

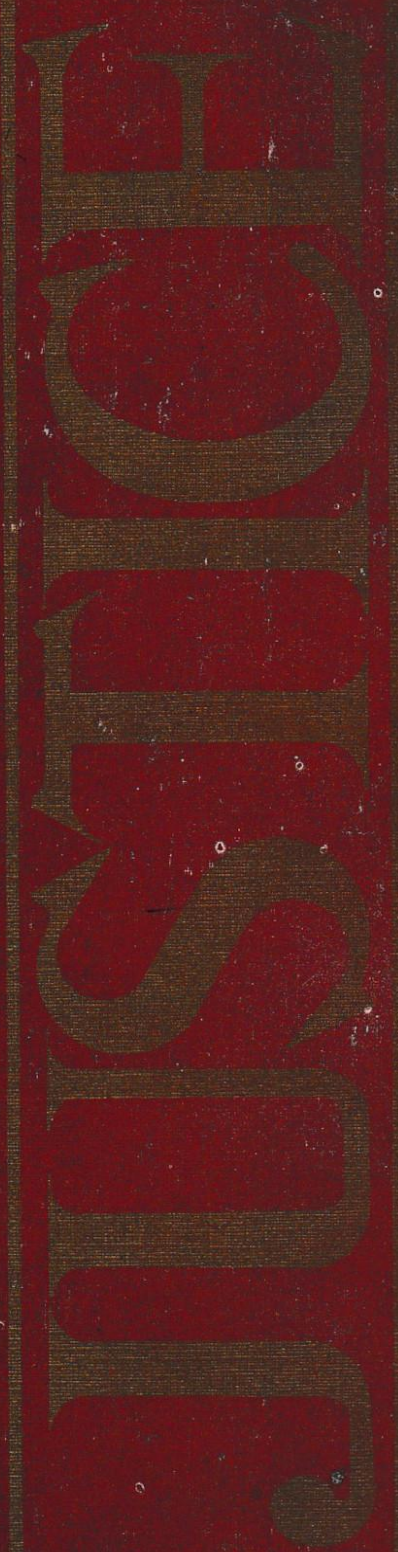
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# FAIR HEARING AND UNIVERSITY DISCIPLINE: AN APPRAISAL

BY  
ENEFIOK ESSIEN

## MEANING

It is curious that the 1979 *Constitution* substituted the phrase "fair hearing"<sup>1</sup> for the common law doctrine of "natural justice". This may probably have been prompted by two reasons. The first reason is the difficulty in defining "natural justice", whether conjunctively or disjunctively.

What may amount to "justice" varies in terms of person, space and place. What the rulers consider as just may be unjust from the viewpoint of the ruled. For instance, reacting to the ban by the Government of Nigeria on ex-politicians,<sup>2</sup> Alhaji Lateef Jakande, an ex-civilian Governor of Lagos State, reportedly remarked that:

- "what the government has done may be in line with their definition of justice but to me the only definition of justice I believe is the only one in the *Oxford Learners Dictionary*"<sup>3</sup>.

The second reason may lie in the wider amplitude and plenitude of the phrase "fair hearing" as opposed to the common law "natural justice". Fair hearing within the meaning of *section 33(1) of the Constitution* means a trial conducted according to all the legal rules formulated to ensure that justice is done to the parties. For instance, a refusal by Court to adjourn for a party to engage Counsel is a denial of fair hearing under *section 33 of the Constitution*<sup>4</sup>. The *Constitution* widens and elevates<sup>5</sup> the common law natural justice and codifies its principles and thus the application of the ordinary rules of natural justice in a case would not exclude the application of *section 33 of the Constitution*<sup>6</sup>, since fair hearing as per *section 33 of the Constitution* is of a wider and higher status than the common law natural justice. This issue was raised but evaded in *Garba & Ors. v. University of Maiduguri* where the Court asked:

- "Now, if the ordinary rules of natural justice apply ... will that exclude the application of section 33 of the Constitution?"<sup>7</sup>

The Court stated that the answer to the question would depend on the nature of the relief sought. In this case the relief sought came directly under the fair hearing clause of the 1979 *Constitution*. It was for:

- "A declaration that the applicants' expulsion with effect from 30th March 1983 from the University of Maiduguri constitutes a violation of the fundamental rights to fair hearing".<sup>8</sup>

And because the relief undoubtedly hinged on the *Constitution* the Supreme Court did not bother itself to consider if the application of the constitutional fair hearing under *section 33* would have been excluded had the claim been brought under the common law doctrine of natural justice. The question arose because counsel for the respondent had argued that since on matriculation a student becomes bound to the University by contract and acquires his status as member of the University through such contract, then the relationship between the University and the student is governed by common law (contract), not by the *Constitution*. Counsel had further contended that there are many situations in which the Court, forgetting *section 33 of the Constitution* with apply the rules of natural justice.

