COURSE GUIDE

PUL 804
COMPARATIVE ADMINISTRATIVE LAW II

Course Team Dr. Omotayo Abisoye & Mrs. Olufunke Aje-Famuyide (Course Developers/Writers) – NOUN
Professor Olubayo Oluduro (Course Editor) – AAU, Akungba
Dr. Ernest O. Ugbejeh (Dean, Faculty of Law) – NOUN
Mrs. Nancy C. Ugochi (Copy Editor) –NOUN

NATIONAL OPEN UNIVERSITY OF NIGERIA

National Open University of Nigeria,
Headquarters,
University Village,
Plot 91, Cadastral Zone,
Nnamdi Azikiwe Expressway,
Jabi, Abuja.

Lagos Office
14/16 Ahmadu Bello Way
Victoria Island, Lagos

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

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INTRODUCTION

The Faculty of Law master's program in Administrative Law is designed to enable a law graduate to further develop an understanding of the course. Administrative agencies affect every aspect of daily life; it regulates labour relations, sets rates and enforce standards. The course explores various aspects of administrative agencies, principles and procedures common to all agencies, the sources, powers and exercises of these agencies.

Administrative Law at the Masters Level, deals with three related topics – Administrative agencies, their powers, exercises and constraints. We have brought them together in this course, as they both relate to forming a complete instrument, which we have not been dealt with at a much milder level at undergraduate.

WORKING THROUGH THIS COURSE

To complete this Course, you are advised to read the study units, read recommended books and other materials provided by NOUN. Each unit contains Self-Assessment Exercises, 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 12 weeks to complete. You will find all the components of the course listed below. You need to allocate your time to each unit in order to complete the course successfully and on time.

COURSE MATERIALS

The major components of the course are:

1. Course Guide
2. Study Units
3. Textbooks
4. Assignment File
5. Presentation Schedule

Each study unit consists of two weeks' work and includes specific objectives; directions for study, reading material and Self-Assessment Exercises (SAEs). Together with Tutor Marked Assignments, these exercises will assist you in achieving the stated learning objectives of the individual units and of the Course.

We have included a large number of examples and Self-Assessment Exercises (SAEs). These have been selected to bring out features of central importance. You will gain immeasurably by giving ample time to the SAEs, and by comparing your efforts with the relevant Answer Box

and then drawing the lessons from the exercise. We do not expect you to come up with answers that are identical with ours. These exercises provide an opportunity to put in practice what has been described in the text and then *evaluating* your performance. This will not only tell you whether you have fully grasped the particular technique, but it will serve to confirm it. If you are not happy with your effort, ask yourself what was missing; then rework the passage in the text and revise your exercise to take account of the approach demonstrated in the answer.

You may find it helpful to read the text of a unit fairly quickly before working the examples and exercises. This will give you a general overview of the whole topic, which may make it easier to see how individual aspects relate to each other. If you break off study of a Unit before it is completed, in the next study session remind yourself of the matters you have already worked on before you start on anything new to maintain the continuity of learning.

MODULES AND STUDY UNITS

Module 1

Unit 1 Administrative Adjudication
Unit 2 Tribunal
Unit 3 Judicial Review
Unit 4 Rules of Statutory Interpretation

Module 2

Unit 1 Ultra Vires
Unit 2 Due Process
Unit 3 Natural Justice
Unit 4 The Rule against Bias – Nemo judex in causa sua

Module 3

Unit 1 The Fair Hearing Rule
Unit 2 Illegality, Unreasonableness, Irrationality
Unit 3 Outstanding Issues
Unit 4 Jurisdictional Control

Module 4

Unit 1 Prerogative Writs
Unit 2 Mandamus
Unit 3 Certiorari
Unit 4 Locus standi

Module 5

Unit 1 Declaratory Judgement
Unit 2 Injunction

TEXTBOOKS AND REFERENCES

Certain books have been recommended in the course. Each study unit provides a list of references. You should try to obtain one or two for your general reading.

ASSESSMENT

There are two aspects of the assessment of this course; the Tutor Marked Assignments and a written examination. In doing these assessments, you are expected to apply knowledge acquired during the Course. The assessments are submitted in accordance with the deadlines stated in the presentation schedule.

FINAL EXAMINATION AND GRADING

The duration of the final examination for Administrative Law will carry 70% of the total course grade. The examination will consist of questions, which reflect the kinds of self-assessment exercises you have previously encountered. All aspects of the course will be assessed. You should use the time between completing the last unit and taking the examination to revise the entire course. You may find it useful to review your Self-Assessment Exercises and Tutor Marked Assignments before the examination.

COURSE SCORE DISTRIBUTION

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

Assessment	Marks
Tutor Marked Assessments 1-3	Three assignments marked out of 30%
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, your study units provide exercises for you to do at appropriate times.

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

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

TUTORS AND TUTORIALS

There are 12 hours of tutorials provided in support of this course. You will be notified of the dates, times and location of these tutorials, together with the name and phone number of your tutor, as soon as you are allocated a tutorial group.

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

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

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

a question list before attending them. You will gain a lot from participating actively.

SUMMARY

You have much to cover in this course. You may find that some of the units call for at least a full study session of their own. You may also find that the Self-Assessment Exercises require more time, as necessarily the text with which we are now dealing is longer. The course builds upon work you have already done; in a number of places you should be on reasonably familiar territory. For example, you have seen earlier that paragraphs can be very useful in organising detailed or elaborate provisions into an easily accessible form. This course explores at greater length their use and flaws that you must avoid.

In this subject you may find it helpful to draw up your own Checklist of things to do or not to do when structuring legislation. This should help to confirm what you are learning, but it also becomes a handy reminder and reference point for the future. Once the routines become standard practice for you, you can dispense with the Checklist.

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

MODULE 1

Unit 1 Administrative Adjudication

Unit Structure

1.1 Introduction

In first semester, we introduced the topic of quasi-judicial functions. We considered the different functions of administrative agencies. From these previous units, you will observe that administrative agencies exercise these three types of power – the executive, legislative and the judicial. Administrative agencies are imbued with power which are conferred by Acts of Parliament. Mr. Justice Jackson remarked on the reality of this position in the oft quoted statement thus:

"They (administrative bodies) have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking…. Administrative agencies have been called quasi-legislative, quasi-executive or quasi-judicial, as the occasion required, in order to validate their functions….." F.T.C v. Ruberoid Co., 343 U.S 470 at 487-88 (1952).

This power, as Eka stated in his work, *Judicial control of administrative process in Nigeria* is a source of anxiety which made philosophers as John Locke and Montesquieu conclude that the concept of political liberty is

endangered and illusory if powers are concentrated in one single hand. Also commenting, James Maddison said: *The accumulation of all powers - legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny*. —James Madison, The Federalist No. 47 (1788)

Therefore, you must be familiar with the common use of the word quasi-judicial' in administrative law. This unit seeks to examine the nature of the quasi-judicial powers of administration.

1.2 Learning Outcomes

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

- discuss the nature of quasi-judicial powers of administration;
- examine quasi-judicial functions of administration in Nigeria;
- trace the evolution of administrative tribunals.

1.3 Administrative Adjudication

From the introduction above, an agency may have (1) the ''quasi-legislative'' power to adopt regulations that control people's everyday conduct; (2) the executive power to enforce those regulations and other laws that the agency is responsible for administering; and (3) the ''quasi-judicial'' power to apply those regulations and laws in individual cases.

Example 1.1

The National Drug Law Enforcement Agency (NDLEA), under its enabling Act, is empowered to adopt measures geared towards the eradication of illicit cultivation of narcotic plants and to eliminate illicit demand for narcotic drugs and psychotropic substances. To achieve these objectives, the agency has the power to adopt measures to identify, freeze, confiscate proceeds derived from drug related offences; the agency can investigate suspected violations of that rule; and, if the NDLEA decides that someone has violated that rule, it can impose a civil fine on that person (subject to judicial review). In this sense, the NDLEA acts like a legislature, a police officer, and a court all rolled into one. Administrative adjudication is the process by which an administrative agency issues an order, such order being affirmative, negative, injunctive, or declaratory in form.

Most formal proceedings before an administrative agency follow the process of either rule making or adjudication. While rule making

formulates policy by setting rules for the future conduct of persons governed by that agency, administrative adjudication applies the agency's policy to the past actions of a particular party, and it results in an order for or against that party. The Administrative Procedure Act (APA) defines adjudication as "agency process for issuing an ''order.'" The APA also defines order as a final disposition of an agency in a matter other than rulemaking but including licensing. What this means is that adjudication is the term used to describe the process by which agencies make final decisions on matters except for rulemaking. Adjudication is defined as a process that culminates in the making of an 'order'. Adjudication (in the broad sense) is divided into two categories: formal and informal.

Example 1.2

A student applies for a federal scholarship under the TETFUND. The student must fill out a form and send it to the Ministry of Education for processing. The appropriate Department in the Ministry of Education reviews the information provided in the form and determines, on the basis of available information which provides the basis for determining the approval of a scholarship to the student.

This is technically adjudication because the Ministry of Education, a federal agency has taken the facts provided to it and determined if a person qualifies for a TETFUND scholarship.

If you pay very careful attention paid to the workings of modern governance, you will be able to discern and come to appreciate the great extent to which administrative adjudication has become an "integral part of the machinery of justice and not mere administrative devices for disposing of allegations or cleverly and conveniently putting to rest burning issues of the moment".

1.3.1 Quasi-judicial

In-text Question **Define quasi.**

According to Wade, quasi applies to powers which can be exercised only when certain facts have been found to exist. The meaning of the word 'quasi' has generated a lot of controversy – for instance, Sir Ivor Jennings regarded it as one of a number of pseudo-analytical expressions derived from false premises as to the separation.

It is commonly used to describe certain kinds of powers wielded by ministers or government departments but subject to a degree of judicial

control in the manner of their exercise. Quasi-judicial powers of administrative agencies have been classified into three groups. These are; statutory, domestic or autonomous bodies and other bodies [Iluyomade and Eka in *Cases and Materials on Administrative Law in Nigeria].*

The discussion on the evolution of administrative adjudication cannot be complete without mentioning the influence of constitutional developments on administrative adjudication in the UK. The first constitutional principle that influenced this is parliamentary sovereignty (refer to your course materials and references on this topic to refresh your memory). As Peter discussed it thus:

The 17th century witnessed a major change in the relationship between the monarchical executive and the central courts. The conciliar courts were abolished and, as a result of the triumph of Parliament over the Monarch, the central courts came to be understood no longer as participants in the royal project of governance but as instruments of Parliamentary will, expressed in statutes. In its mature form, this new relationship was most famously expounded by AV Dicey (in An Introduction to the Study of the Law of the Constitution, first published in 1885) in terms of the principle of Parliamentary sovereignty (or 'supremacy').

The new role of the courts, vis-à-vis the executive was to ensure its conformity to the will of Parliament. The independence of the judges of central courts from royal control was reinforced in the Act of Settlement of 1701, which transferred from the Monarch to Parliament the power to fire judges, limited the grounds on which a judge could be removed from office, and guaranteed judicial remuneration. As a result of these developments, Dicey was eventually able to paint the relationship between the courts and the executive in terms of the rule of law – the idea that the government, like its citizens, is answerable in the courts – thus completing the transformation of courts from instruments of governance into instruments for holding the government accountable to the citizenry.

Self-Assessment Exercise

Trace the historical development of tribunals in three jurisdictions.

1.3.2 Administrative Adjudication in Nigeria

Indeed, the history of the Nigeria Legal System cannot be divorced from the influence of the country's colonial master, England. A look at the use of administrative bodies or tribunals as adjudicatory bodies will most certainly start in England.

In Nigeria, the central and state government departments do provide and administer directly public services. The normal pattern is for a department or ministry to formulate broad policies and for the execution of these policies by local authority or some semi-autonomous public corporations, boards or a commissioner as the case may be.

From the multifarious functions of central, state and local government, it may become necessary for government agencies to hold enquires into a wide variety of matters.

In some instances, the holding of an enquiry may be discretionary e.g. under section 10 of the Federal Housing Authority Act, 1973, the Federal Executive Council may upon application of the authority, institute an enquiry as it thinks fit into the acquisition of land required for the functions of the authority and thereafter declare that the land is required for the service of the authority.

In other cases, the holding of enquiry may be mandatory. In either case, the object of these enquiries is essentially the same – obtaining of information required by government agencies in order to be better informed in connection with a particular matter so as to determine what action or actions to take. Such decisions may engender some sense of grievance which may be the basis of appeals for reconsideration by a higher authority. Such rights have been afforded on an ad hoc basis so as to accommodate peculiar demands.

In the opinion of Professor D.O Aihe, 'the administrative process of Nigeria has not produced a systematic method of administrative legislation. Hence, administrative rule making requires adaptation to varying circumstances to meet variety of actions taken daily by administrative organs. Regulations are made by regulatory agencies and other authorities by virtue of enabling laws without hearing or consulting with those who are likely to be affected. Usually, these regulations vest discretionary powers on authorities or individuals. The method by which these discretionary powers are exercised are unknown to the members of the public. There is therefore the need for hearing or consulting with those likely to be affected by regulations especially those of discretionary nature.'

Section 6 of the Constitution of the Federal Republic of Nigeria, 1999 (the 1999 Constitution), provides that the judicial (i.e. adjudicatory) powers of the Country shall be vested in the Courts established by the Constitution and under the Laws of the National and State Assemblies.
Section 36 (1) of the same Constitution provides that:

"in the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a Court or tribunal established by law and constituted in such a manner as to secure its independence and impartiality."

1.3.3 Administrative Adjudication and the Doctrine of Separation of Powers

In-text Question
How has the doctrine of separation of powers influenced administrative adjudication?

Administrative adjudication defied the doctrine of separation of powers attributable to Montesquieu who, writing in the 17th century maintains that in order to guarantee against a tyrannical government in the three arms of government *viz*: the legislature, the executive and the judiciary must be separated from each other and one another. That the legislature must not do the work of either the executive nor the judiciary and that the judiciary, must neither do the work of the legislature nor the executive, while the executive must not do the work of either legislature or the judiciary.

In reality we do find exceptions to these rules. For example, if parliament is the rule making body how do we account for the other rule making bodies like the local government? If the courts are meant to decide disputes, why do we have the tribunals, the vocational associations like the Disciplinary Society of the Bar, the Architects, Surveyors and the Medical and Nursing Councils in Nigeria deciding various disputes. These bodies do make rules for the procedures in disciplining their members so as to foster compliance with the rules of their profession.

Apart from these bodies, it is patently seen that some administrators are usually vested with the powers of adjudicating disputes that are affecting the rights or interests of many citizens in the country. Since these are not *stricto sensu* law courts, what then is the justification for these bodies so to act in that while?

To what extent then can such administrative body be said to be exercising judicial or quasi-judicial powers? Will the judicial organ of government in a federal system of Nigeria that practices the doctrine of separation of powers permit other organs to encroach on its 'exclusive' area of operation or jurisdiction?

1.3.4 Judicial Review of Adjudicatory Actions as a Safeguard for the Effective Exercise of Judicial Powers

The Court is on the alert to monitor the exercise of judicial powers by administrative agencies, and would not hesitate to review the exercise of such acts once it is against the principles of natural justice.

Aside from judicial review, there is legislative review as well. Where a statute has indicated the methods by which, and the circumstances in which administrative action may be reviewed, it is unlikely that the courts would permit the use of other devices for securing remedies. It is only after it has become clear that there is no legislative procedure for securing appropriate remedies that one may safely think of alternative methods such as mandamus, habeas corpus, prohibition and *certiorari* etc. These orders are regarded as adequate safeguard for the protection of an aggrieved person, as enunciated in the case of ***Burma and Hawa* v. *Sarki*** (1962) 2 All NLR 62**,** where Udo Udoma J. observed on page 69 thus:
…in the absence of a prescribed procedure of attacking the exercise of powers by a minister, the normal civil processes and the principles of general law, including the prerogative orders, are, of course, available to be invoked to advantage by any aggrieved person whose rights have been infringed…

Similar cases in the above regard are: ***Banjo and ors.* v. *Abeokuta Urban District Council*** (1965) NMLR 295**, *R.* v. *Minister for Lagos Affairs ex parte the Cherubim and Seraphim Society*** (1960) L.L.R 129**, *R.* v. *Western Urhobo Rating Authority ex parte Chief Odje and Others***1961) All NLR 796**, *Layanju v. Araoye***1959) 4 FSC 154.

1.4 Summary

This unit has shown that the exigencies of effective administration permit little more than lip service to the classic notion that all government activity should be chopped into block like Montesquieu's principle of separation of powers.

1.5 References/Further Readings/Web Resources

Wade: Administrative Law.1977 pp.739-740

Oluyede, P.A. (2007). Nigerian Administrative Law.

Elias, T.O. (1967). Nigeria: The Development of Its Laws and Constitution. London: Stevens & Sons.

Peter, C. (2009). Administrative Tribunals and Adjudication. Hart Publishing.

Law and Development in Nigeria, vol. 1, Lagos, Federal Ministry of Justice (Publisher)1990 p.235, found in *Federal Ministry of Justice Law Review Series.*

1.6 Possible Answers to Self-Assessment Exercises

Self-Assessment Exercise

To what extent is Administrative Bodies expected to act judicially?
Administrative bodies have the responsibility to always put into consideration the principle of fair hearing and to observe the rules of evidence in the discharge of their duties. Indeed, anyone who is called to decide anything must always do so while putting into practice the rules of natural justice and fair hearing. Whether a body is designated as judicial, quasi-judicial, administrative or executive, it must act judiciously. In fact, it would not be a tenable excuse for such a body to assert that 'acting judicially and applying the rules of evidence and fair hearing' was never a part of its mandate.

See generally, Section 22 of the Republican Constitution of Nigeria, 1963, (See Section 36 Constitution of the Federal Republic of Nigeria 1999 (as Amended) on fair hearing in the determination of a person's civil rights and obligations by the court or other tribunal established by law. This provision is akin to the fifth and fourteenth amendment of the United States of America's constitution regarding 'due process of law' and its constitutional importance in controlling administrative adjudication can be seen in two Nigerian cases:
Jackson* v. *Gowon
Lakanmi and anor* v. *A-G (Western State) and others (1967) Nigerian Bar Journal, Vol. VII, p.87 decided by the Supreme Court of Nigeria.
Similar cases in this regard *are* ***R* v. *Director of Audit (Western Region) and Anor. Ex. Parte Oputa and Others* (1961) All NLR 659; *Lagunju* v. *Olubadan-in-Council and Anor.* (1950) 12 WACA 406 (P.C); *Ademola II and Ors. v. Thomas and ors* (1950) 12 WACA 81; *Denloye v. Medical and Dental Practitioners Disciplinary Tribunal* Suit No. SC 91/1968 of 22nd November, 1968 (unreported)**

The courts have emphasised the need for administrative bodies to act judicially in the following cases: ***Building Authority of Khartoum Municipality* v. *Evangellides*** (1958) Sudan Law Journal and Report 16 (Court of Appeal, Sudan). Reported in B.O Iluyomade and B.U Eka, *Cases and Materials on Administrative Law in Nigeria,* 1980, Ile-Ife, University of Ife Press, p.163-195***, Owolabi and ors.* v. *Permanent Secretary, Ministry of Education*** Suit No. IK/4M69 of 6th May, 1969

(unreported), High Court, Ikeja. Reported in B.O Iluyomade and B.U Eka, *Cases and Materials on Administrative Law in Nigeria*, (supra) p. 163-195***, Arzika* v. *Governor of Northern Region*** (1961) All N.L.R 379***, Okakpu* v. *Resident, Plateau Province*** (1958) NRNLR 5***, R.* v. *Road Transport Appeal Tribunal ex parte Eastern Province Bus. Co.*** (1959) E.A 449, High Court of Uganda.

Unit 2 Tribunals

Unit Structure

2.1 Introduction

This unit is a continuation of unit 1 on administrative feature and it discusses tribunals as a conspicuous part of administrative adjudication. These tribunals are each designed to be a part of administration, and these are sometimes called administrative tribunals; or referred to as Panels, committees, tribunals, referees, adjudicators, commissioners etc. The reason for their creation is not far-fetched, the growth of the modern state led to the creation of many new procedures for settling the disputes that arose from the impact of public powers and duties on the rights and interests of private persons. When Parliament creates new public services or regulatory schemes, questions and disputes will inevitably arise from operation of the legislation. In this unit, we shall be discussing the nature of this tribunals, and procedures in different jurisdictions.

2.2 Learning Outcomes

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

- discuss the reason for the development of tribunals and inquiries;
- analyse the nature, role and conduct of public inquiries;
- enumerate the principles underlying the composition and procedure of tribunals.

2.3 Tribunals

In-text Question
Is there a consensus on the definition of the word 'tribunal'? Give your own definition of tribunal.

There is no uniformly applicable definition of tribunal. This is because, different authors use different terminologies with regard to the diverse social realities. But let us look at some definitions:

In Onuoha v. Okafor (1983) 2 S.C.N.L.R., 244, Oputa CJ as he then was, defined as follows:

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

An administrative tribunal has been described as an administrative agency exercising judicial function before which a matter may be heard and tried. The diversity of tribunals is reflected in their names, but only imperfectly.

There are a wide variety of tribunals and they operate in very different contexts – applying different law, dealing with different government bodies, possessing particular cultures of adjudication etc.

Historical developments of administrative tribunals

This section traces the historical developments of tribunals in Nigeria, the U.K, Australia and the U.S. Each of these jurisdictions starting from the birth of the English legal system; and the second section continues the story in each of the jurisdictions in turn.

In commenting on the historical antecedents of tribunals in England, Professor Wade (Administrative Law (1977) pp.739-740) said:

"Tribunals are mainly a twentieth-century phenomenon, for it was long considered part of the conception of the rule of Law that the determination of questions of law – that is to say questions which require the finding of facts and application of definite legal rules and principles belonged to the courts exclusively. The first breaches of this rule were made for the purpose of the efficient collection of revenue. The Commissioners of Customs and Excise were given judicial powers by statutes dating back from 1660; but though these were criticised by Blackstone and execrated in the definition of 'excise' in Johnson's Dictionary, they were the fore-runners of many such powers…"

Peter Cane, Administrative Tribunals and Adjudication

The development of administrative tribunals in England in 1066. William the Conqueror inherited from his predecessors a relatively unified and centralised kingdom. In any state, one of the main roles of government and one of the most important techniques for maintaining peace and order (as well as power) is to provide facilities for handling citizens' grievances and resolving disputes between citizens and government. At first, the royal officers responsible for this function – the judges – were members of the King's inner circle of advisers and counsellors – the royal court. When the King went on progress around the country, so did the judges. Gradually, however, the dispute-resolution function was separated off from the other activities of the king's council ('Curia Regis'). The Courts of King's Bench and Common Pleas – the 'common law courts' – were established and assumed a fixed abode in London.

The English governmental system as it existed in the first half of the 18th century provided the inspiration for the famous proposal of Charles de Secondat, the Baron Montesquieu – contained in Book XI, Chapter 6 of L'Esprit des Lois, first published in 1748 – that government be understood in terms of a tripartite division of institutions: the legislature, the executive and the judiciary; and a threefold, and corresponding, division of functions: legislative, executive and judicial.

When multi-functional agencies were first established in the 19th century, embedded adjudication of disputes between citizen and government was understood as an aspect of the administrative process. It was only when such agencies were stripped of their non-adjudicatory functions and transformed into mono-functional adjudicatory agencies that the similarity between their basic function and that of courts was clearly discerned. Once that happened, however, administrative tribunals came to be seen as more-or-less problematic because, although their function was understood to be essentially similar to that of courts, they did not belong to the judicial branch of government and they were not staffed by judges who enjoyed guaranteed security of tenure and salary protection. This 'problem of tribunals' was a product of the institutional aspect of separation of powers – the idea that government is composed of three branches each of which exercises a distinct governmental function. If that doctrine had been understood as being essentially concerned with avoidance of undue concentrations of power and conflicts of interest resulting from admixture of functions, and with promotion of independent scrutiny of the exercise of power, the creation of non-court adjudicatory bodies would not, in itself, have been problematic. However, separation

of powers was also understood to stand for the proposition that each of the three functions of government identified by Montesquieu should be allocated to a different institution or set of institutions. The idea that the judicial function should be allocated to judicial institutions, coupled with a narrow understanding of judicial institutions in terms of the superior central courts, was what generated the problem of tribunals.

