NATIONAL OPEN UNIVERSITY OF NIGERIA

SCHOOL OF POSTGRADUATE STUDIES

FACULTY OF LAW

COURSE CODE: LED713

COURSE TITLE: ADMINISTRATIVE LAW

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14/16 Ahmadu Bello Way
Victoria Island, Lagos

Published by
National Open University of Nigeria

Printed
ISBN:

COURSE INFORMATION

COURSE CODE: **LED713**

COURSE TITLE: **ADMINISTRATIVE LAW**

ADAPTED FROM: **Commonwealth of Learning**

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LED713 – Administrative Law

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MODULE 1

This module introduces administrative law as a course of study. As you must have learnt in your undergraduate study, it is the law relating to the control of governmental powers, the primary purpose of which is to keep powers within their legal bounds. Module 1 is an introductory section, in which you will be discussing the

machineries by which government fulfil their duties towards the citizenries, which is administrative agencies. The questions which we seek to answer is, what are these agencies, how did they emerge and how are they classified. Taylor, in English history, noted that 'until August 1914, a sensible law-abiding Englishman could pass through life and hardly notice the existence of the state beyond the post office and the policeman!! Of course, all around we see the growth of administrative agencies from the presence of schools, hospital boards, ministries and so on. And as these agencies are proliferating and taking shape, so is powers and duties attached. Administrative law seeks to regulate these powers to prevent these powerful engines from running amok. (in the words of Professor Wade). This module shall be discussing the following topics:

Unit 1 **Introduction and overview of administrative agencies**
Unit 2 **Creation of administrative agencies**
Unit 3 **The emergence of global administrative bodies**
Unit 4 **Classification of administrative functions**

Unit 1: **INTRODUCTION AND OVERVIEW OF ADMINISTRATIVE AGENCIES**

Contents

1.1 Introduction

This unit sets out the framework for the thinking about the role of administrative law in modern society today, setting out the thinking about the extent to which administrative agencies have influenced the society as we have today. From the growth of administrative agencies is the development of administrative law.

Administrative law is the bye product of the growing socio-economic functions of the state and the increased powers of the government. The relationship of the administrative authorities and the people having become complex, some law is necessary which may bring about regularity and certainty in order to regulate these complexities. With the growth of the society, its complexity increased thereby presenting new challenges to the administration. In the ancient times, the functions of the state were very few among them being protection from foreign invasion, tax issues, etc.

This unit provides a starting point in building up your basic knowledge of administrative law. The essential reading and this unit provide a good overview of the topic under study. At the end of the unit, you are provided a list of further reading that you are encouraged to read to give you a deeper knowledge of the topics you have read in this unit.

1.2 Intended learning outcomes

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

i. Give different definitions of administrative law
ii. Explain the various theories behind the administrative law
iii. Illustrate the concept of a welfare state
iv. Form your own view as to what the main purpose of administrative agencies should be.

1.3 Main content

1.3.1 The development of administrative law

Definitions of administrative law

Essentially, what do we mean by administrative law? Let us consider different definitions.

- According to Harlow and Rawlings, that there are two different senses in which the term ‘administrative law’ might be used (1997: 72).
    - Administrative law is used to refer to the common law principles which police the lawfulness of government behaviour.
    - A second view is that is used to refer to the law of the administration—the substantive powers and duties of public agencies.

Self-Assessment Exercise 1

Do you agree with the classification by Harlow and Rawlings?

- **Austin** has defined Administrative Law as the law, which determines the ends and modes to which the sovereign power shall be exercised. In his view, the sovereign power shall be exercised either directly by the monarch or directly by the subordinate political superiors to whom portions of those are delegated or committed in trust.

- **Holland** regards Administrative Law as “one of six” divisions of public law.

- In his famous book “Introduction to American Administrative Law 1958”, **Bernard Schwartz** has defined Administrative Law as “the law applicable to those administrative agencies which possess of delegated legislation and adjudicatory authority.”

- **Jennings** has defined Administrative Law as “the law relating to the administration. It determines the organization, powers and duties of administrative authorities.”

- Jack M. Beermann defines it as the branch of law that regulates the exercise of authority by officials and agencies executing the law under authority granted by the legislature.

- **Dicey in 19th** century defines it as.
    - **Firstly**, portion of a nation's legal system which determines the legal status and liabilities of all State officials.

    - **Secondly,** defines the right and liabilities of private individuals in their dealings with public officials.

    - **Thirdly**, specifies the procedure by which those rights and liabilities are enforced.

- **Oluyede** defined administrative law as that branch of our law which vests powers in administrative agencies, imposes certain requirements on the agencies in the exercise of the powers and provides remedies against unlawful administrative acts.

- Nwosu Uchechukwu defines Administrative law as the body of law that regulates the activities of administrative agencies of government.**(The Practice of Administrative Law in Nigeria Nwosu, Uchechukwu Wilson (Ph.D**

1.3.2 Sources of administrative law:

Administrative law derives mainly from five sources: First, the **Constitution** of the respective countries. In Nigeria, the 1999 Constitution of the FRN (As amended); constitutional procedures and considerations;

A second source of administrative law, are codified statutes for countries that have enacted statutes. For instance, in the United States, the Administrative Procedure Act (APA) a federal statute that was passed in 1946 after a lengthy effort to bring greater coherence to administrative law and ensure adequate mechanisms for supervising agencies. The APA includes procedures for rulemaking, adjudication, and informal action, and prescribes when agencies must publish their actions.

The third main source of administrative law comprises statutes directed at a particular agency or group of related agencies. The main statute is what we call an agency's ''organic statute'' or ''enabling act,'' the statute that establishes an agency and prescribes its mission. The fourth main source of administrative law comprises generally applicable federal statutes that govern agency action but are not directed at any particular agency or set of agencies.

The fifth and final main source of administrative law is the common law of administrative review. Courts sometimes still refer to the common law doctrines, either as a way of understanding APA provisions or even as independent sources of limits on agency action.

1.3.3 Effects of administrative law include:

- **i.** The emergence of the social welfare has affected the democracies very profoundly;
- **ii.** It has led to state activism;
- iii. The province of administration is wide and embrace following things within its ambit;
- iv. It makes policies;
- v. It provides leadership to the legislature;
- vi. It executes and administers the law;
- vii. It takes manifold decisions;
- viii. It exercises today not only the traditional functions of administration, but other varied types of functions as well;
- ix. It exercises legislative power and issues a plethora of rules, bye- laws and orders of a general nature.

Discussion forum

In the light of your understanding of administrative law, does this definition cover all the aspects? Can you define administrative law in your own words?

See other definitions of administrative law by Friendly (Friendly 'New trends in administrative law' (1974) 6 Md Bar J 3; quoted Devenish, et al Administrative law and justice in South Africa (2001) 7.

1.4 Origin of administrative agency

The label ‘‘administrative state’’ signifies something different, namely that the regulatory reach of the government has expanded greatly through the proliferation of numerous agencies created to address various perceived problems that need attention from the federal government.

Legislature establishes agencies and executive branch offices and specifies their placement within the government structure. Most federal administrative agencies are within a Department of the executive branch, in a chain of command with the President at the apex.

The administrative state has grown in response to the increased size and complexity of the economy and increased demand from interest groups and voters for more regulation. As government programs have grown, so has the administrative state. New agencies have been established, and existing agencies have increased in size.

Self-assessment Exercise 2

Can you categorize agencies in Nigeria? How is your classification different within American jurisdiction?

1.4.1 The Welfare states

Behind every theory of administrative law there lies a theory of the state. The thinking that government exists for the welfare of the citizen gave rise to what was commonly referred to as ‘the welfare state’. Sir Cecil Carr. [**C. Carr, Concerning English Administrative Law (Oxford University Press, 1941), pp. 10–11]** aptly captured the interventionist role of the state thus:

We nod approvingly today when someone tells us that, whereas the State used to be merely policeman, judge and protector, it has now become schoolmaster, doctor, house-builder,

road-maker, town-planner, public utility supplier and all the rest of it. The contrast is no recent discovery. De Tocqueville observed in 1866 that the State 'everywhere interferes more than it did; it regulates more undertakings, and undertakings of a lesser kind; and it gains a firmer footing every day, about, around and above all private persons, to assist, to advise, and to coerce them'

Let us explore the term 'welfare state' and see the different perspectives to the existence of the welfare state.

Definition

The welfare state, a simple phrase covering a complex and ill-defined set of social policies, evolved in western countries during the twentieth century, mainly after the World War II.

What is welfare state?

A comprehensive approach is offered by the OECD taking the pluralistic approach, which covers: -

- A minimum protection of the individual citizen from a variety of social risks i.e. social security in relation to sickness, disability, loss of employment, retirement, etc
- Provision of services essential for individuals to function effectively in modern society i.e. education, housing, childcare.
- Promotion of individual wellbeing, which in the modern sense includes aspirations that go beyond social security and services as traditionally concerned.

1.4.2 Justifications for government intervention

Another side of the medal is looking at the justification for the intervention and objectives of the government in the social sector. Why would government intervene in the social sector? There is a gamut of governmental regulations in erstwhile social sector today; a number of reasons are clearly distinct:

a. It can be inspired by the ethnic-social principle of the community, such as the humanitarian one of helping those in need;

b. Another very important principle in inspiring government intervention ever since the French revolution is represented by the egalitarian motive which requires significant direct wealth transfers among the members of the community in order to reduce, or even abolish economic difference;
c. A final motive for government intervention can be found in merits want i.e wants with regard to which consumer choice is abandoned and satisfaction of which is imposed;

R. Klien in his article gave some justifications about government intervention in social sector when he wrote that:

Social policy is about coercion. Its very essence lies in compelling people to do what they would otherwise not do, either for their own good or for what is conceived to be the good of the society as a whole"

According to this author, there is a need to compel individuals into doing the right thing. This, to him is another purpose for which government intervenes.

A very fundamental merit covering social policy is represented by the desire to protect workers, or any citizens from the fundamental risks of life.

As we mentioned earlier, the great depression established the welfare state but it was not until after the World War II that social scientists began to turn their attention to it as a governmental institution.

1. 4.3 **Theories of the welfare state**

Having considered justifications for the existence of government as a police, we will now examine the different theories of the welfare state. The essence of this theory is to give you a better understanding of the perspectives that scholars viewed the welfare state as at the time it was growing.

1.4.4 Ideological consensus:

This ideology was the first, and for many years, the dominant theory of the post-World War II period, which lasted until it disintegrated in the early 1970s. Drawing on the pluralistic convention of American political science, this consensus believed in the existence of a beneficent state.

The ideological consensus disintegrated in the early 1970s. Two factors led to its break up. First is the critique of pluralism and the notion of a neutral state using the experience of Vietnam and the civil rights struggle to undermine the idea of an impartial and disinterested government.

Second, economic stagnation strengthened the argument of conservatives who asserted that the growth of the welfare state impinged on the functioning of a market economy.

As long as the economic growth had lasted, the chief tenets of the ideological consensus – empiricism, a faith in expertise, the absence of political conflicts and gradual change through the addition of new programs – had been easy to maintain. But when an increased cynicism about government was combined with a poorer economic performance, the ideological consensus came apart, and three new theories arose in its place.

1.3.2 The conservative view

Conservatives blamed economic stagnation on the size of the welfare state. They contended that an excess of social benefits had become a drag on capitalism's natural productivity.

1.4.5 Moderate view

There is the phenomenon of neoliberalism. Fundamentally capitalist in its vision, the neo liberal welfare state justifies social expenditure as an investment in people. This money is not allocated because the poor are needy, or, because the welfare state is benevolent. The rationale is, rather that, since the poor are already costly, the money is far better spent equipping the useful skills. Work, efficiency and international competitiveness are the hallmarks of this welfare state.

1.4.6 The radical view

Instead of affirming the primacy of the private sector or seeking reconciliation with it, these theorists have tried to understand the role of the welfare state as it interacts with a market economy.

1.5 Characteristics of administrative agencies in different jurisdiction

The above discussions have centered on how and why government interfered in social sector; we will now proceed to examine different jurisdictions with a view to understanding the peculiarities of the phased development of administrative law. The jurisdictions used in this unit include the American, the EU, and here in Nigeria.

1.5.1 India

In India itself, administrative law can be traced to the well-organized administration under the Mauryas and Guptas, several centuries before the Christ, following through the administrative, system of Mughals to the administration under the East India Company, the precursor of the modern administrative system. But in the modern society, the functions of the state are manifold, In fact, the modern state is regarded as the custodian of social welfare and consequently, there is not a single field of activity which is free from direct or indirect interference by the state. Along with duties, and powers the state has to shoulder new responsibilities. The growth in the range of responsibilities of the state thus ushered in an administrative age and an era of Administrative law.

1.5.2 Nigeria

It must be stated at the outset that our law is dependent largely on English Law, by virtue of our colonial heritage, and thus traceable and built on the English legal system and which is imported into Nigeria by means of local legislation.

A major contribution to administrative law as we have it in Nigeria cannot be divorced from the transition from colonial to civilian and military regimes. The noticeable constant factor has been the ever-increasing involvement in government and its agencies in the life

and welfare of the populace. The proliferation of governmental agencies commenced earnestly at independence, geared perhaps by the desire on the part of successive governments to improve the lot of people. From a humble beginning of a railway corporation and marketing boards, the list of government agencies, federal and states have grown to virtually uncountable numbers, touching almost every facet of life

1.5.3 England

Administrative law in England has a long history, but the subject in its modern form did not begin to emerge until the second half of the seventeenth century.

See:

Tudor monarchy, The effect of the abolition of the Star Chamber in 1642.

Note the period during and after the Second World War when a deep gloom settled upon administrative law which reduced it to its lowest ebb.

The judicial mood began to change in 1963

See the following cases: **Ridge v. Baldwin (1964) AC 40 @ 72; Breen v. Amalgamated Engineering Union (1971) 2 Q.B. 175 @ 189**.

Self-assessment Exercise

Administrative institutions have been developed to cater for the needs of modern government. Modern government will always find the need to establish administrative institutions and there is no end to such development. Examine this statement with the development of administrative institutions in at least three countries

.

1.6 Summary

The discussion in this unit has been concerned with the development of administrative law focusing on the influence and interaction of government from the perspective of the welfare

state. This perspective enabled a discussion on the different views of the purpose of a welfare state. The second ambit of this unit considered different definitions of administrative law.

Administrative law is a large field, and it can be developed best by a clear recognition of the fact. At the heart of its functions is relating to the control of governmental powers.

1.7 Further reading

Journals/articles

Maitland "The State as Corporation" (1901) 17 LQR 131. Laski "The Responsibility of the State in England" (1919) 32 HLR, 447

http://unpan.1.un.org/intradoc/images/docgifs/unp_icon_inte_DPADM-UNDESA.gif

Nwosu, Uchechukwu Wilson (Ph.D. 2008. The Practice of Administrative Law in Nigeria. 2nd edition. Zubic Infinity Concept

Oluyede. Administrative Law in Nigeria

Neil Hawke, Neil Parpworth. Introduction to Administrative Law. 1996. Cavendish Publishing Limited.

1.8 Possible answers to Self-Assessment Questions

Self-assessment Exercise

Classification in Nigeria:

Constitutionalized agencies - Section 153 () for instance, Code of Conduct Bureau, Federal Character Commission, Federal Civil Service Commission, Federal Judicial Service Commission; Independent National Electoral Commission.

Statutory agencies: Example Economic and Financial Crime Commission (EFCC). Act 2004; Independent Corrupt Practices Commission (ICPC); National Drug Law Enforcement Agency (NDLEA) etc.

Points students should note about the American jurisdiction:

Article II section 2 American Constitution states that the president may require the opinion in writing, of the principal officer in each of the executive Departments upon any subject relating to the duties of the respective offices.

Executive agencies have the power to enact laws within the scope of their authority, conduct investigations and enforce the laws that they promulgate. Executive agencies are subject to the Administrative Procedure Act which governs the process by which administrative agencies are created. Examples of executive agencies include:

Department of Defense, Department of Homeland Security; Department of Education; Department of Education; Department of Justice; Department of Commerce. Etc.

MODULE 1

Unit 1 Introduction and overview of administrative agencies
Unit 2 Creation of administrative agencies
Unit 3 The emergence of global administrative bodies
Unit 4 Classification of administrative functions

UNIT 2 ADMINISTRATIVE AGENCIES

Contents

2.1 Introduction

In looking at this topic, we need to know the powers of these agencies and functions that they perform, why the need to even create these agencies. For there to be so many exigencies in its creation, it presupposes that there is a lacuna that must be filled. In treating this topic as well, we shall consider a few of the administrative agencies to see the need for its creation as well as its functions. This unit proceeds

by looking at the definition of administrative agencies, and then discusses the exigencies for administrative agencies.

2.2 Intended Learning Outcomes

At the end of this unit, it is expected that you should be able to:

i. Analyze different definitions of administrative agencies;
ii. Discuss the need and purpose for the development of administrative agencies;
iii. Discuss the growth of administrative agencies through the different generational classifications; and,
iv. Discuss critically the powers exercised by administrative agencies

2.3 Definition of administrative agencies

We are going to look at different definitions of agencies. You should be able to critique each definition, pointing out their areas of convergence and divergence. Different definitions that scholars have provided are as follows:

i. A governmental regulatory body that controls and supervises a particular activity or area of public interest and administers and enforces a particular body of law related to that activity or interest.

ii. Administrative agencies are lawmaking bodies with limited powers delegated by Congress. Administrative agencies specialize in specific issues that require expertise. Administrative agencies are established by Article 1 Section1 of the federal constitution which reads:

"[all legislative Powers herein granted shall be vested in a Congress of the United States." The "necessary-and-proper" clause in the eighth section of the Article 1 states that the Congress shall have power "[t]o make all Laws which shall be

necessary and proper for carrying into Execution the foregoing Powers, and all other Powers … in any Department or Officer thereof."

iii. In contrast to federal administrative agencies, the states also have administrative agencies to take care of state specific issues like transportation, education, public health, labor law, etc. These agencies are mirror images of the respective federal agencies and are not entitled to create rules/regulations that go against those created by their federal counterparts. [**i] 5 U.S.C.A. § 551 [1982]**

2.3.1 The need for administrative agencies

Administrative Institutions are the agencies of government vested with the powers to legislate on the matters which ordinarily falls within the legislative powers of the legislatures. They exercise the powers which originally belongs to the parliament, but which parliament has delegated to them. They exercise delegated powers to make delegated legislations for the smooth running of their agencies.

These agencies of government have certain functions to perform which in totality will lead to the smooth running of the system. They make decisions and rules, set goals, priorities, establish procedures, run programmes and implement the statute that established them.

Another pertinent reason which has led to the development and growth of administrative bodies is that it has been discovered that parliament lacks the capacity to deal with the volume of legislations required by a modern-day government hence the need for their creation. By means of delegated legislation, parliament spreads out and shares the function of law making with administrative institutions. This facilitates, quickens and enhances the law-making process. To ensure efficient and effective law making and governance therefore, delegation of power is merit able.

Parliament is often required to legislate on highly technical and specialized matters on which many of its members may lack the requisite knowledge that may be required to

legislate in detail and with BRITISH COMMITTEE ON MINISTERS POWERS in 1992 said,

"The truth is that if parliament were not willing to delegate law making power, Parliament would be unable to pass the kind and quality of legislation which modern Public opinion requires.

Self-Assessment Exercise

Justify the need for the creation of administrative agencies.

2.3.2 Administrative powers

Agency powers

Public administration is carried out to large extent under statutory powers, conferred upon public authorities by innumerable Acts, statutes.

When the question is as to validity of an act, the duty is to seek the intention of the creating body as expressed in the relevant act. For instance, in Britain, the dominant source is the Parliament while in Nigeria, it is the National Assembly. (See section 4 of the 1999 Constitution)

Acts reasonably incidental

A statutory power will be construed as impliedly authorizing everything which can be regarded as incidental or consequential to the power itself. See **A.G. v. Great Eastern Railway (1880) 5 App. Cases 473; A.G. v. Smethwick (1932) 1 Ch. 563**. Contrast with the more restrictive approach taken in **Ward v. Metropolitan Police Commissioner (2005) UKHL 32** where the court held that:

"*it is not sufficient that such a power be sensible or desirable. The implication has to be necessary in order to make the statutory power effective to achieve its purpose*".

2.3.5 Contractual powers

Public authorities frequently acquire power by contract, which may derive from a statutory power, and then the rules of administrative law will apply. – **Jones v. Swansea City Council (1990) 1 W.L.R. 1037**

• Under the U.S. Constitution, **Congress may delegate the task of implementing its laws to government agencies**.

– By delegating the task, Congress may *indirectly monitor* an area in which it has passed legislation without becoming bogged down in the details relating to enforcement of the legislation.

• Congress passes **enabling legislation** (state or federal).

• Specifies the **name, purpose, functions, and powers** of agency.

• Describes the **procedures** of the agency.

• Provides for **judicial review** of agency orders.

We shall be discussing these powers more critically in subsequent units, but suffice to note, at this juncture that administrative agencies have these powers.

2.4 Creation of administrative agencies

Stephen S. Jenks and Deil S. Wright in their Article: **An Agency-Level Approach to Change in the Administrative Functions of American State Governments** classified agencies according to the period of establishment; this classification goes a long way in helping to understand why government does a particular thing. [Even though writing within the American context, this classification is also applicable in Nigeria as it has a universal and general application in the development of most jurisdictions. For this purpose, we shall consider this classification]. According to the writers:

"…….the agency-level approach to state government relies on administrative organization as an important indicator for understanding what state government does. This agency approach has the potential to supplement and expand our understanding of public policy and administration in the American states".

The classification of agencies are:

iv. First-Generation Agencies

The general thesis about the origins of the first-generation agencies is that the functions pursued by these agencies are those which are historical or traditional for American states to do or pursue. Many of those mentioned above as universal fall in this classification. But we also know from political, administrative, and intergovernmental history that states assumed many new functions from the turn of the century to the 1950s.

Examples include such major, basic functions as corrections, education, health, higher education, highways, mental health, motor vehicles, revenue (tax collection), unemployment insurance, welfare, and workers' compensation. Other less commanding yet still universal and long-standing agencies include adjutant general, agriculture, attorney general, banking, civil defense, fishing, insurance, parks, parole, secretary of state, treasurer and vocational education.

v. Second-Generation Agencies

The 1960s was a decade of significant social, political, and administrative change in the United States. Civil rights, citizen activism, consumerism, environmental concerns, and Great Society policy initiatives all emerged prominently on the political scene during this decade. The chief focus and locus of these policy issues centered in Washington, D.C. Only secondary and even incidental attention was centered on state administrative activity.

vi. Third-Generation Agencies

To some extent the 1970s represented both a watershed period and a transitional phase for the American states. It was a watershed decade in the sense that the cumulative effect of agency creation and proliferation reached its most extensive point. In this respect the states had created a broad and new reservoir of administrative entities that was perhaps unprecedented in any previous single decade

2.4 Creation of agencies via enabling statute

It is trite that administrative agencies exercise a collage of legislative, executive and judicial powers. We will look at some administrative agencies viz-a-viz the enabling statute and their operations in the three jurisdictions under review.

Nigeria as a case study:

Several administrative agencies exist in Nigeria, which wield powers characteristic of the three traditional arms of government. The National Agency for Food and Drug Administration and Control decree No. 15 of 1993 as amended by Decree No. 20 of 1999; The National Drug Law Enforcement Agency (NDLEA was established by virtue of Decree 48 of 1989 (now an Act of Parliament); Nigerian Communications Commission (NCC) has the power to make regulations and also to enforce those regulations and also impose fines.

Self-assessment Question

Compare the creation of administrative agencies in three jurisdictions including Nigeria. What is/are the difference(s)?

2.5 Summary

It is noteworthy that while the arguments for and against the creation and existence of administrative bodies continue to linger, the institutionalization of administrative agencies continues to thrive even more, so much so that the argument are now merely a legal exercise. While anti-administrative agencies campaigners critique the creation thereof as "unconstitutional, bureaucratic fourth branch of government, with powers that exceed those of the three recognized branches (the legislative, executive and judiciary), on the other hand, supporters of administrative agencies posit that since agencies are overseen by elected officials therefore, agencies are the will of the people. It has also been argued in support of the administrative bodies that they are able to adjudicate relatively minor or exceedingly complex disputes more quickly or more flexibly than states and federal judiciary.

This unit has considered the concept of administrative agencies. In our introductory note in the unit, we have seen that these agencies have come to fulfil several gaps including but not limited to facilitate good administrative practice, and command function by making public bodies perform their statutory duties, including the exercise of discretion under a statute

2.6 References/Further readings

1. **Executive Agencies in Government: The Impact of Bureaucratic Networks on Policy Outcomes Author(s): Francesca Gains Source: Journal of Public Policy, Vol. 23, No. 1 (Jan. - Apr., 2003), pp. 55-79 Published by: Cambridge University Press.**

2. **Pollitt, C. and Talbot, C. (eds.) (forthcoming) Unbundled Government: A Critical Analysis of the Global Trend to Agencies, Quangos and Contractualisation. Routledge.**

2.7 Possible answers to Self-Assessment Exercise

Self-assessment Question

Compare the creation of administrative agencies in three jurisdictions including Nigeria. What is/are the difference(s)?

U.S.A as a case study

In the United States, administrative agencies are created by the federal Constitution, the U.S Congress, State legislature and local lawmaking bodies, majorly to manage crises, redress serious social problems or oversee complex matters of governmental concerns, which may be beyond or remote from the expertise of the legislators.

The first recorded administrative agency was created by the Congress in 1789 to provide pensions for wounded Revolutionary war Soldiers. Also in the late 1700s, agencies were created to determine the amount of duties charged on imported goods.

The legislative branches of government have granted to administrative bodies, judicial, executive and legislative powers. See the case of **Keller v. Kentucky Alcoholic Beverage Control Board, 279 Ky. 272 (Ky. 1939)**

Legislative authority is delegated to an administrative body by the guidelines set forth in the statute that created the administrative body. See: **Unified School Dist. No. 279 v. Secretary of Kansas Dept. of Human resources, 247 Kan 519 (Kan.1990)**

S. 553 of the American Administrative Procedure Act 1946 expressly specifies the process for promulgating rules to include; notice of the proposed rulemaking shall be published in the Federal Register, S. 554 deals with adjudicatory powers of agency and provides inter-alia that persons entitled to notice of an agency's hearing shall be timely informed inter-alia of the time, place and nature of the hearing. The agency shall give interested persons opportunity to be heard. In **Oceanic Steam Navigation Co.v. Stranahan, 214 U.S 320 (1909),** the court recognized that it was already commonplace in the early twentieth century for agencies to exercise judicial type powers in imposing appropriate monetary penalties and enforcing such penalties.

Administrative agencies have been criticized in the United States as it is perceived to circumvent the constitutional directives that laws are to be made by persons constitutionally elected solely for that purpose.

United Kingdom as a Case Study

In the United Kingdom, virtually all government departments have at least one agency. Administrative agencies in the U.K are either executive agency or non-departmental public bodies. These administrative bodies make rules and also enforce them.

Actions and decisions of the administration are usually taken by the constituent administrative agencies-ministers, officials, specialized agencies or commissions, tribunals, corporations. Etc. The action taken by these different bodies or agencies are of

different types and their impact on the people (their persons and properties) matter a great deal.

The position in Britain

Executive Agencies in Britain

The introduction of agencies was one of a long line of reforms aimed at improving management in Government. The Jobbs Report argued the existing organization of the civil service was geared towards prioritizing its policy responsibilities towards ministers, neglected service delivery and that ministers were too overloaded to provide the level of management attention required. The report proposed agencies should deliver executive functions of government "within a policy and resources framework set by a department" and its recommendations intended to initiate a change in roles and a transfer of resources (Efficiency Unit 1988, 2).

In the new agencies, Agency Chief Executives (ACEs) could be appointed on short term contracts and possibly from outside the civil service and were responsible for the delivery of policies outlined in the framework document and annual performance targets. ACEs would be accountable to ministers for these responsibilities, but in general were to operate with more managerial freedom and flexibility than hitherto

Self-Assessment Exercise 2

Justify the need for the creation of administrative agencies.

From your seminal discussions on the growth of administrative agencies, you will be able to understand how these agencies came to be part of modern society. As Nwosu puts it:

'with the increase in the level of state involvement in many aspects of everyday life during the first 80 years of the twentieth century, the need for a coherent and effective body of rules to govern relations between individuals and the state became even more pertinent.'

The implication is that the state nowadays controls and supervises the lives, conduct, and business of individuals in so many ways. Hence, controlling the manner of exercise of public power so as to ensure the rule of law and respect for the right and liberty of individuals may be taken as the key purpose of administrative law. **(Nwosu Ucheckukwu. The Practice of Administrative Law in Nigeria)**

Unit 3 The emergence of global administrative bodies

Contents

3.1 Introduction

Academic scholarship is delving into the presumption of the existence of global administrative law and governance within what is referred to as 'global administrative space'. The global administrative space is composed of several distinct types of regulatory administrative institutions and various types of entities that are the subjects of regulation, including not only states but also individuals, firms. This view is aided further by rapid growth of international and transnational regulatory regimes with administrative components and functions. It is in the light of this that we shall consider the movement towards a global administrative body and the law. As research students, we should be able to expand our research into developing this area of law and juxtapose with domestic administrative law.

3.2 Intended Learning Outcome

The learning objectives are as follows:

i. **Discuss the nature of global administrative bodies;**
ii. **Discuss the scope of administrative bodies;**
iii. **Examine the structure of global administrative bodies**
iv. **Distinguish between global and domestic administrative bodies**

3.3 The emergency of global administrative bodies

Underlying the emergence of global administrative law is the vast increase in the reach and forms of trans governmental regulation and administration designed to address the consequences of globalized interdependence in such fields as security, the conditions on development and financial assistance to developing countries, environmental protection, banking and financial regulation, law enforcement, telecommunications, trade in products and services, intellectual property, labor standards, and cross-border movements of populations, including refugees.

Increasingly, these consequences cannot be addressed effectively by isolated national regulatory and administrative measures. As a result, various transnational systems of regulation or regulatory cooperation have been established through international treaties and more informal intergovernmental networks of cooperation, shifting many regulatory decisions from the national to the global level. Further, much of the detail and implementation of such regulation is determined by transnational administrative bodies including international organizations and informal groups of officials that perform administrative functions but are not directly subject to control by national governments or domestic legal systems or, in the case of treaty-based regimes, the states party to the treaty.

These regulatory decisions may be implemented directly against private parties by the global regime or, more commonly, through implementing measures at the national level. Also, increasingly important are regulation by private international standard-setting bodies and by hybrid public-private organizations that may include, variously, representatives of business.

3.3.1 Historical development of ‘global administrative law’

The growth and spread of international organizations (IOs) since the late part of the 18th and early 19th century have been viewed as a challenge (and opportunity) for international law since the 1860s or earlier.

This challenge has left some international organizations in existence at the time to be grouped as "international administrative unions".

> *The qualification of an institution as international administrative union was originally meant to emphasize its non-political (in the meaning of technical/administrative) nature and that it was merely exercising coordinating functions on administrative matters. The reference to administrative matters means that the institutions in question deal with matters that are dealt with by the administration on the national level. Another distinguishing factor is that many of the international administrative unions were initiated by private groups or national administrative agencies. For example, the World Tourism Organization (UNWTO) was initially established through official tourist publicity organizations. Given the predominant approach of the 19th and the early 20th centuries concerning subjects of international law it was commonly held that international administrative unions were not to be considered as subjects of international law.*

3.3.2 What is global administrative law?

Definition

vii. Global administrative law is seen as comprising the mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make.

viii. global administrative law include formal intergovernmental regulatory bodies, informal intergovernmental regulatory networks and coordination arrangements, national regulatory bodies operating with reference to an international intergovernmental regime.

3.3.3 Structure of global administrative space:

The conceptualization of global administrative law presumes the existence of global or transnational administration. It effectively covers all the rules and procedures that help

ensure the accountability of global administration, and it focuses in particular on administrative structures, on transparency, on participatory elements in the administrative procedure, on principles of reasoned decision-making, and on mechanisms of review.

