THE APPLICATION OF NATURAL JUSTICE IN THE EXERCISE OF ADMINISTRATIVE POWER IN NIGERIA

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ABSTRACT

This paper intends to discuss the adverse effect of the exercise of administrative power on an individual victim or a segment of the society. This is in line with the general principle of the law which is to safeguard individuals in the society from wrongful loss and to prevent others from wrongful gain with a view to establish a just and fair society. The means to check the misuse, misapplication and abuse of administrative power is the application of natural justice in exercising this power. In the Nigerian legal system, it is a trite rule that natural justice is the rule against bias and the right to fair hearing. In the context of the exercise of administrative power, removing bias from a decision-making process, and ensuring fairness in the decision made is the main requirement of natural justice. The aim of this article is to discuss the application of the principles of natural justice as the rule against bias and the rule for fairness in the exercise of administrative power. For the purpose of this researcher, the following findings were made: The exercise of administrative powers has not always applied Natural Justice because of the realization that the circumstances of a case differs from another, therefore every case must be handled based on its peculiar circumstances, the rule on Fair Hearing does to necessarily include legal representation, or oral representation, or the right to cross examine witnesses. Inline the findings made the following recommendations were proffered: That irrespective of the circumstances of each case, the rules of natural justice must apply with a view to safeguard the interest of an individual from being a victim of abuse of power and ultimately suffering loss of any kind wrongfully, That the right to fair hearing must be regarded as

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fundamental to the general rights of an individual. Therefore, any decision that is made which adversely affects an individual must be seen to have complied with the rules of fair hearing.

Keywords: Administrative Power, Natural Justice, Administrative Law, Bias, Natural Law, Justice, Natural Justice, Constitution, Human Rights

1. INTRODUCTION

Administrative power is the power to administer or enforce a law. This power can either be executive, legislative or judicial in nature. It is exercised with a view to carry the law into effect, through the practical application of the law, and also the execution of the principles prescribed by the lawmaker[1]. The authority to make rules and regulations in order to carry out a policy declared by the lawmaker is an administrative power. This include the power of an administrative agency to make rules in order to carry out a policy[2]. It is the law (Act/Statute) that creates the administrative agency that determine the extent of its authority and power. The regulation and control of the exercise of administrative power is the main purview of Administrative Law. Administrative Law is the law concerning the powers and procedures of administrative agencies including the law governing judicial review of administrative action.[3]

The tendency to adversely affect the right and interest of an individual in the course of exercising administrative power exist and ought to be checked to curtail abuse of Administrative Power. This is more so when the result of the adverse effect of exercising administrative power is the probability of wrongful loss to an individual victim or wrongful gain to another beneficiary.

This paper intends to discuss the adverse effect of the exercise of administrative power on an individual victim or a segment of the

[1] (https://administrativelaw.uslegal.com/administrative-agencies/characterization-and-classification-of-administrative-powers/). Accessed on Saturday, September 25, 2021 at 2:30pm.
[2] Robertson v. Schein, 305 (Ky. 1997)
[3] Davis, K.C. (2016) *Administrative Law and Government.* The University of Chicago Law Review. Vol.44 No.1 pp3-5.

society. This is in line with the general principle of the law which is to safeguard individuals in the society from wrongful loss and to prevent others from wrongful gain with a view to establish a just and fair society[4].

The means to check the misuse, misapplication and abuse of administrative power is the application of natural justice in exercising this power. In the Nigerian legal system, it is a trite rule that natural justice is the rule against bias and the right to fair hearing[5]. The rule against bias which is expressed in the latin maxim *nemo judex in causa sua* insist that "no man adjudge in his own case", aims at preventing bias against individuals. The effect of this rule is to present a plain levelled ground as a step towards equality before the law. The right to fair hearing, on the other hand, is also expressed in the latin maxim *audi alteram partem* means "hear the other side"[6]. The effect of this rule also is to allow an accused person to know what he is accused of, to know his accuser and to defend himself as best as he can[7]. In the context of the exercise of administrative power, removing bias from a decision-making process, and ensuring fairness in the decision made is the main requirement of natural justice.

The fact that the two arms of natural justice, which are *nemo judex in causa sua* and *audi alteram partem* appear to be rules of adjudication on the face of it, i.e, they refer to judicial procedures, is not entirely true. They do not necessarily depend on a judicial process to operate. They must be regarded as the rule against bias and the rule for fairness respectfully.

