjudicatory process is irrelevant to proceedings before these special tribunals. For instance, the Special Military Tribunal for the recovery of public property is presided over by a Senior Military Officer to try persons accused of committing offences under the Decree. It turns out that the same person who presides over conviction also takes part in confirming his own decision at the Supreme Military Council by virtue of his membership thereof. This is contrary to the rule against interest and bias.

Meanwhile the denial of fundamental rights has reached its worst form when members of a particular political community are denied means of ventilating their grievances or when even debates on public issues of general concern to the Community are done at the risk of falling foul of the law the moment your views happen to embarass the government no matter how honest and factual such views may be. No one will refute the fact that the purpose and effect of Public Officers (Protection Against False Accusation) Decree No. 4 1984 is to inhibit the freedom of expression in Nigeria. Section 1 of the Decree states that "any person who publishes in any form, whether written or otherwise, any message, rumour, statement or report which is false in any material particular or which brings or is calculated to bring the Federal Military Government or the Government of a State or Public Officer to ridicule or disrepute shall be guilty of an offence". The repressive nature of this provision lies in the fact that even where the statement was not deliberately calculated to embarrass the Government or any public officer once the government or public officer is embarrassed by the statement the offence is committed.[26] Under section 3(1) of the Decree

26. See the case of Guardian Newspapers, Irahbor and Thomas before the Special Tribunal and later before the C.J. of Lagos State (unreported).

the burden of proving that the rumour, report or statement is true in every material particular is on the person charged. Query a system of law where criminal conviction is not based on proof beyond reasonable doubt and the accused is ab initio presumed guilty and the burden of proving otherwise is placed on him instead of the prosecution. The inescapable conclusion after examining the procedures and provisions of the Decrees establishing these Special Military Tribunals is that the concept of fair hearing is irrelevant in any proceedings before the Special Tribunals.

Nigeria has lived under State of Emergency for the better part of its independent existence. During the rein of Yakubu Gowon there were some sporadic arrests and detentions without trial of journalists and social critics. But the record of human rights emasculation of the Buhari/Idiagbon regime is unparalled in the history of Military rule in Nigeria. The situation was so critical that the usually timid Nigerian Bar Association decided to cry out against this wanton human rights violation. The Bar Association aimed its protestation at the composition and procedure of the Special Military Tribunals. Therefore at its 1984 Annual Convention in Lagos the Bar Association passed a resolution calling on members of the legal profession to boycott the Special Military Tribunals. There were, however, some serious dissenting views from some influencial members of the legal profession. The human rights situation was quite chaotic. Critics of the Buhari Regime, such as student bodies, Nigerian Labour Congress, Journalists and other pressure groups were all silenced and suppressed under the weight of Decree No. 4 of 1984 and the omnipresent National Security Organisation.

In the morning of 27th August, 1985 yet another Coup d'etat took place. Among the reasons for the change of Government, this time around, was the restoration of human dignity and human rights to Nigerians. The new regime, headed by Major-General Ibrahim B.

Babangida as the President, ordered for the conditional but immediate release of all political detainees who had not been convicted by the Special Military Tribunal on Recovery of Public Property. He proceeded to disolve the tribunals and set up Review Panels to review the cases of persons convicted and sentenced to various terms of imprisonment by the Special Military Tribunals. These Review Panels are high powered Judicial Tribunals headed by eminent Judges. The Panel for the review of cases of persons convicted by the Special Military Tribunal for the Recovery of Public Property under Decree No. 3 is headed by Justice Muhammed Bello of the Supreme Court. Another Panel to look into the justification or otherwise for the continued incaceration of those persons who are still in detention and to determine whether or not they have a case to answer is headed by Justice Uwaifo, a High Court Judge. Justice Uwaifo's Panel is also empowered to look into the cases of persons convicted under the Miscellaneous Offences Decree No. 20. The third Panel is head by Justice Aguda - retired Chief Judge of Oyo State and is to review cases of persons convicted under the Exchange Control (Anti-Sabotage) Decree No. 7.

An examination of some of the cases that came before these Review Panels will reveal the bizarre and inquisitorial nature of the proceedings of the Special Military Tribunals.

