

Is The Code of Conduct Tribunal A Court With Powers To Convict and Punish Offenders?

ABSTRACT

The paper makes the claim that the Code of Conduct Tribunal has only administrative, but no judicial powers to function as a court. That though it may order persons to appear before it at a time and place decided by it, and may summon witnesses to testify and introduce documents to it, it only has disciplinary powers for the purpose of sanitising public office. It does not and cannot operate as a court to try offenders, pronounce on their guilt and purport to levy punishment on them. It makes bold the position through application of the political and constitutional principle of separation of powers. It therefore argues that any purported power of the Tribunal to punish is unconstitutional.

Introduction

There is no doubt that the extent to which the rule of law is applied in any society is one of the decisive and conclusive indicators of that society's level of advancement and development. It is easily a determinant factor in the categorization of society as developed, under-developed or undeveloped. One medium by which the rule of law is enforced is the court system. The obvious powers which the courts wields respecting the lives and liberties of the citizens makes it imperative that any known or perceived violation of citizens rights would be promptly remedied by the courts. It is therefore important to maintain the sacrosanct powers of the court without dilution. This is why there is a critical need to examine the

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legal status of the Code of Conduct Tribunal, (a tribunal that appears to exercise the power to try, pronounce guilt, punish and sentence for offences).

This paper therefore seeks to answer the question whether the Code of Conduct Tribunal is a court legally capable of convicting and punishing persons guilty by it. In this respect, I have tried to link the question whether the Code of conduct Tribunal can be regarded as a court in the strict sense with the core and wider issues of separation of powers, the capacity to inflict pain, penalty or punishment; what may amount to a crime; the meaning, nature and extent of judicial powers exercisable by the Court and the Tribunal under the Nigerian 1999 Federal Constitution.

Before I introduce you to the several elements of this paper, may I take the liberty to refer you to the assertion credited to Lord Atkins in the famous and war time case of *Liversidge V Anderson*.

In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that judges are no respecters of persons and stand between the subject and any attempted encroachment on his liberty by the executive, alert to see that any coercive action is justified in law".¹

I now turn to the elements of the topic, which I intend to look at from the perspective of criminal trials.

Separation of Powers

The doctrine of separation of powers, old and very much orchestrated, is recognised and adopted in the Constitution of most of the common law countries, and yet remains one of the most confusing doctrines in the vocabulary of political and constitutional thoughts. Geoffrey Marshall in his *Constitutional Theory* admitted this much.²

¹ [1942] A.C. 206 at 244 (House of lords)

² G. Marshall, *Constitutional Theory*, 1971, at p. 27.

Separation of powers as a doctrine was propounded by Montesquieu, a French jurist of the eighteenth century when he wrote in his celebrated book entitled *Del' Esprit des lois (The Spirit of Laws)* about the absolute powers of the kings as a great evil in that it was a negation of the liberty of other people. In the period when Montesquieu existed, power was concentrated in the monarchs all over the continents. He saw that if the same person who makes laws were to execute them or decide disputes arising from them, tyranny might result. He therefore devised the division of government authority into three branches of government-legislative, executive and judicial-each with specified duties. Neither of the other branches is to encroach on the other's power, a thesis which became the constitutional doctrine of checks and balances.³ Although in political theory much has been made of the vital importance of separation of powers, it is extraordinarily difficult to define precisely each power. In an ideal state we might imagine a legislature with supreme and exclusive power to lay down general rules for the future without reference to particular cases; courts whose sole function is to make binding orders to settle disputes between individuals which were brought before them by applying these rules to the facts which were found to exist and an administrative body which carried on the business of government by issuing particular orders or making decisions of policy within the narrow confines of rules that it cannot change. The legislature makes, the executive executes and the judiciary construes the law.⁴

The doctrine captured the minds of great thinkers so much that founding fathers of the Constitution of the United States of America incorporated it in their Constitution. For instance, John Lock, a political philosopher, also advocated the doctrine of separation of powers in his book.⁵ The doctrine was also adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of governmental powers among three departments, to save the people from autocracy.⁶

³ A Garner, et. al, (eds.), *Black's Law Dictionary*, 9th ed., 270

⁴ George White Cross Paton, *A Textbook of Jurisprudence* 330, 4th ed. 1972

⁵ *Second Treatise of Civil Government*

⁶ Justice Louis Brandeis (as quoted in Roscoe Pound, *The Development of Constitutional Guarantees of Liberty* 94 (1957).

The courts all over the world has since given vent, and of necessity adopted this principle in so many celebrated cases. In *Rathburn's case*,⁷ the Federal Trade Commission Act provided that members of the Commission shall be appointed for a seven year term and that the members might be removed by the President for inefficiency, neglect of duty, or malfeasance in office. In 1933, President Roosevelt required the resignation of William Humphrey, a Commissioner whose term was to expire in 1936. Humphrey refused to resign. Shortly thereafter, Humphrey died. His executors sued the Federal Government for recovery of Humphrey's salary. The position of the Commissioner was of a quasi-judicial or quasi-legislative nature. On the question whether the President's power of removal amounted to interference with the quasi-judicial function of the commissioner in derogation of the doctrine of separation of powers, the Supreme Court held that the President was not empowered to remove a commissioner who was discharging quasi-judicial or quasi-legislative function.

It is to be noted that investigations conducted solely for the personal aggrandisement of the investigators or to punish those investigated are indefensible.⁸ It follows therefore that where the executive arm of government sets up a Commission of enquiry or a specialised tribunal or any investigative body by whatever name called, it cannot for that purpose inflict punishment because that will, without doubt, be in breach of the doctrine of separation of powers. Any such body set up by the executive will be an extension of the executive arm of the government, and cannot therefore usurp the function of the judicial arm or any other arm of the government for that matter.

In *Watkins v United State*⁹ for example, a Sub-committee of the Committee on Un-American Activities of the House of Representatives called Watkins as a witness before it. Watkins was an ex-communist and when questioned by the sub-committee to inform about those persons who were no longer members of the Communist party, he refused. He was tried, indicted, and convicted of contempt of the Congress. Watkins appealed against the

⁷ (1935) 295 U. S. 602.

⁸ Hari Chand, *Nigerian Constitutional Law*, 2nd ed., India: Modinagar, Santosh Publishing House, 1982

⁹ (1957) 354 U.S. 178.

decision of the Sub-committee. The Supreme Court held that no enquiry is an end in itself; it must be related to, and in furtherance of a legitimate task of the Congress.

An instance where judicial power was sought to be usurped by the executive is furnished by the *Hayburn's*¹⁰ case. A statute passed by the first congress provided that the Federal Circuit Courts would hear certain pension claims and submit their opinions to the Secretary of War. In summary, this statute gave the power to the Secretary of War to give or not to give effect to the decisions of the courts. Obviously, it was derogatory to the separation of powers doctrine. The Supreme Court as well as the Federal Courts declined to hear such claims. Congress realising the futility of the statute and repealed it.