The aim of this article is to discuss the application of the principles of natural justice as the rule against bias and the rule for fairness in the exercise of administrative power.

[4] Murphy, M. (2019) *The Natural Law Tradition in Ethics*, The Stanford Encyclopedia of Philosophy, Stanford University Press, pp 119-123.
[5] The rules of Common Law operates in Nigeria.
[6] Ibid
[7] Ibid

II. NATURAL JUSTICE

Natural justice has meant different things to different peoples at different times. In its widest sense, it was formerly used as a synonym for natural law. This is however no longer the case today as natural justice and natural law may be similar but are different[8]. It has been used to mean; that reasons must be given for decisions and that a body deciding an issue must only act on evidence of probative value. Some who have asserted that the maxim "*Actus non facit reum, nisi mens sit rea*" is a principle of natural justice.[9]

Whatever the meaning of natural justice may have been, and still is to people, the common law lawyers have used the term in a technical manner to mean that in certain circumstances, decisions affecting the rights of citizens must only be reached after a fair hearing has been given to the individual concerned and without bias to his rights. In this context, natural justice requires two things, namely, *AUDI ALTERAM PARTEM* and *NEMO JUDEX IN SUA CAUSA*[10].

In Continental countries *audi alteram partem* is known as *audiatur et altera pars*. [11] and we find that even in the bible[12]. It goes without saying that a decision which is arrived at through the understanding of all the issues involved will be more rational.

The *Nemo judex* rule, commonly referred to as the rule against bias, ensures that a "judge" is not partial. He should not be influenced by personal interest for jurists and laymen alike have insisted that justice should be manifestly seen to have been done. Where the judge has interest in the subject matter, or in the party, or his own financial interest is involved, the objectivity of his decision is bound to be questionable[13].

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[8] Forbes, J.R.S. (2006) *Natural Justice: General.* Justice in Tribunals. The Federation Press, Sydney, Australia. pp 100-118.
[9] Jackson, P. (2008) *Natural Law.* Longman Press. London, United Kingdom. *pp.* 1—2
[10] ibid
[11] Smith, A.S. (2007) *Judicial Review of Administrative* action Penguin Press Ltd. United Kingdom (3rd Ed.). p. 134
[12] Op.cit
[13] Ibid

III. APPLICATION OF THE RULES OF NATURAL JUSTICE IN COMMON LAW

In order to understand the meaning of natural justice and how it is applied in the exercise of administrative duties, it is important to consider its application in other common law jurisdiction.

UNITED STATES

In the United States the application of the principles of fair hearing is guaranteed by the constitution which provides that no person shall be deprived "of life, liberty or property without the due process of law"[14]. This has been interpreted to mean that the rights of the citizen cannot be interfered with unless he is first given a fair hearing [15]. It does not mean, however, that in all circumstances there must be judicial hearing. It only means that in deciding matters affecting peoples and interests, the procedure must be in accordance with the elementary principles of fair hearing. This means there must be notice and an opportunity to be heard or defend before a competent tribunal.[16] The United States went further to enact the Administrative Procedure Act in 1946 which lays down rules for fair administrative proceedings. [17]

The American courts too, have not always applied these laws mechanically. They have realized that the procedure must be adapted to the circumstances of the case in order to produce administrative efficiency and in recognition of the fact that administrative procedures rest on different principles[18].

UNITED KINGDOM

In the United Kingdom, the application has been left largely to the judges. And the rules so far developed are largely judge-made rules[19]. Several judicial decisions and dicta have tried to explain the precise

[14] Sixth Amendment to the United States Constitution
[15] Whitmore, B. (2005) *Australian Administrative Law.* Longman Press Ltd. (3rd Ed.) p. 145
[16] Morris, D.F. (2010) *A Treatise on Administrative Law.* Oxford Press. (1956) p. 297
[17] This Act, unfortunately, is restricted to agencies of the Federal Government.
[18] *Barker v. Wingo* 407 U.S. 514 (1972)
[19] Schauer, F.F. (2009) *English natural justice and American due process: An Analytical Comparison*. William and Mary Law Review. United Kingdom. pp 47-72.

meaning of the doctrine. Thomas, J; lamented that "the law in natural justice is not in a satisfactory state and it is somewhat lacking in precision in the occasion in which it should apply"[20].

