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Public Examinations in Nigeria and Punishing Malpractice: Human Rights Perspective

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Abstract

This paper principally seeks to address the question of examination malpractice and the violations of the right to fair hearing. This problem apparently seems well detailed and clearly sorted out in internal examinations. But in public or external examination, the law as well as the facts are not too clear. This has contributed to poor performance in examinations and a lowering of the standard of education. How do we get out of this dilemma and what practical solutions thee are to solve this form the main thrust of this work.

Introduction

Examination malpractice is a subject that can be discussed from so many perspectives. Different works[1] have dealt not only with the nature and causes but also the effects of examination malpractice, both in the school environment and public examinations[2] that we need not repeat them in this paper except for purposes of emphasis. However, as an issue, examination malpractice has moved from the sidelines to the front burner of national discourse. It now resonates with many in Nigeria. The print and electronic media are often awash with stories of sordid and hard-to-believe tales of examination malpractice in public examinations like West African School Certificate (WASC),[3] National Examination Council (NECO), Unified Tertiary Matriculation Examination (UTME) conducted by the Joint Admission and Matriculation Board (JAMB), State and National Common Entrances Examination and lately, the Universities Aptitude Test (UAT).This practice which became pronounced during the era of "Expo 70"[4] has grown into a cankerworm with devastating consequences on our standard of education.[5] Indeed, the situation both in scale and frequency has reached a crisis point to the extent that parents, school authority, government, employer and the public have no other choice but to be very concern.[6]

This concern for and about the standard of our education has propelled the relevant examination bodies to strive to impose discipline on erring individuals. To fulfil this mandate, they have adopted measures ranging from the withholding of examination results to outright cancellations, imposition of ban on certain categories of persons and centres and in some instances, threat of arraignment before a court or tribunal saddled with the jurisdiction to hear the matter.

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[1] N. Y. S. Ijaiya, "Re-Engineering Educational Management for Quality Education in Kwara State, Nigeria", (2004) 3 *International Journal of Educational Management*, , pp.1 – 14; A. O. Issa, "The Impact of Cultism and Examination Malpractice on the Quality of Education in the 21st Century Nigeria". Centre for Continuing Education, Federal Polytechnic, Offa, Kwara State, (2006), pp. 1 – 15, V. A. Count, "Examination Malpractices in the Nigerian School System: Perspective and Possibility*http://independentacadamia.edu/victorcounted/papers/31777/Examination_malpractice_in_the_Nigerian_School_System_Perspectivesandpossibilities*" accessed on 25/6/11

[2] For the purpose of this paper the use of the term " public examination(s)" means "external Examination".

[3] This examination is conducted by the West African Examination Council (WAEC)

[4] This refers to the West African School Certificate Examination in 1970, which witnessed a high level of malpractices, especially the leakage of question papers. See Generally E. O. Nwosu, "Law and Examination Malpractice". A Paper presented at the 35th Annual Conference of the Nigerian Association of Law Teachers held at Usman Dan Fodio University, Sokoto, 16th November, 1998.

[5] In 1991 the *Newswatch* weekly magazine in its cover story entitled "Exam Cheats: New Threat to Education" noted in its editorial, "Crookery in Classrooms", that "Students, male and female, of various institutions have elevated examination fraud to a new art form as the invent new, ingenious strategies": July 1, 1991, p.9

[6] Clearly from available statistics the practice of examination fraud is widespread. According to *Newswatch* magazine, in June 1991 the University of Calabar, Unical, expelled 24 students, few weeks earlier, the University of Jos, Unijos, had announced the expulsion and suspension of 32 students, Mid –April, some eight weeks ago, the University of Lagos, Unilag, dismissed and rusticated 54 students, etc.: see the *Newswatch* weekly magazine, July 1, 1991, p.9

Ordinarily, few would quarrel with the outcome of these sanctions if imposed after due consideration of the relevant facts, with the accused or culprit given the opportunity to be heard. But this is not so. Rather what we often see is a flagrant abuse and disregard of the principle of "fair hearing". Punishment is imposed without regard to the rights of the culprits especially the right of fair hearing or due process. This leaves the culprits, the candidates or staff at the mercy of these examination bodies. The manner of disregard of this principle which is well captured in the case of *West African Examination Council v Omodolapo Yemisi Adeyanju*[7], among others,[8] has provoked this paper.[9]

In this paper therefore, our task will be to examine this issue, in particular, the question of whether the proper legal guarantees which make for fair hearing, like the hallowed twin principles of *audi alteram partem*[10] and *nemo judex in causa sua*[11] are complied with in the meting out of punishment. In pursuing this task, the status of the relationship of the examination bodies with the candidate is examined: Is the relationship of the examination bodies with the candidate strictly contractual and incapable of raising issues of potential violations of fundamental rights? Or, are parties in such a relationship bound to observe the fundamental human rights principles?

Although, few cases exist which directly bear on this matter, suffice it to say that the concept and practice of human rights have long been an integral part of our *corpus juris*. Judicial decisions in the examination sector are rife. However, as need to be pointed out, most of these decisions deal with the system of discipline in school environment rather than the specific case of malpractice in public examinations. This work is therefore intended to be an examination of a totally new and fresh area, and with a view to filling the yawning lacuna. The foregoing discussions also throw up some very serious conceptual issues which need clarification. Firstly, what are the meaning, nature and cause of examination malpractice? Secondly, what legal framework exists for discipline of examination candidates and lastly, what is the nature of the relationship between the candidate and the examination body and the relevance of the rule of fair hearing in the event of discipline?

Nature of Examinations in Nigeria

Generally speaking, examination is a process through which students are evaluated or tested to find out the quality or knowledge they have acquired within a specified time. This examination may be internal or external. It could be oral, written

[7] (2008)34 *NSCQR* (Pt.II) April – June 732.
[8] See also *West African Examination Council v. Akinola Oladipo Akinkunmi* (2008) 35 NSCQR 222
[9] See also Joseph N. Nwazi, "Scope of Disciplinary Powers of Nigerian Universities on Examination Malpractice Offences" (2005)2(2) *Ife Juris Review*292, Akin Ibidapo-Obe, "The Declining Disciplinary Power of the Universities (A Case Comment on Garba v. University of Maiduguri)," (1987) *OAU Law Journal* 211 ,S.A.Oretuyi, " Discipline of Students: A Vice Chancellor must observe the rules of Fair Hearing", (1981) 12 (1) *Nig. L. J* 83
[10] This Latin phrase means "let the other side be heard"
[11] Meaning "you cannot be a judge in your own cause"

or both. In Nigeria, an internal examination is one where students' continuous assessment tests, terminal, semester and annual or promotional examinations are evaluated by the school the students attend. External examinations on the other hand are those conducted by external examination bodies such as WAEC, JAMB and other bodies authorized by statutes to conduct entrance examinations.

Definition and Nature of Examination Malpractice

If there has ever existed a term that suffers so much abuse, it is certainly "examination malpractice".[12] Whether from the academic or statutory point of view, the confusion that has bedeviled this term remains glaring. Indeed, the search for a suitable definition has vacillated from the general perception to the particular. Despite this challenge there cannot be any fruitful discussion of the subject unless concise *albeit* definition of the term is given.

Starting from the general outlook of the subject, examination malpractice is defined as cheating at examination or any act intended to benefit or give undue advantage to oneself or another by deceit or fraud, before, during and after examination.[13] This definition is inadequate in that it lacks specificity. It does not relate to any specific acts or incidence, persons, time or place. This gap seems to have been filled in by Badmus and Odor when they defined examination malpractice as wrongdoing in terms of construction, custodianship, administration, marking and release of results, with the intention of conferring advantage on some candidates over others[14]. The World Bank in relating the issue to public examination system sees it as a practice which involves deliberate act of wrongdoing, contrary to the official examination rules designed to place the candidate at an unfair advantage. From this definition, a fundamental fact seems to have been made clear: that there is no fundamental or real difference between malpractice in public examination and school examination. Further, that the wrongdoing must be deliberate, contrary to the

[12] From available literature this subject has been approached from different perspective but hardly from the human rights angle which forms the thrust of this paper: see N. Y. S. Ijaiya, "Re-Engineering Educational Management for Quality Education in Kwara State, Nigeria", *International Journal of Educational Management,* vol. 3, (2004), pp. 1 – 14; A. O. Issa," The Impact of Cultism and Examination Malpractice on the Quality of Education in the 21st Century Nigeria". Centre for Continuing Education, Federal Polytechnic, Offa, Kwara State, (2006), pp. 1 – 15, V. A. Count, "Examination Malpractices in the Nigerian School System:PerspectiveandPossibility@http://independentacadamia.edu/victorcounted/papers/31777/Examinatin_Malpractice_in_the_Nigerian_School_System_Perspectivesandpossibilities accessed on 25/6/11

[13] B. O. Balogun, "Examination Malpractices and the Nigerian Society", (1999) vol. 4, No. 1 *The Jos Journal of Education,* pp. 110 – 116.

