CODE OF CONDUCT ENSHRINED IN NIGERIA'S CONSTITUTION AND ITS IMPORTANCE IN FIGHT AGAINST CORRUPTION

Whether the Code of Conduct Tribunal is right in refusing to grant a request for stay of proceedings in the case before it, and whether the presence of bias or a likelihood of it and a lack of impartiality does not vitiate the proceedings.

1.1 There are three other related papers assigned to very distinguished presenters. I bear in mind that all four papers have the possibility, to what extent can hardly be foreseen, of dovetailing in some aspects. I have made efforts to stay within limits in laying out the essence of my paper.

1.2 In my considered approach, the paper assigned to me can best be discussed, and perhaps appreciated, when in two parts as follows:

(a) Whether the Code of Conduct Tribunal is right in refusing to grant a request for stay of proceedings in a case before it.
(a) Whether the presence of bias or a likelihood of it and a lack of impartiality does not vitiate the proceedings.

2.1 The refusal as indicated in part 2 (a) above, to grant a stay of proceedings by Code of Conduct Tribunal might, it seems to me, to have been predicated in some measure, upon the provision of section 306 of the Administration of Criminal Justice Act 2015which says: "An application for stay of proceedings in respect to a criminal matter before the court shall not be entertained."

2.2 I have not had the opportunity of seeing the ruling of the Tribunal in this regard to be certain about its reliance on the said provision of that Act. Or else, if it did not rely on it but was a matter of impunity, that could well be understood to have a bearing on what is implied in Part (b) above.

2.3 If the said section 306 was relied on, it presupposed that the Tribunal presumed two factors, namely: (i) that what was before it was a criminal offence in the true sense or, at any rate, that there are some criminal elements which would have to be resolved and, if need be, punished; and (ii) that the Code of Conduct Tribunal is conferred with criminal jurisdiction which was open to it to exercise (in this case before it) as if a court of law.

2.4 Let me quickly make a point I consider germane in these matters by referring to the Administration of Criminal Justice Act 2015. That Act states its purpose in section 1 thus:

> "1-(i) The purpose of this Act is to ensure that the system of administration of criminal justice in Nigeria promotes efficient management of criminal justice institutions, speedy

dispensation of justice, protection of the society from crime and protection of the rights and interest of the suspect, the defendant, and the victim.

(2) The courts, law enforcement agencies and other authorities or persons involved in criminal justice administration shall ensure compliance with the provisions of this Act for the realisation of its purpose."

2.5 It is pertinent to also refer to the Explanatory Note of the Act which reads *inter alia*: "An act to make provisions for the Administration of Criminal Justice and for related matters in the courts of the Federal Capital Territory and other Federal Courts in Nigeria…"

This is sufficiently definitive that the Act is for criminal justice administration in courts mentioned in the Explanatory Note. So it is plain that the Code of Conduct Tribunal cannot come into focus under criminal justice administration, not being a court in any sense. It follows as well that the Tribunal could not rely on section 306 of the Administration of Criminal Justice Act to refuse to grant stay of proceedings. Therefore, it is desirable to attempt to delimit its jurisdiction and enunciate what its powers are by the Act which created it.

3.1 It seems to me this can be done in a two-way approach. The first is that we ought to be influenced in a matter of this nature by the jurisprudence established from well thought-out legal principles expressed in timeless pronouncements, as guiding lights, by some of the highest courts in the western hemisphere, practicing liberal democracy which is sustained through tested justice administration under independent judiciary. We must not adopt any myopic interpretation fashioned on our unaided personal understanding to reach a decision lacking in credibility.

3.2 The second approach is to examine and understand the structure of the Act in question as it is and interpret it with what is usually called verbal skills for the sake of clarity.

4.1 The Code of Conduct Tribunal was established under and by virtue of the Fifth Schedule to the Constitution 1999 to deal with certain contraventions or breaches of the duties laid upon public officers there under. The important question is whether the Tribunal is simply a body to exercise disciplinary control of public officers or is a tribunal or court with criminal jurisdiction.