Alhaji Wada Abubakar[27] and two others appeared before the Kaduna Zone of the Special Military Tribunal convened under the Recovery of Public Property (Special Military Tribunals) Decree No. 3 of 1984 as amended by Decree No. 14 of 1984, on a charge of seven counts of alleged offences under the said Decree. Alhaji Wada Abubakar was only charged with Count I, that he conspired with

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27. The main thrust of the discussion in Alhaji Wada's case was derived from the submission of his Counsel - Chief Bayo Kehinde (SAN) before the Justice M. Bello Review Panel sitting in Lagos.

two others to engage in corrupt practices by accepting a total sum of ₦774,133 as gratification from one Andrew L. Holmes, Director of Taylor Woodrow (Nig.) Ltd. on account of a contract for the construction of a New City Centre Project in Kano, thereby committed an offence contrary to section 1(1a)(d) and punishable under section 11(1)(a) of the Recovery of Public Property (Special Military Tribunals) Decree 1984 as amended.

Four witnesses gave evidence for the prosecution but only Mr. Holmes (P.W.I) mentioned in his testimony that Alhaji Wada Abubakar had sent for him and asked him money which he Mr. Holmes refused. Meanwhile Mr. Holmes said he gave money to the other two accused persons at various times - at their request. Mathew Omoblude, DSP who is P.W.2 said that he merely took the statement of Alhaji Wada Abubakar but did not carry out any investigation. Another Police Officer, Abubakar Ahmed (P.W.3) said that he investigated a case of receiving gratification and took statement from P.W.I and P.W.4 and one accused person, not Alhaji Wada Abubakar.

From the evidence before the Tribunal, the offence of conspiracy could not have been established as the principal prosecution witness, Mr. Holmes talked of demand for money from him by each of the accused persons separately not together. The Police Officers who took statements and investigated the case did not adduce any direct evidence of any offence committed by the accused - Alhaji Wada Abubakar, except what they read from the statements which was hearsay. When all the three accused persons were asked to defend themselves they all gave positive evidence that there was no agreement between them to take any money from Taylor Woodrow (Nig.) Ltd. or from its representatives, Mr. Holmes.

At the end of the trial, the Special Military Tribunal convicted the accused, Alhaji Wada Abubakar not count by count nor did it relate the convictions to the counts of the charge before the Tribunal. The convictions were as follows:-

(1) All the accused persons were convicted of conspiracy to receive ₦774,133.00 from Taylor Woodrow;

(2) Second accused, Alhaji Wada Abubakar convicted of corruptly enriching himself of ₦250,000 which he received as kick-back;

(3) Second accused, Alhaji Wada Abubakar, convicted of corruptly enriching himself of ₦100,000 as gratification.

In respect of each of the above-mentioned offences (not counts) the accused was sentenced to 21 calendar years in prison and the sentences were to run concurrently. In addition to the sentence, Alhaji Wada Abubakar was also ordered to refund ₦350,000 to the Federal Military Government "being an amount of money he had received as gratification from Taylor Woodrow (Nig.) Ltd."

In asking the Review Panel to set aside the convictions against the accused, the defence counsel, Mr. Bayo Kehinde (SAN) gave the following grounds:-

(1) The Special Military Tribunal erred in law in convicting the Applicant, Alhaji Wada Abubakar, of the offence of conspiracy with the others to receive the sum of ₦774,133 from Taylor Woodrow Ltd. - when no agreement between the accused persons, which is the most important ingredient of the offence, was established in any way in the evidence before the Tribunal.

(2) The Tribunal erred in law when it convicted the Applicant, Alhaji Wada Abubakar, for the offence of (a) corruptly enriching himself to the tune of ₦250,000 which he received as kick-back, and (b) corruptly enriching himself by receiving ₦100,000 from Taylor Woodrow Ltd. as kick back - when the applicant was not given any opportunity to plead to them or to present his defence to them and there was no evidence to that effect at all at the trial. Because the applicant was not given notice of the offences or charges, if any, for which he was convicted the whole proceeding of the Special Military Tribunal and the Convictions were contrary to section 33(6) of the 1979 Constitution and a gross violation of the Applicant's rights as enshrined therein.

(3) The Tribunal erred in law in convicting the Applicant for count 1 when the offence charged is not defined. The offence charged in Count 1 is conspiracy to engage in "Corrupt Practices" contrary to section 1(1A)(a) of the Decree. But "Corrupt Practice" is not defined in the Decree nor in any written law and therefore the purported convictions offends against section 33(12) of the 1979 Constitution.

In the circumstance, therefore, the Applicant has been denied a fair trial as envisaged by section 33 of the 1979 Constitution and the effect of the irregularity is fatal to the whole proceedings which should be declared null and void and of no effect whatsoever.

