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.N ANALYSIS OF ADMINISTRATIVE APPEALS THE NIGERIAN JUSTICE SYSTEM

By

Ayodeji Awobiyide*

Abstract

Administrative Agencies are an integral part of the workings of the executive arm of government in a democratic society. Their actions and decisions have significant bearing on the workings of each arm of government notwithstanding the concept of separation of powers. Persons aggrieved by decisions of administrative agencies ordinarily ought to be able to challenge the decision of the administrative agency and have the issues resolved by exhausting available local remedies without necessarily proceeding to Court. However, majority of administrative agency decisions are immediately challenged in Court by aggrieved persons without exhausting the administrative appeal process. What could be responsible for this disregard for established administrative appeals procedure? Why would aggrieved persons prefer to litigate in Court than plead their case with the administrative agency? This paper employs a doctrinal approach in reviewing administrative appeals in seeking to analyse the reason for the increase in the number of cases challenging decisions of administrative agencies in Court thereby immensely contributing to the slow dispensation of justice in Nigeria. The paper comparatively examines our extant legal regulatory framework for administrative appeals vis-à-vis that of the United Kingdom and the United States of America drawing notable lessons from the administrative appeals procedure in both jurisdictions. The paper finds that there is a lack of confidence in justice delivery by administrative tribunals in Nigeria occasioned by a perceived lack of independence of administrative agencies. The paper also finds that the current process of administrative appeals in Nigeria is obsolete when compared to systemic developments in the United Kingdom and United States of

deji Awobiyide, Lecturer, Department of Public Law, University of Lagos.

America. The paper recommends the passing of a uniform legislation to set guidelines for administrative procedure in Nigeria. It also recommends the creation of special administrative courts to harmonize the administrative appeals process and create a transparent process for the challenge of administrative decisions by aggrieved persons in Nigeria.

Keywords: Administrative Appeals. Administrative Agencies, Courts, Tribunals

1.1 Introduction

Administrative bodies are mostly creations of statutes which prescribe their functions and powers. In exercise of those functions and powers, decisions are bound to be made which either positively or negatively impact individuals covered by the scope of the enabling Act of the affected administrative agency. These decisions kick start the process of administrative adjudication. Administrative adjudication is the process by which an administrative agency issues an affirmative, negative, injunctive or declaratory order. It involves the application of the agency's policies to the actions of a particular party resulting in an order for or against that party.[1]In Nigeria, most persons affected by administrative decisions pursue the path of litigation in regular courts rather than follow statutorily established administrative appeals procedure.[2]

The paper explores the problem of the preference of persons aggrieved by administrative decisions proceeding to challenge the decision in court instead of pleading their case with the administrative agency. The paper employs the doctrinal approach in analyzing administrative appeals in Nigeria. A comparison of the process of administrative appeals in the United Kingdom and United States of America is also undertaken vis-à-vis our extant regulatory framework for administrative appeals in Nigeria as contained in some selected statutes.

The paper finds that there is a lack of confidence in justice delivery by administrative tribunals in Nigeria occasioned by a perceived lack of independence of administrative agencies. The paper further finds that the current process of administrative appeals in Nigeria is obsolete when compared to the

[1]O.Oyewo*Modern Administrative Law &Practice in Nigeria* University of Lagos Press & Bookshop Limited (2016) p. 211.

[2] Appeals may be formally established within the structure of administrative adjudication, whereby appeals may lie from one administrative adjudication body to another without having connection with the judicial administration of justice system. See O. Oyewo .*Ibid*p. 279.

United Kingdom and the United States of America. Consequently, the paper recommends the passing of a uniform legislation to set guidelines for administrative procedure in Nigeria, the creation of special administrative courts to harmonize the administrative appeals process to ensure transparency and improve confidence in the administrative process.

1.2 Appeals and Judicial Review

The distinction between an Appeal and a Judicial Review is very significant towards an appreciation of administrative appeals. It is particularly important in common law jurisdictions. Appeals are concerned with merit and reviews are concerned with legality.[3] An appeal has been defined as a proceeding undertaken to have a decision reviewed by a higher authority.[4] Judicial review of an administrative action on the other hand entails the Court, in conducting the review, examining the procedure with which the decision was arrived at. The scope of judicial review may be limited to certain questions of fairness, or whether the administrative decision is ultra vires.[5] In *Military Governor, Imo State* v*Nwauwa*[6] the Supreme Court explained the distinction between an appeal and a judicial review as follows:

> The following principles are to be borne in mind by a reviewing Court:-
>
> (a) Judicial review is not an appeal;
> (b) The Court must not substitute its judgment for that of the public body whose decision is being reviewed;
> (c) The correct focus is not upon the decision but the manner in which it was reached;
> (d) What matters is legality and not correctness of the decision; and
> (e) The reviewing Court is not concerned with the merits of a target activity.

