NATIONAL OPEN UNIVERSITY OF NIGERIA

SCHOOL OF LAW

COURSE CODE: LAW 444

COURSE TITLE: ADMINISTRATIVE LAW II

COURSE CODE:	**LAW 444**
COURSE TITLE:	ADMINISTRATIVE LAW II
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ADMINISTRATIVE LAW II

Introduction

What You Will Learn in this Course

Course Aims

Course

Objectives Study

Units

Tutor-marked Assignment

Further readings

Introduction

Administrative Law 2 shall build on the lessons and principles of law you already learnt in Administrative law 1 in the First Semester.

You shall be learning among several other concepts the doctrine of natural justice, division of administrative decisions, remedies available for administrative decisions. In addition, we shall also study the concepts of shall also learn about the local government administration in Nigeria paying attention to its history and how it faired under the military regimes and how it is fairing currently under the Constitution of the Federal Republic of Nigeria.

Objective

The main objective of this course is for you to appreciate the various kinds of administrative decisions and how they can be challenged in terms of someone being aggrieved of the outcome. For instance, you are driving along the roads of Lagos and you are stopped by the Lagos State Traffic Management Authority (LASTMA) apprehends you of breaking a traffic rule and fines you. You discover that the officer on duty was a neighbor with whom you have picked some quarrels in the past. How would you challenge the decision? What the remedies available to you and how would you establish that the procedure is fair and just to you.

The above in addition to the doctrine of natural justice, delegation and sub- delegation are all core objective of this course to ensure your perfect understanding of administrative procedures.

We have broken the course into 4 modules comprising of 17 units. This is with the intention to make it easier for your understanding. It is important that you approach each module with an understanding of the previously module. To assist you, it is advised that you read the conclusion and summary of previous modules before studying the new module.

Tutor marked Assignments

There are Assignments at the end of each module; to assist you try to answer each of them by writing the assignments and also discussing in your study groups.

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MODULE 1

UNIT 1 ADMINISTRATIVE ADJUDICATION

1.0 Introduction

Globally in all jurisdictions, the Courts of Law are recognized as bodies vested with the authority of interpreting the law and applying the law to disputes between various parties. The

primary and near exclusive duty of adjudication is mostly associated with the Courts of Law usually saddled with the responsibility of adjudicating on disputes between parties.

However, the growth of modern day governments has necessitated the empowering of various administrative agencies and tribunals outside of the Law Courts with the exercise of powers which are judicial or quasi-judicial nature. These bodies dispense justice though they are most often majorly constituted of persons who have no legal training or background though expected to be knowledgeable in the area over which it was established.

2.0 Course objective

At the end of this unit, you should be able to aptly describe the basic challenge that traverses this topic which is an attempt to classification of administrative adjudication. You will also appreciate the fact that the more one seeks to explore, the more the discovery of the fluidity which characterises administrative law and actions and thus elusiveness of characterisation. This fluidity is very much evident in the fact that in administrative law there is a convergence of various governmental powers.

3.0 MAIN CONTENT

3.1 Definitions of administrative adjudication

Adjudication has been defined as an act of making an official decision about who is right in a disagreement between two groups or organisation.

It can also be defined as the agency process for issuing an order which resolves particular rights or duties. Administrative Adjudication is the process by which an Administrative Agency issues an order, such order being affirmative, negative, injunctive, or declaratory in form.

Most formal proceedings before an administrative agency follow the process of either rule making or adjudication. Rulemaking formulates policy by setting rules for the future conduct of persons governed by that agency. Adjudication applies the agency's policy to the past actions of a particular party, and it results in an order for or against that party. It is a dispute resolution aspect of administrative action.

3.2 Classification of administrative adjudication in Nigeria

Administrative adjudication is difficult if not impossible to classify. Various attempts at classifying administrative adjudication have led many authors to subjecting the concept of administrative adjudication to division and subdivision of the concept: a symptom of fluidity of

the subject matter and its resistance to proper compartmentalisation. The result is that many authors seek to classify the concept in different ways. So what we have is cacophony of classifications through which one must meander in attempt to discover a coherent understanding of the subject at hand.

The difficulty at classification lies in the fact that sometimes it is difficult to classify the various acts of administrative bodies. It is the characteristics of the act rather than the appellation that determines the proper understanding of the act and then the classification.

The challenge with classification is the difficulty encountered in deciding the particular act being carried out which has its roots in the breakdown of the doctrine of separation power in the face of onslaught of administrative realities. Sometimes it is difficult to determine when a matter has gone from the realm of mere inquiry to adjudication with all the attendant consequences.

Administrative adjudication has been classified into **inquiries** and **tribunals**.

Another attempt at classification of administrative adjudication was made by Ese Malemi who classified adjudicatory bodies rather than administrative adjudication. The learned author classified adjudicatory bodies into (a) Statutory Tribunals (b) Autonomous Bodies(c) Other bodies. Ese Malemi's classification seems to follow an earlier classification attempt by authors of Cases and Materials on Administrative Law in Nigeria.

3.2.1 Informal administrative adjudication

Adjudication can be defined as the informal route sometimes taken by administrative bodies in carrying out a form of dispute resolution. They are informal in the sense that they are not strictly or specifically required under any law and are not compulsory. However, they are equally effective in that they offer a form of domestic means of resolving some administrative grievances before they even escalate into formal adjudicatory processes. However they still form a sort of administrative adjudicatory process and may even be judicial or quasi-judicial in nature.

Informal adjudication being flexible and malleable is practiced in virtually all administrative agencies scattered all over Nigeria. They are usually the first form of attempt at resolving complaints against a public body or agency and most of the time they don't make news. Thus where a consumer for instance has a complaint against a public agency such as PHCN or Police, the relevant officer of the agency, usually the immediate officer ay act directly upon the facts available to him or as presented by the complainant and come up with a solution within his authority. Where there is a solution but outside his official powers, the matter may be escalated to the next higher officer with the official capacity to resolve the matter. Thus a Branch Manager

or Station Manager of PHCN may listen to a complaint such as illegal disconnection by PHCN staff and resolve the matter by ordering reconnection without parties resorting to any formal of formal adjudication.

Informal adjudication is also resorted to by Ministers and other executive bodies. A very good example is the recent dispute between the Nigerian Maritime Security Agency(NIMASA) and Nigerian Liquefied Natural Gas (NLNG) in which there were various attempts by the Attorney General and the Minister of Petroleum to resolve the matter which led to NLNG paying part of the disputed levy to NIMASA while challenging the matter at court.

3.2.2 Formal administrative adjudication

The hallmark of formal administrative adjudication is that there are always direct or indirect statutory provisions for their establishment and procedures. There are laws or some statutory instruments that spell out the formation, jurisdiction and procedures of formal adjudication. This characteristic of formal administrative adjudication makes it easy to appeal or challenge the decision of these bodies. The laws or statutory instrument providing for formal adjudication may be specific or general. A formal administrative adjudication may be created within an agency by virtue of the law creating such an agency. An agency or government body may also be empowered by a law to create a formal judicial or quasi-judicial for the purpose adjudicating on matters that may relate to the agencies.

The various forms of formal administrative adjudication that can be identifiable in Nigeria are:

- Judicial inquiries
- Statutory/Administrative Tribunals
- Domestic or Autonomous Bodies
- Other Adjudicatory Bodies

3.2.3 Judicial Inquiries

Just as the name sounds, formal judicial inquiries are formal inquiries that are basically judicial or quasi-judicial in nature. Judicial inquiries can also be described as formal judicial tribunal of inquiries. The formal nature of judicial inquiries is that it statutorily provided for. The basic law that provided for judicial inquiries is the Tribunal of Inquiry Act. The law empowers the President to, whenever he deems it desirable by instrument under his hand (hereafter in this Act referred to as "the instrument") constitute one or more persons (hereafter in this Act referred to

as "member" or members") a tribunal to inquire into any matter or thing or into the conduct or affairs of any person in respect of which in his opinion an inquiry would be for the public welfare; and the proper authority may by the same instrument or by an order appoint a secretary to the tribunal who shall perform such duties as the members shall prescribe.

3.3 **Statutory or autonomous bodies**

According to the Curzon's Dictionary tribunals are ''bodies outside the hierarchy of the courts with administrative or judicial functions''. Statutory administrative tribunals are –as their name suggests are judicial bodies created by statutes for the purpose of adjudication. One common thread that runs through all statutory administrative tribunals is that they are created by statutes and are usually executive bodies. Thus their memberships, appointments and administration are all under the purview of the executive arm of the government. Although some of the tribunals may have judges as their members, they may still be categorised as executive bodies. A good example includes the Code of Conduct Bureau established under the 1999 Constitution and Electoral Tribunals.

A tribunal can also be defined as a person or body exercising judicial en quasi-judicial functions outside the regular court system. It is a special court consisting of a person or a panel of persons who are officially chosen by government to look into a problem of a particular kind or perform such judicial or quasi-judicial functions as may be assigned to it. Thus, a tribunal is a body with judicial or quasi-judicial functions usually set up by government under statute and existing outside the hierarchy of the regular court system to do the following:

- Investigate matters of public importance or
- To hear and determine cases, matters or claims of a particular kind between parties whether such parties be persons, bodies or government.

In the case of **Onuoha V Okafor (1985) 6 NCLR 503 cr 509** Oputa CJ (as he then was) explained the nature of a court or tribunal as envisaged under the fair hearing provisions of the Nigeria Constitution and said

> ***"The terms, court or tribunal … is usually used to indicate a person or body of persons exercising judiciary functions by common law, statute, patent, charter, custom, etc whether it be invested with permanent jurisdiction to determine all causes or a class or as and when submitted or to be clothed by the state or the disputants with merely temporary authority to adjudicate on a particular group of disputes"***

One difference between judicial inquiries and statutory tribunal is that a judicial tribunal of inquiry is usually appointed by government pursuant to the Tribunals and Inquiries Act or its equivalent laws in the states or under other specific statute enacted for that purpose while statutory tribunals are usually set up under a particular statute or law.

A tribunal may consist of one person sitting alone as the tribunal, such as a sole commissioners or a body of persons, such as a panel of judges. In some cases tribunals are chaired by a Judge of the High Court, Magistrate or Legal Practitioners sitting alone or with such other number of persons or assessors who represent special interest or are persons with professional or technical knowledge in the matters the tribunal, inquiry, panel or commission is set up to investigate or determine. A tribunal is usually subject to:

1) The general law of the land,
2) The Statutes, or instrument guiding its jurisdiction or terms of reference; and
3) The rules of natural justice and fair hearing.

Generally, administrative tribunals are subject to the courts with appeals emanating from their decisions to the High Court or Court of Appeal. While some of them are inferior to the High Court, others enjoy concurrent jurisdiction with the High Courts. Generally, the High Court has power of judicial review over the findings of a tribunal that is inferior to them. Therefore statutory or ouster provisions that an order or determination of a tribunal shall not be called into question in any court do not prevent the removal of the proceedings into the High Court by an order of certiorari or the powers of High Court to make an order of prohibition, or mandamus or otherwise review the findings of a tribunal. However, the statutes establishing a tribunal may provide that all appeals from the decision of the tribunal shall lie directly to the Court of Appeal especially where the tribunal is the equivalent of a High Court in which case, the Court of Appeal is the relevant court to review the findings of such tribunal.

3.3 Domestic or autonomous bodies

Domestic or autonomy bodies are independent tribunals established under chartered professional and self-governing bodies which are usually outside the mainstream government set up. They are autonomous or domestic tribunals set up under the laws that established or chartered professional bodies. Thus domestic or autonomous types of administrative adjudication are set by charted professional bodies pursuant to the extant laws that established or chartered the professional bodies.

A good example of domestic tribunal is the Institute of Chartered Institute of Taxation of Nigeria (CITN) Disciplinary Tribunal. The Chartered Institute of Taxation of Nigeria Act sets up the Disciplinary Tribunal and provides that the duty of considering and determining any case of an alleged professional misconduct of member of the Institute shall lie with the Chartered Institute of Taxation of Nigeria Disciplinary Tribunal otherwise known as the "The Tribunal" as set up in accordance with the provision of the Act. The function of these domestic bodies is to met the regulatory needs within the profession or industry concerned.

Apart from the various categories of formal adjudicatory bodies afore mentioned, there are also other adjudicatory bodies that also perform administrative adjudication. These other bodies are grouped together as they are very difficult if not impossible to categorize.

The functions of these public officers as provided by statutes are usually judicial as they are empowered to conduct quasi-judicial proceedings. Apart from internal discipline, there are also other arms of federal agencies that are empowered to carry out quasi judicial or adjudicatory functions in the course of their duties. Pursuant to the Investment and Securities Act the Securities and Exchange Commission (SEC) established the *S.E.C. Administrative Proceedings* Committee (**APC)** which is an in house adjudicatory arm of the Securities and Exchange Commission to try disputes arising from Capital Market operations. The APC also has a power to impose sanctions. Appeal from the APC lies to the Investment and Securities Tribunal.

3.4 **Justification of Administrative tribunals**

Administrative adjudications have been established in the main, to resolve:

- disputes between a private citizen and a government department, such as claims to social security benefits;
- disputes which require the application of specialised knowledge or expertise, such as the assessment of compensation following the compulsory purchase of land; and
- other disputes which by their nature or quantity are considered unsuitable for the ordinary courts, such as fixing a fair rent for premises or immigration appeals.

The main justification for administrative adjudication may be identified as:

- the relief of congestion in the ordinary courts of law (the courts could not cope with the case-load that is now borne by tribunals, employment tribunals etc.);
- the provision of a speedier and cheaper procedure than that afforded by the ordinary courts (tribunals avoid the formality of the ordinary courts); and

- the desire to have specific issues dealt with by persons with an intimate knowledge and experience of the problems involved (which a court with a wide general jurisdiction might not acquire).

3.5 **Criticism of administrative tribunals**

(1) Although members of administrative adjudications may be experts in their own fields, yet they lack the requisite judicial or legal training for the adjudicatory functions they perform.

(2) They lack the traditional independence of the judiciary, Moreover, some of these appointments are made on political grounds, with the result that membership fluctuates according to the rise and fall of political parties and sometimes the personalities controlling the government.

(3) Undue flexibility in the adjudicatory process has actually created uncertainty in administrative legal development since the administrative decision makers are not bound by the doctrine of precedent.

(4) Whereas the proceedings in the ordinary courts are generally held in public, there is a tendency towards in camera sessions in the administrative adjudicatory process

(5) Many administrative decisions are arrived at without reasons being given for much conclusions.

(6) Unlike the practice in court, many decisions affecting the livelihood of individuals are taken without any hearing whatsoever.

3.6 Advantages and Disadvantages of administrative adjudication

(a) Quick with no long waits for the case to be heard and it is dealt with speedily;

(b) Cheap, as no fees are charged;

(c) Staffed by experts who specialise in particular areas;

(d) Characterised by an informal atmosphere and procedure;

(e) Allowed not to follow its own precedents, although tribunals do have to follow court precedents.

The disadvantages are :

(a) Some are becoming more formal;

(b) They are not always independent of the Government, although the Independent Tribunal Service now recommends possible chairmen to the Lord Chancellor;

(c) Some tribunals act in private;

(d) They do not always give reasons, although under s10 of the Tribunals and Inquiries Act 1992, tribunals listed in the Act must give a written or oral statement of reasons, if asked to;

(e) Legal aid is not generally available;

(f) There is no general right of appeal to the courts: it all depends on the particular statute creating the tribunal.

4.0 Conclusion

Administrative adjudication has developed considerably and there have come into existence a good number of administrative tribunals, boards and other bodies which exercise judicial, quasi-judicial or adjudicatory functions conferred upon them by various statutes. In addition there are professional or vocational bodies which exercise disciplinary control over their members.

5.0 Summary

Today, administration is not confined to the execution and maintenance of law, it goes further to play a significant role in initiating and formulating policy decisions. The bulk of the laws enacted by the legislature are initiated and drafted by the executive department. The reason is quite clear. He who wears the shoe knows where it pinches and calls for flexibility. The administration concerned with the day to day application of the existing laws knows best what defects or shortcomings there are in the legal systems and what modifications are necessary to update the system and make it efficient and defective in action.

6.0 Tutor Marked Assignment

Discuss the various types of administrative adjudicatory bodies mentioned in this unit.

7.0 Further Reading/References

1. Kenneth Culp Davis, Administrative Law and Government (Minnesota: West Publishing Co., 2nd Edition, 1975).
2. Stephen G. Breyer & Richard B. Stewart, Administrative Law and Regulatory Policy (Toronto: Little, Brown and Company, 1979).
3. William Wade & Christopher Forsyth, Administrative Law (Oxford, UK: Larendon Press, 1994).

MODULE 1

UNIT 1 ADMINISTRATIVE ADJUDICATION

UNIT 2 RULE MAKING

UNIT 3 RULE MAKING PROCEDURE

UNIT 4 CONTROL OF RULE MAKING

UNIT 2 RULE MAKING

4.0 Introduction

Law making rests with the citizenry or its representatives, however in practice modern democracies are apt to delegate some portions of its function to administrative agencies. This aspect of administrative law is concerned with the level of guidance that is provided to agencies in their exercise of delegated law making authority. In administration, matters of procedures are as much important as substantive issues. This is because the procedure adopted could be very determinative of the worth .of the substantive rules you get at the end of the day. We have seen that the Constitution or the legislature can delegate power to an administrative agency. In exercising such power, the agency enacts delegated legislation by making rules, regulations, etc. But, for the agency to do this, there are processes or procedures it must follow. That is the crux of decision and rule making.

2.0 Course objective

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

- Know the values that must be considered in rule making;
- What administrative agencies take into consideration when making rules;
- Consider whether this is true of the rule making modality in your environ.

3.0 Main Content

3.1 Definition of rule making

Rule

A rule is defined as an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.

Rule Making

S. 551(4) of the administrative Procedure Act defines role in a king as the agency process for formulating policies, regulation or orders

Rulemaking is the agency process for formulating, amending, or repealing a rule.

ILUYOMADE & EKA also defines rulemaking as the issuance of regulations or the making of determinations which are addressed to indicated but unnamed and unspecified persons or situations.

Ese defines administrative decision or rule in an inclusive and enumerative manner. To him, it means or includes:

(a) Administrative laws, rules and regulations;
(b) Administrative decision, policy, determinations, or directives to act one way or another; and
(c) The choice of a course of action from among alternatives to deal with a public problem.

However, the definition offered by Iluyomade & Eka appears to be narrower in the sense that they define rule-making as the issuance of regulations or the making of determinations which are addressed to indicated but unnamed and unspecified persons or situations.

But there they are actually talking of the same thing because, short of all embellishments, decision or rule making is no more than delegated legislation. The donee of administrative power has the capacity to enact such delegated legislation. This legislation can also be

referred to as subsidiary legislation, administrative legislation, administrative law making, administrative rule making, or administrative decision making.

3.2 Values that should be emphasized in rule makng procedure

a) Flexibility: Rule making procedures can range from highly flexible to inflexible. Flexibility takes full advantage of agency discretion and expertise. It adds to the efficiency of rulemaking as an alternative to legislating. Inflexibility protects against misguided and abusive rules, but also imposes procedural impediments on timely rule making.

b) Participation: Rule making can be limited to one or a few agency personnel or opened up to a universe of interested or affected parties. In general, democracies will prefer participation by stakeholders substantially affected by the rules.

c) Information: Agencies engaged in rule making can provide different type of information to interested parties and to the public at large. Open rule making processes require agencies to publicize their intent to make a rule and to publish the final rule. It may also require them to publish or otherwise make available comments and testimony submitted during the rule making exercise.

d) Substantive criteria: Although administrative law is heavily oriented towards regulating-agency procedures, it may also control the criteria that must be considered in rule making. The most generic substantive requirement is that rules meet an acceptable benefit-cost ratio. Other criteria might look towards protecting various interests or concerns such as farmers, small businesses, minorities, endangered species, or ecosystems.

3.2 Considerations in rule making procedure

There are various procedural problems which accompany administrative rule making. And there are various factors which may affect the type of procedure to be adopted by a particular agency or person. For example, whilst antecedent consultation may be employed in relation to a regulation affecting Spare Parts Traders Association, it may be unreasonable with regard to a regulation affecting all Nigerian students. Also, the procedure to be adopted by a single official could be different from that of a high powered technical committee. There are five main factors which affect these considerations. They are enumerated and discussed below:

(a) **The Characteristics of Parties Affected**

These may vary widely. For instance, whether or not antecedent consultation or prior notice is

workable in terms of their number, whether or not they can easily be identified and whether or not the persons affected are organized. Where applicable, it is necessary to always consult with stakeholders, and harmonize or balance the competing or conflicting interests of all stakeholders.

(b) **Nature of the Problem to be dealt with**

When the problem is a mere routine of the public service or government, for example, the period within which a particular form must be returned or the time to see a particular officer, prior notice is usually unnecessary. Also, sometimes the matter to be dealt with may be of such urgent or technical nature as to reduce the need for such procedure. The procedure may, however, become of utmost importance where, for instance, the regulation will affect fundamental rights or economic and financial interests of some people. In such cases, procedural formalities may be accorded before certain rules or regulations are made. In the absence of any express provision for such, the administrator is at liberty to proceed more freely.

(c) **Characteristic of Administrative Determination**

More often than not, most active rule making involve the exercise, to some extent, of some discretion involving either the aims to be served or the means of attaining such aims. In such a case, it may not be practicable to consult affected interests. For example, if the minister of Health is to make regulations for stopping the spread of an epidemic what is involved may be of such a technical nature that affected interests may not be consulted. This is for practical reasons because even if persons to be affected are educated in the conventional sense, such education is inadequate to enable them appreciate the decisions of the administrator.

(d) **Types of Administrative Agencies**

Whether or not the procedure would be required could be a function of whether the administrative agency is manned by one person or by a group of persons. In certain instances, two or more administrative agencies may be competent to make decisions regarding the same matter. In that case, what one agency does would be influenced by what its sister agency has already done. For example, the Police, the ICPC and the EFCC are all empowered by the Statutes establishing them to, inter alia, combat corruption. So, if the EFCC has investigated a particular corruption case, the ICPC does not need to duplicate such investigation. If the matter is to be properly handled by the ICPC, all that would be done is for the EFCC to hand over the matter to the ICPC together with the result of its investigation and exhibits and evidence. Then, the ICPC will proceed from there.

(e) **Nature of Enforcement**

If it is subject to challenge in all its facets after promulgation, this may dispense with formality in its making. If it binds the affected parties only by requiring them to fulfil some procedural requirements, advance hearings may be unnecessary. But if the regulation requires the persons affected to disobey the regulations on the pain of loss to liberty or estate, then there is the need to allow for an antecedent opportunity for the prospective targets or victims of the enforcement to influence the decision. In other words, if the regulation is to be self-enforcing with grave consequences on people's rights, antecedent regulations would be necessary.

4.0 CONCLUSION

Administrative rules and regulations, policies, directives, etc, all come under the general name of *delegated legislation*. Whatever the nomenclature adopted, they are the means through which administrative agencies carry out their responsibilities. But much more important, however, are the factors that predominate in the minds of these agencies before they finally decide on a course of conduct or action.

5.0 SUMMARY

In this Unit, we considered the administrative rules and regulations and the factors administrative agencies consider in deciding one way or another.

6.0 TUTOR-MARKED ASSIGNMENT

In determining administrative policies and decisions, administrative agencies act purely in accordance with their personal sentiments. Do you agree?

7.0 REFERENCES/FURTHER READINGS

Ese Malemi, *Administrative Law* (Lagos: Princeton Publishing Company, 3rd Edition, 2008).

MODULE 1

UNIT 1 ADMINISTRATIVE ADJUDICATION

UNIT 2 RULE MAKING

UNIT 3 TYPES OF RULE MAKING PROCEDURE

UNIT 4 CONTROL OF RULE MAKING

UNIT 3 TYPES OF RULE MAKING PROCEDURES

CONTENTS

1.0 INTRODUCTION

In administration, matters of procedures are as much important as substantive issues. This is because the procedure adopted could be very determinative of the worth of the substantive rules you get at the end of the day. For example, the procedure adopted by a criminal court could either make or mar the evidence of the defence.

In the process of rule making, administrative agencies adopt one form of procedure or another depending on the occasion. It could be investigational, consultative, auditive or adversary. But you should note that the approach taken is usually a function of the environment. Despite the utility of consultation, however, Nigeria lacks an established record of consulting interested persons, perhaps, because enabling Acts do not require it.

Finally, the role of discretion in administration should not be overlooked especially because administrative agencies cannot succeed without one form of discretion or another.

2.0 **OBJECTIVES**

At the end of this Unit, you will be able to:

- Appraise the various rule making procedures of administrative agencies.

3.0 **MAIN CONTENT**

3.1 **Rule Making Procedures**

3.1 **The methodology of Rulemaking procedure**

The delegation of power on administrative bodies to make law takes different forms. Through the common method is for an Act of parliament to empower an authority to make rule, regulation, by law, order to do give directions. This is not exclusive of others.

Secondly, some formal orders in rule making by administrative authorities have been developed over the years. The development, no doubt must have been in furtherance to the need to reduce to possible limit the arbitrariness in making delegated legislation. Prominent among these orders are the investigation, the consultative procedures, the auditive procedure and the adversary procedure. The adoption of any particular choice however depends on certain number of factors such as the stipulation as to adopt. Thus, administrative legislation in aid of such unpopular or unacceptable proposed policy could be prevented from seeing the light of the day.

Publication

Publication of rules and decisions is the act of bringing the decision, rule, regulation, policy of the administrative agency to the knowledge of the stakeholders or the general public, as the case may be. Such publication may be antecedent publication or subsequent publication.

Section 70 of the Nigerian Communications Act, 2003 (the "NCA") which establishes the Nigerian Communications Commission (the "NCC") provides that the NCC may make and publish regulations for all or any of the following issues (i) written authorization, permits, assignments and licences granted or issued under the NCA, (ii) assignment or rights to the spectrum or numbers under Chapter VIII, including mechanisms for rate-based assignment, and

(iii) any fees, charges, rates or fines to be imposed pursuant to or under the NCA or its subsidiary legislation etc.

Section 99(1) NCA provides that the NCC shall make interconnection regulations which may specify but shall not be limited to models, terms and conditions for interconnection agreements between service providers. Section 99(2) of the NCA provides that the matters which the interconnection regulations shall regulate include but are not limited to (a) a time frame and procedures for negotiations and concluding of the interconnection agreements; (b) quality and levels of service; (c) rate methodologies; (d) protection of intellectual property; (e) protection of commercial information; (f) provisioning of facilities; and (g) sharing of technical information.