Note some of the following committees on tribunals:

- The Donoughmore Committee (refer to first semester)
- In 1955 the government set up a Committee on Tribunals and Enquiries chaired by Sir Oliver Franks to consider, amongst other things, the 'constitution and workings of tribunals other than ordinary courts of law'. Others argued before the Committee for amalgamation or grouping of tribunals so as to inject some order into the diverse and unruly collection of individual bodies, but in response, the Committee made only one minor recommendation along these lines. The Franks Committee's major contribution to systematisation was its recommendation for the establishment of a Council on Tribunals to 'keep the constitution and working of tribunals under continuous review'.

In-text Question
What is/are the features of administrative tribunal?

2.3.1 Features among Tribunals

- They hear a dispute between parties (in a person-and-state tribunal, one of the parties is a government agency);
- they determine a resolution to the dispute with binding effect;
- they determine the case according to the law;
- their jurisdiction is restricted to a specified subject matter; and
- they are not courts;
- They are established by statute;
- they have no inherent jurisdiction;
- they are subject to the oversight of the Administrative Justice and Tribunals Council.

Self-Assessment Exercise 1

Is there any difference between the courts and tribunals?

2.3.2 Why the creation of tribunals?

Most tribunals are a product of the welfare state and have been established to deal with the myriad disputes arising out of decisions relating to eligibility for benefits.

The welfare state could not function without an elaborate judicial system of its own. Claims for benefit, applications for licences, disputes about controlled rents, planning appeals, compulsory purchase of land – there are a host of such matters which have to be adjudicated upon from day to day and which are, for the most part, unsuitable for the regular courts. In the background are the courts of law with supervisory and often, also, appellate functions. But the frontline judicial authorities for administrative purposes are bodies created ad hoc (Schwartz and Wade, Legal Control of Government).

However, it should be noted that tribunals are not part of the administration; because they exercise judicial functions, although essentially, they are not courts.

In-text Question
Is there any justification for the establishment of administrative tribunals?

Scholars have given another insight into the reason for the establishment of tribunals

When Parliament creates new public services or regulatory schemes, questions and disputes will inevitably arise from operation of the legislation. There are three main means of enabling such questions and disputes to be settled: (a) by conferring new jurisdiction on the ordinary courts; (b) by creating new machinery in the form of a tribunal, sometimes with the right of appeal to a higher tribunal or to the courts; or (c) by leaving decisions to be made by the administrative bodies responsible for the scheme. Possible variants in solution (c) include (i) allowing an individual to seek review at a higher level within the same public body of a decision that he or she does not accept; (ii) providing for an appeal to another administrative body (for example, from a local council to central government), or (iii) requiring a hearing or public inquiry to be held before certain decisions are made. Whether or not any provision of these kinds is made, the procedure of judicial review is potentially available to supervise the legality of decisions. But judicial review, which should be an exceptional remedy, does not provide a right of appeal and is unable to ensure the quality of numerous decisions at first instance.

The above highlights the reason why tribunals occupy a prominent place in administrative law; the availability of judicial review in high court provides an avenue for a redress in case of infringement.

The availability of judicial review as an essential requirement of the validity of tribunals was examined in the Indian case of ***S.P. Sampath Kumar v. Union of India*. AIR 1987 SC 386** where the court was called upon to determine the validity of an act which excluded the power of the high court to review under section articles 323 A (2) (d) and 323 B (3) (d) of the *Administrative Tribunals Act 1985 and the Central Administrative Tribunal.* A Bench of seven judges examined the issues and considered the power of the administrative tribunals to exercise the powers and jurisdiction of the High Courts under articles 226 and 227 of the Constitution. After hearing the arguments both for and against, the court ruled that '*the power of judicial review conferred on the High Courts under article 226 and upon the Supreme Court under article 32 as well as the power of superintendence vested in the High Courts under article 227 form an integral and essential part of the Constitution constituting part of basic structure*'. Therefore articles 323 A (2) (d) and 323 (3) (d) were declared unconstitutional to the extent they exclude the jurisdiction of the Supreme Court and the High Courts under articles 32 and 226/227 respectively.

Procedures of tribunal

In this section, you will focus more on the organisation of the tribunal and the powers of the tribunal in three questions**:**

Determination of jurisdiction of a tribunal
Jurisdiction relates to the power to embark upon a cause; this issue is very important because no administrative officer, intending to comply with the law, can act without first determining what are his legal duties and what are the legal restrictions upon him. Jurisdiction of an administrative tribunal is defined in terms of reviewing decisions made in exercise of (specified) statutory decision-making powers (decisions made 'under an enactment'); it is defined more in terms of the source of the power to make decisions rather than the identity of the decision-maker. (This issue will be dealt with in a subsequent unit.)

Suffice to say that in Nigeria, where a tribunal decides without jurisdiction, its determination will be reviewed by the High Court**. See further, Re Umuolu Village Group Court (1953) 20 N.L.R. 112** per Bairamian F.J. where he stated that:
Defects of jurisdiction relates to embarking on a case and not to miscarriages in the course of it or the correctness of the decision.

Another vital consideration is the control of discretion
Administrative powers are wide and wild administrative authorities are conferred with wide discretion, but while the rule of law does not demand

for its elimination, the discretion is exercised within certain confines, and the attitude of the courts is to find limits to such wild powers.

One of the ways in which the courts have attempted to control the seemingly boundless powers of administration is from Lord Russell who stated that : "*the court might well say, 'Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires'"* in Kruse v. Johnson [1898] 2 QB 91 @ 100; see also Associated Provincial Picture House Ltd. v. Wednesbury Cpn. [1948] 1 K.B. 223 @ 234 that *to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in them.*

Self-Assessment Exercises 2

1. Discuss the role of tribunals in the formulation of policies.

2.4 Policy Formulation

A third consideration is policy formulation.
One vital role of tribunals (administrative authorities in general) is their role in policy formulation, which is an extension of the vast boundless powers and autonomy these authorities have garnered in their development. As a writer commented, *'the policies they create may be explained partly by the autonomy these public institutions have gained over decades and partly by the incapacity of legislatures to resolve quickly the problems they encounter.'*

The reason for this power is also found in the following statement that:
The legislative mandate given to many tribunals through their empowering statute can be left intentionally broad. This may occur, for example, when Parliament believes that a particular discretion or authority delegated to a tribunal should be open-ended and that the tribunal should seek further guidance in the common law.

A tribunal may therefore provide its board members with clearer guidance adapted to the exercise of their specific legislative powers. One of the reasons why a tribunal will issue such guidelines will often be to provide their board members (who are often not trained in law) with quick and easy access to sound legal practices. Policies may take a variety of forms, including guidelines, directives, codes, rulebooks or manuals of some other kind which may be published or unpublished.

In addition to legislative gaps which tribunals address through policy development, there are other legislative provisions which require or

permit the tribunal to adopt a statutory interpretation to suit a given circumstance. In this way, the tribunal is not so much completing its legal order as furthering its development, and sometimes doing so with the express authorisation of Parliament. In this role, tribunals are also more likely to engage the advocacy of affected parties.

2.5 Summary

You will observe in this unit, that, the recurring theme is describing the administrative tribunal without offending the traditional adjudicatory power vested in the courts. Overall, the courts are still superior to the tribunals and have the power of review against the decisions of the tribunal.

2.6 References/Further Readings/Web Resources

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2.7 Possible Answers to Self-Assessment Exercises

Self-Assessment Exercise 1

Is there any difference between the courts and tribunals?

Guide

The typical tribunal, like an ordinary court, finds facts and decides the case by applying legal rules laid down by statute or legislation. In many

respects, the tasks performed by tribunals are similar to that of regular courts. The jurisdiction of tribunals is restricted to adjudicating disputed cases involving administrative agencies as parties in their governmental functions based on the principles, rules and standards set under administrative law.

The decisions of most tribunals are in truth judicial rather than administrative, in the sense that the tribunal has to find facts and then apply legal rules to them impartially, without regard to executive policy. Such tribunals have in substance the same functions as courts of law. Tribunals have the character of courts, even though they are enmeshed in the administrative machinery of the state

Self-Assessment Exercise 2
Essentially, the question seeks to test students' knowledge of tribunals and their role within a legal system. This was succinctly captured in the following excerpts :

*First and foremost, tribunals, boards and agencies make policy through their decision-making. Second, tribunals make policy through rule-making, whether using policy instruments such as guidelines, codes of conduct, internal procedures and "quasi-regulation" or through more informal processes such as full-board meetings, case conferences or institutional practices…….These policies may relate to substantive aspects of statutory interpretation or to procedural aspects of the tribunal, board or agency's functions. (Excerpts) f*rom Tribunals and Policy Making : From legitimacy to fairness by France Houle and Lome Sossin.

Unit 3 Judicial Review

Unit Structure

3.1 Introduction

In order to be able to fulfill their governmental functions, administrative agencies are imbued with a wide range of legislative and quasi-judicial powers. (See previous units). Most of these powers are derived from Acts or enabling statutes. Judicial review can be broadly described as the function or capacity of courts to provide remedies to people adversely affected by unlawful government actions. Judicial review, also known as supervisory jurisdiction, is the High Court's power to police the legality of decisions made by public bodies. Judicial review plays a vital role in every system of government. Judicial review means one thing in one system of government and an altogether different thing in another. Judicial Review must therefore be understood in a particular constitutional context. For example, before the Human Right Act, 1998, judicial review in Britain was considered to be the essential core of administrative law, its purpose being to "enforce the legal limits of public and in particular executive power. Thus, the judicial review power of the English Court was limited to administrative actions only; the reason was that under the British constitution, an act of sovereign legislature cannot be invalid in the eyes of the courts.

3.2 Learning Outcomes

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

- discuss the nature and scope of judicial review as a distinct legal process;
- analyse the principal common law grounds for judicial review contained in the doctrine of ultra vires and the rules of natural justice or procedural fairness;
- evaluate the scope of judicial review and its significance.

3.3 Meaning and Scope of Judicial Review

In-text Question
What is judicial review?

Judicial review is a legal procedure, allowing individuals or groups to challenge in court the way that Ministers, Government departments and other public bodies make decisions. The main grounds of review are that the decision maker has acted outside the scope of its statutory powers, that the decision was made using an unfair procedure, or that the decision was an unreasonable one.

Judicial review is designed to prevent the excess and abuse of power and the neglect of duty by public authorities. On review, if a court finds that a decision has been made unlawfully, the power of the court will generally be confined to setting the decision aside and remitting the matter to the decision-maker for reconsideration according to law. It follows from this that there will be circumstances in which although a decision is not the correct or preferable decision on the facts, it will not be open to judicial review. Conversely, there may be situations where a decision is correct or preferable one, but may be set aside because it is subject to legal error. However, you should note that judicial review is not a substitute for administrative or political control of the merits, expediency or efficiency of decisions; and matters such as the level of expenditure that should be permitted to local councils are not inherently suitable for decision by a court.

Take note that judicial review is a procedure for obtaining remedies. It covers a wide range of tribunals and public authorities; its remedies may equally be granted against public corporations where their constitutions and functions are suitable. Judicial review of administrative action is an essential process in a constitutional democracy founded upon the rule of law. It involves the judges in developing legal principles against a complex and often changing legislative background. The court has granted review of a decision to prosecute or not to prosecute or to continue or discontinue a prosecution.

The object of judicial review is to ensure that the scope and limits of statutory powers are not exceeded by administrative authorities. Traditionally, applications for judicial review were founded on allegations that an authority had acted either ultra vires (i.e. beyond its powers) or in breach of the rules of natural justice (the common law rules of procedural fairness). In more modern times, however, the enactment of the Human Rights Act 1998 has provided a further fertile ground for allegations of abuse of power and it is probably true to say that the majority of applications for review are now founded under some alleged

contraventions of one or more of the human rights provisions encompassed by the Act.

3.3.1 Justification: Judicial Review and Constitutional Standards

Administrative bodies derive their adjudicatory powers from Acts, legislation, bye laws, statutory instruments and enabling statutes. These are the commands of the sovereign body which lay down the nature and extent of the authority so granted. It is logical, therefore, for the courts to assume and insist that, as recipients of such authority, act within the authorised or commissioned power. Any exercise of power outside the commissioned power is ultra vires. At its simplest level, therefore, a public body acts lawfully (intra vires) so long as it uses its powers within and according to the grant of authority given to it by Parliament. If not, it has exceeded its lawful authority and acted ultra vires.

The rule of law seeks to impose certain minimum standards of conduct on those responsible for the process of government. These standards are commensurate with good governance and a liberal democracy {revisit your module on constitutional doctrines}. These standards include fairness and reasonableness. Judicial review is concerned with the enforcement of these standards and with the application of legal rules, enshrined in the doctrines of ultra vires and natural justice, which have been developed for this purpose. If a decision-maker makes a finding on the basis of wholly irrelevant considerations, this may be condemned as unreasonable in law and ultra vires, the ambit of the power used.

Special jurisdictions
Ecclesiastical courts are not subject to review by the quashing order since ecclesiastical law is a different system from the common law on which the ordinary court will not sit in judgment – See **R v. St. Edmundsbury and Ipswich Diocese (Chancellor) ex. p White {1948} 1 K.B. 195**; See also **R v. Chancellor of Chicheser Consistory Court ex.p News Group Newspaper Ltd. (1992) COD 48.**

It should be noted however, that, a prohibition order will lie, not only to prevent the ecclesiastical court exceeding its jurisdiction but also from executing decisions marred by error of law, provided that the error is one which the court is competent to correct.

The ordinary courts-martial regularly established under military law in normal conditions are subject to quashing orders and prohibiting orders and to judicial review generally.
The High Court and other superior courts are beyond the scope of these remedies, not being subject to judicial review, but a judge of a superior

court, when acting as a statutory tribunal, has no such immunity. See the case of *R v. Master of the Rolls ex p. McKinnel* (1993) 1 WLR 88

Tribunals whose jurisdiction is confined to the internal affairs of some profession or association, and which are commonly called domestic tribunals are subject to judicial review.

Contracts of employment are beyond the scope of quashing and prohibiting orders.

Generally, the courts are reluctant to enter into issues of academic or pastoral judgment which the university was equipped to consider in breadth and in depth but on which any judgment of the courts will be jejune and inappropriate. That will include such questions as, what marks a class student ought to be awarded. See Clark v. University of Lincolnshire and Humberside {2000} 1 WLR 1988.

Self-Assessment Exercise

How can administrative justice be achieved in tribunals?

3.3.2 Classification of Grounds for Judicial Review

There is no general agreement as to how to classify the grounds of review and the text books take different approaches. In the celebrated case of **Associated Provincial Picture Houses Ltd. v. Wednesbury Corp (1948) 1 KB. 223**, Lord Greene set out the circumstances in which the courts would intervene to set aside decisions of public corporations.

The classification of the grounds of review adopted in this unit is organised on the basis of Lord Diplock's classification in CCSU v. Minister for the Civil Service (1985). In that case, popularly known as the GCJQ case):

1. 'Illegality'
    - Narrow' ultra vires or lack of jurisdiction in the sense of straying beyond the limits defined by the statute.
    - Errors of law, and (in certain cases) errors of fact.
    - Wide' ultra vires in the sense of acting for an ulterior purpose, taking irrelevant factors into account or failing to take relevant factors into account.
    - Fettering discretion.

In-text Question
Do you agree with Lord Diplock's classification of grounds for judicial review in CCSU v. Minister for the Civil Service?

2. 'Irrationality'
    a. 'Wednesbury' unreasonableness. This could stand alone or be the outcome of taking an irrelevant factor into account.
    b. Proportionality

3. Procedural impropriety.
    - Violating important statutory procedures.
    - Bias.
    - Lack of a fair hearing.
    - Failure to give reasons for a decision.

    (We shall examine these grounds in subsequent units).

3.4 Significance of Judicial Review

Judicial review has a number of important functions:

- First, the basic idea that courts must police the boundaries of administrative power is firmly based on the constitutional principle of the rule of law;
- It is an aid to accountability;
- One of the important aspects of the jurisdiction of tribunals in our administrative system is that they do not establish precedent.

3.4.1 Limitations on Judicial Review of Administrative Acts

The judicial perspective:

a. Justiciability;
b. Polycentric decisions;
c. Judicial limits: There are areas where the courts have shown themselves unwilling to intervene, including acts of a high governmental or political nature, such as the signing of a treaty, the existence of war, belligerence and neutrality, the recognition of foreign governments, decisions affecting national security, pardons to convicted persons are amongst such decisions.
d. Legislative limits
    Privative clause i.e. a clause prescribing time limits beyond which there can be no judicial review may also be regarded as a privative clause.

3.4.2 Procedure for Judicial Review in Nigeria

In-text Question
What is the procedure for judicial review in Nigeria?

Various rules of courts make application for judicial review. The rules make separate rules for the orders of mandamus, certiorari and prohibition and for order of habeas corpus. The procedures set in the various Rules of the Court for judicial review must be complied with strictly. In **Ohakim v. Agbaso (2010) 19 (Pt. 1226) NWLR 172**, the Supreme Court per Ckukwuma-Eneh JSC held that:
By the nature of judicial review, it requires that the rules of procedure governing its practice must be strictly obeyed and adhered to otherwise the application is incompetent ab initio. This has to be so as it is the means by which the court exercise jurisdiction over public acts or omissions of inferior tribunals and public authorities and officials.

Under the Lagos Rules, an application for order for mandamus, prohibition, certiorari or an injunction restraining a person from acting in any office in which he is not entitled to act shall be made by way of an application for judicial review in accordance with Order 40 of the Lagos Rules (Order 40 Rule 1 (1) of the Lagos Rules.

Leave of the court must be obtained in accordance with The Lagos Rules Order 40 Rule 2. See the case of **CBN v. Amao (2010) 16 NWLR (Pt. 1219) 271**. The application for leave shall be made ex parte.

3.5 Summary

We conclude this unit by examining the dictum of Lord Justice John Marshall in famous case of Madison v. Madbury 1 Cranch (5 U.S.) 137, 166 (1803) that: *[W]hat is there in the exalted station of [an executive] officer, which shall bar a citizen from asserting, in a court of justice, his legal rights, or shall forbid a court to listen to the claim . . . ?* In that case, the court held that courts can review the constitutionality of acts of Congress, and further that certain acts of executive officials are subject to judicial review for legality. Perhaps more than anything else, is the fact that no arm or agency act is so supreme or sovereign that is not subject to review.

3.6 References/Further Readings/Web Resources

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3.7 Possible Answers to Self-Assessment Exercises

How can administrative justice be achieved in tribunals?

Policy formulation
A third consideration is policy formulation.
One vital role of tribunals (administrative authorities in general) is their role in policy formulation, which is an extension of the vast boundless powers and autonomy these authorities have garnered in their development. As a writer commented, *'The policies they create may be explained partly by the autonomy these public institutions have gained over decades and partly by the incapacity of legislatures to resolve quickly the problems they encounter.'*

The reason for this power is also found in the following statement that: *The legislative mandate given to many tribunals through their empowering statute can be left intentionally broad. This may occur, for example, when Parliament believes that a particular discretion or authority delegated to a tribunal should be open-ended and that the tribunal should seek further guidance in the common law.*

A tribunal may therefore provide its board members with clearer guidance adapted to the exercise of their specific legislative powers. One of the reasons why a tribunal will issue such guidelines will often be to provide their board members (who are often not trained in law) with quick and easy access to sound legal practices. Policies may take a variety of forms, including guidelines, directives, codes, rulebooks or manuals of some other kind which may be published or unpublished.

In addition to legislative gaps which tribunals address through policy development, there are other legislative provisions which require or permit the tribunal to adopt a statutory interpretation to suit a given circumstance. In this way, the tribunal is not so much completing its legal order as furthering its development, and sometimes doing so with the express authorisation of Parliament. In this role, tribunals are also more likely to engage the advocacy of affected parties.

Unit 4 Rules of Statutory Interpretation

Unit Structure

4.1 Introduction

According to Portalis; 'the function of a statute is to establish through a broad view the general maxims of the law; to establish principles rich in consequences and not to descend into the detail of questions, which could arise on every question. It is up to the judge and the jurist imbued with the general spirit of the law, to direct their application'. *CM Germain 'Approaches to Statutory Interpretation and Legislative History in France' [2003] Duke Journal of Comparative & International Law 13, 195 at fn 4.* By rules, we refer to the rules of statutory interpretation applied to any written constitution, statutory codes, statutes (Acts of Parliament, regulations, and other forms of delegated legislation (note that it is the same in both civil and common law jurisdictions). The need to interpret written law flows from the inherent ambiguity in any language. As Aristotle remarked, laws are usually expressed in general terms, which means that they cannot cover every possible scenario and must therefore be interpreted. In *The Art of Rhetoric*, he asked: 'If a man wearing a ring on his finger strikes another with that hand, is he liable for the offence of "wounding another with an iron instrument"?' The same problem was recognised from Cicero through the ages to Grotius. Similarly, St Thomas Aquinas asked: 'If a citizen opens the city gate at night to allow in his townspeople fleeing the enemy, is he liable for the offence of "opening the city gate before sunrise"?' Many examples show the relevance of the language of the law to be read down to avoid it literally applying to a situation that was not intended by the lawmaker or drafter. A basic function of the court is to give meaning to particular words in statutes under considerations. In doing this, the courts have tools or rules of approaches to fulfill that function.

4.2 Learning Outcomes

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

- analyse the raison d'etre of statutory interpretation;
- discuss the different rules of judicial interpretation;
- discuss the applicable rules of judicial interpretations in different jurisdictions.

4.3 Rules of Statutory Interpretation

Rules of Statutory interpretation includes legal principles developed to discover the meaning of statutes. They have been referred to as rules of thumb that aids the court in determining the meaning of legislations. Rules of interpretation are principles upon which the words of a statute are legally analysed to discover the intent of the legislature. These rules are adopted to make the judge's duty of reaching a clear and unambiguous understanding of an Act, much easier. See: M. Zander *The Law-Making Process,* (Cambridge: Cambridge University Press.)

Professor Stefan Vogenauer's in *A comparative study of judicial jurisprudence and its historical foundations* traces the development of the rules of statutory interpretation from the earliest times in both common law and civil law jurisdictions. We shall discuss the civil and common law modes of judicial interpretation to see grounds (if any), of divergence or convergence. As an author noted, while common law jurisdictions such as Australia have enacted an Act - Interpretation Act to supplement the common law rules of statutory interpretation, civil jurisdictions such as France, in their French Civil Code does not provide any general rules of statutory interpretation, unlike the Civil Code of Louisiana of 1870 Articles 13–21.

There are three basic principles of statutory interpretation applied by common law courts: the literal rule, the golden rule, and the mischief rule.

4.3.1 The Literal Rule

The literal rule, also known as the plain meaning is reputed to be the first and preferred rule of interpretation. It stands for the proposition that the meaning of a statute can be revealed through a simple examination of the statutory language. The fundamental rule of statutory interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it; and that intention has to be found by an examination of the language used in the statute as a whole. Its core principle was that the safest guide to and best evidence of legislative intention was 'to be found by an examination of the language used in the statute as a whole.'

In 1917, the Supreme Court pronounced what has become the traditional articulation of the plain meaning rule in *Caminetti v. United States 242 U.S. 470 (1917)* when the Court explained that "[w]here the language is plain and admits of no more than one meaning, the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion.".

The literal approach (and its rationale) was also expounded by Higgins J in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 CLR 129, 161–2 ('Engineers')*. Jamie Blaker described literalism as 'the dominant approach' of the High Court to statutory (and constitutional) interpretation 'over the course of the 19th and much of the 20th centuries'.

In the words of Chief Justice Tindal in *Sussex Peerage* (1844):

… the only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver.

The court in the *Engineers* said:
The question is, what does the language mean; and when we find what the language means in its ordinary and natural sense, it is our duty to obey that meaning; even if we think the result to be inconvenient or impolitic or improbable.

