COURSE GUIDE

PUL 802
COMPARATIVE CONSTITUTIONAL LAW II

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INTRODUCTION

Constitutional law generally deals with the matters of the constitution and its administration as well as application within a given State. Constitution It is essentially the embodiment of the fundamental rules, principles and institutions which constitute the political affairs of the state. Since the advent of constitutional democracy in Nigeria, Constitutional Law has assumed a new and somewhat awesome status.

Our discussion in this semester will focus on definition and scope of constitutional Law. We will also look at the structure and development of constitution in Nigeria as well as its sources and functions.

COURSE LEARNING OUTCOMES

By the end of the study Units,, you will be able to:

- effectively discuss the term, 'separation of power'
- fundamental objectives and directive principles of state policy
- explain what delegated legislation is.

WORKING THROUGH THIS COURSE

To complete this course, you are advised to read the study units, recommended books, relevant cases and other materials provided by NOUN. Each unit contains a Self-Assessment Exercise, and at points in the course you are required to submit assignments for assessment purposes. At the end of the course there is a final examination. The course should take you about 11 weeks to complete. You will find all the components of the course listed below. You need to make out time for each unit in order to complete the course successfully and on time.

COURSE MATERIALS

The major components of the course are.

- Course guide.
- Study Units.
- Textbooks
- Assignment file/Seminar Paper
- Presentation schedule.

MODULES AND STUDY UNITS

The discussion in this course is broken down to 16 (sixteen) study units that are broadly divided into four modules as follows –

Module 1

Unit 1 Separation of Powers
Unit 2 Rule of Law
Unit 3 Conventions
Unit 4 Federalism in Nigeria

Module 2

Unit 1 Fundamental Objectives and Directive Principles of State Policy
Unit 2 Fundamental Rights under the 1999 Constitution (as amended)
Unit 3 Fundamental Rights in Other Jurisdictions
Unit 4 Bill of Rights

Module 3

Unit 1 Impeachment
Unit 2 Protection of Public Officers
Unit 3 Pre-Action Notice
Unit 4 Fiscal Federalism

Module 4

Unit 1 Delegated legislation
Unit 2 Constitutional and Statutory Interpretation
Unit 3 Military Rule
Unit 4 Decrees and Ouster Clauses

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

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

Each study unit consists of one week's work and includes specific Learning Outcomes, directions for study, reading materials and Self-Assessment Exercises *(SAE).* Together, these exercises will assist you in achieving the stated Learning Outcomes of the individual units and of the course.

REFERENCES / FURTHER READING

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

ASSESSMENT

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

SELF-ASSESSMENT EXERCISES

There is a self-assessment exercise at the end for every unit. You are required to attempt all the assignments. You will be assessed on all of them, but the best three performances will be used for assessment. The assignments carry 10% each. Extensions will not be granted after the due date unless under exceptional circumstances.

FINAL EXAMINATION AND GRADING

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

COURSE SCORE DISTRIBUTION

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

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

HOW TO GET THE MOST FROM THIS COURSE

In distance learning, the study units replace the lecturer. The advantage is that you can read and work through the study materials at your pace, and at a time and place that suits you best. Think of it as reading the lecture instead of listening to a lecturer. Just as a lecturer might give you in-class exercise, you study units provide exercises for you to do at appropriate times. Each of the study units follows the same format. The first item is an introduction to the subject matter of the unit and how a particular unit is integrated with other units and the course as a whole. Next is a set of learning objectives. These objectives let you know what you should be able to do by the time you have completed the unit. You should use these objectives to guide your study. When you have finished the unit, you should go back and check whether you have achieved the objectives. If you make a habit of doing this, you will significantly improve your chances of passing the course.

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

TUTORS AND TUTORIALS

There are 11 hours of tutorials provided in support of this course. You will be notified of the dates, times and location of the tutorials, together with the name and phone number of your tutor, as soon as you are allocated a tutorial group. Your tutor will mark and comment on your assignments. Keep a close watch on your progress and on any difficulties you might encounter. Your tutor may help and provide assistance to you during the course. You must send your Tutor Marked Assignments to your tutor well before the due date. They will be marked by your tutor and returned to you as soon as possible.

Please do not hesitate to contact your tutor by telephone or e-mail if:

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

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

MAIN COURSE

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MODULE 1

UNIT 1 SEPARATION OF POWERS

CONTENTS

1.1 Introduction

This unit focuses on the doctrine of Separation of Power as a Constitutional law concept. It explains the concept in clear terms that neither of the arms of government should encroach on the powers of the other arms, except as required by law for the purpose of checks and balances.

The unit also contains an exposition on the views of various jurists, case laws, and other literature reviews.

1.2 Intended Learning Outcomes

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

- explain the concept of separation of power
- describe the application in principle and practice
- differentiate between the application in parliamentary system and presidential system of government.

1.3 Separation of Power

The doctrine of separation of powers is an age long constitutional concept. Locke, in his celebrated book titled Second Treatise of Civil

Government (Chapters 12 and 13) wrote that it was convenient to confer legislative and executive powers on different organs of Government.

In this succinct form, Locke encapsulated the whole concept of separation of powers. From it, he suggested that there was some foolhardiness in giving lawmakers the power to execute the law because in such process they might exempt themselves from obeying such laws to suit their individual interests. This was the idea of separation of powers at the rudimentary stage.

However, the contemporary understanding of the concept is due to the efforts of Baron de Montesquieu whose concern was essentially the preservation of political liberty which could only exist where there was no abuse of powers by those in authority. In his *De L'espirit des Lois*, Chapter XI pages 3 – 6, he wrote

> *".....Political Liberty is to be found only when there is no abuse of power."* He expressed morbid fears in the following words*; "...constant experience shows us that every man invested with power is liable to abuse it and to carry his authority as far as it will go..."*

As a panacea to this, he suggested that *"*...it is necessary from the nature of things that one power should be a check on another."
He stressed

> *"...when the legislative and executive powers are united in the same person or body... there can be no liberty... there is no liberty if the judicial power is not separated from the legislature and the executive."*

And concluded that

> *"...there would be an end to everything if the same person or body, whether of the nobles or of the people, were to exercise all three powers"*

(***Explain the doctrine of separation of power***). Judicial powers ought to be separated from executive and legislative powers. It is only a matter of common sense that if the executive is to adjudicate in its own matters, there will be tyranny. The summation of the above was that the three arms of Government, viz the legislature, the executive and the judiciary should be so organized as not to interfere one with the other.

In view of the novelty of this idea at that time, it drew comments from intellectual minds. For instance, James Madison, discussing the totality of that doctrine pointed out that Montesquieu's doctrine did not mean that the separate departments of government might have no partial 'agency'

in, or no control over the acts of each other. That already brought an exception to Montesquieu's doctrine because the issue of partial control itself belies the idea of separation of powers by Montesquieu. Opinions like this, however, brought about the current refinement of the concept of separation of powers. Such refinements exist under the Constitution of the United States of America and under the Constitution of the Federal Republic of Nigeria, 1999. In *Springer v Government of Philippines Islands 277 US 89, 2021 (1928)*, the court made the following pronouncement:

As a general rule inherent in the American Constitutional system, that unless otherwise expressly provided or incidental to the powers conferred, the legislature cannot exercise either executive or judicial power, the judiciary cannot exercise either executive or legislative power. The issue came up again for discussion in the case of *Liyanage v The Queen (1967) AC 259,* where the Judicial Committee of the Privy Council pointed out, upon the facts of the case that there existed under the Ceylonese Constitution a tripartite division of powers and it would be unconstitutional for judicial functions to be allowed to be interfered with by the legislature through an Act of Parliament.

The Constitution of the Federal Republic of Nigeria 1999 established the doctrine by vesting legislative powers in the National Assembly under Section 4. There are usually three different powers in every state. These are Legislative Power, Judicial Power and Executive Power.

The doctrine of separation of power, in practical terms, entails the following:

(a) There must be no interference with the affairs of one organ by the other;
(b) No person should discharge more than one function;
(c) No organ should exercise the functions of another

These deductions mean that one arm of government should not interfere with the affairs of another, that is, no 'partial control'. Secondly, the Executive should not interfere with the Legislature or the Judiciary and in the same vein; the judiciary must not interfere with the affairs of either the legislature or the executive. Lastly, one individual should not perform more than one function. That is, a person exercising a governmental function must not overlap in the exercise of other functions.

The Legislature

The legislature as an arm of government in the tripartite classification of powers has come to be accepted as a constitutional imperative.

The position of the legislature at the Federal level or the State level depends on the forms of Government that has been put in place. Thus, in the case of Parliamentary system of government, the right of the executive to govern derives from the parliament. This is what is known as parliamentary system. James Bryce called it "the rule of the legislature through a committee of its own members."

The Prime Minister was the person saddled with the responsibility of running the government when the parliamentary system of government held sway in Nigeria. He was appointed from the House of Representatives by the President who was more of a ceremonial head. The Prime Minister was expected to be the person who appeared to the President to command the support of the majority of the members of the House. The same was the position in the various regions where the Premier was appointed from the House of Assembly. The person who was appointable was he who commanded the support of the majority of the members of the House. The determination of the question whether Chief SL Akinola commanded the support of the majority of the members of the Western Region house of Assembly led to the case usually referred to as *Hon SL Akinola Vs Sir Adesoji Aderemi and Alhaji .J Adegbenro.*

Thus, just as it was required that the person to be appointed the Prime Minister or the Premier must command the support of the majority of the Members of the House, the same requirement must be met before the removal of either the Prime Minister or the Premier.

(***What is the main function of the legislature in the running of a government?***). The composition of the executive derived basically from the Parliament as the Ministers in the case of the Federal set-up and the ministers in respect of the Regions were chosen by and from the legislature. It was like giving only one popular mandate for the purpose of putting in place the Government.Thus the members of parliament who were given the authority as such were also given the power to determine Government. As Prof. Nwabueze rightly put it:

It is the majority in the legislature that makes and unmakes the executive. The head of government has to be a member and the leader of the majority in the legislature in order to be so chosen. The other ministers are also required to be members of the legislature. As members and leaders of the majority of the legislature, the Prime Minister and the other Ministers are enabled by the authority of their ministerial offices, their leadership of the majority in the house and of the ruling party to control the legislature and the legislative process, which then results in a partial fusion of legislative and executive powers in the same person

The same obtained by analogy in respect of the Regions.

In respect of a Presidential system of government as can be gleaned from the 1979 and 1999 Constitutions, a better appreciation and guarantee of separation of powers can be seen. The powers of the three basic organs of government, that is, the parliament, the executive and the judiciary can be determined from sections 4, 5 and 6 of the 1979 as well as the 1999 Constitutions. In respect of the parliament, which is the focus of this paper, section 4 of the 1999 Constitution provides:

> *4(1) The legislative powers of the Federal Republic of Nigeria shall be vested in a National Assembly for the Federation which shall consist of a Senate and a House of Representatives.*
> *4(6) The legislative powers of a state of the Federation shall be vested in the House of Assembly of the State.*

By way of comparison, it can be said that the Presidential system of government ensures the attainment of the essence of separation of powers, more than the parliamentary system, that is, freedom from arbitrariness, oppression or tyranny by a segment or an organ of the three main divisions of powers. The argument might be made that in the case of a Presidential system of government, opposition between the organs of government especially between the executive and the parliament is usually prevalent. This however does not preclude us from making the point that it is a derivative of checks and balances required in a Presidential system. It reduces arbitrariness in the process of governance and makes each organ of government alive to its responsibility in ***Samuel Ekeocha V The Civil Service Commission, Imo State (1981 1 NCLR 106)***, the substantive suit turned on the legality of the dismissal of the Plaintiff by the Defendant In the course of evidence, it was found that the Imo State House of Assembly had sought to interpret the Constitution and had taken a decision on the issue of the existence or otherwise of the Civil Service Commission.

As a follow-up to the itemized powers Legislative Houses at the federal and state levels, 4(5) of the 1999 Constitution provides;

> *If any Law enacted by the House of Assembly of a state is inconsistent with any law validly made by the National Assembly the law made by the National Assembly shall prevail, and that other law shall to the extent of the inconsistency be void*

Section 4(5) of the 1999 Constitution regulates the items stated in the Exclusive Legislative List set out in Part I of the second schedule to the Constitution as well as those itemized in the Concurrent Legislative List set out in the first column of Part IIof the Second Schedule to the

Constitution to the extent prescribed in the second column opposite thereto.

The issue of the extent of power of the National Assembly and the House of Assembly of each state became a subject of litigation in *Attorney General of Abia State Ors vs Attorney General of the Federation.* The case dealt a part with the determination of the appropriate legislate body that had the power to create or extend the tenure the Local Government Councils in the various states. The Supreme Court held inter *alia* that the National Assembly had no power whatsoever under item II of the Concurrent Legislative List or indeed underany provisionof the Constitution to increase or alter the tenure of the elected officers of the Local Government Councils. The Supreme Court further held that only the House of Assembly of a State had such power in view of the provisions of section 7 (1) of the Constitution and item 12 of the concurrent legislative list in Part II of the second schedule to the Constitution.

Executive

In **Attorney General Abia State & Ors V Attorney General of the Federation (2003) 4 NWLR 125**, the Supreme Court held on the principle of separation of power:

By the Constitution of the Federal Republic of Nigeria, 1999, the Executive power is to administratively implement the policies of governance made into laws by the National Assembly. The National Assembly is to make the laws, but the implementation of the laws is vested in the Executive. The judiciary is to interpret the law. The legislative powers are vested in the National Assembly by Section 4 of the Constitution; Executive powers are vested in the President by Section 5; the judicial powers are vested in the courts by Section 6.

The Supreme Court, per Belgore, JSC, further stated that the principle behind the concept of separation of powers is that none of the three arms of government under the constitution should encroach into the powers of the other. Each arm-Executive; Legislature and Judiciary is a separate, equal and coordinate department and no arm can constitutionally take over the functions clearly assigned to the other. Thus the powers and functions constitutionally entrusted to each arm cannot be encroached upon by the other**.**

Self-Assessment Exercises

What is the major reason for the establishment of the doctrine of separation of power?

Executive Powers

Under the 1999Constitution, the Executive Powers of the Federation are vested in the President and Governors and such powers are extended to "the execution and maintenance of the Constitution, and all laws made by the National Assembly on matters over which it has for the time being power to make laws”**.** In the case of the State, executive powers are vested in the Governor and the powers extend to ‘the execution and maintenance of all laws made by the House of Assembly of the State.’ The Executive President is not only the Head of State and Head of Government; he is also the Commander-in-Chief of the Armed Forces. In these positions, he has the duties of appointing Ministers, members of various Councils and Commissions, Chief Justice, and the Service Chiefs. In view of the unified Police system in Nigeria, he controls the Police. There are committees where both the Federal Government Executive and State Executive meet. The Governors are members of the National Economic Council for instance.

Under Decree No 107, the Executive authority of the Federal Republic of Nigeria was vested in the Head of State and Commander in Chief of the Armed Forces which was exercised by him in consultation with the Provisional Ruling Council. In his absolute discretion, he appointed the Chief of General Staff, Service Chiefs and General Officers Commanding as well as the Directors General of the National Security Agencies. The meeting point of both the Federal Executive (and legislative) and State Executive was the National Council of State. The State Executive Council also existed under this Decree with the power to regulate its own procedure at the State level. (***Comparatively discuss the functions of the each of the three arms of government***).

Under the 1999 Constitution, the State could create new-states with the approval of a simple majority. The same procedure applies to altering the Constitution. This shows that the Federal principle is well recognized in matters relating to creation of new states and amendment of the Constitution. The actual strength of the Federal Executive lies in its financial powers. This is usually brought under the broad heading of Revenue Allocation.

Judiciary

In the case of *Ojukwu v Governor of Lagos State (1986) 1 NWLR 18,* the Supreme Court held, inter alia, that "in the course of the separation enshrined in the 1979 Constitution, once a matter is submitted for adjudication by a Court in due exercise of the judicial powers vested in it by Section 6 (6) (b), the executive should not interfere until a judicial decision has been made, particularly where the executive interference will have the effect of pre-empting or anticipating the decision.

Judicial Powers

It cannot but be expected that disputes are inevitable in a Federal Government. Such disputes occur mainly between the State Governments and the Federal Government. Adjudicatory powers are created under section 6 of the 1999 Constitution. Courts could be easily stratified into two namely, Federal Courts and State Courts. In this connection, at the Federal level, there are the Supreme Court, the Court of Appeal, the Federal High Courts and Industrial Courts. The Supreme Court and the Court of Appeal are both appellate Courts.The Federal High Courts and Industrial Courts are courts of co-ordinate jurisdiction.The Supreme Court is the ultimate authority on the interpretation of the Constitution and pronouncements on the legality or otherwise of actions of States and the Federal Government.

Functions of the Judiciary

The 1999 constitution provides for two different judicial powers as follows:

a) ... all inherent powers and sanctions of a court of law;
b) ... Matters between persons or between government or authority and any person in Nigeria ... for the determination of any question as to the civil rights and obligations of that person.

These two means by which the judiciary could exercise its powers have been subject to discussions on the functions of this arm of government, that is, the goal for which these judicial powers are exercised.

Firstly, the judiciary acts as the mediator in actions and proceedings relating to disputes between persons or between governments or between an authority and any person in Nigeria. This authority stretches into deciding dispute as well as pronouncing verdicts and rulings thereupon which will be carried into effect as well as the corollary power of punishment for contempt.

Secondly, the judiciary provides checks on the exercise of powers by other branches of government. The judiciary acts as the interpreter of the constitution and the factor for delimiting constitutional boundaries between Governments, *inter se,* and individuals and the Governments.

Thirdly, the judiciary acts as the custodian of the rights and property of the people. It acts as the safeguard of the liberty and property of the people. By virtue of this, it contributes to the orderliness of society. The corollary to this is the continued adherence to the norms and the dethronement of deviant acts.

The fact that 'no one can tell what the law is until the court decides it' leads only to the all-pervading effect of interpretation of laws by the Judiciary. In view of the fact that the process of law making, strictly so called, ends with the Legislature, makes it easy to complete the chain by the judicial arm applying the laws to facts. If we view legislative law as abstract, then their interpretations by the courts is the physical law. These contentions are astutely supported by Holmes, who proclaimed law as 'What the judges say it is'

The judiciary to some extent has the function of law-making or in some cases makes law in the course of adjudication. Judicial decisions create the law. Such decisions remain the law until the legislature changes it. Even in this process of change, the form and procedure are keenly looked into in order to be sure that the legislature has conformed to constitutional requirements. The judiciary has two ways of looking into this kind of matter. It may do so under outright constitutional or statutory provisions.

In the case, it takes refuge in specific proceedings provided by the law.
The other way is by the use of the "'inherent power". This refers to the power of the court to interfere in the interest of justice where there are no express provisions conferring jurisdiction or powers to so act. Afterall, the main duty of the court is *fiat justicia.*With these very important national constitutional duties, there are some attributes expected of a judicial officer as well as the conduct of judicial proceedings.

InJideonwo v Governor, Bendel State of Nigeria [1981]1 NCLR 4,the first defendant having been sworn in as Governor under the platform of the Unity Party of Nigeria (UPN) dissolved and or suspended local government councils. Plaintiffs representing both Nigeria Peoples Party (NPP) and National Party of Nigeria (NPN) members of Assembly challenged the action as legislative and therefore, *ultra vires,* and unconstitutional.

It was held as follows:

1. The Constitution of the Federal Republic of Nigeria, 1979 clearly sets out the powers of the three arms of government, the executive, the legislature and the judiciary and indeed if the legislature passes a law which is beyond its competence and which it has no jurisdiction to pass, whether or not it was passed by all the members of the house, any member of the house or any member of the public who is affected by the law, can challenge the law in court and nothing prevents the court from setting it aside and declaring it, *ultra vires,* the legislature if in fact it is so.
2. The judicial powers of the state are vested in the courts, which are established for the state by the Constitution. Under Section 6 of the constitution, there is nothing which prevents any court of

competent jurisdiction from hearing and determining any matter which had been discussed in the House of Assembly.

3. The judicial powers of the state vested in the court established under the Constitution shall extend, notwithstanding anything to the contrary in the Constitution, to all inherent powers and sanctions of a courtof law and to all matters between persons or between government or authority and any person in Nigeria and to all actions, proceedings relating thereto, in the determination of any question as to the civil rights and obligations of that person: Sec Section 6(6)(a) and (b) of the Constitution.

In a democratic Government, the Constitution is the Supreme Law of the land and the rule of law is the basis of Government actions. Any law or action that contravenes the provisions of the constitution is void to the extent of such inconsistency.

In *Attorney* General *of the Federation v Attorney General of* Abia State (2003) 4 NWLR 125, the Supreme Court declared unconstitutional and contrary to the provisions of section 162 of the 1999 Constitution, the Act of the Federal Government in charging certain funds, like that of the judicial settlement of external federal debt joint venture contracts and the Nigeria National Petroleum Corporation (NNPC) priority projects, special allocation to the Federal Capital Territory in the federation Account out of which all the various levels of government are to take a share.

On the importance of the doctrine of separation of powers, the Court further held that the doctrine is to promote efficiency in governance by precluding the exercise of arbitrary power by all the arms and thus prevent friction.

In the words of Chief Obafemi Awolowo,

> Man loves power, in the family, vicarage, town and state, in the club, groups, association businesses, in the institution of learning, newspaper office… In this entire sphere, you see him always exacting in the use and abuse of power.

He also said that "An independent judiciary is one of the bulwarks of the liberty of the citizen…a judiciary which is subservient to the executive and the legislature will be bound to administer the law with partial affection for those in authority and to the prejudice of the governed".
In *Lakanmi &Ors. v. Attorney General of Western State (1971)UILR 210,* the Court noted inter alia as follows:

In other words, these deductions mean that one arm of government should not interfere with the affairs of another, that is, no "partial control.

Secondly, executive should not interfere with the legislature or the judiciary and in the same vein: the judiciary must not interfere with the affairs of either the legislature or the executive. Lastly, one individual should not perform more than one function. That is, a person exercising a governmental function must not overlap in the exercise of other functions.

Objectives of the Doctrine of Separation of Powers

The objectives of the doctrine of separation of powers are as follows:

1. Avoidance of tyranny and ultimate safeguard of labour, all arms work for peaceful co-existence in the society.
2. Separation of powers makes for specialization in the sense that each arm of government specializes in some area of jurisdiction without interference.
3. Separation of power ensures decongestion of functions in one hand as functions are shared among the three organs.
4. Efficiency is employed in their suitable positions as a result of concentration in specialized functions. Separation of powers brings about higher productivity as a result of dexterity in performance.
5. The corollary principle of separation of power enhances check and balance as one arm serve as a watch dog over the order. In effect, there will be independent co- operation as each arm monitors the activities of the other in an effort to preserve human liberty.

An example of Checks and balances under the 1999 Constitution (as amended), can be seen in instances where Bills are passed by the National Assembly, they must be assented to by the President before they become law. This serves as a check on the legislative power of the National Assembly. The President can exercise his power of veto. To check an indiscriminate use of this veto power, such an executively vetoed bill may be sent back to the National Assembly and it is passed by two-thirds majority of each House in case of Ordinary Bills and, in the case of Appropriation Bill, both Houses at a joint session**. (S**ection 231(1), 238(1), 250(1), 271(1), Second schedule of the 1999 Constitution as amended

The principle of Separation of Power is a blessing to a nation where properly followed. Not only should this principle be seen in books, the evidence of its operation in any government must be visible.

1.4 Summary

Separation of Power as a Constitutional law concept has been discussed in full. The roles of the Legislature, the Executive and the Judiciary have

been drawn. Also considered are the overlaps in terms of their checks and balances in the performance of their constitutional roles.

 1.5 References/Further Readings/Web Resources

Sokefun (2011), *Constitutional Law Through the Cases*, Caligata Publishers

Sokefun, J.A. (2002). *Issues in Constitutional Law and Practice in Nigeria.*In honor of Dr. Olu Onagoruwa: Edited by Justus A. Sokefun.

Montesquieu, L'Esprit des Lois, Chapter XI pages 3 – 6. See also O. Hood Phillips, Constitutional and Administrative Law, 7th ed.).

Second Treatise of Civil Government, Chapters 12 and 13.

1.6 Answers to Self-Assessment Exercise

The decision of the Supreme Court, that the concept of separation of powers is to avoid the possibility of any of the three arms of government under the constitution encroaching into the powers of the other.

UNIT 2 RULE OF LAW

CONTENTS

2.1 Introduction

This unit discusses the concept of Rule of Law. Rule of law is the rule of the law, not the rule of might. By Rule of law, we mean absence of a dictator; absence of arbitrariness.

2.2 Intended Learning Outcomes

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

- explain: the concept of Rule of law
- describe the various signposts that evidence the Rule of law.

2.3 Rule of Law

The *"Rule of Law"* as a constitutional concept has generated a lot of controversy. The controversy stems from two things: the theoretical aspect of the concept and the practical aspect. The theoretical aspect is linked with the fallbacks or perhaps watertight explanation, i.e. the absolute attachment of the concepts to England, offered by Albert Venn Dicey, its main exponent. The main criticism as we shall see later is whether there is a possible extension of the concept beyond the Anglo-Saxon tradition and the possibility of this assurance on matters relating to human rights. No doubt, the full application of the concept is likely to send jitters into governments' spines because the central point there is succinctly put by Stone as being that state officials and ideally state organs themselves must be answerable in the Courts like all other persons and bodies. The argument certainly goes beyond that. Several "important truths" follow from the ethical import of the rule of law notion."

Of these "important truths" he mentioned the following:
a) The sanctity of human rights;
b) The concept is not a mere national legal doctrine;

c) The issue of equal application of laws and the independence of the judiciary;
d) Uniformity of rules of law.

For whatever reasons, there appears to be more emphasis on the Anglo-Saxon application and its interpretation in the practical aspect of the rule of law. The dictum of Lord Wright in *Liversidge v Anderson* [1942] AC 206 at 261 is instructive. He said:

> In the Constitution of this country (England,) there are no guaranteed rights. The safeguard of British Liberty is in the good sense of the people and in the system of representative and responsible Government which has evolved.

(***Briefly discuss the concept of the rule of law***). The history of the Rule of Law dates back to the theories of early philosophers. As stated by Aristotle, the Rule of Law is preferable to that of any individual. Adopting this theory much later and providing an extension to it, relevant to that period (Middle Ages), Bracton, in the 13th century, was of the opinion that, 'the king himself ought not to be subject to man, but subject to God and the Law because the Law makes the King.' This was the extent to which the early philosophers could stretch the rule of law.

Much later, John Locke (Second Treaties of Civil Government) on the same concept added:

> Freedom of men under government is to have a standing rule to live by, common to everyone of that society, and made by legislative power created in it and not to be subject to the inconstant, unknown arbitrary will of another man.

Professor AV Dicey in his seminal work distilled and expatiated on the various ideas on the "Rule of Law." Even though the three aspects are subject to constructive criticisms, writers on the subject are agreed on the fact that the Dicey's formulations are authoritative, coming at the last stage of the evolution of the concept.

The first aspect of the 'Rule of Law' as formulated by Dicey was that the concept means the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power and excludes the existence of wide discretionary authority on the part of the government. He went on further to say, to the displeasure of non-Anglo-Saxon writers, that Englishmen are ruled by the law and by the law alone.He said: a man may with us (the English Nation)be punished for a breach of the law but he can be punished for nothing else." (See Dicey, The Law of The Constitution, (1885) 10th Ed., Page 202.)

The aspect is epitomized by the case of *Entick v. Carrington* (1765) 19 St. Tr. 1030.In that case, the defendant had broken into the Plaintiff's premises and seized some papers. The Plaintiff brought an action for trespass whereon the defendant argued that he had a warrant issued by the government authorizing the trespass and seizure of papers. This was rejected by the court which decided that the government lacked any authority to issue these warrants.

In *Liversidgev. Anderson* (1942) AC 206, the Home Secretary was empowered under the Defence Regulations (issued under the Emergency Powers (Defence) Act 1939) to imprison any person if he had "reasonable cause to believe" such a person had hostile associations. Liversidge was detained without trial under these regulations. He sued the Home Secretary for false imprisonment. The House of Lords in a ruling of 4 against 1 held inter alia that the Court could not inquire into the grounds for the detention, as long as there was no evidence to suggest that he had acted other than in good faith.

The second postulation of Dicey was that every person, no matter his status is subject to the law of the land. In this sense, it means equality before the law or equal subjection of all classes to the ordinary law of the land administered by the ordinary law court. This postulation includes equality, justice and equality of rights. Particularly, it includes rational and reasonable application of law to all without distinction.

Be this as it may, one finds it difficult to explain the existence and operation of constitutional immunities endowed to the Executive, Judicial officers as well parliamentary privilege and diplomatic immunity. All these are limitations to the idea of equality before the law. Dicey was certainly aware of these strictures, he was only setting standards which nations should strive to attain.

The third formulation of Dicey is that the rule of law may be used as a formula for expressing the fact that "...with us, the law of 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 and are defined and enforced by the Courts." By virtue of this, law comes from a source which is not mentioned by Dicey.

A lot has been written on this important subject. One clear understanding however exists. This is that in every political community, there is the need to ensure that affairs are conducted in accordance with pre-determined, formal and binding rules which apply to all without fear or favour. This cuts all bounds. There is the usual misconception that the rule of law affects the executive. However, experience has shown that in practice, the concept of the rule of law pervades all facets of government. For instance,

under the 1999 Constitution of the Federal Republic of Nigeria, the legislature is given immensely wide latitude in terms of lawmaking. The rule of law comes in when in the exercise of this power, it does so in accordance with basic and fundamental rules in terms of procedure, form and content.

Regarding the judiciary, the courts are enjoined to allow fair hearing in all matters and be guided by rules which may be reviewed on appeal in the grant or refusal of equitable remedies, costs, sentences, and the enforcement of fundamental rights. The gamut of the rule of law is predicated on the existence and predominance of formal rules, their equal application to all categories of persons within the jurisdiction for the equilibrium of the society.

In RE: Mohammed Olayori and Ors. Suit No. M/196/69 of 17TH November, 1969
High Court, Lagos (Unreported)
(Facts are contained in the Ruling of Taylor, C. J.)
Taylor, C.J.:

The five applicants were at all material times contractors to the Nigerian Army. On 29th December, 1968; 5th January, 1969; 18th November, 1968; 29th November, 1968; and 4th March, 1969, the applicants, were arrested and detained by or under the authority of the Nigerian Army.
They were alleged to have received money for services not rendered or goods not supplied to the Nigerian Army. At a subsequent time, the applicants were released "on bail" on what is said to be 'an enforced promise' to pay the money claimed by the Army or part thereof. Exhibit A, which is attached to the application, is a Photostat copy of a letter purporting to be signed by Lt Col Ochefu, President, Board of Inquiry, Commandeering of Civilian Owned Vehicles, and is in support of the allegations of the applicants as to their arrest, detention and subsequent release on bail. It reads *inter alia* thus,

> 'Please find attached, details of terms of agreement under which suspects in the Van Hire Racket are being made full refunds in respect of money paid to them for services not rendered. This line of action is being taken with the sole aim of recovering all the cash involved. It should, however, be clearly noted that the detention order served on these persons will be enforced if they fail to live up to their obligations as agreed on Annexure 'A' attached to this letter and the Military Police have been instructed to co- ordinate with GSO II (Pay) at the AHQ to ensure that regular payments are made failing which the detention order will automatically be enforced'.

(***What are the judicial opinions on the concept of the rule of law***?). Before I make reference to Annexure 'A', I would be failing in my duty if I did not make some comment on this letter. From the first paragraph of the letter quoted above, the complaint is said to be that the applicants received money for services not rendered. The first point that must strike one as to do with how the applicants happened to have been paid before a check was made as to whether the services had been rendered. Secondly, one must then ask why, if that be the case, the applicants were not, in accordance with the very rule of law by which we live, arrested and handed over to the civilian authorities to be tried in a criminal court. Such trial is no bar to a civil claim for a refund of the amounts so received. To take the steps that were taken as shown in Exhibit A and the annexure is not in tune with procedure of the rule of law. In Annexure 'A', attached to Exhibit A, and against the names of the five applicants in refund of the sums involved the monthly instalment said to have been agreed on by the applicants in refund of the sums involved and finally a column for "Remarks". In the latter column is contained the following: (a) the granting of bail, (b) the monthly sum to be paid with or without an initial deposit and (c) the time when these payments and /or deposit are to be made. The applicants before me are to make a deposit on or by the end of September, 1969, or the first week on October, 1969.

They were re-arrested and detained on various dates between 8th and 13th October, 1969, inclusive] ... The allegation is that they were so arrested and detained because they had failed to carry out the terms of the payment as in annexure A and further because of the legal proceeding taken out by them in Suit No. M/175/69 as contained in paragraphs 16 and 17 of the affidavit in support of the application. A comparison of the date on which the case was called for mention in court, i.e. the 6th October, 1969, with the dates of re-arrest of the applicants as already set out prima facie supports this contention.

Those are the major facts set out in the affidavits in support of the application, and although specific mention is made in the affidavit as well as in Exhibit A of Lt. Col. Ochefu, President of the Board of Inquiry and writer of Exhibit A, no counter affidavit was sworn to refuting any of the facts deposed to in support of the application. The counter affidavit filed is sworn to by one Alfred SuruOmih, the Superintendent-in-Charge of the Maximum Security Prison, Kirikiri, Apapa. The Only paragraphs of any substance in the 4- paragraph affidavit are three and four, which, in effect, state that the applicants are detained on orders issued by the Chief of Staff of the Nigerian Army pursuant to section 3 of the Armed Forces and Police (Special Powers) Decree, 1967.

It has been difficult to follow the argument of the learned State Counsel, Mrs N Isikalu, in this application and particularly when the arguments are

based on cases which on the facts are clearly distinguishable from the present case. If I get her rightly, her argument is that once an order for such a detention is issued under section 3(1) of the 1967 Decree during that period of Emergency, it is not competent for the Court to inquire into it on an application for habeas corpus and no counter- affidavit need be filed in answer to that sworn to on behalf of the applicants.

In support of this, Mrs. Isikalu, for the respondent, places reliance on the case of *R. v. Secretary of State for Home Affairs, ex- parte Greene,* [1942] A.C.284 (HL).

Quite apart from the distinguishing feature of which I shall make mention anon, the case does not itself support the contention of learned counsel. I do not know whether the whole of the report was given full consideration, but in view of the arguments of the learned State Counsel and that apart, she admitted in these proceedings, I propose to quote from the case in *extenso* from the judgment of Viscount Maugham, I shall begin with the passage on page 290 which reads thus:

> "My Lords, I am certain that this House would be very willing to curtail or diminish the rights of an applicant for a writ of habeas corpus and *suscipiendum*, but we are, of course, sitting in a judicial capacity and are bound by the law as it exists. It is inaccurate to say, as some have said, that the writ is applicable as a remedy in all cases of wrongful deprivation of personal liberty. What the judges of the High Court can do at the instance of the imprisoned person is to command the production of the person and to inquire into the cause of his imprisonment. If there is no legal justification for the detention, the party is ordered to be released, but there are many cases, and in particular those of a criminal or supposed criminal character, in which a return to the writ cannot be traversed or impeached by affidavit… "

The learned Law Lord went on to say on page 291 in respect of the case before the House of Lords that:

In my opinion, the present case is within ss. 3 and 4 of that Act (Habeas Corpus Act, 1816[56] Geo. IIII), since no charge of a criminal or supposed criminal nature is brought against the appellants and it is not within the order made by a Secretary of State purporting an act under Regulation 18B made pursuant to and within the provisions of the Emergency Powers (Defence) Act, 1939. It is, however, not an order of a court of justice, for the Secretary of State was acting as an executive officer in a matter of administration. It is important to note that his good faith in the matter is not challenged. The only fact, therefore, which could be examined as regards its truth pursuant to the terms of the Act

(assuming the order itself to be admitted or proved) is whether the Secretary of State had reasonable cause to believe the appellant to be a person of hostile association and that by reason thereof it was necessary to exercise control over him.

I have underlined the last two sentences in the hope that they will be a guide in future to those who advise authority on these matters and seek to justify the action under the umbrella of the *Ex- parte Greene* case.

The authority, however, continues with these words:

> *At common law apart from the Act of 1816 the return could not be disputed.*
>
> *The proper court to examine the alleged fact under the modern practice is the Divisional Court. Affidavits were filed on both sides.*

Again stopping there for a moment to comment on the statement of the learned Counsel for the respondent, which I must confess completely took me by surprise, that in as much as the Chief of Staff and/ or Lt. Col. Ochefu were not made parties to the application they directed to the Superintendent of Kirikiri Maximum Security Prison, only such person was competent to contradict the allegations made in the affidavit in support of the applications, being ignorant of the circumstances surrounding the detention. In short, where in an application between A and B the Court decides the issue on the affidavits sworn to in the proceedings, even though A and/ or B may have witnessed to the cause who are prepared to swear to affidavits in support, they have no *locus standi*, not being parties to the cause. [This is] a statement which does no justice to a practicing member of the profession. As Chief Williams for the applicants pointed out, in this case as well as in R. v. Governor of Brixton Prison[1968] 2 W.L.R 618, and *R. v. Governor of Brixton Prison*[1916] 2 K.B.. 742, the writ was directed to the officer-in charge of the establishment where the applicants were detained but as the facts show in the former case, evidence of other witnesses was given by affidavit.

Returning to the main issue, it is perhaps necessary to quote further from the judgment in the case to which the learned State Counsel places reliance. In the same judgment Viscount Maugham continued as follows: The Court accepted the accuracy of the statements in the affidavits of Sir John Anderson and of the respondent and thought there was ample evidence to enable the court to believe the appellant to be a person of hostile associations and that by reasons thereof it was necessary to exercise control over to him. I should hesitate to differ from the Divisional Court in such a case, but I must add that, in my opinion, this conclusion, which was also that of the Court of Appeal, was right. If so,

it follows that the return was a good return, that the application for the writ properly failed, and that this appeal must be dismissed.

I hope this quotation shows beyond doubt that the Court did inquire into the accuracy of the statements in the affidavits and on such inquiry held there was ample evidence to justify the action of Sir John Anderson.

Further, on p.293, Viscount Maugham, after a short historical survey of the writ, went on to say:

> *'So far as the question of the power of the court to examine the return to the habeas corpus is concerned, it is dealt with in ss.3 and 4 of the Act, but the sections are confined to cases where persons have been confined or restrained of their liberty otherwise than for some criminal or supposed criminal matter and except persons matters the return (in general) was and is still conclusive. In the other cases, which are plainly under habeas corpus at common law, the judge was given power "to examine into the truth of the facts set forth" in the return although the return "be good and sufficient in law'...*

Finally, Viscount Maugham quoted with approval from a passage in the judgment of Goddard, L. J., on p. 295 as follows:

> *I am of opinion that where on the return an order or warrant which is valid on its face is produced it is for the prisoner to prove that facts necessary to controvert it, and in the present case this has not been done. I do not say that in no case is it necessary for the Secretary of State to file an affidavit.*
>
> *It must depend on the ground on which the return is controverted, but where all that the prisoner says in effect is "I do not know why I am interned. I deny that I have done anything wrong", that does not require an answer because it in no way shows that the Secretary of State had not reasonable cause to believe, or did not believe, otherwise.*

It is on the latter point, stated in the Court of Appeal by Goddard, L.J., that the Court in *R v Governor of Brixton Prison*[1968] 2 W.L.R. 618, had distinguished the former case from the latter, in these words by *Lord Parker, CJ*, at 626:

> 'The case (Ex-parte Greene) concerned an application for a writ of habeas corpus in which the return exhibited an order, made under Regulation 18B of the Defence (General) Regulations, 1939, of the Secretary of State saying that he had reasonable cause to believe that the applicant was of hostile origin or association, and ordering his detention. It was, of course, held that the belief could

> not be inquired into at all. The Secretary of States' order was a valid return, and all in fact that the applicant said by way of answer was "I do not know why I was detained". That clearly was not a sufficient challenge to the order to call for an thing more from the Secretary of State. It was not a case in which any challenge was made in regard to conditions precedent upon which jurisdiction depended.'

In the application before me the order detaining the applicants has been challenged by learned Counsel for the applicants on two substantive grounds. On the first ground under consideration it has been shown in the affidavit of the applicants and the exhibits attached that their detention and arrest which is the subject matter of this application was the result of their failure to pay a deposit or instalment of the sum of money ascribed as due from them in Annexure 'A' and Exhibit A. As I have said, there has been no answer to this challenge. What, however, makes a complete farce, and mockery, of the use to which this special power of arrest and detention, contained in the 1967 Decree, has been put is the fact, admitted by the deponent to the counter affidavit- Alfred SuruOmih- that the third applicant Bisiriyu OlumideAdeyemi, identified in Court, has been released since the 31st October, 1969. This applicant is one of those in respect of whom it is said in the order which is challenged, that the chief of staff is 'satisfied that the person specified in the schedule hereto is or recently has been concerned in acts prejudicial to public order or the preparation or instigation of such acts…'.