Five Types of Global Administration: Five main types of globalized administrative regulation are distinguishable:

(1) Administration by formal international organizations:

Formal intergovernmental organizations established by treaty or executive agreement are the main administrative actors. A central example is the UN Security Council and its committees which adopt subsidiary legislation, take binding decisions related to particular countries and even act directly on individuals through targeted sanctions.

(2) Administration based on collective action by transnational networks of cooperative arrangements between national regulatory officials; this is characterized by the absence of a binding formal decisions making structure and the dominance of informal cooperation among state regulators. This horizontal form of administration can take place in a treaty framework.

(3) Distributed administration conducted by national regulators under treaty, network, or other cooperative regimes; domestic agencies act as part of the global administrative space. They take decisions on issues of foreign or global concern. An example is in the exercise of extra territorial regulatory jurisdiction, in which one state seeks to regulate activity primarily occurring elsewhere. See for example, WTO's appellate body's ruling in 1998 in U.S. Import Prohibition of Certain Shrimp and Shrimp Products (**Shrimp-Turtle) WT/DS 581/AbIR/Doc No. 98-3899 (Oct 12, 1998)**

(4) Administration by hybrid intergovernmental-private arrangements: Bodies that combine private and governmental actors take different forms and are increasingly significant. An example is the internet address protocol regulatory body which was

established as a non-governmental body, but which has come to include government representatives who have gained considerable powers.

(5) Administration by private institutions with regulatory functions. Many regulatory functions are carried out by private bodies.

In practice, many of these layers overlap or combine, but we propose this array of ideal types to facilitate further inquiry.

Yet even among the traditional sources of public international law, there might be room for development of norms relevant to global administrative law.

- **Stop and think**.

The involvement of state actors, subject to national and international public law constraints, alongside private actors who are not, and who indeed may have conflicting duties such as commercial confidentiality threatens a very uneven and potentially disruptive set of controls.

Self-Assessment Exercise

In what ways can global administrative bodies be made more accountable and effective?

3.4 The scope of global administrative law

Understanding global administrative law allows us to recast many standard concerns about the legitimacy of international institutions in a more specific and focused way. It provides useful critical, distance or general, and often overly broad claims about democratic deficits in these institutions.

It shifts the attention of global governance to several accountability mechanisms for administrative decision making, including administrative law, that in domestic systems operate alongside, although not independently from classical, democratic procedures such as elections, and parliamentary and presidential control.

Let us consider an excerpt from Klubber to understand how much international organizations influence and interact with daily lives.

"*….This is largely so for two reasons. One is that the rules and regulations developed by or under auspices of international organizations are becoming increasingly visible as influencing our daily lives. While it took us little time to realize what impact EC law could have on domestic law, we have gradually come to the realization that EC law is not alone in having an impact on domestic law or, in a straightforward way, on our daily lives. Many livelihoods may be affected by single decisions coming out of the IMF; the protesters against the WTO meeting in Seattle, in December 1999, realized all too well how grandiose the influence of WTO law on each and every one of us is, directly or indirectly, actually or potentially; our working lives will be influenced, to a greater or lesser degree, by the activities of the ILO; and as many have found out the hard way in Kosovo, NATO too can have a serious impact on human life.'*

Klabbers goes on to ask the obvious questions which surround the concept and purpose of administrative law, albeit at the global level when he wrote that:

"……This raises, or should raise, obvious questions as to the precise scope of activities of particular organizations, the means by which they acquire their powers, the transparency of their decision-making process, and the democratic and judicial control over their activities……."(Klabbers)

3.4.1 Activities of international organizations akin to administration

There is a lot of ongoing academic discourse on international institutional law that have contributed much on constitutional issues concerning the competences of IOs and their various organs, on the relationships between them and their member States, for instance, Cassese has focused more particularly on administrative procedures and institutional transformations. As has been pointed out, "Contemporary practice of many IOs, in fact,

"can be understood and analyzed as administrative action: rulemaking, administrative adjudication between competing interests, and other forms of regulatory and administrative decision and management."

Let us examine some of them:

a. administrative action at the global level has both legislative and adjudicatory elements. E.g rule making.

b. adjudications, and other decisions that are neither treaty-making nor simple dispute settlements between parties (Kingsbury, Krisch and Stewart, 2005, 17).

3.4.2 Sources of global administrative law

The formal sources of global administrative law include:

a. Treaties;

b. Customs;

c. General principles.

Self-Assessment Exercise

What are the limitations on the above sources in the context of global administrative law?

3.5 Summary

The emergence of the field of global administrative law (GAL) has been very much influenced by the proliferation of the activities of international organizations. This has been the subject of this unit. The concept of global administrative law is still in embryonic state and is yet to be fully conceptualized. And even though it is still evolving, there is a general consensus that it is very much part of academic discourse. Many questions are still unanswered, and there are many debates ongoing leaving much space for further research. A research on the topic of administrative law cannot be complete without recourse into this aspect. This unit provides a guide into themes which guide you into a deeper research of Global administrative law by looking at the definitions, structures, sources and forms.

3.6 References/further readings

Benedict Kingsbury, Nico Krisch, & Richard B. Stewart. **The emergence of global administration:**Global Administrative Law (Summer - Autumn, 2005), pp. 15-61Published by: Duke University School of Law Stable URL: http://www.jstor.org/stable/27592106

J. Klabbers, 2009. An Introduction to International Institutional Law, Cambridge University Press, Cambridge, 2nd ed.

B. Kingsbury, N. Krisch, R.B. Stewart, 2005. "The Emergence Of Global Administrative Law", 68 Law And Contemporary Problems 15

Lorenzo Casini 2012. Beyond the State: The Emergence of Global Administration. In *Global Administrative Law: The Casebook*. Sabino Cassese Bruno Carotti Lorenzo Casini Eleonora Cavalieri Euan MacDonald (Eds).

3.7 Possible Answers to Self-Assessment Exercises

Self-Assessment Question

What are the limitations on the above sources in the context of global administrative law?

Guide

The origins and authority of the normative practice already existing in the field. Only rarely do treaties directly address issues of administrative law. Insofar as they spell out principles of administrative procedure, they are usually addressed to and binding on state.

Customary international law is still generally understood as being formed primarily by state action and thus for the time being does not fully incorporate the relevant practice of non-state actors, such as global administrative bodies. Finally, the use of "general principles of law" as a source of international law has been limited mainly to internal needs of international institutions or to norms on which there is a high degree of worldwide convergence. The acceptance of general principles in the practice of formal international

law has been low and is unlikely to be extended quickly to the diverse and fragmented contexts of global administration.

Self Assessment Questions

In what ways can global administrative bodies be made more accountable and effective?

A poser : To whom (or to which people(s)) should global governance be accountable in the absence of a unitary people, which would be the basis of global democracy; and to what law(s) or legal order(s) should it be accountable in the absence of a global state, which would be the basis of a unified global legal order.

See further: Okitsu, Yukio, ***Accountability As a Key Concept for Global Administrative Law***: A Good Governance Mantra or a Globalized Legal Principle? (2015). Kobe University Law Review (International Edition), No. 49, Available at SSRN: https://ssrn.com/abstract=2853254

MODULE 1

Unit 1	Introduction and overview of administrative agencies
Unit 2	Creation of administrative agencies
Unit 3	The emergence of global administrative bodies
Unit 4	Classification of administrative functions I

Contents

4.7

Unit 4 Classification of Administrative Functions

4.1 INTRODUCTION

Administration today exercises not only what may be called traditional executive functions but also legislative, judicial and quasi-judicial functions. The primary function of the administration or the executive arm of government is the maintenance and execution of public policies as set out in laws, written and unwritten. [See for instance, section 5 of the 1999 Constitution of Nigeria which defines executive powers to include the execution and maintenance of the constitution, all laws made by the legislature and all matters with respect to which the legislature has the power to make laws]. However, because of the overlap of functions of administration, the distinction between the functions is not so clear cut. The purpose of this unit is to examine the different attempts at distinguishing one function from the other. The different classifications is a pointer to the fact that there is no consensus as to the function of the agency.

4.2 Intended Learning Outcome

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

i. Discuss scholarly approaches to administrative functions
ii. Distinguish each approach, bringing out the points of convergence and divergence;
iii. Discuss the Nigerian approach to administrative functions.

4.3 . **Classification of Administrative Functions**

Administrative assignments or functions are creative in nature in that they usually involve the faithful construction and application of legal rules. As **Felser** (Public Administration – Theory and Practice (Prentice Hall Inc., Eaglewood Cliffs, J.J. 1980) puts it, the administration contributes to the shaping and execution of policies, it translates the workings of a statute into changed behaviour by individual members of the society and

converts words into actions altering the behaviour of citizens towards conformity with the statutory mandate and delivering promised benefits to the intended beneficiaries."

Analytically, executive or administrative functions qua executive functions may be said to include the initiation, development, formulation, maintenance and execution of policies but does not include the enactment of such policies. That is a function that strictly speaking belongs to the lawmaker- the legislature. Pure administrative functions normally involve the formulation, interpretation and execution of policies laid down in law.

However, as has been noted previously, the dividing line between the three types of governmental functions -legislative, executive and judicial has never been clear-cut. It is in many cases, hazy and most confusing. The decision in **Lakanmi & Kikelomo Ola v. AG West & Ors. (1974) ECSLR 173** shows that the dividing line between these functions may never be clear.

The reason for this confusion and indistinctiveness appears to lie in the fact that the administration exercises all these functions. All of them are lumped in the executive. Again, all these functions involve in one way or the other formulation, laying down or execution of policies. Thirdly, all the functions, whether legislative, administrative or judicial, involve the exercise of discretionary powers and both executive and judicial arms of government make determinations of issues of law and fact.

Notwithstanding the difficulties associated with differentiating between these functions, attempts have been made to do so. This distinction is generally required because, whereas the administration has legitimate (constitutional) mandate to exercise purely executive functions, it cannot validly exercise legislative or judicial functions without any statutory backing. Again, it is said that judicial functions must be exercised strictly in accordance with the rules of natural justice. Accordingly, certiorari or prohibition lies to control judicial but not administrative functions. Therefore, one of the problems of administrative law is how to draw the distinction or where to draw the line between the functions which are legislative, judicial and administrative so as to determine the appropriate procedure for

exercising a given function. We shall now look at the attempts to distinguish between the three classes of functions.

4.3.1 Distinction between the three classes of functions

The Conceptual approach or doctrine

The conceptual approach or doctrine postulates that functions can and should be identified and isolated and neatly sorted out so that each is put in its proper compartment. In other words, the conceptualists believe that governmental functions can be neatly isolated so that executive, legislative and judicial powers will equally be assigned to the executive, legislature and courts respectively. The advantage of this approach is that, if functions are neatly sorted out, each function will know where it belongs and we shall know the appropriate procedure to adopt in the exercise of such function. This will in turn enable us to know when the exercise of such a function becomes ultra vires

Within the conceptual school, two major proponents have been identified, namely:

- Classification by the committee on Ministers' power 1932 otherwise known as the **Donoughmore Committee**

The committee on Ministers' powers 1932 otherwise known as the Donoughmore Committee was concerned primarily with the development or provision of a formula to guide legislators and draftsmen of statutes in the task of rationally allocating powers to ministers and courts or tribunals. Administrative functions should go to ministers while judicial functions should be assigned to courts or tribunals. In carrying out its assignment, the committee identified not only functions that are either administrative or judicial, but also those that are quasi-judicial, standing between the two earlier ones.

Classification by Gordon

In his publication **Administrative Tribunals and the Courts (D.M. Gordon, "Administrative Tribunals and the Courts," (1933) 49 L.Q.R. 94**, Gordon argues that, apart from legislative functions delegated to it, the administration exercises other functions

which may classified into: ministerial, Judicial and administrative, each of which has its own distinguishing characteristics. A ministerial function involves the carrying out the assignment spelt out in details by the enabling instrument- a statutory provision, a judicial decision or a directive by a higher administrative authority. The repository of a ministerial power can, within the limits of its statutory powers, legitimately invade by force, the rights and liabilities of the people. Usually, the exercise of the power is made exercisable upon the existence of a specified contingent event of state of facts, such as a judicial decision that a person should be deprived of his liberty or property if he fails to pay a judgment debt within a fixed time limit. The donee of the power must comply with the decision or directive strictly, without any modification or variation because the judicial directive is mandatory and leaves no room for his direction or independent judgment.

Note that Gordon's distinction here is based on the amount of discretion exercisable in the course of discharging the prescribed function.

4.3.2 Limitations and the failure of the conceptual doctrine

Conceptual theories are founded on the assumption that it is possible and easy to identify and isolate various categories of administrative activities and, that once this is done, the functions will be more rationally and meaningfully allocated to various agencies of the administration. For example, it is generally claimed that once the functions are effectively categorized and pigeonholed, the legal draftsman and legislator can rationally and realistically assign ministerial, administrative and quasi-judicial functions to ministers, while reserving judicial functions for the court and tribunals. See Errington **v Minister of Health (1935) 1 KB 249, 259-68**.

Furthermore, it is often believed that proper categorization of functions would lead to the certainty and predictability of administrative actions and their results.

4.3.3 Judicial Approach

Because the distinction between these various categories of functions is illusory and unworkable the courts have sought other ways of determining when and where the rule of natural justice are applicable. See Parker C.J. in **re H.K (an Infant) (1967) 1 All E.R. 226.**

But his view had a warm reception among other judges who turned to re-examine and question the propriety of this straight-jacket approach prescribed and imposed by the conceptual theories. For example, Lord Denning M.R, in **Schmidt v Secretary of State for Home Affairs (1969) 2 Ch.149 at 170**, had no hesitation in observing that the distinction between administrative and judicial acts "is no longer valid."

According to the court in **R v Gaming Board for Great Britain, Ex-parte Benaim & Anor (1970) 2 All E.R. 528, 533**, the question in each case is whether the agency vested with the power has a duty to act fairly, for even if the "functions are not judicial or quasi-judicial, but only administrative still it must act fairly" and observed the rules of natural justice.

However, it is wrong to think that the conceptual doctrine was destroyed or replaced by the new concept of fairness; it was only scotched but not completely abandoned.

Although Lord Denning, M. R, said that old decisions such as **R. v Metropolitan Police Commissioner ex parte Parker (1953) 2 All E.R. 717** and **Nakuba Ali v M.F de S. Jayarante (1951) A.C 66** are no longer authoritative, many judicial decisions are still based on them . The conceptual approach is still followed and applied by the courts, but the test of fairness is slowly gaining ground. See **A. K. Hart v. The Military Governor of Rivers State & 2 Ors. (1976) 11 S.C. 211, 238, per Fatai-Williams C.J.N for the S.C**. At present the courts seem to treat the two tests as alternatives, especially in areas where the application of the rules of natural justice appear to be more imperative. Because the concept of fairness, like that of judicial or quasi-judicial, is very elastic and elusive, the quest for alternatives to conceptual theories has continued.

4.3.4 The Functional approach

Messrs.' Griffiths and Street have suggested that other viewpoint should be considered. The Functional approach calls for a detailed analysis of administrative act so as to ascertain the purpose and use of each and how it impinges on the citizens. The functions of the administration are often regulatory or legislative in nature, but they at times involve incidental adjudication, resembling the work usually assigned to the courts. They classify the functions (of the administration) into nine- adjudicative elements are absent in four, only incidental in one and more than incidental in four.

Adjudicative facts are absent in matters of internal management, in ministerial acts, in decisions of pure policy and in summary powers. The exercise of these functions does not call for the application of the rules of natural justice because they involve no *lis inter partes* and no hearing. Pure policy decisions for example manifest the government's prerogative powers such as the declaration of war or the recognition of a foreign government. Summary powers may impinge on the rights or interest of a citizen but no hearing is necessary because all the relevant factual data or information about the citizen must have been supplied in the application forms he completed. And where a licence is refused to the applicant, he is usually free to apply for a judicial review on the ground of abuse of power.

Adjudication is basic or more than incidental in dealing with matters of law and facts or issues properly for inquiries or domestic tribunals. Matters of law and facts are often assigned to the administration because they may be very numerous and the monetary value of each claim too small for the normal judicial process, parties may be persons of small means who want a speedy, inexpensive, informal and ready accessible proceeding. In some cases, administrative actions are required to be exercised in accordance with vaguely defined legal standards such as "reasonable care", "unfair rents", "unfair methods of competition", "adequate compensation" and "special architectural interest" which require to be construed and applied by a court-like assembly of experts observing the role of natural justice.

Adjudication may be incidental in regulatory functions which more often than not involve fact-finding process and the exercise of an independent judgment in choosing between

alternative policy options. The former requires some inquiry and the application of the rules of natural justice, while the latter calls for the exercise of administrator's discretion or free choice based on his assessment of what the public interest, national expediency and the government's policy are.

4.3.5 The Nigerian Constitutional approach

In defining and prescribing the conditions under which the rules of natural justice should apply, the Nigerian Constitution carefully avoided a conceptual approach. The question addressed by the constitution is not whether the function or action of the administrative agency is judicial, quasi-judicial or administrative but whether it impinges on the rights or obligation of the individual; if it involves the determination of the rights or obligation of the individual, it calls for a fair hearing, by a court or tribunal established by law and operating without any likelihood of bias. Section 21(1) of the Independent Constitution of 1960 prescribe that "a determination of his civil rights and obligation, a person shall be entitled to a fair hearing within reasonable time by a court or other tribunals established by law and constituted in such a manner as to secure its independence and impartiality."

See the provision of section 36(1) and (2) of the 1999 Constitution.

By the above provision, the crucial question in each case is no longer whether the action impugned is judicial or administrative but whether a person's right or obligations are involved.

See the case of **Queen v. The Governor in Council, Western Nigeria, Ex Parte Adebo, (1962) WNLR 93; (1962) All NLR 917; 923** where Charles J held that any case involving a determination affecting the person or right of an individual should be deemed to be judicial and qualified for the application of the rules of hearing.

See also **Cooper v. Wandsworth Board of Works (1863) 14 C.B. (N.S.) 180 at 194-195** and **Hopkins vs. Smethwick Board of Health (1890) 24 Q.B.D. 712 at 714**

The crucial question in each case seems to be whether a person's civil right and obligation are involved. If they are, then fair hearing by a court or tribunal is imperative; but if they

are not, then the principles of fair hearing any be dispensed with, but the courts may still insist on fair hearing as part of the rules of natural justice imposed by common law. In other words, any administrative determination or actions involving interference with private rights or obligations require the application of the rules of natural justice. It may, perhaps be controlled by means of certiorari and prohibition.

Perhaps, the American Judicial approach to the problem is better and more detailed. It demands that a party with sufficient interest or right in a dispute is entitled to a trial-type hearing on disputed adjudicative facts. As K.C Davies put it (p.160)

> *"a party who has a sufficient interest or right at stake in a determination of governmental action should be entitled to an opportunity to know and to meet, with weapons of rebuttal evidence, cross-examination and argument, unfavourable evidence of adjudicative facts, except in the rare circumstance when some other interest, such as national security justifies an overriding of the interest in fair hearing, and except where examination and inspection is the proper method of fact-finding" as used above, facts are either adjudicative or legislative. "Adjudicative facts" are the facts that relate to the "parties and their activities, business and properties" whereas legislative facts do not relate to the parties but "are general facts which help the tribunal decide question of law and policy and discretion"- facts are adjudicative when official action is based upon "individual grounds", they are legislative when the action is based upon general ground"*

4.5 Summary

Whatever approach to classification is adopted in any jurisdiction, it serves one purpose and which is to see to effective administration which is exercised with due regard to laid down procedure and within the ambit of power. The administration sees to it that the words are injected with life and reality by having the ideas expressed in those laws extracted and explained so that those to whom they are directed will understand and comply with their commands.

In conclusion, you should take note that administration is not confined to the execution and maintenance of law; rather, 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. However clogged or illusory the functions are, there is still a need to classify these functions in order to enable the proper categorization of these functions.

4.6 References/Further Readings/Web Resources

Felser1980. (Public Administration – Theory and Practice (Prentice Hall Inc., Eaglewood Cliffs, J.J.

D.M. Gordon, "Administrative Tribunals and the Courts, Administrative Tribunals and the Courts" (1933) 49 L.Q.R. 94

4.7 Possible Answers to Self-Assessment Exercises

MODULE 2 CONSTITUTIONAL FOUNDATIONS OF THE POWERS OF ADMINISTRATIVE AGENCIES

Justice Gummov stated that "the subject of administrative law cannot be understood or taught without attention to its constitutional foundations". Administrative law draws fundamentally from constitutional underpinnings. Even though they are different courses, both disciplines have a common foundation, hence there is an overlap in features. Thus, there has not been a clear distinction between administrative law and constitutional law. Administrative law and constitutional law are both categorized as public law.

According to Tony & George, the principles of constitutional law are invoked by those who seek a stable and secure exercise of governmental power and also those who seek to limit the power. Accordingly, the focus of this module is on the constitutional foundations of administrative agencies. For much of Nigeria's constitutional framework, the historical foundations are provided by the institutions and practices of Britain. Therefore, developments in England are almost indispensable in our discussion.

UNIT 1 RELATIONSHIP BETWEEN ADMINISTRATIVE LAW AND CONSTITUTIONAL LAW

Contents

1.1 Introduction

The change in the role of government and thereby the transformation of the police state 'to the welfare state' has necessitated the need for conferring more power on the administration and simultaneously the need for controlling this power. Unlike other fields of law, administrative law is a recent phenomenon and can fairly be described as infant. Historically, its emergence could be dated back to the end of the 19th century. This era marked the advent of the "welfare state" and the subsequent withering away of the "police state." (Refer to Unit 1 Module 1 on the nature of welfare state)

The interventionist role of the welfare state practically necessitated the increment of the nature and extent of power of governments. Simultaneous, with such necessity came the need for controlling the manner of exercise of power so as to ensure protection of individual rights, and generally legality and fairness in the administration. With such background,

administrative law, as a legal instrument of controlling power, began to grow and develop. Typically, with the proliferation of the administrative agencies, administrative law has shown significant changes in its nature, purpose and scope.

Recognizing the inter-relationship between constitutional law and ordinary administrative law is important both for the ongoing debate over the legitimacy of constitutional common law and for proper appreciation of the role of administrative agencies can play in constitutional order.

1.2 Intended Learning Outcome

It is intended that at the end of this unit, you should be able to discuss the overlap between constitutional and administrative law.

1.3 Relationship between administrative Law and constitutional law

1.3.1 Constitutional law in administrative context

Constitutional law regularly surfaces in administrative context, shaping how agencies make decisions, the substance of those decisions and judicial review of agency decision making.

1.3.2 Connection between constitutional law and administrative law

Constitutional law manifestation in administrative context can usefully be divided into three categories.

a. Administrative law provides mechanisms that are either constitutionally mandated or that avoid constitutional violations: the most obvious point of contact between administrative law and constitutional law is that administrative constraints on executive officials are sometimes constitutionally required. For example, administrative hearings which are often adopted to satisfy procedural due process's requirement of notice and some opportunity to be heard.
b. Constitutional norms and concerns underlie and are evident in a number of administrative law doctrines; constitutional concerns have shaped the development

of ordinary administrative law doctrines. In **Motor Vehicle Manufacturer's Association v. State Farm Mutual Automobile Insurance Coy 463 U.S. 29, 43, (1983)**, the court held that the agency must examine the relevant date and articulate a satisfactory explanation of its action, including a rationale connection between facts found and the choice made. The court also in the case of **Chevron v. Natural Resources Defence Council Inc. 467 U.S. 837, 834 (1984)** established the rule that courts should defer to reasonable agency interpretations of ambiguous statutes that the agencies are charged with implementing. Constitutional values also surface expressly when the courts invoke constitutional canons of interpretation in reading administrative statutes.

c. Both courts and political branches sometimes use doctrinal mechanisms and substantive requirement to encourage agencies to take constitutional concerns seriously; the approach here centers on encouraging agencies to take constitutional values and concerns into account in their decision making; the goal of such administrative constitutionalism is fostering a more affirmative and independent agency role in implementing constitutional requirements.

1.3.3 Relationship Between Administrative Law and Constitutional Law

The line of difference between Administrative law and Constitutional law is very thin. A look at the meaning, scope and nature of administrative law would show that it has a separated identity from constitutional law although they share certain similarities. As Justice Gummov has made it clear "the subject of administrative law cannot be understood or taught without attention to its constitutional foundation, this is true because of the close relationship between these two laws." Therefore, despite the separate existence of administrative law from constitutional law, the fact remains that the study of Administrative law will not be complete without a discussion of those important constitutional concepts and procedures which frame and lend explanatory significance to any analysis of the workings of Administrative law.

- Administrative law is a tool for implementing the constitution. Constitutional law lays down principles like separation of power and the rule of law.
- Administrative law is also instrumental in enhancing the development of constitutional values such as rule of law and democracy;
- Administrative and constitutional law shares a common ground, and supplements each other in their mission to bring about administrative justice. Concern for the rights of the individual has been identified as a fundamental concern of administrative law

Self-assessment Question

Wade has observed that administrative law is a branch of constitutional law and that the connecting thread is the quest for administrative justice. Discuss.

1.3.4 Constitutionalism as a Constitutional and Administrative Function

Given the foundational doctrines of constitutional law abundantly influencing administrative law principles; it would be easy to conclude that administrative law cannot exist without constitutional law as same appears to be the case. Such principles as separation of powers, rule of law etc.

Before concluding it is pertinent to observe that not all constitutions embrace these constitutional principles. It then became obvious these seemingly constitutional rules are and can exist in the absence of a formal constitutional structure (i.e. absence of a codified document). In order to understand how this may become possible, we need to appreciate the doctrine of constitutionalism as a constitutional function and its relationship to Administrative law. It is important to highlight the distinction between constitutions and the principle of constitutionalism.

Giovanni Sartori defines constitutionalism as constituting the following elements:

> "(1) *there is a higher law, either written or unwritten, called constitution; (2) there is judicial review; (3) there is an independent judiciary comprised of independent judges dedicated to legal reasoning; (4) possibly, there is due process of law; and, most basically, (5) there is a binding procedure*

> *establishing the method of law-making which remains an effective brake on the bare-will conception of law) . . . for our purpose, constitutionalism (as a descriptive concept) means a system of political arrangements in which there is a supreme law (generally called "constitution"), in which all (particularly the entire system of government) is governed by the supreme law, in which only the people's will (as defined through some pre-specified institutional procedure, usually through a super-majority voting mechanism) can supersede and change the supreme law, in which changes can only be made infrequently due to the difficulty of garnering the requisite popular support, and in which there are separation of power, checks and balances and an independent judiciary dedicated to legal reasoning to safeguard the supremacy of the constitution. Some writers, thinking that there are more than one kind of constitutionalism and defining constitutionalism loosely as any political system with a constitution (of any kind), would call our description of constitutionalism as "liberal constitutionalism." In this essay, I will use "constitutionalism" and "liberal constitutionalism" interchangeably, because "constitutional systems, both past and present, are . . . in fact liberal systems".*

In addition, the following quote from Holmes is helpful in understanding the concept of constitutionalism:

> *"Any agency that wields enough power to protect me against the depredations of my neighbor, wields enough power to destroy or enslave me. This paradox lies at the root of modern state-of-nature theory. How can we exit from anarchy without falling into tyranny? How can we assign the rulers enough power to control the ruled, while also preventing this accumulated power from being abused? . . . The liberal-democratic solution to this problem is constitutionalism. Today, there are still a handful of liberal-democratic regimes [such as England] that operate without a written and legally entrenched basic law. But they, too, organize government in a broadly constitutional way, subordinating citizens to the authority of government while simultaneously subordinating government to the authority of citizens. Liberal government is a remarkable innovation for this reason, because it is meant to solve the problem of anarchy and the problem of tyranny within the single and coherent system of rules".*

We can draw several implications from the above definition of constitutionalism. By constraining and regulating the government's power through a supreme constitution, and by preserving the sovereignty of people, constitutionalism ensures that the government is limited. Second, constitutionalism does not recognize the sovereignty of the legislature. Instead, it only recognizes the sovereignty of people. Under constitutionalism, the legislature does not obtain supremacy over the constitution. The legislature is a creature of

the constitution and is governed by the constitution. Third, constitutionalism is based on a particular view of liberalism towards human nature, which is universal self-interest. One basic premise of constitutionalism, as Stephen Holmes puts it, is the fact that "[a]s ordinary men, rulers too need to be ruled" (See, **Holmes, Stephen. Passions and Constraint: On the Theory of Liberal Democracy.1995. Pg 5**)

That is, self-interest is universal, and rulers are no exception. Because rulers, like ordinary people, are self-interested, rulers also need to be disciplined and constrained by the rule of law.

Two caveats are in order here. First, a country with a written constitution does not necessarily practice constitutionalism. A constitutional government is a limited government, whereas most socialist constitutions, although written, do not place limits on what the government can do. Note the position in China. In China, the national legislature (the National People's Congress or the NPC) has the power to write, amend and modify the Constitution.. In other words, the Chinese Constitution is a creature of the NPC, not vice versa. The NPC also has the exclusive power to interpret the Constitution. (The Constitution of the People's Republic of China, Chapter III, Section 1, Article 62 (1).

The NPC, as the supreme state organ, is above the executive department (the State Council) and the judiciary (the People's Court). There is no separation of power or checks and balances because the NPC is above all and is in theory omnipotent. (Chapter 1 Article III)

The judiciary is not independent from the will of the NPC, and there is almost no judicial review (except to the extent of the Administrative Litigation Act 1990, which only authorizes the court to review certain specific administrative acts of the executive agencies of the government). Finally, for the existing, and very limited, judicial review in China, the Constitution cannot be cited as an authority. In other words, China does not have constitutional jurisprudence. Inspite of all these, China has often been described as an Administrative State.

The position in Cambodia is slightly different. Under the Constitution of Cambodia; the judiciary in Cambodia is highly subordinate to the executive, blurring boundaries between the two arms of government.

Second, a country without a written constitution, on the other hand, may actually operate under constitutionalism. Examples of such countries include the United Kingdom, New Zealand and Israel. These countries do not have a formal written document embodying constitutional principles that constitute the basic framework for Administrative law; yet each country has well developed system of Administrative law.

Britain does not have a single written constitution; it has a number of documents that have constitutional force. These documents include Magna Carta (1215), the Bill of Rights (1689), the Act of Settlement (1701), and certain special acts of the British Parliament. These written documents, together with the British political and legal traditions, form the basis of a constitutional government. The same situation obtains in New Zealand and the State of Israel which governed based on its Basic Laws.

In contrast, the United States and Nigeria both has a single written document called Constitution. These written Constitutions, together with subsequent judicial interpretations and expansions, form the basis of a constitutional government and each also has a well-developed system of Administrative Law *(at least the US does)

The following quote from Gregory Mahler's Comparative Politics is illuminating:

> *"When we discuss constitutional governments, then, we are really not talking about whether there exists a single, specific document; rather, we are interested in a kind of political behavior, political culture, political tradition, or political history.... The forms may vary, but the behavioral results are the same: Limits are imposed upon what governments may do"*

Mahler, Gregory. Comparative Politics: An Institutional and Cross-National Approach. Upper Saddle River, New Jersey: Prentice Hall, 2000. Pg 28

Although the relationship between constitutional law and administrative law is not very emboldened to be seen with naked eyes the fact remains that concomitant points are neither so blurred that one has to look through the cervices of the texts with a magnifier to locate the relationship. The aforementioned illustrations provide a cogent evidence to establish an essential relationship between the fundamentals of both the concepts. Also the very fact that each author, tends to differentiate between the two branches of law commands the hypothecation of a huge overlap.