This writer is unable to support the view that the application of *section 33 of the Constitution* (fair hearing) can be excluded by the application of the rules of natural justice. To start with, the section is a constitutional provisions which can be excluded only by an amending Decree specifically excluding it. Secondly, it does not matter if the Court, in deciding a case, based it solely on natural justice without reference to *section 33 of the Constitution*. The fact is that natural justice and fair hearing under *section 33* are interchangeable phrases, but in substance, one is superior, being a constitutional provision.

## ATTRIBUTES OF FAIR HEARING

Although the primary purpose of this paper is to examine to what extent fair hearing is applied by universities in student discipline cases, it would be

illuminating to mention, at least in passing, the attribute and basic criteria of fair hearing. It is unarguable that fair hearing in the context of *section 33 of the 1979 Constitution* encompasses the principles of natural justice in the narrow technical sense of the twin pillars of justice, namely, *audi alteram partem*<sup>9</sup> and *nemo judex in causa sua*,<sup>10</sup> as well as in the broad sense of what is not only right and fair to all concerned but also seems to be so.<sup>11</sup>

The above criteria were expatiated upon by the Supreme Court when it emphasised that<sup>12</sup> the Court or tribunal shall hear both sides not only in the case but also in all material issues in the case before reaching a decision which may be prejudicial to any party in the case. The person liable to be directly affected by proposed acts, decisions or proceedings should be given adequate notice of what is proposed so as to give him an opportunity to make representations and effectively prepare his own case and to answer the case he has to meet.<sup>13</sup> It may however be emphasized that fair hearing does not require that a party must be heard, but that he must be given an opportunity to be heard. It is left for the party to utilize the hearing opportunity given to him.<sup>14</sup> Thus, a person who has been given but has unreasonably failed to utilize a reasonable hearing opportunity, say, by absenting himself without good cause,<sup>15</sup> cannot thereafter complain of lack of fair hearing.

It may here be mentioned that since the *Constitution*<sup>16</sup> guarantees the right of the accused person to be defended by a legal practitioner, a refusal by the Court to adjourn for the party to engage counsel is a denial of fair hearing.<sup>17</sup> But if the party had already engaged a counsel who had been appearing for him, then in that case failure by the Court to adjourn the case on the day the counsel is absent in Court is not by itself, without more, enough to vitiate the entire proceedings. The entire proceedings would have to be examined to see whether, on the whole, there has been a miscarriage of justice and a denial of the party's constitutional right to a fair hearing.<sup>18</sup>

A hearing here consists in preferring a charge against a person and he proffering explanation in defence of himself<sup>19</sup>. All the evidence against him is stated before him and he denies them, cross-examines his adversaries and calls his witnesses where necessary. But the requirement that a person should be given an opportunity to defend himself may be limited to a written reply.<sup>20</sup> It need not be in the form of a trial involving examination and cross-examination, but only a fair opportunity to correct or contradict any relevant statement prejudicial to such person.<sup>21</sup>

However, where written "hearing" is adopted, oral hearing may also be given so as to give the parties a chance to properly mould their arguments to the issues and particularly where veracity and credibility are at issue. This does not mean that oral hearing is of higher quality or status than hearing on written briefs of documents<sup>22</sup>, though it would be wrong and therefore a denial of justice to receive oral evidence from one side and deny the other side the privilege of adducing same. It will be equally wrong to call for written statements from one side while denying same to the other side.<sup>23</sup>

Apart from that the two sides must be heard, the other major attribute of fair hearing is that the person taking the decision must not be biased or interested in the *lis*. This is normally couched in the laconic latin maxim: *Nemo judex in causa sua*. By this rule, the accused should not be the judge or adjudicator.<sup>24</sup>

But sometimes a breach of the *nemo judex* rule may be over-looked if such breach is merely technical, not substantial, and has not occasioned any miscarriage of justice<sup>25</sup>. Also, a breach of the *nemo judex* rule may be waived on ground of necessity. As the Supreme Court stated in *Ex-Parte Ajidasile & Ors. v. Oba Ogunoye & Ors.*:<sup>26</sup>

- "it is settled that a person who is *prima facie* disqualified for interest or bias may be held on grounds of necessity, competent and obliged to adjudicate if no other duly qualified tribunal can be constituted".