I have asked myself over and over again the question in what possible way can a man, or shall one say a contractor, be "concerned in acts prejudicial to public order or the preparation or instigation of such acts" by merely failing to pay a deposit or an instalment on a sum arbitrarily imposed on him as due from him? I would commend to the learned Counsel for the respondent, who has admitted "having a hand", if I may use the phrase, in the advise given in this matter, what is considered under the words 'public order' in *Earl Jowitt's The Dictionary of English Law,* p 1439, *and Halsbury's Laws of England* (3rd e.), Vol 39, on p 84, Para 74 and on p 85, Para 75. It will be seen and I hope observed for future reference that the main object of defence regulations, as the very words suggest, and emergency powers as contained in the 1967 Decree is the prevention of all acts tending to endanger the security of the State. Indeed, Decree No. 24 of 1967 begins with this preamble: 'Whereas a state of emergency exists in Nigeria and it is expedient to confer special powers during its continuance…'.

Further the side note which sometimes serves as a guide to the real intention of the Act or a section thereof should be borne in mind in this particular use of section 3 (1). It reads thus: 'power to order detention of

trouble makers'. Now in what way does any of the applicants come under the description of troublemakers? I must confess my shock, as a member of an honourable profession and indeed a member of the Bench to whom is entrusted the task of the preservation of practice of the rule of law, at the statement of the learned State Counsel which I have recorded verbatim that:'[t]he Chief of Staff had power to make a decree for the detention of the persons detained even if all the facts are true'.

I am, as I know is every member of the Bench and every right thinking and honest member of our society, against the prevailing conditions of corruption and embezzlement of public funds existing in the country today, but if we are to live by the rule of law, if we are to have our actions guided and restrained in certain ways for the benefit of society in general and individual members in particular, then whatever post we hold we must succumb to the rule of law. The alternative is anarchy and chaos, and the whole purport of the *Defence Regulations and Emergency Regulations* is to prevent this state of things.

I said earlier on that this order has been challenged on two grounds. The other ground is that it is bad for ambiguity. Perusals of the order and a comparison with s. 3(1) have been made available for ready use when required. At the top we have the words:*Armed Forces and Police (Special Powers) Decree, 1967.*

But here the words "and police" have been crossed out in the same way as the same words were crossed out in the second line of paragraph 2 of the order. This is done to make it clear that in these instances the powers are being exercised by the Armed Forces. No endeavour has however been made to show which of the alternative charges is leveled against the applicants. Instead of this, it is said that each of them "is or recently has been concerned in acts prejudicial to public order or in the preparation or instigation of such acts". There are three alternatives in that order and the appellants are, should I use the word more familiar to our court, charged, with the three alternative charges.

Chief Williams drew my attention to Volume 11 of *Halsbury's Laws of England* (3rd edn), p44, Para 84, where the learned author states:

> *The return to the writ must contain a copy of all causes of the prisoner's endorsed on or annexed to the writ. It should state the facts relied on as constituting a valid and sufficient ground for detention of the person alleged to be illegally detained. These facts must be set forth clearly and directly and with sufficient particularity. The return must be unambiguous.*

The case of *R v, Roberts (1860),* F.272, illustrated in note (e) is an example of such ambiguity; and the cases of Ex Parte Greene, *R. v. Governor of Brixton Prison* [1968] 2 WLR 618, etc., are examples of an unambiguous return.

There is no need for me to say any more on the contention of learned Counsel for the respondent that *habeas corpus* will not lay when there is an alternative remedy, for it has not been shown to me that there is another effective and speedy method of obtaining the release of the applicants than by this method. As Lord Wright said in Ex parte Greene: 'The Common Law adapted the old writ *habeas corpus ad suscipiendumetrecipiendum* to the purpose of securing the subjects right to immunity from imprisonment save by due process at law'.

During the hearing of this application I refused an application for an adjournment by the learned State Counsel and said I would give my reason later. There is really very little to add in this respect. The application for an adjournment to file a further affidavit came after the applicants' Counsel had addressed the Court and half way through the address of the learned State Counsel. The reasons for not previously filing an affidavit or counter affidavit in reply to the allegations contained in the applicants' affidavit I find most unconvincing. Because the application was not brought against the Chief of Staff of the Armed Forces and because Lt. Col. Ochefu, who wrote Exhibit A, to which is attached Annexure 'A', is not a party to the application, they are therefore precluded from contesting the facts in the affidavit by swearing to a counter affidavit. Then again I considered the fact that the applicants had been detained for about a month and refused the application for an adjournment.

For the reasons already set out I hold that (1) the return is bad on its face being ambiguous, (2) the applicants have shown that their freedom was unlawfully interfered with and (3) the return is bad and insufficient. In short, it is no answer to the case put up by the applicants.

I therefore order the immediate release of the applicants. I am in this order including the third appellant, for, though he has been released, he should not be made liable to an arrest on the ground that he was not included in the order made.

Case Analysis

ElesieAgbai& 5 Ors v Samuel Okogbue[1991] 7 NWLR (Part 204) 391 SC

Facts:
The respondent as the plaintiff commenced the suit in the Chief Magistrate Court Aba on 10th August 1978 claiming against the appellants as the defendants the sum of N2,000.00 made up of:

(a)i. Return of the Butterfly sewing machine or its value namely N115.00

ii. Loss of use at the rate N15.00 per day for 74 days from 22/4/78 to 17/7/78 working days.

(b) General damages: ₦775.00

It was the case for the plaintiff/respondents that he was by profession a tailor and carried on business at Aba. The defendants were members of Aba branch of Umunkalu Age Group of Alayi. On the 22nd day of April 1978, the defendants/appellant broke and entered the plaintiff's shop and seized and carried away his Butterfly sewing machine. Their refusal to return the sewing machine led to instituting the action against them.

It was the contention of the defendants before the Chief Magistrate that the plaintiff, being a native of Amankalu, Alayi, was, obliged by custom to pay all development levies imposed on members by the age group. The plaintiff's sewing machine was seized because he failed to pay the development levy for the purposes of building and health Centre in their village. The plaintiff contended that he was not a member of the age grade association in that his religion forbids him to join, and that his sewing machine was seized because he refused to pay the contribution levied by the defendants for the construction of a health Centre.

The Chief Magistrate court found for the plaintiff and ordered that the sewing machine or its value of ₦115.00 be returned to the plaintiff. He also awarded ₦740.00 as special damages for the loss of use of the sewing machine. The defendants appealed to the High Court.

The High Court sitting on appeal, in allowing the appeal and dismissing the plaintiff's claim, held that the custom of plaintiff's people is to seize and keep any goods of a person who fails to pay his own share for the communal project until the person pays, and that the custom is not repugnant to natural justice, equity and good conscience nor does it offend any section of the Constitution. The plaintiff who was dissatisfied with the judgment of the High Court appealed to the Court of Appeal.

The Court of Appeal in reversing the decision of the High Court held that the custom of the AmankaluAlayi people enabling seizure of properties of members of age-grade who default in their obligations to their association is unconstitutional.

The defendants being dissatisfied with the decision, appealed to the Supreme Court contending, *inter-alia*, that the court erred in holding that the Alayi custom is invalid and that the plaintiff/appellant is not a member of the Umunkalu Age-grade Association.

Sections 241(1) and 26(1) of the Constitution of the Federal Republic of Nigeria, 1963 applicable to this case stated as follows:
24(1) Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief and freedom, either alone or in community with others and in public or in private, to manifest and propagate his religion or belief in worship, teaching, practice and observance.

26(1) Every person shall be entitled to assemble freely and associate with other persons, and in particular he may form or belong to trade unions and other associations for the protection of his interests.

Also section 14 of the Evidence Act which deals with proof of custom provides:
14(1) A custom may be adopted as part of law governing a particular set of circumstances if it can be noticed judicially or can be proved to exist by evidence. The burden of proving a custom shall lie upon the person alleging its existence.
(2) A custom may be judicially noticed by the court if it is has been acted upon by a court of superior or co-ordinate jurisdiction in the same area to an extent which justifies the court to apply it in assuming that the persons or the class of persons concerned in that area look upon the same as binding in relation to circumstances similar to those under consideration.
(3) Where a custom cannot be established as one judicially noticed it may be established and adopted as part of the law governing particular circumstances by calling evidence to show that persons concerned in the particular area regard the alleged custom as binding upon them: Provided that in case of any custom relied upon in any judicial proceeding it shall not be enforced as law if it is contrary to public policy and is not in accordance with natural justice, equity and good conscience.

It was held as follows:
1. The principles of the rule of law as stated by Dicey are:
    (a) The absolute supremacy of law as opposed to the exercise of arbitrary power;
    (b) Equality of all persons before the law;
    (c) that the constitution is the result of the ordinary law of the land as interpreted by the courts.

Self-Assessment Exercises

Explain the meaning and core essence of the concept of rule of law

Per KARIBI-WHYTE, JSC
It is important to bear in mind that Dicey formulated the rule of law with respect to the unwritten Constitution of England, and in relation to the nature and content of English law-common law and statute. There is no doubt he had in mind the application of democratic principles of Westminster style and the impartial enforcement of the laws of England. The rules enunciated by Dicey were formulated in contrast with the situation in foreign countries.

Our circumstances in this country are not identical. They are peculiar. We have adopted English law as the general law. We did not abolish all our own laws and customs which govern our ways of life in many important respects. We have also adopted the principles of democracy as recognised in West European countries. Undoubtedly these principles adopted must be applied with necessary modification and adaptation within the context of the laws adopted, recognised and applicable in our communities. Of course where any such laws are incompatible with our democratic values they are by our Constitution to be rejected. Hence the Court of Appeal ought to have shown which of the rules of law or its variant is inconsistent with the custom being rejected. The custom applies uniformly only to defaulting members of the age-grade society. It is the law as accepted by them. It is on the evidence the law recognised by the community."

2. Where the rule of law is manifestly accepted, the courts will not shirk their responsibilities in seeing that it is observed.

Per AKPATA, J.S.C:
It is the function of the courts in any orderly society, or any society claiming to be orderly, to settle disputes between persons, between government or authority and person in that society. This law is being accorded general acceptance, in varying degrees, in most countries of the world. For anyone to resort to self-help, that is, taking the law into his hands, in a situation such as in this case, is the very antithesis of orderliness. It is a retrogressive step which, if encouraged, will lead to chaos, anarchy and the law of the fittest.

I do not agree with the learned counsel of the appellants that the Court of Appeal ought to have sanctioned the seizure of the respondent's sewing machine because it held that the grouping of citizens into age group was

lawful and that the purpose of the grouping was also lawful. The Court of Appeal arrived at the right decision, in my view, in the circumstances of this case that the appellants acted unlawfully in having recourse to the use of force.

Per NWOKEDI, JSC:
The appellants and the respondents are all from AmankaluAlayi – a village tucked away somewhere in Imo State and now in the area recently constituted as Abia State. The parties are however all resident in Aba. The plaintiff/respondent commenced the suit in the Chief Magistrate Court, Aba, on 10th August, 1978. He claimed against the defendants/appellants for a sum of ₦2,000.00 made up as follows –

(a)i. Return of the Butterfly sewing machine or its value namely ₦115.00.

ii. Loss of use at the rate of N15.00 per day for 74 days of from 22/4/78 to 17/7/78 working days.

The loss of use continues.

(b) General damages ₦775.00"

The evidence led shows that the defendants/appellants invaded the premises of the respondent in Aba, and seized and carried away his butterfly sewing machine. The respondent is a tailor by trade. The reasons for the invasion and seizure, according to the appellants, were that the appellants and the respondent were members of the Umunkalu age grade had undertaken to build a health center for the village and had levied its members for the project. The respondent was grouped under the age grade. The age grade had undertaken to build a health center for the village and had levied its members for the project. The respondents refused or neglected to pay up his levy of N109.00. The appellants, contended, that the grouping of persons, into age grade was a custom of their village, that age grade levying its member's financial contributions for their development project was also a custom of the village; that compulsory membership of an age grade was equally a custom of their people. The respondent was therefore bound to pay the levy.

The respondent, on the other hand, contended that he was not averse to payment of levies for community development if called upon by the community. He in fact tendered Ex. 'B', B1, B2, B3, B4, B5 to show that he had paid such levies. As regards the levy ordered by Umunkalu age group of AmankaluAlayi, he contended that he was not a member of the age group and did not want to associate with the group. He admitted that he was grouped under the Umunkalu age grade as has been their custom but that he refused to join the association of the age group. When in 1975 he received Ex C, signed by the second defendants/appellants "their Organising Secretary", inviting him to attend the inauguration of "a new

age group in AmankaluAlayi comprising of young talented patriotic men," he declined to attend the function. He contended that he was not a member of this new age group which decided to build a health center for the community. His refusal to associate with the group was based on his religious principles. Not being a member of the said group, he was not subject to the levy of the group. The appellants therefore had no business seizing his sewing machine in order to force him to pay their levy.

The learned Chief Magistrate considered two questions pertaining to his decision. The first was "(1) whether there was a custom that compels a citizen to join an age group whether he likes or not, and if there is such a custom in AmakanluAlayi whether the respondent was in fact a member of the Umunkalu Age Group". In answer to the first question, the learned Chief Magistrate found that the custom that compelled every person to join an age group whether he likes it or not did not exist. He further held "that a custom which deprives a citizen a free choice of association runs contrary to Section 37 of the Constitution of the Federal Republic of Nigeria, 1979 and therefore cannot acquire the force of law". The learned Chief Magistrate further found as a fact, that the respondent was not therefore bound by the decisions of the group of the appellants and was therefore bound by the decisions of the group. He ordered the return of the respondent's sewing machine or its value of N115.00. He awarded the respondent the special damages of N740.00 and general damages of N200.00, with costs assessed and fixed at ₦100.00.

Dissatisfied, the appellants appealed to the High Court.

The learned Judge of the High Court after reviewing the evidence recorded, the arguments of counsel on the grounds of appeal. The Grounds of appeal were as follows:

1. The learned trial Chief Magistrate erred in law in holding that it is not a custom in Amankalu Alayi that it is compulsory for a native on attaining the age of 18 years to belong to an age group for the purpose of community development when there was overwhelming evidence to support the existence of the said custom;
2. The learned trial Chief Magistrate erred in law in failing to recognize that it is the custom in Amankalu Alayi for the movable property of natives who fail to pay levies for community development imposed by their various age groups to be impounded by the age groups pending the payment of such levies when there was evidence to support the existence of the said custom;
3. The learned Chief Magistrate erred in law in holding that membership of age groups in Amankalu Alayi was optional contrary to the evidence before him.

4. The learned trial Chief Magistrate erred in law in failing to recognise that in Amankalu Alayi it is the custom that community development projects are executed by age groups and to give judicial pronouncement to the existence of the the said custom.
5. The learned trial chief magistrate erred in law in failing to recognise that it is the custom in Amankalu Alayi that all natives from the age of 18 years are under an obligation or duty to contribute towards community development effort through their age groups;
6. The learned trial chief magistrate erred in law in awarding special damages of ₦740.00 to the plaintiff/respondent when the said damages were not strictly proved.
7. The judgment is against the evidence.

The learned Judge, after restating the two issues above outlined by the learned Chief Magistrate, was of the view that he had not appreciated the real issues involved in the controversy. According to the learned judge, the learned Chief Magistrate made the fatal error of equating grouping into an age grade or group to be same as joining an age group. Both ideas are very distinct and different. The learned judge proceeded further to hold as follows:

I have already said that grouping into age grades is a different concept from joining an age grade. The plaintiff/respondent said in his evidence that on religious grounds he had not joined the age grade into which he was grouped. He can certainly keep his religion to himself and nobody is forcing him to abandon his sect. There is no such evidence. He himself has not said that his religious beliefs also forbid him from taking part in community development programmes. In fact he did show that he takes part in community development programmes.

Having admitted that community development projects are usually embarked upon by age groups, and that is grouped in Umunkalu age group which he knows is now building a Health Centre for the community, and also admits that people have to contribute in cash towards the project and his own share is N109.00, and having also admitted that all adults take part in community development projects, how can he now avoid rendering this service to his community?

The learned judge further in his judgment held as follows:

By virtue of this section, even apart from the undisputed custom of his people, the plaintiff/respondent cannot escape his civic obligations to his people and can be compelled to contribute his own quota for community development projects. The construction of a Health Centre for the community is for the wellbeing of the whole community and is a project

which ought to be supported and encouraged. The plaintiff/respondent was told that his group is undertaking that project and he was informed that his own share is N109.00. he is not being asked to join the age group. All that he is being told is that having been grouped into Amankalu age group which is building a Health Centre for the Alayi Community he has to pay N109.00 towards the project. He cannot run away from his civic duty. The custom of his people is to seize and keep any goods of a person who fails to pay his own share of such and keep any goods of a person who fails to pay his own share of such project, until the person pays. This is a custom which is in vogue through Ibo land. And I do not see anything in it which is repugnant to natural justice, equity and good conscience nor does it offend any section of the Constitution of the Federal Republic of Nigeria, 1979. *S*ection 43 of the Magistrate's Courts Law enjoins every magistrate to observe and enforce such custom. Section 20 of the High Court Law makes a similar provision for the High Courts…

I therefore uphold the custom and hold that the sewing machine in question was rightly detained."

For the above reason he allowed the appeal of the defendants/respondents in his court. He set aside the judgment of the learned Chief Magistrate. He held that the plaintiff/respondent had no cause of action for the seizure of his sewing machine. He advised him to pay the levy of N109.00 and gave him before the end of December 1980 to do that. He awarded 'moderate costs' of ₦50.00.

Dissatisfied the plaintiff/respondent then appealed to the Court of Appeal. The following amended grounds of appeal was filed, without their particulars are as follows:

Ground One
The learned trial judge erred in law when he held as follows:
The learned Chief Magistrate then proceeded in a greater portion of his judgment to examine the merits of the plaintiff being compelled to join any age group. With respect to the likely effect that had he appreciated the real issues he would have come to a totally different conclusion.

He made the fatal error of equating *grouping into an age grade or* grouping to be same as *joining an age group,* both ideas are very distinct and different.

Ground Two
The learned trial judge erred in law when he held as follows:

Having admitted that Community development projects are usually embarked upon by age groups, and that he is grouped in Umunkalu Age

group which he knows is now building a health Centre for the community also admits that people have to contribute in cash towards the project and his own share is N109.00 and having also admitted that all adults take part in community development projects how can he now avoid rendering the service to his community?

The learned trial Chief Magistrate was of the view that section 37 of the 1979 Constitution of the Federal Republic of Nigeria avails the plaintiff/respondent. With due respect, that section is irrelevant in this case. The section that is pertinent is section 31(1)(c) and section 31(2)(d)(i) of the Constitution'.

Ground Three
That the learned trial judge erred in law in accepting the custom of seizure of goods of a dissenting citizen as valid.

Ground Four
The learned trial judge erred in law when he held as follows:

He is not being asked to join the age group. All that he is being told is that having been grouped in Umunkalu age group which is building a health center for the Alayi community, he has to pay ₦09.00 toward the project.

Briefs were duly filed by the parties and exchanged. The issues set down for determination by the plaintiff/appellant are as follows:

1. Is the plaintiff/appellant a member of the Umunkalu Age grade of AmankanluAlayi?
2. Is there a valid custom in Alayi that goods of members and non-members of the said age grade can be seized to enforce the payment of levies.

The defendants/respondents did not outline issues for determination, rather they argued the appeal on the grounds of appeal as filed. The judgment of the Court of Appeal went as follows:

On this ground I am inclined to accept the view of the learned judge that there is a custom of grading the citizens of each group area into age groups. I also accept that the purpose of the age group as stated by the learned judge and also by the learned Chief Magistrate was for community efforts to develop the area.

This however does not mean that a person who was not aware of his age group could be compelled to participate in the community efforts of that group. There is no appeal on the conclusion of the learned judge that the appellant was aware of his grouping in his group.In my opinion, the

capital being made of the distinction between grouping into an age grade and joining as age group is not based on the evidence adduced before the learned Chief Magistrate. The appellant had himself accepted that "it is our custom in AmankaluAlayi to group people in age grades. It is correct to say age groups undertake development projects on their own …….. I admit that I am grouped in Amankalu age grade but I am forbidden by my religious belief to join the age grade.

On the second issue above set out, the Court said as follows:

Having accepted the custom and having accepted that the custom is lawful, I have to consider the second custom of the age group having authority to compel any person in the age group to participate in the work of his age group if necessary by confiscating his property until he pays whichever levy is imposed on him for the purpose of the communal work. Under the said section 73 of the Labour Act there is provision for regulations to be made by the appropriate Minister specifying for an offence punishable with the fine or imprisonment for anybody refusing to render labour lawfully required of him. Even if the custom can compel any person to participate in the communal work I find it difficult to accept that the custom authorizes the age group to take the law into their own hands by confiscating any property of the erring member in order to compel him to pay any levy in respect of or participate in the communal work. In this country, our Constitutions both in 1963 and today have given sufficient protection under the rule of law that no person, not even government, can take the law into his own hands. If any citizen usurps the function of the Court, the Court will declare such action as unconstitutional. I may refer to the case of *Ojukwu v. The Military Governor of Lagos State and 2 Others (No.1)* reported on appeal to Supreme Court as *Government of Lagos State v. Ojukwu*(1986) 1 NWLR (Pt. 18) 621.

This lead judgment by Nasir P.C.A. was concurred with by Nnaemeka-Agu, J.C.A. and Babalakin, J.C.A. (as they then were).

The ball was then in the court of the defendants /respondents in the Court of Appeal. Dissatisfied, they have appealed to this court. Five grounds of appeal were filed without their particulars. They are as follows:

1. The Court of Appeal erred in law by allowing the appeal after coming to the conclusion that the two questions for determination posed by the learned counsel for the appellant in the Court of Appeal were, on the evidence at the trial before the learned trial Chief Magistrate and the decision of the appellate High Court, answered in the affirmative.
2. The Court of Appeal erred in law when after holding that section 20(2) and (3) of the 1963 Constitution was applicable to the

dispute between the parties and being of the opinion favourable to the defendants/respondents (now defendants/appellants) it nevertheless allowed the plaintiff/appellant's (now [plaintiff/respondent appeal).

3. The Court of Appeal erred in law in not considering in its judgment the numerous judicial and statutory authorities referred to by the defendants/respondents (now defendants/appellants) in their brief in opposition to the appeal in the Court of Appeal.
4. The Court of Appeal erred in law in relying on and basing its judgment on statutory and judicial authorities which were not based on the interpretation of customary laws and which did not and had not abolished established and accepted customs.
5. Customary laws or Customs are not matters of individual convenience and their operation and application can only be refused by the Courts on the ground that they are repugnant to natural justice, equity and good conscience.

The issues for determination outlined by defendants/appellants in their brief of legal arguments were as follows:

1. Whether the Court of Appeal in finding that the custom in this case exists and that it was lawful could nonetheless refuse to enforce it and go on to allow the appeal.
2. Whether the Court of Appeal after finding that the custom in question was sanctioned by the constitution and was not repugnant to equity and good conscience could nevertheless refuse to apply it in its full ramifications on the basis of a judicial pronouncement that was not based on interpretation of customary law.
3. Whether a custom that is not as a whole repugnant to equity, good conscience and natural justice can be divided into parts to be applied at the discretion of non-members of the community as they consider one part reasonable or not.
4. Whether the decision in *Lagos State Government v Ojukwu*(1986) 1 NWLR (Pt18) 621 was rightly applied to the consideration of native law and custom.

Arguments in the brief were directed to the grounds of appeal instead of issue outlined. Grounds 1 and 2 were argued together. The learned counsel for the appellants submitted that it was accepted custom of the community; the sanction for non-performance of communal labour of payment of levy for communal labour was seizure of defaulter's property until compliance. He therefore submitted that the above having been accepted as customs which are not repugnant to equity, good conscience, natural justice or any written law, it was wrong of the Court of Appeal to have held that the same could not be enforced. "It is assent of the community that gives a custom its validity. It is quite apart from the injunction that it should not be repugnant to equity, natural justice and

good conscience" counsel asserted. Learned counsel relied on *EshugbayiEleko v Government of Nigeria* (1931) AC 622 at 673. Accepting the custom as valid, but disallowing its customary enforcement, according to counsel, was wrongful in that one part of the custom existed and that it was not repugnant to equity or natural justice, their lordships had no option but to apply custom in its full ramifications once the plaintiff had been found to be a member of the community and had been enjoying all the rights of so being a member." counsel relied on *Nwokoro v Onuma* (1990)3 NWLR (Pt136) 22 at 25.

On grounds 4 and 5 learned counsel submitted that 'rules of customary law will always be enforced by the court if they have not been altered or repealed by an applicable statute or if they are not barbarous, that is, repugnant to natural justice'. He contended that there was nothing before the Court of Appeal to show that the seizure of chattels of a defaulting member of the community was against any statute or the Constitution of the Federation of Nigeria. The body of laws in Nigeria, he submitted, also included native laws and customs. He relied on *OkeLanipekun Laoye&Ors v AmooOyetunde* (1944) AC 170; *In Re: Southern Rhodesia* (1919) AC 211 TO Elias 'Groundwork of Nigerian Law, Chapter 2 at 12, 13. Native law and custom were not subject to the technicalities of the common law he contended – *Buhari of Kaligeri v Bornu Native Authority* (1953) 20 NLR 159. With reference to the case of G*overnor of Lagos State v Ojukwu* (supra)he argued that the same was not applicable to the facts of this case. In that case, the issue was whether a government can resort to self-help while the subject matter of the dispute is still pending. A dispute had risen in the case which had been brought to court. The judicial powers of the court having been invoked it was wrong for the government to indulge in self-help. The method of seizure of chattel, counsel submitted, did not amount to taking the law into private hands, but a way of resolving family dispute. The age group could therefore not have been said to have usurped the functions of the Court of law, as held by the Court of Appeal.

As no argument was offered on ground 3, the same should be deemed to have been abandoned.

Learned counsel for plaintiff/respondent formulated the issues to be determined as follows –

(1) Is a custom such as the defendants/appellant assert which operates by force, reasonable and permissible in law?
(2) Is self-help available to the defendants/appellants in a present day Nigeria?

In reply to the argument of the appellants, on grounds 1 and 2, learned counsel submitted that to hold that the only basis on which native law and

custom may be rejected is if the same is repugnant to equity, good conscience and natural justice. Relying on Hood Philips "A First book of English Law" 3rd, ed. at page 164, learned counsel submitted that for a local custom to be binding, it must fulfill certain tests which the Courts have laid down. He relied on the case of *Tanisry* (1608) Davies I.R.P.28. The tests as classified by Hood Philips (pages 164-168) were antiquity, continuance, peaceable enjoyment, reasonableness, certainty, recognition as compulsory and consistency. In considering the above ground of appeal learned counsel argued that two issues were before the court of appeal. The first was the custom of having age grade in AmankaluAlayi and the alleged customs of self-help payment of levies. While the court of appeal accepted the first i.e. the existence of the custom, it rejected the second for the reason stated above. Learned counsel urged this court to uphold the rejection. Referring to the contention of the appellants that once their lordships of the Court of Appeal accepted the custom as being valid they had no option but to apply the custom in all its ramifications, learned counsel relying on *In Re Whyte* (1940) 18 NLR 70 at 72-73 and *Cole v. Cole*, 1 NLR15 at 21 submitted that it was not always that a local custom not repugnant to equity, good conscience or natural justice would be applied in all its ramifications by the Court.

In replying to grounds 4 and 5 of the grounds of appeal, learned counsel adopted his arguments on grounds 1 and 2 above. Referring to a book by FH Lawson entitled 'Remedies of Law' Penguin Books page 1 and Chapter 1 at page 45; he drew attention to the fact that progressive societies have always frowned at the concept of self-help, holding that 'one of the most significant themes in history has been a persistent and continuous attempt by political societies to suppress self-help and substitute for its judicial process'.

Counsel concluded that the above noble sentiments have now been eloquently proclaimed and affirmed in our law in the case of *Government of Lagos State v. Ojukwu*[1986] 1 NWLR (Pt18) 621.

The present suit was commenced in the Magistrate Court. Pleadings have not been easy in pin-pointing the real points in controversy between the parties. This was not helped by the scanty evidence led by the parties on their customs and lack-luster cross-examination as regards the incidents of the alleged customary laws. The proper questions as regards the present case are whether a membership of the age group association is compulsory, and if so, whether the respondent who objected to joining such an association on religious grounds may be compelled to do so or be deemed to be a member willy-nilly. There is general agreement that the parties have a custom of grouping persons into age groups. The custom of compulsory membership of the age group association is being challenged. Is there evidence to establish this? Also being challenged is

the procedure of seizing chattel of those who refuse to join the association to enforce a levy ordered by the association. The above questions are basically matters of fact. The case cited by learned counsel for the parties namely *Esugbayi Eleko Officer Administrating the Government of Nigeria (supra), In Re Whyte (supra); Cole v Cole (supra); Nwokoro v. Onuma (supra); Buhari of Kaligeri v Bornu Native Authority (supra); Laoye v Oyetunde(supra)* deal with elementary principles of our customary law jurisprudence to wit; that customary laws are part of the body of laws to be applied by the Court The application of customary laws is subject to the doctrine of repugnance, the essential ingredients of proof and incidents of customary laws. I do not intend to discuss these in this judgement. The discussion of the Labour Act 1974, with the greatest respect; does not strictly fall within the compass of the controversy between the parties as well as the issue of communal labour under section 20(1)(d) of the 1963 Constitution.

The learned judge of the High Court at one stage correctly drew a distinction between grouping the citizens into age groups and joining an age group association. He did not follow up this distinction to a logical conclusion. If he did, it would have been clear to him that the system of grouping persons into age groups would not necessarily imply the establishment of an association for diverse purposes, by members of the age group. The gravamen of the case of the plaintiff/respondent was that he did not belong to the association of the members of his age group, for religious reasons. As the learned judge had stated, grouping young men into age group is a well-known custom throughout all Igbo communities. It is no more than a manner of dating or showing the age of the group in a society where age matters a lot and the art of writing had not been acquired. The age groups are named for purposes of identification. Persons in an age group may decide to organize themselves in an association for mutual benefit and to aid in the development of their community. The evidence led by the parties as will be seen below proves this.

Organizing an age group association was precisely what Ex. C sought to do and what the defendants/appellants eventually succeeded in doing in 1976. In 1975, the Umunkalu age group, his emphatic evidence was that he was not a member. He did not want to join the group on religious grounds. He received a letter dated 4/2/75 (Ex C) informing him ‘of the purported inauguration of a new age group in AmankaluAlayi comprising of young talented patriotic men’. The letter continued ‘the registration of your membership is also necessary’. The respondent spurned the letter and did not attend any of the meetings of the association. He contributed to projects if embarked upon by the Community. He admitted that age groups undertook development projects on their own ‘but that custom has just started.”PW3 testified that it was optional to join an age group

association. His unchallenged and uncontradicted evidence was that he resigned from his age group because it was a drinking club; all monies collected were used for drinking during naming ceremonies. It should be noted that the plaintiff and PW3 contributed to community projects if floated by the community.

DW1 speaking for the other defendants testified in cross-examination as follows:

My age group was started and founded in 1968. It was disturbed by the civil war. We reactivated it in 1976. *I was not a foundation member. It was already formed before I joined it ……* When once a person is of age of 18 and above, *he is free to join any age group he wants.* (Words in Italicsfor emphasis).

He further stated: 'Before a member of an age *resigns from his age group,* he must pay all his contributions to his age group and must join another age group with the approval of the village Union'.

Again in addition he states that '[t]he ages group system is not based purely on ages. When once a person is of age of 18 and above, he is free *to join any age group he wants'.*

Again he said: 'It is compulsory that a native of AmankaluAlayi must *join age group'.*

DW3 stated that 'it is compulsory for any man of AmankaluAlayi*to join one age group.* There is no option'. The age group association was muted in 1975 and inaugurated in 1976. DW2 did not join the association until 1978.

From the above it is quite clear that the plaintiff/respondent was not bound to join Umunkalu age group in particular. He could, if he had wanted, opt for another. It is also quite clear that his objection is based on religious grounds. It is obvious that the defendants were forcibly inducting him to their age group association. There was abundant evidence to show that the plaintiff/respondent was not a member of the association, did not desire to be a member and that his presumed membership was forced on him by the defendants. The learned trial Chief Magistrate found as follows:

I find as a fact that the plaintiff is not and has never been a member of the UmunkaluAlayi. If he had been a member, then he is bound by the decisions of the group and is liable to have his goods seized in default of payment of levies decided upon the group. But since he is not a member, the defendants have no legal right and power to compel him to have one

or seize his goods for non-payment of levies the decision for the collection of which he was not a party.

These findings of fact were not faulted by the learned Judge and the Court of Appeal. The Courts below seemed bent on emphasizing the importance of community development. It should be noted as stated above that the plaintiff/respondent was not opposed to community development and levies consequent thereon. He tendered exhibits B1, B2, B3, B4 in proof of this. His contention was that if the community embarked on a project, he was prepared and willing to make his own contribution. He however was not disposed to accept the authority of the Umunkalu age group association (which he refused to join), and the payment of compulsory levy by him.

From the evidence before the learned Chief Magistrate, it seems to me that grouping into age group precedes joining an organization of the said age group. One does not automatically become a member of the association because he was so grouped. One was not under compulsion to join the age group association under which he was grouped as he had the option to join any other age group of his liking. It seems to me on the evidence that the plaintiff/respondent, even though grouped under the Umunkalu age group, was not bound to join the other members in their organized activities and was not in this case a member of the organized group "of the talented patriotic young men 'who volunteered to build a health center for their community. The learned Judge of the High Court himself acknowledged this when he held that no one was asking him to join the age group and what was required of him was to pay the levy of the age group whether he was a member or not.

In my opinion, the capital being made of the distinction between grouping into an age grade and joining an age groups is not based on the evidence adduced before the learned Chief Magistrate. The appellant had himself accepted that 'it is our custom in AmankaluAlayi to group people in age grades. *It is correct to say age groups undertake development projects on their own ……. I admit that I am grouped in Umunkalu age grade but I am forbidden by my religious belief to join the age grade."* (Italics supplied for emphasis).

In the above passage, the penultimate sentence is not quoted fully. The full sentence is: 'It is correct to say age groups undertake development projects on their own *but that the custom has just started.* This alleged admission was repeated and relied upon by the learned judge of the High Court and the Court of Appeal in holding that the custom of the age groups associations engaging in community project had been proved. With the full sentence, I do not think that the above sentence amounts to an admission of a custom which, by long usage the Courts must enforce,

for custom is defined in section 2 of Evidence Act as "rule which in a particular district, has, *from long usage,* obtained the force of law". I think that both the Court of Appeal and the High Court wrongly foreclosed the question whether the plaintiff/respondent was a member of the age group association on this alleged admission.

As shown, the Court of Appeal had allowed the plaintiff's/respondent's appeal on the consideration of the second issue for determination of the above stated. Customary law when proved, is part of the body of laws of Imo State, which by virtue of section 43 of the Magistrate Court Law and section 20 of the High Court Law, Imo State, the Courts may apply. The application of customary law is however subject to the doctrine of repugnance – section 14(3) of the Evidence Act provides that 'where however in a case of any custom relied upon in any judicial proceedings it shall not be enforced as law if it is contrary to public policy and is not in accordance with natural justice, equity and good conscience'.
Section 43 of the Imo State Magistrate Court Law provides that 43(1)

Every magistrate shall observe and enforce the observance of every local custom and shall not deprive any person of the benefit thereof except when any such custom is repugnant to natural justice, equity and good conscience or incompatible, either directly or by necessary implication, with any Law for the time being in force.

Also, section 20 of the High Court Law also provides as follows:

> 20.(1)*The Court shall observe and enforce the observance of every local custom and shall not deprive any person of the benefit thereof except when any such custom is repugnant to natural justice, equity and good conscience or incompatible either directly or by its implication, with any law for the time being in force.*

Considering the above provision in *Cole v. Cole (supra)* Griffiths J. held as follows:

Does this mean that the Court is bound to observe native customs or to allow native customs to apply in every case of a native where the custom is not repugnant to natural justice etc. not unacceptable with any local ordinance. I think not ... Where on the other hand, the matter before the Court contains elements foreign to native life, habit, custom, the Court is not bound to observe native law and custom.

In saying that compulsory membership of age group association is the custom, the issue of religious freedom, the said religion being Christianity, crops up against the said custom.

The principle which the Court of Appeal considered in this case was the alleged custom of forcible seizure of person's goods wherever they may be in Nigeria, more especially where the party is opposed to the action of the enforcers. If the plaintiff/respondent is a member of the association which had agreed on this mode of enforcement of the payment of their levies, it would have been a case of *volenti non fit injuria.* Since he had resisted the authority of the appellants there is certainly a dispute between the parties, which self- help cannot solve. In such a case, the courts are to adjudicate. Self-help by itself, in circumstances such as this, is a primitive remedy capable of causing a breach of the peace. If the respondent had resisted the invasion of the defendants or he himself applied self-help to retrieve his sewing machine from the appellants, there must probably have been a breach of the peace, the magnitude of which no one may conjecture. A careful reading of the of *Ojukwu (supra)*would have brought out clearly to the learned counsel the general concept of public policy employed by the court to castigate the self-help exercise of the Lagos state Governor. Customary laws were formulated from time immemorial. As our society advances, they are more removed from its pristine ecology. They meet situations, which were inconceivable at the time they took root. The doctrine of repugnancy in my view affords the court the opportunity for fine-tuning customary laws to meet the changing social condition where necessary, more especially as there is no forum for repealing or amending customary laws. I do not intend to be understood as holding that the courts are there to enact customary laws. When however customary law is confronted by a novel situation, the courts have to consider its applicability under existing social environment. Oputa, JSC in his judgment in *Ojukwu's* case (1986) 1 NWLR (Pt.18) 621 (1986)7 NSCC 304 at 322 referred to Lord Denning's dicta in the case of *Agborv. Metropolitan Police Commissioner* (1969) 1 WLR 703 at 707, where the learned lord justice stated:

The plain facts here were that Mr. & Mrs. Agbor claimed as of right to be entitled to possession of the ground floor of this house. They occupied it on February 4. They entered by stealth. They used a key that had been left behind. But they did it under a claim of right. It may be that they had no such right as they claimed. But, even so, the proper way to evict here was by application to the courts of law. No one is entitled to take possession of premises by a strong hand or with a multitude of people. That has been forbidden ever since the Statute of Richard II against forcible entry. This applies to the police as much as to anyone else. It applies to the government departments also. And to the Nigerian High Commission. If they are entitled to possession, they must regain it by due process of law. They must not take the law into their own hands. They must apply to the courts for possession and act only on the authority of the courts.

There is a disputed claim between the respondent and the appellants. The appellants cannot be the plaintiffs, judges and enforcer all at the same time. From the testimony of the respondent and his witnesses, it is obvious that all members of the religious sect who refused to join any age group association could be subject to the same treatment. A situation where a member of the community is not given a chance for a fair trial in his dispute is certainly against public policy, equity and good conscience.

2.4 Summary

As discussed in this Unit, the rule of law is expressed by the supremacy of the law above all persons and authorities. It means equality of all persons and authorities before the law. It means the absence of an arbitrary government. Rule of law is at work when all these are observed by the agencies of government, including the protection and preservation of the fundamental rights of all citizens irrespective of their age or color.

2.5 References/Further Readings/Web Resources

Justus A Sokefun (2002), *Issues In Constitutional Law and Practices in Nigeria,* Faculty of Law, OOU, Ago-Iwoye.

Justus A. Sokefun, *Constitutional Law Through the Cases* (Caligata Publishers, 2011)

Montesquieu, L'Esprit des Lois, Chapter XI, 3– 6.

Hood, Phillips, *Constitutional and Administrative Law*(7th ed). .

Second Treatise of Civil Government, Chapters 12 and 13

2.6 Possible Answers to Self-Assessment Exercise

The rule of law is a concept that describes the supreme authority of the law over and above the governmental actions as well as individual behaviours. Its rationale is to ensure that both government and individuals are bound by the law.

UNIT 3 CONVENTIONS

CONTENTS

3.1 Introduction

Conventions are non-legal rules. They are rules of behavior of persuasive authority. Save and unless they are domesticated by the legislative, they remain non-binding.

3.2 Intended Learning Outcomes

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

- define Conventions
- explain in clear terms the position of the law with respect to conventions.

3.3 Conventions

Conventions refer to binding rules of behaviour which are recognized as obligatory by those concerned in the working of the Constitution. In the main, they regulate political behaviours and by one way or the other, they find their way into the Legal System. The underlying fact about conventions however is that they cannot be legally enforced.

Conventions are non-legal rules, which may include constitutional practices, customs, habits, agreements and understandings which demand particular forms of political and professional behaviour.

Dicey is credited with formulating the term "Convention." While distinguishing conventions from law, he defined them as rules which make up constitutional law and rules for determining the mode in which the discretionary powers of the crown ought to be exercised.

While discussing the nature of Conventions, Jennings noted '…. Conventions is like most fundamental rules of any Constitution in that

they rest essentially upon general acquisition'. (***What do you understand by the term 'Convention'?***).

Other writers have attempted their own definition of this phenomenon. Their point of intersection is that they are rules of political behaviour considered as binding by those who operate the Constitution but are not enforced by the law Courts.