The doctrine was also contained in the Commonwealth of Australia Constitution Act, 1901 and questions, from time to time, had arisen as to the validity of laws and actions on grounds of separation of powers. In *New South Wales v The Commonwealth*,¹¹ a case which has come to be popularly known as the *Wheat case*, the validity of the Wheat Acquisition Act 1914 (N.S.W) was considered. Sections 101-104 of the Commonwealth of Australia Constitution Act contemplated the establishment of an Inter-State Commission with "such powers of adjudication and administration, as the parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made there under". The Inter-State Commission was set up in 1912 with a flexible combination of judicial and administrative powers for the efficient regulation of inter-state trade. The Commission found that the Wheat Acquisition Act of 1914 (N.S.W) contravened S.92 of the Constitution and issued an injunction in restraint of executive action by the government of the New South Wales. An appeal was taken to the High Court (the highest court of the land), on the ground that the Commission had no power to issue an injunction because this was an item of judicial power and under the Constitution it was not a Federal Court. According to S. 71 of the Constitution, judicial power of the Commonwealth shall be

¹⁰ (1792) 2 Dallas 409.

¹¹ (1915) 20 C.L.R. 54.

vested in High Court of Australia and in other Federal Courts as the Parliament creates and in such other courts as are invested with Federal jurisdiction. The question was, whether the Inter-State Commission was a court contemplated under section 71 of the Constitution. The High Court of Australia held that the Commission has no judicial power to issue an injunction. It further stated that since judicial power is to be exercised by the courts mentioned in section 71, no other body has the power to exercise judicial powers. The issuance of an injunction was regarded as an attribute of judicial power.

In *A.G. for Commonwealth v The Queen*,¹² the question arose as to whether the Arbitration Court created by the Federal Parliament had power to punish for disobedience of its orders as contempt of Court. The High Court held that the court does not have the power to punish for its contempt because it was an arbitral tribunal and not a Federal Court. Punishment for contempt of court is an item of judicial power.

The Constitution of Ceylon also entrenched the doctrine of Separation of powers. In 1962, there was an unsuccessful coup d'état. Many persons were convicted of various offences connected with the attempted coup d'état under two statutes passed by the Parliament of Ceylon for that special purpose. The first statute, The Criminal Law (Special Provisions) Act No. 1 of 1962 sought to legalise certain deviations from the existing laws of criminal procedure in detaining the persons. The Act redefined the offences of waging war against the Queen, provided for trial without a jury by three judges to be nominated by the Minister of Justice, and made admissible the evidence of confession, which was inadmissible under the existing law. It also provided arrest without a warrant and new minimum penalty for the offences in question. The Act was expressed to be retrospective to cover an abortive coup d'état. Later, a second statute was passed to substitute the Chief justice for the Minister of Justice, to nominate three judges.¹³ It is to be noted that these statutes were to cease to operate after the trial of the detained persons. The tribunal convicted the defendants who appealed to the Privy Council on the ground *inter alia*, that it constituted a usurpation of judicial powers by the legislature contrary to

¹² (1957) 95 C.L.R. 529.

¹³ Hari Chand, *Nigerian Constitutional Law*, 2nd ed., 241.

the separation of powers embodied in the Ceylonese Constitution. The Privy Council held that the Act in question was inconsistent with the Constitution in that it involved usurpation and an infringement by the legislature of judicial powers.¹⁴ Unfortunately, the court did not go on to define what will constitute usurpation of judicial powers.

If it did, the case of *M.S. Kariapper v. S.S. Wijesinha*¹⁵ would not have made the long journey it did to the Privy Council. Under section 2 of the Commission of Enquiry Act, 1960, it was reported that allegations of bribery had been proved against members of the Senate, House of Representatives, or State Council of Ceylon, of whom the appellant was one. The appellant was elected to Parliament in March 1965 for a five-year term. A Bill was passed in 1965 to impose disabilities on those who were found to have accepted bribe. The Act also provided for vacation of seats in such cases. The Act also provided that in the event of inconsistency with existing law, the Act would prevail. The appellant was penalised under the Act. He was to vacate his seat in the House of Representatives and also disqualified from contesting elective positions for seven years. The appellant applied for a writ of mandamus requiring Clerks of the House of Representatives to recognise him and pay him remuneration and allowances as a member of Parliament on the ground that the Act was inconsistent with the Constitution; it usurped judicial powers. The Supreme court of Ceylon refused the application in this case and the Privy Council also held that it was not a bill of pains and penalties because it contained no declaration of guilt and the disabilities imposed did not have the character of punishment for guilt but were designed to keep public life clean for the public good and not for the punishment of the members whose seats were vacated. Thus the Act was held as an exercise of legislative power and not a usurpation of judicial power.

¹⁴ See also *A.G. Bendal State V. A. G. Federation & Ors* (1982) 3 NCLR 1, *Governor of Kaduna State v. The House of Assembly and A.G. Kaduna State* Suit No. KDH/162/80; *Governor of Kaduna State V. House of Assembly* Suit No. KDH/33M/80 decided March 27, 1981; *Tony Momoh v. Senate*, Sunday Times, April 27, 1980 or (1981) 1 NCLR 105. *Alexander's Case* (1981) 25 C.L.R. 434, *Youngtown Sheet & Tube Co. v Sawyeer* (1952) 343 U.S. 579; *Prize's Case* (1863) 2 Black 635. *Myers V. U.S.* (1926) 272 U.S. 52.

What is important in this case is not the decision which the court finally arrived at, but the reason behind the decision. It is easy to discern from the reason given that if the court had perceived the Commission of Enquiry as making a declaration of guilt of the appellant or if it construed the disabilities imposed on the appellant as having the character of punishment for guilt, it would have declared same null and void for being inconsistent with the Ceylonese Constitution! It follows therefore that it is only a court properly so constituted by the constitution that can try a person and make a declaration of guilt and impose punishment thereof. No other body can do so or purport to do so.

The draftsmen of the old 1979 Constitution of Nigeria envisaged the problems that may arise respecting the issue of separation of powers and did state in unequivocal terms that;

These powers of the legislature must, we believe, be circumscribed in such terms as to avoid invasion of the field of the judiciary. These powers are intended to be ancillary to their legislative functions. We think that s. 80 of the draft Constitution (s. 88 of the 1979 Constitution) ensures that there will be no possibility of any conflict between the legislature and the judiciary. We also have in mind the liberty and freedom of individuals and the need to see that the powers of investigation conferred on the legislature are not exercised in such a way as to contravene fundamental right or for oppressive purposes.¹⁶

It follows therefore, that any time the investigative powers of the legislature contravenes the fundamental rights of the individual or group of individuals, it defeats the purpose for which it is meant and most certainly, will be declared null and void for inconsistency with the Constitution by any court of law.