In a judicial review, the Court must not stray into the realms of appellate jurisdiction for that would involve the Court in a wrongful usurpation of power.[7]The power of a Court as a reviewing tribunal is better clearly stated by the

[3]H.W.Wade,*Administrative Law*, Fourth Edition, Oxford, Clarendon Press(1977) page 780.
[4]B.A. Garner, *Black's Law Dictionary*, Ninth Edition, West Publishers (2009) page 112.
[5] In terms of ultra vires actions in the broad sense, a reviewing court may set aside an administrative decision if it is patently unreasonable under Canadian law, Wednesbury unreasonableness under British Law or for being Arbitrary or Capricious under United States Administrative Procedure Act and New York State Law.
[6][1997] 2 NWLR Pt.940 pg 675 at 697 per Ogundare, J.S.C.
[7]*R* v *Secretary of State for the Home Department, Ex parte Brind* (1991)1 AC 696.

House of Lords in *Associated Provincial Picture Houses Ltd* v*Wednesbury Corporation*[8] when the Noble Master of the Rolls said:

> The power of the Court to interfere in each case is not an appellate authority to override a decision of the local authority but as judicial authority which is concerned and concerned only, to see whether the local authority have contravened the law by action in excess of the powers which parliament has confided in them.
>
> In exercise of his power of judicial review, the Court has no jurisdiction to substitute its own opinion for that of the public body whose decision is being reviewed for it is not part of the purpose of judicial review to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question.[9] What the Court is concerned with is the manner by which the decision being impugned was reached. It is its legality not its wisdom, that the Court has to look into. For the jurisdiction being exercised by the Court is not an appellate jurisdiction but a supervisory one.

The Court of Appeal also re-echoed this position in *Shyllon*v *University of Ibadan*[10] where it held that in a judicial review, the Court is concerned with the legality and not with the merits of the proceedings, decisions or acts of the affected inferior Court, tribunal or governmental body. Despite the distinction between appeals and judicial review, in practice, applicants for judicial review utilize the opportunity of a review to challenge the merits of the proceedings before the administrative body. Usually, issues relating to the administrative body's jurisdiction are raised such that the Court is then invited to go beyond the legality of the administrative body's action by inadvertently examining the merits of its decision.

1.3 Legal Framework for Administrative Appeals In Nigeria

Persons positively affected by decisions of administrative bodies or tribunals are not likely to appeal against a favourable decision. It therefore follows that the

[8](1948) 1 KB 223 at 234 per Lord Green, M.R.
[9]*Chief Constable of the North Water Police* v *Evans* (1982) 1 W.L.R 155 at 160 F per Lord Hailsham.
[10][2007] 1 NWLR Pt.1014 page 1 at 20 para F per Augie J.C.A (as she then was).

persons likely to challenge administrative decisions are persons aggrieved by such decisions. Enabling statutes setting up administrative bodies in Nigeria, usually, either exclude the jurisdiction of the Courts in respect of administrative decisions or provide appellate procedures and local remedies or a combination of both. A brief analysis of these situations which are prevalent in most statutes is provided below:

1.3.1 Exclusion of Jurisdiction

The exclusion of the jurisdiction of the Courts is a relic of the many years of Military rule in Nigeria. Certain Decrees were promulgated to expressly oust the jurisdiction of courts to interfere in the exercise of functions and powers by the Administrative body. The Courts were expressly prevented from exercising either supervisory or judicial powers[11]. One of such ouster provisions can be found in Section 47 of the Land Use Act[12] which provides:

> (1) This Act shall have effect notwithstanding anything to the contrary in any law or rule of law including the Constitution of the Federal Republic of Nigeria 1999 and without prejudice to the generality of the foregoing, no Court shall have jurisdiction to inquire into-
>
> (a) any question concerning or pertaining to the vesting of all land in the Governor in accordance with the provisions of this Act;
> (b) any question concerning or pertaining to the right of the Governor to grant a statutory right of occupancy in accordance with the provisions of this Act; or
> (c) any question concerning or pertaining to the right of a local government to grant a customary right of occupancy under this Act.
>
> (2) No Court shall have jurisdiction to inquire into any question or pertaining to the amount or adequacy of any compensation to be paid under this Act.

[11]O. Oyewo, Military Tribunals and Administration of Justice in Nigeria: A Critical Appraisal in *Issues in Nigerian Law*, J.A.Omotola (ed) (1991) 72-83.
[12]Cap.L5 Laws of the Federation 2004.

Evidently, the intention of the drafters of the above provision was to ensure that the Court does not exercise any form of judicial or supervisory powers over the actions of the Governor and the Local Government with respect to the vesting of all lands. The Section was also elevated to an anomalous position that its provisions were stated to be superior to the Constitution. Expectedly, this provision has been subsequently tested in the Courts especially as it relates to its inconsistency with the provisions of Section 6 of the 1999 Constitution.[13] In *Adigun* v *A-G Oyo State*[14] the Supreme Court when called upon to interpret and make declarations in respect of the provisions of Section 4 of the Chiefs Law of Oyo State[15] held that the Courts will not make a declaration where such jurisdiction is excluded by statute which gives exclusive jurisdiction to another tribunal.[16] This attitude of the Courts in ceding adjudicatory power to Administrative Tribunals was prevalent during the period of Military Rule and has remarkably changed with the restoration of democracy in Nigeria in 1999. Any statute ousting the jurisdiction of Courts to either entertain an appeal or inquire into the propriety of administrative actions will certainly be declared unconstitutional by reason of its inconsistency with the provisions of the Constitution.

