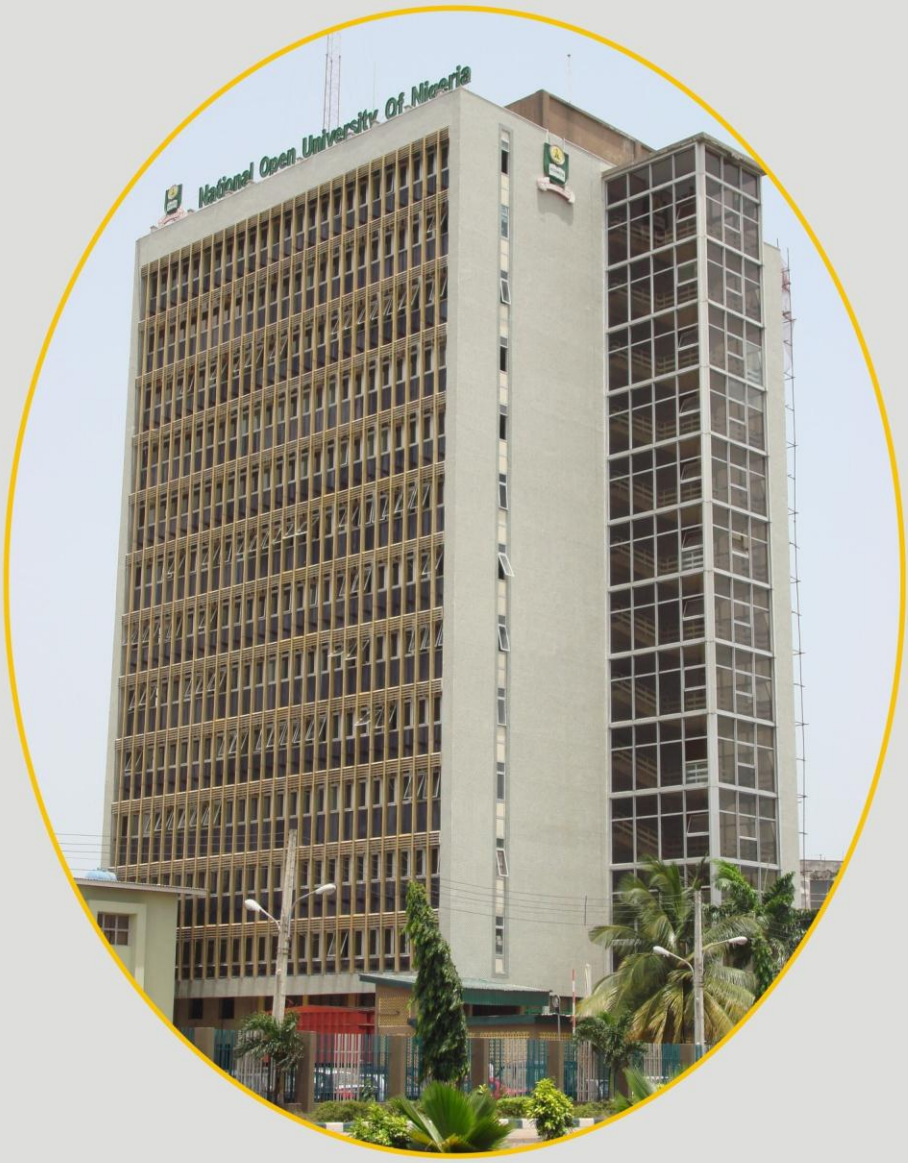
LAW 244
CONTITUTIONAL LAW II



NATIONAL OPEN UNIVERSITY OF NIGERIA

COURSE GUIDE

LAW 244
CONSTITUTIONAL LAW II

Course Code	LAW 244
Course Title	Constitutional Law II
Course Developers/Writers	Professor Toriola Oyewo Institute of African Studies University of Ibadan, Oyo State Ayodeji Ige National Open University of Nigeria
Course Editor	Professor Justus A. Sokefun National Open University of Nigeria
Programme Leader	Dr. Ifidon Oyakhiromen National Open University of Nigeria
Course Coordinator	Ayodeji Ige, Esq National Open University of Nigeria

NATIONAL OPEN UNIVERSITY OF NIGERIA

National Open University of Nigeria
Headquarters
14/16 Ahmadu Bello Way
Victoria Island
Lagos

Abuja Office
No. 5 Dares Salaam Street
Off Aminu Kano Crescent
Wuse II, Abuja
Nigeria

e-mail: centralinfo@nou.edu.ng
URL: www.nou.edu.ng

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Introduction

Constitutional Law is concerned with the law regulating the affairs of an employee with that of the employer. The Nigerian Constitutional Law, as will be seen in the historical aspect of it, was adopted from the English legal system based solely on the fact that we inherited the English legal system by reason of our affiliation with them through the instrument of colonialism. The practice of constitutional law is influenced by the general legal context that prevails in England. The major statute guide for constitutional law in Nigeria is the Constitution of the Federal Republic of Nigeria, 1999.

This course deals with fourteen basic points typically relevant and found in commonwealth jurisdictions most of which gained independence from the Britain, our colonial master. These topics, broken down into units generally bother on employee/employers relationship in Nigeria and they may influence its form and content. They, most importantly, touch upon the underlying valves and features which concern the way by which constitutional law is put into use in a democratic and law governed society.

Course Aim

The primary aim of this course is to familiarize you with the subject matter which is dealt with herein and which you are expected to know much about at the end of your reading through.

Course Objectives

The major objectives of this course, as designed, are to enable the student to be able to know the following at the end of the course.

(i) All the relevant enactments and legislations in relation to constitutional law in Nigeria;
(ii) Determine the processes to go through in order to enforce fundamental rights
(iii) Determine who a legislature and executive are
(iv) Discern the differences in the various arms of government.
(v) Know the jurisdiction of courts judicial
(vi) Know the remedies available to a wrongfully infringement on fundamental rights.
(vii) Know whether or not a citizen can enforce his right as enshrine in the 1999 Constitution..
(viii) Know the basic operational structures of government.
(ix) Differentiate between military rule and democratic rule.
(x) Know ways and manners disputes arising from breach of fundamental right could be redressed.

(xi) Know the basic ingredients and operational effect of the rule of law.
(xii) Know the provision of the 1999 Constitution.

Working through this Course

To complete this course, you are advised to read the study units, read recommended books and other materials provided by NOUN. Each unit contains Self Assessment Exercise, and at points in the course you are required to submit assignments for assessment purposes. At the end of the course there is a final examination. The course should take you about 17 weeks to complete, you will find all the components of the course listed below. You need to allocate your time to each unit in order to complete the course successfully and on time.

Course Materials

The major components of the course are:

Course guide
Study units
Textbooks
Assignment File
Presentation Schedule

Study Units

We deal with this course in 17 study units divided into 4 Modules as follows:

Module 1

Unit 1	Powers of the Federal Republic of Nigeria and few constitutional Concepts
Unit 2	Fundamental Objectives and Directive Principle of State Policy
Unit 3	Right to Fair Hearing
Unit 4	Fundamental Human Rights

Module 2

Unit 1	The Legislature
Unit 2	Power and Control over Public Fund
Unit 3	The Executive
Unit 4	Removal of Governor and Deputy Governor from the Office

.**Module 3**

Unit 1	Judicial Power, Meaning, Scope, Supreme Court , the Court of Appeal, Federal High Court, State High Court, Magistrate Court and Customary Court
Unit 2	Judicial Remedies
Unit 3	Natural Justice and Fundamental Right Enforcement Procedure
Unit 4	Judicial Review
Unit 5	Principle of Natural Justice and Application through Cases

Module 4

Unit 1	Constitution and Structure of the Nigeria Military Government
Unit 2	Structure and Administration of Judiciary under the Military
Unit 3	Demarcation of Function of Government
Unit 4	Legislation under the Military

All these Units are demanding. They also deal with basic principles and values, which merit your attention and thought. Tackle them in separate study periods. You may require several hours for each.

We suggest that the Modules be studied one after the other, since they are linked by a common theme. You will gain more from them if you have first carried out work on the scope of Labour Law generally. You will then have a clearer picture into which to paint these topics. Subsequent Courses are written on the assumption that you have completed these Unit.

Each study unit consists of one week's work and includes specific objectives, directions for study, reading materials and Self Assessment Exercises (SAE). Together with Tutor Marked Assignments, these exercises will assist you in achieving the stated learning objectives of the individual units and of the course.

Textbooks and References

Certain books have been recommended in the course. You should read them where so directed before attempting the exercise.

Assessment

There are two aspects of the assessment of this course, the Tutor Marked Assignments and a written examination. In doing these assignments you expected to apply knowledge acquired during the course. The assignments must be submitted to your tutor for formal assessment in accordance with the deadlines stated in the presentation schedule and the *Assignment file*. The work that you submit to your tutor for assessment will count for 30% of your total score.

Tutor-Marked Assignment

There is a Tutor Marked Assignment at the end for every unit. You are required to attempt all the assignments. You will be assessed on all of them but the best 3 performances will be used for assessment. The assignments carry 10% each.

When you have completed each assignment, send it together with a (Tutor Marked Assignment) form, to your tutor. Make sure that each assignment reaches your tutor on or before the deadline. If for any reason you cannot complete your work on time, contact your tutor before the assignment is due to discuss the possibility of an extension.

Extensions will not be granted after the due date unless under exceptional circumstances.

Final Examination and Grading

The duration of the final examination for this course is three hours and will carry 70% of the total course grade. The examination will consist of questions, which reflect the kinds of self –assessment exercises and the tutor marked problems you have previously encountered. All aspects of the course will be assessed. You should use the time between completing the last unit, and taking the examination to revise the entire course. You may find it useful to review your self assessment exercises and tutor marked assignments before the examination.

Course Score Distribution

The following table lays out how the actual course marking is broken down.

Assessment	Marks
Assignments 1-4 (the best three of all the assignments submitted)	Four assignments. Best three marks of the four count at 30% of course marks
Final examination	70% of overall course score
Total	100% of course score

Course Overview and Presentation Schedule

Unit	Title of Work	Weeks Activity	Assessment (End of Unit)
	Course Guide	1	
Module 1			
1	The Supremacy of the Constitution and Powers of the Federal Republic of Nigeria	1	Assignment 1
2	Fundamental Objectives and directive Principle of State Policy	1	Assignment 2
3	Right to Fair Hearing	1	Assignment 3
4	Fundamental Human Rights	1	Assignment 4
Module 2			
1	The Legislature	1	Assignment 5
2	Power and Control over Public Fund	1	Assignment 6
3	The Executive	1	Assignment 7
4	Removal of Governor and Deputy Governor from the Office	1	Assignment 8
Module 3			
1	Judicial Power, Meaning, Scope, Supreme Court, Court of Appeal, Federal High Court, State High Court etc	1	Assignment 9
2	Judicial Remedies	1	Assignment 10
3	Natural Justice and Fundamental Rights Enforcement Procedure	1	Assignment 11
4	Principle of Natural Justice and Application through Cases	1	Assignment 12
Module 4			
1	Constitution and Structure of the Nigeria Military Government	1	Assignment 13
2	Structure and Administration of Judiciary under the Military	1	Assignment 14

3	Demarcation of Function of Government	1	Assignment 15
4	Legislation under the Military	1	Assignment 16
	Revision	1	
	Examination	1	
	Total	**19**	

How to Get the Most from this Course

In distance learning, the study units replace the lecturer. The advantage is that you can read and work through the study materials at your pace, and at a time and place that suits you best. Think of it as reading the lecture instead of listening to a lecturer. Just as a lecturer might give you in-class exercise, your study units provide exercises for you to do at appropriate times.

Each of the study units follows the same format. The first item is an introduction to the subject matter of the unit and how a particular unit is integrated with other units and the course as a whole. Next is a set of learning objectives. These objectives let you know what you should be able to do by the time you have completed the unit. You should use these objectives to guide your study. When you have finished the unit, you should go back and check whether you have achieved the objectives. If you make a habit of doing this, you will significantly improve your chances of passing the course.

Self Assessment Exercises are interspersed throughout the units. Working through these tests will help you to achieve the objectives of the unit and prepare you for the assignments and the examination. You should do each Self Assessment Exercise as you come to it in the study unit. There will be examples given in the study units. Work through these when you have come to them.

Facilitators/Tutors and Tutorials

There are 15 hours of tutorials provide in support of this course. You will be notified of the dates, times and location of these tutorials, together with the name and phone number of your tutor, as soon as you are allocated a tutorial group.

Your tutor will mark and comment on your assignments, keep a close watch on your progress, and on any difficulties you might encounter and provide assistance to you during the course. You must send your Tutor Marked Assignments to your tutor well before the due date. They will be marked by your tutor and returned to you as soon as possible.

Do not hesitate to contact your tutor by telephone or e-mail if you need help. Contact your tutor if:

You do not understand any part of the study units or the assigned readings;
You have difficulty with the self assessment exercises;
You have a question or a problem with an assignment, with your tutor's comments on an assignment or with the grading of an assignment.

You should try your best to attend the tutorials. This is the only chance to have face-to-face contact with your tutor and ask questions which are answered instantly. You can raise any problem encountered in the course of your study. To gain the maximum benefit from course tutorials, prepare a question list before attending them. You will gain a lot from participating actively.

Summary

This course deals with fourteen basic points typically relevant and found in Commonwealth Jurisdictions most of which gained independence from the Britain, our colonial master. These topics, broken down into units generally bother on employee/employers relationship in Nigeria and they may influence its form and content.

We wish you success with the course and hope that you will find it both interesting and useful.

MAIN COURSE

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MODULE 1

UNIT 1 POWERS OF THE FEDERAL REPUBLIC OF NIGERIA AND FEW CONSTITUTIONAL CONCEPTS

CONTENTS

1.0 INTRODUCTION

The various constitutions of Nigeria from 1963 vested the legislative powers of the Federal Republic of Nigeria in a Legislature which usually consists of a Senate, and a House of Representatives.

This assembly has powers to make laws for the peace, order and good government of the Federation or any part thereof for all the matters that are usually included in the Exclusive legislative list set out both in the 1963, 1979 and 1989 Constitutions respectively.

In addition to the powers conferred as above the same National Assembly is enjoined to make laws with respect to the following matters, that is to say:

(1) Any matter in the concurrent legislative list set out in the first column of part II of the relevant schedule to the extent prescribed by the second column opposite thereto;
(2) Any other matter with respect to which it is empowered to make laws in accordance with the provisions of any particular constitution.

It must however be borne in mind that if any law enacted by the House of Assembly of a state is inconsistent with any law validly made by the National Assembly, the law of the National Assembly shall prevail, and that other law shall to the extent of the inconsistency be void.

This in turn points out that the House of Assembly of a state equally has powers to make laws for the peace, order and good government of the state or any part thereof in respect of any matter *not included* in the exclusive legislative list itemised above in addition to any other matter which is included in the Concurrent legislative list of any particular constitution of the Federal Republic of Nigeria.

Lastly, it must be noted that these legislative powers of both the National and state assemblies are subject to the jurisdiction of courts of law and of judicial tribunals established by law; and accordingly the National Assembly or a House of Assembly shall not enact any law that ousts or purports to oust the jurisdiction of a Court of law or of a judicial tribunal established by law. See section 8 of the 1979 Constitution and 1989 Constitution of the Federal Republic of Nigeria (Promulgation) Decree.

However, the constitution stipulates and prohibits that neither of the assemblies has any power to make any law in relation to any criminal offence whatsoever, which shall have retrospective effect:

The provisions of the Constitution read as follows:

> "*Not withstanding the foregoing provisions in this section, the National Assembly or a House of Assembly shall not, in relation to any Criminal offence whatsoever, have power to make any law which shall have retrospective effect.*"

2.0 OBJECTIVES

At the end of this unit, you should be able to:

identify and define some doctrines like ripeness, ministerial responsibility and powers of the court
identify the various historical circumstances leading to the different sources of these concepts.

Comments

It must be noted that the Army took over the reins of government in Nigeria during the following periods of time to wit 1966, 1967, 1983, 1985 and 1995 respectively with what looks like a threat to the rule of law by some critics and dangerous distortions of some constitutional provisions.

Thus, the coveted provisions of the constitutions came under the subjugation of a Decree, and as such a Nigerian constitution shall not prevail over a Decree and nothing in the constitution shall render any provision of a Decree void to any extent whatsoever.

It therefore means that a Federal Military Government may in fact suspend and modify the provisions of any constitution to the extent desired by it, (ad libitum). Hence, once a Decree is made as it was done by Decree No. 1 of 1966 nothing, and not even the provision of any Constitution can derogate from it. What we therefore have during those periods in Nigeria under various military regimes is the SUPREMACY OF DECREES over the Constitution, and the sub-ordinate roles of the provisions of the Constitution to that of a Decree.

3.0 MAIN CONTENT

3.1 Amendment or Alteration

No alterations or amendment of the provision of the constitution can be made, unless the procedure provided for in the constitution itself for such an alteration is complied with. It must be noted that such provisions are indeed cumbersome, very hard to overcome, special, and or they appear to be a syciphean task to overcome.

For instance, to amend the Switzerland Constitution, a referendum of the electorate has to be done, while in Belgium a prescriptive quorum has to be made. In America, an initiation to amend or alter any part of the constitution must be done by two-thirds of both Houses of Congress and ratified by the Legislature of three-fourths of the states. In the

alternative, an initiation by two thirds of the states has to be done first which has to be ratified by the conventions in three-fourths of the states.

Professor DE Smith in his book titled the New Commonwealth and its Constitutions published by Stevens & Sons London had this to say on Jamaica, Malaysia, Nigeria, Trinidad and Uganda-

> "*Bills for constitutional amendment in Jamaica require the support of an absolute majority of all members in each House; or, in the case of entrenched and specially entrenched provisions, a two-thirds*" *majority of all members in each House, subject to submission to a referendum if the senate does not give the necessary majority. Specially entrenched provisions can not be altered in any event without recourse to a referendum. The two-thirds' majority rule is likely to prove a substantial barrier to the adoption of amendments to which the opposition does not agree; for eight out of twenty-one senators are the nominees of the Leader of the opposition".*

The two-thirds rule appears in one form or another in all the constitutions – in a diluted form in India but reinforced in Malaysia, Nigeria, Trinidad and Uganda by the requirement that the necessary support must be forthcoming at both the second and third readings of the Bill.

However, the position in Nigeria is contained in all the sections of its different constitutions. See S. 4(1) of the 1963 Constitution, section 9 of the *1979* Constitution and section 10 of the constitution of the Federal Republic of Nigeria (Promulgation) Decree 1989 which state mutatis mutandi as follows:

(1) The National Assembly may, subject to the provisions of this Constitution alter any of the provisions of this Constitution.

(2) An act of the National Assembly for the alteration of this Constitution, not being an Act to which section 8 of this Constitution applies, shall not be passed in either House of the National Assembly unless the proposal is supported by the votes of not less than two-thirds majority of the members of that House and approved by resolution of the Houses of Assembly of not less than two-thirds of all the States.

(3) An Act of the National Assembly for the purpose of altering the provisions of this section, section 8 or chapter IV of this

Constitution shall not be passed by either House of the National Assembly unless the proposal is approved by the votes of not less than four-fifths majority of all the members of each House, and also approved by resolution of the Houses of Assembly of not less than two-thirds of all the States.

(4) For the purposes of section 8 of this constitution and of sub-section (2) and (3) of this section, the number of members of each House of the National Assembly shall, notwithstanding any vacancy, be deemed to be the number of members specified in section 44 and 45 of the *1979* Constitution.

Please note that while chapter IV of the Constitution deals with FUNDAMENTAL RIGHTS, section 8 of 1979 Constitution deals with the creation of new states and boundary adjustment.

And for clarity of purposes the provisions are as follows:

8 (1) An Act of the National Assembly for the purpose of creating a new state shall only be passed if:

(a) a request, supported by at least two-thirds majority of members (representing the area demanding the creation of the new state) in each of the following, namely :

(i) the Senate and the House of Representatives;
(ii) the House of Assembly in respect of the area; and
(iii) the local government councils in respect of the area; is received by the National Assembly;

(b) a proposal for the creation of the state is thereafter approved in a referendum by at least two-thirds majority of the people of the area where the demand for creation of the state originated;

(c) the result of the referendum is then approved by a simple majority of all the states of the Federation supported by a simple majority of members of the Houses of Assembly; and

(d) the proposal is approved by a resolution passed by two-thirds majority of members of each house of National Assembly.

(2) An Act of the National Assembly for the purpose of boundary adjustment of any existing State shall only be passed if:

(a) a request of the boundary adjustment, supported by two-thirds majority of members (representing the area demanding the boundary adjustment) in each of the following, namely:

(i) the Senate and the House of Representatives;
(ii) the House of Assembly in respect of the area, and
(iii) the local government councils in respect of the area, is received by the National Assembly; and

(b) a proposal for the boundary adjustment is approved by:

(i) a simple majority of members of each House of the National Assembly, and
(ii) a simple majority of members of the House of Assembly in respect of the area concerned.

3.2 The Executive Powers of the Federation

The executive powers of the Federation is vested on the President of Nigeria, and he is at liberty subject to the provisions of any law made by the National Assembly to delegate such functions to the Vice-President and Ministers of the Government of the Federation or Officers in the Public Service of the Federation.

Also the executive powers of a State is vested in the Governor of that State and he may, subject to the provisions of any law made by a House of Assembly delegate such powers to his Deputy Governor and Commissioners of the Government of that State, or officers in the Public Service of the State. But note that the executive powers shall be so exercised as not to impede or prejudice the exercise of the executive powers of the Federation or to endanger the continuance of the Federal Government of Nigeria.

It should also be noted that the President shall not declare a state of war between the Federation and another country except with the sanction of a resolution of both Houses of the National Assembly sitting in a joint session and except with the prior approval of the Senate, no member of the Armed Forces of the Federation shall be deployed on combat duty outside Nigeria.

3.3 Judicial Power

The judicial powers are vested in both the courts established for the Federation and the States. These courts are contained in section 6(3) (4) and (5) of the 1979 Constitution.

And by section 6(6) (a) and (b) the judicial powers therefore vested has extended to all inherent powers and sanctions of a court of law.

It also extends to all matters between persons, or between government or authority and any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and of obligations of that person; it does not extend, except as otherwise provided by the constitution to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive principles of State Policy set out in Chapter II of the 1979 Constitution and shall not as from the date when the 1979 constitution was promulgated extend to any action or proceedings relating to any existing law made on or after 19th day of January, 1966 for determining any issue or question as to the competence of any authority or person to make any such law.

Comments

The constitution of Nigeria loaths to recognise the OUSTER of the court's jurisdiction, but since a Military Decree is superior to the constitution more often than not, the ouster of court's jurisdiction are prevalent and they constitute hair splitting occurrences in our statute books under the Military dispensation.

For instance in *Lakanmi and another Vs. A.G. (Western State) and other* Edict No. 5 of 1967 (Western State) stated as follows:

> "*No defect whatsoever in respect of anything done by any person with a view to the holding of, or otherwise in relation to, any inquiry under that Decree and this Edict, shall affect the validity of the thing so done or anyproceeding, in the nature of quo warranto, certiorari, mandamus, prohibition, injunction or declaration or in any form whatsoever against or in respect of any such thing, proceeding, finding, order, decision or other act, as the case may be, shall be entertained in any Court of law.*"

When this edict was challenged the Federal Government passed another Decree No. 45 of 1968 which validated all actions done under edict No. 5 of 1967.

Similarly, the Failed (Banks) (Recovery of Debts) and Financial Malpractices in Bank Decree No. 18 of 1994 as amended provides in section 1(5) that the supervisory jurisdiction or power of judicial review of a High court shall not extend to any matter or proceeding before the tribunal under this Decree and that if any proceeding relating to the supervisory jurisdiction or power of judicial review of a high court on a

cause or matter brought before the tribunal is before any High court after the commencement of this Decree, such action shall abate, cease or be deemed to be discontinued without any further assurance other than this Decree.

The Decree in fact went on to usurp the powers of the Court when it says in sections 2(1) (a) and (2) as follows:

Any part-heard proceeding, relating to a matter for which S. (1) under the tribunal has jurisdiction, which is pending before any Court on the date of the making of this Decree – (a) may, in civil case, be discontinued with the leave of that court and transferred to the tribunal for fresh hearing under the Decree.

(2) All proceedings shall be brought before the tribunal in accordance with the provisions of this Decree.

Such legislations may be replete in the statute books of Nigeria on close scrutiny, but the courts loath to see such Decrees pass as authentic without proper examination. Hence the Court will not allow such ouster clauses to go unchallenged when there are sufficient reasons so to do.

The court guides jealously these ouster of court's jurisdiction and usually views them with jaundiced eyes by subjecting them to the following acid tests:

For instance, in *Anisminic Ltd V. The Foreign Compensation Commission & and another and Dr. S.D. Onabamiro V. Chief Bola Ige and others* the Courts have tenaciously intervened in cases of patent irregularity. For instance thecourts have intervened under the presumption of the law that justiciable issue is not to be denied the rights of trial by the Courts, save by clear words in a statute.

Also they have intervened in agreements which are contrary to public policy and which oust the courts in adjudicating on contract cases.

The courts have intervened with the ouster of courts jurisdiction where their jurisdiction have been impliedly curtailed and not expressed in clear terms. For instance the courts have authority to determine whether a particular authority was the one really authorised to act as it was empowered to determine.

The courts will also be permitted to intervene and determine whether an authority has addressed itself to the matters properly put before him.

Lastly the Courts will intervene and decide on cases where the principles of natural justice have been violated.

In the case of *Onabamiro* (supra) the decisions reached by Lord Pearce in *Anisminic case* (supra) were re-echoed as follows:

The lack of jurisdiction of a tribunal may arise in many ways notwithstanding the provisions of the ouster clauses to wit:

(a) Where there is the absence of the formalities and conditions precedent that would confer jurisdiction on the said Tribunal before embarking on its inquiry, for instance where the tribunal could not form a quorum, or
(b) Where the tribunal makes a decision or makes an order that it has no power to make; or
(c) Where the tribunal departs from the rules of natural justice; or
(d) Where the tribunal asks itself a wrong question; and
(e) Where the tribunal considers matters it ought not to consider.

Also must be mentioned the case of *Nigerian Ports Authority V. Panalpina Wood Transport Nigeria Ltd. and others* which holds that matters which are not within the four walls of a Decree can not enjoy the protection of the ouster of the court's jurisdiction.

Lastly the cases of *Agbaje V. C.O.P.* and Re: *Olayori and others* should be remembered where legislative measure to oust the jurisdiction of the courts from reviewing administrative actions have been seriously rebuked for contravening the principles embedded in the rule of law.

3.4 Further Powers of the Court

The courts have also power to declare an edict invalid on the grounds of its inconsistency with a Decree. See *Onyuike V. Eastern States interim assets and liabilities agency, Bronik Motors Ltd. and another Vs. WEMA Bank.*

However in the case of *Military Governor of Ondo State V. Adewumi* the Supreme court gave scintillating accounts of the powers of the court over such Edicts and many more as follows:-

(1) Where the Federal Government has validly legislated on a matter, any state legislation on the same matter which is inconsistent with the Federal legislation will be void to the extent of the inconsistency.

(2) A Military Governor has no power to make any law which is inconsistent with any law made by the Federal Military Government before or after December, 31st 1983 when the then Federal Government came into power.

(3) By the provisions of section 1 subsections 1 and 2 of Decree No. 1 of 1984 which preserved sections 6 and 236 of the Constitution of the Federal Republic of Nigeria 1979, Chieftaincy questions among others are matters within the jurisdiction of the court of every state.

Therefore, any edict or law of a state which purports to remove chieftaincy questions or matters from the jurisdiction of Decree No. 1 of 1984 (section 1 subsections 1 and 2) and sections 6 and 216 of the 1979 Constitution.

A High Court is therefore competent to entertain an action challenging an edict on the ground that it is inconsistent with the provisions of a Decree or the unsuspended provisions of the 1979 Constitution.

Honourable Justice Kayode Eso (JSC rtd) had this to say:

> "*Edict No. 11 of 1984 (of Ondo State) which purports to delimit the jurisdiction conferred by the constitution is void. The edit is not a bean stock planted by JACK. It cannot outgrow itself. It remains puny vis-à-vis the constitution or the portions thereof unsuspended and any Decree.*"

As for Decree No. 13 of 1984, like its predecessor Decree No. 28 of the 1970, nothing therein stops an attack on an edict if it is inconsistent with a Decree. *See Chief Adebiyi V. H.E. Col. Mobolaji Johnson*[10].

3.5 The Doctrine of Ripeness

Please note that there is a gulf of difference between actual ousting of the court's Jurisdiction from entertaining an action and a proviso demanding something to be done before an action can be entertained in a court of law.

This proviso is not and can never be construed as OUSTING OF THE COURTS' Jurisdiction.

In the main it must therefore be noted that the procedural requirements before one can take an action to the court is not a bar to the jurisdiction of any court.

Until those avenues or remedies are complied with and exhausted actions taken straight away to a high court in defiance of the statutory pre-conditional regulations will be struck out as being procedurally ultra-vires. See *Sunday Eguamwense V. James Amashizemwen* decided by the Supreme Court of Nigeria.

The case decided that if a plaintiff has not challenged the validity of any decision of the prescribed authority (as demanded by the Bendel State Chiefs Law) either by appeal to the Executive Council for review, or by *certiorari* removing it to the High Court to be quashed, it is inappropriate to do so by Declaration.

Similarly in *O.A. Akintemi and 2 others Vs. Onwumechili* it is graphically stated without contradictions that when a matter is for the domestic domain of any body, institution or authority as enshrined in the statute, it is not permitted to come to court until all avenues have been exhausted.

Such issues are then not justiciable. This view is equally adopted in the cases of *Thorne V. University of London R. V. Dun Sheat, Ex-Parte Meredith* and *University of Lagos and 2 others Vs. Dr. Dada*.

This is known as Justice Halan's legal calculus or the doctrine of RIPENESS. The doctrine has been applied in series of cases like *Falomo V. Lagos State Public Service Commission* where it was held that unless the plaintiff has exercised his right under the proviso to the Regulation 52 of the Lagos State Public Service Rules, and a decision unfavourable to him has been given by the Commission pursuant to the exercise of its power under the proviso, his application will not succeed and he is strongly advised not to come to court as of first instance until he has exhausted all administrative channels opened to him.

Also variable provisions have been made in the Nigerian local government law stipulating that a notice of intention to sue is a necessary condition precedent to the commencement of an action against a Local Authority. See *Shafiu V. Kaduna Native Authority*[17] *Kaduna L.A. Vs. MakudawaKusada V. Sokoto Native Authority*.

Also must be noted the decision in *Animotu Abike Yesufu V. Ibadan City Council and another* which states that the provisions of section 274 of the Local Government Law (Cap 68) Laws of Western Region are mandatory and therefore any failure to comply with them will debar a court from entertaining any action brought against any Local Government Council established under the provisions of the law.

For further cases see *Alexander D. Yaskey V. The President Councillors and Citizen of Freetown, Aiyemobuwa V. Ondo Western District and another (1960) Dramani Ngelega V. Nongowa Tribal Authority*[23].

3.6 Retrospective Legislation

Retrospective legislation are offensive to the principles of social justice. They are inimical to progress and unwarranted in any progressive country. They should be discouraged and disallowed at all times.

They look like a victimising trap to catch some political opponents and they are indeed unsuitable to any country that recognises the rule of law. That is why Section 4(9) of the 1979 Nigerian constitution prohibits the making of them in relation to any criminal offence whatsoever.

But what we have in a military regime is that a law may be made to start operating from the past which is outside the period of its birth/statutory origin. See Decree No. 45 of 1968 which validated all actions done under Edict No. 5 of 1967 retrospectively (when edict No. 5 of 1967 (Western State) was successfully challenged as a legislative judgement in *Lakanmi V. A.G. Western State of Nigeria*.

Please note that although both edict No. 5 of 1967 and Decree No. 45 of 1968 were declared ultra vires, null and void by the Supreme Court of Nigeria yet this decision was set aside by Decree No. 28 of 1970 by the Federal Military Government (Supremacy and Enforcement Powers) Decree which in our own opinion has a retrospective effect and connotation.

However, one may suggest that Decree No. 105 of 1979 titled the Constitution of the Federal Republic of Nigeria (Certain Consequential Repeals etc.) has repealed Decree No. 28 of 1970 discussed above.

Another area worthy of note are sections 36 and 43 of the Land Use Act where Tobi JCA in the Hand Book on the LAND USE ACT had this to say:

> "*If the original owners of the land performed any of the acts under sections 36 and 43 before the promulgation of the Act, they would not have committed any office.*"

Could the expression "*at the time the offence took place*" be construed to mean the date before the promulgation of the Act as it affects the rights of the original owners of the Land?

If this interpretation is accepted, then the provisions of the Act have retrospective effect and therefore could be said to contradict section 35(7)".

3.7 Few Constitutional Concepts

Parliamentary Sovereignty

This expression "Parliamentary Sovereignty" is otherwise called "legislative supremacy" and it implies the fact that parliament has absolute authority to issue orders and enact laws that are binding on every person within the area of its jurisdiction. These laws or orders when made are obligatory on the citizens and cannot be challenged or abrogated by any arm of the government.

Parliamentary sovereignty is a borrowed relic of the English system of government which became operative as a result of the conflict between the crown and the parliament in England.

Supremacy of parliament is therefore recognised in any country that is having no written constitution. It therefore means that any elected body of men called the parliament can pass any law on any topic which affects the interest of persons.

Please note that the word "Parliament" has many names in many countries. In Britain for example, parliament includes both the House of Commons, the House of Lords and the Queen. In the United States of America, parliament is the Congress; in France for example, parliament is called "the National Assembly" and in Nigeria, Parliament is made up of the House of Representatives, the Senate, and the President of the Republic in the 1979 and 1999 Federal Constitutions of Nigeria.

Because parliament is supreme, it can therefore make and unmake, it can legalise illegality and in some occasions it can pass laws which originally were meant for men to include women. Thus, no arm of the government can control a parliament in its discretion hence whenever the parliament errs; nobody has a voice on the matter for it is the parliament itself that can correct its own errors and no one else.

The supremacy of parliament means therefore that any law enacted by the parliament overrides any form of law. Parliament is very powerful and supreme because it can by itself, extend or shorten its own life; and as a glaring example, the British Parliament extended its life span twice during the two world wars.

However certain limitations are placed on the law making power of parliament in England. One is that no parliament can make any law which would bind its successors. Put in other words "no current parliament can legislate to bind its successor" as it was decided in the case of *Ellen Street Estate Vs. The Minister of Health* which is in line with the decision reached in *Vauzhall Estate V. Liverpool Corporation*.

Another restriction on parliamentary supremacy is that a parliament can only legislate within its legitimate jurisdiction. Thus authority cannot extend beyond its realms.

3.8 The Position of Sovereignty in Nigeria

Parliamentary sovereignty does not exist in Nigeria and in its place what we have is the sovereignty of the Nigerian Constitution. This is so because Nigeria has a written constitution and as such superiority is given to the constitution other than the parliament.

The same position obtains in Canada, United States of America, Zambia, Australia and other countries that have rigid or written constitution.

Therefore, every power in the legislature, judiciary, executive and so on is being controlled by the obtaining constitution.

This argument is fortified both by the *1963, 1979* and the *1999* Constitutions of Nigeria. Chapter one section 1 of the 1963 Republican Constitution of Nigeria states as follows:

> *This Constitution shall have the force of law throughout Nigeria and, subject to the provisions of section 4 of this Constitution, if any other law (including the Constitution of a Region) is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.*

In the same vein chapter one Part 1 section 1(1) of the *1979* Constitution of the Federal Republic of Nigeria talks of the supremacy of the Constitution where it provides as follows:

> *This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria*.

Section (2)

> *The Federal Republic shall not be governed, nor shall any person or group of persons take control of the Government of Nigeria or any part thereof, except in accordance with the provisions of this Constitution.*

Section (3)

If any other law is inconsistent with the provisions of this Constitution, this constitution shall prevail, and that other laws shall to the extent of the inconsistency be void.

Thus the supremacy of the constitution is protected from erosion by the authority of an independent judicial body as it was decided in the case of *Doherty V. Balewa* where the plaintiffs successfully challenged the Commission and Tribunals of Inquiry Act 1961 No. 26 as being unconstitutional by some sections contained thereof. Hence the Tribunal and Commission of Inquiry Act 1961 was said to have exceeded the power of Parliament under the constitution. This, in effect, confers supremacy on the constitution and not on the Parliament; and the decision reached in this case is similar to that of *Bribery Commissioners Vs. Ranashinghe*.

The supremacy of the constitution therefore means that the constitution binds all persons within the state, that it overrides all laws in the state and that all laws and all acts of all the arms of the government do derive their validity from the constitution.

However, it must be noted that during emergency, like in a military take-over some provisions in the constitution may be abolished. This is what happened in Nigeria during the Military rule in 1966 when Decrees were made to override the constitution as it was contained in Decree No. 1 of 1966 Section 1(2) in Nigeria.

However, you should note that for the supremacy of the constitution to have proper meaning and backing, the court must of necessity have power to pronounce on the validity of the government because it is part of the functions of the judiciary to pass judgements on the validity of acts, omissions, and the decisions of the executive with all other arms of the government (including the administrative tribunals) so that considerable opportunity will be afforded the citizens in the protection of their rights.

But the power of such courts may be ousted as discussed earlier during the Military rule for instance, section 6 of the Constitution (suspension and modification) Decree of 1966 provides as follows:

> *…….any decision whether made before or after the commencement of this Decree by any court of law inthe exercise or purported exercise of any powers under the constitution or any enactment of law of the Federation or of any State which has purported to declare or shall hereafter purport to declare as invalid the provisions of any Decree or of any Edict(in so far as the provisions of the Edict are inconsistent with the provisions of a Decree) or the incompetence of any of the governments in the Federation to make the same is or shall be null and void and of no effect whatsoever as from the date of the making thereof.*

Similarly Decree No. 28 – The Federal Military Government (Supremacy and Enforcement Powers) Decree, 1970 has made it clear that a Decree is the supreme law of the land under the military regime.

3.9 Ministerial Responsibility

Ministerial responsibility means that all the ministers are collectively responsible to the elected parliament for the general policy of the administration. This responsibility is centred around the principle of accountability.

Aihe and Oluyede quoted Chamberlain as describing collective responsibility as:

> *absolute frankness in our private relations and full discussions of all matters of common interest …..the decision freely arrived at should be loyally supported and considered as the decisions of the whole government. Of course there may be occasions in which the difference is of so vital a character that it is impossible for the minority …..to continue their support and in this case the ministry breaks up orminority number or numbers resign.*

In another sense, ministerial responsibility means the personal responsibility or liability of a particular minister for all the consequences of his ministry's actions. And in the words of O.H. Philips: *A minister must accept responsibility for the actions of the civil*

servants in the Department, and he is expected to defend them from public criticism, unless they have done something reprehensible which he forbade or of which he disapproves and of which he did not have and could not reasonably be expected to have had previous knowledge. In the latter case, which is unusual, he may dismiss them.

3.10 Separation of Powers

The functions of the government were analysed firstly by Aristotle who was a Greek Philosopher; and in the 17th Century the doctrine of separation of powers was developed by John Locke, who saw in it a way of freeing mankind from the injustice and oppression which resulted from an absolute system of government.

Locke therefore concluded that the powers of the government should be shared between three independent bodies called the Legislature, the Executive and the Judiciary.

He therefore urged that it would be unwise to give any arm of the government power to do the duties of the others *pari passu*. That is, the Legislature must not have the powers to perform the functions of either the Executive or the Judiciary; that the Executive should not be conferred with the powers to perform either the duties of the legislature or the judiciary; and finally the Judiciary should not have any power to perform the duty of either the legislature or the Executive since they might use their powers to exempt themselves from the law they had made for their fellows.

It was however Montesquieu the pre-revolutionary philosopher who contributed immensely to the development of this doctrine and he did a lot to refine it so as to ensure justice and fairness in the running of the government.

In his treatise titled l'Esprit des Lois Chapter IX he said:

> "*Political liberty is to be found only when there is no abuse of powers, but constant experience shows us that every man invested with powers, is liable to abuse it and to carry his authority as far as it will go……To prevent this abuse, it is necessary from the nature of things that one power should be a check on another…. when the legislative and executive powers are united in the same person or body – there can be no liberty – Again, there is no liberty if the judicial power is not separated from the legislature and executive – There would be an end to every thing if the same person or*

> *body, whether of the nobles or of the people, were to exercise all these powers.*"

Montesquieu obviously based his ideas on the British Constitution of the first part of 18th century as he understood it then, and as explained by Garner the doctrine tried to explain three main issues viz:

(a) that if the executive and legislature are the same person or body of persons, there must be a danger of the legislature enacting oppressive laws which the executive will administer to attain its own ends.