However, from the decided cases, certain points stand out as obvious. For example, *audi alteram partem* does not mean that in all cases the parties must have a right to a legal representation. Similarly it does not mean that the representation must necessarily be oral or that the affected party must be given the opportunity of cross-examining witnesses.[21]

Furthermore, the rule against bias is sometimes difficult to apply in disciplinary cases for, "those who have to make the decision can hardly insulate themselves from the general ethos of their organization. They are likely to have firm views about the proper regulation of its affairs and they will often be familiar with issues and conduct of the parties before they assume their roles as adjudicators.[22]

Under these circumstances therefore, the application of the rule against bias should be tempered with realism. There should be a relaxation of the rules. But such relaxation should not be carried to the extent where manifest injustice can result. In this regard, the case of ***WARD* v. *BRADFORD*** [23] is illustrative. In that case, some women students in a Teachers' College were found to have men in their rooms in the early hours of the morning. The Principal of the school declined to exercise her powers to refer the case to the disciplinary committee of the school. There upon, the governing body of the school amended the rules giving themselves power to refer the case to the committee which incidentally included members of the governing body. The committee recommended the expulsion of one of the students and the governing body confirmed it. The Court of Appeal held that they had acted fairly and declined to intervene.[24]

This was a clear case of bias. The members of the governing body have shown clear intention of their interest in the matter. It would be

[20] *Lawlor* v. *Union of Post Office Workers [1965]* Ch. 712, 718.
[21] *University of Ceylon* v. *Fernando* [1960] 1 All E.R. 631
[22] Smith *op. cit.*
[23] (1971) 70 L.G.R.
[24] Ibid

unrealistic to expect them not to have made up their minds one way or the other. But it would appear that the decision was influenced by the moral turpitude of the offence.

NIGERIA

In Nigeria, section 36 of the Constitution provides that in the determination of civil rights and obligations, a citizen shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law"[25]. Like all provisions on fundamental human rights this, too, has its limitations. Fair hearing here refers to the rules of natural justice[26].

The courts, in a decided case, have held that rules of natural justice must be observed where the medical disciplinary committee struck out the name of a medical practitioner [27]. The committee's decision was quashed on the grounds that the rule that no one should be a judge in his own cause had been violated because the Registrar who acted as the prosecutor also took part in the committee's deliberations. In this case, however, the Law provided directly for the setting up of the committee.[28] The Privy Council had held that "a judicial proceeding is nonetheless a judicial proceeding subject to prohibition and certiorari because it is subject to confirmation or approval by some other authority"[29].

IV. PROBLEMS OF APPLICATION OF NATURAL JUSTICE

Judges have unanimously agreed that it is an inherent power of the courts to apply the rules of natural justice except where they are expressly excluded by statute. In other words, like the question of *mens rea* in an offence, the courts start with the presumption that natural justice is required of every person or body of persons exercising powers which affect the rights of individuals. The justification for this approach is that the law maker never intends that power conferred on

[25] Constitution of the Federal Republic of Nigeria, 1999.
[26] Op.cit
[27] *Alakija* v. *Medical Disciplinary Committee (1959) 4* FSC. 38
[28] Medical Practitioners and Dentist Act. Cap. M, 116 of L FN, 2010.
[29] *Estate & Trust Agencies* v. *Singapore Improvement Trust* 1937] A.C. 898

people should be exercised unfairly and unreasonably or that it should be abused. If the law maker so intends, he must expressly say so.

The basic problem facing the courts however has been to decide the type of acts that the rules are applicable to. There are two lines of cases representing two views. Until recently, the rules of natural justice were said to be applicable only to judicial acts.[30] Thus in *NAKKUDA ALI* v. *JA YARATNE*[31] a controller of textiles had power to cancel the license of a textile dealer where he believed on reasonable grounds that the dealer was unfit to continue in business. The Privy Council held that in withdrawing the license, the controller was acting administratively and not judicially and he was therefore, not required to give the dealer a hearing.

In the Nigerian case of *UDEKWE OKAKPU* v. *RESIDENT PLATEAU PROVINCE*[32] it was held that a resident's power to revoke a goldsmith's license under section 6(1) of the Goldsmiths ordinance was administrative. Therefore the Resident was not required to give the plaintiff a hearing.

These decisions were against the decision of the 19th century case of *CAPEL* v. *CHILD*[33] where the court had held that before a Bishop could make an appointment when he was satisfied either of his own knowledge or by affidavit, he must nonetheless first give the vicar a hearing.

Another interesting case during that period was *COOPER* v. *WANDSWORTH BOARD OF WORKS*[34]. The board had power to demolish any building which was erected without permission first received from the board. Cooper had no permission and his building was demolished. The court held that though the provisions of the statute taken literally justified the board's conduct, but such powers were subject to the qualification that no man must be deprived of his property without fair hearing.