1.3.2 Exhaustion of Local Remedies

The exercise of adjudicatory powers by an administrative body devolves from statute. The statute may also prescribe the procedure to be adopted in the event of a perceived wrong having been occasioned by the actions of the administrative body. This situation is adequately covered in most statutes regulating professional bodies such as the Legal Practitioners Act[17] and the Medical and Dental Practitioners Act.[18] Section 10 of the Legal Practitioners Act establishes the Legal Practitioners' Disciplinary Committee which is charged with the duty of considering and determining any case where it is alleged that a person whose name is on the roll has misbehaved in his capacity as a legal practitioner or should for any other reason be subject of proceedings under the Act. Section 11 stipulates the penalties for unprofessional conduct and Section 12 establishes an Appeal Committee of the Body of Benchers and the appeal procedure against a decision

[13] See *Kanada* v *Governor of Kaduna State*[1986] 4 NWLR Pt.35 pg 361; *Kukoyi* v*Aina* [1999] 10 NWLR Pt.624 pg 633;*Lemboye*v *Ogunsiji* [1990] 6 NWLR Pt.155 pg 210 where the Courts declared the provisions of Section 47(2) of the Land Use Act unconstitutional.
[14] [1987] 1 NWLR Pt.53 pg 678.
[15] Cap 21 Laws of Oyo State 1978.
[16] See also the cases of *Military Governor of Oyo State v Adekunle* (2005) 3 NWLR Pt.912 pg 294: *Eguamwense v Amaghizemwen* (1993) 9 NWLR Pt.315 pg 1.
[17] Cap.L11 Laws of the Federation 2004.
[18] Cap.M8 Laws of the Federation 2004.

of the Disciplinary Committee. Section 12(3) to (5) of the Act, provides as follows:

> (3) On any appeal against a direction of the Disciplinary Committee, the Appeal Committee may allow or dismiss the appeal in the whole or in part, and if it is of opinion that any direction given by the Disciplinary Committee should not have been given by the Disciplinary Committee (whether more or less severe), the Appeal Committee shall revoke the direction of the Disciplinary Committee or as the case may be, substitute therefore such direction as it thinks ought to have been given, being a direction which, under section 11 of this Act, could lawfully have been given by the Disciplinary Committee.
>
> (4) The Appeal Committee shall cause a notice of any direction given by it under this Section to be served on the person to whom it relates.
>
> (5) The person to whom such a direction relates may, at any time within 28 days from the date of service on him of the notice of the direction, appeal against the direction to the Supreme Court; and the Appeal Committee may appear as respondent to the appeal and for the purpose of enabling directions to be given by the Supreme Court as to costs of the appeal before that Court and of proceedings before the Disciplinary Committee, the Appeal Committee shall be deemed to be a party to the appeal before the Supreme Court, whether or not it appears on the hearing of that appeal.

The above provisions clearly stipulate the hierarchy of the appeal process in a case of misconduct by a Legal Practitioner under the Act from the Disciplinary Committee to the Appeal Committee and finally the Supreme Court. It would therefore amount to a futile exercise for an aggrieved Legal Practitioner sanctioned by the Disciplinary Committee to proceed to challenge the decision of the Disciplinary Committee in Court without recourse to the local remedies provided under the Legal Practitioners Act.

In similar vein, Section 15 of the Medical and Dental Practitioners Act establishes the Medical and Dental Practitioners Disciplinary Tribunal charged with the responsibility of determining cases referred to it by the Medical and Dental Investigatory Panel. Section 16 of the Act provides for penalties for professional misconduct which may be imposed by the Tribunal. Section 16 (5) and (6) of the Act provide for an appellate procedure against the decision of the Investigatory Panel inter alia:

> (5) When the Disciplinary Tribunal gives a direction under subsection (1) of this section, the Disciplinary Tribunal shall cause notice of the direction to be served on the person to whom it relates.
>
> (6) The person to whom such a direction relates may, at any time within 28 days from the date of service on him of the notice of the direction, appeal against the direction to the Court of Appeal; and the Disciplinary Tribunal may appear as respondent to the appeal and for the purposes of enabling directions to be given as to the costs of the appeal and of proceedings before the Disciplinary Tribunal, the Disciplinary Tribunal shall be deemed to be a party thereto whether or not it appears on the hearing of the appeal.

It is clear from the foregoing that the proper forum to appeal against the decision of the Medical and Dental Practitioners Disciplinary Tribunal is the Court of Appeal which has been statutorily vested with jurisdiction.[19] It must be noted that most of the enabling statutes setting up domestic tribunals in Nigeria usually provide for an Investigative Panel and a Disciplinary Tribunal.[20] The Nigerian Courts have frowned at attempts by parties to by-pass the statutorily laid down appellate procedure against decisions of administrative bodies.