(b) that for laws to be enforced by the same body that enacts them will result in arbitrary rule and make the judge a legislature rather than an interpreter of the law; and

(c) that if then one body or person could exercise both executive and judicial powers in the same matter, there would be arbitrary power which would amount o complete tyranny.

The doctrine then explains that it will be foolhardy to give law makers the power of executing the law because in the process they might exempt themselves from obedience and suit the law (both in making and executing it) to their individual interests.

Please, note as reported by many eminent writers that Montesquieu did not mean that legislature and executive ought to have no influence or control over the acts of each other, but only that neither should exercise the whole or part of another's powers.

Put in brief, the meaning of the words "separation of powers" may mean three different things:

(a) That the same person should not form part of more than one of the three organs of government, e.g. that ministers should not sit in parliament;
(b) That one organ of government should not control or interfere with the exercise of its functions by another organ, e.g. that the judiciary should be responsible to parliament; and

(c) That one organ of government should not exercise the function of another e.g. that the ministers should not have legislative powers.

This was the case in *Lakanmi Vs. Attorney-General Western State* where the supreme court ruled "that Decree No. 45 of 1968 was ultra

vires since it was nothing short of a legislative judgement, an exercise of judicial power".

The Court held that the doctrine of separation of powers exists in Nigeria and it cannot be thus whittled down. The Supreme Court held thus:

"We must here revert again to the separation of powers, which the learned Attorney-General himself did not dispute is still the structure of our system of government. In the absence of anything to the contrary it has to be admitted that the structure of our Constitution is based on the separation of powers – the Legislature, the Executive and the Judiciary. Our Constitution clearly follows the model of the American Constitution".

"In the distribution of powers, the courts are vested with the exclusive right to determine justifiable controversies between citizens and between citizens and the state". See *Attorney-General for Australia V. Queen*. In *Lovel Vs. United States* Mr. Justice Black said as follows:

> "*Those who wrote our Constitution well knew the danger inherent in special legislative acts which takeaway the life, liberty or property of particular named persons, because the legislature thinks them guilty of conduct which deserves punishment. They intended to safeguard the people of this country from punishment without trial by duly constituted courts*".

"These principles are so fundamental and must be recognised. It is to define the powers of the legislature that constitutions are written and the purpose is that such powers that are left with the legislature be limited; and that the remainder be vested in the courts".

However this decision has been overruled by Decree No. 28. The Federal Military Government (Supremacy and Enforcement of Powers) Decree 1970 makes it clear that a Decree is the supreme law of the land during the military rule.
Thus generally legislative usurpation of judicial powers has been declared to be ultra vires as it was decided in the case of *Liyanage Vs. The Queen* when Lord Pearce said:

"In so far as any Act passed without recourse to section 29 (4) of the constitution purports to usurp or infringe the judicial powers, it is ultra vires – it goes without saying that the legislator must legislate, for the

generality of its subjects, by the creation of crimes and penalties or by enacting rules relating to evidence".
But the Acts of 1962 had no such general intention. They were clearly aimed at particularly known individuals who had been named.

Thus it was pointed out that the doctrine of separation of powers exists under the Ceylonese Constitution.

It would therefore be unconstitutional for the legislature, through the Act of Parliament, to interfere with judicial functions.

Similar views were expressed in the case of *Calder Vs. Bull* where what happened was held to be a legislative judgement.

4.0 CONCLUSION

You ha learned about the relationship between a constitution and the people. You have learned the way in which people should be involved in the process of enforcing the constitution and the supremacy of the powers of the courts in adjudicating on constitutional issues.

5.0 SUMMARY

In this unit, you have learnt that there are many constitutional concepts, the inherent powers of the Federal Republic of Nigeria and the source of its authority.

6.0 TUTOR-MARKED ASSIGNMENT

1. Explain the term 'doctrine of ripeness'.
2. What do you understand by judicial powers?
3. Explain the term 'Ministerial Responsibility'.

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UNIT 2 FUNDAMENTAL OBJECTIVES AND DIRECTIVE PRINCIPLES OF STATE POLICY

CONTENTS

1.0 INTRODUCTION

The 1979 and 1999 Constitutions differ from their forerunners in one particular respect. This is in relation to their chapter 2 which deals with fundamental objectives and directive principles of state policy. Prior to its inclusion in the constitution, this idea generated a lot of controversy (The Great Debate 1979:2 – 3). For example, in relation to the non-justiciability of the chapter, Chief Obafemi Awolowo had this to say:

> "*the quality of the social objectives are reduced to worthless platitudes…..and hollow admonitions which should have no place in a constitution which is, first and last, a legal document whose provisions must ipso facto be justiciable and legally enforceable*" (The Great Debate, 1979:3).

In the opinion of Ojo,

> "*most, if not all, the matters provided for in the Objectives and Directives section belong to the area of party politics.*"

H. Sani (Great Debate, 1979:3) sarcastically describes the arrangement as a "half-hearted" and "ostrich-like" approach to constitution making.

Notwithstanding the above views and the ideological dimension introduced into it, it could be asserted that chapter 2 of the Constitution is part and parcel of the document called the Constitution; 1979 – 1999.

The definition of the expression fundamental objectives and directive principles has been given in the report of the Constitution Drafting Committee (Vol. 1:4) in the following terms:

> "*By Fundamental Objectives we refer to the identification of the ultimate objectives of the Nation whilst Directive Principles of State Policy indicate the paths which lead to those objectives. Fundamental Objectives are ideal towards which the Nation is expected to strive whilst Directive Principles lay down the policies which are expected to be pursued in the efforts of the nation to realise the national ideals.*"

Ideological dimension has been given to the above definition. Thus it is taken to mean that the government of the nation at any level is bound to ensure the achievement of the above defined aims since they have been identified in the constitution but this ideological stance is defeated by provisions in the chapter tending to show that the nation has not adopted any ideology. For example in respect of economic objectives, the nation has adopted a mixed economy.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

understand the definition of the fundamental objectives and directive principle of state policy and their functions in the state
classify the fundamental principle and directive principle of state policy.

3.0 MAIN CONTENT

The provisions in this chapter could be grouped into five basic objectives. The objectives are:

(a) Political objectives
(b) Economic objectives
(c) Social objectives
(d) Educational objectives and
(e) Foreign policy objectives.

Before these objectives are considered, it is necessary to point out other provisions which are general in nature. Chapter II begins with the provision that it shall be the duty and responsibility of all organs of government, and of all authorities and persons, exercising legislative, executive, or judicial powers to conform to, observe and apply the provision of this chapter of the constitution.

A quick look at this section seems to point to the fact that the provision of the constitution relating to fundamental objectives and directive principles of state policy should be strictly adhered to. It also seems to suggest that this chapter should be regarded as sacred, hence the emphasis. If it is remembered that section 1 of the constitution states that *the constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria*, then the emphasis could be taken to mean that the framers of the constitution regard this chapter of particular importance.

The above emphasis has however been made irrelevant for in another breadth, section 6(6) (c) of the same constitution states that:

> "*The judicial powers vested in accordance with the foregoing provisions of this section shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in chapter II of this Constitution*".

Any argument as to whether the expression "except as otherwise provided by this constitution" makes chapter II justiciable was removed by the decision in *Archbishop Anthony Olubunmi Okogie (Trustee of Roman Catholic School) & Ors Vs. Attorney-General of Lagos State* (1981).

The plaintiffs sought and obtained leave of court for the enforcement of their fundamental rights under section 36 of the Constitution dealing with freedom of expression, including freedom to hold opinion and to receive and impart ideas and information without interference. It was contended that the fundamental right was threatened with infringement by the Lagos State Government by its proposals to abolish all private primary schools in the state.

Learned counsel for the plaintiffs contended that it was not for the Lagos State Government to tell parents where to send their children for primary or secondary education and that anybody should be at liberty to establish primary and secondary schools.

The court held that the Directive Principles of State Policy in chapter II of the (1979 – 99) Constitution have to conform to and run as subsidiary to the Fundamental Rights under chapter IV of the same constitution. It was further held that the fundamental objectives and directive principles enunciated in section 18 of the 1979 and 1999 Constitutions enjoining the state to provide equal and adequate educational opportunities, are objectives to be carried out by any Government of the Federation without necessarily restricting the right of other persons or organisations to provide similar or different educational facilities at their own expense.

Section 14 starts by stating that *the Federal Republic of Nigeria shall be a State based on the principles of democracy and social justice.* In relation to democracy, it can be said that the basis for the operation of the constitution is the existence of democracy which has been loosely referred to as the government of the people by the people. The constitution provides for mode of governance, the basis of which is representation according to basic ideals and methods universally recognised. Most of the political posts are filled by election. The relevance of this is clearly brought out by the position under a Military Rule. The lingering controversy has been whether a Military government can be said to be a government based on democracy. The position is that a Military government no matter how benevolent cannot be said to be a democratic government. This fact is clearly illustrated by Decree No. 1 of 1984 and Decree No. 107 of 1993. In respect of the jurisprudential dimension to this idea, the case of *Lakanmi vs. Attorney-General (West)* (1971) clearly brings this out. Of particular interest in this case was the argument of the learned Attorney-General for Western State on behalf of the respondents that what took place in January 1966 (that is a coup d' etat) was a revolution, by which method the revolutionary Government seized power on 15 January 1966 and therefore had an unfettered right from the start to rule by force and by means of Decrees. Notwithstanding that this argument was rejected by

the Supreme Court, 3 Decrees were passed to neutralise the decision of the Supreme Court.

The social justice idea is based on the jurisprudential basis of the existence of the government. The social contract idea requires that justice should be the basis of governance for the benefit of all and no one should be denied the constitutionally guaranteed rights except in accordance with the provisions of the constitution, this being the expression of the basis of our group existence.

In consequence of the above, section 14(2) of the Constitutions 1979 and 1999 declares that sovereignty belongs to the people of Nigeria from whom government through this constitution derives all its powers and authority. This section re-emphasises the preamble to the constitution as it states that the constitution represents the will of the people through which the security and welfare of each person is guaranteed. It also emphases the idea of participatory democracy.

Despite the non-justiciability of chapter 2 of the Constitution, (1979 – 99), one particular area that has affected the national consciousness is the constitutional provision relating to the federal character of Nigeria. Section 14(3) provides:

> "*The composition of the Government of the Federation or any of its agencies and the conduct of its affairs shall be carried out in such manner as to reflect the federal character of Nigeria and the need to promote national unity, and also to command national loyalty thereby ensuring that there shall be no predominance of persons from a few states or from a few ethnicor other sectional groups in that government or any of its agencies.*"

The Constitution defines federal character of Nigeria to mean the distinctive desire of the people of Nigeria to promote national unity, foster national loyalty and give every citizen of Nigeria a sense of belonging to the nation as expressed above. By this provision, the constitution recognises the existence of various ethnic groups in the country. Indeed a distinctive feature of Nigeria is the existence of about two hundred and fifty ethnic groups. To reduce the problem, the ethnic groups have been divided into thirty six compartments called states. The question that needs be asked is how are the federal offices, appointments and assets be shared to reflect national character.

The law itself is clumsy. It states that the conduct of the affairs of government shall be carried out in such manner as to reflect the federal

character of Nigeria. This calls for a concerted effort to have regard to the diversity of the country in many respects but the definition of this term states that "the expression federal character refers to the distinctive desire of the peoples of Nigeria to promote national unity, foster national loyalty and give every citizen of Nigeria a sense of belonging to the nation notwithstanding the *diversities of ethnic origin, culture, language or religion*". See Sections 277 (1979) and 318 (1999) Constitution. If indeed, this is the desire, then consideration should not be given to parochial issues. Merit should be the yardstick for governance, distribution of offices and sharing of assets. The only thing that needs be emphasised is honesty of purpose and integrity. If the idea of federal character is pursued to its logical conclusion, then it is paradoxical to talk of national loyalty. As it this is not enough, the same section goes further to state that there shall be no predominance of persons from a few states or from a few ethnic or other sectional groups in the government or in any of its agencies. Indeed, section 14(3) of the Constitution is bereft of meaning and application. The same goes for section 15(3) of the 1989 Constitution. Section 14(4) is a reproduction of section 14(3). It is the state and local government provision for the conduct of affairs at the state and local government levels.

The Constitution emphasises the need to look inwards and protect as well as enhance Nigerian culture. It is beyond doubt that Nigeria is very rich cultural values. Indeed, there is usually provision for the Ministry to take care of the arts and culture of the country both at the national and state levels. A careful observance of this is a source of revenue for the country or the state as the case may be. Refer to section 20 (1979) or section 21 (1999) Constitution.

In the same manner, section 21 (1979) or 22 (1999) recognises the obligations of the mass media. It states:

> "*The press, radio, television and other agencies of the mass media shall at all times be free to uphold the fundamental objectives contained in this chapter and uphold the responsibility and accountability of the Government to the people.*"[16]

The emptiness of this provision lies in the fact that it is not justiciable. A better provision of the law to consider is section 36 of the Constitution which deals with right to freedom of expression and the press. It is this section of the constitution that can be used to give legal teeth to the provisions of Constitution: obligations of the Mass Media (S. 21 (1979) or 22 (1999).

Section 22 (1979) or 23 (1999) relates to national ethics. It states that the national ethics shall be discipline, self-reliance and patriotism. This provision reinforces the argument of those who believe that the fundamental objectives and directive principles of state policy are political issues and should be left to where they properly belong – party and political manifestos (Nwabueze: 48 – 49). The reason for this assertion is that apart from the fact that they are bereft of legal cloak, they are also lacking in precision.

Let us now turn to each of the five objectives.

3.1 Political Objectives

Section 15 of the Constitution (1979 and 1999) state that the motto of the Federal Republic of Nigeria shall be Unity and Faith, Peace and Progress. A motto according to the New Lexicon Webster's Dictionary of the English Language, is a short, pithy sentence or phrase inscribed on a coat of arms, a sentence or phrase used as a watchword, maxim or guiding principle. It reflects what the nation stands for or desires to achieve. Thus, for the purpose of achieving the above, subsection 2 states that national integration shall be actively encouraged, whilst discrimination on the grounds of place of origin, sex, religion, status, ethnic or linguistic association or ties shall be prohibited. National integration is of vital importance and its encouragement cannot be overemphasised. Except this is actively pursued, the nation cannot stand. The policy of the government should therefore be geared towards the attainment of this objective. The Constitution makes the above litigable when it states that:

1. "A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person

(a) *be subjected either expressly by, or in the practical application of any law in force in Nigeria or any executive or administrative action of the government to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, place of origin, sex, religion or political opinions are not made subject; or*

(b) *be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, place of origin, sex, religions or political opinions*".

2. "No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth."

See Section 39 (1979) or Section 42 (1999) Constitution.

For the purpose of promoting national integration, it shall be the duty of the state to provide the following:

(a) facilities for free movement of people, goods and services;
(b) security of full residential rights;
(c) encouragement of intermarriages;
(d) promotion and encouragement of formation of associations.

It is submitted that the above could be achieved through the use of sections 32, 34, 37 and 38 of the Constitution dealing with right to personal liberty, right to private and family life, right to peaceful assembly and association and right to freedom of movement. Thus it could be said that notwithstanding the non-justiciability of section 15, the benefits therein contained can be judicially asserted through the use of relevant provisions dealing with fundamental human rights.

Section 15(4) which enjoins the State to foster a feeling of belonging and or involvement among the various peoples of the Federation merely re-emphasises the idea of national integration. In relation to section 14(5) of the constitution, nothing is lost by its non justiciability as the key expressions there are prohibited by relevant provisions of our criminal law.

3.2 Economic Objectives

Section 16 of both 1979 and 1999 Constitutions provide that the state shall, within the context of the ideals and objectives for which provisions are made in the constitution control, the national economy in such manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity. This provision asserts the practice of every government to control the economy of the nation for the benefit of the citizens. Apart from the major sector of the economy, the state also reserves the right to participate in other areas of the economy. It also goes further to state that without prejudice to the right of any person to participate in areas of the economy within the major sectors of the economy, it shall protect the right of every citizen to engage in any economic activities outside the major sectors of the economy. The above provision has led to the conclusion that the economic system in operation in Nigeria is mixed economy. The result of this system is that it enables the government or public sector to play an important role in the regulation of the economy

of the nation. This enables the public sector to determine basic prices in order to mitigate the harsher effects of private competition. It also, at the same time allows room for private initiative (The Great Debate: 27). Notwithstanding this position however, it has been discovered that although the State is powerful, it is lacking in direction. This development makes it possible for the national bourgeoisie to be in control, using the State to pursue its own class interest.

The policy direction of the State is contained in section 16(2). They are:

(a) The promotion of a planned and balanced economic development;
(b) Harnessing and distributing the material resources of the community as best as possible to serve the common good;
(c) Operation of the economic system to permit the concentration of wealth or the means of production and exchange in the hands of few individuals or of a group; and
(d) Provision of suitable and adequate shelter, suitable and adequate food, reasonable national minimum, living wage, old age care and pensions, and unemployment and sick benefits for all citizens.

The utility of this provision can be determined from measures being taken by the government to ensure those vital national assets such as mineral resources and their exploitation and the scarce resources are controlled for the benefit of all. Measures taken to control investment and employment mitigate or check violent fluctuations of the economy. There are also in existence various laws like the Price Control Act, Petroleum Act, Trade Union Acts, Rent Decrees and Laws enacted for the purpose of ensuring purposeful direction and governance of the nation. As Professor Friedman pointed out:

> "*the sum total of these different state activities is sufficient to transform the free economic society in which the State is a glorified policeman but otherwise a disinterested spectator, into a controlled society in which the state is an active participant in the economic and social life of the citizen.*"[29]

For the purpose of achieving close monitoring of the economy section 16(3) provides that a body shall be set up by an Act of the National Assembly with the power to review from time to time the ownership and control of business enterprises operating in Nigeria and make recommendations to the President on the same; and to administer any law for the regulation of the ownership and control of such enterprises.

In this section is found definitions of some key terms. The "major sectors of the economy" has been taken to mean reference to such economic activities as may from time to time be declared by a resolution of each House of the National Assembly to be managed and operated exclusively by the Government of the Federation and until a resolution to the contrary is made by the National Assembly. Economic activities being operated exclusively by the Government of the Federation on the date immediately preceding the day when this section comes into force, whether directly or through the agencies of a statutory or other corporation or company, shall be deemed to be major sectors of the economy; Economic activities have been defined to include activities directly concerned with the production, distribution and exchange of wealth or of goods and services, and the term "participate" has been defined to include rendering of services and supplying of goods.

The economy of a nation determines its existence, relevance and viability. Although section 16 is not justiciable, it confirms how the government is run and it gives focus to its policy direction.

3.3 Social Objectives

Section 17(1) of the 1979 and 1999 Constitution state that the state social order is founded on ideals of Freedom, Equality and Justice. The key words here are Freedom, Equality and Justice. Freedom is a constitutional right contained in chapter IV of the constitution. The provision in this chapter re-emphasises it. The idea of equality is of great constitutional importance. It is the bedrock of the rule of law. Justice is an expression that is contained in many sections of the constitution. Section 6 of the constitution deals with it. The idea of justice is also contained in section 33 which deals with fair hearing and chapter VII of the Constitution which deals with the Judicature.

Section 17(2) (a) – (d) has provisions relating to equality of rights, obligations and opportunities before the law, respect for the human person and dignity, exploitation of human resources for the good of the community, independence of the judiciary and fair hearing. These provisions are also contained in chapter IV of the Constitution dealing with fundamental human rights.

Section 17(3) provides that "the state shall direct its policy towards ensuring that

(a) all citizens without discrimination on any ground whatsoever have the opportunity for securing adequate means of livelihood as well as adequate opportunities to secure suitable employment;

(b) conditions of work are just and humane, and that there are adequate facilities for leisure and for social, religious and cultural life;
(c) the health, safety and welfare of all persons in employment are safeguarded and not endangered or abused;
(d) there are adequate medical and health facilities for all persons;
(e) there is equal pay for equal work without discrimination on account sex, or on any other ground whatsoever;
(f) children, young persons and the aged are protected against any exploitation whatsoever, and against moral and material neglect; and
(g) provision is made for public assistance in deserving cases or other conditions of need".

The policy directives contained in section 17(3) are policy directives. By and large they relate to social security. They are well framed but they are not justiciable. This fact must have led Prof. de Smith to observe thus:

> "*To fail to guarantee the right to work or to enjoy social security may be bad politics, but it is not thought to be bad law; for a constitution is primarily a legal document; rights ought not to be guaranteed in it unless they can be judicially enforced, and a right to social security manifestly cannot.*"[32]

The usefulness of a social benefit depends on the ability of one to get the benefit and the opportunity or right to ask for its enforcement where the right has been trampled upon. As stated above, the social security provisions are not justiciable. For example the government cannot be sued for its inability to provide adequate medical and health facilities for all persons. Indeed, there are many towns without portable water, electricity and health centre not to mention a standard hospital.

3.4 Educational Objectives

Education is of vital importance to the nation. The strength of a nation depends on its human resources. Education is the best means of developing a nation and on a personal level, it is the best way to developing an individual. In line with the above, section 18 of chapter II of the 1979 Constitution (1979 and 1999) provide that government shall direct is policy towards ensuring that there are equal and adequate educational opportunities at all levels. In line with the need of the nation, there is also the provision that government shall promote science and technology. In its strive to eradicate illiteracy, government shall **as and when practicable** provide:

(a) free, compulsory and universal primary education;
(b) free secondary education;
(c) free university education; and
(d) free adult literacy programme.

The efficacy of the desire to eradicate illiteracy is weakened by the provision that the methods of eradicating illiteracy shall be adopted only when it is practicable. The question then is, when shall it be practicable? That there are no equal and adequate educational opportunities at all levels find practical expression in the various unity schools in existence in the various states in Nigeria and special primary schools. Indeed, the emptiness of this provision was clearly brought out in the decision in *Archbishop Anthony Olubunmi Okogie (Trustee of Roman Catholic School) & Ors. V. Attorney-General of Lagos State*. For a clear manifestation of right to education and assertion of right in this regard, the better provision to consider is section 35 of the constitution which deals with right to freedom of thought.

3.5 Foreign Policy Objectives

Section 19 states that the state shall promote African Unity as well as total political, economic, social and cultural liberation of Africa and all other forms of international cooperation conducive to the consolidation of universal peace and mutual respect and friendship among all peoples and states, and shall combat social discrimination in all its ramifications.

Nigeria is a member of comity of nations. On continental level, she is a member of the African Unity (formerly Organisation of African Unity), on sub-regional level, she is a member of the Economic Community of West African States. Nigeria is also a member of International bodies like the United Nations. It is not unusual for these organisations or bodies to enter into Treaties and Conventions. Section 19 recognises this fact and indeed gives credence to the assertion that there is need for international co-existence. Having regard to the non-justiciability of this section, it is no more than a reminder of the need to belong to a number of international bodies or organisations. Solace can however be found in section 12 of the Constitution which enjoins the country to enter into treaties and makes it possible to make such treaties part of our law.

3.6 How Relevant Are the Fundamental Objectives and Directive Principles of State Policy

Provisions akin to chapter II of the 1979 – 99 Constitutions are contained in the Indian Constitution. In State of *Madras v. Champakam Dorairajin*, the court stated as follows:

> "*The directive principles of the State Policy which by Article 37 are expressly made unenforceable by a court cannot override the provisions found in part III which notwithstanding other provisions, are expressly made enforceable by appropriate writs, orders or directions under Article 32. The chapter on Fundamental Rights is sacrosanct and cannot be abridged by any legislative or executive Act or order, except the extent provided in the appropriate Articles in Part III. The Directive Principles……have to conform to and run as subsidiary to the chapter on Fundamental Rights.*"

The above could be said to be the purpose of the decision of the court in *Archbishop Olubunmi Okogie V. Attorney-General of Lagos State*. The fact that section 6(6) (c) takes the determination of justiciability of chapter II out of the watching eyes of the judiciary renders ineffective the strength of the provisions of the law contained therein. One of the reasons for taking this position is the undesirability of raising issues that are regarded as political promises to the point of rights that can be asserted and enforced in a court of law. They are regarded as values to be pursued and goals to strive to achieve. Solace is taken in the fact that the factors contained in Chapter II could be used to determine the success or otherwise of a government. Thus if it is felt that a party in power has performed abysmally below expectation, the party may not be voted for when next the electorates have the opportunity of voting to choose their leaders.

One thing that has to be noted is that notwithstanding the non-justiciability of chapter II of the Constitution, the provisions of the law contained therein are also found in other sections of the constitution that are justiciable especially in chapter IV of the Constitution dealing with Fundamental Human Rights. Since the provisions of the law in chapter II are more comprehensive in terms of field coverage, they could be used to determine the ambit and operation of the rights provided for in general terms in chapter IV of the Constitution. A critical look at chapter II reveals that the provisions therein contained are repetitive of the justiciable portions of the constitution. Perhaps it could be stated that chapter II is not altogether useless if we come to terms with the view of Eskor Toyo[37] that basically the Indian principles of state policy were meant to represent a touchstone of economic and social progress against which legislation passed by parliament and other law-making bodies were to be measured. Of particular relevance in this regard is section 16 of Chapter II which deals with economic objectives.

3.7 The Constitutional Provisions on Fundamental Objectives and Directive Principles of State Policy

Fundamental Obligations of Government:

Both the Constitution (1979 and 1999) provide as follows:

Section 13: Fundamental obligation of Government: It shall be the duty and responsibility of all organs of government, and of all authorities and persons, exercising legislative, executive or judicial powers to conform to, observe and apply the provisions of this Chapter of this Constitution.

Section 14: The Government and the people:

(1) The Federal Republic of Nigeria shall be a State based on the principles of democracy and social justice.

(2) It is hereby, accordingly declared that :

(a) sovereignty belongs to the people of Nigeria from whom government through this Constitution derives all its powers and authority;
(b) the security and welfare of the people shall be the primary purpose of government;
(c) the participation by the people in their government shall be ensured in accordance with the provisions of this Constitution.

(3) The composition of the Government of the Federation or any of its agencies and the conduct of its affairs shall be carried out in such manner as to reflect the federal character of Nigeria and the need to promote national unity, and also to command national loyalty thereby ensuring that there shall be no predominance of persons from a few States or from a few ethnic or other sectional groups in that government or in any of its agencies.

(4) The composition of the Government of a State, a local government council, or any of the agencies of such government or council, and the conduct of the affairs of the government or council or such agencies shall be carried out in such manner as to recognise the diversity of the peoples within its area of authority and the need to promote a sense of belonging and loyalty among all the peoples of the Federation.

3.7.1 Political Objectives

14. (1) The motto of the Federal Republic of Nigeria shall be Unity and Faith, Peace and Progress.

(2) Accordingly, national integration shall be actively encouraged, whilst discrimination on the grounds of place of origin, sex, religion, status, ethnic or linguistic association or ties shall be prohibited.

(3) For the purpose of promoting national integration it shall be the duty of the State to:

(a) provide adequate facilities for and encourage free mobility of people, goods and services throughout the Federation;
(b) secure full residence rights for every citizen in all parts of the Federation;
(c) encourage intermarriage among persons from different places of origin, or of different religious, ethnic or linguistic association or ties;
(d) and promote or encourage the formation of associations that cut across ethnic, linguistic, religious or other sectional barriers.

(4) The State shall foster a feeling of belonging and of involvement among the various peoples of the Federation, to the end that loyalty to the nation shall override sectional loyalties.

(5) The State shall abolish all corrupt practices and abuse of power.

3.7.2 Economic Objectives

14. (1) The State shall, within the context of the ideals and objectives for which provisions are made in this Constitution :

(a) control the national economy in such manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity;
(b) without prejudices to its right to operate or participate in areas of the economy other than the major sectors of the economy, manage and operate the major sectors of the economy;
(c) without prejudice to the right of any person to participate in areas of the economy within the major sector of the economy, protect the right of every citizen to engage in any economic activities outside the major sector of the economy.

(2) The State shall direct its policy towards ensuring:

(a) the promotion of a planned and balanced economic development;
(b) that the material resources of the community are harnessed and distributed as best as possible to serve the common good;
(c) that the economic system is not operated in such a manner as to permit the concentration of wealth of the means of production and exchange in the hands of few individuals or of a group; and
(d) that suitable and adequate shelter, suitable and adequate food, reasonable national minimum living wage, old age care and pensions, and unemployment and sick benefits are provided for all citizens.

(3) A body shall be set up by an Act of the National Assembly which shall have power:

(a) to review from time to time the ownership and control of business enterprises operating in Nigeria and make recommendations to the President on the same; and
(b) to administer any law for the regulation of the ownership and control of such enterprises.

(4) For the purpose of this subsection (1) of this section:

(a) reference to the major sectors of the economy "shall be construed as a reference to such economic activities as may from time to time be declared by a resolution of each House of the National Assembly to be managed and operated exclusively by the Government of the Federation; and until a resolution to the contrary is made by the National Assembly economic activities being operated exclusively by the Government of the Federation on the date immediately preceding the day when this sections come into force, whether directly or through the agencies of a statutory or other corporation of company shall be deemed to be major sectors of the economy;

(b) "economic activities" includes activities directly concerned with the production, distribution and exchange of wealth or of goods and services; and

(c) "participate" includes the rendering of services and supplying of goods.

3.7.3 Social Objectives

15. (1) The State social order is founded on ideals of Freedom, Equality and Justice.

(2) In furtherance of the social order:

(a) every citizen shall have equality of rights, obligations and opportunities before the law;
(b) the sanctity of the human person shall be recognised and human dignity shall be maintained and enhanced;
(c) governmental actions shall be humane;
(d) exploitation of human or natural resources in any form whatsoever for reasons other than the good of the community shall be prevented; and
(e) the independence, impartiality and integrity of courts of law, and easy accessibility thereto shall be secured and maintained.

(3) The State shall direct is policy towards ensuring that:

(a) all citizens without discrimination on any ground whatsoever have the opportunity for securing adequate means of livelihood as well as adequate opportunities to secure suitable employment;
(b) conditions of work are just and humane, and that there are adequate facilities for leisure and for social, religious and cultural life;
(c) the health, safety and welfare of all persons in employment are safeguarded and not endangered or abused;
(d) there are adequate medical and health facilities for all persons;
(e) there is equal pay for equal work without discrimination on account of sex, or on any other ground whatsoever;
(f) children, young persons and the aged are protected against any exploitation whatsoever, and against moral and material neglect; and
(g) provision is made for public assistance in deserving cases or other conditions of need.

3.7.4 Educational Objectives

18 (1) Government shall direct its policy towards ensuring that there are equal and adequate educational opportunities at all levels.

(2) Government shall promote science and technology.

(3) Government shall strive to eradicate illiteracy; and to this end Government shall as and when practicable provide:

(a) free, compulsory and universal primary education;
(b) free secondary education;

(c) free university education; and
(d) free adult literacy programme.

3.7.5 Foreign Policy Objectives

19. The State shall promote African Unity, as well as total political, economic, social and cultural liberation of African and all other forms of international cooperation conducive to the consolidation of universal peace and mutual respect and friendship among all peoples and States, and shall combat racial discrimination in all its manifestations.

3.7.6 Directive on Nigerian Culture:

Section 20 of the 1979 and 21 of the 1999 Constitution are similar.

They provide as follows:

The State shall protect and enhance Nigerian culture.

3.7.7 Obligations of the Mass Media

The obligations of the mass media are prescribed in Section 21 (1979) and 22 (1999). The press, radio, television and other agencies of the mass media shall at all times be free to uphold the fundamental objectives contained in this Chapter and uphold the responsibility and accountability of the Government to the people.

3.7.8 National Ethic

The National ethic shall be Discipline, Self-reliance and Patriotism. See section 22 (1979) and 23 (1999).

4.0 CONCLUSION

In this unit, we have attempted to examine the various categories of the fundamental objectives and directive principle of state policy. The meaning and definition of each category, the relationship between the economic, political, social, educational and foreign affairs objectives were also examined.

5.0 SUMMARY

We have been able to establish how the various categories of chapter II of the Constitution (1979 – 99) evolved and interrelate. We concluded with the views of Prof. Abiola Ojo that most, if not all, the matters

provided for in the objective and doctrine section belongs to the area of party politics.

6.0 TUTOR-MARKED ASSIGNMENT

1. Explain how the fundamental objectives and directive principle of state policy can be made justiciable in Nigeria.
2. The collapse of the 1st, 2nd and 3rd republic could be traced to non-enforceability of the fundamental objectives and directive principle of state policy. Comment.

7.0 REFERENCES/FURTHER READINGS

Chapter II of the 1989 Constitution, Cap 63 Laws of the Federation of Nigeria 1990.

The Great Debate – Nigerian Viewpoints on the Draft Constitution. A Daily Times Publication based on the debates on the 1979 Constitution.

The Great Debate op cit pp 2 – 3.

The Great Debate pg. 3. see also the view of Professor B.O. Nwabueze on pp. 3, 49 and 52 of the Great Debate.

The Great Debate – Commentary by L. Adele Jinadu p. 3.

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It is also part of the 1989 Constitution.

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(1981) 1 N.C.L.R. 218.

See Constitutions (Suspension and Modification) Decree 1993 Decree No. 107.

(1971) 1 U.I.L.R. 201.

Section 15(2) of the 1989 Constitution.
Section 15(3) of the 1989 Constitution.

Also section 329 of the 1989 Constitution.

Also section 21 of the 1989 Constitution.

Section 22 of the 1989 Constitution.

Also section 38 of the 1989 Constitution.

Also section 23 of the 1989 Constitution.

The Great Debate – Views of Prof. B.O. Nwabueze pp. 48 – 49. See also Sunday Times October 31, 1976.

Also section 16 of the 1989 Constitution.

The New Lexicon Webster's Dictionary of the English Language, Deluxe Encyclopedic Edition p. 653.

Section 41 of the 1989 Constitution.

Also sections 34, 36, 39 and 40 of the 1989 Constitution.

There is a similar provision in section 16(5) of the 1989 constitution. The 1989 Constitution contains a further provision which states that "the state shall protect and defend the liberty of the individual, enforce the rule of law and ensure the efficient functioning of government services.

Section 17 of the 1989 Constitution.

The Great Debate page 27.

Section 17(2) of the 1989 Constitution.

The Great Debate pg. 29.

Cited in E. Toyo, "Constitutional Review and Economic Ideology", Daily Times March 8, 1977 p. 29.

Also section 17(4) of the 1989 Constitution.

Section 18 of the 1989 Constitution.

Cited in E. Toyo op cit pg. 31.
Section 19 of the 1989 Constitution.

Supra

Section 20 of the 1989 Constitution.

A.I.R. 1951 S.C. 226.

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Also section 7 of the 1989 Constitution.

UNIT 3 FUNDAMENTAL HUMAN RIGHTS

CONTENTS

1.0 INTRODUCTION

Fundamental human rights have been entrenched into the Constitution of Nigeria, and it is an offshoot of the European Convention of Human Rights (the Convention for the protection of Human Rights and Fundamental Freedoms of 1950) with the addition of some provisions borrowed from Malaya and Pakistan.

What is interesting to note in the catalogue of the rights enumerated is that they are merely declaratory of either the provisions of the common or the statute law and they have been able to establish as follows:

Any citizen in Nigeria is entitled to his private and family life. He is entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief. He is entitled to the enjoyment of his property rights subject to the law of compulsory acquisition of his property (for public purposes) which must be paid for by adequate compensation.

A citizen in Nigeria is entitled to a peaceful assembly and association with other persons, and in particular he may form or belong to any political party, trade union, or any other association for the protection of his interest. Above all, he is entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference but subject to the laws of defamation, and security of the state. Finally, he has a right to vote and to be voted for if he is otherwise qualified by electoral regulations and law.

In England, Sir Ivory Jennings in his book titled, Cabinet Government at page 4 and quoted by Messrs Wade and Philip expatiated on the importance of these rights, as follows:

> "*Without free elections, the people cannot make a choice of policies, without freedom of speech, the appeal to reason which is the basis of democracy cannot be met, without freedom of association, electors and elected representatives cannot bind themselves into parties for the formulation of common policies and the attainment of common ends.*"[2]

A citizen can take an action against his wrongful arrest and an application for a writ of habeas corpus can be made in favour of any person who is confined without legal justification in order to secure his release from confinement.

It is therefore salutary and helpful to write on few sections of the Constitution dealing with these rights, so as to enable the readers come into the proper grips of their provisions.

2.0 OBJECTIVES

By the end of this unit, you should be able to:

explain freedom of religion, the right to property, freedom against discrimination and right to life.

3.0 MAIN CONTENT

3.1 Right to Life

By section 30 of the 1979 like section 33 of the 1999 constitution, every person has a right to life, and no one shall be deprived intentionally of his life save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria. Subsection (2) then goes on to state that a person shall not be regarded as having been deprived of his life in contravention of this section, if he dies as a result of the use, to such extent and in such circumstances as are permitted by law, of such force as is reasonably necessary:

(b) for the defence of any person from unlawful violence or for the defence of property;
(c) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or
(d) for the purpose of suppressing a riot, insurrection or mutiny.

3.2 Right to Dignity of Human Person

The constitution states as follows:

(1) Every individual is entitled to respect for the dignity of his person, and accordingly:

(a) no person shall be subjected to torture or to inhuman or degrading treatment;
(b) no person shall be held in slavery or servitude, and
(c) no person shall be required to perform forced or compulsory labour.

(2) For the purposes of subsection (1) (a) of this section, "forced or compulsory labour" does not include:

(a) any labour required in consequence of the sentence or order of a court;
(b) any labour required of members of the armed forces of the Federation or the Nigeria Police Force in pursuance of their duties as such or, in the case of persons who have conscientious objectives to service in the armed forces of the Federation, any labour required instead of such service;
(c) any labour required which is reasonably necessary in the event of any emergency or calamity threatening the life or well-being of the community; or
(d) any labour or service that forms part of

(i) normal communal or other civic obligations for the well-being of the community;
(ii) such compulsory national service in the armed forces of the Federation as may be prescribed by an Act of the National Assembly, or
(iii) such compulsory national service which forms part of the education and training of citizens of Nigeria as may be prescribed by an Act of the National Assembly.

See sections 31 and 34 of the 1979 and 1999 Constitutions respectively.

3.3 Right to Personal Liberty

The same constitutions – section 32 (1979) and 35 (1999) provide as follows:

(1) Every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the following cases and in accordance with a procedure permitted by law –

(a) in execution of the sentence or order of a court in respect of a criminal offence of which he has been found guilty;
(b) by reason of his failure to comply with the order of a court or in order to secure the fulfillment of any obligation imposed upon him by law;
(c) for the purpose of bringing him before a court in execution of the order of a court or upon reasonable suspicion of his having committed a criminal offence, or to such extent as may be reasonably necessary to prevent his committing a criminal offence;
(d) in the case of a person who has not attained the age of 18 years, for the purpose of his education or welfare;
(e) in the case of persons suffering from infectious or contagious disease, persons of unsound mind, persons addicted to drugs or alcohol or vagrants, for the purpose of their care or treatment or the protection of the community; or
(f) for the purpose of preventing the unlawful entry of any person into Nigeria or of effecting the expulsion, extradition or other lawful removal from Nigeria of any person or the taking of proceedings relating thereto.

Provided that a person who is charged with an offence and who has been detained in lawful custody awaiting trial shall not continue to be kept in such detention for a period longer than the maximum period of imprisonment prescribed for the offence.

(2) Any person who is arrested or detained shall have the right to remain silent or avoid answering any question until after consultation with a legal practitioner or any person of his own choice.

(3) Any person who is arrested or detained shall be informed in writing within 24 hours (and in a language that he understands) of the facts and grounds for his arrest or detention.

(4) Any person who is arrested or detained in accordance with subsection(1)(c) of this section shall be brought before a court of

law within a reasonable time, and if he is not tried within a period of:

(a) 2 months from the date of his arrest or detention in the case of a person who is in custody or is not entitled to bail; or
(b) 3 months from the date of his arrest or detention in the case of a person who has been released on bail.

he shall (without prejudice to any further proceedings that may be brought against him) be released either unconditionally or upon such conditions as are reasonably necessary to ensure that he appears for trial at a later date.

(5) In subsection (4) of this section the expression "a reasonable time" means:

(a) in the case of an arrest or detention in any place where there is a court of competent jurisdiction within a radius of 40 kilometres, a period of one day; and
(b) in any other case, a period of 2 day or such longer period as in the circumstance may be considered by the court to be reasonable.