Similarly, in the Nigerian case of *Awolowo v Shagari (1960-1980) LRECN 162* the Appellant had approached the court for the judicial interpretation of the meaning of two-thirds of 19 states of Nigeria as provided for in the electoral law. The Supreme Court interpreted the law literally and reached a verdict that two-thirds of 19 states is 12 2/3, and that if 13 states was intended, the law would have stated so in clear terms.

The question is, what does the language mean; and when we find what the language means in its ordinary and natural sense, it is our duty to obey that meaning, even if we think the result to be inconvenient, impolitic or improbable. (Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 CLR 129, per Higgins J at 161.)

An example of literal rule is *Kirk v. Industrial Relations Commission. High Court of Australia: Kirk v. Industrial Relations Commission* [2010] HCA 1 http://www.austlii.edu.au/au/cases/cth/ HCA/2010/1.html. In that case, a farm employee was killed when his All-Terrain Vehicle overturned on a steep slope. His employer was convicted by the New South Wales (NSW) Industrial Court under a NSW statute for failing to warn the employee of this risk. The employer sought to appeal this decision, but section 179 of the Industrial Relations Act 1996 (NSW) appeared to preclude this. Section 179 reads that:

Finality of decisions

(1) A decision of the Commission (however constituted) is final and may not be appealed against, reviewed, quashed or called into question by any court or tribunal.

(2) Proceedings of the Commission (however constituted) may not be prevented from being brought, prevented from being continued, terminated or called into question by any court or tribunal.

(3) This section extends to proceedings brought in a court or tribunal in respect of a decision or proceedings of the Commission on an issue of fact or law.

(4) This section extends to proceedings brought in a court or tribunal in respect of a purported decision of the Commission on an issue of the jurisdiction of the Commission, but does not extend to any such purported decision of: (a) the Full Bench of the Commission in Court Session, or (b) the Commission in Court Session if the Full Bench refuses to give leave to appeal the decision.

(5) This section extends to proceedings brought in a court or tribunal for any relief or remedy, whether by order in the nature of prohibition, certiorari or mandamus, by injunction or declaration or otherwise.

(6) This section is subject to the exercise of a right of appeal to a Full Bench of the Commission conferred by this or any other Act or law.

(7) In this section: 'decision' includes any award or order.

There are some times that the literal rule of interpretation lead to absurdity as in the case of *Fisher v. Bell (1961) 1 QB 394*. The English Restriction of Offensive Weapons Act of 1959, section 1 (1) made it an offence to "manufacture, sell, hire, or offer for sale or hire, or lend to any other person, amongst other things" an offensive weapon. The defendant had a flick knife displayed in his shop window with a price tag on it. The Statute made it a criminal offence to "offer" such flick knives for sale. His conviction was overturned based on the ground that goods on display in shops are not "offers" in the technical sense but an invitation to treat.

A slavish adherence to this rule may sometimes produce an undesired outcome, even though it is the principal canon to guide the interpretation of statutes.

In-text Question
Is there any difference between the literal rule of interpretation and the golden rule of interpretation?

4.3.2 The Golden Rule

The rule was first mentioned in *Becke v Smith* (1836) 2 M & W 195 Justice Parke as follows:

It is a very useful rule in the construction of a statute to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the legislature to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified so as to avoid such inconvenience but no further.

Also, in Grey v Pearson [1857] 6 HLC 95, per Lord Wensleydale at 106 stated that:

. . . the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid the absurdity and inconsistency, but no farther.

The Golden Rule permits a contextual extension to avoid an absurdity arising merely from a literal interpretation. In applying the golden rule, the court is at liberty to find another meaning either by ignoring the words used, or by reading in words, to the existing statute. To do this, the court puts into consideration the inconsistency, absurdity or inconvenience in that rule that the Parliament could not have intended that the words be given their ordinary meaning. For instance, in the Adler v. George [1964] QB 2, 7, a statute that prohibited the creation of an obstruction 'in the vicinity of an [Air Force facility]', was interpreted to apply also to the creation of an obstruction inside the facility. It was regarded as absurd to confine the statute so as not to cover this situation. The avoidance of absurdity can be explained as an instance of an interpretation that is designed to prevent an outcome that is inconsistent with the purpose of the statute.

4.3.3 The Mischief Rule

The mischief rule is also known as the rule in *Heydon's case.* The rule was propounded in that case as follows:

For the sure and true interpretation of all statutes, four things are to be discerned and considered: -

- 1st. What was the common law before the making of the Act?
- 2nd. What was the mischief and defect for which the common law did not provide?

- 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth.
- 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico.*

Driedger E.A. Driedger, *Construction of Statutes*. (Canada: Butterworth & Co. (Canada) Ltd., 1983) at p. 1describes it as follows:

A statute is to be so construed as to suppress the mischief and advance the remedy, thus giving the courts considerable latitude in achieving the objective of the legislature despite any inadequacy in the language employed by it.

The Court will consider the legal and factual situation that existed when a law was passed paying particular heed to the reasons why it was considered necessary to make a change in that Law. Where the court, having regard to the whole statute, some obscurity or ambiguity, the court will construe the statute to avoid the mischief in the rule which the statute seeks to remedy. In *Corkery v. Carpenter [1951] KB 1, 102* for instance, the issue was whether a man could be convicted of drunken driving while on a bicycle when the Licensing Act 1872 (United Kingdom) referred only to a 'carriage'. The Court interpreted 'carriage' to include any sort of vehicle, since the purpose of the offence was to protect the public.

4.4 Purposive or Functional Approach

The purposive or functional approach focuses on legislative intention. This rule evolved to give statutory or constitutional provisions an interpretation that best suits the purpose for which the law was enacted. Called by various name is different common law jurisdictions; it has been argued that this rule evolved as a convenient substitute for the hitherto existing rules of interpretation, to wit: the mischief rule (F.A.R. Bennion, *Statutory Interpretation*, (3rd ed.) (London: Butterworth & Co., 1997), p. 731-750.

Obaseki JSC (as he then was) seemed to have alluded to this approach when he opined in *Awolowo v Shagari & Ors (supra)* as follows:

The three rules of statutory interpretation which dominate the historical perspective are:
(1) The Mischief Rule

(2) The Literal Rule; and
(3) The Golden Rule.

They have been useful aids in the interpretation of statutes in common law countries for centuries.

It has been said that they have been fused so that we now have just one rule of interpretation, a modern version of the literal rule which requires the general context to be taken into consideration before any decision is taken concerning the ordinary meaning of the words.

The philosophical basis for accepting this rule has been drawn from several writings. As Driedger noted:

Today, there is only one principle or approach namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

For instance, in Pepper v. Hart (1993) AC 593:
My Lords, I have long thought that the time had come to change the self-imposed judicial rule that forbade any reference to the legislative history of an enactment as an aid to its interpretation. The ever increasing volume of legislation must inevitably result in ambiguities of statutory language which are not perceived at the time the legislation is enacted. The object of the court in interpretating legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted. Why then cut ourselves off from the one source in which may be found an authoritative statement of the intention with which the legislation is placed before the Parliament?

4.4.1 The Modern Approach

What is the modern approach? Let us examine the dictum of the court in the case of CIC Insurance Ltd (1997) 187 CLR 384, 408 (Brennan CJ, Dawson to decipher the *raison d'etre* of the case:
the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage

when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as [reference to reports of law reform bodies], one may discern the statute was intended to remedy …

A recurring theme of the modern approach is 'context', that is, to ascertain the meaning of a statute, its context must 'be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise' and 'in its widest sense.'

The modern approach is also a common law gateway to the use of extrinsic materials seminal statement of McHugh, Gummow, Kirby and Hayne JJ in Project Blue Sky Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355, 384:
the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.

How then does the court approach statutory interpretation?

Civil law jurisdictions
There are some rules guiding the interpretation of statutes. Let us look at them more closely:

- If the statute is clear, plain, or unambiguous, and no absurdity arises in its application in the case, the court must apply it literally: the sens clair principle (de Cruz 6 at 267);
- The ordinary natural meaning of the words used is to be adopted, often with reference to the dictionary meaning, except for technical expressions;
- If an absurdity arises, the court will depart from the literal interpretation to avoid the absurdity: for example, Cass Crim, 8 March 1930, DP 1930/1/101, where the statute stated that it was unlawful to get on or off a train while it was not in motion (see de Cruz 6 at 268);
- If the language is ambiguous, that is, susceptible to more than one interpretation (common under civil codes and statutes expressed in general terms), then the court may adopt the logical interpretation approach, wherein it considers the context of the provision in the light of the statute as a whole and its relationship with the other branches of the Law, to maintain the coherency and completeness of the legal system;

- If a literal interpretation offers no solution, the court may adopt analogical reasoning. This arises under Article 4 of the French Civil Code, whereby a court is required to decide a case even if the code provides no answer;
- But these last two principles are not necessarily applied in the same way to statutes (lois d'exception), which are usually interpreted strictly - at least until they are assimilated into the droit commun - which may take decades (de Cruz at 269).

4.4.2 Teleological Approach

This enables the court to extend the code provisions to situations that were not contemplated at the time of enactment, thereby ensuring the code's application to changing social and economic conditions.

Common law jurisdictions
Judicial reaction to the interpretation of statutes now extends along 'a spectrum of judicial opinion ranging from strict literalism at one end to broadly based purposive interpretation at the other end' (Hon JJ Spigelman AC 'The intolerable wrestle: Developments in statutory interpretation' [2010] ALJ 84, 822 at 822).

How does the court approach statutory interpretation?
According to Professor Nwabueze in his book, Constitutional Law of the Nigerian Republic (1964), in reviewing legislative and executive measures for constitutionality and legality, judicial approach to interpretation oscillates between the liberal to the strict interpretation. However, according to Lloyd (Freedman M.B.A, Lloyd‟s Introduction to Jurisprudence, London, 4th ed. 1985, p.818),…. Rules are means to an end, purposive instruments. … Lord Denning in the case of *Seaford Court Estate Ltd v Asher, (1949), 2LB 498-499* opined that a judge is not constrained to follow rigidly a single path of interpretation. According to him, a judge is confronted with value choices which allows a measure of flexibility needed to meet the demands of justice in every given case. The approach adopted in Nigeria can be gleaned from cases.

Oputa J.S.C, a former Justice of the Nigerian Supreme Court advanced an interpretative approach which leans less on technicality of law. He said:
This court is not a mechanical or automatic calculator. No. it is a court of law dealing with varying situations and applying the same law to these situations in order to do justice in each and every situation according to its peculiar surrounding circumstances.

Oputa J.S.C in another case elucidated more on the dangers inherent in strict construction of statute. In the case of Aliu Bello & ors v Attorney General of Oyo State (1985) 5 NWLR 886 he stated that:

The picture of law and its technical rules triumphant, and justice prostrate, may, no doubt, have its judicial admirers but the spirit of justice does not reside in forms and formalities, nor in technicalities; nor in the triumph of the administration of justice to be fund in picking one's way between pitfalls and technicalities. Law and its technical rules are to be but a handmaid of justice and legal flexibility.

Eso, J.S.C., a contemporary of Oputa, J.S.C. put the matter succinctly in the State v Gwonto (1983) 1 SCNLR, 142, p.160:
The court is more interested in the substance than the mere forms. Justice can only be done if the substance of the matter is considered. Reliance on technicality leads to injustice.

See the dictum of Fatayi-Williams J.A i**n Lakanmi v. A.G. Western Nigeria (1971) 1 U.I.L.R. 201**; also, the foreign case of British Coal Corporation v. The King (1935) A.C. 158 for the position in U.K. **Emmanuel Onyeama & Ors. v. Uwaeze Oputa (1987) 6 S.C. 362 at 371** for the principles of interpretation.

Self-Assessment Exercise 1

What does the liberal interpretation entail?

4.4.3 Rules Guiding Connotational Interpretation

The apex court has used every opportunity to highlight what constitutional interpretation entails and the rules that guide the court in statutory interpretation. From the case of *Nafiu Rabiu v. Kano State (182) 2 NCLR 117*, Udo Udoma JSC stated that constitutional interpretation should be done liberally and not to defeat the obvious ends of the constitution.

Self-Assessment Exercise 2

What should be the approach of the court in construing the intentions of a procedure - whether mandatory or discretionary?

4.5 Summary

You will observe that by whatever rules of interpretation adopted, there are some basic underlying principles or guidelines which are pervasive in most jurisdictions. These criteria are: its language, genesis, context within the statute and the legal system as a whole, purpose and the extralegal values. The author of Taming the Unruly Horse (cited above) noted that

cases are tackled on case-by-case basis, without adhering to any specific rule of interpretation.

4.6 References/Further Readings/Web Resources

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Taming the Unruly Horse of Rules of Interpretation: A review of ***Marwa & Anor v Nyako & Ors.***

4.7 Possible Answers to Self-Assessment Exercise

Self-Assessment Exercise 1: What does the liberal interpretation entail?

Guide

Let us consider the dictum of Fatai Williams, (CJN) in Senator Abraham Adesanya & 2 Ors v The President of the Federal Republic of Nigeria & or. (1981), 5 SC 112:

I am strongly of the view that when interpreting the provisions of our 1999 Constitution, not only should the court look at the Constitution as a whole, they should also construe its provisions in such a way as to justify the hopes and aspirations of those who have made the strenuous effort to provide us with a constitution for promoting good government. What test can you deduce from the authorities and statute on the rule to be applied in construing rights of citizens?

Schmidthold in his tribute to Lord Denning, noted for liberal approach to law, said:

He looks at law as an instrument of doing justice, doing justice now in the case before him which is founded on what majority of right-thinking people regard as fair solutions to justice and which gives them confidence

that those occupying the judgment seat do not live in a different world of ideas from their own and understands their hopes and anxieties. The belief that law is instrument of doing instant justice is the explanation of Lord Denning's often misunderstood radicalism. His approach is teleological. He thinks of the result before he considers the legal reasoning on which it was to be founded. If the results to which established legal doctrines lead is obviously unfair and out of touch with what ordinary people would expect to be law, he will examine the principles in order to ascertain whether they really compel an injustice solution and after, this method will enable him to arrive at an answer which is more equitable to modern need.

Self-Assessment Exercise 2:
What should be the approach of the court in construing the intentions of a procedure - whether mandatory or discretionary?

The courts always consider:

a. The intention of the legislature to be ascertained from words and phrases used and from the scheme of the statute;
b. The court takes into account the relative importance of the disregarded procedure and the implied consequences of the breach.

MODULE 2

Unit 1 Ultra Vires

Unit Structure

1.1 Introduction

The 'ultra vires' theory emphasises that the ultra vires doctrine is fundamental to the principles of judicial review, being the juristic basis of judicial review. To a large extent, the courts have developed the subject by extending and refining this principle, which has many ramifications and which in some of its aspects attains a high degree of artificiality. As such, you find that most, if not all, can be related to ultra vires. For instance, in the case of *Ridge v Baldwin*, a leading case on natural justice, the court held that the failure to observe the rule of fair hearing, voided the action, and from which followed that it acted outside its jurisdiction, i.e ultra vires. See also the case of Anisminic, particularly Lord Pearce's dictum on page 195.

1.2 Learning Outcomes

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

- discuss the ultra vires doctrine and the various grounds that will come under the theory that has now been styled 'ultra vires doctrine'.

1.3 The Ultra Vires Doctrine

In-text Question
What is the relevance of the ultra vires doctrine?

'Ultra Vires' is a Latin phrase which simply means "beyond powers" or "without powers".

The ultra vires doctrine is the rule against excess or abuse of power; an act which is for any reason in excess of power (ultra vires) is often described as being 'outside jurisdiction'. The doctrine of ultra vires as used in administrative law implies that discretionary powers must be exercised for the purpose for which they were granted. At the inception, the application of the doctrine was designed exclusively to ensure that administrative authorities do not exceed or abuse their legal powers.

The doctrine can be simply stated as follows:

When a public authority is intending to exercise a power vested in it by legislation, it must do so in accordance with the legislation, both as regards the limits of the power and as regards any detailed conditions that must be observed when the power is used. If a public authority acts beyond the limits of the power, its acts are to that extent invalid as being ultra vires.

Any administrative act or order which is ultra vires or outside jurisdiction is void in law; it is not within the powers given by the Act; it has no legal leg to stand on.

See Lord Selbourne's dictum in the case of ***Attorney-General v. Great Eastern Railway*** **[1880] 5 App. Cas. 473 @ 478** when he said that: *it appears to me to be important that the doctrine of ultra vires…. should be maintained. But I agree…that this doctrine ought to be reasonably and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorised ought not (unless expressly prohibited) to be held by judicial construction, to be ultra vires".*

See also ***Attorney-General v Wilts United Dairies*** (1921) TLR 884.

1.3.1 The Principle

The simple proposition that a public authority may not act outside its powers (ultra-powers) might fitly be called the central principle of administrative law - see ***Boddington v. British Transport Police*** **(1999) 2 AC 143 at 171 (Lord Steyn).**

Sir William Wade {H.W.R. Wade and C.F. Forsyth, Administrative Law (Oxford 1994), 7th ed., pp. 41 and 44.} has expressed centrality of this doctrine as follows:

The simple proposition that a public authority may not act outside its powers (ultra vires) might fitly be called the central principle of administrative law.... Having no written constitution on which he can fall back, the judge must in every case be able to demonstrate that he is carrying out the will of Parliament as expressed in the statute conferring the power. He is on safe ground only where he can show that the offending act is outside the power. The only way in which he can do this, in the absence of an express provision, is by finding an implied term or condition in the Act, violation of which then entails the condemnation of ultra vires.

The essence of the ultra vires doctrine is that a person or body acting under statutory power can only do those things the statute authorises him or it to do; an act will be ultra vires if the person or body doing it did not have the statutory power to do it. (And of course, it cannot do what it is forbidden to do.) It follows that the more widely expressed powers are, the less will there be for the doctrine to bite on.

When the empowering Act lays down limits expressly, their application is merely an exercise in construing the statutory language and applying its facts.

Note the following points on ultra vires act

In-text Question
Explain with the aid of decided cases, an act which though was intra vires, but was carried out in an unlawful manner.

Note that the courts have developed various grounds under the general doctrine of ultra vires, which we shall be considered in subsequent units (a few are listed under substantive ultra vires), but hereunder are some instances of ultra vires act:

- A challenge to the legality of an act may be either on the ground that there was no power to do it, or on the ground that though, or if, there was power to do it the power was exercised in an unlawful manner. Note that the powers of an authority include not only those expressly conferred by statute but also those which are reasonably incidental to those expressly conferred;
- A challenge on the first ground is that the body in question acted ultra vires in the narrow, or strict sense of that doctrine - that there was no power to do it;

- A challenge on the second ground is that though the body had the power in question, and was thus acting intra, not ultra vires;
- An act will be ultra vires where it is done by the wrong person. Or: a power can be exercised only by the person on whom it is conferred.

See the case of **Vine *v National Dock Labour Board* (1957) AC 488; (1956) 3 All ER 939**.

The Court can only interfere with an act if exercising its discretion, the authority has contravened the law. What are the principles to be applied in deciding whether it has done so?

1.3.2 Power to be Exercised only by the Person Authorised

In-text Question
What is the effect of an act which though, carried out in a lawful manner, but was improperly delegated.

An act will be ultra vires where it is done by the wrong person. Or: a power can be exercised only by the person on whom it is conferred. Thus:

(i) Where in any administrative scheme decision-making power is distributed amongst various bodies, each body is confined to the powers given to it. This may give rise to disputes between those bodies as to where the boundary line between them runs.

(ii) The problem not uncommonly manifests itself when a body permits a subordinate part of itself to undertake, in whole or in part, a function conferred on it. The problem is sometimes expressed in terms of improper delegation, and the maxim, *delegatus non potest delegare* is invoked. But the more fundamental question is, whether a power conferred on one person can be exercised by another. In principle, it cannot. It is to be assumed that a recipient of a statutory power has been chosen for its qualities and suitability for the task in mind. In each case, the statute has to be examined to see whether a power to delegate is conferred or withheld and if so to what extent.

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

1.4 Substantive Ultra Vires

A person conferred with discretionary power must not:

a. consider irrelevant considerations; see Eleso v. Government of Ogun State (supra); Stitch's case (supra)
b. improper purpose: the court will pierce the administrative veil to consider the appropriateness or otherwise of an action. For this proposition, see the foreign cases of R v. Minister of Health, Ex p Davis (1929) I K.B. 619; Campbell v. Municipal Council of Sydney (1925) A.C. 338 at 343

There are times that there are multiple purposes decipherable from a statute, the court will need to discover the dominant or true purpose of the Act. See the case of Metropolitan Borough of Lewisham v. Roberts (1944) 2 K.B. 608.

Self-Assessment Exercise
What are the criticisms trailing this doctrine?

1.5 Summary

The ultra vires doctrine is a creation of the courts with the view of curtailing abuse of power by administrative authorities and providing relief for the parties. The doctrine of ultra vires has been gradually but, steadily extended by courts, to cover not only those orders or decisions made in excess of power, but also to cover numerous other heads of judicial review, such as, failure to observe rules of natural justice, irregular delegation of powers, breach of jurisdictional conditions, unreasonableness, irrelevant considerations, improper motives, and such other inconsistencies that can be considered as amounting to ultra vires.

Although faced with a lot of criticism, the ultra vires doctrine is a mechanism that seeks to maintain a delicate balance between retaining judicial discretion and accountability at the same time. The doctrine employs established norms and principles of good administration as well as curtails the excesses of decision makers by controlling administrative discretion.

1.6 References/Further Readings/Web Resources

Benjafield & Whitemore (Administrative Law Treaties)

Paul, C. (1998). Ultra Vires and the Foundations of Judicial Review. *The Cambridge Law Journal*, Vol. 57, No. 1, pp. 63-90.

Chamila, S. T. (2011). The Doctrine of Ultra Vires and Judicial Review of Administrative Action. *Journal of Sri Lanka*, Volume XVII.

1.7 Possible Answers to Self-Assessment Exercises

Self-Assessment Exercise:
What are the criticisms trailing this doctrine?

Guide:

- The Indeterminacy of the Ultra Vires Principle: One potent critique of the ultra vires principle is its very indeterminacy; it is very flexible. This can be exemplified by its application to judicial review of jurisdictional issues such as those presented in cases such as Anisminic (supra).
- See Ultra Vires and the Foundations of Judicial Review Author(s): Paul Craig Source: The Cambridge Law Journal, Vol. 57, No. 1 (Mar., 1998), pp. 63-90

Unit 2 Due Process

Unit Structure

2.1 Introduction

In this unit, you will be studying the topic of due process, looking at the historical evolution, practice and application of the doctrine in different jurisdictions. From your reading, you will be able to see how the courts invalidate administrative action on the grounds of 'due process'. Given the expanse of the doctrine, however, you will observe the common factors and normative concepts, subject to multiple interpretations as applied to particular due process contexts. Moreover, they trigger different legal standards in different contexts. Underpinning these different interpretations however, is the democratic liberal democratic expectations of what counts as government "rationality" and proper obedience to expectations about the limits of government power over individual liberties. Due process, due process of law or proper procedure is one of the most important and fundamental constraints on government action, dating back at least to the Magna Carta, the cornerstone document that was first promulgated in England in the year 1215. There are two different types of ''due process'' law: Substantive Due Process and Procedural Due Process. Substantive Due Process refers to limits on what government can regulate; Procedural Due Process refers to the procedures by which government may affect individuals' rights. This unit will trace due process under certain constitutional doctrines – the rule of law because this perspective provides a useful benchmark from which to measure the evolution and development of modern doctrine. By exploring the historical origins of rule of law principles, we can understand how and to what extent debates over the rule of law influenced the formation and development of the American government and its due process

jurisprudence. Also, we can better understand the justifications for and tensions within the current state of this jurisprudence.

2.2 Learning Outcomes

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

- identify the historical underpinnings of due process;
- analyse due process requirements for agency procedure;
- discuss the procedures required by due process.