In *Hamza Lawal & Anor* v *Kafaru Oke & Ors*[21] a dispute arose on the rightful occupant of the Baaleship Stool of Imose Village in Ogun State. The Plaintiffs sought declaratory and injunctive reliefs against the Defendants, including the 1st

[19] See also Section 92 of the Lagos State Urban and Regional Planning Board Law Cap.L52 Volume 4 Laws of Lagos State of Nigeria 2003 which makes provision for an aggrieved person or any interested party to appeal against the decision of the Board, its Agencies or Departments within 28 days of the notification of the final decision of the Board. However, an appeal lies as of right to the High Court in the state against such decision.

[20] O.Oyewo, Constitutional Provisions and Administrative Disciplinary Powers: The Medical and Dental Disciplinary Tribunal in Review, *Nig. Journal of Health and Biomedical Sciences*, Jan-June, 2002, Vol.1, No.1 29-34.

[21] [2001] 7 NWLR Pt.711 pg 88.

Defendant who had been installed by the prescribed authority as Baale of Imose Village. The Learned trial Judge agreed with the Plaintiffs and entered Judgment in their favour against the Defendants. Aggrieved by the decision, the Defendants appealed to the Court of Appeal. In determining the appeal, the Court interpreted the provisions of Section 22 (5) of the Chiefs Law of Ogun State which stipulates that an aspirant to the position of *Baale* who is aggrieved with the decision of a prescribed authority may within 21 days from the date of the decision make representations to the Commissioner to whom responsibility for Chieftaincy affairs is assigned that the decision be set aside. The Court of Appeal held that the non-compliance with the said Section 22 (5) of the Chiefs Law of Ogun State rendered the action incompetent and the High Court lacked the jurisdiction to entertain the suit.[22]In *Faloye* v *Omoseni*[23], a case commenced to seek redress in respect of Chieftaincy of Oniseri of Iseri Quarters, Iju, Akure Local Government of Ondo State, the Court of Appeal reiterated the principle of exhaustion of local remedies before commencement of action in Court as follows:

> It is settled law that where the legislature clearly stipulates the procedure to be followed when an act or decision of an authority is challenged, the party aggrieved can only challenge the decision successfully in the manner laid down in the enabling statute...Furthermore, where an aggrieved party has not resorted to the remedies statutorily available to him on the infringement of his alleged right by the prescribed authority, such a party has therefore not exhausted the remedies available to him and has in consequence not satisfied the precondition for access to Court.[24]

In the case of *Nigerian Communications Commission* v *MTN (Nig.) Comm. Ltd*[25] the appellant wrote a letter dated 3rd February, 2003 to all fixed and mobile telephone operators. It asked for a consultative meeting on all lingering issues in the telecommunications industry. The meeting was held on 6th February, 2003. All participants at the meeting agreed that the appellant should engage a consultant on the issue of arriving at the interconnect rate between

[22] See page 106 para E-H.
[23][2001] 9 NWLR Pt.717 pg 190.
[24]Pg 200-201 para H-B. See also *Adigun* v *Osaka* [2003] 5 NWLR Pt.812 pg 95 where the Court of Appeal held that where a statute provides for resort to an administrative remedy, the court cannot competently adjudicate on any suit arising therefrom unless the administrative remedy has been exhausted. Where the plaintiff fails to exhaust the administrative remedy, he cannot be heard to talk of natural justice until the administrative body had a chance to deliberate on the matter.
[25][2008] 7 NWLR Pt.1086 pg 229.

communication networks. The appellant complied with the request and presented the consultant's report for discussion at a meeting held on 12th June, 2004. All operators made inputs. The respondent made written and oral submission. At the deadline on 3rd December, 2003, the appellant arrived at a determination of the interconnect rates. The respondent was aggrieved with the interconnect rate fixed by the appellant. It commenced a suit by way of writ of summons and claimed, inter alia, a declaration that the decision of the appellant conveyed to the respondent in a letter dated 3rd December, 2003 having been taken in breach of the respondent's fundamental rights to fair hearing enshrined in section 36 (1) of the 1999 Constitution, was null and void and of no effect whatsoever. The respondent also sought an order of perpetual injunction.

The appellant raised a preliminary objection before the trial Court contending that the Court lacked jurisdiction to entertain respondent's suit on the grounds that the respondent failed to take the statutory steps for an administrative review of the appellant's decision. The trial court overruled the objection. Aggrieved by the decision of the trial court, the Commission appealed to the Court of Appeal. In allowing the appeal, the Court of Appeal interpreted the provision of section 87 and 88 of the Nigerian Communications Act, 2003 and held as follows:

> Section 87 provided that on request, respondent should have first forwarded to the appellant for a review of its determination. It was essential that the appellant met the pre-condition which is a review of the decision of the respondent before coming to court. Therefore, not meeting that condition precedent robbed the lower court of its jurisdiction and it ought to have struck out the case.