1.5 Summary

Constitutional law deals with structure and the broader rules which regulate the functions, the details of the functions are left to the administrative law. According to Philips "Constitutional law is concerned with the organizations and functions of the Government at rest while administrative law is concerned with that organization and those functions in motion." The Australian jurists also noted that the dividing line between constitutional law and administrative law is a matter of convenience because every student of administrative law has to study some constitutional law. Finally, Keith pragmatically remarked that "It is logically impossible to distinguish administrative law from constitutional law and all attempts to do so are artificial."

So can there be Administrative law without Constitutional law? May be may not however one thing is certain and that is that the separate existence of administrative law is at no point of time disputed; however, if one draws two circles of the two branches of law, at a certain place they will overlap depicting their stern relationship and this area may be termed as watershed in administrative law.

1.6 References/Further readings

Mahler, Gregory. Comparative Politics: An Institutional and Cross-National Approach. Upper Saddle River, New Jersey: Prentice Hall, 2000.

Holmes, Stephen. Passions and Constraint: On the Theory of Liberal Democracy.1995.

1.7 Possible Answers to Self-Assessment Exercise

Self-assessment Question

Wade has observed that administrative law is a branch of constitutional law and that the connecting thread is the quest for administrative justice. Discuss.

Constitutional law is the supreme law of the land; it formulates fundamental rights of individuals. Accordingly, the provisions of the constitution supersedes all other laws of the law. Administrative law provides principles, rules, procedures and remedies to protect and safeguard fundamental rights. Administrative law is a tool for implementing the constitution.

Other points to note include:

Administrative law is also instrumental in enhancing the development of constitutional values such as rule of law and democracy.

Administrative and constitutional law, share a common ground, and supplement each other in their mission to bring about administrative justice.

MODULE 2 **CONSTITUTIONAL FOUNDATIONS OF THE POWERS OF ADMINISTRATIVE AGENCIES**

UNIT 1 RELATIONSHIP BETWEEN ADMINISTRATIVE AND CONSTITUTIONAL LAW
UNIT 2 THE SOVEREIGNTY OF PARLIAMENT
UNIT 3 THE RULE OF LAW
UNIT 4 SEPARATION OF POWERS

Unit 2: Parliamentary sovereignty

Contents

2.1 Introduction

This unit concentrates on the traditional doctrine of constitutional source material provided by Acts of Parliament, judicial decisions and constitutional conventions. This doctrine is a peculiar feature of the British constitution which exerts a constant and powerful influence. A.V. Dicey's *Introduction to the Law of the Constitution*, published in 1885, acts almost

as a substitute for a written constitution where he argues that the fundamental principles of British constitutional law were representative democracy, parliamentary sovereignty and the rule of law. We shall be discussing A.V. Dicey's theories extensively in the following pages.

2.2 Intended Learning Outcome

After reading this chapter, and all recommended readings, you should be able to:

i. Appreciate the content of parliamentary supremacy and the founding principles of parliamentary supremacy predominant within the British system of governance;'

ii. Research and discuss the difference between Nigeria's parliamentary system of government under Tafawa Balewa and the British parliamentary system;

iii. Be aware of the nature of constitutional conventions, the distinction between constitutional conventions and laws, and the reasons why constitutional conventions are adhered to.

2.3 Parliamentary sovereignty

Parliament, has different meanings. It refers to 'government, the three branches, both the House of Commons and the House of Lords.' A V. Dicey refers to it as follows: 'Parliament means, in the mouth of a lawyer [though the word has often a different sense in ordinary conversation], the Queen, the House of Lords and the House of Commons; these three bodies acting together may be aptly described as the 'Queen in Parliament' and constitutes Parliament.'

The House of Commons is the democratic institution made up of 646 Members of Parliament elected by a simple majority while the House of Lords is made up of heredity peers, life peers, law lords and senior bishops of the Church of England. The Monarchy is an important part of the legislative process, although technically, does not do more than assent a bill.

Parliamentary sovereignty is therefore a doctrine where the Parliament is supreme. In the words of A.V. Dicey, 'There is no person or body of persons who can, under the English constitution, make rules which override or derogate from an Act of Parliament, or which

[to express the same thing in other words], will be enforced by the courts in contravention of an Act of Parliament.'

The doctrine of Parliamentary sovereignty has been the very foundation of the British constitution since, at least the latter days of the nineteenth century. This doctrine maintains that Parliament has unlimited legal power to enact any law whatsoever, without of course denying that there are many political and practical reasons why a particular Parliament may in fact, be restricted. (John Alder, General Principles of Constitutional and Administrative Law). By this, is meant that there are no legal limitations on the power of Parliament to legislate. Parliament here does not refer to the two Houses of Parliament individually, for neither House has authority to legislate on its own, but to the constitutional entity known as the Queen in Parliament: namely the process by which a Bill approved by Lords and Commons receive royal assent and thus becomes an Act of Parliament.

2.3.1 The growth of the legislative authority of Parliament

It is often claimed that the first Parliament was that assembled by Simon de Montfort in 1265 to give counsel to Henry III, which for the first time, included representatives of the shires, cities and boroughs of England as well as the feudal barons. With the English Reformation, there disappeared the belief that Parliament could not affect the authority of the Roman Church.

Although wide authority was attributed to acts of the 'King in Parliament', two views were held as to the justification for this:

a. The royalist view grounded legislative authority in the King, acting as Sovereign in exercise of divine right, but with the approval of Lords and Commons;
b. The Parliamentarian view stressed the role of the two houses, acting on behalf of the nobility and the common people, in exercising supreme authority with the monarch.

See: P. Craig (2000) PL 211; Bonham's case (1610) 8 Co Rep 114a

2.3.2 Meaning of Parliamentary Supremacy:

In this unit, we shall consider writings of some scholars on Parliamentary Sovereignty. The first is A.V. Dicey in his work, ***Introduction to the Study of the Law of the Constitution*** **(Macmillan, 1st ed 1885, 10th edition of 1950)** defined Parliamentary Sovereignty when he stated that 'in theory, Parliament has total power. It is sovereign'

2.3.3 Dicey's writing on parliamentary supremacy

According to Dicey (1915, pp.37–8),

'***The principle of parliamentary sovereignty means neither more nor less than this, namely that Parliament has, under the English constitution, the right to make or unmake any law whatever; and further that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament.'***

Nature of parliamentary supremacy

'a law may, for our present purpose be defined as ..[any rule which will be enforced by the courts]. The principle then of Parliamentary sovereignty may, looked at from its positive side, be thus described. Any Acts of Parliament, or any Act of Parliament which makes a new law, or repeals or modifies an existing law, will be obeyed by the courts.

The same principle, looked at from its negative side, may be thus stated: there is no person or body of persons who can, under the English constitution make rules which override or derogate from an Act of Parliament, or which to express the same thing in other words, will be enforced by an Act of Parliament'

Dicey; The Law of Constitution, pp. 39-40

The second scholar is **G de Walker,** in ***Dicey's Dubious Dogma of Parliamentary Sovereignty*** (1985) 59 Australian Law Journal 276

"According to Professor Dicey's theory of sovereignty, parliament had absolute power. By way of legislation, it could …do anything at all, and there was no person or body in the kingdom with power to set its Act aside….No matter that a purported statute trample on ancient constitutional principles or flew in the face of the most deep-rooted customs, and moral values of the people. No matter that Parliament could therefore validly pass retroactive criminal statutes or…. command that all blue-eyed babies be killed….'

2.3.4 Application of the doctrine of Parliamentary Sovereignty

The legal doctrine of parliamentary supremacy is concerned only with an Act of Parliament (a statute). An Act of Parliament, as the preamble to every Act reminds us, is an Act of the monarch with the consent of the House of Lords and the House of Commons, the Queen in Parliament. A.V Dicey's theory can be surmised into three:

A Parliament can make laws concerning anything. The Parliament can make any law it wishes. This also implies that no power or body can challenge or question the Parliament. Dicey identified two facets of parliamentary supremacy. The first is that Parliament can make any laws it likes irrespective of fairness, justice and practicality; hence Sir Ivor Jennings's famous example that Parliament can make it an offence for Frenchmen to smoke in the streets of Paris.

In legal theory, it means that Parliament may make laws which have extra territorial effect. The UK courts are bound to obey a statute applying anywhere and whether or not the relevant overseas courts would recognise it is immaterial (e.g. Manuel v. A-G (1983) Ch 77). The War Crimes Act 1991 is such a legislation which passed law to make a British Citizen who had committed murder, manslaughter or culpable homicide in Germany or an area occupied by Germany during WWII. The Act was passed under the Parliament Acts 1911 and 1949 as the House of Lords refused to pass it, because there was a concern that this legislation would have retrospective effect.

B. No parliament can bind its successor (that is, it cannot pass a law that cannot be changed or reversed by a future parliament). What this means is that it is not bound by previous acts or previous parliaments and, likewise, cannot bind future decisions on future parliaments.

That no other body can override Parliament, this has two aspects. Firstly, neither the UK courts nor international courts such as the European Court of Human Rights have the power to declare an Act of Parliament invalid (MacCormick v. Lord Advocate (1953) SC 386). Secondly, in the event of a conflict between a statute and some other kind of law, the statute must always prevail.

C. No body except parliament can change or reverse a law passed by parliament.
The case of Cheney v. Conn [1968] 1 WLR 242 is illustrative on this point. Where there is a conflict between two Acts, then the latter in time will prevail. 'it is not for the court to say that a Parliamentary enactment, the highest law in this country is illegal'. This is the doctrine of implied repeal.

2.4 <u>The court under a parliamentary government</u>

We earlier mentioned the position of the judiciary in Dicey's concept of Parliamentary Sovereignty. Let us consider scholars who have attempted to interpret the role for the judiciary in the sovereignty of powers of the parliament.

According to Alex Carrol, 'It follows that the function of the courts in relation to Acts of Parliament is limited to interpreting and applying that which has been placed before them bearing on its face the official consents of the Commons, Lords and Monarch.'

All that a Court of Justice can do is to look at the 'parliamentary role'; if from that it should appear that a Bill has passed both Houses and received the Royal Assent, no Court of Justice can inquire into the mode in which was introduced in Parliament, not what was done previous to its introduction, or what passed in Parliament during its stages through both Houses (per Lord Campbell, Edinburgh and Dalkeith Railway Co v Wauchope (1842) 8 Cl & F 710).

It has also been said that even if 'an Act has been obtained improperly, it is for the legislature to correct it by repealing it: but so long as it exists as law, the courts are bound to obey it' (per Willis J, ***Lee v Bude and Torrington Railway Co*** **(1871) LR 6 CP 577)**.

The reluctance of the courts to 'go behind' how a statute was enacted is well illustrated by the facts of ***Manuel v Attorney-General*** **[1983] Ch 77**. The case concerned a challenge made by representatives of the Indian nations of Canada to the Canada Act 1982. Their challenge was based, inter alia, on the Statute of Westminster, s 4, which provided that the Westminster Parliament would not legislate for a dominion 'unless it is expressly stated in

the Act that the Dominion has requested, and consented to, the enactment . . . ' The Canadian Indians argued that as neither they nor all of the Canadian provinces had given their consent to the Canadian government's request for the legislation, the enactment was inconsistent with the 1931 Act and therefore invalid.

The doctrine, as it now exists, profoundly affects the position of the judges. They are not the appointed guardian of constitutional rights, with power to declare statutes unconstitutional, like the Supreme Court of Nigeria, the United States etc. Subject only to the overriding law of the European Union, they can only obey the latest expression of the will of Parliament. Nor is there own jurisdiction sacrosanct.

Self-Assessment Exercise

How is the principle that Parliament cannot bind its successors achieved?

2.4.1 Criticisms of the parliamentary sovereignty

The doctrine of parliamentary supremacy and indeed the concept of sovereignty itself has in recent years been subject to attack from several perspectives as being unreal and unjust in a modern community, mainly due to the lack of justification of concentrated powers in a single sovereign. For scholars such as Hobbes, however, he opined that a single authority was desirable to resolve conflicts.

One of the constructive critics of Dicey's parliamentary sovereignty was Ivor Jennings, and we have an excerpt here from *The Law and the Constitution* (University of London Press, 5th edition, 1959)

The dominant characteristic of the British Constitution, as has previously been emphasized, and as Dicey pointed out, the supremacy or sovereignty of Parliament. This means, in Dicey's words, that Parliament has the right to make or unmake any law whatever, and that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament.

The consequence is that not only the courts but everybody in the United Kingdom regard that as binding law which Parliament has enacted. It is not possible for any person to

refuse to obey the orders of Parliament because they are not laws, though it is possible for him to disobey on the ground that they ought not to be law. Nor is it possible as it is in some countries such as the United States and most Commonwealth countries, for the courts to declare that an Act of Parliament need not be obeyed because it is ultra vires or beyond the powers of Parliament. These two assertions, it should be noted are not the same. For though in most countries the powers of the legislature are limited, it is not necessarily the prerogatives of the courts to refuse to obey legislation the notion that a court of law could determine the legality of legislation comes from the United States, where the Supreme Court assumed the power of declaring the statutes of Congress to be not applicable because they did not conform with the Constitution The same power has either been assumed by the courts or provided by the Constitutions in Canada, Australia, India, Pakistan, Ceylon, Ghana and the Federation of Malaya. But many continental countries to follow the old principle that excess of legislative authority is a matter between the legislature and the electors. Consequently, the fact that the courts do not regard themselves as competent to restrict the exercise of the legislative power is not in itself conclusive of the extent of that power…….

However, whereas sovereignty is supreme over citizens and subjects, it is bound by divine law and the law of nature, within which limits they can only make laws. Other things that the Parliament may not do is according to Professor Laski, 'No Parliament would dare to disfranchise the Roman Catholics or prohibit the existence of trade unions.'

Parliamentarians who wish to be re-elected may be called upon to give account of their actions, would consider what the wishes of the people are before making laws. It would not pass any law which any substantial section of the population dislikes.

2.4.2 Limits of parliamentary sovereignty

We shall consider excerpts TRS Allan's *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* for insight into the limits of Dicey's parliamentary sovereignty

The legal doctrine of legislative supremacy expresses the courts' commitment to British parliamentary democracy. It provides for the exercise of the political will of the electorate through the medium of its parliamentary representatives. If an appropriate conception of the boundaries of the political community provides the framework for the doctrine's application, some conception of democracy must provide the framework for the doctrine's application …

That respect, however cannot be a limitless one. A parliamentary enactment whose effect would be the destruction of any recognizable form of democracy – for example a measure purporting to deprive a section of the population of the vote on the grounds of their hostility to government policies…..could not possibly be applied by the courts of law. Judicial obedience to the statute of such [unlikely] circumstances could not coherently be justified in terms of the doctrine of parliamentary sovereignty, since the statute would violate the political principle of which the principle itself enshrines.

The central thesis of Allan's argument is that a principle which conflicts with the foundations of democracy could not be said to derive from the concept of sovereignty.

2.4.3 Lack of constitutional protection

One consequence of sovereignty of parliament is that this country has no constitutional guarantee. In other countries, there is normally a written constitution, embodied in a formal document, and protected, as a kind of fundamental law, against amendment by simple majorities. Not only is there no constitutional guarantee, it cannot, according to classical theory, be created.

The doctrine distinguishes from those countries in which a written constitution imposes limits on the legislature and entrusts the ordinary court or a constitutional court to decide whether the acts of the legislature are in accordance with the constitution.

Consider the case of Marbury v. Madison 1 (Cranch 137 (1803), where the US Supreme Court held that the judicial function vested in the court necessarily carried with it the task of deciding whether an Act of Congress was or was not in conformity with the constitution. See also; Liyanage v. R (1967) 1 AC 259; Hinds v. R. (1977) AC.

It follows that a legal system which accepts judicial review of legislation, legislation may be held invalid on a variety of grounds: for example, because it conflicts with the separation of powers where this is a feature of the constitution. By contrast, in the United Kingdom, the legislative supremacy seem to be the fundamental rule of constitutional law and this

supremacy of Parliament appears to be the fundamental rule of constitutional law and this supremacy includes power to legislate on constitutional matters.

Let us consider some illustrations of this power:

ix. Indemnity acts and retrospective legislations.

"Retrospective laws are contrary to general principle that legislation by which the conduct of mankind is to be regulated ought…to deal with future acts and ought not to change the character of past transactions carried on upon the faith of the then existing law….accordingly, the court will not ascribe retrospective force to new laws affecting rights unless by express words or necessary implications it appears that such was the intention of the legislature" Per Lord Willes J. in **Phillips v. Eyre (1870) LR 6 QB 1,23**

See further : **Yew Bon Tew v. Kenderaan Bas Mara (1983) 1 AC 553, 558; Plewa v. Chief Adjudication Officer (1995) 1 AC 249**.

x. Legislative supremacy and international law

The legislative supremacy is not limited by international law. The courts may not hold an Act void on the ground that it contravenes general principles of international law; nor may the courts hold an Act invalid because it conflicts with a treaty to which the United Kingdom is a party. As far as the British courts are concerned, there are no territorial restrictions on the legislative competence of Parliament.

See : Lord Dunedin in Montensen v. Peters (1906) 8 F(J) 93, 100.

xi. No legal limitations on Parliament

Note CJ's comment in ***Dr, Boonham's case*** **(1610) 8 Co Rep 113b, 118a;** and also Lord Cooke of Thorndon has urged that within the common law the judges exercise an authority which extends to upholding fundamental values that might be at risk from certain forms of legislation- Taylor v. New Zealand Poultry Board (1984) 1 NZLR 394; 398; also J L Caldwell (1984) NZLJ 357; R Cooke (1988) NZIJ 158

2.4.4 We will also list some counter arguments on the unlimited nature of Parliamentary sovereignty

- Membership of regional unions. This may not be relevant any longer since Britain has exited the European Union but it is still worth mentioning for the purpose of academic discourse, Britain became a member of the European Union in 1973 when she signed the Treaty of Rome. The implication of this was that Britain was subject to the European Parliament and was bound by rulings and obligations on points of European law. See *the Re Tachographs, 1979; the Factortame case 1990*. The Factortame case demonstrated the extent to which EU membership has affected Parliament's political sovereignty.
- Human rights refer to the basic rights which inheres to all humans by virtue of their humanity. All Acts must include its compatibility with human rights. The European Courts of Human Rights has the power to declare an Act as violating human rights.
- Delegated legislation
- Political restraint
- Referendum. The inclusion of 'referendum locks' is analogous with the conferral of increased power on the judiciary in that it places in the hands of British citizens the potential ability to limit future Parliaments.

2.5 Summary

It is crystal clear that Dicey's understanding of Parliamentary sovereignty is no longer sufficient to explain the state of the UK constitution. In the words of Lord Hopein *Jackson* [2014]: *"Parliamentary sovereignty is no longer, if it ever was, absolute ... the English principle of the absolute legislative sovereignty of Parliament ... is being qualified... The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based. It is becoming increasingly apparent that their ultimate allegiance has shifted away from Parliament and towards common law constitutional fundamentals."*

The doctrine of parliamentary supremacy provides the fundamental legal premise of the UK constitution. Parliamentary sovereignty means that an Act of Parliament must be obeyed by the courts, that later Acts prevail over earlier ones, and that rules made by external bodies, for example under international law, cannot override Acts of Parliament.

It does not follow that Parliament is supreme politically although the line between legal and political supremacy is blurred.

The doctrine has two separate aspects: first, that the courts must obey Acts of Parliament in preference to any other kind of legal authority, and second, that no body, including Parliament itself, can place legal limits upon the freedom of action of a future Parliament.

2.6 References/further readings

The Sovereignty of Parliament Today Author(s): Hamish R. Gray Source: The University of Toronto Law Journal, Vol. 10, No. 1 (1953), pp. 54-72. Published by: University of Toronto Press Stable

John Alder 2002. General Principles of Constitutional and Administrative Law. 4th edition. Palgrave.

Dicey. The Law of the Constitution, Oxford University Press; 1st edition (December 17, 2013)

Lord Irvine QC (as he then was) (Judicial Supremacism" prompted by 'extra judicial romanticism) see (1996) PL 59 at 75 ; (; Adams Tomkins, Our Republican Constitution 2003) Ch. 1

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W.I. Jennings. The Law and the Constitution. University of London Press.

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2.7 Possible Answers to Self-Assessment Exercise

Trace the development of the doctrine of parliamentary supremacy. Has it a secure legal basis?

'The sovereignty of Parliament and the supremacy of the law of the land – the two principles which pervade the whole of the English constitution may appear to stand in opposition to each other, or to be at best countervailing forces. But this appearance is delusive ...' (Dicey). Discuss.

The view is that Parliament's legislative authority includes power to make new arrangements under which future Parliaments would not enjoy legislative supremacy. The argument that the doctrine of legislative supremacy must be retained is strengthened if it can be shown that the political system provides adequate safeguard against legislation which would be contrary to fundamental constitutional principle on the individual's right.

Self-Assessment Exercise

How is the principle that Parliament cannot bind its successors achieved?

Guide

- Express repeal
- Implied repeal

Self-Assessment Exercise 2

Are there limits on the powers of the parliament?

There is much dissatisfaction with undiluted parliamentary power, since the control of legislation has effectively passed into the hands of the executive. Parliament's independent control has been progressively weakened by the party system and it is called upon to pass more Acts in each session than it can scrutinize properly.

Several judges have suggested extra-judicially that constitutional fundamentals such as the rule of law, judicial independence and judicial review may be beyond the power of Parliament to abolish.

It has been suggested that such theoretical justification as exists for these assertions of judicial power over the legislature rest on the proposition that the doctrine of parliamentary sovereignty was created by the judges developing the common law and so the judges can abolish it.

See also Jowell (2006) PL 562 who considers that the preconditions of any constitutional democracy, is respect for certain rights that neither the executive nor the legislature,

representative as it may be, should be able to deny with ‘impunity’ and on this hypothesis Parliament’s power to intrude upon such fundamental rights is limited.

MODULE 2 **CONSTITUTIONAL FOUNDATIONS OF THE POWERS OF ADMINISTRATIVE AGENCIES**

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Unit 3: Rule of Law

Contents

3.1 Introduction

The constitution is founded on the rule of law and administrative law is the area where this principle is to be seen in its most active operation. There are different views to the concept of rule of law, for instance, the Hobbesian view that the lawmaker's power is unlimited such that "the limits of the law are purely formal in the sense that they lie in the structure and processes of the law irrespective of its content." However, there is a need to safeguard this power. There is another view, rooted in Locke, that "the rule of law requires the law to have a certain substantive content which reflects the fundamental values of 'constitutionalism' in a democratic society, in particular respect for equal individuals". This unit discusses the concept of rule of law and its application in the society.

3.2 Intended Learning Outcome

It is intended that at the end of this unit, you will be able to:

i. Discuss the meanings of the rule of law;
ii. Discuss the elements of the concept of rule of law;
iii. Discuss the concept of an international rule of law.

3.3 Rule of Law

Meaning of rule of law

The Rule of Law is what some philosophers have called an "essentially contestable concept."

Conceptualization

Even though it is doubtful whether there is a correct specification of the rule of law, all definitions are not equally reasonable. They can be either too maximalist (include theoretically irrelevant attributes) or too minimalist (exclude theoretically relevant attributes). Moreover, they can be infected by redundancy if the attributes fall short of mutual exclusiveness and by conflation if components are conjoined even if they are manifestations of different overarching attributes. The concept of the rule of law is highly complex and controversial. Thus, it is hardly surprising that "much confusion over the meaning, aims, means and successes of rule of law promotion is currently prevalent among politicians, diplomats, and other practitioners" and that "academia, if anything, is as much divided over the meaning and aims of the rule of law as practice".

The first is identified by Raz (1979, 212) when he writes,

> *"The rule of law" means literally what it says: the rule of the law. Taken in its broadest sense this means that people should obey the law and be ruled by it. But in political and legal theory it has come to be read in a narrower sense, that the government shall be ruled by the law and subject to it.* [Emphasis added]

It is clear from my emphasis that one of the additional dimensions concerns order, requiring that members of the general public comply with the law. The second supplementary dimension regards a feature that Lauth, among others, includes in his list of general principles, namely, equality under the law and before the courts.

The rule of law can be defined as a system in which the laws are public knowledge, are clear in meaning, and apply equally to everyone.

An extended meaning of rule of law has been propounded by Fuller (1969) and Allan (2001), as supporting the substantive values of a liberal democracy. "This means a

commitment to government by consent which respects equality and human dignity and which through obedience to the law honours its obligations to the people".

As Allan [2001] stated,

'*(t)he principle that laws will be faithfully applied, according to the tenor in which they would reasonably be understood by those affected, is the most basic tenet of the rule of law: it constitutes that minimal sense of reciprocity between citizen and state that inheres in any form of decent government, where law is a genuine barrier to arbitrary power.'*

These extended meaning is composed of three elements. The first is that no one is above the law. i.e there must be a justification for any interference with personal liberty; the second element is that there is a right to disobey any law that violates basic values of liberal democracy; and thirdly, there are certain values of fairness and justice particularly associated with law.

Before we delve into a discussion of the features of the rule of law, let us look at its development, different views and the elements of the rule.

3.3.1 Purposes and Elements of the Rule of Law

Efforts to specify the meaning of the Rule of Law commonly appeal to values and purposes that the Rule of Law is thought to serve. Three of such purposes-against which competing definitions or conceptions can be tested appear central.

First, the Rule of Law should protect against anarchy and the Hobbesian war of all against all. Second, the Rule of Law should allow people to plan their affairs with reasonable confidence that they can know in advance the legal consequences of various actions. Third, the Rule of Law should guarantee against at least some types of official arbitrariness.

<u>Rule-of-law ideal types in constitutional debates</u>

Contemporary disagreements about the Rule of Law frequently are reflected in substantive debates involving constitutional interpretation-most often among commentators, sometimes among judges and Justices. A recent, prominent example of express judicial

disputation about the Rule of Law is ***Planned Parenthood v. Casey*** **505 U.S. 833 (1992).** ln that case, a bare five-to-four Supreme Court majority surprised many observers by purporting to uphold the central abortion right first recognized in Roe v. Wade, even though reducing the scope of that right by permitting "incidental" restrictions on abortions that do not amount to "undue burdens."

3.3.2 Criticism of the doctrine

The rule of law is unattainable. Communities never achieve it completely. It requires, among other things, that government officials conform to the law. But they may not do so, and presumably there is no large community in which they always do so. To the extent that officials do not conform to the law, the community fails to attain the ideal of the rule of law. Perhaps no community has even got very close to the ideal. People do not always follow rules.

Community attains the ideal of the rule of law when the life of the community is governed by law. So the rule of law can be opposed to anarchy, in which the life of the community is not governed. The rule of law can also be opposed to arbitrary government. So Aristotle wrote that it was better for the law to rule, than for any one of the citizens to rule.

People tend to think of government as 'arbitrary' if it has any or all of three characteristics:

1. Government is arbitrary if it gives effect to the unconstrained will of the rulers-as in an absolute dictatorship.

2. Government is arbitrary if it does not treat like cases alike-if it does not treat people consistently.

3. Government is arbitrary if it is unpredictable- if it does not tell its citizens where they stand, what their rights and duties are.

But now we have come around in a circle, and we face a paradox. The rule of law is the absence of arbitrary government. Vagueness in the law leads to arbitrary government in

the first three senses. Law is necessarily vague. So arbitrary government the antithesis of the rule of law- is a necessary feature of the rule of law. The rule of law entails both the presence and absence of arbitrary government. It is not just an unattainable ideal, it is a necessarily unattainable ideal. It is incoherent.

3.3.3 Comparative Evolution of The Rule of Law At The National Level

The early history of the rule of law is frequently conflated with the history of law itself. The Code of Hammurabi, promulgated by the king of Babylon around 1760 BC, was one of the first sets of written laws; the fact that it was inscribed in stone and made publicly available was a significant advance toward a legal system. Yet few would argue that Babylon was governed according to the rule of law in any modern sense. That modern conception may be understood at its most basic by a distinction from the "rule of man," implying power exercised at the whim of an absolute ruler, and from "rule by law," whereby a ruler consents to exercise power in a non-arbitrary fashion. In neither case is the ruler him- or herself bound by law in any meaningful sense. Plato held in the Republic that the best form of government was rule by a philosopher king, but allowed that rule by law was a second option warranted by the practical difficulties of locating an individual with the appropriate qualities to reign.

Aristotle surveyed various Greek constitutions before concluding in The Politics that "the rule of law" was preferable to that of any individual," a position later quoted by John Adams on the eve of the American Revolution as the definition of a republic: that it is "a government of laws, and not of men."' Throughout this early period, however, law continued to be seen largely as a means by which to rule rather than a constraint on the ruler as such. Despite occasional doctrinal assertions to the contrary, the development of norms and institutions that might actually bind the sovereign took some centuries.

Self-Assessment Exercise

Discuss the evolution of the rule of law in three jurisdictions

3.3.4 Dicey's Version of the Rule of Law

The modern conception of the rule of law in the Anglo-American tradition is frequently tied to the British constitutional scholar A.V. Dicey, writing in 1885, who referred to it also as the "supremacy of law."

His three-point definition is frequently quoted:

We mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land.... We mean in the second place ... not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals .... [Thirdly,] the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts.

Before we delve into a discussion of Dicey's conception of the rule of law, produced below is an except on the rule of law, its nature and general applications.

'That 'rule of law' then, which forms a fundamental principle of the Constitution, has three meanings, or may be regarded from three different points of view.

It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. Englishmen are ruled by the law, and by the law alone; a man may with us be punished for a breach of law, but he can be punished for nothing else.

It means against equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts; the 'rule of law' in this sense, excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals……

The rule of law, lastly may be used as a formular for expressing the fact that with us the law is the constitution, the rules which in foreign countries naturally form part of a

constitutional code, are not the source but the consequence of the rights of individuals as defined and enforced by the courts……..'
(A.V. Dicey, Introduction to the Study of the Law of the Constitution. Macmillan, 1st edition. 1885, 10th edition 1959. At pages 202 – 203

Dicey's three aspects of the rule of law-regulating government power, implying equality before the law, and privileging judicial process are commonly regarded as basic requirements of a formal understanding of the rule of law emphasizing the ideas of generality, certainty and equality but goes further in stressing the common law basis of the constitution.

With respect to the first, it means that the "*the law is supreme"*, no official can interfere with individual rights without the backing of a specific law. This also means that everything must be done in accordance with the dictates of the law and everyone must be made to obey the law as the law will not be subject to man. Iluyomade & Eka stated that powers must be exercised in accordance with the law. This has already been enshrined in the Constitutions of different jurisdictions, for instance, section 1 of the 1999 Constitution [also 1979 Constitution] provides that:

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

Dicey's second postulation is 'equality before the law; i.e everyone whether high official or ordinary citizen is subject to the same law administered by ordinary courts. Essentially, that officials should not have wide discretionary powers. According to his theory, everyone is subject to the same law administered by the ordinary courts. He did not mean that there are identical rules for everyone and that no one has special privileges, but these special privileges must be justified on the ground of public welfare and human rights. In other words, Dicey sought to emphasize equality of everyone, irrespective of position. This has been represented in the 1999 Constitution of the Federal Republic of Nigeria, (as amended) provides that, *"judicial powers shall extend to all matters between persons or between*

government or authorities and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person".

However, there are special privileges such as immunities of public officers in certain respects. [see immunity clause in the Constitution].

The Supreme court of Nigeria expounded on the rule of law in the case of Military Governor of Lagos State v. Ojukwu (1986) I NWLR (pt 19) p. 621 @ 647 when it stated that

I think it is a very serious matter for anyone to flout a positive order of a court and proceed to taunt the court further by seeking a remedy in a Higher Court while still in contempt of the Lower Court. It is more serious when the act of flouting the order of the court, the Contempt of the Court is by the Executive. Under the Constitution of the Federal Republic of Nigeria 1979, the Executive, the Legislature (while it lasts) and the Judiciary are equal partners in the running of a successful government. The powers granted by the Constitution to these organs by Section 4 (Legislative Powers), Section 5 (Executive Powers) and Section 6 (Judicial Powers) are classified under an omnibus umbrella known under Part II to the Constitution as "Powers of the Federal Republic of Nigeria". The organs wield those powers and one must never exist in sabotage of the other or else there is chaos. Indeed there will be no federal government. I think, for one organ, and more especially the executive, which holds all the physical powers, to put up itself in sabotage or deliberate contempt of the others is to stage an executive subversion of the Constitution it is to uphold. Executive lawlessness is tantamount to a deliberate violation of the Constitution. When the Executive is the Military Government which blends both the Executive and the Legislature together and which permits the Judiciary to co-exist with it in the administration of the country, then it is more serious than imagined.