#### FAIR HEARING AT UNIVERSITY PANELS/COMMITTEES

At one time it was thought that fair hearing only applies to judicial and quasi-judicial bodies. But the advice of De Smith that "Label Worship must be viewed with suspicion"<sup>27</sup> now appears to be heeded, for fair hearing now applies even to purely administrative or ministerial bodies, so long as a person's right, interest or legitimate expectation is to be affected by the decision of that body.<sup>28</sup>

Even a domestic tribunal such as a disciplinary committee must observe the rules of natural justice,<sup>29</sup> and so also must an investigation tribunal which does not recommend disciplinary action but on whose report disciplinary action is based.<sup>30</sup> It is conceded that generally, a body exercising powers which are of a merely advisory, deliberative or conciliatory character or which do not have legal effect until confirmed by another body, or involves only the making of a preliminary decision, will not normally be held to be

acting judicially.<sup>31</sup> However, where the determination by such statutory body may be either one that purports to create, vary or extinguish legal rights or one that purports to declare existing legal rights by the interpretation of common law rules or of statutory norms and their application to a set of facts, fair hearing must apply.<sup>32</sup> In *Adigun & Ors. v. The Attorney-General of Oyo State & Ors.*<sup>33</sup> the Supreme Court said:<sup>34</sup>

- "It makes no difference whether the body charged with the inquiry is judicial, quasi-judicial or administrative. ... It is a well established common law rule that an implied duty to observe the rules of natural justice can arise even in the discharge of administrative functions where such functions directly encroach on individual interests. ... Section 33(2) of the 1979 Constitution does not speak of *lis inter partes*, and in fact concerns power conferred on "government" or "authority" and not necessarily a Court. Thus the constitutional protection of fair hearing in the determination of civil rights and obligations is not limited to the exercise of judicial powers. It includes exercise of administrative discretion."

#### THE STUDENT CASES

It was asserted in 1973 that "when it comes to natural justice students appear to have had a vary raw deal".<sup>35</sup> An attempt to explain why this is so was made in 1977 by Griffith when he said:

- "The Courts see students essentially as children and sometimes very unpleasant children - above all, as very undisciplined children. And universities and colleges are institutions of the State and so to be upheld. ... The student cases indeed are excellent examples of the judicial obsession with, as they see it, the necessity to protect and preserve the structures of constitutional authority without undue concern for the rights of those who wish to challenge that authority."<sup>36</sup>

The explanation proffered by Griffith relates only to students cases which are actually litigated upon in Court and adjudicated. But even in that case, Griffith's explanation would not hold in Nigeria where very many Court cases concerning students have ended in favour of such students and against the University.<sup>37</sup> Griffith's explanation does not touch on the numerous extra-judicial students cases which in fact is our major concern here.

In this connection, it may be stated that in all educational institutions a distinction may possibly be made between decisions on academic matters, that is, for example, success in examinations and non-academic or disciplinary matters. In the former situation the rules of natural justice do not apply, in the normal sense at any rate. A student has no right to be heard before he is failed - except to the extent that the student's scripts or performance of some other academic task could be regarded as his presentation of his case. Besides, of course, there are in all universities, examination regulations provisions for calling into question the correctness of such decisions. This is to enable the student have substantial justice even in these academic matters because, as Megarry J., put it:

- "To say that the requirements of natural justice do not apply is not, of course, to say that the University is free to trample on the student's rights: for he is entitled to have his application duly considered by whatever bodies have the power of decision. In academic matters, i.e., disputes over examination results, the aggrieved student is more or less saying that the examiner performed his task negligently. In other words, he is challenging the subjective judgment of the examiner and this must be discouraged."<sup>38</sup>

The need for the University to comply with natural justice is more patent in disciplinary cases involving expulsion or other punishment for alleged misconduct. This need was acknowledged in *Glynn v. Keele University*<sup>39</sup> where a number of students had appeared naked in the area of the Student's Union, causing offence to many members and employees of the University, and residents on the campus. Because there was no time before the end of the term to summon a meeting of the University disciplinary panel the Vice Chancellor decided to act summarily. He wrote to Glynn whom he regarded as having been identified as one of the nudists, to inform him that he was being fined £10 and was to be excluded from residence on the campus for the following session. The letter pointed out that an appeal against the decision lay to the University Council. The plaintiff wrote the registrar of the University on July 3, 1970 and, at the end of the month, went abroad. On August 10, a letter was written to him informing him that the Council would hear his appeal on September 2. Unfortunately Glynn was abroad and did not return home until after the date fixed for the hearing. The Council by then had upheld the decision of the Vice-Chancellor. Pennycuik V-C held that the disciplinary powers of the University Vice-Chancellor

were, under the University statutes, so extensive and far-reaching in their consequences that when exercising them he must observe the rules of natural justice. It would not be right, said the learned judge, "to treat those powers as merely matters of internal discipline".