3.2 **Antecedent Publication**

This is the prior publication of proposed rules or regulations or action by the administrative agency for the notice or information of stakeholders. In addition to its role of giving advance notice, the notice assists in preparing the minds of interested persons and all those who would be affected by the agency decision. Generally, there is no law which mandates antecedent publication in Nigeria. However, where the enabling statute imposes such obligation on the agency, the agency is bound to comply.

In the UK and in the US, for example, there is a general requirement for the agency to publish its proposal before it becomes effective. Under S. 1 of the *English Publication Act 1893* (now repealed by the *Statutory Instruments Act 1946*), proposed rules, regulations, etc, made pursuant to an Act of Parliament were required to be published in the London Gazette and interested parties given a period of 40 days from the date of such publication to make their views known on the matter. Unfortunately, however, the *Statutory Instrument Act 1946* that repealed the English Publication Act 1893 does not contain a provision on antecedent publication. But that does not mean that administrative agents would not embark on antecedent publication because many enabling statutes require such publication. Even where there is no such requirement, it is in the interest of the agency concerned to follow the agencies' habitual practice of antecedently publishing their proposals for the information of stakeholders. Otherwise, the agency's proposed rules risk unpopularity.

In the US, S.*4* of the *Administrative Procedure Act 1946* (which has been re-designated as Freedom of Information Act 1966) provides as follows:

Notice of Proposed Rules

The proposed rules must be published in the Federal Register. The proposed rule or Notice of Proposed Rulemaking is the official document by which the agency's plan to address a problem or accomplish a goal is announced and explained. The published proposed rule and the public comments received on if form the basis of the final rule. By the provisions of the APA section 553(b), general notice of the proposed rulemaking shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. Under the City administrative Procedure Act, the rulemaking agency must publish notice of the proposed rule change in The City Record at least Thirty (30) days prior to a public hearing or (if earlier) a deadline for submission of written comments.

The notice of the proposed rules contains the following: (i) a statement of the time, place, and nature of public rule making proceeding (ii) reference to the legal authority under which the rule is proposed; and (iii) either the terms or substance of the proposed rule or a description of the subjects and issues involved. The proposed rules have preambles which contain a summary, date and contract information and supplementary information. The agency invites everyone to comment on the proposed rule, sets a date for comments to be submitted, and specifies various methods for conveying comments.

In the supplementary information portion, the merits of the proposed rule must also be stated. The comment period is specified to range from 30-60 days in the "Dates" section of the Federal Register but the time can still vary. The agency concerned may provide for longer period (about 180 days) in respect of complex rulemakings and shorter period may also be used when the same can be justified. When the members of the public so request or when the urgency is not satisfied with the quality of comments, the agency may extend or re-open a comment period. The comments of the public might have raised new issues particularly those not discussed in the initial proposed rules. In such a situation, the agency may publish a series of proposed rule in the Federal Register.

Procedure

After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making, through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose ….

Where the enabling statute specifically provides the consequence of the failure of the agency to comply with the requirement of antecedent publication, then that consequence shall be invoked in the event of such agency failure. Otherwise, it lies within the powers of the court to, depending on its assessment of the situation, annul the proposal or to give a less coercive order.

SELF ASSESSMENT EXERCISE 1

1. Explain antecedent publication and its applicability in Nigeria.

3.3 **Subsequent Publication**

The other type of publication is that of subsequent publicity, that is, after the law is made. See, for example, *S. 22(3)* of the *Interpretation (Miscellaneous Provisions) Act 1964* which makes provisions for such publication in a Federal or State Gazette in relation to rules of court. But note that this provision does not apply to administrative rules and regulations generally. Note, however, an equivalent section is missing from the revised Interpretation Act 2004. Consequently, there is no general provision imposing the duty of subsequent publication on agencies save to the extent that particular enabling Acts so provide. See, for example, *S. 10(2)* of the *Nigerian Citizenship Act 1961* which requires such subsequent publicity. You should recall that the government has perfected some practice of periodically publishing existing laws through, for example, the Laws of the Federation of Nigeria (LFN), or publication in Federal or State Gazette.

You should note that publication to the general public (which includes the stakeholders) can also be accomplished through the print and electronic media. In ministries, departmental offices and local government councils, publication can be consummated by pasting notices on notice boards provided within their premises. Even local governments can go to the extent of pasting these notices in strategic locations in the streets within their jurisdiction. And in the extreme of cases, where the matter involved is really a local matter, the local government councils can disseminate the information through traditional rulers and chiefs who in turn engage the services of town criers to ultimately announce the information to the people.

3.3.1 Effect of Failure to subsequently publish

Where the enabling Act mandates the agency to subsequently publish, it will often specify the effect of non-compliance. It may, for example, declare the proposed decision to be

invalid, ineffective, null or void. For example. *S. 7(2)* of the *Nigerian Research Institute Act 1964* provides that the effect is to render the regulation a nullity. In the UK and the US, non-publication means no liability for contravention, being an exception to the maxim: *ignorantiam legis neminem excusat*.

In Nigeria, where the statute does not prescribe the effect of non-compliance, the court has classified the effects into mandatory or directory, depending on the overall effect, for example, where great public inconvenience would result from holding them mandatory or where it relates to the performance of the statutory duty, the court will hold that non-compliance is directory.
Where, however, rights would be affected it will be mandatory. See the case of:
Onuorah v. Livinus Mbadugha & Another[1984) 5 S.C. 79

In the UK, *S. 3(2)* of the *Statutory Instrument Act 1946* provides that in proceedings against a person who has breached the rules, regulations or instruments, it is a defence for him to assert that the instruments had not been issued or that reasonable steps were not taken to bring the rules or regulations to public notice. Similarly, *Section. 3(a)* of the *US Freedom of Information Act 1966*, no person is in any manner to resort to any organization or procedure that has not been subsequently published. This constitutes an exception to the general legal rule of or *ignorantiam juris non excusat* (ignorance of the law is no excuse).

It tells much of the inefficiency of the Nigerian legal system that, despite the sanctity of the principle – of the ignorance of the law not being an excuse – therein, no concerted effort is made to dutifully publish every rule, regulation, bye-law, policy, decision, or intended action by an agency knowing full well that these are the parastatals of government that have several contacts with the people at the grassroots daily. It is worse to find that most of these people get to know of the existence of such rules, regulations, bye-laws, policies, or decisions at the point of enforcement, that is, when they have been arrested or when they are being prosecuted (by some mobile courts, etc) to the detriment of their personal liberty or property. In this connection, let us end this Unit by recalling the apt statement of Karibi-Whyte, JSC in *Popoola v. Adeyemo* 1992] 8 NWLR (Pt. 257) 1 as follows:

"The purpose of publication is to acquaint the public with the law and to provide an opportunity for criticism. These are the best and surest safeguards against authoritarianism and abuse of power. They constitute an effective insurance against clandestine exercise of

arbitrary power"

SELF ASSESSMENT EXERCISE 2

1. In the Nigerian legal system, subsequent publication is rare. How true is this statement?

Rulemaking procedures

The interface amongst the factors that influence administrators in their decision making has produced many types of administrative rule making procedures. For the purpose of our convenience, we will categorize them into four groups as follows:

Investigational Procedure;

Consultative Procedure

Auditive Procedure

Adversary Procedure

3.2 **Investigational Procedure**

As the name implies, this procedure is investigational. In other words, this is the stage where the administrative agency arms itself with the required information in order to come up with an informed decision and sound rule or regulation. There are several ways in which it could carry out its investigations. It may set up a committee, a panel, a commission or a team to investigate the issues involved in a particular matter. In order to discharge its responsibility, such body would seek facts and information, make inquiries, hold hearings, and examine memoranda or reports. For example, following its acknowledgement of the fact that the 2007 Presidential Elections that brought his government to power was fundamentally flawed, late President Yaradua established the Uwais Panel to, *inter alia*, examine the problems associated with the conduct of elections and to recommend measures for conducting free and fair election in the country.

Upon the conclusion of its assignment, the panel would usually submit its report of its findings (including its recommendations) to its creator, that is, the body that constituted it. Thereafter, such creator will decide on what to do with the report. It may fully, substantially, partially accept the recommendations contained therein. In the worst of cases, it may reject the recommendations. It is quite usual for the government to issue a white paper on the submitted report wherein it will make its views known as to the acceptance or rejection of the recommendations.

A classic example of this procedure is the parliamentary or legislative hearing. For example, in the course of its proceedings whether or not relating to the passage of a bill, President of the Senate or the Speaker of the House of Representatives invites the Senators or Representatives affected by a particular problem or issue (e.g. flooding, erosion, or pollution, etc.) to address the parliament on the facts, the circumstances of the people, and on possible remedial or ameliorative measures. Those invited to address the parliament obtain their information from their constituencies, print and electronic media, internet, etc. In certain cases, the representatives of the people or of human rights or environmental rights bodies may be permitted to directly address the parliament or to submit memoranda, reports and recommendations.

What the parliament – the donor of power – can do in terms of investigations, administrative agencies – the donees of power – can equally do.

In the final analysis, it is at the discretion of the body to which a report is submitted to decide the weight it attaches to the recommendations in its making decisions, rules, regulations, policy statements and, most important, in the action it takes.

3.3 **Consultative Procedure**

To 'consult' means to obtain information, advice or opinion of a person or body. This consultative procedure is the process by which an administrative agency gets interested persons or those to be affected by its decisions involved in the arrangements leading to the coming into effect of its rules, regulations and policies. It is a participatory procedure in the sense that it is an avenue for stakeholders to take part in the way and manner decisions or actions affecting them are taken. Persons that are usually consulted are stakeholders with special knowledge on the issues in question. In such consultation, the administrative agency obtains information or facts it does not already have or information or facts that supplement the one it already have. In the process, it may obtain expert knowledge or advice either from individuals, or groups.

In order to elicit informed response from the stakeholders, it may send the proposed rules and regulations or policies or proposed line of action to the stakeholders for comments, observations, objections or suggestions. With a view to ironing out or resolving identified differences, it may also enter into discussions, correspondences, or negotiations with the interested persons.

The consultative system has over the years been institutionalized as manifest in the establishment or creation of statutory or governing boards, councils, or committee for administrative agencies. The remit of these statutory or governing bodies is to make policy decisions and formulate general rules or regulations for running such agencies. Before doing this, they consult amongst themselves and advise on important proposed decisions, rules or regulations or actions before they are adopted, published or implemented. It is noteworthy that members of these statutory or governing bodies are drawn from different backgrounds, professions, etc. The effect of this is that members bring their wealth of diverse knowledge and experience to bear on any proposed decision or action. Ultimately, the rules, regulations, policies or actions that are implemented would be fairly acceptable to all or, at least, to the majority and, most important, they would be less contentious or controversial.

Again, it is significant to remember that, in addition to their statutory duties, the members perform the following functions:

(i) Furnishing the administrative agency with information and suggestions;

(ii) Presenting views and information they received from stakeholders to the agency; and

(iii) Rolling back the stakeholders' frontiers of ignorance, misinformation or prejudices by educating the stakeholders on the duties, decisions, rules, regulations and proposed actions of the administrative agency.

The utility of such in-house consultative body cannot be over-emphasized in view of the intricacies and the technicalities of the issues involved and the large number of persons that time may not permit the administrative agency to consult. Where an enabling act requires the administrative agency to consult stakeholders, such consultation must be carried out. However, where the law is silent on consultation, the agency is not bound to hold one. But, it is not improper for the agency to discretionarily hold one. In this regard, recall the comments of Sir William Graham-Harrison in his evidence before the British Committee on Ministers' Powers:

"No minister in his senses … would ever think of making regulations without, where applicable, giving the persons who will be affected thereby or their representatives an opportunity of saying what they think about the proposal."

In Nigeria, only a few statutory enactments stipulate consultation. See, for example, *S.2 of the Legal Practitioners Act No. 33 of 1962*. There is no established practice of consultation.

Arguments often preferred against it is that it is expensive and that the public often have nothing to offer. Whilst this may be so, it should be noted that consultation is, undoubtedly, important because it enables objectionable proposals to be properly evaluated by administrative agencies before they take any action. Such consultation would drastically reduce discontent amongst those to be affected by the rule or regulation. There may be no formal procedure for doing this. But where a formal procedure is expressly required, failure to comply may render the act void on procedural ground. See the case of: ***Bates v. Lord Hailsham*[*1972] I.W.L.R. 1373***

Regarding those enactments that are silent on the issue of consultation, the agency simply follows the law by not conducting any consultation especially when such steps are geared towards implementing unpopular policies or self-enhancing programmes. However, a worthy administrative agency should be guided by the above comments of Sir William Graham-Harrison.

SELF ASSESSMENT EXERCISE 1

1. Explain investigational procedure.
2. Discuss the nature of consultation.

3.3.1 **Effects of Non-Consultation**

Where the enabling Statute imposed a duty to consult and the agency failed to observe such in duty, anything decision, rule, regulation or action that comes out therefrom is liable to nullification on the ground of procedural *ultra vires*. See the case of: *Agricultural,* **Horticultura*l and Forestry Industry Training Board v. Aylesbury Mushroom Ltd.* [1972]1All.** See also the case of ***Popoola v. Adeyemo*[1992**] 8 NWLR (Pt. 257) 1 S.C a matter that involved a chieftaincy dispute where Olatawura, JSC said that:

Once it is established that those entitled to be consulted or those who ought to know, such as members of the ruling houses were shut out or excluded from the exercise leading to the registration of a Chieftaincy Declaration, it will be unjust to rely on such a declaration. It will amount to a violation of the right of those entitled to be consulted.

Contrast the above case with ***Bates v. Lord Hailsham of St. Marylebone & Ors*** [***1972] 3 All ER 1019*** where the Court of Chancery held, *inter alia*, that the function in contention was legislative and not administrative, executive or quasi-judicial as a result of which the administrative agency was not bound by the rules of natural justice or by the general duties of

fairness to consult all bodies that would be affected by its order.

3.3.2 **Justification for Consultative Procedure**

Why should an agency consult stakeholders before it takes any decision or action? There are certain factors justifying such approach including:

(i) It allows for the cross-ventilation of ideas to the end that objectionable laws, rules, regulations, order, decisions, policies, or proposed action are reviewed or abandoned. Ultimately, the administration process is the better for it because whatever the agency comes up with at the end of the day would be quite harmonious with the wishes and aspiration of the people. In order words, unnecessary rancour and bitterness are avoided and frivolous litigation prevented.

(ii) The process enables administrative agency to acquire useful information and knowledge from the stakeholders. This pool of knowledge and information can be a useful database for the present and for future proposals.

Conversely, arguments against consultation include the ollowing:

(i) It may be time wasting and expensive; and

(ii) The idea of consultation assumes that the stakeholders have something to offer on the basis of their training, academic background and consciousness. But, more often than not, especially in this part of the world, stakeholders lack the basic knowledge, technical orientation and consciousness to meaningfully contribute to the consultation process.

3.4 **Auditive Procedure**

This is the hearing procedure akin to the judicial process whereby the judge listens to both sides to the dispute before making his decision. Here, stakeholders present their views orally or by submitting memoranda or other documents. The notice as to the convening of such hearing is usually published in electronic or print media in order to enable interested parties to attend. No formal rules are required save those necessary for orderly conduct or behaviour of the stakeholders. The advantage of this procedure is that interested parties are given prior notice in order to enable them participate in the process.

3.5 **Adversary Procedure**

This is the trial law making procedure. Interested parties are formally heard the way they would be heard in a court proceeding before the agency makes its decision. An example of this process is where a tribunal, a commission, a panel or committee is set up to investigate

the cause of a problem and to hear the representations and submissions of stakeholders. Note that the parties could present their case in person or through their legal representatives. Though its workings are similar to that of the courts, it should be noted that rules adopted by the tribunal or panel are less formal than those utilized by the conventional courts.

You should note that the main remit of this body is fact-finding. At the end of its proceedings, it compiles and submits the report of its findings together with its recommendation to the appointing authority. Note that the report usually comprises the formal record of all the evidence presented by the parties at the hearing, their findings, and recommendations. Upon its receipt of the report, the appointing authority studies it and bases its proposed decision, rule or regulation thereon.

3.6 **Exercise of Discretion in Decision and Rule Making**

You will note that an agency is usually empowered to exercise discretionary power in arriving at a particular decision, rule, regulation, or policy. Generally, in exercising such discretion, the agency is not amenable to interrogation. However, there are instances where even though the agency has discretion, the court requires it to exercise it fairly, reasonably and lawfully. A case that demonstrates this point is ***Padfield v. Minister of Agriculture*** **[1968] 1 All ER 694 HL.** See also: ***Fawehinmi v. Akilu[1987] 1 NWLR (Pt. 67) 797 SC*** and **Stitch v. A.G. Federation[1986] 5 NWLR (Pt. 46) 1007 SC.**

In *Padfield's case*, the minister had a discretion to order an investigation into complaints regarding the administration of the Milk Marketing Scheme. However, the minister refused to refer Padfield's complaint to a committee of inquiry. For this, Padfield sued the minister. The House of Lords held on appeal that the minister's failure to order an inquiry was prejudicial to the aims and objects of the parent Statute, the Agricultural Marketing Act 1958.

SELF ASSESSMENT EXERCISE 2

1. Evaluate the effects of non-consultation.
2. Explain the scope of the auditive and the adversary procedures

4.0 CONCLUSION

There are procedures peculiar to certain organizations. Administrative agencies are no exceptions. As a result of the fact that they constitute the fourth organ of government and because they are close to the grassroots, the procedures they adopt in the making of rules and

regulations are unique.

The issue of consultation deserves some attention especially because it encourages participatory government and responsive and responsible governance. In other words, it makes the people to see the government as their own which they will strive to assist to succeed in the delivery of goods and services as efficiently as possible.

Also deserving of mention is the issue of discretion usually exercised by administrative agencies. We all know that discretion is second nature to administrative agencies but what we are much more concerned about is the way and manner such discretion is exercised.

5.0 SUMMARY

In this Unit, we looked at the various procedures for making rules and regulations, the incidents attendant to the failure to consult, and the nature of discretion exercised by administrative agencies.

6.0 TUTOR-MARKED ASSIGNMENT

1. Critically examine the procedures involved in rule making
2. What role does discretion play in rule making?

7.0 REFERENCES/ FURTHER READINGS

Ese Malemi, *Administrative Law* (Lagos: Princeton Publishing Company, 3rd Edition,2008).

MODULE 1

UNIT 1 ADMINISTRATIVE ADJUDICATION

UNIT 2 RULE MAKING

UNIT 3 TYPES OF RULE MAKING PROCEDURE

UNIT 4 CONTROL OF RULE MAKING

UNIT 4 CONTROL OF THE RULE-MAKING

CONTENTS

1.0 I N T R O D U C T I O N

There is bound to be an abuse or misuse of the delegated legislation. The importance of the rule-making powers of administrative authorities and the need for its exercise under modern condition have led writers to emphasize increasingly that control is necessary to ensure against misuse or abuse. There are safe-guards upon the exercise of powers of delegated legislation in most systems of government which are external to the administrative process. The two main methods of controlling subsidiary legislation would appear to be through the law givers (legislative during a civilian regime) themselves or through the courts. It is noteworthy that there is also executive control over the exercise of the power of delegated legislation.

2.0 O B J E C T I V E S

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

- Analyze the various means of controlling administrative agencies
- Critique the inadequacy in existing means of control.

3.0 M A I N CONTENT

3.1 **Means of Control**

The need for control of rule-making power is due to the dangers often associated with such powers. This is because administrative powers are prone to abuse and can easily become arbitrary if unchecked. There are safeguards within and outside the system of administration itself. We are, however, mainly concerned with control outside the administration, which may be parliamentary, presidential, executive or, perhaps, military.

3.2 Legislative Control

We have earlier stated that it is imperative and necessary for the legislatures to delegate powers, to departments or agencies to fill in details in the statutes. However, the agencies may exercise their powers in oppressive or illegal manners or abuse their powers to the detriment of the populace. It is therefore of great importance that the law-makers, be they military or civilian, should exercise strict supervision over legislative powers thus delegated, whether in respect of policy matters or any issue affecting the interest of the common man. There are many ways by which legislature control the rule-making bodies.

Under the affirmative procedure of rule-making, the legislatures may provide in the enabling laws to the effect that a statutory instrument shall not become law unless and until the same is ratified or approved by the legislature conferring the power. By this the legislature exercises supervision and control over the agencies to ensure that they do not misuse or abuse their powers. For instances, section 4 of the Official Secrets Act, 1962 empowers the Ministry to make regulations for controlling the manner in which any person conducts any organization for receiving letters, telegrams, packages or other matter for delivery or forwarding to any person and providing for the furnishing of information and keeping of records by persons having or ceasing to have the conduct of such an organization.

Subsection 3 thereof however provides that *"[r]egulations under this section shall not come into force until they are approved by resolution of each House at the National Assembly"*.

Also, there are provisions of statutes requiring mere laying before the legislative houses or laying subject to the objection of the legislature. Section 17(1) of the Institute of Chartered Accountants of Nigeria Act, 1965 provides that any regulations made under the Act shall be published in the Federal Gazette as soon as may be after they are made; and the Minister shall lay a copy of any such regulations before each House of the National Assembly as soon as may be after they are so published.

The exercise of delegated legislation may also be subject to the Committees in the Houses of Assembly. The British Committee on Ministers' Powers in 1932 recommended that each House should set up a Standing Committee to consider and report on every regulation made in the exercise of delegated legislative powers required to be laid before Parliament. There are now in England two Standing Committees of Parliament, viz: (a) the Select Committee on statutory instruments of the House of Common and (b) the Special Orders Committee of the House of Lords

Other ways in which the Legislature may control the activities of the executive branch and administrative agencies include the following:

(a) Amending the law setting up the administrative agency with a view to making it more effective and responsive to the demands of the people;

(b) Repealing the law establishing such agency and, *ipso facto,* abolishing the agency;

(c) Inviting a minister or head of an agency. This is usually done where there are grey areas in the operations of the ministry or agency or where there is public outcry against their conduct or, at any rate, where there are unfavourable media reports of their incompetence or insensitivity.

Under this type of control, which Nigeria operated in the First Republic, there is the requirement of laying before the full House of Parliament which may take various forms:

(a) Laying subject to Annulment, Amendment or Disallowance For example, under *Section.10(3)* of the *Nigeria Citizenship Act 1961*, such regulation becomes void if not so late and the parliament exercises its powers within specified days after which it comes into effect or lapses.

(b) Laying subject to Affirmative Resolution. For instance, *Section 5* of the *Emergency Powers Act 1961* provides that regulations made by the president become void if not approved by a resolution of both Houses within 4 months.

SELF ASSESSMENT EXERCISE 1

Explain legislative control of administrative agencies.

3.3 Constitutional Control

You should note that it is the legislature or the National Assembly that enforces the constitutional control. This type of legislative control operated under the 2nd Republic and it is similar to the one that exists under the U.S Constitution. It is, however, very different from that of the parliamentary type of control and it is not so laborious. This is because the duty of control is left more in the hands of the courts, under the doctrine of separation of powers. Thus, this type of control tends to be more indirect through the requirement of certain standards to which the administration must conform. But there are some forms of control. Under *S. 32* of the *CFRN 1999*, for example, the president has the power to make regulations concerning certain aspects of citizenship. Such a regulation must be laid before the National Assembly. The purpose of this provision is not clear but, according to Nwabueze, this is not the legislature properly so-called since the power is derived directly from the constitution. The reason of such lack of control is, perhaps, because the president is directly responsible for the action of his ministers. Worthy of note is the provision of *S. 88* of the CFRN 1999 which gives the National Assembly the power to direct investigations into any matter or thing for which it has the powers to make laws and into the conduct of affairs of any person, authority, government department or minister charged with the responsibility of executing the laws of the National Assembly and so on. The purpose of this is to expose and prevent corruption, inefficiency or waste and to enable it make laws or correct defects in existing ones. Whilst this is not a direct type of legislative control, it is there is no doubt that it can indirectly be used by the legislature to control the power of delegated legislation. Under the military, this type of control is probably more absent in the absence of any express constitutional-type control. Undoubtedly, due to

the legislatively unlimited powers of the military power, it can be exercised if desired.

3.4 Executive Control

The executive is aware of the need to supervise subordinate legislation in order to keep executive family within the bounds of law. This is essential because of the concept of collective responsibility under the parliamentary system of government which makes it imperative to call the executive to be careful so as to avoid controversy. In England, for example, there's the legal committee of the cabinet which is charged with the screening of subordinate legislation. In the US, the president shares such power with the senate and the situation in Nigeria is similar to that of the U.K in some respect and that of the US as well.

The most potent of such powers of control being exercised by the minister on his subordinate is through the appointment of the board of statutory corporations. Though these corporations are in theory independent and charged with dealing with particular social matters, they each have a parent ministry, so that the minister can give general direction as to their operation. This executive control can also be seen within the hierarchy of control in each setting. More specifically, the executive control administrative powers through the following ways:

(a) Issuing general or specific directives regarding the way administrative agencies should carry out their duties.

(b) Requiring the agency to submit its proposed decision, rules, regulations, budget, etc, for examination or vetting before implementation.

(c) Directing relevant agencies such as the Police, Ministry of Justice, ICPC, EFCC, Code of Conduct Bureau, etc, to initiate criminal proceedings or to prosecute erring officials such as those accused of corruption and money laundering.

(d) Setting up a panel of inquiry to look into the activities of the relevant agency and to make recommendations to the government. Note that the executive often resorts to this measure although the reports are usually not acted upon because of several reasons including the need not to rock the boat of the influential persons found culpable by those panels

(e) Issuing a query or caution to an erring officer.

(f) Suspending the officer from duty.

(g) Demoting the officer to a lower rank or status.

(h) Transfer or re-deployment of the erring officer from his present office to a different one. Removal, retirement or termination of service:

3.5 Judicial Control of the Power of Rule-making

Our presidential system of government, unlike English Parliamentary system of government, allows the judiciary to exercise more control over the exercise of the power of delegated legislation. This is because the principle of separation of power gives less power to the legislatures to exercise control over the agencies. The judiciary exercises its checks over agencies, in their rulemaking through what is known as **judicial review**. This means that review by the court of any exercise of power to make some form of delegated legislation. There are many reasons why a regulation or rule will be challenged.