Crimes/Offences

Crime is defined as "a social harm that the law makes punishable; the breach of a legal duty treated as the subject-matter of a criminal proceeding."¹⁷ Understanding that the conception of crime, as distinguished from that of wrong or tort and from that of sin, involves the idea of injury

¹⁷ Blacks Law Dictionary, 7th ed., West Group St. Paul, MINN, 1999,

to the state of collective community, we first find that the commonwealth, in literal conformity with the conception, itself interposed directly, and by isolated acts, tries to avenge itself on the author of the evil which it had suffered.¹⁸

It is a curious fact that all the minor acts enumerated in the penal code of a State like, say, New York are in law called crimes, which term includes both murder and over-parking. It is a strong term to use for the latter, and of course the law has for centuries recognised that there are more serious and less serious crimes. At the common law, however, only two classes were recognised, serious crimes or felonies, and minor crimes or misdemeanours.¹⁹ There are other categorisation of crime like administrative crime, capital crime, common-law crime, computer crime, consensual, corporate crime, crime against nature like sodomy, crime *malum in se*, crime *malum prohibitum*, crime of omission, crime of violence, crime of passion, infamous crime, status crime, signature crime, *crimen majestatis*, *crimen incendii*, crime against humanity etc. These categories are for convenience sake and are of little importance for our present purpose. What may emerge in simple terms is that any such act that is codified either in the Criminal Code (for the Southern Nigeria) or the Penal Code (for the Northern Nigeria) is an offence for which a court of law can levy penalties ranging from death, incarceration, to fines. A person who has committed any such act may be referred to as a criminal.

An offence on the other hand is a violation of the law; a crime often a minor one. Offences may be classified in two ways as follows:

- a) Indictable and non-indictable offences;
- b) Felonies, misdemeanours and simple offences.

Both types of classification are important for the purpose of the law of criminal procedure in Southern Nigeria. Neither type of classification exists in the law of criminal procedure in the Northern State of Nigeria. An indictable offence is an offence which on conviction may be punished by a term of imprisonment exceeding two years or which on conviction may be punished by imposition of a fine exceeding four hundred Naira, not

¹⁸ Henry S. Maine, *Ancient Law* 320 (17th Ed. 1901).

¹⁹ Max Radin, *The Law and You* (1948) 91.

being an offence declared by the law creating it to be punishable on summary conviction. An offence other than an indictable offence is a non-indictable offence. The importance of the division of offences into indictable and non-indictable offences lies in the method of trial and in the power of arrest for an offence.²⁰ The two terms may also be used conjunctively and interchangeably. A crime or a criminal offence may therefore be described as an act or omission which renders the person doing the act or making the omission liable to punishment by the State. The State apparatus for doing this is the Court. I shall come back to this in detail.

In Nigeria, no act or omission can be a crime unless such act or omission is stated to be a crime under a written law in force in Nigeria.²¹ In *Aoko v. Fagbemi*²² for instance, the accused was convicted of adultery in a customary court. On application to the High Court, the conviction was quashed because it violated the applicant's constitutional right in as much as she had not violated any written law. There are therefore no customary criminal offences in Nigeria because of the unwritten nature of most customary laws.

Judicial Power is defined as "the authority vested in courts and judges to hear and decide cases and to make binding judgments on them; the power to construe and apply the law when controversies arise over what has been done or not done under it."²³

It is instructive to note that the word "tribunal" was not used at all in this definition of judicial powers. What then is a court? A court is a permanently organised body, with independent judicial powers defined by law, meeting at a time and place fixed by law for the judicial public administration of justice."²⁴ It follows therefore that any time the judiciary (the third arm of the government) is exercising judicial powers, the apparatus with which it does so, is the court and no other body.

²⁰ A.O. Obilade, *The Nigerian Legal System*, London Sweet & Maxwell (1979)

²¹ Ezeugwu K. C, Nnachetam C, Chukwu Arthur Elvis, Ogbu O.N. *Manual on Introduction to Nigerian Law*; Enugu: CIDJA Press, 2000, 21. See also S. 36 (12) Constitution of the Federal Republic of Nigeria 1999.

²² [1961] 1 All NLR 400.

²³ Blacks Law Dictionary *ibid* p. 851.

²⁴ William J. Hughes, *Federal Practice, Jurisdiction & Procedure*, 1931, 7-8.

Now, the Constitution of the Federal Republic of Nigeria states in unequivocal terms that "the judicial powers of the Federation shall be vested in the Courts to which this section relates being courts established for the Federation."²⁵ At the State level, "the judicial powers of a state shall be vested in the courts to which this section relates, being Courts established, subject as provided by this Constitution, for a State."²⁶

What then are these courts to which the above two sub-sections relates? This question got a straight, unambiguous answer in the letters of sub-section (5) of the same Section at Paragraphs (a) – (k).

I produce this sub-section verbatim here for purposes of clarity.

"S. 6(5) 'This section relates to-

- a) the Supreme Court of Nigeria;
- b) the Court of Appeal;
- c) the Federal high Court;
- d) the High Court of the Federal Capital Territory, Abuja;
- e) a high Court of a State;
- f) the Sharia Court of Appeal of the Federal Capital Territory, Abuja;
- g) a Sharia Court of Appeal of a State;
- h) the Customary Court of Appeal of the Federal Capital Territory, Abuja;
- i) a Customary Court of Appeal of a State;
- j) Such other Courts as may be authorized by law to exercise jurisdiction on matters with respect to which the National Assembly may make laws; and
- k) Such other Courts as may be authorized by law to exercise jurisdiction at first instance or on appeal on matters with respect to which a House of Assembly may make laws."

²⁵ S. 6(1)

²⁶ Ibid, s. 6 (2)

It is blatantly obvious, that no mention was made here of the Code of Conduct Bureau or the Code of Conduct Tribunal. You will also notice that in paragraphs (j) and (k) in the sub-section, the word "courts" instead of "tribunals" was used. Since the law cannot expressly exclude the jurisdiction of the court in matters which only the court is properly suited to adjudicate, it cannot do so by the mere vesting of the exercise of certain powers on another authority or institution.

The courts of Law in Nigeria have the power and duty to see that there is no infraction of the exercise of legislative, judicial and even executive power, whether substantive or procedural as laid down in the constitution. In cases of infraction, the courts ought to declare such legislation as unconstitutional and invalid. So any legislation which seeks or purports to divest judicial powers from the courts by vesting same in a special tribunal or other body, is unconstitutional and of no effect.²⁷ For the same reason the Court can interfere with the exercise of executive functions if the executive violates the provisions of the Constitution.²⁸ It is an established principle.

In *Okitipupa Oil Palm Co. Ltd v. Jegede & Ors*²⁹ it was stated that only the courts have jurisdiction given to it by the Constitution to entertain an action relating to the civil rights and obligations of a party. This is more imperative when the party is accused of a crime.³⁰ Without attempting a detailed definition or exposition of judicial powers, it is enough to say that judicial power is not necessarily involved because a dispute involves two opposing parties, or because the issue to be determined affects their legal rights or other questions of law or because a determination of the dispute is made binding on them.³¹ While these are necessary attributes of judicial power, they are not exclusive to it, but can also and often do form part of administrative power. But conviction and punishment for a criminal offence goes much beyond that. It determines authoritatively and

²⁷ *A.G. Bendel State v. A.G. Federation* (1982) 3 NCLR P.1.