[14] G. A. Badmus and P. I. Odor, *Challenge of Managing Educational Assessment in Nigeria,* (Kaduna: Afaman Ltd, 1996), p. 1 quoted in "Examination Malpractice, Limitation to Understanding Scientific Performance in Primary Science Among Primary Six Pupils in Cross River State, Nigeria". (Unpublished Ph.D Thesis, University of Calabar, Calabar, Nigeria, 2007), see also S. O. Igwe, *Professional Handbook for Teachers*, (Owerri, Nigerian Union of Teachers, 1990), p. 355

"official" examination rules and intended to give an unfair advantage to the supposed beneficiary. [15]

Examination malpractices may also be defined by description. Its methods are elastic, varying in forms, shapes and sizes with differing designations such as "microchips", 'macro chips', 'download', 'laptop', 'giraffe' and 'quite recently, the use of 'mercenaries'.[16] Micro and macro chips are same techniques, but the difference lies in the size of the materials imported into the examination hall'. Whereas, the former has to do with small pieces of extraneous materials imported into the examination hall, the latter is of a more significant size. "Download" refers to the bringing in of the whole text from which the candidate intends to copy. Here, the scientific calculator and in recent times, the GSM mobile phones are easily used to store data and formula. 'Laptop' is a form of examination malpractice often carried out by female students, who perpetuate it easily by wearing of skirts. Hence, the lap of the culprits is used as the writing surface from which relevant information can be copied in the examination as the need arises. "Giraffe" on the other hand is the age-long style whereby candidates stretch their necks in order to see and copy from other candidates in the examination hall.[17]

The above forms of examination malpractices are nothing compared with the sophistication and artistry that mercenary represents. A major difference between mercenary and other forms of examination malpractices is that whereas the actual candidate in question perpetuates other forms of examination malpractices, "mercenary" involves someone recruited as an external person to write the examination on behalf of the candidate concerned. Usually, the mercenary is considered as being intellectually better placed to write the examination successfully for the one who has engaged his services. It is hereby asserted that the 'mercenary' syndrome is usually male dominated, often with pecuniary benefits attached or sometimes to compensate an amorous relationship.

At the level of rule-making, i.e. legislation, attempts have also been made to define this offence and provide punishment in various statutes. The statute establishing the West African Examination Council (WAEC)[18] for instance makes provision for what it terms "offences in relation to examination".[19] By its provisions, both the offences and penalties for illegally using examination papers and leakage of examination papers, etc.[20] are spelt out and specifically include such things as person

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[15] SeeWorldBankGroup,"PublicExaminationMalpractice"*http://www.worldbank.org/education.examination.malpractice.asp.* access 20/6/2011 , See also N. O. Olanipekun, "Examination Malpractice in Nigeria Schools: An depth Analysis (Offa: Royal Prestige Venture, 2003), p. 23

[16] Most have different classification for these methods. For example, other methods, according to a Newswatch investigation include 'bullets/missiles',, 'dubbing', 'body writing or tatoo'' walkie talkie', 'computer', 'giraffe', 'super print', 'ECOWAS', 'micro-chips', 'impersonation' , and 'contractor': *Newswatch* weekly magazine, July 1, 1991, p.14

[17] See *University of Calabar Students Handbook, 1997* (UNICALCONS: University of Calabar Publication, 1997), pp. 29 – 30.

[18] Cap. W4 LFN, 2004

[19] See Part II of the Statute

[20] Sections 19 and 20 WAEC Act, 2004 respectively.

having foreknowledge of live questions or the contents of live question papers (whether or not such foreknowledge is in respect of one or more live questions or live question papers) or where a person in any manner unauthorised makes use of live questions or live question papers.[21] In Section 20 also, " any person engaged in setting, moderating, revising, vetting, printing, or in the collection, storage, distribution or custody of live question papers or instruction, or in making drafts or copies thereof or engaged as supervisor, invigilator, attendant or otherwise howsoever who, before or during the period of an examination knowingly or recklessly and without being lawfully authorised so to do, discloses the contents of any such live question paper or instruction, or any draft or copy thereof to any person (whether a candidate for that examination or not) shall be guilty of an offence." and subsection 2 of section 20 further provides that, " any person (whether a candidate or not)who knowingly makes use of the contents of any live question paper or instructions of any draft or copy thereof in a manner whosoever, and without being lawfully authorised so to do shall be guilty of an offence and liable…"

However, the most elaborate and all-embracing is the Examination Malpractice Act.[22] This Act creates offences relating to examination malpractices emanating from examination conducted by the following examination bodies: WAEC, JAMB, The National Teachers Institute (NTI), the National Business and Technical Education Measurement and "any other body established by the Government to conduct an examination". What this means is that the Act regulates examination in both within and outside school environment. In addition, the Act has specifically stated the offences – cheating at examination, stealing of question papers, impersonation, disorderliness at examinations, disturbances at examinations, conducts at examinations, obstructing of supervisor, breach of duty, conspiracy, aiding, abetting, procuring and inducing the commission of offence of examination.

Causes of Examination Malpractice

The causes of examination malpractice, whether for public or school examinations are legion[23] and specifically include: first, the existence of dubious and fraudulent admission process, right from the primary level to the tertiary level. With the active connivance of some of the staff of these examination bodies, parents get their wards admitted by all means even when they have failed the entrance examination or aptitude test. Hence,

[21] Section 19 (1) WAEC Act 2004
[22] Cap. E 15, Vol. 6, Laws of the Federation of Nigeria, 2004
[23] See the following articles: R. Ekpo, "Examination Cheats", *Newswatch Magazine*. (1991, July, 1st). p.5. S.U. Amang, *Factors that influence Students' Tendency to Cheat in Examination,* (Unpublished Post -Graduate Diploma project, 1994.) A. Bushway, & W. Nash, School Cheating Behaviour, (1977) 47 *Review of Educational Research,pp.*623 – 632. J. R. Godfrey, Academic dishonesty in schools: The intermediate Certificate policies of the board of secondary schools studies 1937 – 1957(2002), retrieved on 11/1/2005 from htt://education.curtin.edu.au/iier/iier12godfrey.html.E.C.Okoro, *The Impact of Examination Malpractice on the Functionality of Education in Nigeria*, (2001) 1(1)*International Journal of Administration, Planning & Research* pp. 105 – 114.

the system is saturated with persons who know that they have cheated their ways into our educational institution and are poised to cheat their ways through to the end.[24]

Second, the frequent and indiscriminate closure of institutions of learning resulting from frequent strike actions, naturally leads to unstable academic calendar. This forces our academic institution to condense semesters and course work in order to catch up with the time needlessly lost to strikes. Such rushed academic programme which subjects the students to receiving so many lectures at so short a time makes them panicky. As a result, they resort to what they consider to be the "second best option" to pass examinations, which is to cheat.

Third, the shortage of facilities conducive for learning which according to *Newswatch* report, include: Shortage of facilities such as classrooms, hostels, recreation facilities, constant supply of electricity, lack of good libraries and books, adequate teaching and non-teaching manpower suitably qualified for the purpose, are some of the causes of examination malpractice. Confirming this, Professor Utibe Ita of the Faculty of Agriculture, University of Port Harcourt, intones that "the condition under which the students study and write examination (makes it) conducive to perpetrate examination malpractice"

Fourthly, the erosion of the autonomy of academic departments over admission robs the department of the discretion of taking students or persons they consider suitable for their peculiar courses. Usually this exercise is burdened by demands from all quarters to admit people not on the basis of merit but for "PR" purposes. This group does not only help to corrupt the system but indeed brings about total collapse.

Fifthly, there is the problem of over-admission of students against available facilities in most education institutions. This creates a situation where students are crammed into a small space, with few having any sitting place in the lecture halls when they have to attend lectures or have examination. This state of affairs is certainly not conducive to learning. This condition does not but gives impetus to the students wanting to seek external help. Hence, they cheat.

The high cost of undergoing academic studies is another factor encouraging malpractice in examination. Education today is no more cheap as students pay high school fees under the guise of charges both in their institutions and fees for public examinations – SSCE, NECO, JAMB. As a result of these exorbitant fees (which in some cases, is now being borne by some state governments) students ensure that the examination is a "one off" thing. This indeed is a realistic expectation in a land where there is suffocating poverty. Therefore, parents and students would stop at nothing to do everything to pass because if they should fail, it is not likely that they would have the money to retake them.