(6) Any person who is unlawfully arrested or detained shall be entitled to compensation and public apology from the appropriate authority or person; and in this subsection, "the appropriate authority or person" means an authority or person specified by law.

(7) Nothing in this section shall be construed :

(a) in relation to subsection (4) of this section, as applying in the case of a person arrested or detained upon reasonable suspicion of having committed a capital office; and
(b) as invalidating any law by reason only that it authorises the detention for a period not exceeding 3 months of a member of the armed forces of the Federation or a member of the Nigeria Police Force in execution of a sentence imposed by an officer of the armed forces of the Federation or of the Nigeria Police Force, in respect of an offence punishable by such detention of which he has been found guilty.

3.4 Explanation

Arrest means a restraint on a person's personal liberty in order to make the person amenable to justice. An arrest to compel a person against his

will in order to help in a police enquiry when there is no reasonable suspicion that he has committed a criminal offence is unlawful – see **Queen v. Lemsatef** (1977) 2 AER. 835.[2]

Note the manner of making arrest as contained in sections 3 – 6 of the Criminal Procedure Act which state as follows:

Arrest, how made

S. 3. In making an arrest the police officer or other person making the shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.

No unnecessary restraint

S. 4. A person arrested shall not be handcuffed, otherwise bound or be subjected to unnecessary restraint except by order of the court, a magistrate or justice of the peace or unless there is reasonable apprehension of violence or of an attempt to escape or unless the restraint is considered necessary for the safety of the person arrested.

Notification of cause of arrest

S. 5. Except when the person arrested is in the actual course of the commission of a crime or is pursued immediately after the commission of a crime or escape from lawful custody, the police officer or other person making the arrest shall inform the person arrested of the cause of the arrest.

Search of arrested persons

S. 6(1). Whenever a person is arrested by a police officer or a private person, the police officer making the arrest or to whom the private person makes over the persons arrested may search such person, using such force as may be reasonably necessary for such purpose, and place in safe custody all articles other than necessary wearing apparel found upon him.

Provided that whenever the person arrested is admitted to bail and bail is furnished, such person shall not, subject to the provisions of subsection (6), be searched unless there are reasonable grounds for believing that he has about his person, any –

(a) stolen articles, or
(b) instruments of violence or poisonous substance, or

(c) tools connected with the kind of offence which he is alleged to have committed, or

(d) other articles which may furnish evidence against him in regard to the offence which he is alleged to have committed.

(3) Whenever it is necessary to cause a woman to be searched, the search shall be made by another woman.

(4) Notwithstanding the other provisions of this section, any police officer or other person making an arrest may in any case take from the person arrested any offensive weapons which he has about his person.

(5) Where any property has been taken under this section from a person charged before a court of competent jurisdiction with any offence, a report shall be made by the police to such court of the fact of such property having been taken from the person charged of the particulars of such property, and the court shall, if of opinion that the property or any portion thereof can be returned consistently with the interests of justice and with the safe custody of the person charged, direct such property or any portion thereof to be returned to the person or to such other person as he may direct.

(6) Where any property has been taken from a person under this section, and the person is not charged before any court but is released on the ground that there is no sufficient reason to believe that he has committed any offence, any property so taken from him shall be restored to him.

(7) When a person is in lawful custody upon a charge of committing in such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of the offence it shall be lawful for a qualified medical practitioner, acting at the request of a police officer, or if no such practitioner is procurable, then for such police officer, and for any person acting in good faith in aid and under the direction of such practitioner or police officer, as the case may be, to make such an examination of the person so in custody as is reasonably necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose.

3.5 Right to Freedom from Discrimination

A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person:

(a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions, or political opinions are not made subject; or
(b) be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions.

(2) No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.

(3) Nothing in subsection (1) of this section shall invalidate any law by reason only that the law imposes restrictions with respect to the appointment of any person to any office under the state or as a member of the armed forces of the Federation or a member of the Nigeria Police Force or to an officer in the service of a body corporate established directly by any law in force in Nigeria. See section 39 (1979) and 42 (1999) Constitution.

3.6 Compulsory Acquisition of Property

The Constitution, in section 40 (1979) and 43 (1999) provides as follows:

No movable property or any interest in an immovable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner and for the purposes prescribed by a law that, among other things:

(a) requires the prompt payment of compensation there for; and
(b) gives to any person claiming such compensation a right of access for the determination of his interest in the property and the amount of compensation to a court of law or tribunal or body having jurisdiction in that part of Nigeria.

(2) Nothing in subsection (1) of this section shall be construed as affecting any general law:

(a) for the imposition or enforcement of any tax, rate or duty;
(b) for the imposition of penalties or forfeitures for the breach of any law, whether under civil process or after conviction for an offence;
(c) relating to leases, tenancies, mortgages, charges, bills of sale or any other rights or obligations arising out of contracts;
(d) relating to the vesting and administration of the property of persons adjudged or otherwise declared bankrupt or insolvent, of persons of unsound mind or deceased persons, and of corporate or unincorporated bodies in the course of being wound-up;
(e) relating to the execution of judgements or orders of courts;
(f) providing for the taking of possession of property that is in a dangerous state or is injurious to the health of human beings, plants or animals;
(g) relating to enemy property;
(h) relating to trusts and trustees;
(i) relating to limitation of actions;
(j) relating to property vested in bodies corporate directly established by any law in force in Nigeria;
(k) relating to the temporary taking of possession of property for the purpose of any examination, investigation or enquiry;
(l) providing for the carrying out of work on land for the purposes of soil conservation; or
(m) subject to prompt payment of compensation for damage to buildings, economic trees or crops, providing for any authority or person to enter, survey, or dig any land, or to lay, install or erect poles, cables, wires, pipes, or other conductors or structures on any land in order to provide or maintain the supply or distribution of energy, fuel, water, sewage, telecommunication services or other public facilities or public utilities.

(3) Notwithstanding the foregoing provisions of this section, the entire property in and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone in Nigeria shall vest in the

Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.

3.7 Restriction on and Derogation from Fundamental Rights

Nothing in sections 34 – 38 (1979) or 37 – 41 (1999) this Constitution shall invalidate any law that is reasonably justifiable in a democratic society:

(a) in the interest of defence, public safety, public order, public morality or public health; or
(b) for the purpose of protecting the rights and freedom of other persons.

(2) An Act of the National Assembly shall not be invalidated by reason only that it provides for the taking, during periods of emergency, of measures that derogate from the provisions of section 30 or 32 (1979) or 33 or 35 (1999) Constitution; but no such measures shall be taken in pursuance of any such Act during any period of emergency save to the extent that those measures are reasonably justifiable for the purpose of dealing with the situation that exists during that period of emergency;

Provided that nothing in this section shall authorise any derogation from the provisions of section 30 or 33 of 1979 and 1999 Constitutions respectively, except in respect of death resulting from acts of war or authorise any derogation from the provisions of the section 33(8) 1979 or 36(8) (1999) Constitution.

(3) In this section, a "period of emergency" means any period during which there is, in force a Proclamation of a sate of emergency declared by the President in exercise of the powers conferred on him under section 265 and 305 of 1979 and 1999 Constitutions respectively.

4.0 CONCLUSION

The Constitution of Nigeria forbids any religion and protects individual right to life, education, freedom of thought and convenience. See the case of ***Bosede Badejo v. Ministry of Education***.

5.0 SUMMARY

In this unit, we have considered four fundamental human rights provisions as enshrined in chapter IV of the 1979 – 1999 Constitutions of Nigeria. You should now be able to determine when these rights have been breached and seek for enforcement or redress.

6.0 TUTOR-MARKED ASSIGNMENT

1. Right to property, how absolute is it?
2. Right to fair hearing, how absolute is it?

7.0 REFERENCES/FURTHER READINGS

Oyewo & Yakubu (1998). Constitutional Law in Nigeria.

UNIT 4 RIGHT TO FAIR HEARING

CONTENTS

1.0 INTRODUCTION

The right to a fair hearing is, perhaps the most important of all guaranteed rights. It is the foundation on which other rights rest because it is at the root of the administration of both civil and criminal justice. In the first place it guarantees a right to a hearing; that is a right to access to courts and tribunals established by law whenever there is any question or dispute as to the rights or obligation of a person or whenever any person is charged with a criminal offence. In the second place, it imposes a duty on such courts and tribunals to act fairly, fearlessly, openly and impartially.

2.0 OBJECTIVES

By the end of this unit, you should be able to:

identify all the provisions governing right to fair hearing.

3.0 MAIN CONTENT

If adjudications are to command general acceptability as having been properly made, they must possess the essential characteristics of **openness, fairness** and **impartiality**. And where government rests on the consent of the governed, the general acceptability of adjudication as

possessing these essential characteristics is one of the vital elements in sustaining the consent of the governed. That is the political philosophy on which the right to fair hearing rests. The constitution of the Federal Republic of Nigeria, 1999, section 36 also with both the civil procedure and criminal procedure.

It provides that in the determination of civil rights and obligations a person is entitled to fair hearing within a reasonable time by a court or tribunal which is so constituted as to be independent or impartial while provisions are also made to ensure that the proceedings are held in public – in order to avoid what is known as cloistered justice.

What then is a fair hearing as decided by cases?

In *Kotoye V. Central Bank of Nigeria and 7 Others* (1989) the Supreme Court held that fair hearing anticipated by Constitution implies that every reasonable and fair minded observer who watches the proceedings should be able to come to the conclusion that the court or other tribunal has been fair to all the parties concerned.

Applying the principles in *Mohammed V. Kano N. A.* (1968), the apex court gave the following basic criteria and attributes of fair hearing which should include the followings:

(a) That the court or tribunal shall hear both sides not only in the case but also in all material issues in the case before reaching a decision which may be prejudicial to any party in the case;
(b) That the court or tribunal shall give equal treatment, opportunity and consideration to all concerned. See *Adigun V. A.G. of Oyo State* (1987);
(c) That the proceedings shall be heard in public and all concerned shall have access to and be informed of such a place of public hearing; and
(d) That having regard to all the circumstances in every material decision in the case, justice must not only be done but must be manifestly and undoubtedly seen to have been done. See *Deduwa V. Okorodudu* (1976).

The rule of fair hearing is not a technical doctrine. It is one of substance. The question is not whether injustice had been done because of lack of hearing. It is whether a party, entitled to be heard before deciding, had in fact been given the opportunity of hearing.

Once an appellate court therefore comes to the conclusion that a party was entitled to be heard before a decision was reached but was not

given the opportunity of hearing, the order or judgement thus entered must be set aside.

Also note that the right to be heard in one's own defence had been amplified by Denning M.R. in *Surinder Singh Kanda V. Government of Federation of Malaya* (1962) as follows:

> "*If the right to be heard is to be a real right which is worth something it must carry with it a right in the accused man to know the case which 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*".

See the following cases for further details:

Amadi V. Thomas Aplin & Co. Ltd. (1972) 4 SC. 228; *Kano N.A. V. Obiora* (1959) SC. NLR 577. *The State V. Onagoruwa* (1992) 2 NWLR (Pt. 221) 33; *U.B.A. Ltd. V. Achoru* (1990) 6 NWLR (Pt. 156) 254; *Alhaji Umaru Abba Tukur V. Government of Gongola State* (1989) 9 SCNJ 1 or (1989) 4 NWLR (Pt. 117) 517 and *Stephen Adedeji V. Police Service Commission* (1967) 1 ALL NLR 631 to mention a few.

3.1 Provision Dealing with Impartiality

This section of the Constitution also reinforces the fact that judges must see themselves as impartial umpires and they should have no business to descend to the arena of civil litigation. See *Ezeain Nnajiafor and Others V. Linus Ukonu & others* (1985) per Justice Bello JSC.

They should refrain at all times from telling Counsel what to do and how to do it, otherwise they may be challenged for taking sides. See *A.E. Macchi SPA & Others V. A.L.S. Limited* (1986).

In *Kim V. State* (1992) these duties of impartiality and fairness were re-echoed as follows:

"*In our system of administration of justice, the judge must be and manifestly be seen to be an impartial umpire. He must maintaina balance between the two parties to the dispute.*

> *Therefore, any act of his that can ground the conclusion that he has taken sides in the conflict vitiates the trial, while a trial studied with impartiality on one side is not fair hearing*". See *Akinfe V. The State* (1988) and *Okoduwa V. The State* (1988).

Fair hearing within the contemplation of sections 33 of the 1979 (i.e. section 36 of the 1999(Nigerian Constitution is a manifest epitome of even handed justice. Therefore a judge should remain an impartial umpire throughout the proceedings and allow parties to the conflict conduct their case on their own initiative.

It will be improper for a judge to take any step in any proceeding which has even the remote possibility of projecting an impression that the judge is handling the proceeding with a slant in favour of one side against the other. See *Arubo V. Aiyelere* (1993); *Orizu V. Anyaegbunam* (1978) and *Ojo V. Oseni* (1987).

3.2 Bias and Likelihood of It

A judge should not be hostile to any of the parties before him. He should not be a judge in his own case in order that the public confidence in the administration of justice may be fully maintained hence no man who has either a pecuniary or proprietary interest in a case before him should be allowed to adjudicate on it. See *Metropolitan Properties Company (FG) Ltd. V. Lennon* (1969).

In summary, it is now conceded that to disqualify a person from acting in a judicial or quasi judicial capacity upon the ground of interest (other than pecuniary or proprietary) in a subject matter of the proceedings, a real likelihood of bias must be made to appear not only from materials in fact ascertained by the party complaining, but from such further facts as he might readily have ascertained and easily verified in the course of his disqualifications.
Note that the test for BIAS is whether there is a reasonable suspicion of bias when it is looked at from the objective standpoint of a reasonable person and not from the subjective standpoint of an aggrieved party.

3.3 Civil Rights

Since he who pays the piper dictates the tune, the granting of a privilege to anybody to operate a bank is not a civil right, for such a grant can be revoked subsequently on due course shown to the grantor.

This was an issue in the case of *Merchant Bank Ltd. V. Federal Minister of Finance* (1961), which stated that the appellant bank did not possess any “Civil Rights” within the meaning of the 1954 Constitution then in force and that all they possessed was a privilege to carry on banking business within the meaning of the Banking Ordinance and no more. And that the business can be determined in the manner provided for in the Ordinance if in the opinion of the Minister, an examination shows that the licensed bank is carrying on business in a manner

detrimental to the interests of its depositors and other creditors, or has insufficient assets to cover its liabilities to the public, or is contravening the provisions of the Ordinance.

3.4 Fair Trial within a Reasonable Time

The constitution compels a person to be tried within a reasonable time. This in essence is to do away with the odious effect of delay in the administration of Justice.

This idea is salutary because delay usually defeats equity, for justice delayed is justice denied, and as a matter of fact, Harry Jones made the following scintillating comments on the bad effects of delay in judicial process:

> "*Delay causes hardship, delay brings our courts in disrepute, delay results in deterioration of evidence through loss of witnesses, forgetful memories and death of parties and makes it less likely that justice will be done when a case is reached for trial*".

These points were well articulated in the case of *O'Donell V. Watson Bros. Transportation Company* (1960) in America which went on for twenty years – a pretty longtime; and see also the case of *Ekeri V. Edo Kimisede* (1976) where hearing in a case commenced on 20th May, 1971 and dragged on after series of adjournment until 19th July, 1973 when defence closed its case. Counsel addressed the Court in July and August, 1973 but judgement was not delivered until 30th November, 1974.

The Supreme Court accepted the submission of counsel to the Plaintiffs/ Appellants that owing to the many long intervals of delay in taking evidence and the long delay before delivering judgement the learned trial judge ought to be regarded as having lost his impression of the evidence and the advantage of having seen and heard the witnesses.

3.5 Authenticated Copies of Judgement

It is an important duty of a court delivering judgement to furnish all parties with duly authenticated copies on the date of the delivery of judgement under section 258 (1) of the 1979 Constitution (also Section 294 of the 1999 Constitution).

This section reads:

> "*Every court established under this Constitution shall deliver its decision in writing not later than 3 months after the conclusion of evidence and final addresses, and furnish all parties to the case of the matter determined with duly authenticated copies of the decision on the date of the delivery thereof*".

But in *Chief Adedapo Adekeye & Another V. Chief Akin Olugbade* (1987) Oputa JSC adjudged that this provision is merely directory and not mandatory with regards to the giving of authenticated copies of the judgements on the date that the judgement is delivered. We therefore need more guidance on the interpretation of section 33(7) of the Constitution, 1979 (or section 36(7) of the 1999 Constitution) which provision concern criminal proceeds.

It reads:

> "*When any person is tried for any criminal offence, the court shall keep a record of the proceedings and the accused person or any person authorised by him in that behalf SHALL be entitled to obtain copies of that judgement in the case within 7 days of the conclusion of the case*".

It is the opinion of these authors that the provisions in this perspective are mandatory in criminal trials; See *Olanrewaju V. Government of Oyo State and Others* (1992) which deals with the meaning of the word "SHALL" in any enactment.

It states that the word SHALL in any enactment is PREDATORY rather than a mere DIRECTIVE, and compliance is therefore binding and not left to the discretion of the person to whom the enactment imposes the duty.

3.6 Right to an Interpreter

Every person who is charged with a criminal offence shall be entitled to be informed promptly in the language that he understands and in detail of the nature of the offence.

In other words, the language must be properly interpreted to give him an opportunity to defend himself. For every person who is charged with a criminal offence, for example, shall be entitled to have without payment

the assistance of an interpreter if he can not understand the language used at the trial of the offence.

Any negation of this principle therefore definitely contravenes not only the constitutional provision of Nigeria, but also the principle of Natural Justice. This was in fact established in the case of *Buraima Ajayi and Julande V. Zaria Native Authority* (1964) where the appellants successfully appealed to the Supreme Court against the High Court's refusal to interfere with their conviction in a Native Court on the ground that the interpretation in the Native Court had been unsatisfactory. The proceedings in the Native Court were in Hausa, which the appellants neither spoke nor understood. They were Yoruba speakers by birth and understood English, but not perfectly. The proceedings were interpreted into English and one into Yoruba. It did not appear what language the other interpreted into. None of them was sworn. The trial record gave their names but it did not appear how they came to be called on to interpret or who they were, except that one was a school boy another was an Ibo who spoke English but not Yoruba. Only one gave evidence in the High Court. The High Court found that in at least two occasions the ability of the interpreters satisfactorily might be questioned, but that in fact, the whole proceedings has been interpreted correctly.

On appeal it was held amidst all other facts that this was wrong. It deprived the appellants of their constitutional rights, and that it contravened the principles of natural justice which demand that justice needs not only be done but must be manifestly seen done. Put succinctly the Supreme Court held as follows:-

> "*It was essential to be satisfied that the appellants had a fair opportunity to defend themselves and in particular that they were accorded in full the right conferred by section 21 (5)(c) of the Constitution of the Federation, which requires that there shall be adequate interpretation to the accused person of anything said in a language that he does not understand, and equally that there shall be adequate interpretation to the Court of anything said by the accused person in a language that the Court does not understand. The Court further held that there is a failure of justice within the meaning of section 382 of the Criminal Procedure Code, if the proceedings at the trial fall short of the requirement not only that justice be done but that it may be seen to be done, as that maxim has been applied by the Judicial Committee in Adan Haji jama V. The King* (1948) *and by the Queen's Bench Division in such cases as Rex*

V. East Kerier Justice Ex-parte Munday (1942)".

3.7 Opportunity to Defend

The Constitution under the Fundamental Human Rights provides that a person charged with a criminal offence shall be entitled to be given adequate time and facilities for the preparation of his defence.

This means that if for any special reason he can not defend himself properly without an adjournment, the court should grant him legitimate adjournment. See *Alhaji Ramonu Bello V. Dr. M.O. Thompson*, *Maxwell V. Keun* (1928); *Solanke V. Ajibola* (1996/97). See *A.T. Oyewo*, in his book titled "Cases and materials on the Principle of Natural Justice".

Therefore where in a given case it is conclusively established that the trial has been conducted in such a way as to lead but to the conclusion that an accused person was not offered adequate opportunity to put across his case, as for example, when an application for adjournment has been unreasonably or capriciously refused, or that the right to call a witness whose evidence is material to the just determination of the case has been denied, a Court of Appeal will undoubtedly interfere with the judgement of the trial court and hold that a failure of justice has been occasioned.

Lastly, it must be emphasised that a person standing trial must be allowed to call any witness to testify in his or her favour without any hindrance.

In summary, the following safeguards are available to an accused in a criminal trial:

(1) An accused shall be presumed innocent until he is proved guilty.
(2) An accused has a right to be informed promptly of the nature of the offence in the language that he understands.
(3) He has a right to be given adequate time and facilities for the preparation of his defence, *Gokpa V. I.G.P.* (1961). Where the accused was brought from Port Harcourt without his counsel and an application for adjournment of trial was refused by the trial court. It was held that there was no fair hearing.
(4) An accused has a right to defend himself in person or by a counsel of his choice. But in *Awolowo V. Federal Minister of Internal Affairs* (1962) and *Awolowo V. Sarki* (1962) was held that a counsel means a Nigerian that is enrolled to practice in Nigeria and one that is free to enter Nigeria without prohibition.

(5) Also an accused has a right to examine witnesses called by the prosecution and obtain the attendance of witnesses in his favour on the same condition as those applying to prosecution witnesses.

(6) An accused has a right to, without payment, the assistance of an interpreter if he can not understand the language used at the trial. See *Ajayi V. Zaria N.A.* (1964).

(7) He has also a right to obtain copies of the judgement within 7 days – Note in this regard that section 258(1) of the Constitution.

(8) An accused can not be convicted for an offence that did not constitute an offence at the time of the act or commission.

(9) An accused can not be tried a second time for an offence for which the accused had been previously convicted or acquitted and or pardoned.

(10) Right not to be compelled to give evidence at the trial is accorded to an accused person.

(11) Right not to be convicted for an offence not defined by law is also available to an accused i.e. accused can only be charged with a statutory offence. In *Aoko V. Fagbemi* (1961) High Court quashed the conviction of the appellant by a Customary court for the offence of "committing adultery by living with another man without judicial separation".

3.8 Right of Confrontation and Cross Examination

It is a fundamental rule of natural justice that a man charged before any tribunal should know the nature or full particulars of the charges against him before the trial. He should be given copies of the evidence taken without him, and he should be permitted to make cross examinations on them, otherwise justice is not done. In other words, he must be give adequate opportunity to know the case he has to meet and failure to supply him with a full statement of the facts or evidence upon which a panel and eventually a tribunal relied will be a denial of justice and a breach of the rules of Natural Justice.

This was the ratio decidendi of the Federal Supreme Court in the case of *Denloye V. Medical and Dental Practitioners Disciplinary Tribunal* (1965).

In this case, it was alleged that Denloye issued Certificates of fitness on various dates to three different persons after collecting monies from each one of them, and without examining them. He was preferred these charge; but instead of allowing him to be present before a panel who took evidence on this, evidence was taken without him, and the matter was eventually brought before the tribunal. At the tribunal, his counsel urged for the production of evidence which was said to be confidential

and this he was refused; nor were even the witnesses recalled. He was found guilty and he appealed accordingly.

The Federal Supreme Court held that while it is not in dispute that any tribunal of this nature is entitled to decide its own procedure and lay down its own rules for the conduct of inquiries regarding discipline as was decided in *R.V. Central Tribunal Ex-Parte Parton,* it is of the utmost importance that the inquiry be conducted in accordance with the principles of Natural Justice. The court further referred to the case of *Russel V. Duke of Norfolk* (1949) and the words of Tucker L.J. (as he then was) who said:-

> "*The requirement of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rule under which the tribunal is acting, the subject-matter that is being dealt with and so forth*".

Surely the appellant in the present case was entitled to know the nature of the evidence given against him on the 7th August, 1967 before the panel; and it was wrong to withhold this evidence from him.

Referring to such right, the Privy Council in the case of *Kanda V. Governor of the Federation of Malaya* (1962) was quoted as follows:

> "*If the right to be heard is to worth anything, it must carry with it the right in the 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*".

As a result of all the above propositions, the Supreme Court held that justice has not been done to the appellant and therefore allowed his appeal.

3.9 Right to Counsel

The constitutional provision states that every person who is charged with a criminal offence shall be entitled to defend himself in person or by legal practitioners of his own choice.

The interpretation of this provision was vividly curtailed in the case of *Awolowo V. Federal Minister of Internal Affairs* (1962) where Mr. Gratiaen was refused entry into Nigeria by an immigration officer through the directive of the Federal Minister of Internal Affairs; and consequently was unable to defend the plaintiff. As a result the plaintiff

complained that the refusal is prejudicial to his best interest as his liberty is in jeopardy.

The Plaintiff further complained that this refusal was a denial of his constitutional right as provided for in section 21(5)(c) of the second schedule to the Nigerian (Constitutional Order in Council 1960).

But the Court held that the provision referred to was never intended to be invoked in support of the expensive undertaking of importing lawyers whether British or otherwise into Nigeria.
The Court further held that section 21(5)(c) of the Constitution is subject to certain limitation as follows:-

> "*It is clear that any legal representative chosen must not be under a disability of any kind. He must be someone who, if outside Nigeria, can enter the country as of right, and he must be someone enrolled to practice in Nigeria. For if the legal representative can not enter Nigeria as of right, and he has no right of audience in the Nigerian Courts then he is under disability*".
>
> *……..The Constitution is a Nigerian Constitution meant for Nigerians in Nigeria. It only runs in Nigeria. The natural consequence of this is that the legal representative contemplated in section 21(5)(c) ought to be someone in Nigeria, and not outside.*

3.10 Compulsory Acquisition of Property

All public administrators must respect the fundamental right to own properties. Therefore if any piece of land is needed by any government for public purposes, it may be compulsorily acquired, while adequate compensation should be given to the owner of the land compulsorily acquired.

Please note that the quantum of compensation is always based on the value of the land as at the time of acquisition.

As a matter of fact the English law recognises the presumption against confiscation of property without adequate compensation; as it was revealed by Lord Atkinson thus in the case of *Central Control Board Liquor Traffic V. Canon Brewery Company Limited* (1819).

> "*That Canon is that an intention to take away the property of a subject without giving him a legal right to compensation for the loss of it is not to be imputed to the legislature unless that intention is expressed in unequivocal term*".

The Nigerian law supports this view and by Decree No. 33 of 1976 it provides for interest also to be paid apart from compensation once a person has given up possession of his property as a result of compulsory acquisition.

Section 6 of the Decree states as follows:

> "*Where an owner of an estate or interest in land compulsory acquired is required to yield up possession of his estate or interest in land prior to the payment of compensation or provision of alternative accommodation, as the case may be.*
>
> *Interest at the bank rate shall be payable on the value of the estate or interest acquired (as determined pursuant to this Decree) for the period between the entry on the land and the payment of compensation or the provision of alternative accommodation*".

This is also supported by the case of *Malewood Pulp & Paper V. Newsbrunswick Electric Corporation Limited* (1928) which provides for interest after possession has been taken on any compulsory acquisition embarked upon unless otherwise statutorily directed.

4.0 CONCLUSION

The provisions of the fundamental human rights are compelling, salutary and a sine-qua-non for the organic growth of any civilized and democratic nation. They do determine like a barometer or as ambidexter the success or failure of any particular government. They are indeed promotive of democracy and in fact enemies of despotism. They have been likened to be pivots upon which a successful government stands and grows for without them a particular government may be sterile, vindictive and odious in the estimation of the right thinking members of its society.

Therefore the more they are allowed to exist in the statute books in any country the better and satisfying that particular government will be, for any curtailment of them usually exposes a government to ridicule, opprobrium and dysfunctionalism.

The idea of fundamental human rights has been discussed at length of having episcopal origin for they have been acclaimed to be in existence before the birth of the law. And that was why it was held in *Joseph Garang xors v. The Constituent Assembly*, High Court Cs/93/1965 (unreported) that the fundamental human rights were not created by the state but are external and of universal institution, common to all mankind and ante-dating the state and founded upon natural law.

But be that as it is, there have been scholastic discussions on the justifiability of retaining these rights in the statute books of any permanency and at all times immutable hence it has been opined that there is an inbuilt tendency to erode upon or curtail some of these provisions during emergency periods.

Thus if a particular government sees reason in suspending any or part of the so-called fundamental human rights, it can do so for the smooth running of the government. The test therefore is subjective for each particular case must be considered according to its circumstances.

Therefore, in order to restrict or regulate freedom, the State is imperatively bound to use the system of either repression or prevention.

It was conceded by the International Commission of Jurists in 1962 that in a free society, preventive measures are considered legitimate to re-establish law and order if the latter has been disturbed, or in order to ward off grave dangers which menace it in a direct and imminent fashion.

5.0 SUMMARY

The summation of this therefore is that any government is free to suspend the fundamental freedom whenever it deems it fit to do so, and a typical example was seen when the Spanish government suspended Article 14 of the Charter by the decree of June 8, 1962 thus depriving Spanish people for two years of the right to establish freely their place of residence on national territory.

Also by virtue of Article 35 of the Charter of the Spanish people, the enforcement of Articles: 12 – freedom of expression and of the press, 13 – inviolability of correspondence, 14 – freedom of residence, 15 – inviolability of domicile, 16 – freedom of assembly and association, and 18 – Immunity from detention, may be temporarily or partially suspended by the government. These were usually done by means of decrees which strictly limit the application and duration of such measures.

A similar provision is contained in the 1979 Nigerian Constitution which provides for restriction and derogation from fundamental human rights. Here, section 41 reads: - Nothing in sections 34, 35, 36, 37 and 38 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society.

(a) in the interest of defence, public safety, public order
or (b) public morality or protecting the rights of freedom of other persons.

and (2) ……no Act shall be invalidated by reason only that it provides for the taking during periods of emergency, of measures that derogate from the provisions of section 30 or 32 of the Constitution……All measures taken to derogate from fundamental human rights are justifiable to the extent that those measures are reasonably justiciable for the purpose of dealing with the situation that exists during that period of emergency. This provision was re-enacted in section 45 of the 1999 Constitution.

6.0 TUTOR-MARKED ASSIGNMENT

What do you understand by the right to freedom of property?

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MODULE 2

UNIT 1 THE LEGISLATURE

CONTENTS

1.0 INTRODUCTION

The Senate and the House of Representatives are known as the Federal Legislature in Nigeria. These two Houses can not make laws without the consent of the President, since no bill can become law until the President has assented to it. Hence it will be right to suggest that the parliament in Nigeria consists of the President, the Senate, and the House of Representatives. By virtue of the 1979 Constitution, 5 Senators were usually elected from each state while 450 members in all constituted the House of Representatives.

It must be noted however that while we have a President and a Deputy President in the Senate in the Senate who are usually elected by the members of the Senate itself, there are also the Speaker and Deputy Speaker of the House of Representatives usually chosen by the members of the House also – in consimili casu.

OBJECTIVES

When you have completed this unit, you should be able to:

discuss issues on supremacy of the legislature
the functions of the legislature
qualification of members of the legislature.

3.0 MAIN CONTENT

3.1 Vacation of Seats

The President or the Deputy President of the Senate or the Speaker or Deputy Speaker of the House of Representatives shall vacate his office under the following conditions; to wit:

(a) If he ceases to be a member of the Senate or the House of Representatives, as the case may be, otherwise than by reason of a dissolution of the Senate or the House of Representatives; or
(b) When the House of which he was a member first sits after any dissolution of that House; or
(c) If he is removed from office by a Resolution of the Senate or of the House of Representatives, as the case may be, by the votes of not less than two-thirds majority of members of that House.

3.2 Tenure of Seats of Members

(1) A member of the Senate or of the House of Representatives shall vacate his seat in the House of which he is a member if:

(a) he becomes a member of another legislative house;
(b) any other circumstances arise that, if he were not a member of the Senate or the House of Representatives, would cause him to be disqualified for election as a member;
(c) he ceases to be a citizen of Nigeria;
(d) he becomes President, Vice-President, Governor, Deputy Governor or a Minister of the Government of the Federation or a Commissioner of the Government of a State;
(e) save as otherwise prescribed by this Constitution, he becomes a member of a commission or other body established by this Constitution or by any other law;
(f) without just cause he is absent from meetings of the House of which he is a member for a period amounting in the aggregation to more than one-third of the total number of days during which the House meets in any one year; or

(g) being a person whose election to the House was sponsored by a political party, he becomes a member of another political party before the expiration of the period for which that House was elected: Provided that his membership of the latter political party is not as a result of a division in the political party of which he was previously a member or of a merger of 2 or more political parties or factions by one of which he was previously sponsored.

(2) A member of the Senate or of the House of Representatives shall be deemed to be absent without just cause from a meeting of the House of which he is member, unless the person presiding certifies in writing that he is satisfied that the absence of the member from the meeting was for a just cause.

3.3 Qualifications for Membership of National Assembly

To be qualified for an election to the Senate, a Nigerian Citizen must be 30 years of age, while he must be 21 years of age to stand for any election to the House of Representatives. Please note that only a Nigerian citizen can stand for any election in either of these two bodies.

3.4 Disqualifications

(1) No person shall be qualified for election to the Senate or the House of Representatives if:

(a) he has voluntarily acquired the citizenship of a country other than Nigeria or, except in such cases as may be prescribed by the National Assembly, has made a declaration of allegiance to such a country;
(b) under any law in force in any part of Nigeria, he is adjudged to be a lunatic or otherwise declared to be of unsound mind;
(c) he is under a sentence of imprisonment for an offence involving dishonesty (by whatever name called) exceeding 6 months imposed on him by such a Court or substituted by a competent authority for any other sentence imposed on him by such a court;
(d) within a period of less than 10 years before the date of an election to a legislative house he has been convicted and sentenced for an offence involving dishonesty or he has been found guilty of a contravention of the Code of Conduct;
(e) he is an undischarged bankrupt, having been adjudged or otherwise declared bankrupt under any law in force in Nigeria; or
(f) he is a person employed in the public service of the Federation or of any State.
(2) Where in respect of any person who has been adjudged to be a lunatic, declared to be of unsound mind, sentenced to death or

imprisonment or adjudged or declared bankrupt, any appeal against the decision is pending in any court of law in accordance with any law in force in Nigeria, subsection (1) of this section shall not apply during a period beginning from the date when such appeal is lodged and ending on the date when appeal is finally determined or, as the case may be, the appeal lapses or is abandoned, whichever is earlier; and for the purposes of this subsection, an "appeal" includes any application for an injunction or an order of certiorari, mandamus, prohibition or habeas corpus, or any appeal from any such application.

3.5 The Life Span of the Legislature

The maximum life of the Legislature is 4 years by both the 1979, 1989 and 1999 Constitutions of Nigeria. This period is to be calculated from the date of the first sitting of the House. But if the Federation is at war in which the territory of Nigeria is physically involved and the President considers that it is not practicable to hold elections, the National Assembly may by resolution extend the period of 4 years from time to time but not beyond a period of 6 months at any one time.

3.6 Duty of the President in Relation to the National Assembly

The President is fully empowered to issue a proclamation for the holding of the first session of the National Assembly immediately after his being sworn in or the dissolution of the National Assembly.

The President is fully empowered to address annually a joint meeting of the National Assembly on the State of the Nation.

He may also attend any joint meeting of the National Assembly or any meeting of either House to deliver an address on national affairs including fiscal measures or to make such statement on the policy of government as he considers to be of national importance.

The President also has a constitutional power to assent to the bills passed by the National Assembly. But where the President within 30 days after the presentation of the bill to him fails to signify his assent or where he withholds assent, then the bill shall again be presented to the National Assembly sitting at a joint meeting; and if passed by two-thirds majority of members of both Houses at such joint meeting, the bill shall become law and the assent of the President shall not be required.

It is therefore pertinent to discuss in details mode of exercising Federal legislative power in general and with regard to money bills.

3.7 Mode of Exercising Federal Legislative Power: General

(1) The power of the National Assembly to make laws shall be exercised by Bills passed by both the Senate and the House of Representatives and, except as otherwise provided by subsection (5) of this section, assented to by the President.

(2) A bill may originate in either the Senate or the House of Representatives and shall not become law unless it has been passed and, except as otherwise provided by this section and section 55 of this Constitution, assented to in accordance with the provisions of this section.

(3) Where a bill has been passed by the House in which it originated, it shall be sent to the other House; and it shall be presented to the President for assent when it has been passed by that House and agreement has been reached between the 2 Houses on any amendment made on it.

(4) Where a bill is presented to the President for assent, he shall within 30 days thereof signify that he assents or that he withholds assent.

(5) Where the President withholds his assent and the bill is again passed by each House by two-thirds majority, the bill shall become law and the assent of the President shall not be required.

3.8 Mode of Exercising Federal Legislative Power: Money Bill

(1) The provisions of this section shall apply to:

(a) an appropriation bill or supplementary appropriation bill including any other bill for the payment, issue or withdrawal from the Consolidated Revenue Fund or any other public fund of the Federation of any money charged thereon or any alteration in the amount of such a payment, issue or withdrawal; and

(b) a bill for the imposition of or increase in any tax, duty or fee or any reduction, withdrawal or cancellation thereof.

(2) Where a bill to which this section applies is passed by one of the Houses of the National Assembly but is not passed by the other House within a period of 2 months from the commencement of a financial year, the President of the Senate shall within 14 days thereafter arrange for and convene a meeting of the joint finance

committee to examine the bill with a view to resolving the differences between the 2 Houses.

(3) Where the joint finance committee fails to resolve such differences then the bill shall be presented to the National Assembly sitting at a joint meeting, and if the bill is passed at such joint meeting, it shall be presented to the President for assent.

(4) Where the President within 30 days after the presentation of assent, then the bill shall again be presented to the National Assembly sitting at a joint meeting, and if passed by two-thirds majority of members of both Houses at such joint meeting, the bill shall become law and the assent of the President shall not be required.

(5) In this section, "joint finance committee" refers to the joint committee of the National Assembly on finance established pursuant to section 58 (3) of this Constitution.

4.0 CONCLUSION

You ha come to the end of the discourse concerning the legislature and its powers. The qualification of members and how members could be made to vacate their seats in the legislative house ha also been discussed.

5.0 SUMMARY

In this unit, we have considered the role of the legislature, the qualification for membership and the process to follow for a member to vacate its seat in the legislature.

6.0 TUTOR-MARKED ASSIGNMENT

The legislature makes law in Nigeria which must be obeyed. Discuss with reference to the legal position in Nigeria.

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UNIT 2 POWERS AND CONTROL OVER PUBLIC FUNDS

CONTENTS

1.0 INTRODUCTION

In this unit, we shall consider the powers of the legislature as it is enshrined in the 1999 Constitution.

OBJECTIVES

By the end of this unit, you should be able to:

identify and explain all the powers of the legislative arm of government as it is contained in the 1999 Constitution of Nigeria.

3.0 MAIN CONTENT

Establishment of Consolidated Revenue Fund:

(1) All revenues or other moneys raised or received by the Federation (not being revenues or other moneys payable under this Constitution or any Act of the National Assembly into any other public fund of the Federation established for a specific purpose) shall be paid into and form one Consolidated Revenue Fund of the Federation.

(2) No moneys shall be withdrawn from the Consolidated Revenue Fund of the Federation except to meet expenditure that is charged upon the fund by this Constitution or where the issue of those moneys has been authorised by an Appropriation Act, Supplementary Appropriation Act or an Act passed in pursuance of section 75 of this Constitution.

(3) No moneys shall be withdrawn from any public fund of the Federation other than the Consolidated Revenue Fund of the Federation unless the issue of those moneys has been authorised by an Act of the National Assembly.

(4) No moneys shall be withdrawn from the Consolidated Revenue Fund or any other public fund of the Federation, except in the manner prescribed by the National Assembly.

3.1 Authorisation of Expenditure from Consolidated Revenue Fund

(1) The President shall cause to be prepared and laid before each House of the National Assembly at any time in each financial year estimates of the revenues and expenditure of the Federation for the next following financial year.

(2) The heads of expenditure contained in the estimates (other than expenditure charged upon the Consolidated Revenue Fund of the Federation by this Constitution) shall be included in a bill, to be known as an Appropriation Bill, providing for the issue from the Consolidated Revenue Fund of the sums necessary to meet that expenditure and the appropriation of those sums for the purposes specified therein.

(3) If in respect of any financial year it is found:

(a) that the amount appropriated by the Appropriation Act for any purpose is insufficient; or

(b) that a need has arisen for expenditure for a purpose for which no amount has been appropriated by the Act, a supplementary estimate showing the sums required be laid before each House of the National Assembly and the heads of any such expenditure shall be included in a Supplementary Appropriation Bill.