Conventions are more prominent in jurisdictions that are ruled by unwritten Constitution. Where there is a Constitution, the rules that exist as conventions are easily identified and enshrined in such Constitution. It is along these lines that the topic will be discussed in Great Britain and Nigeria.

Self-Assessment Exercises

Identify the major feature of Conventions

Case Analysis
In Re:Hon SL Akintola (Premier, Western Nigeria) vSir Adesoji Aderemi(Governor of Western Nigeria)
And by Order for Joinder:
Hon SL Akintola (Premier, Western Nigeria) v

1. *Sir Adesojiaderemi (Governor of Western Nigeria)*
2. *Alhaji DS Adegbenro* [1962] ALL NLR 442(Federal Supreme Court)

Per ADEMOLA, CJF: ON the 21st day of May, 1962, the above-named plaintiff filed an action in the High Court at Ibadan in Western Nigeria against the 1st defendant claiming as follows:

(i) A Declaration that there is no right in the Defendant to relieve the Plaintiff of his office as Premier of Western Nigeria under section 33(10) of the Constitution of Western Nigeria in the absence of a prior resolution/decision of the Western House of Assembly reached on the floor of the House to the effect that the Plaintiff no longer commands the majority of the members of the House of Assembly.

(ii) An injunction to restrain the Defendant from purporting to relieve the Plaintiff of his office as Premier of Western Nigeria under section 33(10) of the Constitution of Western Nigeria in the absence of a prior resolution/decision reached on the floor of the House of Assembly to the effect that the Plaintiff no longer

commands the support of a majority of the members of the House of Assembly.

At the same time there was filed in the Court a motion on notice for an order of interim injunction to restrain the 1st defendant 'from purporting to relieve the plaintiff of his office as Premier of the Western Region in the absence of a resolution of the House of Assembly to the effect that he no longer commands the support of the majority of members of the House of Assembly'. Subsequent to the filing of the Writ and motion on notice, the 1st defendant by a notice, purported to remove the plaintiff from the office of Premier and proceeded to swear in the 2nd defendant as Premier of the Region. The plaintiff thereupon sought and obtained the leave of the Court to add to his claims two more reliefs as follows:

S T O P

(iii) A Declaration that the purported removal of the Plaintiff by the Defendant as Premier of Western Nigeria is invalid and of no effect.

(iv) An injunction to restrain the Defendants from usurping or permitting anyone to usurp the duties of the Plaintiff as Premier of Western Nigeria unless and until he resigns or is constitutionally relieved of the office.

At this stage leave was obtained by the plaintiff to join the 2nd defendant in the action. Subsequently, the 2nd defendant obtained the leave of the Court to file a counter-claim.

On the 29th May, 1962, the plaintiff, in accordance with the Order of Court, filed a Statement of Claim to which a Statement of Defence and counter-claim were filed jointly on behalf of the two defendants. The Counter-claim reads:

The Defendants' claim:

(1) A declaration that the removal of the Plaintiff from the office of Premier of Western Region was valid and effective.

(2) A declaration that the 2nd defendant was validly and lawfully appointed as Premier by the first Defendant and that the second Defendant has ever since the 21st May, 1962, been entitled to act and to exercise all powers and to discharge all the functions of Premier of the Western Region.

(3) An injunction to restrain the Plaintiff from purporting to act as Premier of the Western Region or from exercising any of the functions or discharging any of the functions of Premier of the Western Region.

Upon this matter coming up for hearing before the High Court, Ibadan, on 5th June, 1962 after a preliminary argument, including an application under Section 108 of the Constitution of the Federation to have certain points referred to the Federal Supreme Court, it was decided to refer the matter and counsel on both sides agreed that the following issues be so referred:

1. Can the Governor validly exercise power to remove the Premier from office under Section 33 (10) of the Constitution of Western Nigeria without prior decision or resolution on the floor of the House of Assembly showing that the Premier no longer commands the support of a majority of the House.
2. Can the Governor validly exercise power to remove the Premier from office under Section 33(10) of the Constitution of Western Nigeria on the basis of any materials or information extraneous to the proceedings of the House of Assembly?

The learned Chief Justice of the High Court, Western Region, accordingly referred the two issues to this Court under Section 108(2) of the Constitution of the Federation of Nigeria which provides:

108(2) Where any question as to the interpretation of this constitution or the constitution of a Region arises in any proceedings in the High Court of a territory and the court is of the opinion that the question involves a substantial question of law, the Court may, and shall if any party to the proceedings so requests refer the question to the Federal Supreme Court. At the hearing before us, Mr Akinyele for the defendants raised a preliminary objection to the Reference being heard at this stage on the grounds (1) that it was too premature, and (2) that the Reference was not according to form. We overruled the two objections and the Reference continued.

Mr Moore for the plaintiff prefaced his arguments with what he called "three admitted facts before the Court." This was not disputed by the defence, and indeed the whole reference was based on these facts, namely:

1. Plaintiff was duly appointed Premier according to the Constitution.
2. The 1st defendant in removing him as Premier acted under Section 33(10) of the Western Nigeria Constitution.
3. The decision by the 1st defendant to remove the plaintiff from the Premiership was based on a letter purporting to have come from 66 members of the House of Assembly to the effect that they no longer have confidence in the Premier.

The matter that arises for consideration in the first question is whether the Governor would be acting in contravention of Section 33(10) of the

Constitution of Western Nigeria if he by notice removed the Premier from office without giving him an opportunity of testing his popularity on the floor of the House of Assembly because he (Governor) formed the view that the Premier no longer commanded the support of a majority of members of the House of Assembly. The relevant section of the Constitution is as follows:

33(10) Subject to the provisions of subsections (8) and (9) of this section, the Ministers of the Government of the Region shall hold office during the Governor's pleasure:
It provided:

(a) the Governor shall not remove the Premier from office unless it appears to him that the Premier no longer commands the support of a majority of the members of the House of Assembly; and
(b) the Governor shall not remove a Minister other than the Premier from office except in accordance with the advice of the Premier.

Mr. Moore made his submissions in two ways stating that in either case the question should be resolved in the negative. His submissions are:

1. That within the basis of the constitution itself, the position is that a Premier will be removed from office on a resolution of the House, and
2. That the provisions of Section 33(10) of the Constitution of Western Nigeria is an attempt to write down the constitutional convention of the English Constitution, and therefore its interpretation should be based on the way the Convention had worked historically and the stage of evolution it had reached when it was embodied in the Nigerian Constitution of 1960.

Arguing on the 1st submission, Counsel invited us to note the difference in the wording of Section 33(10) and Section 33(2) of the Constitution, which deals with the appointment of a Premier, and is as follows:

33(2) Whenever the Governor has occasion to appoint a Premier he shall appoint a member of the House of Assembly who appears to him likely to command the support of the majority of the members of the House.

When a Government or Premier is defeated in the House, Counsel observed, there is no question or likelihood the event becomes certain. The discretion left in the Governor, it was submitted, can only be exercised when the proceedings in the House are confused. When it is clear, there is no discretion and the Governor has to act accordingly. Reference was made to Section 38(1) of the Constitution of Western Nigeria which deals with the exercise of the Governor's powers. The subsection, after providing that the Governor shall act in accordance with the advice of the Executive Council, continues:

Provided that the Governor shall act in accordance with his own deliberate judgment in the performance of the following functions –

(a) in the exercise of the powers relating to dissolution of the Legislative Houses of the Region conferred upon him by the Legislative Houses of the Region conferred upon him by the proviso to subsection (20 of Section 31 of this Constitution;

(b) in the exercise of the power to appoint the Premier conferred upon him by subsection (2) of Section 33 of this Constitution;

(c) in the exercise of the powers conferred upon him by Section 37 of this Constitution (which relates to the performance of the functions of the Premier during absence or illness) in the circumstances described in the proviso to subsection (2) of that section; and

(d) in signifying his approval for the purposes of section 63 of this Constitution of appointment to an office on his personal staff.

In arguing the second submission, Mr. Moore referred to the conventions in England on these matters which are adopted in Nigeria. Section 33(10)of the Constitution which relates to the tenure of office as Premier or as a Minister, and to removal from office, he said, is the same as the English constitutional convention.

Mr. Ibekwe, Solicitor-General of the Eastern Region, whose Attorney-General was invited with other Attorneys- General by the Court under Order VI rule 4(2) (b) of the Federal Supreme Court Rules, gave the Court the benefit of his views in the matter and submitted that the issue must be determined on the floor of the House and only in exceptional cases should the Governor act outside the House, Mr. Ibekwe submitted that section 31(4) (b) of the Constitution of Western Nigeria supports the view that the removal of a Premier should depend on the vote taken on the floor of the House. The learned Solicitor-General then examined section 33 (10) and referred to the words 'if it appears to him" (the Governor) and "shall not remove'; the former words, he said, connote that the Governor must only judge from official information supplied to him, and the latter words, he observed, are very strong words.

For the defendants, Mr Akinyele submitted that the answers to the two questions must be in the affirmative. Section 33 (10) (a) dealing with the removal of the Premier himself is silent and therefore can only mean that the Governor needs no advice and must use his own discretion in removing the Premier. He is not limited to taking the matter from the House and may use his own discretion. This discretion, he submitted, is absolute, and if it was desirable for it to be otherwise, the Constitution should have said so. The House, he said, can only react to the decision of the Governor if it disapproves of it. Section 38, which gives the Governor absolute discretion in the proviso to subsection (1), must be read with section 33 (10).

Now, there can be no doubt that the Court is called upon to perform a difficult duty. For the interpretation of Section 33 (10) of the Constitution of Western Nigeria, no precedent can be found. The meaning of the subsection and the scope of its application must be read in the light of convention and, of course, other relevant sections of the Constitutions must be looked at. As we stated earlier in our ruling on the preliminary objection, three of the four main points in the claim made by the Plaintiff have been admitted by the defence and this Court acts on matters referred to it, only when facts as admitted, or as found, are before it.

The truth is that Mr. Moore was right when he said that Section 33 (10) was an attempt to write down the constitutional convention of the English Constitution. It is also true that in England political processes have a flexibility and easy adaptability to the moods of a country. The English tradition, which is emulated in Nigeria, goes very far; but circumstances in Nigeria are so different and life is much complex that it is difficult to accept in a generation what England has learnt through the centuries by bitter experience both in and out of Parliament. Cabinet Governments or Representative Government in Nigeria has taken the form of the English Cabinet. In England the Crown is the fixed point from which almost everything emanates and around which everything revolves. Nigeria has not yet found it possible to settle and find for herself her own doctrine; her own form of Government and what form Cabinet Government will take. With England, there are conventions of the Constitution. Nigeria has a written Constitution; some of the English Conventions are put into writing as part of this Constitution.

Section 32 of the Constitution of Western Nigeria vests the Executive Authority of the Region in Her Majesty, and subject to the provisions of the Constitution, the Executive authority of the Region may be exercised on behalf of Her Majesty by the Governor, either directly or through officer's subordinate to him. The Governor is appointed by the Queen, but on the recommendation of the Premier. He (the Governor) may be removed by the Queen presumably on the recommendation of the Premier. Under section 33 (2) of the Constitution of Western Nigeria, the Governor appoints the Premier. He is the head of Government: he and his Ministers (who are appointed by the Governor on the advice of the Premier) have collective responsibility to the legislative Houses of the Region (section 35(1). For the Premier's removal the Constitution makes a provision under section 33(10), and in an extreme case under section 31(4) (b). A Careful examination of Section 31 to 39 of the Western Nigeria Constitution reveals that they are based on the constitutional conventions of the English system of Cabinet Government.

The Premier, like the Prime Minister of England, depends upon the support of a majority in the House, and ultimately on the electorate. In

the year 1841, in England, Government was defeated in the House of Commons on the budget but preferred to stay in office. Sir Robert Peel, the leader of the Opposition, moved a resolution that their continuance in office in such circumstances was at variance with the spirit of the Constitution; this was carried by one vote and dissolution followed. It will be observed that the Queen did not remove the Prime Minister when his Government was defeated and he refused to leave office; the matter was left for a decision on floor of the House.

In England the Sovereign acts exclusively on the advice of the Cabinet, tendered as rule, through the Prime Minister. By a convention of the Constitution, not only must the Sovereign act on that advice, but may accept no other. Also the Sovereign must be kept informed of the general run of Government and of political events, particularly the deliberations of the Cabinet, and it is the duty of the Prime Minister to do this. In the same way, Section 39 of the Constitution of Western Nigeria lays the duty on the Premier to keep the Governor informed of those matters.

An examination of some sections of the Constitution of Western Nigeria, in so far as they are relevant, will be useful. Section 31 deals with prerogation and dissolution of legislative Houses. Subsections (4) and (4)(b) are relevant. Subsection 4 reads:

(4) In the exercise of his powers to dissolve the legislative Houses of the Region, the Governor shall act in accordance with the advice of the Premier: Provided that -

Paragraph of subsection (4):
(b) if the House of Assembly passes as resolution that it has no confidence in the Government of the Region and the Premier does not within three days either resign or advise a dissolution, the Governor may dissolve the legislative Houses.

That proviso gives the Governor discretion, but it is clear that the Government or the Premier must have suffered a defeat on the floor of the House before the Governor could act.

Section 38(1) has already been referred to above. The proviso gives the Governor power to act in accordance with his own deliberate judgment in four causes; one of them concerns the power to appoint the Premier under Section 33(2). This subsection is very important. Whilst it empowers the Governor to use his own deliberate judgment in appointing a Premier, it does not state that he (the Governor) shall use his deliberate judgment in removing him. It seems this is a pointer that something more would be necessary before the Governor could remove. He must have the house with him. The question might be asked why the Governor was

given power to use his own judgment in the exercise of the power to appoint. The reasons are not far to seek. It is because circumstances may arise in which on a Premier's death or resignation on personal grounds, either of two party leaders would be able to form a Government and command the support of the House. There is also the question of personal ambition.

Section 39 is designed to keep the Governor abreast of political events and the temper of the House, as appearing from its proceedings, all through the Premier. It reads:

39. The Premier shall keep the Governor fully informed concerning the general conduct of the government of the Region and shall furnish the Governor with such information as he may request with respect to any particular matter relating to the government of the Region.

It appears this is the section which affords the Governor an opportunity of evaluating from the trend of the proceedings in the house whether the Premier still commands the support of a majority of the House. It gives a chance for discussion with the Premier himself. When, for instance, various measures of Government are defeated from time to time, the Governor is in a position to suggest to the Premier to resign or test his popularity on the floor of the House. As it was put by the learned Solicitor-General, Eastern Nigeria: 'The only way the House speaks on whether it has lost confidence in the Government or in the Premier is on the floor of the House by vote'.

To my mind the conclusion is inescapable that the framers of the constitution wanted the House to be responsible at every level for the ultimate fate of Government and the Premier. The horizon must be larger than leaving it to one man. The Governor might eventually be the instrument used to effect this, but his position as final arbiter must be dictated by events in the House of events emanating from the House, and not by a letter, however well meaning, signed by a body of members of the House. Law and convention cannot be replaced by party political moves outside the House.

Ours is a constitutional democracy. It is of the essence of democracy that all its members are imbued with a spirit of tolerance, compromise and restraint. Those in power are willing to respect the fundamental rights of everyone including the minority, and the minority will not be over-obstructive towards the majority. Both sides will observe the principle as accepted principles in a democratic society.

Further, there are, in a democratic society, certain accepted conventions in responsible Government and tenure of office; when those forming the

Government of the day find that they no longer command the support of a majority in the House, they resign. Alternatively, the Premier asks for a dissolution and fresh elections in the belief that he and his supporters will get a majority in the elections. I think that the Constitution was framed in the light of normal constitutional practice and should be interpreted in that light rather than by a consideration of an extremely unlikely possibility that one can only imagine as being adopted by a Premier who would then, in truth, be entering the path of dictatorship; for if a Premier were to go on although he knew that he did not command a majority, he would be departing from the democratic principle of majority rule which pervades the Constitution-a departure which opinion would not tolerate and which I think was not contemplated by the framers of the Constitution.

I believe that the House of Assembly cannot be relieved of its responsibilities and duties as the House by a letter to the Governor signed by members of the House. It will be an unduly narrow and restrictive interpretation of the powers of the House, and a correspondingly unduly wide interpretation of the powers of the Governor, if in the circumstances, Section 33(10) is interpreted in any other way except in a way which makes it clear that the evidence emanates from proceedings of the House. The answer to the first question therefore is that the Governor cannot validly exercise power to remove the Premier from office under Section 33 subsection 10 of the Constitution of Western Nigeria except in consequence of proceedings on the floor of the House whether in the shape of a vote of no-confidence or of a defeat on a major measures of some importance showing that the Premier no longer commands the support of majority of the members of the House of Assembly.

Comments

The dissenting opinion of Brett F.J., is also very innundative and instructive, particularly his consideration of the fact that the Governor may not have recourse to the House before removing the Premier.

BRETT FJ *(dissenting)* held:

I have had the privilege of reading the judgment which has just been delivered by the Chief Justice of the Federation. In his general comments on the relationship between the written constitution of Nigeria and the unwritten constitution of the United Kingdom he speaks with authority, and it would be presumptuous on my part to do more than express my respectful assent. I should be glad to feel able to agree with him also as to the specific questions referred to us, but after careful consideration I remain, with all diffidence, of a different view.

I accept the submission made on behalf of the plaintiff that the Constitution of Western Nigeria embodies the essential characteristics of

responsible Government, as developed in the United Kingdom in a Ministry collectively (except on a few clearly defined issues) responsible to the Legislature (s.35) and a Governor exercising the executive authority of a Region on behalf of Her Majesty (s.32) and required to act on ministerial advice except in the strictly limited cases where he is expressly empowered to act in accordance with his own deliberate judgment (s38). The resemblance does not extend, however, to the matters with which this reference is concerned, and what we have to do is to construe a written Constitution, not to apply a set of unwritten conventions.

Paragraph (*a*) of the proviso to s33(10) of the Constitution lays down conditions for the exercise of the power of dismissing the Premier, but it does not prescribe, as it might have done, the matters to which the Governor is to have regard in deciding whether the condition is satisfied. I do not feel able to say that its wording entitles the Court to hold that the Governor must in every case look to the proceedings of the House of Assembly and to no other source of information before coming to and acting on the conclusion that the Premier no longer commands the support of majority of the members of the House, or even that the information on which he forms his conclusion must in every case include something done in the House of Assembly. It is not on record that a situation analogous to the one with which we are now concerned has ever arisen in the United Kingdom, and it does not appear to me that there is a sufficiently clear convention as to what Her Majesty might with propriety do in such a situation to justify a presumption as to what the Governor of Western Nigeria may lawfully do.

The nature of the responsibilities entrusted to the Governor personally in the various sets of circumstances in which he is empowered to act in accordance with his own deliberate judgment under the four paragraphs of the proviso to s. 38(1) of the Constitution seems to me significant. Apart from the approval of members of his own personal staff under paragraph (d), which is a mere matter of ordinary courtesy to him, he has the responsibility not only of appointing the Premier in the first place under paragraph (b) but, under paragraph (c), of choosing another member of the Executive Council to discharge the Premier's functions on the Premier's advice. Paragraph (a) empowers him in certain circumstances to make up his mind whether or not to dissolve the Legislative Houses contrary to the Premier's advice or in spite of the lack of it. These are functions of high importance for the welfare of the Region. They only fail to be discharged at a crisis in the affairs of the Region, and to discharge them in the way which best serves the public interest requires not only complete impartiality of judgment but the nicest assessment of political facts and possibilities. For the purpose of deciding how wide a discretion is left to the Governor at a crisis of a different kind

by paragraph (a) of the proviso to s. (10) of the Constitution, the extent of the discretion allowed to him in these other matters affords no ground for a presumption that he may not act on any information which he considers reliable. I have used the word "crisis" in its primary sense of a turning-point, but it may well also be a crisis in the primary sense of a moment of danger or suspense, when the maxim *saluspopuli suprema lex*has special force.

In considering the extent of the discretion entrusted to the Governor, it is also pertinent to remember that both the Constitution and the statute law of Western Nigeria presuppose that the Region will never be left without a Premier, so that even an adverse vote of the House of Assembly does not necessarily involve the immediate removal of the Premier. The task of finding an alternative Premier is left to the Governor and he may well think it right to defer removing one Premier until he is in a position to appoint a successor, whether after a dissolution and a general election or otherwise.

No doubt the clearest way in which it can possibly appear that the Premier no longer commands the support of a majority of the members of the House of Assembly is by an adverse vote, or a series of adverse votes, of the House itself either expressly on the issue of confidence or on some other matter or matters of sufficient importance. That is the orthodox source of information and preferable to any other when it is available, but it does not necessarily follow that it is the only source from which the fact may lawfully become apparent to the Governor, particularly in a Region where the House of Assembly is less continuously in session than the House of Commons of the United Kingdom. To take an extreme example, suppose the Premier quarrels with his political associates to such an extent that all the other Ministers resign and he can find no members of the House of Assembly willing to serve on the Executive Council; or suppose that there is coalition government dependent on the support of two political parties, the parties fall out, all the Ministers from one party in opposing the Premier and his government. Suppose in either case that the House of Assembly has been prorogued and that the Premier declines to advise that it should be convened, so that its views may be known. If these events occurred shortly after the passing of the annual Appropriation Act, a Premier who was obstinate to the point of perversity might try to remain in office for a further twelve months or so. In such an exceptional case I cannot see why, for the purposes of s. 33(10) of the Constitution, the Governor should not be allowed to know what everyone else in the Region knows, and exercise his discretion as the public interest requires, even if it means that he has to rely on information extraneous to the proceedings of the House of Assembly in deciding whether the Premier would be likely to command it. I agree that the greatest caution is necessary in assessing the weight to be given to reports of anything said

or done outside the House of Assembly, and that the members of a political party may quarrel openly among themselves and still close their ranks against danger from outside, but a person who is competent to discharge the other duties of a Governor must be supposed to be as well aware as anyone else, and to be capable of exercising an independent judgment. In addition to more honourable motives for caution, the Governor will hardly wish to risk the personal rebuff which he would suffer if he were to dismiss a Premier who was shown later still to command the support of a majority of the members of the Houses.

For these reasons I would answer the first of the questions referred to us in the affirmative. In answer to the second question, I would say that always assuming good faith, the Constitution does not preclude the Governor from acting on any information which he considers reliable. In the present case bad faith has been pleaded and as the nature of the information on which the Governor acted is one of the matters which the Court below will have to take into consideration in deciding whether bad faith has been established, I abstain from commenting on it.

Comments

Not a few of these conventions exist in England where Hood Phillips points out that obedience to them is both political and psychological. Examples strengthens Sir Jennings' position on the effect of conventions on the running of the government. The main purpose of conventions is to bring about constitutional harmony.

This brings up a case for codification, at least in jurisdictions where conventions play a prominent part in their daily national life. The failure to observe an important constitutional convention may precipitate a change in the law. This may occur by the parliament promulgating a law to prevent a reoccurrence.

A foremost advocate of codification of conventions is Bernard Crick who, in his papers on constitutional reforms argued that conventions, at least, the most important ones, should be codified in writing. In a codified form, it is possible to determine the scope of every convention.

One example of such codification exercise in the form of a statute was the convention that the House of Lords should yield to the elected body, the House of Commons. In 1909, the House of Lords disobeyed this convention. As a result, the liberal government presented a parliament bill which limited the power of the Lords, and in effect ensured that they must yield to the commons. This was enacted as the Parliament Act of 1911.

The main advantage of conventions is flexibility. For the fact that conventions are not formally written down, they are often very difficult to identify. This explains why it is virtually impossible to provide a definitive list of them.

Despite this ostensible advantage, a rule of law overrides any convention where there is no written constitution. In *Madzimbamuto v Lardner-Burke*[1961] AC 645, the Judicial Committee of the Privy Council had to decide whether a statute passed by Parliament (the Southern Rhodesia Act, 1965) should take priority over a convention. The convention required that Parliament should legislate for a commonwealth country only with the consent of that country's government. The Southern Rhodesian Government (now known as Zimbabwe) had unilaterally declared independence. In response to this, Parliament passed the statute reasserting the right of Westminster to legislate for Southern Rhodesia. The Privy Council held that the U.K. statute although passed in breach of the convention (as the Southern Rhodesian government had not consented to its enactment), took priority and was therefore valid.

In the same vein, in *Re: Amendment to the Constitution of Canada [1982] 125 DLR (3d)* 1, a valuable discussion of constitutional conventions took place in the Canadian Supreme Court. The Canadian government, which was in the process of asking the Westminster Parliament to pass a new statute to amend the British North America Act 1867 (which had created the Dominion of Canada), requested an advisory opinion. The issue facing the court was whether or not the consent of the provinces was required before the Canadian Parliament made that official request. Some of the Canadian Provinces had argued that there was a constitutional convention, which required their agreement to any proposed changes to the Canadian Constitution. The Canadian Supreme Court agreed that this convention did exist, but that it did not have the status of a rule of law and so could not be enforced.

By way of recapitulation, matters that are taken as conventions in jurisdictions with unwritten Constitutions are formally present in jurisdictions with written Constitutions. To this end, it can be safely asserted that conventions present themselves in a formal manner in constitutional democracies.

3.4 Summary

We have stated that Conventions are not binding, except they are domesticated by the legislature. Conventions are also largely unwritten.In every democracy, the rule of law overrides any convention.

3.5 References/Further Readings/Web Resources

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3.6 Possible Answers to Self-Assessment Exercise

Conventions are generally unwritten.

UNIT 4 FEDERALISM

CONTENTS

4.1 Introduction

You have heard of Federalism and Federal character. Federalism is a form of government. In this unit, we look into the definition of Federalism, the characteristics of federalism, Federalism in Nigeria and the United States, and a host of other relevant details.

4.2 Intended Learning Outcomes

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

- explain: federalism as a form of government;
- determine federalism under the 1999 Constitution;
- explain when Federalism is most necessary.

4.3 Federalism

The Nigerian Constitution refers to the nation as a Federal Republic. With the exception of Major General JTU Ironsi who made a proclamation for a Unitary Government, Military Governments that are prone to suspending and modifying the Constitution by their fiat through decrees still did not attempt to modify this constitutional arrangement. They referred to their governments as the 'Federal Military Government.' This attaches a curious significance to the phenomenon of Federalism. Question arises as to whether Federalism is a concept or a doctrine. On the face of it, it might just be safe enough to adopt KC Wheare's parlance in referring to Federalism as a 'Constitutional Arrangement'.

The opinion of Wheare was that Federalism is brought about by circumstances where people are prepared to give up only limited powers while retaining other limited powers, both sets of powers being exercised by coordinate authorities. The idea of giving up some powers and

retaining some actually form the bedrock of Federalism. Federalism may be graphically seen as in a Constitutional organogram whereby different strata (at least two) of government maintain a symbiotic existence in a hierarchical order that is set out in a Written Constitution. It entails acceptance of slight dominance by one stratum and domination by the other stratum. One thing however has to be accepted from the onset, and it is that a constitutional document has to outline the areas of intersection between these strata as well as areas where one stratum takes precedence over the other. (***Briefly discuss the concept of federalism***)

Federalism has been aptly described as a methodology of limited union directed to the production of limited unity. Referring to the quantum of unity in a federation, Akande is of the opinion that it will be determined by the exigencies of the federal situation. To buttress this point, she cited the United States of America where according to her, Federalism was adopted as a means of seeking unity in diversity and a way of rejecting confederation. She also cites federation in Australia, which she said was actuated by the need to act nationally.

Riker has simplified the whole idea of Federalism as follows;

(a) Two or more levels of government rule the same people
(b) Each level of government has at least one area in which it sets policy independently of the other.

It is from Riker's opinion that we draw distinctions between a military system of government and a confederacy as against a federation. Whereas in a confederacy there is a weak central government, in a federation, the central government and the local government have congruent and complementary powers except as otherwise provided by the Constitution. In the case of unitary government, the central government takes all the powers and gives and withdraws such powers at its own discretion alone. Whereas in a Federal Government there is a constitutional power sharing system between the center and the local governments, an all-encompassing view is given by Akande of a Federation as "a process of bringing about a dynamic equilibrium between centrifugal and centripetal forces in a society'Which'entails continuous adjustments between the federal governments and the governments of the component parts.

This definition, it is submitted, shows the mechanism and phenomenon of a federation. The forces in reference are historical, cultural, social and economic etc a harnessing of these forces. Adjustments are made between the central government and the other governments. This adjustment, it is submitted, is also determined by a host of factors.

For instance, in the Nigerian example, there is a plural society. Here, there are diverse groups, languages, religions, culture, politics and trado-political differences. If the central government is prepared to unify such a diverse and multifarious society, the only way out is to allow each state to run itself along its restricted cultural lines with slight control from the centre. In this context, there is nearly no interference with the local governments (Regional Governments) and there is power distribution as outlined by the Constitution.

Self-Assessment Exercise

Why do you think Nigerian constitution is referred to as federal constitution?

In various sections of the 1999 Constitution, Nigeria is referred to as a Federal Republic. To the extent that there are three levels of government with each having its constitutional competence, it can be asserted that the constitution is overtly federal. The fallback in Federation under the constitution is the concentration of power in the central government. This includes legislative powers particularly in terms of legislative lists. For instance, items like Police, Prisons, registration of business names, labour and trade union matters, meteorology, among others are in the exclusive legislative list. In this same context is the issue of revenue allocation which gives more benefits unto the central Government.

The 1960 Constitution was an epitome of a Federal Constitution. Under this Constitution (and the later 1963 constitution) there were autonomous regions which had a fair control over revenue derived from them for the purpose of development. It is worthy of note that each region had its own Constitution, diplomatic missions and judiciary.

As enunciated in *Texas v White 74 US (7 Wall)* 700, 19L edn 227 [1868], the Constitution specifically sets up the national government and basically assumes the existence and continuance of the state, with a distribution of governmental powers between the states and the nation. It is not the phenomenon of power distribution and continuance of the states that actually make up the idea of Federalism. These characteristics exist in a Confederation and even in a Unitary Government. After all, under both systems of government there is a constitutional power structure and command line which is absolutely political but based on the evolutionary process of the adopted system.

Case Analysis

Attorney General of Ondo StatevAttorney General of the Federation and 36 Ors [2002] SCM 1, SC

Facts

By an originating summons filed in the Supreme Court on 16 July, 2001, for adjudication in its original jurisdiction under section 232(1) of the 1999 Constitution, the plaintiff sued the 1st defendant (i.e. Attorney-General of the Federation, and joined the 2nd -36th defendants as parties whose rights may be affected by the action. Of the 35 defendant states, 16 filed briefs of argument in support of the plaintiff and the others supporting the position of the Attorney General of the Federation. The Court also invited three Senior Advocates of Nigeria as *amici curiae* – Professor BO Nwabueze, Chief AfeBabalola and OlisaAgbakoba and they also filed briefs. Only AfeBabalola SAN took a stand against the plaintiff's claim.

The summary of the plaintiff's contentions and those in its support is as follows:

1. The subject matter of the Anti-Corruption Act (i.e. Corruption) is not one on which the National Assembly can legislate because it is neither in the exclusive or concurrent list- the Act is unconstitutional.
2. The National Assembly has no constitutional power to create the offences in the Act.
3. The Federal Attorney General or anyone authorised by him cannot initiate criminal proceedings in respect of any of the offences under the Act in the State High Court (Ondo and other supporting States)
4. S 26 (3) and 35 of the Act specifying the period within which proceedings under the Act should be concluded is unconstitutional being a usurpation of judicial powers.
5. The Act being made further to Chapter II (Directive Principles of States Policy) of the constitution cannot be exercised over private individuals.

The defendants on the other hand contended that by the combined effect of section 4(2) (3) and (4), 15 (5), items 60 (a), 67 and 68 of the 2nd schedule of the Constitution, the National Assembly has power to enact the Act. That though corruption is not in the Exclusive Legislative List, item 68 thereof provided for 'any matter incidental or supplementary to any matter mentioned elsewhere in the list. Since S. 15 (5) enjoins the State to abolish Corrupt Practices and Abuse of Power and item 60 (a) of the Exclusive List empowers the National Assembly to make law for the establishment and regulation of authorities to promote and enforce the observation of the Fundamental Objectives and Directive Principles (S. 15(5) Inclusive), the National Assembly has power to enact the Act. On

the creation of the offences, S.2 of part III of the 2nd Schedule specifies ‘ offences’ as one of the incidental and supplemental matters that can be legislated upon by the National Assembly.

After a review of the submissions of counsel the Court upheld the defendant’s submissions and the action of the plaintiff succeeded in part only to the extent that S. 26 (3) & 35 of the Act are unconstitutional and applying the blue pencil rule, the same were struck out. The validity of the Act and the constitutional power of the National Assembly to make same upheld.

The issues canvassed are hereunder stated:

i. Whether the Corrupt Practices and Other Related Offences Act, 2000 is a law with respect to a matter or matters upon which the National Assembly is empowered to make laws for the peace order and good government of Nigeria under the 1999 Constitution the Federal Republic of Nigeria.
ii. Further and in the alternative to Question (i), whether the National Assembly has power to make laws for the peace, order and good government of the Federal Republic of Nigeria with respect to the criminal offences contained in the Corrupt Practices and Other Related Offences Act, 2000.
iii. Whether the Attorney General of the Federation or any person authorised by the Independent Corrupt Practices and Other Related Offences Commission can lawfully initiate or authorise the initiation of criminal proceedings in any court of law in Ondo State in respect of any of the provisions of the said Corrupt Practices And Other Related Offences Act, 2000.
iv. Whether all the powers conferred on the Independent Corrupt Practices and Other Related Offences Commission or any other functionaries or agencies of the Federal Government by the Corrupt Practices and Other Related Offences Act, 2000 are exercisable in Ondo State in relation to the activities of any public person in that State (including any public officer or functionary officer or servant of the Government of Ondo State).

The Court also considered the following matters;

i. Constitutionality of the Corrupt Practices and Related Offences Act 2002 – whether the National Assembly has the power to legislate on the Fundamental Objectives and Directive Principles of State Policy (Chapter II of the 1999 Constitution).
ii. Whether the Fundamental Objectives and Directive Principles of State Policy (Chapter 2 1999 CFRN) applies only to persons exercising executive, legislative and judicial functions not to private individuals.

iii. Whether the National Assembly has power to legislate on corruption.
iv. Power to legislate on corruption and abuse of power- whether Federal or State- Interpretation of the word 'State' as used in S.15 (5).
v. Whether the power of the National Assembly to legislate on corruption and abuse of office is a breach of the principles of Federalism.
vi. Whether the Attorney-General of the Federation or his representative can initiate criminal proceedings in respect of Offences Created under the Corrupt Practices etc. Act.
vii. On the Constitutionality of some provisions of the Corrupt Practices etc. Act vis-à-vis the validity of the Act itself.
viii. Interpretation of Statutes – the principle of law that every grant of power includes by implication incidental powers.
ix. Circumstances when a court will permit the use of extrinsic
x. evidence (legislative history) in interpretations of statutes - purpose of such evidence.
xi. Principles guiding interpretation of Constitutional provisions.
xii. Justiciability of the Fundamental Objectives and Directive Principles of State Policy.

According *Uwais CJN (as he then was)*
Section 4 subsection (2) of the Constitution provides that the National Assembly has the power to make laws for the peace, order and good government of the Federation with respect to any matter included in the Exclusive Legislative List. This means that the National Assembly is empowered to legislate under item 60 (a) for the purpose of establishing and regulating the ICPC for the Federation. This the National Assembly has done by enacting the Act. The ICPC, is by the provisions of item 60 (a), to promote and enforce the observance of the Fundamental Objectives and Directive Principles of State Policy as contained under Chapter II of the Constitution. The question is: how can the ICPC enforce the observance? Is it to use force? Is it to legislate or what? The ICPC cannot do either of these because the use of force or coercion in enforcing the observance will require legislation. The ICPC has no power to legislate. Only the National Assembly can legislate. Since the subject of promoting and enforcing the observance comes under the Exclusive Legislative List it seems to me that the provisions of item 68 of the Exclusive Legislative List come into play. Therefore, it is incidental or supplementary for the National Assembly to enact the law that will enable the ICPC to enforce the observance of the Fundamental Objectives and Directive Principles of State Policy. Hence the enactment of the Act which contains provisions in respect of both the establishment and regulation of ICPC and the authority for the ICPC to enforce the observance of the provisions of section 15 subsection (5) of the Constitution. To hold otherwise is to

render the provisions of item 60(a) idle and leave the ICPC with no authority whatsoever. This cannot have been the intendment of the Constitution.

Uwaifo JSC
The power to legislate for the Federal Republic of Nigeria by virtue of Section 4 (1) of the 1999Constitution is vested in the National Assembly to wit: the Senate and the House of Representatives. Subsection (2) of section 4 empowers the National Assembly to make laws for the peace, order and good government of the Federation or any matter included in the Exclusive Legislative List which is set out in part 1 of the Second Schedule to this Constitution. In chapter II Fundamental Objectives and Directive Principles of State Policy, Section 15(5) thereof provides as follows: 'The State shall abolish all corrupt practises and abuse of power'. To enable the State, carry out the directive contained in section 15 (5) supra, item 60 (a) of the Second Schedule – Part 1, the Constitution empowers it to establish and regulate authorities for the Federation or any part thereof. Subsections (1), (2), (3) and (4) of Section 4; subsection (5) of Section 15 items 60 (a), 67 and 68 of the Second Schedule- Part I of the 1999Constitution. Reading these provisions of the 1999 Constitution together and construed liberally and broadly, it can easily be seen that the National Assembly possesses the power both "incidental" and "implied" to promulgate the Corrupt Practises and Other Related Offences Act, 2000 to enable the State, which for this purpose means the Federal Republic of Nigeria, to implement the provision of section 15 (5) of the Constitution.

In the words of *Uwaifo* JSC:
I need to stress a point further about item 60(a).t is quite tenable, in my view, to consider item 60(a) in regard to section 15(5) of the constitution as having placed directly as a subject in the Exclusive Legislative List, the abolition of all corrupt practices and abuse of office, in the terms that item is stated. Under that circumstance, the National Assembly may, in the exercise of the substantive power given by section 4 of the constitution in relation to item 60(a), make all laws which are directed to the end of those power and which are reasonably and necessarily incidental to their absolute and entire fulfilment. It will then be seen that the National Assembly is empowered (1) to establish and regulate an authority, and (2) to give power to the said authority to promote and enforce the observance of the abolition of corrupt practices and abuse of power. The authority it has established and regulated by law is the ICPC. That body cannot give itself power to promote and enforce the said observance. It needs the power to do so and this can be given only by the organ that created it, namely the National Assembly.

Katsina-Alu JSC (as he then was)
I am not aware of the submissions on behalf of the plaintiff with regard to the duties and responsibility stipulated by section 13; that the duties and responsibilities are not to be exercised by every Nigerian or all organs of government, or authorities. These submissions, in my view, overlook the reality of the situation. Corrupt practices and abuse of power spread across and eat into every segment of the society. These vices are not limited only to certain sections of the society. It is lame argument to say that private individuals or persons do not corrupt officials or get them to abuse their power. It is good sense that everyone involved in corrupt practises and abuse of power should be made to face the law in our effort to eradicate this cankerworm. This I believe is the intention of the framers of our Constitution.

But I cannot also help saying, with all due respect, that the contention that section 13 limits the duty and responsibility to conform to, observe and apply the provisions of Chapter II only organs of government and all authorities and persons exercising legislative, executive or judicial powers, does not take account of the undeniable fact that those organs do not operate entirely within their official cocoons, if I may use that phrase for want of a more appropriate expression. They do not in the performance of their duties act in isolation of the public. It is true those organs have to bear the primary duty and responsibility, but they would be of no use to society if they possibly succeeded in performing their official duties without interacting with the public. That cannot represent the reality of the situation. They exist to serve the public and in the course of that they come in contact with private individuals and persons. Their duty and responsibility to confirm to, observe and apply the provisions Chapter II, for instance in regard to section 15(5), will include ensuring that they do not breach that provisions against, or on account or for the benefit of, any individuals or persons. If therefore an enactment creating offences for breach was validly made, l would be surprised if private individuals or person involved in corrupting officials or getting them to abuse their power were, by some alchemy of change, to escape criminal liability, or not to be punished because no provision was made to define their culpability.

Uwais CJN
It is submitted that ‘corruption’ is not a subject under either the Exclusive or the Concurrent Legislative List therefore being a residual matter, the National Assembly has no power to legislate upon it. This submission overlooks the provisions of section 4 subsection (4) of the Constitution which provide that the National Assembly has the power to legislate on any matter with respect to which it is empowered to make law in accordance with the provisions of the Constitution. Section 15 subsection

(5) directs the National Assembly to abolish all corrupt practices and abuse of power. The question is how can the National Assembly exercise such powers? It can only do so effectively by legislation. Item 67 under the Exclusive Legislative List read together with provisions of section 4 subsection (2) provide that the National Assembly is empowered to make law for the peace, order and good government of the Federation and any part thereof. It follows, therefore, that the National Assembly has the power to legislate against corruption and abuse of office even as it applies to persons not in authority under public or government office.