[24] I.D Denga, & H.M Denga, *Educational malpractice and cultism in Nigeria,(*Calabar: Rapid Educational Publishers Limited. 1998).

With the soaring height of unemployment especially among university graduates, this group becomes a ready and willing tool in the hands of those who want to cheat in exchange for an agreed remuneration. The escalating number of these unemployed graduates feels they must survive by using the intellectual power in them to get their much needed means of livelihood denied them by an uncaring country. Thus, they become "workers in the examination malpractice factory".

Examination malpractice is exacerbated by the escalating rate of frauds and fraudulent practices in Nigeria and it is generally a sad reflection of the moral decadence of the time. Whenever a pastor commits an "unpastoral" act or a public office holder suffocates and strangles the economic life of the country through their wrongful acts, or a politician refuses to play politics according to the rules of the game or a lecturer or a teacher exhibits undue laziness in their jobs or married couple fail to keep their marital vows or security forces unduly victimise those they are paid to protect or a judge gives judgments that violate their judicial oaths and conscience, or a bank worker dips his hands into depositors account or a trader takes delight in gaining from half-measure scales, then the perpetrators of examination malpractice bask in the vain glory that they are doing in a different way what other persons have done or are doing and thus openly challenge any person with an iota of credibility, to cast the first stone by pronouncing a guilty verdict. Sadly, tribalism is another factor that encourages this malfeasance. It is believed that primordial sentiments play a major part in entrenching this culture especially in a society where the tradition of nepotism is rife. In doing this therefore, the lecturers or supervisors responsible for the grading of scripts or supervising the examinations favour people from their ethnic groups. They are driven by the philosophy of helping to assist in the intellectual human capital development of their tribes or communities.

Urgency to acquire academic qualifications and the rush to proceed to the labour market lead students to pursue paper qualification at all cost, thus, making them susceptible to cheating. Such students with the help of their parents connive with certain unscrupulous individuals by the use of unfair means to ensure they do not stay a day longer than their normal academic programme years. All these they do to fast-track their much expected taste of good life in the labour market and their subsequent working years.

Society's perception of persons who take examinations more than once as academic failures: One of the major causes of examination malpractice in Nigeria is our societal perception that brilliant persons do not fail examinations or cannot take the same examination more than once. Hence, candidates in such public examinations as the SSCE, NECO, JAMB, etc, in order not to be victims of this perception, feel that it is a duty incumbent on them to pass at one sitting. Accordingly, the urge to indulge in examination malpractice becomes a controlling factor if such candidates must have to be seen as intellectual giants by their peers as well as members of the public.

In these days of financial straits, stipend paid as salaries are inadequate to meet the financial needs of many a person, therefore when the opportunity comes for one to make a few one or more naira, they all fall in droves for its irresistible

fascination. Over glorification of paper qualification to the detriment of sound intellectual potentials makes some students who strongly believe in the philosophy of "the end justifies the means" to seek to acquire paper qualifications by all means even to the detriment of hard work. It is the theory of paper qualifications first before sound intellectual potentials.

Finally, there is the suggestion that tends to link malpractice to the need for juicy jobs. This issue finds its relevance in the fact that most juicy and lucrative jobs are linked to high academic grades. So those with first class are more likely to get these limited and high paying jobs. Thus this provides a strong incentive to cheat or get involved in examination malpractice.

Effects of Examination Malpractice

One obvious effect of examination malpractice is that it undermines the integrity of the examination bodies as well as the quality of certificates they issue. Both nationally and internationally, products of this system are viewed no more than illiterate graduates who lack the wherewithal to hold their own in the labour market.

Examination malpractice leads to loss of faith and confidence in examination as true test of knowledge. When there exist obvious disparity between the student's level of work and the grades earned, especially when it is tilting in favour of less intelligent and less hardworking people who more often than not earn good grades because they have the relevant connection and financial muscles, than the entire examination is not only discredited but also brought into disrepute. Attendant frustration often result in sundry other malpractices in examinations to such extent that they are sooner or later certified as academically unfit and marked for withdrawal on academic ground. Desperate ones among them would want to do all things possible to hang on. This often leads them to all forms of anti-social vices, prominent among which is cultism.

A nexus has in recent times been drawn between the high rate of prostitution, the spread of HIV and AIDs. Female students are alleged to exchange sex for grades and the unfortunate aspect of this conduct is that they do it without regard to any form of protection like the use of condoms.

The Right to Fair Hearing

The doctrine of natural justice or fair hearing which is encapsulated in the twin Latin maxims *audi alteram partem*[25] and *nemo judex in causa*[26] has a long history. First, it is believed that its origin can be traced to the biblical account of the interaction between God and Adam in the Garden of Eden when God was to pass judgment on him for disobedience. This was confirmed by Fortescue J., in the celebrated case of *R v. Cambridge*[27], where the learned judge based its judgment to

[25] "Hear the other side"
[26] "A person should not be a judge in his own cause"
[27] *Rex v. Chancellor of the University of Cambridge* (1723)1 Sr.557,567; 93 Eng. Rep. 698,704 (KB)

nullify the decision of the corporation of Cambridge University removing Dr. Bentley from the University on the breach of the rule of fair hearing. He declared that:

> the objection for want of notice can never be got over. The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam before he was called upon to make his defence. 'Adam,' (says God) where at thou? Hast thou not eaten of the tree, whereof I commanded thee that thou shouldest not eat?' And the same question was put to Eve also." [28]

The Greek people of ancient times recognized this principle and had it inscribed upon images in places where justice was administered. This doctrine was regarded by the Greeks as a practical aid to making good decision rather than an abstract aspect of justice.

Before the advent of colonial administration which brought in its wake British type courts into Nigeria, the traditional society was ruled by the King-in-Council who administered justice according to their notion of what was fair and just central to the system of adjudication then was the realization that a party to dispute must be heard. The right to fair hearing is enshrined in numerous declarations which represent Customary International Law, such as Universal Declaration of Human Rights (UDHR, 1948). The UDHR enshrines basic fair hearing right, such as the presumption of innocence until the accused is proven guilty. Specifically, Article 10 states that; 'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligation and of any criminal charge against him''. Regional human rights regimes such as the African Charter on Human and Peoples' Rights (which is applicable to Nigeria)[29] have also made provisions for the right of fair hearing.

Some years after the adoption of the UDHR, it was decided that the right to fair hearing should be defined in more detail in the international convention on civil and political rights. This right to fair hearing which is specifically protected in Articles 14 and 16 of the ICCPR is binding in international law on states that have ratified it. Generally, Article 14 establishes the basic right to a fair trial, presumption of innocence; minimum standards for criminal proceedings, the right of a convicted person to have a higher court review the conviction or sentence and prohibition against double jeopardy.

The rules of natural justice entered the shores of Nigeria as a by-product of our colonial domination by the British. In America, the doctrine is accommodated in

[28] It is also a biblical principle that one must be heard before sentence is passed. St. John succinctly puts it rhetorically thus: "Doth our law judge any man before it hears him and know what he doeth?"

[29] African Charter on Human and People's Rights 1983 (now part of the Laws of the Federation of Nigeria 2004)

the "due process" clause of the United State of America Constitution. In Nigeria however, even though the rules of natural justice came to us as part of the received common law of England, the expedient of incorporating the requirement of the rules of natural justice in our constitutions has been embraced since the 1960 constitution. It comes in as fair hearing in each successive constitution. In the 1999 Constitution[30] for instance, section 36(1) provides as follows[31]:

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

Expounding on the above constitutional provision, Olujinmi lists the rights to include the following[32]:

(a) the right to be present all through the proceedings and hear all the evidence against him;
(b) The right to cross-examine or otherwise confront or contradict all the witnesses that testify against him;
(c) The right to have read before him all the documents tendered in evidence at the hearing;
(d) The right to have disclosed to him the nature of all relevant materials evidence including documentary and real evidence, prejudicial to the party, serve in recognized exception.
(e) The right to know the case he has to meet at the hearing and have adequate opportunity to prepare his defence.
(f) The right to give evidence himself call witnesses, if he likes and make oral submission either personally or through a counsel of his choice before an impartial tribunal in an atmosphere free from fear and intimidation, etc.