An action may be filed in Court by any person who is affected by the rule of an administrative on the ground that the rule is invalid or unreasonable in the circumstances. In ***Williams v. Majekodunmi (1962)1 All NLR 413***, the Plaintiff challenged the legality/validity or justifiability of the Emergency Powers (Restoration Orders) Regulations, 1962 which were made pursuant to the Emergency Powers Act, 1962, which restricted the Plaintiff's movements to a distance of three miles from a certain address in Abeokuta. The Court held that the order was not reasonably justifiable in the circumstances and set the same aside. The court however did not declare the Regulations null and void. Where the order of arrest is made without due reference to law or arbitrarily, the same is bound to be set aside. See ***Re Mohamed Olayori (Suit M/196/96 of November 17, 1969) (unreported)*** but cited by Oluyode op. cit pages 346 to 347. Where an order has been made ultra vires the rulemaking body the same is liable to be set aside. See ***Akingbade v. Lagos Town Council (1995) 21 NLR 90***.

Where a power is granted to a body to make regulation, that body cannot sub-delegate the said power unless authorized to do by the parent Act. This is because the power is only exercisable by that person himself directly and personally and he lacks the legal power to re-delegate such power on the principle of delegatus non potest delegare. See ***Okon v Delta Steel Co. Ltd. (1990)2 NWLR (Pt. 130) 87;*** and ***NNPC v. Trinity Mills Ins. Brokers (2003) 9NWLR (Pt. 825) 384***. If the procedure laid down in the

enabling law to make the rules has not been complied with, then the rule becomes invalid. For instance, a declaration that is not published in Gazette and not therefore not brought to the attention of the parties affected be the declaration becomes ineffective. See ***Johnson v. Sargant (1918)1 KB 101***; and ***Popola v. Adeyemo (1992)8 NWLR (Pt. 255)1***. The same end will be the fate of a rule that is passed in excess of the power conferred.

SELF ASSESSMENT EXERCISE 2

1. How does the CFRN control administrative agencies?
2. The executive is the most competent body to control administrative agencies. Do you agree?

4.0 CONCLUSION

Because power corrupts and absolutely power corrupts absolutely, there is always the need by the donor of power to nip in the bud any tendency on the part of the donee to exceed its power. Such necessity is the more justified when persons who may be affected by any misuse of power are very many.

Thus, there are various ways by which administrative agencies can be restrained from exceeding their powers.

5.0 SUMMARY

In this Unit, we examined the various ways in which administrative agencies may be controlled.

6.0 TUTOR-MARKED ASSIGNMENT

With the various means of controlling administrative agencies, there is little or no room for maladministration. Discuss.

7.0 REFERENCES/ FURTHER READINGS

Ese Malemi, *Administrative Law* (Lagos: Princeton Publishing Company, 3rd Edition, 2008).

MODULE 2 JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

UNIT 1 THE PRINCIPLE OF NATURAL JUSTICE

1.0 Introduction

An underlining factor in the discussions above finds a footing on the implementation of the doctrine of natural justice. It is important that you refresh your knowledge of the concept as we consider it once more as it affects judicial decisions. It is important that you recollect that judicial remedies exist to challenge any decision taken by an administrative officer. Also that prerogative remedies also exist and their application must be with respect to the fulfillment of natural justice.

Natural justice as a concept did not start with modern government; it is as old as the existence of mankind on earth evidently borne out of cultivated traditional attitudinal disposition of fairness in man to man relationship for which Natural Justice as a concept has attained notoriety. In fact, what seems to have happened to the doctrine in this age of globalization is the codification of several scattered principles of Natural Justice in statute books, partly for ease of reference and to concretize the long standing right of place of the doctrine.

2.0 Course objectives

The core of this module is to extensively examine the doctrine of natural justice since it is a prime basis for the operations of any administrative decision. At the end of this unit, it is expected that you shall be able to identify when administrative decisions are being violated.

3.0 **Main Content**

3.1. **Concept of Natural justice**

The word 'Natural Justice' manifests justice according to one's own conscience. It is derived from the Roman Concept 'jus - naturale' and 'Lex naturale' which meant principle of natural law, natural justice, eternal law, natural equity or good conscience. Lord Evershed, in **Vionet v. Barrett** remarked, "Natural Justice is the natural sense of what is right and wrong." But Natural justice has meant different things to different peoples at different times. In its widest sense, it was formerly used as a synonym for natural law. It has been used to mean that reasons must be given for decisions; that a body deciding an issue must only act on evidence of probative value.

The phrase 'natural justice' has been described as lacking any precise definition and is said to mean similar things in slightly different circumstances. In its broadest sense, natural justice may simply mean simply 'the natural sense of what is right and wrong, and even in its technical sense it is now equated with 'fairness'.

As one of the principles of judicial control, the concept of natural justice perform a very important function in the field of administrative law in that it helps to maintain certain standards of fairness of administrative law. Natural justice embodies two main rules which have been described as 'the twin pillars supporting it'. One of these is the audi alteram partem rule which requires that actions or decisions affecting the rights of individuals may not be taken until the persons affected have been given an opportunity of being heard. The opportunity to provide hearing before making any decision was considered to be a basic requirement in the court proceeding. Later on this principle was applied to other quasi-judicial and other tribunals and ultimately it is now clearly laid down that even in administrative actions, where the decisions of the authority may result in civil consequences, a hearing before a decision in necessary. In **Lapointe v. L'Association (1906) A.C. 535 @ 539**, it has been observed that 'the rule (audi alteram partem) is not confined to the conduct of strictly legal tribunals, but is applicable to every or body of persons invested with authority.

The other principle– nemo judex in causa sua –disqualifies a person who may be biased or otherwise interested in the subject-matter from acting in a judicial or quasi-judicial capacity. The emphasis is on the objectivity in dealing with and deciding a matter. The principle is applicable in such cases also where the deciding authority has some personal interest other than pecuniary interest. Lord Denning observed in Metropolitan Properties Ltd v. Lunnon (1969) 1 Q.B. 577 that ***"…the reason is plain enough. Justice must be rooted in confidence, and confidence is destroyed when right minded people go away thinking, the judge is biased".*** The principle therefore ensures hearing or consideration of a matter by unbiased and impartial authority.

According to the decision in **Russel v. Duke of Norfolk (1969) 1 All E.R. 109 @ 118** (Per Tucker L.J., it was stated that: "**the requirements of natural justice must depend on the circumstance of the case, the nature of the inquiry, the rules upon which the tribunal is acting, the subject matter to be dealt with and so forth".**

It is now an indisputable fact that the principle of natural justice implies the need for justice: that those who are called upon to exercise administrative or judicial powers are mandatorily expected to respect and obey the principles of natural justice. Failure to obey the rules of natural justice is a ground for holding an action ultra vires.

The term natural justice signifies fundamental rules of procedure and fair play in action. According to Lord Widgery, "the principles of natural justice are those fundamental rules, the breach of which will prevent justice from being seen to be done.

3.2 **Definition of "natural justice"**

What is meant by the term 'principle of natural justice is not easy to determine. Lord Sumner in Ray v. Local Government Board (1914) 1 K.B. 160 at 199:83 described the phrase as sadly lacking in precision. In **General Council of Medical Education & Registration of U.K. v. Sanckman (1943) A.C. 627, (1948) 2 All E.R 337**, Lord Wright observed that it was not desirable to attempt to 'force it into any "procusteam bed", and mentioned that one essential requirement was that the tribunal should be impartial and have no personal interest in the controversy and further that it should give 'a full and fair opportunity to every party of being heard'.

In the Earl of Selbourne L.O. in Spackman v. Plumsted District Board of Works (1985) (10) A.C. 229:55 LJMC, the learned and noble Lord Chancellor observed as follows:

"No doubt in the absence of special provisions as to how the person who is to proceed, law will imply no more than the substantial requirements of justice should not be violated. He is not a judge in the proper sense of the word; but he must give the parties an opportunity of being before him and stating their case and their view. He must give notice when he will proceed with the mater and he must act honestly and impartially and not under a dictation of some of other person(s) to whom the authority is not given by law.

The principle has therefore been variously defined by different Judges. A few instances will suffice. **In *Drew v. Drew and Lebura (1855(2) Macg. 1.8,*** Lord Cranworth defined it as **'universal justice'**. In ***James Dunber Smith v. Her Majesty the Queen (1877-78(3) App.Case 614,*** **623 JC**) Sir Robort P. Collier, speaking for the judicial committee of Privy council, used the phrase '**the requirements of substantial justice'**, while in ***Arthur John Specman v. Plumstead District Board of Works (1884-85(10) App.Case 229,*** **240),** Earl of Selbourne, S.C. preferred the phrase '**the substantial requirement of justice'**. In ***Vionet v. Barrett (1885(55) LJRD 39,*** **41**), Lord Esher, MR defined natural justice as '**the natural sense of what is right and wrong'**. While deciding ***Hookings v. Smethwick Local Board of Health (1890 (24) QBD 712),*** Lord Fasher, M.R. chose to define natural justice as 'fundamental justice'. In ***Ridge v. Baldwin (1963(1) WB 569***, 578), Harman LJ, in the Court of Appeal countered natural justice with 'fair-play in action' a phrase favoured by Bhagawati, J. in ***Maneka Gandhi v. Union of India (1978 (2) SCR 621)***. In ***re R.N. (An Infant) (1967 (2) B 617,*** **530),** Lord Parker, CJ, preferred to describe natural justice as '**a duty to act fairly'**. In ***Fairmount Investments Ltd. v. Secretary to State for Environment (1976 WLR 1255)*** Lord Russell of Willowan somewhat picturesquely described natural justice as '**a fair crack of the whip'** while Geoffrey Lane, LJ. In ***Regina v. Secretary of State for Home Affairs Ex Parte Hosenball (1977 (1) WLR 766)*** preferred the homely phrase '**common fairness'**.

What should be noted is that the concept has undergone a great deal of change in recent years. The rules are not always expressly in a statute or in rules. They may be implied from the nature of the duty to be performed under a statute. What particular rule of natural justice should be implied and what its context should be in a given case must depend to a great extent on the fact and circumstance of the

case, the framework of the statute under which the enquiry is held. The old distinction between a judicial act and an administrative act has withered away. Even an administrative order which involves civil consequences must be consistent with the rules of natural justice.

HISTORICAL ORIGIN

It is said that principles of natural justice are of very ancient origin and was known to Greek and Romans. The notion of a natural justice system emerges from religious and philosophical beliefs about how we see ourselves with respect to nature. Kluckhohn's (1953) analysis provides one of the most noted descriptions of the philosophical principles that govern our relationship with nature. He claimed that humans think of themselves as being:

1) subjugated to nature,

2) an inherent part of nature, or

3) separate from nature.

Each of these views shapes a particular natural justice belief and thus a distinct moral stance toward nature. Some cultures emphasize their submissiveness to nature and would tend to adopt a morality of divinity. Others emphasize their harmonious relationship with nature and would tend to adopt a morality of caring. Still others emphasize their control over nature and would tend to adopt a morality of justice.

The principles of natural justice were associated with a few 'accepted rules' which have been built up and pronounced over a long period of time. In the West, in the olden days of laissez-fair practice, when industrial relations were governed and administered by the unscrupulous and harsh weighted law of hire and fire, the management was in supreme command and at its best with the passage of time, notions of social justice developed and the expanding horizons of socio- economic justice necessitated statutory protection to the workmen. The freedom to hire men/women is embedded in the management philosophy and thinking and the liberty is restrained to firing them arbitrarily or at its own will. The passage demonstrates that the rule against bias, like the hearing rule, was treated as an expression of the natural law regarded by Roman legal scholars as 'that ideal body of right and reasonable principles which was common to all human beings'. Those principles are said to have emerged from Cicero's Latin renderings of Greek Stoic philosophy, written in the first century BC. They became the

underpinnings of Thomas Aquinas's philosophy and were regarded as divine law informing creation and binding human beings.

3.2 Natural justice in the common law

As observed earlier, the rules of natural justice can be traced back to medieval precedent. In that guise, they were regarded as part of the immutable order of things, so that in the theory, even the power of the legislature could not alter them. This theory reached its water mark in **Dr. Bonham's case (1610) 8 Co. Rep. 113b at 118a**. where Justice Coke went as far as to say that the court could declare an Act of Parliament void if it made a man judge in his own cause, or was otherwise against 'common right and reason'. This was one of the grounds for disallowing the claim of the College physicians to fine and imprison Dr. Bonham, a doctor of physics of Cambridge University, for practicing in the City of London without the license of the College of Physicians. The statute under which the College acted provided that fines should go half to the College, so that the college had a financial interest in its own judgment and was a judge in his own cause.

Any meaningful consideration of the concept of natural justice would necessarily involve an appreciation of certain essential doctrines which are irrepressibly knitted for a fuller understanding of the concept itself. Be that as it may, these rules of natural justice are so fundamental and necessary in the administration of judicial and quasi-judicial functions that a breach of any of them may lead to setting aside or quashing of the decision reached in such proceedings. At this junction, it is pertinent to point out that a decision reached in breach of any of the rules of natural justice renders it voidable and not void.

The doctrine of Natural justice embraces principles and rules of justice and fairness which impose obligation on authorities and persons who have power to make decisions affecting other persons to act fairly without bias in good faith and afford the person the opportunity to be heard and adequately state his case the term refers to divine law and divine justice. It is divine justice or justice according to God. The natural justice as God would have us dispense it. In a nut shell it is the inherent right of a person to a just and fair treatment in the hands of rules and agents.

The principles of natural justice are rules which have been laid down by the courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be

adopted by a judicial, quasi-judicial and administrative authority while making an order affecting these rights.

The Supreme Court in the case of **Uma Nath Pandey v. State of U.P. AIR 2009 SC 2375 said**:

"Natural justice is another name for common sense. Rules of natural justice are not codified cannons. They are principles ingrained into the conscience of man. Natural justice is the administration of justice in a commonsense liberal way. Justice is based substantially on natural ideals and human values. The administration of justice is to be freed from the manner and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and grammatical niceties. It is the substance of justice which has to determine its form".

In the celebrated case of **Cooper v. Wardsworth Board of Works (1863) 143 E.R. 44,** the principle was thus stated:

"Even God did not pass a sentence upon Adam, before he was called upon to make a defence."Adam", says God, "where art thou? has thou not eaten of the tree whereof I commanded thee that thou shouldest not eat?"

3.2 International Conventions: a new dimension to Principles of Natural Justice

One of the object behind establishment of United Nation Organization is to secure respect to Human Rights within its member States, this objectives of UN compelled to enact several international convention on the Subject of Human Rights which consists 'Principles of Natural Justice within their ambit. Especially Universal Declaration of Human Rights, 1948, International Covenant on Civil and Political Rights, 1966, Geneva Convention on Refugees Right, 1951 and European Convention on Human Right, 1998 gave new meaning to principles of natural justice.

Universal Declaration of Human Rights, 1948 and Principles of Natural Justice:

Preamble of the UDHR declares that:

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief

and freedom from fear and want has been proclaimed as the highest aspiration of the common. This international convention sought to protect 'inalienable rights' of individual to achieve this object it calls member States to pledge themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for observance of human rights and fundamental freedoms.

UDHR declares that all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him. Article 10 within its ambit includes components of fair hearing and also rule against bias, independent and impartial tribunal to hear the party is fundamental requisite of Art. 10.
In the same manner, International Covenant on Civil and Political Right, 1966 U/Art 14, inter alia, Guarantees Under this Article we can find clear wordings requiring observance of Principles of Natural Justice, as 'fair and public hearing by competent, independent and impartial tribunal' is wider and clear than Art. 6 of UDHR.

Apart from above mentioned safeguard we also find provision relating to,
Art 10(3) Guarantees, right to be informed of the grounds of arrest, adequate time for preparation of case, right of speedy trial, right of legal assistance (including free legal aid), right of cross examination, and even right to have interpreter in case of language difficulty to the accused. This Convention recognizes very wide verity of natural rights, and consequentially it widened the scope of Natural Justice.

Another important international convention containing principle of Natural Rights into it is European Convention on Human Rights, 1998 which U/ Art 6 declares that :

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society,

where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

Art. 6(1) provides the procedural fairness protection applies only to the determination of" civil rights or obligations" or of a criminal charge: moreover, to engage Art.6, there should be a dispute, although, generally, this requirement is not interpreted too restrictively. The result of the proceedings must be decisive of the "civil rights or obligation" the mere fact that an official investigation makes findings detrimental to the applicant, where it is not dispositive of civil right or obligation, will not bring the investigation within the scope of Art. 6. Art.6 requires a 'fair and public hearing within a reasonable time' by an "independent and impartial tribunal established by law" for the determination of individual's "civil rights and obligations". International convention covering principles of natural justice made the concept very wide, comprehensive and transcended nationality.

Apart from Art.6 it is Art.2 which requires effective investigating in breach of right to life, 1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) In defence of any person from unlawful violence;

(b) In order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Art.2 requires a state to conduct an adequate and effective investigation, wherever there is a breach of the right to life through the use of lethal force. A violation of Art.2 may arise from the absence of

procedural safeguards even where the applicant has failed to provide sufficient evidence to conclude that the deceased was intentionally killed by the state. Thus lack of state protection, rather than just direct state involvement, will trigger the Art.2 procedural duty, and where authorities are informed of the death, this in itself can give rise to an obligation to carry out an effective investigation into the circumstances surrounding the death. The fact that a security situation exists in the country will not relive the state of its obligation.

3.3 NATURAL JUSTICE AS AN ARM OF THE RULE OF LAW IN NIGERIA

The principle of natural justice is the foundation for the fundamental right to fair hearing, which is guaranteed under section 36 of the Constitution of the Federal Republic of Nigeria, 1999. The right composes of two guiding principles: the Audi Alteram Partem and Nemo Judex in Causa Sua rules. The principle of natural justice has featured prominently in decisions by judicial, quasi-judicial grounds upon which a court may invalidate the decision of a body or tribunal vested with the duty to take decisions that affect the rights of a citizen

According to Etudaiye, to a very great extent, substantial justice is coterminous with natural justice. See the case of **Oliko v. Okonkwo. Unrep. B/1/78 delivered on 17.05.79.** There can be no doubt that fair hearing is in most cases synonymous with natural justice. There is no doubt that fair hearing is a rule of natural justice for the concept of natural justice is definitely wider in scope than the doctrine of fair hearing. On the other hand the two views cannot be said to be diametrically opposed to each other. For fair hearing indeed covers a substantial space of the field called natural justice. In that sense it is also accurate to hold the view that fair hearing is in most cases but not in all cases synonymous with natural justice. Thus, once fair hearing has been ensured in the procedure in arriving at a decision, it is irrelevant that the tribunal arrived at an erroneous, even an unfair, decision.

4.0 Conclusion

The doctrine of natural justice is an age long doctrine that goes to the root of respect of human rights. With a constitutional recognition any administrative decision violating it shall be void to the extent of its inconsistency. It is therefore important in all administrative procedures to ensure that

the doctrine is well respected and articulated in all administrative steps.

5.0 Summary

Considering the important nature of natural justice, it is reiterated that every act of administrative procedure must respect it. The root of the doctrine is an age long one found in the roman era. The doctrine deals with fair hearing and equity. There can therefore be no doubt that fair hearing is in most cases synonymous with natural justice.

6.0 Tutored Marked Assignments

Discuss comprehensively the doctrine of natural justice.

1.7 Further readings

1 Oyewo, AT, Cases and Materials on the Principles of Natural Justice in Nigeria

(Ibadan: Jator Publishing Co, 1987) at p. 2.

2 Evans, JM, De Smith's Judicial Review of Administrative Action (London: Stevens & Sons, 4th ed, 1980) at p. 158.

MODULE 2 JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

UNIT 2 AUDI ALTERAM PATEM

1.0 Introduction

The Nemo judex rule, commonly referred to as the rule against bias, ensures that a "judge" is not partial. He should not be influenced by personal interest; for jurists and laymen alike have insisted that justice should be manifestly seen to have been done. Where the judge has interest in the subject matter, or in the party, or his own financial interest is involved, the objectivity of his decision is bound to be questionable

2.0 Course objective

3.0 Main Content

3.1 Historical Perspective of "Audi Alteram Patem"

The rules of procedural fairness, as rules of natural justice were derived from natural law as is

demonstrated by English cases of the seventeenth and eighteenth centuries. The first limb to be considered in this connection is the so called hearing rule.

Chief Justice Coke, who played a leading role in its exposition and the development of the remedy of mandamus where it had been breached, inferred it from the provision of the Magna Carta that: ***No free man shall be taken or imprisoned ruined or disseized or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgment of his peers or by the law***.

The principle of audi alteram partem was considered in the Bagg's Case (1615) which was a case that concerned municipal misbehavior. The Mayor and Chief Burgesses of the Borough of Plymouth had removed one of their members, James Bagg, from the office of Chief Burgess on the grounds of his misconduct. They made a number of allegations against him. They said that he had called the previous Mayor, Mr. Trelawney, a 'cozening knave' and 'an insolent fellow'. They said that he had threatened to crack the neck of the current Mayor, Thomas Fowens.

Mr Bagg commenced proceedings in the Court of Kings Bench challenging his removal from office by the Mayor and other Burgesses. The Court ordered the Mayor and the Burgesses to either restore Mr Bagg to office or to show cause why he was removed. An answer was given referring to Mr Bagg's very bad behavior. However, the Court was not satisfied that the reasons given in the return to the writ justified his removal. On the question of how and by whom and in what manner a citizen or burgess should be disenfranchised, Coke CJ said: … ***although they have lawful authority either by charter or prescription to remove any one from the freedom, and that they have just cause to remove him; yet it appears by the return, that they have proceeded against him without … hearing him answer to what was objected, or that he was not reasonably warned, such removal is void, and shall not bind the party***.

Bagg's Case was an early judicial expression of the hearing rule, although by no means the first. It was probably most notable as one of the first occasions on which mandamus was used as a tool for judicial review of administrative action. In justifying the issue of the writ, Coke asserted the jurisdiction of the court of the King's Bench in sweeping terms as:

"not only to correct errors in judicial proceedings, but other errors, and misdemeanors [sic] extra-

judicial, tending to the breach of peace, or oppression of the subjects, or to the raising of faction, controversy, debate, or to any manner of misgovernment; so that no wrong or injury, either public or private, can be done but that it shall be (here) reformed or punished by due course of law".

In 1723, the Court of King's Bench issued mandamus to the University of Cambridge requiring the restoration to one Dr Bentley of the degrees of Bachelor of Arts and Bachelor and Doctor of Divinity of which he had been deprived by the University without a hearing. Dr. Bentley had been served with a summons to appear before a University court in an action for debt. He said the process was illegal, that he would not obey it and that the Vice-Chancellor was not his judge. He was then accused of contempt and without further notice deprived of his degrees by the 'congregation' of the University. The judgment of Fortescue J. in the case is often cited as an example of the way in which the idea of natural law informed the concept of natural justice.

Fortescue J said: "*The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defence."*

After Dr Bentley's Case the hearing rule was reinforced in 1799 by Lord Kenyon CJ in R v Gaskin. It was Lord Kenyon who apparently coined the Latin term 'audi alteram partem' to encapsulate the rule, of which he said: It is to be found at the head of our criminal law that every man ought to have an opportunity of being heard before he is condemned. This is how principle of Audi Alterm Partem evolved in common law system.

3.2 Audi Alteram Partem under Nigerian law

"**Audi alteram partem"**

Each party must have reasonable notice of the case he has to meet; and he must be given an opportunity of stating his case, and answering (if he can) any arguments put forward against it. In criminal cases this elementary principle of justice is expressed in the saying that *no on ought to be condemned unheard*.

In ***Buhari Akande v. The State Government of Oyo-State,*** Kayode Eso(1985) 7 N.W.L.R 681 JSC said:

Audi alteram partem means please hear the other side, not that the other side had been heard once and need not again be heard, especially when the decision taken after that previous hearing was in favour of that party.

Also, Jibowu, FJ (as be then was) said in *Malam Saadu of Kenya v. Abdul Kadir of Faggo.(1956) 1 FSC 39 @ 41:*

"It is a fundamental principle of the administration of natural justice that a defendant and his witnesses should be heard before the case against him is determined, and it is, in my view, a denial of justice to refuse to hear a defendant's witnesses."

Similarly, Ademola, CJF, (as he then was) said in *Kano Native Authority v. Raphael Obiora* that: *"*Natural justice requires that as accused person must be given the opportunity to pull forward his defence fully and freely and to ask the court to hear any witnesses whose evidence might help him.

3.3 The Audi Alteram Partem Rule

This is the doctrine that in coming to a decision the deciding authority must hear all the parties. This doctrine was formulated with precision in the case of Ridge v. Baldwin (1963) 2 All E.R. 63 where Lord Hudson said: No one, I think, disputes that three features of natural justice stand out: (1) the right to be heard by an unbiased tribunal; (2) the right to have notice of the charge of misconduct; and (3) the right to be heard in answer to those charges.
The rule now seems to have been summarised as follows:

a. that a person knows what the allegations against him are;
b. that he knows what evidence has been given in support of such allegations;
c. that he knows what statements have been made concerning these allegations;
d. that he has a fair opportunity to correct and contradict such evidence; and,
e. that the body investigating the charge against such person must not receive any evidence behind his back.

Without much ado, the Supreme Court has evolved a set of principles, standards so to say, by which the test of fair hearing may be said to have been met and these are not too

dissimilar to the above. One of those cases is Baba v. Nigerian Civil Aviation Training Centre where the Supreme Court formulated the following standards for a fair hearing before a judicial or quasi-judicial body. In order to be fair, the hearing must include the right of the person to be affected:

a. to be present all through the proceedings and hear all the evidence against him;
b. to cross examine or otherwise confront or contradict all the witnesses that testify against him;
c. to have read before him all the documents tendered in evidence at the hearing;
d. to have disclosed to him, the nature of all relevant material evidence including documentary and real evidence prejudicial to the party, save in recognized exceptions;
e. to know the case he has to meet at the hearing and have adequate opportunity to prepare for his defense; and
f. to give evidence by himself, call witnesses if he likes, and make oral submissions either personally or through a counsel of his choice.

a. **To be present all through the proceedings and hear all the evidence against him**. **Denloye v. Medical and Dental Practitioners Disciplinary Tribunal (1968) 1 All NLR 306.** In that case the sole issue was whether the Medical and Dental Practitioners Investigation Panel denied the Appellant a fair hearing. The panel met and received evidence from certain persons but neither the Appellant nor his witnesses were called at the meeting. The Appellant was subsequently summoned to appear before the Panel. The evidence taken prior to this date was not made available to him or his counsel and when the counsel asked for it, the Chairman of the Investigation Panel refused to produce it. He stated categorically that they were confidential and for the exclusive use of the panel. The court set aside the decision of the Disciplinary Committee. The court held that the procedure adopted by the Panel was unknown to law as the Panel had deprived the Appellant of his right to be present at the hearing and did not make available the evidence taken against him in his absence to him or to his counsel on repeated request.