²⁸ *Bell V. Sani & Ors* (1982) 3 NCLR 831; *Orugaju v. Governor of Imo State* (1982) 3 NCLR 743.

²⁹ (1982) 3 NCLR 494

³⁰ B.O. Nwabueze, *Judicialism* (1974) 1-19.

³¹ See the case of *Shell Company of Australia Ltd. v Federal Commissioner of Taxation* [1931] A.C. 275 (Privy Council).

conclusively the legal standing of a person as a member of society, and punishes him by the infliction of physical pain, the deprivation of personal liberty or property. It follows that no one can, under the Constitution, be lawfully convicted, and punished for a criminal offence by a tribunal, which is not part of the courts in which judicial power, in particular, criminal jurisdiction, is vested by the Constitution.³²

Chief Justice Griffith, speaking for the High Court of Australia (the highest Court in the Country) puts it emphatically as follows in *Waterside Workers' Federation of Australia v. J.W. Alexander Ltd.*³³

"It is not disputed that conviction for offence and the imposition of penalties and punishments are matters appertaining exclusively to judicial power."

There are good, indeed compelling reasons why, in a democratic government, limited by a constitutional protection of personal liberty, the trial of a person on a criminal charge brought against him by the State should be conducted, not by a special tribunal, but by the ordinary court of law, characterised as a court of law is, by independence in terms of its powers and the appointment and tenure of its members and by a trial procedure that guarantees its impartiality and the absence of bias. First, conviction of a person for a criminal offence carries a distinct "moral obloquy and social stigma." It is an expression of society's disavowal of his conduct as a deliberate flouting of its values, a condemnation of him as unworthy of its membership.³⁴ As Lucas put it, "to be branded an anti-social is half-way to being deemed an outlaw"³⁵

It is intolerably unjust to be so treated if the conviction is false. The conviction will be false if it is arrived at by a wrong assessment of evidence or without regard to an existing law which if it had been considered would have changed the face of the conviction (*per incuriam*) or if it is arrived at by an authority which is unconstitutional.

³² Nwabueze BO, *Policy & Politics*, The Guardian, vol. 21 No. 9, 478 of 3rd November 3, 2004, 9.

³³ (1918) 25 C.L.R. 434 at 444. But cf. *Alhaji Abdulkadir Balarabe Musa v. Hamza* (1982) 3 NCLR 229; *Anago-Amanze v. FEDECO* (1985) 6 NCLR 638.

³⁴ Nwabueze, (n. 30).

³⁵ JR Lucas, *On Justice* (1980) 138

A false conviction is a lie. It proclaims that the person convicted has done something he has not done. It is, moreover, a particularly damaging lie, in that in making imputations against a man's character, it impugns him as the individual he is, and assails his status as a responsible member of society.....

To impute misdeeds is, therefore, to deny one's identity by making out that one is not the person one is. This element of public disgrace, it has been said, is the worst part of criminal conviction.³⁶

The moral obloquy and social stigma of criminal conviction have practical legal consequences. Criminal conviction brands a person with an indelible stamp of someone unfit to be employed, to be admitted into decent institution or society or to be trusted. The disability arising from a conviction is prescribed by the law itself in cases where the offences involve dishonesty. Thus, a person convicted of such an offence is disqualified by law from holding certain public offices or from functioning in certain capacities.

The imposition of punishment following upon a conviction carries the matter further; given society's disesteem a tangible form in the way of some unwelcome incarceration, like imprisonment. It thus gives weight to the society verbal condemnation and disesteem of a person flouting its values. To condemn and disgrace a person as a flouter of society's values and to punish him accordingly, imperatively requires that the process used must be such as guarantees the independence and impartiality of the tribunal and the other safeguards of a fair trial, such as the presumption of innocence, the requirement of proof beyond reasonable doubt, the rules of admissibility or inadmissibility of evidence, etc This is necessary to guard against the possibility of an innocent person being convicted. The injustice of a false conviction and punishment is among the worst injustices imaginable.

Independence of the judiciary may not be absolute as has been severally argued but it is still without doubt the only institution that is best suited for deciding matters relating to the civil rights and obligation of individuals.

³⁶ Ibid at 13.

The method of appointment of judges so far as possible, insulate the choice of candidates from political motives.³⁷ Other matters which guarantee the independence of our court include the security of the independence of judges by putting their salaries and expenditure for the judiciary on the consolidated fund; the retirement age and retirement benefit and pension rights of judges; the provision for retirement or removal of judges before the statutory age or compulsory retirement; the control by the judiciary over the staff etc. The case in point here which aptly demonstrates the security of job of the judge, and by extension his independence and which makes him most suitable for dispensing justice is *Justice Kalu Anya v. Borno State House of Assembly*.³⁸ In 1982, the Borno State House of Assembly began proceedings for the impeachment of the Chief Judge of the State, Justice Kalu Anya. It would appear that the Chief Judge fell out of grace with the legislature and the executive in the State because his judgments were invariably against the State Government. He was accused of ill-defined "misconduct". A newspaper, the New Nigerian, summed up the completely ugly situation in the following editorial:

Unmindful of its own ultimatum, the House has now prepared "impeachable" grounds against the Chief Judge. These are, as can be seen in the story on this page, as watery as they came. In normal times they would not be accepted as meeting the provisions of Section 256 of 1979 Constitution. But the times are not normal but political. Mr. Justice Anya's problems with the State Government are tied up with the Bedde Emirship tussle.

The State Government lost a case in his Court in March 1982. In April, the State Government ordered that all his financial expenses, air tickets, settled claims and fuel receipts be investigated. Its anger must have been aggravated by the fact that it lost the case on appeal to the Federal Court of Appeal. The Assembly has now been dragged in and is palpably being used to serve a political expedience. Although matters of this nature are not justifiable, the Chief Judge succeeded in getting the High Court of Borno State to grant an interim injunction against the legislature. This was because the House had earlier passed a resolution giving the Chief Judge the choice of resigning within 14 days, if he did not wish to be impeached. The Chief Judge challenged the constitutionality of the

³⁷ Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law* CF Telford Georges, *the Courts in Tanzania One-party State in East African law and Social Changes*.