In situations where there is a group action by students like in *Glynn's case*, the proper procedure appears to be that the student(s) identified as the actor(s) be given a formal charge. This would make the student charged to know beyond doubts that he is accused of or charged with having done the act and so is called upon to defend himself and examine and, if need be, cross examine witnesses. It would not suffice to merely "summon" the student to come and testify along with other persons.<sup>40</sup>

Another aspect of the problem is the common occurrence in universities where the same individual sits on a number of committees dealing with a case, in various capacities, e.g., as examiner, then as Dean of Faculty and Chairman of Faculty Board and as Senate member. As an examiner, if he catches a student cheating and reports, this makes him a complainant and a potential witness. As member of faculty Board he is the judge. Is fair hearing breached in the circumstance? That is the question.

One way of solving the problem would be to exclude the examiner from the Board during deliberation on the student's case. But if by excluding the examiner the board cannot form a quorum then the examiner/board member may be allowed to sit and participate on ground of necessity. As the Supreme Court stated in *Ex-parte Ajidasile & Ors. v. Oba Ogunoye & Ors.*<sup>41</sup>

- "It is settled that a person who is *prima facie* disqualified for interest or bias may be held, on grounds of necessity, competent and obliged to adjudicate if no other duly qualified tribunal can be constituted."

Furthermore, it appears the examiner cum Board member may legitimately take part in deciding the student's case even at the Senate (if he is also the University senate member) in view of the very persuasive Canadian Supreme Court decision in *King v. University of Saskatchewan*.<sup>42</sup> In that case the Court refused to quash a University decision merely on the ground of over-lapping membership in the various University bodies which had dealt with *King's case*; the Court held that such duplication is inevitable in the light of the organisation of universities.

It is therefore the considered view of this writer that

when it comes to observation of fair hearing in the students cases, the Courts pay due regard to the substance rather than the form; it looks at the decision to see how just and fair (or otherwise) it is and not just at the status of the man taking the decision. If a decision is right, it would not seem to matter who took it.<sup>43</sup> It is also the view of this writer that as a general rule, fair hearing must be observed in all cases of student discipline.

In emphasizing that the substance rather than the form should be considered the writer is however not unmindful that as a general rule once fair hearing is breached the whole decision is void, notwithstanding that that same decision would have been arrived at in the absence of the breach, and notwithstanding that the applicant has not suffered any detriment thereby.<sup>44</sup> The point we are making is that the University cases are an exception, just as we have pointed out other exceptions, to this general rule.

#### ENDNOTES

1. Section 33(1) of the 1979 Constitution of Nigeria.
2. See: Schedules 1 and 2 of Decree No. 25 (Participation in Politics and Elections (Prohibition) Decree 1987).
3. See: "Cleaning the Aegean Stable", Newswatch, Oct. 12, 1987 page 8.
4. See: *Ntukidem & Ors. v. Asuquo Oko & Ors.* (1986) 5 N.W.L.R. (Pt. 45) 909.
5. *Adigun & Ors. v. The A-G of Oyo State & Ors.* (1987) 3 S.C. 250 at 451.
6. *Legal Practitioners Disciplinary Council (LPDC) v. Gani Fawehinmi* (1985) 7 S.C. 178 at 205, 251, 341, 374-376.
7. This was posed as a question but not answered in *Garba & Ors. v. University of Maiduguri* (1986) 1 N.W.L.R. (Pt. 18) 550 at 584.
8. *Ibid.*
9. Sometimes expressed as "Audietur et altera pars".
10. Sometimes expressed as "Nemo index in re sua"; "Nemo debet esse Judex in propria sua". Coke used the form "Aliquis non debet esse index in propria causa": Co. Litt. 1419.
11. *FCSC v. Laoye* (1989) 2 N.W.L.R. (Pt. 106) 652.
12. *Kotoye v. Central Bank of Nigeria & Ors.* (1989) 1 N.W.L.R. (Pt. 98) 491.
13. *Per Nnamani J.S.C. in Garba v. University of Maiduguri op. cit.* at 601-602.
14. *Kuusu v. Udom* (1990) 1 N.W.L.R. (Pt. 127) 421 per Karibi Whyte, J.S.C. at 445 and per Nnaemeka-Agu, J.S.C. at 448; *The State v. Oba Adebambo Oyenuga & Ors.* (1971) 1 U.I.L.R. 476.