Fundamentally, the accused must be informed of the charges against him in writing and he must be given a reasonable time to make his defence and the tribunal or court seised of the matter must be impartial; the hearing must be in the open, the trial must not be unduly rushed or delayed; it must be within a reasonable time.[33]

[30] Constitution of the Federal Republic of Nigeria 1999 (as amended)
[31] Section 36 (1) Constitution of the Federal Republic of Nigeria 1999 (as amended)
[32] Chief Akin Olujinmi, "Fair hearing in Nigeria: the Current State of the Law" in in J. A. Yakubu (ed.) , *Administration of Justice in Nigeria: Essays in Honour of Hon. Justice Mohammed Lawal Uwais, CON GCON*(Malthouse Press Ltd.,2000),p.8
[33] In the case of Prof. Ajomo asserts that not only is the full enjoyment of other rights hinged on the right to fair hearing, but that "in fact the painstaking observation of this right within any society means that the foundation of such a society is rooted in justice and its citizens can be reassured of fair play at all times. This noble right have (sic) been espoused in it's modern connotation in *Cooper v. WandsWorth Board of Works* where it was said that the right is of universal application, founded on the plainest of principle of justice'

It must once again be stated, that the *audi alteram partem* rule is not confined to the conduct of strictly legal tribunals but it is applicable to every tribunal or body of persons vested with authority to adjudicate upon matters involving civil consequences to individuals. This view was upheld by Karibi –Whyte JSC. In *Legal Practitioners Disciplinary Committee V. Fawehinmi*[34] when he observed that "The principle of natural justice applies in all cases where the preliminary investigation or inquiry is an integral or necessary part of a process which may "terminate in an action adverse to the interest of the applicant claiming the right to be heard". This principle, though it has a universal application, is applied depending on the circumstances of each case, the nature of the inquiry, the rule under which the tribunal is acting, and the subject – matter that is being dealt with.

Fair hearing is the same thing as a fair trial. The test of a fair- hearing is the impression of a reasonable person who was present at the trial, whether from his observation justice has been done in the case. This is so because, it is of fundamental importance that justice should not only be done, but manifestly and undoubtedly be seen to be done.[35] In *Kaunda v. Government of the Federation of Malaya*[36], an Inspector Kaunda challenged his dismissal on the ground that it was based on a report he had not seen and as such amounted to a breach of fair hearing. The court upheld is claim, thus nullifying his dismissal. According to the court, the minimum requirement of a fair hearing is as follows: " if the right to be heard is to be a real right which is worth anything, it must carry with it the right of accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him and then he must be given a fair opportunity to correct or contradict them". The observation of a reasonable man here implies whether considering all the factors stated above, whether the minimum standards required of adjudication to satisfy the demand of fair hearing where complied with.

Having disposed of the discussion on the need to grant an accused a fair hearing, it is intended here, to briefly discuss the issue with respect to whether this right of fair hearing can be waived? The point has been made that this right to fair hearing is germane to every trial before a tribunal, panel of enquiry and even the regular court. The practice in other jurisdictions, for example Britain and America, is that it is open to the beneficiary of the right to waive it. For instance, if the beneficiary is fully aware of the circumstances disqualifying an adjudicator from sitting and he neglects, omits or refuses to object, he is deemed to have acquiesced to the proceedings. The position in Nigeria is however different. It is trite law that the right to fair hearing, being constitutionally guaranteed rights, includes a public right which cannot be compromised, waived or lost by consent.[37] Indeed, in the words of Kayode Eso JSC, (as he then was), "the Supreme Court has a duty to safeguard the

[34] (1985) 2NWLR 301
[35] *R v. Sussex J.J.Ex p. McCarthy* (1924)1K.B. 256 or 1923 All E.R.233(per Lord Hewart C.J.)
[36] (1962) A.C.322
[37] *Ariori v. Elemo* (1985) 2NWLR (pt.6) 211

fundamental rights in this country which from its age and problems that are bound to associate with it, is still having an experiment in democracy."[38]

On a further probe into the issue, one may ask what the position would be where a beneficiary is fully put on notice of the charges against him and he refuses to make his defence. Would this also be treated as a waiver? Would the court or adjudicator wait for him to make his defence *ad infinitum*? The Supreme Court had laid down the law in this regards. The Supreme Court has stated that an accused who has not been charged to court cannot claim the right to fair hearing. Again, a person who has failed or neglected to get his case heard cannot complain of denial of fair hearing. Flowing from both positions as enunciated by the Supreme Court above, in both instances, it cannot be said that the person has waived his right to fair hearing, since he lacks the competence to do so. The correct proposition, it would appear is that he has merely abandoned his right to fair hearing.

Disciplinary Powers of External Examinations Bodies in Examination Malpractice Cases

The statutes establishing the various examination bodies showed little enthusiasm in dealing with this issue. Apart from the National Business and Technical Examination[39] and the West African Examination Council[40] which devote some sections to examination malpractices, others rather avoid any mention of it. The latter statutes instead place more emphasis on such general issues as the general control and conduct, developing and administering, monitoring, collecting and keeping of records relating to the examination.[41] The lack of any specific provision on this issue has never stopped the examination bodies from assuming jurisdiction and this they do by stretching the definitions of the aforementioned powers on the control and management of examinations conferred by statute.

However, in order to properly deal with the legal framework available in Nigeria on examination malpractice, it is necessary that we take a holistic view of the subject. In this wise therefore, we shall look at both specific legal provisions contained in the statutes of the various examination bodies, general law on examination malpractice put in place by statute to govern all public examinations conducted in Nigeria and the provision of the 1999 Constitution (as amended) which have overriding powers over other specific statutes.

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[38] *Ibid, at* p.219. See also *Registered Trustees of the Constitutional Rights Project (CRP) v. The President of Nigeria & Ors.*Suit No.M/102/93(unreported), *Garuba & Ors. v. A.G Lagos State*, Suit No. ID/559M/90(dated 31/10/90) (Unreported), *Ogugu & Ors v. The State* (1994) 9 NWLR(pt.366)1, *Ransome-Kuti v. Attorney-General of the Federation* (1983) 1 SC 13

[39] Cap N 12, Vol. 10, LFN 2004

[40] Cap. W4 LFN, 2004

[41] See the National Examination Council (NECO) (Establishment) Act Cap N37, Vol. 10, LFN, 2004, Joint Admission and Matriculation Act, Cap J… LFN, 2004

Specific examination malpractice provisions in the statute creating the examination bodies

The external examination bodies are creatures of statutes. These statutes provide for their constitution, powers and funding. Outside these powers there is also that which authorises it to apprehend, investigate and punish cases of examination malpractice. It is important that we note from the outset that the provisions in the various statutes are similar but not necessarily the same. In some of the statutes, the bodies are more empowered than in others.[42] This difference notwithstanding, the purpose of the Act is the same- the punishment of offenders.

In order to discuss this law, we shall take a look at some statutory provisions that confer powers of punishment on offenders and to what extent these powers have been utilised. For instance, the law which establishes the West African Examination Council (WAEC)[43] makes provision for what it terms "offences in relation to examination".[44] The provision empowers the examination body to take disciplinary action against those who have committed both the offences and penalties for illegally using examination papers and leakage of examination papers, etc.[45] Specifically, section 19(1) reads in part as follows: "such candidate shall not take or be allowed to take or continue the examination, in addition, he shall be prohibited from taking any examination held or conducted by or on behalf of the Council for a period of two years immediately following upon such contraventions and if a candidate aforesaid has already taken any papers at the examination, his result therefrom shall be cancelled." In addition, the candidate may be prosecuted and if found guilty shall be "liable on conviction to a fine of N2,000 or imprisonment for a term of five years or to both such fine and imprisonment."[46]

It is important to point out here that the power of the examination body to impose penalties contained in the WAEC Act is not in any way impaired by the act of prosecution of the culprit. In fact, section 20 (2) reads: "the penalties contained in this sub-section (a) may be imposed whether or not a prosecution for an offence under section 20 or 21 of this Act has been brought or is being conducted or contemplated and (b) shall be in addition to such other penalties as a court may impose upon conviction for an offence under the aforesaid section 20 or 21." The powers conferred by the above subsection 2 of section 20 may either be exercised by the Council itself or "by any person authorised in that behalf by the Council."[47]

[42] For example the National Examination Council (NECO) does not have any specific provision dealing with malpractice. However in the light of such omission it would not be out of place to rely on such statutes as Miscellaneous Offences Act, Cap. M17, LFN 2004 and Examination Malpractices Act Laws of the Federation of Nigeria CapE15, 2004. These statutes are "general statutes' in the sense that the deal with malpractices occurring in all examinations.

[43] Cap. W4 LFN, 2004

[44] See Part II of the Statute

[45] Sections 19 and 20 WAEC Act respectively.