3.2 Authorisation of Expenditure in Default of Appropriations

(1) If the Appropriation Bill in respect of any financial year has not been passed into law by the beginning of the financial year, the President may authorise the withdrawal of moneys from the Consolidated Revenue Fund of the Federation for the purpose of meeting expenditure necessary to carry on the services of the Government of the Federation for a period not exceeding 6 months or until the coming into operation of the Appropriation Act, whichever is earlier;

(2) Provided that the withdrawal in respect of any such period shall not exceed the amount authorised to be withdrawn from the Consolidated Revenue Fund of the Federation under the provisions of the Appropriation Act passed by the National Assembly for the corresponding period in the immediately preceding financial year, being an amount proportionate to the total amount so authorised for the immediately preceding financial year.

3.3 Contingencies Fund

(1) The National Assembly may by law make provisions for the establishment of a Contingencies Fund for the Federation and for authorising by the President, if satisfied that there has arisen an urgent and unforeseen need for expenditure for which no other provision exists, to make advances from the Fund to meet the need.

(2) Where any advance is made in accordance with the provisions of this section, a Supplementary Estimate shall be presented and a Supplementary Appropriation Bill shall be introduced as soon as possible for the purpose of replacing the amount so advanced.

3.4 Remuneration of the President and Certain Other Officers

(1) There shall be paid to the holders of the offices mentioned in this section such salaries and allowances as may be prescribed by the National Assembly.

(2) The salaries and allowances payable to the holders of the offices so mentioned shall be a charge upon the Consolidated Revenue Fund of the Federation.

(3) The salaries payable to the holders of the said offices and their conditions of service other than allowances shall not be altered to their disadvantage after their appointment.

(4) The offices aforesaid are the offices of the President, Vice-President, Chief Justice of Nigeria, Justices of the Supreme Court, president of the Federal Court of Appeal, Justices of the Federal Court of Appeal, Chief Judge of the Federal High Court, Judges of the Federal High Court, the Auditor-General for the Federation and the Chairman and Members of the following executive bodies, namely: the Federal Civil Service Commission, the Federal Electoral Commission, the Federal Judicial Service Commission, the Police Service Commission and the National Population Commission.

(5) Provisions may be made by an Act of the National Assembly for the grant of a pension or gratuity to or in respect of a person who has held office as President or Vice-President and was not removed from office as a result of impeachment; and any pension granted by virtue of any provision made in pursuance of this subsection shall be a charge upon the Consolidated Revenue Fund of the Federation.

(6) The recurrent expenditure of judicial officers of the Federation (in addition to salaries and allowance of the judicial officers mentioned in subsection (4) of this section) shall be a charge upon the Consolidated Revenue Fund of the Federation.

3.5 Audit of Public Accounts

(1) There shall be an Auditor-General for the Federation who shall be appointed in accordance with the provisions of section 80 of this Constitution.

(2) The public accounts of the Federation and of all offices, courts and authorities of the Federation, including all persons and bodies established by law entrusted with the collection and administration of public moneys and assets, shall be audited and reported on by the Auditor-General; and for that purpose, the Auditor-General or any person authorised by him in that behalf shall have access to all books, records, returns and other documents relating to these accounts.

(3) The Auditor-General shall submit his reports to each House of the National Assembly, and each House shall cause the reports to be considered by a committee of the House of the National Assembly responsible for public accounts.

(4) In the exercise of his functions under this Constitution, the Auditor-General shall not be subject to the direction or control of any other authority or person.

3.6 Appointment of Auditor-General

(1) The Auditor-General for the Federation shall be appointed by the President on the recommendation of the Federal Civil Service Commission subject to confirmation by the Senate.

(2) Power to appoint persons to act in the office of the Auditor-General shall vest in the President.

(3) Except with the sanction of a resolution of the Senate, no person shall act in the office of the Auditor-General for a period exceeding 6 months.

3.7 Tenure of Office of Auditor-General

(1) A person holding the office of the Auditor-General for the Federation shall be removed from office by the President acting on an address supported by two-thirds majority of the Senate praying that he be so removed for inability to discharge the functions of his office (whether arising from infirmity of mind or body or any other cause) or for misconduct.

(2) The Auditor-General shall not be removed from office before such retiring age as may be prescribed by law, save in accordance with the provisions of this section.

3.8 Power to Conduct Investigation

(1) Subject to the provisions of this Constitution, each House of the National Assembly shall have power by resolution published in its journal or in the *Official Gazette* of the Government of the Federation to direct or cause to be directed an investigation into:

(a) any matter or thing with respect to which it has power to make laws; and

(b) the conduct of affairs of any person, authority, ministry or government department charge, or intended to be charged, with the duty of or responsibility for:

(i) executing or administering laws enacted by the National Assembly, and
(ii) disbursing or administering moneys appropriated or to be appropriated by the National Assembly.

(2) The powers conferred on the National Assembly under the provisions of this section are exercisable only for the purpose of enabling it:

(a) to make laws with respect to any matter within its legislative competence and to correct any defects in existing laws; and
(b) to expose corruption, inefficiency or waste in the execution or administration of laws within its legislative competence and in the disbursement or administration of funds appropriated by it.

3.9 Power as to Matter of Evidence

(1) For the purposes of any investigation under section 82 of this Constitution and subject to the provisions thereof, the Senate or the House of Representatives or a committee appointed in accordance with section 58 of this Constitution shall have power:

(a) to procure all such evidence, written or oral, direct of circumstantial, as it may think necessary or desirable, and to examine all persons as witnesses whose evidence may be material or relevant to the subject-matter;
(b) to require such evidence to be given on oath;
(c) to summon any person in Nigeria to give evidence at any place or to produce any document or other thing in his possession or under his control, and to examine him as a witness and require him to produce any document or other thing in his possession or under his control, subject to all just exceptions; and

(d) to issue a warrant to compel the attendance of any person who, after having been summoned to attend, fails, refuses or neglects to do so and does not excuse such failure, refusal or neglect to the satisfaction of the House or the committee in question, and to order him to pay all costs which may have been occasioned in compelling his attendance or by reason of his failure, refusal or neglect to obey the summons, and also to impose such fine as may be prescribed for any such failure, refusal or neglect; and any fine so imposed shall be recoverable in the same manner as a fine imposed by a court of law.

(2) A summons or warrant issued under this section may be served or executed by any member of the Nigeria Police Force or by any person authorised in that behalf by the President of the Senate or the Speaker of the House of Representatives, as the case may require.

3.10 Miscellaneous Provisions

It must be borne in mind that each of the Houses has powers to regulate its own procedure including the procedure for summoning and recess of the House. Each House has power to appoint a committee of its members for such special or general purposes that it thinks fit for the effective performance of its functions. And in this regard provisions are made which allow the House to delegate any of its functions to any committee by way of resolution, regulations or otherwise.

It must also be remembered that provisions are made compelling the Senate or the House of Representatives to sit for a period of not less than 181 days in a year; while the Federal Electoral Commission is being saddled in the Constitution with the responsibility and modes of conducting elections. To this end, the commission is permitted to make laws and regulations binding elections to a National Assembly.

Lastly, it must be remembered that all elected people to any of the Houses must declare their assets and liabilities and also take oath of the office before they can function either as a member of the Senate or the House of Representatives.

3.11 Recall

The 1989 Constitution goes a long way to enforce dedication of duties. It is no longer easy for an elected member to abandon his or her functions to the electorates after election without taking the booth and face the reprisal of being recalled. Since section 68 of the Constitution provides as follows:

"A member of the Senate or of the House of Representatives may be recalled as such a member if:

(a) there is presented to the Chairman of the National Electoral Commission a petition in that behalf signed by more than one-half of the persons registered to vote in that member's Constituency alleging their loss of confidence in that member; and

(b) the petition is thereafter in a referendum conducted by the National Electoral Commission within 90 days of the date of receipt of the petition, approved by a simple majority of the votes of the persons registered to vote in that member's Constituency.

3.12 House of Assembly of a State

The House of Assembly of a State consists of three times the total number of seats which that State has in the House of Representatives.

The members are usually elected in an election and they must be Nigerian citizens of not less than 21 years of age each by the 1979 Constitution and 25 years of age by the 1989 Constitution.

Apart from the age barrier, they should have the same qualification and disqualification criteria like members of the National Assembly.

This body has power to make laws by passing bills for their states; and regulation prevails for the assenting procedures by the Governors which are more or less the same with that of the National Assembly.

The House of Assembly of a State has powers to regulate also its own procedure including the procedure for summoning and recess of the House.

The House can appoint a committee of its own members for any special or general purpose as in its opinion is necessary for the effective discharge of its functions.

The House shall be dissolved at the expiration of 4 years commencing from the date of the first sitting of the House unless the Governor through proclamation issues otherwise as provided in the Constitution.

3.13 Tenure of Seats of Members

(1) A member of a House of Assembly shall vacate his seat in the House if:

(a) he becomes a member of another legislative house;
(b) any other circumstances arise that, if he were not a member of that House, would cause him to be disqualified for election as such a member;
(c) he ceases to be a citizen of Nigeria;
(d) he becomes President, Vice-President, Governor, Deputy Governor or a Minister of the Government of the Federation or a Commissioner of the Government of a State;
(e) save as otherwise provided by this Constitution, he becomes a member of a commission or other body established by this Constitution or by any other law;
(f) without just cause he is absent from meetings of the House of Assembly for a period amounting in the aggregate to more than one-third of the total number of days during which the House meets in any one year; or
(g) being a person whose election to the House of Assembly was sponsored by a political party, he becomes a member of another political party before the expiration of the period for which that House was elected;

Provided that his membership of the latter political party is not as a result of division in the political party of which he was previously a member or of a merger of 2 or more political parties or factions by one of which he was previously sponsored.

(2) A member of a House of Assembly shall be deemed to be absent without just cause from a meeting of the House of Assembly unless the person presiding certifies in writing that he is satisfied that the absence of the member from the meeting was for a just cause.

3.14 Powers and Control over Public Funds

These powers are contained in sections 112 of the 1979 Constitution and section 118 of the 1989 Constitution. Also the mode of authorisation of expenditure from Consolidated Revenue Fund may be found in sections 113 and 119 of the 1979 and 1989 Constitutions respectively.

Both Constitutions also contain provisions for authorisation of expenditure in default of appropriation, provisions governing how to

make or utilize Contingency Fund, provisions for the Remuneration of the Governor and certain other officers, are also contained in the Constitutions, while comprehensive provisions are equally made for (a) Audit of Public Accounts, (b) Appointment of Auditor-General of a State, (c) Tenure of office of the Auditor-General, (d) Power to conduct investigations; and (e) power as to matters of evidence.

Learners are therefore enjoined to read the relevant portions of these constitutional provisions for proper assimilation and understanding.

3.15 Recall

The Recall principle contained in relation to the National Assembly in the 1989 Constitution applies by virtue of section 108 to a member of the House of Assembly.

4.0 CONCLUSION

In this unit, you learnt about the constitution, the legislature and the powers of the legislation to appropriate money and pass bills.

5.0 SUMMARY

In this unit, we have considered the constitutional provision of the powers of the legislature and how they can authorise expenditure of states etc.

6.0 TUTOR-MARKED ASSIGNMENT

What is the significance of the legislature authorisation of spending of money by the state?

7.0 REFERENCES/FURTHER READINGS

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UNIT 3 THE EXECUTIVE

CONTENTS

1.0 INTRODUCTION

Under this heading, we shall discuss the establishment of the office of the President, the Vice-President, Ministers of the Federal Government and the establishment of certain Federal Bodies, we shall also discuss Public Revenue, the Public Service, the Prerogative of Mercy and the State Executive to mention a few.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

Discuss the:

powers of the President
immunity clause
the executive arm of government at the federal level and state level
removal of President from office, ditto State elected executive.

3.0 MAIN CONTENT

3.1 The President

The President of Nigeria must be a Nigerian Citizen of not less than 35 years of age. This criterion applies also to the Governor and Deputy Governor of any state in Nigeria.

The President is the Head of State, the Chief Executive of the Federation and also the Commander-in-Chief of the Armed Forces of the Federation.

Once a President is elected, he holds the office until:

(i) his successor in office takes the oath of that office;
(ii) he dies whilst holding such office;
(iii) the date when his resignation from office takes effect; or
(iv) he otherwise ceases to hold office in accordance with the provisions of the Constitution.

But note that a person is disqualified to hold the office of a President if:

(a) he does an act, acquires any status or suffers any disability which, if he were a member of the SENATE, would have disqualified him from membership of the SENATE; or (b) he had been elected to such office at any previous elections.

It must be noted however that the President shall not during the period when he holds office, hold any other Executive office or paid employment in any capacity whatsoever.

What is interesting to note is that the election of any candidate to the office of the President shall not be valid unless he nominates another candidate (Vice-President) as his associate for his running for the office of President. The same provision prevails that a candidate for the Governorship of a State must choose another candidate as a Deputy Governor.

3.2 Removal of President from Office

The President or Vice-President may be removed from office whenever a notice of any allegation in writing signed by not less than (1/3) one-third of the members of the National Assembly is presented to the president of the Senate, stating that the holder of the office of President or Vice-President is guilty of gross misconduct in the performance of the functions of his office.

Please note that the provisions enjoin a detailed particular of such a misconduct to be specified:

(1) The President of the Senate shall within 7 days of the receipt of the notice of the allegation, serve a copy on the President and each member of the National Assembly; and shall also cause any statement made in reply to the allegation by the holder of the office to be served on each member of the National Assembly.

(2) And within 14 days of the presentation of the notice to the President of the Senate, each House of the National Assembly shall resolve by motion without any debate whether or not the allegation be investigated.

(3) A motion of the National Assembly that the allegation be investigated shall not be declared as having being passed, unless it is supported by the votes of not less than two-thirds majority of all the members of each House of the National Assembly.

(4) The President of the Senate shall within 7 days of the passing of the motion cause the allegation to be investigated by a committee of 7 persons who in his opinion are of high integrity not being members of any public service, legislative house, political party, and who shall have been nominated and with the approval of the Senate, appointed by the President of the Senate to conduct the investigation.

(5) The President or Vice-President whose conduct is being investigated shall have the right to defend himself in person and be represented before the committee by legal practitioners of his own choice.

(6) A Committee appointed under this section shall:

(a) have such powers and exercise its functions in accordance with such procedure as may be prescribed by the National Assembly; and

(b) within 3 months of its appointment report its findings to each House of the National Assembly.

(7) Where the Committee reports to each House of the National Assembly that the allegation has not been proved, no further proceedings shall be taken in respect of the matter.

(8) Where the report of the Committee is that the allegation against the holder of the office has been proved, then within 14 days of the receipt of the report, each House of the National Assembly

shall consider the report, and if by a resolution of each House of the National Assembly supported by not less than two-thirds majority of all its members, the report of the Committee is adopted, then the holder of the office shall stand removed from office as from the date of the adoption of the report.

(9) No proceedings or determination of the Committee or of the National Assembly or any matter relating thereto shall be entertained or questioned in any Court.

(10) In this section, "gross misconduct" means a grave violation or breach of the provisions of this Constitution or a misconduct of such nature as amounts in the opinion of the National Assembly to gross misconduct.

3.3 Permanent Incapacity of President

(1) The President or Vice-President shall cease to hold office, if:

(a) by resolution passed by two-thirds majority of all the members of the executive council of the Federation it is declared that the President or Vice-President is incapable of discharging the functions of his office;

(b) and after such declaration has been verified by a medical panel in its reports to the President of the Senate and the Speaker of the House of Representatives accordingly.

(2) Where the medical panel certifies in the report that in its opinion the President or Vice-President is suffering from such infirmity of body or mind as renders him permanently incapable of discharging the functions of his office, a notice thereof signed by the President of the Senate and the Speaker of the House of Representatives shall be published in the Official Gazette of the Government of the Federation.

(3) It is interesting to note that to ensure fair play and convincing report; the medical panel to be appointing for this exercise will consist of 5 members only; one of whom shall be the personal physician of the holder of the office concerned; and 4 other medical practitioners who have in the opinion of the President of the Senate, attained a high degree of eminence in the field of medicine relative to the nature of the examination to be conducted.

3.4 Discharge of Functions of President

Whenever the President transmits to the President of the Senate and the Speaker of the House of Representatives a written declaration that he is proceeding on vacation or that he is otherwise unable to discharge the functions of his office, until he transmits to them a written declaration to the contrary such functions shall be discharged by the Vice-President as Acting President.

(1) The Vice-President shall hold the office of President if the office of the President becomes vacant by reason of death or resignation, impeachment, permanent incapacity or the removal of the President from office for any other reason in accordance with the provisions of Sections 143 or 144 of the Constitution.

(2) Where any vacancy occurs in the circumstances mentioned above during a period when the office of Vice-President is also vacant, the President of the Senate shall hold the office of the President for a period of not more than 3 months, during which there shall be an election of a new President, who shall hold office for the unexpired term of office of the last holder of the office.

(3) Where the office of the Vice-President becomes vacant:

(a) by reason of death or resignation, impeachment, permanent incapacity or removal in accordance with the provisions of Sections 143 or 144 of the Constitution;
(b) by his assumption of the office of President in accordance with subsection (1) of this section; or
(c) for any other reason,

the President shall nominate and, with the approval of each House of the National Assembly, appoint a new Vice-President.

3.5 The Vice-President

The President is not bound to give the Vice-President any function at all by the provisions of the 1979 Constitution of Nigeria. This lapse has engendered lots of problem and serious misgivings coupled with vehement bickering, confusion and misunderstanding as well as leading to internal disharmony. Now however, the 1999 Constitution emphatically provides that the President may in his discretion, assign to the Vice-President responsibility for any business of the Government of the Federation of any department of governance.

The President shall hold regular meetings with the Vice-President and all the Ministers of the Government of the Federation for the purpose of:

(a) determining the general direction of domestic and foreign policies of the Government of the Federation;
(b) coordinating the activities of the President, the Vice-President and the Ministers of the Government of the Federation in the discharge of their executive responsibilities; and
(c) advising the President generally in the discharge of his executive functions other than those functions with respect to which he is required by the Constitution to seek the advice or act on the recommendation of any other person or body.

3.6 The Appointment of Special Adviser

The President may appoint special advisers in order to assist him in the performance of his functions.

The number of such Advisers and their remuneration and allowances shall be as prescribed by law or by resolution of the National Assembly.

The appointment of a Special Adviser is at the pleasure of the President and any person so appointed by him will cease or vacate the post when the President ceases to hold office.

3.7 The Ministers

Both sections 135 of the 1979 Constitution and 147 of 1999 Constitution are explicit on the appointment of the Ministers of the Federal Government and they all provide as follows: mutatis mutandi:

(1) There shall be such offices of Ministers of the Government of the Federation as may be established by the President.

But before appointment of any person as a Minister by the President can be done, a nomination of any person to such office must be confirmed by the SENATE. The President is enjoined to follow the federal character principles in the appointment of his Ministers and the President shall appoint at least one Minister from each state who shall be an indigene of such State.

(2) This directive is in conformity with the fundamental objectives and directive principles of state policy which demands that the composition of the Government of the Federation or any of its agencies and the conduct of its affairs shall be carried out in such manner as to reflect the Federal Character of Nigeria and the

need to promote national unity, and also to command national loyalty thereby ensuring that there shall be no predominance of persons from a few states or from a few ethnic or other sectional groups in that government or in any of its agencies.

Note that where a member of the National Assembly or of a House of Assembly is appointed a Minister of the Government of the Federation, he shall be deemed to have resigned his membership of the National Assembly or of the House of Assembly on his taking the Oath of Office as Minister.

No person shall be appointed as a Minister of the Government of the Federation unless he is qualified for election as a member of the House of Representatives.

Lastly it must be remembered that a Minister of the Government of the Federation shall not enter upon the duties of his office, unless he has declared his assets and liabilities as prescribed by the Constitution and has subsequently taken and subscribed the Oath of Allegiance and the Oath of Office of Minister prescribed in accordance with the relevant schedule to the Constitution.

3.8 The Establishment of Certain Federal Executive Bodies

There shall be established for the Federation the following bodies:

(1) Code of Conduct Bureau;
(2) Council of State;
(3) Federal Civil Service Commission;
(4) Federal Judicial Service Commission;
(5) National Defence Council;
(6) National Economic Council;
(7) National Population Commission;
(8) Federal Character Commission;
(9) Independent National Electoral Commission;
(10) National Judicial Council;
(11) Revenue Mobilisation Allocation and Fiscal Commission;
(12) National Security Council;
(13) Nigeria Police Council;
(14) Police Service Commission.

All members and Chairmen of the bodies shall be appointed by the President and the appointment shall be subject to confirmation by the Senate.

However, in exercising his powers to appoint a person as Chairman or member of the Council of State, the National Defence Council, or the National Security Council, the President shall not be required to obtain the confirmation of the SENATE. But in exercising his powers to appoint a person as Chairman or member of the Independent National Electoral Commission, National Judicial Council, the Federal Judicial Service Commission or the National Population Commission, the President shall consult the Council of State.

It must however be noted that the Constitution contains provisions for:

(a) The tenure of office of the members;
(b) qualification for membership; and
(c) how members can be removed from office.

See the Federal Republic of Nigeria Constitution, 1999 Sections 155 – 157 for details.

3.9 Independence of Certain Bodies

Section 158(1) of the 1999 Constitution is more comprehensive than section 145(1) of the 1979 Constitution.

Section 145(1) of the 1979 Constitution limits such independent bodies to the Federal Civil Service Commission, the Federal Judicial Service Commission and the Federal Electoral Commission, while the quorum for holding meetings and taking decision of the bodies shall not be less than one-third of the total number of members of that body at the date of the meeting.

Section 158(1) of the 1999 Constitution states as follows: -

S. 158(1) In exercising its power to make appointments or to exercise disciplinary control over persons, the Code of Conduct Bureau, the Federal Civil Service Commission, the Federal Judicial Service Commission, and Independent National Electoral Commission, the Revenue Mobilisation Allocation and Fiscal Commission and the National Judicial Council **shall** not be subject to the direction or control of any other authority or person.

(2) The National Population Commission shall not be subject to the direction or control of any other authority or person:

(d) in appointing, training or arranging for the training of enumerators or other staff of the Commission to assist it in the conduct of any population census;

(e) in deciding whether or not to accept or revise the return of any officer of the said Commission concerning the population census in any area or part of the Federation;
(f) in carrying out the operation of conducting the census; and
(g) in compiling its report of a national census for publication.

3.10 State Executive

The State Executive is a miniature of the Federal Executive in that the Governor of a state who also has to be a citizen of Nigeria and not less than 35 years of age operates with both his Deputy Governor and the Commissioners jointly to steer the ship of any particular state.

The Chief Executive of a state is the Governor who holds such an office until:

(a) his successor in office takes the oath of that office;
(b) he dies whilst holding such office;
(c) he otherwise ceases to hold office in accordance with the constitutional provisions.

3.11 Deputy Governor

The Constitution provides that a candidate for the office of Governor shall not be deemed to have been validly nominated to such an office unless he nominates another candidate as his associate for his running for the office of Governor, who is to occupy the office of Deputy Governor; and that candidate shall be deemed to have been duly elected to the office of Deputy Governor if the candidate who nominated him is duly elected as Governor.

While no provision is made for the assignment of duties to a Deputy Governor in the 1979 Constitution; section 193 of the 1999 Constitution provides that the Governor of a state may in his discretion assign to the Deputy Governor specific responsibility for any business of the Government of the state, including the administration of any department of government.

3.12 The Commissioners of State Government

Any appointment to the office of Commissioner of the Government of a state shall be made by the Governor after confirmation by the House of Assembly of the state.

However before any appointment is made by the Governor must be guided by this provision which states:

"The composition of the Government of a state, a local Government, or any of the agencies of such Government, and the conduct of the affairs of the Government or such agencies shall be carried out in such manner as to recognise the diversity of the people within its area of authority and the need to promote a sense of belonging and loyalty among all the people of the Federation".

Note that no person shall be appointed a Commissioner of the Government of a state unless he is qualified for election as a member of the House of Assembly; while section 193 of the 1999 Constitution gives the Governor of a state a discretion to assign to the Commissioner of the Government of the state responsibility for any business of the Government of that state including the administration of any department of Government.

The Constitution provides that the Governor should hold regular meetings with the Deputy Governor and all the commissioners of the Government of the state for the purpose of:

(a) determining the general direction of the policies of Government of the state;
(b) coordinating the activities of the Governor, the Deputy Governor and the commissioners of the Government of the state in the discharge of their executive responsibilities; and
(c) advising the Governor generally in the discharge of his executive functions other than those functions with respect to which he is required by the constitution to seek the advice or act on the recommendation of any other person or body.

3.13 Qualification for Appointment as a Commissioner

Apart from the qualificational criteria for election as a member of the House of Assembly of the state and subject to section 14(4) of the 1979 constitution and 15(4) of the 1989 constitution, there appears to be no specific qualifications made to guide an appointment to the office as a commissioner.

However, in appointing an Attorney-General for each state who shall be the Chief Law Officer and a commissioner of the Government of that state, no person shall be qualified to hold or perform the functions of the office of an Attorney-General unless such a person is qualified to practice as a legal practitioner in Nigeria and has been so qualified for a period of not less than 10 years.

3.14 Special Advisers

The Governor of a state also has a constitutional right to appoint any person as special Adviser to assist him in the performance of his functions and such officers will cease to be in office when the Governor ceases to hold office.

The number and the remuneration of such officers appointed shall be fixed by law or by the resolution of the House of Assembly of the state.

4.0 CONCLUSION

In this unit, we have attempted to examine the office of the President of the Federal Republic of Nigeria and the Governors as well as the law relating to their election, powers and removal from office.

5.0 SUMMARY

You have learnt in this unit about the constitutional provisions concerning the President of the Federal Republic of Nigeria and the Governors in the State. Their powers, functions, limitations and how they can be removed from office.

6.0 TUTOR-MARKED ASSIGNMENT

1. Explain and discuss the powers of the President and Governors under the 1999 Constitution.
2. Explain the powers of removal of President under the 1999 Constitution.

7.0 REFERENCES/FURTHER READINGS

I.G.P. Vs. Oke (1958) LLR 45 at 46.

Commissioner for Works, Benue State Vs. Devcon Ltd. (1983) (Pt. 83) 40 at 422.

Obeya Memorial Hospital Vs. A.G. of the Federation (1987) 3 NWLR (Pt. 60) 325.

Ladunni Vs. Kukoyi (1972) 1 ALL NLR 133 (Pt. 1).

Egbe Vs. Onogu (1972) 1 ALL NLR 95.

Kufeji Vs. Kogbe (1961) 1 ALL NLR 133.

Kotoye Vs. C.B.N. Supra.

Missini and Others Vs. Balogun (1968) 1 ALL NLR 318

Ladunni Kukoyi and Ojukwu Vs. Governor of Lagos (1986) 3 NLR (Pt. 26) 39

Onyesoh Vs. Kukoyi.

Orji Vs. Zaria Ind. Ltd. (1992) 1 WNLR (Pt. 216) 124 ratio 2, 3.

Akapo V. Hakeem-Habeeb (1992) 6 NWLR (Pt. 247) 266 ratio 4.

Mohammed Ojomu Vs. Salawu Ajao (1983) 9 SC. 22 – 58.

Thompson V. Park (1994) 1 KB. 408.

Akapo V. Hakeem-Habeeb 1992) 6 NWLR (Pt. 247) 266 at page 275.

Ogbonnaya Vs. Adapal Ltd. 1993) 6 KLR 89 at ratio 5”In the exercise of its discretion to grant an Interlocutory Injunction”.

Igwe Vs. Kalu (1993) 4 KLR 33 at page 35 ratio 3 and 4.

John Holt Nig. Ltd. Vs. Holts African Workers Union of Nigeria and Cameroons (1963) 2 SC. NLR 383.

Nigeria Civil Service Union Vs. Essien (1985) 3 NWLR (Pt.12) 185.

UNIT 4 REMOVAL OF GOVERNOR OR DEPUTY GOVERNOR FROM OFFICE

CONTENTS

1.0 INTRODUCTION

Under this heading, we shall discuss the removal of Governor and or Deputy Governor from office by the House of Assembly of a State.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

identify the provisions and powers governing the removal from office of Governor or Deputy Governor from office by the House of Assembly of a State
discuss the establishment powers and functions of certain state executive bodies.

3.0 MAIN CONTENT

Whenever a notice of allegation in writing signed by not less than 1/3 (one-third) of the members of the House of Assembly is presented to the Speaker of the House of Assembly of the state stating that the holder of such office of the Governor or the Deputy Governor is guilty of gross

misconduct in the performance of the functions of his office, detailed particulars of which shall be specified, the Speaker of the House of Assembly shall within 7 days of the receipt of the notice cause a copy thereof to be served on the holder of the office and on each member of the House of Assembly and shall cause any statement made in reply to the allegation by the holder of the office to be served on each member of the House of Assembly. Thus an impeachment proceeding is set in motion for the removal of a Governor or the Deputy Governor.

(1) Within 14 days of the presentation of the notice to the Speaker of the House of Assembly (whether or not any statement was made by the holder of the office in reply to the allegation contained in the notice) the House of Assembly shall resolve by motion without any debate whether or not the allegation shall be investigated.

(2) A motion of the House of Assembly that the allegation be investigated shall not be declared as having been passed unless it is supported by the votes of not less than two-thirds majority of all the members of the House of Assembly.

(3) Within 7 days of the passing of a motion under the foregoing provisions, the Speaker of the House of Assembly shall cause the allegation to be investigated by a Committee of 7 persons who in his opinion are of high integrity, not being members of any public service, legislative house or political party, and who shall have been nominated and, with the approval of the House of Assembly, appointed by the Speaker of the House to conduct the investigation.

(4) The holder of an office whose conduct is being investigated shall have the right to defend himself in person and be represented before the Committee by legal practitioners of his own choice.

(5) A Committee so appointed shall:

(a) have such powers and exercise its functions in accordance with such procedure as may be prescribed by the House of Assembly; and

(b) within 3 months of its appointment report its findings to the House of Assembly.

(6) Where the Committee reports to the House of Assembly that the allegation has not been proved, no further proceedings shall be taken in respect of the matter.

(7) Where the report of the Committee is that the allegation against the holder of the office has been proved, then, within 14 days of the receipt of the report, the House of Assembly shall consider the report and if by a resolution of the House of Assembly supported by not less than two-thirds majority of all its members, the report of the Committee is adopted, then the holder of the office shall stand removed from office as from the date of the adoption of the report.

(8) No proceedings or determination of the Committee or of the House of Assembly or any matter relating thereto shall be entertained or questioned in any court.

(9) In this section "gross misconduct" means a grave violation or breach of the provisions of this Constitution or a misconduct of such nature, as amount in the opinion of the House of Assembly to gross misconduct.

3.1 Tenure of Office of Governor

An executive Governor holds his office until:

(a) his successor in office takes the oath of that office;
(b) he dies whilst holding such office;
(c) the date when his resignation from office takes effect; or
(d) he otherwise ceases to hold office in accordance with the provisions contained in the Constitution.

3.2 Permanent Incapacity of Governor or Deputy Governor

If it is ascertained and further verified by a medical panel that in its opinion the Governor or his Deputy is suffering from such infirmity of body or mind as renders him permanently incapable of his discharging the functions of his office, a notice thereof signed by the Speaker of the House of Assembly shall be published in the official gazette of the Government of the state.

And thus the Governor or his Deputy shall cease to hold office as from the date of publication of the notice.

Note that the panel required under this regulation shall consist of 5 medical practitioners in Nigeria, one of whom shall be the personal physician of either the Governor or the Deputy Governor as the case may be; while the remaining 4 should be those (in the opinion of the Speaker of the House of Assembly) who have attained a high degree of

eminence in the field of medicine relative to the nature of the examination to be conducted.

3.3 Establishment of Certain State Executive Bodies

The Constitution, 1999 made it imperative for each state of the Federation to establish the following bodies, namely:

(1) The State Civil Service Commission;
(2) The State Independent National Electoral Commission; and
(3) The State Judicial Service Commission

The composition and powers of each body can be found in the third Schedule Part II of the Constitution, 1999.

The composition and the functions of each of these bodies are as follows:

3.4 State Executive Bodies

3.4.1 The State Civil Service Commission

1. A State Civil Service Commission shall comprise a Chairman and not less than 2 and not more than 4 other persons who shall, in the opinion of the Governor, be persons of unquestionable integrity and sound political judgement.

2. The Commission shall have powers without prejudice to the power vested in the Governor and the Judicial Service Commission:

(a) appoint persons to the offices in the state civil service;
(b) dismiss and exercise disciplinary control over persons heading such offices.

Its powers do not extend to offices of heads of divisions of Ministries or departments of government of the state as may from time to time be designated by an order made by the Governor except after consideration with the Head of the Civil Service of the State.

3.4.2 State Judicial Service Commission

A State Judicial Service Commission shall comprise the following members, namely:

(a) The Chief Judge of the State, who shall be the Chairman;

(b) The Attorney-General of the State;
(c) The Grand Kadi of the Sharia Court of Appeal of the State, if any;
(d) The President of the Customary Court of Appeal of the State, if any;
(e) Two members who are legal practitioners and who have been qualified to practice as legal practitioners in Nigeria for a period of not less than 10 years; and
(f) Two other persons not being legal practitioners who in the opinion of the Governor are of unquestionable integrity.

The Commission shall have power:

(a) to advise the National Judicial Council on suitable persons for nomination to the office of:

(i) the Chief Judge of the State;
(ii) Grand Kadi of the Sharia Court of Appeal if any; and
(iii) the President of the Customary Court of Appeal if any, subject to the confirmation of such appointment by the House of Assembly of the State.
(iv) Judges of the High Court of the State;
(v) Kadis of the Sharia Court of Appeal of the State, if any;
(vi) Judges of the Customary Court of Appeal of the State, if any.

(b) subject to the provisions of this Constitution, to recommend to the National Judicial Council, the removal from office of the Judicial officers specified in sub-paragraphs (a) and (b) this paragraph;

(c) to appoint, dismiss and exercise disciplinary control over the Chief Registrar and Deputy Chief Registrar of the High Court, the Chief Registrars of the Sharia Court of Appeal and the Customary Court of Appeal, the Magistrates, the Judges and members of the Area Courts and Customary Courts, and all other members of the staff of the judicial service of the State not otherwise specified in this Constitution.

3.5 Prerogative of Mercy

(1) The Governor may:

(a) grant any person concerned with or convicted of any offence created by any Law of a State a pardon, either free or subject to lawful condition;

(b) grant to any person a respite, either for an indefinite or for a specified period, of the execution of any punishment imposed on that person for such an offence;
(c) substitute a less severe form of punishment for any punishment imposed on that person for such an offence; or
(d) remit the whole or any part of any punishment imposed on that person for such an offence or of any penalty or forfeiture otherwise due to the state on account of such an offence.

(2) The powers of the Governor under subsection (1) of this section shall be exercised by him after consultation with such advisory council of the state on prerogative of mercy as may be established by the Law of the State.

Supplemental

The Constitution, 1999 makes provision for the National Population Census (Section 213), the establishment of Nigeria Police Force (Sections 214 – 216), the establishment and composition of the armed forces of the Federation (Sections 217 – 220), and the formation of political parties (Sections 221 – 229). Refer to the Constitution for details.

3.6 Declaration of State of Emergency

The President may by official Gazette issue a proclamation of a State of Emergency in the Federation or any part thereof when:

(a) the Federation is at war;
(b) the Federation is in imminent danger of invasion or involvement in a state of war;
(c) there is actual breakdown of public order and public safety in the Federation or any part thereof to such extent as to require extra-ordinary measures to restore peace and security;
(d) there is a clear and present danger of an actual breakdown of public order and public safety in the Federation or any part thereof requiring extra-ordinary measures to avert the same;
(e) there is an occurrence of imminent danger, or the occurrence of any disaster or natural calamity, affecting the community or a section of the community in the Federation;
(f) there is any other public danger which clearly constitutes a threat to the existence of the Federation; or
(g) the president receives a request to do so by the Governor of a State with the sanction of a resolution carried out by a two-thirds majority of a House of Assembly of a State in support when there

is an existence within the state any of the situations specified in (c), (d) and (e) above.

3.7 Immunity from Suits or Legal Proceedings

A person holding the office of President or Vice-President, Governor or Deputy Governor can not be sued for any Civil or Criminal matters during his period or term of office. See section 308 of the 1999 constitution of the Federal Republic of Nigeria

He can not even be arrested or imprisoned during that period either in pursuance of the process of any Court or otherwise.

And no process of any Court shall be allowed or issued compelling the appearance of such an office holder in any Court of law.

However, it must be noted that these exclusion clauses or immunities will not apply to Civil Proceedings in his official capacity or Criminal Proceedings in which such a person is only a nominal party.

4.0 CONCLUSION

The constitution of the Federal Republic of Nigeria clearly spells out the role the Legislature plays in the federation. In the same vain, it outlines the extent of the powers of both the legislature and the executive. In order to facilitate the functions of each arm of government, it endows powers unto both arms of government in the exercise of their constitutional duties. It also provides for the removal of state executives.

5.0 SUMMARY

In this module you have learnt about the powers of the Legislature, control of public funds, making of bills and removal of governors and their deputies.

6.0 TUTOR-MARKED ASSIGNMENT

Explain the process of making a money bill.

7.0 REFERENCES/FURTHER READINGS D.E.

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MODULE 3

UNIT 1 JUDICATURE

CONTENTS

1.0 INTRODUCTION

The term Judicature means the system of administration of justice. Without going too far into the past, the 1979 – 1999 Constitutions can be used as the basis of our discussion as this is the only Constitution that is certain of extent and application (New Lexicon Webster Dictionary).

Section 6 of the both Constitutions state the judicial powers of the courts. By virtue of section 6(6) of the 1979 and 1999 Constitutions, the courts have the power to decide disputes. It states that the judicial powers vested in the courts by virtue of this section, shall:

(a) extend, notwithstanding anything to the contrary in this Constitution to all inherent powers and sanctions of a court of law;
(b) extent to all matters between persons, or between government or authority and any person in Nigeria and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person; and accordingly, the doctrine of state immunity in respect of the liability in tort no longer applies;
(c) not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of the State Policy set out in chapter II thereof.

Prior to the present dispensation, the Supreme Court had won several toga of authority. It was first akin to what is today the High Court in terms of authority and hierarchy. It was later referred to as the Federal Supreme Court. At this time, it served the purpose of an intermediate court of Court of Appeal from where appeals lay to the Judicial Committee of the Privy Council. Lord Cave discussing the position of the Judicial Committee of Privy Council in **Nadan V. The King** (1962) A.C. 482, a Canadian case held:

"*The presence of invoking the exercise of the Royal Prerogative by way of appeal from any court in His Majesty's Dominions has long obtained throughout the British Empire. In its origin such an application may have been no more than a petitory appeal to the Sovereign as the fountain of Justice for protection against an unjust administration of the laws but if so, the practice has long since ripened into a privilege belonging to every subject of the King in parliament, and was the foundation of the appellate jurisdiction of the House of Lords: but in His Majesty's Dominion beyond the seas the method of appeal to the King in Council has prevailed, and is open to all the King's subjects in those Dominions*".

With the abolition of appeals from the Nigerian courts to the Judicial Committee of the Privy Council[2], the Supreme Court became the apex court for the land. For example, section 120 of the 1963 Constitution[3] provided thus:

> "*…….no appeal shall lie to any other body or person from any determination of the Supreme Court*."

By this provision, the Supreme Court of Nigeria became the final court of record for the trial of issues and in respect of appeals to any court of law by any person or authority in respect of issues, rights or disputes between persons or between any persons or authority in Nigeria. In *Adigun v. Governor of Osun* State(1995), it was held that there can be no appeal against the judgement of the Supreme Court. This court being the apex court in the hierarchy of our judicial system. Furthermore, section 215 of the 1979 Constitution provides thus:

> "*Without prejudice to the powers of the President or of the Governor of a State with respect to prerogative of mercy, no appeal shall lie to any other body from any determination of the Supreme Court*."

This provision was replicated in Section 235 of the Constitution, 1999.

The need to have finality in respect of decisions of our courts has made it imperative to adorn the Supreme Court with the toga of the final court to which appeals may lie, and from which there can be no further appeal.

Apart from the Supreme Court, other courts are also in existence. In any event, when one talks of an appellate court, there must be other courts down the ladder looking up to the Supreme Court as the apex court. Such other courts are the Court of Appeal, the Federal High Court, the High Court of a State, Sharia Court of Appeal of a State and Customary Court of Appeal of a State. The existence of these courts is constitutionally guaranteed.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

discuss fully the administration of justice in Nigeria from the federal to state level.