Uwaifo JSC
We are faced with a desire to abolish all corrupt practices and abuse of power. Very gory details, perhaps with some measure of cynicism, of corrupt practices involving Nigerians and of the perception in which Nigeria is held in the international community on matters of corruption have been recorded. Our image in that regard, as said by Chief Babalola, is on the level of a pariah status. In those circumstances, an Act has been enacted by the National Assembly to give effect to section 15(5) of the Constitution. The Act does not state under which of the constitutional provisions the National Assembly promulgated it. I suppose it does not have to so state so long as the Act can be defended as being within the powers of the National Assembly. Arguments have been canvassed by those in support of the Act that the National Assembly was empowered by virtue of section 4 (1), (2) and (3) to rely on items 60 (a), 67 and 68 of the Exclusive Legislative List and para. 2 (a) of part III of the second schedule to the constitution in my opinion, upon a liberal view, that can be supported.

Uwaifo JSC
As l said earlier, section 14(1) equates the State with the Federal Republic of Nigerian not with the Federal Government. Therefore, by section 15(5), it is the Federal Republic of Nigeria that is to abolish all corrupt practices and abuse of power. Now, the organ that legislates on behalf of the Federal Republic of Nigeria and not the Federal Government is the National Assembly by virtue of section 5.

It is therefore on behalf of the Federal Republic of Nigeria that the Act has been enacted and was assented to by Mr. President not on behalf of the federal Government, he being the President of the Federal Government. He cannot help but be concerned with the overall well-being of the Federation. He need not concern himself with the affairs of individual states operating within their own rights in the Federation. Each of those states has its organs of government with the Governor as the chief executive whose responsibility it is to bother about his State. That is the nature of federalism.

Uwais JSC
It has been pointed out that the provisions of the Act impinge on the cardinal principles of federalism, namely, the requirement of equality and autonomy of the State Government and non-interference with the functions of State government. This is true, but as seen above, both the Federal and State Government share the power to legislate in order to abolish corruption and abuse of office. If this is a breach of the principles of federalism, then, I am afraid, it is the Constitution that makes provisions that have facilitated breach of the principles. As far as the legislation is supported by the provisions of the Constitution, I think it cannot rightly be argued that an illegality has occurred by the failure of the Constitution to adhere to the cardinal principles which are at best ideals to follow or guidance for an ideal situation.

Uwais CJN
I hold that the criminal proceedings can be initiated in the court in Ondo State in accordance with the provisions of section 286 subsection (1) (b) of' the Constitution, which provides:

286 (1) subject to the provisions of this Constitution – (b) whereby the Law of a State jurisdiction is conferred upon any court for the investigation; inquiry into, or trial of persons accused of offences against the Laws of the State and with respect to the hearing and determination of appeals arising out of any such trial or out of any proceedings connected therewith, the court shall have like jurisdiction with respect to the investigation, inquiry into, or trial of persons for federal offences and hearing and determination of appeals arising out of the trial or proceedings…..

Federal offence is defined in subsection (3) thereof to mean 'an offence contrary to the provisions of an Act of the National Assembly or any law having effect as if so enacted'. Since the Act is to operate throughout the Federation, the Attorney General of the Federation has power, conferred on him by Section 174 (1) (a) of the 1999 Constitution, to institute criminal proceedings against any person before any Court in Nigeria, other than a court-martial, in respect of any the offences created by the said Act.

Section 174 of the 1999 Constitution confers powers on the Attorney General of the federation:
(a) to institute and undertake criminal proceedings against any person before any court of law in Nigeria, other than a court- martial, in respect of any of the offences created by or under any Act of the National Assembly…. They require no interpretation necessitating unusual canon of construction. They must be read in their plain and ordinary words

which best give their meaning ….. Section 286(1) (b) of the Constitution makes it clear that any court of a State which is by the law of that State given jurisdiction to try persons accused of offences against the Laws of the State shall have like jurisdiction with respect to Federal offences.

Though new constitutions have been promulgated for Nigeria since the 1954 Constitution, the divisions between the national and the state legislatures were maintained in those Constitutions and also in the 1999 Constitution. This means that the Federal Legislature, namely, the National Assembly, was given complete power in the Federal Capital Territory, Abuja while legislative power was divided between the National Assembly and the House of Assembly of the states. The constitutions specified two legislative lists, one called the Exclusive and the other Concurrent. The National Assembly alone could legislate with respect of any matter on the Exclusive list. Both the National Assembly and the appropriate State Assembly could legislate on matters not specified on either list. The detailed provisions of the above are to be found in section 4 of the 1999 Constitution.

4.4 References/Further Readings/Web Resources

Justus A Sokefun (2002), *Issues in Constitutional Law and Practices in Nigeria*, Faculty of Law, OOU, Ago-Iwoye.

Justus A Sokefun, (2011). *Constitutional Law Through the Cases*, Caligata Publishers.

AR Akinyemi, PD Cole & Walter Ofonagoro (Eds.), *Readings on Federalism*, NIIA1979

4.5 Possible Answers to Self-Assessment Exercise

So far as there are three levels of government with each having its constitutional competence, it can be asserted that the constitution is overtly federal.

MODULE 2

UNIT 1 SEPARATION OF POWERS

CONTENTS

1.1 Introduction

Over the years, the international community has embraced the view that human rights are indivisible, interdependent and interrelated. These rights, also known as fundamental rights or human rights, are rights inherent to all human beings, regardless of race, sex, nationality, ethnicity, language, religion, or any other status.

In this unit, we shall discuss in details the Chapter 2 of the 1999 Constitution and draw a comparative analysis with other jurisdictions.

1.2 Intended Learning Outcomes

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

- explain the concept of Fundamental objectives and Directive Principles
- describe the application of this concept under the 1999 Constitution
- do comparative analysis of the concept as operated in Nigeria and other jurisdictions.

1.3 Separation of Powers

Human rights include the right to life and liberty, freedom from slavery and torture, freedom of opinion and expression, the right to work and education, and many more. Everyone is entitled to these rights, without discrimination. It is on this premise that they are regarded as inalienable rights, being that they are rights which all humans are presumed to be born with.

The above position is as held by the United Nations. However, over the years, what constitutes human rights has varied from country to country. The United Nations has set up international guidelines on what constitutes human rights. But, what the sovereign States recognize in their various Constitutions varies. For example, right to work is considered as a human right under the Universal Declaration of Human Rights; but, such right is not covered under Chapter IV of the Nigeria Constitution.

(***Briefly explain the Nature of Fundamental Objectives and Directive Principles of State Policy*****).** In Nigeria, there are rights declared to be fundamental by the Constitution. These are the rights contained in the Chapter 4 of the Constitution. Any person or group who feels any of the rights therein has been, is being or is likely to be contravened can approach the High Court of the State for redress.

Apart from the rights considered to be fundamental under the Nigerian Constitution, also referred to as civil and political right, there are certain other rights, popularly referred to as socio-economic rights, which the Constitution considers as not so fundamental in the sense that it restricts the affected persons or authorities from approaching the courts of law for redress. These socio-economic rights are categorized as the Fundamental objectives and directive principles of state policy, and are contained in Chapter II of the Constitution.

Nature of Fundamental Objectives and Directive Principles of State Policy

The concept of Fundamental Objectives and Directive Principles for State Policy is such that has received huge attention across the globe and over the years. This is necessitated by several reasons, amongst which are the citizens' need to hold their governments accountable for leadership, curb the excesses of elected representatives and have a benchmark to assess the performance of the government.

While it has been argued by many that the Fundamental Objectives and Directive Principles aim at holding the government of the day accountable and set the benchmark for appraisal, it is necessary to add

that the policies are not only for appraising the government. They also place emphasis on the responsibilities of the citizenry and their loyalty to their common nation.

Fundamental objectives and directive principles of State policy, also known as socio-economic rights, are now enforceable in several countries of the world, including India. In Nigeria, however, these rights remain non-justiciable. Nigeria has ratified the African Charter on Human and People's Rights that provide for socio-economic rights. These have since been adopted into the laws. However, the Policy is embedded in the Constitution which has supremacy over the African Charter. Also, there are no specific provisions in the Constitution for the enforcement of socio- economic rights. Hence, these rights remain a mirage in Nigeria unlike the position in other jurisdictions. In countries like South Africa, India and some Latin American countries, the enforcement of these rights have been achieved by either merging constitutional provisions with socio-economic rights or the courts giving expansive definitions to the provisions of the Constitution.

In *Minerva Mills v Union of India* (1980) SC 1789 at 1813, Justice Bhagwati of the Supreme Court of India, in his dissenting judgment said: **..** the conferment of an aura of sacrosanctity and inviolability on such formal rights as are designated Fundamental Rights and relegating Directive Principles to insignificance creates a situation where manifest public good and substance is sacrificed to private interests and obeisance to empty form.

While the Supreme Court of India has, in a plethora of cases, elevated the rights categorized as socio-economic rights to be justiciable; the Supreme Court of Nigeria still upholds the rigid interpretation of section 6(6)(c) of the Constitution stating them as non-justiciable. In *Attorney General of Ondo State v Attorney General of the Federation & 35 Ors (2002) FWLR parr 111 page 1972*, the Supreme Court, per Uwais, JSC held as follows: It is well established as per section 6 subsection (6) (c) of the Constitution that rights under the fundamental objectives and directive principles of state policy are not justiciable except as otherwise provided in the constitution.

Making the fundamental Objectives and Directives Principles of State policy justiciable would create an absolute duty on government to go for their realization both immediately and in the future. This will in turn give rise to an era of responsible government. Moreover, this is the best way not just to fight, but to cage corruption in any nation with such a noble design because governance will now be less attractive to election riggers, do-or-die politicians, political thugs, god fatherism, money launders and investors in politics who hope to reap a significant portion of the financial

fortunes of the states of their beneficiaries when such persons win elections.

For emphasis, under Section 17 of the Constitution, every citizen shall have equality of rights, obligations and opportunities before the law. This is not the reality in Nigeria; persons gain opportunities on the basis of the connections they have and the influence thereof. The fact that these socio-economic rights are not justiciable makes it absolutely impossible for aggrieved individuals to approach the courts for the purpose of asserting their rights. Hence, without making the realization of these objectives legally binding on the government, the governed will continue to suffer gross neglect by those in government.

It is interesting that a lot of arguments have been made as to the colossal amount of lawsuits that would be filed against the government if the provisions of Chapter II become justiciable in Nigeria. However, the words of Lord Denning in *Parker v Parker* (1954) All ER p22are instructive. He stated that if something is not done just because it has never been done before, the law will not develop while the rest of the world moves ahead.

Brief History of Fundamental Objectives and Directive Principles of State Policy inNigeria

The concept of Fundamental Objectives and Directive Principle of State policy is a long age one. While some authors traced its origin to India, others traced same to Ireland. According to Basu (1993), the concept has its roots in the Indian Independence movement which began in the year 1917, and was introduced to achieve the values of liberty and social welfare as the goals of an independent Indian state. The movement was able to achieve its goal in 1976 when the Fundamental Duties were later added to the India Constitution by the 42nd Amendment in 1976.

Austin, however, believes that the Directive Principles, which were also drafted by the sub-committee on Fundamental Rights, expounded the socialist precepts of the Indian independence movement, and were inspired by similar principles contained in the Irish Constitution.

According to history, the evolution of the Fundamental Objectives and Directive Principles of State policy in Nigeria began in 1975/76 during the tenure of the Muritala/Obasanjo military regimes. The idea was borrowed from the fact that certain countries like India and Indonesia had earlier adopted same into their Constitutions in 1950 and 1951 respectively. Prior to that time, the 1960 Constitution and 1963 Constitution never had such input. The introduction of the concept into government was premised on the need to measure up with the comity of nations, and to guide the government of the day into becoming

accountable and responsible to her citizens, their material needs and human rights.

A 50-man committee was set up tagged as the Constitution Drafting Committee (CDC). The committee was saddled with a task to produce a Draft Constitution for the second republic. The CDC invited submissions from the general public in order to achieve a Draft Constitution that represented the heartfelt needs of the Nigerian people. The CDC then submitted a two-volume report in September 1976 which formed the basis of "the Great Debate". Upon submission of the Draft Constitution, it was thereafter re-scrutinized by a "partly indirectly elected and partly appointed" Constituent Assembly which began deliberations in December 1976.

In June 1978, the Constituent Assembly submitted a revised version of the Draft Constitution to the Federal Military Government. It is important to note that upon receipt of the submitted work, the military government merely promulgated a modified version into the 1979 Constitution, as opposed to the real intentions of the general populace.

In the words of Aguda (Aguda, TA, *Judiciary in the Government of Nigeria* (Ibadan: New Horn Press), 1983, p 4, 'it was also found objectionable that a government consisting of *a few men in uniform*, without any pretense whatsoever to any knowledge of law or constitution-making made some atrocious amendments and additions to a referendum.' It was apparent that the plentitude of the objections to the 1979 Constitution was that it did not truly reflect the exact wishes and aspirations of the majority of Nigerians.

Self-Assessment Exercises

How would you analyse the provision of section 17 of the 1999 Constitution of the Federal Republic of Nigeria and its application?

Scope of Fundamental Objectives and Directive Principles of State Policy in the 1999 Constitution of the Federal Republic of Nigeria

Under this heading, we shall consider the Chapter II of the 1999 Constitution. We shall also consider the limitation placed on these objectives and directive principles by Section 6 (6) (c) of the 1999 Constitution.

According to the Constitution Drafting Committee:

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

Section 6 of the Constitution espouses the inherent powers of the judicial arm of government. Section 6 (1) states: 'The judicial powers of the Federation shall be vested in the Courts to which this section relates, being courts established for the Federation'.

Section 6 (6) (c) states:
The judicial powers vested in accordance with the foregoing provisions of this section- (c) shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution.

By virtue of the above provision, a limitation has been placed on the intentions of the original founders of this principle. The limitation is that in Nigeria, authorities and individuals cannot be taken before the Courts if their act or omission violates or fails to conform to the provisions of Chapter II of the Constitution, except the alleged act or omission is prohibited by another section of the Constitution or any other enactment of the legislature.

In*Archbishop Anthony Oolubunmi Okogie (Trustees of Roman Catholic Schools) & ors v Attorney General of Lagos State*(1981) INCLR 218; (1981) 2 NCLR 337, the Court held that issues relating to Fundamental Objectives and Directive Principles of State Policy must conform to and run as subsidiary to the fundamental rights and that the obligation of the judiciary to observe the provisions of Chapter II is limited to interpreting the general provisions of the Constitution or any other statute in such a way that the provisions of the chapter are observed, but that this is subject to the express provisions of the Constitution.

The Court went further to state that the arbiter for any breach of and the guardian of the Fundamental Objectives and Directive Principles of State Policy is the Legislature itself or the electorate.

Unlike in Nigeria, the Supreme Court of India has, by judicial activism, given validity to the Fundamental Objectives and Directive Principles of State Policy thereby making these socio-economic rights enforceable as Human Rights. The Supreme Court of India held in *Olga Tellis v Bombay*

Municipal Corporation (1968) AIR SC 180, that an important facet of right to life is the right to livelihood. If the right to livelihood is not treated as part of the Constitutional right to life, the easiest way of depriving a person of his life would be to deprive him of his means of livelihood.

Appraisal of the Relevant Sections Constituting Chapter Ii of the Constitution (Sections 13 To 25)

Section 13: by its short title, the section provides for the Fundamental obligations of the Government (that is: the legislative, the executive and the judiciary) to conform to, observe and apply the provisions of Chapter II of the Constitution. It is important to stress that the section does not only apply to the organs of government, but also to all authorities and persons.

It must also be stressed that while the Fundamental Objectives and Directive Principles of State policy are not justiciable, they have indeed set a benchmark for the purpose of assessing the performance of any government. They also guide the legislature in formulating issues and making laws relevant to any of the provisions contained in Chapter II.

Section 14: The Government and the Peoples

This provision expounds on the government and the people. It states that the Federal Republic of Nigeria shall be a State based on the principles of democracy and social justice. By that section, the concept of democracy and sovereignty being vested in the people is stressed. It follows that those in government are mere representatives of the people and must therefore stay guided in the performance of their public duties. The section further provides that it is the responsibility of government to provide security and cater to the welfare of the citizenry. It emphasized peoples' participation in government. The section also underscores the principle of Federal Character, State Character and Local Government Character. The pluralistic nature of the country in terms of ethnic groups is covered by the Constitution. Due to this fact, the Constitution seeks to accommodate the various ethnic groups into the various agencies of the three tiers of government.

Section 15: Political Objectives

Section 15 of the Constitution espouses the political objectives of the entity called Nigeria. It states the motto of the Federal Republic of Nigeria as 'Unity and Faith, Peace and Progress'**.** The provision promotes national integration and discourages discrimination on the basis of sex, religion, origin, status in life, ethnicity or linguistic association or ties. In order to achieve this end, the Constitution vests a duty on the State to:

i. Provide adequate facilities for and encourage free mobility of people, goods and services throughout the Federation;

ii. Secure full residence rights for every citizen in all parts of the Federation;
iii. Encourage inter-marriage among persons from different places of origin, or of different religious, ethnic or linguistic association or ties; and
iv. Promote or encourage the formation of associations that cut across ethnic, linguistic, religious or other sectional barriers.

The State shall foster a feeling of belonging and of involvement among the various peoples of the Federation, to the end that loyalty to the nation shall override sectional loyalties. In essence, a citizen of Nigeria is first a Nigerian, and holds his/her loyalty to the nation of Nigeria. All other sectionalism such as being a Yoruba, Igbo or Hausa are all secondary, the identity of being a Nigerian is superior to all others. The State shall also abolish all corrupt practices and abuse of power.

Section 16: Economic Objectives
The economy of a nation to a large extent determines its strength and in practical terms its position among the comity of nations. The Constitution provides that the resources of the nation shall be harnessed for the purpose of promoting national prosperity and an efficient, dynamic and self-reliant economy. The State, that is the Government at all levels, has been enjoined to control the national economy in such manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity. The extent to which each tier of Government can do this depends on the provisions of the Constitution in relation to the allotment of power between the constituent parts.

Section 17: Social Objectives
The State social order is founded on the ideals of Freedom, Equality and Justice. These social objectives are further explained as follows:
a. Every citizen shall have equal rights, obligations and opportunities before the law;
b. the sanctity of the human person shall be recognized and human dignity shall be maintained and enhanced;
c. governmental actions shall be humane;
d. exploitation of human or natural resources in any form whatsoever for reasons, other than the good of the community, shall be prevented; and
e. the independence, impartiality and integrity of courts of law, and easy accessibility thereto shall be secured and maintained.

The Constitution further states as follows: The State shall direct its policy towards ensuring that:

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

Section 18: Educational Objectives
By this provision, the government is enjoined to direct its policy towards ensuring that there are equal and adequate educational opportunities at all levels. Government shall promote science and technology. Government shall strive to eradicate illiteracy, and to this end shall as and when practicable provide:

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

It is evident from the wordings of the above provision that the above can only be provided as and when practicable. The phrase "as and when practicable" is subjective to mean the government of the day reserves the power to decide same, as was seen in the case of *Archibishop Anthony Olubunmi Okogie v The Governmental of Lagos State*(*supra*)

Section 19: Foreign Objectives
The foreign objectives of the nation shall be:

a. promotion and protection of the national interest;
b. promotion of African integration and support for African unity;
c. promotion of international co-operation for the consolidation of universal peace and mutual respect among all nations and elimination of discrimination in all its manifestation;
d. respect for international law and treaty obligations as well as the seeking of settlement of international disputes by negotiation, mediation, conciliation, arbitration and adjudication; and
e. promotion of a just world economic order

Section 20: Environmental Objectives
By this provision, the State shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria. In the making of policies, the government, by this provision is enjoined to take all reasonable precaution in protecting and improving the Nigerian environmental space in its entirety.

Section 21: Directive on Nigerian Cultures
Considering the rich cultures being exported from Nigeria to other nations of the world, this section seeks to enjoin the Nigerian State to take all reasonable steps to protect, preserve and promote the Nigerian cultures which enhance human dignity. The government is further enjoined to encourage development of technological and scientific studies which enhance cultural values.

Section 22: Obligations of the Mass Media
In law making process, adequate laws should be put in place for the purpose of ensuring freedom and dissemination of idea. By this provision, the press, radio, television and other agencies of the mass media are enjoined to use their freedom to uphold the fundamental objectives by upholding the responsibility and accountability of the government to the people.

Section 23: National Ethics
Ethics are principles of conduct in government. By this provision, the national ethics shall be discipline, integrity, dignity of labour, social justice, religious tolerance, self-reliance and patriotism. All these ethics should reflect in all government activities, as well as in acts of individuals and authorities.

Section 24: Duties of Citizens
It appears quite laughable to know that the purport of Section 6 (6) (c) which renders Chapter II of the Constitution as non-justiciable, also by effect means that the duties of citizens as stated in Section 24 are merely advisory. A close look at the various duties would reveal that to demand obedience from the citizens, the legislature has through several statutes and laws mandated obedience thereof.

By the provision of Section 24, it shall be the duty of every citizen to do the following:

a. abide by this Constitution, respect its ideals and its institutions, the National Flag, the National Anthem, the National Pledge, and legitimate authorities;
b. help to enhance the power, prestige and good name of Nigeria, defend Nigeria and render such national service as may be required;

c. respect the dignity in other citizens and the rights and legitimate interests of others and live in unity and harmony and in the spirit of common brotherhood;
d. make positive and useful contribution to the advancement, progress and wellbeing of the community where he resides;
e. render assistance to appropriate and lawful agencies in the maintenance of law and order; and
f. declare his income honestly to appropriate and lawful agencies and pay his tax promptly

1.4 Summary

Evidence shows that the Nigeria nation has not fully maximized the accruing benefits for which the Constitutional concept of Fundamental Objectives Representative system of government was introduced. It is therefore suggested to the legislative arm of government to take dressing from other climes, such as India and Ghana; to make the concept justiciable and allow the nation to make progress thereof.

Where the National Assembly fails to measure up in expanding the frontiers of the law, the judiciary, by way of judicial activism, can undertake the task towards developing the law. A clue should be taken from India in this wise. The position of Lord Denning in Parker v. Parker (Supra) is worth emulating. If something is not done just because it has never been done before, the law will not develop while the rest of the world moves ahead.

On the whole, as it stands, Chapter II of the Constitution may remain unenforceable as it were, nevertheless they remain fundamental objectives, fundamental aims and fundamental ideals which every nation interested in growth and development must embrace, strive to achieve and preserve. Civil societies, Political parties, governments and individuals are enjoined to engage in campaigns aimed at enlightening the general public of the existence and rich dividends of these Fundamental Objectives and Directive Principles of State Policy.

1.5 References/Further Readings/Web Resources

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1.6 Possible Answers to Self-Assessment Exercise

Under Section 17 of the Constitution, every citizen shall have equality of rights, obligations and opportunities before the law. This is not the reality in Nigeria; persons gain opportunities on the basis of the connections they have and the influence thereof. The fact that these socio-economic rights are not justiciable makes it absolutely impossible for aggrieved individuals to approach the courts for the purpose of asserting their rights

UNIT 2 FUNDAMENTAL RIGHTS

CONTENTS

2.1 Introduction

As discussed in Unit 1, human rights are indivisible, interdependent and interrelated. These rights are rights inherent to all human beings, regardless of race, sex, nationality, ethnicity, language, religion, or any other status.

In this unit, we shall discuss in details the Chapter 4 of the 1999 Constitution and draw a comparative analysis with other jurisdictions.

2.2 Intended Learning Outcomes

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

- explain the concept of Fundamental Rights, also known as Human Rights;
- determine the extent of the rights and their limitations;
- do Comparative analysis of Nigeria and other jurisdictions.

2.3 Fundamental Rights

The whole of Chapter IV of the Constitution of the Federal Republic of Nigeria, 1999 contains a long list of rights with the heading "Fundamental Rights." In India, the same is the case in Part III of her Constitution where such rights are referred to also as "Fundamental Rights." The United States' Constitution is also known to contain an impressive list of protections from an oppressive central government.

The origin of setting out fundamental rights in writing, from the common law viewpoint, dates back to 1215 when the English barons and peasants, under the tyranny of King John protested and the monarch was coerced into signing what is now popularly referred to as Magna Carta to guarantee some basic rights to the people.

Chapter 39 of this document provided as follows: 'No free man shall be taken, outlawed; banished or in any way destroyed, nor will we proceed against or prosecute him except by the lawful judgment of his peers and by law of the land'.

(***What is fundamental right and how can it be enforced?***). This is with reference to African tradition. Across the whole of Africa, where there is not much written evidence of rights, individuals still possessed some rights like rights to shelter, liberty, dignity, and gainful employment even in the traditional setting.

The Bill of Rights of 1689 came much after the Magna Carta to perform the duty of consolidation and provided further guarantee for personal liberty and other freedoms that could further human dignity.

The Constitution of the Federal Republic of Nigeria, 1999 contains 12 rights that are constitutionally guaranteed for citizens and others. The 1995 Draft Constitution introduced three other rights as follows: (a) Right to eradicate corrupt practices – section 35, (b) Right to medical consultation – section 43 (c) Right to primary education – section 45. These unfortunately did not feature in the 1999 Constitution.

In a positive form, the Constitution defines rights in a definitive language with adequate clarity. The following are the rights provided under the 1999 Constitution;

(a) Right to life – section 33.
(b) Right to dignity of human person – section 34.
(c) Right to personal liberty – section 35.
(d) Right to fair hearing – section 36.
(e) Right to private and family life – section 37.
(f) Freedom of thought, conscience and religion – section 38.
(g) Freedom of expression and the press – section 39.
(h) Right to peaceful assembly and association – section 40.
(i) Freedom of movement – section 41.
(j) Freedom from Discrimination – section 42
(k) Right to acquire and own immovable property anywhere in Nigeria
(l) Freedom from compulsory acquisition of property section 40

Self-Assessment Exercises 6

What approach does the judiciary usually adopt in the interpretation of fundamental rights provisions?

The task of interpreting these sections is trusted on the judiciary in democratic jurisdictions. As would be seen later in this unit, the judiciary has always applied a generous approach in interpreting fundamental rights provisions. This issue was considered in Minister of Home Affairs v. Fisher [1980] AC 319, 329 (PC), where Lord Wilberforce had the following to say on the interpretation of fundamental rights provisions:'as sui generic, calling for principles of interpretation of its own, suitable to its character…without necessary acceptance of all the presumptions that are relevant to legislation of private law'.

The same approach was taken in the case of Attorney-General of the *Gambia v Momodu Jobe* [1984] AC 689 at 700, where Lord Diplockmade the following pronouncement:

A Constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled is to be given a generous and purpose construction.

Case Analysis

Jurisdiction of High Courts in Matters of Fundamental Rights

Tony Momoh

v

1. *Senate of the National Assembly,*
2. *President of the Senate of the National Assembly,*
3. *Clerk of the National Assembly*

[1981] I NCLR 105

(High Court)

In this case, the appellant, the *Editor* of the *Daily Time*, applied to the court for leave to apply for an order quashing the resolution of the Senate of the National Assembly made on the 5th February, 1980 and contained in an official communication dated 11th February 1980 sent to the applicant.

The National Assembly pursuant to the provisions of sections 82 and 83 of the Constitution of the Federal Republic of Nigeria, 1979 had summoned the applicant to come and disclose sources of his information about senators and their lobbying for contract from the executive.

The said leave was granted and the respondents were ordered to be put on notice. The court bailiff accompanied by the applicant's counsel was prevented from serving some documents on the second respondent by his (second respondent's) legal adviser.

It was contended by the legal adviser that the premises of the National Assembly have absolute immunity against any court process under

section 31 of the Legislative House (Powers and Privileges) Act Cap 102, Laws of the Federation of Nigeria.
Held:

1. Section 236(1) of the 1979 Constitution gives to the High Court unlimited jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, inability, privilege, interest obligations or criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person.
2. Besides the above, Chapter (IV) of the Constitution makes provisions for the protection of certain fundamental rights and it is concerned about the sanctity of these rights that it conferred in addition to the general jurisdiction, special jurisdiction on the High Court in Section 42(9)(1) (2) (3).
3. Before a court can adjudicate on a matter within its jurisdiction, it should have issued process to ensure the appearance of the parties in order to give both sides an opportunity of being heard and so ensure a fair hearing. The service of process therefore is deemed to be an essential means of enforcing the rights guaranteed in the Constitution, when such rights are threatened or contravened.
4. The provision of Section 42 of the Constitution is all embracing because it would appear to be unlimited and unrestrictive as to the mode or place of service of any process required for the due enforcement of the rights conferred.
5. The provision of Section 31 of the Legislative (Powers and Privileges) Act Cap 102 Laws of the Federation of Nigeria and Lagos, 1958 is void and of no effect and inoperative by reason of the fact that it is inconsistent with the provisions of Section 1 of the Constitution which proclaims the supremacy of the Constitution and declares void any law inconsistent with its provisions.

Ademola-Johnson Ag CJ:In view of the great constitutional issue raised by this incident, I consider it necessary to examine and pronounce on the validity of the stand of the personae dramatis in this incident. While Chief Fawehinwi holds the view that by reason of the provision of the Constitution, DrObozuwa had no right to disturb, prevent or in any manner interfere with the service of the process of the court on the application filed on behalf of the applicant, DrObozuwa holds a contrary view and believes that Section 31 of the Act constitutes an absolute prohibition to serve within the House. Section 236(1) of the Constitution gives general jurisdiction to a State's High Court as follows:

236–(1) Subject to the provisions of this Constitution and addition to such other jurisdiction as may be conferred upon it by law, the High Court of a State shall have unlimited jurisdiction to hear and determine any civil

proceedings in which the existence or extent of a legal right, power, duty liability, privilege, interest, obligation or criminal proceedings or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person.

Besides the above, Chapter (IV) of the Constitution made provisions for the protection of certain fundamental rights and felt so concerned about the sanctity of these rights that it conferred in addition to the general jurisdiction special jurisdiction on the High Court in Section 42(1) (2) (3) as follows:

42(1) Any person who alleges that any of the provisions of this Chapter has been is being or likely to be contravened in a State in relation to him may apply to a High Court in that State for redress.

(1) Subject to the provisions of this Constitution, a High Court shall have original jurisdiction to hear and determine any application made to it in pursuance of the provisions of this Section and may make such orders, issue such writ and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement within that State of any rights to which the person who makes the application may be entitled under this Chapter.

(2) The Chief Justice of Nigeria may make rules with respect to the practice and procedure of a High court for the purpose of this Section.

It is elementary to restate that before a court can adjudicate on a matter within its jurisdiction, it should have issued processes to ensure the appearance of the parties in order to give both sides an opportunity of being heard and so ensure a fair hearing. The services of process therefore, is deemed to be an essential means of enforcing the rights guaranteed in the Constitution, when such rights are threatened or contravened.

When by statute, the laws give a right, it is equally deemed to give all such rights which are necessary as an aid to the enforcement of the given rights. Since therefore in a matter of this nature, special jurisdiction is conferred on the court, there is also deemed conferred on it auxiliary powers towards the effective exercise of that jurisdiction. I have no doubt in my mind that the all-embracing and very wide provisions of Section 42 of Constitution is deliberate to prevent any person, body or authority from frustrating in any manner, whatsoever the effective exercise of the jurisdiction of the courts including the service of its process without let or hindrance and the effective enforcement of the rights so guaranteed.
What way can be better employed to frustrate and/or delay the exercise of the jurisdiction of the court under the constitution than by making it impossible and/or difficult to effect service of the process of the court by

some restrictive laws inconsistent with the provisions of the constitution. The courts would and should resist and frustrate any such move.

I shall therefore say that there is right conferred on process server of the court to serve any process of the court either in accordance with the rules or as specially ordered by the court.

What then may we ask is the effect of the provision of Section 31 the Act? The Section reads:

Notwithstanding anything in any written law, no process issued by any court in Nigeria in the exercise of its civil jurisdiction shall be served or executed within the chambers or precincts of a Legislative House while that House is sitting or through the President or any Officer of Legislative House.

The provision of Section 42 of the Constitution earlier quoted appears all embracing because its provisions would appear to be unlimited and unrestrictive as to the mode or place of service of any process required for the due enforcement of the rights conferred.

Section 31 of the Act clearly appears to be restrictive in its provisions as to place of service of process relating to the Legislative House and as such inconsistent with the provision of Section 42 of the Constitution.

That Section of the Act, cannot but suffer the fate reserved for such legislations by the provision of Section (1) of the Constitution which proclaims the supremacy of the Constitution and declares void any law inconsistent with its provision.

Shugaba Abdulrahaman Darman v
1. The Federation Minister Minister of Internal Affairs
2. M Mofio,
3. His Excellency, Alhaji Shehu Shagari,
4. The Hon Mr Justice PC Akpamgwo

HC[1981] 1NCLR 25.

Adfilla J said:
The motion before me now by the applicant's counsel which is a Motion on notice is (1) for an order suspending the Shugaba Abdulrahaman Deportation Order1980 until the determination of these proceedings.

Secondly that the applicant, Alhaji Shugaba be at liberty to re-enter Nigeria and remain therein until the determination of this suit for the purpose of preparing for and giving evidence in these proceedings.

Thirdly that there should be an order granting an interlocutory injunction restraining the respondents, their servants and/or agents from continuing to enforce the Shugaba Abdulrahaman Darman Deportation Order 1980 until the determination of these proceedings and for such further order as the court may deem fit to make in the circumstances.

Arguing his motion, the learned leading counsel for the applicant GOK Ajayi referred the court to the affidavit attached to the motion sworn to by one of the Solicitors to the applicant. He said that affidavits and the counter-affidavits necessitate the giving of oral evidence in this case and that it becomes essential for the applicant to give evidence. He referred to a couple of counter-affidavits, on alleging that the applicant wanted to kill Alhaji Kam Salem, Alhaji Mai Deribe, Alhaji Barko and Alhaji Abana. He said these are serious allegations and the applicant in the opinion of his counsel, should be heard. He also referred to the counter-affidavit by the first defendant in this case, the Minister of Internal Affairs that the applicant is a foreigner from Chad Republic and that he is a danger. He said that is not sufficient in itself for deportation.

He also refers to Section 33 of the Constitution that a litigant is entitled to a fair hearing. Mr Ajayi argued further that it is aliens who can be deported not Nigerians. He further argued that the court should not decide on conflicting views in the affidavits and counter-affidavit. He said that the court should hear oral evidence.

He said that in England the Parliament is Supreme but in Nigeria it is the Constitution which is Supreme. He said that the President, His Excellency, Alhaji Shehu Shagari has been sued in his official capacity. Also, the second defendant the Minister of Internal Affairs. In support of his argument, he referred to Sections 41 and 238 of the Constitution. He also referred us to the case of *Agbonmagbe, GBO and Adebayo Doherty v Tawafa Balewa.*

Opposing the motion, the Federal Attorney-General and Minister of Justice, Chief Richard Akinjide leading other counsel for the respondents, argued twelve points which are *inter alia:* that Section 33 of the Constitution has no application where the issue of national security of the State is concerned. Secondly that whether the presence of an individual is a danger to the security of the State is not a matter for the court to decide. In his own view, it is not a justiciable issue for a matter of law. It is a matter of executive decision or order on which the court has no jurisdiction. He argued further that where national security is at stake the freedom of an individual must give way and that the applicant has no legal right to the interlocutory relief sought. He further argued that at the time the application was made the applicant was already out of jurisdiction as a deportee.

It is now, according to the Hon Attorney-General, not open to the applicant to complain. He argued that the President enjoys immunity and therefore has been wrongly joined as a defendant in this case and that the immunity flows to the ministers including the minister, the first defendant in this case.

The Hon Minister for Justice went in detail into the history of Section 33 of the Constitution that in a nutshell it is not a concept of constitutional matters. It was borrowed into our Constitution. He also referred to the affidavits of the Hon Minister of Internal Affairs and Section 5 of the Constitution. He referred to Exclusive List 2nd Schedule dealing with deportation of persons who are not citizens of Nigeria. He said that the security of the nation is at stake. The court could not hear the case, he said he referred the court to some cases – *Rex v Home Secretary, Ex-Parte Rosenball* [1977] WLR Page 20as well as to the case of *Franklin Agee v United Kingdom* Application No 7729/76 in the European Court of Human Rights. The Hon Attorney General submitted that the principle applies both to citizens and aliens. He said that the applicant is not entitled to the order sought because the principle of Natural Justice does not apply. He also referred to the case of *Liversidge v Anderson &Another 3 All ER 338*and that in peace or in war the principle is the same. He referred to Section 267 of the Constitution that the President enjoys absolute immunity and that no order can be made against him since his name Alhaji Shehu Shagari was included in the application. He said that the President is on the same footing with the Queen of England enjoying immunity.

He referred to the case of *Simons v Moore and others (1975) 3WLR 459,* where the court held that the Judges are immune. He also referred to the case of *Merricks v The Minister of Agriculture(Food) Disheries & Food* (1995) ChP 567.The learned Attorney-General further submitted that the applicant has not shown that it is not possible for him to take instructions where he is and that it is not necessary he should be present. He said that the applicant is a prohibited immigrant. He further submitted that under Section 42 of the Constitution, the court could stretch its powers beyond its State.

I have considered the arguments of both counsel in this matter. I have also gone through all the affidavits and the counter-affidavits referred to by both parties. I have referred to all the cases and authorities referred to by both learned counsel who are Senior Advocates of Nigeria. The substantive application before me is seeking redress that the applicant is a Nigerian and therefore immune from expulsion from Nigeria. An order to quash the Deportation order etc. That is the redress sought to which I gave leave on 15th February 1980. The case was for hearing on 28th February 1980. On that day the defendants filed twelve counter-affidavits

which they have the right to do and as a result of these counter-affidavits the counsel for the applicant is bringing this present motion asking the court to suspend the deportation order.

This application has arisen as I understand it, as a result of counter-affidavits filed by the respondents and makes it necessary as I understand the counsel for the applicant to bring the applicant himself to court to give evidence. The affidavits and the counter-affidavits have been to Court and the court knows their contents. In one of the affidavits one Balu Koloswore that the applicant is her son. She said she is from Konduga in Borno State of Nigeria. In one counter-affidavit, one Usuman Moro said that the mother of the applicant is one Achadi a Chadian like herself. I have no doubt that a mother must know her son, the son must know his mother. I think it is a case here all should be produced in court including the applicant to know who is who. As I said earlier it is a case involving freedom of a person. It involves his personal liberty guaranteed under the Constitution. I wish also to add that there are two affidavits saying they don't know Balu Kolo as belonging to Konduga area of Borno State. I hold all should be in court to state their case since there are contradictions in the affidavits and counter-affidavits. They are all typewritten and signed by Commissioner of Oaths, in each case. It is not easy at this stage to prefer one to the other. Also in one of the counter-affidavits one Moyi Dumbu swore that he filed a departure card for the applicant who was dictating to him as he Moyi, was writing. And that the applicant in the card said the he is a Chadian. I am not doubting the counter-affidavit but the crucial point before me is whether the applicant is a Nigerian if he fills or dictates that he is a Chadian, one wonders why he should trouble himself coming to court. It would be difficult to say that he is a Chadian on dictation written by somebody else. It could be due to the panic of that moment.

Also for the respondents, there was a further counter-affidavit where one Umar Mohammed swore on 7th March 1980 saying that a counter-affidavit where he mentioned Alhaji Haruna, that the name Alhaji Haruna should be deleted from that paragraph as it was immaterial as a result of mistaken identity. We may not know except all the parties are heard in evidence, how many of such mistaken identities exist.

I have had great consideration for the submission of the Attorney-General to the effect *inter alia* that the applicant being a security risk to the nation has been deported and therefore is not entitled to fair hearing within Section 33 of the Constitution. He referred to two cases, *Rosenball and Franklin Agee* and that following what obtains in Britain, the Home Secretary is immune and his decision in respect of these matters like deportation etc. are not justiceable. I agree with the learned Attorney-General on this submission. The cases he cited support these views. The

two cases however deal with aliens, non-citizens. Franklin Agee is a citizen of the United States born in 1955 but has been resident in United Kingdom since 1972. He was being deported from United Kingdom.

Also in Rosenball's case, the applicant was also an alien, a United States citizen. The case before me is distinguishable from those two cases quoted. The Minister of Internal Affairs in the case before me has not stated anywhere the way the applicant is a security risk to the Nation. In the two cases quoted they know why they were security risks, the only thing the Home Secretary did not disclose is the source of information or further information. The deportees in the two cases were present before the committee and before the various courts who heard their appeals. Physical presence though not all the time necessary was in most cases essential as in this case.

In addition to all these, I do not think that those principles referred to by the Hon Attorney-General will apply in Nigeria here since I hold the view that the immunity enjoyed by the Crown and her Ministers is not enjoyed by the President and his Ministers in Nigeria. Our Constitution is written and the immunity enjoyed is in Section 267 and Subsection 2 clearly provides that, that Section shall not apply to civil proceedings against a person to whom the Section applies in his official capacity. The Section applies to the office of the President, Vice President, Governors and Deputy Governors. If it is to extend to the Ministers or Commissioners or other public functionaries the Constitution will say so expressly. Such immunity cannot flow. I am quite satisfied that third respondent is properly sued in his official capacity as His Excellency, 'President of Nigeria'. The application of Alhaji Shehu Shagari notwithstanding.