[46] Section 20(1) and (2) WAEC Act 2004

[47] WAEC Act 2004

A slight modification, in fact, an improvement on the WAEC Act seems to have been made in the National Business and Technical Examination Board (NABTEB) Act. [48] In this statute, the major improvement is in the investigation of offences in such a manner as to arguably accommodate the doctrine of fair hearing. By virtue of section 16(1) (a) NABTEB Act, a Post-Examination Investigation Committee[49] is established with the responsibility of "conducting a preliminary investigation into any case where it is alleged that the candidate at an examination had access to or used live question papers." Also, where need be, the Committee shall investigate other cases of malpractice spelt out in the said section, impose the penalties provided for in section 17subsections (2)-(9). More importantly, it is part of the Committee's mandate to recommend to the Board (NABTEB) that, "the case (of malpractice) should be referred to the Federal High Court, the High Court of the State or the High Court of the Federal Capital Territory, Abuja, whichever is applicable in the circumstances."[50]

General statutory provision

The general law governing malpractice in all examinations in Nigeria is spelt out under the omnibus statute described as "Examination Malpractices Act".[51] By virtue of section 13 of this Act, the Federal High Court shall have Jurisdiction to try offenders under the Act and shall have power, "notwithstanding anything to the contrary in any other enactment, to impose the penalty provided for offences in this Act."Among the offences that can be prosecuted are cheating, stealing of question papers, impersonation, disturbance and obstruction of supervisor, forgery of slip, conspiracy and aiding the commission of these offences. It is however important to state that the law also provides for a situation where a failure to sustain a charge of the offence itself leaves room for alternative trial for the offence of attempt where evidence of same exist. Further, in line with the practice under the WAEC Act "an examination body shall have the power to:

a) Withhold, suspend or cancel the result of a candidate or ban or blacklist a candidate from taking its examination if it is satisfied that the candidate has engaged in any form of examination malpractice;

b) Withdraw recognition, suspend, ban or blackmail or place on probation a school or examination centre if it is satisfied that the school or examination centre is involved in any form of malpractice.

[48] Cap.N12 LFN 2004.Quite to the contrary, why this is seen as an improvement is that although there is also the power to constitute a pre-examination committee under the WAEC Act, the said Committee does not provide the basis for trial as this can be done independent of it: See section 22 WAEC Act 2004

[49] Hereinafter referred to as the "Committee"

[50] Section 16 (1)(b) NABTEB Act 2004

[51] Laws of the Federation of Nigeria, CapE15, 2004. See also Miscellaneous Offences Act, Cap M17, Laws of the Federation of Nigeria 2004

c) Remove the name of, or withhold payment to a supervisor or an invigilator or any other official employed in the conduct of an examination if it is satisfied that the invigilator or official has contributed to an examination malpractice.
2) An examination body may in exercise of its power under this section circulate the name of the offending candidate, supervisor, invigilator, official, school, or examination centre to the other examination bodies which may impose similar punishment.

From the foregoing, an analysis of the above provisions raises more questions than answers. For instance, what type of relation has a candidate vis-a-vis the Examination bodies? Does the Examination Malpractice law, (however described), envisage the granting of fair hearing before punishment is imposed? Or should we assume that the candidate having applied to the examination body to participate in the examination has impliedly waved his right to fair hearing? Further, there is the issue of authorisation. How can that be ascertained or should we assume that all WAEC staff (ad hoc or permanent) are so authorised?

Examination Malpractice and Human Rights Violations in Nigeria – Era of Judicial Intervention

Until the mid-seventies, punishment resulting from any act of indiscipline, including examination malpractice, whether within or outside the school environment; was largely an internal matter of the respective institution and bodies. Students could be restricted, expelled or otherwise punished, without external interference for various kinds of conduct, including examination malpractice. Occasionally, staff got punished for misconduct, but in the latter case, it was under a more careful procedure. By this arrangement, the autonomy of the university and the external examination bodies in matter of discipline was practically unchallenged. Indeed, the university administration was the *alpha* and *omega* in matters of discipline of whatever kind.

Towards the end of the seventies, however, there was a change and a radical, departure from the above state of affairs. The authorities began to evoke stern disciplinary measures in order to match the nature of the misconduct which, had now grown astronomically and become more sophisticated. Another dimension which got introduced was that, those affected by the decisions of the school authorities began to challenge the outcome in court, mostly on ground of procedural unfairness or non-compliance with laid down rules. This therefore marked the beginning of judicial intervention in matters of discipline which hitherto was thought to be the exclusive preserve of the universities.

Although the judicial intervention was bold, refreshing and well received, it also introduced a lot of uncertainties. For example, the exact scope and limits of the authorities vis-à-vis the law enforcement authorities is far from clear. The court in *Miss O.A. Akintemi and 2 Ors v. Prof. C. O. Onwumechili and 2 Ors*[52] not wanting to rock the boat felt comfortable to retain the *status quo* by upholding the inviolability of

[52] (1985) 3 NWLR (pt 13) 504

the domestic forum of a University. This attitude found justification in the argument that the University or any institution of learning has a proprietary right over its degree and as such should have the primary responsibility and absolute discretion in academic matters.

Then came the incident that led to the case of *Garba v. University of Maiduguri*[53] which changed everything. There was now the need for strict adherence to the rule of fair hearing.[54] The students had not been given the opportunity of knowing what the allegations against them were nor were they allowed to give evidence in contradiction thereof. The Supreme Court held further that the disciplinary issues within the domain of the University which in themselves were criminal or had criminal elements had to be dealt with in a court of law.[55] Finally, even the powers of Vice-Chancellor on disciplinary matters which seem to have been preserved and which cuts across most of the Act of Universities in Nigeria and can only be exercised in a very subjective manner,[56] was condemned by the learned Justices of the Supreme Court. A cursory look at the oft-quoted section sadly shows that there is no provision for fair hearing. Reacting to the subjective nature of the section in question, Kayode Eso JSC condemned the decision of the Vice-Chancellor in very strong terms. He stated thus:

> It is no longer a case of a person upon whom the discretion is conferred making a blunt, but authoritative statement, that he is satisfied. It seems to me to be a case wherein the date upon which that person has come to his conclusion would have to be examined objectively, according to the rules of natural justice and no longer left to his subjectively… it follows therefore that when section 17 of the University of Maiduguri Act, 1979, No. 83 gives a discretion to the Vice-Chancellor" where it appears to him that any student of the University has been guilty of misconduct" and the data of his satisfaction are known, the Vice-Chancellor should under the ordinary rules of natural justice even under the common law obey the elementary rules of fairness and fair-play before he finds against any such student or as this case, before he takes such a drastic action under section 17(i)(d) of the Act to expel the student.

[53]*Yesufu Amudu Garba & Ors* v. *University of Maiduguri(1986) 1NSCC245*

[54] The Supreme Court unanimously allowing the appeal reasoned that the breach of the principles of fair hearing related to the fact that the Disciplinary Panel which investigated the matter had as its chairman the Deputy Vice-Chancellor who had himself been a victim of the students' rampage. The court held further that neither the Vice-Chancellor nor any internal investigating panel set up by him had any competence in law to so do.

[55] According to the Supreme Court by virtue of section 33(1),(4) and (13) of the Constitution of the Federal Republic of Nigeria, 1979, only a court of law or a judicial tribunal is competent to hear and determine a criminal charge against students of a university.

[56] This section provides as follows: "where it appears to the vice-chancellor that any student of the University has been found guilty of misconduct…" preserve their right to impose the he can impose any of the punishments specified under the section.

The Supreme Court underscored the need, and indeed, the necessity of applying the basic principles of natural justice at every trial and the effect that the non-applicability of same may have on the accused to the extent that it is capable of blasting a man's reputation forever or ruin his prospects for life. He asserts emphatically thus "a university student is a priceless asset and he is on the threshold of a world of useful service to the nation. We cannot afford to destroy him by stigmatizing him with the guilt of offences unless proved guilty before a court".
Also in the cases of *Egwu v. University of Port Harcourt,*[57] *Onwumechili v. Akintemi*[58] *and Uko Effion Robert Uduak v. West African Examination Council (WAEC) & Anor*,[59] the decisions of the University and the examination bodies were quashed on the grounds that the applicants were denied the rights to fair-hearing. However, it must be noted that where the enabling law establishing the examination body or university provides that before a matter may be brought to court to ventilate a grievance in respect of investigation by a disciplinary committee or body, where the applicant does not await the outcome of the panel, but goes to court, such would be dismissed for being incompetent and prematurely embarked upon.[60]

Examination Malpractice in Public Examinations And Human Rights Violations

However, despite the uncertainties as a result of the above judicial decisions, on the other hand, there has been reluctance on the part of the external candidates to challenge the actions of external examination bodies, including such specific acts like the refusal of the examination body to allow candidate take his examination, the arbitrary act of examination cancellation, the withholding of examination results, the withdrawal of examination result already issued; ban on centres and postponements of examination. Each of these acts have their peculiar consequences, the worse being the imposition of a *fait accompli* on the action of the examination body. Unfortunately, in these cases, the students (or culprits) are not given a hearing before any decision respecting their matter is reached.