The court further held that a breach of the rules of natural justice had ensued when the respondent did not make available to the Respondent or to his counsel the evidence taken against him in his absence in spite of repeated request nor make the witnesses available for cross-examination.

In **Jalo Guri & Anor. v. Hadejia Native Authority (1959) 4 FSC 44** the Appellants who were

convicted under "hiraba" (Highway robbery) law of Maliki were set free by the Supreme Court because the lower court adopted not only an inquisitorial procedure but also failed to some extent to observe the principles of natural justice, equity and good conscience. The "hiraba" law was declared inoperative

either an opportunity of defending himself or any chance of questioning any of the witnesses for the prosecution. Oputa JSC, in **Garba v. The University of Maiduguri (1961) ALL NLR 659**.opined that to constitute a fair hearing whether it be before the regular courts or before Tribunals and Boards of Inquiry the person accused should know what is alleged against him; He should be present when any evidence against him is tendered and he should be given a fair opportunity to correct or contradict such evidence.

In **R. v. Director of Audit (Western Region) & Anor. Ex Parte Oputa & Ors. (1961) ALL NLR 659.,** the Director of Audit wrote to the Appellants and certain other councilors calling on them to show cause why they should not be surcharged in respect of a certain sum in accordance with the provisions of a certain law. Many of the councilors failed to reply and those who did reply failed to satisfy the Director that a surcharge should not be made and were accordingly surcharged though given a right of appeal to the Minister. Though the Appellants exercised this right they challenged the Minister's final decision upholding the surcharges by them or giving them a further opportunity to be heard. The trial judge came to the conclusion that a fair inquiry had been held. On appeal the Federal Supreme Court held that the Appellants' petition was forwarded to the Ministry without any intimation that the Appellants wished to supplement the document, and no further submissions were received before the decision of the Minister was communicated to the Appellants. All relevant documents were forwarded to the Minister and there is nothing to show that the Director of Audit made further representations, which required a further explanation from the Appellants.

b. **To have disclosed to him the nature of all relevant material evidence, including documentary and real evidence, prejudicial to the party, save in recognized exceptions**. In Adedeji v. Police Service Commission (1968) N.M.L.R. p. 102, the appellant who was an Assistant Superintendent of Police was served with a letter by the Respondent in which he was accused of corruption and contraventions of certain general Orders. He was required to

make representations why he should not be dismissed for the offences. He wrote a reply but was eventually dismissed. He challenged his dismissal but was confronted at the High Court with a four foolscap page counter affidavit which contained allegations which were not in the letter querying the appellant. The Court dismissed his case. He appealed to the Supreme Court which held that the letter did not sufficiently apprise the Appellant of the case against him giving him sufficient opportunity to state his case in rebuttal in view of the fresh allegations in the counter affidavit and that adequate opportunity was not given to the appellant to meet the case or the facts of the case known to the Commission.

c. **To know the case he has to meet at the hearing and have adequate opportunity to prepare for his defence.** In **Aiyetan v. Nigerian Institute for Oil Palm Research (NIFOR**), the appellant, an employee of the Respondent, a statutory corporation was invited before a board of inquiry to testify as witness as to the loss of some money with which a fellow employee absconded.. The appellant testified as a witness and gave useful suggestions as regards to how such an occurrence can be avoided in future. The respondent later dismissed the appellant from his employment on the ground that the board found him guilty of negligence. The Supreme Court held his dismissal to be a serious and fatal breach of the rules of natural justice since there was nothing on the face of the invitation which could have given the appellant the notion that he was in the line of fire, or that his conduct was to be probed particularly as he must have felt that he had been discharged and acquitted by a court. The appellant was not informed of the case against him or given an opportunity to defend himself as he had been invited to testify to the loss of money, not to his role in the loss. The exchanges between him and the board of inquiry were no more than could be expected between a mere witness, which is what the appellant was, and a Panel.

4.0 Conclusion

Over the years by a process of judicial interpretation two rules have been evolved as representing the principles of natural justice in judicial process, including therein quasi-judicial and administrative process. They constitute the basic elements of a fair hearing, having their roots in the innate sense of man for fair-play and justice which is not the preserve of any particular race or country but is shared in

common by all men.

5.0 **Summary**

It is firmly established that a judge or anyone exercising a judicial function must hear both sides; not only the plaintiff or the prosecutor but the defendant as well. This rule is well recognized as one of the fundamental principles of natural justice.

6.0Tutor Marked Assignment

Analyse the rules audi alteram partem' and its application under Nigerian law.

7.0 Further Reading/References

1. Ese Malemi, Administrative Law, 4th Edition, Princeton Publishers

J.N. Egwummuo,Esq, Modern Trendss in Administrative Law,2nd Edition, Academic Publishing Company

MODULE 2 JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

UNIT 3 NEMO JUDEX IN CASUA SUA

1.0 Introduction

The Latin maxim nemo judex in causa sua is the shorthand expression for the rule against bias and interest. This means that a man must not be a judge in his own cause. The actual bias or the real likelihood of bias, prejudice, partiality or unfairness that arises from that anomaly would decimate public confidence in the administration of justice by the courts or tribunals. It has been defined as follows: 'Bias in its ordinary meaning is opinion or feeling in favour of one side in a dispute or argument resulting in the likelihood that the judge so influenced will be unable to hold an even scale'

2.0 Course objective

At the end of this unit, you should be able to discuss the historical perspective of the rule.

3.0 Main Content

3.1 Development of the rule

The second aspect of procedural fairness, the rule against bias, surfaced in 1610 in Dr. Bonham's **Case 8 Co. Rep. 113b at 118a** where Chief Justice Coke went so far as to say that the Court could declare an Act of Parliament void if it made a man as judge in his own cause, or otherwise 'against common

right and reason'. This was one of his grounds for disallowing the claim of the College of Physicians to fine and imprison Doctor Bonham, a Doctor of Physics of Cambridge University, for practicing in the city of London without the license of College of Physicians. The statute under which the College acted provided that fines should go half to the King half to the College, so that the College had financial interest in its own judgment and was judge in its own cause.

The character of the rule against bias as a kind of natural or constitutional limit upon parliamentary power, was also asserted by Lord Chief Justice Hobart in the case of **Day v Savadge (1614) Hobart 85**, when he said that a statute 'made against natural equity, as to make a man Judge in his own case, is void in itself, for ***jura naturæ sunt immutabilia*** the laws of nature are unchangeable, and they are ***leges legum*** laws that apply to law. After Savadge it was the case of: In ***City of London v. Wood (1701)***, **12 Mod. 669**, Chief Justice Holt reaffirmed the rule against bias as an expression of the natural law. By that time, the idea that a person could not be a judge in his own cause was well established. Natural law as an emanation of the divine had taken its place alongside the theories of Thomas Hobbes in which it was treated 'not as traditional right reason, but rather as a mode of reasoning about the liberty of individuals in the state of nature'.

In this case, the city of London sued Thomas Wood to recover a penalty imposed upon him for refusing to accept nomination as a sheriff. Anyone who refused to accept such a nomination could be punished by a fine. The fine was four hundred pounds. To nominate unwilling but wealthy individuals to the office of sheriff was used in the City of London as a way of raising revenue from those who were prepared to pay rather than to serve. The City brought its action of debt against Mr. Wood in the name of the Mayor and others and brought it in the Mayor's Court, which consisted formally of the Mayor and the Alderman. The judicial functions of the Court had for a long time been carried out by the Recorder. This did not save the proceedings from invalidity. The Mayor and the commonalty and the citizens could not sue in a court held before the Mayor and the Alderman.

In so holding, Chief Justice Holt expressed support for Dr. Bonham's Case saying: … "***it is a very reasonable and true saying, that if an Act of Parliament should ordain that the same person should be party and Judge, or, which is the same thing, Judge in his own cause, it would be a void Act of Parliament; for it is impossible that one should be Judge and party, for the Judge is to determine***

between party and party, or between the Government and the party; and an Act of Parliament can do no wrong, although it may do several things that look pretty odd; for it may discharge one from his allegiance to the Government he lives under, and restore him to the state of nature; but it cannot make one that lives under a Government Judge and party."

Further in **Dimes v Grand Junction Canal (1852) 3 HLC 759**. The House of Lords in that case set aside a decision involving a canal company in which the Lord Chancellor, Lord Cottenham, who had presided, was a shareholder. There was no suggestion that he was influenced by his pecuniary interest in the case. The appearance of bias sufficed. Lord Campbell, after stating that no-one could suppose that Lord Cottenham would be in the remotest degree influenced by his interest took the opportunity to deliver a stern warning to all lesser dispensers of justice: This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of labouring under such an influence.

3.2 The rule against bias

The bias rule demands that the decision should be disinterested and/or unbiased in the matter to be decided. Justice should not only be done but seen to be done. If fair minded people would reasonably apprehend/suspect the decision maker has prejudged the matter, the rule is breached (often referred to as 'a reasonable apprehension of biases). The application of the bias rule is mostly established when the person who is the in the position of the accuser is also the decision maker or participates in the investigation/decision or gives advice throughout the course of the matter.

Sources of bias

The sources of these biases can vary from jurisdiction; however, G Horgan, in his book, Administrative Law in Ireland, (3rd edition) Thomson Round Hall, Dublin, 511-525m separated into four segments namely:-

a. When the judges have a financial interest in the matter to be so decided (a pecuniary interest);
b. Biases arising from the judges' personal attitude, relationships or beliefs in the case;
c. Loyalty to an institution that may affect the judge to be so committed to the objective and interest of the said institution; and,
d. Prior involvement in a case or prejudgment of the issue.

The first source is when the judges have a financial interest in the matter to be decided in other words, a pecuniary interest. Pecuniary bias will arise when the adjudicator has monetary or economic interest in the subject matter of the dispute. In other words, pecuniary interest in the subject matter of litigation disqualifies a person from acting as a judge. Any decision tainted by a financial interest is liable to be quashed and the Courts will apply a high standard under this category of bias. See the case of Dimes v Grand Junction Canal Proprietors (supra).

The next source of biasness is when the said bias arose from the judges' personal attitudes, relationships or beliefs in the case. When a judge has personal attitudes, relationships or beliefs in the case that he is hearing, he should excuse himself from deciding in the case and to uphold the principle of natural justice.

Thirdly, a judge's loyalty to an institution can result in him being so committed to the institution's goals and interests that he compromises the fairness of his decision. This may occur when there is a dispute between the interests of the constitution and some individual interest which is being decided by a member of that institution.

Fourthly, the last source of judicial biasness is from prior involvement in a case or pre-judgment of the issues. This issue can be seen clearly in the case of Bruce Ihionkhan Ighalo v. The Solicitors Regulation Authority [2013].14 Ighalo appealed against the decision of the Solicitors Disciplinary Tribunal to strike him off the Roll. He appealed on two grounds. One of the ground was that the composition of the tribunal was not independent nor impartial. Specifically, Mr. Hegarty, who had previously been on the Solicitor's Regulation Authority's Adjudication Panel. In this position, Mr Hegarty would have made decisions through his clouded judgment

3.3 Tests for determining bias

There are tests to determine the presence of judicial bias.

In Rv. Gough, Court of Appeal May 1993, the real danger test was set out by the House of Lords. This test is to be applied in cases occasioning an apparent bias by a juror, arbitrator, magistrates or member

of another inferior tribunal. The real test was whether there was real danger of injustice having occurred as a result of the alleged bias.

In **Porter v. Magill (2001) UKHL 67**, the test was said to be 'whether the fair minded and informed observer, having considered the fact, would conclude that there was a real possibility that the tribunal was biased. The requirement for a 'fair minded and informed observer' is higher than the normal 'reasonable man' because a 'fair minded and informed' person would know fundamental principles of fair trial.

3.4 Meaning of bias

Edeko, Sunday E, in his article : "The Protection of the Right to Fair Hearing in Nigeria (Sacha Journal of Human Rights Volume 1 No.1 (2011) pages 68-89 considered the meaning of the term. He said that the term "bias" was defined by the Court of Appeal in University of Calabar v. Esiaga (1997) 4 NWLR (Pt. 502) 719. According to the court, bias means "***inclination, bent, pre-disposition, or a preconceived opinion; a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction of mind which sways judgment and renders a judge unable to exercise his functions impartially in a particular case***."

As used in law regarding disqualification of a judge, it refers to mental attitude or disposition of the judge toward a party to the litigation, and not to express any view that he may entertain regarding the subject matter involved.

A biased judge is incapable of using his naturally given senses of hearing and seeing to the egalitarian advantage of the parties. In the adjudication process, the judge is deemed to close one of his ears and one of his eyes against the evidence of the person he hates and opens the other ear and eye in favour of the person he likes. The only evidence that interest him is that given by the person he likes. At the end of the day, he gives judgment in favour of the person he likes without due consideration of the evidence before him.

A biased judge is one who has preconceived ideas on the matter which invariably leads him to hold preconceived decision in favour of the person he likes and against the party he hates.

3.5 **When will bias arise?**

Edeko considered the various circumstances that may lead to bias. These are outlined by the court in the University of Calabar v. Esiaga (supra) as follows:

(a) It could be as a result of pecuniary interest in the litigation. In order words, the judge has taken a bribe or has been corrupted or has a pecuniary interest hanging on the outcome of the case. Pecuniary interest could be a financial interest or a financial benefit or disadvantage indirect pecuniary interest - where a person with whom you have a close relationship has a financial interest non-pecuniary bias - a predisposition towards a certain outcome based on some emotional or other interest.

(b) It could arise from blood, filial or any other form of personal relationship with one of the parties. Family relationship or ties may disqualify a person from hearing and deciding a case, but the relationship must be sufficiently close to create a real likelihood of bias.

(c) A mere natural aversion or revulsion to the facts of the case could give rise to bias on the part of a judge who is incapable of suppressing his natural and instinctive tendencies.

A party who alleges bias has a duty to prove his allegation on the basis of any or all the above categories or of other cogent reasons. Counsel, who decides to attack a judge on bias, should not stop at mere filibustering but show concrete evidence in support of his attack or charge.

Adherence to the principles of the rule against bias goes a long way towards the realization of justice. An administrative body cannot be said to be acting lawfully when its decision is actuated in malice. A bias judgment is unlawful by virtue of the provisions of Section 36(1) of the 1999 Constitution. An administrative body has no discretion to commit injustice. It can only exercise its discretion to attain justice.

Bias is a denial of natural justice which is a legally recognizable injury under the constitution for which remedy may be granted. The rule against bias does not allow a man to be a judge in his own cause because; it would be likely to lead to injustice. In **E.C.S.C. v. Laoye (1989) 2 NWLR (Pt. 106), 652** it was held that the Ministry of External Affairs was both accuser and the investigator of the

allegations against the respondent. The entire disciplinary action was initiated, investigated and determined by the Ministry of External Affairs, which appears to have been a judge in its own cause. Such a situation is intolerable in the Nigerian concept of justice and clearly a breach of the rules of natural justice.

In the case of Commissioner for Local Government v. Ezemuoke (1991), 3 NWLR (Pt 191) 615 a strong influence or likelihood of bias on the part of the sole enquirer was proved when he held that the accusation heaped against the respondent, were so substantial that no reasonable man will impugn it. It was the opinion of the court in Denge v. Ndakwoji (1992) 1 NWLR (Pt. 216) 221 that bias is a state of mind, incapable of precise definition or proof, whatever impression it may convey.

3.6 What is the meaning of "the likelihood of bias"?

In Omoniyi v. Central School Board (1988), 3 NWLR 2 the Court of Appeal held that the term "real likelihood of bias" may not be capable of exact definition since circumstances giving rise to it may vary from case to case, but it must mean at least 'a substantial possibility of bias" This may arise because of personal attitudes and relationships, such as personal hostility, personal relationship, professional and vocational relationship, employer relationship, partisanship, in relation to the issue at stake and a host of other circumstances from which the inference of a real likelihood of bias may be drawn. A textbook case of the real likelihood of bias is the Trinidad and Tobago case of **Pittman & Ors v. Benjamin & Ors (1986) LRC 580** .The appellants, soldiers in the Trinidad and Tobago Defence Force, were brought to trial before a court –marital on or a number of civil offences and breaches of the Defence Act, 1962. The first respondent, a member of the judicial and legal service, serving in the Department of the Director of Public Prosecutions, was appointed the judge advocate, the other respondents being officers of the Defence Force.

The two counsels prosecuting before the court – martial were also members of the Department of the Director of Public Prosecutions. After objection was taken at the hearing of the court martial, it was adjourned and subsequently the appellants applied to the High Court by way of judicial review for an order prohibiting the respondents from continuing to sit as a court martial to try the appellants on the ground, inter alia , that the fact the judge advocate and the prosecuting counsel were all members of the same Department and remained serving officers in it created bias and, therefore, a breach of the rules of natural justice, i.e. an infringement of the principle of nemo judex in causa sua.

The appeal was allowed by the Court of appeal (Kelsick, C.J., Braithwaite and Warner JJ.A). It was held that the test of bias was not a subjective one, whereby the court seeks to discover whether the judge in question was in fact biased. The authorities laid down two texts to be applied in deciding whether a judge was disqualified by bias, namely, the "the real likelihood of bias" test and the "reasonable suspicion of bias" test. The court, unlike the court of first instance, preferred the second test, so that what had to be decided was whether right – minded members of the public spectators, would on the material available reasonably entertain the suspicion that the judge in question might be biased so that the persons charged might not have fair trial. In the present case, the court concluded that there would be such a suspicion that the judge Advocate, because of his association with the prosecuting counsel, might not bring an impartial and unprejudiced mind to the performance of his duties. There is no doubt that the decision in this case contributed to giving the rule against bias a new lease of life. The "reasonable suspicion of bias" test is wider than the "real likelihood of bias" test. The mere presence of the prosecutor among those who will decide the case is a sufficient "reasonable suspicion of bias" or at least, a "real likelihood of bias" and will vitiate the proceedings of a tribunal. In Alakija v. Medical Disciplinary Committee (1959), 4 FSC 38 the Registrar was the prosecutor and the appellant proved that the Registrar was with the members of the Committee while they were considering their decision on the question of removing the appellant's name from the Medical Register. It was held by the Supreme Court that the principle of natural justice had, owing to the Registrar remaining with the Committee during their deliberation, not been fully observed. The decision of the disciplinary committee was reversed. If a reasonable possibility of bias is established, the proceeding of a tribunal on inferior court will be vitiated. In R.v. Sussex justices, Ex Parte Mccarthy (1924) 1 KB 256 the acting clerk to the justice, was a member of a firm of solicitors who were to represent the plaintiff in civil proceedings as a result of a collision in connection with which the appellant was summoned for a motoring offence. The acting clerk retired with the Bench but, was not asked to advice the justices in their decision to convict the appellant. It was held that as the clerk's firm was connected with the case in the civil action he ought not to advice the justices in the criminal matter and therefore could not have been required to do so, properly have discharged his duties as a clerk. The conviction was accordingly quashed, despite the fact that the clerk had actually taken no part in the decision to convict. A judicial decision must be set aside if there are grounds for a reasonable suspicion of bias on the part of one or more members of the tribunal, and it is not necessary that the reviewing court should decide that there was in fact a real likelihood.

In R. v. Abingdon ex. P Cousins (1964) 108 sol. J. 840, it was held that a magistrate should not have adjudicated in a case where the defendant was one of his former pupils at a school of which he was a headmaster;

3.7 Application of the rule by Nigerian courts

In Nigeria, it has also been *held* over and over by our courts that any breach of the principle embodied in the maxim *nemo judex in causa sua* will amount to a breach of the rule requiring fair hearing *Legal Practitioner Disciplinary Committee v. Gani Fawehinmi*. The nemo judex rule therefore applies in Nigerian law as well. In the case **of Obadara & ors. V. President of Ibadan West District Grade D Customary Court (1964) 1 All NLR 336 at 344**, the court held that the principle is one that is applicable in all civillised countries, and as such, cannot be different in our own jurisdiction.
The rule finds expression in section 33 (1) of the 1979 Constitution and section 36 (1) of the 1999 Constitution which states that:
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 such a manner as to secure its independence and impartiality.

The effect of a successful proof of bias on the part of the trial judge
If an allegation of bias is proved, the decision of a tribunal or an inferior court founded on bias will be set aside. In **Akoh v, Abuh (1988) 3 NWLR (Pt. 85) 696** it was held that once an allegation of bias on the part of a trial judge is established by evidence, he is disqualified
from adjudicating in the case, and it has already decided the matter; his decision will be set
aside on appeal or upon review.

Bias and Natural Justice
Bias has been compartmentalized into two: pecuniary and/or proprietary bias on the one hand and non-pecuniary bias on the other. It would appear, from the decision in Metropolitan Properties Co. (F.G.C.) Ltd. v. Lennon, that a direct pecuniary interest in a matter automatically disqualifies a judge from his role as such. In practice however, the decisions upturned owing to

pecuniary bias are not so prevalent in the Nigerian jurisdiction. This is due to the practice in this country where litigants can petition the National Judicial Council where
they are aggrieved.

In cases of non-pecuniary bias, it appears that what is paramount is the propensity of the fact, in its appearance to the reasonable man, to becloud and taint the judgment of a judicial arbiter see the case of ***Mohammed v. Nigerian Army*** **[2001] 1 CHR. 470 at p. 482**. Thus all forms of non-pecuniary bias, be they policy bias or bias formed on the basis of personal animosity, family or professional relationship, will be measured against the yardstick of its reasonable likelihood to taint a judgment see the case **of *Oyelade v. Araoye* (1968) NMLR 41 .**
Thus, if it would appear to a reasonable man that the fact in issue has the propensity to leave this impression in the mind of the arbiter, the form of non- pecuniary bias in issue would vitiate a decision.
It follows then that a person who is a party to dispute or who acted as counsel for one of the parties may not sit in judgment over the same matter in view of the apparent likelihood that his emotions may tilt. In **Umenwa v. Umenwa & Anor1987) 4 NWLR (Pt. 67) 407** a lawyer appeared for a party in a case and on becoming a judge also sat to decide the dispute. He was held to have descended into the arena. In such a case, the whole decision of the court is vitiated and the judgment would be void. See the case **of *Sandy V. Hotogua* (1952) 14 WACA 18.**

Similarly, it has been held that foreknowledge of the primary facts of a case is an aspect of bias for "where a judge has foreknowledge of the facts he does not come to the dispute with an openness of mind that would enable him to hold an even scale. Therein lies the unfairness". *Kenon & Ors. V. Tekam & Ors.* There the court however drew the line between that situation and one in which the parties and the subject matter are different and came to the conclusion that that would not amount to a foreknowledge of the facts.

In Oyelade v. Araoye 1968) NMLR 41 the decision in Obadara v. President Ibadan West District Grade B Customary Court (1965) NMLR 39 in holding that in the rare cases where it could be proved that a decision had actually been affected by the bias of the person making it would

no doubt be conclusive but that while suspicion is enough, the courts do not appear to require proof that actual bias operated on the mind of the person making the decision and that a real likelihood of bias may be shown.

Similarly, Ogundere, JCA in Bamigboye v. University of Ilorin also observed that: the law stipulates that a mere likelihood of bias suffices".

It is to be observed that when it comes to the even handedness of administrative tribunals, decisions usually reflecting on the standard of impartiality of judicial officers are freely cited. This is not without justification. This justification was to be found in the Court's holding regarding the Panel in Garba case that 'the standard of impartiality required of full time Judges is the same as those required of persons who adjudicate in administrative Boards (like the Disciplinary Investigation Board) entrusted, may be not with a final decision but all the same with some decision albeit preliminary'.

Bias then may be inferred from a number of things and more - a compelling personal animosity or hostility, personal friendship, family or professional relationship. Proof must be substantial. For in cases involving allegations of bias or the real likelihood of bias: there must be cogent and reasonable evidence to satisfy the court that there was in fact such bias or real likelihood of bias as alleged. In this regard it has been said, and quite rightly too, that the mere be made a standard to constitute proof of such serious complaints.

MODULE 2 JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

UNIT 1 THE ULTRA VIRES DOCTRINE

1.0 Introduction

Judicial review of executive action is an essential process in a constitutional democracy founded upon the rule of law. It is not a substitute for administrative or political control of the merits, expediency or efficiency of decisions; but the courts can ensure that decisions made by public authorities conform to the law and that standards of fair procedure are observed. The courts enjoy the traditional and constitutional prerogative to interpret and apply the law. In the process, they wield a great deal of power for can, and often do, read limitations not apparent in the statutes, into the exercise of administrative review. This unit outlines the grounds on which the courts can exercise the functions of judicial review.

2.0 After this unit, you should be able to:

3.0 Main content

3.1 The Ultra Vires Doctrine

Black's Law Dictionary defines; *ultra vires* as unauthorized; beyond the scope of power allowed a granted by a corporate charter or by law the officer was liable for the firm's ultra vires actions.

A tribunal or other body with a limited jurisdiction acts *ultra vires* if it purports to decide a case falling outside its jurisdiction. Thus a rent tribunal which is given power to fix the rent of a dwelling house cannot make an order relating to premises which are let for business purposes. If such a tribunal erroneously concluded that the facts of a case fall within its jurisdiction its decision is *ultra vires* and can be set aside by the courts.

The proposition that an administrative authority must act within the powers conferred upon it by the legislature may well be considered the foundation of Administrative Law. The primary purpose of administrative law, therefore, is to keep the powers of government within their legal bounds, so as to protect the citizens against their abuse.

3.2 Development of the doctrine of ultra vires

The doctrine of ultra vires as used in Administrative law implies that discretionary powers must be exercised for the purpose for which they were granted. At the inception, the application of the doctrine was designed exclusively to ensure that administrative authorities do not exceed or abuse their legal powers. If they did so, the courts declared such acts ultra vires and therefore, invalid. Administrative power is generally derived from legislation. Legislation confers power on administrative authorities for specified purposes, sometimes, laying down the procedure to be followed in respect of exercise of such power. More often than not, these legislation stipulate
the limits of such conferred power. If an administrative authority acts without power, in excess of power or abuses power, such act/s are liable to be rendered invalid on the ground of substantive ultra vires. When an administrative authority acts in contravention of mandatory

rules stipulated in the legislation or does not comply with the principles of natural justice, such acts are liable to be rendered invalid on the ground of procedural ultra vires.