2.3 The Concept of Due Process

In-text Question
What do you understand by 'due process'

According to William Funk and Richard Seamon, the exact content of due process protections was never made clear. But earliest cases in the twentieth century, *Londoner v. Denver*, 210 U.S. 373 (1908), suggested that due process could be satisfied by the most simplest procedures:

Due process of law requires that, at some stage of the proceedings, the [person] shall have an opportunity to be heard, of which he must have notice, either personal or by publication, or by a law fixing the time and place of the hearing. . . . Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this nature. But even here a hearing, in its very essence, demands that he who is entitled to it shall have the right to support his allegations by argument, however brief, and, if need be, by proof, however informal.

Due process has been defined in the following terms:
It is the legal requirement that the state must respect all of the legal rights that are owed to a person and laws that states enact must confirm to the laws of the land like - fairness, fundamental rights, liberty etc. It also gives the judiciary access to fundamental fairness, justice, and liberty of any legislation.

According to Ese Malemi, due process is the total protection the law gives to a person; the term due process is also the term that is used for what is fair, right, proper, due or ought to be done in the opinion of the public.

It is the lawful and proper way of doing a thing in any given area of life, and with the full and equal protection of the constitution and other laws of the country. Due process is the observance of the law. (Ese Malemi, Administrative Law, 4th edition)

Under English law, the historical antecedents of the due process clauses are that clause of Magna Carta which reads that:
"No freeman shall be arrested or detained in prison, or deprived of his freehold, or outlawed, or banished, or in any way molested: and we will not set forth against him, nor send against him, unless by the lawful judgment of his peers and by the law of the lands"

We also see the clause of the confirmation of Magna Carta by Edward III, by which he ordained that "the Great Charter . . . be kept and maintained ... and that no Man of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken or imprisoned".

The provisions of this Act have been subjected to different interpretations. There are two main currents of opinion in regard to Magna Carta. One, the traditional attitude, looks upon it as a great declaration of human rights and democratic principles, the constituent text for trial by jury and the bulwark of liberties which gave and guaranteed full protection for property and person to every human being who breathes English air. The second current of opinion is as found among modern scholars.

The court in the case of *Den v. The Hoboken Land and Improvement Company* How. 272, 276 (U.S. 1855). Per Lord Curtis attempted to define due process when it stated that:

The words "due process of law" was undoubtedly intended to convey the same meaning as the words, "by the law of the land" in Magna Carta. Lord Coke in his commentary on these words says they mean due process of law. The constitutions which had been adopted by the several states before the federal constitution, following the languages of the great charter more closely, generally contained the words, "but by the judgment of his peers, or the law of the land."

The court also in the case of *Atkins v. The Disintegrating Company*, 18 Wall. 272, 276-277 (U.S. 1873) attempted a definition when it stated that:
The constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it is due process .... To what principles then are we to resort to ascertain whether this process, enacted by congress, is due process? To this, the answer must be twofold. We must examine the constitution itself... (and) we must look to those settled usages and modes of proceeding existing in the statute law of England, before the emigration of our ancestors which are shown not to have been unsuited to their civil and political condition....

The original meaning of the concept of due process is not clear. However, legal historians have opined that it has its origin in Chapter 39 of the Great Charter of Liberties of 1215. It was not until a 1354 reissue of the charter that the phrase "due process of law" was included, but by the end of the fourteenth century the due process check against arbitrary government forces was firmly established within the charter.

Chapter 39 of the Great Charter of Liberties of 1215, provided that:
"No freeman shall be arrested, or detained in prison, or deprived of his freehold, or outlawed, or banished, or in any way molested; and we will not set forth against him, nor send against him, unless by the lawful judgment of his peers and by the law of the land.

The principles of due process are also provided for in the Fifth and Fourteenth Amendments of the Constitution of the United States of America.

Fifth Amendment:
No person ....shall be deprived of life, liberty or property without due process of law, now shall private property be taken for public use, without just compensation.

Fourteenth Amendment
No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"No freeman shall be arrested, or detained in prison, or deprived of his freehold, or outlawed, or banished, or in any way molested; and we will not set forth against him, nor send against him, unless by the lawful judgment of his peers and by the law of the land.

But it has been described by Judge Frank Easterbrook as follows:
"Government must follow the procedures established by law, and in cases involving ''fundamental natural liberties.'' The term, due process has come to mean that courts review the sufficiency of procedures employed in all government actions affecting life, liberty, or property, as measured against a judicially created constitutional standard.

Due process of law stands as the anti-pole of what French jurists call *droit administratif*, which rests upon the assumption that the government and

each of its servants possesses a body of special rights and privileges as against private citizens to be fixed on principles different from those defining the legal rights and duties of one citizen toward another.

2.3.1 Due Process and the Rule of Law

In-text Question
Due process is often discussed in the context of rule of law. What is the point of convergence and divergence between the rule of law and due process?

You have studied the theoretical underpinnings of the concept of rule of law in first semester of this course. You may wish to refresh your memory by revisiting the appropriate unit. Therefore, we are not going to do an in-depth analysis of this doctrine over again, but as only essential in relation to the topic at hand. All we will do is bullet point some fundamentals in this unit.

Rich Cassidy quoted Justice Anthony Kennedy {urt Justice Anthony Kennedy Tells Us What It Means and Why It Counts, On Lawyering (May 4, 2010), http://onlawyering.com/2010/05/the-rule-of-lawsupreme-court-justice-anthony-kennedy-tells-us-what-it-means-and-why-it-counts/} at the 2006 American Bar Association meeting gave an interesting insight into the rule of law.

"He suggests a provisional definition of the Rule of Law with three key elements: '[(1)] The Law is superior to, and thus binds, the government and all its officials.' '[(2)] The Law must respect and preserve the dignity, equality, and human rights of all persons. To these ends, the Law must establish and safeguard the constitutional structures necessary to build a free society in which all citizens have a meaningful voice in shaping and enacting the rules that govern them.' '[(3)] The Law must devise and maintain systems to advise all persons of their rights, and it must empower them to fulfill just expectations and seek redress of grievances without fear of penalty or retaliation." The rule of law marks a fundamental move away from "the rule of men" and requires that laws be publicly known prior to their enforcement.

What this means is that the rule of law requires first that the law be superior to and binding on government and its officials. Second, it requires that, by providing the necessary safeguards, the law "must respect and preserve the dignity, equality, and human rights of all persons." Finally, the law must "devise and maintain systems to advise all persons of their rights, and it must empower them to fulfill just

expectations and seek redress of grievances without fear of penalty or retaliation."

This perhaps is where the concept of due process derives its two arms – the procedural and the substantive elements. The importance of rule of law to due process is that at first blush, due process expressly connected the concepts of rule of law with a provision of proper procedures: providing for limitations of government search and seizure, protections for criminal defendants, basic notice and hearing opportunities, and a host of other procedural protections for unfair application of the law or deprivation of life, liberty, or property without a firm base in existing law.

In-text Questions
What cases have influenced the development of due process?

Great influences of the development of due process:

The first case that highlights due process is the dictum of Lord Coke in Dr. Bonham's case when he ruled that acts of Parliament are void when they are against "common right or reason, or repugnant or impossible to be performed.". He had the opportunity of restating this position in his *Institutes*, where he explicitly stated that the Magna Carta acts as a check against parliamentary acts.

Another great influence on the development of due process is Locke's writings, particularly *Two Treatises on Civil Government.* John Locke, Ch. IX § 124. He stated that:

> The great and chief end of Mens uniting into Commonwealths, and putting themselves under Government, is the Preservation of their Property to which in the state of Nature there are many things wanting. First, there wants an establish'd, settled, known Law, received and allowed by common consent to be the standard of Right and Wrong, and the common measure to decide all Controversies between them. For though the Law of Nature be plain and intelligible to all rational creatures, yet Men, being biased by their Interest, as well as ignorant for want of study of it, are apt not to allow of it as a law binding to them in the application of it to their particular Cases.

Here is an excerpt from E. Thomas Sullivan and Toni M. Massaro in their work *The Arc of Due Process in American Constitutional Law*

It was not until a 1354 reissue of the charter that the phrase "due process of law" was included, but by the end of the fourteenth century, the due process check against arbitrary government forces was firmly established within the charter. From the outset, the Magna Carta's explicit restriction on royal power contained "the rule of law in embryo." The basic protections for free men set out in the charter were dependent upon the existence of an overarching law - legem terrae — that existed apart from and above the whims of individual rulers or government entities. Though the Magna Carta was not seen as providing the same liberties to each class until later, the original charter did recognise the supremacy of law. Importantly, the Magna Carta did not represent a radical departure from historical trends, but instead grew out of principles that had been assumed and applied by average freemen long before its creation in 1215. The use of widely accepted and understandable terms helped create a strong foundation in the charter for its denunciation of unaccountable royal power.

In England, King Henry VIII embraced the theory of the divine right and declared that he was "not 'subject to the laws of any earthly creature.'" Despite this hostile environment, the rule of law survived and continued to develop. Medieval institutions continued to form the basis of English monarchies, and Henry VIII continued to act under the authority of Parliament. Though Parliament was "so subservient as to offer no serious threat to royal autocracy and willingly allowed the king to clothe his most ruthless and arbitrary acts in the raiment of statute," its maintenance as an institution emphasised the ultimate rule of law system, which depended upon enacted laws for government action. The English monarchy and Parliament during this period effectively eliminated reliance on private law, which further established the rule of law as a governing principle.

Self-Assessment Exercise

Can procedural modify the substantive due process?

2.3.2 Due Process in Specific Context

The constitution guarantees against a deprivation "of life, liberty, or property," without due process of law. A form of due process jurisprudence deals with hearing themselves. Relevant factors include whether the hearing is a civil suit or a criminal case, whether the person in question is a minor, mentally incapacitated, a prisoner, or in the military, and the nature of the interests or rights in dispute.

2.4 Types of Due Process

Due process of law may be classified into two types. A caveat is that the distinction is not always so finely cut, as warned that the dividing line between substantive and procedural rights is not always easy to see. One reason for this is that it is often the case that a given right has both a substantive and a procedural component. That is why you find that some of the earliest and best-known due process cases addressed a hybrid of procedural and substantive due process principles and involved questions of jurisdiction, in particular whether a given tribunal can properly claim jurisdiction over a case or interest. An example is *Pennoyer v. Neff , 95 U.S. 714 (1877)*.

2.4.1 Substantive Process

In-text Question
What do you understand by substantive due process?

The focal point of the substantive process of due process is that individual laws made by a government can be deemed unjust if they violate ideas of natural law or accepted traditions, even if they were passed by institutions that otherwise adhered to the structural requirements of the rule of law.

Ese Malemi defines substantive due process as a requirement that law should be fair and reasonable. A court scrutinizes a law to ascertain whether it breaches any provision of the constitution. According to Matthews, standards of due process should be determined and adjusted according to the customs of the age as determined by the judiciary.
Substantive due process can be discussed within three ambits.

Firstly, any form of substantive scrutiny into life, liberty and property deprivations; any inquiry into the reason why an authority acted, carried out an action, took a decision, the injustice of an action or decision regarding life and liberty is regarded as a substantive due process review.

Secondly, scrutiny that entails the creation of fundamental rights. Substantial inquiries feature two distinct elements of creation and enforcement of unenumerated rights. This variety of substantive due process is referred to as rights creating and burden imposing limbs of substantive due process. As Abhinav described this: 'The rights creating component of substantive due process assumes that life and liberty can be deprived in ways other than imprisonment or physical restraint, and involves the creation or constitutionalisation of new or unenumerated rights through permissive interpretation of the word 'liberty' in the 14th Amendment. Strictly speaking, the rights creating component has less to do with the due process element and more to do with the word liberty.'

Although nearly all adjudication involves an interpretive or "rights-creating" element, the term "rights-creating" in this work is used to denote perfectionist interpretation i.e. interpretation which would not strictly follow from the language of the text. When a person claims a right which cannot persuasively be linked to any textual provision of the Constitution, he is said to bring a "substantive due process" case. For example, in the Lochner case, the American Supreme Court held that the "general right to make a contract in relation to [one's] business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution".

The rights-creating component of the due process clause may have either an indirect textual origin or a non-textual origin. For example, declaring that free speech rights are available against the States has an indirect origin in the Constitution's text since the 1st Amendment recognises the right to free speech, although the textual right is only available against the federal Government. On the other hand, the declaration of privacy as a fundamental right did not strictly have a textual origin (although the courts treated it as a penumbra), extension of certain textual provisions. In substantive due process cases, the court is usually seen to declare "fundamental rights" i.e. rights hierarchically superior to ordinary constitutional rights or rights "so rooted in the traditions and conscience of [the] people as to be ranked as fundamenta1"} a phrase used by Cardozo J with in a "procedural due process" context. The notion of "fundamental rights" in substantive due process underscores the idea of a rights hierarchy i.e. that some rights are superior to others.

Let us consider some rights creating substantive due processes. In *Skinner v. Oklahoma 86 L Ed 1655: 316 US 535 (1942),* the right to "procreation" was considered to be one of the basic civil rights of man "which was fundamental to the very existence and survival of the race".

In *Munn v. People of the State of Illinois* 24 L Ed 77: 94 US 113, 142 (1876), Field J (in his dissent) held that the word "life" in the 14th Amendment meant something more than "animal existence". Thereafter, the right to privacy was considered to be a "penumbral extension" of the 14th Amendment to the American Constitution while *Gitlow v. New York.*69 L Ed 1138: 268 US 652 (1925) the court opined that the essence of the rights-creating component of substantive due process is that "life and liberty" deprivations can take place in ways other than by imprisonment or physical restraint.

The burden imposing component involves scrutiny of legislative means and end. The case of Lochner established the standard as: Is this a fair, reasonable and appropriate exercise of the police power of the state, or is

it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty... Accordingly, a statute may be invalidated for pursuing either an illegitimate legislative end, or for pursuing the end in an under inclusive or over inclusive manner. See for example, Planned Parenthood of Southeastern Pennsylvania v. Casey 505 US 833 (1992).

The first case that dealt with substantive due process was the Dred Scott v. Sanford, 60 U.S. 393 (1856). In that case, the Supreme Court said that slave owners had a substantive due process right to possess slaves. Then, after Dred Scott, the Supreme Court, during the discredited Lochner (Lochner v. New York, 198 U.S. 45 (1905) era, created economic substantive due process rights. However, prior to Dred's case, Justice Chase in the case of Calder v. Bull, 3 U.S. 386, 388–90 (1798) enunciated many of the principles that modern substantive due process reflects, though his precise intentions obviously must be taken in their narrower, historical context. He stated that:

An act of the legislature (for I cannot call it a law), contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law in governments established on express compact, and on republican principles, must be determined by the nature of the power, on which it is founded. . . A law that punish[es] a citizen for an innocent action, or, in other words, for an act, which, when done, was in violation of no existing law; a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a Judge in his own cause; or a law that takes property from A and gives it to B . . . is against all reason and justice, for a people to entrust a legislature with [such] powers; and, therefore, it cannot be presumed that they have done it.

We now find that in Allgeyer v. Louisiana, 165 U.S. 578 (1897) the court invalidated a statute on the ground of due process. See also the Nigerian case of A.G. Bendel v. A.G. Federation & 22 ors. (1982) All NLR. 85 SC.

2.4.2 Procedural Due Process

In-text Question
What is the difference between substantive due process and procedural due process?

Procedural due process operates to ensure that life, liberty and property deprivations can only occur upon "due" or fair process. The goals of procedural rights are intrinsic in the value they serve. It focuses on the manner in which a decision depriving right was reached. Intrinsic in this function is firstly the goal of protecting substantive rights, especially the

right to liberty, and partially constituting the rule of law. They protect the means by which substantive rights violations can be brought to public light and redressed; concerning itself with the fairness of the procedure by which deprivations occur. *A.G. Bendel State v. Aideyan (1989) 4 NWLR Pt. 118 p.646; Bello v. AG. Oyo State (1986) 5 NWLR Pt. 45 p. 828 SC; R. v. Bodom (1935) WACA 353*

Secondly, they constitute the rule of law. Professor Richard Fallon {Richard Fallon, "Some Confusions About Due Process, Judicial Review, and Constitutional Remedies" (1993) 93 Coltm1 L Rev 309.} identified three subsets of procedural due process doctrine: i) fair pre-deprivation procedures; ii) judicial access; and iii) judicial remedies.

Similarly, Niki Kuckes ["Civil Due Process, Criminal Due Process" (2006) 25 Yale L & Pol Rev 1. [emphasised four meanings of procedural due process: i) participatory procedures; ii) unbiased adjudicators; iii) prior process; and iv) continuity.

2.4.3 Distinction between Substantive and Procedural Due Process of Law

It is necessary to distinguish procedural from substantive due process for at least three reasons. Firstly, procedural norms seldom operate in the absence of substantive values; secondly, in defining norms that constitute due process, the courts substantially set standards for administrative adjudication and thirdly, in safeguarding judicial access where judicial review was specifically excluded by statute, the courts substantively create judicial access.

Michael Bayles (Michael D. Bayles, Procedural Justice, Dordrecht: Kluwer Academic Publishers, 1990, p.3.) provides us with a very good place to start in distinguishing between procedure and substance. He says: Most people have a common-sense grasp of the difference. Procedure concerns the process or steps taken in arriving at a decision; substance concerns the content of the decision. The two are conceptually distinct, for one can use different procedures for the same substantive issue and the same procedure for different substantive issues. Hence, a substantive topic cannot imply a procedure, nor a given procedure imply a particular substantive topic.

Larry May's weighty rule
If there is to be a bright line between procedural and substantive rights, the most plausible view is that procedural rights differ from substantive rights in that, substantive rights are especially weighty rules that aim to promote a particular human good or end, whereas procedural rights are especially weighty rules that aim only at a certain kind of formal fairness.

2.4 Summary

In conclusion, Hannis stated that: "due process of law stands as the anti-pole of what French jurists call droit administratif, which rests upon the assumption that the government and each of its servants possesses a body of special rights and privileges as against private citizens to be fixed on principles different from those defining the legal rights and duties of one citizen toward another. Under that theory, speaking generally, the ordinary tribunals have no concern with the administrative law (droit administratif) as applied by administrative courts (tribunaux administratifs)….."

2.5 References/Further Readings/Web Resources

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2.6 Possible Answers to Self-Assessment Exercise

Guide to answer

Michael Bayles (Michael D. Bayles, Procedural Justice, Dordrecht: Kluwer Academic Publishers, 1990, p.3. notes that both are substantially different to modify each other.

Moreover, the two types of due processes are distinct and mutually exclusive. However, one form of due process reinforces the other, as stated that, procedural norms seldom operate in the absence of substantive values. However, one cannot modify the other, rather, it reinforces one to achieve the ends of justice.

Unit 3 Natural Justice

Unit Structure

3.1 Introduction

The previous unit mentioned the elements of due process inherent in two great scholar's interpretation of procedural. These scholars, Professor Richard Fallon and Niki Kuckes components include i) fair pre-deprivation procedures; ii) judicial access; and iii) judicial remedies; and i) participatory procedures; ii) unbiased adjudicators; iii) prior process; and iv) continuity, respectively, while Abhinav Chanchachud discussed as natural justice and access to justice. In this unit, we shall be breaking these elements and regrouping them under distinctive headings. It is apt to discuss these concepts given their extreme importance to the validity of administrative procedure. As has been noted, 'it is through procedures that the law plays a key role in both facilitating and constraining exercises of power by public authorities, and thus promoting public goals and protecting individual interests.' Act of arbitrariness is curtailed by the shield of procedure; it also can be a powerful instrument in ensuring that the will of political authorities is correctly implemented; the element of procedure ensures that a variety of interests are considered before a decision or action is taken or implemented.

Natural justice consists of certain principles which are essentials of justice. If these essential principles are overlooked, the result would be a travesty of justice. Thus, natural justice is nothing but the means to the ends of justice. The aim of natural justice is to enforce throughout the administrative system those elements of fair procedure which are so universal that they apply not only in courts of laws, but also in tribunals, inquiries and in administrative adjudications of all kinds. Natural justice is included within the concept of justice and need not be named apart in the Constitution. The importance and value of the concept of natural justice lies in its practical utility and tribunals are required to observe it strictly.

3.2 Learning Outcomes

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

- discuss the principle of natural justice;
- discuss the underlying principles of natural justice.

3.3 Meaning of Natural Justice

Let us examine different definitions that have been proffered on the meaning of natural justice.

In-text Question
What do you understand by the natural justice?

'Natural' is virtually equivalent to 'universal' or 'universally valid'. According to Hari Sharan, "natural justice" means justice based upon the innate moral feeling of mankind. According to *de Smith* (Judicial Review of Administrative Action, 4th edition at 157), the concept of natural justice in English law means the rules of natural justice which perform a function, within a limited field, similar to the concept of procedural due process as it exists in USA, a concept in which they lay embedded.

Ese Malemi, Administrative Law, 4th edition defines natural justice as principle, comprising of fairness and justice, which imposes obligations on persons who have power to make decisions affecting other people to act fairly, without bias and to afford a person the opportunity to be heard and adequately state his case.

He also sees it as '*the inherent right of a person to a fair and just treatment in the hand of rulers, their agents, and other persons. Natural justice means the golden rule – do unto others what you want them to do unto you*'

According to Goodhart [English Law and the moral law] at page 65.
"Natural justice expresses the close relationship between the common law and moral principles and it has an impressive ancestry".

Similarly, Lord Hewart; The *New Despotism* 151 (1929) says:
Amid the cross-currents and shifting sands of public life, law is like a great rock upon which a man may set his feet and be safe, while the inevitable inequalities of private life are not so dangerous in a country where citizen knows that in the law courts at any rate, he can get justice. The judiciary is considered to be the guardian of an individual's life,

liberty, property and other interests which are essential for a full development of human personality.

The meaning of natural justice, was differently understood by different writers and lawyers at different systems.

- Some regarded natural justice as civil law, others took it as a form of jus gentium or the common law of nations. Dworkin, Justice according to English common lawyers. 1961
- Others regarded it as synonymous with expressions such as, (i) 'natural justice; 'universal law'. *Cooper v. Wandsworth Board of Works Board of Work, (1863) 14 C.B;*
- 'eternal law'; the 'laws of God'; universal justice; *Drew v. Drew, (1885) 2 Macq. 18*
- 'natural equity'. *Ram Coomar v. Macqueen,* (1872) I.A. Suppl 40
- the substantial requirement of justice, the essence of justice. *Spackman v. Plumstead District Board of Works, (1885) 10 A.C. 229 at 240 (per Earl of Selborne L.C.*).
- substantial justice, *Smith v. R., (1878) 3 AC 614 at 623*
- 'fundamental justice', *Hopkins v. Smethwick Local Board of Health (1890) 24 Q.B.D 712 @ 716*
- the principles of British Justice', *Errington v. Minister of Health {1935) 1 K.B 249 at 280.*
- principles of justice, *Harvey v. Shelton, (1884) 7 Beav. 455 at 462*
- rational justice, *R. v. Russell (1869) 10 B.*;
- divine justice see, R. v. University of Cambridge , (1723) 1 Str 557 @ 567 Per Fontescue J
- essential principles, *Tameshwar v. Oueen , (1957) A.C. 487 (per Lord Denning MR).*

3.3.1 Nature and Scope of the Rules of Natural Justice

The court stated in the case of Green v. Blake 1948 I.R. 242 at 268 that: *The rules are not "exnecessitate those of courts of justice" (Local Government v. Arlidge (1915) A.C 120 @ 138 but rather 'those desiderate which ... we regard as essential, in contra distinction from the many extra precaution's helpful justice, but not indispensable to it, which by their rules of evidence and procedure, our courts have made obligatory in actual trials before themselves.*

The Donoughmore Committee [Committee on Ministers Power Cmd. 4060 (1932) 76] stated that:

'Although natural justice does not fall within those definite and well recognised rules of law which English courts of law enforce, we think it is beyond doubt that there are certain canons of judicial conduct to which

all tribunals and persons who have to give judicial and quasi-judicial decisions ought to conform. The principles on which they rest are, we think, implicit in the rule of law. Their observance, no more than any other factor, which has inspired the criticisms levelled against the Executive and against Parliament for entrusting judicial or quasi-judicial function to the Executive'.