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[30] David Foulkes : *Introduction to Administrative Law* (3rd Ed.) *143*
[31] [1951] A.C. 66. See also Ex. *P. Parker* [19531 2 ALL E.R. *Franklin* v. *Miii of Thwn & Country Planning* [19481 A.C. 87
[32] (1958) NRNLR *5*
[33] (1832) 2 Cromp & Jer. *558*
[34] (1863) 14 CBNS 180 See also *Queen* v. *Smith, Ex. P. Harris* 16 QBD 614

It was therefore comforting when in 1963, the House of Lords revived these 19th century authorities.[35] Since then, English courts have held that even non-judicial powers may be exercised in accordance with the rules of natural justice.[36]

Lord Denning put the matter in his characteristic blunt manner that "it is now well-settled that a statutory body which is entrusted by statute with a discretion, must act fairly [37]. It does not matter whether its functions are described as judicial or quasi-judicial or administrative it must, in proper cases give a party a chance to be heard." If these latest authorities represent the law, then there would be no need to split hairs trying to categories acts into judicial and non-judicial for the purpose of determining whether or not natural justice applies. [38]

Lord Denning's statement in the above Breen's case suggests that in cases that are not proper, the rule will not apply. As already noted, they will not apply where they are excluded. In *FUR NAL v. WHANGARAI HIGH SCHOOL*[39]*,* the New Zealand Education Act provided for discipline of teachers and prescribed the procedure. It was held that the Act was a complete code and there was no need importing into it the rules of natural justice. But exclusionary provisions made by subordinate legislation will be strictly construed.[40]

Again, where the function is purely ministerial and the performance of it is possible in one way only, natural justice will normally be excluded.; or where disclosing information to the party affected will be prejudicial to the public interest, or giving of notice or hearing will obstruct prompt action, especially actions of preventive nature. in all these cases it will not be proper to apply natural justice.

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[35] *Ridge* v. *Baldwin* [1963] 2 All E.R. 66

[36] Re K (H) [1967] 1 All E.R. 226 K was entitled to enter the United Kingdom if he satisfied the immigration officer that he was under 16. The officer believing him to be at least 16 refused his entry. K was not given a hearing. It was held that notwithstanding the fact that the officer was acting administratively, he was required to give K a hearing.

[37] *Breen v. Amalgamated Engineering Union* [1971] 1 All E.R. 1148

[38] See classification in the Report of the Committee on Ministers Powers p. 73.

[39] [1973]2WLR92

[40] See de Smith. *op.* cit. p. 161 on Cooper's case (p. *5* supra) where it was held that if Legislature omits to provide a procedure, justice of the common law will supply the omission

Subject to these exceptions, it is submitted that the duty to observe the rules of natural justice is obligatory on anybody exercising judicial or non-judicial functions of the result is capable of affecting the rights in property, personal liberty, status, livelihood or reputation of an individual. But here again we must qualify the proposition by adding that the austerity in the application of the rules ought not to be uniform. The nature of the right to be affected, the severity of the sanction and the interest of the public need be taken into consideration. Thus, a mere servant enjoying no special status has no common law right to be heard before dismissal. The rules of expulsion from a body ought reasonably to be sterner than rules for mere suspension[41].

Natural justice is inapplicable to legislative powers[42]. It is irrelevant where it is the question of the extent of powers. In that case, one has to fall back on procedural and substantive ultra vires rules. Natural justice is only relevant when the question is that of exercise of power.

V. DISCRETION AND REASONABLENESS

Before we relate this discussion to the powers of the institutions, it would be worthwhile saying a few words about discretionary powers. This is necessary because in most cases the exercise of these powers is usually discretionary.

The exercise of discretionary power is required also to be reasonable[43]. The essence of discretionary power is that there are two courses of action. If only one course of action can lawfully be adopted, it becomes the performance of a duty. Summarizing the general principle laid down by the courts for the exercise of discretionary powers de Smith said, "The authority in which discretionary power is vested can be compelled to exercise that discretion but not to exercise it in any particular manner. In general, a discretion must be exercised only by the authority to which it is given by law. That authority must genuinely address itself to the matter before it. It must not act under dictation of another body or disable itself from exercising a discretion in each individual case. In the purported exercise of its discretion, it must not do what it has been forbidden to do nor must it do what it has not been

[41] Ibid
[42] Op.cit
[43] *Breen v. Amalgamated Engineering Union* (Supra).

authorized to do. It must act in good faith, it must have regard to all relevant considerations, it must not seek to promote purposes alien to the latter or to the spirit of the legislature that gave it power... and it must not act ARBITRARILY AND CAPRICIOUSLY"[44].