……By virtue of the Constitution (Suspension & Modification) Decree No.1 of 1984, a good number of the provisions of the Constitution were suspended. Indeed, what was left was what had been permitted by the Federal Military Government to exist. All the provisions relating to the Judiciary were saved. Section 6 of the Constitution, the most important provision, insofar as the institution known as the Judiciary is concerned, which vests in the Courts the judicial power of the Federation was left extant. The Military Government had the power and still has the power to put an end to the existence of that provision. It has not done so, and that must have been advisedly for it does intend that the Rule of Law should pervade. It is the clearest indication against rule by tyranny, by sheer

force of arms against a presumption subjecting the nation to the rule of might as against the rule of right.
That being the case, it behoves every organ of the Military Government to make it clear at all times, albeit as the presumption is always that of rule by might of the military, to assume a perennial onus of demonstrating a rebuttal of this onus.

The essence of the Rule of law is that it should never operate under the rule of force or fear. *To use force to effect an act and while under the marshall of that force, seek the Court"s equity, is an attempt to infuse timidity into Court and operate a sabotage of the cherished rule of law. It must never be.*

The law is no respecter of persons, principalities, government or powers and the court stands between the citizens and the government, alert to see that the state or government is bound by law and respect the law.

The third arm of Dicey's theory is that the constitution is the 'result' of the ordinary law, i.e government activities should be conducted within the framework of recognized rules and principles which restrict discretionary powers. Dicey's third meaning of the rule of law derives from the common law tradition and relates to the extended notion of the rule of law. No doubt, the purpose of conducting activities within the frame of the law is to prevent abuse and tyranny.
The seminal case of Entick v. Carrington (1765) and R. v. IRC ex parte Ross minister Ltd (1980) brings together all three aspects of Dicey's rule of law.

3.3.5 Interpretations of the rule of law

Let us consider some academic writings on the interpretation of the rule of law. Ivor Jennings in his *The Law and the Constitution,* J. Stone in Social Dimensions of Law and Justice and the 1959 Report of the International Congress of Jurist. These excerpts provide different perspectives on the nature and application of the rule of law.

W.I. Jennings The Law and the Constitution

'if the rule of law is a synonym for law and order, most States have achieved it, and it is a universally recognized principle. The degree of obedience varies from country to

country…….the rule of law in this liberal sense requires that the powers of the Crown and of its servants shall be derived from the law; for that is true even of the most despotic state. The powers of Louis XIV, of Napoleon I, of Hitler and of Mussolini were derived from the law, even if that law be only 'The leader may do and order what he pleases'. ***Accordingly, a king or any other person acting on behalf of the State cannot exercise a power unless he can point to some specific rule of law which authorizes his act. The State as a whole is regulated by law.*** *Since fundamentally it requires a limitation of powers, most states have sought to attain it by a written constitutions, for such a constitution is fundamental law which limits by express rules the powers of the various governing bodies and this substitutes constitutional government….it implies also a separation of powers, since the fusion of powers in one authority is dictatorship or absolutism, which according to liberal ideas is potential tyranny'.*

J. Stone. Social Dimensions of Law and Justice

'*The heart of the doctrine seems rather to lie in the recognition by those in power that their power is wielded and tolerated only subject to the restraints of shared socio-ethical convictions. The central legal point, that some state officials and ideally state organs themselves must be answerable in the courts like all other persons and bodies, seems but a concrete application of this…. '*

International Commission of Jurists: The Rule of Law in a Free Society – Report of the International Congress of Jurists

'The Rule of Law is a convenient term to summarize a combination of ideals and practical legal experience……. Two ideals underlie this conception of the Rule of law. In the first place, it implies without regard to the content of the Rule of Law, that all power in the State should be derived from and exercised in accordance with the law. Secondly, it assumes that the law itself is based on respect for the supreme value of human personality.'

Can we situate the rule of law?

The preamble to the 1948 Universal Declaration of Human Rights (UDHR) states that "it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."

- The UDHR enumerates specific rights such as prohibiting arbitrary deprivation of liberty, requiring fair trials by independent and impartial tribunals, and protecting equality before the law. These protections broadly correspond to the three aspects of the core definition adopted here, with the qualification that independence of the judiciary is only part of what is implied by supremacy of the law.

- The 1993 Vienna World Conference on Human Rights recommended that the United Nations should offer technical and financial assistance upon request to "national projects in reforming penal and correctional establishments, education and training of lawyers, judges and security forces in human rights, and any other sphere of activity relevant to the good functioning of the rule of law." This was endorsed in a series of General Assembly resolutions, each citing the rule of law as "an essential factor in the protection of human rights."

Self-assessment Question

To what extent is Dicey's version of the rule of law of value today?

International rule of law?

What, if anything, is meant by terms such as "the international rule of law"?

At the United Nations World Summit in 2005, Member States unanimously recognized the need for "universal adherence to and implementation of the rule of law at both the national and international levels" and reaffirmed their commitment to "an international order based on the rule of law and international law."

At times the term is used as if synonymous with "law" or legality; on other occasions it appears to import broader notions of justice. In still other contexts it refers neither to rules nor to their implementation but to a kind of political ideal for a society as a whole.

There has been continuing efforts within the international community to further the rule of law in international relations to secure respect for the protection of human rights. The

Universal Declaration of Human Rights, adopted in 1948, was followed by the European Convention on Human Rights, signed at Rome in 1950. The Convention recognized that European countries have "a common heritage of political traditions, ideals, freedom and the 'rule of law' and created machinery for protecting certain human rights."

See **Golder v. UK (1975) 1 EHRR 524** which concerned the right of a convicted prisoner in the United Kingdom to have access to legal advice regarding a civil action against the prison authorities. The European Court of Human Rights held that "in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts"

Within the Commonwealth, the heads of government at their biennial meetings have often expressed support for the rule of law. In 1991, at Harare, they linked the rule of law, the independence of the judiciary and the protection of human rights with 'democratic process and institutions which reflect national circumstances and just and hones government as being among the fundamental values of the Commonwealth association' –

See ***The Harare Communique, 1991; and Communique of the Commonwealth Heads of Government Meeting in Malta, November 2005, para 45***,

What, then, might the rule of law mean at the international level?'

It is helpful here to distinguish between three possible meanings.

xii. First, the "international rule of law" may be understood as the application of rule of law principles to relations between States and other subjects of international law.

xiii. Secondly, the "rule of international law" could privilege international law over national law, establishing, for example, the primacy of human rights covenants over domestic legal arrangements.

xiv. Thirdly, a "global rule of law" might denote the emergence of a normative regime that touches individuals.

3 Conclusion

The object of both law and order is justice. Justice presupposes the right of all men freely to achieve the best and the most within them, subject only to the same rights of others. If that simple truth is ever forgotten or trampled upon or significantly diminished, the rule of law becomes merely a device, barren of meaning, worthy of no respect and incapable of survival. The law should be an avenue of progress and not a fence of restraint.

1.5 Summary

This unit has discussed the concept of rule of law. The discussion traced the concept and its application in different jurisdictions. Dicey's conception, which is the most popular emphasized emphasize three meanings of the rule of law.

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1.6 Possible Answers to Self-Assessment Exercise

Self-Assessment Exercise

Discuss the evolution of the rule of law in three jurisdictions

A. The Anglo-American Tradition

The rule of law took root in England in theory before it did in practice. Though the 1215 Magna Carta established some limits on the exercise of power by the king with respect to the liberties of freemen, it was not until the seventeenth century that the notion of the king himself being subject to law began to be taken seriously. In an extraordinary exchange with James I in 1607, Sir Edward Coke, Lord Chief Justice of the Common Pleas, rebuffed the King's argument that he could withdraw cases from the judiciary and decide them himself: the King ought not to be subject to man, Coke argued, quoting Bracton, but subject to God and the law. Due in large part to such impertinence Coke was later dismissed from the bench, but returned to the legislature where he played a role in drafting the 1628 Petition of Right, also seeking to limit the prerogatives of the Crown. In the 1644 publication Lex, Rex, Scottish theologian Samuel Rutherford outlined a more general theory of limited

government, including concepts such as the separation of powers-his book was burned and he was cited for treason, dying before he could be tried.

A. Thomas Hobbes' Leviathan (1651), who argued that the rule of law, even in the limited sense of government being founded on a rule or set of precepts, was logically impossible. To be subject to the law, Hobbes argued, a sovereign must subject himself to a greater power. This implies some other sovereign who is free of the law unless subject to another sovereign and so on.

the Bill of Rights Act was adopted in 1689.

American Declaration of Independence in 1776;

Bills of Attainder were abolished in 1870.

The Reform Act of 1832 abolished infamous rotten boroughs despite having only eleven voters (none of whom was a resident), but the franchise became universal only in 1928.

B. Continental Europe: Continental European jurists developed a slightly different understanding of the role law plays in ordering society, placing less emphasis on judicial process than on the nature of the State. This is reflected in the terms commonly used for "rule of law"-*Rechtsstaat, Etat de droit, stato di diritto, estado de derecho,* and so on. An important substantive distinction was the role of constitutionalism: whereas Britain never developed a written constitution, in Europe the establishment of a basic law that constrained government came to be seen as axiomatic. This distinction lives on in the different approaches to legal interpretation epitomized by common law precedent-based argument, and civil law doctrinal analysis. It also survives in the relative weight accorded to fundamental rights in civil law as opposed to common law countries, with the United States being a prominent exception. German scholars typically trace the origins of the Rechtsstaat (the law-based State, or constitutional State) to Kant. Robert von Mohl developed the idea in the 1820s, contrasting it with the aristocratic police State. For Hans Kelsen, one of the most influential scholars of twentieth century legal positivism, the rule of law and the State were essentially synonymous. The extent to which the concept of

Rechtsstaat embodies both substantive aspects, such as the requirement that the State be based on reason, as well as formal requirements of legality, is a recurrent debate in the literature with the slide towards National Socialism providing a troubling political back drop. (Nazi Germany is the most prominent example of a State in which the rule of law was used for pernicious ends, but far from the only one). Apartheid South Africa was another such "wicked" legal system -a list to which some might add certain aspects of the U.S. legal response to the global war on terror.

Self-assessment Exercise

To what extent is Dicey's version of the rule of law of value today?

Guide

The rule of law as expounded by Dicey has significantly political thinking. Dicey advocated that government discretion should be limited by definite rules of law, that the same law could in general apply to government and citizen alike, in his view the common law made by independent courts with practical remedies provides a firmer foundation for individual rights. This has greatly influenced the thinking of the legal profession, but may be unsuited to the control of modern government. It is also difficult to reconcile the rule of law in this sense with the principle that Parliament has unlimited power that can be harnessed by a strong executive.

MODULE 2 **CONSTITUTIONAL FOUNDATIONS OF THE POWERS OF ADMINISTRATIVE AGENCIES**

UNIT 4 SEPARATION OF POWERS

Contents

4.1 Introduction

The idea of separation of powers, that is, differentiation between the three different functions of government is founded in the writings of Aristotle, but was elaborated in the 18th century through the writings of *Charles Louis de Secondat, Baron De Montesquieu.* The doctrine of separation of powers is the division of powers into three clear branches of the legislature, executive and the judiciary with the objective of separating each organ both in function and in membership, into independent organs in order to prevent abuse of powers. This doctrine is no doubt a common and essential feature of modern democratic states, not only governments with written constitution but also without a written

constitution, as we have seen in the case of Britain. This unit adopts a comparative mode by looking at the application of the doctrine in different civil and common law jurisdictions.

4.2 Intended Learning Objectives

It is intended that you will be able to discuss the following questions after going through the study outline, reading up your references and further readings:

i. The extent to which the three government functions are distinguishable;
ii. The extent to which the three functions are exercisable separately by the institutions of Parliament, the executive and the courts.

4.3.1 Separation of Powers

The theory of separation of powers was the main thrust of Baron Montesquieu's book, 'Spirit of the laws' which means that 'the spirit of the laws fertilizes the workings of the administration through the doctrine of the separation of powers'. The essence of the doctrine is that, in order to avoid abuse of powers, powers of government must be kept separate. The concerns against abuse of powers were echoed by other scholars. For instance, Louis Loeb & Daniel Mberman stated that "the accumulation of all powers, legislative, executive and judiciary in the same hands or body, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny."

Also, that "What is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary". **The Federalist, ed. Jacob E. Cooke (Middletown, Conn., 1961), p. 324. 2 p. 349.**

Separation of powers is found, in stronger or weaker form in many modern constitutions; it is opposed to the concentration of state power in a single person or group. Since that is a clear threat to democratic government. The need for a separation of power arises not only in political decision making but also in the legal system, where an independent judiciary is essential if the rule of law is to have any substance.

Baron de Montesquieu in *The Spirit of the Laws*
***(*transl T Nugent, Hafner Press, 1949)**

In every government, there are three sorts of powers: the legislative, the executive in respect to which things dependent on the law of nations and the executives in regard to matters that depend on the civil law.
By virtue of the first, the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have already been enacted. By the second, he makes peace or war, sends or receives embassies, establishes the public security and provides against invasions. By the third, he punishes criminals, or determines the disputes that arise between individuals. The latter we shall call the judiciary power, and the other simply, the executive power of the state.
When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty, because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.
Again, there is no liberty, if the judiciary be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be no end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.

O' Hood Phillips and P. Jackson. Constitutional and Administrative Law
(Sweet and Maxwell, 7th edition. 1987)

Montesquieu in L'Espirit des Lois following attempts by Aristotle and Locke, divided the powers of government into (i) the legislative power (ii) the executive power in matters pertaining to the law of nations, and, (iii) the power of judging, and so we get the first statement of the modern classification to which we are now accustomed, viz: (i) legislative, (ii) executive, and, (iii) judicial. ……..(i) the legislative function is the making of new law, and the alteration or repeal of existing law. Legislation is the formulation of law by the appropriate organ of the state, in such a manner that the actual words are themselves part of the law; the words not only contain the law, but in a sense they constitute the law.

O' Hood points out the function of the legislative as involving the enactment of general rules, determining the structure and the powers of public authorities and regulating the conduct of citizens and private organization.

(ii) The executive or administrative function is the general and detailed carrying on of government according to law, including the framing of policy and the choice of the manner in which the law may be made to render that policy possible…..(iii) The judicial function consists of the interpretation of the law and its application by rule or discretion to the facts of particular cases. This involves the ascertainment of facts in dispute according to the law of evidence.

However, it is agreed that a strict separation of the three functions and powers, with no overlapping or coordination, would bring government to a standstill. This point was reechoed Blackstone's commentaries (1765) which stated that *'in all tyrannical governments,……the right of making and of enforcing the laws is vested in one and the same man, or the same body of men, and wheresoever these two powers are united together, there can be no liberty'.*

Theories of separation of powers.

Ademola Taiwo, in Separation of powers, a key principle of democratic governance, 2nd edition. 2018 discusses the theories of separation of powers viz

The first school theorists argued that the doctrine of separation of powers metamorphosed from an eminent English Economist, Adam Smith's theory of division of labour, among the workers within an establishment, based on specialization or expertise and which paved the way for greater efficiency in government.

The second is the liberty school of thought which argue that the primary essence of separation of powers is to allow and sustain the fundamental rights of citizens. The preservation of rights and liberty is the actual reason for the establishment of separation of powers in government.

Speaking against the first school of thought, Earl Warren C.J in USA v. Brown 381 US 437, 443 [1965] stated that 'the United States of American Constitution was not instituted and cannot be amended with the notion to promote [government] efficiency and expertise'.

The liberty school is the more popular view and upon which most states practice the doctrine of separation of powers.

Different jurisdictions have reflected the doctrine of separation of powers in their system of governance. In the United Kingdom, new law is enacted when, usually on the proposal of the government, a Bill has been approved by Commons and Lords and has received the royal assent. Under the Parliament Acts of 1911, and 1949, however, legislation may be enacted even though it has been rejected by the House of Lords.

In India, the executive is part of the legislature. The President is the head of the executive and acts on the advice of the Council of Ministers. Articles 53 and 74 (1) He can be impeached by Parliament. Article 56 (1) (b) read with Art 61, Constitution. The Council of Ministers is collectively responsible to the Lok Sabha Article 75 (3) and each minister works during the pleasure of the President. Article 75 (2) If the Council of Ministers lose the confidence of the House, it has to resign. Functionally, the President's or the Governor's assent is required for all legislations. (Articles 111,200 and Art 368). The President or the Governor has power of making ordinances when both Houses of the legislature are not in session. (Articles 123 and 212). This is legislative power, and an ordinance has the same status as that of a law of the legislature. (**AK Roy v Union of India AIR 1982 SC 710)**

The President or the Governor has the power to grant pardon (Articles 72 and 161). The legislature performs judicial function while committing for contempt those who defy its orders or commit breach of privilege (Articles 105 (3) 194 (3) Thus, the executive is dependent on the legislature and while it performs some legislative functions such as subordinate it, also performs some executive functions such as those required for maintaining order in the house. There is, however, considerable institutional separation between the judiciary and the other organs of the government. (**See Art 50).** In State of Bihar v. Bihar Distillery Ltd., **(AIR 1997 SC 1511)** the Supreme Court has held that the

judiciary must recognize the fundamental nature and importance of the legislative process and must accord due regard and deference to it.

In Nigeria, though the constitution had not specifically pronounced the entrenchment of separation of powers to be a fundamental and inviolable principle, ss. 4-6 of the 1999 Constitution portray the document as such. The three sections, like the U.S Constitution, define the nature and extent of the three powers.

The legislative organ of government comprising of the National Assembly (Senate and representatives) and the State houses of assembly. is responsible for making, amending and ratifying government nominees.

The executive is the body responsible for the implementation, enforcement and administration of the laws made by the legislative arm of government. This arm is comprised of leaders of the government and those saddled with the responsibility of the day to day running of the State.

The judiciary as the third arm of government is the adjudicative arm of the government, responsible for the interpretation of the laws, settlement of disputes between individuals, individuals and state, and between two or more levels of government. As Deane J stated in *Polynchorich v. the Commonwealth [1991] 172 CLR 501*, that, without the judiciary with freedom to exercise such powers, the justice, liberty and the entire concept of the rule of law in a society will be in jeopardy.

4.3.2 Separation of Powers in Nigeria

Nigeria operated the parliamentary system of government till the military intervention in Nigeria and the doctrine of separation of power was adopted in the following instances.

- The exercise of judicial function was not rigidly restricted to the judiciary -. See the case of **Attorney-General Oyo State v. I.O. Adeyemi (Alafin of Oyo) (1982) 3 N.C.L.R. 846;**
- Where the legislature, or the executive by its actions which deprive the citizen of his constitutional rights, seek to oust the jurisdiction of the court to enquire into same; see the case of **Lakanmi & anor v. A.G (Western State) (1971) 1 U.I.L.R. 20**;
- The doctrine was enshrined in the 1979 constitution as held in the case of **Government of Kaduna State v. The House of Assembly, Kaduna State and the A.G, Kaduna State (1981) 2 N.C.L.R. 444**
- Though the constitution has not specifically pronounced the entrenchment of the doctrine to be fundamental and inviolable, ss.4, 5, 6 portray the document as such.
- The doctrine is also visible in local governments or municipal corporations in Nigeria. Local governments have two principal powers, legislative and executive. These powers were formerly exercised by the same body, the Local Government Council. Although policies and bye-laws were formulated and made by the councilors on the recommendations of various committees of the council and these were executed by the council officers (professionals/civil servants), this did not mean that there was a strict separation of powers.

  Consider such laws as Local Government (Basic Constitutional and Transitional Provisions) Decree, 1989 (hereinafter the 1989 Decree); Local Government (Basic Constitutional and Transitional Provisions) (Amendment) (No. 3) Decree, 1991

Self-Assessment Exercise

Compare and contrast the doctrine of separation of powers in U.S and Britain

4.4 Exceptions to the doctrine of separation of powers

The prerogative of mercy – see sections 175 and 212 1999 constitution.

Nolle prosequi – see R v. Comptroller of Patents; U.S v. Brokano (U.S. District Court, Southern District of Illinois 1945 60F; State v. Adekole Ako & ors (1980) R.S.L.R. 175; State v. Ilori & ors (1983) 2 S.C 155

4.5 Summary

The essence of the doctrine is that the responsibility for the three main functions of government, viz. the executive, legislative and judicial processes, should be divided between separate but dependent institutions so that no one of these can dominate or function effectively without the others. A strict separation of functions is probably impracticable. A separation of personnel is essential in respect of judicial functions but arguably less so in other cases. In all cases the notion of checks and balances is essential in order to maintain the rule of law.

The separation of powers in its several senses plays an important part in the Nigerian constitution. The doctrine provides the framework of our modern system where the three powers of government the legislature, the executive and the judiciary shared power, so that each countered the excesses of the others.

4.6 References/further reading,

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4.7 Possible Answers to Self-Assessment Exercises

Feature of separation under the US constitution

xv. President is not elected at the same time as the Congress. He does not have a seat in the Congress and is not directly answerable to it.

xvi. Neither the President nor members of his Cabinet sit or vote in Congress; they have no direct power of initiating bills or securing their passage through congress; consider however, the President's veto legislation by congress, which may be overridden by two-third votes in each house of congress.

xvii. President may nominate to key offices, including the justices of the Supreme Court, but the Senate must confirm these appointments and may refuse to do so. The prospect of impeachment was the immediate cause of President Nixon's resignation in 1974 following his complicity in the Watergate affair; 25 years later, President Clinton successfully defended the impeachment proceedings that were brought against him.

Even in the US constitution, there is no complete separation of powers between the executive, legislative and judicial functions.

Let us consider separation of powers under the judiciary in the US.

See **Chisholm v. Georgia**, 2 Dall. (U.S.) 419 (1793). dealing with the suability of states in federal courts, was overruled by the adoption of the Eleventh Amendment (1798); **Dred Scott v. Sanford, 19 How. (U.S.) 393 (1857)** was set aside by Section 1 of the Fourteenth Amendment (1868); and the **Pollock v. Farmers' Loan and Trust Co**., **157 U.S. 429, 158 U.S. 601 (1895).** which invalidated a federal income tax law, was overruled by the Sixteenth Amendment (1913).

Justice Reed in **Ex parte Levitt, 302 U.S. 633 (1937)**

Mississippi v. Johnson, 4 Wall. (U.S.) 475, 499 (1867).

Whether the president is subject to a direct order of a court is as yet an unsettled question. See Glendon A. Schubert, Jr., The Presidency in the Courts (Minneapolis, Minn., 1957): "It is accepted as a political and legal fact today that the President of the United States is

immune from prospective control by the judiciary. The principal reason for this is the president's power of direction over the Department of Justice and other national police agencies, and his position as commander-in-chief of the armed forces: therefore he cannot be forced to accept service of legal process" (p. 318).

In the now-famous case of the tapes, the special prosecutor (Mr. Jaworski) filed a motion for a *subpoena duces tecum* for the production of certain tapes relating to precisely defined conversations and meetings between the president and others, which had a bearing on a pending criminal action, and Judge Sirica issued the requested order. When a unanimous Supreme Court rejected the president's claim of executive privilege, **United States v. Nixon, 417 U.S. 683** (1974). 35 the president decided not to defy the subpoena and delivered the tapes. It is familiar history that this led quickly and directly to his resignation. The Supreme Court ruled in the tapes case that neither the doctrine of the separation of powers nor the generalized need for the confidentiality of high-level communications can sustain an absolute, unqualified presidential privilege of immunity under all circumstances, for, since the tapes were sought as evidence in a pending criminal case, any absolute executive privilege would plainly conflict with the function of the courts under the Constitution.

Another example of how the Court imposes restraint upon the president is reflected in cases dealing with the removal power of the president. In 1926, in the Myers case, the Court ruled that Congress could not constitutionally limit the power of the president to remove executive officials--in this instance a first-class post- master-whom he appoints, on the theory that otherwise he would not be able to carry out his constitutional mandate to see to it that the laws are faithfully executed.

The judiciary also acts, within the separation of powers concept, as a check upon the Congress, especially through the exercise of the power of judicial review. The very first case involving the invalidation of an act of Congress, **Marbury v. Madison1 Cr. (U.S.)**

137 (1803), had the effect of preventing Congress from expanding the original jurisdiction of the Supreme Court as stated in Article III of the Constitution.

There have been other decisions of the Supreme Court touching upon the internal structure of Congress, and the privileges and immunities of members of Congress. Two examples illustrate this point. Article I, Section 6 of the Constitution provides that with respect to members of Congress "for any speech or debate in either house they shall not be questioned in any other place." The scope of this immunity has often been construed by the Supreme Court. Thus, the Court has ruled that the immunity is not limited to words spoken in debate on the floor of either house, but, in the words of Chief Justice Warren, extends to "committee reports, resolutions, and the act of voting. …."

The Supreme Court has made it abundantly clear that the separation of powers concept requires Congress to do our legislating and forbids the president to make the laws. The same concept limits the judiciary to the function of adjudication. In the case of **Furman v. Georgia 408 U.S. 238 (1972.**

The British Model

It should be said that in the absence of a written constitution, there is no formal separation of powers in the United Kingdom. No Act of Parliament may be held unconstitutional on the ground that it seeks to confer powers in breach of the doctrine. The functions of legislature and executive are closely inter-related and ministers are members of both. Yet it is a feature of the peculiarly British concept of the separation of powers that Parliament, the executive and the courts each have their distinct and largely exclusive domain –

See the case of **R v. Home Secretary, exp. Fire Brigades Union (1995) 2 AC at 567** (Lord Mustill), the case concerned the 'separation of legislative functions between Parliament and the Home Secretary.'

Consider the effect of British membership of the European Union – that the effect is that the Community now exercises legislative, executive and judicial powers in respect of the United Kingdom.

MODULE 3

UNIT 1 THE NATURE OF ADMINISTRATIVE AGENCIES

1.1 Introduction

"Administrative agencies are just like legislatures and courts - except when they're not". This cache phrase best explains how and what the operation of administrative agency looks like. It has been described as amebic, having no particular shape, but spreading its tentacles in the various forms and exercise of governmental powers. It has been described as the fourth arm of government power, so necessary, yet exercising such wide and wild powers. The aim of this unit is to examine the nature of the powers of administrative agencies.

Administrative agencies, generally are extensions of the Executive and as such fundamentally concerned with administration of affairs of the state as may devolved on them from the executive arm and so are ordinarily not empowered to make law. However, with the emergence of the regulatory state demanded regulators to have modes of action that permit regulatory policies to be implemented. These traditional roles are rulemaking and adjudication. When administrative agencies promulgate legislative rules providing binding legal norms that govern nearly everything ranging from the quality of the air we breathe to the safety of the products we buy.

1.2 Intended Learning Outcome

If you read up this unit, with the additional reading materials, you should be able to:

i. Analyse the impact and operation of administrative law from policy perspectives and identify and explain government accountability for the exercise of public power;

ii. Reflect on their abilities to effectively undertake work as an administrative decision maker, or to challenge administrative decisions.

iii. Have a meaningful conception of how administrative agencies operate.

iv. Discuss and examine the structure, procedure, and the operation of the administrative agencies to ascertain the points of similarity and difference, particularly in comparison or contrast to the courts and the other branches of government.

1.3 **Nature of Administrative agencies**

You have learnt in previous units that agencies were created as a practical response to the limits on what legislatures and courts could effectively do, both because of time constraints and legislators' lack of expertise in many areas of administrative regulation. You also learnt that agency powers can be classified according to functionality. The realization that agencies supplement the work of legislatures and courts enables students to analogize rulemaking to legislating and adjudication to judicial decision making, thereby creating a starting place in understanding the administrative process.

However, by the opening statement in the introduction that *"Administrative agencies are just like legislatures and courts - except when they're not"* shows that there are significant differences. The activities of administrative agencies fall into two broad categories: rulemaking and adjudication. We shall discuss the first which is the rulemaking, also described as "quasi-legislative" because the product is a rule that generally looks and acts like legislation. We shall be discussing this in the light of developed jurisdictions such as the United States APA, and other jurisdictions. Agency action is also quasi-judicial and executive in nature. Administrative agencies, within their respective spheres, decide individual cases involving the application of statutes and regulations in a judicial or quasi-judicial manner.

In understanding the nature of administrative agencies, the classical statement of Congressman Oren Harris, the distinguished Chairman of the House Commerce Committee, is apt for our discussion that:

"These [regulatory] agencies were created by the Congress in discharging Congress' constitutional responsibilities with regard to the regulation of interstate and foreign commerce. Congress delegated to these agencies some of its legislative responsibilities to be carried out under broad mandates set forth in the enabling acts creating these agencies. Therefore, Congress traditionally has considered these agencies arms of the Congress.

Congress expected these agencies to be independent of the executive branch, except for limited purposes such as budgetary controls, for example, and the general supervision of agency personnel by the President to see, as the Constitution requires, that the laws enacted by the Congress be executed faithfully.

With respect to policy development and execution, however, in the areas under their jurisdiction, Congress sought to avoid executive control, whether such policies were to be developed through rule-making or on a case-by-case basis.

In establishing these agencies, Congress approached its task pragmatically. The enabling acts creating these agencies intermingle legislative, judicial and executive functions. In proceeding in this manner, Congress hoped to accomplish several objectives: (1) to provide expertness in the particular areas to be regulated; (2) to expedite the handling of anticipated large workloads by being able to give undivided attention; (3) to be vigorous in enforcing the policies laid down in the enabling statutes; (4) to evolve more specific yardsticks in applying broad congression policies; and (5) to assist the Congress in shaping new and effective policies to meet the changing conditions and new needs. In other words Congress deliberately charged the regulatory agencies with legislative, executive, and judicial responsibilities.

Address by Congressman Oren Harris, to U.S. Chamber of Commerce, Washington, D.C., Feb. 4, 1965 (mimeo)

The conventional field of administrative law is the study of procedure before the agencies and on review of agency action.

1.3.1 Administrative agency as legislature.

Traditionally, the making of general rules has been the primary function of the legislature, and the application of the rules by giving specific orders to named individuals has been the job of the courts. Under the Nigerian legal system, the two functions have been constitutionally separated and entrusted to separate branches of government. Section 4 of the 1999 Constitution.

However, the legislature, at times, do delegate some of its power of legislation to other persons or bodies for administrative convenience. For smooth running of governance, administration must involve a great deal of general law-making and it would appear that a blend of both legislation and administration is the answer to contemporary problems. See the case of ***Doherty v. Balewa*** **(1961) All N.L.R 604**.

The agencies set out rules concerning its own operations; the terms of grants and other payments to state and local governments and to private entities; rules that impose obligations and confer benefits on business firms, organizations, and individuals in their private capacities, independently of any contractual employment, or beneficiary relationship they may have with the government. The agencies operate programs for adjudicating disputes under these rules - the domain customarily described as "government regulation."

Administrative rulemaking has been defined as "the process used by an administrative agency to formulate, amend or repeal a rule or regulation". Administrative legislation or subsidiary legislation denotes the making of rules by somebody not ordinarily empowered to, but is delegated such power by another who is authorized by law to make law.

A regulation constitutes a source of law issued by an administrative body to which a statute (commonly its organic statute) has committed a rulemaking power in order to implement statutory law. According to the second meaning, a regulation is the product of the exercise of rulemaking power. Regulations are instruments of regulatory policy. *Elizabeth M. Magill, Agency Choice of Policymaking Tools, 71 U. CHI. L. REV. 1383, 13861390 (2004)*

A rule is defined under the APA as "the whole or a part of an agency statement of general or particular applicability and future effect." 5 U.S.C. §551(4).