Chief Justice Coke [Marshall, Natural Justice, 1959, pp. 81 and 15 respectively] was sufficiently well informed to be able to state how Almighty God proceeds: "*Postquam reus diffamatus est*-1. *vocat*, 2. *interrogat*, 3. *judica*t"; and an eighteenth century gentleman pointed out that this was the procedure in the Garden of Eden-"Adam (says God) where art thou ? Hast thou not eaten. - .? And the same question was put to Eve also" [Marshall, Natural Justice, 1959, pp. 81 and 15 respectively]. What this means is that the specific content of natural justice, in short,

- *the rules of natural justice are those which make it probable that, whatever the matter to be decided, the decision will be right.*
- *the rules of natural justice are those whose breach makes it less probable that, whatever the matter to be decided, the decision will be right.*

3.3.2 The Importance of Natural Justice in Administrative Law

In-text Question
What is the relevance of the principle of natural justice in administrative law?

The phrase 'natural justice' has acquired great importance in the judicial interpretation arising out of the decisions of tribunals and administrative bodies. Faced with the multiplication of administrative and domestic tribunals, and of administrative or executive acts by government ministers, in a state which has no administrative judiciary system, English courts have felt forced to invent the notion of a ' quasi-judicial' process. The legal point of this predicate is to entail that a decision can be nullified if it is contrary to natural justice.

Under administrative law, natural justice is well seated between the two fundamental concepts of fair procedure, that a man be not a judge in his own cause and that a man must be heard for his own defense.

As Lord Selbourne held in Spackman v. Plumstead District Board of Works [1885] 10 App Cas 229 @ 240 that; 'there would be no decision within the meaning of the statute if there were anything of that sort done contrary to the essence of justice'.

Lord Russel in Fairmount Investments Ltd. V. Secretary of State for the Environment [1976] 1 WLR 1255 @ 1263 also said:

It is implied, unless the contrary appears, that Parliament does not authorise by the Act the exercise of powers in breach of the principles of natural justice, and that Parliament does by the Act require, in particular procedures, compliance with those procedures.
Therefore, where there is a violation of natural justice in a decision, the decision taken in that violation is void and of no effect.

The plaintiff, a member of the Malayan Indian Congress, was suspended by the president of the Congress purporting to act under section 28 of the party constitution, without being given an opportunity of being heard. Rule 28 empowers the president to suspend a member if he is satisfied that that member is acting in a manner detrimental to the Congress. As a precaution against the abuse of this power, the aggrieved person has the right to be heard at any subsequent meeting of the working committee whose decision after hearing both the appeal and the president's justification of his action is to be final and conclusive. The plaintiff did not pursue his right of appeal, but brought an action for a declaration that his suspension was null and void, an injunction to restrain the defendant from denying him the exercise of his rights and privileges as a member, damages and costs.

The first question raised is, whether the president in exercising his power of suspension was under an obligation to observe the audi alteram partem rule, i.e. whether the words "if he is satisfied" import a requirement that any proceedings for suspension shall be in accordance with the rules of natural justice.

Lord Denning's pronouncement in Lee v. Showmen's Guild of Great Britain [1952] 2 Q.B. 342 where he said (at page 346):
"There are important limitations imposed [on domestic tribunals] by public policy. The tribunal must for example observe the principles of natural justice. They must give the man notice of the charge and a reasonable opportunity of meeting it. Any stipulation to the contrary will be invalid. They cannot stipulate for a power to condemn a man unheard."

In recent cases, the superior courts have shown a willingness to adapt the principles of natural justice in view of constitutional requirements: Ingle v. O'Brien (1975) 109 I.L.T.R. 7 (observance of the *audi alteram partem* rule required when revoking taxi-driver's licence); Irish Family Planning Association Ltd. v. Ryan, Supreme Court, 27 July 1978, unreported

(quashing order of the Censorship Board which failed to give either the publisher or author an opportunity to make representations concerning the proposed ban); and Garvey v. Ireland, Supreme Court, 9 March 1979, unreported (natural justice must be observed when removing Garda Commissioner from office).

In the context of statutory powers, natural justice had become by the nineteenth century no more than a canon of statutory interpretation, though a powerful and important one nonetheless.

Self-assessment Exercise 1

What is 'natural' justice?

According to *J.F. Garner, In Review of the International Commission of Jurist* -in France, there are unwritten principles, deduced in decisions of the courts from jurisprudential notions of natural justice and the revolutionary ideas of liberty, equality and fraternity, enshrined in the preamble of every Constitution since 1789 including that of 1958.

In India, we may say that the principles of natural justice are the gift of common law. In USA, the concept of natural justice is part of the 'due process' clause as enacted in the Fifth Amendment and in section 1 of the Fourteenth Amendment of the Constitution. The fourfold principle of justice, viz., (i) notice, (ii) opportunity of hearing, (iii) an impartial tribunal; and (iv) an orderly course of procedure is now, in USA a settled practice both in legal as well as administrative justice. The principles of natural justice are also subject to the doctrine of waiver. G. Sarana v. Lucknow University. A.I.R. 1976. SC 2428
Lord Parker, C.J. *In re H.K. An infant* stated that:

The aim of the rules of natural justice is to secure justice or, to put it negatively, to prevent miscarriage of justice. They do not supplant the law of the land but supplement it. In past it was thought that it included just two rules namely; first, that no one shall be a judge in his case (nemo debet esse judex propria causa) and second, that no decision shall be given against a party without affording him a reasonable hearing (audi alteram partem). But very soon thereafter a third rule was envisaged, and that is that quasi-judicial enquiries must be held in good faith, without bias and not arbitrarily or unreasonably.

The Supreme Court in Maneka Gandhi v. Union of India, *(1978) S.C.C 248* held that there can be no distinction between a quasi-judicial function and an administrative function. The aim of both administrative inquiry as well as quasi-judicial inquiry is to arrive at a just decision and if a rule of natural justice is calculated to secure justice, or to put it

negatively, to prevent miscarriage of justice, it is difficult to see why it should be applicable to quasi-judicial inquiry and not to administrative inquiry. It must logically apply to both.

On what principle can distinction be made between one and the other? Can it be said that the requirement of 'fair play in action' is any the less in an administrative inquiry than in a quasi-judicial one? Sometimes an unjust decision in an administrative inquiry may have far more serious consequences than a decision in a quasi-judicial inquiry and hence the rules of Natural Justice must apply equally in an administrative inquiry which entails civil consequences.

Self-Assessment Exercise 2

Are the principles of natural justice applicable in administrative tribunal?

3.4 Summary

Natural justice represents the basic irreducible procedural standard with which administrators are required to comply. One of the circumstances under which a decision is reached and which is often thought to make it validly or invalidly reached is, of course, the partiality or impartiality of the person making the decision. Both the rightness of the decision and the impartiality of the judge can be called justice or fairness.

We can conclude this important discussion by taking a look at Rudolf Von Jhering (**R.V. Jhering, Law as a Means to an End 297-8**) when he stated that the success of the administration of justice is dependent on two requisite conditions, that one is moral in its nature and a matter of character. The authority who decides the case must have the necessary firmness of will and moral courage to maintain the law without being led astray by consideration of any kind, by hate or friendship, sympathy or fear. This bears a similitude of the concept in the common law. Historically, the concept of natural justice was embedded upon the notions of fairness and justice or what was referred to as the justice of the common law. The high mark of the concept was seen in the case of Dr. Bonham's case [1610] 8 Co. Rep. 113b at 118a where Chief Justice Coke stated that the court could declare an Act of Parliament void if it negated the principles 'against common right and reason' and the ground upon which the claim of the College of Physicians to fine and imprison Dr. Bonham for practicing in the City of London without license was disallowed.

3.5 References/Further Readings/Web Resources

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3.6 Possible Answers to Self-Assessment Exercises

Self-Assessment Exercise 1

What is 'natural' justice? Are the principles of natural justice applicable in administrative tribunal?

The concept of natural justice in English law means the rules of natural justice which perform a function, within a limited field, similar to the concept of procedural due process as it exists in USA, a concept in which they lay embedded.

Ese Malemi, Administrative Law, 4th edition defines natural justice as principle, comprising of fairness and justice, which imposes obligations on persons who have power to make decisions affecting other people to act fairly, without bias and to afford a person the opportunity to be heard and adequately state his case.

Self-Assessment Exercise 2
Are the principles of natural justice applicable in administrative tribunal?

The application of the principles of natural justice is essential in administrative proceedings performed by administrative bodies, domestic tribunals, and of administrative or executive acts by government ministers especially in performing quasi-judicial functions, to ensure that the justice criterion of fair hearing and impartiality are satisfied. Basically, the legal point of this predicate is to entail that a decision can be nullified if it is contrary to natural justice.

UNIT 4 THE RULE AGAINST BIAS – NEMO JUDEX IN CAUSA SUA

Unit Structure

4.1 Introduction

The requirements of due process and natural justice is not treated in isolation but with regard to the pillars that make up these principles. This twin pillars of justice, or the principles of natural justice are classified into *audi alteram partem (hear the other side) and nemo judex in causa sua* (no man should be a judge in his own case) as commonly called, are principles of great antiquity dating back to the great Magna Carta Act. These principles are the standards that are to be adhered to in the process of decision making. Those two maxims encompass much of procedural justice, including the common law rule against bias and the right to a fair hearing. A right to an administrative or judicial appeal (or to judicial review) bolsters the *audi alteram partem* rule, by guarding the integrity and soundness of the initial determination.

4.2 Learning Outcomes

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

- discuss the rules of impartiality of judges;
- discuss the application and workability of the rules.

4.3 Nemo *Judex in Causa Sua*

Nemo judex in causa sua, also known as the rule against bias means that nobody should be a judge in his cause. The rule against bias has been

established to ensure that the judiciary is impartial and free from bias; this it does by disqualifying a judge from determining any case in which he is fairly suspected or remotely connected in any way. According to Clarence Thomas, 'the duty of the judge is to figure out what the law says, not what he wants to say.' Human nature involves emotion, and where there lays any interest, it is very difficult to decide on one's interest which leads to partiality and destroys the very idea of justice. A person can apply his mind effectively when he follows the path of impartiality.

The importance of the rule was well captured by Chief Justice Coke when he stated that it should prevail over an Act of Parliament; as such, in the case of ***Egerton v. Lord Derby (1613) 12 Co. Rep 114***, the court of Chancery resolved that the equity judge in Chester was incompetent to preside over a case in which he himself was a party.

4.3.1 Meaning of Bias

In-text Question
What do you understand by 'bias' ?

Bias means a preconceived notion, a predisposition or one-sided inclination. It is a mental condition which sways judgement and renders a judge unable to exercise his function impartially.

Let us look at some legal definitions of bias.
In the case of ***Eriobuna v. Obiorah [1999] 8 NWLR (pt. 616), p. 622*** Niki Tobi gave a vivid explanation of how bias affects the judge as follows:
'in a charge of bias, the integrity, honesty or infidelity of purpose and the judge's traditional role of holding the balance in the matter are questioned……..the judge is said to have a particular interest which cannot be justified on the scale of justice, as he parades that interest recklessly and parochially in the adjudication process to the detriment of the party he hates and to obvious advantage of the party he likes. The judge, at that level, is incapable of rational thinking and therefore rational judgement. His thoughts are blurred against the party he hates……..such is the terrible state of mind of the biased judge or one who is likely to be biased.

…The law recognises a number of biases. …it is foreknowledge or previous knowledge of the case. This arises when the judge at one time or the other, had done something in the matter to the extent that he cannot be said to be a completely neutral person or stranger to it.

In-text Question
What are the features of bias?

4.3.2 Feature of Bias

- **Impartiality.** The jurisprudence behind impartiality is that, based on human psychology, no man can take a decision against his own interest. The principle of impartiality prevents arbitrariness by questioning every action which *appears* tainted.

4.3.3 Bias and Its Relevance in Administrative Adjudication

The rule against bias is a basic administrative law principle for over a century, and has been described as one of the hornbooks of administrative law in ***Withrow v. Larkin, 421 U.S. 35, 46 (1975) (citing in re Murchison, 349 U.S. 133, 136 (1955))***, where the court stated that, *"a 'fair trial in a fair tribunal is a basic requirement of due process.' ...This applies to administrative agencies which adjudicate, as well as to courts."* See Justice Field in ***Spring Valley Water Works v. Schottler, 110 U.S. 347, 364 (1884)*** that: *It need hardly be said that it is an elementary principle of natural justice that no man shall sit in judgment where he is interested, no matter how unimpeachable his personal integrity. The principle is not limited to cases arising in the ordinary courts of law in the regular administration of justice, but extends to all cases where a tribunal of any kind is established to decide upon the rights of different parties.*

Thus, there is a constitutional parallel between rulemaking and statute-making procedural requirements, thus subjecting, as a general proposition, agencies engaged in rule-making to the same standard of constitutional procedural requirements as is the legislature engaged in enacting a statute. Such an agency, said the Court, may not act in "violation of the principle that no man shall be a judge in his own case." Lastly, is the holding of the court in the case of Dawkins v Lord Rokeby [1887] LR. & QB 265 at 266, the court stated that:

'a court of enquiry, though not a court of record, nor a court of law nor coming within the ordinary definition of a court of justice, is nevertheless a court duly and legally constituted and recognised in the Articles of War and many Acts of Parliament.'

Self-Assessment Exercise

1. How far should the rules of natural justice be applied to administrative decisions? The exigency of this question lies in the conflicting positions proffered in two cases whose holdings have been stated below:
2. What are the different forms of bias?

In the case of R v. Electricity Commissioners, Ex parte London Electricity Joint Committee [1920] the court stated that:
'but the operation of the writs has extended to control the proceedings of bodies which do not claim to be, and would not be recognised as, courts of justice. Whenever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the king's Bench Division exercised in these writs'.

Likewise, in the case of R v. Legislative Committee of the Church Assembly, Ex parte Hance Smith [1928] 1 K.B. 411 @ 415 where the court stated that:
'*in order that a body may satisfy the required test, it is not enough that it should have legal authority to determine questions affecting the rights of subjects; there must be superadded to that characteristic the further characteristic that the body has a duty to act judicially'.*

To resolve the issue, the major question is to resolve the question of: when is act judicial; when is an act administrative; and when is an act quasi-judicial? Let us look at the cases to see how judicial activism and scholars have attempted to answer this query.

In the case of ***Legal Practitioners Disciplinary Committee (LPDC) v. Gani Fawehinmi*** [1985] 7 S.C.178 per Aniagolu JSC defined quasi-judicial thus:
'…quasi-judicial may have one of three meanings: firstly, it may describe a function that is partly judicial and partly administrative such as the making of a compulsory purchaser order preceded by the holding of a judicial type local inquiry and the consideration of objections; secondly, it may alternatively describe the 'judicial' element in a composite function – thus the holding of inquiry and considering objections in respect of a compulsory purchase order becomes 'quasi-judicial' acts and thirdly, it may describe the nature of the discretionary act itself where the discretion is unfettered.'

The court went on further in its holding that:
One test for identifying judicial function has been said to be whether the performance of the function terminates in order that has conclusive effect. The decisions of courts are binding and conclusive, in as much as they have the force of law without the need for confirmation or adoption by any other authority.

Another test in identifying whether statutory functions are of a judicial character is said to lie in certain formal and procedural attributes – those trappings and procedure adopted by the courts….

De Smith Judicial Review of administrative Action 4th edition states that the more closely a statutory body resembles a court *stricto senso*, the more likely is it that body will be held to act in a judicial capacity and that judicial acts may be identified by reference to their formal, procedural or substantive characteristics or by a combination of any of them.

Eka [Judicial Control of administrative processes in Nigeria] stated as follows:
'Errington v. Minister of Health expressly held that although the act of affirming a clearance order is an administrative act, the consideration which must precede the doing of that act is of the nature of a quasi-judicial consideration'. The learned author also quoting Carr, *Concerning administrative law* [1941] stated that 'it is a controlled fact-finding procedure followed by an uncontrolled decision on policy'

In the case of ***L.P.D.C v. Fawehinmi*** [cited above], the appellate court did justice in attempting to distinguish between a judicial and administrative function. According to the respondent, the LPDC is a quasi-judicial tribunal whose decision can 'affect the rights of others particularly their means of livelihood' and therefore ought to be made to observe the principles of natural justice of fair hearing since it is a body which has to decide 'between an allegation and a defence'.

Karibi-Whyte JSC in L.P.D.C. v Fawehinmi laid down certain tests in determining whether a function is judicial or administrative. According to the learned jurist, the exercise of judicial powers by a statutory body is determined largely by the nature of its function. He cited the case of Shell Co. of Australia v. Federal Commissioner of Taxation [1931] AC 295 where the lordships cited the case of Huddart, Parker & Co. Moorehead C.L.R 300 at p.357 thus:

"…..the word *judicial power….means the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the right relates to life, liberty or property. The exercise of this power does not begin until some tribunal which has some binding and authoritative decision (where subject to appeal or right) is called upon to take action."*

Accordingly, in compliance with the provisions of section 33 (1), any statutory body, which has powers to decide controversies, and give binding decisions is a court or tribunal within the section. According to this view the tests necessary for the determination whether a statutory body has judicial powers are:

1. Whether it has before it a *lis inter partes*;
2. Whether the decision of the statutory body is binding;

3. Whether the decision is conclusive and final.

In ***Wiseman v. Borneman [1971] A.C. 297 at 310-311*** Lord Guest stated that in a statutory tribunal set [up] to decide final questions affecting parties' rights and duties, the principles of natural justice should be applied but where the tribunal has to decide a preliminary point which does not finally decide the rights of the parties, the court has to decide, whether, and if so to what extent, the principles of natural justice should be followed by the Tribunal.

From the plethora of cases, it appears that where an administrative authority is acting judicially, it is bound by the principles of fair hearing. It seems that even if an administrative body in the course of adjudication does not conform to the principles of fair hearing, the courts would hold that the rules of natural justice have not been infringed, provided the law allows the decision of the administration to be reviewed. If, on the other hand, the exercise of an administrative power directly affects a person's right or his property, it is more likely to be subject to natural justice.

Another classical case where the decision of the judge, who although affirmed a number of decrees against a company in which he had pecuniary interest is Dimes v. Grand Junction Canal [1852] 3 HLC 759. In that case, Lord Campbell stated that:

"no one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern, but, my Lords, it is of the last importance that the maxim, no man is to be a judge in his own cause, should be held sacred. And that is not be confined to a cause in which he is a party, but applies to a cause in which he has an interest….and it will have a most salutary influence on [inferior] tribunals when it is known that this high court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that account a decree not according to law, was set aside. This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of labouring under such an influence".

Overtime, this rule has been applied to justify that 'justice should not only be done, but should manifestly and undoubtedly be seen to be done' – The essence of the rule was stated in the case of ***R v. Sussex Justices exp McCarthy [1924] 1 KB 256*** where Lord Hewart CJ said:

'the question therefore is not whether in this case the deputy clerk made any observation or offered any criticism which he might not properly have made or offered, the question is whether he was so related to the case in its civil aspect as to be unfit to act as clerk to the justices in the criminal

matter. The answer to that question depends not upon what actually was done but upon what might appear to be done. Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice.'

In that case, a solicitor was acting for a client who was suing a motorist for damages caused in a road accident. The same solicitor was also the acting clerk to the justices before whom the same motorist was convicted of dangerous driving and he retired with them when they considered their decisions. The court held that the fact that the clerk's firm was acting against the interests of the convicted motorist in other proceedings invalidated the decision of the court, although it was proved that the justices had not in fact consulted with the clerk and had scrupulously refrained from saying anything prejudicial.

4.3.4 Circumstances of Bias

The rule against bias has extended beyond direct pecuniary interest of the decision maker, however small, to proprietary interests, to where the judge is himself a party or has a relevant interest in the subject matter of the litigation, even where he has no financial interest in its outcome.
In R v. Rand [1866] LR 1 QB 230; R v. Meyer [1875] 1 QBD 173. See also the cases of R v. Farrant [1887] 20 QBD 58 and R v. Barnsley Licensing Justices exp Barnsley and District Licensed Victuallers' Association [1960] 2 QB 167

4.3.5 What is the Real Test of Bias?

There have been divergent views of what will constitute an apparent bias, and so the courts have always applied different tests to prove bias. The courts have developed two main tests to conclude whether the interest of the adjudicating authority in a matter is sufficient to amount to apparent bias. These tests are discussed below:

In the case of ***R. v. Rand [supra],*** the court laid down and applied the 'real likelihood of bias' formula, by holding that a test for disqualification is whether the facts, as assessed by the court, give rise to a likelihood of bias. This test looks out for a probability, rather than a possibility of bias. Lord Bingham in the case of R v Inner West London Coroner ex. P Dallagio [1994] 4 All E.R 139 at page 162 stated that, despite the appearance of bias, the court can examine all relevant materials and satisfy itself that there was no danger of the alleged bias having caused injustice, and the decision will be allowed to test.

Other times, as in the cases of ***R v. Gaisford [1882] 1 Q.B. 381; Cooper v. Wilson [1937] 2 KB 309 at 324*** the courts have applied the 'reasonable

suspicion test' emphasising that justice must not only be done, but manifestly seen to be done. The test also stressed that a person should not adjudicate where he might be reasonably thought that he ought not to have acted because of some personal interest. See also the case of R v. Sussex Justices [supra].

The European Court on Human Rights [ECHR] have moved in the case of ***Lawal v. Northern Spirit Ltd. [2002] UKHL 35*** to apply the test of 'whether, the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased', the essence of which was to secure public confidence in the administration of justice. The fair minded and informed observer is assumed to be a person who has access to all the facts that are capable of being known by members of the public generally, bearing in mind that it is the appearance of these facts that give rise to the matters, not what is in the mind of the particular judge or tribunal member under scrutiny.

In Nigeria, the apex court in the case of L.P.D.C v. Fawehinmi attempted to explain the concept of *likelihood of bias* when it noted that: '*The term 'real likelihood' may not be capable of exact meaning, since circumstances giving rise to it may vary from case to case, but it must mean, at least; a substantial possibility of bias". This may arise because of personal attitudes and relationships, such as personal hostility, personal friendship, family relationship, professional and vocational relationship, employer and employee relationship, partisanship in relation to the issue at stake, and a whole host of other circumstances from which the inference of a real likelihood of bias could be drawn.'*

Therefore, an appellate court, in considering the existence or otherwise of the likelihood of bias, is not concerned with actual bias, but considers the impression that is created or given to right minded or right-thinking people. Would a right-thinking observer, think, in the circumstances, that there is a likelihood of bias?

4.4 What is the Position of this Rule in Nigeria?

In-text Question
How is the bias rule applied under Nigerian law?

The bias rule is also very applicable as much as the principles of natural justice are well embedded within the Nigeria as we shall soon see from the plethora of cases discussed below.

A good starting point is the provisions of the Constitution FRN 1979 and 1999 Constitutions. Section 36 of the 1999 Constitution essentially requires that a person be given a fair hearing before his civil rights and obligations are finally determined; such a hearing before "*a court or other*

tribunal established by law and constituted in such manner as to secure its independence and impartiality". By this provision, the court or tribunal, in determining the rights and obligations must be impartial, independent and must accord to the principles of fair hearing.
Adeboanu Manufacturing Industries (Nig.) Ltd. v. Akiyode, where the court held that:

"*…The second … directs that no one shall be a judge in his own cause. These are the twin pillars on which the concept of natural justice rests. When it is being questioned whether justice has been done in any particular case, a safe ground for reason of difficulty of the terms is to assert that justice has been done according to law, for the law itself must of necessity include the procedure laid down for its attainment. To have the attainment of justice to a free for all pursuit and jettison the rule is to pave way for judicial high handedness and the omnipotence of individual judges."*

One of the most interesting and perhaps the most cited cases on bias, dating back to about five decades is the case of ***Alakija v. Medical Disciplinary Committee [1959] 4 F.S.C 38***. This was an appeal against the decision of the Medical Disciplinary Committee that the appellant's name be removed from the Medical Register for a period of two years. The appellant filed five grounds of appeal and the fifth states that:
'the inquiry was conducted in a manner contrary to the principles of natural justice, in that the Registrar, who was in fact the prosecutor, took part in the Committee's deliberations.' The appellate court considered that the *mere presence* of the Registrar at the deliberations offended against the principles of natural justice, a pointer to the fact that the proceedings of the Committee was unsatisfactory.