³⁸ SUIT NO. FCA/K/141/82.

resolution. While the action was pending in Court (and 14 days ultimatum has not expired), the House began the proceedings for impeachment of the Chief Judge. As a result, the High Court granted the interim injunction and so, for the meantime, forced the House to suspend further action on the matter. The High Court relying on the provisions of S. 256(2) 1979 Constitution later referred the questions of law arising from the Suit to the Federal Court of Appeal for its opinion. The court of Appeal held that the House had no power of impeachment over the Chief Judge but over the Governor or his Deputy.³⁹

It is important to note that Karibi-Whyte, J. C. A (as he then was) said:

There is no doubt that the determination whether behaviour by a public officer amounts to misconduct and a criminal offence raises issues for the determination of questions as to the civil rights and obligations of such officer. It is well settled that the judicial power of the Constitution is vested in the Courts specified therein. Hence, all allegations of misconduct in office, by a public officer fall within the constitutional domain of the courts for a determination, unless otherwise provided by the constitution.⁴⁰

Evidently, the kind of process best calculated to reduce to the barest minimum the chances of a false conviction and punishment is that in which the trial is conducted by a court manned by independent, trained and experienced judges who are learned in the law and versed in the difficult art of sifting evidence and judging the demeanour of witnesses, and who have been reared in the legal tradition of individual liberty, which insists, rightly, that it is better for nine guilty persons to go free than for one innocent man to be incarcerated. Clearly, therefore, conviction for a criminal offence and the infliction of punishment therefore, with their attendant moral obloquy, public disgrace, disabilities and unwelcome incarceration, does imperatively require the processes of the ordinary courts of Law.⁴¹

The Code of Conduct Tribunal, with all respect, does not have the trappings of a court of law. (The chairman is the only one of the three members of

³⁹ 16TH August, 1982

⁴⁰ In Suit No. FCA/K/141/82. See also Hon. Justice A. Ademola, Independence of the judiciary, Problems and Prospects in Nigeria. (Sir Louis Mbanefo Memorial Lectures No. 4 of 1987).

⁴¹ Ibid.

the Code of Conduct Tribunal required to be "a person who has held or to be qualified to hold office as a judge of a superior court of record in Nigeria."⁴² There is another reason why a tribunal composed, in whole or in part, of persons who are not independent of the executive should not convict and sentence for a criminal offence. The executive is the accuser in a criminal trial, and it simply affronts justice that it should also, through its functionaries or other persons, appointed by it, be the judge of the guilt or otherwise of an accused person. Justice can only be seen to be done if the trial is conducted by persons who are in no way connected with the executive, either as its appointee to the membership of the tribunal or as its paid functionary.⁴³

It is unconstitutional, null and void to vest the trial, conviction and punishment for a criminal offence in a tribunal, which is not one of the courts vested with judicial power by section 6 of the Nigerian Constitution 1999. Chief Justice Griffith put it more succinctly in *Waterside Workers' Federation of Australia V J.W. Alexander Ltd.*, as follows:

It is impossible under the Constitution to confer such functions upon anybody other than a court, or can the difficulty be avoided by designating a body, which is not in its essential character a court, by that name, or by calling the function by another name. In short, any attempt to vest part of the judicial power... in anybody other than a court is entirely ineffective.⁴⁴

Perhaps, it is this kind of futile but devilish attempt to emasculate the judiciary and by all means whittle down its powers in the performance of its functions as the third arm of government that have sparked off comments of the kind made by one of the founding fathers of American Constitution thus:

The judiciary is beyond comparison the weakest of the three departments of power... (It) has no influence over either the sword or the purse; no direction of the strength or of the wealth of the society, and can take no active resolution whatever. It can truly be said to have neither force nor will, but merely judgment.⁴⁵

⁴² Paragraph 15 (2), Fifth Schedule to the Constitution of the Federal Republic of Nigeria 1999. And Section 20 (3), Code of Conduct Bureau and Tribunal Act. (APC 15 Laws of the Federation 2004 Edition).

⁴³ For further reading on this matter see, Nwabueze, *Constitutional Democracy in Africa* Vol. 3 (2003) pp 201-203.

⁴⁴ (Supra) P. 442.

⁴⁵ *The Federalist* No. 78.

In the United State of America, Australia, India, Sir Lanka, the Supreme Courts have the power to strike down a law which is not in accordance with the Constitution. In a written Constitution particularly in the case of a Federal Constitution, the judiciary must be given the power to decide whether a legislative or executive measure is *ultra vires* the Constitution or an ordinary law is valid or not; otherwise no organ can be stopped from over stepping its bounds. Moreover, the judiciary is the least harmful arm of the government. The highest courts are manned by most competent judges who have well cultivated sense of justice. It is expected of them to decide rightly, dispassionately while being free from all sorts of biases. Generally, judges are by disposition above politics. Again, assuming the judiciary starts encroaching upon other organs of government, the other wings are always able to react back in various ways and undo what the judiciary might have done. Therefore, considered from any angle, judicial review (of legislations) does not in reality detract from the doctrine of separation of powers.⁴⁶ If anything, it helps to strengthen it as it acts as an instrument of checks and balances. Above all, public criticism is a potent factor checking the functions of the judiciary.

The courts have made real its power to adjudicate. For example, in *Sofekun V. Akinyemi*⁴⁷ the dismissal of a medical doctor employed in the public service, a purely disciplinary penalty, who was found guilty of indecent assault and attempted rape by a disciplinary tribunal constituted and empowered in that respect under the Public Service Commission Regulations was held null and void by the Supreme Court as a usurpation of judicial power.

In this judgment concurred in by Irikefe, Bello, Idigbe, Obaseki, Eso and Aniagolu JJSC, Fatayi Williams, CJN said:

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..... No other tribunal, Investigating Panel or Committee will do..... If Regulations such as those under attack in his appeal were valid, the judicial power could be wholly absorbed by the Commission (one of the organs of the Executive branch of the State Government) and taken out of the hands of the magistrates and judges If the Commission is allowed to get away with it, judicial power

⁴⁶ Hri Chand, *Nigerian Constitutional Law*, 2nd ed. (1982) 247.

⁴⁷ (1981) 1 NCLR 135.

will certainly be eroded..... The jurisdiction and authority of the Courts of this Country cannot be usurped by either the Executive or the Legislative branch of the Federal or State Government under any guise or pretext whatsoever.⁴⁸

In *Re J.C. Ononye*,⁴⁹ the proceedings of a Commission of Inquiry which found a Chief magistrate guilty on five different allegations of taking bribes, and recommended his dismissal from the public service, were nullified by the High Court at Enugu on the ground that the allegations, being criminal offences under the Criminal Code. The proceedings and findings by the Commission of Inquiry amounted to trial and punishment for a criminal offence in usurpation of judicial power. The decision in the case of *Denloye V. Medical and Dental Practitioners Disciplinary Tribunal*⁵⁰ is instructive here.

However, it must be noted that judicial power is not usurped by a finding of guilt by an administrative body which does not operate as a conviction for a criminal offence and which is intended to serve merely as a basis for disciplinary action. Disciplinary proceedings and criminal trials operate on completely different planes and serve entirely different purposes. It is not the business of a court to order the removal of a public officer found guilty of criminal conduct. Nor is a criminal trial pre-empted or precluded by disciplinary proceedings.⁵¹ Both *Re Ononye* and *Denloye* shows how jealous the courts are about judicial power and how alert they are to protect against encroachments by the executive.

The Constitution and Its Schedules

The power granted to the Code of Conduct Tribunal by the Act, to try and determine criminal charges and to impose punishments therefore, like fine or imprisonment, is null and void for inconsistency not only with Section 6 of the 1999 Nigerian Constitution, but also with guarantee of fundamental rights envisaged in the same Constitution at sections 35 and 36. In respect

⁴⁸ Ibid at 146.