Thus, the general presumption is that the legislature, when conferring powers on administrative authorities, does not intend that those authorities should exceed or abuse that power. As, Lord Acton once said;

"*Power tends to corrupt, and absolute power corrupts absolutely*".

Therefore, the presumed intention of the legislature discards the notion of absolute power conferred on administrative authorities. As such, courts may impute certain safeguards against abuse of power in to the legislation which have conferred powers on administrative authorities, even in the absence of specific provisions to that effect. The courts validate such imputation on the ground that, it is a general principle embodied in the broad notion of rule of law that legislature is not expected to incorporate such safeguards expressly in every piece legislation that is enacted.

Take note that the doctrine of ultra vires covers not only those orders or decisions made in excess of power, but also to cover numerous other heads of judicial review, such as, failure to observe rules of natural justice, irregular delegation of powers, breach of jurisdictional conditions, unreasonableness, irrelevant considerations, improper motives, and such other inconsistencies that can be considered as amounting to ultra vires.

M.C. Okany identified grounds upon which ultra vires may arise from:-

1. Want or acting in excess of jurisdiction: every administrative agency owes its power to an enabling act. And where it acts outside the provisions of the statute, such an act would be unjustified and in excess of its power. He further considered the following sub-headings as being in excess of jurisdiction –
    a. Exercise of power without any legal backing; See the cases of Akhigbe v. Att.Gen. of Bendel State & Ors (1953) 1 W.L.R. 54 at 59; Dr. Sofekun v. Akinyemi & Ors (1980) 5-7 S.C 1; Obayuwana v. Governor of Bendel State and Ors, Suit No. B/25/80 (Unreported) where the courts have held that any act not defined within the limits of the enabling statute is invalid.

b. Action taken by the wrong person or body i.e. where a wrong person or body takes an action, it is ultra vires. Allingham v. Minister of Agriculture and Fisheries (1948) 1 All E.R 780
c. Body authorized to act improperly appointed or constituted – an administrative body may lack the power to act because it is not properly constituted. To be competent to act, it must be constituted in accordance with the enabling act. Woollett v. Minister of Agriculture and fisheries (1955) 1 Q.B. 103
d. Wrong orders or penalty imposed by the person – this is where the person or body in exercising the powers goes outside the scope of the powers so as to issue orders not prescribed by the enabling statute. J. Allen and Co. v. Provincial Police Officer (1972) 2 E.C.S.L.R. (Part III) 390

2. Defective procedure: where a body uses a procedure other than the procedure prescribed by the enabling statute or applicable law, any action taken in respect of that wrong procedure used is ultra vires. However, this depends largely upon the nature of the procedure disregarded. Where the procedure disregarded is imperative, any action taken will be rendered a nullity.
3. Use of power for an improper purpose. An administrative agency, is created for a certain purpose. Where such purposes are clear, it is necessary that the agency should aim to achieve the objective. Any power exercised for the primary purpose of achieving ends other aims, the power is clearly an abuse and therefore arbitrary. See the cases of Sydney Municipal Council v. Campbell (1925) A.C. 338

In the ***GCHQ Case,*** Lord Diplock enumerated a new threefold classification of grounds of judicial review, any one of which would render an administrative decision and/or action in concern, ultra vires. These grounds are; illegality, irrationality and procedural impropriety. Later judicial decisions have incorporated a fourth ground to Lord Diplock's classification, namely; proportionality.

3.2.1 Illegality" as a ground of judicial review

This means that the decision-maker must understand correctly the law that regulates his decision-making and must give effect to it.

3.2.2. Procedural impropriety

By "Procedural Impropriety" His Lordship sought to include those heads of judicial review, which uphold procedural standards to which administrative decision-makers must, in certain circumstances, adhere. See the cases of ***Council of Civil Service Unions v. Minister for the Civil Service*** **[1985] AC 374 See,** ***R v Secretary of State for Home Department ex. p. Brind*** **[1991] AC 696,**

3.2.3 Irrationality

His Lordship in the GCHQ case explained the term "Irrationality" by succinctly referring it to "unreasonableness". Unreasonableness arises for the purpose of ensuring that an executive action of a judicial nature is reviewable by one of the courts if they are not reasonable.

In view of this new classification of the doctrine of ultra vires, Galligan observes that the doctrine has been extended and developed to mean "acting beyond principles of good administration". Accordingly, when administrative authorities breach principles of good administration, incorporated in the extended doctrine of ultra vires, courts would be entitled to exercise juridical review and grant relief to the affected parties of such breach.

Conclusively, in administrative law, an act may be judicially reviewable for ultra vires in a narrow or broad sense. Narrow ultra vires applies if an administrator did not have the substantive power to make a decision or it was wrought with procedural defects. Broad ultra vires applies if there is an abuse of power (e.g., unreasonableness or bad faith) or a failure to exercise an administrative discretion (e.g., acting at the behest of another or unlawfully applying a government policy). Either doctrine may entitle a claimant to various prerogative writs, equitable remedies or statutory orders if they are satisfied.

Where a power is legislative, an exercise of it may not be set aside by court on the ground of being unreasonable, arbitrary, draconian or ultra vires except for instance it breaches the constitution or some other relevant statutes.

However, where a power is administrative/ executive it will be set aside as ultra vires on grounds of unreasonableness, arbitrary. In Alfry v. Farrell (1896) 1QB 836, a bye-law regulation by weight and measures was declared unreasonable and void.

4.0 Conclusion

The Ultra Vires is a very important rule in administrative law. In all situations, it is advised that any person carrying out an administrative function in whatever capacity whether delegated or not must ensure that such functions are carried out with the limits and scope of the law.

5.0 Summary

The ultra vires rule is a very important one with applications in several facets of law. However, in administrative law, an act may be judicially reviewable for ultra vires in a narrow or broad sense. Narrow ultra vires applies if an administrator did not have the substantive power to make a decision or it was wrought with procedural defects.

Where a power is legislative, an exercise of it may not be set aside by court on the ground of being unreasonable, arbitrary, draconian or ultra vires except for instance it breaches the constitution or some other relevant statutes.

6.0 Tutor Marked Assignment

1. In how many areas of law can ultra vires doctrine be applied?
2. Under what circumstances are administrative decisions voided for been ultra vires?

7.0 Further Reading/References

1. Bernard Schwartz, Administrative Law (Toronto: Little, Brown & Co., 1976).

2. David Scott & Alexandra Felix, Principles of Administrative Law (Great Britain: Cavendish Publishing Ltd, 1997).

3. Foulke's Administrative Law (London: Butterworths, 6th Edition, 1986).

4. H.W.R. Wade, Administrative Law (Oxford: Clarendon Press, 3rd Edition, 1971).

MODULE 2 JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

UNIT 1 THE DOCTRINE OF LOCUS STANDI

1.0 Introduction

The principle of locus standi is an age old one that forms the basis of any action in a court of law. Locus standi is a Latin phrase meaning "place to stand". It refers to whether or not someone has the right to be heard in court. People may use the term "standing" or "legal standing" to describe this concept. In her book entitled "Locus Standi", Australian jurist Leslie Stein defines it as: "… the existence of a right of an individual or group of individuals … to have a court enter upon an adjudication of an issue … before that court by proceedings instigated by the individual or group.

2.0 Course objective

At the end of this unit, you should be able to discuss the meaning of the doctrine of locus standi and its application in Nigeria.

3.0 Main Content

3.1 Definition of locus standi

Locus standi is a Latin phrase meaning "place to stand.

Locus standi means the right to bring an action, to be heard in court, or to address the Court on a matter before it. Locus standi is the ability of a party to demonstrate to the court sufficient connection to and harm from the law or action challenged to support that party's participation in the case.

The right or capacity to bring an action or to appear in a court.

In the words of Fatayi-Williams, CJN in **Senator Adesanya v. The President & Ors. (1981) 2 NCLR 358**, the term 'locus standi' denotes legal capacity to institute proceedings in a court of law"

3.2 The general nature of the doctrine of locus standi

Properly conceived, the doctrine of locus standi operates as a practical limitation on the availability of judicial review of administrative actions since it requires that in order to be able to challenge an action, a person must have an interest which is sufficiently affected by the action being challenged. It is not enough to show that one falls within the class affected, he must go further to show that he has some personal interest that have been or is certain to be affected by the action complained of.

In the case of **Adeshina v. Lemonu (1965) 1 All NLR 233**, the defendant argued inter alia, that it was not competent to the plaintiff to sue (as the crown was the real owner, he could not have an injunction without joining the Attorney General. The court held that the plaintiff had proved the existence of that right and its violation, and that he made money from fishing, as a result, he suffers special damages, peculiar to himself from the interference with the public right. And was entitled to sue and obtain injunction without joining the Attorney General.

In the case of ***Olawoyin v. Attorney General (1961) All NLR 269***, the court held that the appellant failed to show that he had sufficient interest to sustain a claim. ***"It seems to me that to hold that there was an interest here would amount to saying that a private individual obtained an interest by mere***

enactment of a law with which he may, in the future, come in conflict, and I would not support such a proposition."

See also the cases of Kamiova & ors. V. Ezezi (1961) All NLR 548.

If the quantum of interest demonstrated is held to be legally insufficient, a party might not be able to obtain judicial relief. The principle is aimed at preventing vexatious and professional litigants including busybodies from overlabouring the judicial system with frivolous actions.

Generally, action may be public or private in nature. By private action, it is meant that a person has suffered damages in conjunction with the public at large. Generally, the courts have tended to apply the doctrine in the same manner to both instances without necessarily recognizing whether the injury is private or public. While the courts have strictly applied this doctrine to private actions, they insist that only the Attorney General has locus standi to challenge any public wrong or through a process known as relator action. Lord Wilberforce strongly supported this relator action in **Gouriet v. Union of Post Office Workers (1977) 1 All E.R. 696** when he said that '***it is a fundamental principle of English law that private right can be asserted by the individual but that a public right can only be asserted by the Attorney General as representing the public"***

It is the strict application of the doctrine of public law that has tasked the intellect of writers, legal writers, judges and civil right activists. Judges have unwillingly tied their hands in the face of stark illegalities on the basis of lack of locus standi on the part of the litigants.

In the case of ***Missisipi & Missouri Railway Co. v. Ward (1813) 67 U.S. 485***, the court held that the plaintiff in that case would not be heard unless he shows that he sustained, and is still sustaining individual damages. Furthermore, in ***Massachussets v. Mellon (1923) 262 U.S 447***, the court held that a party who invokes the power must be able to show not only that the statute (been ……) because he has sustained or he is immediately in the direct injury as a result of of its enforcement and not merely that he suffers in an indefinite way in common with people generally.

In the Nigerian case of ***Onyia v. Gov in Council (1962) WNLR 89***, it was argued that the claim was not properly before the court in that the right alleged to be infringed was a public right and that the plaintiff had no locus standi. The court held that the plaintiff cannot sue in his private capacity to

enforce a public right or restrain interference with a public right in which he has no particular or special interest or where he has suffered no special damage without joining the Attorney General.

The cases ***of Dada v. University of Lagos (1961) I U.I.L.R. 344; Olawoyin v. A.G. , Northern Nigeria; Mohammed v. Governor of Kaduna State (1981(1 NCLR 117*** all followed the same opinion that in public law matters, it is not enough for someone to claim that he belonged to a society against which the action is directed. He must also show that his interest have been, or is been, or is likely to be affected in a significant way.

The Supreme Court of Nigeria had a unique opportunity to reverse this situation in the case of Senator **Abraham Adesanya v. The President (supra)** but unfortunately it shirked that duty by engaging in a judicial somersault. In that case, the court held that the plaintiff had no locus standi to bring an action challenging the appointment of the Chairman of FEDECO since he participated in the deliberations of the senate.

Recently, there has been a tremendous relaxation of a locus standi doctrine in England with Lord Denning been in the vanguard of that crusade. Standing has now been given to complainants who merely show that they are members of the society. This cases are known as Blackburn cases –

1. **R. v. COP of the Metropolis ex parte Blackburn (1968) 2 QB 118; Blackburn v. A.G. (1971) 1 WLR 103; R v. Police Commissioner ex parte Blackburn (1973) QB 241; R. v. Greater London County Council exparte Blackburn (1976) 1 WLR 550**

In the case of **Gani Fawehinmi v. Col. Akilu (1987) 4 NWLR Pt. 57** the Nigerian Supreme Court gave locus standi to the applicant to compel the Attorney General to prosecute some state officials for murder because according to the court "the peace of the society is the responsibility of all persons in

the country. And as far as protection against crime is concerned every person in the society is "each other's keeper".

The relaxation of the doctrine in England which is based on the common law has limitations in Nigeria where every right and liability to sue derives from the constitution and other statutes.

3.3 The Constitutional position of locus standi in Nigeria.

Section 6 (6) paragraph (b) of the 1979 Constitution provides that :

"***The judicial powers vested in accordance with the foregoing provisions of this section vested in accordance with the foregoing provisions of this section shall extend to all matters between persons or between government or authority and any person and to all actions and proceedings relating to thereto for the determination of any question of any question as to the civil rights and obligations of that person***"

Section 46(1) of the 1999 Constitution provides that ***"any person who alleges that any of the provision of this chapter has been, is being or likely to be contravened in any state in relation to him may apply to the high court in that state for redress***".

This section relates to fundamental rights contained in chapter IV of the Constitution. Also in section 272(1), a state High Court has 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

4.0 Conclusion

To have locus standi therefore, one must show that his civil right and obligations are or are about to be affected for only then can he invoke the judicial power of the Court. The constitutional provisions on locus standi are contained in sections 6(6) (b), 46(1) and 272(1) of the 1999 Constitution as amended.

The interest must be manifest in the claim. Locus standi is an aspect of justiciability as such the problem of locus standi is surrounded by the same complexity and vagaries inherent in justiciability.

The fundamental aspect of locus standi is that it focuses on the person seeking to get his complaint before the court not on the issue he wishes to have the court to look into. See the case of Amusa v. Jimoh Olotu (1970) 1 All NLR 117

5.0 Summary

We have looked at the doctrine of locus standi.

6.0 Tutor Marked Assignment

1.

7.0 **Further reading/references**

1. Bernard Schwartz, Administrative Law (Toronto: Little, Brown & Co., 1976).

2. David Scott & Alexandra Felix, Principles of Administrative Law (Great Britain: Cavendish Publishing Ltd, 1997).

3. Foulke's Administrative Law (London: Butterworths, 6th Edition, 1986).

4. H.W.R. Wade, Administrative Law (Oxford: Clarendon Press, 3rd Edition, 1971).

MODULE 3 PREROGATIVE REMEDY

UNIT 1 MANDAMUS

1.0 Introduction

In the previous module, we considered the principles which the courts apply to the exercise of administrative powers by public authorities. We now examine the procedures by which the procedures by which the courts exercise their supervisory jurisdiction. The law provides a large number of possible remedies – prerogative orders and the equitable remedies. These traditional remedies were means by which the royal courts exercised the supervisory jurisdiction over the inferior courts, and which were originally granted by the king as the 'fountain of justice'.

2.0 Course objectives

It is expected that at the end of this unit, you should be able to discuss the development as well as the general nature of the prerogative writs. You should also be able to discuss mandamus as a remedy and its inadequacies.

3.0 Main Content

3.1 Emergence of Prerogative writs

Definitions of prerogative writs

The name 'prerogative writs' indicates that it is a writ associated with the king. Most modern writers have said that prerogative writs are writs which originally were issued only at the suit of the king but which were later made available to the subject.

The prerogative writs of mandamus, prohibition and certiorari (later restyled as prerogative orders) were the principal means by which the former Court of King's Bench exercised jurisdiction over local justices and other bodies. Although the writs issued on the application of private persons, the word 'prerogative' was apt because they were associated with the right of the Crown to ensure that justice was done by inferior courts and tribunal. The Crown played no part in the proceedings, and orders could be sought by or against a minister or government department.

There was later the shift of power from the Crown to the Parliament. This shift of power form the Crown to Parliament and the Government did not leave the prerogative unaffected. Thus, the exercise of prerogative became dependent on the government of the day. What then had started as a royal prerogative become to all interest and purpose government or even prime ministerial are now in the following forms:

(i) those acts where sovereign plays no part *e.g.* relater actions and *nolle prosequi*;

(ii) Sovereign on the advice of minister (i.e. conduct of foreign affairs, negotiating treaties pardoning criminals etc.; and

(iii) Sovereign acting alone (the original form) e.g. conferment of certain honours and appointment and dismissal of ministers. For instance, the **Bill of Right, 1689** has removed a significant number of the Sovereign's prerogatives. **The Crown Proceeding Act, 1947** removed the crown immunity for liability in contract and tort.

All the writs, except the writ of habeas corpus, are now to be known as 'prerogative orders. The family name 'prerogative' indicates that they share the same ancestry.

3.1.1 Prerogative writs in Nigeria

The history of prerogative powers in Nigeria is traceable to the English laws because of the colonial history that Nigeria experienced with Britain. With the advent of the British administration in Nigeria came the English laws on prerogative powers. **Interpretation Act, Cap. I23 Laws of the Federation of Nigeria, 2004 (the "IA") Section 32(1)** provides that:

> ***"Subject to the provisions of this section and except in so far as other provision is made by any federal law, the common law of England and the doctrines of equity, together with the statutes of general application that were in force in England on the 1st day of January, 1900, shall, in so far as they relate to any matter within the legislative competence of the Federal legislature, be in force in Nigeria. Section 32(2) however provides that such imperial law shall be in force so far only as the limits of the local jurisdiction and circumstances shall permit and subject to any Federal Law".***

Unlike England which operates parliamentary system of government and whose constitution is unwritten, Nigeria now operates presidential system of government with a written constitution, which in addition to various statutes setting out the power of the President and Governors. As at now, Nigeria has operated nine constitutions. It started with the Sir Frederick Lugard's Amalgamation Report of the 1914. Thereafter, there were the sir Clifford Constitution (1922); Sir Arthur Richards Constitution (1946); Sir John Macpherson Constitution (1951), Oliver Littleton's Constitution (1954), the Independence Constitution (1960); the Republican Constitution (1963), the 1979 Constitution (1979) and the 1999 Constitution.

In the case of **Faki Burma v. Usman Sarki (1962) 2 All NLR 62**, Udoma J (as he then was) said that ***"in the absence of a prescribed procedure for attacking the exercise of powers by a minister, the normal processes and principles of the general law, including the prerogative orders, are…..available to be invoked to advantage by any aggrieved person whose rights have been infringed."***

Until 1934, the writs remedies were regarded as writs. But by the Administration of Justice (Miscellaneous Provisions) Act, these ancient writs were replaced by the word 'order'. It should be noted however, that in Nigeria, the courts still erroneously refer to these 'orders' as writs.

3.2 Mandamus

Mandamus is one of the prerogative orders by which the courts generally control inferior courts and tribunals. It has been described as 'the high prerogative writ', commanding an inferior court, corporation or person to do a particular thing of right and justice. The history of the remedy has been traced to **Bagg's case (1615) 11 Co. Rep 93b**. (You may review your note on Module Two, Unit 2 on a comprehensive report of this case).

The term "Mandamus" is a Latin word meaning "we command". It is a device for securing the enforcement of public duties by a police officer. It is employed where there is no specific remedy against a public officer for failure to perform his duty in favour of the applicant, or where there is an alternative remedy, the mode of redress is less convenient, beneficial and effectual.

Mandamus lies to compel the performance of any public duty, whether the duty is judicial or administrative or of any other function. The duty to be performed must be of a public nature. It is a very useful means of securing the performance of public obligation. Lord *Mansfield J. in* ***R v. Barker (1762)3 Bun 1265 on p. 129*** said "it was introduced to prevent disorder from a failure of justice and detect of police. Therefore, it ought to be used upon all occasion where the law has established no specific remedy and where in justice and good government theme ought to be one…"

An order of mandamus was granted in **R. v. Poplar Borough Council ex p. London County Council No 1) (1922) KB 72. t**o compel the borough council of Poplar to pay their statutory contribution to the London County Council for rates, and when they were not made, the county council obtained writs of attachment for the imprisonment of the disobedient councilors.

In summary of the principle for the award of mandamus Sir Carleton Allen wrote:

> *"When a public authority is under a duty-which must be obligatory and not merely discretionary – to perform a certain function and when required to do so refused or omits to perform it, any person who has a legitimate and sufficient interest in its execution may apply to the High Court for a mandamus commanding it to perform it. The applicant must satisfy the*

court that no other remedy (e.g. an appeal) equally convenient, beneficial and effectual is available to him"

Mandamus will only issue only to compel the performance of a public duty and will not lie where "discretion" (and not a duty) is conferred on the person or body against whom it is sought. Mandamus is comparable to mandatory injunction in many respects. Mandatory order or order of mandamus is a discretionary remedy and the courts have the full discretion to withhold it in unsuitable circumstances. Disobedience to a mandatory order is contempt of court, punishable by fine or imprisonment. It could be issued against any person including public functionaries. It even lies against government departments, provided that such bodies have public duty to perform.

Mandamus may be invoked:

i. To review the quashing of an Information.
ii. To review refusal to issue a subpoena.
iii. To compel a hearing concerning shackling of the accused in court.
iv. To compel disclosure at preliminary inquiry.

3.3 Elements under which mandamus will issue

3.3.1 The element of public duty

An applicant for the order of mandamus must show that nonperformance of the duty he seeks to enforce would affect him prejudicially even if it is a duty to the public generally. In the case of **Bashir Alade Shitta-Bey v. Federal Public Service Committee (1981) 12 NSCC 19**, the court stated that the order of mandamus will issue to a person or corporation requiring him/them to do some particular thing specified which appertains to his office and is of a public nature. Also, in the case of **R. v. Minister of Land and Survey, ex p The Bank of the North (1963) N.R.N.L.R. 58,** the court said that the applicant must show that the duty is imperative or mandatory and not merely permissive.

Take note that mandamus will not lie to enforce a discretionary duty. The court can only make him to exercise the discretion but not to tell him which way to exercise that discretion.

3.3.2 The duty must be to the applicant

The second element for this order to lie is for the applicant to show that the duty imposed on the other party is owed to him; that he is a member of the class to whom the duty is owed. In **Federal Electoral Commission v. Dr. Ibrahim Datti Ahmed (1978) 4 F.C.A 361**, Coker, J.C.A. held that "the respondent must show a legal right conferred by the said Act before he can call in aid the discretionary remedy of mandamus to enforce the performance by the appellant of the statutory duties imposed on them by the Act. Also, in the case **of Shitta-Bey v. Federal Public Service Commission (1981) 12 NSCC 19** where Idigbe JSC held that ' …Exhibit D invests the appellant with a 'legal right' to remain in office and carry out his public duties as a civil servant…"

3.3.3 Request for performance and refusal

An applicant must have addressed a specific demand to the respondent that he performs his duty, and the respondent must have refused to comply. See the case of Shitta-Bey (supra). Mandamus also lies where a body has performed his duty in bad faith or for improper purposes or having taken into account wrong consideration. See R**. v. Cotham (1898) 1 Q.B. 802, Banjo and others v. Abeokuta UDC (1965) NMLR 295**. In **The Queen v. Chief Ozo gula II ex parte Ekenga (1962) 1 All NLR 265**, there was evidence to show that a request for performance was expressly made. The request must be in respect of a duty which the authority is in a position to perform of its own volition. Where it is clear that the person cannot perform the act unaided, then mandamus may not issue. See the case of **Layanju v. Emmanuel Araoye (1961) All NLR 83.**

4.0 Conclusion

Today the majority of applications for mandamus are made at the instance of private litigants complaining of some breach of duty by some public authority. But public authorities themselves may still use the remedy, as they did in the past, to enforce duties owed to them by subordinate authorities

5.0 Summary

Mandamus is often used as an adjunct to certiorari. It belongs essentially to public law. It would not be granted to enforce the duties of trustees since there are sufficient remedies in private law. Nor will it be granted to enforce private rights of shareholders against companies. It is also a discretionary remedy.

6.0 Tutor Marked Assignment

What are the conditions that must be met before mandamus is issued?

7.0 Further reading/references

N.A Inegbedion & J.O. Odion, Constitutional Law in Nigeria, Ameitop Books Publishers, 2000, p.213

M.C. Okany, Nigerian Administrative Law, Africana Academy.

MODULE 3 PREROGATIVE REMEDY

UNIT 2 CERTIORARI

1.0 Introduction

Certiorari and prohibition have established themselves as the most important and effective remedies in administrative law. Although the two orders differ in the spheres of function but similarly the principles applicable to them and the conditions for their availability to applicants are substantially the same. The quashing order and the prohibiting order are complementary remedies, based upon

common principles, so that they can be classed together. We shall consider the remedy of certiorari in this unit.

2.0 Course objective

At the end of this unit, and after the relevant readings, you should be able to :-

- Discuss the nature and development of the remedy of certiorari
- Explain the use of the remedy of certiorari
- Describe under what circumstances the remedy will be available to an applicant;

3.0 Main Content

Certiorari is used to bring up into the High Court the decision of some inferior tribunal or authority in order that it may be investigated. If the decision does not pass the test, it is quashed—that is to say, it is declared completely invalid, so that no one need respect it.

3.1 Nature of certiorari

Certiorari is a Latin word which means "to be informed of". The order of certiorari is a discretionary remedy. That is, it cannot be invoked as of right.

It is an order directing a lower court, public or administrative body to forward its record of proceeding to a higher court for that court to inquire into the legality of its decisions and review it as may be necessary. It is one of the traditional common law machinery for the review of proceedings of inferior courts, statutory or administrative bodies and individual officers, discharging public functions. The purpose of the remedy is to cause the decision of such institutions and individuals discharging public functions to be investigated.

It is one of the prerogative remedies by which an ultra vires act may be challenged. It is usually an order by which the decision of a lower court of inferior status is set aside and the entire proceedings quashed. It is an appropriate remedy where an inferior court or tribunal has exceeded its jurisdiction or failed to follow the requisite procedure for the exercise of its power or failed to comply with the principles of natural justice.