A rule could be general or specific in which case, affecting only a portion of people e.g employees, or employers. Once a rule is in place, it must be obeyed unless a court overturns it or the agency revokes it. Thus, for example, observance of specified period of time on

issuance of a rule setting a speed limit of 35 miles per hour in certain locations, a driver must follow that rule just as if it were enacted by Congress.

Agencies that it creates are also limited to those subjects. In practice, agencies will have even more limited missions, some confined to a single industry (such as airlines or nuclear power plants), while others have a broader reach (such as the environment or occupational safety), although with more limited mandate.

Under the Constitution, a law is enacted by a process in which elected members of the House of Representatives and the Senate agree on the text of a bill and either the president signs it or both Houses override a presidential veto by a two-third. In Nigeria, a law is made.

The action of administrative agencies is regulatory and essentially legislative because it creates standards where none exist. Generally, the law specifies standards that are capable of application with only marginal interpretation. For example, tax laws, traffic laws, negotiable instrument practice, real estate tenure laws, and other similar bodies of laws consist of general rules which specify rather definite principles. Administrative agencies are established in fields where it is too difficult to state a practical general rule, and hence the standards specified by legislation are put in extremely vague and general terms such as "public interest" or "unfair practice." As Nwosu stated, “administrative legislation has over time met its primary purpose of filling in details of statutory scheme and of making rules and regulations for specific areas or subject matters that the legislature feels will be better handled or legislated upon by those knowledgeable in the area or subject-matter.”

Having examined the scope of administrative rule making, the question then is, are there differences? The most striking difference between agency rulemaking and congressional legislation is in the procedural requirement for rule making between congress and administrative rulemaking procedures. For instance, the APA, in 5 U.S.C. § 553, imposes significant procedural requirements on agencies issuing rules and, unlike comparable procedural rules of Congress, courts enforce them. Section 553(a) requires agencies to

publish a notice of proposed rulemaking in the Federal Register and allow for written public comment on the proposed rule, which is normally at least thirty days, and often considerably longer.

The notice must include the proposed rule, along with a statement of basis and purpose. Section 553 requires agencies to identify in the notice the principal factual bases for the proposed rule, which often is done through a public file (paper or now, more likely, electronic) that contains the key documents and, subsequently, the comments submitted in response to the notice. Once the agency has evaluated the comments, it may issue a final rule that must have an accompanying statement describing the changes made in response to public comments, identifying the main issues raised by the comments, and explaining why it did not adopt the principal alternatives by those who suggested changes. If the agency makes changes that could not have been reasonably anticipated by the notice, the agency must provide the public an opportunity to comment on those changes through a supplementary proceeding. The rule cannot be effective sooner than thirty days after its publication. However, these procedural requirements can be avoided if an agency finds "good cause" for dispensing with them and "incorporates the finding and a brief statement of reasons therefor in the rules issued" on the ground that compliance would be “impracticable, unnecessary, or contrary to the public interest.” 5 U.S.C. 66 553ieì. 555ieì. and 706Í1).

Self-Assessment Exercise

Why should rulemaking section contain notice and comment on procedural requirements, enforceable by the courts?

1.3.2 Dissimilarities between congressional and administrative rulemaking

Congress does not have to explain what it is doing or why it is doing it, either in advance or as part of the final product. Nor does it have to justify in any respect why it chose one alternative over another. Similarly, there is no requirement that Congress make available its evidence for public comment, or in most cases, that it even has evidence to sustain a

law, including a law that imposes burdens (or gives benefits) to one party and not another. The lawyers defending the statute can offer any reasons they can create to persuade the court that the decision was rational. Vance v. Bradley, 440 U.S. 93, 109 (19

By contrast, if an agency issued a rule without an explanation, that would violate §553(b). If it tried to defend a rule in court on a ground on which it did not rely when it issued the rule, the courts would require at least a remand if not outright reversal, even though a court of appeals could properly affirm a district court decision on a different ground than the one the court relied on below. SEC v. Chenery Corp., 318 U.S. 80, 88.

The advantages of rulemaking are vividly epitomized in National Petroleum Refiners Association v. FTC 157 U.S. App. D.C. 83, 482 F.2d 672 (1973),

"[T]here is little question that the availability of substantive rulemaking gives any agency an invaluable resource-saving flexibility in carrying out its task of regulating parties subject to its statutory mandate. More than merely expediting the agency's job, use of substantive rule-making is increasingly felt to yield significant benefits to those the agency regulates. Increasingly, courts are recognizing that use of rule-making to make innovations in agency policy may actually be fairer to regulated parties than total reliance on case-by-case adjudication."

One of the central premises of the rulemaking process is that agencies will be receptive to public comments and make appropriate changes; otherwise, the process would be a farce. But to make a change, an agency head must be open to change which, in turn, logically means that the official has not irrevocably made up her mind on the desirability and contents of a proposed rule.

A final requirement imposed on agencies is that they act consistently. They are not forbidden from changing their minds, but if they do so, they must explain why - or at least how they reconcile the disparate treatment of similar.

1.4 Agencies as Adjudicators

The basic dissimilarity between judicial and administrative power in the common-law world was underlined by the well-known attempt by the British Committee on Ministers' Powers to distinguish between "judicial" and "administrative" decisions. A judicial decision was said by the Committee to presuppose an existing dispute between two or more parties and to involve four requisites: (1) the presentation of their case by the parties to the dispute; (2) the ascertainment of questions of fact by means of evidence adduced by the parties; (3) the submission of legal argument on questions of law; and (4) a decision that disposes of the whole matter by a finding upon the facts in dispute and an application of the law of the land to the facts so found.'

> *An administrative decision is something entirely different. Indeed, asserted the Committee, the very word "decision" has a different meaning in the one sphere of activity than in the other.*
> *In the case of the administrative decision, there is no legal obligation upon the person charged with the duty of reaching the decision to consider and weigh submissions and arguments, or to collate any evidence, or to solve any issue. The grounds upon which he acts, and the means which he takes to inform himself before acting, are left entirely to his discretion.*

COMMITTEE ON MINISTERS' POWERS, REPORT, CMD. PAPER 4060, at 73 (1932).

Administrative adjudication refers to the process used by administrative agencies to issue regulations through adversary proceedings. Under the APA, any agency action that is not a rulemaking is an adjudication, Under § 551(7), "adjudication means agency process for the formulation of an order," and under § 551(6) an "order means the whole or a part of a final disposition ... of an agency in a matter other than rule making, but including licensing." Thus, unless the final product of an agency action is a rule, it must be an order, which is the product of an adjudication.

Adjudications sound like court cases in an agency setting, and in some cases, they resemble what goes on in a courtroom. If the statute requires that the proceedings be held on the record, they are "formal adjudications," governed by §§ 554, 556 and 557, which are more like court cases. But there are other forms of adjudications under the APA

(because they are not rulemakings) that look much less like court cases and in some instances do not resemble court adjudication. In Nigeria, the system of administrative adjudication is basically made up of the administrative tribunals and panels of inquiry usually referred to in Nigeria as Commissions of Inquiry.

Although there are no specific procedures for informal adjudications, some statutes specific to certain substantive laws do contain other procedural requirements.

Because agency adjudications are similar to court adjudications, contrasting court cases with legislation may help illuminate the nature of agency adjudications. Legislation is generally prospective only, prescribing consequences for conduct that will take place in the future.

Agency rules are forward-looking, like legislation, while many agency adjudications are, like court adjudications, backward looking, in that they focus on prior conduct, often involve disputed issues of fact, and impose consequences based on that conduct.

More typically, agencies will issue orders that resemble court-issued injunctions, though they may be called something else, such as "cease and desist orders".

1.4.1 Formal Adjudications

While many agencies implement laws that contain criminal penalties, the agency law enforcement proceedings carried out through formal adjudication are civil. Most adjudications involve a request for some form of injunctive relief, which can have far more significant consequences for a business than a fine of a few thousand dollars. For instance, the Securities and Exchange Commission (SEC) can prevent an individual from continuing in the investment business or conclude that a company's financial statements are false and misleading, thereby guaranteeing stockholder suits.

Formal adjudications are the most judicial-like of agency proceedings, but there are a number of significant differences –

Many agencies have the authority to carry out their missions either by issuing rules or by bringing individual cases in an administrative forum. If, however, all of those cases had to go to court, it would change the nature of the choices that administrators have and reduce their flexibility in deciding the best way to resolve a policy issue. There may be other reasons for placing certain kinds of adjudications in agencies rather than courts, but these will suffice to understand the general point.

There are two readily apparent differences between court and agency adjudications: The judges are different, and there is never a jury in an agency proceeding. Second, agencies develop an expertise in their subject areas that allow them to operate more efficiently and consistently because they handle those cases on a regular basis.

1.4.2 Informal and Semi-Formal Adjudications

If a proceeding is not intended to produce a rule, and if the agency is not required to have on the record hearing, then the proceeding is considered an informal adjudication, as that is all that remains of the administrative universe under the APA. As the catch-all, informal adjudications include a wide range of agency decisions, some on very complex and very important matters, and others on relatively simple issues that have modest consequences. However, unlike formal proceedings or informal rulemakings, there are no specific procedural requirements that agencies must follow when engaging in informal adjudication.

Self-assessment Exercise

"Administrative agencies are just like legislatures and courts - except when they're not'.
Is there a reason for those differences?

Structure of administrative agencies

- all of the major administrative agencies are similar. They have collegiate heads and policy makers;

- Another structural characteristic of the administrative agencies is that in each one each commissioner has his own individual staff which is answerable to him alone. By this means each commissioner is given some degree of independence from complete reliance upon the institutional staff;
- The President, of course, appoints the members of the agencies, designates the chairman, and approves the annual budgets. The Congress approves the appointment of members, appropriates funds requested in the budgets, establishes the jurisdiction of the agencies, prescribes the general governing principles by the respective statutes, and exercises a general supervisory power by means of investigations and hearings before committees;
- The courts review agency action in order to ensure compliance with constitutional and statutory principles but do not have authority to supervise the exercise of agency discretion or to substitute their own judgment on policy matters.

1.5 SUMMARY

There are other differences between legislatures enacting laws and agencies issuing rules, but they generally follow the same pattern. While there is a basic similarity in the two processes, there are additional requirements imposed on agencies that largely can be explained by the fact that various checks that control the legislative process are absent from rulemaking. These requirements thus fill a void in the system of checks and balances, but while they do not replicate the legislative process, they do produce a rough approximation of it.

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1.7 Possible Answers to Self-Assessment Exercises

Why should rulemaking section contain notice and comment on procedural requirements, enforceable by the courts?

Guide

The answer is that the legislative process contains a built-in check that is designed to accomplish the same ends, but through different means: A bill must pass both Houses of Congress and be signed by the president before it can become a law. Requiring the concurrence of all three, at least in theory, prevents rash decision making, provides alternative sources of information and viewpoints, and creates several avenues for public input on pending legislation. Because the three components that must approve a bill are elected by different means and with different, though partially overlapping, constituencies, the legislative process provide a check that is largely political rather than procedural. Because there are three components required for adopting any law, the opportunity for public input and democratic participation by interested persons is increased, albeit not guaranteed. And if the pressure from outside becomes significant, the same process that produced a law can amend or repeal it, with no required procedures to slow down the process.

By contrast, when Congress legislates, it is not required to provide public notice of what it is going to do and why, or provide any opportunity for public input of any kind, although it often provides both. With no requirement that it tell anyone what it is doing or why, or give interested persons a right to tell it why it should not do what it is about to do, Congress can change its mind on any part of a bill that has been introduced, at any time, for any reason or no reason at all. New matters can be included when the two Houses meet to

reconcile their differences in a bill, and provisions that have been part of a bill in both Houses can suddenly vanish, with no procedural check whatsoever. Bills can also provide that they are effective upon enactment (typically when signed by the president), and the Supreme Court even has allowed some substantive laws to have limited retroactive.

MODULE 3

UNIT 2 CLASSIFICATION OF ADMINISTRATIVE POWERS II

Contents

2.1 Introduction

Administrative powers can be classified via administrative functions into legislative, executive and judiciary. This is because the legal consequences attached to an administrative act often depend on the type of function being performed. Thus, the weight attached to one administrative power may not be the same as that attached to another administrative power. This unit is sequel to the previous by looking at another dimension of classification the goal of which is to fully understand the administrative powers, issues and debates emanating from all these aspects.

2.2 Intended Learning Outcome

The learning objectives are as follows:

i. Discuss the classification of administrative powers along function
ii. To know the significance of classification.

2.3 Classification of administrative powers

Confusion has generally arisen especially as different classifications have been conferred with different meanings. Also, the courts have contributed to this confusion by their attributing inconsistent meanings to the functions and it is often difficult to say why a particular function has been classified in a particular way. The various attempts at definitions often lead to more confusion. In its 1932 Report, the British Committee on Ministers' powers (reported in 1932, cmd 4060,20,73,81 the committee attempted defining and distinguishing these powers as follows:

1.3.1 Legislative Powers

Legislation is the process of formulating a general rule of conduct, without reference to particular cases, and usually operating in the future. Simply put, this is the power to make laws. However, in contemporary times, the scope of legislative powers goes beyond mere law-making functions. It includes the power to amend and repeal laws, state creation, checks and balances functions, budget approval and monitoring, ratification of foreign treaties, approval of appointments etc.

2.3.2 Executive Powers

Execution is the process of performing particular acts, of issuing particular orders, or (as usually) of making decisions which apply general rules to particular cases.

In Nigeria, executive power is vested in the President at the Federal level and governor at the state level and Local government Chairmen at the Local government level – see section 5 of the 1999 Constitution.

Administrative agencies are almost always agents of the executive (however there are some independent agencies), but they also exercise other forms of governmental power, which include rule making powers, policy making powers, and some measure of adjudicatory powers. However, the bulk of the powers of administrative agencies are executive powers. This extends to law enforcement, investigative and prosecutorial powers, apprehension of offenders etc.

2.3.3 Judicial Powers

A true judicial decision presupposes an existing dispute between two or more parties and then involves four prerequisites: the presentation (not necessarily orally) of their case by the parties; the ascertainment of any disputed facts by evidence adduced by the parties, often with the assistance of argument on that evidence; the submission of argument on any disputed question of law; a decision which disposes of the whole matter by a finding upon disputed facts and an application of the law to the facts so found, including where required a ruling upon any disputed question of law.

2.3.4 Quasi-Judicial Powers

A quasi-judicial decision equally presupposes an existing dispute between two or more parties and involves:

(1) the presentation (not necessarily orally) of their case by the parties;

(2) the ascertainment of any disputed facts by evidence adduced by the parties, often with the assistance of argument on that evidence, but does not necessarily involve submission

or argument on any disputed question of law; and never involves decision which disposes of the whole matter by a finding upon disputed facts and an application of the law of the land to the facts so found, including where required a ruling upon any disputed question of law. This aspect is in fact taken over on administrative action, the character of which is determined by the minister's free choice.

As a general rule, only courts of law have the authority to decide controversies that affect individual rights. One major exception to this general rule is the power of an Administrative Agency to make decisions concerning the rights of parties. Part of the regulatory power given to an administrative agency is the power of adjudication. Under the Administrative Procedure Act 60 Stat. 237 [5 U.S.C.A. § 551 et seq]), an agency engages in adjudication when it follows a process for the formulation of an order. With the exception of rulemaking, any decision by an agency that has a legal effect is a quasi-judicial action.
Quasi-judicial activity is limited to the issues that concern the particular administrative agency. For example, the ***SOCIAL SECURITY ADMINISTRATION*** may resolve disputes on issues concerning Social Security contributions and benefits, but it may not decide any other issues, even those related to Social Security benefits such as tax, estate, and probate questions.

An administrative agency must hold a formal hearing only when required by statute. As a general rule, the scope of a hearing depends on the importance of the right at issue. If the Internal Revenue Service attempts to take away a person's homestead, for example, a full hearing would be required. By contrast, when an agent of the Department of Safety issues a small fine for illegal parking, the agency needs to provide only a brief, one-to-one meeting with a hearing officer regarding the issuance of the fine.

Quasi-judicial action by an administrative agency may be appealed to a court of law. With a few exceptions, a Claimant generally must exhaust all remedies available through an agency before appealing the agency's decision in a case. One notable exception is that a person may appeal directly to a court of law and bypass the quasi-judicial activity of an

administrative agency if the agency's remedies would be inadequate. For instance, if the creditors of a failed bank are suing the Federal Savings and Loan Insurance Corporation, they need not go through the agencies hearings before filing suit in a court of law because the agency has adverse interests to the creditors.

Self-Assessment Exercise

Differentiate between judicial functions exercised by the judiciary and quasi-judicial functions exercised by administrative agencies.

2.3.5 Ministerial Act is a Government action "performed according to legal authority, established procedures or instructions from a superior, without exercising any individual judgment." It can be any act a functionary or bureaucrat performs in a prescribed manner, without exercising any individual judgment or discretion under law; this would be classified under the rubrics of public policy. A Minister in this context is a person at the head of a ministry or department of state and a member of the cabinet. Examples of ministerial acts include:

- the entry of an order of the court by clerk of the court
- notarization (acknowledgement) by a notary public
- mechanical processing of an income tax return
- determining the existence of facts and applying them as required by law, without any discretion
- issuance of a building permit
- approval of a subdivision real estate
- approval of a demolition permit
- a court's remand for "the correction of language in a judgment or the entry of a judgment in accordance with a mandate"

Actions that are not ministerial would include:

- a decision about application of a tax law, auditing of an income tax return, determining facts and applying law to those facts, and prioritizing such returns

If a ministerial act is not performed, then a court may issue a writ of mandamus to compel the public official to perform said act. Absolute or sovereign immunity does not apply to the performance or non-performance of ministerial acts.
See Bogan v. Scott-Harris, 523 U.S. 44 (1998).

According to Benjamin and Whitmore, the distinction between judicial and quasi-judicial powers on the one hand and administrative powers on the other hand rests mainly on the asserted lack of dispute and hearing procedures in the latter case ; it says nothing as to the nature of the act to be performed. It is surely clear almost every governmental decision affecting members of the public is capable of producing a dispute even though it may be a dispute between the government itself and the member of the public who is affected. The presence or absence of a hearing procedure will usually depend on the particular legislation involved.

See the holding of the court in **A.G. Lagos State v. Eko Hotels Ltd** (2008) All FWLR (Pt. 398) 235, where the Court stated thus *"By the way, it is not now anachronistic for one to continue to propound the dichotomy between judicial/quasi-judicial and administrative or executive bodies for the purposes of judicial review particularly when all such bodies are now required to observe the rules of natural justice in their discharge of their duties"* and cited Ridge v Baldwin(1964) AC 40 in support .

However, though we could easily understand the classification of legislative power vis-à-vis executive power, our declared understanding could become unfounded. Thus, a power that appears to be executive may turn out to be legislative.

According to Professor Griffith and Street:

> "But the distinction between legislative, judicial and administrative action is often difficult to draw … A statute may empower a Minister to delegate part of his function to some other authority. When he delegates he may impose certain conditions. Is the laying down of these instructions a legislative act? Legislation is

often distinguished from administration on the ground that there is an element of generality about rules; they apply at least to a group of persons, whereas administration is particular in its application. But this does not result in a clear distinction, since it is not always possible to separate what is general from what is particular or specific. So the judicial function merges into the legislative and the legislative into the administrative".

In the U.S. it is recognized that no real distinction can be drawn between judicial, quasi-judicial and administrative powers because constitutional requirements of due process will convert administrative power into adjudicative powers by requiring, inter-alia, the giving of a fair hearing.

Impact of the classification of administrative powers

Legal significance for the classification of administrative powers

It can be deduced from the foregoing that the hinge of the classification of administrative powers into various categories exists more in theoretical conception than in actual operations of administrative agencies. Nonetheless it is important to classify administrative functions for the following reasons

2.4.1The right to fair hearing and Rule against interest and Bias

When an administrative authority's power is classified as judicial or quasi-judicial, the administrative agency is obligated to observe the rules of natural justice. See **Fawehinmi v. Legal Practitioner's Disciplinary Committee (1982) 3 N.C.C. 719**. Conversely, if a power is classified as legislative, executive or administrative, the rules of natural justice do not apply. Note that the non-applicability of the rules of natural justice to legislative, executive or administrative acts does not imply that the donee of power is at liberty to act purely to suit his whims and caprice.

2.4.2 Prerogative Remedies

Prerogative orders of prohibition and /or certiorari are normally available to quash an administrative action classified as judicial or quasi-judicial. However, in the case of legislative, executives or administrative act an order of mandamus may lie to compel performance of a public duty. See **Banjo & Ors. v. Abeokuta Urban District Council (1965) NMLR 296**

Note also that the Fundamental Human Rights (Enforcement Procedure) Rules 2009 have liberalized the processes of prerogative remedies. Formerly, this issue of the correct remedy in administrative law was a major form of dissatisfaction and this led to considerable miscarriage of justice. Issues were settled on the nature of the remedy chosen by the plaintiff rather than the substance of his cause. Major reforms carried out and the introduction of application of Judicial Review has considerably ameliorated the situation. This has also been the method of choosing remedies introduced by the Fundamental Rights (Enforcement Procedure) Rules of 2009. The combined effect of these is to make the choice of remedies more flexible and easier for the plaintiff.

2.4.3 Duty to Give Notice

Where a power is legislative or administrative, there is no requirement to give notice as a general rule except a statute provides that notice be given to persons likely to be affected or that they be consulted. However where a power is judicial or quasi-judicial then notice must be given to the person to be affected, otherwise the decision or action thereon, may be set aside for failure to observe the rules of natural justice.

2.4.4 Sub-delegation

The general rule is *delegatus non potest delegare*, which means that a person to whom power has been delegated cannot sub-delegate. Executive or Ministerial or administrative authorities can sub-delegate without express or implied power to do so. But where the said power is legislative, judicial or quasi- judicial it cannot be sub-delegated.

2.4.5 Ultra Vires

Where a power is legislative, an exercise of it may not be set aside by court on ground of been unreasonable, arbitrary, or ultra vires except for the instances it breaches the constitution or other statute. However, where a power is administrative or executive, it will be set aside as ultra-vires on ground of unreasonableness, arbitrariness, mala fide etc. See Unilorin v. Adesina (2009) 25 WRN 97.

2.5 Summary

This unit has shown that an understanding of classification of administrative functions is very essential for two principal reasons. First, the making and passing of delegated legislation is a fundamental aspect of our constitutional arrangements. Secondly, a decision may be subject of an administrative law challenge in the courts. It is therefore essential to know the considerations and the implications of the functions of the agency.

2.6 References/Further reading/Web Resources

Benjafield & Whitemore (Administrative Law Treaties)

(Coit Indep. Joint Venture v. FSLIC, 489 U.S. 561, 109 S. Ct. 1361, 10 Mashaw, Jerry L., Richard A. Merrill, and Peter M. Shane. 1992. Administrative Law: The American Public Law System; Cases and Materials. 3d ed. St. Paul, Minn.: West 3

2.7 Possible Answers to Self-Assessment Exercise

Self-Assessment Question

Differentiate between judicial functions exercised by the judiciary and quasi-judicial functions exercised by administrative agencies.

Answer:

Judicial functions exercised by the judiciary and administrative agencies are quite similar. In conducting a case, the trial court conducts a hearing beginning with oral hearing, direct evidence and considers documentary evidence. The trial court weighs all the evidences and takes a decision based on the evidences before it.

In quasi judicial functions, they are in effect applying the facts to the law just like a court. The exercise of this powers affect individual rights and benefits.

MODULE 3

Unit 1 The Nature of Administrative Agencies
Unit 2 Classification of administrative agencies II
Unit 3 Rule making procedure
Unit 4 Rule making procedure in other jurisdictions.

UNIT 3 RULE MAKING PROCEDURE

Contents

3.1 Introduction

Rule-making, sometimes referred to as "administrative legislation," have become primary consideration in the study of administrative law. This function performed by administrative agencies has become more fashionable as an important technique by which agencies are empowered to implement statutes and attention has focused increasingly on the procedures required for rule-making. That is, in enacting an agency-empowering statute, the General Assembly often directs the agency to adopt rules for particular purposes.

Administrative rulemaking procedure refers to the formal path, established in legislation, which an administrative action should follow. Usually, an administrative action has to be carried out through a number of steps, which should be known in advance. A pre-established decision-making procedure is essential to any complex organizations if their activities have to be controlled internally and externally, which is particularly crucial if the organization deals with public interests. At the same time, the procedure has to guarantee the rights of those dealing with the administration.

3.2 Intended learning outcome

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

i. Define rulemaking;
ii. Discuss the criticism against administrative legislation;
iii. Succinctly discuss the administrative rulemaking procedure

3.3 Rule making procedure

What is a 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

The most obvious definition of rule-making and the one most often employed in the literature of administrative law asserts simply that it is the function of laying down general regulations as distinguished from orders that apply to named persons or to specific situations. ***16 I COMMITTEE ON MINISTERS' POWERS (Report) (1932) 20; CARR, DELE GATED LEGISLATION (1921) 46****; WILLIS, THE PARLIAMENTARY POWERS OF ENGLISH GOVERNMENT DEPARTMENTS (1933) 49.*

Paul defines rulemaking as the exercise of legal authority that has been delegated by the legislature to an agency. Administrative rules "fill in the blanks" of legislative statutes and,

like the statutes themselves, carry the force of law. Neal D. Woods Source: Public Administration Review May - Jun., 2009, Vol. 69, No. 3 (May - Jun., 2009), pp. 518-53
S. 551(4) of the Administrative Procedure Act defines rule in an the agency process for formulating policies, regulation or orders.
The Administrative Procedure Act of 1946 defines a rule as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy."
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.
Administrative rulemaking is, thus, the process/procedure involved in the making of administrative rules by administrative agencies in particular and of the executive branch of the government in general.

3.3.1 What is the rulemaking process?

After Congressional bills become laws, federal agencies are responsible for putting those laws into actions through regulations. This process may include the following steps:

1. An agency initiates a rulemaking activity, and adds an entry to its Regulatory Agenda
2. A rule or other document is published to Regulations.gov
3. The public is given the opportunity to comment on this rule for a specified timeframe
4. Final Rules can be accessed on Regulations.

<u>What is the purpose of the rulemaking process?</u>

The rulemaking process is generally designed to ensure that:

• the public is informed of proposed rules before they take effect;
• the public can comment on the proposed rules and provide additional data to the agency;

• the public can access the rulemaking record and analyze data and analysis behind a proposed rule;
• the agency analyzes and responds to the public's comments;
• the agency creates a permanent record of its analysis and the process;
• the agency's actions can be reviewed by a judge or others to ensure the correct procedure was followed.

3.3.2 The Bases of Rule-Making Procedure

The aspects of rule-making which determine the significant categories for procedural purposes are as follows: (i) the character of the parties affected; (2) the nature of the problems to be dealt with; (3) the character of the administrative determination; (4) the types of administrative agencies exercising the rule-making function; and (5) the character of enforcement which attaches to the resulting regulations.

The character of the parties affected by administrative regulations varies widely, even when only those regulations that bear upon private interests are considered. It varies not only with the number and identifiability of the parties which has obvious bearing on the practicability of adequate notice and full hearing to all.

The nature of the problems to be dealt with in administrative regulations affects procedure in evident ways. Thus in matters of governmental routine, even where private interests are affected, as they are, for example, by the hours during which public offices are open for business and by the forms prescribed for tax returns.

The character of the administrative determination which an authority is called upon to make, having regard to the mental processes involved, has an important effect upon the suitable procedure. Some degree of discretion, involving a choice either of the ends to be served or of the means to be employed in attaining defined ends, usually is involved in rule-making. Regulations for the routine operations of a public office, for example, involve at least an appraisal of the factors that bear upon efficiency; and the administrator who is

responsible for the regulations must frame them to serve the prescribed end of effective conduct of his office.

The character of the enforcement which attaches to a regulation also has a bearing upon the procedure which is best adapted to its formulation. If the regulation is subject to challenge in all of its aspects after its promulgation, the need of advance formalities is reduced or eliminated. If it binds the affected parties only by requiring them to comply with certain procedures in matters subsequently arising - as, for example, in future applications for licenses - it is not likely to be sufficiently weighty in its effects to warrant advance hearings or consultations in regard to its content; *United States v. Baltimore & O. R. R., 293 U. S. 454 (1935); Morgan v. United States, 304 U. S. 1*. (1938) The parliamentary law which controls legislative proceedings is designed to secure fair discussion, adequate deliberation, and efficiency in the disposition of matters coming before legislative assemblies and not at all to accord procedural rights to outside individuals and groups.

3.3.3 Principles of Administrative Legislation

As has been discussed earlier, administrative rules are made outside the proper lawmaking body; i.e. the legislative organ of the government. Unlike the ordinary laws or parliamentary enactments, they may not be required to meet the requirements of legislative procedures.

According to Hewart, unless the powers of the state are exercised according to law, it will ultimately lead to administrative despotism. For this reason, certain principles have been developed and put in practice so that administrative rules may not encroach upon individual rights and freedoms.

These schemes of protection and control against discretion and abuse are the principles of notice, public participation, publication, and control.

3.3.3.1 Notice

Notice is the first and one of the most important principles of administrative rulemaking. In some jurisdictions, it is known as *Antecedent Publicity*. It is required that the administrative rules must be first published in a draft form to give an opportunity to the people to have their say in the rulemaking.

See for instance Section 4 of the American Administrative Procedure Act of 1946 requires general notice of the proposed rule/s to be published in the federal register.

See also Britain Rules of Publication Act of 1893. Section 1 of this Act, public notice of proposals to make statutory rules was given, and the department concerned has to consider suggestions made by interested bodies, which were thus made aware of the proposed rules of which they otherwise might not have known.

3.3.3.2 Public Participation

An important scheme of check and control in the exercise of the power of delegated legislation/administrative rules is consultation through which entities that are likely to be affected may participate in the rulemaking process. This system makes administrative rulemaking a democratic process and therefore increases its acceptability and validity.

Wade and Philips rightly observed that one way of avoiding a clash between the department exercising delegated legislative power and the interest most likely to be affected is to provide for some form of consultation.

Self-Assessment Exercise

Read comment on public participation and consultation of interests in England

3.3.3 Publication

Another equally established principle is the entitlement of the public to have access to the law and to an opportunity to know the law.

Self-Assessment Exercise

What is the jurisprudence behind publication of rules? Comment on the mode of publication of rules in England, US and India

3.4 **Rule making procedure**

In the process of rulemaking, administrative agencies adopt one form of procedure or another depending on the occasion. *The administrative rule-making procedures that have grown up as a result of the interplay of the foregoing factors may be separated for convenience into four.* It could be investigational, consultative, auditive or adversary. But you should note that the approach taken is usually a function of the environment named.

3.4.1 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. In general practice, it involves investigating misconduct that are contrary to any law or regulation or inconsistent with the general functions of administrative organs. The investigational procedure is analogous to that of legislatures. A legislature is theoretically competent to dispose of matters coming before it without according procedural formalities to affected interests. It is vested with full discretion and final authority, subject to constitutional limitations. Its representative character brings the community's knowledge and wisdom into the exercise of its discretion.

3.4.2 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. The adversary procedure in rule-making, like so many other aspects of administrative law, seems to have crystallized first in the regulation of procedure, they and their trial examiners sit as tribunals before whom affected interests and government representatives present evidence and arguments; they are required to base their factual conclusions upon "evidence" and to embody them in careful "findings"; and they maintain formal records embodying all the evidence presented at their hearings. Whether a commission may go outside the record for

information, not regularly the subject of "judicial notice," upon which to base a decision, is a subject of controversy. In any event, adherence to these and other aspects of a careful, essentially adversary procedure is usual and is to a large extent judicially enforced.