Some have argued that public examinations have their peculiar characteristics and as such understanding them is necessary in order to deal with issues of malpractice in public examination. These issues which need clarification include the following, first, what is the nature of the contract an external candidate has with the examination body? Secondly, if it is a contractual arrangement can there at any point be an issue of breach of fundamental rights if the party is acting within the terms of the contract? Thirdly, considering the fact that the law empowers the examination body to impose some penalties, can it be implied that it is within the intendment of the law, the statutes and the constitution, that such penalties must only be imposed after fair hearing has been granted the culprit? Fourthly, how *sacrosanct* is the assertion that if an act of criminality exists in any disciplinary proceeding

[57] [1995]NWLR (pt.414) 419
[58] (1985) 3 NWLR (pt 13), 504
[59] Suit No. M/370/2000(unreported)
[60] This fully discussed *infra*

automatically it is only the court that has jurisdiction? And finally, how justifiable is it to impose collective punishment for malpractice when criminal liability is personal?

The existence of contractual relationship

It has been acknowledged that the external student who applies to the examination body by buying the form, registering for the examination and sitting for same is in a contractual relationship with the body. More importantly, as part of that relationship, the student is entitled to a result. In *West Africa Examination Council v. Akinola Oladipo Akinkunmi* [61] the examination body, WAEC, had cancelled the respondent result after its provisional release and upon which the respondent used in securing admission at the University of Ilorin. The respondent challenged the cancellation on the ground that it was done purportedly on the allegation of malpractice without the respondent being given a hearing. At the hearing the issue of the contractual status of the parties was raised. For the appellant, the examination body, it argued that "there was contractual relationship between the appellant and the respondent and that the rules and regulation which constitute the terms and conditions of the said contract are contained in Standard Forms prepared and presented by the appellant to the candidates including the respondent who accepted to be bound by the terms and conditions by filing and signing same."[62] The counsel to the respondent countered that "the rules (made by the appellant pursuant to section 23(1) of the West African Examination Council Act) are not common law rules of the law of contract … (but) statutory."[63]The Supreme Court in allowing the appeal conceded that the issue before the court was breach of contractual obligation with the question of fundamental right only being subsidiary.

But in *Adeniran Tobi Onagoruwa v. Joint Admission and Matriculation Board,*[64] the court spelt out the ingredients of a valid contract thus:" the acceptance of the offer of provisional admission by the appellant was not sufficient to stop the respondent from withdrawing since the parties had not reached a conclusive agreement as to the terms of the contract. For a valid contract to be formed they must meet at the same point, event or incident. They must not meet at different points, events or incidents. They must be "ad idem". The post review exercise carried out showed that the appellant has not met the conditions for him to be given a final admission for his course of study." It can therefore be said without equivocation that the relationship of the student with the examination body is contractual, howbeit; a contract with a statutory flavour.

Can a breach of human rights be founded on contractual obligations?

Just like in those cases dealing with students discipline, whether within or outside the school's environment, or wrongful dismissal, cases that are founded on

[61] (2008)35 NSCQR 222
[62] *Supra* at p.234
[63] *Supra* p.237
[64] (2001) 10 NWLR 724

contracts with statutory flavour must necessarily conform to the principle of fair hearing. In the celebrated case of *Garba v. University of Maiduguri*[65]this principle was reaffirmed. The facts of the case are as follows: on 2nd February, 1983, there was a students' demonstration in the University of Maiduguri involving about 500 out of the 4,000 students. Out of the 500 students, less than 100 students actually participated in the arson, destruction of property, looting and indecent assault. Subsequently, the Vice-Chancellor set up the Disciplinary Investigating Board, headed by the Deputy Vice-Chancellor, who himself was a victim of the rampage. The panel met and during the conduct of investigation 104 witnesses including students were interviewed. The appellants were among the 76 students interviewed. At the end of its investigations several students including the appellants were expelled from the university.

The expelled students filed an action at a Maiduguri High Court under the Fundamental Human Right (Enforcement Procedure) Rule 1979 seeking reinstatement to the University on the grounds that they had been denied a fair-hearing by the Disciplinary Investigating Board upon whose findings their rustication was based. The Maiduguri High Court granted the relief sought by the appellants. Dissatisfied by the decision of the trial court, the University appealed against decision of the High Court, Maiduguri to the Court of Appeal sitting in Jos. The Court of Appeal reversed the decision of the trial court. The students then appealed to the Supreme Court.

The Supreme Court unanimously allowed the appeal and quashed the decision of the court below. The Supreme Court held that the appellants had not been given a fair hearing by the University before they were rusticated. The court reasoned that the breach of the principles of fair hearing related to the fact that the Disciplinary Panel which investigated the matter had as its chairman the Deputy Vice-Chancellor who had himself been a victim of the students' rampage. Again, the students had not been given the opportunity of knowing what the allegations against them were nor were they allowed to give evidence in contradiction thereof.

Similarly, in the cases of *Egwu v. University of Port Harcourt,*[66] *Onwumechili v. Akintemi*[67] *and Uko Effion Robert Uduak v. West African Examination Council (WAEC) & Anor,*[68] the decisions of the University and the examination bodies were quashed on the grounds that the applicants were denied the rights to fair-hearing. Briefly, the facts of *Onwumechili v. Akintemi*[69] are this. Three female students of the University of Ife (as it was known then) were alleged to have been involved in examination leakages and malpractices in the sessional examinations in the University. These students had merely as others appeared as witnesses before an investigation panel set up to look into the alleged leakages. Thereafter, the panel submitted their written report to the Vice-Chancellor who relying on it, suspended the

[65] *Supra*
[66] [1995]NWLR (pt.414) 419
[67] (1985) 3 NWLR (pt 13), 504
[68] Suit No. M/370/2000(unreported)
[69] (1985) 3 NWLR (pt 13), 504

students. The students went to court to challenge their suspension on the ground that they were not accorded fair hearing in respect of alleged examination leakages which formed the basis of their suspension. Reliefs sought by the applicants/appellants in the above cases were granted by the court.[70]

Can penalties be imposed without fair hearing?

As noted earlier, the statutes creating the various examination bodies empowered them to imposed penalties for examination malpractices.[71] But what remain contentious is whether the culprit or accused is by that statutes required to be informed of the offence against him and give him the opportunity to put in a defence. In *West Africa Examination Council v. Akinkunmi,*[72] the counsel for the examination body has argued that given the large number of candidates involved in the examination malpractice, it was impracticable to accord every candidate a hearing before the cancellation."[73] On the other hand, counsel to the student (respondent) contented that the rules of natural justice provided in the fair hearing provisions of the constitution and the African Charter on Human and Peoples' Right cannot be circumvented on such flimsy grounds. Assuming (without conceding) that the legal relationship is contractual, counsel argued, it was a contract with statutory flavour similar to that in Garba's case and under which any punishment by way of cancellation of result must be preceded by due process. Further, this cancellation on the ground of alleged malpractice without the respondent being heard violates his fundamental rights of fair hearing, he argued. It was contended that in exercise of disciplinary power against a candidate for examination malpractice, the appellant is acting in a quasi-judicial capacity, comparable to a domestic or administrative tribunal bound to observe the twin rules of natural justice – namely (i) *audi alteram partem and (ii) non judex debet esse in causa sua*- embodied in section 36(1) of the 1999 constitution and Article 7 of the African Charter on Human and Peoples' Rights.

In *Garba v. University of Maiduguri,*[74] the Court noted that the Vice-Chancellor could exercise his disciplinary powers under section 17 of the University of Maiduguri Act. This section which is couched in a very subjective manner and cuts across most of the Acts of Universities in Nigeria provides as follows: "where it appears to the Vice-Chancellor that any student of the University has been found guilty of misconduct…" What this means is that the Vice-Chancellor can impose any of the punishments specified under the section. As the court observed, a cursory look

[70] See also *Sofekun v. Akinyemi & Ors* (1980)5/7 SC 1, *MDPC v. Okonkwo* (2001) ALL FWLR (pt.44) 642

[71] This confirms the fact that the relation of the parties, the examination body and the candidate is contract with statutory flavour: see *UBN Ltd v.Ogboh* [1995] 2NWLR (pt.280) 647, *Eperokun v. University of Lagos* (1986) 2NWLR(pt.9)162 & *Dr Edet Akpan Udo v. University of Calabar* (Suit No. M./SC/8/78 of 14th of April 1978 cited in Joseph N. Nwazi, "Scope of Disciplinary Powers of Nigerian Universities on Examination Malpractice Offences" (2005) , 2(2) *Ife Juris Review*292

[72] *Supra*

[73] *Ibid,* p.738

[74] *Supra*,p.232

at the oft-quoted section shows that there is no provision for fair hearing. Reacting to the subjective nature of the section in question, Kayode Eso JSC condemned the decision of the Vice-Chancellor in very strong terms. He stated thus:

> It is no longer a case of person upon whom the discretion is conferred making a blunt, but authoritative statement, that he is satisfied. It seems to me to be a case wherein the date upon which that person has come to his conclusion would have to be examined objectively, according to the rules of natural justice and no longer left to his subjectively… it follows therefore that when section 17 of the University of Maiduguri Act, 1979, No. 83 gives a discretion to the Vice-Chancellor" where it appears to him that any student of the University has been guilty of misconduct" and the data of his satisfaction are known, the Vice-Chancellor should under the ordinary rules of natural justice even under the common law obey the elementary rules of fairness and fair-play before he finds against any such student or as in this case, before he takes such a drastic action under section 17(i)(d) of the Act to expel the student.