3.2 Development of the remedy

The form of the old writ was that of a royal demand to be informed (certiorari) of some matter, and in early times it was used for many different purposes. It became a general remedy to bring up for review in the Court of King's Bench any decision or order of an inferior tribunal or administrative body. Its great period of development as a means of controlling administrative authorities and tribunals began in the later half of the seventeenth century

There was also the problem of controlling special statutory bodies, which had begun to make their appearance. The Court of King's Bench addressed itself to these tasks, and became almost the only coordinating authority until the modern system of local government was devised in the nineteenth century. The most useful instruments which the Court found ready to hand were the prerogative writs. But not unnaturally the control exercised was strictly legal, and no longer political. Certiorari would issue to call up the records of justices of the peace and commissioners for examination in the King's Bench and for quashing if any legal defect was found. At first there was much quashing for defects of form on the record, i.e. for error on the face. Later, as the doctrine of ultra vires developed, that became the dominant principle of control.

Certiorari is a prerogative order which enables a superior court or tribunal to call upon an inferior court or tribunal to certify the record upon which an inferior court or administrative tribunal backs its decision of a judicial or a quasi-judicial nature. It lies to quash inferior proceeding or decision tainted by jurisdiction defects or to invalidate decisions or action taken in breach of natural justice or to correct errors of law apparent on the face of the record. The purpose is to enable the superior court to review that record in order to adjudge the legality of the decision based on it. The underlying policy is that the inferior courts or tribunals must keep strictly within the defined jurisdiction.

On the question whether certiorari will lei when other remedies are available, the Court per Ademola, C.J.F. in ***The Queen v. District Officer and Ors*** **(1961) 2 NSCC 35 at 39** held inter-alia that certiorari would not normally, except upon application of the Attorney-General, lie when other remedies are available. It is also noteworthy that though certiorari is discretionary, it will nevertheless be granted “ex debito justitiae” to quash proceedings which the Court has power to quash, where it is shown that the Court below has acted without jurisdiction or in excess of jurisdiction. It has been held by Lord

Green, M.R. in ***R. v. Stafford Justices ex parte Stafford Corporation*** **(1940) 2 K.B. 33 C.A at pg 44** that unless there is something in the circumstances of a case which makes it right to refuse the relief sought, the Court will grant it, and that is the way in which the Court will and must on ordinary principle exercise its discretion.

3.3 Utility of the doctrine

Commenting on the utility of this order Lord Atkins observed in ***R v. Criminal Justice Compensation Board Ex Parte Law (1967) 2 Q.B. 864 :***

> ***"Whenever anybody of persons having legal authority to determine questions affecting the rights of subjects having a duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the Kings Bench Division exercised in these writs".***

1. It is a corrective order.

   It is the proper remedy to be granted for actions which have already been completed. Therefore, certiorari is the appropriate order when a final decision has been made on a matter. This order is available against government and public authorities but not against private person(s) and bodies.

   See ***R v. His Honour Judge Sir Donald Hurst, (1960) 2 All ER 385 at 389*** Lord Parker CJ said: "I am quite satisfied that certiorari will lie against a … judge if he has acted without jurisdiction".

   This position was re-affirmed in **R v. Patents Appeal Tribunal, Ex Parte Champion Paper and Fibre Co.,** ***1957) 1 All ER 227*** Goddard LCJ said:

   "In the opinion of this court, certiorari will lie, if the tribunal exceeds its jurisdiction, and equally if the tribunal gives a decision which the court conceives to be bad on the face of the decision".
2. It is a purely supervisory function of a higher court and not an appellate one. Therefore in considering whether or not an order of certiorari will lie against an inferior court, a tribunal, panel of inquiry or an administrative body, the superior court must not substitute its own views for those of the court as an appellate court would do.
3. An order of certiorari will also issue to anybody exercising statutory authority and this includes departments of State, local authorities, individual ministers and public bodies. However, these bodies must exercise judicial or quasi-judicial powers that may affect the administration of

justice in the legal system. Thus, for an order of certiorari to lie against the body, it must be established that it had legal authority to act, as distinct from contractual powers. Furthermore, the body must have powers to determine questions affecting the rights of subjects in the society. Rights include privileges.

4. Certiorari is equally an appropriate remedy in cases of alleged violation of fundamental rights as well as alleged victimization in employment matters. In **Arzike v. Governor of Northern Region, (1961) 1 All NLR 279** an order of certiorari was issued to quash the order of the then Governor of Northern Region by which the applicant and others were removed from their offices in the native court.

3.4 When will the remedy lie?

Certiorari will only lie where a public officer in the discharge of his function is bound to act judicially. It does not lie to quash the decision of an administrative agency if the agency has no duty to act judicially. In the case of **Fela Anikulapokuti & 70 ors v. C.O.P Lagos State (1977) 5 CCHCJ 797,** it was held that certiorari will not lie to quash purely administrative acts.

Take note that the existence of an alternative remedy will not deny the application of the remedy to an applicant; however, the court will consider the reasons why the applicant is not pursuing those alternatives.

Also, certiorari will not lie to question the decision of a court with jurisdiction over an issue merely because the decision is against the applicant. See Nwaribe v. President and Registrar Eastern Oru District Council, Orlu (1964) ENLR 24

3.5 Application of the doctrine in Nigeria

In Nigeria, certiorari is employed to review acts of administration. See the case of **Queen v. Resident, Ogoja Province Ex parte Ipah Onah.**

Certiorari lies only against statutory bodies. Such a body may be a court of inferior jurisdiction. It will lie against a magistrate as in the case of Queen v. Magistrate Court 1

Necessary conditions or the issue of the Writ: When anybody persons

(a) Having legal authority.

(b) To determine questions affecting rights of subjects,

(c) Having duty to act judicially,

(d) Acts in excess of their legal authority, writ of certiorari may be issued. Unless all these conditions are satisfied, mere inconvenience or absence of other remedy does not create a right to certiorari.

Grounds of Writ of Certiorari: The writ of certiorari can be issued on the following grounds:

(1) Want of jurisdiction, which includes the following:

(a) Excess of jurisdiction.

(b) Abuse of jurisdiction.

(c) Absence of jurisdiction.

(2) Violation of Natural justice.

(3) Fraud.

(4) Error on the face of records.

(1) Want of jurisdiction : The Supreme Court has stated in**,** that want of jurisdiction may arise from.

(1) The nature of subject matter.

(2) From the abuse of some essential preliminary, or

(3) Upon the existence of some facts collateral to the actual matter, which the Court has to try, and which is the conditions precedent to the assumption of jurisdiction by it.

It may be added that jurisdiction also depends on

(4) The character and constitution of the tribunal. The Court does not interfere in the cases where there is a pure exercise of discretion, and which is not arbitrary if it is done in good faith. They do not ignore the legislative intention in the statute which might give a wide aptitude of powers to the administrative authority or the social needs, which demand the bestowal of some wider jurisdiction, or the historical circumstances under which a certain tribunal got exclusive jurisdiction of a particular subject-matter.

2) Violation of Natural Justice The next ground for the issue of writ of certiorari is the violation of natural justice and has a recognized place in Indian legal system as discussed in the earlier part of the reading material.

(3) Fraud there are no cases in India where certiorari has been asked on account of fraud. The cases are found in British Administrative law where on the ground of fraud the Court has granted the writ of certiorari. The superior Courts have an inherent jurisdiction to set aside orders of convictions made by inferior tribunals if they have been procured by fraud or collusion a

jurisdiction that now exercised by the issue of certiorari to quash Where fraud is alleged, the Court will decline to quash unless it is satisfied that the fraud was clear and manifest and was instrumental in procuring the order impugned.

(4) Error of law apparent on the face of record. "An error in decision or determination itself may also be amenable to a writ of certiorari but it must be a manifest error apparent on the face of the proceeding e. g., when it is based on clear ignorance or disregard of the provision of law." In other words; it is a patent error, which can be corrected by certiorari but not a mere wrong decision.

4.0 Conclusion

From the above, it appears that the most effective remedy available to a citizen injured by a decision of an administrative agency is the remedy of certiorari. The principle underlying this remedy is that all inferior courts and authorities have only limited jurisdiction or powers, and must be kept within their bounds.

5.0 Summary

We have learnt from this unit, that certiorari is a discretionary remedy and as such, lies at the discretion of the court. We also learnt that the existence of alternative remedy does not deny the applicant of the remedy. It will only deny the applicant where the alternative remedy is statutorily made or if it is a more exclusive and adequate remedy.

6.0 Tutor Marked Assignment

1. under what circumstances will the remedy of certiorari lie?

7.0 Further Reading and References

1. N.A Inegbedion & J.O. Odion, Constitutional Law in Nigeria, Ameitop Books Publishers, 2000, p.213
2. M.C. Okany, Nigerian Administrative Law, Africana Academy**.**

MODULE 3 PREROGATIVE REMEDY

UNIT 3 PROHIBITION

1.0 Introduction

Another remedy that we will consider in this unit is the remedy of prohibition. Like other remedies, it is discretionary in nature and lies to command, in appropriate cases, an inferior tribunal to desist from continuing to handle or conduct any proceeding pending before it in excess of its jurisdiction, or from proceeding before it. We shall now discuss this remedy in detail.

2.0 Course objectives.

The aim of this study is to apprise you of the remedy of prohibition; you should be able to differentiate prohibition and certiorari and discuss its application under the Nigerian law.

3.0 Main Content

3.1 The nature of the remedy of prohibition

Prohibition is employed to prevent the performance of an administrative act which is nevertheless judicial or quasi-judicial in nature. It is an order of court restraining an inferior court, tribunal, public or administrative authority from exercising its judicial or quasi-judicial powers. Thus, an order of prohibition is an order to prevent the exercise, or continuance of the exercise of judicial or quasi-judicial powers, which is likely to affect the applicant's right.

It is an order by which a superior court or tribunal possessing judicial or quasi-judicial powers from exceeding its jurisdiction in matters over which it had cognizance or usurping matter within its jurisdiction to hear or determine.

An order of prohibition is preventive in nature, rather than corrective. Prohibition is in the nature of an injunction.

3.2 Development of the remedy of prohibition

Prohibition or prohibiting order developed alongside the quashing order as part of the system of control imposed by the Court of King's Bench. The order is prospective in that it looks at the future. It is available to an applicant to prevent the performance or continuance of administrative action which must be judicial or quasi-judicial in nature i.e. to stop an incomplete and *ultra vires* proceeding. The rationale for prohibition is that 'prevention is better than cure', and it therefore comes into play at an earlier stage than certiorari.

Crown courts, county courts, justices of the peace, coroners and all statutory tribunals are liable to have their decisions quashed or their proceedings prohibited, except where Parliament provides otherwise and sometimes when it does. This applies to all other public authorities, whether their functions are judicial or administrative. In the earlier times, such prohibiting order was used to restrict tribunals such as ecclesiastical and admiralty courts exercising jurisdiction. But both quashing and

prohibiting orders, in the modern applications for the control of administrative decisions lie principally only to statutory authorities. The reason for this is that nearly all public administrative power is statutory. Thus, quashing or prohibiting orders cannot be granted against arbitrators. In this case, Lord Goddard CJ stated that *"[b]ut the bodies to which in modern times the remedies of these prerogative writs have been applied have all been statutory powers and duties which when exercised, may lead to the detriment of subject who may have to submit to their jurisdiction"*.

Also, an order of *certiorari* cannot made against decisions of election tribunals as the supervisory jurisdiction of High Courts does not extend to elections matters

An order of prohibition does not lie and is not available to stop a judicial act or determination that has been concluded but is only available in two instances; that is to stop the commencement or to stop the continuation of a judicial determination. An applicant for prohibition must act timeously. See the case of **Byverley v. Windus (1826) 103 ER 1 at 8.**

Thus, it prohibits the unlawful assumption of jurisdiction and is a medium by which a superior court prevents a lower court, tribunal, public or administrative authority:

1. From exceeding its jurisdiction in a matter in which it has power and thereby confine it to a proper jurisdiction. See ***Shugaba v. Minister of Internal Affairs (1981) 1 NCLR 25***; or
2. From hearing or determining a matter which is not in his jurisdiction; or
3. From sitting due to improper constitution of the court; or
4. From acting contrary to the rules of natural justice and fair hearing; and so forth.

3.3 Similarities between Prohibition and Certiorari

Many authors prefer to discuss certiorari and prohibition together because of the similarities applicable to them. The bulk of litigants usually combine these two remedies in one application and it seems a very attractive course to take. However, Akintunde Emiola is of the opinion that it should be treated separately because the legal consequences differ even though the object and procedure may be the same.

Certiorari applies to a decision which is fast accomplished; prohibition seeks to prevent the fast from becoming accomplished. This simply means that whereas prohibition would lie where an administrative tribunal has not yet reached a decision, certiorari is the proper remedy for action already completed. Initially, one of the conditions for the issuance of certiorari and/or prohibition is that the act or decision sought to be quashed or prohibited must be "judicial" or "quasi-judicial" **R v. District Officer, Exp. Atem (1961)1 ALL NLR 51**. In other words, the tribunal or body against which these remedies are sought must be under a duty to act judicially and not administratively. However, judicial review has been extended to a number of non-statutory bodies. Both quashing and prohibiting orders have been extended to cover all kinds of administrative as well as judicial acts.

Applications for prohibition and certiorari may be brought together, for instance to quash a decision already by an inferior court or tribunal, and to prevent it from exceeding its jurisdiction. Apart from this line of distinction, both remedies are practically the same, moreover, the same conditions as discussed earlier are required for the grant of an order of prohibition

Prohibition also suffers from the same weakness as certiorari in that it applies only to judicial or quasi-judicial decisions. It has no application to a purely administrative decision or action.

3.4. Types of orders of prohibition

a. Prohibition ***quosquo;***
b. Peremptory prohibition.

The difference between the two is that once peremptory prohibition is granted, the whole proceedings are immediately brought to a halt; while in proceedings quosquo, the proceeding may continue on condition that the offending part of the action is excised. Where the type of proceeding is not specified. An application for prohibition is usually understood to mean peremptory (i.e. total).

3.5 Conditions for the grant of prohibition

To enable a grant of an order of prohibition, some elements are necessary to support the application. These include:-

a. There must be a person or persons to whom power is committed;
b. The power has to be a legal power;
c. The legal authority must be concerned with determination of issues;

d. The applicant must have sufficient interest in the matter;
e. There must be an obligation to act judicially.
f. It must be shown that the particular legal authority has exceeded its legal authority

4.0 Conclusion

Prohibitions will not be applicable unless something remains to be done that the court can prohibit and certiorari will not lie unless something has been done that the court can quash. Applications for prohibition and certiorari may be brought together, for instance to quash a decision already by an inferior court or tribunal, and to prevent it from exceeding its jurisdiction. Apart from this line of distinction, both remedies are practically the same, moreover, the same conditions as discussed earlier are required for the grant of an order of prohibition.

5.0 Summary

It is now known that prohibition will lie to quash administrative decisions. It is also now known that the order resembles the order of certiorari in many respects. It is granted by the High Court on application for judicial review. It should be mentioned here that the order of prohibition could be a very important instrument for enforcing fundamental rights provisions of the Constitution.

6.0 Tutor Marked Assignment

Compare and contrast the orders of certiorari and prohibition, bringing out the distinction between the two discretionary remedies.

7.0 Further reading/references

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MODULE 3 PREROGATIVE REMEDY

UNIT 4 HABEAS CORPUS

1.0 Introduction

The writ of habeas corpus is noted to be the oldest of all prerogative writs. It is on record that it is older than the Statute of Magna Carta 1215 which is reputed to be the bulwark of personal liberty in England. The writ is still as potent as it was in the early days. The common law rules governing the

issuance have been refurbished in England by the provisions of Habeas Corpus Act. We shall now look at the application of the doctrine in details.

2.0 Course objective

At the end of this unit, you should be able to discuss the variants of habeas corpus and its application in Nigeria.

3.0 Main Content

3.1 The nature of habeas corpus

The Latin term habeas corpus means, "You have the body". It is a prerogative order issued by the court for the presentation of the detainee before it. It is an appropriate remedy in cases of unlawful detention, where the personal liberty of the detainees is at stake. By this writ, the court compels the officer detaining the applicant or the appropriate authority in charge to ensure that the applicant is not detained beyond the time allowed under the enabling law.

Writ of *habeas corpus* is more of a constitutional rather than of administrative remedy, its unique and historical importance as a means of securing the liberty of individuals detained by executive orders, makes it equally useful remedy in administrative law. In English law it has been described as:

> *"The most important writ known to the constitution 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 on illegal usurpation of power by the executive at the cost of the liege*. See ***Secretary of State for Home Affairs v. D. Brien*** **(1923) A.C. 602 at 609;** ***Armah v. Ghana Government*** **(1966)3 All ER 177.**

3.2 Habeas corpus at common law

At common law, there were several types of habeas corpus. Of these, the most widely known is the habeas corpus ad subjiciendu, which is appropriate for securing the release of a peson held in illegal detention. It lies to command the person who has the custody of a prisoner to produce him before the court and to show cause for his detention, or why the prisoner should not be released immediately.

The other types of habeas corpus are:

Habeas corpus ad respondendum – this is issued to a detaining authority requiring it to remove or produce the body of a prisoner for the purpose of a trial. This is applicable in criminal cases. habeas corpus ad satisfaciendum,- this is issued to a detaining authority to produce a prisoner who has a judgment against him so that the judgment could be executed.

Habeas corpus prosequendum, - this lies against a detaining authority to produce or remove the body of a prisoner in roder for him to be prosecuted in a place or court having jurisdiction where the acts in question were committed.

Habeas corpus ad faciendum et recipeindum otherwise called habeas corpus cum causa. That is, you have the body with the cause. It is issued in civil cases directed to an inferior court to transfer a prisoner to a higher court with jurisdiction.

Their general object is to secure the production of an individual before a court or judge for various purposes as the names of the writs indicate. Most of these writs are now obsolete. Only three of them are still extant, the most prominent of which is the writ of habeas corpus ad subjiciendum. See Williams v. Majekodunmi (1962) 1 All NLR 324

3.3 Utility of the habeas corpus

a. The writ of habeas corpus plays a part, though not a large one, in administrative law, since some administrative authorities and tribunals have powers of detention. The cases most likely to arise are those where some person is detained as an illegal immigrant or in order that he may be deported, or as being of unsound mind. A writ of habeas corpus challenging the legality of the detention is then a means of challenging the validity of the administrative order which caused it.

b. The writ may be applied for by any prisoner, or by any one acting on his behalf, without regard to nationality, since 'every person within the jurisdiction enjoys the equal protection of our laws.' It may be directed against the gaoler, often the appropriate prison governor, or against the authority ordering the detention, e.g. the Home Secretary. It is not discretionary, and it cannot therefore be denied because there may be some alternative remedy. There is no time

limit.

c. Habeas corpus cannot be used as a means of appeal, but only of review. The court is concerned with the question whether the order of detention is made within jurisdiction or ought to be quashed, but not with the question whether it is correct on its merits.

d. Where there has been excessive delay in bringing a prisoner up for trial, or in executing an order for his deportation, he can use habeas corpus so as to bring himself before the court and the court will give suitable directions by declaration or otherwise. In the contrary situation, where the deportation may take place before the court has been able to decide his case, he may seek a habeas corpus quia timet, to protect him meanwhile. But habeas corpus will not avail to challenge the conditions of detention, provided that the detention itself is lawful.

3.3 Habeas Corpus in Nigeria

In Nigeria, the writ of habeas corpus is highly regarded; it is a remedy of extreme constitutional significance and it is generally available in cases of wrongful infringement of constitutionally guaranteed personal liberty. **Section 34 of the Constitution of 1989 Administration of Justice (Habeas Corpus) Act 1961; *Eshugbayi Eleko v. Government of Nigeria* (1931) A.C. 662 (p.c.) *Agboye v. C.O.P* (1969)1 NMLR 137 (HC) and 176 (CA**). Although Nigeria has not adopted "preventive detention" as a national or governmental policy but in some cases people are detained precisely for this reason. However, unlike countries where preventive. Detention without trial in Nigeria is usually brought into force during a state of emergency and this course of action was provided for by the constitution which also made provisions for a judicial type (special) tribunal to review periodically the cases of the detainees. Section 30 of the Constitution 1963 see also Advisory Tribunal Act, 1962, provision as to a state of emergency exist also in 1977 and 1999 Constitution.

Despite the military rule and the consequential declaration of a state of emergency in Nigeria, the impact of *habeas corpus* has continued to be felt in many cases of detention without trial. Even in cases where the relevant statutes contain provisions purporting to oust the jurisdiction of courts, the court has taken position that such clauses are ineffective to take away a person's right to *habeas corpus*

3.4 When the writ can issue

The writ of habeas corpus is a writ of right; but where the applicant is in lawful custody, the writ will not issue see Edet Okon v. Chief of Staff of the Armed Forces & Anor (1970\0 2 All NLR 169;
Secondly, a person whose detention or restriction is in execution of a sentence of imprisonment imposed on him by a court of competent jurisdiction or his arrest was effected on him with a view to bringing him to justice for an offence committed or suspected to have been committed by the prisoner cannot have the benefit of the writ.

3.5 Other species of remedies

Procedendo

Procedendo is used to prevent a failure of justice or to end alleged abuses of procedure that are delaying the administration of justice. It orders the inferior :

i. To keep the process going, for instance, when the accused takes no steps to pursue a motion to quash committal, the Crown can use procedendo to resurrect the case.

ii. To expedite a case.

Quo warranto

Definition and Nature.

The term quo warranto means "by what authority."
Whenever any private person wrongfully usurps an office, he is prevented by the writ of quo warranto from continuing in that office. The basic conditions for the issue of the writ are that the office must be public, it must have been created by statute or Constitution itself, it must be of a substantive character and the holder of the office must not be legally qualified to hold the office or to remain in the office or he has been appointed in accordance with law. A writ of quo warranto is never issued as a matter of course and it is always within the discretion of the Court to decide.

The Court may refuse to grant a writ of quo warranto if it is vexatious or where the petitioner is guilty of laches, or where he has acquiesced or concurred in the very act against which he complains or where the motive of the relater is suspicious.

As to the question that can apply for writ to quo warranto, it can be stated that any private person can file a petition for this writ, although he is not personally aggrieved in or interested in the matter. Ordinarily, delay and laches would be no ground for a writ of quo warranto unless the delay in question is inordinate. An unauthorized person issues the writ in case of an illegal usurpation of public office. The public office must be of a substantive nature. The remedy under this petition will go only to public office private bodies the nature of quo warranto will lie in respect of any particular office when the office satisfies the following conditions:

(1) The office must have been created by statute, or by the Constitution itself;

(2) The duties of the office must be of public nature.

(3) The office must be one of the tenure of which is permanent in the sense of not being terminable at pleasure; and

(4) The person proceeded against has been in actual possession and in the user of particular office in question.

Another instance of granting the writ of quo warranto is where a candidate becomes subject to a disqualification after election or where there is a continuing disqualification.

In cases of office of private nature the writ will not lie. In Jamalpur Arya Samaj Sabha v. Dr. D. Rama, **(AIR 1954 Pat 297)** the High Court of Patna refuse to issue the writ of quo warranto against the members of the Working Committee of Bihar Raj Arya Samaj Pratinidhi Sabha- a private religious association. In the same way the writ was refused in respect of the office of a doctor of a hospital and a master of free school, which were institutions of private charitable foundation, and the right of appointment to offices therein was vested in Governors who were private an don't public functionary.

It will not lie for the same reason against the office of surgeon or physician of a hospital founded by private persons. Similarly, the membership of the Managing Committee of a private school is not an office of public nature; therefore writ of quo warranto will not lie.

It has been held that writ in the nature of quo warranto cannot be issued against a person not holding a public office. Acquiescence is no ground for refusing quo warranto in case of appointment to public office of a disqualified person, though it may be a relevant consideration in the case of election. When the office is abolished no information in the nature of quo warranto will lie.

3.7 Benefits of prerogative remedies

a) It serves as a check on the exercise of the powers of the branches of government.

b) It curbs or reduces arbitrariness on the part of public officers, as they are made to comply with the law in the discharge of their official duties. This point is beautifully captured by Former President Shehu Shagari thus:

> *From the records, the Executive arm has been taken to court a number of times. The legislature arm has similarity has been dragged to court. In each case your lordships gave your verdict. I am glad to say before you that we, on whom these verdicts have been passed, have always respected your pronouncements ... it is on record that even where we had cause to feel dissatisfied, we made sure that in exercising our right of appeal, we strictly adhered to the rules and procedures as laid down by law.*[1]

c) It provides the avenue for remedying the wrong done to aggrieved persons by public officers.

d) It instills diligence in Judicial Officers in lower courts, as frequent certiorari orders against the decision of a particular judicial officer question the competence of the same.

3.8 Limitations to prerogative remedies

A court will not be able to exercise its prerogative powers, if there are limitations in entertaining the matter. These limitations include:

a) Lack of locus standi: Where a party who is applying for relief has no locus standi to sue on a matter, then the course of legal action will fail.

b) Absence of right of action: Where right of action is expressly ousted by statute with appropriate words, an aggrieved party may not be able to challenge the act in question. For instance Section 308 of the 1999 Constitution places a restriction on legal proceedings in a court with respect to impeachment proceedings initiated by the legislature.

c) Absence or limitation of right to appeal: where there is no right of appeal or it is limited under statute, such a party may have no recourse than to petition for clemency or pardon by the government in an exercise of the prerogative of mercy by the President or Governor as the case maybe

[1] Cited in Fatayi-Williams CJN, Faces, Cases and Places, p. 175

d) Failure to serve a pre-action notice: a failure by the plaintiff to serve a pre-action notice on the defendant where the law provides for it, usually bars the right to institute court action.
e) Regularity of an action done intra vires. Where an action is regular and has been done intra vires, which is within the powers of the public or administrative authority doing it, then of course, no cause of action will lie for relief.

4.0 Conclusion

From the foregoing it is certain that this rarely used group of remedies is historically important in understanding administrative law and is also important in relation to decisions for which there is no remedy. The student must bear in mind that a person who wants to challenge a government action by judicial review must be prepared to do so in a higher court. There are several problems facing anyone who considers such a step, including the relatively complicated legal work involved, the consequently high legal fees and the intimidating atmosphere of the courts, created by both the physical environment and the high level of legal argument.

The remedies available are limited in effectiveness since the courts are concerned, in theory at least, only with the legality of the process rather than whether the decision under challenge was the correct one. Furthermore, all the remedies are discretionary. The court may take into account such factors as delay in seeking the remedy, the futility or usefulness of granting it, and the hardship caused to others by granting it.