In another case, Professor Godwin A. Odenigwe[28] was a Special

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28. I am indebted to Lawyer Peter Olumo's discussion of this case as published in the National Concord of 13/9/85.

Adviser on Political Affairs to the President and a member of the Presidential Task Force on Rice under the Chairmanship of Dr. Umaru Dikko, Minister of Transport. As a member of the Task Force (PTF) Professor Odenigwe recommended one Messrs Inyita Trading Company as distributors of Task Force Rice. He also, on the instruction of Alhaji Umaru Dikko, the Chairman signed the letter of appointment of Inyita Trading Company as distributors of the rice. This Company was supplied some quantity of rice on credit through Messrs Pan Atlantic Company, the clearing agents of PTF, and as at the 31st December, 1983 when the Army took over the Government a debt of ₦804,218 to the PTF was still outstanding against them in the books of Pan Atlantic Limited. This represented the value of 21,164 bags of rice claimed, rightly or wrongly, by the Company "to be bad, damaged and unfit for human consumption". No decision was taken on this claim and so the debt still appeared in the books of Pan Atlantic as a debt to the Federal Government, and so Inyita Trading Company was obliged to pay the amount to the Federal Government.

On 21st March, 1985 Professor Odenigwe was charged before the Lagos Zone of the Special Military Tribunal for the trial of offences under the Recovery of Public Property (Special Military Tribunals) Decree 1984. The charge was in the following terms:-

> "That you, Professor Godwin Odenigwe, being a public officer to wit: Presidential Adviser on Political Affairs and Vice-Chairman of the Presidential Task Force on Rice..... had corruptly enriched yourself by defrauding the Federal Government of Nigeria's Presidential Task Force on Rice of the sum of ₦804,218.00 .... being the proceeds of sale of 21,164 bags of rice belonging to the Federal Government of Nigeria which you declared or caused to be declared as bad, damaged, and unfit for human consumption when you knew that in fact the said 21,164 bags of rice were good and were sold for the said sum of ₦804,218.00 which sum you converted to your own use....."

In actual fact Professor Odenigwe was in no position to declare any rice bad or write off a debt owed to the FTF and no rice had been declared bad by the FTF though a claim to that effect had been put forward by the distributor. So there could have been no question of defrauding the Federal Government since the relevant books showed a debt of ₦804,218.00 outstanding against Inyita Trading Company. It was proved, during the trial, that Professor Odenigwe was not a shareholder in, or registered co-proprietor of Inyita Trading Company and was not a signatory to the cheques of the Company. Not surprisingly, Professor Odenigwe was discharged and acquitted of the charge of fraud, conversion and unjust enrichment.

The Tribunal, however, felt that the Professor's involvement in the business of Inyita Trading Company was much deeper than was called for by the normal run of duty. In particular, the Tribunal took a very serious view of the fact that the alleged reason for recommending Inyita Trading Company as distributors was to enable the rice allocated to them to be sold in the Eastern States whereas all available evidence showed that all the rice was in fact sold in Lagos. The Tribunal, therefore, found the Professor guilty of "abuse of office", an offence for which he had not been charged and for which he had not been given notice or opportunity to defend himself.

The basis for this offensive and bizarre procedure is to be found in Amendment No. 2 to the Recovery of Public Property (Special Military Tribunals) Decree 1984 No. 14. Section 1(4) which provides as follows:-

> "Where a person is charged with an offence under this Decree but the evidence established the Commission of another offence under this Decree the Offender shall not be entitled to acquittal but he may be convicted of that other offence....".

Professor Odenigwe could therefore not be said to have had a fair trial as the procedure adopted by the Special Military Tribunal was a violation of section 33(b) of the 1979 Constitution.

Respect for human rights and the dignity of man was said to be the pivot around which policies of the Babangida Government revolve. But is it not hypocritical and subterfuge on a grand scale for a Military regime to claim to be championing the course of human rights? Does this not amount to a negation of its very nature as an autocratic and despotic regime that came to power through the barrel of the gun? Recent happenings have justified this kind of cynicism in Nigeria. Inspite of its professed respect for human rights the Babangida Administration has not thought it fit to abrogade those decrees for which it toppled the Buhari Administration. Does this development not justify the suspicion that the abrogation of Decree No. 4 of 1984 was only meant as a subterfuge to win over the Nigerian Press in support of the Government's deception game?