The issue of fundamental rights is central to any quasi-judicial determination in Nigeria. Indeed, it is an issue of public policy and public good which seeks to uphold the Constitution of the Federal Republic of Nigeria. The rights can neither be waived, compromised nor suspended by the parties, any statutes or governmental policy.
The memorable words of Edem Kooffreh C.J. in *Dr. Edet Akpan Udo v. University of Calabar*[75]about the need for opportunity to be given in such circumstances will continue to guide us through the ages:

> Even if the applicant was not governed by regulations for his employment, the rules of natural justice would still have been invoked to give him the right to know why he was terminated by the council set up by the respondent to consider such cases. I agree with the counsel for the applicant that in deciding the fate of the staff of the university, the council or the university is performing a judicial or quasi-judicial function as distinct from administrative or executive functions. That being so, the respondent will be expected to observe the rules of natural justice and give the affected staff the full complaint against him, and the opportunity to be heard…If such flagrant abuse of natural justice was allowed to go unchecked, no appointment in the public service is safe, not even that of the Vice-Chancellor"

In *University of Ilorin v. Oluwadare,* [76] Court of Appeal affirmed the fact that this right cannot be waived when it said "the Committee set up by appellant lacked the power and jurisdiction to try the respondent and since any incompetent trial is a

[75] Suit No.M.SC/8/78 of 14th April 1978 (Unreported)
[76] (2003) FWLR (pt.149) 1195 at pp.1211-1212, (per Onnoghen JCA(as he then was)

nullity, the said trial by the committee is a nullity, void and of no effect. This follows the fact that the respondent's complaint is basically is basically against an infringement of his fundamental right to fair hearing which *is a constitutionally guaranteed right that cannot be taken away by any domestic arrangement between the parties."*[77]

It needs to be pointed out that even in extreme cases the courts have not ignored the right to fair hearing. In *West African Examination Council v Omodolapo Yemisi Adeyanju*[78], the Supreme Court had upheld the appellant's appeal on the ground that the main allegation was for wrongful or unlawful cancellation of the result of the Senior School Certificate Examination and the principal relief was the restoration of the plaintiff/respondent by the defendant/appellant which the court below in allowing the respondent's appeal ordered the appellant to do. It was however, observed that the alleged breach of the respondent's fundamental right flowed directly from the main complaint of the respondent that the cancellation of her result was done without affording her a fair hearing. The alleged breach of the respondent's fundamental right is therefore, only ancillary or subsidiary to the main claim.
The Supreme Court, therefore upheld the appeal that the trial court had no jurisdiction when it allowed the suit to be brought before it under the fundamental rights enforcement procedure instead of by a writ of summons because the main claim was principally made up of disputed facts and that the fundamental rights issue raised by the respondent *although relevant* was only ancillary or subsidiary to the main claim.

The point has been made earlier that part of the requirement is that the trial must be transparent to the reasonable bystander ad the trial must be in open court except for matters where public morality demand that such trial should be in chambers. This point has been clearly stated by Kayode Eso J.S.C. in the case of *Federal Civil Service Commission v. Layode.*[79] He stated that "when anyone is accused of a criminal offence, he should in his own interest and in the interest of truth and justice be tried by the ordinary court of the land. No hush hush inquiry will take the place of open trial. The right to fair hearing comprehends and includes the right to be heard in open court in defence of one's character and good name, when accused by misconduct amounting to a criminal offence."

In the final analysis, we can say, without fear of contradiction that the right to fair hearing is the entitlement of every Nigerian and these rights must include the following constitutional safeguards that: (1) the accused must have information of the crime committed;(2) the accused must have the right to be represented by counsel;(3)

[77] *Ibid*. Emphasis mine
[78] (2008)34 *NSCQR* (Pt.II) April – June 732. *West African Examination Council v. Akinola Oladipo Akinkunmi* (2008) 35 NSCQR 222

[79] (1989) 2 NWLR 652 – 729 part 707, (paras. D – E)

there must be disclosure of identities of witnesses and (4) there should be only one trial for the crime committed.[80]

Jurisdiction in Disciplinary matters with Criminal Elements

The case of *Garba v. University of Maiduguri*[81]has been elevated to the status of a *Delphic oracle* especially with regards to the powers of a disciplinary body to exercise jurisdiction when the issue of criminality is raised. In the above case the Supreme Court held that by virtue of section 33(1), (4) and (13) of the Constitution of the Federal Republic of Nigeria, 1979, only a court of law or a judicial tribunal is competent to hear and determine a criminal charge against students of a University. The court held further that neither the Vice-Chancellor nor any internal investigating panel set up by him had any competence in law to so do.[82] This decision has been followed in many cases including *University of Uyo & 3 Ors v. Linda Onyebuchi Essel*.[83] In *University of Uyo & 3 ors v. Linda Onyebuchi Essel*, the respondent, a student at the University of Uyo, was allegedly involved in examination malpractice. The examination malpractice panel and the Senate Appeal Panel set up the university to investigate the allegations recommended her expulsion from the university, which was carried out. The respondent then filed a motion on notice at the high Court seeking an order of certiorari to quash the decisions of both panels and for her reinstatement.

The trial court held that the proceeding was in breach of fair hearing and granted the relief' sought by the respondent except that of damages. Dissatisfied, the appellants appealed to Court of Appeal. Three issues were distilled by the court from the issues formulated by the parties. Among the issues was:

> Whether the trial Court was right in holding that the allegation of examination malpractice levelled against the respondent was in the nature of a criminal offence and consequently, not within the domestic jurisdiction of the two panels set up by the university to determine.

This issue the Court of Appeal resolved in favour of the respondent thus:

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[80] This right enables the accused to raise the plea of *autrefois acquit or autrefois convict* so as to avoid double jeopardy. Section15 (3) of the Examination Malpractice Offences Act provides that a person who has been tried and convicted or acquitted for an offence in connection with examination malpractices shall not be tried a second time for the same offence.
[81]*Supra*
[82] In *University of Ilorin v.Oluwadare* (2003) FWLR (Pt.149) 1195
[83](2006)All FWLR(Pt.315) 81. See also *University of Ilorin v. Oyelana* (2001) N.W.L.R 84, *Ugwumadu v. University of Nigeria* (2000) 7 NCLR 130, *University of Ilorin v. Oluwadare (2003) FWLR(Pt.149)1195*

> Any accusation or allegation of examination malpractice is a serious criminal charge under section 3(16) of the Special Tribunal Miscellaneous Offences Act Cap. 40, Laws of the Federation of Nigeria, 1990 and it is punishable with 10years imprisonment. Therefore, it is definitely not within the domestic jurisdiction of the two panels of set up by the 1st appellant… by virtue of section36(1) and (4) of 1999 constitution, only a court of law or a judicial tribunal is competent to hear and determine a criminal charge … furthermore, where infamous conduct or gross misconduct cannot be established without proving facts that would amount to an offence covered by the criminal code, the tribunal should yield to the criminal court for the trial of the criminal offence.[84]

The point has been made earlier that part of the requirement of fair hearing is that the trial must be transparent to the reasonable bystander and the trial must be in open court except for matters where public morality demand that such a trial should be in chambers. This point has been clearly stated by Kayode Eso J.S.C. in the case of *Federal Civil Service Commission v. Layode.*[85] He stated that "when anyone is accused of a criminal offence, he should in his own interest and in the interest of truth and justice be tried by the ordinary court of the land. No hush hush inquiry will take the place of open trial. The right to fair hearing comprehends and includes the right to be heard in open court in defence of one's character and good name, when accused of misconduct amounting to a criminal offence".