3.0 MAIN CONTENT

3.1 The Supreme Court of Nigeria

3.1.1 Composition

The Head of the Supreme Court is the Chief Justice of Nigeria. The Constitution also provides that such number of Justices of the Supreme Court, not exceeding 21, as may be prescribed by an Act of the National Assembly may also be appointed. While the appointment of a person to the Office of the Chief Justice of Nigeria shall be made by the President on the recommendation of the National Judicial Council, subject to confirmation of such appointment by the Senate. The appointment of a person to the office of a Justice of Supreme Court shall be made by the President on the recommendation of the National Judicial Council subject to confirmation of such appointment by the Senate. See the Constitution 1979:211 and 1999:230.

To be qualified for appointment to the office of Chief Justice of Nigeria or of a Justice of the Supreme Court, such a person must be qualified to practice as a legal practitioner in Nigeria and must have been so qualified for a period of not less than 15 years. In case of a vacancy in respect of the office of the Chief Justice of Nigeria, or where the holder of that office is for any reason unable to perform the functions of that office, the President shall appoint the most senior Justice of the Supreme Court to perform those duties until a person has been appointed to such has resumed these functions or until the person holding the office has resumed these functions.

For the purpose of exercising any jurisdiction conferred upon it by this Constitution or any law, the Supreme Court shall be duly constituted if it consists of not less than five justices of the Supreme Court. But where the court sits to consider an appeal brought under section 213(2) (b) or (c) (1979) or 233 (2) (b) or (c) (1999) of the Constitution, or is to exercise its original jurisdiction in accordance with section 212 (1979) or 232 (1999) of the Constitution, the court shall be constituted by seven Justices.

3.1.2 Jurisdiction

Essentially, the Supreme Court is an appellate court. It however has power to exercise original jurisdiction in certain instances. It has original jurisdiction to the exclusion of any other court, to determine any dispute between the Federation and a State or between states if and in so far as that dispute involves any question (whether of law or fact (in which the existence or extent of a legal right depends. Furthermore, the

Supreme Court shall have such original jurisdiction as may be conferred upon it by any Act of the National Assembly provided that no original jurisdiction shall be conferred upon the Supreme Court with respect to any criminal matter. See the Constitution: 1979, Section 212 or 1999 Section 232.

In respect of the appellate jurisdiction of the court, it is provided that the Supreme Court shall have jurisdiction to the exclusion of any other court to hear and determine appeals from the Court of Appeal.
An appeal shall lie from decisions of the Court of Appeal to the Supreme Court as of right in the following instances:

(a) where the ground of Appeal involves a question of law alone, decisions in any civil or criminal proceedings before the Court of Appeal;
(b) decisions in any civil or criminal proceedings on questions as to the interpretation or application of the Constitution;
(c) decisions in any civil or criminal proceedings on questions as to whether any of the provisions of chapter IV of this Constitution has been, is being or is likely to be contravened in relation to any person;
(d) decisions in any criminal proceedings in which any person has been sentenced to death by the Court of Appeal or in which the Court of Appeal has affirmed a sentence of death imposed by any other court;
(e) decisions on any question whether any person has been validly elected to any office under this Constitution or to the membership of any legislative house or whether the term of office of any person has ceased or the seat of a person in a legislative house has become vacant; and
(f) such other cases as may be prescribed by any law in force in any State.

Except as stated above, an appeal shall lie from the decision of the Court of Appeal to the Supreme Court with the leave of the Court of Appeal or the Supreme Court.

The right of Appeal to the Supreme Court from the decisions of the Court of Appeal shall be exercisable in the case of civil proceedings at the instance of a party thereto, or with the leave of the Court of Appeal or the Supreme Court at the instance of any other person having an interest in the matter, and in the case of criminal proceedings, at the instance of an accused person or subject to the provisions of this Constitution and any powers conferred upon the Attorney-General of the Federation or the Attorney-General of a State to take over and continue or to determine such proceedings, at the instance of such other

authorities or persons as may be prescribed. In *Ajomale v. Yaduat & Anor.* (1991), the Supreme Court emphasised that in ordinary cases, it cannot exercise appellate jurisdiction over matters emanating other than from the Court of Appeal.

It should also be pointed out that the Supreme Court does not treat its decisions lightly. In *Bronik Motors Ltd. v. Wema Bank Ltd.* (1983), it was held that none of its decisions can be overruled by any of the lower courts. It will not depart from its decisions except three conditions are satisfied, namely: (a) on account of a broad issue of justice, or (b) policy or (c) a question of legal principle such that the retention of the decision would amount to a perpetuation of injustice.

The issue of jurisdiction of a court is very fundamental. A court that has no jurisdiction has no judicial basis for trying an action. In *Bronik Motors Ltd. v. Wema Bank Ltd.* (1983), the Supreme Court held that where a court has no jurisdiction with respect to a matter before it, the judicial basis for the exercise of any power with respect to such matter is also absent. This is because power can only be exercised where the court has the jurisdiction to do so. In the same vein, the Supreme Court held in *Ajomale v. Yaduat & Anor. (No. 1)* (supra) that:

> "*jurisdiction is not to be equated with powers. Whereas jurisdiction is the right in the court to hear and determine the dispute between the parties, the power in the court is the authority to make certain orders and decisions with respect to the matter before the court. This is clearly implied by the provisions of section 6 of the 1979 Constitution which presented the powers of the courts and in chapter VII on the judicature ……*."

The foregoing discussion shows that before a court can exercise jurisdiction, the legal basis for assumption of power to try a case has to be established. While it is true that section 6 of the Constitution provides in general terms the basis for the inherent jurisdiction of the court, specific provisions in chapter VII state the extent and mode of exercising the jurisdiction conferred on each court through the blanket provision of section 6of the Constitution.

3.2 Court of Appeal

The Court of Appeal derives its existence from the Constitution. Thus the determination of the existence and power of the Court should be traced to the Constitution. This was also the view of the Court in *Afribank (Nig.) Ltd. v. Caleb Owoseni* (1995). In this case, the Court of

Appeal held that "it is a well settled principle of law that the existence of appellate jurisdiction is entirely statutory. An appellate court derives its jurisdiction from the statute creating it and other enabling statutory power."

3.2.1 Appointment

The Constitution makes provision for the establishment of the Court of Appeal. The court is made up of a president and such number of justices of the Court of Appeal not less than forty-nine, of which not less than three shall be learned Islamic personal law, and not less than three shall be learned in Customary law. See the Constitution: 1979 (Section 217) or 1999 (Section 237).

A president of the Court of Appeal shall be appointed by the President on the recommendation of the National Judicial Service Council subject to confirmation of such appointment by the Senate. Where there is a vacancy in the office of the president of the Court of Appeal, the President shall appoint the most senior Justice of the Court of Appeal to perform such functions, but such appointment shall not last for more than three months. A person shall not be qualified to hold the office of a Justice of the Court of Appeal unless he is qualified to practice as a legal practitioner in Nigeria and has been so qualified for a period of not less than twelve years.

3.2.2 Jurisdiction

The Court of Appeal is as its name connotes. That is, it is an appellate court. In *Iyimoga v. Governor of Plateau State* (1994), it was held that section 6 (6) of the 1979 Constitution does not confer original jurisdiction on the Court of Appeal. Unlike the Supreme Court that has original jurisdiction as stipulated by section 212 (1979) or 232 (1999), the Court of Appeal is essentially a court to which appeals lie. This is the purport of section 219 (1979) or 240 (1999) of the Constitution. It states:

> "*Subject to the provisions of this Constitution, the Court of Appeal shall have jurisdiction to the exclusion of any other court of law in Nigeria, to hear and determine appeals from the Federal High Court, High Court of FCT, High Court of a State, Sharia Court of Appeal of a State and Customary Court of Appeal of FCT, Customary Court of Appeal of a State, and from decisions of a Court Martial or other Tribunals as maybe prescribed by the Act of the National Assembly*."

The jurisdiction conferred on the Court of Appeal may be invoked in one of two ways, viz: (a) as of right and (b) in some respect by leave of the Court of Appeal or the Court from which the appeal is to come to the Court of Appeal. An appeal shall lie from the decisions of a High Court to the Court of Appeal as of right in respect of the following matters:

(a) final decisions in any civil or criminal proceedings before the High Court sitting at first instance;
(b) where the ground of appeal involves questions of law alone, decisions in any civil or criminal proceedings;
(c) decisions in any civil or criminal proceedings on questions as to the interpretation or application of this Constitution;
(d) decisions in any civil or criminal proceedings on questions as to whether any of the provisions of chapter IV of this Constitution has been, is being or is likely to be contravened in relation to any person;
(e) decisions in any criminal proceedings in which the High Court has imposed a sentence of death;
(f) decisions on any question whether any person has been validly elected to any office under this Constitution, or to the membership of any legislative house or whether the terms of office of any person has ceased or the seat of a person in a legislative house has become vacant:

(i) where the liberty of a person or the custody of an infant is concerned;
(ii) where an injunction or the appointment of a receiver is granted or refuse;
(iii) in the case of a decision determining the case of a creditor or the liability of a contributory or other officer under any enactment relating to companies in respect of misfeasance or otherwise;
(iv) in the case of a decree nisi in a matrimonial cause or a decision in any admiralty action determining liability; and
(v) in such other cases as may be presented by any law in force in Nigeria.

There shall be no right of appeal in respect of (a) a decision of any High Court granting unconditional leave to defend an action, (b) an order absolute for the dissolution of nullity of marriage in favour of any party who, having had time and opportunity to appeal from the decree nisi on which the order was founded, has not appealed from that decree nisi and (c) except by leave of a High Court (Federal or State) or Court of Appeal from a decision of the High Court made with the consent of the parties or as to costs only.

Except as stated by section 220 (1979) or 242 (1999) of the Constitution, an appeal shall lie from decisions of a High Court to the Court of Appeal with the leave of that High Court or the Court of Appeal.

In exercise of the right of appeal in civil cases, the interested party shall or with the leave of the High Court (Federal or State) or the Court of Appeal at the instance of any other person having an interest in the matter, and in the case of criminal proceedings at the instance of an accused person, or, subject to the provisions of this Constitution and any powers conferred upon the Attorney-General of the Federation or the Attorney-General of a State to take over and continue or to discontinue such proceedings, at the instance of such other authorities or persons as may be prescribed.

In *Nigerian General Insurance Co. Ltd. v. Alhaji Y. Ola Ishola Bello* (1994), it was held that by virtue of section 217 (1) of the 1979 Constitution (identical with Section 237 of the 1999 Constitution) and section 7 (1) of the Court of Appeal Act 1976, there is only one Court of Appeal and its territorial jurisdiction runs throughout the Federation. The division of the Court to various divisions throughout the country has been regarded as a matter of convenience for litigants and non-litigants. For effective performance of the duties relating to hearing and determination of cases brought before the Court of Appeal, Rules of Court have been made. This is in consonance with the powers conferred on the president of the Court of Appeal by section 227 (1979) or 248 (1999) of the Constitution.

An appeal shall lie from decisions of the Sharia Court of Appeal of a State to the Court of Appeal as of right in any civil proceedings before the Sharia Court of Appeal with respect to any question of Islamic personal law which the Sharia Court of Appeal is competent to decide. By this provision, it means that the Sharia Court of Appeal can only decide questions of Islamic personal law. A right of appeal in this regard is exercisable at the instance of a party thereto or, with the leave of the Sharia Court of Appeal or of the Court of Appeal, at the instance of any other person having an interest in the matter.

In similar terms, section 224 (1979) or 245 (1999) of the Constitution provides that an appeal shall lie from decisions of the Customary Court of Appeal of a State to the Court of Appeal as of right in any civil proceedings before the Customary Court of Appeal with respect to any question of Customary law and such other matters as may be presented by an Act of the National Assembly. In *Golok v. Diyalpwan* (1990), it was held that by the provisions of section 224 (1) of the 1979 Constitution (same as Section 245 of 1999 Constitution), there is only

one right of appeal to the Court of Appeal from the decisions of a State Customary Court of Appeal and that right is in respect of a complaint or ground of Appeal which raises a question of customary law alone. This section does not accommodate any complaint or ground of appeal which does not raise a question of customary law. It was further stated in this case that the intendment of the Constitution is that right of appeal to the Court of Appeal from a decision of the Customary Court of Appeal of a state be one tier. In the words of Uwais J.S.C:

> "*It cannot, therefore be possible to interprete the provisions of section 224 (1) which gives the right to appeal by leave. To do otherwise will, in my opinion, give a wide interpretation to the provisions of the subsection which are clearly intended, in the context of the Constitution, to have narrow meaning.*"

The Court of Appeal has the right to hear appeals from decisions of the Code of Conduct Tribunal established by the Constitution. The Court of Appeal may also hear appeals from such other courts duly established by law. See the Constitution: 1979 Section 225; 1999: Section 246.

In relation to the constitution of the court, the Court of Appeal shall be duly constituted if it consists of not less than three Justices of the Court of Appeal, and in the case of Appeals from a Sharia Court of Appeal, if it consists of not less than three Justices of the Court of Appeal learned in Islamic personal law. In the case of a Customary Court of Appeal, if it consists of not less than three Justices of Appeal learned in Customary law.

The Court of Appeal is bound by the decisions of the Supreme Court of Nigeria: Enang v. Obeten (1979) and Adegoke Motors Ltd. V. Adesanya (1989). It is bound by its own previous decisions in civil cases: Osumanu v. Kofi Amadu and Kanada v. Governor of Kaduna State (1986). In the case of two conflicting decisions of its own, it may choose to follow any of its conflicting decisions: (Enang and Adegoke Motors Ltd. (supra)).

The Court of Appeal must do away with its own decisions where having regard to the decision it cannot stand vis-à-vis the decision of the Supreme Court (Enang v. Obeten) where the Court of Appeal is satisfied that its previous decisions was given per incuriam, it may refuse to follow the decision. In respect of criminal cases, it is not bound by its own previous decisions: Ganiyu Adisa Motayo v. C.O.P. In *Enang v. Obeten*, it was held that by reason of the hierarchical set up of Nigerian courts and by the dictates of the principles of judicial precedent, a Court of Appeal faced with conflicting decisions of the

Supreme Court is privileged to choose between such conflicting decisions in reaching its decision on a matter in controversy before it.

It was also held in this case that a division of the Court of Appeal is not obliged to follow a previous decision of another division which has been adjudged to have been delivered per incuriam.

3.3 The Federal High Court

The history of the Federal High Court can be traced to 1973 when the then Federal Military Government felt that it was necessary to establish a court of a different character but with limited powers. The reason for this was the felt need that issues relating to the revenue of the Federal Government should be determined expeditiously. Thus Decree No. 13 of 1973 was promulgated and the court tagged 'Federal Revenue Court' was established. It was given original jurisdiction in respect of issues touching on taxation of companies, customs and excise duties, banking, foreign exchange, currency and fiscal measures of the Federal Government. The court also had power in respect of copyright, patents, designs, trade-marks, merchandise marks and Admiralty cases. The name of the court was later changed from Federal Revenue Court to the Federal High Court.

Of all the courts recognised by the 1979 Constitution, none has been bedeviled by controversies and varying or wavering jurisdictional powers as the Federal High Court. As Aguda rightly noted, the imponderable problems of conflict of jurisdiction which characterised its existence led to the clamour for its abrogation.

3.3.1 Appointment

Section 228 of the 1979 and 249 of the 1999 Constitutions make provision for the creation of a Federal High Court. It is made up of the Chief Judge of the Federal High Court and such number of judges of the Federal High Court as may be appointed by an Act of the National Assembly. The appointment of persons to the offices of the Chief Judge and Judges of the Federal High Court shall be made by the President on the recommendation of the National Judicial Council, subject to confirmation of such appointment by the Senate.

To qualify for appointment as a Judge of the Federal High Court, such a person must have qualified to practice as a legal practitioner in Nigeria and should be so qualified for a period of not less 10 years. Where there is a vacancy, the President shall appoint the most senior Judge of the Federal High Court to perform those functions. Such holder of an acting appointment shall so hold office for a period of not more than 3

months from the date of such appointment and the person so appointed shall not be re-appointed at the end of the three months period, except on the recommendation of the National Judicial Council.

Section 230 of the 1979 Constitution states that except as otherwise provided by the Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other Court in civil causes and matters arising from:

(a) relating to the revenue of the Government of the Federation;
(b) taxation of companies and other bodies established or carrying on business in Nigeria and all other persons subject to Federal taxation;
(c) custom and excise duties and export duties including any claim by or against the Nigeria Customs Service or any member or officer thereof, arising from the performance of any duty imposed under any regulation relating to customs and excise duties;
(d) banking, banks, other financial institutions including any action between one bank and another, any action by or against the Central Bank of Nigeria arising from banking, foreign exchange, coinage, legal tender, bills of exchange, letters of credit, promissory notes and other fiscal measures, not being any dispute between individual customer and his bank:

the operation of the Companies and Allied Matters Act, its regulation or any other enactment replacing it;
copyright, patent designs, trade marks, and passing off, industrial designs and merchandise marks, business names, commercial and industrial monopolies and standards etc.
admiralty jurisdiction;
diplomatic, consular and trade representation;
bankruptcy and insolvency;
aviation and safety of aircraft;
arms, ammunition and explosives;
drugs and poisons;
mines and minerals, weights and measures;
administration or management and control of Federal Government or any of its agencies;
operation and interpretation of the Constitution in so far as it affects the Federal Government or any of its agencies;
declaration or injunction affecting the validity of any executive or administrative action or decision of Federal Government or any of its agencies;

and such other jurisdiction (civil or criminal) and whether to the exclusion of any other court or not;
treason, treasonable felony and allied offences;
criminal causes and matters in respect of matters within its jurisdiction.

This provision does not affect the right of any person to seek redress against the Federal Government or any part of its agencies in any action for damages, injunction or specific performance, where the action is based on any enactment, law or equity.

The Constitution (1999:252) provides that the Federal High Court shall have all the powers of the High Court of a State, for the purpose of exercising its jurisdiction. This provision has often been misinterpreted to mean that the Federal High Court is not different from the State High Court. That it is a duplication of effort in the search for justice as the former is not different from the latter, and that both can be said to have concurrent jurisdiction. In *Jammal Steel Structures Ltd. v. A.C.B. Ltd.* the plaintiffs sued the defendants for the sum of N641,328.39 being the balance due to the plaintiffs in respect of overdraft facilities granted by the plaintiffs for money paid by the plaintiffs as bankers to the defendants at defendants' request. When the case came up for hearing at the High Court, learned Counsel for the defendants argued that the High Court had no jurisdiction to deal with the matter having regard to the provisions of the Federal Revenue Court. The Court held that it had jurisdiction.

On appeal to the Supreme Court, the court held that where there is involved only a dispute between a bank and one or more of its customers in the ordinary course of banking business or transaction, as in the case with the subject matter of the present case, any State High Court should be competent to entertain the case, because "the Government is not really interested in the outcome of the dispute apart of course from its interest in the general maintenance of law and order; that certain criminal offences relating to banking transactions, such as embezzlement or criminal breach of trust committed by anyone against a commercial bank should be prosecuted like any other crimes in any appropriate State High Court and not in the Federal Revenue Court". However, in *American International Insurance Corporation Ltd. v. Ceekay Traders Ltd.*, it was held that only the Federal High Court could assume jurisdiction in cases similar to that in *Jammal Steel Structures v. A.C.B.*

A case that really dealt with the jurisdiction of the Federal High Court was *Bronik Motors Ltd. v. Wema Bank Ltd.* the respondent, a bank, instituted an action in the High Court claiming specific performance of

a mortgage agreement to secure the appellants overdraft and N2,135,095.70 being balance due to the respondent for overdrafts to the first appellants in the normal course of their business as bankers.

At the close of the case, the trial judge gave judgement for the respondent. Aggrieved by this judgement, the appellant appealed to the Court of Appeal. It confirmed the High Court's judgement and dismissed the appeal. On further appeal to the Supreme Court, it was contended by the appellant that the two lower courts erred in failing to observe that jurisdiction over the claim in the action was not vested in the High Court but in the Federal High Court in accordance with section 7 of the Federal High Court Act 1973. The court was thus urged to overrule its decision in *Jammal Steel Structures Ltd. v. A.C.B. Ltd*.

The Supreme Court held inter alia that in respect of a dispute between a bank and one or more of its customers in the ordinary course of banking business or transaction, any State High Court is competent to exercise jurisdiction since the Government is not really interested in the outcome of the dispute, apart of course from its interest in the general maintenance of law and order. The Supreme Court held further that the time object and purpose of the Federal High Court can be gathered from the four corners of it which is that of expeditious dispatch of the revenue cases, particularly those relating to personal income tax, company tax, customs excise duties, illegal currencies, deals, exchange control measures and the like which the State High Courts were supposed to have been too tardy to dispose of especially in recent years.

The case could be said to be the *locus classicus* in respect of the extent of the jurisdiction of the Federal High Court. As stated above, of all the courts constitutionally established, none except the Federal High Court has witnessed much somersaulting jurisdictional powers. The recent is contained in schedule 1 to the Constitution (Suspension and Modification) Decree No. 107 of 1993.

3.4 The State High Court

Each State is empowered to create its own High Court.

3.4.1 Composition

The High Court of a State shall consist of the Chief Judge of the State and such number of Judges of the High Court as may be prescribed by a Law of the House of Assembly of the State.

The Chief Judge shall be appointed by the Governor of the State on the recommendation of the National Judicial Council subject to

confirmation of such appointment the House of Assembly of the State. The appointment of a person to the office of a Judge of a High Court of a Sate shall be made by the Governor on the recommendation of the National Judicial Council. To qualify for appointment as a Judge of the High Court, such a person must have qualified for a period of not less than 10 years.

In a situation where the office of the Chief Judge is vacant or where the person who holds the office is unable to perform the functions of that office, then until the person holding the office has resumed those functions, the Governor of the State shall appoint the most senior Judge of the High Court to perform those functions. Such appointment shall cease after the expiration of 3 months from the date of such appointment and the person so appointed shall not be re-appointed at the expiration of the three months except on the confirmation of the House of Assembly of the State.

3.4.2 Jurisdiction

The High Court of a State enjoys unlimited jurisdiction. See the Constitution (1979: Section 236; 1999: Section 272) which provides:

> 1979: S.236 "*Subject to the provisions of this Constitution and in addition to such other jurisdiction as may be conferred upon it by law, the High Court of a State shall have unlimited jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person.*"[64]
>
> 1999: S.272 "*Subject to the provisions of Section 251 and other provisions this Constitution and in addition the High Court of a State shall have jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of any offence committed by any person*"

In order to appreciate the extent and beauty of this provision, it is necessary to quote again section 6 (6) (a) and (b). Section 6 (6) (a) provides:

> "*The judicial powers vested in accordance with the foregoing provisions of this section shall extend, notwithstanding anything to the contrary in this constitution, to all inherent powers and sanctions of a court of law*".

Section 6 (6) (b) states that the power:

> "*shall extend to all matters between persons, or between government or authority and any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person*".

The sweeping nature of this power makes it possible for the High Court of a State to have original jurisdiction in all matters. Indeed, the Federal High Court, despite the fact that its jurisdiction has been extended, does not enjoy this kind of overwhelming jurisdiction.
There is only one High Court for each State although there may and are usually many judicial divisions. The same goes for the Federal High Court and the Court of Appeal: See MBA v. Owoniboys Technical Service Ltd. (1994).

3.5 Sharia Court of Appeal

The Constitution permits any state that desires it to establish a Sharia Court of Appeal. The reason for this development is not unconnected with the secular nature of the country as well as the presence of two dominant religions in Nigeria i.e. Christianity and Islam.

3.5.1 Composition

The Sharia Court of Appeal of the State shall consist of a Grand Kadi of the Sharia Court of Appeal and such number of Kadis of the Sharia Court of Appeal as may be prescribed by the House of Assembly of the State.

The Governor is saddled with the responsibility of appointment of any person to the office of the Grand Khadi of the Court. This is done on the recommendation of the National Judicial Council subject to confirmation of the House of Assembly. The appointment of a person to the office of a Kadi of the Sharia Court of Appeal of a State shall be

made by the Governor of the State on the recommendation of the National Judicial Council.

To qualify for appointment as a Kadi of the Sharia Court of Appeal of a State, such a person must be:

(a) a legal practitioner in Nigeria and must be so qualified for a period of not less than 10 years and has obtained a recognized qualification in Islamic law from an institution acceptable to the National Judicial Council, or
(b) have attended and obtained a recognised qualification in Islamic personal law from an institution approved by the National Judicial Council and must have held the qualification for a period of not less than 10 years; and he must either have considerable experience in the practice of Islamic personal law or must be a distinguished scholar of Islamic personal law.

In the case of a vacancy in respect of the office of the Grand Kadi of the Sharia Court of Appeal of a State or where a person so appointed is unable to perform the functions of that office, the Governor of the State shall appoint the most senior Kadi of the Sharia Court of Appeal of the State to perform those functions.

An appointment made in the case of such vacancy shall cease to have effect after the expiration of 3 months from the date of such appointment and the Governor shall not re-appoint a person whose appointment has lapsed on the recommendation of the House of Assembly of the State.

The Constitution provides that the Sharia Court of Appeal of a State shall in addition to such other jurisdiction as may be conferred upon it by the Law of the State, exercise such appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic personal law which the court is competent to decide in accordance with the provisions of subsection 2 of section 242 (1979) which is identical with section 277 (1999).

The Sharia Court of Appeal shall be competent to decide:

(a) any question of Islamic personal law regarding a marriage concluded in accordance with that law, including a question relating to the validity or dissolution of such a marriage or a question that depends on such a marriage and relating to family relationship or the guardianship of an infant;
(b) where all the parties to the proceedings are Moslems, any question of Islamic personal law regarding a marriage, including

the validity or dissolution of that marriage, or regarding family relationship, a founding or the guardianship of an infant;

(c) any question of Islamic personal law regarding a "*wakf*", gift, will or succession where the endower, donor, testator or deceased person is a Muslim;

(d) any question of Islamic personal law regarding an infant, prodigal or person of unsound mind who is a Moslem or the maintenance or guardianship of a Moslem who is physically or mentally infirm; or

(e) where all the parties to the proceedings (whether or not they are Moslems) have requested the court that hears the case in the first instance to determine that case in accordance with Islamic personal law, any other question.

See the Constitution: Section 242 (1979) and 277 (1999).

In *Maishanu v. Hardo* (1991), it was held that where the claim of a plaintiff does not fall within the ambit of the provision of section 242 of the 1979 Constitution, it is outside the jurisdiction of the Sharia Court of Appeal. In *Muninga v. Muninga* (1997), it was held that notwithstanding all the amendments introduced by various Decrees or Acts, the provisions of section 242 (2) of the 1979 Constitution is still the law.

It was also the view of the Court of Appeal in this case that the jurisdiction of the Sharia Court of Appeal in land matters is restricted to cases where questions of Islamic personal law is involved and in *Gambo v. Tukuyi* (1997) the court held that the deletion of the word "personal" from the phrase "Islamic personal law" under the 1979 Constitution has not altered the scope or extent of the jurisdiction of the Sharia Court of Appeal.

For the purpose of exercising any jurisdiction conferred upon it by the constitution, or any law, a Sharia Court of Appeal of a State shall be duly constituted if it consists of at least three Kadis of the Court according to the 1999 Constitution, Section 278.

3.6 Customary Court of Appeal of a State

The Constitution empowers any state that desires it to establish its own Customary Court of Appeal.

3.6.1 Composition

A Customary Court of Appeal of a State shall be constituted by a President of the Customary Court of Appeal of the State and such

number of Judges of the Customary Court of Appeal as may be prescribed by the House of Assembly of the State.

The appointment of a person to the office of the President of a Customary Court of Appeal shall be made by the Governor of the State on the recommendation of the National Judicial Council subject to the confirmation of such appointment by the House of Assembly of the State. In the case of a Judge of a Customary Court of Appeal, this shall be made by the Governor of the State acting on the recommendation of the National Judicial Council.

Apart from other qualifications that may be prescribed by the National Assembly, a person shall not be qualified to hold office of a Judge of a President or of a Customary Court of Appeal of a State unless:

(a) he is a legal practitioner in Nigeria and he has been so qualified for a period of not less than 10 years and in the opinion of the National Judicial Council, he has considerable knowledge and experience in the practice of customary law; or
(b) in the opinion of the National Judicial Council, he has considerable knowledge or experience in the practice of Customary Law.

If the office of the President of the Customary Court of Appeal of a State is vacant or if the person holding the office is for any reason unable to perform the functions of the office, or until the person holding the office has assumed those functions, the Governor of the State shall appoint the most senior Judge of the Customary Court of Appeal of the State to perform those functions. Except on the recommendation of the National Judicial Council, such appointment shall cease to have effect after the expiration of 3 months from the date of such appointment, and the Governor shall not re-appoint a person whose appointment has lapsed.

3.6.2 Jurisdiction

A Customary Court of Appeal of a State shall exercise appellate and supervisory jurisdiction in civil proceedings involving questions of customary law. In this regard, a Customary Court of Appeal of a State shall exercise such jurisdiction and decide such questions as may be prescribed by the House of Assembly of the State for which it is established.

In carrying out its duties, a Customary Court of Appeal of a State shall be duly constituted if it now consists of at least three Judges of that Court (1999 Constitution, Section 283).

3.7 Jurisdiction of State Court in Respect of Federal Cases

By the combined effect of sections 6, 236 and 250 of 1979 Constitution, a State court shall have jurisdiction to hear and determine federal cases and of appeals arising out of such cases. This idea is of great value as it is not necessary to have federal courts in respect of federal cases alone and state courts in respect of matters relating to the state courts alone. Sections 6, 236 and 250 of the 1979 Constitution are the same as Sections 6, 272 and 286 of the 1999 Constitution.

However, the Constitutions (Suspension and Modification) Decree 1993 otherwise called Decree No. 107 of 1993 has widened the jurisdiction of the Federal High Court in respect of matters or issues relating to the Federal government and its agencies.

3.8 Tenure of Office of Judicial Officers

Previously, a judicial officer may retire when he attains the age of 60 years, and cease to hold office when he attains the age of 65 years. This position has however been altered by the Constitution of the Federal Republic of Nigeria, 1979 (Amendment) Decree No. 6 of 1997, and the 1999 Constitution Supreme Court Judge now retires at the age of 65 and ceases to hold office at the age of 70 years. The Judicial officers may retire at the age of 60 and shall cease to hold office when he attains the age of 65 years.

3.9 Removal of Judicial Officers from Office

A judicial officer shall not be removed from his office or appointment before his age of retirement except as stipulated by section 292 of the 1999 Constitution, formerly by Section 256 of the 1979 Constitution.

(i) in the case of Chief Justice of Nigeria, President of Court of Appeal, Chief Judge of Federal High Court, Chief Judge of High Court of FCT, Grand Kadi, Sharia Court of Appeal (FCT), President Customary Court of Appeal (FCT) by the President acting on an address supported by two-thirds majority of the Senate;

(ii) in the case of Chief Judge of the High Court of a State, Grand Kadi of a Sharia Court of Appeal of a State or President of a Customary Court of Appeal of a State, by the Governor acting on an address supported by two-third majority of the House of Assembly of the State, praying that he be so removed for his inability to discharge the functions of his office or appointment

(whether arising from infirmity of mind or of body) or for misconduct or contravention of the Code of Conduct;

(iii) in any other case, by the President or, as the case be, the Governor acting on the recommendation of the National Judicial Council that the judicial officer be so removed for his inability to discharge the functions of his office or appointment (whether arising from infirmity of mind or of body) or for misconduct or contravention of the Code of Conduct.

Any person who has held office as a judicial officer shall not, on ceasing to be a judicial officer for any reason whatsoever thereafter, appear or act as a legal practitioner before any court of law or tribunal in Nigeria.

3.10 Determination of Cases and Matters

Upon conclusion of evidence and final addresses, the court shall deliver its decision in writing not later than ninety days after conclusion of evidence and final addresses are furnish all parties to the cause, or matter with duly authenticated copies of the decision within seven days of the delivery thereon. It is not unusual not to get a copy of the judgement on the day its delivery. This however does not vitiate the judgement.

3.11 Establishment of Other Courts or Tribunals

It is not strange to establish tribunals or other courts for the purpose of taking care of specific problems, exigencies or particular affairs or certain affairs. Thus several tribunals are in existence for the purpose of determining particular issues. Such tribunals include Public Property Investigation of Assets Tribunal, Election Tribunals, Code of Conduct Tribunal, etc.

A notable feature of such tribunals is that the enabling law usually determines their composition and jurisdiction. As stated above, they do not operate as regular courts in respect of infiniteness of existence and duration of tenure of members of such tribunals. In certain cases, the decisions of such tribunals are subject to appeal to a higher court. In other cases, appeal is to the Governor or the President.

3.12 Restrictions on Legal Proceedings

No civil or criminal proceedings shall be instituted or continued against certain persons during that period of office. Such persons shall not be arrested or imprisoned during that period either in pursuance of the

process of any court or otherwise. No process of any court requiring or compelling the appearance of such persons shall be applied for or issued:

In ascertaining whether any period of limitation has expired for the purposes of any proceedings against a person to whom this privilege applies, no account shall be taken of the period of office. This restriction shall not apply to civil proceedings in his official capacity or to civil or criminal proceedings in which such a person is only a nominal party.

The persons to who these restriction on legal proceedings apply are persons holding the office of:

(i) President
(ii) Vice-President
(iii) Governor
(iv) Deputy Governor

In this context, "period of office" means 'the period during which the person holding such office is required to perform the functions of the office'

3.13 Appellate Jurisdiction of the Supreme Court

Section 213 (e) of the 1979 Constitution has been expunged. It dealt with the jurisdiction of the Supreme Court in relation to appeals from the Court of Appeal as regards to whether any person has been validly elected to any office under the Constitution or to the membership of any Legislative House or whether the term of office of any person has ceased or the seat of a person in a legislative house has become vacant. Section 246 (3) of the Constitution, 1999 has provided that 'the decisions of the Court of Appeal in respect of appeals from election petitions shall be final'.

3.14 Appeals from Decisions of Presidential Election Tribunals

Appeals from decisions of the Presidential Election Tribunal lie to the Supreme Court which shall hear and determine appeals from decisions on any question as to whether any person has been validly elected to the office of President or Vice-President, under this Constitution or as to whether the term of office of any person as President or Vice-President has ceased". See Section 253 (2) (e) of the 1999 Constitution.

3.15 The Constitution under the Military

The 1966 Coup d'etat led to the abrogation of the supremacy of the 1963 Constitution. For example, Decree No. 1 of 1966 tagged Constitution (Suspension and Modification) Decree 1966 provided: "*Subject to this and any other Decree the provisions of the Constitution of the Federation which are not suspended by subsection 1 above shall have effect subject to the modifications specified in Schedule 2 of this Decree*". The provision to section 1 in Schedule 2 read: "*Provided that this Constitution (the Republican Constitution 1963) shall not prevail over a Decree and nothing in this Constitution shall render any provisions of a Decree void to any extent whatsoever*".

In 1983 when the Military terminated the civilian government in power, a Decree similar in intendment was promulgated. Since 1983, Nigeria has had various Decrees suspending or modifying various sections of the 1979 Constitution. Of particular importance is the Constitution (Suspension and Modification) Decree 1993 otherwise called 'Decree No. 107'. Its section (1) provides: "*The Constitution of the Federal Republic of Nigeria as suspended by the Constitution of the Federal Republic of Nigeria (Suspension) Decree 1993 is hereby restored and amended as set out in this Decree*". Its sub-section 3 states that "*Subject to this and any other Decree made before or after the commencement of this Decree, the provisions of the said Constitution which are not suspended by subsection (2) of this Section shall have effect subject to the modifications specified in the Second Schedule to this Decree*".

Section 5 of this Decree takes out of any court an inquiry into the validity or otherwise of a Decree or an Edict. It states:

> "*No question as to the validity of this Decree or any other Decree, made during the period 31st December, 1983 to 26th August, 1993 or made after the commencement of this Decree or of an Edict shall be entertained by any court of law in Nigeria*".

Section 15 of the Decree establishes the Advisory Judicial Committee whose functions among others include rendering advice to the Provisional Ruling Council on the appointment of the Justices of the Court of Appeal, the Chief Judge and Judges of the Federal High Courts of the States and of the Federal Capital Territory, the Grand Khadi and other Khadis of the Sharia Court of Appeal of the States and of the Federal Capital Territory, Abuja as well as President and other Judges of the Customary Court of Appeal of the States.

In the first Schedule to the said Constitution are contained various amendments to the mode of appointment of the Justices and Judges of various courts, original jurisdiction for the Federal High Court, the High Court of the Federal Capital Territory, Abuja, establishment of a Sharia Court of Appeal and Customary Court of Appeal for Abuja and so on. It is necessary to state that by virtue of this Decree, the Federal High Court has been empowered to handle matters or suits against the Federal Government or any of its agencies in an action for damages, injunction or specific performance where the action is based on any enactment, law or equity.[85]

By virtue of the said Decree 107 of 1993, section 258 of the constitution has been extended to include sub-section 4 which states thus:

> "*The decision of a court shall not be set aside or treated as a nullity solely on the ground of non-compliance with the provisions of this section unless the court exercising jurisdiction by way of appeal from or review of that decision is satisfied that the party complaining of such non-compliance has suffered a miscarriage of justice by reason thereof*".

The implication of the amendments is that in the event of any conflict between the provisions of the constitution and any Decree, the Decree takes precedent.

The Judiciary is the third organ or arm of government. This arm of the government has been regarded as the last hope of any man. Notwithstanding the fact that it is an arm of government, it is usually advocated that it must be independent of the executive and Legislature so as to ensure impartiality of decisions. For example, section 36 of the 1999 Constitution, also identical with section 33 of the 1979 Constitution provides:

> "*In the determination of his civil rights and 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 other tribunal established by law and constituted in suchmanner as to secure its independence and impartiality*".

The Constitution has guaranteed the existence of the judiciary in recognition of the fact that a free, impartial and independent Judiciary is a necessity to a virile judicial system especially in a developing country like Nigeria.

4.0 CONCLUSION

The judiciary as a constitutionally provided arm of government has the unique functions of adjudication and interpreting laws. In this process, it enforces the rights of all within the jurisdiction**.**

5.0 SUMMARY

In this module, you have learnt about the judicial system of Nigeria. You have also learnt about the hierarchy of courts in Nigeria.

6.0 TUTOR-MARKED ASSIGNMENT

To what extent does the constitution guarantee the freedom of the judiciary in Nigeria?

7.0 REFERENCES/FURTHER READINGS

See The New Lexicon Webster's Dictionary of the English Language (Deluxe Encyclopedic Edition) p. 530.

Lord Cave discussing the position of the Judicial Committee of Privy Council in **Nadan V.The King** (1962) A.C. 482, a Canadian case held:

"The presence of invoking the exercise of the Royal Prerogative by way of appeal from any court in His Majesty's Dominions has long obtained throughout the British Empire. In its origin such an application may have been no more than a petitory appeal to the Sovereign as the fountain of Justice for protection against an unjust administration of the laws but if so, the practice has long since ripened into a privilege belonging to every subject of the King in parliament, and was the foundation of the appellate jurisdiction of the House of Lords: but in His Majesty's Dominions beyond the seas the method of appeal to the King in Council has prevailed, and is open to all the King's subjects in those Dominions".

Section 120 of the 1963 Constitution, Laws of the Federation of Nigeria, 1963.

(1995) 3 NWLR (Pt. 385) 513.

Section 215 of the 1979 Constitution, Cap. 62, Law of the Federation of Nigeria, 1990.

Section 217 of the 1979 Constitution, Cap. 62, Laws of the Federation of Nigeria, 1990 and section 236 of the 1989 Constitution Cap. 63, Laws of the Federation of Nigeria, 1990.

Section 288 of the 1979 Constitution, Cap. 62, Laws of the Federation of Nigeria, 1990 and section 247 of the 1989 Constitution, Cap. 63, Laws of the Federation of Nigeria, 1990.

Section 234 of the 1979 Constitution, Cap. 62, Laws of the Federation of Nigeria, 1990 and section 29 of the 1989 Constitution, Cap. 63, Laws of the Federation of Nigeria, 1990.

Section 240 of the 1979 Constitution, Cap. 62, Laws of the Federation of Nigeria, 1990 and section 259 of the 1989 Constitution, Cap. 63, Laws of the Federation of Nigeria, 1990.

Section 245 of the 1979 Constitution, Cap. 62, Laws of the Federation of Nigeria, 1990 and section 264 of the 1989 Constitution, Cap. 63, Las of the Federation of Nigeria, 1990.

Section 210 (2) (a) of 1979 Constitution, section 228 (2) (a) of 1989 Constitution.

Section 210 (2) (b) of 1979 Constitution, section 228 (2) (b) of 1989 Constitution.

Section 211 of 1979 Constitution, section 229 of 1989 Constitution.

Section 211 of 1979 Constitution, section 229 (3) of 1989 Constitution.