A clear confirmation of these fears was the recently announced amendment to Decree No. 2, 1984 State Security (Detention of Persons) Amendment Decree 1986. The main thrust of the amendment is to have increased the period for which a person can be detained without trial from three months under the Buhari regime to six months. And under the 1984 Decree the power to detain under the decree was exercisable by the Chief of Staff Supreme Headquarters alone. But now in addition to this the Inspector-General of Police can also exercise this power.

CHAPTER EIGHT

CONCLUSION

The essay started off with an attempt to highlight the futility of giving a generalised definition for a concept such as fair hearing which is vast and constantly ever expanding. The thinking was that any definition proffered would only be unduly restrictive thus impugning upon the very resilent nature of the concept. Rather a pragmatic approach was adopted whereby all the known constuents (rules) of the concept were analysed and examined throughly thereby enabling an insight into its nature and characteristics. This led to the conclusion that the concept of fair hearing was different from Rules of natural justice with which it was sometimes erroneously confused. It had been shown that fair hearing was a much wider concept and in fact natural justice was just a set of rules that evolved within the historical development of the concept of fair hearing.

The whole gamut of the Nigerian Legal System was subjected to intense analysis the intention of which was to determine to what extent fair hearing was reflected and applied. The fact that the Nigerian Legal System is a derivative from the common law system of the eastwhile colonial masters made it imperative to start the analysis with particular reference to the common law jurist's own contribution to the development of fair hearing. ... Their contribution was incontrovertibly spectacular in that it has, amongst other things, demonstrated unequivocally the futility of studying law by reference to its formal content alone. It was in the common law courts that the concept of fair hearing had been translated into a concrete normative rule justiciably applied in Courts of Law. It was also in the common law courts that the most spectacular expansion of the scope

of the concept was witnessed. It had been demonstrated that fair hearing developed from a simple rule of procedural fairness applicable to courts of law and similar judicial tribunals to a requirement of fairness applicable to administrative tribunals and other bodies that were anything but judicial.

The most significant expression of the universal nature of fair hearing was its recognition by supra-national bodies such as the United Nations, the European Commission on Human Rights, the Organisation for African Unity. It had been shown that these international organisations had given full expression to the concept of fair hearing in their various charters, Declarations and Conventions in parallel with human rights. The concept having been so universally recognised it became fashionable for all modern nation-states to incorporate it into their national constitutions as one of the fundamental human rights deserving special protection. With the attainment of political independence in 1960, Nigeria promulgated a Constitution the principal feature of which was the entrenchment of a chapter on fundamental human rights amongst which Fair Hearing was prominent. The discussion centred around the provisions of section 33 of the 1979 Constitution with of course numerous references to provisions of previous Constitutions on the concept. This had to be so not only because the 1979 Constitution was the most recent but it was also the most comprehensive in its provisions relating to the concept of fair hearing. In order to achieve clarity of presentation section 33 was divided into two; fair hearing in civil proceedings and in criminal proceedings, thus making two separate chapters (3 and 4). The discussion in relation to criminal proceedings was meant to bring out the nature of the principles enshrined in subsection 4 to 13 of section 33 and to examine their efficacy in order to see the extent to which they strengthened fair hearing. The conclusion reached was that on the whole these

principles were adequate to guarantee fair hearing to accused persons. Any shortcoming could therefore be attributed to the individual judges own perception of these principles in relation to their application in particular instances. In addition to those principles traditionally associated with the concept of fair hearing section 33 of the 1979 Constitution provided new procedural safeguards that were hitherto unknown. For instance, subsection (7) of section 33 has made it a duty upon Courts of law to keep records of criminal proceedings and the accused person or any person in his behalf would be entitled to obtain copies of the judgment within seven days of the conclusion of the case. This was an unequivocal indication of the esteem with which the concept of fair hearing was viewed in Nigeria. The comprehensiveness of the provisions in subsection (4) and (6) of section 33 was also a mark of respect for the concept of fair hearing and a recognition of its importance in guaranteeing fair criminal trials.

Likewise in civil proceedings, the provisions in subsection 1-3 of section 33 were equally unequivocal in ensuring procedural fairness. A person was entitled to a fair hearing in matters affecting his civil rights or obligations. This right was protected whether the proceeding was against or by an individual or any government or other authority. Subsection 1 had also made it a requirement of fair hearing that the court or tribunal that was to decide must necessarily be an independent and impartial one. Independence of the judiciary was thus made an inherent part of the concept of fair hearing. In line with this approach, therefore independence of the judiciary was treated throughout this essay, as a requirement of fair hearing, the absence of which would be a negation of the concept of fair hearing within a legal system. Though studies had shown that the Nigerian judiciary had always

been independent yet certain weaknesses in the system had been identified. For instance, the composition of the Federal Judicial Service Commission which was responsible for appointment to judicial offices was found to be defective in many respects. The present composition under the 1979 Constitution had shown a preponderance of political appointees thereby making interference by the executive arm of the government possible.