This was the decision of the Supreme Court in *University of Ilorin and Anor v. Idowu Oluwadare*.[86] In this case, the Applicant/Respondent, a student of the University of Ilorin, was allegedly involved in examination malpractice during the semester examination conducted by the appellants on 27th day of August, 1998. On that fateful day, the invigilator who caught him demanded the respondent to write a statement to that effect, which he refused. Based on the above facts, he was invited to appear before the University Student Disciplinary Committee to defend himself. Having appeared before the disciplinary committee he was found guilty of examination malpractice. The Committee therefore recommended to the school authority that he should be expelled from the university. Meanwhile, by virtue of the law establishing the University of Ilorin, the respondent was to appeal to the University Governing Council against the decision of the Student Disciplinary Committee. However, the respondent did not await the outcome of his appeal to the Governing Council of the University before rushing to court to institute his action. Though both the trial court and the Court of Appeal allowed the relief sought on the grounds of denial of fair hearing, the Supreme Court in a unanimous decision reversed both decisions on the

[84] (2006) ALL FWLR 81 at pp. 105-106, (per Adamu JCA who delivered the lead judgement)
[85] (1989) 2 NWLR 652 – 729 part 707, paras D - E
[86] *Supra*

grounds that "… rather than awaiting the outcome of his appeal to the university (sic) council, the respondent herein "jumped the gun" by reporting (sic) (meaning resorting) to court action thus drawing a domestic issue to the arena of court litigation, a practice which is not only embarrassing but frowned upon by the Supreme Court." The court went ahead to hold that "… it can only mean that until the remedies available in the domestic forum are exhausted, any resort to court action would be premature".

Crime and personal responsibility

The act of prosecuting offenders by whatever means and under whatever kind of justice system, is said to be "one of the most fundamental underpinnings of any viable society, Indeed, any society that does not specify those acts it will not tolerate and does not provide sanctions for doing those acts cannot truly be defined as viable, sustainable society."[87] In carrying out its constitutional responsibility in criminal or *quasi* criminal matters however, the law restricts liability only to a person criminally accountable for any unlawful or wrongful acts he voluntarily commits or omission he makes, unless and until it is proved that such act or omission proceeded from his involuntary act shown not to have been perpetrated with an evil or criminal intention or blame-worthy conscious mind. The need for criminal responsibility to be personal could not have been better put than in the following words: "before a person is punished for any wrongful act defined as criminal, responsibility must be attached to him; that he is capable of knowing and be appreciative of the wrongfulness of his actions; and that his act or omission was accompanied with a guilty state of mind or intent known as *mens rea* or guilty intent and knowledge of the wrongfulness of an act."

This sadly does not seem to be the case in the practice of examination bodies where there exists collective punishment. The power to cancel or ban students as well as particular centres[88] without due regard to their various levels of culpability is nothing but jungle justice. In fact, looking at the provisions of the different statutes one is compel to argue that the drafters of the law intended, by the inclusion of such words as, "if a candidate", "any person", "a person who", or "such candidate", [89] to make liability personal and not collective.

RETHIKING GARBA V. UNIVERSITY OF MAIDUGURI

[87]T.A. Bankole Williams, "Presumption of Innocence versus Detention, Bail and Trial Rights: Issues, New Thoughts and Evaluations", in Mukalia R. Adesokan, (ed.), *Burning issues in Criminal Procedures and Practice,* (International Legal Research House, 1999),pp.149-150

[88] See section16 (1) (a) –(c) Examination Malpractices Act 2004

[89] Section 17 (2) &(4) of NATEB Act 2004, sections 19 &20 (1),(2) WAEC Act 2004 & sections 1 -12 of Examination Malpractices Act 2004

The removal of domestic jurisdiction of the University to entertain any case of misconduct tainted with criminality against a student held until *Esiaga's case* [90]. In *Esiaga* the Supreme Court acknowledged the fact that the University had the power to discipline a student within its internal rules even where the conduct involves some elements of crime. In its words,

> The University has authority within its premises to discipline any erring or misbehaviour student. The principle of fair hearing as envisaged in the constitution must, however, be the guiding principle in applying any sanction against a misbehaving student. If the act of the student amounts to a crime, the normal report should be lodged with the police but this will not preclude the University exercising its powers under its statute to punish misconduct by any student. The case of *Garba v. University of Maiduguri* has not precluded the University taking action against misconducting student within its campus.[91]

Furthermore, the Supreme Court in its effort to encourage, maintain and sustain meaningful academic standards in the Universities opined thus:

> In so far as the examinations are conducted according to the university rules and regulations and duly approved, and ratified by the University senate, the courts have no jurisdiction in the matters. A court of law which dabbles or (gets) into the arena of University examinations a most important and sensitive aspect of University function should remind itself that it has encroached into the bowels of University authority. Such a court should congratulate itself of being party to the destruction of the university and that will be bad not only for the universities but also for the entire nation.[92]

But lest we forget, the power to discipline an erring individual comes with its own responsibility. For the purpose of this paper it is the obligation, and indeed the duty, to accord the culprit or erring individual a fair hearing. This is not only a civilised way to act but an also an obligation imposed by the constitution and international law. In doing this, we may well be guided by the words of Justice Fortes of the United States of America, who while delivering his judgment in *Tanker v. Des Moines Community School District*,[93] declared "in our system, state operated school may not be enclave of totalitarianism. School officials do not possess absolute authority over their students. They (students, and I dare add external candidates) are possessed of

[90] *Supra. University of Ilorin v. Oluwadare* (2003) FWLR (pt.149) 1195 (pp.1211-1212, per Onnoghen JCA(as he then was)
[91] *Ibid* atp.405
[92] *Ibid* p.404
[93] 393 U.S.503 (1969)

fundamental right as they themselves must respect their obligation to the state. It can hardly be argued that students shed their constitutional rights at the school gate (or in the case of external students or candidate when they enrol for their examination)".

This above position form the basis of the advice of the court in *Onagoruwa v. JAMB*[94] that although: "the Joint Admission and Matriculation Board has the power to cancel the result of a candidate in the examinations conducted by it where the board deems it necessary to do so. However, the exercise of the power must not be arbitrary but rather the circumstance necessitating its exercise ought to be clearly seen as fair and just."

CONCLUSION

This work has appraised the disciplinary mechanism put in place by examination bodies and institutions of higher learning to punish erring candidates for examination malpractice both in public examinations and in internal examinations in higher institutions. It has been observed that the procedure usually adopted by them is unacceptable as it does not conform to laid down principles of fundamental rights contained in our constitution. This has often led to their actions being voided by the courts. This was noted by Lord Denning thus: "if an act is void, then it is in law a nullity. It is not bad, but incurably bad". The fundamental principle of natural justice has become part and parcel of our law and no institution has discretion to depart from it.

In order to chart a new course in this direction therefore, the following recommendations are made: Firstly, before examination bodies and tertiary institution invoke powers conferred on them by their respective enabling laws, it is necessary for them to be conversant with the provisions of the law so as to know the extent of their powers in matters of punishment. Secondly, whenever a panel of investigation is to be set up to investigate incidences of examination malpractice, it is pertinent that persons invited as accused should be duly informed of the misconduct they are alleged to have committed. Also, such a Panel should be properly constituted so that the issue of bias, actual or potential will arise, may not be mentioned. To achieve this, the advice of a legal practitioner is very necessary. Thirdly, issues of examination malpractice should not be treated hastily and with levity knowing full well that the outcome of such actions may tarnish one's prospect for life. In addition, haste may lead to the matter being vitiated and the desired justice may be delayed. In *Olaniyan & Ors v. University of Lagos*[95] the Supreme Court cautioned against haste as follows:

> The procedure adopted by the council may be quick, convenient and time saving, but the dictates of justice demand that the legal principle of audi alteram partem must be obeyed no matter how cumbersome and inconvenient it may appear to the council.

[94] *Supra.* p.725,(paraC-D)
[95] [1985] 2 NWLR 452

Fifthly, the requirement under section 20 (4) of the WAEC Act to get the consent of the Attorney–General of the Federation before the relevant examination body institutes an action may be one of the reasons for the non-prosecution of offenders. In practical terms, I hardly see what purpose that is meant to serve if not to delay the matter. It is suggested that this should be dispensed with. The examination bodies should be empowered to carry out their own prosecution with the aid of legal officers in their employ.

As a final thought, we must realise that education is the fulcrum on which the other resources revolve and that the attempt to re-classify resources in order of importance has in recent times, put the human capital far ahead of others. Therefore, in the development of the nation and a disciplined individual, there is the need to provide the enabling school environment by catering, both in action and words, for our educational sector. Studies have shown that the right environment breeds a disciplined individual, just like the quality of graduates or student correlates with the type and quality of discipline such a school environment instils. On the same footing, there is no gainsaying that a right environment inculcates positive attitude on the students which readily reflects on the image of the teachers, student, institution and nation at large.

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