Similarly, ***L.P.D.C v. Fawehinmi [1985] 2 N.W.L.R. 300*** where Aniagolu JSC stated thus: …..the preliminary issue of the competence of the individuals scheduled to adjudicate on the matter under the Legal Practitioners Act 1975 to hear it, having regard to the principles of natural justice particularly, the principles which forbid a person to be an accuser as well as the judge at the same time in a case, and the one which demands fairness in the prosecution of a person accused.

Another very important case in Nigeria on the issue of the likelihood of bias is ***Abiola v The Federal Republic of Nigeria*** [1995] 7 NWLR 405 at page 1; The applicant was arraigned before the Federal High Court, Abuja, charged with several offences. The charge was read and explained to the applicant and he pleaded not guilty. Counsel for the applicant made an oral application to the learned trial judge who refused to grant bail to the applicant and dismissed the application. The applicant's appeal to the Court of Appeal was allowed. The Court of Appeal then granted the bail

application. The respondent was dissatisfied with the decision and appealed to the Supreme Court. Thereafter, a series of applications were filed by both the applicant and the respondent alike in the Supreme Court. Some of the applications were taken why others were adjourned. Before the other applications were heard, the applicant brought another application by way of motion. The motion was supported by an affidavit. It was deposed, inter alia, that the applicant is the Chairman, Chief Executive and Publisher of the Concord Press Nigeria Limited and control 90% of its shares. His wife, Alhaja Doyin Abiola, is the Managing Director of the Weekend Concord. The applicant is reputed to be the owner of the Concord Press Nigeria Limited and the Suit instituted by the Chief Justice, in which considerable evidence which received world-wide publicity had already been given, was regarded by average Nigerian as a claim against Chief M.K.O. Abiola, the applicant. Finally, paragraph 9 of the affidavit deposes: "It will be in the best interest of the administration of justice in Nigeria if the justices of the Supreme Court who have sued the respondent (the applicant) to court for substantial damages which, if awarded will erode the applicant's financial viability are not placed in a position to decide issues relating to his personal liberty". The Supreme Court unanimously granted the application. On what principles of natural justice demands, the court held that a judge should not hear a case if he is suspected of partiality because of consanguinity, affinity, friendship or enmity with a party's advocate. Also, natural justice demands, not only that those interests that may be directly affected by an act or decision should be given prior notice and adequate opportunity to be heard, but also that the tribunal should be disinterested and impartial.

4.5 Summary

The principles of natural justice, as the essence of justice, occupies a vital role in administrative law. The principle secures justice, prevents miscarriage of justice. The doctrine of nemo judex is one of the two pillars of justice which in essence, ensures that a decision is free from bias. In any decision of a body which is based on bias, or where the slightest bias can be inferred, would be prejudicial to the tenets of justice. According to Odeleye, it is a principle which is principally concerned with impartiality preventing an umpire from prejudging whoever is standing trial before any tribunal. Also, that, natural justice, the notion of law and justice are inextricably intertwined, as the observance of the one produces the other.

4.6 References/Further Readings/Web Resources

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4.6 Possible Answers to Self-Assessment Exercise

Self-Assessment Exercise

How far should the rules of natural justice be applied to administrative decisions?

Guide

See the holding of the court in the cases of **R v. Electricity Commissioners, Ex parte London Electricity Joint Committee [1920]**

R v. Legislative Committee of the Church Assembly, Ex parte Hance Smith [1928] 1 K.B. 411 @ 415

It appears that where an administrative authority is acting judicially, it is bound by the principles of fair hearing. It seems that even if an administrative body in the course of adjudication does not conform to the principles of fair hearing, the courts would hold that the rules of natural justice have not been infringed provided the law allows the decision of the administration to be reviewed. If, on the other hand, the exercise of an administrative power directly affects a person's right or his property, it is more likely to be subject to natural justice.

Self-Assessment Exercise

What are the different forms of bias? See Dimes' case (cited above); R v. Rand [1866] LR 1 QB 230; R v. Meyer [1875] 1 QBD 173. See also the cases of R v. Farrant [1887] 20 QBD 58.

Guide: In your research and discussion, did you have pecuniary and proprietary bias?

MODULE 3

Unit 1 The Fair Hearing Rule

Unit Structure

1.1 Introduction

The second leg of the concept of natural justice we are examining is the phrase 'fair hearing', a phrase so commonly used in all legal proceedings because it is fundamental to fair procedure that all parties should be heard: *audi alteram patem*. According to a judicial picturesque, the first fair hearing was given in the Garden of Eden. [Bagg's case [1615] 11 Co. Rep 93b. Fair hearing from time immemorial relies upon the skill and dedication of administrator for the achievement of justice with the Anglo-American maxim 'he who decides must hear'.

1.2 Learning Outcomes

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

- analyse the origin and development of this concept;
- discuss the elements of the doctrine; and
- discuss the principles that are inherent in the right to fair hearing.

1.3 The Meaning of Fair Hearing

In-text Question
What is the legal meaning of fair hearing?

The phrase is a constantly evolving concept, embracing almost every aspect of due or fair process [H & C [2003] UKHL 3]; it is broad enough to include withholding sensitive information from litigants, including accused persons in criminal trials, encompassing the rule against bias etc. A fair hearing means a fair trial. Fair hearing is one in which the authority, if fairly exercised is consistent with the fundamental principles of justice embraced with the conceptions of the laws. It includes the right to present evidence, to cross examine and to have findings supported by evidence.

As the court stated in the Dr. Bentley's case, where the court stated thus: 'I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defense. 'Adam, says God, where art thou? Hast thou not eaten of the tree, whereof I commanded thee that thou shouldst not eat?' And the same question was put to Eve also'.

In ***Dr. Bentley's Case (R. v. Chancellor and scholars of the University of Cambridge)*** (1 Strange 557), Dr. Bentley was deprived of his degrees by the congregation because of what they described as contumacious conduct. This was done without giving him any notice. The court of King's Bench unanimously gave Dr. Bentley his degrees back, by order of mandamus, because he had received no notice of hearing prior to the degradation. In the course of his judgment, Fortesque J. said:
: ...the laws of God and Man both give the party an opportunity to make his defense, if he has any. I remember to have had it observed by a very learned man upon such an occasion that even God himself did not pass sentence upon Adam before he was called upon to make his defence.

It amounts to a denial of fair hearing for a trial judge to stop proceedings, suo motu after a defendant had testified in chief but before being cross examined by the plaintiff, who with his counsel was present in court and never waived his right of cross examination.

Audi alteram partem, also known as the hearing rule. It states that no one should be condemned unheard. In any situation or circumstance where an individual's right or liberty is being affected, he should be provided with the opportunity of being heard. The two essentials of this rule are notice and hearing. It is important to note that serving notice is not a mere technical formality but should be sufficient and provide all the important information. Kayode JSC in ***Akande v The State*** (1988) 729 stated that

the principles of a*udi alteram partem* means please hear the other side, not that the other party had been heard once and need not again be heard.

The principle of *audi alteram partem* has been extended to different circumstances but this material discusses two out of the different circumstances: in criminal cases and administrative cases.

In-text Question

Discuss the application of *audi alteram partem* in different contexts.

Did your answer include the context of criminal cases and administrative cases? Expand your answers to administrative hearings especially as it pertains to the determination of rights of persons.

1.3.1 Audi Alteram in Criminal Cases

The essential elements of a fair criminal trial include a presumption of innocence, equal treatment of all persons, a fair hearing before an independent and impartial tribunal to be tried in one's own presence and to defend oneself through legal assistance of your own, choosing to examine, or have examined the witnesses against you, and to obtain the attendance and examination of witnesses on your behalf under the same conditions as the witnesses against you.

Let us consider the provisions and application of fair hearing in different instruments in different jurisdictions.

A right to a fair trial is widely recognised. It is implied by Magna Carta (1215). It is an important feature of written constitutions (such as the US Constitution, 1789, which requires “due process” of law). Likewise, it is an important principle of international law, expressed in the UN Declaration of Human Rights (articles 10 and 11) and given fuller legal effect by the International Covenant on Civil and Political Rights (article 14.)

In the European Convention on Human Rights, Article 6 guarantees the “right to a fair trial” to claimants in civil cases and to defendants in criminal trials. Article 6 rights are, of course, given effect in UK law through the terms of the Human Rights Act 1998 (HRA). It is well known that the United States Constitution, as interpreted by its courts, guarantees fair trials. However, Article 6 (1) does not apply to all administrative proceedings. Instead, it limits its coverage only to administrative proceedings that determine civil rights and obligations of individuals. Where this is in issue, it provides that there should be a fair hearing within a reasonable time.

In-text Question

Analyse the application of the fair hearing rule in Nigerian criminal cases.

1.3.2 Administrative Cases Covered

The fair hearing principle is one that has a universal application which makes it applicable to a whole range of administrative powers. One of such is the leading case of ***Cooper v. Wandsworth Board of Works*** (1863) 14 C.B. (N.S) 180 at 189. In that case, a local authority, acting upon the Metropolis Management Act 1885, which expressly empowered the authority to demolish any building erected without the authority's permission and approval and did not impose any express duty of hearing the defendant. On this basis, the authority without notice or hearing, ordered the demolition of the man's building. Erle J, in that case stated that it was immaterial that the Statute clothed the authority with such wide powers, and according to Willes, J, the right to fair hearing is a universal one that is founded on the plainest principles of justice. He further stated that:

'.... although there are no positive words in a statute requiring that a party shall be heard, yet the justice of the common law will supply the omission of the legislature'.

The court went further to say that: 'I do not quite agree with that….I think the appeal clause would evidently indicate that many exercises of the power by a district board would be in the nature of the judicial proceedings'.

The holding of Willes J in Cooper's case also emphasises the importance of the fair hearing principle. He said that:

'I apprehend that a tribunal which is by law invested with power to affect the property of one of Her Majesty's subjects, is bound to give such subject an opportunity to be heard before it proceeds, and that the rule is of universal application, and founded on the plainest principles of justice. Now, is the board in the present case such a tribunal? I apprehend it clearly so'.

Byles J. also stated that:
'it seems to me that the board are wrong whether they acted judicially or ministerially. I conceive they acted judicially because they had to determine the offence and they had to apportion the punishment as well as the remedy. That being so, a long course of decisions beginning with Dr Bentley's case, and ending with some very recent cases, establish that,

although there are no positive words in a statute, requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature.'

The import of these decisions is that every administrative act that affects any person's right is a judicial act which must conform to the rules of natural justice. The right solution is for the tribunals to require due process in the exercise of administrative functions, as well as judicial and quasi-judicial functions.

One early statement of this solution to the problem lies in Lord Denning MR's reasons in the Court of Appeal in ***Padfield v Minister of Agriculture, Fisheries and Food*** [1968] AC 997, 1006: 'It is said that the decision of the Minister is administrative and not judicial. But that does not mean that he can do as he likes, regardless of right or wrong. Nor does it mean that the courts are powerless to correct him.' In making administrative decisions, due process may require a hearing, because of (1) the process value of a hearing, and (2) the possibility of requiring a hearing without damaging the public authority's performance of its administrative functions. Judicial decisions may call for special procedures. But the difference between administration and adjudication does not mean that it is acceptable to make administrative decisions with no procedural participation for people affected.

Discussion forum

Read the case of ***Cooper v. Wandsworth Board of Works*** (1863) 14 C.B. (N.S) 180 at 189. Why did the justice of the common law in Cooper's case require a hearing? Is it appropriate for judges to impose the processes they consider proper on an executive agency?

'no man is to be deprived of his property without his having an opportunity of being heard' (Erle CJ, 187); 'A tribunal which is by law invested with power to affect the property of one of Her Majesty's subjects, is bound to give such subject an opportunity of being heard before it proceeds' (Willes J, 190). Willes J called it a rule 'of universal application, and founded upon the plainest principles of justice' (190).

The requirement of a hearing subjects the power of the Board of Works to the rule of law, and promotes the allied value of accountability.

Another ancient case which exposes the fair hearing principle is the case of ***Board of Education v. Rice*** (1911) AC 179. The issue before the House of Lords in Rice's case was whether the Board of Education

had properly determined a dispute between a body of school managers and the local education authority of Swansea, which had refused to pay teachers in church schools the same wage as teachers in the authority's own schools.

1.4 Statutory Hearing

Another aspect to consider is the way of resolving disputes about the exercise of statutory powers? How should the procedure of a government department be reconciled with the legal standards of fair hearing? Let us look at the development through the cases.

In the oft cited case of ***Local Government Board v. Arlidge*** [1915] AC 120, a public inquiry had been held on an appeal to the Local Government Board by the owner of a house against which the Hampstead Borough Council had made a closing order on the ground that that it was unfit for human habitation. The owner complained to the court that the Board had dismissed his appeal without a fair hearing because he was not allowed to appear before the officer of the Board who made the decision or to see the report of the inspector who held the inquiry. The argument that prevailed in the HOLs was that by entrusting the power to a government department, Parliament has intended that the department should act in its normal manner, and should therefore be able to take its decision without making public its papers and without having to conduct itself like a court of law.

The legal issue is, how can a government department retain its administrative freedom while at the same time performing its quasi-judicial function of deciding a contested issue? The decision in Arlidge's case has been criticised mainly because of the failure of the law to keep abreast with the standard of fairness required. The position of the court initially was that purely administrative functions was in no way judicial or quasi-judicial, in other words, according to this line of reasoning, the principles and application of natural justice was not applicable to ordinary administrative action unless it can be categorised as judicial or quasi-judicial. See the following cases – ***Nakkuda Ali v. Jayaratne [1951] AC 66, David v. Abdul Cader [1963] 1 WLR 834***

However, in the case of Ridge v. Baldwin [1964] AC 40 Charles Ridge was the Chief of Police in Brighton, and had served 23 years on the police force, when he was prosecuted on corruption charges. He was acquitted, but at the end of the trial, the judge said, first, that he was a bad example because of his association with men suspected of bribing police, and second, that his evidence would not be trusted in future prosecutions. The day after this damaging scene, the police authority told Ridge that he was sacked. His lawyer immediately complained to the Home Secretary that

the decision was contrary to natural justice, because the authority had given Ridge no hearing. The Home Secretary upheld the decision, and Ridge brought an action for a declaration that the decision was unlawful. The police authority's defence was that 'for those who are responsible for a police force such a dismissal is a matter of the policy of the borough and therefore in acting they need not apply the principles of natural justice'. In that case, Lord Hodson, stated the as follows:

"the answer in a given case is not provided by the statement that the giver of the decision is acting in an executive manner or administrative capacity as if that were the antithesis of a judicial capacity. The cases seem to me to show that persons acting in a capacity which is not on the face of it judicial but rather executive or administrative have been held by the courts to be subject to the principles of natural justice" thus reinstating the right to be heard.

Following this, the line of cases reiterated the importance and centrality of natural justice. Even in statutory positions – as Lord Morris in ***Furnell v. Whangarei High Schools Board*** [1973] 1 QB 539 at 578 natural justice is but fairness writ largely and judicially, thus, ….as Lord Diplock puts it, …. 'where an Act of Parliament confers upon an administrative body functions which involve its making decisions which affect to their detriment the rights of other persons or curtail their liberty to do as they please, there is a presumption that ***Parliament intended that the administrative body should act fairly towards those persons who will be affected by their decisions'*** **(emphasis mine).** Lord Denning too in ***Re Pergamon Press*** [1971] Ch. 388 stated thus: 'seeing that their work and their report may lead to such consequences, I am clearly of the opinion that the inspectors must *act fairly.* This is a duty which rests on them, as on many other bodies even though they are not judicial or quasi-judicial, but only administrative'.

It is now clearly settled and self-evident, that there is no difference between natural justice and acting fairly but rather, are alternative names for a single doctrine.

Self-Assessment Exercise 1

We have been discussing the universality of the principles of fair hearing, by extension, the principle of natural justice – this has been restated over and over again – see Lord Loreborn in Board of Education v Rice (supra) where he said that the duty afford it is 'is a duty lying upon everyone who decides anything'. Are there exceptions to the doctrine of fair hearing? The courts have stated that the requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting and the

subject-matter to be dealt with – Tucker LJ in the case of Russell v. Duke of Norfolk [1949] 1 All ER 109

1.4.1 Context of Fair Hearing

The right to know the opposing case
The accused has right to know the case which is against him. He must know what evidence that has been given and what statements have been made affecting him and given a fair opportunity to correct or contradict them. See Lord Denning in the case of ***Kanda v. Government of Malaya*** [1962] AC 322.

1.4.2 Duty to Give Notice

It is the duty of a tribunal or decision-making body which is bound to act judicially to give adequate notice of hearing to a party who is likely to be affected by the decision taken. Failure to give adequate notice would vitiate the proceedings. He must have a fair notice of any accusation against him. The requirement of informing the person affected is designed to serve the three purposes of a hearing. It serves the interests of good outcomes, duty to respect and the rule of law. See the case of ***Owolabi & Ors. v. Permanent Secretary Minister of Education; R v. Huntingdon DC ex.p Cowan*** [1984] 1 WLR 501; ***B Johnson & Co v Minister of Health*** [1947] 2 All ER 395

Self-assessment Exercise 2

What is/are the content(s) of a right to fair hearing?

1.5 Summary

In conclusion, it is clear that the duty to act fairly, in taking decisions, transcend status, from disciplinary bodies, just as the same to anyone else, and are subject to the control by the court. Natural justice has acquired a status akin to fundamental rights.

1.6 References/Further Readings/Web Resources

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1.7 Possible Answers to Self-Assessment Exercises

Self-Assessment Exercise 1
Are there exceptions to the doctrine of fair hearing?

Guide
The courts have stated that the requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting and the subject-matter to be dealt with – Tucker LJ in the case of Russell v. Duke of Norfolk [1949] 1 All ER 109 Does the flexibility of natural justice imply a variable standard of procedural justice? Where a fair hearing would make no difference – Such as seen in the case of Ridge v. Baldwin (supra). The question of court's discretion.

Self-Assessment Exercise 2

What is/are the content(s) of a right to fair hearing?
Guide: Does the right to a hearing include the right to an oral hearing? What facts should be disclosed; a right to confront and cross-examine? Etc.
It includes the right to provide a reasonable opportunity for a person to present his case, present his evidence before an impartial tribunal; the right to be represented by a counsel of his choice.

Unit 2 Illegality, Irrationality, Unreasonableness

Unit Structure

2.1 Introduction

So far, we have been discussing the two pillars of the principles of natural justice – *nemo judex* rule and *audi alteram partem*. In this unit, we want to examine some other equally fundamental grounds of review. As you know, the grounds of review are the arguments that can be put forward as a reason why the decision of a public body such as a tribunal or panel of inquiry would be unlawful. In this unit, we will see that the judges need to substitute their own judgment for that of an administrative authority on some issues – this means examining some of the reasonings of the administrative authority. One of the grounds is the well-known division outlined by Lord Diplock in the ***GCHQ case (R v. Minister for the Civil Service ex p Council of Civil Service Unions*** [1985]. In that case, Lord Diplock divided the grounds into three. According to him, 'judicial review has, I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and third 'procedural impropriety.' That is not to say that further development on a case-by-case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of proportionality which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three well-established heads that I have mentioned will suffice'.

2.2 Learning Outcomes

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

- define illegality as a ground for review;
- discuss the basic ideas and scope of the grounds for review.

2.3 Illegality

In-text Question **What is the meaning of illegality?**

In the GCHQ case, Lord Diplock gave a very brief definition of illegality as follows: "by illegality as a ground for judicial review, I mean that the decision-maker must understand correctly the law that regulates his decision-making and must give effect to it".

Within this meaning is that a decision maker shall not fetter his discretion by deciding how to exercise it in advance, unlawfully delegate his function/discretion by giving another person the power to take decision.
Sueur & Herberg gave an Illustration:
If a decision maker is given the power to choose between (a), (b), and (c), he would be acting illegally if he chose (d).

Parliament decides to pass legislation to control local markets. It enacts a statute called the 'Market Stallholders (Control) Act 1995.' This statute provides that it is unlawful for anyone to trade from a market stall without a licence. The statute sets up a body called the Market Traders Licensing Board (the MTLB') to issue licenses.

Section 2 provides 'the MTLB shall have the power to issue or renew market stall licences to applicants as it sees fit.

Section 3 provides 'in consideration whether or not to issue a license to an applicant, the MTLB shall consider whether the applicant is a fit and proper person to hold a license

Section 4 provides 'the MTLB shall have power to prevent anyone from trading from a market stall without a license, and can confiscate equipment used in market trading by any such person'

From the above, the MTLB has power to prevent any individual or company from continuing trading without a license. Where however, MTLB extends its powers to regulating shops and trading malls, then it is going outside the scope of its powers, and any power so exercised is

illegal and ultra vires its powers. This is because, MTLB only has powers to regulate local stalls and not shops/malls.
There are a number of things you should know about illegality as a ground for judicial review. Illegality is concerned mainly with the control of power. By power, we mean (the type of legal authority exercised by administrative and government bodies) and jurisdiction (the type of legal authority exercised by courts and tribunals), and ensuring that the body acts within, and according to, the legal authority conferred on it (jurisdictional control); secondly, illegality is concerned with discretion, i.e. ensuring that when dealing with a matter within its power or jurisdiction, the body uses its power to decide and does so according to the full extent of the discretionary remit entrusted to it (control of discretion).

Under this sub-heading, we shall identify some of the different types of reasons that the court may hold for concluding that a decision maker has acted outside its powers.

In-text Question
With the aid of decided cases, discuss some reasons the court has upturned a decision of an administrative authority.

2.3.1 Relevant and Irrelevant Considerations

Public authorities always ought to act for proper purposes, and on the basis of the relevant considerations. An administrative authority acts illegally where it fails to take into account a relevant consideration, i.e does not consider those facts which it ought to consider. A public authority that does not act on relevant considerations is not genuinely doing what it was given power to do.

Lord Esher articulated this rule clearly in the case of ***R v. Vestry of St. Pancras*** [1890] 24 Q.B.D. 371 that: *if people who have to exercise a public duty by exercising their discretion take into account matters which the courts consider not to be proper for the guidance of their discretion, then in the eye of the law they have not exercised their discretion.*

In Wednesbury case, Lord Greene stated that *If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, . . . the authority must disregard . . . irrelevant collateral matters.'*

Also, in ***Padfield v Minister of Agriculture, Fisheries and Food*** [1968] AC 997, the Minister had a discretionary power to refer complaints to a

committee, and he refused to refer a complaint because he did not want to generate political pressure in favour of the opponents of the scheme. Lord Reid held at p.1030 that: *'Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act, the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court.'*

The import of the above holdings of the court is that a public authority must consider only relevant consideration in the exercise of statutory discretion. But what are the considerations that are expected to be followed? A learned scholar noted that:

A consideration is simply something that a decision maker might take into account in a way that would affect the decision; it can be a general consideration as to how to use the decision-making power, or it can be one of the facts of a specific case on which the authority relies in applying the general grounds of decision to the case. A relevant consideration is one that the decision maker ought to take into account. Relevant considerations include; legitimate general grounds for decision, and also those facts of the particular case on which the legitimate general grounds of decision depend.

The doctrine also applies to situations where a public authority fails to take account some considerations which is necessarily relevant; or those situations in which the discretion is exercised but in ways which contravene the intentions of Parliament. Where a decision maker must take the obligatory relevant considerations into account, and he fails to do so, the judicial review will set him right.

Timothy Endicott *Administrative Law*: Oxford University Press

There are two classes of relevant (and irrelevant) considerations, as follows:

(1) Grounds of decision that the law specifically requires the decision maker to attend to or to ignore (and the facts that relate to those grounds) - for example, cost is an irrelevant consideration in deciding what would count as meeting a local authority's duty to provide a 'suitable education': *R v East Sussex County Council, ex p Tandy [1998] 2 All ER 769* (see p 253).

(2) Grounds for a good decision that are not specified by law, but which no reasonable decision maker would ignore or which no reasonable decision maker would act on (and the facts that relate to those grounds)—for example, the statute in *Roncarelli v Duplessis [1952] DLR 680 (see p 220*) did not specify that support for Jehovah's Witnesses was irrelevant to the liquor

licensing power, but it was an abuse of power for the Minister to pursue his vendetta by taking away Roncarelli's liquor licence because Roncarelli supported Jehovah's Witnesses.