Section 211 (4) of 1979 Constitution, section 229 (4) of 1989 Constitution.

See also section 233 of 1989 Constitution. When the Supreme Court sits with 7 Justices, this has been referred to as “full court” under the 1989 Constitution.

See also section 230 1) of the 1989 Constitution.

Section 213 (2) of 1979Constitution. It should be noted that the provision of the 1989 Constitution in section 231 (2) differs from what obtains under the 1979 Constitution.

Section 213 (2) of 1979 Constitution. It should be noted that the provision of the 1989 Constitution in section 231 (2) differs from what obtains under the 1979 Constitution.

Section 213 (6) of 1979 Constitution, section 231 (6) of the 1989 Constitution.

(1991) 5 S.C. 172

(1983) 6 S.C. 158 page 176.

(1995) 2 NWLR (Pt. 375) 110 at 122, 123. See also **Odofin v. Agu** (1992) 2 NWLR 2 NWLR (Pt. 229) 350 at 365.

See section 217 (1) of the 1979 Constitution and section 236 (1) of the 1989 Constitution in this regard.

See also section 236 (2) of the 1989 Constitution.

See section 218 (4) and (5) of the 1979 Constitution and 237 (1) of the 1989 Constitution.

See section 218 (4) and (5) of the 1979 Constitution and section 237 (4) and (5) of the 1989 Constitution.

(1994) 8 NWLR (Pt. 360) 73.

See section 238 of the 1989 Constitution and the inclusion of other courts not mentioned in section 219 of the 1979 Constitution. See also **Adeniji v. Onagoruwa** (1994) 6 NWLR (Pt. 349) 225.

See **Golok v. Diyalpawan** (1990) 3 NWLR (Pt. 139) 411 at 418.

Section 220 (1) of the 1979 Constitution and section 239 (2) of the 1989 Constitution.

Section 220 (2) of the 1979 Constitution and section 239 (2) of the 1989 Constitution.

Section 220 (1) of the 1979 Constitution and section 240 (1) of the 1989 Constitution.

Section 220 (a) of the 1979 Constitution and section 241 (a) of the 1989 Constitution.

(1994) 1 NWLR (Pt. 319) 207.

See also section 246 of the 1989 Constitution **Adeniji v. Onagoruwa** (1994) 6 NWLR (Pt. 349) 225.

See also section 242 of the 1989 Constitution.

See section 223 (2) of the 1979 Constitution and section 242 (2) of the 1989 Constitution.

See also section 243 (1) of the 1989 Constitution.

(1990) 3 NWLR (Pt. 139) 411at page 419.

Section 225 of the 1979 Constitution, see also section 244 of the 1989 Constitution.

Section 266 of the 1979 Constitution, and section 245 of the 1989 Constitution.

See **Enang v. Obeten** (1979) 11 NWLR (Pt. 528) 255. See also **Adegoke Motors Ltd. v. Adesanya** (1989) 3 NWLR (Pt. 109) 250.

See **Osumanu v. Kofi Amadu** 12 WACA 437; see also **Kanada v. Governor of Kaduna State** (1986) 4 NWLR (Pt. 35) 361.

See fnt 47

See **Enang v. Obeten** supra

See **Enang v. Obeten** supra

See **Ganiyu Adisa Motayo v. Commissioner of Police** 13 WACA 114 (1997) 11 NWLR (Pt. 528) 255.

See Federal Revenue Court Decree No. 13 of 1973.

See Aguda T.A., **The Challenge of the Nigerian Nation: An Examination of its Legal Development 1960 – 1985** Heinemann Ltd. (1985) pg. 50.

See also section 247 of the 1989 Constitution.

See section 229 of 1979 Constitution and section 248 of the 1989 Constitution.

(1973) All NLR (Pt. 2) 208

In Jammal Steel Structures v. A.C.B. Ltd.

(1981) 5 S.C. 81supra

See section 234 (1) of the 1979 Constitution and section 253 (1) of the 1989 Constitution.

See section 236 of the 1979 Constitution and section 254 of the 1989 Constitution.

See also section 255 of the 1989 Constitution.

See M.B.A.N. **Owoniboys Technical Service Ltd.** (1994) 8 NWLR (Pt. 365) 705.

See section 240 (1) of the 1979 Constitution and section 259 (2) of the 1989 Constitution.

See section 240 (2) of the 1979 Constitution and section 259 (2) of the 1989 Constitution.

See section 241 of the 1979 Constitution and section 260 of the 1989 Constitution.

See section 242 (1) of the 1979 Constitution and section 261 of the 1989 Constitution.

(1991) 11 NWLR (Pt. 528) 333. See also **Garba v. Dogon-Yaro** (1991) 1 NWLR (Pt. 165) 102 and **Usman v. Kareem** (1995) 2 NWLR (Pt. 379) 537.

(1997) 11 NWLR (Pt. 527) 01.

(1997) 10 NWLR (Pt. 526) 591.

See section 243 of the 1979 Constitution and section 362 (1) of the 1989 Constitution.

See section 245 (1) of the 1979 Constitution and section 264 (1) of the 1989 Constitution.

See section 245 (2) of the 1979 Constitution and section 264 (2) of the 1989 Constitution.

See section 246 of the 1979 Constitution and section 265 of the 1989 Constitution.

See section 247 of the 1979 Constitution and section 266 of the 1989 Constitution.

See section 248 of the 1979 Constitution and section 267 of the 1989 Constitution.

See also sections 6, 255 and 270 of the 1989 Constitution.

See section 255 of the 1979 Constitution and section 275 of the 1989 Constitution.

Section 276 of the 1989 Constitution Provides a more Comprehensive provision in respect of removal of the Chief Judge of a State from Office.

Unlike section 258 of the 1979 Constitution which states that the Court shall deliver its judgement in writing not later than 3 months after the conclusion of evidence and final addresses, section 280 of the 1989 Constitution states that the judgement should be delivered not later than 90 days after the conclusion of the evidence and final addresses.

See also sections 246 of the 1979 Constitution and section 265 (1) of the 1989 Constitution in respect of appointment of President and Judges of the Customary Court of Appeal of the State.

The first Military Coup d'etat in Nigeria occurred in 1966.

See **Onyenucheya v. Military Administrator of Imo State** (1997) 1 NWLR (Pt. 482) 374.

UNIT 2 JUDICIAL REMEDIES

CONTENTS

1.0 INTRODUCTION

In no part of the constitution can be found provisions relating to constitutional remedies except in relation to section 42 of the 1979 Constitution and section 44 of the 1989 Constitution with the side note "Special jurisdiction of High Court and legal aid".

Having regard to the above, the option left is to consider some recognised constitutional remedies. Such remedies include certiorari, prohibition, mandamus, habeas corpus, injunction and declaration. It is necessary to start with the general remedy relating to breach of fundamental human rights.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

identify judicial remedies
differentiate between the different types of remedies available to an aggrieved person
identify the historical circumstances that brought about all the remedies.

3.0 MAIN CONTENT

3.1 Analysis of Section 42 of the 1979 Constitution and Section 45 of the 1989 Constitution

Section 42 of the 1979 Constitution provides:

"Any person who alleges that any of the provisions of this chapter has been, is being or likely to be contravened in any state in relation to him may apply to a High Court in that State for redress."

The chapter in focus deals with Fundamental Rights. From this section, a person has the right to go to a High Court for redress where there is an apprehension that his right may, has been or is being trampled upon.

In furtherance of this objective, section 42(2) of the constitution provides:

"Subject to the provisions of this Constitution, a High Court shall have original jurisdiction to hear and determine any application made to it in pursuance of the provisions of this section and may make such orders, issue such writs and give such direction as it may consider appropriate for the purpose of enforcing or securing the enforcement within that state of any rights to which the person who makes the application may be entitled under this chapter."

Sub-section (3) of this section empowers the Chief Justice of Nigeria to make rules with respect to the practice and procedure of a High Court for the purposes of this section. In line with this, the Fundamental Rights (Enforcement Procedure) Rules, 1979 were made. Its date of commencement was put at 1st January, 1980.

The Rules contain the requisite procedure for the enforcement of one's Fundamental Rights under the Constitution. For example, Order 1 Rule-l requires that leave of the court must first be sought by an *ex parte* application to the appropriate court. This must be supported by a statement setting out the name and description of the applicant, the relief sought, the grounds on which it is sought and supported by an affidavit verifying the facts relied *on.*

The court may impose such terms as to giving security for costs as it or he thinks, fit. The granting of leave under this rule shall operate as a stay of all actions or matters relating to or connected with the complaint until the determination of the application or until the court or judge otherwise orders[l].

In the language of Order I Rule 3(1):

"Leave shall not be granted to apply for order under these Rules unless the application is made within twelve months from the date of the happening of the event, matter, or act complained of, or such other period as may be prescribed by any enactment or, except where a period is so prescribed, the delay is accounted for to the satisfaction of the court or judge to whom the application for leave is made."

After leave has been granted to apply for the order being asked for, the application for such order must be made by notice formulation or by originating summons to the appropriate court. Unless the court or judge granting leave has otherwise directed. There must be at least eight clear days between the service of the motion *or s*ummons and the day named therein for the hearing. In the motion must be contained an affidavit giving the names and addressee of, and the place and date of service on, all persons who have been served with the motion or summons. This must be filed before the motion or summons is listed for hearing, and, if any person who ought to have been served has not been served, the affidavit must state the fact and the reason why service has not been effected, and the said affidavit shall be before the Court or judge on the hearing motion or summons.

There are other provisions in the Rules relating to enforcement of fundamental rights.

As stated above, the constitutional remedies usually asked for are Prohibition, certiorari, mandamus, habeas corpus, injunction and declarations. Notwithstanding the fact that these remedies are not specifically mentioned, they could be made use of In *Burma* v. *Usman Sarki*, Udo-Udoma pointed out that:

".In the absence of a prescribed procedure for attacking the exercise of powers by a Minister, the normal civil processes and the principles of general law, including the prerogative orders, are of course, available to be invoke to advantage by any aggrieved person whose rights have been in fringed.

These remedies will now be examined.

3.2 Prohibition and Certiorari

These two remedies are of great constitutional importance. The orders of Prohibition and certiorari could be discussed together. Prohibition can be used as a way of preventing the performance of an administrative action which is judicial in nature. Certiorari enables a superior court or

tribunal to call upon an inferior court or tribunal to certify the record upon which the inferior court or tribunal based its decision of a judicial or quasi-judicial nature. In *R.* v, *Electricity Commissions Ex parte London Electricity Joint Committee CO.* Lord Atkin held:

"Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially act in excess of their legal authority they are subject to the controlling jurisdiction of the Queen's Bench Division exercised in the writs."

Thus where the act complained of is judicial in nature certiorari or prohibition can be made use of. Where the act has not been concluded or where a decision has not been reached, prohibition is the appropriate remedy to ask for. In the case of a concluded act, certiorari is the appropriate remedy. Adeoba J. explaining when certiorari will lie as a remedy held in Owolabi & 2 Ors. v. Permanent Secretary, Ministry of Education thus

(a) If the respondent has authority to determine the issue and also has a duty to act judicially in coming to a decision then an order of certiorari will lie against the respondent if it exceeded its jurisdiction or acted contrary to the rules of natural justice.

(b) It is essential that the person or body to whom the order is to be directed must have authority to determine the issue i.e. it must be a tribunal.

(c) If the body is held to be a tribunal the question arises as to whether the tribunal is bound to act judicially.

(d) If the body or person is bound to act judicially, if it exceeds its authority then its act can be removed by an order of certiorari for the purpose of having it quashed.

In the Queen Ex Parte Ojiegbo Ikoro of Ngodo V. The Governor Eastern Region & 5 *Anor,* in 1955, a Native Court presided over by a District Officer, gave judgment against the respondent declaring the appellant to be the owner of certain land and granting him an injunction. The appeal from that decision was heard by a senior officer, who varied the judgement by dividing the land between the parties and by enjoining each party against trespass on the other's land as divided.

The Senior District Officer had no jurisdiction to hear an appeal from a Native Court which had been presided over by a District Officer. The governor dismissed an appeal from the Senior District Officer's

decision. The appellant instituted proceedings in the High Court; Eastern Region for an order of certiorari for the purpose of bringing into court the judgements of the Senior District Officer and of the Governor and having them quashed.

The High Court refused to make the order nisi absolute, upon the ground, the Senior District Officer having no jurisdiction to hear the appeal, the proceedings were an absolute nullity and certiorari does not lie in such circumstances, The appellant appealed to the Federal Supreme Court. Before the Federal Supreme Court the respondent contended that as the appellant had submitted to a hearing by the Senior District Officer he could not object later to his want of jurisdiction to hear the appeal or, alternatively, that the court, in its discretion, should refuse the order of certiorari. The Court held that certiorari could lie to quash a decision of a Senior District Officer, who without jurisdiction heard an appeal from a native court. The Court also held that the governor's confirmation of the decision of a senior district officer without jurisdiction was liable to being quashed by certiorari.

In *the Queen: Ex Parte Laniyan Ojo* ll. *Governor-in-Council Western Region,* one Lawani Kehinde was appointed to chaplaincy which came within the provisions of Part N of the Western Nigeria Chiefs Law, 1957, which appointment was approved by the Governor-in-Council by Notice dated July 20th 1959, published in the Gazette of 6th August, 1959. The appellant applied to the High Court for an order of certiorari against the (Governor-in-Council for the purpose of quashing the approval of the appointment of Lawani Kehinde. The application was made on the ground:

(i) that the Governor-in-Council had no jurisdiction to grant approval to the said appointment which was made without complying with section 11 of the Chiefs Law 1917, and consequently not an "appointment" within the Chiefs Law 1957;

(ii) that before granting the said approval and recognition the Governor-in-Council failed to act judiciary by failing to consider a petition protesting against the Iid "appointment" forwarded to the Governor-in-Council as soon as the Labebe Ruling House knew of Lawani Kehinde's recommendation for approval. The court held inter alia that despite express words taking away certiorari, the court issued. It for manifest defect of jurisdiction in the tribunal which made the order under review.

Dr. Smith' has rightly highlighted the grounds for awarding certiorari and prohibition. They are: (a) Lack of jurisdiction

(1) Breach of the rules of natural justice or in relation to Nigeria, non observance of the provision of section 33 of the 1979 Constitution.

(c) Error of law on the face of the record. (d) Fraud or collusion.

3.3 Mandamus

The essence of the order of mandamus is the need to secure judicial enforcement of public duties. In *R. v* Lord Mansfield, it was held that:

"it was introduced, to prevent disorder from a failure of justice, and defect of police. Therefore it ought to be used upon all occasions where the law has established no specific remedy, and where justice and good government there ought to be done."

In *Banjo* & *Ors.* v. *Abeokuta Urban District Council,* section 3(1) of the Abeokuta District Council (Control of Traffic) Bye Laws provided thus:

"no person shall operate or cause to be operated any stage or hackney carriage within the area of the jurisdiction of the Council save under and in accordance with a permit issued by the Council."

The applicants who were taxi owners, applied to the respondent council for permits to operate their taxi cabs in the area of jurisdiction of the Council. They paid necessary fees and filled the required forms. The Secretary to the Council replied that in view of the large number of taxis operating in the Council's area of jurisdiction, no further permits would be issued.

In an application in the High Court for an order of mandamus to be directed against the respondent council to compel the Council to issue the permits to the applicants, it was on behalf of the .applicants that section 3(1) of the Abeokuta Urban District Council (Control of Traffic) Bye Laws gave the respondent council no discretionary power as they were bound to· issue taxi permits and had no discretion to refuse after necessary fees had been paid and required forms filled. It was held that the power of the High Court to grant an order of mandamus was discretionary and that it could only be granted against a person bound to perform a duty of a public nature. The Court laying down a general rule in this respect held further that if a body against whom an order of mandamus is sought is shown to have departed strictly from the conditions laid down in the law empowering that no body to perform its public duty, an order of mandamus would lie against it to compel it to act according to law. The court reached a similar decision in *The Queen, Ex Parte Chief Sunday Odje* & *Ors* v. *Western Urhobo Rating*

Authority to. The applicants had appealed against a tax assembly by the respondents. They subsequently brought this application asking for leave of the court to apply for an order of mandamus to compel the respondents to grant a stay of execution i.e. not to collect income taxes from the applicants until their appeals against assessments are heard. It was argued for the applicants that by virtue of section 51 (I) (b) of the Western Region Income Tax Law, Western Region Cap 48, a stay of collection, was automatic once an appeal against an assessment of tax had been lodged~ that the application was for an order of mandamus to compel the respondents to grant the stay of collection and not merely an application for such a stay. The court held inter alia that the power to make an order of mandamus is a discretionary one which will not be exercised by the court unless there is imposed upon the person against whom the order is sought a public duty to do the act sought to be compelled to be done. The court further held that an order of mandamus will not lie to compel a person to do an act which is in his general discretion to do or to refrain from doing.

3.4 Habeas Corpus

Section 32 of the 1979 Constitution provides that:

"Every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the following cases and in accordance with a procedure permitted by law:

(a) in execution of the sentence or order of a court in respect of a criminal offence of which he has been found guilty;

(b) by reason of his failure to comply with the order of a court or in order to secure the fulfillment of any obligation in posed upon him by law:

(c) for the purpose of bringing him before a *court* in execution of the order of a court upon reasonable suspicion of his having committed a criminal offence, or to such extent as may be reasonably necessary to prevent his committing a criminal offence;

(d) in the case of a person who has not attained the age of 18 years, for the purpose of his education or welfare;

(e) in the case of a person suffering from infectious or contagious disease, persons of unsound mind, persons addicted to drugs or alcohol or vagrants for the purpose of their care or treatment or the protection of the community; or

(f) for the purpose of preventing the unlawful entry of any person into Nigeria or of effecting the expulsion, extradition or other lawful removal from Nigeria of any person or the taking of proceedings relating thereto

Provided that a person who is charged with an offence and who has been detained in lawful custody awaiting trial shall not continue to be kept in such detention for a person longer than the maximum period of imprisonment prescribed for the offence".

Thus, where a person is kept in an unlawful custody, he has the right to ask for his personal liberty. The appropriate remedy to seek in this regard is a writ of habeas corpus. Lord Birkenhead describing this order in *Secretary of State for Home Affairs VS.* 0' *Brien* held:

"It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. It has through the ages been jealously maintained by courts of Law as a check upon the illegal usurpation of power by the executive at the cost of the liege."

De Smith 2 described the writ of habeas corpus as a renown contribution of the English common law to the protection of human liberty. The writ of habeas corpus is also of great constitutional importance in Nigeria. In *Chief Alhaji Agbaje v.* C 0.P, on the application of Chief Abdul Mojeed Mobolanle Agbaje, *the High Court, Ibadan* caused a writ of habeas corpus to issue on 12 June, 1969 on the Commissioner of Police, Western State.

The Substance of the applicant's complaint was that he was unlawfully detained in the police station, Ibadan by the Commissioner of Police as from 31 May, 1969 to 12 June, 1969 when his application was heard by the High Court. He swore to an affidavit deposing that he repeatedly demanded the reason or authority for his detention at the police station, but no one answered him. He wrote letters to the same effect but he got no reply. Instead, he claimed to have been treated rather roughly.

The Commissioner of Police filed a return to the writ. In it, he admitted detaining the applicant as aforesaid, and based his authority for so doing, under *Orders Exits 1 and 2,* said to have been made by the Inspector-General of Police, who it was said, acted under and by virtue of powers vested in the Inspector-General of Police by section 3(1) of the Armed Forces and Police (Special Powers) Decree No. 24 of 1967. The Court in delivering its judgement held that the writ of habeas corpus is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from unlawful or

unjustifiable detention when in prison or in private custody and that it is applicable as a remedy in all cases of wrongful deprivation of personal liberty. The court cited with approval the Halsbury's Laws of England 3rd Edition and *R. v. Governor of Brixton Prison, Ex Parte Sarno*. It also quoted with approval the case of *Singh v. Delhi* where the court held that "This court has often reiterated before that those who feel called upon to deprive other persons of their personal liberty in the discharge of what they consider to be their duty, must strictly and scrupulously observe the forms and rules of the law". The court held that the detention of the applicant under the circumstances of this case was unlawful. The court reached a similar conclusion in the case of *Re Mohammed Olayori.*

3.5 Injunction

An Injunction is an equitable remedy. There are many variants of this remedy. One may have in view prohibitory or mandatory Injunction, preliminary interlocutory. What is certain is that whatever variant one-bosom view, 'its usefulness lies in the fact that it is an order of court addressed to a Party with the aim of refraining him from doing or compelling him to do a particular act. A perpetual Injunction gives a definite order for a durable period when used in contradistinction to an interlocutory Injunction. One advantage an injunction has over other remedies is the flexibility of its application and grounds that judge may consider before; granting an order of injunction. The cow explaining the meaning and grounds for granting an interim, and interlocutory order of injunction in *Kotoye vs. Central Bank of Nigeria* & 7 *Ors.* made the following points.

(i) "Ex parte" in relation to injunctions is properly used to contradistinction to "on notice" and both expressions which are mutually exclusive, more strictly rather refer to the manner in which the application is brought and the Order procured:

(ii) An applicant for a non-permanent injunction may bring the action ex parte that is without notice to the other side as appropriate. By their very nature injunction granted on ex parte applications can only be properly interim in nature. They are made, without notice to the other side, to keep matters in status quo to a named date, usually not more than few days, or until the Respondent can-be put on notice.

(iii) What is contemplated by the law is urgency between the happening of the event, which is sought to be restrained by injunction and the date the application could be heard if taken after due notice to the other side.

The court also held in this case that application for interlocutory injunction are properly made on notice to the other side to keep matters in status quo until the determination of the suit. The issues which a court will consider in granting an interlocutory injunction, after avoiding controversial issues of fact are:

(i) The strength of the applicant's, case. What needs be shown is only a real possibility, not a probability of success at the trial, that there is a serious question to be tried.

(ii) Once the applicant gets over the initial handle of showing that there is a serious question to be tried he must show that the balance of convenience is on his side that is that mere justice, will result in granting the application than in refusing it, the onus of proving that the balance is on his side is that of the applicant.

(iii) The applicant, to succeed, even if he had shown that he has a good case and that the balance of convenience is on his side, must furthermore show that damages cannot be an adequate compensation for his damage, if be succeeds at the end of the day.

(iv) Conduct of the parties – For example, in bringing the application will defeat it ~se su~ a delay postulates there is no urgency in the matter and destroys the very basis for a prompt relief by way of interlocutory injunction and, in any opinion, rightly made, as to the 'rights 'of the parties under contracts, without waiting for some event to happen, as, for instance, for a ship to arrive at its destination, in order to determine the result, of the contracts and with the exact causes of action might be. In my opinion under order XXV rule 5, the power of the court to make a declaration where it is a question of defining the rights of two parties, is almost unlimited; I might say only limited by its own discretion. The discretion should of course be exercised judicially, but it seems to me that the discretion is very wide. "

Where an individual claims that his right has been trampled upon by any person or agency, be it private or public he has the right to apply to court for a declaration or for a demotion and an injunction. Where the, right that is sought to be asserted is a public wrong, the person seeking the declaration must show that he has suffered damages over and above that of any other person. In *Hope Harriman* v. *Mobolaji Johnson* the court quoted with approval the statement in the Halsbury's Laws of England Vol. 22 that the court will not make a declaratory judgement where the" trisection raised is purely academic or the defamation would be or embarrassing.

The court in *Hope Harrison* v. *Col. Mobolaji Johnson* held, thus: .' ..... no court exists for the purposes of indigenous what from the start would be a completely wasteful and useless exercise. All courts in every part of the civilized world are jealous of their jurisdiction as well as their powers and as such are unwilling to indulge in any exercise which will bring about principle of contempt. The granting of a declaratory right offering is discretionary and it must always be exercised within the care, caution and judicially. ..... "

A Court will therefore not give *a declaratory the issue to decided is purify*, or A declaratory order may be an effective remedy. It is however usual to couple it with an order for an injunction.

3.6 Summation and Comments Judicial Remedies

The general notion of Judicial remedy is that where there is a right, there must be a remedy. This notion is graphically and succinctly expressed in the latin words as "ubi jus ibi remedium"

It is therefore of utmost importance that Constitutional wrongs which consist on the infringement at another's legal rights must be redressed or should be repressible. But in going through the provisions of the Nigerian Constitution, there appears to be no clear cut remedy for the seeming infringement of legal rights, hence result must be made in the first instance to the law of Tort whose province is to allocate responsibility for injurious conduct. (See Lord Denning in 63 LQR517).

Also these common law rights were often being utilised with equitable remedies to correct administrative and executive wrong -of the people in Government.

However after the historical sojourn of the writs of mandamus, prohibition and certiorari, what we now have are the orders of Mandamus, prohibition and certiorari which are now in vogue to curb the excesses of the Executive actions.

These orders have been adjudged nowadays to be adequate for the protection of an aggrieved person.

For instance in *Burma Vs. Usman* Sarki 24(1962)'ALL N.L.R. Hon. Justice Udo Udoma had these to say:

1) 1n the absence of a prescribed procedure-for, attacking the exercise of powers by a Minister, the normal civil processes and the principles of general law, including the prerogative orders are of course, available i. e. to be invoked to advantage by any aggrieved person whose rights have been infringed”

However to be able to invoke successfully these Remedies, the following conditions must be complied with: An applicant for the Order must establish that:

1.The breach of the duty which he seeks to be performed is an imperative public duty bestowed on the respondent to do;

2.He must also show that he had asked for this duty to be done by the authority responsible and he has been denied such a performance;

3.He prove also that he has a substantial personal interest in the performance of the duty;

4.He must ensure that the Court to which he has brought his application has jurisdiction to entertain the action;

5.Lastly must be noted that an order of mandamus is never granted to enforce a discretionary power; because the Court can not enforce a respondent to exercise his discretion in a particular way. See *Lagunju Vs. Araoye2'* (1959) 4 FSC 154.

And this was graphically stated in *R* Vs. *Coltam (1908)* I QB. 802 and *R* Vs. *Man Mouthshire Justice Ex-Parte Heaver'* (1913) 10 LJ. 788 as follows:

"Where a statute Confers discretion to do or nor to do a particular thing, the Court will not by mandamus dictate that it be done, and provided that the discretion has been exercised bona fide and upon relevant materials, the Court, will not interfere by mandamus to correct an error either of law or fact in the determination of the subordinate tribunal because the Court, in determining whether or not mandamus should issue, is not exercising appellate jurisdiction".
6.But if a body against whom an order of mandamus is sought has departed strictly from the conditions laid down in the law empowering it to perform its public duty, mandamus will lie against it. See such cases like *R* V s. *Dodds* (l905). 2 KB 4Q; R. Vs. 11 Jomas (1892) 1QB. 426 and RVs. *Bowman* (1898) 1 QB. 663.

An order of certiorari is maintainable/sustainable against any adjudicatory body exercising judicial or quasi judicial power; it will therefore not lie if the body is exercising an administrative or other power like ministerial which is neither judicial nor quasi-judicial.

1. A person can bring certiorari application to quash any judgement that is obtained by fraud as it was done in *R* Vs. *Gillpart* (1884) 12QB. 52.,
2. He can bring such an application also if the body has acted in

violation of the principles of natural justice before it arrived at a decision.

3. Certiorari will lie if the decision of the lower Court appears on the face of the record to be erroneous in point of law, or if the tribunal decided the case in excess of its jurisdiction, or by wrongfully assuming jurisdiction;

4. Certiorari will never lie to quash the decision of the Sharia Court and that of the Customary Court of Appeal in Nigeria for it is continue to other adjudicative bodies lower than either the Sharia Court of the Appeal Court;

5. Any applicant who wants to avail himself of this remedy must do so in good faith and after leave has been taken he must put the other person on NOTICE within the time stipulated by law.

6. An applicant must apply for this relief within six months after the making of the order sought to be quashed see *Queen* V *The Judge Western Urhobo - Grade 'B' Cus tomary Court .Ex-Parte Sunday Odje.*

7. Under order 59 Rule 5(la) R.S.c. in 1961, Leave to ap ply for the·order of Prohibition, Certiorari, and Mandamus lapse unless it is put on the list for hearing within 14 days after leave has been granted; *The Queen* V *Cus tomary Court Grade 'A': Ilesha* & *Another* (1961) ANLR (pt IV) filed at 813.

8. Lastly it must be known that in an application for certiorari, it is mandatory that the application *ex-parte should* be accompanied by a statement which should contain nothing more than the name and the description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavit verifying the facts relied on See *The Queen* Vs. *Azigbo and others* (1961) WNLR 37 at page.

This is available to secure the release of persons unlawfully detained. *See Ogunwunmi* V. *Federal Attorney General* (1973) 4 CCHCJ 52 at 54.

In *Re: Olayori Others (l969)* 2 A.N.L.R. 298 at 309 and cases cited under our chapter on "The Rule of Law". But it must be noted that an applicant must act in this regard with utmost good faith. This is the ratio decidendi brought out in the celebrated case of *The Queen v. The Alake of Abeokuta and Others*' (1960) WRNLR 228 at 230.
An order of Prohibition like the "order of Certiorari" lies only in respect

of judicial acts *Arzika* vs. *Governor, Northern Nigeria* (1961) NRNL 5 at 6 Prohibition lies against any Court that lacks jurisdiction to entertain a case before it see' *Katabca* V. *Boust* (1952-55) 14 WACA 281 at 282 Put succinctly an order of prohibition will be granted when any body of person having authority to determine questions affecting the rights of the subjects, and having the dottiest act judicially or quasi judicially acts in excess of its legal authority. It will also lie when there is a want of jurisdiction or excess of jurisdiction; and if an inferior Court has no jurisdiction, the fact that an appeal lies to some Court from its decision does not prevent this order of prohibition from being made. See *The Queen* V s. *The Governor in Council Western Nigeria, Ex-Parte Ishmael Dbaemi Green Adebo* (1962) WNLR. 93 at 97, and Queen Vs. Governor-in-Council Western Nigeria,43 Ex-Parte Mustapha Oyebola (1962) WNLR 360 at pages 364-365.

Please note that the fact that the applicant has another remedy for him to utilise is not a bar to him not to avail himself of this Order of Prohibition.

And finally must be noted that an Order of Prohibition will not be made against either a Police Officer who exercises a judicial function or to prohibit an administrative or ministerial act. See *District Commissioner* Vs. *Patterson* (1944) 10 WACA 128 at 130 - 131, and see also the case of *I. G.P.* V s. *Oke* (1958) LLR 45 at 46 which are very explanatory of these contentions.

In my book on~ "Principles of Civil -Litigation", I wrote as follows on this remedy and circumstances when it will not avail any applicant.

Injunctions whether Interim, Interlocutory or perpetual are not granted in vacuo, but only to protect a right which is being threatened.

In other words, an Injunction can only be granted to support or protect a legal right. See *Commission for Works, Benue State Vs. Devcon Lttf'* (1983) (pt. 83) 40 at 442.

An Injunction is an equitable remedy and the grant of it depends on the discretion of the judge; while this discretion must be exercised both judicially and judiciously.

Therefore an injunction being an equitable remedy, he who comes to it must come with clean hands.

There have been many grounds to be taken into consideration before an application for interlocutory Injunction could be granted - but the more acceptable view becomes that the applicant needs only show:

(a) that he has a right which ought to be protected pending the determination of the substantive action; and
(b) that there is a serious issue on the evidence before the judge between the parties to be *tried 1Jbeya Memorial Hospital* V. *A. G. of the Federation* (1987) 3 NWLR (Pt. 60) 325 *Ladunni* V. *Kukoyi* (1972) 1 ALL NLR (pt. I) 133; *Egbe* V. *Onogu* (1972) 1 ALL NLR 95;

It therefore means that the essence of the granting of Injunction is to protect the existing legal right or of recognisable right of a person from unlawful invasion by another.

In *Kotoye* Vs. *C.B.N. case,* the Supreme Court laid down the following factors to be taken into account before granting any application of Interlocutory Injunction to wit:-

1.The strength of the applicant's case in the substantive suit, and that there is a serious issue to be tried.

2.That the balance of convenience is on the side of the applicant. The onus of proof of which is on the applicant. See *Missini and Ors.* Vs. *Balogun* - (1968) 1 *ALL NLR 318.*

3.That monetary damages will not be an adequate compensation for injury resulting from the violation of his right if he succeeds in the action.

Implicit in the conditions laid down are the essential requirements that the evidence must disclose that the applicant has a legal right to bring the substantive action on which the application is based and that he has established a prima facie case to the Injunction. See *Ladunni v Kukoyi and Ojukwu* V. *Governor of Lagos (1986)* 3 NLR (Pt. 26) 39 Please note that the applicant must establish" a prima facie case" before he succeeds, no longer represents the law.

The law as it now stands requires that the applicant needs only to show that there is a substantial issue to be tried in the suit; This is a rule of convenience which has gone a long way to eliminate or reduce the need to try issues of fact twice; first in the application for Interlocutory Injunction, and secondly in the substantive suit.

Once therefore the matter is one that ought to be restrained by Injunction, and the applicant shows that there is a substantial issue to be tried, that also the balance of convenience is on his side, and that an irreparable damage will be done to his case if that Injunction is not

granted, and that he is prepared to give an undertaking for damages, the application ought to be granted, unless of course the Court prefers to accelerate the hearing of the suit".

The Court is under a duty to examine the affidavits of the applicant and the respondent in order to ascertain whether the applicant has established that there is a serious question to be tried and that he has a right which ought to be protected.

3.7 When Injunction Will be Refused

The Court will not grant an Injunction however strong the applicant's case may appear to be where the damages in the measure recoverable at common law would be adequate and the Respondent would be in a financial position to pay. *Duurji* V. *Zaria Hotel Ltd.* (1992) 1 NWLR (pt. 216) 124 ration 2, 3. Please note that mere Inconvenience without a property right in the subject matter of the Complaint is not enough to entitle an applicant to an order of Interlocutory Injunction.

Injunction will be refused where to grant it will amount to a condonation of illegality and such actionable wrong of trespass and nuisance. "Law and Lawlessness are strange bed fellows under the rule of Law".

Under the rule of law everything is presumed against the law breaker, and as against the person who asserts a superior right, the law does not give its protection to a trespasser.

We can not surrender the machinery of law to the aberration of lawlessness; whereas law and lawlessness are strange bed fellows under the law. *SeeAkapo V. Habeeb*- (1992) 6 NWLR (pt. 247) 266 at page 275 per NNAMEKA·AOU JSC at Page 304.

Injunction will be refused if the strength of the applicant's case is *weak.Ogbonnaya* Y. *Adapalm* Ltd (1993) 6 KLR 89 at ratio *S* "In the exercise of its discretion to grant an Interlocutory Injunction, the Court must have regard to the strength of the claim vis-a-via the strength of the defence and then decide what best to do in the circumstances.

An application for injunction will be refused where if granted opportunity will be given to the grantee to sell all the land away and alter its character. See *Igwe* V. *Kalu* (1993) 4. KJ "R 3 3 at page 3 S ratio 3 and 4.

An Injunction will be refused if an order for accelerated hearing is

given. Whenever it is possible to accelerate the hearing of a case .instead of invading through massive affidavits, and the hearing fleshy argument on interlocutory Injunction. the Court should accelerate the hearing and decide finally on the rights of the parties. *John Holt (Nig) Ltd.* V *Holts African Union of Nigeria and Cameroon 2(l963)* 2 SC NLR 383; *Nigeria Civil Service Union. EMie1J64* (1985) 3 NWLR{pt. 12) 185.

4.0 CONCLUSION

You have learned about the relationship between fundamental human right and the remedies available in case of a breach. You have learned the various types of remedies available and how it can be enforced in the law court.

5.0 SUMMARY

In this unit, you have learnt that there are five different types of judicial remedies to a breach of fundamental human right i.e. Mandamus, Injunction, Certiorari, Prohibition, Habeas Corpus, etc.

6.0 TUTOR-MARKED ASSIGNMENT

1. Under what condition can injunction be refused?
2. What is the main difference between ex-parte injunction and interlocutory injunction?
3. Explain the term ‘Mandamus’.
4. Describe the effect of an order of certiorari.

7.0 REFERENCES/FURTHER READINGS

Toriola Oyewo: Constitutional Law and Procedure in Nigeria.

The 1999 Constitution of the Federal Republic of Nigeria.

K.M. Mowoe (2002). Constitutional Law in Nigeria.

Ben Nwabueze (1982). Presidential Constitution of Nigeria.

UNIT 3 NATURAL JUSTICE AND FUNDAMENTAL RIGHTS (ENFORCEMENT PROCEDURE)

CONTENTS

1.0 INTRODUCTION

By chapter IV of the 1979, 1989 and 1999 Constitutions of Nigeria, provisions are made for certain fundamental human rights.

These fundamental rights deal mainly with:

(a) Right to life
(b) Right to dignity of human person
(c) Right to personal liberty
(d) Right to fair hearing
(e) Right to private life
(f) Right to freedom of thought, conscience and religion
(g) Right to expression and the press
(h) Right to peaceful assembly and association
(i) Right to freedom to movement
(j) Right to freedom from discrimination
(k) Right to own property, and
(l) Compulsory acquisition of property.

The federal government realizing the importance of these rights therefore made the following provision for their enforcement.

For instance, the High Court of a state has original jurisdiction to hear and determine any application brought to it from any person who alleges that any of the provisions of Chapter IV has been, is being or is likely to be contravened in relation to him. Thus and accordingly a person who s or likely to be affected by a contravention of any of the provisions contained in fundamental rights may apply to a high court for

redress.
And on hearing the application, the High Court may make such orders, issue such writs, and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement within that state or in the Federal Capital Territory Abuja, of any rights to which the person who makes the application may be entitled under this chapter.

Provisions also are made in the said Constitutions for legal aids to be given in order to help those who are considered indigent so as to enable them prosecute their rights accordingly when necessities demand.

Also, it is stated in the Constitutions that the Chief Justice of Nigeria may make rules with respect to the practice and procedure of a high court and procedures made are contained in appendix "B" attached.

These are pertinent discussions on the nature and value of Natural justice in Nigeria for law without enforcing mechanisms are sterile laws since they serve no utility purpose to any person or persons.

Therefore, should any person be denied of his constitutional right to fair hearing, or should a tribunal or any adjudicative body or process refuse to hear his own side of the case before affixing punishment and or should a procedure meant for determining disputes be abridged or abrogated when trying his case, then he can come to court to seek for redress under the fundamental human right enforcement procedure.

Also should a person charged with a Criminal Offence be denied of any of the following pre-requisites- viz

(a) To be informed promptly in the language that he understands and in detail of the nature of the offence.

(b) To be given adequate time and facilities for the preparation of his defence

(c) To defend himself in person or by a legal practitioner of his own choice.

(d) To examine in person or by his legal practitioner the witnesses called by the prosecution before any Court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the Court on the same conditions as applying to the witnesses called by the prosecution and

(e) To have without payment the assistance of an interpreter if he

can not understand the language used at the trial of the offence, then he can take an action in a high court having jurisdiction in his state to enforce his fundamental human rights to fair hearing, and declare null and void any proceeding and judgment given so far.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

understand the definition and judicature
appreciate the fundamental rights enforcement procedure rules
understand the process for enforcing human rights.

3.0 MAIN CONTENT

APPENDIX B
Fundamental Rights (Enforcement Procedure) Rules

THE CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA, 1979

3.1 Fundamental Rights (Enforcement Procedure Rules, S.I. Of 1979

Date of Commencement: 1st January, 1980

In exercise of the powers conferred by section 42 subsection (3) of the Constitution of the Federal republic of Nigeria, the Chief Justice of Nigeria hereby makes the following Rules.

ORDER 1

1. (1) These Rules may be cited as the Fundamental Rights (enforcements Procedure) Rules, 1979.

2. In these rules-

"application" includes an application for the leave of the court

"constitution" means the Constitution of the Federal Republic of Nigeria, 1979;

"Fundamental Right" means any of the Fundamental rights provided for in Chapter IV of the Constitution;

"Court" means the judge of the Court;
"Legal representatives" means a person admitted to practice in the Supreme Court of Nigeria who has been retained by or assigned to a party represent him in the proceedings before the court;

"originating summons" means every summons other than a summons in a pending cause or matter;

"Prison Superintendent" means the person in charge of the prison or any other place in which the complainant is restrained or confined;

"registrar" means the registrar of the Court hearing the application or of any Court to which an order is directed;

"Rules" means these Rules or any amendment thereto and includes the Forms appended to these Rule;

"State" means one of the component parts of the Federal Republic of Nigeria.

Fundamental Rights (Enforcement Procedure) Rules
Application for Leave

2. (1) Any person who alleges that any of the Fundamental Rights Provided for in the Constitution and to which he is entitled, has been is being or is likely to be infringed may apply to the Court in the State where the infringement occurs or is likely to occur, for redress.