Section 33 of the Constitution therefore applies because it is the Constitution that is supreme. And it is clearly stated there that in the determination of civil rights and obligations involving any determination of law by or against any government authority a person shall be entitled to a fair hearing within reasonable time by a court or other tribunal established by law in such manner as to secure its independence and impartiality. In this case, the applicant is seeking a redress. In the redress he is saying he is a Nigerian and cannot be deported under Section 38 of the Constitution. It is more than inquiring into the action of Home Secretary of a deportee. The Minister as I said earlier acted in accordance with Immigration Act 1963. That as I said in an earlier ruling is not consistent with the Constitution. Under Section 6 of the Constitution, the Judicial powers of the Federation are visited in the courts and under Subsection 6(b) shall extend to all matters between persons or between Government or authority and any person in Nigeria and to all actions and proceedings relating thereto for the determination of any question as to the civil rights and obligations of that person. The Section relates to a

High Court of a State. In that chapter, deportation (expulsion from Nigeria in Section 38 of the Constitution) is a matter dealt with by the Federal Government in Lagos. There is no doubt that the Constitution envisages that such matters would raise. Section (2) of Section 42 as I understand gives the right to the court to issue such writs and give directives as it may consider appropriate for the purpose of enforcing within that State of any rights to which the person who makes the application may be entitled under the chapter. The right is the right to enforce the right applied for within State, in this case, the applicant who according to the affidavits was deported and removed from his house in Maiduguri within this state. In enforcing his right, I am sure the Hon Attorney-General is not saying that I have no right to issue any summons or writ or order to a place outside my jurisdiction since it is a power inherent in the court to do such to serve outside the jurisdiction. This matter is within my jurisdiction and this court has the power to issue any writ or give any order within or outside jurisdiction.

Happily, the orders have been obeyed and we hope they will continue to be obeyed as required by law and if the Hon. Minister and Attorney-General of the Federation can represent the respondents because of the services by this court of summons on them, I wonder who then cannot obey a court order. The Hon. Attorney-General raised a point that this court is limited in this case to this State and cannot stretch to Lagos where the Minister issued the order but section (6) (b) quoted has cured that since this court is empowered to hear litigation between parties and any person in Nigeria. Lagos is in Nigeria and moreover under section 42 of the Constitution, any person who alleges that any of the provisions of this chapter (iv) has been or is likely to be contravened in any state in relation to him, may apply to a High Court in that state for redress. The deportation, the subject matter of this application, is one of the provisions, the complaint now, and to say that we have no such power which the law says we have is in my view purely academic.

I have, as the Attorney-General properly put, considered all the facts before me in respect of this motion very carefully since it is a judicial discretion, I am asked to exercise and I have come to a conclusion having considered all the points above and Section 42(2) of the Constitution and Order 6 Rule 1(1) of the Fundamental Rights (Enforcement Procedure) Rules of 1979 shall for the reason I have stated answer the prayers on the motion.

I hereby order that:

1. The Deportation Order 1980 deporting the applicant Shugaba Abdulrahaman is suspended forthwith.
2. I hereby order that the applicant Alhaji Shugaba Abdulrahaman Darman be at liberty to re-enter Nigeria and remain therein until

the determination of this Suit, for the purpose of preparing for and giving evidence in these proceedings.

3. I hereby grant an interlocutory injunction restraining the respondents, their servants and/or agents to enforce the Shugaba Abdulrahaman Darman Deportation Order 1980 until the determination of these proceedings.

I hereby order that the order be served on all the respondents. In particular, as required by the Fundamental Rights Enforcement Procedure Rules 1979 the first defendant who made the order in the gazette. I hereby direct him in furtherance of his Order to suspend his order in the gazette so that the applicant should re-enter Nigeria immediately. So far the first defendant swore to affidavit that he is acting on the order of the third respondent, the President of Nigeria. This order suspending the deportation order should be served on him also.

2.4 Summary

From the foregoing, it is submitted that Fundamental rights shall remain with us as long as the earth remains. They are inalienable rights bestowed on all humans irrespective of their State of origin or position in life.

2.5 References/Further Readings/Web Resources

Justus A. Sokefun (2002), *Issues in Constitutional Law and Practice in Nigeria*, Faculty of Law, OOU, Ago-Iwoye.

Justus A. Sokefun (2011), Constitutional Law Through the Cases, Caligata Publishers.

2.6 Possible Answers to Self-Assessment Exercise

The judiciary has always applied a generous approach in interpreting fundamental rights provisions. This was evident in the case of Minister of Home Affairs v. Fisher

UNIT 3 JUDICIAL REVIEW

CONTENTS

3.1 Introduction

Judicial review is used to determine the constitutionality of an action. It is a medium used to achieve the rule of law in the activities of government agencies. In this unit, the subject is discussed extensively.

3.2 Intended Learning Outcomes

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

- discuss the meaning and scope of judicial review
- distinguish judicial review from other similar but different terms, like appeal.

3.3 Judicial Review

In his book, Fundamentals of American Government, 1978, page 54; Pollock refers to Judicial Review as '… the power of courts to rule on the constitutionality of legislative and executive acts…,.He went further in his discourse to link the power of judicial review with the rule of law, particularly the aspect which maintains that actions of all members of the society must be judged in accordance with the principles of common law, statutory law and equity. (***Explain the rationale behind the concept of judicial review***)

The general focus of judicial review is on the constitutionality of the action of the arm of government in question.Necessarily, the power of judicial review is predicated on the following:

a. The acceptance of a Constitution or a grundnorm by whatsoever name it might be called,
b. The acknowledgement of lesser laws in the hierarchical order of the Legal System,
c. The conviction that all laws must be made in consonance with the grundnorm and other laws and,

d. the acknowledgement of the fact that courts constitute the branch of government endowed with the duty of safeguarding and upholding the Constitution and any other law.

Self-Assessment Exercises

What grounds or facts is a court to consider before exerting its power or judicial review?

The Courts in the United States have over the years distilled certain standards for the exercise of the power of the judiciary. For instance, in the famous case of *Ashwander v Tennesesse Valley Authority*297 US 288, 347 (1936), the Supreme Court of the United States of America in the lead judgement read by Justice Louis D Brandeis came up with some comprehensive rules on this subject matter. They were as follows:

(a) The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary proceeding;
(b) The court will not anticipate a question from anybody's standpoint and must not intervene solely on the basis that it would itself have acted differently. While coming to this conclusion, the court brought out the scope and extent of judicial review of administrative acts as follows:
    i. Judicial review is not an appeal.
    ii. The court must not substitute its judgement for that of the public body whose decision is being reviewed.
(c) The correct focus is not upon the decision but the manner in which it was reached.
(d) What matters is legality and not the correctness of the decision.
(e) The reviewing court is not concerned with the merits of a target activity;
(f) In a judicial review, the court must not stray into the realms of appellate jurisdiction for that would involve the court in a wrongful usurpation of power;
(g) What the court is concerned with is the manner by which the decision being impugned was reached. It is its illegality, not its wisdom that the court has to look into for the jurisdiction being exercised by the court is not an appellate jurisdiction;

Hereunder are the grounds the Court would consider while exercising its power of judicial review:

(a) Ultra Vires

This is the doctrine used by the judiciary to invalidate any law or enactment passed by any Legislative House or any Executive act when such law or act has gone beyond the power vested in that body. Generally, this doctrine relates to powers and the exercise of such powers by the arm of government involved. It also relates to the procedure for the exercise of such powers by most often, the Executive. In this sense, the executive has rightfully performed a function but in a wrong procedure. In both situations above, the act will be regarded as *ultra vires*. Surprisingly, by extension, the effect of such *ultra vires* acts could have strong negative bearing on the judiciary. This was shown in the all-time case of *Marbury v Madison (Supra)*where the Judiciary Acts of 1789, in the United States, had granted original jurisdiction to the Supreme Court to grant a Writ of Mandamus. The court decided even against itself that such grant of original jurisdiction was unconstitutional, therefore null and void. The result of this case would have been different if the Judicature Act had been assimilated into the Constitution.

In that case, it would have been read as part of the Constitution and not as another piece of legislation. The procedure for that might have been quite intricate and technical, as the Legislature would have had to amend the Constitution to include the Act.

Simply put an application for Judicial Review means asking for the inherent supervisory jurisdiction of a superior court, invariably the High Court over the decisions and proceedings of government departments, parastatals, tribunals of all sorts and also inferior courts.

(b) Locus Standi

This term denotes a legal capacity to institute proceedings in a court of law. Under the Nigerian legal system, before there can be judicial review of any statute or executive act, the applicant must be able to establish that the statute or action is invalid and that he has sustained or he is immediately in danger of sustaining some direct injury as a result of the enforcement. It is enough to say that he may suffer in some indefinite way in common with public in general.

Three elements of this doctrine have been identified in many decisions of our courts. (See *Olawoyin v A.G. Northern Region of Nigeria* [1961] 1 All NLR 269, *AlhajiAdegbenro v A.G. Federation of Nigeria & Others* [1962] WNLR 169). They are stated below:

i. A litigant must show that he is directly affected by the act he complained about before he can be heard;
ii. Obviously a general interest common to the public at large is certainly not a litigable interest to accord a right to sue or standing in court proceedings;

iii. The litigant must have a right peculiar or personal to him and that right must have been infringed or there must be a real threat of an immediate infringement of such right.

The combined effect of this is that where a plaintiff cannot show to the Court that he is directly affected by the act he is complaining of or cannot establish that a right peculiar to him has been infringed he cannot institute a case.

Case Analysis

Senator Abraham Adesanya
v
1. President of the Federal Republic of Nigeria
2. The Hon Justice Victor Ovie-Whiskey
[2001] FWLR (Part 46) 859
(SCN)

The appellant was a member of the Senate of the National Assembly. The 1st respondent, the President of the Federal Republic of Nigeria, in exercise of the power vested in him under section 14(1) of the 1979 Constitution, appointed the 2nd respondent as member and Chairman of the Federal Electoral Commission. On 17th July, 1980, the appointment of the 2nd respondent by the 1st respondent was confirmed by the Senate. Appellant participated in the proceedings which resulted in the confirmation of the appointment in the Senate. He was said to have pointed out the unconstitutionality of the appointment and confirmation, the 2nd respondent because at the time of the appointment and confirmation, the 2nd respondent was the Chief Judge of Bendel State of Nigeria and, therefore, in the public service of the state. The appellant was dissatisfied with the confirmation. He commenced proceedings in the High Court of Lagos State where he claimed:

1. A declaration that the appointment of the 2nd defendant by the 1st defendant as a member and Chairman of the Federal Electoral Commission is unconstitutional, null and void in that at the time of his appointment by the 1st defendant, Hon. Mr. Justice Ovie-Whiskey (the 2nd defendant) was the Chief Judge of Bendel State and is, therefore, disqualified from being appointed a member of the Federal Electoral Commission.
2. An injunction restraining the 1st defendant from swearing in or causing to be sworn in the 2nd defendant as a member and Chairman of the Federal Electoral Commission.
3. An injunction restraining the 2nd defendant from acting or purporting to act as a member or as a Chairman of the Federal Electoral Commission.

None of the parties testified at the trial although some exhibits were tendered by consent. After hearing the arguments of counsel for the

parties, the learned trial judge granted the declaration asked for and set aside the said appointment on the ground that it was unconstitutional and was, therefore, null and void. He, however, refused the two injunctions which the appellant also claimed. The respondent appealed to the Court of Appeal.

At the Court of Appeal, the court called the attention of the counsel for each of the parties to the observation the trial Judge made in the judgment while considering the issue of costs that he was of the view that the appellant had no personal interest in the matter. The court thereafter *suomotu*decided to hear both parties on the question of *locus standi* of the plaintiff. Whilst the counsel for the defendants (the Attorney-General) contended that the plaintiff had no *locus standi* to institute the proceedings, he indicated that he would like to invoke the provisions of section 259(3) of the 1979 Constitution under which he would ask that the matter be referred to the Supreme Court for interpretation.

Section 259(3) of the 1979 Constitution provides:
(3) Where any question as to the interpretation or application of this Constitution arises in any proceedings in the Federal Court of Appeal and the court is of opinion that the question involves a substantial question of law, the court may, and shall, if any party to the proceedings so requests, refer the question to the Supreme Court, which shall give its decision upon the question and give such directions to the Federal Court of Appeal as it deems appropriate.

The question which were eventually formulated after amendment read:
(1) Whether by the combined effect of sections 6(6)(b), 33(1), 48,141,236(1) of the Constitution, the issue raised in the plaintiff's claim as to the validity of the appointment of 2nd defendant by the President as Chairman of Federal ELECTORAL COMMISSION calls for the determination of any question as to the civil rights and obligations of the plaintiff/ respondent?

(2) What does the expression 'The determination of any question as to the Civil Rights and Obligations of that person', under section6(6) (b), mean in relation to the competence of the plaintiff to institute the said action?

(3) In the light of the answers to questions 1and 2, whether or not the plaintiff/ respondent has the *locus standi* to challenge in a court of competent jurisdiction the constitutionality of the appointment made by the 1st appellant of the 2nd appellant under section141(1) of the Constitution as Chairman of the Federal Electoral Commission? The Court of Appeal, rather than refer the questions to the Supreme Court for determination, determined them contrary

to section 359 (3) of the 1979 Constitution and order 6 rules 1 and 3 of the Supreme Court Rules.

Order 6 rules 1 and 3 of the Supreme Court Rules provide:

(1) When a lower court refers any question as to the interpretation of the Constitution of the Federation under section 259 of the Constitution of the Federation, or reserves any question of law for the consideration of the court in accordance with any written law, the lower court as the case may be, shall state a case in Civil Form 10 or 11 in the First Schedule to these Rules, whichever may be appropriate, and the Registrar of the lower court shall forward ten copies direct to the Registrar. A case stated under this order shall be divided into paragraphs, which, as near as may be, shall be confined to distinct portions of the subject and every paragraph shall be numbered consecutively. It shall state such of the findings of fact as are necessary to explain the question on which the decision of the court is sought but except where, in a criminal matter, the question is whether there is any evidence to support any decision, or whether the evidence for the prosecution disclosed a case for the defendant to answer, it shall not contain a statement of the evidence. It shall also state the contentions of the parties, the opinion or decision (if any) of the court stating the case *and the questions of law for the determination of the Court.* In cases to which section 243A of the Criminal Procedure Act (or similar provision in any State law) applies, the case shall state whether the hearing has been adjourned or the verdict has been postponed or accused has been committed to prison or admitted to bail.

The Court of Appeal held that the plaintiff had no *locus standi* to institute the proceedings. Because of the irregularity in the procedure adopted by the Court of Appeal, the reference was deemed an appeal by the plaintiff/ appellant to the Supreme Court against the ruling.

Section 6(6)(b) of the 1979 Constitution which was considered provides:

6 (6) The judicial powers vested in accordance with the foregoing provisions of this section…

(b) shall extend to all matters between persons, or between government or authority and any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.

The Supreme Court held as follows:

1. The term' *locus standi'* denotes legal capacity to institute proceedings in a court of law. It is used interchangeably with terms like 'standing' or 'title to sue'.

2 *Locus Standi* or 'Standing' may be defined as the rights of a party to appear and be heard on the question before any court or tribunal.

3 Where a plaintiff seeks to establish a 'private right' or 'special damage' either under the common law or administrative law, in non-constitutional litigation, by way of an application for certiorari, prohibition, or mandamus or for a declaratory and injunctive relief, the law is now well settled that the plaintiff will have *locus standi* in the matter only if he has a special interest in the performance of the duty sought to be enforced, or where his interest is adversely affected. What constitutes a legal right, sufficient or special interest, or interest adversely affected, will, of course, depend on the facts of each case. Whether an interest is worthy of protection is a matter of judicial discretion which may vary according to the remedy asked for.

3.5 References/Further Readings/Web Resources

Justus A. Sokefun (2002), *Issues In Constitutional Law and Practices in Nigeria*, Faculty of Law, OOU, Ago-Iwoye.

Justus A. Sokefun (2011), Constitutional Law Through the Cases, Caligata Publishers.

3.6 Possible Answers to Self-Assessment Exercise

The court would consider the issues of:

i. *Ultra Vires*
ii. *Locus standi*

UNIT 4 BILL OF RIGHTS IN FRANCE, SOUTH AFRICA AND NIGERIA

CONTENTS

4.1 Introduction

In this unit, we consider the Bill of Rights as a Constitutional Law subject. Academic effort is made towards drawing a comparative analysis of how it operates in France, South Africa and Nigeria.

4.2 Intended Learning Outcomes

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

- discuss Bill of rights in France, South Africa and Nigeria.
- differenciate between the Declarations of Rights of Man and Citizen and the Bill of Rights.

4.3 Bill of Rights in France

The Bill of Rights and Declaration of the Rights of Man and Citizen are based on the same principles of natural rights; therefore, each document is similar in protecting the people's natural rights. However, despite their similarities, their differences are apparent due to the social situations in which they were adopted. The Bill of Rights stood to protect the freedoms of each individual by establishing a democratic government. The French Revolution eliminated the hierarchy of class and established equality among men with the Declaration of Rights of Man and Citizen. Several influences from past philosophers and documents assisted the frame work of the Bill of Rights and Declaration of Rights and Citizen.

(***Explain the issue of Bill of Rights in France***). The Declarations of Rights of Man and Citizen differ to the Bill of Rights because of the different social and economic institutions. The Bills of Rights protect citizens through the security of the government. The ten amendments

donot directly address the rights of individuals, instead allow the government to enforce them, such as; Congress will make no law inflicting rights of speech, press, and religion. These are objectives of the government to keep intact, not necessarily a right upon an individual. However, in the Rights of Man and Citizen, it addresses the individual and their equality before the law.

In Article IV, it announces that liberty is based on the individual not to harm another. Thus, has no limits but the law will determine the limits. In Article I, it states: "Men are born and remain free and equal in rights." The diction in the Declaration gives the impression of the equality among individuals first, then law will follow. It contrasts to the Bill of Rights; which established a government for law, to protect the rights of individuals. In The Declaration addressed the responsibility of individuals and general will to mold the law.

The Bill of Rights was ratified together with the Constitution in 1791. The Bill Rights was incorporated with the Constitution to diminish the fear by the Anti-Federalists of a government. An agreement was finally made to create the Bill of Rights to help secure ratification of the Constitution itself. Secondly, the Bill of Rights did not address every foreseeable situation. One failure of the Bill of Rights was the first amendment of the original Bill of Rights. The amendment concerned the number of constituents for each Representative and was never ratified. It said that once the House has one hundred members, it should not go below one hundred, and once it reached two hundred members, it should not go below two hundred. The Bill of Rights without a doubt states the numerous rights of the citizens. These rights were acknowledged within the first Ten Amendments of the Constitution. Put into action on December 15, 1791, for example the right for a speedy public trial, freedom of religion. If one takes a closer look from a different angle one may see real meaning as well as the reason why the Bill of Rights was written.

South Africans Bill Of Rights

This is contained in Chapter 2 of the Constitution of the Republic of South Africa, 1996. This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality and freedom. It provides that the State must respect, protect, promote and fulfill the rights in the Bill of Rights.The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by

the right. When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a Court:

a. in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
b. may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

Everyone is equal before the law and has the right to equal protection and benefit of the law. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

Human Dignity

Everyone has inherent dignity and the right to have their dignity respected and protected and everyone has the right to life.

Everyone has the right to freedom and security of the person, which includes the right -

a. not to be deprived of freedom arbitrarily or without just cause;
b. not to be detained without trial;
c. to be free from all forms of violence from either public or private sources;
d. not to be tortured in any way; and
e. not to be treated or punished in a cruel, inhuman or degrading way.

Everyone has the right to bodily and psychological integrity, which includes the right -

a. to make decisions concerning reproduction;
b. to security in and control over their body; and
c. not to be subjected to medical or scientific experiments without their informed consent.

No one may be subjected to slavery, servitude or forced labour.Everyone has the right to privacy, which includes the right not to have -

a. their person or home searched;
b. their property searched
c. their possessions seized; or
d. the privacy of their communications infringed.

Everyone has the right to freedom of conscience, religion, thought, belief and opinion. Religious observances may be conducted at state or state-aided institutions, provided that -

a. those observances follow rules made by the appropriate public authorities;
b. they are conducted on an equitable basis; and
c. attendance at them is free and voluntary.

Everyone has the right to freedom of expression, which includes -

a. freedom of the press and other media;
b. freedom to receive or impart information or ideas;
c. freedom of artistic creativity; and
d. academic freedom and freedom of scientific research.

The right in subsection (1) does not extend to -

a. propaganda for war;
b. incitement of imminent violence; or
c. advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions. Everyone has the right to freedom of association. Every citizen is free to make political choices, which includes the right -

a. to form a political party;
b. to participate in the activities of, or recruit members for, a political party; and
c. to campaign for a political party or cause.

Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.

Every adult citizen has the right -

a. to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
b. to stand for public office and, if elected, to hold office. No citizen may be deprived of citizenship.

Self-Assessment Exercise

What is Bill of Right?

Freedom of movement and residence
Everyone has the right to freedom of movement. Everyone has the right to leave the Republic.Every citizen has the right to enter, to remain in and to reside anywhere in, the Republic.Every citizen has the right to a passport.

Freedom of trade, occupation and profession
Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.

Labour relations
Everyone has the right to fair labour practices.

Every worker has the right -
a. to form and join a trade union;
b. to participate in the activities and programmes of a trade union; and
c. to strike.

Every employer has the right -
a. to form and join an employers' organisation; and
b. to participate in the activities and programmes of an employers' organisation.

Every trade union and every employers' organisation has the right -
a. to determine its own administration, programmes and activities;
b. to organise; and
c. to form and join a federation.

Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).

National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).

No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
Property may be expropriated only in terms of law of general application -

a. for a public purpose or in the public interest; and
b. subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including-

a. the current use of the property;
b. the history of the acquisition and use of the property;
c. the market value of the property;
d. the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
e. the purpose of the expropriation.

The purposes of this section -

a. the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
b. property is not limited to land.

The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

Parliament must enact the legislation referred to in subsection (6).

26. Housing

Everyone has the right to have access to adequate housing.

The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

27. Health care, food, water and social security

Everyone has the right to have access to -

- health care services, including reproductive health care;
- sufficient food and water; and
- social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

No one may be refused emergency medical treatment.

28. Children

Every child has the right -

a. to a name and a nationality from birth;
b. to family care or parental care, or to appropriate alternative care when removed from the family environment;
c. to basic nutrition, shelter, basic health care services and social services;
d. to be protected from maltreatment, neglect, abuse or degradation;
e. to be protected from exploitative labour practices;
f. not to be required or permitted to perform work or provide services that -
    i. is inappropriate for a person of that child's age; or
    ii. place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
g. not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be -
    i. kept separately from detained persons over the age of 18 years; and
    ii. treated in a manner, and kept in conditions, that take account of the child's age;
h. to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and

i. not to be used directly in armed conflict, and to be protected in times of armed conflict.

The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

Nigeria Bill of Rights

Nigeria Bills of rights is contained in Chapter 4 of the 1999 Constitution (as amended). They are:

- Section 33 provides for right to life.
- Section 34 provides for right to dignity of human person.
- Section 35 provides for right to personal liberty.
- Section 36 provides for right to fair hearing.
- Section 37 provides for right to private and family life.
- Section 38 provides for right to freedom of thought, conscience and religion
- Section 39 provides for right to freedom of expression and the press
- Section 40 provides for right to peaceful assembly and association.
- Section 41 provides for right to freedom of movement.
- Section 42 provides for right to freedom from discrimination.
- Section 44 provides for right to acquire and own immovable property anywhere in Nigeria.

4.4 Possible Answers to Self-Assessment Exercise

This mainly laid down the principles of parliamentary supremacy.

MODULE 3

UNIT 1 IMPEACHMENT

CONTENTS

1.1 Introduction

Power corrupts, and absolute power corrupts absolutely. This phrase is common to Constitutional Law, drawing the inference that powers reposed in the organs of governments must not be absolute.

In this unit, we take a look at the Constitutional issue of impeachment.

1.2 Intended Learning Outcomes

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

- describe the subject of impeachment in light with the provisions of the Constitution
- explain what the Constitution say on the issue of impeachment as it relates to the President, Vice President, Governors and Deputy Governors?

1.3 Impeachment

The Constitutional requirement for the impeachment of the President and the Vice President on the one hand and the Governors and their Deputies on the other hand as provided for under Sections 143 and 188 of the Constitution of the Federal Republic of Nigeria, 1999 are similar. The

process of removal is also similar. Section 143 (1)-(11) provide as follows:

143(1) The President or Vice-President may be removed from office in accordance with the provisions of this section.

(2) Whenever a notice of any allegation in writing signed by not less than one-third of the members of the National Assembly –
   (a) is presented to the President of the Senate;
   (b) stating that the holder of the office of President or Vice President is guilty of gross misconduct in the performance of the functions of his office, detailed particulars of which shall be specified, the President of the Senate shall within seven days of the receipt of the notice cause a copy thereof to be served on the holder of the office and on each member of the National Assembly, and shall also cause any statement made in reply to the allegation by the holder of the office to be served on each member of the National Assembly.

(3) Within fourteen days of the presentation of the notice to the President of the Senate (whether or not any statement was made by the holder of the office in reply to the allegation contained in the notice) each House of the National Assembly shall resolve by motion without any debate whether or not the allegation shall be investigated.

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

(5) Within seven days of the passing of a motion under the foregoing provisions, the Chief Justice of Nigeria shall at the request of the President of the Senate appoint a Panel of seven persons who in his opinion are of unquestionable integrity, not being members of any public service, legislative house or political party, to investigate the allegation as provided in this section.

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

(7) A Panel appointed under this section shall -
   (a) have such powers and exercise its functions in accordance with such procedure as may be prescribed by the National Assembly; and
   (b) within three months of its appointment report its findings to each House of the National Assembly.

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

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

(10) No proceedings or determination of the Panel or of the National Assembly or any matter relating thereto shall be entertained or questioned in any court.

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

In the case of Governors and their deputies, section 188(1)-(11) provide as follows:

(1) The Governor or Deputy Governor of a State may be removed from office in accordance with the provisions of this section.

(2) Whenever a notice of any allegation in writing signed by not less than one third of the members of the House of Assembly
   (a) is presented to the Speaker of the House of Assembly of the State;
   (b) stating that the holder of such office is guilty of gross misconduct in the performance of the functions of his office, detailed particulars of which shall be specified, the Speaker of the House of Assembly shall, within seven days of the receipt of the notice, cause a copy of the notice to be served on the holder of the office and on each member of the House of Assembly, and shall also cause any statement make in reply to the allegation by the holder of the office, to be served on each member of the House of Assembly.

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

(4) A motion of the House of Assembly that the allegation be investigated shall not be declared as having been passed unless it

is supported by the votes of not less than two-thirds majority of all the members of the House of Assembly.

(5) Within seven days of the passing of a motion under the foregoing provisions of this section, the Chief Judge of the State shall at the request of the Speaker of the House of Assembly, appoint a Panel of seven persons who in his opinion are of unquestionable integrity, not being members of any public service, legislative house or political party, to investigate the allegation as provided in this section.

(6) The holder of an office whose conduct is being investigated under this section shall have the right to defend himself in person or be represented before the Panel by a legal practitioner of his own choice.

(7) A Panel appointed under this section shall—
have such powers and exercise its functions in accordance with such procedure as may be prescribed by the House of Assembly, and within three months of its appointment, report its findings to the House of Assembly.

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

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

(10) No proceedings or determination of the Panel or of the House of Assembly or any matter relating to such proceedings or determination shall be entertained or questioned in any court

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

(***Discuss the Constitutional requirement for the impeachment of the president and vice-president of the federal republic Nigeria***). The process is by way of notice of any allegation in writing signed by not less-than one-third of the members of the National Assembly. The notice must be presented to the President of the Senate, alleging gross misconduct on the part of President or Vice-President in the performance of the functions of his office. A detailed particular of such allegation must be specified. The Senate President must within seven days, serve the notice on the Chief Executive concerned, whether the President or the Vice-President

and cause copy of it to be served on each member of the National Assembly. A reply made by such Chief Executive must also be served on members of the National Assembly.

Self-Assessment Exercise

What is the initiating process in the impeachment of president and his vice in Nigeria?

The second stage is that within fourteen days of the presentation of the notice to the Senate President, each House shall resolve by a vote of not less than two-third majority of all the members whether or not to investigate the allegation.

The third condition stipulates that within seven days of stage two stated above, the Chief Justice of Nigeria be requested to appoint a panel of seven persons who in his opinion are of unquestionable integrity. Such persons must not be members of political parties, public officers and members of the legislative house. The Chief Executive being investigated has a right to defend himself in person or by lawyer of his choice. The relevant legislative house is required to prescribe the rules of procedure for the panel.

The next stage is the submission of the finding of the Panel which must take place within three months. If the allegations "are not proved", the matter ends there. However, if the allegations are proved", that will set a stage for the final proceedings.

The final stage is the consideration of report of the panel and it must be adopted within fourteen days of the receipt of the report of the panel by a resolution of not less than two thirds majority of each House of the National Assembly. Once this report is adopted, the holder of the office being investigated stands removed from office.

All the above processes apply to impeachment against the President, Vice President, Governors and Deputy Governors.

The Constitution also provides that no proceedings or determination of the Panel of the National Assembly or any matter relating thereto shall be entertained or questioned in any Court.

Case Analysis

(a) Nature, Purpose and Features of Impeachment.

(b) Jurisdiction of Courts in Impeachment Matters.

Chief Enyi Abaribe
v
1. The Speaker, Abia State House of Assembly
2. Abia State House of Assembly

[2000] FWLR (Part 9) 1558
(Court of Appeal)
The appellant is the Deputy Governor of Abia State. On 8/1/2000, some sixteen members of the State's House of Assembly presented an impeachment notice to the Speaker of the House for the appellant's removal from office. On 31/1/2000, the Speaker served the appellant with a copy of the said notice together with a letter in which he requested the appellant to send him his reactions to the issues raised in the notice before Friday, the 11th day of February, 2000.

Three days before the expiration of time allowed the appellant to submit his reaction, the House voted and resolved to refer the allegations in the notice for investigation. This action by the House was considered premature and irregular by the appellant who believed his fundamental right to fair hearing enshrined in section 36 of the Constitution of Nigeria, 1999, and Article 7 of the African Charter on Human and Peoples' Rights had been infringed. He, therefore, applied to the Abia State High Court for the enforcement of his fundamental right under the Fundamental Rights (Enforcement Procedure) Rules, 1979.

When the case came up for hearing of the ex-parte application for leave to enforce the appellant's rights, the trial judge *suomotu* raised the question whether he had jurisdiction to entertain the suit in view of section 188(10) of the 1999 Constitution which provides that 'no proceedings or determination of the panel or any matter relating to such proceedings or determination shall be entertained or questioned in any court'.

This sole issue was set down for arguments and in his ruling, the trial judge held that the court lacked jurisdiction. Aggrieved, the appellant appealed to the Court of Appeal.

It was held as follows:
1. It is the duty of the judiciary in relation to Executive and overbearing and abrasive tenderness of the Legislature so that each of the three components of the Government confines itself to the province allocated or prescribed for it by the Constitution.
2. The Constitution is not a mere common legal document. It is essentially a document relating to and regulating the affairs of the

nation- state and stating the functions and powers of the different apparatus of the Government as well as regulating the relationship between the citizen and the State. It makes provisions for the rights of the citizen within the compass of the State.

3. Albeit the issue of impeachment is a political matter, the court at the same time may not close its eyes to serious injustice relating to the manner the Impeachment Procedure is being carried out. It is within the province of the Court to ensure strict adherence to the spirit of the Constitution for the evidence of the democratic regime.

Pats–Acholonu, JSC
The Court should not however attempt to assume for itself power it is never given by the Constitution to brazenly enter into the miasma of the political cauldron and have itself badly bloodied and thereby losing respect in its quest to play the legendary *Don Quixote de la Manche.*

In its bid to embark on Impeachment Procedure, it is expected that the House of Assembly should not ride roughshod over the prescription of the law. Beyond exercising its judicial powers as conferred on it by the Constitution to ensure the equilibrium in the distribution of functions of the organs of the government, the Court should exercise utmost caution in invading the area that is prohibited by the Constitution. I cannot but quote here *in extension* the ringing words in *AlhajiAbdulkadirBalarabe Musa v AutaHamza*(1983) NCLR p. 229 at 247:

Finally, at a time like this, let us remember the words of that great intellectual from the famous Harvard Law School who once sat as a member of the Supreme Court of America in a case which aroused much political emotion like this has done.

Felix Frankfurter said in *Baker v Car*(1962) 369 US 186:
The Court's authority possessed neither of the purse nor the sword- ultimately rests on sustained public confidence in its moral sanction. Such feelings must have nourished the Court's complete detachment, in fact and in appearance, from political settlements …

In this situation, as in others of like nature, appeal for relief does not belong here. Appeal must be to an informed, civically militant electorate. In a democratic society like ours, relief must come through an aroused popular conscience of the people's representatives.

4. In a matter relating to proceedings on impeachment, the House of Assembly exercises a judicial function

Per Pats–Acholonu, JCA

It must quickly be admitted here that the Abia State House of Assembly is indeed not an inferior tribunal but an equal to the judiciary or the Court in the power sharing characteristic of a Federal Constitution where there is separation of powers. It and only it can determine what constitutes a gross misconduct or a conduct that will lead to Impeachment proceedings. I must confess that I look with trepidation at the awesome and unregulated powers conferred by the outser clause which seeks as it seems to me to emasculate the Court from examining a case of non- compliance with the provisions of the Constitution where there is a violation.

5. Constitution is a legal instrument giving rise amongst other things, to individual rights capable of enforcement in a Court of Law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply to take as a point of departure from the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principles of giving full recognition and effect of those fundamental rights and freedom with a statement of which the Constitution commences.

6. Pats -Achololu, JCA:

What indeed are the limits of judicial process in this political area heavily mined. It is arguably a political matter whichever way one looks at it. This may explain why the courts are touchy about delving into the nuances of such matters. Professor Laurence Tribe said at p.215 of American Constitutional Law.

Although the Impeachment process has been used periodically since 1789 there has been no judicial attempt to define its limits. This is attributable in part to the constitutional language ostensibly consigning the issue of impeachment to the Legislative branch of Government and thus arguable barring judicial review of Impeachment under the political question doctrine.

Political question doctrine relates to those amorphous political issues which generally arise in political structure of parties or in the House of Assembly and in which no Court should try to get involved for fear of being smeared or appear to take sides.

Reference was made of the provisions to section 46(1) of Constitution of Nigeria which gives powers to the High Court to determine matters relating to Fundamental Rights to redress infractions of those rights.

It must be said straightaway that the operation of these provisions, in other words, the jurisdiction conferred on the High Court, is subject to

other provisions of the Constitution (see section 46(2) of the Constitution). It is, indeed, tempting for a Court to immerse itself unwittingly and irretrievably in this area of turbulent sea in order to do justice only to realize that it has entered into brackish water of no return.

7. The primary objective of the remedy of impeachment is to improve public services by removal of the officer and not to punish the officer or to safeguard his interest. The legislature in impeachment proceedings exercises judicial, not the legislative power conferred on it by the Constitution.

8. The particularity required in an indictment need not be observed but the notice of the proceedings must be reasonable and opportunity must be afforded for hearing. The Legislative power of impeachment is not an arbitrary power but the authority ordinarily is final and the judgment of the senate sitting as a Court of impeachment cannot be called in question in any tribunal whatsoever except for lack of jurisdiction or excess of constitutional power.

9. Pats – Acholonu, JCA

Impeachment is not a matter to be trivialized as it affects the reputation of an individual who might at one time or the other have been held in high esteem before the fall from grace. The complaint is that since the Constitution states 14, days the Assembly should have waited till the end of that period. Attractive as that argument appears, it ignores the fact that the Constitution says 'within 14 days' of the presentation of the notice. The interpretation of that phrase by the appellant' counsel appears otiose and highly exaggerated. The Respondents acted within the ambit of the Law.

The most important thing is whether if a panel is set up eventually he has the opportunity of being heard.

In my view, the Court below was not to assume jurisdiction as the main relief to issue on impeachment proceedings. No useful purpose would have been served by assumption of jurisdiction at that stage only to backtrack in full force of the gale that would hereafter blow. In the final result, the appeal fails and is dismissed and the ruling of the Court below is confirmed.

10. An ouster clause is a clause in the provision of a statute that ousts. It is most frequently used in relation to jurisdiction of Court. The verb 'to oust' means to put out of possession, to deprive of, to expel from, to force overleaf or to put into the place of another.

11. Ikongbeh, JCA
Now, we have seen that all governmental power derives from the Constitution. The Constitution is a scheme whereby power is shared beforehand among the various arms of government. Executive, Legislative and Judicial powers are allocated to the appropriate organs. Each, within its sphere of competence, is subject to the necessary co-operation with the other organs to ensure the smooth functioning of Government as an effectively entity, is master of its own affairs. It has been universally recognized that impeachment procedure is pre-eminently a political matter and is an affair of the legislature. The people elect officers to elective offices. The people can withdraw their mandate. They can do this either by the recall procedure or by impeachment. The latter procedure has been assigned exclusively to the legislature by the Constitution. I do not, therefore, see section 188(10) as an ouster clause. I see it as doing no more than underscoring the recognized fact that the impeachment process is a political matter that is best left where it best belongs, ie, with the legislature. It does not, in my view, set out to oust the jurisdiction of courts in the same way as the military decrees discussed in the cases cited by Chief Anah, SAN, did. Those decrees expressly set out to put the courts out of possession of not just the jurisdiction but, invariably, also the judicial powers vested in them by the constitution. Those were clear cases of ouster.

When, therefore, section 188(10) provided that no proceedings or determination of the 2nd respondents or its investigation panel or any matter relating thereto shall be questioned before or entertained by any court it was only giving expression to a fact that has always been recognized and respected by all concerned. It was not, in my view, ousting the jurisdiction as the courts have never possessed that jurisdiction. The converse of the maxim *nemo dat quad non habet*applies here. You cannot take from a person what that person never had.

12. Ikongbeh, JCA
The words in subsection (3) and which make it abundantly clear is that the House need not to wait for the officer whose impeachment is proposed to put in his statement in reply before passing the resolution to investigate. Indeed, they expressly state that the House may proceed to take the vote 'whether or not any statement was made by the holder of the office in reply to the allegation contained in the office'.

Another point that stands out is that the issue of hearing, fair or otherwise, has not arisen at this stage. The House is merely to examine the allegations contained in the impeachment notice and decide whether or not they raise a *primafacie* case warranting further inquiry. This is made clear by the fact that the vote to decide whether or not to investigate is to be taken without debate. It is after the resolution that investigation

commences before the Panel. It is only at this investigation stage that subsection (6) gives the officer under probe by a legal practitioner of his choice.

The procedure stipulated here is, to my mind, akin to the procedure in the Criminal Procedure Act for a judge when deciding whether or not to grant consent for preferment of information.

13. *Per* Ikongbeh, JCA

Looking at the provisions of section 188(1)-(9), I am of the firm view that adequate provision has been made to ensure that the officer to be impeached is given a fair hearing. At the stage up to the passing of the resolution and before the setting up of the investigating panel, no non-conformity is committed by the House if it passes its resolution to investigate without waiting for the affected officer to react to the allegations in the impeachment notice. I see no substance whatsoever in the appellant's claim in ground (b) of his accompanying grounds that section 188(3) gives him 14 days to submit his defence. The 14 days specified is the period before the expiration of which the House must pass a resolution whether or not to investigate. It does not inure for the benefits of the appellant. Rather, it is a directive to the House as to the period within which it must act. And the subsection says nothing about a defence. What it talks about is a statement. That period cannot, therefore, be referred to as the appellant's 'constitutionally allowed period of defence' as the appellant did in ground (e).

The only circumstance in which there can be said to have been non-conformity is where the Investigating Panel disallows the affected officer from presenting his case in defence of himself. It is when this happens that it becomes necessary to consider whether or not such non-conformity can or does rob the alleged ouster clause in section 188(10) of its potency. As that stage had not been reached the necessity for such consideration has not arisen. The appellant jumped the gun, crying foul when no foul had in fact been committed. The resolution passed by the 2nd respondents and of which the appellant complains in these proceedings has the full backing and support of section188 (3).

Jurisdiction of Court to Determine the Compliance with Impeachment Procedure

Hon Muyiwa Inakoju, Ibadan South East & 17 Ors
v
Hon Abraham Abraham Adeolu Adeleke (Speaker) & 3 Ors

(2007) 1 S.C. (Part 1) 1, SCN

On 13th December, 2005, the Oyo State House of Assemble sat at the usual Assembly Complex Secretariat, Ibadan. The Appellant sat at

D'Rovans Hotel Ring Road Ibadan, where they purportedly suspended the Draft Rules of the Oyo State House of Assembly. The Appellants purportedly issued a notice of allegation of misconduct against Senator Ladoja the Governor, with the purpose of commencing impeachment proceedings against him.