5.0 Summary

In summary, you are to bear in mind that committal of an accused at a preliminary inquiry, in the absence of evidence on an essential ingredient in a charge, is a reviewable jurisdictional error. A discharge based on terse and uninformative reasons can successfully result in certiorari and corrective committal. To challenge a search warrant, Certiorari is used to quash a search warrant if the applicant can show a jurisdictional error was made. Human rights is highly premised on the exercise of the remedy of habeas corpus. Probably the most famous prerogative remedy, it brings a party before a Superior Court judge to enable a release order from unlawful imprisonment. It is a method of reviewing detention when there is no statutory method available.

By these remedies, the Superior Court commands an official or an inferior court to perform a particular act or restore a right or privilege which it has taken away. It forces the performance of legal duties by inferior officials who have failed or refused to perform them. Finally you must bear in mind that the exercise of prerogative remedies are discretionary in nature.

6.0 Tutor Marked Assignment

Discuss each mentioned remedies and cite examples as to the situations where each will be applicable.

7.0 Further Readings/References

1. Bernard Schwartz, Administrative Law (Toronto: Little, Brown & Co., 1976).

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3. Foulke's Administrative Law (London: Butterworths, 6th Edition, 1986).

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Publishing Co., 2nd Edition, 1975).

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Policy (Toronto: Little, Brown and Company, 1979).

7. William Wade & Christopher Forsyth, Administrative Law (Oxford, UK: Clarendon Press, 1994).

MODULE 4

UNIT 1 LOCAL GOVERNMENT

UNIT 2 LOCAL GOVERNMENT REFORMS IN NIGERIA

UNIT 3 LOCAL GOVERNMENT ADMINISTRATION IN NIGERIA

UNIT 4

UNIT 1 **LOCAL GOVERNMENT**

1.0 Introduction

This is the final module of our study of Administrative Law 2 and it is important that you take cognizance of the fact that all this while we have examined the function and activities of the legislature, judiciary and executive. It is also important that you recollect the doctrine of separation of power and its application. In this module therefore, you shall be learning about the operation of the local government which is the third tier of government in Nigeria.

2.0 Course Objective

The main objective is for you to learn about the local government arm as the third tier of

government in Nigeria; after reading the course materials, the references referred to as well as related journals on the topic, you should be able to discuss the legal framework of local governments and its administration in Nigeria.

3.0 **Main Content**

3.1 **Definition of Local Government**

The concept of local government involves a philosophical commitment to democratic participation in the governing process at the grassroots level. This implies legal and administrative decentralization of authority, power and personnel by a higher level of government to a community with a will of its own, performing specific functions as within the wider national framework. A local government is a government at the grassroots level of administration "meant for meeting peculiar grassroots need of the people. It is defined as "government by the popularly elected bodies charged with administrative and executive duties in matters concerning the inhabitants of a particular district or place.

Local government can also be defined as that tier of government closest to the people, which are vested with certain powers to exercise control over the affairs of people in its domain. Every citizen of a state has a local loyalty as well as national one. The central government cannot possibly attend to every detail of local administration, giving full weight to local preferences and prejudices in every sense. If it tries to, it would probably cause a great deal of resentment and unpopularity. It therefore attempts to make use of its citizens' local loyalties by delegating local functions to local administrative bodies, which may be of various types, such as a locally elected representative body; a recognized traditional authority, such as Northern Nigerian Emirate; or a local representative, with clearly defined powers, of the central government. Local government

administration therefore evolved out of the desire to bring government and development to the grassroots.

The Guideline for Local Government Reform (FGN, 1976) defines local government as: Government at local level exercised through representative councils established by law to exercise specific powers defined areas. These powers should give the council substantial control over local affairs as well as the staff and institutional and financial power to initiate and direct the provisions of services and to determine and implement projects so as to complement the activities of the state and federal government in their areas, and to ensure, through devolution of functions to these councils and through the active participation of the people and their traditional institutes, that local initiative and responses to local head and conditions are maximized.

3.2 Implication of the above definition

a. Local government must be a legal entity distinct from the state and federal government;
b. Local government must be administered by democratically elected officials;
c. Local government must have specific powers to perform a range of functions assigned by law;
d. Local government must enjoy substantial autonomy to perform array of functions, plan, formulate and execute its own policies, programmes and projects, and its own rules and regulations as deemed for its local needs. This autonomy includes power to control its finance, recruit and discipline its staff.

3.3 Constitutional Nature and function of the Local Government

The provisions of the 1979 Constitution guaranteed the system of local government by democratically elected local government council thus:

The system of local government by democratically elected local government councils is under this constitution guaranteed; and accordingly, the Government of every State shall ensure their existence under a law which provides for the establishment, structure, composition, finance and functions of such councils.

The constitutional nature and functions of the local government has been considered and clarified in **Knight, Frank & Rutley (Nig.) Ltd. v. Attorney-General of Kano State (1990) 4 NWLR (Pt. 143) 210** where the court confirmed the metamorphosis of the local government as a third tier of government. As such, the court will confirm the jurisdictional sphere of operation of the local government authorities from the incursion of the State or the Federal Government since they are in their own rights an independent third tier of government. See the case of **Bamidele & Ors v. Commissioner for Local Government and Community Development Lagos State & Anor. (1994) 2 NWLR (Pt. 328) 568 C.A.** Here, the claim was for a declaration that it is incompetent of the defendants, contrary to the constitution of the Federal Republic of Nigeria, to establish, maintain and regulate markets, particularly to interfere with the day to day running of the alayabiagba market situate and lying within the Lagos Island Local Government. Justice Uwaifo JCA (as he then was) delivering the lead judgment held inter alia:-

"By the Local Government Edict No. 16 of 1976 of Lagos State, Section 63(a) thereof Local Governments were given exclusive responsibility and power to make bye-laws, for markets and motor vehicle parks. Incidentally, section 7(5) of the 1979 Constitution provides for the functions of Local Government in the 4th Schedule of the Constitution, among which as stated in paragraph 1 (e) thereof, is the : establishment, maintenance and regulation of markets,

motor parks and public toilets. It will be unconstitutional for any other person or authority to purport to exercise that function on the state of the Law. The function has been given to the Local Government. That usurpation of function was done by an elected State Government to an elected Local Government tells a lot about our respect for democratic principles"

It can be deduced from these judicial authorities that the local government is by nature, a constitutional third tier of government, endowed with its own constitutional functions and sphere of operation distinct and distinguishable from those of the states and federal government.

Local Government administration and development in Nigeria has, historically undergone a number of epochs: Native Authority or Indirect Rule system; Local Administration system; democratization of the system and the separation of traditional / emirate council from democratic local government system. The last of these epochs is the most spectacular in the way it deepened and still deeps democracy at local government level. To date, this last epoch has had not less than nine reforms: The 1976 Guidelines for local government reform; the 1979 Constitution of the Federal republic of Nigeria; the 1984 Dasuki Report on the Nigerian local government system; the 1988 Civil Service Reforms in the local government system, the 1989 Constitution of the Federal Republic of Nigeria; the 1992 Handbook on local government administration; the 1999 Constitution of the Federal Republic of Nigeria; the 2003 review of local government councils in Nigeria.

Local Government under the 1999 Constitution

The 1999 Constitution recognized the local government as arm of government by assigning some functions to it. It provides that the system of local government by democratically elected local government councils is under the Constitution guaranteed; and accordingly, the Government of every State shall, subject to section 8 of this Constitution, ensure their existence under a Law

which provides for the establishment, structure, composition, finance and functions of such councils. The local government, therefore, is recognized by the 1999 Constitution, its status is not distinct from that of the state. This is because the 1999 Constitution provides that the person authorized by law to prescribe the area over which a local government council may exercise authority shall do so while having regard to communal common interests, traditional association and administrative convenience in order to ensure the existence of local governments under a law which provides for the establishment, structure, composition, finance and functions of local governments.

The constitutional highlighting and underlining of political entities, Federal Government", „State Government" and „Local Government Councils" show clearly that the intendment of the 1999 Constitution is for Nigeria to have three - tiers of government. In other words that Constitution contemplates a more viable local government system than that which is presently operated passively in practical reality.

3.2 LEGAL FRAMEWORK OF LOCAL GOVERNMENT

Although all local government owe their creation and existence to the respective States and Federal Government, they are not part of the Federal Government machinery, and have, to a greater or lesser extent, an independent existence of their own, since they run their own affairs and are responsible to their own electorate. They must however, like private individuals, only act within the framework of the Constitution and other laws made by the legislature.

When we say that local authorities have an independent existence of their own, we mean that in legal terminology local authorities are corporations with perpetual succession. When we say that

they are corporations, we mean that they have a legal existence like ordinarily human beings. In other words, they can sue and be sued in the courts as if they were individuals. Perpetual succession means that, unlike human beings, they never die. They are continually in existence, and therefore, even though all the councilors may change owing to death, resignation or defeat in elections, the council continue to be responsible for legal acts of the past, and can bind itself for the remote future. If a council in 1990 signs a contract and therefore places itself under a legal obligation, that legal obligation is still enforceable on the council in 2014 even though not one single councilor who was in office in 1990 is still in office in 2014.

Like private individuals, the local government can only act within the framework of the law. The important difference between them and private individuals from the legal point of view is that, unlike an ordinary individual, who can do anything which the law does not specifically forbid him to do, the local government may only do those things which the law specifically orders or permits it to do. This is known as the doctrine of *ultra vires*. The legal view is that a corporation is created as a legal entity purely to carry out those functions for which it was created, and therefore it has no existence as a legal entity for any other function. If, then, a local government, with the best intentions in the world, anxious to make life more meaningful for its taxpayers and to earn profit which will help to pay for other public services in the area, starts, say, a department store without having first got legal approval for it, although all the inhabitants of the area may welcome the setting up of this departmental store, the local government is acting illegally in running it.

The doctrine of *ultra vires* may seem to be an excessively restrictive attitude towards the expanding activities of local government, and the local authorities may be prevented by this doctrine from carrying out a variety of functions which would have been welcomed by the local inhabitants; nonetheless, this doctrine has been considered essential in order to prevent local authorities from so expanding their activities without any form of control from the States and Federal Governments.

Laws regulating the activities of local government councils may either be mandatory or permissive. A mandatory law is one which orders a local government council to do something (for example, a local government council may be ordered to provide primary schools); a permissive law permits a local authority to do something if it wishes to (for example, a local government council may be permitted to establish a municipal theatre if it so wishes). Local Government councils in their turn make bye-laws, which have the full force of law within the local government area, to enable them to carry out their responsibilities (for example, a local government council may pass a bye-law forbidding dogs in public parks except when on a lead, or regulating the commodities which may be sold in the markets).

From our knowledge of the doctrine of *ultra vires*, these mandatory and permissive laws impose absolute restrictions on the lawful activities of local government councils. For example, if a local government council desires to build an airport for people within its locality, it has no legal power to do so. This enables the central government to limit the activities of local government councils and ensure that local government administration in Nigeria is carried out on the lines desired by the Constitution.

The Relevance of the Local Government System in Nigeria

The local government is government at the grass roots. It is a basic government, near to the people and so localized in order to meet the basic social and economic needs of the beneficiaries – the local people.

The local people by spatial arrangement are farther from the centre and nearer to the state. The local government is like a cell; while state government, like a tissue and the Federal Government, like an organ in a general system of administration in Nigeria. Each of these component parts in a system of administration provides essential services to the people. T. Eddison states in relation to local government that:

"there can be no dispute that the effect of local government (and other levels and scales of government also) is intervention, intervention in the sense that it causes things to happen which may not otherwise happen or, on the other hand prevent things happening which may otherwise happen .... The very moment we accept local government as an institution we accept the fact that its effect will be intervention in the "natural" order of things. The issue, then, is not whether or not local government should intervene – its very existence ensures that, but the degree to which it should intervene."

The impact of local government on the community is so crucial in the determination of whether it is relevant or irrelevant. Where it has no intervention approach – an avenue through which problems are either solved or prevented, its existence is called to question or its relevance subjected to doubt. What follows next would be a call for its abolition. However, in a situation where the relevance of local government is strongly established , any call for the abolition of this essential tier of government will amount to nothing other than a mere political tool to maneuver

it out of existence and hijack the fund accruing to it by the administration of state. Such unpopular tool is ineffective, the usage of which results to agitation and anarchy.

The expediency for the creation of local government anywhere in the world stem from the need to facilitate grass root development. The importance of local government is a function of its ability to generate sense of belonginess, safety and satisfaction among its populace. It is also a crucial aspect of the process of democratization and intensification of mass participation in the decision making process.

Decentralization is another purpose for the establishment of local government. Too much concentration of political and economic power at one level would ultimately lead to managerial constipation.

4.0 **Conclusion**

Local government governance was an introduction of the colonial master to enable them control local communities that they could not reach initial. It was also used to solve the challenges of language barrier and resistance presented by the colonized. However, the success of indirect rule has succeeded in entrenching the local governance structure.

5.**0 Summary**

Local governance found its way into the amalgamated Nigeria with its success in the Northern part of the country. It is also the closest strata of governance to the masses with the federal and state government operating at higher levels.

8.0 Tutor Marked Assignment

Discuss the legal framework of local government in Nigeria.

9.0 Further Reading/References

1. J. H. Price. Comparative Government. Second Edition.

2. Gboyega. Political Values and Local Government in Nigeria by Fatai Ayisa Olasupo. Malthouse Publishing Limited, 1987

3. Alex Gboyega. "Democracy and Development: The Imperative of Local Good Governance". An Inaugural lecture, 2003; Ibadan: The Faculty of Social Sciences, University of Ibadan, 2003,

4. Historical Epochs of Local government Administartion in Nigeria: Women and the Poor by Mr. F.A. Olasupo and Dr. (Mrs.) I.O. Fayomi. Published by the Global Journal of Human Social Science Arts and Humanities, Volume 12 Issue 9, Version 1.0, June 2012

MODULE 4

UNIT 1 LOCAL GOVERNMENT

UNIT 2 LOCAL GOVERNMENT REFORMS IN NIGERIA

UNIT 3 LOCAL GOVERNMENT ADMINISTRATION IN NIGERIA

UNIT 4

UNIT 2 LOCAL GOVERNMENT REFORMS IN NIGERIA

1.0 Introduction

The whole of Nigeria was not colonized at the same time by the British Government. Anytime the British Government successfully colonized any tribe, it tried to put in place the local administration it is used to in United Kingdom which is through County Councils and local councils but this was difficult for the British government because of lack of manpower and difficulty in communication. We will consider in this unit, the gradual introduction of local government administration into Nigeria polity. At the time of introduction, it was not named 'local government' but came in form of different programs introduced by the colonialists, such as indirect rule, native authority, sole administratorship, etc.

2.0 Course objective

At the end of this unit, you should be able to discuss in detail the following:

- The local government reforms Phase I
- Phase II of the Local Government reforms
- Discuss the reasons for the reforms
- Make an objective assessment of the reforms

3.0 Main Content

3.1 Phase I

The history of local government in Nigeria dates back to pre-colonial period. However, the advent of British colonial administration in Nigeria changed the method of leadership in Nigeria from traditional to the British colonial government. Local government developed through a system of indirect rule as laid down by Lord Lugard which was then autocratic and unrepresentative.

In 1914 when the Protectorate of Northern and Southern Nigeria was amalgamated by the British Government, Lord Lugard who had successfully experimented the indirect rule system in the Northern Protectorate was appointed as the Governor General. He extended the indirect rule administrative system to Southern Nigeria. . Under the colonial administration, local government was known as Native authority or Administration system. It was a form of indigenous rule under colonial authorities whereby traditional institutions of chiefs and other traditional rulers administer the natives under the supervision of British Administrative Officer. Between 1930s and 1940s, for instance, local government was known as chief-in-council and chief-and-council, where traditional rulers were given pride of place in the scheme of things. The use of indigenous

institutions, chiefs and rulers in the then newly established local administration was not novel, but was the existing administrative structure before the advent of colonialism.

The indirect Rule system was successful in the Western Region where there was in existence Obas who wield both political and spiritual influence on their subjects as it was in the Northern Region. The system was however not successful in the Eastern Region because of the absence of kingship or Oba institutions. While commenting on this development, Dr T.O. Elias said:-

> *"One of the most significant events in the administration of the country since the Second World War has been the conversion of the traditional native authority into a system of Local Government. The process has been most rapid in Eastern Nigeria, where the practice of Indirect Rule was least firmly established; it has been most gradual in Northern Nigeria where the large and powerful Emirates for long defiled assimilation to the new order"*

Regardless of nomenclature, local government is a creation of British colonial rule in Nigeria. Since the Native Authority Ordinance No. 4 of 1916 under the colonial government, local government system in Nigeria has been subjected to several reforms with some notable changes. It has overtime experienced change in name, structure and composition

It has been observed that the operators of the Native Authority System could neither be described as executives, legislators nor administrators. This is because, according to Ayoade, they executed, legislated or administered nothing. At best, as Ayoade observed, the traditional rulers were mere "administrative couriers" to the colonial officers. This brings into question the status of the Native Authority System itself. Is it proper to call it local government or local administration?

It is a misnomer to call it local government because there was nothing government about it to warrant the nomenclature. However, towards 1946, the system had acquired a new nomenclature- Sole native Authority System.

3.4 Phase 2

In trying to address the defects in the Native Authority System, the last colonial Secretary of State, Lord Creech-Jones, in 1947, had argued as follows:

> *"The key to resolving the problems of African administration lay in the development of an efficient and democratic system of local government. I wish to emphasize the words: efficient, democratic and local. Local because the system of government must be close to the common people and their problems, efficient because it must be capable of managing local services in a way which will help to raise the standard of living, and democratic because it must not only find a place for the growing class of educated men, but at the same time command the respect and support of the mass of the people."*

Following these policy statements, regional governments into which the whole country had broken into, began to reform their Native Authority systems to local government system-Multi tier system- that tended to replace the old one-single tier- that had been in place since 1914. This multi-tier system was a concentric circle of variety of three local Government systems. For example, the County, District and local council or provincial. The Districts or Divisional councils were in charge of markets, dispensaries and sanitary services Local or District councils, the smallest of them all, were responsible for the maintenance of streams and footpaths.

In the 1950s, election was introduced according to the British model in the western and eastern parts of the country with some measure of autonomy in personnel, financial and general administration. It was on this premise that the rising tide of progress, growth and development experienced in the local governments in these areas was based. The pace of this development was more noticeable in the south than in the north.

During this period, heterogeneity was the hallmark of local government as there was no uniformity in the system and the level of development was also remarkably different.

Secondly, Regional governments, especially those of the Southern part of the Country began to pass laws that provided for broad political participation under representative or democratic system of local government. The broadened participation included local representative of the people, traditional rulers and chiefs, which the law still permitted to act as the chairmen of the local government councils. The traditional members according to C. E. Emezi, were either ex-officio members of these councils or to sit on them by and from amongst themselves. The president of the council was the traditional ruler of the place but where they were more than one, the office rotated amongst them.

Although, the President of the Local government, under this new dispensation, had purely ceremonial functions like presiding at budget meetings and on other important occasions, he sometimes attempted to exercise executive authorities that tended to cause occasional out breaks of misunderstanding, if not outright fiasco, between him and the executives of the council. How one expected a peaceful cohabitation of an entirely illiterate president of Local government with educated treasurer and secretary of Local government seemed not clear. It is not an overstatement that the restless educated elite at that time would actually encourage and work for

the success of their colleagues both at the council pools and administration, so that, having formed majority in the council, they could always over turn the decisions or plans of their reactionary opponents. Alex Gboyega alluded to this when he said that 1950 Local government reform tended to produce more participation than even the government wanted.

Thus, as mentioned earlier, conflicting composition of the management of Local government at this period did not allow for proper local government administration. While the traditional rulers who were presidents of the Local government councils were mere titular, technocrats of the Local government councils –Secretary and the Treasurer – exercise executive powers, though through directive from the regional government as they had no any initiative other than acting on 'order from the above'. The intensity of this was high in places where educated traditional rulers headed the councils. Power tussle, not just on who ran the councils but who is superior in the system, frequently ensued between them and the technocrats.

Perhaps the regional governments deliberately created this cleavage between the traditional rulers, as the presidents of the councils and the technocrats so as to have inroad into happenings going on at the grassroots, for Local governments, as earlier form of government, were too important to the politicians and the regional governments to be left alone. Hence they, regional governments, held tenaciously on to power to create and abolish Local governments. With this power, they created, abolished and dissolved erring Local governments, beside the fact that they "must also approve their annual budget before they can be implemented".

This way, Local governments under this second phase were effectively subordinated to the regional governments. The upshot of this for the local government system was lack of autonomy. The lack of autonomy concomitantly also meant that these Local governments were dependent on the regional governments in a "horse and the rider" relationship. While Local governments were the horses, regional governments were the riders. Given this, Local government system during this period cannot be properly called so, but, as Ayoade suggested, "Agents of the central government at the local level". As agent of the regional governments, they (Local governments) could not provide for the people what they wanted but what regional governments wanted for them (local people) hence it is a misnomer, for the system, under this phase, to be regarded as Local government because there was nothing governmental about it. However, it could be appropriately termed Local administration.

3.5 Phase 3

Civil war era was another important epoch in the administrative development of Local government. Not only was development in the East stalled, poverty was alarmingly skyrocketing as the East was at that time the theater of war. As a result of this civil war there was prevalent of emergency both in the West and the North.

Sole Administrator ship system of administration was adopted in the West and Mid-West. It was a system supported by force and the emergency situation of the period. It was not meant to perform any meaningful duty other than mobilizing support geared towards the war efforts. The North, during this period had also desired complete abolition of Native Authorities and its replacement by advisory council. Local government development during this period, as earlier

said, was in stupor while poverty was on the increase as virtually all resources were being mobilized towards successful completion of the raging war.

4.0 Conclusion

Local governance in Nigeria has undergone several changes from the beginning of colonial rule up until the Nigeria civil war. These changes have changed the perception and style of governance by a great deal. It remains however, for one to say whether in the light of the current challenges facing the third tier of government in Nigeria if it is operating at its best possible effect level.

5.0 Summary

The application of local government governance in Nigeria had different applications in different areas of the country. This led to different challenges. For example there was a high rate of default in the payment of property rates, in Lagos, including government institutions, which slashed the revenue of local councils. The situation in the East was not a far cry from this up until the civil war 1967. The North saw gradual changes in the structure of councils as the number of e l e c t e d or a p p o i n t e d non-traditional office holders becoming members of local authorities increased

Local authorities had smooth operation in carrying out their duties, with some measure of success for more tasking operations such as primary education. Incidental to this, the local government gets statutory grants from Federal and State Government, and is expected to bring development to the rural areas.

6.0 Tutor Marked Assignment

Discuss the rationale for the establishment of local government in Nigeria

7.0 Further Reading/References

1. Ayoade John A.A. “The Development of Democratic Local Government in Nigeria”. Aborisade and Mundi
   (Ed.) Local Government in Nigeria and the United States: Learning from comparison, Ife: Local Government Publication series, 1995, P. 19

2. Dele Olowu: “Local Governance, Democracy, and Development”. Richard Joseph (Ed.) State, Conflict and
   Democracy in Africa. Lynne Rienner Publishers, Inc. 1999. P. 286

MODULE 4

UNIT 1 LOCAL GOVERNMENT

UNIT 2 LOCAL GOVERNMENT REFORMS IN NIGERIA

UNIT 3 LOCAL GOVERNMENT ADMINISTRATION IN THE REGIONS

UNIT 4

UNIT 3 LOCAL GOVERNMENT REFORMS IN THE REGIONS

1.0 Introduction

With the knowledge of the advent of local government in Nigeria, we take note that since independence the structure has changed tremendously. In unit 3, we learn the various reforms that the system has undergone in Nigeria in the different regions. As you may have also observed in the last unit, the success or otherwise of local government administration was dependent on many factors. We will now study the modus operandi of local government in the different regions.

2.0 Course objective

After you may have studied this course material and read up other relevant materials on the topic, you should be able to:

- Discuss the local government in eastern Nigeria
- Local government in western Nigeria
- Local government in northern Nigeria as well as in Lagos state.

3.0 Main Content

3.1 Local Government system in Eastern Nigeria

The Native Authority system was introduced into Eastern Nigeria in 1933. Because the Easterners were not comfortable to the Indirect Rule system being introduced from the Northern Region, there were serious complaints against the system which led to the promulgation of the local Government Ordinance in 1950. This new law was patterned after the English system of Local Government. It provided, inter alia for county councils, Urban and Rural District Councils and Local Councils all of which were directly responsible to the Regional Government. In 1955 however, this law was repealed and a new Local Government Law was enacted in 1955 under this new law, the post of provincial Resident was replaced and brought under the control of the Minister of Local Government who was empowered to appoint Local Government Commissioners and to approve all contracts which the Councils might want to enter into. The appointment and dismissal from the service of the Councils were also subject to the approval of the minister for Local Government.

All the effort made by the government to bring government closer to the people soon hit the rocks as politicians politicized the system and it became highly corrupt. Dr T.O. Elias in his observation in this respect said:-

"serious allegations of bribery and corruption in the award of contracts, in staff appointments, in the allocation of market stalls as well as accusations of financial irresponsibility and maladministration, led to the institution in 1955 of a commission of inquiry into the operation of several Local Government Councils. As a result, the Aba and Onitsha Urban District Councils,

Eastern Ngwa and Igbo Etiti Rural District Councils were dissolved by the Regional Government.

There were soon introduced detailed regulations governing conditions of service for all local government staff, regulations controlling the award of contracts, a series of financial memoranda laying down a uniform accounting system and electoral regulations "[2].

This commentary by the learned author shows that the local government administrative system in the then Eastern Region was seriously politicized and unsuccessful.

3.2 LOCAL GOVERNMENT SYSTEM IN WESTERN NIGERIA

Although the powers of the Yoruba Obas were greatly enlarged in 1916 when the system of "Indirect Rule" for purposes of local administration was introduced into Western Nigeria, the need for a change was soon felt mainly because of the widespread dissatisfaction with the workings of the Native Authorities from which the educated elements were virtually excluded. It was therefore no surprise when in answer to the general demand of the people, the Western Nigeria Local Government Law of 1952 was passed and took effect from February 25, 1953. The Law was based on the English local government and it involved three-tiers known as Divisional, District and Local Councils. Under the law no council was to have more than one quarter of its total membership as traditional members and the remaining members should be elected according to Section 5(1) (h) thereof.