The above judicial decisions reveal that there is a high tendency for litigants to proceed directly to Court for the resolution of disputes related to and connected with decisions of administrative agencies or departments. In most cases, the High Court entertains such actions which it manifestly lacks jurisdiction over. Perhaps, the reason for persons aggrieved by administrative decisions to approach the High Court instead of exhausting available local remedies is as a result of perceived bias on the part of the decision making agency. Although, the Court of Appeal has always stood tall when called upon to resolve these issues, the number of years, manpower and resources spent pursuing an appeal is not economically viable. There is consequently a need to rethink the process of administrative appeals in Nigeria. The procedure adopted in the United Kingdom and United States of America towards administrative appeals are examined below.

1.4 Administrative Appeals in the United Kingdom

The system of administrative appeals in the United Kingdom is governed by the Tribunals, Courts and Enforcement Act, 2007.[26] The Act divides the administrative adjudicatory process into three stages which starts from the Decision of the Agency and proceeds to the First Tier Tribunal and finally stops at the Upper Tribunal. The Act makes provision for an aggrieved British Citizen or Resident to challenge an administrative decision at the First Tier Tribunal. The task of the First Tier Tribunal is to examine the decision of the administrative agency and judicially review it. The Upper Tribunal[27] on the other hand, decides appeals on points of law from decisions of the First Tier Tribunal.

Tribunals in the United Kingdom have provided a quick and accessible means of challenging administrative decisions. The tribunal appeal implies a wider remedy than that provided by way of judicial review. It provides a full *de novo* assessment to assess an individual's eligibility for the relevant entitlement. The full assessment usually results in a decision which is then binding on the individual unless successfully overturned on appeal. The introduction of the Tribunals, Courts and Enforcement Act, 2007 has led to the Courts increasingly recognizing the expertise of the Upper Tribunal. This has been demonstrated in the Court taking great precaution before setting aside the decision of the Upper Tribunal. This has also had the effect of ensuring that public bodies make better decisions first time round. There is also a steady clamour for online dispute resolution (ODR) as a method of addressing issues stemming from administrative decisions. This ODR may reduce the need for oral hearing and ensure that relevant claims are speedily submitted and determined without the need for the attendant bureaucracy accompanying a physical hearing.[28]

In the nineteenth century, Tribunals emerged as multi-functional administrative entities operating in areas such as railways regulation and tax which, amongst other things, resolved disputes.[29] The advent of the modern tribunal system can be traced back to the National Insurance Act, 1911 which introduced unemployment

[26] This legislation was inspired by the Australian Administrative Appeals Tribunal Act of 1975. The Act establishes the Administrative Appeals Tribunal (AAT) which conducts independent merits review of administrative decisions made by the Australian Government, Ministers, Departments and Agencies. The AAT has no general jurisdiction as its jurisdiction is conferred by Individual Statutes which specifically grant it jurisdiction and its decisions are subject to review by the Federal Court of Australia and Federal Circuit Court of Australia.

[27] Such appeals may come from the Social Entitlement Chamber, Health, Education and Social Care Chamber, General Regulatory Chamber, War Pensions and Armed Forces Compensation Chamber of the First Tier Tribunal.

[28] R.Thomas*Current Developments in UK Tribunals: Challenges for Administrative Justice* School of Law, University of Manchester Press 2010.

[29] C. Stebbings, *Legal Foundations of Tribunals in Nineteenth Century England* (Cambridge, Cambridge University Press, 2006).

insurance. The Act by-passed the ordinary Courts by requiring that appeals against decisions of insurance officers be brought to a Court of referees. The Act introduced the concept of a local, non-legal tribunal that specialized in a particular area of administration. These Courts were accessible for users and legal representation was unnecessary.[30]Following the Great War, tribunals proliferated. Initially, tribunals were seen by some as a threat to the rule of law as expounded by Dicey. Although the practical utility of tribunals came to be accepted in the 1930s, they remained anomalous institutions that were neither wholly administrative nor judicial.[31] Tribunals were seen as alternatives to the courts that could provide quicker and speedier redress.

The Franks report[32] emphasized the values of openness, fairness and impartiality but there were weaknesses. Tribunals were not fully independent from the government departments making the initial decisions against which appeals were determined. Tribunal members were often appointed by these same departments. Tribunals were also served by staff of those departments. Throughout the 2000s, tribunals experienced a renaissance. The key landmarks were: the Legatt report of 2001, the 2004 white paper Transforming Public Services and the Tribunals, Courts and Enforcement Act, 2007.[33]The outcome of the above reforms included the rationalizing of previously free-standing tribunals into chambers of the generic First-Tier and Upper Tribunals; separating tribunals from their government departments and extending the statutory guarantee of judicial independence to tribunals. These outcomes ensured that tribunals were no longer alternatives to the Courts but were themselves a species of specialist Courts.