⁴⁹ Unreported, Suit N. E/31M/73, but noted in the (1974) 8 *Nigerian Law Journal* 154

⁵⁰ [1968] 1NLR 306; (1968) N.S.C.C. Vol. 260

⁵¹ BO Nwabueze, The Guardian, Wednesday 3rd November 2004, Page 9. For criticisms of the Decisions on the grounds above, see Nwabueze, *Military Rule and Constitutionalism in Nigeria* (1992) 185-186.

of the first issue raised above, the Constitution has Seven Schedules attached or annexed to it. For purposes of this article, I shall concentrate only on the Third and Fifth Schedules.

The Third Schedule prescribes the composition and powers of the Code of Conduct Bureau, which is established by section 153(1) of the Constitution of the Federal Republic of Nigeria, 1999, along with thirteen other bodies. Section 153(2) provides that, "the Composition and powers of each body established by subsection (1) of this section are as contained in Part 1 of the Third Schedule of this Constitution." The Fifth Schedule prescribed the duties and obligations of public officers (persons holding any of the offices specified in Part II of this Schedule which include in Paragraph 12, the Chairman, members and staff of the Code of Conduct Bureau and Code of Conduct Tribunal), specifies the public officers subject to such duties and obligations, establishes the Code of Conduct Tribunal and prescribes its composition and powers.

Now the relationship of the Constitution with any of its Seven Schedules was stated by Brett L.J. in *Attorney General v Lamplough* as follows:

"The Schedule is as much a part of the statute, and is as much an enactment, as any other part."⁵²

Francis Bennion put it even more pungently in the following words:

It was formerly the practice for the inducing words (i.e. the words incorporating the Schedule into the Statute) to say that the Schedule was to be construed and have effect as part of the Act. This is no longer done, being regarded as unnecessary, since the Schedule, by its incorporation into the statute, is an integral part thereof.⁵³

It is an established principle of interpretation however, that, where a provision in the schedule contradicts or is inconsistent with a provision in the body of the statute to which it is annexed, the latter prevails.⁵⁴ We are going to see shortly, whether any provisions in the Third and Fifth Schedules regarding the Code of Conduct Bureau and the Code of Conduct Tribunal

⁵² (1878)3 Ex. D. 214 at Page 279.

⁵³ Francis Bennion, *Statutory Interpretation*, 2nd ed., (1992) p. 491.

⁵⁴ See *Re Baines* (1840) 12 A & E 227, per Lord Cottenham L. C; *Dean v. Green* (1882) 8 PD 79, per Lord Penzance.

are inconsistent or in conflict with any provisions in the body of the Constitution. The legal status of a schedule inconsistent with a provision in the body of the constitution is well articulated by Craies"⁵⁵ and Sandra"⁵⁶ discussing *Muneshwara Nand v State*.⁵⁷ The commentators argue that any part of a schedule in a Constitution that is inconsistent with a provision in the body of the statute is to the extent of inconsistency, null and void and of no effect whatsoever. Many principles governing interpretation of the Constitution as the supreme law of the land follow the well established general principles of interpretation of statutes, and some others developed over the years to complement the widely accepted canons of interpretation to make the working of the Constitution purposeful, progressive and responsive to the peculiar circumstance of Nigeria.⁵⁸

The Constitution and Ordinary Laws

The relation of the Constitution and ordinary laws is governed by express provisions in the Constitution. Section 1 (1) provides that; "This Constitution is supreme and its provisions shall have binding force on all authorities and person throughout the Federal Republic of Nigeria."

By this provision, the Constitution is rendered the supreme law and failure to follow its provision renders whatever is done contrary to it unconstitutional.⁵⁹ Also "if any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void."⁶⁰ This position has also recognised in the cases of *Obaba v. Military Government of Kwara State*;⁶¹ *Erekamure v. State*;⁶² *Onagorwa v. I.G.P.*;⁶³ *Governor of Kaduna State v. Dada*.⁶⁴

⁵⁵ Craies, *Statute Law*, 5th ed. (1985) 225. See also *A.G. Bendel v. A.G. Federation* [1981] 10 SC P.1; *A.G. Kaduna State vs. Hassan* (1985) 2 NWLR (pt. 8) P. 483; *Onagorwa vs. State* (1993) 7 NWLR (pt. 193) P. 49; *Mohammed v. Olawunmi* (1990) 2 NWLR (pt. 133) p. 458.

⁵⁶ N. S. Sandra, *The Interpretation of Statutes* (1970) 68.

⁵⁷ [1961] A.L.R., 24 at 39.

⁵⁸ *Ekpenkhio v. Egbadon* (1993) 7 NWLR (pt. 308) 717; *Kalu v. State* (1998) 13 NWLR (pt. 853) 531; *Tukur v. Govt. of Gongola State* (1989) 4 NWLR (pt.117) 517; *Bronik Motors Ltd. v. Wema Bank Ltd.* (1983) 1SCNLR P. 296; *Awolowo v. Sarki* [1966] 1 All NLR 178; *Okkwe v. Governor of Bendel State* (1990) 4 NWLR (pt.114) 327; *Nafiu Rabi v. The State* (1981) 2 NCLR 293.

⁵⁹ *Adediran v Interland Transport Ltd* (1991) 9 NWLR (pt. 214) 115 at 179 Para. G-H

⁶⁰ S. 1(3) of Nigerian Constitution, 1999

⁶¹ (1994) 4 NWLR (pt. 336) 26 at 39, para A-F. G-H

⁶² (1993) 5 NWLR (pt. 294) 385 at 393, para E.

⁶³ (1991) 5 NWLR (pt. 193) 593 at 641, para F-G.

⁶⁴ (1986) 4 NWLR (pt. 38) 687.

As regards laws existing prior to the commencement date of the Constitution, the provision in section 1(1) & (3) above is reinforced by that in Section 315(3) which says:

"Nothing in this Constitution shall be construed as affecting the power of a court of law or any tribunal established by law to declare invalid any provision of an existing law on the ground of inconsistency with the provision of any other law, that is to say-

- a) Any other existing law;
- b) A law of House of Assembly;
- c) An Act of the National Assembly; or
- d) Any provision of this Constitution.

While the Courts cannot determine the competence of any authority to make an "existing law" they are competent, by virtue of this provision, to make pronouncements as to the validity of any existing law on ground of inconsistency with the provision of any part of the constitution or any other existing law as it did in *Olu of Warri v. Kperegbeyi*,⁶⁵ *Osadebay v. Attorney-General of Bendel State*,⁶⁶ *Uwaifo v. Attorney-General of Bendel State*.⁶⁷

Strictly speaking, section 1(1) & (3) above makes it unnecessary for a court to make a declaration of invalidity against a law found by it to be inconsistent with the Constitution. By the provision in section 1(3) that any law inconsistent with the Constitution "shall to the extent of the inconsistency be void," the Constitution has itself made a declaration of invalidity against such a law, thus taking away from the court the discretion it possess and exercises in non-constitutional cases as to whether or not to grant a declaration of invalidity. The court's only role in the matter is to decide whether or not a law is inconsistent with the Constitution. Upon a finding of inconsistency, invalidity flows inexorably from the declaration of invalidity contained in section 1(3) of the Constitution.⁶⁸

The question, whether any provisions of the Code of Conduct Bureau and Tribunal Act,⁶⁹ are inconsistent with the Constitution will be considered in relation to the Constitution, its Schedules and ordinary laws as already

⁶⁵ (1994) 4 NWLR (pt. 339) 416 at 434-435, para H-B.