4.2 Let us make reference, for example, to the Ceylonese case of Kariapper v. Wijesinha (1967) 3 All E.R. 485 decided on appeal by the Privy Council. In 1965 some members of the legislative assembly and local government councils in Ceylon were found guilty of corruption by a commission of enquiry. The country's legislature (the Parliament of Ceylon) the enacted a law, known as Imposition of Civil Disabilities (Special Provisions) Act, vacating their seats in parliament and in the local government councils and also disqualifying them for seven years from being voters or candidates in any parliamentary or local government elections.

4.3 In referring to the implication of the disabilities suffered by the persons affected by the Act the Privy Council observed inter alia at page 491 that "the disabilities imposed by the Act are not, in all the circumstances, punishment….the disabilities are not linked with conduct for which they might be regarded as punishment but, more importantly, the principal purpose which they serve is clearly enough not to punish but to keep public life clean for the public good."

4.4 As to what punishment implies in situations similar to the matter of false declaration of assets, the observation of Justice Frankfurter in United States v. Loveth (1945) 328 US 303, which the Privy Council quoted in the Ceylonese, is that:
"Punishment presupposes an offence, not necessarily an act previously declared criminal, but an act for which retribution is exacted. The fact that harm is inflicted by government authority does not make it punishment.

Figuratively speaking all discomforting action may be deemed punishment because it deprives of what otherwise would be enjoyed. But there may be reasons other than punitive for such deprivation. A man may be forbidden to practice medicine because he has been convicted of a felony…. or because he is no longer qualified…. 'The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact.'''

. It ought to be said that an understanding of the way this somewhat dialectical reasoning plays out is key to such matters as we are confronted with at this seminar.

5.1 This now takes us to the Code of Conduct Bureau and Tribunal Act 1989, the date of commencement being 1st January, 1991.
Part I of the Act deals with the Code of Conduct Bureau while Part II deals with the Code of Conduct Tribunal. The aims and objectives of the Bureau, as stated in section 2 of the Act, ''shall be to establish and maintain a high standard of morality in the conduct of government business and to ensure that the actions and behaviour of public officers conform to the highest standards of public morality and accountability." This in a sense reflects what the Privy Council said in the Ceylonese case that the principal purpose of the Act which gave rise to that case was not to punish but to keep public life clean for the public good.

5.2 The functions of the Bureau are purely administrative, namely to receive assets declaration, examine the declarations to ensure compliance with the law, take and retain them, receive complaints about non-compliance with, or breach of the Act; and if need be, refer them to the Code of Conduct Tribunal.

5.3 It would appear that assets declaration and matters related thereto as per section 3 are the real fulcrum upon which the Bureau may make reference to the Tribunal, not other matters, in my view, having some bearing with crime. This is worthy of note because the proviso to that section says: "Provided that where the person concerned makes a written admission of such breach or non-compliance, no reference to the Tribunal shall be necessary." If crime had been involved and admission is made does that proviso imply that the crime be condoned?
6.1 There are some sections of the Act which have nothing to do with assets declaration. But section 23 is what confers powers on the Tribunal and it is pertinent to set out the provisions as follows:

> "23. Powers of the Tribunal to impose punishment
> (1) Where the Tribunal finds a public officer guilty of contravening any of the provisions of this Act, it shall impose upon that officer any of the punishments specified under subsection (2) of this section.

(2)The punishment which the Tribunal may impose shall include any of the following-
(a)vacation of office or any elective or nominated office, as the case may be;
(b) disqualification from holding any public office (whether elective or not) for a period not exceeding ten years; and
(c)seizure and forfeiture to the State of any property acquired in abuse or corruption of office.

(3) The punishments mentioned in subsection (2) of this section shall be without prejudice to the penalties that may be imposed by any law where the breach of conduct is also a criminal offence under the Criminal Code or any other enactment or law.