3.4.3 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. Auditive procedure, either by itself or as a supplement to the types previously described, affords an opportunity to such interests to express their views, as well as a means whereby rule-making agencies may receive fruitful suggestions. This procedure consists of the holding of duly-announced hearings at which interested parties are permitted to appear. There are no specific issues or rules of evidence or formalities of any kind except such as are necessary to assure order. Such hearings are analogous to legislative hearings and bear no relation to court proceedings. They are valuable to the extent that notice of them can be brought home to affected parties, that they are accessible to these parties, and that the questions involved are susceptible to intelligent discussion by those who do appear. This auditive type of procedure is increasingly being resorted to voluntarily by administrative agencies and is required frequently in statutes.

3.4.4 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. Consultative rule-making procedure is one to which legislatures and administrative rule-making agencies have resorted increasingly, of receiving opinions, advice, and suggestions from groups whom their work affects. It is inevitable, on the one hand, that such groups should seek to make their wishes known and, on the other hand, that officials should turn to them for information upon the problems to be solved. The complexity of these problems under modern conditions makes consultation with those who are "on the inside" virtually a necessity.

3.4.5 What Values Should Be Emphasized In Rulemaking Procedures?

Administrative law also regulates the procedures used in agency rulemaking. A number of value dimensions are pertinent.

a. Flexibility: rulemaking 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 rulemaking;

b. Participation: rulemaking can be limited to one or a few agency personnel or opened up to the universe of interested or affected parties. Their input is to enhance the quality and legitimacy as well as to facilitate enforcement;

c. Information: agencies engaged in rulemaking can provide different types of information to interested parties and to the public at large. Open rulemaking processes require agencies to publicize their intent to make a rule and to publish the final rule;

d. Substantive criteria: Although administrative law is heavily oriented toward regulating agency procedures, it may also control the criteria that must be considered in rulemaking.

3.5 Summary

Administrative rule-making is one type of function performed by administrative agencies. The procedural problems attending the exercise of this function are to some extent distinct from those which surround the performance of other administrative acts, such as decisions and orders addressed to particular individuals in licensing, workmen's compensation administration, and public health regulation. Administrative rule-making procedure necessarily requires adaptation to the varying circumstances under which general regulations are prescribed by administrative action. It should be noted that the extent to which this procedure shall be used in particular instances, however, and the degree of

participation which shall be permitted to those concerned remain wholly within legislative control.

3.6 References/Further reading/Web Resources

Ralph F. Fuchs Procedure in administrative rule making. Harvard Law Review Dec., 1938, Vol. 52, No. 2 (Dec., 1938), pp. 259-280

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William Wade, (1988), *Administrative Law* (Oxford University Press),

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Neal D. Woods Source: Public Administration Review May - Jun., 2009, Vol. 69, No. 3 (May - Jun., 2009), pp. 518-53

3.7 Possible Answers to Self-Assessment Exercise

Self-Assessment Exercise

Read comment on public participation and consultation of interests in England

Guide

In England, although there is no statutory provision which requires public participation and consultation of interests before the issuance of subordinate legislation, it is considered mandatory and no minister in his senses with the fear of parliament before his eyes would think of making regulations without giving persons who will be affected thereby or their representatives an opportunity of saying what they think about the proposal.

Self-Assessment Exercise

What is the jurisprudence behind publication of rules?

Guide

It has been said that "all laws ought either to be known or at least laid open to the knowledge of all. The world in such a manner that no one may in impunity offend against them under the pretence of ignorance". As Lon Fuller observes, people cannot be expected to comply with rules of which they are unaware. Fuller strongly argues that any genuine system of law necessarily abides by certain moral principles which are called "*The Inner Morality of the Law*". According to Fuller, a system of regulation and control is not a system of law, unless these principles of inner morality of law are satisfied.

Self Assessment Exercise

Read up and comment on the mode of publication in England, US and India

Looking at the international experience, there is no unanimity regarding the mode of publication of administrative rules as a requirement in the administrative process. For instance, in England and the US, delegated legislation/administrative rules and directives are required to be published so as to enable the people to get knowledge about it. In India, the practice of publication of delegated legislation/administrative rules differs between statutes. Certain statutes require the rules to be published in the official gazette', while other statutes allow the relevant administrative authority to choose its mode of publication. In the practices of the three countries above, the mode, content and methods of publication are different. Nevertheless, the fact that any administrative rule or directive should be published and made known to the public is an important administrative procedure they all share in common.

MODULE 3

UNIT 4 Rulemaking procedures in other jurisdictions

Contents

4.1 Introduction

Rulemaking procedures differ from jurisdiction to jurisdictions. While there exists similarities in some, others, reveal striking difference, for instance between America and Britain. The purpose of this unit is to discuss the procedures in different jurisdiction and, develop a speculation towards the difference in procedures.

4.2Intended Learning Outcome

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

i. Discuss procedural rulemaking in different jurisdictions
ii. Discuss similarities and dissimilarities in different jurisdictions

4.3 Rulemaking procedures in other jurisdictions

In previous units in this module, we have discussed the rulemaking function of administrative agencies, noting that a 'rule' is a pronouncement which has general applicability and future effect but which has the force of law. We also know that the process of promulgating them is called ‘rulemaking’. We shall now discuss specific jurisdictional procedures.

In America, the enactment of the Administrative Procedure Act (APA) (5 U.S.C. 551 (a) in 1946 was the landmark event in the history of American administrative law. The Administrative Procedure Act (APA) applies to all executive branch agencies, including so called independent regulatory agencies. The APA prescribes procedures for agency actions such as rulemaking, as well as standards for judicial review of agency actions.

The broad coverage of rule-making under the Administrative Procedure Act is shown clearly by its definition in Subsection 2 (c):

"Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, See ***Prentis v. Atlantic Coast Line, 211 U. S. 210***

Public Information" Requirements of Section 3. The first operative provision of the Act insofar as rule-making is concerned is the public information requirement of Section 3.

This section continues the requirement of the Federal Register Act as to the publication of substantive rules and in addition requires agencies to publish in the form of rules their organization and procedures. Specifically, each agency must publish in the Federal Register:

(1) Organizational rules containing a description of the agency's central and field organization, its delegations of final authority, and the manner in which the public may secure information; (2) Procedural rules relative to the general course and method by which its functions, such as rule-making and adjudication, are determined; and

(3) Substantive rules, as well as agency statements of general policy which have been formulated and adopted by the agency for the guidance of the public (Subsection 3 (a)).

However, there is an exception to Section 3 for any function of the United States requiring secrecy in the public interest or for any matter relating solely to the internal management of an agency. Thus, it is not expected that the Federal Bureau of Investigation and the Secret Service will have to present statements of the manner in which they conduct their investigations.

Section 4 regulates in some manner all types of substantive rule-making, both formal and informal, while Section 5 regulates only formal adjudications.

The purpose of Section 4 is to guarantee the public an opportunity to participate in the rule-making process. With certain stated exceptions, each agency will be required to give notice in the Federal Register of rules it proposes to adopt and to grant interested persons an opportunity to present their views in some manner to the agency prior to the adoption of the rules.

Exceptions to Section 4.

As in most other situation under the Act, there are exceptions to Section 4. The introduction to the section states that the section does not apply "to the extent that there is involved

(1) Any military, naval, or foreign affairs function of the United States or

(2) Any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts."

It will be seen, therefore, that the rule-making provisions do not apply to the typical functions of the War Department and the Navy Department. Nor do they apply to the usual functions of such lending agencies as the Reconstruction Finance Corporation and the Farm Credit Administration, since these agencies are engaged in matters relating to public loans. Likewise, Section 4 would not be applicable to the rules issued by the Department of the Interior with reference to public parks and the public domain and to property held in trust or as guardian for Indians.

Under Section 4, any agency which intends to issue a substantive rule must publish in the Federal Register a general notice which must include a statement of the time, place and nature of the rule-making proceeding, a reference to the authority under which the rule is proposed, and either the terms or substance of the proposed rule or a description of the subjects and issues involved.

See *Patchett v Leadhem (1946) 65 T.L.R. 69 at 70*.

In summary, a brief account of the procedure under the APA is the requirement of an agency to give general notice of the terms or substance of a proposed rule. Such notice is published in the Federal Register, a daily document with a large national circulation, and is generally mailed to anyone whom the agency knows to be interested in the subject. Interested persons are invited to submit written data, views, or arguments, with or without an oral presentation. The rule must incorporate a 'concise general statement' of its basis and purpose and be published not less than thirty days prior to its effective date.' APA s 553(c), (d).

4.3.1 Rulemaking procedure in Nigeria

The congress passes a law designed to address a social or economic need or problem. The appropriate regulatory agency then creates regulations necessary to implement the law.

The rule making procedure in Nigeria commencing from the proper delegation, the law is also very clear, where a particular or special method of delegation is required. Concerning the exercise of delegated power exercised by a body; such body must be the right authority to act accordingly.

As in any democratic setting, the law-making power certainly and indeed rightly belongs to the legislature. This body is represented in Nigeria in the form of National Assembly, made up of Senate and House of Representatives and Houses of Assembly at the Federal and State levels, respectively.

Enforcement of administrative procedures

What considerations should guide judges in deciding whether to enforce a given administrative procedure?

1. **Parliament.**

When requested to enforce a procedure against the administration, a British court will begin by inquiring into matters of legal status. In Great Britain the courts can enforce a regulation (including an administrative procedure) only if it is "law." For a rule to be "law," its

authority must be traceable to one of three legitimate sources of governmental power-Parliament acting through statute, the Crown acting through royal prerogative, or the courts acting through common law. In administrative law the latter two play a relatively minor role, and so the only relevant source of law for present purposes is parliamentary enactment. For its authority to be properly traceable, then, an administrative rule of procedure must be made pursuant to a parliamentary grant of power to legislate.

2. The Council on Tribunals.

There is in Britain one body that is likely to keep watch over the form in which particular procedures are promulgated. The Council on Tribunals was established in 1958 to consider and report on the workings of administrative tribunals and inquiries. See Tribunals and Inquiries Act 1958, 6 & 7 Eliz. 2, c. 66? 1(1), now Tribunals and Inquiries Act 1971, c. 62,? 1.

3. The Administration

Sometimes it may be left to the administration to choose whether or not a procedure will be enforceable against it.

4. The Central and Local Ombudsmen

Even when a procedure has been published in a circular and hence is not legally enforceable, an agency may not escape all outside pressure to adhere to it. Since 1967 the British ombudsman, or Parliamentary Commissioner for Administration, has been investigating complaints by persons who claim to have sustained "injustice in consequence of maladministration" at the hands of a central department.

5. The Courts

The above framework seems to leave very little room for judicial creativity. Parliament decides whether a procedure should be enforceable against a department. If it prefers enforcement, then it simply grants formal rule-making authority and, with the possible aid

of the Council on Tribunals, sees that it is exercised. If not, it allows the department to deal with the matter by means of a circular. One instance is Essex County Council v. Ministry of Housing and Local Government66 L.G.R. 23 Ch.D. (1967) involving a special development order to allow the third London airport to be built at Stansted. The Minister had allegedly violated a circular by considering fresh evidence in secret after the close of a discretionary inquiry. Although the court did not believe that the circular was meant to apply to this kind of inquiry, it indicated that it would have declined to enforce it against the Minister in any case. See however, the case of **Queen v. Criminal Injuries Compensation Board, ex parte Lain** [1967] 2 Q.B. 864 (D.C.).

Procedures Dealing With Internal Management

American courts have been known to approach procedures dealing with internal management through familiar legal doctrines like standing and prejudice. In **United States v. Jaskiewicz, 278 F. Supp. 525, 537 (E.D. Pa. 1968,** the government was excused from following a provision in an Internal Revenue Service Policy Manual prohibiting criminal and civil suits from being filed simultaneously against a defaulting taxpayer.

In **Federal Trade Commission v. Foucha, 356 F. Supp. 21, 25-26 (N.D. Ala. 1973** a court declined to enforce a Department of Justice regulation detailing intra-departmental procedures for deciding whether to compel testimony from a witness in an administrative proceeding. The court stated that "it is neither shown nor apparent that [the witness] suffered any prejudice".

Historically, in Nigeria the requirement to disclose *locus standi* in order to challenge public policy dated back to 1961 in the case ***of Gambioba and Ors v. Insesi and Ors*** 1961) All NCR 584 where it was held that its absence is fatal to a case. One of the relatively recent matters in this regard is Captain Din v. Independent E1ectoral Commission (INEC) 1961) All NIR 269.

The court's decision in following cases seems to buttress this view. In *Olawoyin v. Attorney General of Northern Nigeria* (1961) All NIR 269 the court dismissed on preliminary objection a claim by the applicant on the constitutionality of certain provisions of Young Persons Law 1958. It is a well-known fact that review an action of an administrative body by court calls for interpretation of the enabling status.

In *Awolowo v. Federal Minister of Internal Affairs (1962) LLR 177,* the aforesaid administrative directive prompted the plaintiffs complaints that the refusal to admit Mr. Gratiaen into Nigeria to defend them is prejudicial to their best interest as their liberty is in jeopardy and that by so refusing, the defendant has deprived them of their right to be defended by a counsel of their choice as provided in section 21(5)(c) of the 2nd schedule to the Nigeria constitution order in council, 1960. The section provided that ***"an accused person was entitled to defend himself in person or by legal representative of his own choice"***. This is also the provision of section 36(6) (c) of the 1999 constitution of Nigeria.

4.5 Summary

All of the above cases-whether they deal with managerial procedures, with isolated procedures guiding or benefiting citizens, or with procedures forming part of a hearing-make one point: in America it is the courts that decide which procedures should be enforced and which should not be. This is not to say, however, that judges operate entirely unaided by others. It is obvious from the above that the administrative rulemaking plays an important role in the life of everyone in this country and the law it makes affect every citizen directly or indirectly.

4.6 References/Further readings

Michael Asimow Delegated Legislation: United States and United Kingdom: Oxford Journal of Legal Studies. Summer, 1983, Vol. 3, No. 2 (Summer, 1983), pp. 253-276

Nwosu, Uchechukwu Wilson (PhD). 2008. The Practice of Administrative Law in Nigeria. 2nd edition. Zubic Infinity Concept.

4.7 Possible Answers to Self-Assessment Exercise

Compare administrative rule making procedure in UK with the US. What are the differences?

Rulemaking procedure in United Kingdom

Rulemaking legislation is not a new phenomenon in United Kingdom, while the statute of proclamation 1539 given Henry VIII extensive powers to legislate by proclamation proved to be a relatively short-lived measure, the statute of sewers 1531 was the harbinger of a more general trend.

It was, however, the social and economic reforms of the nineteenth century that was the origin of delegated legislation on the scale to which we have now become accustomed.

The poor Law Amendment Act 1834 which vested the poor law commissioners with power to make rules for the management of the poor and many other 19th century statutes contained power to make rules. It is imperative to note that defence of the realm Act 1914 gave the government power to make regulation for securing the public safety and the defence of the realm, a power liberally used as regulations were made on dog shows and the supply of cocaine to actresses neither of which was of prime concern to the war effort. The advent of the World War II found the draftsmen ready with emergency powers (Defence) Acts 1939 and 1940 which empowered the Crowns to make regulations for public safety, the defence of the realm, the maintenance of order, the maintenance of supply and the detention of persons whose detention appeared to the secretary of state to be expedient in the interest of public safety or the defence of the realm.

The law concerning regulation-making in Britain is not difficult to summarize. Although there is a well-established custom of pre-adoption consultation with interested groups, the

law imposes no general requirement of pre-adoption public notice and comment and the rules of natural justice (or procedural fairness) are inapplicable. Circulars and other official pronouncements having general applicability but not made pursuant to statutory delegations need not be centrally published; the law seems unclear as to such non-delegated legislation.

Enforcement in the United States

Unlike their British counterparts, American judges are not compelled to identify the source of a procedure in "law" before they can enforce it. Instead, they have available the federal Constitution-more specifically, the due process clauses of the Fifth Amendment (for federal administrative agencies) and of the Fourteenth Amendment (for state agencies). The issue is not one of "procedural" due process (the judicial creation and enforcement of fundamental procedures). Rather, it is of "substantive" due process.

The leading precedent governing adherence to procedural rules is United States ex rel. Accardi v. Shaughnessy. **347 U.S. 260 (1954.** In Otero v. New York City Housing Authority, 344 F. Supp. 737, 745 (S.D.N.Y. 1972 a court invalidated an administrative action for failure to adhere to stated rules.

MODULE 4

The field of administrative law is inextricably bound to two phenomena that trace their origins to the nineteenth century: the rise of large state bureaucracies designed to fulfill a complex array of societal needs and the development of liberal democratic norms of social organization and public authority. Thus we see that much of administrative law can be understood as an attempt to work out the tension inherent in these two phenomena: the recognition that the attainment of public purposes is contingent on a cadre of full-time employees, paid by the public purse and loyal to the state, and, at the same time, the belief that public authority is legitimate only if embedded in democratic politics and liberal societies. To put it more succinctly, these are the objectives, on the one hand, of neutrality and expertise, and, on the other hand, of democracy and liberal rights. The common aspiration of making public administration both capable and accountable serves as the springboard for the comparative analysis in this module. This unit begins with a discussion on civil service, the reforms that have taken place within the civil service and then look at public corporations.

Unit 1 The Civil Service I

UNIT 1 THE CIVIL SERVICE

1.1 Introduction

Civil service systems are complex institutions. Civil service arrangement has emerged as important mediating institutions which interface between the state and its citizens. In many ways, they resemble welfare states, playing a vital role in the formulation, implementation, evaluation and review of government policies and programmes. The role and position of the civil service are core actors in the public sector. Because of the importance of the role the civil service plays, it has been referred to as the "thinking arm of the sovereign nations". It generates ideas to create and continuously renew the charter and mission of nationhood. This is why nations all over the world are currently in the struggle to better their existence through the process of good governance, and responsible civil service for effective and efficient service delivery. You are going to study this topic comparatively, looking at different jurisdictions to know the operation of civil service systems in these regions.

1.2 Intended Learning Outcome

At the end of this unit, it is intended that you should be able to discuss:

i. Have a proper understanding of the civil service;

ii. Understand and discuss the evolution of the public service;

iii. Discuss the characteristics of public service

iv. Compare civil service reforms in selected jurisdictions.

1.3 Civil services

The civil service is the machinery through which government designs and implements its policies; it is the organ created to ensure that policies and programmes of any government at any particular time are carried out. The civil service system is organized to help the executive arm of government meet its responsibilities and it is made up of servants of the state other than holders of political and judicial offices, who are employed in a civil capacity.

One of the defining elements of bureaucracy is civil service employment: the selection and promotion of public officials based on merit and insulated from political influence through tenured employment. The core features of civil service employment are: (1) life tenure absent grave misconduct; (2) merit-based recruitment; (3) promotion based on a mixture of seniority and merit (often accompanied by independent civil service commissions); (4) pay scales and benefits that are more standardized than in private enterprise; and (5) restrictions on political activity, speech, and union activities, although these are far less common now than in the past.

The legal guarantees of civil service employment emerged to serve multiple ends: autocratic rulers seeking to consolidate their authority (Prussia), political elites adapting the instruments of government to the demands of industrialization and urbanization (Britain), and government reformers intent on shielding administration from the instability and incompetence of party-patronage appointments (France and the United States). In Europe, Japan, and North America, civil service safeguards were introduced over the course of the nineteenth century: beginning in the 1840s in France, 1870 in Britain, 1873 in Prussia, 1882 in Canada, 1887 in Japan, and 1883 in the United States. (Francesca Bignami. 2012)

Definitions

The New Encyclopedia Britannica (2004) defines civil service as the body of government officials who are employed in civil occupations that are neither political nor judicial. It consists of people employed by the state to run the public service of a country.

Solarin defines civil service as the body of men including women, employed in a civil capacity and non-political career basis, by the federal, state and local government, primarily to render advice and faithfully implement their decisions.

Malemi defines the civil service thus: 'it is the body of workers excluding political appointees, who work for any branch, or department of government, or any agency, authority, body, institution, or establishment owned by governments, and are usually paid out of money voted or budget passed by parliament.'

Under the 1999 Constitution of the Federal Republic of Nigeria (as Amended), 'public service of a state' is defined as the service of the State in any capacity in respect of the Government. In the same vein, section 169 of the Constitution created the Public Service of the Federation.

Section 318 of the Constitution provides that:

> *"civil service of the Federation means service of the Federation in a civil capacity as staff of the office of the President, the Vice-President, a ministry or department of the government of the Federation assigned with the responsibility for any business of the Government of the Federation"*
>
> *"civil service of the state means service of the government of a state in a civil capacity as staff of the office of the governor, deputy governor or a ministry or department of the government of the state assigned with the responsibility for any business of the government of the state"*

According to Oluyede "the civil service is made up of all the permanent, sometimes temporary and non-political offices and employments held under the Federal or State

government with the exception of the armed forces". Civil servants are those public servants who are direct employees of both federal and state governments other than the police, armed forces personnel, and the teachers. Civil servants work for the 'civil' as opposed to the military, ministerial or judicial arms of the state. Thus, H.R.Wade opined that "the legal test of a civil servant is that he should be in the non military service of the State ……." Members of the armed forces, government ministers and judges are not civil servants.

The Civil Service Handbook (2011) describes civil service as "a body or organ which enjoys continuity of existence". Its members are not limited to a short term of office and they enjoy security of employment. Civil Servants according to the Handbook, command a pool of experience and know-how for implementing government policies. It recognizes that while the civil service is the instrument of the government of the day, the service and its members are not permitted under the law to be partisan of any political party.

Civil service presupposes those branches of public service that are not legislative, judicial, or military and in which employment is usually based on competitive examination. It may also be defined as the entire body of persons employed by the civil branches of a government.

Although some bodies are civil in character and are wholly owned by the government, the employees are not regarded as public servants, or even civil servants. Consider the reasoning of the Supreme court in *NITEL v. Awala (2001)* where it held inter alia that: "*the proposition that since the shares of the statutory body (NITEL) are owned wholly by the Federal Government, it makes its employee a civil servant is untrue……. although NITEL may be a public company, its staffs are not civil or public servants….."*

An appendix 'Definition of a Civil Servant' to a 1977 report by the Expenditure Committee of the House of Commons.

'the only legal definitions of 'civil servant' are those contained in Superannuation Acts. The Superannuation Act of 1965, s.98(2), reads as follows:

In this Act 'civil servant' means a person serving in an established capacity in the permanent civil service, and references in this Act to persons ceasing to be civil servants, to persons retiring from being civil servants and to retired civil servants shall be construed accordingly.
'Civil Service' upon which the above definition depends is defined in s.98(1) of the same Act as:
In this Act 'civil service' means the civil service of the State.'

The 1931 Tomlin Commission in the following words:

Servants of the Crown, other than holders of political or judicial offices, who are employed in a civil capacity and whose remuneration is paid wholly and directly out of moneys voted by Parliament.

Self-Assessment Exercise

Is the term 'public service' conterminous with civil service?

Self-Assessment Exercise:

Is the civil service part of the executive arm of government, or an independent agency of government?

1.3.1 Characteristics of civil service

a) It has to be non - partisan to enable it serve any government of the day.

b) It has to be made up of experienced men and women with the technical and professional know – how to enable it implement government policies.

c) It has to be orderly and also ensure that orderly administration of the country is continuous.

d). The Civil Service is indispensable since it continues the traditional role of keeping the functions of government running no matter what changes occurs in the administration of the country.

e). It operates under rules which guide its conduct.

f) The Civil Service is an entity but operates in hives of activities, divided between Ministers and Departments. Each of the Department has its set functions and goals.

1.3.2 Functions of Public Service

The analysis of the definitions of the Civil Service as a structure within the political system shows the many functions it performs including policy formulation, policy advice, policy implementation and such other functions geared towards national development. Ezeani (2006) however discusses five functions of the Civil Service viz:

- Policy implementation: The major function of any Civil Service is to implement the policies of any government in power, whether military or civilian. Implementing and enforcing economic, political and social policies of the current government; and
- Designing and implementing public service;
- . Raising revenue for the government;
- Ensuring managerial, political and financial accountability
- Serving the people;
- Monitoring and evaluating the performance of organizations (Public, private or non – governmental) that are rendering service on behalf of government
- Driving all development initiative;
- Delivering quality public service (such as education, electricity, water and transportation).

In summary, the public service is crucial to the overall efforts towards nation building.

1.3.3 Historical evolution of the civil service

Many scholars have observed that the civil service is not a creation of modern times but rather has its roots and dates back to the times of ancient civilization. With the emergence of modern states and the development of parliamentary system of government, the civil service evolved as the bedrock of the executive arm of government. We will consider evolution accounts of different countries, focusing majorly on Nigeria.

Nigeria

The civil service in Nigeria owes its existence to series of constitutional and administrative necessities. Abba and Anazodo (2006) argued that civil service in Nigeria comprises workers in the various ministries or departments apart from those who hold political appointments.

The British colonial power through conquest forcefully integrated different ethnic communities and kingdoms under Lagos colony and established direct rule in 1861. Civil service was created in 1862 with the specific purpose: the survival of capitalism in colonial Nigeria, and the stability of colonial capitalist state structure. As a result, British government established different hierarchical positions of Governor, Chief Magistrate, Colonial Secretary and Senior Military Officers, Offices of Private Secretary to the Governor, Auditor for Public Accounts, Chief Clerk, and Collector of Customs. (See Background to the Nigerian Civil Service, available at http://www.ohcsf.gov.ng/about_civil_service.html)

The origin of the modern Nigerian Civil Service can be traced to the administration of Lord Lugard who was the Governor General of the amalgamated administrations of Northern and Southern Nigeria between 1914 and 1919. Inevitably, the history of civil service in Nigeria can be attributed to the history of Modern Nigeria itself.

Prior to the colonial rule, different ethnic groups and societies that make up today's Nigeria, lived in clans and empires. In the north, there exist Islamic Sokoto caliphates (of Borgu, Sokoto, Kano and Kanuri); while in the West and East exist different empires and communities.

Lord Luggard established a Central Secretariat in Lagos in 1921. In 1939 similar secretariats were established for the three broad groups of provinces administered from Ibadan, Enugu and Kaduna. The structure and form of the machinery of government and the entire Civil Service was such that would make it possible for the British administrators to report performance to their home government and not necessarily to the people of Nigeria. Financial management and financial statements were structured as mere branch

reports. The emphasis was to administer and report home. The 1940s and 1950s marked the beginning of pressures for reforms in the Nigerian civil service structure. Indeed, different panels were set up by various governments to study and make recommendations for the reform of the Civil Service in particular and the public service in general.

1.3.4 Feature/characteristics of the civil service

The constitutional representative government model sees the civil servant as an adviser to and an implementer of elected officials' policies.

Neutrality

Neutrality recognizes that the bureaucracy is an independent force in society since it has an inherent tendency to overstep its proper function as a technical instrument of politicians. Civil servants are not meant to be political actors when carrying out this role, but are supposed to be politically neutral. 'Neutrality' here means that civil servants are willing and able to serve differing administrations with equal effectiveness. It means treating equally the incumbent party no matter what its ideology. Weber suggests in his political writings.

Civil service and policy formulation

A core function of civil servants is the formulation and execution of policies, though more attention is devoted to those who help formulate policy. As policy advisers they are in very powerful positions to influence or indeed create policy. How powerful they are is a moot point, but their central role makes them the major target of organized pressure groups attempting to influence policy. The civil service must advise the party in government about the presentation of policies, help ministers avoid attacks during question times and debates and under the 'Osmotherly Rules' only selectively provide information to select committees of the House. Note that the Osmotherly Rules are guidance for civil servants on giving evidence to parliamentary select committees and they take their name from E.B.C. Osmotherly, the civil servant who drew up the first version of the Rules in 1980.

The civil service in Sweden has been described as strong and well-developed; it is therefore imperative to bring out the defining characteristics of the civil service.

What is it that makes the Swedish civil service unique? According to Levin, Sweden is unique on three points: openness and accountability, the divide between politics and administration, and the highly decentralized nature of the state.

Example 1.1. The Sweden civil service by Aidan Horn

Openness and accountability in the Swedish civil service is reflected in the principle of transparency (*offentlighetsprincipen*). This principle, enshrined in the constitution, requires that any document produced by or sent between agencies and ministries must be made available to the public (Levin, 2009:39–40; UN, 2006:14). The media thus has access to records of correspondence between government officials and to court proceedings. An open culture in Sweden's society enables this principle to be put in practice; the media enjoy considerable freedom with reporting on what Swedish politicians do.

The Ombudsman, similar to the public protector in South Africa, is an independent institution which highlights wrongdoing by ministers and government officials (Levin, 2009:40–41; UN, 2006:9). It responds to whistle-blowers and media reports by investigating the claims and taking action when deemed necessary. A letter from the Ombudsman is shameful enough to deter undemocratic activity by politicians, but the Ombudsmen also have the power to recommend disciplinary measures to the Government Disciplinary Board or to take the accused to court and act as the prosecutor (Levin, 2009:41). It is worth noting that Sweden was ranked the 6th least-corrupt country, out of 133 countries, using the Corruption Perception Index in 2003 (UN, 2006:13).

The third uniquely defining feature of the Swedish civil service is the extent of decentralization. Although Sweden is a unitary state, the extent of decentralization is comparable to federal states such as the United States, Germany and Canada (Levin, 2009:44). In Sweden, 82% of government employees work at the sub-central level, and

this number is increasing (OECD, 2011:2). There are 20 counties and 290 municipalities. Local governments are fairly autonomous because they have the ability to levy taxes, which helps them to sustain their activities.

1.3.4 Civil service structure.

The purpose of this sub-unit is to discuss the changing position of civil servants within the framework of government with particular attention to the changing personnel size of the civil service, the legal status of public employment, reward systems and other HRM policies and practices. We will be taking each jurisdiction as regards their status, you as students is expected to read up the policies and the civil service systems in these jurisdictions.

a. Legal status

The drive for more codified civil service legislation started in 1794 in Prussia with the inclusion of ample provisions in the Preußische Allgemeine Landrecht. In Prussia, as early as the Mid-17th Century, Fredrick William, elector of Brandenburg, created an efficient civil administration, staffed by civil servants chosen on a competitive basis. The UK has adopted a statutory civil service legislation in the Constitutional Reform and Governance Act in 2010. The legal framework for the civil and public service in Nigeria is found in the 1999 Constitution of FRN Sections 169 and 206 of the 1999 constitution which provide for the establishment of the public service of the federation and of the state respectively. There are also the Civil Service Rules and other relevant legislation such as the Public Officers (Special Provisions) Decree No.17 of 1984.

b. Bureaucracy: representativeness, diversity and inclusiveness.

This invariably confirms the gap between the composition of the civil service and society at large. According to Van der Meer (2011), the important factors for understanding the level of actual representativeness are, inter alia, the homogeneity of a country, the educational system, the relevant constitutional and legislative framework, the role and perception of the state, and the territorial system of the state. For instance, the national character and quality control on education should as much as possible prevent inequalities; or in some other countries, we see ample variation when concentrating on delivering equal

opportunities for, for example, women and minorities. A good example is, to a certain extent Belgium which has been an exception because of the language dimension. The scale and influence of policies to increase the inclusion of females, and in some cases ethnic minorities, by using instruments like positive discrimination, are limited, but such policies do exist in police organizations in order to promote the perception of legitimacy.

The United States Civil Service Reform Act of 1978 established a merit system for federal employment that governs various aspects of such employment such as – job classification, tenure, pay, training, employee relations, equal opportunity, pensions, health, and life insurance.

c. Politicization and political control in European civil service systems

The politicization of civil service systems can refer to the (changing) number of (party) political appointments and (party) political behavior, as well as political sensitivity of civil servants (Van der Meer and Raadschelders, 1998). Hojnacki (1996) argues that civil service politicization implies a violation of the principle of political neutrality. According to most contemporary and Weberian (Page, 1992) definitions, politics is not limited to certain persons, institutions or specialized arenas in which an action takes place. Politics can be defined as the process that determines 'who gets what, when and how' (Lasswell, 1936). There are countries where some (senior) civil servants are still forbidden to be (active) members of political parties (e.g. the UK and Ireland). In the majority of the remaining countries (e.g. Germany, the Netherlands and Sweden) there is an increasing tendency for civil servants to be party members. The Federal Hatch Act5 U.S.C.A; 7324, 1939 in the United States makes participation by federal, state, and local civil service employees in designated public electoral and political activities unlawful.