15. *Lim v. Minister of Interior, Malaya* (1964) 1 N.W.L.R. 554, 566; *Glynn v. Keele University* (1971) 1 W.L.R. 487, 495.
16. Section 33(b)(c) of the 1979 Constitution.
17. *Ntukidem & Ors. v. Asuquo Oko & Ors.* (1986) 5 N.W.L.R. (Pt. 45) 909.
18. *Adamu v. Attorney-General of Bendel State* (1986) 2 N.W.L.R. (Pt. 22) 284.
19. A person is not "charged" if he is merely summoned perhaps along with others, to testify on an issue: *Onwumechili & University of Ife v. Akintemi & Ors.* (1985) 3 N.W.L.R. (Pt.13) 504 at 515.
20. *Dawodu v. Ologundudu & Ors.* (1986) 4 N.W.L.R. (Pt. 33) 104; *New Nigeria Bank Ltd. v. Obevudiri* (1986) 3 N.W.L.R. (Pt. 29) 387.
21. *Onwumechili & UNIFE v. Akintemi*, op. cit., *Adedeji v. Police Service Commission* (1968) N.M.L.R. 102.
22. *Adigun & Ors. v. Attorney-General of Oyo State* (1987) 3 S.C. 250 at 307.
23. *Ibid* at 453; *Re Brook* (1864) 16 C.B. (NS) 403 at 416; *Cooper v. Wandsworth Board of Works* (1863) 32 L.J.C.P. 185 at 188 per Byles J.
24. *LPDC v. Fawehinmi* (1985) 2 N.W.L.R. (Pt. 7) 300.
25. *Ikomi v. State* (1986) 3 N.W.L.R. (Pt. 28) 340.
26. (1985) 1 N.W.L.R. (Pt. 4) 654.
27. De smith, *Judicial Review of Administrative Action*, 3rd ed. page 162.
28. *Schmidt's case* (1969) 2 Ch. 149; *Ridge v. Baldwin* (1964) A.C. 40, per Lord Reid.
29. *NNB v. Obevudiri* (1986) 3 N.W.L.R. (Pt. 29) 387.
30. *University of Ife v. Akintemi & Ors.* Op. Cit.,
31. *Okoye v. Lagos State Government* (1990) 3 N.W.L.R. (Pt. 136) 115.
32. *Ibid.*
33. (1987) 3 S.C. 250.
34. *Ibid* at pages 309, 412-413.
35. A. Samuels, "The student and the Law" (1973) 12 J.S.P.T.L. 252, 255; B. Schwart and H.W.R. Wade; *Legal Control of Government*, 1972 Opp. 245.
36. J.A.G. Graffith, *The Politics of the Judiciary* (1977) Fontana pp. 170, 197.
37. See: e.g., *Onwumechili & University of Ife v. Miss Akintemi & Ors.* (1985) 3 N.W.L.R. (Pt. 13) 504.
38. *Thorne v. University of London* (1966) 2 Q.B. 237.
39. (1971) 1 W.L.R. 487; (1971) 2 All E.R. 89.
40. See *Onwumechili & UNIFE v. Akintemi & Ors.* (1985) 3 N.W.L.R. (Pt. 13) 504.
41. (1985) 1 N.W.L.R. (Pt. 4) 652.
42. (1969) S.C.R. 678; see also Lord Denning M.R. in *Ward v. Bradford* (1972) 7 O L.R.G. 27.
43. This is analogous to the principle that if a decision is right it does not matter that wrong reasons were given for the decision. See: Blackall in *Ukejianya v. Uchendu* 13 W.A.C.A 45 @ 46; *Taiwo & Ors. v. Abiodun* (1982) 5 S.C. 60 @ 74.
44. See: *Adigun & Ors. v. Attorney-General of Oyo State Ors.* (1987) 3 S.C. 250 at 309-310; *Dawodu v. Ologundudu & Ors.* (1986) 4 N.W.L.R. (Pt. 33) 104; *LPDC v. Fawehinmi*, op. cit.