(4) Where the Tribunal gives a decision as to whether or not a person is guilty of contravention of any of the provisions of this Act, an appeal shall lie as of right from such decision or from any punishment imposed on such person to the Count of Appeal at the instance of any party to the proceedings.

(5)Any right of appeal to the Court of Appeal from the decision of the Tribunal conferred by subsection (4) of this section shall be exercised in accordance with the provisions of the rules of court for the time being in force regulating the powers, practice and procedure of the Court of Appeal.

(6)Nothing in this section shall prejudice the prosecution of a public officer punished under this section, or preclude such officer from being prosecuted or punished for an offence in the court of law.

(7)The provisions of the Constitution of the Federal Republic of Nigeria 1999, relating to prerogative of mercy, shall not apply to any punishment imposed in accordance with the provision of this section."

6.2 It is my firm view that section 23, when carefully considered and properly understood as to its import– whether in its wording or structural layout –denies or restricts or restraints or limits the Tribunal from the exercise of any criminal jurisdiction under or by virtue of the provisions of the Act howsoever expressed.
6.3 It is helpful to begin the analysis of the said section 23 by putting the opening words of subsection (2) thereof in their proper perspective.

The words are: "The punishment which the Tribunal may impose shall include any of the following" and then the three aspects of punishments are set out. That means that the punishment the Tribunal may impose shall be any or all of those three aspects of punishment, which said aspects clearly constitute a limitation on the jurisdiction of the Tribunal.

6.4 Those three aspects of punishment, whether by implication or ipso facto, connote no criminal liability as such. Then interestingly, subsections (3) and (6) which must go and be read together,

foresee where a criminal offence may arise from or be part of a breach of conduct by an officer. In that case, subsection (6) is unambiguous that nothing precludes that officer punished for such breach of conduct from being prosecuted or punished for such a criminal offence in a court of law.

6.5 Nothing, in my candid view, can be more definite that jurisdiction over criminal offence arising in whatever shape or form from the wording of the Act is taken off the Tribunal but belongs exclusively to a court of law. To put it plainly, the Tribunal has no criminal jurisdiction under the Act establishing it and cannot exercise it under any pretext.

6.6 In a sense, subsection (7) supports this conclusion. It says that the prerogative of mercy shall not apply to any punishment imposed in accordance with the provisions of section 23. The constitutional power to grant the prerogative of mercy either by the President or Governor is only in relation to criminal punishment and this they can exercise at their discretion. No Act can abrogate that power nor need the power be exercised where no crime has been punished. Subsection (7), therefore, is needlessly a confirmation, in effect, that the Tribunal in all circumstances deals only with breaches of conduct by public officers in whatever form except criminal. That is why the exercise of the prerogative of mercy in the punishment imposed by the Tribunal does not arise.

7.1 The Code of Conduct Tribunal is not a court and cannot exercise judicial powers. The Constitution of the Federal Republic of Nigeria 1999 (as amended) has set out established courts in section 6(5) (a)- (i); and in 6(5) (j) such other courts as may be authorized by law to exercise judicial powers. Other bodies, disciplinary committees and tribunals (such as Medical and Dental Practitioners Disciplinary Tribunal, Disciplinary Committee of the Body of Benchers, Administrative Panel including the Code of Conduct Tribunal) may punish for breaches but it must be kept in mind that they are established for disciplinary purposes, exercising at best administrative jurisdiction. They do not and are not meant to, exercise judicial power which is exclusively for the courts.