The Tribunals in the United Kingdom are so diverse covering different fields and aspects of day to day administration. Many Tribunals determine appeals with a possibility of a further appeal to the Upper Tribunal and if still aggrieved a further appeal to a High Court. Many Tribunals adopt an inquisitorial or enabling procedure but others are more adversarial.[34] The larger tribunals have dedicated tribunal centers and are staffed by permanent fee-paid judges. There are some 4,055 tribunal judges in the First-Tier and Upper Tribunal structure.[35] The first-

[30]R.E.Wraith and P.G. Hutchesson, *Administrative Tribunals* (London: Allen &Unwin, 1974) pp.33-37

[31]G.Drewry, TheJudicialisation of 'Administrative' Tribunals in the UK: From Hewart to Legatt (2009) 28 *Transylvanian Review of Administrative Sciences* 45.

[32] The Franks Report, Report of the Committee on Administrative Tribunals and Enquiries (Cmd 218, 1957)

[33] The Legatt Report, Tribunals for Users: One System, One Service (2001): Department for Constitutional Affairs, Transforming Public Services: Complaints, Redress and Tribunals (Cm 6243, 2004) also known as the 2004 White Paper. See M. Adler, Tribunal Reform: Proportionate Dispute Resolution and the Pursuit of Administrative Justice(2006) *Modern Law Review* 958.

[34] For instance the Social Security Tribunals, The Tax, Lands and Immigration Tribunals are more adversarial.

[35] 3, 729 are fee paid and 326 are permanent salaried judges. See Judiciary of England and Wales, Judicial Diversity Statistics (2015).

tier Tribunals are essentially fact-finding bodies and much of its activities revolve around assembling and evaluating the evidence. They deliver ground-level justice without many of the legalistic trappings of the higher Courts. Central to the very idea of First-Tier Tribunals are the values of accessibility, informality and directness.

It is noteworthy that Tribunals are subjected to external oversight. Under the 2007 reforms, the statutory oversight body was reformed from the Council on Tribunals into the Administrative Justice and Tribunals Council (AJTC). The AJTC has the objective of keeping the administrative justice system under review and consider ways to make it more accessible, fair and efficient. The AJTC challenged government to recognize the scale of poor administrative decision-making and highlighted the difficulties people experience in seeking to challenge decisions.[36] It warned against the risks of government pursuing its own interests by limiting access to administrative justice when government is itself often a party to such disputes.[37]

However, the AJTC and its immediate benefits were short lived as it was abolished in 2013. The rationale for the abolition of the AJTC by the Government was that the abolition would enhance the accountability of government departments to Ministers by bringing oversight of administrative justice within the Ministry of Justice (MoJ) and save public money. Following concerns raised during the abolition process, the MoJ created a new statutory advisory group, Administrative Justice Forum, to review how administrative justice and tribunals work and to provide informal testing of policy ideas. The Forum is, however, not empowered to replicate the depth of scrutiny previously carried out by the AJTC.

1.5 Administrative Appeals in the United States of America

The expansion of the powers of administrative agencies was one of the greatest developments in 20th Century America. During this period, administrative agencies performed a wide variety of government functions through the issuance of regulations. The enactment of the Administrative Procedures Act (APA)[38] was crucial to this expansion. The APA established both a classification for different types of agency decision making and a set of procedural rules to govern that

[36] AJTC, Securing Fairness and Redress: Administrative Justice at Risk? (2011);AJTC, Future Oversight of Administrative Justice (2013) at www.ajtc.justice.gov.uk accessed on 14/5/2020.
[37] AJTC, Putting It Right- A Strategic Approach to Resolving Administrative Disputes (2012) at www.ajtc.justice.gov.uk accessed on 14/5/2020.
[38](1946) 5 U.S.C 551.

decision-making in every respect.[39] The APA also ensured the preservation of individual rights against the abuse of administrative power. Until the twentieth century, the United States had no uniform body of administrative law because most Americans believed that such a formal uniform body of administrative law would enhance the ability of government to exercise power over citizens and that regardless of any procedural protections, it would ultimately diminish individual rights.[40]This opposition to the perceived extensive authority of administrative agencies led to the issuance of over 1000 injunctions against the enforcement of what was widely termed New Deal Legislation giving such powers to several administrative agencies.[41]

The Supreme Court decision in *West Coast Hotel* v *Parrish*[42] turned the tide on judicial resistance to the New Deal. The opponents of President Roosevelt proposed legislation designed to limit the power of regulatory agencies by imposing a series of strong procedural and judicial constraints on their actions, including strict limits on agencies discretion to make policy and change existing law.[43]The legislative proposals were advanced by the Special Committee on Administrative Law of the American Bar Association.[44] The Special Committee was disturbed by the fact that agencies were improperly blending modes of procedure that should be distinct, namely, rulemaking, factual investigation and adjudication.[45] In 1938, the Special Committee drafted "An Act to provide for a more expeditious settlement of disputes with the United States" later known as the Walter-Logan Bill. The aim of the Bill was the creation of a new United States Court of Appeals for Administration "to receive, decide and expedite appeals from Federal Commissions, Administrative Authorities and Tribunals in which the United States is a party or has an interest, and for other purposes".[46]