(2) No application for an order enforcing or securing the enforcement within the State of any such right shall be made unless leave therefore has been granted in accordance with this rule.

(3) An Application for such leave must be made *ex parte* to the appropriate Court and must be supported by a statement setting out the name description of the applicant, the relief sought, and the grounds on which it is sought, and by an affidavit verifying the facts relied on.

(4) The applicant must file, in the appropriate Court, the application for leave not later than the day preceding the date of hearing and must at the same time lodge in the said Court enough copies of the statement and affidavit for service on any other party or parties as the court may order.

(5) The Court or judge may, in granting leave, impose such terms a to giving security for cost as it or he things fit.

(6) The granting of leave under this rule, if the Court or judge so directs, shall operate as a stay of all actions or matters relating to, or connected with, the complaint until the determination of the application or until the Court or judge otherwise orders.

Time for Applying for Leave

3. (1) Leave shall not be grated to apply for an order under these rules unless the application is made within twelve months from the date of the happening of the event, matter, or act complained of, or such other period as may be prescribed by any enactment or, except where a period is so prescribed, the delay is accounted for to the satisfaction of the Court or judge to whom the application for leave is made.

(2) Where the event, matter, or act complained of arouse out of a proceeding which is subject to appeal and a time is limited by law for the bringing of the appeal, the Court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

Fundamental Right (Enforcement Procedure) Rules

ORDER 2

1. (1) When leave has been granted to apply for the order being asked for, the application for such order must be made by notice of motion or by originating summons to the appropriate Court, and unless the Court or judge granting leave has otherwise directed, there must be at least eight clear days between the service of the motion or summons and the day named therein for the hearing Form No 1 or 2 in the appendix may be used as appropriate.

(2) The motion or summons must be entered for hearing within fourteen days after such leave has been granted

(3) The motion or summons must be served on all persons directly affected, and where it relates to proceedings in or before a court, and the object is either to compel the court

or an officer therefore to do act in relation to the proceedings or to quash them or any order made therein, the motion or summons must be served on the registrar of the court, the other parties to the proceedings and, where any objection to the conduct of the judge is made, on the judge.

(4) An affidavit giving the names and addresses of, and the place and date of service on, all persons who have been served with the motion or summons must be filed before motion or summons is listed for hearing, and if any person who ought to have been served under paragraph (3) has not been served, the affidavit must state the fact and the reason why service has not been effected, and the said affidavit shall be before the Court of judge on the hearing of the motion or summons.

(5) If on the hearing of the motion or summons the Court or judge is of the opinion that any person who ought to have been served with the motion or summons has not been served, whether or not he is a person ho ought to have been served under paragraph (3), the Court or judge may adjourn the hearing on such terms, if any, as it or he may direct in order that the motion or summons may be served on that person.

Statement and Affidavits

2. (1) Copies of the statement in support of the application or leave under Order 1 and 2 (3) must be served with the notice of, motion or summons under rule 1 (3) of Order 2 and, subject o paragraph (2) of this rule, no grounds shall be relied upon or any relief sought at the hearing of the motion or summons except the grounds and relief set out in the said statement.

(2) The Court or judge may, on the hearing of the motion or summons allow the said statement to be amended, and may allow further affidavits to be used if they deal with new matters arising out of any affidavit of any other party to the application, and where the applicant intends to ask to be allowed to amend his statement or use further affidavits, he must give notice of his intention and of any proposed amendment of his statement to every other party, and must supply to every such other party, copies of such further affidavits.

(3) Every party to the application must supply to any other party copies of the affidavit which he proposes to use at the hearing.

Several Applications to the Same Infringement

3. Where several applications relating to the infringement of a particular Fundamental Right are pending against several persons in respect of the same matter, and on the same grounds, the applications may be consolidated by order of the Court or judge hearing the application.

ORDER 3

Application to Quash any Proceedings

1. (1) In the case of an application for an order to remove any proceedings for the purpose of their being quashed, the applicant may not question the validity of any order, warrant commitment, conviction, inquisition or record unless before the hearing of the motion or summons he has served as certified copy thereof together with a copy of the application the Attorney General of the federal or of the state in which the application is being heard as the case may be, or account for his failure to do so the satisfaction of the Court or judge hearing the motion or summons.

(2) Where an order to remove any proceedings for the purpose of their being quashed is made, in any such case, the order shall direct that the proceedings shall be quashed forthwith on their removal into the court which heard the application.

ORDER 4

Application for Production and or Release of Person Restrained

1. (1) In an application where the applicant complaints of wrongful or unlawful detention, the Court or judge to whom the application is made exparte may make an order forthwith for his release from such detention, or may –

(a) direct that an originating summons as in the Form 2 in the Appendix be issued or that an application therefore be made by notice of motion, as in the Form 3; or

(b) adjourn the *ex parte*

(2) The summons or notice of motion must be served on the person against whom the order for the release of the applicant is sought and on such other persons as the Court or judge may direct, and, unless the Court or judge otherwise directs, there must be at lease five clear days between the service of the summons or motion and the date named therein for the hearing of the application.

(3) Every party to and application under rule 1 must supply to every other party copies of the affidavits which he proposes to use at the hearing of the application.

2. Without prejudice to rule 1 (1), the Court or judge hearing an application where the applicant complains of wrongful or unlawful detention may, in its or his discretion, order that the person restrained be produced in court, and such order shall be a sufficient warrant to any Super indent of a Prison, Police Officer in charge of a police state, Police Officer or Constable in charge of the complainant, or any other person responsible for his detention, for the production in court of the person under restraint.

3. Where an order is made for the production of a person restrained, the Court or judge by whom the order is made shall give directions as to the Court or judge before whom, and the date on which, the order is returnable.

4. (1) Subject to paragraphs (2) and (3), an order for the production of the person restrained must be served personally on the person to whom it is directed.

(2) If it is not possible to serve such an order personally, or if it is directed to a Police Officer or a Prison Superintendent or other Public Official, it must be served by leaving it with any other person or official working in the office of the Police Officer, or the prison or office of the Superintendent or the office of the public official to whom the order is directed.

(3) If the order is made against more than one person, the order must be served in manner provided by the rule on the person first named in the order and copies must be served on each of the other persons in the same manner.

(4) There must be served with the order (in the Form 4 in the Appendix) for the production of the person restrained a notice (in the Form 5 in the Appendix) stating the Court or judge before whom, and the date on which the person restrained is to be

brought.

5. (1) The return to an order for the release of a person restrained must be endorsed on or annexed to the order and must state all the' causes or justifications of the detain of the person restrained.

(2) The return may be amended, or another return substituted therefore, by leave of the Court or judge before whom the order is returnable.

Proceedings at Hearing of Motion or Summons after Order has been Returned

6. When a return to the order has been made, the return shall first be read in open courts and an total application then made for discharging or remanding the person restrained or amending or quashing the return, and, where that person is brought up in court in accordance with the order, his legal representative shall be heard first, then the legal representative for the State or for any other official or person restraining him. The legal representative for the person restrained will then be heard in reply.

7. An order for the release of a person restrained shall be made in clear and simple terms having regard to all the circumstances.

ORDER 5

Right of any Person or Body to be Heard

Any person or body who desires to be heard in respect of any application, motion, or summons, under these Rules, and appears to the Court or judge to be a proper person or body to be heard, shall be heard notwithstanding that he or she has not been served with the copy of the application, motion, or summons.

ORDER 6

Order which the Court Can Make and Effect of Disobedience

1. (1) At the hearing of any application, motion, or summons under these Rules, the Court or judge concerned may make such orders, issue such writs, and give such directions as it or he may consider just or appropriate for the purpose of enforcing or securing the enforcement of any of the Fundamental Rights provided for in the Constitution to which the complainant may be entitled.

(2) **In** default of obedience of any order made by the Court or judge under these Rules, proceedings for the committal of the party disobeying such an order will be taken. Order of Committal is in the Form 6 of the Appendix.

FORM NO 1
NOTICE OF MOTION FOR AN ORDER ENFORCING A FUNDAMENTAL RIGHT
(Order 2 rule (1))

In the Federal High Court High Court of .....State
Take notice that pursuant to the leave of the Federal High Court at) High Court State (or the Honourable Justice ……..) given on the .. .. day of .. ..19 , or so soon thereafter as counsel can be heard on behalf of ……. (for an order that
.....) .... (in terms of the relief sought in the statement accompanying the affidavit in support of the application for leave to apply for the order) on the grounds set out in the copy statement served herewith used on the application for leave to apply for such order.

And take notice that on the hearing of this motion the said..... will use the affidavit of and the exhibits therein referred to. (And also take notice that the) High Court (or the Honourable Justice)

By order dated .....directed that all proceedings in (or on) the said be stayed until after the hearing of this motion or further order).

DATED the .....day of .....19 …….

(Signed)
Applicant or his Legal Representative
To
Respondent or his Legal Representative
Note: - Delete the High Court which is not applicable.

FORM NO. 2
ORIGINATING SUMMONS
(Order 2 rule 1 (1), and Order 4 rule 1(1)

In the Federal High Court at ....High Court of State Division (in the matter of……….) ....…. Between A.B Plaintiff and C.D …… ……..Defendant To C.D. of in the Of Let the defendant, within fourteen days (or if the summons is to be served out of the jurisdiction, insert here the time for appearance fixed by the order giving leave to issue the summons and serve it out of the jurisdiction) after service of this summons on him, inclusive of the day of service, cause an appearance to be entered to this summons, which is issued on the application of the plaintiff ……………… of ………………..

By this summons the plaintiff claims against the defendant' .... (or seeks the determination of the Court of the following questions, namely, or as may be) If the defendant does not enter an appearance, such judgment may be given or order made against or in relation to him as the Court may think just and expedient.

DATED the ....day of ....19 …..

Note: This summons may not be served later than twelve calendar months beginning from the above date unless renewed, by order of the Court.

This summons was taken out by ....of the solicitor for the plaintiff whose address is . . . . (or where the plaintiff sues in person this summons was taken out by the said plaintiff who resides at . ...)

The defendant may enter an appearance in person or by a solicitor by handing in the appropriate forms duly completed, at the Federal High Court at or the High Court of State sitting at(Delete Court which is not applicable) For Service on

FORM NO 3
NOTICE OF MOTION FOR AND ORDER FOR THE PRODUCTION OF PERSON DETAINED

In the Federal High Court at .... the High Court of State In the matter of A.B. Suit No. .. .. and In the matter of an application for the release of person detained Take notice that pursuant to the direction of the Honourable .....Justice .....of the Federal High Court .....at.. .....*for* of the High Court of…….....State the High Court will be moved on the day of .....…….. 19……..or so soon thereafter as counsel can be heard on behalf of . . . . . for an order directed to .... to have the body of the said .. .. before. the High Court at . .. . at such times as the Court or-judge may ....direct upon the grounds set out in the affidavits of the said . ……... .. and . . . . . ……... . . . . and the exhibits therein respectively referred to used on the application to the Honourable Justice (or the High Court) for such order, copies of which affidavits and exhibits are served herewith.

And take notice that on the hearing of this motion the said
Signed
Applicant or his Legal Representative
Note - Delete the High Court which is not applicable. To
The officer or person who has .. Custody of person detained.

FORM NO. 6
ORDER OF COMMITTAL
(Order 6 rule 1 (2)) (Heading as in Action)

Upon motion has this day made unto this Court by counsel for the plaintiff and upon reading (an affidavit of ……..filed the day of ……19……. of service on the defendant ……of a copy of the order of the Court dated the ….. Day of ….. 19 *…. and notice of this motion). And it appearing to the satisfaction of the Court that the defendant has been guilty of contempt of court in (state the contempt):*
It is ordered that for his said contempt the defendant do stand committed to Prison to be there imprisoned (until further order).
(It is further ordered that this order shall not be executed if the defendant .....complies with the following terms, namely,

*DATED the .....day of .....*19 .....

4.0 CONCLUSION

In this discuss you learn about the concept of natural justice and fundamental right enforcement procedure in Nigeria. We learn about the various steps of which beach of human right and natural justice could be enforced. The 1979 fundamental right enforcement rules is still applicable in Nigeria.

5.0 SUMMARY

In this unit, you have learned about the definition and type of powers or procedure a litigant should employ to get a re-dress in law court.

6.0 TUTOR-MARKED ASSISGNMENT

Define order of committal.

7.0 REFERENCES/FURTHER READINGS D.E.

Smith (1977). Constitution and Administrative Law.

Nwabueze, B. (1973). Constitutionalism; Hurst & Co. London.

Sokefun, J. (2002). Issues in Constitutional Law and Practice in Nigeria, Olabisi Onabanjo University.

UNIT 4 JUDICIAL REVIEW

CONTENTS

1.0 INTRODUCTION

This unit deals with judicial review and its application in Nigeria. We will consider various examples in Nigeria and the attitude of the court.

2.0 OBJECTIVES

At the end this unit, you should be able to:

identify the various course opened to a person whose right is being or will be and have been infringed upon.

3.0 MAIN CONTENT

3.1 Application for Judicial Review

Cases Appropriate for Application for Judicial Review

By Order 43 of the State High Courts Uniform (Civil Procedure) Rules and Order 46 of the Federal High Court (Civil Procedure Rules) 1999 the underlisted provisions are made for judicial review- S.l (1) An application for:

(a) an order of mandamus, prohibition or certiorari, or
(b) an injunction restraining a person from acting in any office in which he is not entitled to act shall be made by way of an application for judicial review in accordance with the provisions of this Order.

(2) An application for a declaration or an injunction (not being an injunction mentioned in sub-rule (1)(b) of this rule) may be made by way of an application for judicial review and on such an

application, the Court may grant the declaration or injunction claimed if it considers that having regard to:

(a) the nature of the matters in respect of which relief may be granted by way of an order of mandamus, prohibition or certiorari;
(b) the nature of the persons and bodies against whom relief may be granted by way of such an order; and
(c) all the circumstances of the case.

It would be just and convenient for the declaration or injunction to be granted on an application for judicial review.

Joinder of Claims for Relief

S. 2: On an application for judicial review, any relief mentioned in rule 1 (1) or (2) of this Order may be claimed as an alternative or in addition to any other relief so mentioned if it arises out of or relates to or is connected with the same matter.

Grant of Leave to Apply for Judicial Review

S.3: (1) No application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this rule.

(2) An application for leave shall be made ex-parte to the Court, except in vacation when it may be made to a judge in Chambers and shall be supported by -

(a) a statement, setting out the name and description of the applicant, the relief sought and the grounds on which it is . sought; and
(b) affidavit to be filed with the application, verifying the facts relief on.

(3) The Applicant shall file the application not later than the day before the motion is heard and shall at the same time lodge copies of the statement and every affidavit in support.

(4) The Court hearing an application for leave may allow the applicant's statement to be amended, whether by specifying different or additional grounds or relief or otherwise on such terms, if any, as it thinks fit.

(5) The Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relate.

(6) Where leave is sought to apply for an order of certiorari to remove for the purpose of its being quashed any judgment, order, conviction or other proceedings 'which is subject to appeal and a time is limited for the bringing of the appeal, the Court may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

(7) If the Court grants leave, it may impose such terms as to costs and as to giving security as it thinks fit.

(8) Where an application for leave is refused by a Judge in Chambers, the applicant may after the period of vacation make a fresh application on notice to the Court.

(9) An application to a Judge in Court under sub-rule (8) of this rule shal1 be made within 10 days after the Judge's refusal to give leave.

(10) Where leave to apply for judicial review is granted, then-

(a) if the relief sought is an order of prohibition or certiorari and the Court so direct, the grant shall operate as a stay of the proceeding to which the application relates until the determination of the application or until the Court otherwise orders;
(b) if any other relief is sought, the Court, may at any time grant in the proceedings such interim relief as could be granted in an action begun by writ.

Delay in Applying for Relief

S.4 (1) Subject to the provisions of this rule, where in any case the Court considers that there has been undue delay in making an application for judicial review or, in a case to which sub-rule (2) of this rule applies, the application for leave under rule 3 of this Order is made after the relevant period has expired, the Court may refuse to grant-

(a) leave for the making of the application; or
(b) any relief sought on the application.

If in the opinion of the Court the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.

(2) **In** the case of an application for an order of certiorari to remove any judgment, order, conviction or other proceeding for the purpose of quashing it, the relevant period for the purpose of sub-rule (1) of this rule is three months after the date of the proceeding.

(3) Sub-rule (1) of this rule is without prejudice to any statutory provision which has the effect of limiting the time within which an application for judicial review may be made.

3.2 Mode of Applying for Judicial Review

S.5: (1) Subject to sub-rule (2) of this rule, when leave has been granted to make an application for judicial review, the application shall be made by originating motion, except during vacation when it may be made by originating summons to a Judge in Chambers.

(2) Where leave has been granted and the Court or Judge in Chambers so directs, the application may be made by motion to a Judge sitting in open court or, by originating summons to a Judge in Chambers.

(3) The notice of motion or summons shall be served on all persons directly affected and where it relates to any proceedings in or before a Court and the object of the application is either to compel the Court or an officer of the court to do any act in relation to the proceedings or to quash them or any order made therein, the notice or summons shall also be served on the clerk or registrar of the Court and, where any objection to the conduct of the Judge is to be made, on the Judge.

(4) Unless the Court granting leave has otherwise directed, there shall be at least 10 days between the service of the notice of motion or summons and the day named therein for the hearing.

(5) A motion shall be entered for hearing within **14** days after the grant of leave.

(6) An affidavit giving the names and addresses of, and die places and dates of service on, all persons who have been served with the notice of motion or summons shall be filed before the motion or summons is entered for hearing and, if any person who ought to be served under this rule

has not been served, the affidavit shall state that fact and the reason for it, and the affidavit shall be before the Court the hearing of the motion or summons.

(7) If on the hearing of the motion or summons the Court is of opinion that any person who ought, whether under this rule or otherwise, to have been served has not been served, the Court may adjourn the hearing on such terms (if any) as it may direct in order that the notice or summons may be served on that person.

Statements and Affidavits

S.6: (1) Copies of the statement in support of an application for leave under rule 3 of this Order shall be served with the notice of motion or summon and, subject to sub-rule (2) of this rule, no grounds shall be relied upon or any relief set out in the statement.

(2) The Court may on the hearing of the motion or summons allow the applicant to amend his statement whether by specifying different or additional grounds of relief or otherwise, on such terms, if any, as it thinks fit and may allow further affidavits to be used if they deal with new matters arising out of an affidavit of any other party to the application.

(3) Where the applicant intends to ask to be allowed to amend his statement or to use further affidavits, he shall give notice of his intention and of any proposed amendment to every other party.

(4) Each party to the application shall supply to every other party on demand and on payment of the proper Court charges copies of every affidavit which he proposes to use at the hearing including, in the case of the applicant, the affidavit in support of the application for leave under rule 3 of this Order.

Claim for Damages

S. 7: On an application for judicial review, the Court may subject to sub-rule (2) of this rule, award damages to the applicant if :

(a) he has included in the statement in support of his application for leave under rule 3 of this Order a claim for damages arising from any matter to which the application relates; and

(b) the Court is satisfied that if the claim had been made in an action begun by the applicant at the time of making his application, he could have been awarded damages.

Application for Discovery, Interrogatories, Cross-Examination etc.

S.8: Unless the Court otherwise directs; any interlocutory application in proceedings on an application for judicial review may be made to any Judge notwithstanding that the application for judicial review has been made by motion and is to be heard by the Court.

Hearing of Application for Judicial Review

S. 9: (1) On the hearing of any motion or summons under rule 5 of this Order, any person who desires to be heard in opposition to the motion or summons and appears to the Court to be a proper person to be heard, shall be heard, notwithstanding that he has not been served with notice of the motion or the summons.

(2) Where the relief sought is or includes an order of certiorari to remove any proceedings for the purpose of quashing them, the applicant may not question the validity of any order, warrant, commitment, conviction, inquisition or record unless before the hearing of the motion or summons he has filed a copy thereof verified by affidavit or accounts for his failure to do so to the satisfaction of the Court hearing the motion or summons.

(3) Where an order of certiorari is made in any such case as referred to in sub-rule (2) of this rule, the order shall, subject to sub-rule (4), direct that the proceedings shall be quashed forthwith on their removal into the Court.

(4) Where the relief sought is an order of certiorari and the Court is satisfied that there are grounds for quashing the decision to which the application relates the Court may, in addition to quashing it, remit the matter to the Court, tribunal or authority concerned with a direction to reconsider it and reach a decision in accordance with the findings of the Court.

(5) Where the relief sought is a declaration, an injunction or damages and the Court considers that it should not be granted on an application for judicial review but might have been granted if it had been sought in an action begun

by writ by the applicant at the time of making his application, the Court may, instead of refusing the application, order the proceedings to continue as if they had been begun by writ.

Saving for Person Acting in Obedience to Mandamus

S. 10: No action or proceeding shall be begun or persecuted against any person in respect of anything done in obedience to an order of mandamus.

Consolidation of Applications

S. 11: Where there is more than one application pending against several persons in respect of the same matter, and on the same grounds, the Court may order the applications to be consolidated.

Explanation and Scope of Judicial Review

It must be noted that a judicial review can take place by an action based on the prerogative order of certiorari to remove proceedings from inferior Courts or Tribunals to the High Court to be quashed for many reasons like (1) want of jurisdiction (2) excess of jurisdiction, (3) unfair procedures and so on.

In other words, and according to Gamer:

The ambit of certiorari can be said to cover every case in which a body of persons, of a public as opposed to a purely private or domestic character, has to determine matters affecting subjects provided always that it has a duty to act judicially.

Thus continued Gamer, the remedy may be obtained on the grounds of a defect in the jurisdiction of the Court or Tribunal below, or of a breach of the rules of natural justice

(1983) 1 SC. NLR. 296. The question of jurisdiction is an important aspect of the law to be discussed, and for our purpose it may be pertinent to state the views of the various Supreme Court judge over it as follows:

PER UWAIS, JSC. In *State* vs. *Onagoruwa:*

It has been said time without number that the issue of jurisdiction of a Court is fundamental. Its being raised in the course of proceedings can neither be too early or premature nor be late. For if there is want of jurisdiction the proceedings of the Court will be affected by a

fundamental vice and would be a nullity however well conducted the proceedings might otherwise be.

See *Oredoyin* v. *Arowolo* (1989) 4 NWLR (Pt. 114) 172 at P.187 and *Onyema* v *Oputa* (1987) 3 NWLR) (Pt. 60) 259.

Furthermore, the jurisdiction of a Court to determine an issue as to whether it has jurisdiction is not a procedural matter but substantive, since any Court without jurisdiction is incompetent to determine a matter and if it does exercise the jurisdiction which it does not possess, its decision. is a nullity. See *Ojokolobo* v. *Alanamu* (1987) 3 NWLR (Pt. 61) 377 at P. 391; *Jfezue* v. *Mbadugha* (1984) 5 Sc. 79; (1984) I SVC NLR 427 and *Odi* v. *Osafile* (1985) 1 NWLR (Pt. 1) 17.

Mr. Justice Karibi- Whyte JSC in the same case stressed the point that the question of jurisdiction can be raised at any time and even on appeal when he held as follows:

In my opinion, it is neither too early nor too late for a party to litigation to raise the issue of lack of jurisdiction in the Court. As soon as the parties, and the subject matter of the LIS, the issues in dispute, are clear and have been identified, the issue of lack of jurisdiction can be raised. So also can the point be raised on appeal?

'On his own part, Mr. Justice BELGORE JSC raised the seriousness of the lack of jurisdiction and urged the Court to raise such issues *suo moto* if they are apparent on the record notwithstanding the fact that the Counsels of the parties failed to advert to it. Further, he stated that sometimes the question of jurisdiction is latent; and once raised by any of the parties, it must be addressed first by the Court, because if a Court should embark on a trial without jurisdiction, its exercise will be a nullity. See *Oyema* v. *Oputa* (1987) 3 NWLR (Pt. 60) 259 Conclusively Mr. Justice Belgore said as follows:

The red light to Court to be cautious is the issue of jurisdiction, and it must be settled by proper hearing of the parties before further proceedings in the matter can be embarked upon. Similarly there are occasions after a matter has been before the court for long before the issue of jurisdiction arises - some in the middle of the entire proceedings or towards its tail end - in that case the jurisdiction must first be settled before proceeding further. See *Turkur* v. *Government of Gongola* (1989) 4 NWLR (Pt. 117) 517. It is therefore never too late to raise the issue of jurisdiction and in cases of this nature it is never premature to raise it. See *Management Enterprises Limited* v. *Otusanya* (1987) 2 NWLR (Pt. 55) 179. The preliminary objection as to jurisdiction is usually taken first and decided upon. See *Olaba* v. *Akereja* (1988) 3 NWLR (Pt. 84) 508.

Mr. Justice NNAEMEKA-AGU JSC. in his own part baked up his colleagues and held that:

"Once an issue of jurisdiction is raised at any stage in the proceedings in any matter it ought to be gone into first as failure to do so may mean that all the exercise of adjudication may turn out to be a useless waste of time".

With all these discussion therefore, it is apparent that one can raise the question of or lack of jurisdiction on appeal even in the Supreme Court for the first time notwithstanding the fact that such issues were not raised in the lower Courts.

Raising Jurisdiction on Appeals/Supreme Court:

The general rule is that issues not raised in the Court below cannot now be made a ground of appeal, but this is not a rule of thumb for it is subject to an exception bothering on jurisdiction. An appellant therefore, can raise the issue of jurisdiction at any stage of the proceedings with the leave of the Court. See *Shonekan v. Smith* (1964) 1 ALL NLR. 168 at 173.

And if it is fundamental as to go to the root of the case of the trial Court, the Court will uphold it. See *Obikoya v. Registrar of Companies* & *anor* (1975) 4 Sc. 31 at 34 and *Sken Consult Nig. Ltd. v. Godwin Secondy Ukei* (1981) 1 Sc. 6 at 18. The appeal Court will allow even the question of jurisdiction or in competency of the Court to be raised if the question to be raised involves substantial points of law (Substantive and procedural) and it is plain that no further evidence could have been adduced which would affect the decision on them. This will be allowed to prevent an obvious miscarriage of justice. *See Akpene v. Barclays Bank Nig. Ltd. and anor.* (1977).

1 Sc. 47 and *Abinabina v. Enyinadu (1953)* AC. 209 and 210.

One may ask as at this stage, for the time when a proceeding of a Court may be declared incompetent; and the answer is as follows:-

The question of when a Court. is competent to decide a case has been judicially considered and redefined in 'such cases like the *Western Steel Works Ltd. v. Iron Steel Workers Union* (1986) 3 NWLR (Pt. 30) 617 where OBASEKI JSC. said as follows:

A Court can only be competent if among other things, all the conditions to its having jurisdiction are fulfilled. A Court is competent when:

1. It is properly constituted as regards numbers and qualifications of the members of the Branch and no member is disqualified for one reason or another; and the subject matter of the case is within its jurisdiction and there is no feature of the case which prevents the Court from exercising its jurisdiction; and

2.The case comes before the Court initiated by due process of law and upon fulfillment of any condition precedent to the exercise of jurisdiction". See also *Kalio v. Daniel* (19^{7}9) 12 Sc. 175.

Again certiorari proceedings can be maintained as said above, if the inferior tribunal contravenes the principles of Natural Justice. And for the understanding of the law, it may be pertinent to write on the meaning and application of the words "Natural Justice" also.

4.0 CONCLUSION

In this discourse, you learnt about the constitutional provision of fundamental human right in chapter IV of the 1999 Constitution and the fundamental right enforcement procedure rules of 1979 and how application could be made for judicial review in the law court.

5.0 SUMMARY

In this unit, you have learnt about the definition and types of powers or procedure a litigant should employ to get a redress in the law court. You have been able to distinguish between fundamental human right and natural rights and the approach to judicial review in Nigeria.

6.0 TUTOR-MARKED ASSIGNMENT

1. Identify the Rights protected by chapter IV of the 1999 Nigeria Constitution.
2. What is judicial review?

7.0 REFERENCES/FURTHER READINGS

D.E. Smith (1977). Constitution and Administrative Law.

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UNIT 5 THE PRINCIPLES OF NATURAL JUSTICE AND THEIR APPLICATIONS IN NIGERIA THROUGH CASES

CONTENTS

1.0 INTRODUCTION

This unit deals with natural justice and its application in Nigeria. We will consider various examples in Nigeria and the attitude of the court.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

identify the various course opened to a person whose right is being or will be and have been infringed upon.

3.0 MAIN CONTENT

3.1 Natural Justice

The expression "natural justice" has been described as one sadly lacking in precision, and it has been consigned more than once to the lumber room. This expression has many historical, episcopal and philosophical connotations. For instance, Leeds remarked that various meanings have been attached to the word "Justice"; and at one breadth it means benefits according to merit and worth. This followed the philosophy of Aristotle and Greek Philosophers who stated that those who contributed most to the society should be greatly rewarded. However, by the 16th *Century*, important changes were introduced and a new idea in quest for justice was introduced. This made the socialists to state that everyone in the society should be treated according to his needs. It means therefore that those who are poor would be better satisfied by the law of nature than

those who are rich. They must be satisfied even at the expense of the rich.

However, after the 19th Century, some lawyers have come to associate natural law or justice with the law of the land; because the state exists to achieve certain purposes which are: the good life of the community. The law is therefore the instrument by which these purposes or ends are made possible, and the law can be fully understood only when considered in relation to its object which is justice. In the main, one deduce by legal history that from quite a considerable period of time the Greeks have been trying to seek the existence of an ideal law, by which the fitness of ordinary law could be tested. And this ultimate law, according to Salt and Sinclair, has been known as natural law. To hit the nail on the head, Aristotle confirmed that we have both natural justice and the conventional justice.

To him, natural justice is recognised everywhere by civilized men and the conventional justice is binding only because some lawgivers have laid them down. However, it must be accepted that natural law is the same thing as natural justice which prevents the adjudication of disputes with a biased mind. It prevents unfairness and upholds equality of treatment according to law. Natural law exists from the time of our Lord as would be found in the Bible, and today what is important is that all adjudicators should see that justice is not only being done but that it must be manifestly seen to be done.

Hence the principles of British justice stipulate that there must be a fair play in settling action. Therefore, natural justice links up the common law with moral principles. The principles then state 'that a man can only be deemed to have justice if he is heard in his own defence. This is called the principle of "audi alteram partem" - De-Smith puts it as follows: "No proposition can be more clearly established than that a man cannot incur the loss of liberty or property for an offence until he has had a fair opportunity of answering the case against him" ... That is a man must be given adequate, opportunity to reply to them. This notion has been accorded importance both in England and also in Nigeria.

As a matter of fact, the Federal Supreme Court laid it down emphatically in *Sule Katagun and Others Case* that no enquiry should be conducted without the application of the principles of natural justice. This rule is given recognition also by God, and it was applied to Adam and Eve in the Garden of Eden. De-Smith confirms this when he said:-

"Even God himself did not pass sentence upon Adam before he was called upon to make his defence. God said to Adam, "Where art thou"? Has thou not eaten out of the tree whereof I commanded thee that thou should not eat?

It is also pointed out in John, Chapter Seventhat our Lord would not judge a man or condemn him without hearing him. The verse states: "Doth our Lord Judge any man, before it hears him and knows what he doeth".

This principle of audi alteram partem is further explained in Genesis, Chapter Four, verse nine 4 when Cain's offering was rejected and he killed his brother Abel whose own offering was accepted by-God: This killing was done in anger and God knew that the brutal act has been committed by Cain, but instead of punishing Cain outright, the Lord gave him an opportunity to defend himself. And thus, God asked Cain: "Where is Abel thy brother?" And he answered: "I know not, Am I my brother's keeper?" Then God confessed that Abel's blood has cried unto him from the ground and hence Cain was punished accordingly· in the following words:-

"When thou tillest the ground, it shall not henceforth yield unto thee her strength; a· fugitive and vagabond shall thou be on earth".

The right to be heard in one's own defence is also embodied into the Nigerian Constitution while its concept has been amplified by Denning M.R., in this way:
~'If the right to be heard is to be a real right which is worth noting it must carry with it a right in the accused mail to know the case which has been given and what statements have been made affecting him, and then he must be given a f air opportunity to correct or contradict them."

It is therefore apparent that any administrative body, Court or corporate personality which fails to observe this principle acts contrary to, and in defiance of, the rules of natural justice. And judgment therefore made as a result of the breach of the rule of natural justice cannot stand, even if the plaintiff or the accused is wrong.

This was the view expressed by the Supreme Court of Nigeria in *Stephen Adedeji* v. *Police Service Commission* as follows:-

"We are therefore not satisfied that when the circumstances of this case are looked into, adequate opportunity was given to the appellant to meet the case or the facts of the case known to the Commission".

It is possible that the appellant is corrupt and did commit the offence alleged against him that is not what we have to consider. Was the case against him sufficiently brought home to him that one can say that the requirements of natural justice were sufficiently observed on the facts and circumstances?

We hereby order that the writ should go and the letter dismissing the appellant is hereby declared inoperative, void and of no effect".

The other rule to observe under the principle of natural justice is "Nemo Judex in Causa Sua" - that is that a person shall not be a judge in his own cause, which is the same thing as saying that nobody can be both an accuser and accused, and at the same time to be a judge of a matter in dispute. This evidently is to eliminate the possibility of bias in. such a proceeding.

Having discussed the two main principles of Natural Justice, let us now consider their applications in Nigerian context through cases and further modifications.

The Nigerian Experiment

Ancillary to these two principles may be mentioned the following, which are to a considerable extent supported by some decided cases - For instance, in the *Queen* v. *Local Government Eastern Region, Ex-Parte Oka/or Chigbana.* The Federal Supreme Court in Nigerian held that a Court must act in good faith, listen fairly to both sides and give fair opportunity to the parties adequately to present their case and to correct or contradict any relevant statement prejudicial to their views. These directives are in consonant with the requirements of Natural Justice, and if a Court does anything in flagrant contradiction to these directives, his judgement may be successfully challenged on appeal.

Also it is imperative that a Court must endeavour to see at all times. That the man standing trial understands the language being used during the Court's proceedings. In case of a man who speaks another language, therefore an interpreter must be made available to him so as to enable him to know the case he is facing and to prepare him properly for defences on it.

In other words, the language must be properly interpreted to give him an opportunity to defend himself. For every person who is charged with a criminal offence for example shall be entitled to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the offence. Any negation of this principle therefore definitely contravenes not only the Constitutional provision of Nigeria, but also the principle of natural justice.

This was in fact established in the case of *Buraima Ajayi and Julande Jos* v. *Zaria Native Authority*where the appellant successfully appealed to the Supreme Court against the High Court's refusal to interfere with their conviction in a Native Court on the ground that the interpretation

in the Native Court had been unsatisfactory. The proceedings in the Native Court were in Hausa, which the appellants neither spoke nor understood. They were Yoruba speakers by birth and understood English, but not perfectly. The proceedings were interpreted by five different interpreters at successive stages: two interpreted into English and one into Yoruba. It did not appear what language the others interpreted into. None of them was sworn. The trial record gave their names but it did not appear how they came to be called on to interpret or who they were, except that one was a school boy and others were those who spoke English but not Yoruba. Only one gave evidence in the High Court. The High Court found that in at least two occasions the ability of the interpreters satisfactorily might be questioned, but that in fact, the whole proceedings has been interpreted correctly.

On appeal it was held amidst all other facts that this is wrong. It deprives the appellants of their Constitutional rights and that it contravened the principles of natural justice which demand that justice needs not only be done, but must be manifestly seen done. Put succinctly the Supreme Court held as follows:-

"It was essential to be satisfied that no appellants had a fair opportunity to defend themselves and in particular that they were accorded in full the right conferred by section 21 (5)(e) of the Constitution of the Federation, which requires that there shall be adequate interpretation to the accused person of anything said in a language that he does not understand, and equally that there shall be adequate interpretation to the Court of anything said by the accused person in a language that the Court does not understand. The Court further held that there is a failure of justice within the meaning of section 382 of the criminal code if the proceedings at the trial fall short of the requirement not only that justice be done but that it may be seen to be done, as that maxim has been applied by the Judicial Committee in *Adem Haji Jama* v. *The Kinlo* and by the Queen's Bench Division in such cases as *Reg* v. *East Kerrier Justices Ex-Parte Munday.*

Adjournments

It is also established in many cases and statutes that a Court must ensure that it grants legitimate adjournments to litigants so as to enable the~ prepare well for their cases and to afford them such opportunities to defend themselves. This is a part of the fundamental rule of natural justice.

In other words, if a party to a dispute has necessarily excused himself from appearance and that he could not be reasonably expected to attend the hearing of the case against him, it will be a void judgement if a

decision is given against him in default of appearance. This proposition was well established in the case of *Alhaji Ramonu Bello and Dr. M.o. Thomson.* In this case, the appellant was not given opportunity of presenting his case because notwithstanding the fact that a medical certificate of illness was sent to the Court and that his Counsel asked for an adjournment, the trial judge continued with the case and granted the Counsel a leave to withdraw from it accordingly.

The Court of Appeal held this to be wrong and that it tantamounts to a denial of justice. The course taken by the learned trial judge was held to be unfair, and prejudicial to the appellant who was thereby denied the opportunity of presenting his defence fully.

Also it is categorically stated that this step adopted by the trial judge has engendered a miscarriage of justice and interference was accordingly allowed by the Court of Appeal as it was done in the case of *Maxwell* v. *Keun.*

As a matter of fact, the same ratio decidendi was reached in the case of *Solanke* v. *Ajibola* when notwithstanding an application for adjournment owing to illness coupled with the tenacious denial of the plaintiffs claim, the learned trial judge continued with the case in the defendant's absence and held that the defendant was not willing to defend the action. The Supreme Court held this action of the learned trial judge to be manifestly unjust and a total denial of justice because his discretion was not legally exercised in the circumstances by refusing an adjournment and not taking all the circumstances of the case into consideration.

The Court concluded as follows emphatically:

"We do consider that this is an appeal where it has been shown that the exercise of the learned trial judge's discretion has worked hardship and injustice on the defendant. We must therefore allow this appeal." Cases on this type of denial of justice are many, and for brevity purposes, let us consider the case of *A.A. Odusote* v. 0. 0. *Odusote.* Here the junior Counsel applied for an adjournment because his senior - the leading Counsel and apparently one who had all the relevant facts of the case and file - was not present. This application was refused by the Appeal Court and argument on the appeal continued.

On appeal to the Supreme Court, it was held as follows:

"With respect we are satisfied that in the circumstances of the present case, the Court of Appeal was in error in refusing the application for adjournment and dismissing the appeal, especially as the appellant was

by herself not present in Court and there was no evidence that she knew the appeal was fixed for hearing that day.

It cannot be denied that the dismissal of the appeal in the circumstances has occasioned a miscarriage of justice, and it will be wrong for us to hold that the Court was justified in dismissing the appeal or that it was exercising its discretion properly and judicially in so acting".

It must however be noted that frivolous adjournments should not be granted as stipulated by law. This obviously is the deduction arrived at from the case of *Tsaku* v. *The State* which establishes the following propositions:

1.That the granting or refusal of an application for adjournment is a matter which calls for the exercise of discretion by the Court. And as in all cases of discretion, the power must be exercised judicially and in the interest of justice.

2.That it is the duty of a person seeking the indulgence of the Court to satisfy it that he is deserving of the favour he seeks, and this he can do by pointing to facts and circumstances tending to establish that injustice would result from a failure to grant the application. In Short, there must be sufficient material before the Court to justify the exercise of the discretion as it was decided in *Demuren* v. *Asuni.*

3.That where in a given case it is conclusively established that the trial of the case has been conducted in such a way as to lead but to the conclusion that an accused person was not offered adequate or full opportunity to put across his case, as for example, when an application for adjournment has unreasonably or capriciously been refused or that the right to call a witness whose evidence is material to the just determination of the case has been denied, a Court of Appeal will undoubtedly interfere with the judgement of the trial Court and hold that a failure of justice has been occasioned.

4.That every person who is tried for a criminal offence must be given full opportunity to present his case and to call witnesses in his defence. Any failure on the part of the trial Judge/Court to give an accused person that full opportunity is a breach of Natural Justice as it was decided in the case of *Ngubdo* v. *The State.*

5.That there is a failure of justice if the proceedings of the trial fall short of the requirement not only that justice be done, but that it may be seen to be done as it was decided also in the case of *Buraima Ajayi and Another* v. *Zaria Native Authority.*

While it is the binding duty of a Court to act in conformity with the principles of Natural Justice and grant adjournments when the occasions are justifiable, yet it must be noted as a rule of practice that non-attendance of parties or of a party at a hearing may be fatal. For instance where a case on the cause list has been called, and neither party appears, the Court shall, unless it see good reasons to the contrary, strike the case out of the cause list.