However, it was the contention of this writer that structural safeguards alone were not enough to guarantee independence of the judiciary, rather adequate training, personal intergrity and the judge's own perception of the strategic importance of his office would be a stronger armor against any possible interference with the independence of the judiciary.

Determination of questions affecting a person's civil rights and obligations by bodies or authorities that were not strictly courts of law or tribunals had been seen to be a reality of modern governments. In recognition of this reality section 33 had placed a duty upon such bodies to observe all the principles of fair hearing. Subsection 2 (a) and (3) stated that law administering authorities must provide for an opportunity to persons whose civil rights or obligations would be affected by its decision to make representation to it and that its decision should not be made conclusive and final. All these were justifiable extensions of fair hearing to cover new grounds. An important innovation in subsection 2(b) of section 33 was to have made an appeal a right and a requirement of fair hearing.

In the treatment of the constituents of fair procedure particular attention was paid to decisions of Nigerian Courts, especially the Supreme Court. This was meant to bring out into sharper focus the exact attitude of the Courts to the constitutional provisions in

respect of fair hearing. Overall assessment revealed a readiness on their part to give full vent to the rules of fair procedure especially where the decision of an administrative body threatened the civil rights or obligations of a citizen. In this connection, notice must be taken of the highly erudite decision of the Supreme Court in the recent case of Professors Olaniyan, Olawoye and DUROJAIYE v. UNIVERSITY OF LAGOS COUNCIL, in which the honourable court held that "the principle of eternal justice" dictated that a servant could not lawfully be dismissed without first telling him the allegations against him and hearing his defence or explanation thereto[1]. This commendable posture notwithstanding, mention must be made of the occasional undue legalism exhibited by the Supreme Court in some of its decisions.

The extent of the esteem with which the concept of fair hearing was held under the Nigerian Legal System should be seen through the exceptions the law provided to it. While discussing 'State Privilege' or 'Privileged Evidence' it had been shown that the position of the law was very unsatisfactory prior to the 1979 Constitution. Section 22(3)(b) of the 1963 Constitution dealing with private disclosure of evidence applied only to civil proceedings. In other words, under the doctrine of State Privilege, a document could be totally excluded from examination by the court even where its production would be vital in proving the innocence of the accused person. This, certainly, was a denial of fair hearing. The courts did not hesitate to say so whenever occasion warranted. Justice Agula (retired) of the Ibadan High Court, when dealing with section 219(1) of the Evidence Act, which stated that a Minister or Governor might object to production of a document where it was

1. (1985) S.C. 53/7/1985 unreported.

in the public interest so to do, held that such a law was inconsistent with the constitutional right to a fair hearing.[2]

Even the Supreme Court had recognised the inconsistency of section 219(1) and (2) of the Evidence Act with the doctrine of fair hearing when it decided that the privilege was not absolute and that such evidence could be heard in private.[3] But the major demerit of the Supreme Court's decision was that it fell short of declaring the relevant provisions of the Evidence Act as null and void on grounds of the glaring inconsistency with section 22(1) of the Constitution. Happily, the position had been radically improved under the 1979 Constitution in that private disclusure under section 33(13)(b) was made applicable not only in civil but criminal proceedings as well. On the basis of this significant improvement, therefore, one could posit that section 219(1) and (2) of Evidence Act had been rendered superflous. This much was implied in the decision of the Oyo State High Court in OLALEKE v. CONCORD PRESS NIGERIA LIMITED.[4]

Under the doctrine of State Immunity a person could be denied a fair hearing or a hearing at all, in a case where the Government was the defendant.[5] Prior to the promulgation of the 1979 Constitution a person could proceed against the government only by means of Petition of Rights Act. It had been shown in the chpater dealing with State Immunity that the Petition of Rights Act was a piece of legislation reminecent of a normachical government hence a misnomer

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2. HAMEED ALIMPA v. BALOGUN (1970) unreported.
3. AFRICAN PRESS LIMITED v. THE ATTORNEY-GENERAL OF WESTERN STATE (1965) All N.L.R. See p. 125.
4. (1982)3 N.C.L.R. 434.
5. See B.A. SHITTA-BEY v. FEDERAL PUBLIC SERVICE COMMISSION (1981) 1 S.C. 40, 58.