⁶⁶ (1991) 1 NWLR (pt. 169) 525 at 581, para B-C.

⁶⁷ [1982] 7 SC 124 at 209

⁶⁸ B.O Nwabueze, *Judicialism*, (1974) pp. 109-110

⁶⁹ C15, cap Law of the Federation 2004 Edition

stated above. Nwabueze, submitted that the Tribunal could not punish as a court of law in *Joshua Chibi Dariye vs. Code of Conduct Bureau, Code of Conduct Tribunal and Attorney-General of the Federation*.⁷⁰

In the learned writers view, the tribunal couched in almost identical terms as Section 153(1) and paragraph 15(1) of the Fifth Schedule of the Constitution, the provision in the Act that "there is hereby established a bureau to be known as the Code of Conduct Bureau" (Section 1(1) or that "there is hereby established a tribunal to be known as the Code of Conduct Tribunal" (Section 20(1) raises the question whether the basis of the existence of the Bureau and the Tribunal is thereby changed from the Constitution to the Act. Do the two bodies cease to be constitutional organs, that is, organs established by the Constitution? Will the repeal of the Act by the National Assembly terminate their existence? It makes hardly any sense that a body established by the Constitution should be established yet again by an ordinary law, which, being subject to the overriding supremacy of the Constitution is inferior to it.

The significance of this point is even greater in regard to the powers of the Bureau and the Tribunal. Their powers are stated to have been conferred by the Act. The powers of the Tribunal to order vacation of a public office held by a person, even an elective office, disqualification from the holding of such office and the seizure and forfeiture of property seem, arguably, to go beyond what can be conferred or authorized by an ordinary law, it is even arguable whether, as powers conferred by the Fifth Schedule to the Constitution, they are not inconsistent with some provisions in the body of the Constitution. But the point need not be pursued here. There are other provisions reproduced in the Act from the Third and Fifth Schedules to the Constitution which are open to question as to the competence of an ordinary law to enact them, but which being peripheral to the issues under consideration, need to be gone into here.

On whether criminal process and punishment, as distinct from disciplinary penalty, are embraced within the power conferred on the tribunal by paragraph 18 of the Fifth Schedule to the Constitution (or Section 23 of

⁷⁰ Prof. BO Nwabueze, SAN was counsel to the plaintiff in that matter.

the Code of Conduct Bureau and Tribunal Act,⁷¹ it was contended on behalf of the plaintiff that it did not. For a thorough examination of this point, the provisions of paragraph 18 of the Fifth Schedule and Section 23 of the Act which, with minor variations, are identical need to be set out in their precise wordings here.

18(1), where the Code of Conduct Tribunal Finds a public officer guilty of contravention of any of the provisions of this Code (or of the Act) it shall impose upon that officer any of the punishments specified under sub-paragraph (2) of this paragraph and such other punishment as may be prescribed by the National Assembly.

(2) The punishment which the Code of Conduct Tribunal may impose shall include any of the following:

- a) vacation of office or seat in any legislative house, as the case may be;
- b) disqualification from membership of a legislative house and from the holding of any public office for a period not exceeding ten years; and
- c) seizure and forfeiture to the State of any property acquired in abuse or corruption of office.

(3) The sanctions mentioned in sub-paragraph (2) hereof shall be without prejudice to the penalties that may be imposed by any law where the conduct is also a criminal offence.

The words underlined in sub-paragraph (1) above are so underlined to indicate that they are omitted from the Act.

A noteworthy feature of these provisions is the use of the words "punishments", "penalties" and "sanctions" as inter-changeable terms, which they are not, as is made clear by the decision of the Judicial Committee of the Privy Council in a Ceylonese appeal – *Kariapper v. Wijesinha*.⁷² Here a law enacted by the Ceylonese legislature in 1965 imposed certain disabilities on certain named persons who had been found

⁷¹ Cap C15 Laws of the Federation 2004

⁷² [1967] 3 All E. R. 485.

guilty of bribery by a Commission of Inquiry. The law vacated the seat in parliament or local authority of the person so named and disqualified them from being voters or candidates for parliament or a local authority for seven years.

The Privy Council held that the sanctions imposed by the law are not, in all the circumstances, punishment (at page 491). Rather, they were intended not really to punish, but to discipline and to "keep public life clear for the public good". In the view of the Privy Council, there is a difference between a disciplinary penalty and a punishment for an offence. Quoting the words of Justice Frankfurter in a United States case of *United States v. Lovett* thus,

"Punishment presupposes an offence, not necessarily an act previously declared criminal, but an act of which retribution is exacted. The fact that harm is inflicted by government authority does not make it punishment. Figuratively speaking, all discomfiting action may be deemed punishment because it deprives of what otherwise would be enjoyed. But there may be reasons other than punitive for such deprivation. A man may be forbidden to practice medicine because he has been convicted of a felony..... Or because he is no longer qualified..... The deprivation of any rights, civil or political, previously enjoyed may be punishment, the circumstances attending and the causes of the deprivation determining this fact."⁷³

The decision of the Privy Council in this case shows clearly that the Code of Conduct Tribunal is conceived by the Constitution as a disciplinary body, and that the power given to it by paragraph 18 of the Fifth Schedule (Section 23 of the Act) are intended, not really to punish, but to discipline and, in the words of the Privy Council, to "keep public life clean for public good."

The view of the provisions in paragraph 18(1) & (2) & (3) (Section 23(1), (2) & (3), as disciplinary rather than punitive derives support from the provision in paragraph 18(6) (Section 23 (6), which says;

Noting in this paragraph shall prejudice the prosecution of a public officer punished under this paragraph or preclude such officer from being prosecuted or punished for an offence in a court of law.

The provision in paragraph (18(6), (Section 23 (6) seems conclusive that

⁷³ (1945) 328 U.S. 303.

paragraph 18(1), (2) and (3) confers no power on the Code of Conduct Tribunal to try and determine criminal charges against any person, and that the penalties there mentioned are not punishments for a criminal offence, as otherwise it will contradict or conflict with the prohibition against double jeopardy in Section 36(9) of the Constitution, which says:

No person who show that he has been tried by any Court of competent jurisdiction or tribunal 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.⁷⁴

If, however, the provisions are viewed as punitive, and not merely disciplinary, then, the question of their inconsistency with certain provisions in the body of the Constitution will arise.