On 22nd December, 2005, without following the laid down rules, regulation and the Constitution of the Federal Republic of Nigeria. The Appellants purportedly passed a motion calling for the investigation of the allegations of misconduct against Senator Ladoja without the concurrent consent and approval of the two-thirds majority of the 32 member House of Assembly. The purported notice of allegations of misconduct against the Governor was not served on each member of the House of Assembly.

Aggrieved by the procedure of removing Senator Ladoja, the Respondents as plaintiffs, filed an action at the High Court of Justice Oyo State by way of originating summons. They asked for six declaratory reliefs and three orders setting aside the steps taken by the appellants/defendants in relation to the issuance of notice of allegation of misconduct, passage of motion to investigate same and injunction restraining the appellants/defendants their agents, servants privies or any person or persons from taking any further steps, sitting, starting, or continuing to inquire or deliberate n the investigating and impeachment proceedings of His Excellency Senator Raheeed AdewoluLadoja the action was supported by a 17-paragraph affidavit.

In a preliminary objection, the Appellants as Applicants contended that the court lacked jurisdiction to entertain the suit and that the plaintiff lacked *locus standi* to institute the suit. They also contended that the claims did not disclose a reasonable cause of action.

In his Ruling of 28th December 2005, the learned trial judge upheld the Preliminary objection that he had no jurisdiction to deal with the matter. On Appeal to the Court of Appeal, it was held that the High Court had jurisdiction to hear the matter. The Court of Appeal invoked the power conferred on it by Section 16 of the court of Appeal Act and took the merits of the matter before the High Court. The Court of Appeal gave Judgment to the Respondents and granted eight of the nine reliefs sought. Dissatisfied with the Judgment of the Court of Appeal, the Appellants appealed to the Supreme Court. At the Supreme Court, among the issues for determination was;

Whether the court of appeal was right in its determination that the High Court had jurisdiction to entertain the question of the impeachment of the party interested as the Governor of Oyo State without a decision of the

lower court as to whether or not there has been any non-compliance with section 188(1) –(9) of the 1999 Constitution.

The judgement, specifically that of Mustapher JSC at p178 captures the duty and jurisdiction of the court in determining the compliance or otherwise to the procedure of impeachment under section 188 of the 1999 Constitution of Federal Republic of Nigeria.

Mustapher JSC at Page 178 (edited)
The fundamental question raised in the action is whether the preparatory steps taken by the defendants in removing Governor Ladoja from office have breached Section 188 of the Constitution or not. The court has the jurisdiction to look into the matter and to decide whether any constitutional provision has been breached or not.

Section 188(10) of the Constitution cannot apply to oust the jurisdiction of the courts in a situation in which the Assembly acted in breach of fundamental provisions such as those provisions under Section 95, Section 96, Section 98 and Section 103 of the Constitution. Where there is any breach of such provisions, the courts will have the jurisdiction to intervene. Section 188(10) does not empower the Assembly to do what it likes regardless of other provisions of the Constitution. The courts have the jurisdiction and the competence to ensure that the legislature, in the exercise of its legislative functions, acts in complete harmony with the constitutional provisions.

As mentioned above, the kernel of the case of the respondents before the trial court was that in the preparation before the trial court was that in the preparation to remove Senator Ladoja from his elective post of Governor of Oyo State, the House of Assembly breached a number of constitutional provisions including the mandatory ones under Section 188 dealing with the removal of an elected Governor or Deputy Governor.

In the first declaratory relief recited above, the plaintiffs, respondents herein, complained that the "preparatory" steps taken to 'impeach', Senator Ladoja, the Governor of Oyo State was unconstitutional, null and void. Impeachment here means removal of an elected officer, as a matter of fact, the word "impeachment" does not appear in Section 188 of the Constitution but there is no need to split hairs, removal means impeachment. *Black's Law Dictionary* defines impeachment in the following words:

A criminal proceeding against a public officer, before a quasi-political tribunal instituted by a written accusation called articles of impeachment; for example, a written accusation of the House of representatives of

United States to the Senate of the United States against the President, Vice President or an officer of the United States, including federal Judges.

But Section 188 of our Constitution is not worded like that, the allegation under section 188 is that the officer is alleged to have conducted himself in a perverse and delinquent manner amounting to gross misconduct "in the performance of the functions of his office. Gross misconduct has been defined under subsection (2) of section 188, which provides that 'Gross misconduct means a grave violation or breach of the provisions of this Constitution. Of a misconduct of such nature as amounts in the opinion in the House of Assembly to gross misconduct.'

For articles of impeachment to be relevant, the misconduct must be gross, here means glaringly noticeable, because of obvious inexcusable badness or as conduct in breach of the Constitution. Accordingly, it is not every misconduct that will attract impeachment. Although it appears that the legislature has the discretionary power to determine what amounts to "gross misconduct", it is clearly supposed to be apparent to all and sundry that the misconduct is clearly and immediately apparent.

Impeachment has come to be recognized as one of the legitimate means by which a Governor or Deputy Governor. President or Vice President can be removed from office for an impeachable offence. The meaning of "gross misconduct as contained in the Constitution in relation to impeachment proceedings is whatever the legislature deems "gross misconduct". This clearly, is very nebulous, fluid and subject to potentially gross abuse and is also potentially dangerous at this point of our national or political life. That is why the legislature should strictly comply with all the other provisions as contained under Section 188. Failure to comply with any one of them will render the whole exercise unconstitutional, null and void and any purported impeachment or removal will be declared improper by the courts.

1.4 References/Further Readings/Web Resources

Justus A. Sokefun (2002), *Issues in Constitutional Law and Practices in Nigeria*, Faculty of Law, OOU, Ago-Iwoye.

Justus A. Sokefun (2011), Constitutional Law Through the Cases, Caligata Publishers

1.5 Possible Answers to Self-Assessment Exercise

The process is by way of notice of any allegation in writing signed by not less-than one-third of the members of the National Assembly. The

notice must be presented to the President of the Senate, alleging gross misconduct on the part of President or Vice-President in the performance of the functions of his office.

UNIT 2 PROTECTIONS OF PUBLIC OFFICERS

CONTENTS

2.1 Introduction

Protection of Public Officers is one of the major provisions of the Constitution. Under Section 308 of the 1999 Constitution (as Amended), certain provisions and qualifications are made on the issue of immunity. In this unit, an in-depth exposition is attempted towards the discourse.

2.2 Intended Learning Outcomes

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

- describe the Constitutional provisions for the immunity and protection of serving elected officers, to wit: The President and Vice President, the Governor and Deputy Governor.

2.3 Protection of Public Officers

To reduce the rigors that public officers might experience as a result of numerous actions from aggrieved parties, protection is granted to them under the Public Officers Protection Act. Section 2 of the Act provides:
[W]here any action, prosecution or other proceedings is commenced against any person for any act done in pursuance or execution or intended execution of any ordinance or law or any public duty or authority or in respect of any alleged neglect or default in the execution of any such ordinance, law, duty or authority, the following provisions shall have effect;

(a) The action, prosecution or execution shall not lie or be instituted unless it is commenced within 3 months next after the act, neglect or default complained of or in the case of a continuance of damage or injury within 3 months next after the ceasing thereof provided that if the action, prosecution or proceedings be at the instance of any person for cause

arising while such person was a convicted prisoner, it may be commenced within 3 months after the discharge of such person from prison.

(***Briefly appraise the protection public officer***). This provision affords a defence to a Public Officer only in the performance of his public duties. It does not avail protection to the Public Officer under the following circumstances:

(a) Acts performed outside the scope of the Public Officer's employment.
(b) Acts within the scope but which are tainted with malice, mischief, spite and are mala fide and done with improper motive.

Ancillary to this is the concept of Constitutional immunity. By this, under Section 308 of the 1999 Constitution, no civil or criminal proceedings shall be instituted against a person who is the President or Vice President of the Federal Republic of Nigeria or Governor and Deputy Governor of a State in Nigeria during the period in which he is in office. The case of *DSP Alamieyeigha v. Chief Saturday Yeiwa and Others* gives a clear impression of this concept.

Case Analysis
(a) Definition of Public Officer
(b) Purview of Public Officers Protection Law
(c) Statute Bar

LAA Adeomi
v
1. The Governor of Oyo Sate
2. Secretary to the Government of Oyo State
3. Attorney General of Oyo State
4. Publijc Service Commission of Oyo Sate
[2003] FWLR (Part 149) 1444, CA

The appellant was employed by the Government of Oyo State as Assistant Technical Officer through its agent charged with appointments and discipline of Officers in the State Civil Service- the 4th respondent- in 1975. Due to the creation of OyoState, he was deployed to the Ministry of Works, OyoState in 1976. He came to work at the rural electrification scheme at Podo Village Ibadan. In January 1987 there was a theft at the PodoVillage rural electrification stores, and this was followed by a fire incident in February. The Oyo State Government set up a panel of inquiry to look into the incidents. The panel of inquiry submitted its report in which it was indicated that there was no proof that the appellant colluded with any person to perpetrate the theft or arson at the PodoVillage stores of the rural electrification scheme. The Secretary to the Government of Oyo State acting on behalf of the Governor, served the appellant with a

termination letter PC/1838/1/72 dated the 12/6/87. Consequently, the appellant as plaintiff filed an action against the respondents as defendants in the lower court challenging the purported wrongful determination of its employment wherein he sought declaratory reliefs and injunctive orders against the purported termination of his employment. In the action before the High Court parties filed and exchanged pleadings. It was contended that the appellant's employment was terminated under the Public Officers (Special Provisions) Decree No 17 of 1984 hence the court-lacked jurisdiction to try the case. The respondent raised a preliminary objection by way of a motion dated 31/8/90 challenging the jurisdiction of the court. The respondent filed another application dated 15/10/90 asking the court to strike out claims C(1) and (11) and paragraphs 19-26 of the appellant's statement of claim as being statute-barred under section 2 (a) of the Public Officers Protection Law, Cap. 106, Laws of Oyo State of Nigeria 1978. After address of Counsel the court granted the application of the respondents. The case of the appellant was struck out for want of jurisdiction and the court dismissed same. The Court of Appeal in resolving the appeal considered:

Decree No 17 of 1984, particularly section 1(i), 3(3), Public Officers Protection Law Cap 106 Laws of Oyo State 1978, particularly section 2 and held, inter alia:

Public Officer extends to and includes every officer vested with or performing the duties of a public nature whether under immediate control of the President or the Governor of a State or not.

The period under the Public Officers Protection Law when time begins to run is from the date of the act or neglect or default complained of or, in the case of a continuing injury or damage, from the date of the ceasing.
In determining whether or not an action is statute barred, the period of limitation thereof must strictly be calculated with mathematical accuracy. Thus the court faced with the task must calculate to the minutest details, the years, months and days that have elapsed after the accrual of the cause of action. [*Aina vs. Jinadu*] (1992) 4 NWLR (Pt. 233) 91; *Fadare v Attorney G Oyo State* (1982) 4 SC I.

A cause of action becomes statute barred when no proceeding can be brought in respect of it because the period laid down by the Limitation Act for commencing that particular type of action has lapsed. In the instant case, the appellant's appointment was terminated on 12/6/87 while he instituted an action on 17/1/90 which is almost three years after the termination of the appointment. This runs contrary to the provisions of section 2 (a) of the Act.[*Egbe v Adefarasin* (1987) 1 NWLR (Pt. 47) 1; *Obiefuna vs. Okoye* (1961) 1 SCNLR 144; *Amusan v Obideyi* (2001) 6 NWLR (Pt 710) 674.

When action is statute- barred, the effect is that the plaintiff cannot maintain a suit on the basis of the action. In the instant case, the appellant having not complied with the provision of section 2(a) of the Public Officers Protection Law Cap. 106, Laws of Oyo State to institute an action within 3 months specified in the law this deprived the appellant of the right to maintaining suit against the respondents.

Constitutional Immunity

Constitutional immunity refers to the immunity endowed some Government officers against litigation. This is clearly stated in section 308 of the 1999 Constitution of the Federal Republic of Nigeria. That section provides as follows:

(1) Notwithstanding anything to the contrary in this Constitution, but subject tosubsection (2) of this section:
   (a) No civil or criminal proceedings shall be instituted or continued against a person to whom this section applies during his period in office.
   (b) A person to whom this section applies shall not be arrested or imprisoned during that period either in pursuance of the process of any court or otherwise and
   (c) No process of any court requiring or compelling the appearance of a person to whom this section applies shall be applied for or issued; provided that in ascertaining whether any period of limitation has expired for the purposes of any proceedings against a person to whom this section applies, no account shall be taken of his period of office.

(2) The provisions of subsection (1) of this section shall not apply to civil proceedings against a person to whom this section applies in his official capacity or to civil or criminal proceedings in which such a person is a nominal party.

(3) This section applies to a person holding the office of President or Vice-President, Governor or Deputy Governor, and the reference in this section to "period of office" is a reference to the period during which the person holding such office is required to perform the functions of the office**.**

When do we say action is statute barred?

The rational for this section is to prevent such office holder from being inhibited in the performance of his executive functions by fear of civil or criminal litigation arising out of such performance during his tenure of office.

The decisions in *Alamieyeseigha v Yeiwa* (2001) FWLR (Part 50) 1676 and Global Excellence Communication Limited v. Donald Duke have provided, without any ambiguity, the mind of the judiciary regarding this section. In the former authority, although a Court of Appeal matter, aside providing the literary interpretation of the section that holders of the offices in section 308 (3) are immune from judicial proceedings, arrest and imprisonment while in office, it went further to decide that the existence of the immunity renders the exercise of jurisdiction null and void.

The latter authority, being a Supreme Court decision provided an amplification of the earlier cited authority. The Court expressly declared that while the section immune the stated office holders against criminal and civil processes, persons in that category do not suffer disability in instituting any civil action while in office.

By the same token, actions commenced prior to assumption of office cannot be continued against the person during his tenure. In order to provide succour against actions being statute barred, the provision in subsection (1) is to the effect that no account shall be taken to the period in office in the calculation of the limitation period.

In the same vain, acts and omissions by judges in the course of their judicial functions are immune from lawsuits. This aims at sustaining the integrity of the judiciary. As interestingly put in *Arenson v CassonBechman* (1977) AC 405 at 440, ‘no man but a beggar or a fool would be a judge if he is liable to be sued on account of his judgements”. The justification for the immunity of judicial officers against litigation was succinctly put by Karibi-Whyte JSC (as he then was) in *Egbe v. Adefarasin*(1985) NWLR (Part 3) 546 at 567as follows:

It is of considerable interest to the administration of justice and the stability of our society and the constitution that the fragile fabric of our judicial wall should be protected from wanton attacks of irate litigants whose only grievance is that they have lost or falsely believe they are persecuted”.

There is the current debate on the propriety of the retention of section 308 in the Nigerian constitution. On one side is the argument that the immunity clause should be expunged. With this, the public officers who benefit from the clause would seize to do so and be more mindful of their

duties. Along these lines, attention has been brought to issues on corruption. The contention is that when such office holders engage in corrupt practices while in office, the long arm of the law will not reach them by virtue of the immunity clause.

On the other side of the divide is the argument that its retention will shield the officers in reference from frivolous litigation. This is the agelong raison *d'etre* for the immunity provision all over the world.

As a way of getting out of the controversy, it is suggested that in civil matters, the aforementioned public officers should enjoy immunity while in office.

However, on allegations of corruption, the officer involved should personally waive immunity. This has a way of restoring public confidence in public office holders. It is also possible to subject the enjoyment of the immunity clause to judicial discretion. In other words, when the immunity provision is pleaded, the courts should be endowed with the duty of determining whether or not the public officer can take advantage of the clause. No doubt this leaves a lot of unbridled discretion to the judiciary. It is hoped that such discretion will be exercised judiciously.

In Nigeria, section 52 of the Independent Corrupt Practices and Other Offences Commission Act allows the Chief Justice of the Federation to appoint an Independent counsel in investigating corruption allegations made against the President, Vice-President, Governors and their Deputies. This section further provides that an Independent counsel who is a legal practitioner of not less than 15 years standing shall investigate the allegation and make a report to the National Assembly or State House of Assembly as appropriate. This section appears to reduce the immunity endowed these public officers. It is however noteworthy that this section has not been put into operation by the Chief Justice of the Federation.

No matter how it goes, there is the genuine need to retain the immunity of some public officers in the constitution. This will go a long way in guiding and protecting the officers in the honest and effective discharge of their duties.

DSP Alamieyeseigha
v
1. Chief Saturday Yelwa
(Traditional Law Officer of GbaraunKingdom)
2. Chief Levi Edidi
(Traditional Custodian of Gbaraun Culture)
3. Chief (Engineer) Dakubo Okaikpe
(Deputy ChiefGbaraunTown)

4. Chief of Air Staff
[2001] FWLR (Part 50) 1676, CA)

The 2nd and 3rd respondents vide a motion ex-parte sought leave of the Federal High Court, Abuja to compel the 4th respondent to dismiss from service and /or refer to a court martial for trial Squadron Leader D.S.P. Alamieyeseigha (NAF/677) for the offence of cheating in an examination at the Command and Staff College in 1991. In support of the application was a statement which sought from the court a declaration that the 4th respondent has a legal duty under the Air Force Act Cap. 15 of 1990 to act on the findings of the Command and Staff College Board of inquiry which indicted the appellant for examination malpractices by either disciplining him or dismissing him from the NAF.

They also sought an order compelling the 4th respondent to dismiss the appellant with effect from the date of the offence and that the same be reported to the Inspector General of Police and the Attorney General of the Federation for prosecution. Court granted the leave sought. In consequence, the 1st – 3rd respondents caused an Originating Motion on Notice to be issued against the 4th respondent in terms of the said motion and seeking the same reliefs as in the *ex parte* application. When the 4th respondent was served with the motion, no appearance was put in on his behalf so the motion was heard in his absence. The application was granted as prayed.

In all these, the appellant who stood to be directly affected by the decision was not made a party to the suit. The appellant thereafter made an unsuccessful attempt to have the trial court set aside the far reaching orders made by it against him. Having not succeeded, he sought for and obtained leave of the Court of Appeal to appeal as a person interested in the decision of the lower court.

The Court of Appeal considered the provisions of section 308, 1999 Constitution.
It was held as follows:

1. What section 308 of the Constitution, 1999 provides in favour of the persons enumerated in subsection (3) thereof so long as each of them holds the office stipulated is an immunity from civil or criminal proceedings instituted or continued against him; immunity from arrest or imprisonment during that period either in pursuance of the process of any court or otherwise or the application for or issue of the process of any court requiring or compelling the appearance of a person to whom the section applies.

2. Any breach of the provisions of section 308 of the 1999 constitution renders such process, proceedings, civil or criminal, null and void and of no effect.
3. The immunity granted is not intended to subject a person to whom section 308, 1999 Constitution applies to a civil disability in respect of any of his other fundamental rights guaranteed by the constitution. At least, it is not intended that it shall deprive a person concerned the right to a fair hearing in the determination of his civil rights or obligations as would be the case if the attempt by the respondents were to be successful.
4. Section 308 of the Constitution, 1999 is not to be read in isolation. It should be read alongside other provisions of the Constitution in such a way as to give effect and validity to the other rights conferred by the Constitution.
5. Immunity need not be expressly claimed. Its existence renders the exercise of jurisdiction null and void.
6. However, in the sense that the immunity terminates when the person who enjoys the immunity ceases to hold the office by which he enjoyed immunity, the constitutional provision concerned could be classified as procedurally making the immunity merely inchoate or in suspense during the beneficiary's incumbency in the office.
7. The immunity granted under subsection (3) of section 308, Constitution, 1999 is not intended to deprive a holder of an office to which such immunity attaches right of fair hearing guaranteed by section 36 of the Constitution during the period in which he enjoys the immunity. In effect the only way to give effect to the provisions of section 308 of the Constitution is to decline jurisdiction in any process or proceeding which is capable directly or indirectly of affecting the persons occupying the offices stated.

Courts in Nigeria have no jurisdiction to try a person on criminal charge or civil matters if he is entitled to immunity under the Constitution even if for a reason that his immunity is waived. Any waiver of such immunity is ineffective. The immunity under section 308 (3) of the Constitution is over and above the popular Diplomatic Immunity. Therefore, waiver of any kind does not arise. The immunity is not that of the person of the appellant but of the particular state which he represents during the tenure of his office as an Executive Governor of a State.

Per Muntake - Coomasie, JCA, said:
[A]ppellant is directly mentioned in section 308 (3) of the Constitution as one of the Public Office holders against whom processes of court cannot be served on. He cannot be arrested because of the immunity. No court can lawfully exercise any jurisdiction on the appellant. If it does, then that exercise is going to be declared a nullity. *R v Madan* (1961) 2

QB page 1 per Lord Parker CJ. The court below cannot claim ignorance of the existence of section 308 (3) of the 1999 Constitution of the Federal Republic of Nigeria.This section applies to a person holding the office of President, or Vice President, Governor or Deputy Governor….

2.4 References/Further Readings/Web Resources

Justus A. Sokefun (2002), *Issues in Constitutional Law and Practices in Nigeria*, Faculty of Law, OOU, Ago-Iwoye.

Justus A. Sokefun (2011), Constitutional Law Through the Cases, Caligata Publishers.

2.5. Possible Answers to Self-Assessment

When action is statute- barred, the effect is that the plaintiff cannot maintain a suit on the basis of the action.

UNIT 3 PRE-ACTION NOTICE

CONTENTS

3.1 Introduction

A pre-action notice is prescribed by statute or legislation to be served on a prospective defendant by a prospective plaintiff declaring his intention and or desire to institute a civil action to redress a perceived wrong committed by the prospective defendant against the plaintiff.

3.2 Intended Learning Outcomes

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

- determine the modalities of pre-action notice
- explain what it entails, how it operates, and the position of the law when it is not complied with.

3.3 Pre-Action Notice

A pre-action notice is prescribed by statute or legislation to be served on a prospective defendant by a prospective plaintiff declaring his intention and or desire to institute a civil action to redress a perceived wrong committed by the prospective defendant against the plaintiff. The cause of action may take the form of a breach of contract. Such notices are common in the Statutes establishing Statutory Corporations and Local Governments. Some statutes require a prospective plaintiff to serve a prescribed notice on the defendant before litigation can be validly commenced in Court. Where the prescribed notice has not been served by the plaintiff, the action would not be validly commenced. See *Nigerian Ports Plcv Ntiero* [1998] 6 NWLR (pt 555) 640 at 650. (

Self-Assessment Exercise

What is pre-action notice and how does it work?

Pre-action notices have equally been described as similar in connotation as conditions precedent in the litigation process.Against the background of these Statutes are the provisions of the Constitution of the Federal Republic of Nigeria which guarantee unimpeded access to the courts by citizens in the enforcement of their rights. Notable among the provisions is section 6(6)(b) of the Constitution of the Federal Republic of Nigeria, 1999. It provides:

The judicial powers vested in accordance with the foregoing provisions of this section –

(b) shall extend to all matters between persons, or between government or authority 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.

Furthermore, Section 46(1):
Provides that 'any person who alleges that any of the provisions of this chapter has been, is being, or likely to be contravened in any state in relation to him may apply to a High Court in that State for redress' The object is usually to give the prospective defendant an opportunity to meet the prospective plaintiff with a view to negotiating a possible out of court settlement. (***Briefly x-ray the case on pre-action notice and adjudicatory power of the court***).

Apart from the inherent objective of a pre-action notice already noted, it is otherwise treated as a condition precedent to the validity of an action.Pre-Action Notices do not remove the adjudicatory powers of the court. They do not also deny access to a court. However, at best, they may impose and regulate the manner of commencement of judicial proceedings against statutory bodies. In order words, the jurisdiction of a court may not be invoked until such a notice has been issued.

The rule is sacrosanct that whenever there exists the need for a pre-action notice, it must be adhered to otherwise the litigation process would not have been validly commenced and the action would be incompetent.

Pre-Action Notice and the Adjudicatory Power of Courts (Case Analysis)

Obafemi Awolowo University, Ile Ife
v
RA Oliyide & Sons Ltd
[2002] FWLR (Part 105) 799, CA

Facts

The respondent (as plaintiff) filed a writ of summons against the appellant (as defendant) at the Ile-Ife Division of the High Court of Osun State claiming a declaration that the purported determination of the contract between the plaintiff and the defendant is wrongful, null and void. The plaintiff also claimed several other pecuniary reliefs.

After entering a conditional appearance, the defendant filed a motion on notice for an order to strike out or dismiss the suit on the ground that the action was incompetent, premature, null and void for non-compliance with the provisions of section 46(1) of Obafemi Awolowo University Act,which reads:

46(1) No suit shall be commenced against the University until at least three months after written notice of intention to commence the same shall have been served on the University by the intending plaintiff or his agent and such notice shall clearly state the cause of action, the particulars of the claim, the name and place of abode of the intending plaintiff and the reliefwhich he claims.

Argument on the application was taken by the Court. Whilst the defendant's position was that the plaintiff's solicitor's letter dated 3rd March, 1992 addressed on behalf of the plaintiff did not meet the requirement of section 46(1) of the Obafemi Awolowo University ActCap334, Laws of the Federation of Nigeria 1990,the plaintiff's position was that the said letter met the requirement.

The trial judge in a considered ruling held that the said letter satisfied the requirement of section 46(1) of the Act. The motion on notice was accordingly dismissed. Dissatisfied with the ruling, the defendant appealed to the Court of Appeal.

The Court of Appeal held as follows:

1. When the competence of an action is challenged, a court has a duty to consider the issue first and determine the competence or otherwise of the suit before going into any other issue in the matter.*(*See*Madukolu vs. Nkemdilim*(1962) 1 ALL NLR 587, 595
2. A court is competent when:
    (a) It is properly constituted as regards numbers and qualifications of the members of the bench and the member is not disqualified for one reason or another; and
    (b) the subject matter of the case is within its jurisdiction and there is no feature in the case which prevents the court from exercising its jurisdiction and
    (c) The case comes before the court initiated by due process of law and upon fulfilment of any condition precedent to the exercise of jurisdiction.

Any defect in competence is fatal for the proceedings are a nullity however well conducted and decided, the defect is extrinsic to the adjudication.

3. Pre-action notices far from being unjust, have for a long time been accepted as part of our civil procedure wherever statutes prescribe that such should be given.
4. The requirement of a pre- action notice as in the instant case is not merely ornamental but goes to the root of what will make the institution of such action in a court valid and would enable the court to exercise jurisdiction so conferred on it. Once the defendant raises objection as to non- compliance with condition precedent to the exercise of court's jurisdiction, it is for the court seized of the proceedings to most profoundly examine the objection to ascertain whether it can adjudicate. The court cannot sidetrack such an objection by a mere wave of the hand. The trial court in this case ought not to have assumed jurisdiction having been made to see that there was no due conformity with statutory provisions. *Somolu Local Government Council vs. ShakiruGbadesereAgbede* (1996) 4 NWLR (pt 441)174; *University of Ife v Fawehinmi Construction Co. Ltd* (1991) 7 NWLR (pt 210) 26; *GBA SANTOS v Epe Native Authority* (1943) 17 NLR 67.
5. A pre-action notice is a condition precedent to the exercise of jurisdiction by a court. Where a plaintiff therefore fails to issue one or the one issued is not in conformity with statutory provisions, the vital condition precedent to the exercise of jurisdiction would not have been fulfilled and the competence of the court to adjudicate on the matter would thereby be affected.
6. The pre- action notice in the instant case (Exhibit T) is invalid for reasons of non-compliance with statutory prescription as provided for in section 46(1) of the Obafemi Awolowo University Act. Apart from the fact that the letter was not addressed to the proper person, it neither contained the abode of the plaintiff nor his cause of action and particulars of claim. To that extent, the plaintiff's action was incompetent and the jurisdiction of the court thereby ousted.

Adekeye JCA

The pre-action notice must clearly state-

(a) The cause of action
(b) The particulars of the claim.
(c) The name and place of abode of the intending plaintiff
(d) The relief which he claims.

The letter, exhibit 'T' has not complied strictly with the foregoing. Furthermore, service of the pre-action notice must be properly effected on the University- by its corporate name-and same must be within the three months statutory *period* provided in the statute. Exhibit 'T' falls short of these requirements. In order to allow the court to assume judicial powers to inquire into facts, apply the law, make decisions and declare judgement in the proposed action between the parties all these conditions precedent specified in section 46(1), Cap.334, Laws of the Federation must be fulfilled. Since exhibit 'T' failed to comply with action 46(1) of the statute – Ife High Court lacked jurisdiction to entertain the suit filed by the respondent; as it failed to approach justice through the proper channel."

ONALAJA, J.C.A:
Section 46(1) proceeded further that the pre- action or statutory notice of intention to sue shall clearly state the cause of action, the particulars of the claim which are not clearly set out in exhibit T. It also enjoins the intending plaintiff to state the name and place of abode. The name and place of abode is conjunctive. *Abode* is not defined in Cap. 334, so the approach is to apply the ordinary, literal and natural meaning as stated below:

(a) *The New Oxford Dictionary of English*, page 4 defines-
'Abode, a place of residence, a house or home,
(b) *Collins English Dictionary*, page 4, Abode a place in which one lives, one's home.'
(c) *Black's Law Dictionary*, seventh edition, page 5- Abode- A home, a fixed place of residence.'

Applying the above, abode means a place or house where somebody lives, sleeps and resides, it is because of the strict approach of interpretation that the court rejected as abode under the *Ports Act* that the solicitor's address does not fall within the meaning of abode. Exhibit T did not give the registered office or address of respondents being a company, a juristic and legal personality the registered office can pass as its abode.

The last straw that breaks the camel's back of non-strict compliance with section 46(1) in exhibit T is that it is eminently silent as to the relief which it claims as set out in the particulars of claim in the writ of summons or paragraph 36 of the amended statement of claim. After a cool calm view and consideration of the strict compliance of the pre- action notice set out in section 46(1) supra, I come to the irresistible conclusion as decided in *Nigerian National Petroleum Corporation v Chief GaniFawehinmi& 4 Ors* (*supra*) that exhibit T being letter of 3rd March 1992 did not pass the acid test of the provisions of section 46(1) aforesaid. I therefore declare that the action commenced against the appellant was incompetent,

applying *Madukolu vs. Nkemdilim* (*supra*); the court lacked jurisdiction to adjudicate in this action.

Qualifications of a Notice

The registered Trustees of Kwara Anglican Diocese
v
1. *Asa Local Government*
2. *Asani Alata*
3. *Jimoh Councillor*
4. *Babatunde Baba Alata*

[2003]FWLR Part 160) 1586, CA

FACTS

The appellant herein, sometime on or about 10th and 11th of April 1999, noticed that a certain group commenced construction of a shopping complex in front of one of the branches of their church at All Saints Anglican Church, Eiyenkorin, Ilorin, Kwara State. On enquiry from the said people, they claimed that it was Asa Local Government which gave them permission.

Upon instruction of the appellant, their counsel caused two different letters to be written to the 1st respondent warning that within five days if it fails to stop further construction on the land and withdraw any right or permission already granted, the matter will be reported to the appropriate authority. The respondents failed to heed the warning. Consequently, the appellant instituted an action against the respondents at the Kwara State High Court sitting at Ilorin. Before the suit was fixed for hearing, the appellants brought an ex-parte motion praying for an interim order restraining the respondents from further constructing the shopping complex pending the hearing of the motion on notice. The trial court heard and granted the application. When the respondents were served with the interim order, they raised, a preliminary objection to the effect that the trial court lacked jurisdiction to entertain the suit against the 1st respondent as the pre-action notice required under section 179 (1) and (2) Kwara State Local Government Law was not given. Equally that the jurisdiction of the trial court to entertain the entire suit is ousted by section 14 of the Land Use Act, 1978, as the land in dispute is covered by right of occupancy granted by a local government. The trial court heard argument of counsel to both sides in respect of the motion and gave its ruling that the action is improper against the 1st respondent. Therefore, its name should be struck out. It further held that its jurisdiction to entertain the entire suit has been ousted by section 41 of the Land Use Act, 1978 and struck out the suit.

Dissatisfied with the ruling, the appellant has appealed to the Court of Appeal.
Held:

1. Notice is defined as information or that warning of what will happen.
2. By virtue of section 179 (1) and (2) of the Local Government Law, Kwara State, no suit shall be commenced against a local government until one month at least after written notice of intention to commence the same has been served upon the local government by the intending plaintiff or his agent. Such notice shall state the cause of action, the name and place of abode of the intending plaintiff and the relief which he claims.

Per Amazu, JCA
In my view, the wordings of section 179 (1) are plain and clear. In that case, the wordings will be given their ordinary meanings. Exhibit B only gave the local government 5 days within which if the action complained of is not remedied, the appellant would '…report to the appropriate authority.' This, in my considered view, does not mean that an action will be instituted against the local government after five days. In that case, the submission of the learned counsel for the respondent cannot stand. This is because 'to report' does not mean the same thing as 'to institute action'.

The next, is the provision of section 179(2) of the Local Government Law.

It must be noted that under the section, for a letter to qualify as a notice, it must state-

1. the cause of action
2. the name and abode of the intending plaintiff, and
3. the relief which the intending plaintiff claims.

I have already observed that it is the contention of the appellants that exhibits B and C qualify as notices under section 179 (2) supra. The learned counsel to the respondents argues *per contra.* I have carefully considered the two arguments canvassed by the learned counsel on both sides, it is my considered view that Exhibits B and C do not qualify as 'pre action notice', in view of the provisions of sections 179 (2) supra. A careful look at exhibits B and C shows that the abode of the intending plaintiff is nowhere stated in the two documents. Even if we accept the fact that the two letters contain the cause of action, it is nowhere stated in the letters the relief which the provisions of section 179 supra clearly indicate.

Effects of Non-Compliance with Pre-Action Notice

1. Chief George Abegunde

2. *Alexander Abegunde*
3. *Elijah Abegunde*
   (For themselves and other members of Ekungba Family of Ifinmi quarters, Egbe- Ekiti)
   v
1. *Oba Ayodele Ige Olokesusi II*
2. *Mr Ibidapo Awojolu*
   (For themselves and other members of Awojolu Family of Ifinmi Quarters, EgbeEkiti)
3. *The Secretary, Ekiti East Local Government, Omuo Ekiti*
   [2003] FWLR(Part155) 683, CA

This is an appeal against the ruling/judgment of the High Court of Ekiti State holden at IkoleEkiti and delivered on 1/8/2000. The subject matter of the suit that led to this appeal had to do with the Ojumu of Ifinmiquarters title in EgbeEkiti. The Ojumu stool is a minor chieftaincy title under the prescribed authority of the 1st respondent. The appellant was of the view that their family is the only family in Ifinmiquarters,EgbeEkiti entitled to select or present candidates(s) to fill any vacancy in the Ojumu of Ifinmi quarters' Chieftaincy under the native law and custom. They instituted this action claiming series of declarations and injunctions against the respondents. After settlement of pleadings, the 3rd respondent filed a notice of objection contending that the suit was incompetent by the non-service of pre-action notice on Ekiti East Local Government before suing the 3rd respondent in his official capacity as the secretary to the local government. The trial court thereafter declined jurisdiction in the suit and struck out the entire action.

The Court of Appeal held inter alia:

1. Where a condition precedent is prescribed before an action can be commenced, non-compliance with such condition is fatal to the whole proceedings no matter how well conducted. This is due to the fact that it is the fulfillment of the condition precedent that confers jurisdiction on the court to entertain the matter, and where the court lacks jurisdiction the whole proceeding is a nullity. [*Obata vs Okpe* (1996) 9 NWLR (Pt. 473) 401; *Odua Investment Ltd vs. Talabi* (1997) 10 NWLR (Pt. 528) 1.

2. Whether pre- action notice is required to be served on Secretary to the local government sued on behalf of the Local Government

Section 174 (1) of the Ondo State Local Government Law applicable to Ekiti and Ondo State provides that:'[n]o suit shall be commenced against a local government until one month at least after written notice of intention to commence same has been served upon the local government by the intending plaintiff or his agent'.In other words, it requires a month pre- action notice before service of process. This was judicially confirmed

by this court in the case of *Duerueburno v Nwanedo*[2000] 15 NWLR (Pt 690) 287 p 295.

In the light of the foregoing authority, the Local Government Law which requires a month pre-action notice before service is effected on the Local Government issued on behalf of the Local Government, *a-fortiori* pre action notice applies to the Secretary to the Local Government acting in that official capacity.

3 Where there is need for a pre-action notice to be given to a party, only that party will benefit from failure to give such notice. The benefit is striking out the name of that party to the suit leaving the names of the others. In the instant case, only the secretary to the local Government, representing the local government, should have been struck out and not the whole suit.

Onnoghen, JCA
However, the crucial point in this appeal is whether the non-service of the pre-action notice on the Local Government as represented by the present 3rd respondent affects the competence of the whole proceedings against the 3rd respondent.

It is clear and I hold the view that there is no substantial relief being claimed against the original 4th defendant (now 3rd respondent) as evidenced in reliefs Nos. (1)-(iv) and that only an injunction is claimed against the said 3rd respondent in (v). That being the case, it is my considered view that the appellants can still maintain the action against the other respondents if the 3rd respondent is struck out of the suit. To that extent I agree with learned counsel for the appellants that the lower court erred in striking out the entire suit for non-compliance with the condition precedent before the institution of the action against the 3rd respondent. It is only the 3rd respondent that can legally take the benefit of the provisions of section 174 (1) of the said Cap. 63 (supra) and no other persons.

d. By the provisions of order 2, rule 1 (1) of the Ondo State High Court Civil Procedures Rules, applicable in Ekiti and Ondo States, the right relating to pre-action notice can only be waived by effluxion of time and acquiescence.

3.4 References/Further Readings/Web Resources

Justus A. Sokefun (2002), *Issues In Constitutional Law and Practices in Nigeria,* Faculty of Law, OOU, Ago-Iwoye.

Justus A. Sokefun (2011), Constitutional Law Through the Cases, Caligata Publishers

3.4. Possible Answers to Self-Assessment

A pre-action notice is prescribed by statute or legislation to be served on a prospective defendant by a prospective plaintiff declaring his intention and or desire to institute a civil action to redress a perceived wrong committed by the prospective defendant against the plaintiff.

UNIT 4 FISCAL FEDERALISM

CONTENTS

4.1 Introduction

This unit is a focus of the mode of revenue allocation under the Nigerian Federalism. It is an exercise undertaken to reveal in depths the Constitutional provisions in terms of allocation and spending of the government.

4.2 Intended Learning Outcomes

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

- discuss the provisions of the Constitution on Revenue mobilization and allocation.
- Are there Constitutional safeguards put in place to checkmate the activities of government in terms of spending?

4.3 Fiscal Federalism

Under the Constitution of the Federal Republic of Nigeria, 1999, the Revenue Mobilisation Allocation and Fiscal Commission is charged with the duty of making recommendations for revenue allocation to the President, while the President is to table such proposals before the National Assembly.

Section162 (1) - (5) of the 1999 Constitution provide as follows:
162.(1)The Federation shall maintain a special account to be called the 'Federation Account' into which shall be paid all revenues collected by the Government of the Federation, except the proceeds from the personal income tax of the personnel of the Armed Forces of the Federation, the Nigeria Police Force, the Ministry or department of government charged

with responsibility for foreign affairs and the residents of the Federal Capital Territory, Abuja.

5 The President, upon the receipt of advice from the Revenue Mobilization Allocation and Fiscal Commission, shall, table before the National Assembly proposals for revenue allocation from the Federation Account, and in determining the formula, the National Assembly shall take into account, the allocation principles especially those of population, equality of states, internal revenue, generation, land mass, terrain as well as population density. Provided that the principle of derivation shall be constantly reflected in any approved formula as being not less than thirteen per cent of the revenue accruing to the Federation Account directly from the natural resources.

6 Any amount standing to the credit of the Federation Account shall be distributed among the Federal and State Governments and the Local Government Councils in states on such terms and in such manner as may be prescribed by the National Assembly.

7 Any amount standing to the credit of the states in the Federation Account shall be distributed among the states on such terms and in such manner as may be prescribed by the National Assembly.

8 The amount standing to the credit of local government councils in the Federation Account shall also be allocated to the states for the benefit of their Local Government Councils on such terms and in such manner as may be prescribed by the National Assembly.

(***Analyse the relevant Nigerian cases on fiscal federalism***). Going by these provisions, a special account referred to as 'Federation Account' is created for the purpose of paying all revenue collected by the Federal Government except those listed above. There are three tiers for the distribution of the money in the credit of Federation Account. These are the Federal, the States and the Local Governments. The Constitution further provides for the establishment of 'The Revenue Mobilisation Allocation and Fiscal Commission' under section 153(1)(n) of the Constitution as an executive body which has the duty to advise the President of the Federal Republic of Nigeria on the proposals for revenue allocation from the Federation Account. The President is to table such proposals before the National Assembly. The procedure for this is by passing the Allocation of Revenue (Federation Account etc.) Act which will prescribe the basis for such distribution.

The Bill is presented by the Government and goes through the processes of enactment as a 'Money Bill' within the definition of that term in the Constitution. Thus revenue distribution is a constitutional provision and the prescribed mode of carrying out this purpose is designed primarily to prevent mismanagement of financial resources. Furthermore, the

specified role assigned to each of the three bodies, the Revenue Mobilization Allocation and Fiscal Commission, the President and the National Assembly is in furtherance of the principle of separation of powers as guaranteed in the Constitution.