The Nigerian courts, like their English counterparts recognise the rule of irrelevancy of considerations. In the case of ***Banko v. Abeokuta U.D.C***. [1965] N.M.L.R. 295, where a local council refused to issue licenses to applicants on the ground that there were too many taxi cabs operating in that axis. The court held that the consideration of the council was irrelevant to the exercise of the statutory power. Similarly, ***R. v. District Officer, ex p Atem*** [1961] 1 All N.L.R. 51 where a public authority, exercising his power to review decisions of native courts, based his decision on his experience of the land grabbing and self-aggrandisement tendencies of one of the parties was held to be irrelevant and extraneous.

See also R. v. Federal Minister for Lagos Affairs, exp. The Cherubim and Seraphim Society [1960] L.L.R. 129 ; R v. Registrar General exp Segerdal [1970] All ER 1; Attorney-General of Hong Kong v. Shiu (1983) 2 A.C. 629 (P.C)

2.3.2 Improper Purpose

Statutory powers must be used for the express or implied purposes for which they were given. If a power is used for some ulterior purpose, or in a way which is clearly inconsistent with the objectives of the enabling Act, then it has been used illegally. Public authority ought to use power conferred upon it by statute for the purpose(s) for which it was given. Any exercise of power outside the intendment of the Act is ultra vires. The court held that the power must be exercised for the purpose for which it was given – ***Entick v. Carrington*** [1765] 19 St. Tr. 1030

In ***Webb v Minister of Housing and Local Government*** [1965] 2 WLR 755, a power to build sea defences was used to build both a sea wall and a promenade – the court has to identify the authority's main purpose or objective and determine whether this was consistent with the dominant purpose for which the power was given.

If Parliament grants power to a government department to be used for an authorised purpose, then the power is only validly exercised when it is used by the department genuinely for that purpose as its dominant purpose. If that purpose is not the main purpose but is subordinated to some other purpose which is not authorised by law, then the department exceeds its powers and the action is invalid (per Lord Denning LJ, ***Earl Fitzwilliams Wentworth Estates Co Ltd v Minister of Town and Country Planning*** [1951] 2 KB 284).

In ***Padfield v. Minister of Agriculture, Fisheries and Food*** (supra), the reasoning of the HOL was that the decision was unlawful because he was exercising his discretion not to refer for a wrong purpose to protect the existing scheme. As Lord Reid stated, *'the Minister's discretion….must be inferred from a construction of the Act read as a whole, and for the reasons I have given I would infer that the discretion – has been used by the Minister in a manner which is not in accord with the intention of the statute which conferred it'*

Note that the fact that other purposes are achieved is not fatal so long as these are reasonably incidental to the main and authorised purpose. As was held in the case of ***Hanks v Minister of Housing and Local Government*** **[1963] 1 QB 999,** alterations to the pattern of roads in an area compulsorily acquired for housing redevelopment, being secondary and reasonably consistent with the development process, were found to be permissible. Also, in ***Westminster Corporation v London and North Western Railway Co Ltd*** **[1905] AC 426,** the court took no objection to a power to provide public conveniences being used to build the same under a road with accesses on either side thereby creating a subway. Again, it was felt that the authorised purpose – the provision of a public convenience – had been the authority's main concern and that the creation of a subway was merely secondary and reasonably incidental to this purpose.

Discussion forum

Is there a problem where there are multiple purposes? Consider the following cases: Metropolitan Borough of Lewisham v Roberts (1949) 2 K.B. 608; Earl Fitzwilliams Wentworth Estates Co Ltd v Minister of Town and Country Planning [1951] 2 KB 284). Travis v. Minister of Housing & Local Government (1951) 2 K.B. 956; Hanks v. Minister of Local Government & Planning (supra).
The reading of the above cases should elicit some thoughts and direction – real purpose – main purpose – dominant purpose - residual purpose

Self-Assessment Exercise

Discuss constitutional and judicial attempts in interpreting/controlling administrative actions.

2.4 Reasonableness

In-text Question
Discuss the doctrine of reasonableness under judicial review of administrative decisions.

The principle of reasonableness is regarded as one of the most conspicuous among the doctrines in judicial review of administrative decisions. This ground of review is usually called 'Wednesbury unreasonableness' or Wednesbury ground after Lord Greene's speech in **Associated Provincial Picture Houses Ltd v. Wednesbury Corporation [1948] 1 KB 223.** Lord Greene MR emphasised that the court will interfere only where a decision is so unreasonable that no reasonable authority could have made it, not merely because they think it is a bad decision. In that case, Lord Greene MR. explained that unreasonableness as a species of ultra vires could be understood in two senses. First, the term could be used as a general heading for those types of error usually dealt with under the heading of abuse of discretion.

Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretion often use the word unreasonable in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of things that must not be done. For instance, a person entrusted with discretion must . . . direct himself properly in law. He must call his attention to matters he is bound to consider. If he does not obey these rules, he may truly be said . . . to be acting unreasonably.

Second, it was said that unreasonableness could be used as a separate and distinct head of review. In this sense, it would apply to that type of decision which it might not be possible to impugn for the more usual causes of abuse of discretion, e.g. irrelevancy, improper purpose, but which might appear to be 'so unreasonable that no reasonable authority could even have come to it' (ibid.). As Lord Greene put it, a decision is so unreasonable that no reasonable authority could have made it.

Let us look at some cases where the court intervened on grounds of unreasonableness of decision. In **Hall v. Shoreham Urban District Council** (1964) a local authority planning condition required the plaintiff to dedicate a road to the public. This was held to be unreasonable because it amounted to the confiscation of property without compensation. The condition was hardly perverse or immoral given that the plaintiff stood to make considerable profit out of the permission. In ***Wheeler v. Leicester City Council*** *(1985),* a local authority refused to allow a rugby club to use its playing field. This was because the club had not approved certain of its members from touring in South Africa during the apartheid era. The

House of Lords held that the Council had acted unlawfully. This could be regarded as unreasonable infringement of individual freedom, or as a decision based upon an improper political purpose, or as an unfair decision in that the matter had been prejudged.

There are also some cases in which the court has held an action reasonable. In the Nigerian case of ***Local authority Calabar v. The Agent Cohbam Factory*** (1923) 5 N.L.R. 4, the court held that the statute in question is entirely *reasonable*, and clearly within the powers of the authority; See also ***Akingbade v. L.T.C*** [1955] 21 N.L.R. 90; ***Sharp v. Wakefield*** [1891] AC 173

2.4.1 Standard of Unreasonableness

Lord Greene admitted, however, 'to prove a case of that kind would require something overwhelming'. So, what is the standard? The rule of reason has been used by the court to cover the multitude or a wide category of absurdity or errors. And as seen in the stance of the court, the standard of unreasonableness is nominally pitched very high: 'so absurd that no sensible person could ever dream that it lay within the powers of the authority' 'so wrong that no reasonable person could sensibly take that view; 'so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the questions to be decided could have arrived at it'.

See the following cases: ***Tameside case*** [1977] AC 1026; ***CCSU v. Council of Civil Service Unions*** [1984] 3 All ER 935; ***R. v. Radio Authority ex parte Bull*** [1997] 2 All ER 561, 577); ***R. (Mahmood) v. Secretary of State*** [2001] 1 WLR 840

The court, per Hailsham LC in ***Re W (an infant)*** [1971] AC 682 at 700 noted that 'two reasonable persons cannot perfectly.

2.5 Summary

Unreasonableness must be limited to an inherently negative or stupid conduct or action. Note that the Wednesbury test is now more reformulated as the irrationality test as stated by Lord Diplock in the GCHQ case, where he said: *By irrationality I mean what can now be succinctly referred to as 'Wednesbury unreasonableness' . . . It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.* A similar position was adopted by the House of Lords in the well-known case of Council for Civil Service Unions v Minister for the Civil Service [1985] AC 374. Here it was suggested that the rules for judicial review should henceforth be

understood as falling into three broad categories – those of '**illegality**', '**irrationality**', and '**procedural impropriety'.**

Examples of cases in which decisions of public authorities have been struck down for irrationality simpliciter are limited in number. This may be for two principal reasons. First, the requirements of the test, as explained above, are not easy to satisfy. Second, for a decision to approach the required threshold, set as high as it is, it will, in most cases, be almost inevitable that one of the more specific types of abuse which are easier to establish, e.g. irrelevancy or improper purpose, will be present.

2.6 References/Further Readings/Web Resources

B.U. Eka Judicial Control of Administrative Process. 2001. Obafemi Awolowo Press Ltd.

H.W. R Wade & Forsythe. Administrative Law. Oxford University Press. Tenth Edition.

2.7 Possible Answers to Self-Assessment Exercise

Self-Assessment Exercise
Discuss constitutional and judicial attempts in interpreting/controlling administrative actions.

Guide: for instance, Commissioner for Lands v. Adeleye 14 N.L.R. 109; Commissioner of Lands v, Effia (1955) 14 W.A.C.A 712; See also Public Lands Acquisitions Act Cap 167 Laws of the Federation (1958) ; Public Lands Acquisition Law, Cap. 105, 159 (Western Nigeria); Land Tenure Law (1962); Chief Commissioner, Eastern Provinces v. Ononye (1944) 17 N.L.R. 142 ; Akingbade v. Lagos Town Council (1955) 21 N.L.R. 90

Unit 3 Outstanding Issues in Judicial Review

Unit Structure

3.1 Introduction

This unit will touch some outstanding issues on ground for review. Why do we need to look at the continuing evolving process? Lord Diplock in ***R. v IRC, ex p National Federation of Self-Employed*** **[1982] AC 617, 640** painted a vivid picture of the nature of the evolving judicial review that: 'judicial statements on matters of public law if made before 1950' were likely to be a misleading guide to the current law; since 1981 changes in the law have continued to occur, as the coverage of government by judicial review has spread and the depth of review has intensified. It was formerly said that judicial review of administrative action 'is inevitably sporadic and peripheral' when set against the entire administrative process. But the general principles which emerge from the judicial process should not be haphazard, incoherent or contradictory.

This unit outlines such other issues in judicial review. One of such issue is the connection between the substance of a decision and the process by which it is made. Occasionally, the case is that the tribunal failed to give reasons for the decision, or a case of wrongful admission of evidence etc.

3.2 Learning Outcomes

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

- discuss the test of proportionality;
- discuss the difference between Wednesbury test and proportionality test;
- discuss the reasons why public authorities should sometimes explain their reasons for a decision;
- discuss the difference and the relationship between substance and process.

3.3 Proportionality

It requires a structured analysis by the court of the decision challenged and the justification of the decision-maker for that challenge. Proportionality requires the court to take additional steps and engage with the challenged decision in much greater depth.

Lord Steyn in 114 ***R v. Home Secretary, ex p Daly*** **[2001] UKHL 26; [2001] 2 AC 532** discusses the test of proportionality and differentiates it from other grounds.

The starting point is that there is an overlap between the traditional grounds of review and the approach of proportionality. Most cases would be decided in the same way whichever approach is adopted. But the intensity of review is somewhat greater under the proportionality approach. Making due allowance for important structural differences between various convention rights, which I do not propose to discuss, a few generalisations are perhaps permissible. I would mention three concrete differences without suggesting that my statement is exhaustive. ***First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations.*** *Thirdly, even the heightened scrutiny test developed in R v Ministry of Defence ex p Smith [1996] QB 517, 554 is not necessarily appropriate to the protection of human rights . . . In other words, the intensity of the review, in similar cases, is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued. The differences in approach between the traditional grounds of review and the proportionality approach may therefore sometimes yield different results. It is therefore important that cases involving convention rights must be analysed in the correct way.*

The test of proportionality as a ground for review is yet to receive full endorsement although it has been adopted by many English courts. For instance, the Privy Council in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* 1999] 1 AC 69 where it stated that: *The court must ask whether: (1) the legislative objective is sufficiently important to justify limiting a fundamental right; (2) the measures designed to meet the legislative objective are rationally connected to it; and (3) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.*

3.3.1 Difference between Proportionality and Wednesbury Tests

In-text Question
Is there difference between the proportionality and Wednesbury unreasonableness test?

While it is conceded that the principles of proportionality and Wednesbury cover a great deal of common ground, however, proportionality is not the same as Wednesbury unreasonableness, and there is still a margin of appreciation in the two principles.

The HOLs in R v. Homes Secretary ex. P Brind [1991] 1 A.C. 696 held that, proportionality requires the court to judge whether the action taken was really needed as well as whether it was within the range of courses of action that could reasonably be followed.

3.3.2 Giving Reasons for Decisions

The giving of reasons is a procedural step that informs people affected by a decision (and, potentially, the public) of the substance of a decision. Why is it necessary to give reasons for decisions? Is it part of the principles of natural justice, to give reasons?

In **Flannery v Halifax Estate Agencies** [2000] 1 WLR 377 (CA), 381 (Henry LJ) stated that '*[T]he duty to give reasons . . . is a function of due process, and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties especially the losing party should be left in no doubt why they have won or lost. . . The second is that a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not... Transparency should be the watchword*.'

Although the principles of natural justice did not require, in its developmental stage, that decision makers should give reasons, however, there is a strong case, in the interest of justice, that it be so. Moreso, with the expanding law of judicial review, on grounds of improper purpose, irrelevant consideration or errors of law, it is essential that citizens be aware of the reason behind a decision, to enable him know whether it is reviewable or not. For all these reasons, a 'right to reason' is almost indispensable part of natural justice.

3.3.3 Circumstances in which reasons may be given

Although there is no closed list of circumstances in which reasons may be given, but let us illustrate through the cases, situations in which fairness requires reason to be given.

The first circumstance relates to decisions that appear aberrant without reasons have to be explained, so that it may be judged whether the aberration is real or apparent.

Cases in which the interests concerned are so highly regarded by the law that fairness requires that reasons be given as of right.

Thirdly, failure to give reasons for a decision may justify the inference that the decision was not taken for a good reason.

Self-Assessment Exercise

What is the position of the law in Nigeria on giving reason for judgement?

3.4 Summary

When there is a duty to give reasons, it is a duty to give sufficient explanation, for the purpose for which reasons are required. When reasons are required, their purpose is not to show the reviewing court that the decision was correct. Demanding reasons that show the decision to be the correct decision would presuppose a judicial power to replace another public authority's decision with its own. Correctness is not a general ground of judicial review.

3.5 References/Further Readings/Web Sources

Timothy Endicott. Administrative Law. Second edition. Oxford University Press.

H.W.R. Wade & C.F. Forsythe. Administrative Law. Tenth Edition. Oxford University Press.

B.U. Eka. Judicial Control of Administrative Law in Nigeria. Obafemi Awolowo University Press.

3.6 Possible Answers to Self-Assessment Exercise

Self-assessment Exercise

What is the position of the law in Nigeria on giving reason for judgement? Section 245 Criminal Procedure Act provides a guide. It provides that a magistrate may, in lieu of writing a judgement, it suffices if the magistrate states the reasons for decisions.

Unit 4 Jurisdictional Control

Unit Structure

4.1 Introduction

In many cases, statutes define the role of the judiciary; but to a very large considerable degree, judicial review of administrative action is molded by the court. Theirs is the power of final interpretation of the statutory guides. Judicial review developed even as the common law itself, gradually from case to case, in response to the pressures of particular situations. Just as administrative agencies have developed in response to the demands of new subjects and new legislations, so has judicial review responded to the needs of a changing system of administration. Just as there is diversity in administrative agency, so is the diversity in the courts' review of their action. In this unit, we shall discuss another means of judicial review through review of jurisdiction.

The existence of power or jurisdiction as so explained was once assumed to be discernible at the outset of the decision-maker's inquiry and could be determined by asking certain fundamental questions – principally, was the body properly constituted and was it dealing with a matter upon which it was legally entitled to decide? If such questions were answered in the affirmative, then the decision-maker had power or jurisdiction to proceed safe from risk of judicial review.

4.2 Learning Outcomes

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

- discuss the extent the courts can go in controlling the exercise of statutory powers;
- evaluate the ambit of 'control' of judicial power.

4.3 Jurisdiction

In-text Question
What is the legal definition of jurisdiction?

The term jurisdiction implies 'to make a decision'; it can also be described as the marking of an area of power. In some contexts, it assumes the narrower meaning of 'power to decide'; 'power to determine'. Note that the underlying principle is that it is synonymous with 'excess of jurisdiction' or 'excess of power'. (See Wade & Forsythe; cf De Smith. Administrative law).

Jurisdiction is generally used to demarcate the boundaries of decision-making authority within which a public body is free to act without judicial interference. It relates to the freedom to decide whether rightly or wrongly – R v. Ex parte Kasali Adenaiya (1962) 1 All NLR. 300.

The jurisdiction principle was expressed in the case of ***Fuller v Fotch*** [1695] Carthew 345 when Holt CJ spoke of:
This diversity, that if the commissioners had intermeddled with a thing which was not within their jurisdiction, then all is coram non judice (i.e null and void) and that may be given in evidence upon this action; but 'tis otherwise if they are only mistaken in their judgement in a matter within their conusance, for that is not inquirable, otherwise than upon an appeal.

Similarly, Laws {*"Illegality: The Problem of Jurisdiction" in M. Supperstone and J. Goudie (eds.), Judicial Review (London 199?), 2nd ed.}* ***has written that:*** *"Jurisdiction",……is a protean word. Its easiest application is the case where a body has express but limited powers conferred on it by another body: so, if it acts outside those powers, it exceeds its jurisdiction. But the superior courts in England are not constituted on any such basis. They have, in the last analysis, the power.*
The point being made above is that there is no definite prescription of the boundaries of jurisdiction

In Attorney-General v Wilts United Dairies. (1921) TLR 884, the facts were that under emergency wartime legislation, the government had been given the power to control the production and supply of food. In a purported exercise of this power, the Minister of Food granted the Dairy Company a licence to buy and distribute milk in the southwest of England. This was subject to a condition that the company pay a *2d* charge to the

government for every gallon of milk purchased. When the government brought proceedings for arrears of such payments, the court found that the imposition of the charge offended the ancient rule, embodied in the Bill of Rights 1689, that no tax should be levied without the approval and authority of Parliament. No such express or implied authority could be construed from the enabling legislation. The court said:

. . . if an officer of the executive seeks to justify a charge upon the subject made for the use of the Crown, he must show in clear terms that Parliament has authorized the particular charge. I am clearly of the opinion that no such powers . . . are given to the Minister of Food by the statutory provisions on which he relies (per Atkin LJ).

Noted that a body may do that which is reasonably incidental to the fulfilment of specific express powers:
. . . whatever may be fairly regarded as incidental to, or consequential upon, those things which the legislative has authorized, ought not . . . to be held, by judicial construction, to be ultra vires (per Lord Selborne, Attorney-General v Great Eastern Railway Co (1880) 4 App Cas 473

Self-Assessment Exercise

When is a public authority acting lawfully, or unlawfully?

4.3.1 General Principles of Jurisdiction

As a general principle, questions of fact, discretion and law were all assumed to lie within the decision-maker's jurisdiction or power. Errors relating thereto did not justify any finding that the decision-maker had acted ultra vires: 'Where a court has jurisdiction to entertain an application, it does not lose its jurisdiction by coming to a wrong conclusion, whether it was wrong in law or in fact' (per Lord Coleridge CJ, R v Central Criminal Court JJ (1886) 17 QBD 598).

As understood in this sense, the concepts of jurisdiction and power permitted only a limited role for judicial review. Although the courts would insist on compliance with statutory requirements as to form and procedure, it was extremely difficult to persuade them that a Minister had acted ultra vires by erring in law or fact, or that he was under an implied obligation to observe the rules of natural justice, or that in exercising a discretionary power he had been influenced by legally improper considerations (De Smith, Judicial Review of Administrative Action).

Eka distinguished **jurisdictional and non-jurisdictional issues** as follows: the former relates to the power to act in the first place or to act all, the latter pertains to acting in a particular way which the court will

accept as legal; one is a nullity, the other is merely voidable, i.e having a contingent validity until and unless reversed on appeal or such procedure laid down by statute.

In-text Question
Stop and think: Can you think of any other distinction between jurisdictional and non-jurisdictional errors?

4.3.2 Types of Jurisdictional Issues

4.3.2.1 Jurisdictional and Non-jurisdictional Fact

Where an administrative authority makes certain mistakes of fact, it may carry such an authority or tribunal outside its jurisdiction. Jurisdictional fact is synonymous with precedent fact or collateral questions – see the case of ***Bunbury v. Fuller*** (1853) 9 Ex, 111 where Coleridge J stated that: it is a general rule, that no court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends…[Thus the question] whether some collateral matter be or be not within the limits…must always be open to the inquiry in the superior court.

Where a jurisdictional issue arises in dispute before a tribunal or administrative authority, the distinction to be made is whether, the issue is a primary or central question which the tribunal has power to decide conclusively and other questions which circumscribe the scope of that power. As Coleridge J pointed out in Bunbury v. Fuller [supra], there is a distinction between the main question which the tribunal has to decide and other questions on which the existence of jurisdiction depends.

It is not uncommon for enabling legislation to provide that a power or jurisdiction to decide may be exercised only when a particular fact or state of fact is in existence. Hence if a local council has the statutory authority to seize and destroy all black dogs, the lawful use of the power to seize and destroy is dependent on the existence of two questions of fact, viz. is the animal in question (a) black, and (b) a dog. Use of the power to seize and destroy a brown dog or a black cat would therefore be ultra vires. Such facts have been variously defined as jurisdictional facts, precedent facts, preconditional facts and collateral facts. The particular terminology favoured is not of great significance provided it is understood that their function is to delineate the subject-matter or factual context in relation to which the power should be exercised.

White and Collins v Minister of Health **[1939] 2 KB 838** the court stated that: The first and most important matter to bear in mind is that the jurisdiction to make the order is dependent on a finding of fact; for, unless

the land can be held not to be part of a park . . . there is no jurisdiction in the borough council to make, or in the Minister to confirm, the order (per Luxmoore LJ).

The effect of a mistake in fact which is outside the powers conferred on the tribunal or public authority is that such a decision may be quashed on certiorari where the applicant is able to prove the mistake of facts.

4.3.2.2 Jurisdictional and Non-jurisdictional Law

This occurs where a public body, more often a court or tribunal, misconstrues or gives an incorrect meaning to a legal rule which it has been empowered to apply to the facts of cases coming before it for decision. The traditional view was that where a decision-maker erred in law this did not 'go to jurisdiction'; that is, the decision-maker did not act ultra vires. Mistakes of law within jurisdiction could only be remedied through an appeal (where such right existed) or by applying for review for what was known as 'error of law on the face of the record'. The latter was an ancient ground of relief, popular until the mid-nineteenth century, and was used to challenge the validity of decisions where a mistake of law or procedure could be found in the written record of the particular proceedings.

In the landmark decision in ***Anisminic v Foreign Compensation Commission (No. 2)*** [1969] 2 AC 47, wherein the House of Lords expressed the view that henceforth an error of law which affected the decision of a tribunal or official should be regarded as 'going to jurisdiction', i.e. as rendering the decision ultra vires and void. The breakthrough that Anisminic made was the recognition . . . that if a tribunal whose jurisdiction was limited by statute or subordinate legislation mistook the law applicable to the facts as it had found them, it must have asked itself the wrong question, i.e. one into which it was not empowered to inquire and so had no jurisdiction to determine (per Lord Diplock, ***O'Reilly v Mackman*** [1983] 2 AC 237).

In the case of ***Anisminic v Foreign Compensation Commission (No. 2)*** [1969] 2 AC 147, the House of Lords, in deciding that a tribunal could lose jurisdiction if it made a mistake of law, made it abundantly clear that jurisdictional errors could occur during, as well as at the beginning of any inquiry. Lack of jurisdiction may arise in many ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry or at the end the tribunal may make an order that it has no jurisdiction to make. Or in the interviewing stage, while engaged on a proper inquiry, the tribunal may depart from the rules of natural justice; or may ask itself the wrong questions; or it may take into account matters which it was not directed to

take into account. Thereby it would step outside its jurisdiction. It would turn its inquiry into something not directed by Parliament and fail to make the inquiry which Parliament did direct. Any of these things would cause its purported decision to be a nullity (per Lord Pearce). All of this tends to suggest that the meaning of power or jurisdiction is a matter of judicial policy which may be adjusted from time to time in accordance with the judges' view of their relationship with the executive and the need to maintain the effectiveness of the constitutional balance inherent in the separation of powers.