In Southern Kansas, when it is said that a discretionary power has been exercised arbitrarily or unreasonably, it means that the purported action is irrational, foolish, unwise, absurd, silly, preposterous, senseless, stupid, injudicious, nonsensical[45].

In *PRESCOTT* v. *BIRMINGHAM CORP*[46] a corporation was given powers to maintain and operate a transport system and to charge such fares as it thought fit. It decided to provide free travelling facilities for women over *65* and men over 70 years. The court of appeal held that the action was unreasonable because it was economically stupid.

It is arguable that in this particular case, the corporation had totally failed to exercise its discretion. There is a difference between fixing a charge and not fixing any at all. It could have been interesting if the corporation had fixed some token amount, say one penny!

However, the courts are cautious about invalidating an act on grounds of unreasonableness and they are only likely to do so where there is manifest partiality or discrimination or unjustifiable interference with private life[47].

VI. BASIS OF APPLICATION OF NATURAL JUSTICE IN ADMINISTRATIVE POWERS

Before we are done, we must address our minds to the issue raised by Professor Wade.[48] He argues forcefully that in most of the cases, the courts have failed to state the grounds on which natural justice is applicable. If the power of the administrative agency is public and statutory, then like any public authority it is expected to observe the

[44] de Smith. op. *cii.* pp. 252 —253. For a fuller discussion on the topic see p. 246 —- 31
[45] *Southern Kansas State Lutes Co.* V. *PC'S.* (1932) 135 KANS. *657*
[46] *[1954]* 3 All ER. 698;
[47] *Kruse* v. *Johnson* [1898] 2 *Q.B.* 91
[48] Wade: "Judicial Control of Universities" (1969) 85 LQR 468 see also Wade: *Administrative law* (3rd Ed) pp 348 —356

rules of natural justice This, he says is administrative law and the prerogative remedies of *certiorari* and *mandamus* are issuable. On the other hand, if the powers operate by way of contract, then the remedies available to the victim are private remedies of injunction etc.

CONCLUSION

Natural justice, whether applied in governmental or quasi-governmental agencies is' undoubtedly a civilized standard of determining issues. But its rules 'are nonsensical to the individual except that the courts are willing to insist on their application. For, by the very nature of the litigation arising under an alleged breach of the rules of natural justice, the courts are bound to choose between individual rights and executive action., And to my mind it is only a truly independent and bold judiciary, not mere independence on paper, that can make the application of the rules of natural justice a reality.

Findings

The researcher observed that it is well-settled that a statutory body which is entrusted by statute with a discretion, must act fairly and unbiased. Therefore, it was found that natural Justice must be applied in the exercise of administrative powers. However, the following were also found in the course of writing this article: -

1- The exercise of Administrative powers has not always applied Natural Justice because of the realization that the circumstances of a case differs from another, therefore every case must be handled based on its peculiar circumstances. Thus, natural justice is not in a satisfactory state and it is somewhat lacking in precision in the occasion in which it should apply.

2- The rule on Fair Hearing does to necessarily include legal representation, or oral representation, or the right to cross examine witnesses. A person can be summarily dismissed from employment without fair hearing where the relationship is one of personal service in labour relations.

3- The rule against bias is sometimes difficult to apply because those who have to decide can hardly insulate themselves from the general ethos of their organization and are likely to have a firm view on the character of the individual involved and the subject matter before it for deliberation and adjudication.

Recommendation

Notwithstanding the challenges confronting the application of natural justice in the exercise of administrative powers as found above, the following measures are recommended for addressing these challenges.

1- That irrespective of the circumstances of each case, the rules of natural justice must apply with a view to safeguard the interest of an individual from being a victim of abuse of power and ultimately suffering loss of any kind wrongfully.

2- That the right to fair hearing must be regarded as fundamental to the general rights of an individual. Therefore, any decision that is made which adversely affects an individual must be seen to have complied with the rules of fair hearing. Otherwise, that decision must be set aside accordingly.

3- That the rule against bias must be observed in as much as is required by the law. Therefore, any party who has an interest in a matter or has shown an interest in a matter or has shown an inclination to one side must not be part of the judgement or decision.