Although the Presidents of such councils would be traditional Chiefs or Obas, the day to day functions of the councils were left to the elected members headed by a Chairman[3]. It is significant to note that the law provided that the powers and duties of the Resident in charge of Provinces should be transferred to Inspectors of Local Government barely three years after the law came into force. About 22 Divisional, 104 Districts and 100 Local Councils were established in Western Nigeria. This was done to satisfy politicians who were using the local

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2 Nigeria: The Development of Laws and Constitution (1967) 85

3 P.O. Oluyede (Supra) pg 108

government administrative system not to bring governance closer to the people but to meet the selfish desires of themselves. The politicians were also using the system to oppress their political opponents.

3.3 LOCAL GOVERNMENT IN NORTHERN NIGERIA

As noted earlier, Lord Lugard first introduced Indirect Rule in Northern Nigeria on January 1, 1900. By this means, the British Government was using the administrative structures already in existence in the emirates in Northern Nigeria to reach the natives. As this system of administration progressed, the educated class amongst the natives noted that the emirs were becoming too powerful and uncontrollable. This prompted the Northern Region Government to enact the Native Authority Law in 1954. By virtue of the provisions of section 6 of this law, five types of Native Authorities were created as follows:[4]

(i) a chief or other person in council appointed by the Premier;
(ii) a chief or other person and council appointed by the Premier;
(iii) a council appointed by the Minister for Local Government;
(iv) a group of persons appointed by the Minister for Local Government; and
(v) a chief or other person appointed by the Premier.

The Minister for Local Government was empowered under the new law to determine the composition of the above councils and to make standing orders for the regulation of their meetings. This was done to dilute the powers of the Emirs in the administration of the emirates. Section 52 of the law also empowered the Native Authority Councils to make "Standing Orders" with the approval of the Minister for the regulation of their meetings. Elections to Councils were also provided for under Section 6 of the Law. The result was that by the end of 1962 there were not less than 70 Native Authorities out of which more than 70% had elected members and about 51% had elected majorities. Many of the Councils adopted the practice of allocating to their "members supervisory duties on the ministerial principle", so that each councillor was given a kind of portfolio/responsibility in respect of stated subject or group of subjects.

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[4] Oluyede (supra) page 109.

Also, in 1956, the Northern Regional Government enacted the Kaduna capital Territory Law which empowered the Premier to appoint an Administrator for the Kaduna capital Territory. The Administrator was to be responsible directly to the Governor-in-Council.

While commenting on this development in Northern Nigeria, Dr T.O. Elias said:

> *"By middle of 1962, there were 39 Native Authorities constituted as Chiefs-in-Council and 11 as Chiefs-and-Council. By 1955, some 120 Native Authorities and about half that number of Treasuries had been established in Northern Nigeria"*[5].

This was done not for the overall benefit of the ordinary man but to satisfy the political aspirations of the politicians. The people became disenchanted and craved for a better system of local administration. This led to allegations and counter allegations prompting the setting up of various commissions of enquiry to probe the finances of the local governments.

Reason for the failure of indirect rule

1. It has been contended that there was nothing wrong with the use of indigenous institutions, chiefs and rulers in the then newly established local administration, for the was the existing governing structure before the advent of colonialism; but there was there was certainly something wrong with the quality of these people expected to run these traditional institutions in 'modern governance'- Indirect rule system. Very few of the traditional rulers or chiefs, if any at all, had western education and exposure in modern governance to be able to run this newly introduced local administration. Ayoade expressed this better when he said that 'The policies were transmitted to the traditional rulers who hardly understood the logic and rationale of the policies. Nevertheless, they transmitted those policies to their people and expected compliance"[6].

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5 Ibid Page 110

6 Ayoade John A.A. "The Development of Democratic Local Government in Nigeria". Aborisade and Mundi (Ed.) Local Government in Nigeria and the United States: Learning from comparison, Ife: Local Government Publication series, 1995, P. 19

2. Besides lack of western education necessary for these indigenous rulers to understand their 'superintendents', some roles expected of them to perform by the new system were also repugnant to the tradition of the people. For instance, the Native Authorities were expected "to be able to levy and collect taxes for the salaries of the chiefs and other officials and services of the authorities"[7]. But while communities were already accustomed to this, others were not; though they also had their own traditional ways of carrying out such services. In brief, their lack of exposure to Western education and modern governance hampered their administrative and service delivery capacity in the Native Authority System.

3.4 Local Government system in Lagos

Lagos was a colony of the British and it was treated separately from its adjoining regional government of Western Nigeria. It was initially administered by a Health Board which was established in 1869. In 1919, the Health Board was replaced with a Town Council consisting of elected members. The Lagos Township ordinance was enacted in 1941 and this was amended in 1948 to give Lagos a first class township, status with a Council consisting of the commissioner of the Colony as President, five elected members representing the five recognized wards. The Council also had eight nominated members of whom three were Nigerians. One woman represented the interest of women in the Council and another was a white cap chief representing the Oba of Lagos. The two remaining were government officials. Lagos attained the status of a municipal under the Lagos Local Government Law of 1950 but the day to day administration of the council was supervised by the Treasurer and the Town Clerk.

As can be deduced from the discussion of local government administration in various regions of the country up to and including the termination of the first republic, there was no uniform system of local government administration in Nigeria. Each regional government adopted the system

best suited for its purpose. The regional governments had financial, legislative, executive and judicial control over the local governments. This was so to the extent that the Premiers were dethroning Obas who were not ready to do the will of the regional governments. A case in point is that of **Ekundare vs. Governor in Council & another (1961) All NLR 149** when the Governor in Council dissolved the Ilesha Urban District Council on the mere allegation that it passed a resolution calling on the Owa of Ijesha to abdicate. The Plaintiff's counsel, Sir Frank Soskice contended:

(1) That the Ilesha Urban District Council had a right to pass the resolution which was only an invitation to the Owa of Ijesha to abdicate.

(2) That if it was held that the Council had no power to pass the resolution, as long as the Council had properly discharged its functions laid down by law, the Governor-in-Council had no right to dissolve the Council.

(3) That the Governor-in-Council was satisfied on the facts before deciding to dissolve the Council and that therefore the Governor-in-Council did not act in accordance with Section 87 subsection (1) (b) of the Local Government Law, Cap. 68, in dissolving the Council.

Chief Rotimi Williams for the Defendant contended:

(1) That no power was vested in the Ilesha Urban District Council to pass a resolution urging the abdication of the Oba as the Owa of Ijeshaland, who can only be removed in accordance with Native Law and Custom and subject to the provisions of the Chiefs Cap. 19 and that the resolution passed by the Council was *ultra vires* and therefore unlawful.

(2) That as the Plaintiff has led no evidence to support the allegation of bias against the Governor-in-Council, the presumption is in favour of the Defendants that the Governor-in-Council was satisfied that the council was not discharging its duties under the law before it decided to dissolve the Council.

(3) That as the decision to dissolve the Council was an executive as distinct from a judicial action, the question whether there were grounds upon which the Governor-in-Council was so satisfied or whether the Governor-in-Council ought to have been satisfied is not one which can be subject of litigation in Court.

(4) That the Plaintiff has no *locus standi* to institute the proceedings.

It was held that in law, the action of the Governor-in-Council in dissolving the Ilesha Urban District Council was an executive function and could not be questioned in Court. The case was therefore dismissed.

This, again demonstrated the political intrigues between and amongst the various political parties contending for power in Lagos State.

4.0 Conclusion

We have been examining the place of local governments in colonial Nigeria. We have also examined the dynamics of the structure in the different regions, and in Lagos as well as a historical review of the development of local government system in Nigeria. What can be deduced from the discussion and in the light of the Local governance in Nigeria has undergone several changes from the beginning of colonial rule up until the Nigeria civil war. These changes have changed the perception and style of governance by a great deal

5.0 **Summary**

Local government has taken different forms from one period to the other in Nigeria. We have pre-colonial experience culminating in different traditional systems; from the Yoruba, Igbo, and Hausa systems.

6.0**Tutor Marked Assignment**

1. Critically evaluate the system of local government administration in pre-colonial Nigeria.

7.0**Further Reading/References**

1. Alex Gboyega. “Democracy and Development: The Imperative of Local Good Governance”. An Inaugural lecture, 2003;
Ibadan: The Faculty of Social Sciences, University of Ibadan, 2003,

2 Administrative Law in Nigeria, Iluyomade & Eka

3. Ayoade John A.A. “The Development of Democratic Local Government in Nigeria”. Aborisade and Mundi (Ed.) Local Government in Nigeria and the United States: Learning from comparison, Ife: Local Government Publication series, 1995,

MODULE 4

UNIT 1 LOCAL GOVERNMENT

UNIT 2 LOCAL GOVERNMENT REFORMS IN NIGERIA

UNIT 3 LOCAL GOVERNMENT ADMINISTRATION IN THE REGIONS

UNIT 4 LOCAL GOVERNMENT ADMINISTRATION FROM 1976

UNIT 4 LOCAL GOVERNMENT ADMINISTRATION FROM 1976

1.0 Introduction

Prior to 1976, the administration of Local Governments in Nigeria was purely an administrative law affair because local government system was not enshrined in the Nigerian Constitutions of that time, neither was Local Government made a tier of Government. Following the disorderly manner local government were administered during the first republic up to and including year 1976, the Military Administration of General Murtala/Obasanjo set up a Committee to recommend reforms in the local government administration in Nigeria. We shall consider the impact of military on local government development and administration as well as current issues on this important tier of the government.

2.0 Course Objective

The major aim here is to assess the impact of military regime on local governments in Nigeria and also educate us about the current position under the constitution.

3.0 Main Content

Further, under the system of Indirect rule, communities felt no sense of belonging and self-involvement in the system called local government then. Another reason for the

failure of the system was the restlessness of the educated elite who felt uncomfortable with their total exclusion from the Native Authority System.

3.2 LOCAL GOVERNMENT ADMINISTRATION IN NIGERIA AS A CONSTITUTIONAL LAW MATTER

The introduction of 1976 Local government reforms by military administration of General Obasanjo brought about empowerment of Local government system in four important aspects. The empowerments are in the areas of uniformity in the administrative structure of the system, making the newly reformed democratic local government councils a third tier of government with constitutional recognition, separation of traditional rulers from the Local government council and constituting into a separate council known as traditional or emirate council .

Uniformity had to do with standardization of Local government structures, personnel and functions throughout the country; making Local government staff transferrable form one Local government to the other throughout the country. This was a deviation from the previous arrangement whereby each region operated varieties of Local government systems. The separation of traditional rulers from the Local government councils was informed by decision to block one of the important obstacles hindering the growth of democratic Local government system in the country. For, traditional rulers had always tackled the Local governments for the resources and the loyalty of the localities[8]. As a level of government, the new Local government system, according to the guidelines for the 1976 Local government reform, should do precisely what the word government implies i.e., governing at the grassroots or Local level.

The reforms introduced a multi-purpose single-tier local government system. The reforms also introduced population criterion under which a local government could be created. Consequently, a population of within 150,000 to 800,000 was considered feasible for a local government. This was done to avoid the creation of non-viable local council and for easy accessibility. There was provision for elective positions having the chairmen as executive head of local government with supervisory councillors constituting the cabinet. This was complemented by the bureaucrats and

[8] Alex Gboyega: "Local Government and Democratization in Nigeria in the last decades. Paper presented at the National Conference on Two Decades of Local Government in Nigeria. Held at the Administrative Staff College of Nigeria (ASCON) Topo-Badagry on June 4-6, 1996, P.3.

professionals, such as Doctors, Engineers, etc., who were charged with the responsibility of implementing policies (1976 Guidelines).

The recommendation of this Committee was endorsed by the Constitution Drafting Committee and the Constituent Assembly that recommended the promulgation of the 1979 Constitution of the Federal Republic of Nigeria. **Section 7(1)** of the Constitution provides as follow:

7(1) "The system of local government by democratically elected local government councils is under this Constitution guaranteed; and accordingly, the Government of every State shall ensure their existence under a Law which provides for the establishment, structure, composition, finance and functions of such councils.

(2) The person authorized by law to prescribe the area over which a local government council may exercise authority shall –

(a) define such area as clearly as practicable; and

(b) ensure, to the extent to which it may be reasonably justifiable, that in defining such area regard is paid to-

(i) the common interest of the community in the area,
(ii) traditional association of the community, and
(iii) administrative convenience.

(3) It shall be the duty of a local government council within the State to participate in economic planning and development of the area referred to in subsection (2) of this section and to this end an economic planning board shall be established by a Law enacted by the House of Assembly of the State.

(4) The Government of a state shall ensure that every person who is entitled to vote or be voted for at an election to a House of Assembly shall have the right to vote or be voted for at an election to a local government council.

(5) The functions to be conferred by Law upon local government councils shall include those set out in the Fourth Schedule to this Constitution.

(6) Subject to the provisions of this Constitution –

(a) the National Assembly shall make provisions for statutory allocation of public revenue to local government councils in the Federation; and

(b) the House of Assembly of a State shall make provisions for statutory allocation of public revenue to local government councils within the State.

A cursory look and literal interpretation of Section 7 of the 1979 Constitution shows that the various state governments were empowered to create local governments within their territorial boundary as soon as the conditions prescribed by this section of the constitution is met.

Sections 7 and 8 of the 1999 Constitution is reproduced verbatim.

7(1) The system of local government by democratically elected local government councils is under this Constitution guaranteed; and accordingly, the Government of every State shall subject to section 8 of this Constitution, ensure their existence under a Law which provides for the establishment, structure, composition, finance and functions of such councils.

(2) The person authorized by law to prescribe the area over which a local government council may exercise authority shall-

(a) define such area as clearly as practicable; and

(b) ensure, to the extent to which it may be reasonably justifiable, that in defining such area regard is paid to –

(i) the common interest of the community in the area,

(ii) traditional association of the community, and

(iii) administrative convenience.

(3) It shall be the duty of a local government council within the State to participate in economic planning and development of the area referred to in subsection (2) of this section and to this end an economic planning board shall be established by a Law enacted by the House of Assembly of the State.

(4) The Government of a State shall ensure that every person who is entitled to vote or be voted for at an election to a House of Assembly shall have the right to vote or be voted for at an election to a local government council.

(5) The functions to be conferred by Law upon local government councils shall include those set out in the Fourth Schedule to this Constitution.

(6) Subject to the provision of this Constitution –

(a) the National Assembly shall make provisions for statutory allocation of public revenue to local government councils in the Federation; and

(b) the House of Assembly of a State shall make provisions for statutory allocation of public revenue to local government councils within the State.

Section 8 (1) (3)

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

(3) A bill for a Law of a House of Assembly for the purpose of creating a new local government area 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 local government area) in each of the following, namely -

(i) the House of Assembly in respect of the area, and

(ii) the local government councils in respect of the area,

Is received by the House of Assembly;

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

(c) the result of the referendum is then approved by a simple majority of the members in each local government council in a majority of all the local government councils in the State; and

(d) the result of the referendum is approved by a resolution passed by two-thirds majority of members of the House of Assembly.

Section 8 (5) (6)

8-(5) An Act of the National Assembly passed in accordance with this section shall make consequential provisions with respect to the names and headquarters of State or local government areas as provided in section 3 of this Constitution and in Parts I and II of the First Schedule to this Constitution.

(6) For the purpose of enabling the National Assembly to exercise the powers conferred upon it by subsection (5) of this section, each House of Assembly shall, after the creation of more local government areas pursuant to subsection (3) of this section, make adequate returns to each House of the National Assembly.

A reading of section 7 of the 1999 Constitution shows that the provisions of section 7 is made subject to the provisions of section 8 of the Constitution.

Section 8 (3) (5) & (6) have circumscribe the power of the State House of Assembly to solely create a local government within its geographical boundary without reference to the National Assembly. This is because after the creation of the local government by the State House of

Assembly, returns are expected to enable the National Assembly ratify same and amend section 3 (6) of the constitution.

The interpretation of the above constitutional provisions were made by the Supreme Court in **Attorney General Lagos State vs. Attorney General Federation**(2005) ALL FWLR (Pt 244) 805. Uwais CJN as he then was held at page 851 as follows:

> *"When those sections are read together (i.e sections 8(3) (5) & (6) what emerged is that the passing of a bill by a House of Assembly creating a local government or local government council in accordance with section 8 subsection (3) of the constitution is not enough; the state will have to go a step further by submitting returns to the National Assembly which in turn will have to amend section 3 (6) of the constitution for the new local government to be accommodated by the constitution. In other words, the exercise by the State House of Assembly in passing the necessary bill creating a new local government or local government area is inchoate. I therefore come to the conclusion that the passing of the Local Government Areas Law, no. 5 of 2002 by the Lagos State House of Assembly was not sufficient to give life to the new Local Government Area until the National Assembly passes the consequential Act amending section 3 subsection 6 and part 1 of the first schedule to the constitution. Similarly, the enactment of New Local Government Areas (Amendment) Law, 2004 by the Lagos State House of Assembly which was assented by the Governor of Lagos State on the 6th day of October, 2004, when this case was pending before us, is of no effect and cannot be operative until the National Assembly passes the appropriate Act under section 8 subsection 5 of the constitution appropriately amending part 1 of the first schedule to the constitution to accommodate the new Local Government Areas".*

The 1979 provision was also tested in the case of **Chief Sule Balogun vs. Attorney General of Lagos State and Others1981) 1 NCLR 31**. The substantive action before the Court, brought by a writ of summons, was for a number of declarations to the effect that the Local Government Law 1980, which vested in the Governor of Lagos State the power to establish, create or constitute new local Government Councils or redefine the area of authority of existing Local

Government Councils in Lagos State is ultra vires the Constitution of the Federal Republic of Nigeria; that Section 7 of the Local Government Law is ultra vires the Constitution; that the purported elections into 23 Local Government Councils holding on the 29th March 1980 is unconstitutional, void and of no effect and an injunction restraining the Defendants from creating or constituting any such local government councils and holding election under the said law.

It was held:

(1) That a Federal Constitution is a charter of rights and duties of the Federal and State authorities, which must be kept in their proper proportions. The rights asserted by any one authority and the duties required of one authority by another must not be beyond the schedule laid down in the Constitution. Section 3(2) of the Constitution does no more than define the area of each State in the Federation and does not prescribe the local government councils which must exist in each State for any period of time until the First Schedule of the Constitution is amended. The national government is not granted any power under the Constitution either in the Exclusive Legislative List or in the Concurrent Legislative List or otherwise to make laws with respect to the establishment, structure, composition, finance and functions of local government councils but such powers are expressly vested in the Government of every State i.e. the House of Assembly of every State. From the grammatical construction of Sections 3 and 7 of the Constitution, the intention of the framers of the Constitution was to prescribe in Section 3 the number of States in the Federation, the geographical area of each State and to make provisions as to the Federal Capital Territory but not to restrict the powers expressly given to the State Government in Section 7.

(2) A legislative body cannot delegate any of its legislative powers especially when it relates to important subjects, to another branch of the government except under a limitation of a prescribed standard.

(3) It was not within the contemplation of the makers of the Constitution that the State Assembly will delegate to the Governor the power to define the area of authority of a

local government area without the House of Assembly setting out the standards which as area of authority of a local government must conform with.

(4) As a schedule was not set out in the Local Government Law 1980 a blanket power has been given "and the Court will not delete the words and the boundaries thereof shall correspond as closely as possible to the boundaries of the respective areas specified in closely as possible to the boundaries of the respective area specified in the schedule to this Law" in Section 7(1) of the enactment, as such deletion would constitute a rewrite of the law enacted by a House of Assembly.

(5) The power to divide a Local Government Council into wards for purposes of Local government elections is by implication vested by the Constitution in the State Electoral Commission and the number of members to be retired from each ward in any Local Government Election is to be fixed by an Act of the National Assembly.

(6) The Local Government Law 1980 which purports to repeal the Local Government Electoral Regulation 1976 is unconstitutional, null and void and all subsidiary instruments made by the Governor under the said law are unconstitutional, null and void.

(7) The new 23 Local Government Councils purported to be created under those instruments have not been validly created and the eight local government councils created under the Local Government Edict 1976 are still in existence.

(8) As no assent of the Governor was recorded on the Local Government Law 1980, it was not established that the Governor of Lagos State gave his assent to the Local Government Bill 1980 which was passed into the Local Government Law 1980.

It can be seen from the above that before 1976, the various regions and later states operated politically motivated local government administration through divisions and provinces created for their convenience with the aim of impacting on the lives of the ordinary Nigerian. There was no uniform system of local government throughout the country.

However in 1976, the Military Government of General Murtala/Obasanjo issued a Decree, creating local governments in Nigeria with uniform structure and made same the third tier of government. In the words of Brigadier Shehu Musa Yar'Adua (Late) "The Federal Military Government has therefore decided to recognize local governments as the third tier of government activity in the nation. Local government should do precisely what the words government implies i.e. governing at the grass roots or local level"

After the exit of the Muritala Mohammed/Obasanjo Military government in 1979 October 1, the reforms made by the military administration was entrenched in the 1979 Constitution of the Federal Republic of Nigeria sequel to the recommendation of the Constitution Drafting Committee and the endorsement thereof by the Constituent Assembly. The result is that the amorphous system of local government administration in Nigeria up to and including 1976 was removed from the exclusive ambit of state governments and entrenched in the Constitution of the nation for the first time.

In 1991, a major landmark reform was introduced as the system had legislative arm. In addition, the Babangida administration increased the number of local government from 301 in 1976 to 453 in 1989 and 589 in 1991. The Abacha regime also increased the number to 774 local councils that we have today and the administrative structure also underwent some changes.

Traditional or Emirate council that was severed from Local government council shared some similarities with conventional democratic Local government council. First, as there are 774 Local government councils throughout the country today so are there 774 traditional or Emirate councils. Secondly, Local Government councils render services allotted to them by the Constitution so do the Traditional or Emirate council. In any case the differences between these 'traditional government' and the conventional democratic Local Government system are in the areas of legislative role (making of bye-laws) and democratization. Whereas modern Nigerian Local Government system is democratic, representative, legislative and executive, 'traditional government' of Babaginda's vision lacked all these attributes and thus merely assists the other levels of government in service delivery, dissemination of information and explanation of government policies to the rural populace[9].

[9] Mead Timothy, D. "Barriers to Local Government Capacity in Nigeria". Aborishade O. and Mundt R.J. Local

In summary, it can be said that no public institution in Nigeria has been so subjected to frequent reforms than local government. Nearly every successive administration introduces one administrative change or the other. In essence, it has become almost fashionable in Nigeria for incumbent administration to introduce one change or the other in the institution. So far, local government system in Nigeria has not been stable and this leaves its future to remain bleak, uncertain and insecure.

Administrative structure in Nigeria.

There are 774 local government areas (LGAs) in the country. The functions of Local Governments, as spelt out in the Constitution, are as follows:

a. Consideration and making of recommendations to the State commission on economic planning or any similar body on economic development of the State, particularly in so far as the area of authority of the Council and of the State are affected;

b. Collection of rates, and radio and television licenses;

c. Establishment and maintenance of cemeteries, burial grounds and homes for the destitute or infirm;

d. Licensing of bicycles, trucks (other than mechanically propelled trucks), canoes, wheel barrows and carts;
e. Establishment, maintenance and regulation of markets, motor parks and public conveniences;

highways, parks, open spaces, or such pub- lic facilities as may be prescribed from time to time by the House of Assembly of a State;

g. Naming of roads 'and streets and numbering of houses;
h. Provision and maintenance Of public conveniences and refuse disposal;

Government in Nigeria and the United States: Learning form Comparison. Local Government Publication Series, 1995, P. 198.

i. Registration of births, deaths and marriages;

j. Assessment of privately-owned houses or tenements for the purpose of levying such rates as may be prescribed by the House of Assembly of a Stale; and,

k. Control and regulation of:
i. out-door advertising and hoarding,
ii. movement and keeping of pets of ail descriptions,
iii.shops and kiosks,
iv. restaurants and other places for sale of food to the public, and
v. laundries.
The local government councils also work hand- in-hand with State governments on issues such as:
a. the provision and maintenance of primary education;
b. the development of agriculture and natural resources, other than the exploitation of minerals, and,
c the provision and maintenance of health services.

Each local government area is administered by a Local Government Council. The Council comprises of a Chairman who is the Chief Executive of the LGA, and other elected members who are referred to as Councillors.

The Chairman is normally elected, but can, under special circumstances, also be appointed. He/she supervises the activities of the local government and presides over all meetings of the Council.
All members are enjoined by law to meet, as far as practicable, the aspirations of the people who elect them. Committees, focusing on specific issues, play very important roles in the day-to-day business of the Council. They assist the Councils in decision-making and are usually required to report their discussions to the Councils.

A Local Government Council is the pivot of socio-economic planning and development in its area of authority. Being also the tier of government closest to the people, it is considered a most important facilitator of economic and social development at the grassroots.

Constitutional roles of local government in Nigeria

Three criteria, were applied in allocating functions to newly reformed Local Government councils. The parameters applied included:

(i) Require detailed Local knowledge for efficiency performance;

(ii) In which success depends on community responsiveness and participation and

(iii) Which are of personal nature requiring provision close to where the individuals affected live, and in which significant use of discretion or understanding of individuals is needed. These parameters were applied to produce two lists of functions for Local Government.

In the Constitution of the Federal republic of Nigeria, 1999 (as Amended), section 7 (5) makes provisions for the functions of local government council in Nigeria. The sub-section provides as follows:

> *"The functions to be conferred by law upon Local government council shall include those set out in the Fourth Schedule to this Constitution."*[10]

The functions conferred on Local government council in the Fourth Schedule of the 1999 Constitution (as amended) are similar with those listed above. It suffices to say however, that in addition to the above functions, in item 1 (a) of the said Schedule, Local government councils are also conferred with the function of making recommendations to State Commissions on economic planning or any similar body on the economic development of the State, particularly in so far as the areas of authority of the council and of the State are affected. Further, item 2 (d) of the Schedule also gives Local government councils "such other functions as may be conferred on a local government council by the House of Assembly of the State".

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[10] Section 7(5) of the Constitution of the federal Republic of Nigeria (1999) (As Amended)

4.0 **Conclusion**

On the whole, one good thing with the series of reforms in the Local Government administration in Nigeria since 1976 is that, as a result of these reforms, matters relating to the establishment, structure, composition, finance and functions of local government administration are now constitutional matters and not administrative as previously the case before 1976.

5.0 **Summary**

Local governments suffered a setback under the military regimes because of the lack of respect for the constitution and the rule of law. Under the CFRN 199, the law provides for the basis of the administration on local governance and also stipulates areas of collaboration with the state government.

Finally, the constitution recognizes about 774 local council areas in Nigeria. Do note that Lagos had created some municipal areas which caused problems with the federal government during the Obasanjo government from 1999 to 2004.