If on the other hand, the plaintiff does not appear, the Court shall unless it sees good reason to the contrary, strike out the case (except as to any counterclaim by the defendant) and make such order as to costs in favour of any defendant appearing as seems just. Provided that if the defendant shall admit the cause of action to the full amount claimed, the Court may, if it thinks fit, give judgment as if the plaintiff had appeared.

Lastly, if the plaintiff appears and the defendant does not appear or sufficiently excuse his absence, or neglects to answer when called, the Court may, upon proof of service of the summons, proceed to hear the cause and give judgment on the evidence adduced by the plaintiff, or may grant postponement to be given to the defendant.

Any compliance with any directive contained in the above provisions does not constitute a denial of justice, but it is a mere procedural device to ensure quick dispensation or disposition or justice; for justice delayed even at times is justice denied.

Therefore a strict adherence to these rules of practice will not render a judgement nugatory, notwithstanding the fact that certain refusals to adjourn, to permit to cross examine, to affix penalty after the hearing of a case may be a violation of the rules of natural justice.

All these cases have really established the principle that it is contrary to natural justice not to give any person a reasonable opportunity to be heard in any case which involves him.

One may wonder at this stage for the real meaning of “reasonable opportunity" in the circumstances which conforms with the "audi alteram partem principle" - since eggs are eggs and yet some are rotten. However in the matter of the' Constituent Assembly Decree No. 50 of 1977 and Dr. Ibrahim Datti Ahmed the expression was well explained. In this case, the electoral commission wrongfully excluded the applicant's name from contesting an election when as a matter of fact he was qualified on all grounds. What was even wrong was the fact that he was informed very late on the eve of election to prevent the possibility of raising an objection to this action and the election was thus held accordingly without allowing him to take part.

He therefore petitioned to the Court, and it was held that when the law talks of an opportunity to be heard being given to a party to a dispute, it meant "reasonable opportunity". Otherwise, the rule of Natural Justice expressed in the Latin maxim "Audi alteram partem" would be deemed to have been breached. Hence a communication on the eve of the election cannot be anything but a denial of a reasonably opportunity to challenge an objection.

The Court further fortified his grounds by holding that the compliance with the principle of natural justice is very important in all cases that are meant for adjudication, and therefore a Court will intervene even if the Court's jurisdiction is ousted once it is shown that a breach of the provision of Natural Justice is committed. The Court then will intervene in such circumstances to correct obvious injustice as it was done in *Anisminic v. Foreign Compensation Committee* where Browne 1. stated as follows:

"It is a well established principle that a provision ousting the ordinary jurisdiction of the Court must be construed strictly, meaning, I think, that if such a provision is reasonably capable of having two meanings that meaning shall be taken which preserves the ordinary jurisdiction of the Court".

Witnesses and Natural Justice

It must also be noted that the principle of Audi alteram partem, enjoins that a Court must allow any person to call his witnesses and consider the case of the defendant however weak.

In addition to that, it is considered a breach of Natural Justice to keep on interrupting the defendant, and if his interests are thus in jeopardy, he must be allowed to call witnesses in the order that he thinks best. These broadly stated propositions have been supported by the following cases:

For instance in *RE Enock*[51], it was held that undue interference by the Court tantamounts to a denial of justice. Also in the case of *Malam Sadau of Kunya and Abdul Kadir of Fagge* where the trial Court did not allow the appellant to call his witnesses who could bear out that the document he signed was done under force or pressure, the Appeal Court held this accordingly to be a breach of Natural Justice in the Circumstances. The Court of Appeal stated categorically thus:- "It is a fundamental principle of natural justice that a defendant and his witnesses should be heard before the case against him is determined and that the Chief Alkali's Court erred in not allowing the appellant to call his witnesses".

Hence, the appeal was allowed and a new trial was ordered.

The Rules of Natural Justice have been extended to cover many areas not necessary for a detailed discussion here, hence readers are enjoined to read OYEWO A.T.'s book entitled *"The Concept and Application of Natural Justice in Nigeria* ".

An order of Judicial review may even challenge the Locus Standi of the respondent. When then is the meaning of an application of Locus Standi in law?

Locus Standi

Locus Standi is a right to be heard by any person in Court or other proceedings. LOCUS STANDI literally means a place of standing; and it is a right to be exercised only if the application falls within the previews of section 6(6) of the 1979 Constitution of Nigeria. *See Adesanya* v. *The President* (1981 1 ALL N .L.R. 1.

It is one of the tributes of law that anybody who intends to take an action against any party must of necessity be recognised and known to law. That is, he must be a legal person otherwise his case may be struck out.

Locus standi depicts and delimits the competence of any person to institute an action, and all judicial pronouncements have found inspiration and guidance from the constitution which states:

"The judicial powers vested in accordance with the foregoing provisions of this section:

(a) Shall extend, notwithstanding anything to the contrary in the constitution, to all inherent powers and sanctions of a Court of law; and

(b) Shall extend in all matters between persons, c between government or authority and any person in Nigeria, and to all actions and proceedings relation thereto, for the determination of any question as to the civil rights and obligations of that person.

This section 6(6) states simpliciter that to entitle a person to correct standing in law, that person must show that his civil right and obligations have been injured.
This is very fundamental and cases like *Irene Thomas v. Olufosoye*(Pt. 18) with *Amusa Momoh and Others* v. *Jimoh Olotu and Ors.* (1970) 1 ALL NLR 117 have well expressed the principles.

If the plaintiff then has no Locus Standi, it means that the Court has no jurisdiction to entertain the matter and it must be struck out.

See *Oloriode and Ors.* (1984) 5 Sc. At page 28, *Grogan* v. *Soremekun* (1986) 5 NWLR (Pt. 44) 688 and 700, *A.G. Kaduna* v. *Hassan* (1985) 2 NWLR (Pt 8) 483 and *ChiefGani Fawehinmi* v. *Col. H. Akilu and Others* (1987) 12 SC. 136-281.

4.0 CONCLUSION

It must be noted that the principle of natural justice enjoyed that a court must allow the other side to be heard i.e hear the other side. It is trite law that the principle of fair hearing encompasses that the other side must be heard any breach of this law is against the principle of natural justice.

5.0 SUMMARY

In this unit, we have considered the issue of natural justice and the application through cases in Nigeria.

6.0 TUTOR-MARKED ASSIGNMENT

Explain the term 'Natural Justice'.

7.0 REFERENCES/FURTHER READINGS

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Oloride v. *Oyebi* (1984) ~ Sc. NLR 390 1.

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Ojokolobo v. *Alanamu* (1987) 3 NWLR (Pt. 61) 377 at P. 391

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Oyema v. *Oputa* (1987) 3 NWLR (Pt. 60) 259.

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Oloba v. *Akereja* (1988) 3 NWLR (Pt. 84) 508.

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Obikoya v. *Registrar of Companies* & *anor.* (1975) 4 SC. 31 at 34.

Sken Consult Nig. Ltd. v. *Godwin Secondy Ukey* (1981) 1 SC."6 at 18.

Akpene v. *Barciays Bank Nig Ltd. and anor.* (1977) 1 Sc. 47.

Abinabina v. *Enyinadu* (1953) A.c. 209 and 210.

Western Steel Works Ltd. v. *Iron Steel Workers Union* (1986) 3 NWLR (Pt. 30) 617.

Kalio v. *Daniel* (1979) 12 SC. 175.

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Stephen Adedeji v. *Police Service Commission* (1967) I *All* NR 631.

Queen v. *Local Government Eastern Region, Ex-Parte Okafor Chigbana* 2 FSC 46 at 49.

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Anisminic v. *Foreign Compensation Committee* (1969) 2 AC 147 at page 161.

RE Enock 1 KB 327.

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MODULE 4

UNIT 1 CONSTITUTIONAL STRUCTURE AND NATURE OF THE NIGERIAN MILITARY GOVERNMENT

CONTENTS

1.0 INTRODUCTION

The object of this unit is to set out and consider the peculiar structure and nature of the Nigerian military government. It is however difficult or perhaps inaccurate to talk about 'the Nigerian military government' because Nigeria has now experienced five distinct military Administrations viz two in 1996, that is, the Ironsi regime which suffered a counter – coup in its seventh month, July 1966. This was the Gowon administration which lasted until 1975 when it was itself overthrown in another coup resulting in the Muhammad – Obasanjo regime which handed over the administration of the country to civil rule in 1979. on December 31, 1983, as a result of the excesses and irresponsibility of the civilian administration the Armed Forces re-entered the government of Nigeria under the leadership of Major General Muhammad Buhari with Brigadier (later Major – General) Tunde Idiagbon as chief of staff supreme headquarters) The Buhari regime was itself overthrown in a bloodless counter – coup on August 27, 1985. Major – General Ibrahim Babangida emerged as the new leader under the style and title of president, commander – in – chief of the Armed Forces.

Both of Ironsi and the Gowon regimes under a substantially similar constitution, the basis of which was the constitution (suspension and Modification) Decree No. 1 of 1966. The Muhammad Obasanjo regime operated under the constitution (basic provision decree No. 32 of 1975, the provisions of which are almost word for word to be found in the constitution (suspension and Modification) Decree No. 1 of 1984 of the Buhari regime. As the law, structure, nature and operations of government under Decree No.1 of 1966 are substantially different from the position under the last two Decrees, comparative analysis would be made of the two situations.

Decree No. 1 of 1966 was the first expression of a military constitution in the constitutional history of Nigeria. In contrast with the former civilian constitution it had characteristics which stood out in sharp contrast to its predecessor. The last two military constitutions: the constitution (Basic Provisions) Decree No. 32 of 1975 and the constitution (Modification and Suspension) Decree No. 1 of 1984 substantially the same in contents and style stand in marked contrast to Decree No. 1 of 1966. the three decrees have a common purpose as is, for example, stated in their explanatory notes that "the decree sets out the basic frame work for the government of the Federal Republic of Nigeria and its component states, as from 31st December, 1983, under a Federal Military Government and specified the principal organs thereof". They also always provide for the suspension and modification of provisions of previous constitutions, particularly those aspects incompatible with the stance and operation of the new government. The 1985 Decree departs radically from all the previous ones; it will be discussed in the final unit.

The approach will be to highlight on a comparative basis the institutions of government established, and consider the nature and extent of legislative, executive and adjudicating powers in the Decree. We shall consider first the structure of government.

2.0 OBJECTIVES

By the end of this unit, you should be able to:

distinguish between a democratic government and a military government.
identify the structures of government under a military regime.

3.0 MAIN CONTENT

3.1 Structure of Government

Unlike the Decree No. 1 of 1966 which set up two major federal institutions in government (the supreme military council and the federal executive council) the last two Decrees added a third one designated the national council of states.

3.2 Composition

The supreme military council consisted of the head of the federal military government as President; the Chief of Staff, Supreme Headquarters, the Chief of Army Staff, the Chief of Naval Staff, the Chief of Air Staff, the Inspector General of the Nigeria Police, the general officers commanding the first, second, third and fourth divisions of the Nigerian Army respectively, 12 designated members who shall be senior officers of the Nigerian Armed Forces and the Nigerian Police Force of whom six shall be from the Nigerian Army three from the Nigeria Navy, two from the Nigerian Air Force; and such other members as the council may from time to time appoint. The Attorney-General of the Federation shall attend the meeting of the council in an advisory capacity.

The federal executive council consisted of the head of the federal military government as president; the chief of staff, supreme headquarters; the inspector General of Nigeria Police; the attorney General of federation; and such other members (to be know as commissioners) as the supreme military council may from time to time appoint.

The new body, the national council of states, consisted of the head of the federal military government as president; the chief of staff; supreme military headquarters; the chief of Army staff; the chief of Naval staff, the chief of Air staff; the inspector General of the Nigeria police; the military governors of the states; and such other members as the supreme military council may from time to time appoint. Again, the Attorney General of the federation attended in an advisory capacity.

There are striking differences in the arrangement of machinery of federal government under Decree No. 1 of 1966 and the last Decrees.

First, an entirely new body, the national council of states has been created. Second, military governors have been excluded from the highest organ of government, the supreme military council. They belonged to the national council of states. Their removal from the

supreme body was a reaction to their virtual ungovernability and 'irresponsibility' under the Gowon regime. Since they sat and participated in major policy formulation in the former supreme military council General Gowon found it impossible to discipline them, not to think of re–posting or removing them as military Governors. Indeed on the appointments as Military Governors, the new men were expressly told that they were on purely military assignments and not as political administrators as their predecessors turned out to be. To have included the Military Governors in the Supreme Military Council would not only have made it an unnecessarily unwieldy body, it would also have led to the exclusion from that body of more senior military personnel. To further underscore the purely military nature of their assignments, the Military Governors were to channel problems of their states through the Chief of Staff, Supreme Headquarters, to the head of the federal military government. This contrasts with the almost too frequent visits of the military governors in the Gowon administration to Lagos to see the head of state in the process of which conflicting and embarrassing statements on major national issues were made at press conferences at the airports.
Also, both the supreme military council and the national council of states were composed entirely of military personnel. The only civilian or two bodies were the federal attorney general who attended purely in an advisory capacity. This arrangement was also designed to stress the military nature and posture of this regime. This point was further underscored by the inclusion, for the first time, of the four General Officers commanding the four divisions of the Nigerian Army in the Supreme Military Council. Of note also is the exclusion of the chiefs of Army, Naval, and Air staff from the federal executive council and their placement in the National Council of States.

That the Buhari regime is less concerned with persons and personalities but more with offices is shown by provision that 'A member of the supreme military council shall, unless the council otherwise directs, vacate his office as a member if he ceases to be the holder of any office by virtue of which he was appointed a member '. This again is a reaction to the practice in the Gowon regime when certain individuals were appointed to the supreme military council by name rather than by virtue of their offices.

While it is provided that each of the three councils established shall be presided over by the head of the federal military government, a novel arrangement was also made whereby the chief of staff, supreme headquarters, was to preside in his absence. This provision should have gone on to provide for the method of appointing some other person to preside at the council meetings in the event of both the head of state and the chief of staff, supreme headquarters, not being available. A provision to the effect that the councils shall appoint one of their

members to act might have sufficed. Perhaps, however, section 6(7)(b) of Decree No. 32 and 2.7 (6)(b) of Decree No. 1 of 1984 empowering each council to regulate its own procedure and, subject to its rules of procedure, to act notwithstanding any vacancy in its membership or the absence of any member, may be the answer.

Another departure from the former Decree was the express provision for meeting schedules[6] for the three councils. The supreme military council under Major – General Buhari met at least once every three months; the National council of states met at least thrice every year and the federal executive council met normally once every week.

3.2 Structure of Government in the States

In the Gowon administration, the military governor was virtually a law unto himself. This may sound cynical but the cynicism arose from the law itself. Decree No. 1 of 1966 literally equated the government with the military governor. There was the provision that '… any reference to the government of a region shall be construed as a reference to a military governor of that Region. In other words, the Decree made the military governor the sole lawmaker as well as executor of the laws. A later and obscure Decree set up state executive councils without stating their functions. They existed only to advise the military governor on any matter he might choose to refer to them.

Decrees No. 32 of 1975 and 1 of 1984 however changed this position. They expressly provide for an executive council for each state, which council shall comprise the military governor as chairman; one senior officer each from the Nigerian Army, the navy and the Air Force in the State; the most senior officer of the Nigeria Police in the state; and such other members(to be known as commissioners) appointed. Now, therefore, a military governor has no choice but to set up an executive council with the specified composition. Consequently, while the new Decrees still vest in the military governors the functions performed by civilian regional governors and premiers, functions performed by civilian executive councils, Houses of assembly or Houses of chiefs vest in the executive council of the States.

The real meaning of all this is that State Military Governors would not lightly disregard the advice of their executive councils on matter of policies affecting the state. These arrangements are most in accord with the principle and practice of the doctrine of separation of powers. Each state executive council may regulate its own procedure and, subject to its rules of procedure, act notwithstanding any vacancy in its membership or the absence of any member. A strict interpretation of this provision may lead to an absurd situation. One may ask what

happens if the vacancy or absence was created by the unavailability of the military governor himself.

Unless, of course, a new military governor is quickly appointed, there is no provision in the Decrees for a deputy or acting chairman. Unless of course, administration grinds to a halt, where no replacement is made for the military governor, the alternative might be that the most senior member of the Armed Forces in the executive council might act as chairman. If section 7(2) is not flexible enough to accommodate this interpretation; the answer would be the constitutional doctrine of necessity.

4.0 CONCLUSION

In this discourse, you learnt about the Nigerian Military and the structure of government of the Nigerian Military from 1966 till 1999 when they handed over to a democratically elected government.

5.0 SUMMARY

In this unit, you have learnt about the nature of the Nigeria Military and their structural composition. You should be able to distinguish a military government and civilian government in Nigeria.

6.0 TUTOR-MARKED ASSIGNMENT

The structure of government under the military regime gives room to abuse of power. Comment.

7.0 REFERENCES/FURTHER READINGS

S. 15 (4) (b) of Decree No. 32 of 1985; s. 15 (4) (b) of decree No. 1 of 1984.

Decree No. 32 of 1975, s. 7 (2); decree No.1 of 1984, s. 8 (2).

Since the Administration is a Military One

See Decree No. 1 of 1966, ss. 11 (1) (2) and (3); and Sched. 1, ss 112, 113, 123 and 124.

However, by a later amendment, the chief justice of Nigeria was to be appointed or dismissed solely by the head of state-Constitution amendment Decree No. 5 of 1972.

Decree No. 1 of 1984 provided for one President of the Customary

Court of appeal appointed on rational basis like the Grand Khadi.

Decree No. 1 of 1966, Sched.2 ss, 112, 113 and 123

Decree No. 32 of 1975, S. 13(3); Decree No. 1 of 1984, s. 14 (3)

Decree No. 1 of 1984, Sched 2, s. 256

Abiola Ojo: Military Government and Constitutional Law in Nigeria.

S. 4 of decree 32 of 1975; s. 5 of Decree No. 1 of 1984

See Lakanmi and Kikelomo Ola V. Att. Gen. (Western state) S. C 58/69. The Federal Military Government (supremacy and Enforcement of Powers) Decree No. 28 of 1970; see Abiola Ojo, The Search for a Grundnorm in Nigeria- the Lakanmi case' in Nigerian Journal of Contemporary Law 1970, Vol, 1 No. 1 pp. 40-77.

UNIT 2 STRUCTURE AND ADMINISTRATION OF THE JUDICIARY

CONTENTS

1.0 INTRODUCTION

In deference to state autonomy and perhaps the principle of federalism, the military regime continued to leave judicial organisation largely on state basis. However, in the areas of appointment, promotion, discipline and removal of judges, the new Decrees adopt the policy under Decree No. 1 of 1966, with some differences. Under Decree No. 1, judicial administration was centralized in the supreme military council acting after consultation, with the advisory judicial committee. under this arrangement, all judges in Nigeria were to be appointed or dismissed by the supreme military council after consultation with an advisory judicial committee this committee comprised the chief justice of Nigeria as chairman; the chief justices of the regions (states); the grand Khadi of the Sharia court of Appeal; and the Attorney General of the federation. The solicitor general of the federation acts as secretary of the committee.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

effect of decrees in the Nigerian government

3.0 MAIN CONTENT

The new Decrees depart in some important particulars from the above. First, the composition of the advisory judicial committee has been radically altered; it left untouched the chief justice of Nigeria as chairman; the Attorney-General of the federation to be a member; the chief justice of each of the states of Nigeria also remains. New appeal; the president of the federal Revenue Court; instead of the Grand Khadi of the Sharia Court of Appeal, it would now be one Grand Khadi of the Sharia Court of Appeal appointed annually in rotation by the supreme

military council from the states having a Sharia Court of Appeal. The new Decree unlike the former one, did not include the solicitor general of federation as secretary to the committee. The reasons for this omission might be that the solicitor general invariably aspires to judgeship were made by the supreme military council after consultation with the Advisory Judicial Committee to advise the supreme military council before the latter makes an appointment. Again in terms of removal of justices and judges, the new Decrees, like Decree No. 1 of 1966 provided that the chief justice of Nigeria, the chief judge of the high court of a state, Grand Khadi of a sharia court of appeal, president of a customary court of appeal of a state shall be removed by the supreme military council on the recommendation of the Advisory judicial committee. They also provide that removal of judicial officers in other cases shall be by the supreme military council. the provision in section 256 of the 1979 Constitution to the effect that, 'Any person who has held office as a judicial officer shall not on ceasing to be a judicial officer for any reason whatsoever thereafter appear or act as a legal practitioner before any court of law or tribunal in Nigeria is left undisturbed by Decree No. 1 of 1984. In the current wave of mass retirement of judges all over the country, in particular, some of them who are still young, the effect of this provision might likely create some hardship.

As under Decree No. 1 of 1966 [the] new Decrees also provide that, 'No question as to the validity of this or any other decree or of any edict shall be entertained by any court of law in Nigeria. The decree means what it says in this provision was amply demonstrated when the Supreme Court felt otherwise. However, the courts have insisted, rightly in my view, that they are free to challenge the validity of an Edict [if] such edict is contrary to the provisions of a decree. There can be no other interpretation if the power structure and the integrity of the federation is to be maintained.

4.0 CONCLUSION

To conclude, we could see that in deference to federalism, the appointment, promotion and dismissal of judges are done centrally.

5.0 SUMMARY

In this unit, we have considered the various issues on the administration of the judiciary during military regimes.

6.0 TUTOR-MARKED ASSIGNMENT

1. Identify the problems of the judiciary under the military regime.
2. Independence of the judiciary under the military is a mirage. Comment.

7.0 REFERENCES/FURTHER READINGS

Abiola Ojo (1984). *Military Government and Constitutional Law in Nigeria.* Ibadan: Evans.

K. M. Mowoe (2002). *Constitutional Law in Nigeria.*

UNIT 3 DEMARCATION OF FUNCTIONS OF GOVERNMENT

CONTENTS

1.0 INTRODUCTION

Unlike the old Ironsi and Gowon regimes, the new decrees, specifically and clearly, state the various functions of the different arms of government. This is in very marked contrast to the rather aphoristic provisions of Decree No. 1 of 1966. While Decree No. 1 of 1966 virtually glorified the office of the head of state and that of a military governor, almost without restraints, the new decrees hedged these offices and the exercise of their powers around with checks and balances.

There are significant differences between the new decree and those it replaces. The decree specifies that the executive authority of the federation, which is vested in the head of the federal military government, 'should be exercised by him in consultation with the supreme military council. This is quite unlike what happened under Gowon. The general exercised executive authority and consulted or informed the supreme military council only when it pleased him to do so. Apparently, the new rulers do not want the emergence of another Gowon, and they have, therefore, provided for collective leadership at the very top.

It is in recognition of the need for limited, though military, government that each major organ of government has its functions clearly stated.

2.0 OBJECTIVES

At the end of the course, you should be able to:

discuss the structure of a military government
explain the dynamics of a military government

3.0 MAIN CONTENT

3.1 The Supreme Military Council

The fact of its being the highest national organ of government is clearly reflected in the magnitude and amplitude of functions allocated to it. it is responsible for determining from time to time national policy on major issues affecting the Federal Republic of Nigeria in other words, major matters of national policy shall be a collective responsibility rather than the decision of any one person or group of Constitutionally unrecognized persons. It is also responsible for constitutional matters, including amendments of the Constitution of the federation. Its functions also include matters of all national security, including the authority to declare war or proclaim a state of emergency or martial law. The express mention of the right of the supreme military council to declare a state of martial law in the new Decrees (this was not in any of the former decrees) is significant. The full meaning and implication of 'martial law' is not often appreciated, even by lawyers.

However the provisions under which it appears in these Decrees show that, perhaps, there is no mistake here. The reason for this being that it is provided for as an alternative to declaration of an emergency, which is a lesser evil. The term 'martial law is often incorrectly used to cover any of the following: military law, that is, law governing the Armed Forces; the law administered by a military commander in occupied enemy territory in time of war; or the common law right and duty to maintain public order by the exercise of any degree of necessary force in time of invasion, rebellion insurrection or riot. The true meaning of martial law is that it is no law at all. It is merely, in its strictest sense, the suspension f the ordinary law (including civilian and military laws) and the substitution therefore of discretionary government by the executive exercised through the military. It is often called to service when the ordinary laws of land are inadequate to deal with certain situations.

A novel and very interesting function of the council is its exclusive responsibility for the appointment of the head of the federal military government, the chief of staff, supreme headquarters, the chief of Army staff, the chief of naval staff, the chief of Air staff, the general officers

commanding, the inspector general of the Nigeria police, military governors, members of the national councils of states and of the federal executive council. This function raises a number of points. First, it is now made clear that any important functionary of government is to be appointed by the collective will and approval of the supreme military council. Second, since council is responsible for appointing members of the other two national councils, that is, the federal executive council and the national council of states, it demonstrates that the supreme military council is the ultimate source of authority in the federation.

And finally, it attempts to take care of the popular but erroneous constitutional assumption, particularly in a military regime, that the removal of the head of government is tantamount to a change of government. This means that any attempted coup d'etat which merely aims at liquidating the head of government without corresponding efforts to overpower the supreme military council will be futile. Because, in such an eventuality, the council will quickly appoint another head of government. The question of who then controls the nation becomes that of effectiveness. When clubs are trumps, all that succeeds is success. The council is also responsible for ratifying appointment of such senior public officers as the council may from time to time specify. In the end, the council is responsible for the general supervision of the work of the national council of states and the federal executive council. This provision further strengthens the hierarchy of control in this administration.

3.2 Head of State

By definition, while Decree No. 1 of 1996 defined Head of Federal Military Government to mean not only that but also supreme commander of the Armed Forces of the federal republic of Nigeria, the new decrees concede his headship of government but not supreme commander. He is just commander – in- chief of the armed forces of the federal republic of Nigeria. In the setting of the Buhari administration, the head of state is seen as primus inter pares. However, in reality theory tends to diverge from practice, particularly in the field of government. It can be tentatively said that once again Nigeria has succeeded in innovating a new constitutional concept in the style of a constitutional military monarchy. While there is a distinct recognition of the office of head of government, the powers of the office have to be used and operated in the context of, and subject to the restraints of the other functionaries of government.

The Decree confers on the head of the federal military government functions hitherto performed by law by the civilian president or prime minister. The executive authority of the federal republic of Nigeria is

vested in him and may be exercised by him directly or through persons or authorities subordinate to him. However, it is specifically stated in this decree that the exercise of such powers shall be in consultation with the supreme military council. This provision not found in the former decree, was expressly enacted as a reaction to the unbridled exercise of executive and discretionary powers by the former head of state. It is also significant that the new decrees, unlike the former one, provided an immediate alternative to the head of government. The chief of staff, supreme headquarters, presides over meetings in his absence. This is not only a curtailment of his assumed discretionary powers to appoint an acting head but also a pointed reminder that there is a present alternative to him. With or without him, administration will go on. It is however more significant that the new decrees are clear on the issue as to the absolute discretion of the supreme military council to appoint whoever it wants as head of government at any given time.

Further more, most of the functions through which the head of the former military government maintained his personal authority have been eroded away by the new decrees. We have already noted that his wide and potent executive powers have now to be exercised in consultation with the supreme military council. Sections 8 of Decree No. 32 and sec. 9 of Decree No. 1 of 1984 have clearly given the most important of these powers to the supreme military council. Of note are the former prerogative of appointing and removing key functionaries of government like the various chiefs of staff, general officers commanding and military governors. Since these no longer owed their offices to him personally, they are likely or expected to be more independent. This appears theoretical, though, if only because of military seniority and discipline.

All said and done, the alleged misuse and abuse of powers by the former head of state bring into focus again the unavoidable dichotomy between constitutional law in form and in operation. While some of the wide discretions of General Gowon could be related to Decree No. 1 of 1996, a good number of them arose from the practice and prevailing atmosphere of government. One of the major factors responsible for creating an unlimited head of government in the Gowon regime was the civil war. The event shook the foundation of the nation and it was felt that, at all costs, the nation must remain intact. In the process, draconian and emergency powers were assumed in the name of prosecuting the war.

Powers gained or assumed for war purposes were not relaxed or released after the war and unfortunately voices of protest within government were feeble. At a stage, it was even being assumed that the words or wish of the head of state were laws. Two events illustrate this.

The first was the statement of the former defence Ministry's Deputy Permanent Secretary under the Gowon administration. He spoke, and his words had the force of decrees and he need not write anything down. The second was when the scare of kidnapping was rampant and many innocent lives were being lost. The head of state was obliged to broadcast a threat that kidnappers would be shot. To have shot any person as a result of this would have been obviously illegal because the laws of Nigeria did not prescribe this punishment for a kidnapper. Mere statement of the head of state was not recognized as law by decree yet. It would have been pure murder. The then Lagos State Commissioner of Policy merely re- echoed this broadcast to the public. This was an example of the indiscretions in the Gowon regime. Although the head of state might be riding his tiger, the truth was that he had more alarming passengers. The happenings of the Gowon regime showed clearly cases of public officials being more loyal than the king himself.

3.3 The National Council of States

The national council of states, the new institutional innovation under the new decrees, although national in name deals essentially with state matters. It is charged with responsibility for policy guidelines on financial, economic and social matters in so far as they affect the states. It also deals with the formulation and general implementation of national development plans including state programmes. Another function of the council is to consider constitutional matters especially in so far as they affect the states. The council is subject to the overall control of the supreme military council and it has responsibility for such other matter as the supreme military council may from time to time determine. In essence, it is designed as a forum for discussion of purely local (state) matters, thereby, affording the supreme military council more time to deal with purely national matters and issues.

3.4 The Federal Executive Council

The new decrees vest the executive authority of the federal republic of Nigeria in the head of the federal military government but oblige him to exercise such authorities in consultation with the supreme military council with respect to any exercise of the executive authority of the federal republic of Nigeria shall not be justicable. it is however provided that the executive authority of the federal republic of Nigeria may be exercised by the head of the federal military government either directly or through persons or authorities subordinate to him. in another part of the Decree,[51] the federal executive council is charged with the responsibility for determining and executing the general policy of the federal military government within such framework as may from time to time be determined by the supreme military council. What, in my view,

is meant by the provisions in sections 10 and 11 is the federal executive council merely determines and executes policies as laid down by the supreme military council.

The position occupied by the federal executive council in the set up is akin to that of the cabinet or council of ministers under the civilian regime. This fact is further reinforced by the inclusion of commissioners or ministers (political heads of departments) in the council. Also, section 15(3) of Decree No. 32 of 1975 specifically allocates to the council functions formerly performed by the council of ministers, House of Representatives, or Senate.

In the case of Decree No. 1 of 1984, functions formerly conferred on the national assembly vest in the federal executive council. And where any function was formerly performed by a minister in the government of the federal other than the prime minister or the president such function shall vest in the appropriate commissioner or Minister. The power to make an instrument is conferred on the federal executive council by any law and where the council itself does not act, any instrument made in the exercise of the power may be executed under the hand of the commissioner or minister or permanent secretary to the department of government of the federation responsible for the matter which the instrument relates, or under the hand of the secretary to the federal military government.

The head of the federal military government may also delegate any function conferred on him by any law to the federal executive council. This however excludes the function of signing Decrees. Since the federal executive council is really responsible for the overall general administration of the country, the decree provides that it shall meet normally once a week.

As stated earlier on, state executive councils which were not constitutionally recognized under the old administration have now been given constitutional recognition and functions. Military governors equated with their state governments under the former administration have now been made to operate constitutionally with set governmental apparatus. State executive councils now occupy a position similar to that of their executive councils, thus mentioning that office for the first time for the purpose of state administration.

The new decrees specifically provide that any function which is conferred by the existing law on the civilian scheme executive council, house of assembly or house of chiefs shall be vested in the state executive council. Happily new scheme and a number of them have appealed to the new commissioners not only for their co – operation but

they have also been reminded that, as much as possible, the constitutional principle of collective responsibility shall operate in the running of government. This is a departure form the understanding and practice in the old administrations that the military governors were solely responsible for the government of their areas.

4.0 CONCLUSION

The military government is usually extra constitutional. It is run by decrees. The main organs of government are the Supreme Military Council or the Armed Forces Ruling Council as the case was between 1993 and 1999 and the Head of state was also the Commander in Chief of the Armed Forces.

5.0 SUMMARY

In this module you should be able to explain the structure of a military government.

6.0 TUTOR-MARKED ASSIGNMENT

Explain the functions of the National Council of State and the Federal Executive Council.

7.0 REFERENCES/FURTHER READINGS

Ademolekun v. The Council of the University of Ibadan (1968) N.M.L.R 253.

Nigerian Tribune, November 20, 1975, p.1 see also Eweluka, opcit pp. 10-11.

Decree No. 32 of 1975, s. 8.

S. 8 (a) of Decree No. 32; sec 9 (a) of Decree No. 1 of 1984.

S. 8 (b) of Decree No; Sec 9 (b) of decree No. 1 of 1984.

S. 8 (c) of Decree No. 32; Sec 9 (c) of decree No. 1, 1984.

R v. Nelson and Brand (1867). Special Report, 99-100 quoted in Hood Philips, Constitutional Law and Administrative Law (3rd ed), 1962, p. 502.

S. 8 (c) of Decree No. 32 of 1975; sec 9 (d) of Decree No 1 of 1984.

S. 8 (c) of decree No. 32; sec 9 (c) of Decree No. 1 of 1984.
S. 8 (d) of decree No. 32; sec 9 (d) of Decree No. 1 of 1984

S. 16 No. 32 of 1975, s. 20; No 1 of 1984 sec 20.

He is president of all the three major councils of federal Administration

S. 15 (3) (a) of Decree No. 32; s. 15 (3) (a) of Decree No. 1 of 1984.

S. 5 (1) and (3) of Decree No. 32 sec 6 (1) and (3) of Decree No. 1 of 1984.

UNIT 4 LAW MAKING

CONTENTS

1.0 INTRODUCTION

Under this heading we shall discuss law making processes in Nigeria.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

discuss the process of law making
identify provisions of law and organ of government responsible for law making.

3.0 MAIN CONTENT

The immediate problem that arises is to identify the body or institutions responsible for making laws (legislation) under the new Decree. On state level the decree appears specific as to the body responsible. The new decrees provide that the power of the military governor of a state to make laws shall be exercise by means of edicts signed by him. it can be concluded that a military governor not only determine what law he wants to make but also makes it by merely signing it. This is further supported by the provision that an edict is made when it is signed by the military governor of the state to which it applies, whether or not the edict then comes into force. There is no indication in the decrees obliging the military governor to discuss legislative proposals with the executive council although it is understood that this is invariably done.

On the other hand at the federal level the situation is not really clear as to who determines what legislation is to be made. What is clear, however, is the person or body responsible for finally making legislation. The Decrees make it clear that a decree is made when it is signed by the head of the federal military government, whether or not it then comes into force. However in the formulation of legislation, all that the decree says is that ‘the power of the federal military government to

make laws shall be exercised by means of decree signed by the head of the federal military government. by strict definition of section 6(1) of Decree No. 32 and section 7(1) of Decree No. 1 of 1984 which provide that 'There shall be for Nigeria a supreme military council, a national council of states and a federal executive council', the federal military government is made up of those three institutions.

However, the specific functions allocated to each of the three institutions in the Decrees appear to accord with above provision and its logical and literal interpretation. The national council of states deals purely with state matters; the federal executive council determines and executes general policies of the federal military government within such framework which may from time to time be determined by the supreme military council. Aside from this process of deduction by elimination, the functions allocated to the third body, the supreme military council shows that they are constitutional and legislative ones. Confusion about the competent body to formulate legislative policies will be avoided if the Decree has specifically stated that the supreme military council, rather than the nebulous entity, federal military government, has powers to make laws. In fact and in law, it is the supreme military council, like the military governor in the states that has powers to make laws. It cannot in truth, in my view, be the federal military government as stated by the Decree.

As the decrees retained the federal nature of the constitution, they provide that division of powers as between the federal government and the states shall be in accordance with the legislative list in the Constitution of the federation. This means that the classification of subjects into the 'Exclusive Legislative List', within which the federal government has exclusive jurisdiction and the 'Concurrent Legislative List' over which both the federal and state governments, have jurisdiction, is retained.

However, the retention of this classification appears not only theoretical but cynical in the light of other sections of the decree and practice of government. First, sections 1(1) and 2(1) of Decree No. 32 of 1975 and Decree No. 1 of 1984 negate the classification. They provide that 'The Federal Military Government shall have power to make laws for the peace, order and good government of Nigeria or any part thereof with respect to any matter whatsoever'. In other words the federal military government is not only unlimited in respect of the two legislative lists, it can also enter areas of residual powers constitutionally reserved to the states. Secondly, the apparent freedom of the states to even legislate on matters in the concurrent list is curtailed by the duty to obtain the prior consent of the federal military government. However, where any legislation of a state government conflicts with an Act or Decree of the

civilian federal government and the federal military government, the former would be avoid to the extent of the inconsistencies.

In spite of the above seemingly tight overall control of legislative powers by the federal military government, there is sufficient room for manipulation by an enterprising military governor. In spite of the restraints of the legislative lists, the Decrees do not preclude the military governor of a state from making provision for grants or loans from or the imposition of charges upon any of the public funds of the state for any purpose notwithstanding that it relates to a matter included in the exclusive legislative list; and where such matter relates to a subject in the concurrent legislative list, a military governor need not obtain the consent of the federal military government to such provision. The way is therefore left open to a military governor to purportedly legislate in respect of loans or imposition of charges when in reality an ulterior motive might be the objective. The question whether a law made by the Military Governor of a State on a subject in the Concurrent Legislative List was made with the consent of the Federal Military Government shall not be justiceable.

While legislation made by the Federal Military Government is known as Decree, a State one is known as Edict. A decree or edict is made known to the public by means of a sound or television broadcast, or by publication in writing, or in any other manner. Where one or more Decrees or edicts make provisions on the same subject matter the ones published in the Gazettes shall prevail over ones not so published. A decree or Edict is made when it is signed by the Head of the Federal Military Government or a military Governor respectively as the case may be, whether or not it then comes into force. Where no other provision is made as to the time when a particular provision contained in a Decree, Edict or subsidiary instrument is to come into force, it shall come into force on the day when the Decree, edict or subsidiary instrument, as the case may be, is made.

As in the previous Decrees, no questions as to the validity of this or any other decrees or of any edict shall be entertained by any court of law in Nigeria. This provision has been interpreted to mean that although the courts may not question the validity of a Decree, they are not estopped from declaring an Edict void to the extent that it conflicts with a Decree.

What has emerged from the comparison of the provisions of Decree No. 1 of 1966 and Decrees No. 32 of 1975 and 1 of 1984 is that whereas the earlier decree placed little or no restrains on government, the latter decrees provide for restraints. Greater care has been taken in the latter decrees to spell out the functions and limitations of government personnel and institutions. While the former administration did not

conceive the constitution as a control-mechanism within which the government could operate, the latter decrees are little with checks and balances. In terms of strict and theoretical analysis and interpretation the latter decrees, in contrast to Decree No. 1 of 1966, attempt some measure of 'constitutionalism in a military administration. However we shall have to turn to the Babangida Administration to see how a military administration, in truth governs in accordance with the wishes of the people.

4.0 CONCLUSION

The constitution of the Federal Republic of Nigeria clearly spells out the role the legislature plays in law making in the same vain it outlined the extent of the power of legislature**.**

5.0 SUMMARY

In this module we learn the power of the legislature to make laws and the process of law making in Nigeria.

6.0 TUTOR-MARKED ASSIGNMENT

Explain the process of law making under the military.

7.0 REFERENCES/FURTHER READINGS

Constitution (Basic Provisions) Decree No. 32 of 1975, S.6; Constitution (Suspension and Modification) Decree No. 1 of 1984, S. 7.

S. 7 (3)

S. 6(7) (a) of Decree No. 32 of 1975; S. (6) (a) Decree No. 1 of 1984.

S.6 (8) of Decree No. 32; S. 7 (7) of Decree No. 1 of 1984.

Constitution (suspension and Modification) Decree No. 1 of 1966, Sched, 2, S. 1; see also Sched, 4, pt. 1, S. 1.

Ibid, S. 3

Ibid S. 4

Constitution (Miscellaneous Provisions) Decree No. 20 of 1967, S. 3.

See Eweluka, D.I. O 'Constitutional Aspects of Military Take Over in

Nigeria' in (1967) 2 Nig. L.J. No. 1, pp 1-15.

Decree No. 32 of 1975, s.7; Decree No.1 of 1984, s. 8 .

S. 15 (4) (a)

Abiola Ojo (1984). Military Government and Constitutionalism Law in Nigeria.