and an aberration in a Republican system like Nigeria. The submission made therein was that though the 1979 Constitution had not expressly repealed the Petition of Rights Act yet an examination of its various provisions would lead one to conclude that it had been repealed by necessary implication. This was buttressed by the provision of section 6(6)(b) which extends the judicial powers of the Federation over matters between persons or between government or authority and any person in Nigeria. Also in support of this submission decisions of various courts including the Supreme Court were cited.[6] The persons who would enjoy immunity from law suit were expressly mentioned in section 267 of the 1979 Constitution and included the President and his Vice, State Governor and his Deputy. Even in respect of these the immunity was limited to the period during which they were performing the functions of their offices. This meant that they could be proceeded against the moment they ceased to hold office.

The offence of contempt is one which is sometimes regarded as an exception to rules of fair hearing. However, it had been established through case analysis that whenever a Court decided to invoke its power to punish for contempt the requirements of fair hearing must not be lightly disregarded. In other words the judge against whom the contempt was committed must not try the case but refer it to another judge for trial.[7]

The most inopportune period in the history of the concept of fair hearing, indeed all human rights, in Nigeria, was the Buhari/ Idiagbon interegnum. That regime would go down in history as one

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6. See RANSOME-KUTI v. ATTORNEY-GENERAL OF NIGERIA (1985)2 N.W.L.R. 211 (Supreme Court).
7. AWOBOKUN AND ANOR. v. TOUN ADEYEMI (1968) N.M.L.R. 289.

during which all the fine democratic norms existing in Nigeria were thrown overboard. It was a regime characterised by a wanton resort to ad heminem legislation, detention without trial and trial, if any, by kangaroo type tribunals! The regime was also marked by frequent use of ex post facto legislation. As a matter of fact another dimension was added to the nature of retroactive legislation whereby it was being used as a tool to invalidate the actions of the previous civilian rulers even though these actions were quite lawful at the time they were committed.

The administration of justice saw its darkest days during this regime. Tribunals were created to adjudicate breaches of the newly created offences. These tribunals were for the most part manned by persons that lacked any judicial training whatsoever. Trial before these tribunals was no more than a drama played by the prosecution on its own stage where the accused persons were mere spectators. The decisions of these tribunals were characterised more by their inherent inconsistency and illegicality than by the quality of justice contained herein. Principles of procedural fairness were thrown to the winds and the onus of rebutting a presumption of guilt was on the accused person who had already been denied excess to documents and other facilities for the preparation of his defence. There was no appeal against judgments of the Military Tribunals even though some of them were empowered to pass a death sentence. In short, fair hearing became an aberration before these Military Tribunals.

The judiciary as an institution, experienced its most trying moments under the Buhari/Idiagbon regime. The assaults on the independence of the judiciary and its sanctity knew no bound. In addition to frequent use of legislative adjudication through

the promulgation of ad heminem laws, decrees such as Decree No. 1 were enacted in order to preclude Courts of law from entertaining any questions as to the validity of any decree or edict. More montrous was Supremacy and Enforcement of Powers Decree No. 13 of 1984 which precluded any legal proceedings to questions any act, matter or thing done or purported to be done under or pursuant to any decree or edict, and if any such proceedings were instituted before, on or after the commencement of this decree the proceeding shall abate, be discharged and made void. Furthermore the Decree stated that anything done or to be done in pursuance of any decree or an edict which contravened any provisions of Chapter IV of the 1979 Constitution dealing with Human Rights should not be inquired into in any court of law. In addition to the wanton erosion of its judicial powers, the judiciary was also not spared from the retrenchment propensity of the Buhari/Idiagbon regime. This dastardly state of affairs was aptly summed up by a judge of the Federal Court of Appeal when he said that "on the question of civil liberties, the law courts of Nigeria must as at now blow muted trumpets".[8]

However, everything was not lost as far as fair hearing is concerned in Nigeria as there is still a silver line in the clouds. A very encouraging note has been sounded by IRIKEFE, J.S.C. in ARICRI v. ELEMO[9] where the eminent Judge said that fair hearing under the relevant provisions of our Constitution is not negotiable.

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8. Per Adeneka Ademola, J.C.A. in WANG CHING-YAO v. CHIEF OF STAFF, (1985) at p. 148.

9. (1983)1 S.C.L.R.1.

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