[39]R.Elias'The Legislative History of the Administrative Procedure Act'*Fordham Environmental Law Review*, Vol.27 No.2 (Winter 2016) p. 207.
[40] M. Shapiro,*A Golden Anniversary? The Administrative Procedure Act of 1946* 19 REGULATION 40 (1996) at https://www.thecre.com/oira_reg/wp-content/uploads/2015/08/APA-at-Fifty.pdf accessed on 12/5/2020.
[41]W.F.Murphy, *Elements of Judicial Strategy*, University of Chicago Press (1964).
[42]300 U.S 379 (1937).
[43] M. McCubbins et al., *The Political Origins of the Administrative Procedure Act*, 15 J.L ECON & ORG, 180, 196 (1999).
[44] The Committee was established in 1933 and led by Roscoe Pound.
[45]M. McCubbins.,fn 43 at 196.
[46] American Bar Association, Report of the Special Committee on Administrative Law in AMERICAN BAR ASSOCIATION ANNUAL REPORT (1938).

This Court of Appeal would have the authority to evaluate agency rulings and grant relief for individuals and firms affected by agency decisions. This Bill passed both Houses of Congress but was vetoed by President Roosevelt. However, the APA was eventually approved by the United States Senate in February, 1946, the House in May, 1946 and was signed into law by President Trumman in June, 1946. The APA created three principal categories of administrative action:

i. Rulemaking, in which agencies imposed regulations;

ii. Adjudication, in which agencies resolved disputes by finding facts and making conclusions of law;

iii. Discretionary agency decision making.

The rulemaking provisions of APA are designed to ensure public participation in the informal rulemaking process. Agencies are required to provide the public with adequate notice of a proposed rule followed by a meaningful opportunity to comment on the rule's content. The APA requires the notice of proposed rulemaking to include:

1. A statement of the time, place and nature of public rulemaking proceedings;
2. Reference to the authority under which the rule is proposed; and
3. Either the terms or substance of the proposed rule or a description of the subjects and issues involved. Once adequate notice is provided, the agency must provide interested persons with a meaningful opportunity to comment on the proposed rule through the submission of written "data, view or arguments".[47]

The APA also provides for a more elaborate procedure for certain kinds of rulemaking. The APA provides that "when rules are required by statute to be made on the record after opportunity for an agency hearing, the formal rule making requirements of section 7 and 8 of the APA apply. Under this procedure, the agency must undertake rulemaking by engaging in trial-like procedures, which include the presence of a neutral hearing officer, the opportunity for parties to present evidence and conduct cross-examination of contrary evidence and the

[47] Pub.L.No.79-404, 60 Stat.237§ 4(a) (1946);§4(c).

agency's ultimate determinations must be made on the basis of the entire record and must include reasoned explanations in terms of that record. Section 10 of the APA provides that "any person suffering legal wrong because of an agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."There are two exceptions to the availability of judicial review of agency action as follows:

a. Judicial review is not available to the extent that statutes preclude judicial review; and

b. Where agency action is committed to agency discretion by law.

Courts review agency action, findings and conclusions on the basis of the entire administrative record when such conclusions are found to be:

i. Arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law;

ii. Contrary to constitutional right, power, privilege or immunity;

iii. In excess of statutory jurisdiction, authority or limitations or short of statutory right;

iv. Without observance of procedure required by law;

v. Unsupported by substantial evidence in a case subject to sections 556 and 557 of the Act or otherwise reviewed on the record of an agency hearing provided by statute; or

vi. Unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

The concept of separate and independent judicial power has fast eroded with administrative processes because the executive exercises legislative and judicial powers. The APA provides for Federal Hearing Officers also called Examiners to hear complaints by citizens on administrative policies and regulations. The decisions of Federal Hearing Officers are potentially final because they are largely adopted by the Agency. It is also true that the decision of the hearing officer may not be final because every respondent could be, might be and frequently is judged by his accuser, the agency.[48] Technically, the agency always

[48]R.Lorch'Toward Administrative Judges'*Public Administration Review* Vol.30 No.1 (Jan-Feb 1970) pg 1.

has the last say either by adopting the decision of the hearing officer or overruling the decision.

Hearing Officers must therefore enjoy independence such that the agency which he hears its case cannot reverse the decision. Although, the APA has tried to ensure some measure of independence for hearing officers by providing that an examiner may be removed by the agency in which he is employed only for good cause established and determined by the Civil Service Commission on the record after opportunity for hearing. The Act also provides that examiners "are entitled to pay prescribed by the Civil Service Commission independently of agency recommendations or ratings". The advantages of administrative hearings such as its flexible procedure, comparative freedom from the compulsion of *stare decisis* and from judicial lag, its inexpensive and speedy nature, special competence in disputes involving government and their sympathy for the problems, purposes and goals of the agencies cannot be overemphasized. However, the practice of letting people who have not heard oral evidence at the hearing, decide cases leaves much to be desired. Hearing Officers are generally the ones who hear cases but do not have finality of decisions because they merely recommend.