It is respectfully submitted that the Code of Conduct Tribunal is merely a disciplinary body, and has no power under paragraph 18 of the Fifth Schedule to try and determine criminal charges or to issue summons to bring anybody before it for such trial; accordingly, any summons issued by the Tribunal ordering any person to appear before it for the trial of criminal charges brought against him are unconstitutional, null and void.

On the question whether a tribunal, including the Code of Conduct Tribunal, which is not a court in the sense defined in Section 6 of the Constitution, can try and determine criminal charges against a person, and impose criminal punishments against him, like fine or imprisonment, it was submitted on behalf of the plaintiff that

"Paragraph 18 of the Fifth Schedule to the Constitution (or Section 23 of the Act) does not grant power to the Code of Conduct Tribunal to try the Plaintiff for criminal charges; but if it does, then, as will be demonstrated presently, it is null and void for inconsistency with certain provisions in the body of the Constitution. Obviously, the view taken by the defendants is that Section 23 of the Act, taken together with the provisions is Section 24 and the Third Schedule to the Act, grants such a power, these latter provisions are not in Paragraph 18 or any other paragraph of the Fifth Schedule to the Constitution. Section 24(1) of the Act provides:

The rule of procedure to be adopted in any prosecution for the offences

⁷⁴ *Regina v. Ogoo* tried in July 1880. Ref. In Adewoye: *The Judicial System of Southern Nigeria 1854-1954*, 80-82; *Pleas of the Crown* (1824 ed. Vol. 2) 240 at Seq.

under this Act before the Tribunal, and the forms to be used in such prosecution shall be as set out in the Third Schedule to the Act."

Paragraph 2 of the Third Schedule to the Act provides:

"Where, after the perusal of the application and the summary of evidence, affidavit or any further evidence in such forms as the Tribunal may consider necessary, the Tribunal is satisfied that any person appears to have committed an offence provided under this Act, it shall cause that person to be brought before the Tribunal on such date and at such time as it may direct.

Paragraph 3-16 of the Schedule prescribe the rules of procedure to be followed at the criminal trial. Paragraph 17 says:

Where these Rules contain no provision in respect of any matter relating to or connected with the trial of offences under this Act, the provisions of the Criminal procedure Act or depending on the venue, the Criminal Procedure Code shall, with such modifications as the circumstance may require, apply in respect of such matter to the same extent as they apply to the trial of offences generally.

The grant of power to the Tribunal by Section 24 of the Act and the Third Schedule to the Act to try and convict a person on a criminal charge is null and void for inconsistency with certain provisions of the Constitution. One such provision is section 6, which vests judicial powers in the Courts specified therein. The Code of Conduct Tribunal, or any other such tribunal for that matter, is not included in the specification. This position is further supported by the case of *Doherty V. Balewa*⁷⁵ where the then Prime Minister of Nigeria set up a Commission of Inquiry for the purpose of probing the activities of certain politicians in relation to certain banking operations. The following provision was part of the Commissions of Inquiry Act:

The fact that a Commission is issued under this Section shall be sufficient proof of the proper exercise by the Prime Minister of his authority to do so: and neither of the Commission itself nor any action of the Prime Minister in relation thereto shall be inquired into in any Court of Law.

The provision was held to be contrary to Section 22 of the Constitution in that it sought to shut out judicial review of the actions of the Prime Minister and also to impose a presumption of regularity in respect to any of his

⁷⁵ [1961] 1 All NLR 604

acts. The Federal Supreme Court also decided that the Commission of Inquiry is only a tribunal, and not a court of law: and only a court can be empowered to impose a fine as for a criminal offence.

On appeal, the Judicial Committee of the Privy Council also pointed out the distinction between a court of law and a tribunal established by law as consisting in the compulsive or coercive powers possessed by courts strictu-sensu, since it is they alone that can inflict punishments such as imprisonment or fine on a convicted person.

A tribunal has not these powers, although, it often has power to summon witnesses and order the production of documents: it can therefore only certify any one guilty of contempt before it, to a court for the purpose of the imposition of the appropriate punishment: it cannot itself do it. Where a tribunal purports to do this, the trial would not only be unfair, but also null and void.⁷⁶

Fair Hearing

On the issue of fair hearing, I find the statement of Justice Oputa JSC as he then was, in the case of *Yekim Oiapo v. Chief R. O. Sunmonu & Ors*, very apt.

.....a hearing that is tantamount to a travesty of justice cannot by any stretch of the imagination be described as fair, for justice itself is fair and even handed."

It is particularly instructive to note the reason given by the Supreme Court in the dismissal of the appeal in the case of *Federal Civil Service Commission v. J. O. Laoye*.⁷⁷ The Supreme Court inter alia stated:

.....that in view of the fact that the charges against him (J.O. Laoye) amounted to crimes, serious crimes at that, they (the Federal Civil Service Commission) were not competent to try him at all on the principle of *Garba v. University of Maiduguri*⁷⁸ in view of the

⁷⁶ See T. O. Elias, *Judicial Process in the Newer Commonwealth*, Lagos: University of Lagos Press (1990) pp. 198-199.

⁷⁷ S. C. 202/1987 of the 21st day of April (1989) Unreported.

⁷⁸ (1986) 1 NWLR (pt. 16) 556. Also *Cassin & Anor V. University of Aston in Birmingham* [1983] 1 All E.R. 88; *Metitiri v. University of Benin*, Suit No. B/IM/78 of 9th May (1978) (Unreported).

provision of Section 33(4) of the Constitution. Having been accused of a crime, the respondent was entitled to be tried by a properly Constituted Court.⁷⁹

Again, in matters of discipline in our universities, the law concedes to the Visitor, the Council and the Senate respective jurisdictions and powers. But they are not a court. So, once the matter of discipline involves an accusation of a crime, they must hands-off the matter and turn it to the appropriated authority (the courts) for prosecution. The right to fair hearing, it is submitted, involves a right to be heard by an appropriate authority duly constituted by law, the courts. In this respect, fair hearing does not refer to the "pleasing form and appearance" of the hearing nor does it concern itself with the fact that the hearing had the best of intentions but with the "mode of obtaining the hearing."⁸⁰ Justice must not only be done but must manifestly and undoubtedly be seen to have been done.⁸¹

Conclusion

It is our conclusion therefore; that though the Code of Conduct Tribunal may order persons to appear before it at a time and place decided by it, though it may summon witnesses to testify and introduce documents to it, it only has disciplinary powers for the purpose of sanitising public office. It does not and cannot operate as a court to try offenders, pronounce on their guilt and purport to levy punishment on them. This is the prerogative of our courts and no other body can constitutionally do so.

⁷⁹ (1987) 2 NWLR (pt. 587) 623.

⁸⁰ Lord Esher, M.R. Construing the words "fair and reasonable" in the case of *Re Stuart, Ex Parte Cart heart* [1893] 2 Q.B.201, at pp. 204-205

⁸¹ *R. V. Sussex Justices, Ex Parte Mc Carthy* [1924] 1 KB 256; *R. v. Chancellor of the University of Cambridge (Dr. Bentley's case)* [1923] 1 Str. 557.