Bills and Revenue Allocation

Attorney-General of Bendel State
v
Attorney-General of the Federation & LOrs
[2001] FWLR (Part 65) 448, SCN

Being desirous of getting the National Assembly to enact a law pursuant to section 149 of the Constitution of the Federal Republic of Nigeria, 1979, the President of the Federal Republic on 28th October, 1980 forwarded to the National Assembly a Bill entitled 'Allocation of Revenue (Federation Account, etc.) Bill 1980' setting out new formula for the distribution of the amount standing to the credit of their Federation Account between the Federal and State Governments and the Local Government Councils in each state for the consideration and enactment by National Assembly. The Bill as originally presented was debated and passed by Senate with amendments. It was also passed by the House of Representatives after debate with different set of amendments which were at variance with those of the Senate. The President of Senate convened a meeting of the Joint Finance Committee of Senate and the House of Representatives, as he is enjoined under section 55(2) of the 1979 Constitution to resolve the differences between the two Houses of the National Assembly.

Self-Assessment Exercise

How does fiscal federalism operate?

The joint Finance Committee comprised 12 members of each House of the National Assembly. The Joint Committee met and resolved the differences between the Senate and the House of Representatives. Thereafter the Bill, without being sent back to either the Senate or the House of Representatives was presented to the President, who signed it into law on the 3rd February, 1981. The Act came into force retrospectively with effect from 1st January, 1981.

The Bill as presented to the President for his assent attached to it a schedule prepared by the Clerk of the National Assembly in accordance

with the provisions of the Acts Authentication Act, 1961. In the said schedule, it was stated therein that it was passed by the Joint Committee on Finance on 29/1/81 before being sent to the President for his assent. Section 272 of the Constitution expressly allowed the use of the revenue formula for sharing the amount in the Federation Account in force in the financial year April 1978 to 31st March, 1979 pending any Act of the National Assembly providing a new formula for revenue allocation between the Federation and the States, among the states, between the states and the local governments and among the local governments. This formula provided the basis for allocation of the amount in the Federation Account before the assent to the Bill.

The plaintiff was dissatisfied with the mode and manner by which the National Assembly had exercised its legislative power in respect of the said bill. It therefore commenced these proceedings in the Supreme Court by originating summons against the Government of the Federation and the Government of each of the other eighteen states. In the said summons, as amended, the plaintiff asked the Supreme Court to determine the following questions and sought for the following declarations respectively:

1(a) Whether the Bill entitled –
'A Bill for an Act to prescribe the basis for distribution of Revenue accruing to the Federation Account between the Federal and States; the formula for distribution amongst the States *inter se*, the proportion of the total Revenue of each State to be contributed to the State Joint Local Government Account; and for other purposes connected therewith" (hereafter referred to as "the Bill' published in the Supplement to the *official Gazette* of the Federal Republic of Nigeria ((hereafter referred to as the 'Constitution") apply to the Bill.

(c) Even if the Bill has been enacted into law in the manner required by the Constitution of the Federal Republic of Nigeria -

- Are the provisions of subsection (2) of section 2 thereof consistent with section 149(3) of the Constitution of the Federal republic of Nigeria?
- Are the provisions of section 8 thereof consistent with the provisions of sections 7(6), 149(4) and 149(7) of the Constitution of Nigeria?

The plaintiff thereupon sought the following declarations -

(a) declaration that a Bill for an Act of the National Assembly with respect to any manner which the National Assembly is authorised to prescribe pursuant to the provisions of section 149 of the Constitution of the Federal Republic of Nigeria or the provisions of item A1 (a) of Part II of the Second Schedule to that

Constitution can only be enacted into law in accordance with the procedure prescribed in section 55 of the Constitution;

(b) a declaration that a Bill for an Act of the National Assembly referred to Joint Committee of the said Assembly pursuant to the provisions of section 55 of the Constitution of the Federal Republic of Nigeria cannot lawfully be presented to the President of the Republic for his assent until such Bill (as amended by the Joint Committee aforesaid) has been considered and passed by a majority of the members of each of the Houses of the National Assembly;

(c) a declaration that the members of National Assembly who met as a Joint Conference Committee on Allocation of Revenue (Federation Account, etc) Bill 1980 did not constitute a meeting of the Joint Committee of the National Assembly on Finance contemplated by the provisions of section 55 of the Constitution of the Federation Republic of Nigeria.

(d) a declaration that it is or it would be illegal and unconstitutional for the Federation Account, etc.) Act, 1981 not being an Act of the National Assembly and its provisions regarding the division of public revenue between the Federation or among the said States is unconstitutional, null and void and of no effect; and

(e) a declaration that it is or it would be illegal and unconstitutional for the Federal Government to carry out the provisions of an Act passed pursuant to section 149 of the Constitution of the Federal Republic of Nigeria if and in so far as the said Act provides that a specified proportion of public revenue payable from the Federation Account (on basis of derivation) to States from which minerals have been extracted shall be paid into Fund 'to be administered by the Federal Government for the development of the mineral producing areas in those States.

or

For the establishment in each State in the Federation of a body charged with the functions of ensuring that 'allocations made to the local government councils in the State from the Federation Account and from the State concerned are promptly paid into the State Joint Local Government Account and distributed to local government councils in accordance with the provisions of any law made in that behalf by the House of Assembly of the State.

(f) an injunction restraining all officers, servants and functionaries of the Government of the Federal Republic of Nigeria or any other public officer whomsoever from dividing or otherwise allocating the public revenue of the Republic between the Federation and the States of the Federation or among the said States as prescribed under the Allocation of Revenue (Federation Account, etc.) Act, 1981.

Counsel for the defendants raised the following objections:

(1) That the plaintiff's claim is not properly before this court and that the originating summons ought not to have been issued as the claims so framed failed to comply with the requirement of Order 5 rule 2 of the Supreme Court Rules, 1977 in form and content.
(2) That the plaintiff's claim is not justifiable.
(3) That this court has no jurisdiction to adjudicate on the matter.
(4) That the plaintiff is *estopped* from raising the issue of the constitutionality of the Act as Bendel State has taken a benefit under the Act.
(5) That the plaintiff has by his action waived his right to challenge the constitutional validity of the Act.

The following provisions of the 1979 Constitution were considered: Section 4(8):

Save as otherwise provided by this Constitution, the exercise of legislative powers by the National Assembly or by a House of Assembly shall be subject to the jurisdiction of courts of law and of judicial tribunals established by law; and accordingly, the National Assembly of a House of Assembly shall not enact any law that ousts or purports to oust the jurisdiction of a court of law or a judicial tribunal established by law.

Section 52

(1) Except as otherwise provided by this Constitution, any question proposed for decision in the Senate or the House of representatives shall be determined by the required majority of members present and voting; and the person presiding shall cast a vote whenever necessary to avoid an equality of votes but shall not vote in any other case.
(2) Except as otherwise provided by this Constitution, the required majority for the purpose of determining any question shall be a simple majority.
(3) The Senate or the House of representatives shall by its rules provide-
    - That a member of the House shall declare any direct pecuniary interest he may have in any matter coming before the House for deliberation;
    - That the House may by resolution decide whether or not such member may vote, or participate in its deliberations, on such matter;
    - The penalty, if any, which the House may impose for failure to declare any pecuniary interest such member may have; and

- for such other matters pertaining to the foregoing as the House may think necessary.

Section 54

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

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

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

(4) Where a Bill is presided to the President for assent, he shall with 30 days thereof signify that he assents or that he withholds his assent and the Bill is again passed by each House by two-thirds majority, the Bill shall become law and the assent of the President shall not be required.

Section 55

(1) The provisions of his section shall apply to -
   (a) an appropriate Bill or a supplementary appropriation including any other Bill for the payment, issue or withdrawal from the Consolidated Revenue Fund or any other public funds of the Federation or any majority charged thereon or any alteration in the amount of such a payment, issue or withdrawal; and
   (b) a Bill for the imposition of or increase in any tax, duty or fee or reduction, withdrawal or cancellation.

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

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

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

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

Section 58

(1) The Senate or the House of Representatives may appoint a committee of its members for such special or general purposes as in its opinion would be better regulated and managed by means of such a committee, and may by resolution, regulation or otherwise, as it thinks fit, delegate any functions exercisable by it to any such committee.

(2) The number of members of a committee appointed under this section, their terms of office and quorum shall be fixed by the House appointing it.

(3) The Senate and the House of Representatives shall appoint a joint committee on finance consisting of an equal number of persons appointed by each House and may appoint any other joint committee under the provisions of this section.

(4) Nothing in this section shall be constructed as authorising the House to delegate to a committee the power to decide whether a Bill shall be passed into law or to determine any matter which it is empowered to determine by resolution under the provisions of this Constitution, but the Committee may be authorised to make recommendations to the House on any such matter.

Section 149

(1) The Federal Government shall maintain a special account to be called 'the Federation Account' into which shall be paid revenues collected by the Government of the Federation, except the proceeds from the personal income tax of the personnel of the Armed Forces of the Federation, the Nigeria Police Force, the ministry or department of government charged with responsibility for External Affairs and the residence of the Federal Capital Territory.

(2) Any amount standing to the credit of the Federation Account shall be distributed among the Federal and State Governments, and Local Government Councils in each State, on such terms and in such manner as may be prescribed by the National Assembly.

(3) Any amount standing to the credit of the States in the Federation Account shall be distributed among the States on such terms and in such manner as may be prescribed by the National Assembly.

(4) The amount standing to the credit of local government councils in the Federation Account shall also be allocated to the States for the benefit of their local government councils on such terms and in such manner as may be prescribed by the National Assembly.
(5) Each State shall maintain in a special account to be called 'State Joint Local Government Account' into which shall be paid all allocations to the local government councils of the State from the Federation Account and from the Government of the State.
(6) Each State shall pay to local government councils in its area of jurisdiction such proportion of its total revenue on such terms and in such manner as may be prescribed by the National Assembly.

Section 212:
(1) The Supreme Court shall, to the exclusion of any other court, have original jurisdiction in any dispute between the Federation and a State or between States of and in so far as that dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends.

Section 272
Pending any Act of the National Assembly for the provision of a system of revenue allocation between the Federation and the States, among the States, between the States and local government councils and among the local government councils in the States, the system of revenue allocation in existence for the financial year beginning from 1st April, 1978 and ending on 31st March, 1979 shall, subject to the provisions of this Constitution and as from the date when this section comes into force, continue to apply;

Provided that where functions have been transferred under this Constitution from the Government of the Federation to the States and from the States to local government councils the appropriations in respect of such functions shall also be transferred to the States and the local government councils, as the case may require.

Sections 2 and 3 of the Acts Authentication Acts provide:
(1) The Clerk to National Assembly shall forthwith after enactment, prepare a copy of each Bill as passed by both the Houses of the National Assembly or by the House of Representatives as the case may be, embodying all amendments agreed to, and shall endorse on the Bill and sign a certificate that the copy has been prepared as prescribed by the section and is a true copy of that Bill.
(2) The Clerk to the National Assembly shall, as from time to time be directed by the Speaker of the House of Representatives, prepare a schedule of Bills passed at any time during a session and intended to be presented from assent; and shall certify on that

schedule that it is a true and correct record. The schedule shall set forth the long title of a Bill and a summary of its contents and the respective dates on which each Bill is passed by each House of the National Assembly; and subject to the provisions of this section, when signed by the Clerk to the National Assembly the certificate shall be conclusive for all purposes. If a Bill in the schedule is one to which section 59 of the Constitution of the Federation applies, the schedule shall, in addition, be endorsed with the prescribed certificate of the Speaker of the House of Representatives in respect of that Bill.

3(1) The Schedule and copies of the Bills shall be presented to the President of the Federal Republic of Nigeria in duplicate. If the President of the Federal Republic of Nigeria is satisfied, he shall cause the schedule to be passed under the public seal of the Federation after affixing his signature to the schedule;

2 A duplicate of the schedule when passed and signed shall be returned to the Clerk to National Assembly who shall cause a copy to be published in the Gazette; and the production of the Gazette containing the schedule as published shall be conclusive evidence for all purposes.

Order 5 Rules 2 and 6, Supreme Court Rules, 1977 provide as follows:

Any person claiming any legal or equitable right in a case where the determination of the question whether he is entitled to the right depends on the construction of the Constitution of the Federation by a State may apply for the issue of an originating summons for the determination of such question of construction and for a declaration as to the right claimed.

Rules 2 and 3 of this Order shall not affect the right of any person seeking a declaratory judgment to institute proceedings by filing a statement of claim under Order 3 and on an application by originating summons the court shall not be bound to determine any such question of construction if in the opinion of the court it ought not to be determined on originating summons.

The Supreme Court considered the following issues:
(a) Legislative process
(b) Legislative power
(c) Original jurisdiction of the Supreme
(d) Money bills.

It then held as follows:
1. Legislative process commences when a Bill is introduced and first read in any of the two Houses of the National Assembly and ends

when the Bill has been passed into law by those Houses and assented to by the President of the Federal Republic of Nigeria.

2. The exercise of legislative powers by the National Assembly' referred to in section 4(8) of the 1979 Constitution being part of the legislative process, starts when a Bill is first introduced and ends before it is assented to by President. Since the exercise of such powers 'shall be subject to the jurisdiction of courts of law and of judicial tribunals established by law' as provided for in section 4(8), the Supreme Court has jurisdiction to hear the plaintiff's claims in this case.
3. For the original jurisdiction of the Supreme Court to be invoked under section 212(1) of the 1979 Constitution:
   (1) there must be an existing dispute
   (2) the dispute must be one between the Federal government and a State government or between two or more state governments.
   (3) the dispute, to be justiciable, must involve a question of law or facts;
   (4) the dispute must be one on which the existence or extent of a legal right depends.

In the instant case, since any amount standing to the credit of the Federation Account shall be distributed among the Federal and State governments and the local government councils in each state 'on such terms and in such manner as may be prescribed by the National Assembly', any state which takes the view that the legislative procedure followed in prescribing the terms and manner of distribution is not in accordance with the procedure laid down in the Constitution has a justiciable dispute. If, as in the case in hand, such a state does not wish to receive a share which is not supported by a law which it considers to be valid and cannot, therefore, if need be, sue for that share, under a legal right entrenched in sections 272 and 149 of the Constitution, the State can sue the Federal Government by virtue of the provisions of section 212 of the Constitution for a declaration that such an Act is invalid. Moreover, since all and each of the states in the Federation have a stake in what its legal share of the revenue should be, it is only fair and just that should be joined in the action.

There is a dispute between the government of Bendel State and the Federal Government, and the dispute involves not only questions of law or fact but also be constitutional right of the Bendel State Government. Furthermore, it is fair, just and proper for all the other defendants sued or joined by order of court, to be heard when the claims of Bendel State are being considered by the court.

4. By virtue of the provision of section 4(8) of the 1979 Constitution, the courts of law in Nigeria have the power, and indeed, the duty to see to it that there is no infraction of the exercise of legislative power, whether substantive or procedural, as laid down in the relevant provisions of the Constitution, if there is any such infraction, the courts will declare any legislation passed pursuant to it unconstitutional and invalid. In the instant case, since the legislative process has not been followed in the passing of the Allocation of Revenue (Federation Account, etc.) Act, 1981, the Act is not a valid law.
5. The legislative process commences with the gathering of materials for legislation and ends with the enrolment of the Act. But the exercise of legislative power envisaged under the Constitution commences with the presentation of the Bill and 1st reading in either House of the National Assembly, and ends with the assent by the President or passing a second time with two-third majority in the National Assembly.

Per OBASEKI, JSC 'I hesitate to say that the President's assent is not a share of the exercise of the legislative power. It is true that the President is the Chief Executive and head of the Federal Republic of Nigeria, but his function as Chief Executive is not limited to the maintenance and execution of the Constitution and the laws made by the National Assembly, but includes giving assent to Bills passed by the National Assembly, to become law. Counsel for the plaintiff has submitted that the President was performing an executive function but the requirement for assent has been dealt with in the Constitution under the mode for exercising legislative power. Further, since a withholding of the President's assent deprives the Bill of validity as law, it can be equated to the second exercise by the National Assembly of passing the Bill by two-thirds majority to put it on the statute book as an Act of the National Assembly. I do not think that there is any doubt that the passage of the Bill by two-thirds majority in the National Assembly is an exercise of legislative power. See section 5(1) and section 54[((1) and (5)] and section 55[(3) and (4)] of the Constitution.

Per ESO, JSC:
The pertinent question in regard to the legislature is, what are those legislative powers, the exercise of which are subject to the jurisdiction of the court, or to ask the question in another form, do they end? In my view, legislative powers commence when a Bill is introduced in either House of the National Assembly and ends when the Bill is submitted to the President. In assenting to a Bill he is performing executive powers within a legislative process.

7. Where a Bill is said to be passed by the National Assembly it can only mean that it has been so passed in accordance with the procedure laid down under the Constitution. In the instant case, the Allocation of Revenue (Federation Account etc.) Bill, 1980 was passed in breach of constitutional requirements was thereby unconstitutional and void.
8. A Bill (whether a 'money bill' or 'non-money bill') does not and cannot become a law made by the National Assembly unless and until it has been passed by the Senate, the House of Representatives and except where section 54(5) applies - assented to by the President. In the case where a Bill ('money bill or non-money bill') is passed only the other or second House to which it is transmitted, then the Bill cannot become law until agreement has been reached between the two Houses on arrears of disagreement and the President-except in circumstances where section 54(5) applies-has assented to the Bill.
9. In the interpretation and construction of the 1979 Constitution, the following are relevant:
    (a) Effect should be given to every word.
    (b) A construction nullifying a specific clause will not be given to the Constitution unless absolutely required by the context.
    (c) A constitutional power cannot be used by way of condition to attain unconstitutional result.
    (d) The language of the Constitution where clear and unambiguous must be given its plain, and evident meaning.
    (e) The Constitution of the Federal Republic of Nigeria is an organic scheme of government to be dealt with as an entity; a particular provision cannot be dismembered from the rest of the Constitution.
    (f) While the language of the Constitution does not change, the changing circumstances of a progressive society for which it was designed yield new and fuller import for its meaning.
    (g) A constitutional provision should not be construed so as to defeat its evident purpose.
    (h) Under a Constitution conferring specific powers, a particular poser must be granted or it cannot be exercised.
    (i) Delegation by the National Assembly of its essential legislative function is precluded by the Constitution (section 58(4) and section 4(1).
    (j) Words are the common signs that mankind makes use of to declare their intention one to another and when the words of man express his meaning plainly and distinctly and perfectly, there is no occasion to have recourse to any other means of interpretation.

(k) The principles upon which the Constitution was established rather than the direct operation or literal meaning of the words used, measure the purpose and scope of its provisions.

(l) Words of the Constitution are therefore not to be read with stultifying narrowness.

9 There can be no *estoppel* against the assertion of the Supremacy of the Constitution

10 'Bill' is the draft for a proposal of an Act of the National Assembly submitted for consideration by the Senate and the House of Representatives with a view to its being passed into law. The bill is not the document on which the draft is contained; the draft is the Bill.

11 A Bill for the payment, issue or withdrawal from the Consolidated Revenue Fund or any other public funds of the Federation (such s the 'Federation Account under section 149 of the 1979 Constitution) if any money thereon charged or any alteration in the amount of such a payment, issue or withdrawal is a money bill, and so also is a Bill for the imposition of or increase in any tax duty or fee or any reduction, withdrawal or cancellation thereof and the Revenue Allocation Bill is a money Bill.

Attorney-General of the Federation
v
Attorney-General of Abia State and others
[2002] FWLR (Part 102) 15, SCN

Facts
The Attorney-General of the Federation brought a claim against the thirty six Attorneys-General of the all the States of Nigeria seeking a determination by the Supreme Court in its original jurisdiction of the seaward boundary of a littoral state within the Federal Republic of Nigeria for the purpose of calculating the amount of revenue accruing to the Federation Account directly from any natural resources derived from the states pursuant to the provision of S 162(2) of the Constitution of the Federal Republic of Nigeria 1999. Eleven of the 36 states filed preliminary objections against the jurisdiction of the Supreme Court on various grounds.

Below are excerpts of the judgements of the Supreme Court of Nigeria which give a clear insight into the issues treated in the case.

Learned counsel for the eleven defendants have argued that the provisions of section 232 of the Constitution of the Federal Republic of Nigeria 1999 (the Constitution) require that there must be a dispute between the Federation and States before this Court can exercise its original

jurisdiction. They argued further that the dispute must involve any question of law or fact on which the existence or extent of a legal right depends. That there is no dispute apparent from the statement of Claim to justify this action. The Court, therefore lacks the jurisdiction to hear the case.

The plaintiff contends that in determining whether this Court has the jurisdiction to hear the case it needs to look at the Statement of Claim and the relief sought by it only, as laid down by the decision of this Court in *Adeyemi v. Opeyori*, (1976) 10 N.S.C.C. 455 P.464 per Idigbe, JSC *Izenkwe v Nnadozie*, 14 WACA 361. He states that the dispute or controversy which brought about the action relates to the discharge by the President of the Federal Republic of Nigeria of his responsibilities under section 162 of the Constitution. That paragraphs 6 and 7 of the Statement of Claim fall on the principle of derivation under section 162 subsection (2) of the Constitution. That the action is necessary mainly because there is a very serious dispute between the Federal Government and some of the State Governments as to the seaward boundary of the states which are by the sea.

This in turn creates a controversy as to whether natural resources located offshore of the Nigerian coastal belt must be treated as Federal or belonging to the littoral States. It is submitted that paragraphs 8 and 10 of the Statement of Claim read together establish the dispute between the Federal Government and the States which challenge the jurisdiction of the Court on the ground that there is no dispute. Now section 232 subsection (1) of the Constitution provides:

232 (1) The Supreme Court shall, to the exclusion of any other Court, have original jurisdiction in any dispute between the Federation and a State or between States if and in so far as that dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends.

It follows, therefore, that for this Court to exercise its original jurisdiction in cases between the Federation and States(s) or between States, there must be;

(a) dispute between the Federation and a State or States;
(b) the dispute must involve a question of law or fact or both; and
(c) the dispute must pertain to the existence or extent of a legal right.

What constitutes a dispute under section 212 subsection (1) of the Constitution of the Federal Republic of Nigeria, 1979, which is exactly the same provision as section 232 subsection (1) in question has been considered by this Court in the cases of *Attorney-General of Bendel State v Attorney-General of the Federal & 22 Ors (1981) 10 SC 1 and Attorney*

General of the Federation v AttorneyGeneral of Imo State &Or, (1983) 4 NCLR 178.

The issue of jurisdiction was contested on three grounds. Firstly, that there is no dispute which affected the interest of the Federation and Bendel State between the plaintiff (Bendel State) and the Federation.

Secondly ….
I think the first point may be easily disposed of from the definition of the word "dispute". The Oxford Universal Dictionary defines it as 'the act of arguing against, controversy, debate, contention as to rights, claims and the like or on a matter of opinion.

It also held as follows on P.320 thereof:
It is a well-established principle of the interpretation of constitution that the words of a constitution are not to be read with stultifying narrowness – *United State v Classic*, 313 US 299 and *NafiuRabiu v The State*, (1980) – 11 SC 130 at pp 148-149.

The word 'dispute' in section 212 (1) should therefore be given such meaning that will effectuate rather than defeat the purpose of that section of the Constitution. *Webster's New Twentieth Century Dictionary,* 2nd edition, provides that 'dispute' is synonymous with controversy, quarrel, argument, disagreement and contention.

It is clear that paragraph 10 of the Statement of defence in this case, which is quoted above, has expressly averred that there is a dispute or controversy between the Plaintiff and the 3rd, 6th, 9th, 10th, 24th, 27th and 28th defendants on the facts averred in paragraph 8 of the Statement of Claim. By the decision of this Court in the case of *Adeyemi v Opeyori,(supra)*, those averments are to be taken as true for the purpose of the present exercise. I am, therefore, satisfied that there is a dispute between the plaintiff and the littoral States as defendants in this case.
The next question is whether the dispute involves a question of law or fact or both? The preliminary objectors have variously argued that the plaintiff's claim has not established the existence of a valid dispute whether of law or fact nor disclosed the existence or extent of a legal right.

The dispute, as stated in the Statement of Claim concerns the sharing of the 'Federation Account' based on the principle of the derivation as provided under section 162 (2) of the constitution to determine who benefits or shares in the allocation of revenue accruing from the natural resources located offshore the coastal area of Nigeria. In my opinion, the dispute involves at least a question of law (if not fact) which is the interpretation of section 162 subsection (2) of the constitution, in

particular the proviso thereof which directly affects the littoral States and indirectly the non-littoral States.

The last question is whether the dispute pertains to the existence or extent of a legal right? The short answer to this is provided by the dictum of Bello, JSC in the case of *A-G of Bendel State v A-G of the Federation & 22 Ors.*, (supra) at p.50 thereof, viz:

It is clear from the two sections (of the 1979 Constitution) that the plaintiff has a constitutional right to a portion of any amount standing to the credit of the Federation Account. It follows, therefore, that the dispute between the plaintiff (Bendel State) and the Federation involves a question on which the extent of a constitutional right of the plaintiff (Bendel State) and the Federation involves a question on which the extent of a constitutional right of the plaintiff depends. I do not think any authority is required to say that constitutional right is a legal right within the purview of section 212 of the (1979) Constitution.

The next point on jurisdiction is that this Court has no jurisdiction to entertain the plaintiff's claim or grant the relief sought or to interpret section 162(2) of the Constitution including the provision thereof because the dispute is non justifiable.

As has been shown above, section 232(1) of the Constitution vests this Court with the jurisdiction to determine any dispute between the Federation and the States. In addition, section 6(1) of the Constitution vests in the Supreme Court judicial powers of the Federation and subsection (6) thereof provides that the powers vested:

(a) shall extend, notwithstanding anything to the contrary in this Constitution, to all inherent powers and sanctions of a court of law;
(b) shall extend to all matters between persons, or between government or authority and to any person in Nigeria, and to actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligation of that person.

These provisions clearly show that this Court has the jurisdiction to interpret not only the provisions of the Constitution whether on appeal or in exercise of its original jurisdiction under section 232 subsection (1). The dispute in the present case, as shown above, involves at least the interpretation of section 162(2) of the Constitution. Surely, that is a justiciable issue, apart from anything else being claimed by the plaintiff. The fact that the other issues might not be justiciable, which is arguable, cannot deny the Court the jurisdiction to interpret section 162(2) of the Constitution. Any issue which calls for the interpretation of the Constitution is obviously justiciable unless otherwise provided by the Constitution. The end result of the interpretation may not entitle the

plaintiff to the relief sought but then that is another matter, and it is not a ground to contend that the claim is not justiciable or that the Court lacks the jurisdiction to hear the case.

By misjoinder of parties it has been canvassed that the 28 non-littoral States joined by the plaintiff in the action are wrongly joined since they have no seaward boundary and ought to be struck out from the case. It is also argued that since the action is not properly constituted it is incurably defective on grounds of the misjoinder of the non-littoral states.

3.5 References/Further Readings/Web Resources

Justus, A. Sokefun (2002), *Issues In Constitutional Law and Practices in Nigeria*, Faculty of Law, OOU, Ago-Iwoye.

Justus, A. Sokefun (2011), Constitutional Law Through the Cases, Caligata Publishers.

3.6 Possible Answers to Self-Assessment Exercise

In a fiscal federalism the federal government regulates, subsides taxes, provides goods and services and redistributes incomes.

MODULE 4

UNIT 1 DELEGATED LEGISLATION

CONTENTS

1.1 Introduction

What is delegated legislation? Who can delegate? Can a person who is expected by statute to carry out an action delegate same? All these are the objects for discussion in this unit.

1.2 Intended Learning Outcomes

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

- descrbe what delegated legislation is
- explain what a delegate does
- describe who is expected by statute to carry out an action delegate same..

1.3 Delegated Legislation

Delegated legislation refers to the concept of law making by any other body outside the legislature. In the words of *Dayal,* '[A] great deal of legislation takes place outside the legislature in the government departments'.

Various reasons have been given for the necessity of delegated legislation. Stone has aptly described delegated legislation as a functional necessity. The issue of functional necessity, in Stone's conjecture implies some form of administrative usefulness actuated by some inadequacies of the legislative duties by the primary legislative organ of the government. It gives the opinion of an augmentation to the legislature by way of filling some lacunae created by the legislature in the performance of its duties.

(***Discuss the forms of delegated legislation***). Firstly, the encapsulating raison d'etre was given by Julius Stone as 'the tendency of meeting difficult policy questions by conferring administrative discretions on the applying authorities'. Delegated Legislation therefore is only administrative discretion made possible only after there has been policy legislation. The difficult policy questions in reference are such that are technical in nature or of novel experience. The use, therefore of delegated legislation is to give practical and feasible expression to the policy legislation made by the legislative authority.

Secondly, linked with this first reason is the necessity for giving precise guidance to the administration of such laws that are made continually by the legislature. This boils down to the fact that legislation in general is usually imprecise at its crude form. The precision for use is provided through administrative power given through subsidiary legislation. In these circumstances, legislation serves as a guide and a rule to meet the framework of the imprecise legislative policy. This is closely attached with the need for continuous supervision over legal development in areas where general legislation has been made. The result is the continuous growth of the area of endeavour under legislation.

Yet, another reason is the issue of law– making in areas of new knowledge where experience is virtually lacking. In this circumstance, the legislature may delegate the power of subsidiary legislation to the executive in order to blend the law and make it useful for contemporary trend and possible for future purposes at least in so far as the current knowledge could fathom out.

Attention is also paid to the dynamic role of law in an equally dynamic world. The necessity is therefore created for a regular use of subsidiary legislation in making legislation regularly relevant. This is brought about by the need for flexibility and rapid readjustment with a view to meeting changing contemporary circumstances.

Self-Assessment Exercise

What is delegated legislation?

Also, it is on record that legislative houses all over the world have a fixed period of meeting. For instance, under the Constitution of the Federal Republic of Nigeria, 1999, the National Assembly meets for not less than 181 days in a year. It is assumed that this is not enough for a detailed consideration and passage of laws. The need therefore arises for subsidiary legislation to put flesh to laws hurriedly made by the legislature due to lack of time. Basically, the issue of lack of time refers to the unavailability of time to treat all subject matters in details.

Lastly, in periods of emergency, like during serious national crises or epidemics, it will be foolhardy for the government to expect all laws to pass through legislative technicalities before eventually emerging as valid pieces of legislation. In this situation, it is necessary to find succor in delegated legislation which may be formalized by the legislature with time.

Under this situation, there may be need for immediate action to save the situation. Resort to delegated legislation for immediate needs would suffice.

Forms of Delegated Legislation

Delegated Legislation could come in various forms. It can be outright delegated legislation of power for regulations. By this, the enabling act gives the executive the power to amend, delegate or formulate subsidiary laws based on the blanket legislative policy. Section 4 of the Companies Income Tax Act is an example of this. It provides that the minister may at any time by order delegate any of the powers or duties specified in the schedule of the act or include therein powers or duties or otherwise amend such schedule or substitute a new schedule therefore.

Another law of the same kind is the Control of Advertisement (Federal Highways) Act. Section 1 of this Act provides that the minister may make regulations for the control of display of advertisements on the Federal highways as well as imposition and collection of prescribed charges of advertisements.

A look at these two laws shows the endowment of legislative powers to the minister. In the second instance, the title of the delegated legislation is called regulation.

Yet another form of delegated legislation is delegation coupled with the power to sub-delegate. In this form, the legislature expressly delegates power to a certain authority and in the same vein endows that authority to sub-delegate its powers to a competent authority. This happens when the subject matter of legislation is technical and the delegate is seized of wide discretionary powers. For instance, the Minister for Agriculture

could be given the power to make pacts with other nations on agriculture along the coast of international rivers. The issue of enforcing the legislation made thereon could be delegated to yet another authority under the Minister. The essence of this is to make for more technical input into the enforcement and observance of the law that is made.
Also, another variant is the delegation of emergency powers. This aspect strikes at the root of the reason of delegated legislation. The legislature may delegate its powers to specific authorities in emergency situations. Under this circumstances, to convene may be difficult for the legislature and a complete adherence to legislative technicalities may spell doom for the nation. In view of these, the executive may be given wide discretionary powers by virtue of a delegation. An example of this is the war period, during which it may be impossible for the legislature to seat. It is not unusual to endow the executive with legislative powers on specific subject matters.

In *Re Delhi Laws ActAIR* (1995) SC 332, the laws in question had provided for sweeping delegated legislation.The question brought before the Supreme Court of India was whether the Indian Parliament was competent to delegate extensive powers to make laws to another person or authority. All the seven justices agreed that the parliament had such powers to delegate legislative power to the executive. What they did not however agree upon was the limit of such delegation of powers. Despite this, the court still made relevant and germane constitutional inductions with strong bearing on delegated legislation. In such a case, delegated power can be further delegated in accordance with the express provisions of the enabling status.

The under listed facts are germane to all matters on delegated or subsidiary legislation:

a. The power to repeal or amend laws is a power which is coordinate and coextensive with the legislative power itself and hence it could be exercised by the authority that has power to enact laws.
b. The delegation of a power to modify would not be unconstitutional if it relates not to the legislative policy but to matters of detail which may not be considered essential to legislative function.

1.4 Summary

The two ratios have relevance in Nigeria. The first admits and approves delegated legislation and the second sets vital limits for the exercise of delegated legislation. A delegated power cannot antedate the enabling law, that is, the parent law. This is heavily supported by the legal maxim that something cannot be put on nothing. The parent legislation must come before the enabling statute.

1.5 References/Further Readings/Web Resources

Justus A. Sokefun (2002), *Issues In Constitutional Law and Practices in Nigeria*, Faculty of Law, OOU, Ago-Iwoye.

Justus A. Sokefun (2011), Constitutional Law Through the Cases, Caligata Publishers.

The Constitutional Law of India, (12th ed.).

Julius Stone, Social Dimensions of Law and Justice, 1966, London,

1.6 Possible Answers to Self-Assessment Exercises

Delegated legislation simply refers to the concept of law making by any other body outside the legislature

UNIT 2 CONSTITUTIONAL AND STATUTORY INTERPRETATION

CONTENTS

2.1 Introduction

The wording of an Act may communicate one thing and another read into it. Since the legislature is merely vested with the responsibility of enacting laws and no further, there could be occasions where an expression has more than one meaning in law.

In this unit, we look at Constitutional and Statutory interpretation with a view of highlighting the grey areas.

2.2 Intended Learning Outcomes

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

- discuss the various canons of interpretation and their limitations.

2.3 Constitutional and Statutory Interpretation

Constitutional and Statutory Interpretation appears to be one of the greatest and indeed most delicate duties of the judiciary. This issue stretches itself into the realms of practitioners and experts in specific fields of legislation who, in the main, are called upon to render assistance to the courts in terms of finding interpretation to statutes and giving meaning to specific words or expressions. Howbeit, the final arbiter under all such situations is the court which, taking cognizance of the submissions of the counsel and where necessary, the opinion of experts on expressions, must come to a conclusion.

The discussion between Bishop Hoadley and George 1 conveys in practical terms, the status of the courts in statutory interpretation. To

Hoadley, (***Succinctly discuss the term 'constitutional and statutory interpretation***)

Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the law giver to all intents and purposes, and not the person who first wrote or spoke them.
This old position was amplified by the fact that during medieval times, judges had a role in legislative drafting. This was why a medieval judge suggested to a counsel not to '…gloss over the statute…we know better than you, we make them'.

Constitutional and Statutory Interpretation is essential in order to discover the latent meaning of the law. When there exists no ambiguity in a statute there ought to be no problem of interpretation. However, where there are doubts and ambiguities to be cleared, then the issue of interpretation as a phenomenon rears its head. Such ambiguities in question are endemic to the nature of language generally due, often times, to the fluid nature of language, especially legal language. It is this aspect that attracts judicial discretion in statutory interpretation. In the words of *Denning L.J. in Magor and St Mellons Rural District Council v Newport Corp*(1950) 2 All E R 1226 at 1236:

We do not sit here to pull the language of parliament and of ministers to pieces and make nonsense of it… We sit here to find out the intention of parliament and of ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it to destructive analysis.

In performing this special art, the courts eliminate ambiguities, define terms and harmonise inconsistencies. They resort to the use of "aids to construction, presumption or pointers which are usually referred to as canons of interpretation.

In a broad form, the canons of interpretation in approaches are two. The first is the functional approach, while the other is the literal approach. This functional approach in reference has been encapsulated in the Mischief Rule.

Mischief Rule
The Mischief Rule was first used in the *Heydon's Case*16 ER 638.This rule bids the court to:

Look at the common law before the Act, and the mischief that the statute was intended to remedy. The Act is then to be construed in such a way as to suppress the mischief and advance the remedy.

The formulation of this rule came through the Baron of Exchequerwho resolved that four things should be taken into consideration in matter of statutory interpretation as follows:

a) Determination of the state of law before the making of the particular statute.
b) Discovery of the mischief or defect in the law.
c) The remedy provided in the statute.
d) The reason for the remedy.

Giving approval to this approach was Lord Diplock*in Black- Clawson International Ltd v PalerworkeWaldhof- Aschaffenbury*(1975) AC 591, where he said:

So when it was laid down, the mischief rule did not require the court to travel beyond the actual words of the statute itself to identify the mischief and defect for which the common law did not provide…

Seeking justification for this rule, the same Lord Diplock opined that it must be used with caution to justify any reference to extraneous documents for the purpose.

Self-Assessment Exercise

Why do you think constitutional and statutory interpretation is essential?

The mischief rule is in consonance with the practice in continental courts where it is allowed for the courts to make inquiries into the intention of the legislature and purposes of the law. The courts there also look into presuming the intention of the legislature. This rule allows an examination of the policy and purpose behind any statute.

Easy as this approach appears, a look at examples will show its nebulous nature. In *Smith v Hughes* [1960] 1 WLR 830, the section in question was section 1 of the Street Offences Act, 1959. This section provided as follows:

S.1 It shall be an offence for a common prostitute to loiter, or solicit in a street or public place for the purposes of prostitution.

Upon this provision, prostitutes decided a method of trying to attract customers by signaling to men from balconies or from windows. They

would indicate the price by raising their fingers. Counter offers were received equally by a show of fingers. The Queen's Bench Division decided that the mischief of the Act was to clean the streets of prostitutes. The Mischief Rule, being the first canon of interpretation has bred other principle of interpretation. It was adequate with the limited kind of cases that existed. In contemporary times, statutes put into effect new social experiments and altogether operate on a broader scale. In achieving this, the following must be taken into consideration:

a) The long title of the statute as well as the preamble stating legislative objective.
b) An inspection of the entire body of laws.
c) Identification of the legislative effect.
d) Consideration of other statutes in *parimateria.*

The Literal Rule

The literal rule indicates a leaning towards the literal meaning ascertainable by reference to the statute in question. It was epitomized by the Sussex Peerage Case(1844) 11 CI & FIN 85. In this case, perhaps as a deviation from the Mischief Rule, Tindal C.J. proclaimed:

The only rule for the construction of Acts of Parliament is that they should be construed according to the intent of Parliament which passed the Act. If the words of statute are in themselves precise and unambiguous then, no more can be necessary than to expound those words in that natural and ordinary sense. The words themselves alone do in such a case, best declare the intention of the law giver.

Relying heavily on the dictum above LJ Diplock in *Dupport Steel v Sirs*(1980) I WLR 142 said:

Where the meaning of the statutory words is plain and unambiguous, it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning, because they consider the consequences of doing so would be inexpedient or even unjust or immoral.

The main criticism against this rule is its heavy reliance on words which by their very nature are evasive, slippery and are essentially no instrument of mathematical precision (See *Awolowo v Shagari* [1979] 6-9 SC 51.

This imprecise nature invites some aids into legislative interpretation. For instance, the Latin maxim *expressiounius, exclusioalterius* means that the express mention of a thing is the exclusion of others. In this context therefore, where there is a specific mention of a group of things, it is assumed that all others unmentioned are not included. This approach again dovetails into the *ejusdem generis* rule. This rule proffers that

where general words follow specific class in reference, they may not be brought in. The usual approach in both rules is to seek assistance from the interpretation section.

Golden Rule

The Golden Rule is pivoted on the fact that it is useful in the construction of a statute to adhere to the ordinary meaning of the word used, and to the grammatical construction unless it is at variance with the intention of the legislature or leads to manifest absurdity. The gamut of this rule was stated in *River Wear Commissioners v. Adamson*[1876-77] 2 Ac 743 at 743-5 where Lord Blackburn noted as follows:

...I believe that it is not disputed that what Lord Wensledale used to call the golden rule is right… that we are to take the whole statutetogether and construct it all together, giving the words their ordinary signification unless when so applied they produce an inconsistency, or an absurdity or inconvenience so great as to convince the court that the intention could not have been to use them in their ordinary significance and to justify the court. In putting on them some other signification which though less proper, is one which the court thinks the words will bear.

The fundamental principles of the golden rule as follows:

1. Interpretation of every clause with reference to its contents, in conjunction with other sections, of the statute.
2. The Interpreter should place himself in the position of the legislature.
3. Referring to other statutes in the case of consolidating Acts.