7.2 An important aspect of judicial power is the issue of individual liberty which criminal offence may threaten; and the constitution provides safeguards which only competent courts of law as the third arm of government are entrusted with the observance thereof. No other body can be so empowered. In the case of Waterside Workersí Federation of Australia v. I.W. Alexander Ltd (1918) 25 C.L.R. 442-444, Chief Justice Griffith of the High Court of Australia (the highest court in that country) aptly said inter alia:

"It is impossible under the constitution to confer such functions upon anybody other than a court, nor can the difficulty be avoided by designating a body, which is not in its essential character a court, by that name, or by calling the function by another name. In short, any attempt to vest any part of the judicial power ÖÖ in any body other than a court is entirely ineffective … it is not disputed that convictions for offences and the imposition of penalties and punishments are matters appertaining exclusively to judicial powers"

7.3 The above observation is indisputably a demonstration of judicial oracy so appropriate to and enlightening upon the circumstances with which we are now concerned. No sustained system of jurisprudence can refute or move away from its grand perception.

7.4 I need to say at this juncture that I am particularly impressed with the observation of Jonah Adah J. of the Federal High Court in Fed. Republic of Nigeria v. Chief Joshua Chibi Dariye that: "The Code of Conduct Tribunal is conceived by the constitution as a disciplinary body, and that the powers given to it by paragraph 18 of the Fifth Schedule are intended, not really to punish, but to discipline and, in the words of the Privy Council, to keep public life clean for the public good. I am entirely in agreement with this position of Professor Nwabueze (SAN) as the exact intendment of the Constitutional relating to the Code of Conduct Tribunal"

7.5 In the same case, the learned judge went further to opine in no uncertain terms that: "The Code of Conduct Tribunal is never conceived of as a Court by the Constitution and no legislation of the National Assembly can empower it to act as a Court or dress it with judicial powers which are only meant to be exercised by the Courts created by section 6 of the Constitution. This conclusion has solved most of the nagging questions yet to be answered in this case. Since the Code of Conduct Tribunal is not a Court and has no power of criminal trial, it cannot issue any warrant for the arrest or imprisonment of any person under any guise. In fact, the power given to the Tribunal under paragraph 18 of the 5th Schedule to the Constitution does not extend to ordering the arrest or detention of any person who contravenes the Code of Conduct. Any law which confers that power on the Tribunal will definitely be inconsistent with the provisions of the Constitution and therefore null and void".

7.6 To the above, in order to conclude this aspect of my presentation, will be added the case of Sofekun v. Akinyemi (1981) 1 NCLR 135. There, a public officer in the public service of the western Region of Nigeria was dismissed upon a finding of guilt for indecent assault and attempted rape by a disciplinary tribunal constituted and empowered in that behalf under the Public Service Commission Regulations. His dismissal was held null and void by the Supreme Court as a usurpation of judicial power. In a judgment of the full court of seven, with no dissentient, Fatayi-Williams CJN at page 146 made this immortal observation inter alia: ìIt seems to me that once a person is accused of a criminal offence, he must be tried in a court of law where the complaints of his accusers can be ventilated in public and where he would be sure of getting a fair hearingÖÖNo other Tribunal, Investigating Panel or Committee will do… If Regulations such as those under attack in this appeal were valid, the judicial power could be wholly absorbed by the Commission (one of the organs of the Executive branch of the State Government) and taken out of the hand of the magistrates and judges….If the Commission is allowed to get away with it, judicial power will certainly be eroded….The jurisdiction and authority of the courts of this country cannot be usurped by either the Executive or the Legislative branch of the Federal or State Government under any guise or pretext whatsoever"

7.7 This is a fitting coalescence and re-echo of the eternal observation in 1918 (nearly one century back) by Chief Justice Griffith of Australia earlier quoted in para. 7.2 above. It is too late in the day to fail to venerate such outstanding judicial pronouncements for the protection of individual liberty and the sanctification of a worthy social order; or worse still, to unfortunately disavow such pronouncements by a side-wind.

8.1 It seems to me to follow that in the case of Saraki, he has been brought before the Code of Conduct Tribunal on making false declaration of assets as if to answer to crime in whatever sense. The claim that Tribunal has and can exercise criminal jurisdiction over him is tenuous in

substance, ambivalent in direction and ambiguous in meaning as it is not borne out by the provisions of the Act as already shown in this presentation. The idea of bench warrant or warrant of arrest in a situation like this is most uncharitable to say the least; and presumably that will be a display of impunity to overrun the limits of jurisdiction in order to intimidate, and then subdue.