In *Morgan* v *United States*[49], the Court held that the word "hear" did not require actual listening to witnesses, nor even seeing or reading all the evidence. The Court held that an agency head could "hear" by addressing himself to the evidence in condensed form prepared by his staff from the record of the actual hearing. Ordinarily, it should come off as a challenge that a person gets to finally decide a matter without hearing the evidence of the parties or seeing the demeanour of the witnesses to ascertain the truthfulness and actual knowledge of the witnesses. However, the position of the Court in *Morgan v United States* can be appreciated in the light of the policy considerations and busy work load attached to the position of Agency Head which make it impracticable for an Agency Head to sit in at every hearing.

1.6 Conclusion

This paper examined the distinction between administrative appeals and judicial review. The paper found that despite the settled position of the law on this distinction, applications for judicial review are majorly administrative appeals in disguise. Consequently, the Courts are flooded with endless cases of administrative appeals disguised as judicial review. The paper also found that although there are local remedies available for appealing against administrative decisions, a lack of confidence and the fear of bias have hindered resort to these

[49] 298 U.S. 468 (1936).

remedies by aggrieved persons. The writer suggests that a way out of this quagmire is to borrow a leaf from the procedure adopted in the United Kingdom and United States of America in harmonizing the administrative appeals process in Nigeria. Administrative adjudication and appeals that result there from in Nigeria can be efficiently improved through legislative intervention. The purpose of the legislative intervention will be the harmonization of the administrative appeals process to create a uniform and systemic procedure for dealing with disputes arising from administrative decisions. In the light of the increasing role that administrative law plays in modern government and the constant interactions between individuals and administrative agencies, the writer hereby recommends as follows:

1. There is undoubtedly a proliferation of administrative agencies in Nigeria. Each agency established by Law or extracted from Government Ministries and Parastatals is saddled with one objective or the other. It is consequently imperative that a uniform legislation be passed by the National Assembly to set minimum guidelines for administrative procedure across the Country. This approach has been adopted successfully in the United Kingdom and the United States of America.

2. In the light of the slow dispensation of justice in Nigeria which negatively impacts on modern day administrative government, there is an urgent need for administrative courts to be presided over by administrative judges. It is sufficient for the purpose of modern day administrative government if the Judges are assisted by persons who are professionally and technically skilled in specialized areas of administration. There is precedent for this recommendation in the establishment of the National Industrial Court[50] which handles all labour related disputes between an employer and an employee. The Lagos State Judiciary has also recently dedicated special courts for sexual offences and corruption cases.

3. In the creation of the Administrative Courts, care must be taken to ensure that the right of appeal from the decision of the Administrative Courts terminates at the Court of Appeal. In other words, the extant Constitution of Nigeria 1999 should be amended to reflect the appellate jurisdiction of the Court of Appeal to include appeals from Administrative Courts and specifically state that there shall be no further right of appeal on the decision of the Court of Appeal on appeals emanating from administrative

[50] See Section 254 C of the Constitution of the Federal Republic of Nigeria 1999.

Courts. This constitutional amendment is important to avoid the confusion that was generated by right of appeal over the decisions of the National Industrial Court before it was eventually resolved by the Supreme Court in the cases of *Skye Bank* v*Iwu*[51] and *Cocacola (Nig) Ltd* v*Akinsanya*[52].The writer is not unmindful of the tedious process of constitutional amendment, however, if the amendment is effected, there are considerable future gains that will be derived from it.

In the final analysis, this writer believes that a change of approach to administrative appeals through the implementation of the above recommendations would ensure that our administrative agencies get their decisions right the first time and where they fail to do so, the administrative appeal procedure will ensure that appeals against agency decisions are speedily dealt with thereby fostering increased citizen confidence in the administrative process.

[51][2017] 16 NWLR Pt. 1590 pg 24.

[52][2017] 17 NWLR Pt.1593 pg 74. Both cases were commenced at the National Industrial court in 2012 and were resolved by the Supreme Court in 2017. It took a period of 5 Years to determine who the issue of right of appeal of decisions of the National Industrial Court. The Supreme Court held in *Skye Bank* v *Iwu* per Ogunbiyi, J.S.C at page 133 para B-E as follows: The National Industrial Court was established vide Section 254A of the Constitution (Third Alteration Act), 2010 when it was elevated to a status of superior court of record and thus elevating its status to the level of the courts which are existing already as provided under section 240 of the Constitution. It will be against logical reasoning therefore that a child, who is the last in the family, should seek to take over birthright of those who are elders and without any reason and explanation so expressly stated. The Biblical situation of Esau and Jacob, where the younger took over the birthright of the older is well explained with reason. It was not borne out of imagination or from nowhere. The Supreme Court is the highest Court in the land, while other courts are subordinate to it. The Constitution cannot be interpreted to create by implication (NIC) as another Supreme Court in certain areas. The law is firmly established that if any court and moreso an appellate court is to be divested of its conferred jurisdiction, it is done expressly and not impliedly. A court of law can be clothed with power of finality only by express provision to that effect and not by implication.