1.4.2 Civil Service Reforms

Change, continuity, and diversity have characterized the development of the civil service in the past two centuries. It is most common to date the start of wide-ranging and profound changes in (mainly) the environment of government organizations in the early 1980s. These environmental changes necessitated or even dictated a fundamental overhaul and reforms

of CSS. The quest for civil service reform is not peculiar to Nigeria alone. This is because according to World Bank (2002), there is a strong consensus in the international development community on the need for civil service reform in developing nations. It is therefore a topical issue of the moment as developing nations all over the world engage in the struggle to better their existence through the process of reforms for efficient and effective service delivery.

Civil service reforms play an integral part of good governance processes if sustainable solutions to currently existing issues within the ambit of civil service delivery is to be realized. This is evidenced by the initiation of processes in different jurisdictions. Let us take examples from different jurisdictions

Asia

Studies of specific Asian countries, such as Japan, conclude that the reform process has been hesitant and slow and that little of substance has actually changed. Real reform of the civil service in Vietnam, to take another example, has been 'very slow'. In general, scholarly accounts conclude that in spite of ambitious public sector and/or civil service reform programs not much has happened. Scholarly accounts of civil service (or public sector) reform in Asia generally emphasize the limited scope of the reforms

According to Knill, reform capacity is a function of the general capacity for executive leadership in the system, the institutional entrenchment of administrative structures and procedures, and the influence of the bureaucracy on policy making. Insofar as politicians and bureaucrats are 'interlinked' the capacity for administrative reform goes down. This means that systems with bureaucracies that are more autonomous from politicians have less capacity to reform. Conversely, those systems with strong political executives (where there are fewer veto points and interlinkages) have a greater capacity for reform.

The socialist reform

The need for social transformation in China and Vietnam meant the party/state took control over virtually all aspects of public life and obliterated the boundaries between state and

society. Let us highlight some important reforms in the socialist countries taking China and Vietnam.

The need for social transformation in China and Vietnam meant the party/state took control over virtually all aspects of public life and obliterated the boundaries between state and society.

- The reforms with the greatest impact have been those that (1) decentralized power over management of the economy to local governments; and (2) forced thousands of state-owned enterprises (SOEs) into the market. In the early 1980s the central government decentralized power to manage the economy to provincial and county governments.
- The second reform, forcing SOEs into the market, had major consequences for government revenue and for employment. As a result of the declining profitability of SOEs, government revenues in China fell from more than 35 percent of GDP to a low of 10.7 percent of GDP in 1995.
- Other public sector reforms in China have included government restructuring and civil service reform. Neither has had the dramatic impact of the public sector downsizing, however. In wave after wave of structural reform (1988, 1992, 1998) the central planning apparatus was merged, downsized, and then abolished altogether.
- Public sector reform in Vietnam has followed a similar track and included economic decentralization and moving SOEs into the market. Driven by the growing demands of marketization and globalization, authorities pushed to reform the SOEs. From 1986 to 1994 many smaller SOEs were restructured through mergers or liquidation. As a result the number of public sector workers fell by 35 percent (Painter, 2003: 214). Further restructuring during the 1990s saw the number of SOEs decline from about 12,000 in 1990 to 5300 in 2000 (Painter, 2003: 214). Although the process of reforming the country's state-owned enterprises has demonstrated weaknesses in Vietnam's reform capacity (such as ambivalence about how to proceed with SOE reform), the huge number of public sector workers laid off from their positions indicates the growing autonomy of the state.

- The Japanese political system is organized in a way that frustrates the political executive. The First and Second Provisional Civil Service Reform Councils in 1961 and 1981 have had limited success but did manage to cut the civil service by 5 percent and reorganize some central ministries. The participation of senior civil servants as members of the councils allowed them to effectively protect their interests (Painter, 2003: 243–244).

Let us consider African civil service to enhance economic performance

In contrast to the comparatively low performance of African economies in the years before the crisis, many countries in the region have posted 5–8 percent GDP growth figures. The reasons for this turnaround are multiple and complex but there is also a discernible worrying trend, and that is of the increasing fragility of states in the region. Most of these states have existed for 50 years and more since their independence from colonial powers but they systematically lost their authority, capacity and legitimacy to perform the basic state functions of security, welfare and representation of their people.

Africa: Revitalizing Civil Service Systems to Enhance Economic Performance
Ladipo Adamolekun and Dele Olowu

Historical background: from relatively healthy to weak civil service institutions

'The civil service institutions (CSIs) inherited by the new African states that emerged in the 1950s and 1960s had three advantages that enabled many of them to perform satisfactorily during the immediate post-independence years. First, the CSIs operated in a context in which the goals of governments were clearly articulated: win independence and seek to improve the quality of life of the mass of the population through the provision of infrastructure and services such as roads, energy, water, education and health. Second, the political leaders who progressively took over executive powers from the departing colonial rulers from the early 1950s through the early 1960s were nationalists who were committed to winning independence, and, in most cases, were conscious of the need for strong and well-equipped CSIs that would serve as instruments for ensuring the continuity of the state, maintaining law and order, and assuring better living standards for the people.

The third advantage was the inheritance (from the departing colonial governments) of career civil service systems led by small numbers of well-trained, experienced and committed senior civil servants that provided quality leadership for the institutions in most of these new states in the different sub-regions of Sub-Saharan Africa (SSA).'

State of African economies and civil services since 2005

African countries have grown at over 5 percent in 2012 and are projected to have a GDP growth of nearly 6 percent in 2013. The IMF (2012) noted that seven of the ten fastest-growing economies in the world are in SSA and this at a time when many other regions have experienced downturns.

Challenges in the SSA civil service systems

- Many economies are still not able to provide jobs to young people, whose ranks continue to grow, and if the Arab Spring is to provide any lesson it is that these elements represent a time bomb that could unravel and ultimately set back whatever positive GDP figures show presently which include Rwanda, Ethiopia, Tanzania and Uganda – also have the lowest employment intensity growth. Even countries like Botswana, Nigeria and South Africa have 'alarmingly high youth unemployment rates' – and when they find jobs at all it is in low-paying, informal sector work, not in the booming (natural resource) sectors.
- In most countries, both civil and military bureaucracies have experienced systemic breakdown as explained and amply demonstrated by events in many different African countries, such as Zimbabwe, Congo, Nigeria, Mali, Central African Republic, DRC, or even in North Africa or the Cameroon – where the state's integrity has been called into question.
- Severe education deficit while others face a looming food crisis.
- Inequality has widened between the few that are opulent and the mass of the people that are poor, for instance Nigeria and South Africa.

1.5 summary

Most governments have engaged in civil service reforms in recent decades. Many have been motivated by political and budgetary considerations, but there are cases where civil servants themselves have played a major role in introducing reform.

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1.6 Possible Answers to Self-Assessment Exercise

Self-Assessment Exercise

Is the term 'public service' conterminous with civil service?

Guide

According to Ese Malemi, the civil service is also known as the public service. In *Oloruntoba-Oju, Tayo v. Lawal, Bayo and Ors(2001) 31 WRN, P.171* the court tried to draw a distinction between the term "civil service" & "public service". The court in that

case compared the definition of the two terms as stated under Section 277 of the 1979 Constitution of the Federal Republic of Nigeria and opined as follows:

"... it is very clear that whereas the operative words in the definition of "civil service of the Federation" are service in a civil capacity as staff .....the ones in "public service of the Federation" are service in any capacity in respect of the Government of the Federation ……" This clearly shows that the term "civil service of the Federation" is narrower than the term "public service of the Federation". In fact, it is clear from the definition of „public service of the Federation" that it includes service in the "civil service of the federation". I am however of the firm view that even though a civil servant is a public servant it is not every public servant that is a civil servant ……."

The Supreme court per Nnaemeka – Agu in *Nwosu v. Imo State Environmental Sanitation Authority & Ors (1990) 2 NWLR (pt.135) p.722.* stated thus:

"No doubt "civil service of a state" is a service in a civil capacity such as a staff of the ministry of Health or of a Local Government ……Public service of a state includes …… of the authority, which was established by the law for the state…."

There seems to be a consensus discernible from the views of scholars and the courts which is that both "civil service" and "Public Service" entail an employ under the service of the government. It is also an acceptable view that while the public service is all encompassing and subsumes the civil service, the same cannot be said of the latter. It follows therefore that not all public servants are civil servants.

Self-Assessment Exercise

Is the civil service part of the executive arm of government, or an independent agency of government?

Guide

According to Adamolekun, there are two contradictory propositions which determine the position and function of the civil service. The first principle states that the distinct groups of people - the politicians and Administrators run the executive branch of government in a democratic policy. One group comprises elected political officials who serve for a temporary period of time limited by their term of office before another election is conducted. The second group consists of officials appointed into permanent careers positions expected to serve the successive sets of political office holders. The second principle accepted by the two schools of thought is the conception of the civil service as an instrument in the hands of the elected political officials with the latter being the dominated in group and the former, the dominated the power structure or equation.

Thus according to Ademolekun the civil service is nothing but an appendage but not a major constituent that stands a strong footing within the executive arm of government. In the first place it occupies an assistant position to the political executive, meaning that the latter can do without if it deems fit.

MODULE 4

Unit 2 CIVIL SERVICE II

2.1Introduction

2.1 Introduction

The previous unit has described the functions and importance of the civil service to the proper functioning of a state. We start this discussion by looking at ethics expected within the civil service. There is a need to emphasize ethics within the civil service to ensure high level of efficiency and operations. Note that by ethics, we mean more than the mere definition of actions complying or not complying with the law. Ethics means the rules and principles regulating the behaviour of individuals. Chapman also refers to ethics as the basic principles of the right action and to rules of conduct. According to moral philosophy, there is a difference between descriptive ethics, normative ethics and meta-ethics. Descriptive ethics means the description of ethical ideas without presenting an opinion on their rightness. An example of this is the statement that in the opinion of civil servants it is wrong to take a bribe. Normative ethics, or morals, presents guidelines and rules, which requires commitment to a certain ethical system. Meta-ethics is the study of the nature, scope, and meaning of moral judgment.

2.1 Intended Learning Outcome :

It is expected that after reading this unit, and recommended texts, you should be able to:

i. Have a proper understanding of civil service ethics;
ii. Examine code of conduct of ethics in selected jurisdictions;
iii. Consider various civil service reforms in different jurisdictions.

2.2 Civil service 11

The word ‘Ethics’ is derived from the Greek word ethos, which means "character". Ethics is defined as "a set of concepts and principles that guide us in determining what behaviour helps or harms sentient or conscious creatures". It also refers to the study of right and wrong behaviours.

According to Beauchamp & Childress (2001), Ethics “involves critical reflection on morality”. Ethical principles are not laws, but guiding principles about what is ‘good’ and what is ‘bad’. From this point of view, ethics are moral conduct that guide the way individual behave in an establishment. According to Adams and Danny (2007) ethics in the technical-rational tradition flows from the Theological tradition and focuses on the individuals’ decision-making process in the modern, bureaucratic organization and as a member of a profession.

Civil service ethics

Civil service ethics refers to actions in a civil-service relationship; civil service ethics and morals mean the general values and principles which apply to civil servants. A civil service relationship is not a profession but a public-law service relationship.

According to Chapman, civil service ethics is “the application of moral standards in the course of official work”. It is therefore expected of civil servants to apply and exercise certain ethical considerations when carrying out orders of political bosses and when they are faced with a situation where they have to make value judgment that have implications for their professional standing.

The civil service of a state is a professional service activity which comprised of officials or employees who are charged with the responsibility of ensuring the execution of the powers of state structures. This duty gives direction to the activities of government bodies and, in the course of implementing the competence of these bodies, preserves and provides this direction. The role of the civil service can also be described as a steersman in the practical execution of powers, helping the state achieve the goals determined by the country’s political leadership. According to the established duty, the civil servant must selflessly, unselfishly, conscientiously perform professional duties and duties. His conduct

within and outside the service must be such that it does not damage the respect and confidence of the society and citizens which his profession requires.

2.3.1 Code of conduct

Definition

The International Federation of Accountants provides a working definition of code of conduct as, 'principles, values, standards, or rules of behavior that guide the decisions, procedures and systems of an organization in a way that (a) contributes to the welfare of its key stakeholders, and (b) respects the rights of all constituents affected by its operations'*2007 International Good Practice Guidance, Defined and developed an effective code of conduct for organization, available at http://www.ifac.org*

A code of conduct is a set of rules outlining the responsibilities of, or proper practices for, an individual, party or organization. Related concepts include ethical, honor and moral codes, as well as halakhah and religious laws.

According to Tihomirov, code is "a set of rules for self-sufficiency, the fulfillment of which serves as a guarantee of successful labor and productive work".

Similarly, Tsvyk et.al, said that "*The Code of Ethics for Civil Servants is a systematized list of ethical principles, norms and rules that express the moral requirements of society for the moral personality of a civil servant, the social purpose of his activities and the nature of the relationship with society, citizens and the state in his professional environment. As any other code, it contains norms which "reflect existing social relations... are produced by social needs, by the level of working morality development, by the specificity of professional functions*".

The professional ethics of civil service as a system of ethical norms and the science of their application in management performs a very essential function. No matter how optimal the legal standards regulating labor relations are, they can lose effectiveness because of unscrupulous employees' activity. That is why it is important that legal standards be supplemented also with moral ones.

Let us look at the guiding principles of the civil service ethics in Russia:

The principle of public service, stemming from the provisions of the Constitution of the Russian Federation on the social character of the Russian state, is based on the systematization of the ethical principles of official conduct of civil servants as the fundamental requirements to the moral essence and social purpose of their professional activity, to which they must adhere during performing their official duties.

Another important ethical principle of the Russian civil servant is the principle of legality of the supremacy of the Constitution of the Russian Federation and federal laws over all other normative acts and duty descriptions.

The ethical principle of humanism requires from the state and municipal employee respect for the person, faith in him, recognition of the sovereignty and dignity of the individual.

The principle of impartiality and independence should, first of all, provide the civil servant the service to the interests of the state and society in a situation of moral choice in the development and implementation of a concrete decision.

The principle of responsibility emphasizes that any administrative authority is responsible for the negative consequences of decisions, failure to perform its official duties, actions that violate the rights and legitimate interests of citizens.

2.3.2 Functions of Public Service

The public service is the machinery that Government uses to render services to the people and as such, public servants should think of how they can constantly and conveniently improve themselves to give better service.

The Constitution of the Federal Republic of Nigeria prescribes the code of conduct for public servant in the discharge of their duties. Part 1 of the fifth schedule of the 1999 Constitution has generally made provision in respect of code of conduct and work attitude for a public servant.

The public service (Ministers, Department and Agencies) has always been the tool available to the Nigerian government for the implementation of development goals and objective.

Part 1 of the fifth schedule of the 1999 constitution has generally made provision in respect of code of conduct and work attitude for a public servant. Section 1 provides that, 'a public officer shall not put himself in a position where his personal interest conflicts with his duties and responsibilities'.

Sub – paragraph (b) of this section goes ahead to restrict a public officer from engaging or participating in the management or running of any private business, profession or trade except where his employment is on part – time basis or he is otherwise engaged in farming.

Section 2 (a) provides that, 'public officer shall not receive or be paid the emoluments of any public office at the same time as he receives or is paid the emoluments of any other public office'.

Section 3 prohibits maintaining or operating a foreign bank account by the President, Vice – President, Governor, Deputy Governor, and Ministers of Government of the Federation and Commissioners of the Governments of the States, and such other public officers or persons as the National Assembly may by law prescribed.

Section 4 ban a public officer from accepting more than remunerative position as chairman, director or employee of a company owned or controlled by the Government; or any public authority after his retirement from public service and while receiving pension from public funds. However, section 14 (a) exempt members of legislative houses from the provision of this section.

Sub – paragraph (2) of this section also bans a retired public servant from receiving any other remuneration from public funds in addition to his pension and the emolument of such one remunerative position.

Section 5 prohibits retired and ex – serving, Vice President, Vice – President, Chief Justice of Nigeria, Governor and Deputy Governor of a State from serving or accepting employment in foreign companies or enterprises.

Section 6 prohibits a public officer from asking for or accepting property or benefit of any kind for himself or any other person on account of anything done or omitted to be done by him in the discharge of his duties. Sub – paragraph 2 prohibits the receipt by a public officer of any gifts or benefits from commercial firms, business enterprises or persons who have contracts with the Government.

Sub – Paragraph 3 allows a public officer to accept personal gifts or benefits from relatives or personal friends, and donations or gifts to public institutions are allowed.

Section 9 provides that: A public officer shall not do or direct to be done in abuse of his office, any arbitrary act prejudicial to the rights of any other person knowing that such act is unlawful or contrary to any government policy.

Section 10 also provides that, 'a public officer shall not be a member of, belong to, or take part in any society the membership of which is incompatible with the functions or dignity of his office'.

Section 11 provides that any public officer shall within three (3) months after being appointed into office and thereafter, the end of every four (4) years or the end of his term, submit to the Code of Conduct Bureau a written declaration of all his properties, assets and liabilities and those of his unmarried children under the age of 18 years. Any statement in the declaration that is found to be false by any authority or person authorized in that behalf to verify it shall deemed to be in breach of the code; and any property or assets acquired by a public officer after any declaration under the constitution and which is not fairly attributable to the income, gift or loan approved by the code shall be deemed to have been acquired in its breach unless the contrary is proved.

Section 12 provides that any allegation that a public officer has committed a breach of or has not complied with the provisions of this code be made to the Code of Conduct Bureau. The Bureau has the power to investigate the alleged violation and if a case is found, institute an action at the Code of Conduct Tribunal. The Tribunal has the power to handle cases of breach of work ethics and code of conduct. Where any public officer is found guilty

of contravening any section of the provision of the code of conduct, then the tribunal shall impose punishment which include any of the following: - a) Vacation of *office or seat in any legislative house, as the case may be; b) Disqualification from membership of a legislative house and from the holding of any public office for a period not exceeding ten years; and c) Seizure and forfeiture to the State of any property acquired in abuse or corruption of office.*

In the recent case of **Ahmed v Ahmed *(2013) LPELR- 21143 (SC)***, Per Chukwuma-Eneh, JSC Supreme Court while given life to the above provision, held thus: "*Any allegation that a public officer has committed a breach of or has not complied with the provisions of this code shall be made to the code of conduct Bureau''. The foregoing provisions are clearly unambiguous and so construed literarily mean that any breaches of any provisions of the said 5th Schedule or matters of non compliance with any provisions of the code shall (meaning that it is mandatory i.e must) be made to the Code of Conduct Bureau that has established its Tribunal with the exclusive jurisdiction to deal with any violations of any provisions under the code, if I may emphasise, any violation shall be made to Code of Conduct Bureau…This provision has expressly ousted the powers of ordinary regular courts in respect of such violation.*

2.3.3 Reforms within the Nigerian civil service

Alex gave accounts of the different civil service reform within the Nigerian civil service system. In his work: *Civil Service Reform in Post-Independence Nigeria: Issues and Challenges*, he classifies the Nigerian reform experience into colonial and post-colonial experience. Below are some excerpts.

LEGACY OF POST-INDEPENDENCE REFORMS

The history of the Nigerian civil service dates back to 1914 when the British colonial rulers established a unified government structure that encompassed the territory now known as Nigeria. During the colonial era, the Nigerian civil service was dominated by imperial

European officials with power concentrated in the hands of a few of them (appointed colonial officers). The main function of the imperial civil service was maintenance of law and order. The colonial government adopted the process of "Nigerianization," a process that involved rapid replacement of foreign or imperial administrators in the civil service with nationally-oriented qualified Nigerians over a decade prior to Nigeria's attainment of independence. In 1952, the colonial government set up the Phillipson-Adebo Commission to review the phase of the Nigerianization process. By the time the commission submitted its report two years later, the 1954 constitution had declared Nigeria as a federation, thus shifting attention from issues and concerns about Nigerianization to regionalization of the country's civil service (Owulu, Otobo, and Otokoni, 1997). The Elwood Grading Team of 1996 and the Adebo Commission of 1970 constituted the government's early post-independence initiatives to reform the Nigerian civil service. Although less comprehensive in scope, both ccm missions attempted to upgrade the salaries of civil servants and entrench professionalism and high ethical standards within the civil service. The most renowned civil service reform measures undertaken in post-independence Nigeria included the Public Service Review Commission of 1974 or the Udoji Commission of 1974, and the Ayida Panel.

Discussion forum

How can civil service reforms be more meaningful to reflect the desired outcomes?

Adedire's account of civil service reforms in Nigeria is as follows: These reforms are in three phases such as Pre-Udoji, Udoji and Post-Udoji reforms.

'*Pre-Udoji Reform: Prior to Udoji reform of 1972, the following commissions were set up to review the civil service structure (Civil Service Handbook, 1997: 21-22).*

Tudor Davis (1945): This was primarily concerned with the review of wages and general conditions of service (Civil Service Handbook, 1997).

Harragin Commission (1946):…..the commission was the first commission set up to look into the man-power problem in the service and the discontent among the European members of what was described as poor financial reward. The commission made some structural changes by introducing "senior service" and "junior service," thus dividing the service into two rigid compartments (Civil Service Handbook, 1997)

Gorsuch Commission (1954): This commission was the first to attempt giving the regional administrative bureaucracies indigenous structure. It reviewed the senior and junior service categories and recommended that the service be structured into five main grades, from the lowest established posts upwards, with parallel classes for both the administrative and professional cadres. It recommended that the Public Service, which had been unitary, be split into four separate services, comprising the federal and three regional services (Civil Service Handbook, 1997).

Mbanefo Commission (1959): This was set up to review the basic rates of salary and wages payable to holders of posts in the Federal Public Service as well as the Public Service of the Northern and Eastern Regions and Southern Cameroon (Civil Service Handbook, 1997).

Adeyinka Morgan Commission (1963): This was set up to review the wages, salaries and conditions of service of junior federal civil servants and workers in private establishments. It introduced for the first time a minimum wage in the country on a geographical basis.

Adebo Salaries and Wages Commission (1971): This commission was set up to review the existing wages and salaries at all levels in the public services and in the statutory public corporations and state-owned companies; examine areas in which rationalization and harmonization of wages, salaries and other remuneration and conditions of employment are desirable and feasible as between the public and private sectors of the national economy; consider the need to establish a system for ensuring that remunerations in the public services, the statutory corporations and the state-owned companies are periodically reviewed and kept to proper national balance and make recommendations to the Federal Military Government. The commission reviewed the salaries and wages of workers and

recommended that a public service commission should be put in place to take up the responsibility of effectively reviewing the salaries and wages (Report of the Salaries and Wages Commission, 1971).

The Udoji Reforms: The commission which was named after its chairman was milestone in the annals of Nigerian civil service because of the wide-ranging nature of its review and recommendations, which extended beyond the civil service and encompassed the parastatals and local governments as well. The terms of reference of the Udoji Commission are among others to examine the organization, structure and management of the public service and recommend reforms where desirable; investigate and evaluate the method of employment and the staff development programmes of the public service; examine the legislation relating to pensions as well as the various superannuation schemes in the public services and in the private sector and suggest such changes as may be appropriate. In his report, Udoji (1974) made such recommendations like the introduction of open reporting system for performance evaluation; the unified grading and salary structure covering all posts in the civil service; the opening of the post of chief executive of a ministry, referred to as permanent secretary; the introduction of the merit system as a basis of reward; the replacement of the confidential reporting system by the open reporting system; and the introduction of a new code of conduct to the Nigerian civil servant.

The Civil Service Reforms of 1988: In 1988, General Babangida took bold and innovative measures to reform the civil service. The measures were designed to remove the uncertainties in the role of the political head of a department and that of his chief civil servant adviser; and also to infuse new life into the civil service giving it purpose and direction and thereby overhauling the whole civil service machine to make it more efficient and effective (Adebayo, 1989). The reform which was headed by Dotun Phillips made such provisions like the politicization of the service, especially its upper echelon. For instance, the office of the head of civil service was abolished, the Minister, in addition to being the chief executive, also became the accounting officer in place of the Permanent Secretary.

Civil Service Reforms of 1994 (Ayida Panel): The 1988 Civil Service Reforms had such disastrous consequences on the service that the Abacha administration had to constitute the Ayida Panel in1994 to examine the civil service afresh, with a view to discovering factors inhibiting its effectiveness and efficiency and the various factors that had led to low morale in the service. Government decision on the recommendations was published in a white paper in June 1997 (Bhagwan and Bhushan, 2006).

The decisions of the Federal Military Government were that ministries and extra-ministerial departments should be structured according to their objectives, functions and sizes, and not according to a uniform pattern; minister should no longer be the accounting officer of the ministry. This function now becomes the responsibility of the Director-General; government accepted the recommendation that the title of Director-General should revert to Permanent Secretary. Government accepted the recommendation that the post of Permanent Secretary should be a career post i.e. appointment will be made from among serving senior officers in the civil service on the advice of the Head of the Civil Service and the Chairman of the Civil Service Commission (Civil Service Reorganization Decree, 1988).

Public Policy Reforms of 2003: A policy analysis unit was established in the legislative arm, with a view to building capacity for policy formulation, implementation and review.

Monetization as a Public Policy Reform (2003): The Presidential Committee on Monetization in the Public Service was set up on November 11, 2002, under the chairmanship of Chief U.J. Ekaette, Secretary to the Federal Government. The monetization policy aimed at reducing government recurrent expenditure, waste and abuse of public facilities. This is to enhance efficiency in resource allocation and move the economy forward.

(Ekaette, 2003: 16) listed some benefits currently being monetized like residential accommodation- monetized at 100 per cent of annual basic salary; furniture allowance-paid as 300 per cent of annual basic salary in line with the provisions of employment of certain political, public and judicial office holders; utility allowance and domestic

servants' allowance; motor vehicle loan and transport- monetized with provision of vehicle loan of 35 per cent annual basic salary and recoverable over 6 years with 4 per cent interest rate; fueling/maintenance and transport allowance- 10 per cent of annual basic salary will be paid to public servants while political office holders will be paid 30 per cent annual basic salary; leave grant- monetized at the rate of 10 per cent of annual basic salary; meal subsidy- monetized; entertainment allowance- already monetized for public servants, while 10 per cent of annual basic salary was stipulated for political office holders; and personal assistant allowance- monetized.

The Pension Reform Act, 2004: The Federal Government set up Adeola Committee to look into pension administration in Nigeria. The committee came up with a recommendation for the reform of pension administration and management in Nigeria. This recommendation was subsequently introduced as a bill to the National Assembly and passed into law on Friday, June 25, 2004. The passage of the bill into law repeals the Pension Act of 1979 and establishes a uniform contributory pension scheme for both the public and private sectors of the economy. Eneanya (2009) highlighted the major features of the Act such as contributions of funds by both the employer and the employee to fund retirement benefits; amounts deducted from the employee's emoluments together with the employer's contributions are to be credited to the employee's retirement savings account with pension fund administrators.

SERVICOM Policy (Initiative): It was established within the Presidency to manage and effect government commitments to the people in the area of service delivery. It is a social contract between the Federal Government of Nigeria and its people. According to Eneanya (2009), Servicom was empowered to co-ordinate the formulation and operation of Servicom charter; monitor and report to the President on the progress made by ministries and agencies in performing their obligations under Servicom; carry out independent surveys of the services provided to citizens by the ministries and government departments, their adequacy, timeliness and customer satisfaction; conduct Servicom compliance evaluation services provided by government departments; award Servicom index; and view Servicom books and relevant documents.

Civil Service Reforms during Obasanjo administration (1999-2007): According to Obasanjo (2005), the reform of the civil service is one of the central themes of the government's agenda. "For without a transparent and effective civil service, government business and service delivery to the public will be crippled and mired in dishonesty and graft. I am convinced that an efficient transparent and accountable civil service should be the hallmark of our democratic transformation and development. The Nigeria people deserve nothing less." (Obasanjo, 2005).

In his effort to re-orientate the value system and improve the standard of living of Nigerians, Obasanjo regime provided well remunerated packages to enhance democratic governance. Since 1999, the government has increased the salaries of workers twice, while several official hitherto deprived of promotion have been promoted (The Guardian, May 30 2004: 15)

2.3.4 Challenges within the civil service in Nigeria

The public sector like its counterparts the private and third sectors are faced with challenges of behavioural conformance. As Stevenson and Wood stated (2004:178):

....there appears not to have been any in-depth examination of the contents of the codes of ethics and the related organizational ethics artefacts in public sector organizations.

Kojo Sakyi and Justice Nyigmah Bawole in a study carried out to determine the barriers to the implementation of code of conduct in the public sector in five Anglophone West African countries, revealed the following:

- Inadequate education of public employees;

- Too many inconsistencies and impartiality in administering code of conduct.

- Unavailability of copies of codes of conduct to staff;

- Senior managers' clandestine and subversive behaviours and refusal to practice what the code of conduct says.

- Difficulty in comprehending the language of the code of conduct.

- Lack of exemplary leadership; poor supervision and monitoring.

- Prevalence of a syndrome of leniency.

- Ineffective application of the reward and punishment system.

- Undue societal pressure on bureaucrats coupled with an unsupportive public service organisation culture.

Self-Assessment Exercise

Discuss the challenges facing the Nigerian civil service.

2.4Conclusion

This unit pays special attention to the analyses of the ethical code aimed to increase the efficiency of the performance of duties by civil servants. Approved ethical principles of civil service set the common guidelines, ensuring the integrity and viability of the service as a system. The key to assessing quality of professional behaviour is where civil servants observe ethical principles. It also requires proper implementation and monitoring of the ethical behaviour. Civil service systems have experienced a good deal of reforms in the past decades which has been assessed as intense with incremental transformations and systemic changes. These reforms are more administrative in nature, involving the development of ethical codes are tools for the ultimate purpose of evolving better managerial and administrative codes for the public sector.

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1.6 Possible Answers to Self-Assessment Exercises

Self-Assessment Exercise

Discuss the challenges facing the Nigerian civil service.

Eke, Gabriel Favour discusses the peculiar problem of the Nigerian civil service as follows: The problems of Nigerian civil service are traceable to lack of management consciousness, the non-application of modern techniques of management, the absence of performance emphasis, the absence of systematic evaluation, the lack of emphasis on accountability and responsible managers and chief executives. …The lack of efficiency and effectiveness in the civil service is built on corruption.

Onikoko Salihu Tajudeen's research work on *Civil service ethics and the problem of compliance* reveals that high level of Corruption among public officials which takes such forms such as bribery, fraud, forgery, embezzlement of public funds; misappropriation of funds and materials are problems bedeviling the civil service in Nigeria.

MODULE 4

UNIT 3 PUBLIC CORPORATIONS

3.1 Introduction

Among the most conspicuous developments in the last three decades, is the proliferation of public corporations. Public corporations are government-owned outfits which perform exclusive functions for the general public and citizens of the state. They are most times

called 'Government Controlled Enterprise', or 'State Owned Enterprise'. Public enterprise has been called into existence to achieve a variety of vital national task. They were specifically created by the state governments "to address market deficits and capital short-falls, promote economic development, reduce mass unemployment...ensure national control over...the economy..." (Khan; 2005). Public corporation is a feature of modern governments which most, if not all governments cannot do without. Given this increasingly conspicuous feature, so many questions that beg the issue are 'Why does the federal government sometimes use the corporate form of organization? What are the supposed advantages of this form of organization? How do these perceived advantages hold up in practice?' As administrative law students, you are concerned with the establishment, expectations and status of these corporations in order to avoid pitfalls and gross deviations from intended policy outcomes.

3.2 Intended Learning Outcome.

The aim of this unit is to enable students to be able to discuss the following:

i. scrutinize the concept of public corporation;
ii. to be able to discuss the nature, relevance and purpose of public corporations;
iii. to see the relevance of publications as a necessary outcome of modern governance.