8.2 In the event, it is unfortunate the way he was arraigned and thereafter treated with demeaning subtlety. First, he should not have been compelled to appear in person before the Tribunal even on any day so long as he could adequately be represented by his lawyers unless he considered his presence at any stage to be in his best interest. Second, he should not have been placed in the dock since in the eye of the law as it stands, he is not, and cannot be, standing criminal trial before the Tribunal. Third, the Tribunal is not covered by and does not come under the Administration of Criminal Justice Act, 2015 in any manner whatsoever and therefore was wrong to refuse an application for stay of proceedings before it pending an appeal. It would seem to have acted with impunity in this regard.

9.1 In considering Part (b) of this Paper, it must be recalled the unease Dr. Saraki is going through in the Senate for being the Senate President. It is now open secret that the power behind the ruling Party APC did not back him for that office. It is fair to see a connection between that circumstance and the Code of Conduct matter. There is the rumour that the Chairman of the Code of Conduct Tribunal has an alleged crime hanging over him which might give the impression that he may be willing to act as the hatchet-man over Saraki to save himself the prospect of the alleged crime not seeing the light of day by way of prosecution.

9.2 Looking at the treatment Saraki has received so far in the Tribunal presided over by the said Chairman who might, or is deemed to, know that there is the Sword of Damocles hanging over him, would the ordinary, right-minded persons aware of the situation have the impression that there was a real likelihood of bias on his part to deny Saraki justice?

9.3 In such a scenario, it may well be that the Chairman will do his best to be fair. It may also well be that there is no substance in the allegation of the crime said to have been committed by the Chairman. But Lord Denning MR has stated plainly how to determine real likelihood of bias by an adjudicator when he observed in Metropolitan Properties Co. Ltd v. Lannon (1969) 1Q.B. 577 at page 599 thus:
"In considering whether there was real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the Chairman of a Tribunal, or whosever it may be who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The Court looks at the impression which would be given to other people. Even if he was impartial as could be, nevertheless, if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit.And if he does sit, his decision cannot stand. However, it is necessary that there must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, of a tribunal would or did favour one side unfairly at the expense of the other. The Court will not inquire whether he did, in fact, favour one side unfairly. Suffice it to think that people might think it did. The plain reason for this is that justice is rooted in confidence; and confidence is destroyed when right-minded people go away thinking: the Judge is biased."

9.4 Looking at all the circumstances: the move which made Saraki the Senate President to the chagrin of those behind the powers that-be; the bringing of breach of code of conduct charge against Saraki based on false declaration of assets way back (some 10 years ago) as Governor of Kwara State this time; the Chairman of Code of Conduct Tribunal docked Saraki as if a criminal before it; the criminal charge against the Chairman, which is not being prosecuted now, may propel him to be hard on Saraki in the hope that could finally spare him being prosecuted of the alleged criminal charge; and that was how he was refused an application by him for stay of proceedings pending an appeal against the jurisdiction of the Tribunal in spite of the well-known principle on that issue! What else is needed to come to the conclusion that there is a real likelihood of bias which may deny Saraki justice?

10.1 I will leave the matter at that. It is a convenient point to end my presentation. I need to remark, however, that the tendency to get the Code of Conduct Tribunal and probably similar bodies to intrude into the administration of criminal justice is not a welcome development. It is indeed a challenge to our constitutional democracy which puts the liberty of individuals at risk. It is also a challenge to the foresight of anyone who fails to appreciate this dire consequence.

Uwaifo, (CON.) a former Justice of the Supreme Court presented this paper at the inaugural seminar of Ben Nwabueze Centre for Studies in Constitutional Law and Related Subjects held at Nigeria Institute of International Affairs (NIIA), Victoria Island Lagos on March 24, 2016.