To the extent that the Golden Rule allows for extrinsic references, it is a modification of the mischief rule.

There is also the purposive interpretative/liberal approach. This is a espoused in various judgment ranging from *Seaford Coast's Estate v Asher*(1949) 2KB 184 *and Magor and St Melons Rural DC v Newport Corp* (1950) All ER P 1226. In this case the court was quoted as follows: We sit here to find out the intention of parliament and of ministers and carry it out. We do this better by filling in the gap and make sense of the enactment than by opening to destructive analysis.

Another case that adopted the purposive interpretative approach was *Pepper v Hart*(1993) 1 All ER 42. Here, the House of Lords in England had recourse to Parliamentary debates as an aid to construction. This case was cited in *A. G. Lagos v Attorney General (Federation) &Ors*(2003) 6 SCNJ 1,where the Supreme Court adopted the purposive interpretative approach in ascertaining and interpreting the scope of section 20 of the 1999 Constitution of the Federal Republic of Nigeria. The court

considered the discussions, considerations, deliberations, recommendations and resolutions of the 1994/1995 Constitutional Conference that lead to the formulation of the issues on environmental protection as contained in section 20 of 1999 Constitution. (***Explain the rules of interpretation you know***)

Nigerian Courts have developed their own interpretation rules along the English courts lines.

Case Analysis
Chief Obafemi Awolowo
v
1. Alhaji Shehu Shagari
2. Alhaji Ahmadu Kurfi
(the Chief Electoral Officer of the Federation)
3. FLO Menkiti
(the returning officer, presidential election)

[2001] FWLR (part 73) 53,SCN
Both the appellant and the 1st respondent were among the presidential candidates seeking election into the office of President of the Federal Republic of Nigeria. The election was conducted by the Federal Electoral Commission (FEDECO).

The result of the election showed that the 1st respondent scored the highest number of votes cast throughout the country followed by the appellant. In actual figures, the 1st respondent got 5,688,857 votes while the appellant got 4,916,651 votes.

The 1st respondent at the same exercise scored at last 25 % of the total votes cast in each of the following twelve States- Bauchi, Bendel, Benue, Borno, Cross River, Gongola, Kaduna, Kwara, Niger, Plateau, Rivers and Sokoto while the petitioner scored at least 25% of the total votes cast in each of the following six States- Bendel, Kwara, Lagos, Ogun, Ondo and Oyo (See Exhibit T2). In Kano State, the 1st respondent scored 243,423 votes which, when worked out on a percentage basis against the total votes cast in the whole of Kano State, came to 19.94 %.

It was on the basis of the aforesaid score by the 1st respondent, that the third respondent, Mr. F.L.O. Menkiti, who was the Returning Officer Presidential Election, declared the 1st respondent elected as the President of the Federal Republic of Nigeria.

The petitioner was dissatisfied with this declaration, and he filed a petition at the Electoral Tribunal (No.3) Lagos State, which Tribunal was

seised with the determination of petitions in regard to the Presidential Election.

The tribunal's main task was to interpret the expression "two-thirds of all the of the Federation" in section 34(A)(1)(c)(ii)of the Electoral Decree No. 73 of 1977, which they did by interpreting it to mean "twelve two-thirds states". It then dismissed the petition and declared the 1st respondent as duly elected President.

The appellant appealed to the Supreme Court, which construed section 34A (1)(c) of the Electoral Decree No. 73 of 1977. It then provides:

A candidate for an election into the office of President shall be deemed to have been duly elected to such office where

(c) being more than two candidates-
  (i) he has the highest votes cast at the election, and
(ii) he has not less than one-quarter of the votes cast at the election in each of at least two- thirds of all the States in the Federation."

The Supreme Court in this matter dealt extensively with the functions of the Judiciary in Statutory interpretation and most importantly, the canons of interpretation. Hereunder are the highlights of the judgment of the Court:

1. In most countries with common law jurisdiction, it is the function of the judiciary to interpret the law with the minimum of direction from the legislature as to how they should set about these tasks. Thus, nearly all the principles, precepts and maxims of statutory interpretation are judge- made.
2. (a) A statute should always be looked at as a whole.
   (b) Words used in a statute are to be read according to their meaning as popularly understood at the time the statute became law.
   (c) A statute is presumed not to alter existing law beyond that necessarily required by the statute.
3. Some canons of interpretation take the form of broad general principles only. Consequently, a common feature of most of them is that they are of little practical assistance in settling doubts about interpretation in particular cases. This is partly due to vagueness, but also because, in many cases, where one canon appears to support a particular interpretation, there is another canon, often of equal status, which can be invoked in favour of an interpretation which could lead to a different result.
4. The three rules of statutory interpretation in common law countries which dominate the historical perspective are:
   (a) The mischief rule
   (b) The literal rule; and

(c) The golden rule.

5. The mischief rule is used to explain what was said by legislature, not to change it as at the time of *Heydon's* case. The object of the statute is relevant on all occasions not only when the meaning is doubtful.
6. The golden rule can only be invoked when there is internal disharmony in the statute, not in cases which are absurd or inconvenient for other reasons. Thus, the golden rule, allows for a departure from the literal rule when application of the statutory words in the ordinary sense would be repugnant to or inconsistent with some other provisions in the statute or even when it would lead to what the court considers to be an absurdity. The usual consequence of applying the golden rule is that words which are in the statute are ignored or the rule is used as a jurisdiction for ignoring or reading in words Resort may only be made to it in the most unusual cases.
7. The literal rule of construction is done according to the intent of the legislature which passed the statute. If the words of the statute are precise and unambiguous, then no more can be necessary than to expound those words in the natural and ordinary sense.

The words themselves alone, do in such a case, best declare the intention of the lawgiver. But if any doubt arises from the terms employed by the legislature, it is safe means of collecting the intention to call in aid the ground and cause of making the statute and to have recourse to the preamble which is a key to opening the minds of the makers of the Act, and the mischief which they intend to redress. The proper application of the literal rule does not mean that the effect of a particular word or phrase, clause or section is to be determined in isolation from the rest of the statute in which it is contained.

8. The duty of a court in interpreting a statute is to give effect to its intention. The court cannot order the legislature or its draft men to observe the rule which the judges laid down. In the instant case, in interpreting the Electoral Decree which was enacted by the Supreme Military Council, the duty of the court is to convey the intention of the Council and give effect to the intention.
9. 'State' by virtue of the Electoral (Amendment) Decree No. 37 of 1979 and the State (Creation and Transitional Provisions) Decree, 1976, refers to a physical territorial area.

Role of Court in Interpretation and Principles of Constitutional Interpretation

Alhaji Oyedele Ishola

(Substituted by Mustapha Oyedokun)

v

Memeudi Ajiboye
(For himself and on behalf of Abioye family)
[1994] 6 NWLR (Part 352) 506, SCN
Issue:
What should be the composition of the High Court of Kwara State when sitting to determine an application for leave to appeal to the Court of Appeal against the decision of the said High Court sitting in its appellant jurisdiction having regard to Section 238 of the 1979 Constitution and Section 63 of the High Court Law of Kwara State?
Held**:**

1. A court is competent when:
   a. It is properly constituted as regards number and qualification of the members on the bench, and no member is disqualified for one reason or another; and
   b. The subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the court from exercising its jurisdiction; and
   c. The case comes before the court initiated by due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction.
      Any defect in competence is fatal, for the proceedings are a nullity, however well conducted and decided they may be. This is because the defect is extrinsic to the adjudication.
   d. In the instant case, the challenge to the competence of the High Court is predicated on its composition whilst hearing the application for leave to appeal to the Court of Appeal. This falls under the rubric of (a) above [*Madukolu v. Nkemdilim*[1962] 2 SCNLR 341; *Skenconsult (Nig.) Ltd v. Ukey*(1981) 1 S. C. 6 at 26.
2. The provisions made in section 274 of the Constitution of the Federal Republic of Nigeria 1979 in relation "existing law" are not novel in the constitutional development of this country. The 1960 Constitution contained similar provisions. However, the fundamental difference between those provisions of 1960 and those of section 274 of the 1979 Constitution was that the relevant provisions 1960 Constitution limited to six months the time within which necessary changes could be made in the existing law by the appropriate authority. In respect of the corresponding provision of the 1979 constitution, *id est*, section 274, there is no limitation of time.
3. A court of law has an important role to play in the process of construing and in relation to the effect, if any, to be given to an existing law under the provisions of section 274 of the of 1979 Constitution. The Supreme Court has judicially pronounced on the foregoing principle, and the proposition that section 274(1) for 1979 Constitution imposes an exercise on the courts in its

interpretative jurisdiction in order that effect shall be given to an existing law without prejudice to their powers to declare invalid any provision of the 1979 Constitution. A court is, furthermore, obliged to construe an existing law in such a way as to give effect thereto and, if need be, to apply such modification as would make the existing law effective. When such alterations and modifications have been made, the existing law shall be read with such modifications, and shall be deemed as a law of the National Assembly or of a State House of Assembly, as the case may be. However, where what is required is to make textual changes in the existing law to bring it into conformity with the provisions of the Constitution, it is for the appropriate authority to make such changes by way of an adaptation order. [*Adigun Attorney General, Oyo State* [1987] 1 NWLR (Pt53)678.

4. Because the function of the Constitution is to establish a framework and principles of government which are broad and general in terms and intended to apply to the varying conditions entailed by the development of the diverse communities that exist in the dynamic and pluralistic Nigerian society, mere technical rules of interpretation of statutes are, to some extent, inadmissible in a way so as to defeat the principles of government enshrined in the Constitution. On the contrary, some of these principles of constitutional interpretation must be borne in mind:
   (a) The Constitution of the Federal Republic of Nigeria is an organic scheme of government to be dealt with in its entirety; a particular provision of the Constitution cannot be severed from the rest of the Constitution;
   (b) The principles upon which the Constitution was established rather than the direct operation or literal meaning of words used measure the purpose and scope of its provisions;
   (c) Words of the Constitution are not to be read with stultifying narrowness;
   (d) Constitutional language is to be given a reasonable construction, and absurd consequences are to be avoided;
   (e) Constitutional provisions dealing with the same subject matter are to be construed together;
   (f) Seemingly conflicting parts are to be given to all parts of the Constitution,
   (g) The position of an article or clause in a Constitution influences its construction.
   (h) Where in their ordinary meaning, the provisions are clear and unambiguous, effect should be given to them without resorting to any external aid.
   (i) Words of a constitution may not be ignored as meaningless; some meaning or effect should be given to all conformity with the intention of the framer. [*Rabiu v. State* [1980] 9 –

11 S. C. 130 at 149: *Attorney Bendel v Attorney Federation* [1981] 10 SC 1.

5. The phrase 'any law' used in section 238 of the 1979 Constitution includes existing laws which are valid and not inconsistent with the provisions of the 1979 Constitution.
6. Per IGUH, JSC
   I have given the above submissions some anxious consideration and I entirely agree with the learned *amicus curiae* that the word '*shall'* in section 238 Constitution is used in a directory or permissive context and not in a mandatory sense. In my view, the words '*at least'* used in that section of 1979 Constitution may be ignored as meaningless. In constructing a Constitution, some meaning or effect should be given to all the words or language used if it is possible to do so in conformity with the intention of the farmers and unless the context suggests otherwise, words are to be given their natural, obvious or ordinary meaning.

There is certainly an ocean of difference between a statutory or constitutional provision to the effect that the High Court of State shall be properly constituted by 'at least one Judge' as against another provision that such a court shall be properly constituted by *One Judge'.*

\The former provision clearly connotes a minimum of one Judge for a proper constitution of that court thus making it permissible for one or more Judges of that court to exercise any jurisdiction conferred on such a court. The latter, on the other hand, would appear to make it mandatory that in exercising its jurisdiction, that court shall be duly constituted by one Judge. I am therefore of the view that the use of the words 'at least'seems to suggest the word 'shall'in section 238 of the 1979 Constitution. I agree entirely with learned counsel that the word is therein used in a directory sense only and that the logical construction of section 238 is that it is permissive of a High Court of a State to be duly constituted by a number of Judges higher than one.

7. Section 238 of the 1979 Constitution provides that the High Court of a state is duly constituted if it "consists of at least one Judge of that court". The key to the construction lies in the phrase "at least". It means that, for the purpose of exercising any jurisdiction (including appellate jurisdiction by virtue of section 236(2) conferred upon it under the Constitution or any law, a High Court of a state shall be duly constituted if it consists of a number of Judges, but not less than one Judge of that Court. Thus, the section allows the court to be constituted by more than one Judge. Support for the above interpretation may be garnered from the wording of section 214 of the 1979 Constitution relating to the composition of the Supreme Court.

Per Ogundare JSC
There is a world of difference between the provision of section 238 as it stands and a provision that reads thus:

For the purpose of exercising any jurisdiction conferred upon it under this Constitution or any law, a High Court of a state shall be duly constituted if it consists of one Judge of that court.

In that latter case, there would be no argument that the section has covered the field in so far as the subject of the constitution of a State High Court is concerned. But by the use of the words 'at least' in section 238 as it presently stands, the section cannot be said to have covered the field nor that it is self-executing. A constitutional provision is self-executing when it lays down a sufficient rule by means of which the right or purpose which it gives or is intended to accomplish may be determined, enjoyed or protected without the necessary aid of legislative enactment. InWillis v. St. Paul Sanitation Co [1892] 48 Minn, 140, 50 NW 1110, 1111-2, the Minnesota Court in the United States of America, stated:

if the nature and extent of the right conferred and of the liability imposed is fixed by the provision itself, so that they can be determined by the examination and construction of its own terms, and there is no language used indicating that the subject is referred to the legislature for action, then the provisions should be construed as self-executing.

See also *Higgins . Cardinal Mfg Co*[1961] 188 Kan 11, 360 P 2D 456, 462 where the Arkansas court also stated:
It is a settled rule of constitutional construction that prohibitive and restrictive constitutional provisions are self-executing and may be enforced by the courts independent of any legislative action unless it appears from the language of the provision that the enactment of legislation is contemplated as a requisite to giving it effect.

The Arkansas Court suggested in *Rockefeller v. Hague* 244 Ark 1029, 429 S W 2d 85, 88 the test to be applied.

It said that one of the principal tests as to whether a constitutional provision is self-executing is the determination, from the language, its nature and its objects, whether it is addressed to the legislative branch or to the judicial branch. Where the provision merely announced general principles, or where the framers expressly or by necessary implication indicate legislative action to follow in order to give effect to the principle, the provision is non self-executing.

Per Bello, CJN

I am very much impressed by the submission of Mr. Hom and Alhaji Mahmoud on their approach to the interpretation of section 238 of the 1979 Constitution and section 63 of the Law. It is a cardinal principle of interpreting the provisions of the Constitution that where in their ordinary meaning the provisions are clear and unambiguous, effect should be given to them without resorting to any external aid: *Attorney General of Bendel State v Attorney General of the Federation (supra).*

Now, section 238 of the 1979 Constitution provides that for the purpose of exercising any of its jurisdiction, the High Court shall be duly constituted if it consists of '*at least one Judge'* of that court. The words 'at least one Judge' are the operative words for the determination of the composition of the court under the Constitution. In its ordinary meaning, the word 'least', *inter alia',* means 'a minimum' and the phrase 'at least' means 'qualifying an expression of an amount or number, (so much or many)at any rate, is not more': *The Shorter Oxford English Dictionary*, Third Edition.

2.4 Summary

It is clear that in its ordinary meaning, section 238 of the 1979 Constitution puts a minimum of one Judge to constitute the court and does not restrict the number of Judges that may constitute the court. Accordingly, two or more Judges may within the purview of the section constitute the court. It also appears clear to me that the provisions of section 63(1) of the Law that '*the High Court shall be constituted of two Judges of the court'* in the exercise of its appellate jurisdiction is mandatory and a single Judge cannot constitute the court. Since it is permissible to have two Judges constituting the court under section 238, section 63(1) cannot be said to be inconsistent with section 238. Accordingly, I hold the remainder of section 63(1) to be a valid existing law."

2.5 References/Further Readings/Web Resources

Justus A. Sokefun (2011), *Constitutional Law Through the Cases*, Caligata Publishers

Justus A. Sokefun, J.A. (2002). *Issues in Constitutional Law and Practice in Nigeria.*In honor of Dr. OluOnagoruwa: Edited by Justus A. Sokefun (2002) Faculty of Law, Olabisi Onabanjo University, Ago Iwoye .

2.6 Possible Answers to Self-Assessment Exercises

Constitutional and Statutory Interpretation is essential in order to discover the latent meaning of the law. When there exists no ambiguity in a statute there ought to be no problem of interpretation

UNIT 3 MILITARY RULE

CONTENTS

3.1 Introduction

The rule of law is not the rule of might. Military rule is the rule of might by a certain individuals of the armed forces usurping political powers and suspending the Constitution.

In this unit, the issue of Military rule is discussed with a view of highlighting the features and its history in Nigeria.

3.2 Intended Learning Outcomes

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

- trace the history of Military rule in Nigeria from 1960 to 1999 and their various features.

3.3 Military Rule

Since Nigeria gained her Independence in 1960, and before 1999, Nigeria had more years of Military rule than Civilian rule. Previous civilian governments were short-lived and truncated abruptly by revolution through coups d'etats. The ensuring situation always brought about a military rule.

Section 1(2) of the 1999 Constitution provides that the Federal Republic of Nigeria shall not be governed nor shall any person or group of persons take control of the government of Nigeria or any part thereof, except in accordance with the provisions of the Constitution.

It is evident from that provision that the Constitution did not envisage any governance outside a civilian rule (democracy). The Constitution provided for modes and means of power succession in the country, not by a military takeover, but a rule by due process. Thus, military rule is a form of revolution in Nigeria.

In the words of Lenin at page 20. 'A revolution is an act whereby one part of the population imposes its will upon the other part by means of rifles, bayonets and authoritarian means…'

(***Briefly discuss the features of military rule***). The definition by Lenin encapsulates the general phenomenon of a revolution that brings about military rule. The Black's Law Dictionary defines a revolution as a complete overthrow of the established government in any country or State; by those who were previously subject to it.

The succinct definition encapsulates the general the general phenomenon of a resolution that brings about military rule. To augment this definition, Black's Dictionary defines a revolution as a complete overthrow of the established government in a country or state, by those who were previously subject to it.Kelsen gave the juristic viewpoint when he suggested that the decisive criterion of a revolution is that the order in force is overthrown and replaced by a new order in a way which the former had not itself anticipated.

Kelsen suggested further that 'when revolution occurs, the legal order of the community is nullified and is replaced'. A military revolution or what has become popularly known as a Coup d'etat is usually spearheaded by members of the military institution for diverse reasons. The end product of such a revolution is a military rule. For the fact that they attain power through extra-constitutional means, it is expected that the military institution will rule outside the purview of the Constitution. This is a peculiarity of all military rules the world over.

Customary international law recognizes Coup d'etat as proper and effective means of changing a government provided that the following requirements are fulfilled;

(a) There must have been an abrupt political change.
(b) The change must have been within the contemplation of an existing constitution.
(c) The change must destroy the entire legal order except what is preserved and
(d) The new constitution must be effective.

Military rule is governance by the armed forces in any country. To date, Nigeria has had at least eight coup d'etats. The first was recorded in January 1966. It was staged by the officers of the Nigerian Army.

January 15, 1966 witnessed the emergence of Decree No 1. This Decree was titled Constitution (Suspension and Modification) Decree No1 of 1966. This was the first legislative action of the Armed Forces on having

a *terra firma*. It abolished the Parliament and the Regional Legislative Councils and listed in its first schedule the sections of the Constitution that were suspended. It also provided in its section 6that 'no question as to the validity of this Decree or any Edict shall be entertained by any Court of Law in Nigeria'. This section expunged the power of the court to challenge the validity of any decree.

Self-Assessment Exercise

What is military rule?

The courts therefore exercised their adjudicatory powers only where they had been ousted by a provision in a Decree. With this Decree, the hitherto *fons et erigo,* which was the legal source,the Constitution was displaced. It ceased to be the grundnorm and the emission of the validity to other norms fell on the said Decree No. 1. Each administration brought about by a Coup *D'etat* had its own Constitution (Suspension and Modification) Decree. The Coup of December 31st, 1983 brought into being the Buhari/Idiagbon Government. This regime had its own Constitution (Suspension and Modification) Decree No.1 of 1984. The Abacha/Diya regime promulgated its own Constitution (Suspension and Modification) Decree as Decree No107 of 1993.

With the promulgation of this decree, the first thing to note is the complete destruction of democratic structures in the state and erosion of the principle of separation of powers.

For instance, under section 8 of the defunct Decree No 107 of 1993, the Provincial Ruling Council, the Federal Executive Council and National Council of State were created. The Provincial Ruling Council consisted of some Ministers, all Service Chiefs, the Chief of General Staff and the Special Adviser on National Security. The Chairman was the Head of State and Commander in Chief of the Armed Forces while the Chief of General Staff was the Vice-Chairman. The Federal Executive Council consisted of the Head of State as Chairman and such number of men and women of unquestionable and proven integrity as the Provincial Ruling Council, may from time to time appoint as the National Executive Council, this consisted of the Head of State as the Chairman, the Chief of General Staff, the Minister of Defence, the Service Chiefs and such other members as the Provincial Ruling Council might appoint.

The Executive Council for each State of the Federation was also created under section 9 of the Decree. It consisted of the State Administrator as the Chairman, a senior member of the Army, Navy and Air Force and the most Senior Police Officer in the State and such other members to be known as Commissioners as the Administrator may appoint.

The functions of the Provincial Ruling Council included;

(a) The determination from time to time of National policy on major issues affecting the Federal Republic of Nigeria.
(b) Constitutional matters, including the amendment of the Constitution of the Federal Republic of Nigeria.
(c) All national security matters, including the authority to declare war or proclaim a state of emergency or martial law.
(d) The ratification of the appointment of such senior public officers as the Council may from time to time specify; and
(e) General supervision of the work of States, Council of State and the Federal Executive Council.

Section 10 (2) of the Decree provided expressly that the power vested in the National Assembly or the Federal Military Government specified in the sections of the Constitution of the Federal Republic of Nigeria, 1979 shall vest in the Provisional Ruling Council which was a body consisted of Executive members.

3.4 Summary

From the above provisions, it is clear that the Provisional Ruling Council was endowed with both executive and legislative powers.

Certain issues are clear as far as relationship between Decrees and the Constitution was concerned. It was clear for instance that Decrees were superior to the suspended parts of the Nigerian Constitution. In section 1 (3) of Decree 107, 1993, it was provided that the provisions of the Constitution which were not suspended shall have effect.

Other major constitutional issue that had arisen ever since the advent of military rule was their deliberate efforts to protect their administration and actions from litigation in the courts. This they did through what was known as ouster clauses. By the fiat of those two words, a court was hamstrung to adjudicate on anywhere they were cited.

3.5 References/Further Readings/Web Resources

Justus A Sokefun (2002) . *Issues In Constitutional Law and Practices in Nigeria,* Faculty of Law, OOU, Ago-Iwoye.

Justus A. Sokefun (2011). Constitutional Law Through the Cases, Caligata Publishers.

Lenin, State and Revolution, Peking,

3.6 Possible Answers to Self-Assessment Exercises

In a nutshell, Military rule refers to governance by the armed forces in any country.

UNIT 4 DECREES AND OUSTER CLAUSES

CONTENTS

 4.1 Introduction

One of the distinguishing features of Military rule is the suspension and modification of the Constitution. Another is ousting the jurisdiction of the Courts in the performance of their adjudicatory roles.

In this unit, we take a look at the various ouster clauses under the Military rule.

 4.2 Intended Learning Outcomes

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

- describe the various details of Ouster clauses
- list the hierarchy of laws under the Military regime,
- explain the notable differences between decrees and edicts.

 4.3 Decrees and Ouster Clauses

Ouster clauses exist by means of drafting mechanism usually employed as a way of excluding the adjudicatory powers of courts in particular issues. Examples of each drafting mechanism include such clauses as:

(a) Outright exclusion of courts' powers in the challenge of a specific law;
(b) Decision of an agency being final and conclusive;
(c) The decision of the government or a Tribunal not challengeable under an existing Decree.

(***Comparatively define the two terms, decree and ouster clauses***). A Decree was superior to the Constitution under Military Rule. This decision was reached in *Labiyi v Anretiola*[1985] 3 NWLR part 13 p 497, where the Supreme Court held that by virtue of Section 2 (4) of the

Constitution (Supremacy and Modification) Decree, No 1 of 1984, where any law made by the House of Assembly of a State before the 31st December, 1983 or made by a Military Governor of a State thereafter, is inconsistent with any law made by the National Assembly before that date or by the Federal Military Government, the laws of the National Assembly or the Decrees of the Federal Military Government shall prevail and the State Law, shall, to the extent of the inconsistency, be void. The Court went further to hold that although it had once attempted to assert its constitutional authority by declaring that the provisions of a Decree which were in conflict with the provisions of the Constitution were invalid, the correct position is that the Decrees of the Federal Government are superior to the unsuspended sections of the Constitution. In that case, the court made an expose of the hierarchy of laws in Nigeria. It said that with regard to section 1 (1) & (2) of Decree No 1 of 1984, the status of the laws in Nigeria in order of priority as from 31st December, 1983 was as follows:

(a) Constitution (Suspension & Modification) Decree No 1 of 1984;
(b) Decree of the Federal Military Government;
(c) Unsuspended provisions of the 1979 Constitution of Nigeria;
(d) Laws made by the National Assembly before December 31st 1983 or having effect as if so made;
(e) Edicts of the Governor of a State;
(f) Laws enacted before 31st December 1983 by the House of Assembly of a state or having effect as if so enacted.
(g) Hierarchy of Laws in a Military Regime
(h) Edicts and Decrees
(i) Ouster Clauses

The Attorney General of the Federation

v

1. *Guardian Newspapers Limited*
2. *Rutam Crellon Computers Limited*
3. *Meleq-m*
4. *PMS ltd*
5. *Express Printing and Packaging ltd*
6. *Guardian Services ltd*

[2001] FWLR (part 32) 87, SCN.

The respondents carried on at all material times to this case their businesses in the premises known as Rutam House at lsolo Expressway, Lagos. They were (and are) different and separate businesses. Only the 1st respondent is engaged in the business of publishing newspapers and magazines. At about 12:10 am in the early hours of Monday, 15 August, 1994, about 150 armed policemen entered the said Rutam House premises. No warrant of any type or judicial order was produced to support this invasion of private premises, properties and rights. The 2nd

respondent is a computer distribution and consultancy company, the 3rd respondent an engineering services company, the 4th respondent, a merchandising and trading company, the 5th respondent, a printing and packaging, 6th respondent is a management consultancy services company. The said Rutam House premises were sealed up and kept under armed guard.

Self-Assessment Exercise

Provide any three examples of drafting mechanism you know

The respondents then approached the Federal High Court to seek redress. They came under the Fundamental Rights Enforcement Procedure upon an application *ex parte* with a view to obtaining a number of declaratory reliefs as to the constitutionality of the action of the police, a mandatory injunction, damages of N200 million on behalf of the 1st respondent and N50 million on behalf of each of the 2nd to 6th respondents. The Federal High Court, presided over by Kolo, J., gave leave on 17 August, 1994 to the respondents to seek to protect their fundamental rights. On 30 August, 1994, Auta, J., sitting in the Federal High Court, gave leave to the Inspector General of police to join as a respondent (defendant) to the action while the action itself was still before Kolo J

The present respondents say that somehow they sighted sometime in September, 1994 in the Federal Republic of Nigeria Official Gazette No 3Vol 81, dated 24 August, 1994, the following two enactment;(i) Guardian Newspapers and African Guardian Weekly Magazine (Proscription and Prohibition from Circulation) Decree 1994 No.8; and (ii) Federal Military Government(Supremacy and Enforcement of Power) Decree 1994 No.12.The said Decree No.8 of 1994 was promulgated, on the face of it, on 24 August, 1994 but with the commencement date made retroactive from 18 November, 1993. As a result, the respondents applied for a determination of the questions whether the said Decrees No. 8 and No. 12 of 1994 are Decrees of the Federal Military Government and whether the proceedings to enforce the fundamental rights of the respondents have accordingly abated.

The said questions which were raised in the amended summons filed in this connection were:

(i) Whether the instruments published as Decree in the Federal Republic of Nigeria Official Gazette No. 3 Volume 81 dated 24th

August, 1994 are enactment or Decrees of the Federal Military Government.

(ii) Whether the proceedings herein or any portion thereof have abated and become of no effect whatsoever as a result of the Guardian Newspapers and African Weekly Magazine (Proscription and Prohibition from Circulation) Decree 1994 No. 8 or as a result of the Federal Military Government (Supremacy and Enforcement of Powers) Decree 1994 No.12 or as a result of any other enactment or law relating to the jurisdiction and powers of courts of law in general or the Federal High Court in particular.

Arguments were canvassed as to the true status of Decree No 8 and No. 12 of 1994, i.e. Whether they are enactments properly so called to qualify as Decree promulgated under the powers to legislate and/ or whether they are legislative judgment in the sense that they inflicted punishment on individuals the way a judgment of a court or tribunal would (but after due proceedings).

On 13 October, 1994, Kolo, J, ruled that Decrees 8 and 12 of 1994 were enactments which were properly made by the Federal Military Government, and that the court lacked jurisdiction to entertain the said proceedings. The respondents appealed to the Court of Appeal which, on 13 June, 1995, overruled kolo, J, holding that the Inspector-General of Police was wrongly joined and that the Federal High Court had jurisdiction to hear and determine the action.

Being dissatisfied, the appellants appealed to the Supreme Court, contending, inter alia, that no court in Nigeria has jurisdiction to declare invalid the Decrees made by the Federal Military Government of Nigeria. Section 1(2) of Decree No 107 provides as follows:

Subject to this and any other Decree made before or after the commencement of this Decree the provisions of the said Constitution which are not suspended by subsection (2) of this section shall have effect subject to the modification specified in the second schedule to this Decree.

Section 2 (1) of Decree No 107 provides that: 'The Federal Military Government shall have power to make laws for the peace, order and good government of Nigeria or any part thereof with respect to any matter whatsoever'. Section 3(1) of Decree No 107 of 1993 also'provides for the procedure making of laws, states that: 'The power of the Federal Military Government to make laws shall be exercised by means of Decree signed by the Head of State…'.

Section 4(1) of Decree No. 107 as follows: 'A decree is made when it is signed by the Head of State, Commander- in-Chief of the Armed Forces

whether or not it then comes into force'. Section 5 of Decree No. 107 of 1993 which provides:

No question as to the validity of this Decree or any other Decree made during the period 31st December, 1993 to 26th August, 1993 or made after the commencement of this Decree or of an Edict shall be entertained by any court of law in Nigeria.

Sections 1& 2 of Decree No 107 reads:

1. Notwithstanding anything contained in the Constitution of the Federal Republic of Nigeria 1979 as amended, or any other enactments of law, the newspaper and Weekly Magazines listed in the Schedule of this Decree, published by Guardian Newspapers Limited, both with Headquarters at Rutam House, Isolo Expressway, Oshodi, are hereby proscribed and from being published and prohibited from circulation in Nigeria or any other part thereof.
2. The premises where the Newspapers and Magazines referred to in section 1 of this Decree are printed and published shall be sealed up by the Inspector- General of police or any officer of the Nigeria Police Force authorised in that behalf during the duration of this Decree.

Decree No. 12 of 1994 provides:
No civil proceedings shall lie or be instituted in any court for or on account of or in respect of any act, matter or thing done or purported to be done, under or pursuant to any Decree or Edict and if such proceedings are instituted before, on or after the commencement of this Decree, the proceedings shall abate, be discharged and made void.

The Court held as follows:

1. Attention must also be drawn to the fact that the Federal Military Government rules by the enactment of Decrees. It is now settled law that decrees are the highest form of law in Nigeria under the Military Government and that the provisions of a Decree are superior to those of the 1979 Constitution or the unsuspended sections thereof. Accordingly, once a Decree is duly promulgated, its provisions enjoy well settled superiority over those of the 1979 Constitution or any other enactment on the subject matter. Thus, the unique but judicially recognised peculiarity of the Military regime is the subjection of the provisions of the Constitution and indeed, any other law whatever to those of a Decree. *Attorney General of the Federation vs. Sode* (1990) 1 NWLR (Pt 128) 500 at 518; *Military Governor of Ondo State v Adewunmi* (1988) 3

NWLR (Part 82) 280; *Adejumo v Military Governor of Lagos State* (1972) 3 SC 45.

It is also trite law that the provisions of any legislation, inclusive of those of the unsuspended sections of the 1979 Constitution, which are in conflict with those of any Decree or Edicts are to the extent of such inconsistency or conflict of no effect and null and void. Although, the courts are vested with jurisdiction to determine whether the provision of an unsuspended section of the 1979 Constitution is inconsistent, courts possess neither the jurisdiction nor the competence to challenge the validity of a Decree whether as being in conflict with the Constitution or with any other enactment. In other words, no question as to the validity of a Decree shall be entertained by any court of law in Nigeria whether as being in conflict with any section of the Constitution or, indeed, with any other Decree.

The above proposition of law is clearly set out by section 5 of Decree No 107 of 1993, wherein it is provided as follows:

Section 5:
No question as to the validity of this Decree or any other Decree made during the period 31st December, 1983 to 26th August, 1993 or made after the commencement of this Decree or of any Edict shall be entertained by any court of law in Nigeria. (See also *Labiyi vs. Anretiola* (1992) 8 NWLR (Pt 258) 139 at 170-171; *Adejumo v Military Governor of Lagos State* (1972) 1 AII NLR (Pt1) 159 at 169) It therefore, seems to me that as at the present time, there does not appear to exist any recognised exceptions to the general rule that a court of law is without jurisdiction to challenge the validity of a Decree which has been enacted according to law, whether as being in conflict with the 1979 Constitution or with any other statute.

2. Courts ought to guard their jurisdiction jealously; however, if in any case, that jurisdiction is expressly ousted by the provisions of a Decree, the path of justice dictates compliance with such an ouster clause. In the instant case, the ouster clauses in Decrees Nos 8 and 12 of 1994 are clear and totally unambiguous and effectively divested the Federal High Court of its jurisdiction to entertain the present suit in relation to the 1st respondent.
3. Courts in Nigeria lack the power to question the competence of the Military Governments to promulgate a Decree or Edict. In the instant case, the Court of Appeal erred in holding that Decrees Nos.8 and 12 of 1994 were not valid Decree. *[Midwest vs. Esi* (1997) 4 SC 7; *Abayo vs. Civil Service Commission, BenueState* (1991) 3 NWLR (Pt. 182) 693 referred to]

4. No court is also competent to pronounce the competence of the Military Governments to promulgate a Decree or Edict with regard to its superiority thereof. *[Labiyi vs. Anretiola*(1992) 8 NWLR (Pt. 258) 139 referred to

Per UWAIFO, JSC:
Issue 2 refers to some of the observation of Pats Acholonu, JCA in the present case. It is true the learned Justice devoted some passages in his judgment to the jurisprudential aspect of positive law and natural law which stands for what is good and that if a law at any point departs from natural law, it is no longer law but a prevention of law. In the course of that, the learned justice seems to want to judge the validity of a law on the basis of ethics, morality and religion. The learned Justice may, admittedly, have gone far and away from the real issues. Somehow, I think it must be conceded that that proposition is not only wholly irrelevant but it cannot be considered right in the circumstances of this case.

5. An action lies to challenge an Edict on the ground that it is inconsistent with the provisions of a Decree, but no action lies to challenge a Decree on the ground that it is inconsistent with the provisions of the 1979 Constitution or any other law or statute. *[Military Governor, OndoState v Adewunmi*(1988) 3 NWLR (Pt 82) 280; *Onyiuke vs. Eastern States Interim Assets & Liabilities Agency* (1974) 1 ALL NLR (Pt. 2) 151 referred to.
6. When there is successful abrupt change of government in a manner not contemplated by the constitution, a revolution is deemed to have taken place. If such change was brought by the military revolution even if it was a peaceful change.
7. The claims of the respondent are within the jurisdiction of the Federal High Court as conferred on it by section 230 (1) of the 1979 constitution, as modified by Decree 107 of 1993. The action was properly constituted and was initiated by due process of law. However, the effect of the clauses in Decrees Nos. 8 and 12 of 1994 is that the subject of the action ordinarily within the jurisdiction of the Federal High Court is taken out of its jurisdiction.
8. EJIWUNMI, JSC
   From what I have said above and in the context of the fact that at the relevant time, the governance of this country depends on Decrees enacted by the Federal Military Government, it is manifest that the Supremacy of the Decree so enacted supersedes the provisions of the unsuspended part of the 1979 Constitution. It follows that the consideration that may apply where governance is by a written Constitution or such Convention and Laws that do not owe their existence to a Military Government cannot be made to

apply to a thorough- going Military Government as is the lot of this country at the time. I also do not think that it is proper to examine this matter any further, having regard to the stand already taken by this Court in its several decisions that are pertinent to the instant case. I therefore must hold that Decrees Nos. 8 and 12 of 1994 are valid Decrees of the Federal Military Government of Nigeria

Ouster Clauses in Decrees
Lakami and Anor
v
Attorney General, Western State
and Others
[1971] 1 UILR 201, SCN
(Facts are contained in the judgement of Ademola CJN)
Ademola, CJN

This is an appeal from the Western State Court of Appeal which heard and dismissed the appeal of the appellants from the judgment of the High Court of the Western State sitting at Ibadan.

The application before the High Court was for an order of *certiorari* to remove an order dated the 31st day of August, 1967, made by Justice Somolu in his capacity as Chairman of the Tribunal of Inquiry into the assets of public officers of the WesternState, into Court, for the purpose of being quashed.

Order by Assets Tribunal
Under the provisions of Section 13(1) of Edict No. 5 of 1967, it is hereby ordered that Mr EO Lakanmi, Kikelomo Ola (his daughter) and all others who may be holding properties on behalf of or in trust for any of them, shall not dispose of or otherwise deal with any of the said properties of whatever nature(i.e. lands, houses, etc), whether standing in their names, or in any other of their various names and or aliases, until the Military Governor of the Western State of Nigeria shall otherwise direct.

2. In particular, it is hereby ordered that the said EO Lakanmi or his said daughter mentioned above shall not operate their individual bank accounts by means of withdrawal there from without consent of and only to the extent that the Military Governor of Western State shall permit in writing.
3. It is hereby further ordered that all rents due on the properties of the said persons from henceforth shall be paid by the tenants

thereof into Western State Sub Treasury at Ikeja or the Treasury at Ibadan, until the Military Governor shall direct to the contrary, pending the determination of the issues involved in the investigation into the assets of all those concerned.

4. Attention of all the persons concerned, and of their partners, co-directors, shareholders or nominees, or anyone who may like to have business transactions with them for any reasons or in any manners whatsoever is invited to these orders and the penalties provided by section 13 (2) of the same Edict in case of the infringement thereof.

Dated this 31st day of August, 1967.

The learned judge of the High Court on 21st December, 1967, dismissed the applications, holding that the order was not *ultra vires* and that Edict No 5 was validly made since, according to him, the Federal Military Government Decree No. 51 of 1966 was not in operation in the WesternState of Nigeria when the Edict was made. We shall have cause to say more about Decree No. 51 of 1966. He went on say that the validity or otherwise of the order made by the Chairman of the Tribunal could not be challenged since section 21 of Edict No 5 of 1967 states:

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

A few days after this judgment, and precisely on 27th December, 1967, the appellants filed their notice of appeal with nine grounds of appeal to the Western State Court of Appeal. From the grounds of appeal filed, it became obvious to the respondents what they must expect at the hearing of the appeal; and when the appeal was pending, the Federal Military Government came to their aid by passing three successive Decrees, namely:

1. No 37 of 1968: The Investigation of Assets (Public Officers and Other Persons) Decree;
2. No 43 of 1968: The Investigation of Assets (Public Officers and Other Persons) (Amendment) Decree; and
3. No 45 of 1968: The Forfeiture of Assets, etc. (Validation) Decree, dated 28th August, 1968.

4.4 Summary

These Decrees speak for themselves as their objects are clear, and they apply throughout the Federation. It was therefore no surprise when on 18th October, 1968, the Acting Principal State Counsel filed in the Western State Court of Appeal a notice of preliminary objections that the Court had no jurisdiction to entertain the appeal on the following grounds:

(1) that the proceedings in this appeal relate to a challenge of the validity of an order which has been validated for all purposes under the provisions of section 1 (2) of the Forfeiture of Assets, etc. (Validation) Decree 1968 No. 45;

(2). that the said proceedings have abated as from 28th August, 1968, by virtue of section 2 (2) of the aforesaid Decree.

4.5 References/Further Readings/Web Resources

Justus A. Sokefun (2002). *Issues In Constitutional Law and Practices in Nigeria,* Faculty of Law, OOU, Ago-Iwoye.

Justus A. Sokefun (2011), Constitutional Law Through the Cases, Caligata Publishers

4.6 Possible Answers to Self-Assessment Exercises

Examples drafting mechanism are:

i. Outright exclusion of courts' powers in the challenge of a specific law;
ii. Decision of an agency being final and conclusive;
iii. The decision of the government or a Tribunal not challengeable under an existing Decree