3.3 Public corporation

The concept of public corporation

Public corporations are sub-specie of public bodies, the distinguishing feature being that they have a separate legal personality which is usually conferred upon them by the legislature through an enabling instrument.

Presently, many duties are not delegated to central, federal or state regional or local governments but to official boards, commissions and agencies. An important feature of these corporations is that the members of the board or agencies are not publicly elected. Rather, the members are usually appointed to their posts by the federal or state government. Accordingly, although ministers do not expressly run the affairs of these bodies, the ministers have a fundamental but indirect responsibility to both the government and the public for the efficiency and effectiveness of the public corporations.

Tierney asked the question: ***why the federal government of the United States has sometimes chosen the government corporation as its strategy of intervention rather than employing some sort of subsidy, tax expenditure, or coercive regulation.?***

The typical answers involve three sorts of problems: risk, where private entrepreneurs do not see sufficient possibility of return on investment (as in the case of the Synthetic Fuels Corporation); scope (typically, large infrastructure investments), where the amount of capital to be raised and the area of activity to be covered

Definition of public corporation

Public corporation can be defined as "an organization that is set up as a corporate body and as part of the governmental apparatus for an entrepreneurial or entrepreneurial objective". It is an organization which emerged as a result of government acting in the capacity of an entrepreneur. Public Corporations/Parastatals are companies, establishments, and enterprises owned and financed by the government to render essential social and welfare services at affordable prices.

According to Friedman, it can be defined as 'an institution operating a service of an economic or social character, on behalf of the government, but as an independent legal entity, largely autonomous in its management, though responsible to the public, through Government and Parliament and subject to some direction, by the government, equipped on the other hand with independent and separate funds of its own and the legal and commercial attributes of a commercial enterprise.'

Dimock defined it as publicly-owned enterprise that has been chartered under federal, state or local government law for a particular business or financial purpose. Pfiffner defines it as "a body framed for the purpose of enabling a number of persons to act as a single person."

Sir Henry provides an interesting definition of public corporation as follows:

'Public Corporation as an institution for producing goods or rendering services under the general condition that the cost of doing so is met from the revenues earned by doing so- i.e., it has no taxing power. This differentiates it from the Public Authority- e.g., the Assistance Board. But it has certain other essential characteristics: - (1) It is created by some public political act, normally an Act of Parliament; and its constitution, rights and duties can be varied at any time by the authority which created it. (2) There is no equity interest in the hands of private stockholders.'

3.1.4 Nature of public corporation

From the definitions above, we can infer the nature of these corporations.

- The chief characteristics of a public enterprise are: government ownership, government control and management, public accountability, constituent of political and administrative structure, public purpose, economic enterprise covering wide areas of activities and autonomous functioning. Their existence is at the prerogative of the state.

- Public corporations are not delegated to central, federal, state or local governments but to several official boards, commissions and agencies. The very important feature of public corporation is that the members of the board of the agencies are usually appointed to their posts by the federal or state government; they are not elected.

- Public corporations usually enjoy far more latitude than that accorded administrative agencies. For example, the corporations typically have separate personnel systems of their own, and may thus be exempted from all the civil service pay and employment restrictions. Some of the corporations are permitted to set their own employment policies and to engage in direct collective bargaining with their employees over wages, working conditions, and the like. Unlike traditional government agencies or bureaus, government corporations also typically have the power to act in their own names, to sue and be sued, and to acquire, develop, and dispose of real estate and other kinds of property.

- The social benefits to flow from these public enterprises include protection of the interests of the consumers, generation of employment opportunities.

- An undisputed characteristic of the political economy of the 20th century is that the modern state has obtained immense new social and economic authority, power and control over economic resources.

3.3.2 Reasons for the creation of public corporations

The most common rationale in textbooks and conventional wisdom for the establishment of government corporations is that they provide for the efficient and effective operation of "businesslike" enterprises, either owned or sponsored by the federal government. This reasoning was captured in President Truman's 1948 budget speech that:

Experience indicates that the corporate form of organization is peculiarly adapted to the administration of government programs which are predominantly of commercial character-those which are revenue producing, are at least potentially self-sustaining, and involve a large number of business-type transactions with the public. In their business operations, such programs require greater flexibility than the customary type of appropriation budget ordinarily permits. As a rule, the usefulness of a corporation lies in its ability to deal with the public in the manner employed by private enterprise for similar work.

The establishment of public corporations provides strong support for the opinion that governmental administration of major industries is most likely to be less efficient and less flexible than management by public corporations.

Establishment of public corporations affords the government the opportunity to entrust serious social and economic matters to an independent body which reduces the extent of political interference.

A corporate form of organization is likely to be adopted in cases where government itself will be managing an economic enterprise (for whatever reason-historical accident, private

sector default, high cost or technological barriers to private initiation, protection of "the public interest") and where there is a perceived need to confer on the managers and executives of the enterprise a considerable amount of flexibility or autonomy-not as much as private organizations have, but more than is common for most government agencies.

Public corporations have moved beyond the traditional economic role to service delivery as is usually the case in the ancient and medieval eras, but in service delivery, for instance the Federal Road Safety Corps (FRSC), the Nigerian Fire Service (NFS) etc. These institutions do not engage in profit making but in full-time service delivery.

'Necessity', is a theme that resonates with the purpose of creation of public corporations, implying the need for an area of action to be taken by the government. Where a government is faced with social challenges which could cause great harm to the individuals or the state, it comes up with immediate ad hoc measures to tackle them. But, when it is obvious that such challenges are perennial and recurrent, the government quickly establishes a corporation, with the help of the Legislature to handle them. For example, the establishment of Nigeria Fire service, Water Board (Water Corporation), Power Holdings Company of Nigeria; the Niger Delta Development Commission (NDDC).

1.3.3 Powers of Public corporations

A comparison of the power clauses in all the relevant Acts show that the legislators have chosen wide and elastic formulas giving the corporations almost unlimited scope and discretion. The general pattern is that of setting out the specific tasks of the public corporation in question. This is followed by provisions specifying a number of particular activities which the public corporations shall be empowered to carry out, but without prejudice to the generality of the powers granted in the section as a whole.

The degree of elasticity of the powers conferred upon the corporations, and in particular, the choice between an objective and a subjective formulation of those powers, have a direct bearing upon the question of ultra vires control.

3.3.4 Classification of public corporations

In the United Kingdom, public corporations are classified into three groups

a. **Public corporations**; In the U. K, this term includes British Nuclear Fuels PLC, British Shipbuilders, the British Broadcasting Corporation (BBC) and the Royal Mail. In Nigeria, this term includes the Nigerian Postal Service, Nigerian Telecommunications, former National Electric Power Authority.

b. **National Health Service Board**; In the U.K there were 26 of such bodies in 2005. They include the Institute for Clinical Excellence, National Blood Authority, NHS Trusts

c. **Non departmental Public bodies**. In 2005 there were 862 of such bodies in the United Kingdom.

   i. **Executive bodies**. There are 221 of statutory bodies in the U.K that carry out administrative and executive functions. Examples of such bodies are the Teachers Training Agency, Human Fertilization and Embryonic Authority. In Nigeria, such bodies include the Teachers Training Institute, National Board for Technical Education and the Universal Basic Education Authority, Standard Organization of Nigeria.

   ii. **Advisory Bodies**: These categories of bodies provide independent and expert advice to Ministers on particular or specific topics. Examples of such bodies in the United Kingdom are the Advisory Committee on Safety of Medicine and the Law Commission while Nigerian examples include the Nigerian Law Commission, National Council on Privatization;

   iii. **Tribunals**: These bodies have power in specialist fields of law. Examples in the U.K. are the foreign Compensation Commission, Employment Tribunals, Mental Health Review Tribunal. Example of such body in Nigeria is the Code of Conduct Tribunal.

3.4 Legal Status of public corporations

See Lord Denning in Tamlin v. Hannaford (1950) 1 K.B. 18 @ 24 where he stated that:
"In the eye of the Law, the Corporation is its own master and answerable as fully as any other person or Corporation. It is not the Crown and has none of the immunities or privileges of the Crown. Its servants are not civil servants and its property is not Crown property. It is of course a public authority and its purposes, no doubt, are public purposes, but it is not a government department nor do its powers fall within the province of government.

In the U.K, its servants are not civil servants and its property is not Crown property; and it is as much bound by Acts of Parliament as any other subject of the King. It is a public authority and its purposes are public purposes, but it is not a government department, nor do its powers fall within the province of government; unless the public corporations are expressly authorized by statute to act on behalf of the Crown or "are directly placed under a minister of the Crown."

See also the case of Pfizer v. Ministry of Health (1965) HL 512. Contrast this with the case of BBC v. Johns (1965) CH. 32

In the UK, the departments of the Central government share in the legal status of the Crown. Unless provided otherwise by statute, Public Corporations share from certain privileges and immunities that are peculiar to the Crown. However, statutory bodies established for local commercial purposes do not participate in benefitting from crown privileges –see the case of Mersey Docks and Harbour Trustees v Gibbs (1866) LR 1 HL 93. In the UK it is now common for the statutes that establish a new Public Corporation to make express provision for its status. Example- the Health and Safety Commission and the Health and Safety Executive are stated by the enabling statutes to perform their functions on behalf of the Crown. In the UK, where a Public Corporation does not benefit from Crown immunities, it is subject to the criminal law. B. Sullivan (2001) Crim L R 31, J. Gobert (2002) LQR72

Accordingly, public corporations are subject to the law in terms of taxation, liability in tort and corporate powers except they are exempted by law. If they enter into contract outside their powers, such contracts are null and void.

Self-assessment Exercise

Distinguish between public corporations and traditional administrative agencies

3.4 Legal Control of Public Corporations

Public corporations are created to deal with socio-economic problems and to do this effectively, the corporations need to exercise powers conferred upon them by the enabling statute. The powers conferred on the corporations by the Act are discretionary in nature and these discretionary powers enable the corporations to make decisions at critical times and enable them deal with the complex socio – economic problems of the society effectively.

See the opinion of J.F Garner, Administrative Law, 4th Edition, Butterworth & Co Publishers Ltd, 1974, p. 237 as follows:

"In many cases, the statutory power of public corporations are so widely drawn that it becomes virtually impossible to visualize circumstances in which any court could hold any particular act of such corporation to be ultra vires".

3.4.1 Executive and Ministerial Control

In Nigeria, there are a variety of arrangements for executive and ministerial control of public corporations ranging from the power to appoint and remove board members, approval of annual budget of public corporations, ratification of contracts entered into above a specified amount, reception and examination of annual reports and audited financial statements.

1. Power of appointment and removal. See section 2(5) of the Statutory Corporations ETC (Special Provisions) Act (Cap S11, Laws of the Federation of Nigeria, 2004).
2. Setting of policy framework

3. Presentation of financial records
4. Setting of prices and tariffs

3.4.2 Legislative control

a. Oversight functions e.g National Assembly

Parliamentary control is another and effective way of controlling public corporations applicable in England by virtue of the parliamentary system of government. The functions carried on by the public corporations are of public concerns and are performed in the public interest and members of Parliament may on occasion wish to exercise some measure of control over these public corporations. Such controls in forms of debates or discussion as may be exercised by parliament in practice.

3.4.3 Judicial Control

i. Judicial review. See the case of Shyllon v. University of Ibadan (2007) 1 NWLR (Pt. 1014) p.1 at p. 20 Para D-E

Self-Assessment Exercise

What are the grounds for judicial review of an administrative action?

Judicial remedies

Note the following remedies which are available in proceedings for judicial review:

Certiorari

Prohibition

Mandamus

Declaration

Damages

Self –Assessment Exercise

Read up Judicial control in the United Kingdom. What are the distinctive features in judicial control of public corporations?

- The Constituent Statutes. See the case of **Smith v. London Transport Executive(1951) A.C 555; (1951) 1 All ER 667**

3.5 Summary

Public Corporations are essentially sub-specie of public bodies. The distinguishing characteristics of public corporations are that they always have a separate legal personality which is usually conferred on them by the legislature through the instrumentality of an enabling statute. These enabling or constituent legislations usually empower the Public Corporations with large powers for the purposes of their work.

3.6 References/further readings

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3.7 Possible Answers to Self-Assessment Exercises

Self-assessment Exercise

Distinguish between public corporations and traditional administrative agencies

Guide

One of the more striking differences between government corporations and traditional agencies is the way their activities are financed.

Another important feature (some would say the most important) distinguishing government corporations from regular agencies is that the former are theoretically freed of many of the direct control. Their management and operation are theoretically insulated from untoward political influences, especially those of a partisan variety.

Self –Assessment Exercise

Read up Judicial control in the United Kingdom. What are the distinctive features in judicial control of public corporations?

Note the following about public corporations in the United Kingdom

- The jurisdiction of the courts over any private or public company, except that of the public corporations depends on the terms of a special statute while the powers of a company will depend on the terms of its memorandum of association.
- Public corporations are subject to the ordinary law as are other corporate bodies except that they enjoy some statutory exemption.
- The duties imposed on a corporation by statute must be clear but where they are vaguely drawn, it would be impracticable to obtain a mandamus against the corporation or to sue the corporation in action for breach of statutory duty.

MODULE 4

Unit 1 The Civil Service I
Unit 2 The Civil Service II
Unit 3 Public Corporation
Unit 4 The Ombudsman

4.1 Introduction

In the absence of adequate institutional mechanisms for seeking redress in cases of maladministration, public confidence in the government and its personnel would become seriously eroded thereby creating avoidable conflicts between the government and the governed. There are different administrative means of reaching the government for remedy. And that is what this unit seeks to address. You should note however, that the ombudsman is not restricted to governmental agencies alone, as some jurisdictions such as the U.K and the Australia has been adopted wholeheartedly right across the public and private sector, with the result that for some forms of complaint, the ombudsman has become the dispute resolution mechanism of first choice. The first one this unit discusses is the ombudsman. As we shall see in this unit, it is a non-judicial means.

4.2 Intended Learning Outcome

It is intended that at the end of this unit, you should be able to discuss the administrative mechanisms to seek redress in situations of maladministration, ultra vires actions by civil servants. Specifically, the institutional mechanism of the ombudsman. Also, you should be able to discuss the roles, functions and powers of the ombudsman. Lastly, you should be able to differentiate the operations of these protective and redress mechanisms in select jurisdictions.

4.3 The Ombudsman

The term ‘ombudsman’ is Swedish in origin and means ‘representative’. In a state, ombudsman constitutes ‘the ears of the people’. The institution is the ears of the people because it serves as a mechanism of redressing the grievances of citizens in a political system. It is one of the two methods of enforcing accountability that are showing some promises of effectiveness in African countries that accept them. The ombudsman, which originated in Sweden, was set up in order to provide opportunity to redress the grievances of the citizens with regard to administrative injustice. The general objectives of the ombudsman are the improvement of the performance of the public administration and the enhancement of government accountability to the public.

Thus, Sweden is indisputably the home-country of the institution of Ombudsman.

The UK’s first ombudsman was the Parliamentary Commissioner for administration, established in 1967 (parliamentary commissioner Act 1967).

A variety of names have been used to represent the ombudsman office in different countries. The titles adopted by various countries connote diversity of shade and focus of ombudsman office. For example, in Guatemala ombudsman is known as *Procurador de los Derechos Humanos* (Counsel of Human Rights), in El Salvador as the *Procurador Para la Defensa de los Derechos Humanos* (Counsel for the Defence of Human Rights), and in Mexico as *Comisión Nacional de Derechos Humanos* (National Commission of Human Rights). Other national level example includes, Plenipotentiary for Human rights in Russia, the Commission on Human Rights and Administrative Justice of Ghana, the Civil Rights Protector of Poland, the Human Rights Ombudsman of Slovenia and the Parliamentary Commissioner for Human Rights in Hungary.

Definition

According to Andren, the ombudsman is a law officer, appointed by a national parliament for the task of supervising the activities of certain categories of public service and of public authorities. His main concern is with the rights and liberties of the citizens. The supervision

of the activities under his control has, on the whole, the observance of the laws as its primary objective, not the general suitability of decisions.

According to Iluyomade and Eka, Ombudsman implies that citizenry aggrieved by an official action or inaction reserves the right to make his grievances known to an independent body legally authorized to investigate the complaint.

Again, Ezeani, sees Ombudsman as an official appointed by the National Assembly or Government (as the case may be), and charged with the responsibility of protecting the citizens from the arbitrary and oppressive exercise of the executive powers of government.

Ombudsman, is a body established by law, conferred with power to investigate cases of administrative misrule or abuse of power brought to it by an aggrieved citizen with the sole intent of resolving the dispute between the parties independent of government interference.

Ese Malemi defines the ombudsman as an independent and non-partisan public agency that receives and investigates complaints from members of the public and makes contacts with the alleged wrongdoer to peacefully resolve and obtain remedy for the complainant.

The following are to be noted about ombudsman

- According to Barber in his book, Public Administration, (1972) London, Michael and Evans, it is a device designed to deal with cases of maladministration; it is established to examine and report upon complaints where an individual has sustained injustice as a result of maladministration by certain departments in the course of discharging their administrative functions;
- Oluyede, in Nigerian Administrative Law, Ibadan, University Press (1989) alluded that the Public Complaints Commission, Nigeria's ombudsman, was created to examine and deal with cases of undue influence, negligence, error or maladministration by government officials and state officials and staff of parastatals;

- Ese Malemi sees it as a body which gives citizens safeguards against maladministration;
- According to Artur Victoria, the ombudsman fills the space between an organized entity, such as the government and where there is no special jurisdiction; it is a vehicle for commencing a formal complaint, or an inquiry with formal procedures resulting in a conclusion;
- Ombudsman is not a substitute for the ordinary courts and tribunals. See Wade H.W. (1997) Administrative Law, Oxford; Claredon Press.

4.3.1 Historical evolution

The Ombudsman is an agency of effective public administration. The concept began in Scandinavia, as an agency for oversight of the bureaucratic machinery. The first modern ombudsmen were established by the Swedish parliament in the early 1800s (*Justieombudsman* of 1809) to provide citizens a means to pursue grievances against the executive and administrative offices of the government.

LINDA C. REIF's Account of the evolution of the ombudsman in *The Ombudsman, Good Governance and The International Human Rights System* at page 5

After a military defeat by Russia in 1709, the Swedish king, Charles Xll, fled to Turkey for some years. As a result of the long absence of the monarch, the administration in Sweden deteriorated. In 1713 the king appointed a representative to monitor the conduct of the Swedish administration and judiciary, and named the official Justitiekanslern (Chancellor of Justice) in 1719. If a violation of the law or other misconduct was discovered, the Justitiekanslern was empowered to commence legal proceedings against the recalcitrant official. This was and still is an executive appointment, as the Chancellor of Justice continues to exist as "the government's ombudsman". However, between 1766 and 1772, the Estates (Riksdag or parliament) took over the function of electing the Chancellor of Justice, with the monarch regaining this power in 1772. After the King was deposed in 1809, a new Constitution was adopted which divided power between the crown and the

parliament, giving the latter the ability to place some checks on the exercise of executive power. The Constitution of 1809 included a novel institution - the justitieombudsman - appointed by parliament with the powers to supervise the public administration and judiciary and to prosecute those who failed to fulfil their official duties. As the institution evolved, it changed from being a purely legislative monitor to public complaints driven process. Why did the Swedish Riksdag create a new institution, like that of the legislative ombudsman? Wieslander states that the memorandum of the Constitutional Committee indicates that the members felt that an ombudsman appointed by the legislature would promote "genuine civic feeling" and that the ombudsman "was intended primarily to establish a system of supervising the discharge of public office which was independent of the Government".

Since then other countries in the Commonwealth and around the world have introduced into their systems the office of the ombudsman or ombudsman-like agencies. New Zealand was the first Commonwealth country to create an ombudsman in 1962. Beginning in the mid-1960s, numerous other Commonwealth nations in the Americas, Africa, Asia and the Pacific region have established classical or hybrid ombudsmen. These include the provinces of Canada, Tanzania, Zambia, Mauritius, the UK, and Pakistan. The institution is becoming increasingly popular in Central and South America as well. In addition to Puerto Rico, ombudsmen and ombudsman-like institutions exist in Argentina, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, and Venezuela.

The Ombudsman or Public Complaints Commission which came up in the 19th century, is a body constituted to deal with administrative radicalism and injustice emanating from public institutions. The core idea of an Ombudsman is simply that complaint of maladministration or administrative misrule is investigated or examined by an independent and non-partisan public agency.

4.3.2 Models of ombudsman

A preliminary point to make about all previous work on the ombudsman is that no one claims that there is one model of ombudsman. What is apparent is that from a global perspective, a key feature of the ombudsman technique is its flexibility and adaptability to new circumstances. As Trevor buck, Richard Kirkham and Brian Thompson noted, *the ability of the ombudsman institution to operate comfortably in a range of different legal regimes, and perform the very different roles and functions that it has been used to deliver, also lies behind the success of the institution.*

That being said, we have the different models. The first, which is the **classic model**, is based on the Swedish and Finnish ombudsman. The classic ombudsman can be described as "a public sector office usually established by the legislature to monitor the administrative activities of the executive branch of government." The classical ombudsman model, a public sector office appointed by but separate from the legislature, is given the authority to supervise the general administrative conduct of the executive branch through investigation and assessment of that conduct. The classical ombudsman model has been defined as:

'*an office provided for by the constitution or by action of the legislature or parliament and headed by an independent, high-level public official who is responsible to the legislature or parliament, who receives complaints from aggrieved persons against government agencies, officials, and employees or who acts on his own motion, and who has the power to investigate, recommend corrective action, and issue reports'.*

Under the classical ombudsman model (COM), the ombudsman has the power to investigate complaints from members of the public that the administration of government is being conducted in an illegal or, more broadly, an unfair or improper manner. Classical ombudsmen typically only take complaints directed against the government and usually do not have the jurisdiction to investigate complaints between private entities.

There is also what may be called a **mixed model**. For example, the Slovenian model is a combination of both. In addition to powers over state bodies, the Slovenian ombudsman is vested with some limited jurisdiction over judicial procedure (Ayo & Anthony 2011). The

Slovenian model is also both reactive and proactive; as the ombudsman can investigate the matter concern at his own initiative.

An office provided for by the constitution or by an action of the legislature or parliament and headed by an independent, high-level public official who is responsible to the legislature or parliament, who receives complaints from aggrieved persons against government agencies, officials and employees or who acts on his own motion, and who has the power to investigate, recommend corrective action and issue reports.

The third model is the **Variegated Ombudsman Model.** This model is characterized by an increasing scale and scope in jurisdiction of classical ombudsman. While the emphasis of the institutions in this model remains upon the essential core features of an ombudsman (as described under ROM) what distinguishes this group of ombudsmen is growth in both the number and variety of functions they perform.

Discussion forum

Analyse the characteristics of the different ombudsman model. How can you classify the ombudsman in Nigeria and two other jurisdictions of your choice?

4.3.3 Roles of the ombudsman

The ombudsman operates autonomously from executive government, parliament and the courts. Therefore, linking it directly to one of the three traditional core institutions of the state will fail to provide a complete and coherent explanation of the institution's contribution to the constitution.

a. Constitutional Values and the Rule of Law: A key justification for ombudsmen is the need to secure certain essential constitutional values that it would be much more difficult to secure in full without the existence of the ombudsman enterprise. The significant purpose of constitution building is to create systems and institutions that prevent and/or call to account for the abuse, arbitrary, incompetent or lazy exercise of public power by public authorities. The rule of law is granted such a pre-eminent

place in the constitution precisely because it provides legitimacy and control to the exercise of public authority.

What are the constitutional values? Firstly, institutional integrity. Spigelman defines it as institutional integrity … requires a governmental instrumentality to be faithful to the public purposes for the pursuit of which a power was conferred or a duty imposed. Furthermore, its conduct must be in accordance with the values, including procedural values, which the institution is reasonably expected to obey by those who are affected by its conduct and decisions. In any stable polity there is a widely accepted concept of how governance should operate in practice. The role of integrity institutions is to ensure that that concept is realised. **Integrity**, therefore, is being posited as a fundamental and multifaceted constitutional value to be adhered to by government institutions in their relations with the governed.

According to Anita Stuhmcke,

……. ……. While no doubt the third element of institutional values is infused to varying degrees within both the operation of judicial review and merits review, the mechanism of ombudsmen best reflects this element of review. It is in this manner that an ombudsman, by contributing to the values of which an institution must obey, provides integrity review.

A second constitutional value is good administration. The introduction of almost all ombudsman schemes, and indeed the wider administrative justice system, can be traced to the failure of existing mechanisms to provide sufficient confidence that one expectation of government or another was being properly upheld. The arguments in favour of a constitutional right to good administration are strong and gaining ground.

4.3.4 Features of an ombudsman

Michael Brophy: The ombudsman system provides a forum which enables citizens to have access to an independent, impartial and inexpensive dispute resolution mechanism which can resolve their grievances, protect their human rights, and restore their dignity and confidence in the democratic process. There are three flavours – independence, flexibility and credibility. These three can be further broken down as follows:

- Professional preoccupations with complaints handling;
- freedom of action;
- speedy disposal of complaints;
- informality and non-bureaucratic;
- accessibility;
- publicity;
- Persuasiveness
- Ombudsman as a moderator
- independence

Independence

Article 225 of the constitution provides that the commission shall not be subject to the control of any person or authority. The commission does not come under any ministry or government department like in Nigeria.

Jurisdiction:

The jurisdiction of the commission is spelt out in **section 7** of the **Act;** it includes the power to investigate complaints of violations of fundamental human rights, complaints concerning the function of public service commission, etc.

Unlike Nigeria, the commission is not expressly empowered to initiate an action on its own.

Decision/Recommendation

The commission may take action in court to seek any remedy available from the court for the proper discharge of its functions. See for instance, Article 229, Ghana Constitution.

One unique power given to the commission is the power to go to any court for the enforcement of its decisions and recommendations if they are not complied with within 3 months after the decision has been rendered.

Challenges of the Ombudsman

- Prolonged military rule
- Interference by Government
- Insufficient funds
- Bureaucratic problems
- Inadequate institutional capacity to deal with cases etc.

The institution is designed to improve legality, fairness, accountability and efficiency of government. The institution also functions as a human rights promotions institution. The ombudsman's powers are predominantly the power of investigation and the power of publicity. Let us look at some jurisdictions:

Ombudsman in Jamaica

Jamaica have had an ombudsman for the centralised public administration, one for public utilities, and another for the political process. In addition, we have a Contractor-General, which is an ombudsman for government contracts and licences. The Contractor General monitors and investigates matters concerning the award of government contracts, and his fundamental objective is to ensure efficiency, integrity and impartiality in the award of government contracts, licences and permits. Although the Office of Ombudsman in Jamaica and the Office of Contractor-General are based on different legislation, the language of both statutes is so similar that we can conveniently discuss them together.

Tenure of Office

The Contractor-General and the Ombudsman are both commissions of parliament, consisting of persons appointed by the Governor General. The Governor-General appoints the Ombudsman on the recommendation of the Prime Minister after the latter has consulted with the Leader of the Opposition, and he appoints the Contractor-General after he consults the Prime Minister and the Leader of the Opposition. This method of appointment by the Governor- General acting in his own discretion is unique in Jamaican law and, indeed, is unusual in the Commonwealth Caribbean except for Trinidad and Tobago.

The incumbents to the respective offices of Contractor-General and Ombudsman hold office for a period of Seven years and may be re-appointed for five years only in the case of the Ombudsman and further periods not exceeding five years at a time for the Contractor General. Neither can be a member of parliament, a bankrupt, an ex-convict of an offence involving dishonesty or moral turpitude and the Contractor-General is further disqualified for failure to disclose interest in any contract with the government. Both the Ombudsman and the Contractor-General enjoy security of tenure from arbitrary dismissal. Both are removable from office only for inability to discharge the functions of his office or for misbehaviour or, in the case of the Contractor-General, for trading with the Government without the prior approval of both houses of Parliament. Dismissal is only possible after resolutions in both Houses of Parliament that the question of removal of the office holder be investigated. And then, only after the Governor-General has been advised by a Tribunal of not fewer than three persons who hold or have held the office of a judge in a court of unlimited jurisdiction (or a court of appeal from such a court) that the office holder ought to be removed for inability or misbehaviour. In the case of the Ombudsman the Governor-General appoints the tribunal on the advice of the Prime Minister after the latter has consulted the Leader of the Opposition whereas in the case of the Contractor-General the Governor-General appoints the tribunal without acting on anyone's advice.

The Ombudsman is charged with investigating injustices resulting from the exercise of the administrative functions of a government authority or officer, informing principal officers of the authority of the results of his investigations and, where someone has suffered an injustice as a consequence of that breach, making recommendations for action to be taken by the authority within a specified time.

The Ombudsman investigates injustices resulting from administrative action.

4.3.5 Reasons for the establishment of the ombudsman

The UK’s first ombudsman was the Parliamentary Commissioner for administration, established in 1967. In keeping with developments that led to the introduction of ombudsmen around the rest of the world, the ombudsman idea was adopted following

recognition of the shortcomings and lack of coverage of existing systems of redress and justice. In eastern Europe, Spain, Portugal and much of South America and parts of Africa, for example, the shortcoming identified was the profound lack of respect for human rights.

Largely for historical reasons, it was determined that the courts alone could not be relied upon to improve conditions in this area and a new institution was required to strengthen the existing legal order. In much of the remainder of Europe, the reason for the adoption of the ombudsman institution has been more prosaic and has been linked to the growth of the administrative sector (Heede 2000). Large-scale bureaucracies created new opportunities for both arbitrary and incompetent exercise of power and, as a consequence, a growth in citizen complaints against the various emanations of the state. The general conclusion in most countries has been that the complex challenges posed by the nature of modern relations between citizens and public bodies are not ones that can be easily overseen by the courts alone. This discovery has led to the search for alternative means by which disputes can be resolved.

Functions

The core responsibilities of Ombudsman are to investigate complaints and make efforts to address and settle them by way of recommendations.

Ombudsman in Nigeria

Let us consider the ombudsman in Nigeria:

- The origin of the ombudsman can be traced to the Justice Ayoola report on Civil Disturbances in Western Nigeria;
- The recommendations of the Udoji Public Service Review Committee to examine the organization, structure and management of the public service and recommend reforms where desirable, brought up the establishment.

4.3.5 Reason for its establishment

To correct the human rights abuses prevalent among political/corporate entities;

It is geared towards ensuring good governance, administrative justice and respect for human rights;

It provides an avenue where minor claims and less significant issues and grievances can be heard.

4.4 Summary

From our reading, it is stating the obvious that the ombudsman is now an established feature not just of systems of administrative and civil justice, but also of the constitution. This is because if the bigger constitutional picture is taken into account then the ombudsman is only one of a range of institutions that have been devised over the years to heighten the accountability of governments to their citizens and, latterly, private bodies to their customers.

4.5 References/Further readings

Benjamin O. Igwenyi, Njideka Helen Ekpe & Nnamdi P. Ben-Igwenyi 2020. The Ombudsman in Nigeria: A Jurisprudential Overview Global Journal of HUMAN-SOCIAL SCIENCE: H Interdisciplinary Volume 20 Issue 3 Version

Ombudsman Committee, International Bar Association Resolution (Vancouver: International bar Association, 1974) cited in Reif, LC (2004) The Ombudsman, Good Governance and the International Human Rights System, Martinus Nijhoff Publishers,

Hill, LB. (1976) The Model Ombudsman: Institutionalizing New Zealand's Democratic Experiment Princeton, Princeton University Press; Seneviratne, M. (2002) Ombudsman: Public Services and Administrative Justice London, Butterworths.

Professor Anita Stuhmcke, The evolution of the classical ombudsman: A view from the Antipodes*Faculty of Law, University of Technology, Sydney

1.6 Possible Answers to Self-Assessment Exercise

Discussion forum

Discuss the concept of your understanding and appreciation of the role of the ombudsman institution within the wider 'administrative justice system'.