The present attitude of the courts in this matter has been summarised as follows: *The concept of error of law within jurisdiction is rapidly becoming obsolete. As a result of a series of judgments the courts now assume that Parliament does not intend to confer jurisdiction or power on inferior courts or public authorities to determine questions of law. All errors of law by public authorities except superior courts are now regarded (or may easily be turned into) jurisdictional errors* (Lewis, Judicial Remedies in Public Law). This approach was confirmed by the House of Lords in *Page v Hull University Visitor* [1993] 1 All ER 97, and in ***Williams v Bedwellty Justices***[1996] 3 All ER 737.

Henceforth, errors such as lack or insufficiency of evidence, abuse of discretion (e.g. irrelevancy) and mistake of law committed during the inquiry, were to be regarded as 'going to jurisdiction'. Lack or insufficiency of evidence was asserted as a jurisdictional matter in ***Ashbridge Investments Ltd v Minister of Housing and Local Government*** [1965] 1 WLR 1320: '. . . the court can interfere with the Minister's decision if he has acted on no evidence, or if he has come to a conclusion to which on the evidence he could not reasonably have come' (per Lord Denning MR). The same was said of abuse of discretion by the House of Lords in ***Padfield v Minister of Agriculture*** [1968] AC 997: Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act . . . [I]f the Minister . . . so uses his discretion as to thwart or run counter to the policy and objects of the Act . . . the law would be very defective if persons aggrieved were not entitled to the protection of the courts (per Lord Reid).

In-text Question
What is the impact of the decision of the court in *Anisminic v Foreign Compensation Commission (No. 2)* [1969] 2 AC 47 with respect to jurisdiction of tribunal

4.3.3 The Nigerian Position on Jurisdictional Control

The position of law on jurisdictional reviews in Nigeria was stated by Dove-Edwin in the case of **R v. Governor E.N. ex.p Okafor** (1955) 21 NLR that : '*And, in this regard has an inherent jurisdiction to control all inferior tribunals not in appellate capacity but in a supervisory capacity'* See for instance, section 8 of the High Court Law, Cap 44, Laws of the Western State (1959 ed.)

The courts have the power to prevent abuses of jurisdictions and to correct errors of law apparent on the record – ***R v. Deputy Governor E.N (1960) 4 E.N.L.R. 103; Nwosu v. Imo State Environmental Sanitation Authority (1990) 2 NWLR (Pt. 135) 688.***

4.4 Discretionary Power

Consider the meaning of discretion. From its very name, it implies freedom to choose among alternative courses of action. An element which is essential to the lawful exercise of power is that it should be exercised by the authority upon whom it is conferred, and by no one else, in accordance with the maxim *delegatus non potest delegare.*

Lord Halsbury L.C. dictum in **Sharp v. Wakefield (1891) A.C. 173 at 179** is an accepted test that:
Discretion means when it is said that something is to be done within the discretion of the authorities that something is to be done according to the rules of reason and justice, not according to private opinion…According to law, and not humour. It is to be, not arbitrary, vague, and fanciful but legal and regular. And it must be exercised within the limit to which an honest man competent to the discharge of his office ought to confine himself.

In-text Question

Within the first meaning of discretion above, discuss examples of delegation and the limits of doctrine against sub-delegation. Are there advantages/disadvantages? See the Nigerian cases of Ibrahim v State; In Bamgboye v University of Ilorin on the delegation of powers. See section 5(1) (a) & (2) (a) of the 1999 Constitution.

Another vital consideration in the exercise of discretionary power is that it must be exercised in a proper and lawful way in accordance with the presumed intention of the legislature that conferred the power.

Scope of Review:

4.4.1 Subjective Discretion

Modern statutes frequently confer discretionary powers in subjective terms in the hope of ousting the jurisdiction of the court and thereby rendering the administrative decisions unreviewable. Smith however, is of the view that the discretionary power is not reviewable.

Liversidge v. Anderson (1942) A.C. 206 where the court applied the subjective test.

Consider any post development after the Liversidge case such **as Nakudda Alli v. Jayaratne (1951) A.C. 66**; note Sach J.'s view in the case of **Custom and Excise v. Care Deeley Ltd. (1962) Q.B .366-7** where the discretion of the Commissioner was called into question.

Padfield v. Minister of Agriculture, Fisheries and Food (1968) 1 All E.R. 694 is the most unequivocal illustration in recent times, of the futility of subjectively worded clauses in statutes conferring discretion.

4.4.2 Concept of 'Jurisdictional' Reviews in Nigeria

This can be divided into parts.
Under the colonialist, the courts were manned by British judges who brought with them the concept of jurisdictional control of inferior bodies. The concept was imported into the Nigerian Legal System by virtue of English law. Consider the case of R. v. Governor E.N. exp. Okafor (1955) 21 N.L.R. 67.

Now, section 6(6) and 272(1) of the 1999 Constitution has conferred powers on the court. Thus, the High Court has power to review by means of prerogative orders.

Activity
Reflect on the powers of review of superior courts under successive constitutions in Nigeria.

Take note that the Liversidge rule i.e. the subjective doctrine, has been rejected in most commonwealth countries. See the case of **Nakkuda Ali v. Jayartne (1951) A.C. 66 at 76**. You may look up other jurisdictions such as Zambia for the position on subjectively worded discretion.
See the following cases: **Re: Mohammed Olayori and Ors (1969) 2 All NLR 298; Chief Agbaje v. COP W.S (1969) 1 NMLR 137 (HC) and (1960) 1 NMLR 176 (SC)**

4.5 Summary

The courts are ready to intervene to protect liberties, civil and proprietary rights. Thus, any provision in the enabling Act which has the effect of

limiting a person's right or imposing any personal or financial burden is usually construed strictly. See **Barclays Bank of Nigeria Ltd v. Central Bank of Nigeria (1976) 2 FRN129 at 135; Congreve V. Home Office (1968) A.C. 997; Iwuji v. Federal Establishment Commission (1985) 1 NWLR (Pt. 3) 497. Eleso v. v. Government of Ogun State & Ors (1990) 2 NWLR (Pt. 133) 420; Labiyi v. Iretiola (1992) 8 NWLR (Pt. 258) 139**

4.6 References/Further Readings/Web Resources

B.U. Eka Judicial control of administrative process in Nigeria. Obafemi Awolowo University Press.

4.7 Possible Answers to Self-Assessment Exercise

Self-Assessment Exercise
When is a public authority acting lawfully, or unlawfully?

Guide: *Your discussion should include examining the statute to know the intention of legislature as expressed or implied in the relevant Act. The principles of administrative law are generalized rules of interpretation. Thus, the dominant source of power is legislation, or prerogative, corporate and contractual powers. (Revisit the unit on rules of statutory interpretation)*

MODULE 4

In this module, we shall be addressing the remedies available to the court. The most common remedies under the general law available to public interest groups in seeking the review of questionable decisions concerning public interest orders were the prerogative writs. From the 12th to the 20th centuries, claimants went to court seeking a particular remedy, and there were different forms of proceeding for different remedies. From the seventeenth century, the courts developed the 'prerogative orders' (called such because in theory they issue from the Crown) of mandamus, prohibition and certiorari that enable the High Court to police the powers and duties of 'inferior bodies', i.e., lower courts and government officials. Mandamus ordered a body to perform its duty. Prohibition was issued in advance to prevent a body from exceeding its jurisdiction. These orders remain the basis of the modern law of judicial review but are now called, mandatory orders, prohibiting orders and quashing orders, respectively. The process offers special remedies (still called 'prerogative' remedies) available only in judicial review: a 'quashing order' to nullify a decision, a 'mandatory order' to require some official action, and a 'prohibiting order' to ban some official action. They were called 'certiorari', 'mandamus', and 'prohibition' until the Civil Procedure Rules (CPR) 1998 came into effect. Declarations and the ordinary remedies of damages and injunctions are also available in a claim for judicial review. But a claim for damages alone cannot be brought by judicial review.

Unit 1 Prerogative Writs
Unit 2 Mandamus
Unit 3 Certiorari
Unit 4 Locus Standi

Unit 1 Prerogative Writs

Unit Structure

1.1 Introduction
1.2 Learning Outcomes
1.3 Prerogative
  1.3.1 Characteristic
  1.3.2 History and Development of Prerogative Writs
  1.3.3 Recent Developments on Prerogative Writs/Orders
  1.3.4 Relevance of Prerogative Writs within a Legal State
1.4 History in Nigeria
1.5 Summary
1.6 References/Further Readings/Web Resources
1.7 Possible Answers to Self-Assessment Exercise(s)

1.1 Introduction

The object of this unit is to have a general knowledge of the nature and development of the prerogative writs. In the common law jurisdiction overseas, their significance is not less than in England, and in some instances, it is even greater because of the more extensive jurisdiction conferred upon them.

1.2 Learning Outcomes

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

- analyse the development of prerogative writs;
- define "prerogative writ";
- explain the characteristics of prerogative writs;
- discuss the nature and how the orders are applied by the courts.

1.3 What is Prerogative Writ?

'Writ' was originally a short, written command issued by a person in authority, and tested and sealed by him as a proof of its genuineness. The name indicates that it is a writ especially associated with the king.

The term royal prerogative applies to those ancient powers and immunities – once exercised or influenced by the Monarch personally and thought to be a natural attribute of the Monarch's constitutional and political pre-eminence. Most modern writers have said that prerogative writs are writs which originally were issued only at the suit of the king but which were later made available to the subject.

The initial purpose of these remedies was to allow the royal courts to ensure that other courts, such as ecclesiastical courts, worked within the scope of their given jurisdiction and did not exceed the limits of their powers.

In the late nineteenth century, Dicey described the prerogative as follows: *The prerogative appears to be historically and as a matter of fact nothing else than the residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown . . . From the time of the Norman Conquest down to the Revolution of 1688, the Crown possessed in reality many of the attributes of sovereignty. The prerogative is the name of the remaining portion of the Crown's original authority . . . Every act which the executive government can lawfully do without the authority of an Act of Parliament is done in virtue of the prerogative* (Dicey, An Introduction to the Law of the Constitution).

Another frequently cited definition had been provided by the eminent judge and jurist, Sir William Blackstone: *By the word prerogative we usually understand that special pre-eminence, which the King hath, over and above all other persons, and out of the ordinary course of common law, in right of his regal dignity . . . It can only be applied to those rights and capacities which the King enjoys alone, in contradiction to others and not to those which he enjoys in common with any of his subjects, for if once any prerogative of the Crown could be held in common with the subject, it would cease to be a prerogative any longer* (Blackstone, Commentaries on the Laws of England).

The royal prerogative is part of the common law though legal authority for modern government is, of course, now provided in legislation. It represents those powers. Thus, prerogative writs were in origin, writs peculiar to the King himself; it is valid only with respect to certain obsolete writs.

Importance: As already indicated, the prerogative – despite its ancient origins – remains an important source of governmental power. It extends, inter alia, to the conduct of foreign affairs (including the making of treaties and declaring war and peace), the power of patronage, command of the armed forces, the summoning and dissolving of Parliament.

Five main writs initially emerged: the writ of mandamus, prohibition, certiorari, quo warranto and habeas corpus. Each of the remedies has a different purpose and demand the fulfilment of distinct procedural formalities.

In-text Question
What do you understand by the term prerogative writ?

1.3.1 Characteristics which are generally common to all Writs

a. They are not writs of course; they cannot be had for the asking, but proper cause must be shown to the satisfaction of a court, only then would they issue it. What this means is that the writs issued only upon cause shown by motion when applied for by the applicant;
b. The award of the writs usually lies within the discretion of the court; the court is entitled to refuse certiorari and mandamus to applicants if they have been guilty of laches or misconduct or if an adequate alternative remedy exists, notwithstanding that they have proved a usurpation of jurisdiction by the inferior tribunal or an omission to perform a public duty. On applications by subjects for certiorari to remove indictments, the courts have always exercised a very wide discretion. See for instance the case of R. v. Commissioners of Excise (1788) 2 T.E. 381 at 385 where the court

stated that: *'An application for mandamus is an application to the discretion of the court; a mandamus is a prerogative writ and is not a writ of right* ';

c. They were awarded pre-eminently out of the court of King's Bench;

d. At common law, they would go to exempt jurisdiction to which King's writ did not normally run.

1.3.2 History and Development of Prerogative Orders

Note that royal prerogative powers developed from a time when the Monarch was both a Feudal Lord and the Head of State. As Wade puts it, they are referred to as 'prerogative' because they were originally available only to the crown and not to the subject. The King had powers to protect and preserve the State from enemies and to also act for public good. Prerogative powers were traditionally exercised solely by the Monarch.

However, the erosion of prerogative powers started in the seventh century with the Common Law Courts. In ***Prohibitions de Roy*** **(1607) 12 Co. Rep. 63**, it was held that the King in his own person could not adjudicate any case. Later on, it was held that the King had no prerogative, but that which the law of the land allows him. There was later the shift of power from the Crown to the Parliament. This shift of power from the Crown to Parliament and the Government did not leave the prerogative unaffected.

The prerogative remedies were commonly known as prerogative writs until 1938 when they were tagged prerogative orders by the Administration of Justice (Miscellaneous Provisions) Act at section 7. However, this section was later amended by the provisions of Senior Courts Act 1981.

Also, by the Civil Procedure Rules ("CPR") Part 54 (this replaced Order 53 of the Rules of the Supreme Court), judicial review procedure must be used in a claim for judicial review where the claimant is seeking – (a) a mandatory order; (b) a prohibiting order; (c) a quashing order; or (d) an injunction under section 30 of the Supreme Court Act 1981 (restraining a person from acting in any office in which he is not entitled to act). The changes did not affect *habeas corpus*.

1.3.3 Recent Developments on Prerogative Writs/Orders

In Britain, a number of developments have occurred with regard to prerogative powers.

The Public Administration Select Committee published an inquiry into the royal prerogative in March 2004. The Report entitled "Taming the Prerogative: Strengthening Ministerial Accountability to Parliament" recognised that such powers are necessary for effective administration, especially in times of national emergency and it considered whether they should be subject to more systematic parliamentary oversight. The Report concluded that the case for reform was unanswerable.

The Governance of Britain Green Paper was also published in July 2007-- days after Gordon Brown became Prime Minister. The Green Paper set out plans for wide-reaching constitutional reforms and addresses the prerogative powers held and exercised by ministers. The Review considered action to be taken or proposed in respect of prerogative powers.

The foregoing are indications that prerogative powers are seriously under attack and some have canvassed their elimination from politics. For instance, in Nigeria, while some have argued in support of retention of immunity clause, others are of the view that the immunity clause does more harm.

Activity
Although the term 'prerogative writ' is well known, wherever the language of the common law is spoken, no one has ever been able to give a satisfactory answer to the question: what is prerogative writ?

In-text Question
Discuss, drawing the development of prerogative orders in three different jurisdictions including Nigeria.

In this module, we shall be discussing mandamus, prohibition, habeas corpus and certiorari.

Although the prerogative features of the writs were ancient, it seems that the first time they were grouped together and called 'prerogative' was in R v Cowle (1759) 2 Burr 834, 855–6; Lord Mansfield called mandamus, prohibition, habeas corpus, and certiorari 'writs not ministerially directed', because they were not automatically issued by the court office at the request of a claimant to commence proceedings. He said that they were 'sometimes called prerogative writs, because they are supposed to issue on the part of the King'. Lord Mansfield was a royalist judge who wanted to emphasise the King's prerogative to do justice according to law

by bringing complaints of unlawful administration before his Court of King's Bench.

1.3.4 Relevance of Prerogative Writs within a Legal State

Prerogative writs have gradually found their way into constitutional guarantees within different legal systems – Mellisa Couch discusses the constitutionalisation of these prerogative writs extensively.

According to the writer, the first phase of the transfer of common law writs into constitutional text occurred with the acknowledgement of the existence of the writ of habeas corpus in the US Constitution 1789, being the first constitution to include the remedy of habeas corpus, and this appears to have inspired later constitution-drafting processes, particularly across Latin America in the 1800s. The US Constitution presupposed the existence of habeas corpus as part of the common law, and provided that it could not be suspended except in the case of invasion or insurrection. The constitutions of many countries in Latin America (including Paraguay, Peru, Brazil, Guatemala, El Salvador, Honduras, Ecuador, Nicaragua, Argentina and Columbia) and the Philippines also added the rights of amparo. In some jurisdictions, such as Argentina, the Supreme Court was willing to grant habeas corpus applications even under military rule in the 1980s.

The second stage of the constitutional incorporation of the writs occurred in the Australian Constitution 1901. Section 75(v) of the Constitution provides for the writs of prohibition and mandamus. Commenting on the debate concerning section 75(v), they note that Barton emphasised that:
The object of [the provision] is to make sure that where a person has a right to ask for any of these writs he shall be enabled to go at once to the High Court, instead of having his process filtered through two or more courts ...

The third and primary stage in the constitutional incorporation of the writs occurred in India in the late 1940s, when the crucial link was made between writs and constitutional rights. The 1950 Constitution of India, which included a bill of rights and the five writs as a remedy for the protection of fundamental rights conferred on the Supreme Court and High Courts the power to issue the five writs or any other writ for the protection of rights (article 32). The Constitution also conferred on the High Courts the broad power to issue any other directions, orders or writs 'for any other purpose' (article 226)

By including and upgrading the writs into the Indian Constitution, the drafters consciously departed from the English tradition in order to ensure that writs could be used for the protection of fundamental rights.

According to Forsyth and Upadhyaya: *'In so insisting on the protection of fundamental rights, the committee was breaking with the then tradition of British Constitutionalism which did not countenance any limitation on Parliamentary supremacy as implied by the protection of fundamental rights.'*

This idea of incorporating the writs into the written constitution and connecting them to the protection of constitutional rights was borrowed and included in other constitutions as countries across South Asia gained independence, including Burma, Pakistan, Sri Lanka and Bangladesh. Constitutional writs also emerged across Africa, including in Nigeria, Sierra Leone, Kenya, Gambia, Zimbabwe, and across the Commonwealth Caribbean, in states such as Mauritius, the Bahamas and Barbados.

Self-Assessment Exercise

Highlight Mellisa's categorisation of the constitutionalisation of prerogative writs

1.4 History in Nigeria

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

All the writs with the exception of the writ of *habeas corpus* are now known as the prerogative orders. They are all now being regulated by the rules of the various states of the federation. To be sure, Order 40 Rule 1(1) of the High Court of Lagos (Civil Procedure) Rules, 2004 (the "Lagos Rules") provides that an application for orders of mandamus, prohibition or certiorari or an injunction restraining a person from acting in any office in which he is not entitled to act shall be made by way of an application for judicial review.

We see the constitutional guarantees in the 1999 Constitution (and previous constitutions) which has guaranteed a set of fundamental rights to the Nigerian citizens. Every person in Nigeria is thus entitled to enjoy, within the context of the Constitution, the right to life, personal liberty, human dignity, right to a fair hearing, freedom of expression and of the press, right to privacy and family life, peaceful assembly and association, freedom of thought, conscience and religion, freedom of movement, freedom from discrimination and protection of property right.

1.5 Summary

Having considered the operation and development of prerogative orders in Nigeria and United Kingdom, we came to the conclusion that prerogative orders exists in both jurisdictions. Although, prerogative orders were imported into the Nigerian legal system through ordinances we have discovered above and unlike in England, where the prerogative writs (orders) developed more or less independently of each other and applied uniformly throughout the realm, in Nigeria, the reception and application of these prerogatives were effected piecemeal, and by way of ordinances, to the colony of Lagos, then to the protectorates of southern Nigeria and finally to the whole country. The operation of prerogative remedies in Nigeria has been further backed up by the provisions of the constitution. Section 46 (1) of the 1999 constitution.

To borrow the words of the learned author (Melissa Crouch), The constitutionalisation of the writs effected a shift in understanding of administrative review. The writs as constitutional remedies now had greater prestige and a higher public profile and become part of the judicial landscape. The inclusion of the writs in written constitutions added greater certainty for applicants, as the government could not legislate away these remedies. In addition, as the rules of standing were relaxed in India, the writs shifted from a limited means of redress to a primary channel for public interest litigation.

1.6 References/Further Readings/Web Resources

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Aguolu, S.I.O. (1981). The Prerogative Writs and Orders under Nigerian Law and Constitution. Star Printing and Publishing Company.

1.7 Possible Answers to Self-Assessment Exercise

Highlight Mellisa's categorisation of the constitutionalisation of prerogative writs

- The first phase of the transfer of common law writs into constitutional text occurred with the acknowledgement of the existence of the writ of habeas corpus in the US Constitution 1789;
- The second stage of the constitutional incorporation of the writs occurred in the Australian Constitution 1901.
- The third and primary stage in the constitutional incorporation of the writs occurred in India in the late 1940s, when the crucial link was made between writs and constitutional rights.

Unit 2 Mandamus

Unit Structure

2.1 Introduction

The most common remedies under the general law available to public interest groups in seeking the review of questionable decisions concerning public interest orders were the prerogative writs. Despite the more frequent usage of the injunction and declaration now, the writs are still of importance given the specificity of the breaches they cover. These are the three commonly used writs of certiorari, prohibition and mandamus.

2.2 Learning Outcome

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

- discuss the applicability of the doctrine under the prerogative order of mandamus.

2.3 Mandamus

Mandamus is a Latin word which literally means a "command" or an "order". It is a judicial command requiring the performance of a specified duty which has not been performed; mandamus is also defined as the royal command issued in the name of the Crown, from the Court of the King's Bench, to the subordinate court, an inferior tribunal, a corporation, board or any other person requiring it (or him) to perform a public duty. Thus, a writ of mandamus commands or orders or directs a person to whom it is addressed to perform the public duty pertaining to his office.

A writ of mandamus was designed to compel a government agency to perform a public duty that had not yet been performed. This was the first prerogative writ to broaden in scope as 'a more general-purpose tool for the remedying of administrative error'. See Dr. Bentley's case (supra) where the writ of mandamus was granted to restore him to his degrees which had been unlawfully taken away by the Vice-Chancellor's court of Cambridge University.

Mansfield J in R v. Barker [1762] 97 ER 823 explained that: …*it was introduced to prevent the disorder from a failure of justice, and defect of police. Therefore, it ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one.*

The Lord Justice stated that the order of mandamus been granted to admit lecturers, clerks, sexton, scavengers etc. and to restore an alderman to precedency, an attorney to practice in an inferior court.

Similarly, the Supreme Court in the case of *Wilbur v. United States ex rel. Kadrie, 281 U.S. 206, 218 (1930)* gave a classic explanation of the use of mandamus:

Mandamus is employed to compel the performance, when refused, of a ministerial duty, this being its chief use. It is also employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way, nor to direct the retraction or reversal of action already taken in the exercise.

In-text Question
What are the elements of the order of mandamus?

2.3.1 Elements of the Order of Mandamus

This writ is usually sought if there is a public duty that remains unperformed. Mandamus lies against authorities whose duty is to perform certain acts and they have failed to do so. See for instance, *Fawehinmi v. Akilu (1987) 4 NWLR Pt. 67 pat page 797* where the court granted an order of mandamus compelling the DPP to take a decision to prosecute or not to prosecute.

To fall within the purview of the writ, the performance of a 'duty' and not merely the exercise of a power is required. There must be a clear demand for the performance of a duty which has been deliberately withheld. The most common, although not conclusive indication is the difference in wording of the duty or power. If a mandatory 'will' is used, as opposed to discretionary 'may', then it is more likely that a duty has been created.

Note that the court cannot substitute its decision for that of the government officer involved, but the court can require the officer to perform a duty according to law. **See** *Fawehinmi v. Akilu (supra)*

The applicant must have a legal right to the performance of a legal duty: In *Ulegede v. Commissioner for Agric, Benue State (1996) 8 NWLR Pt. 467* Orah JSC in his dictum said that: *for an order of mandamus to issue, the law requires that there must be a legal right on the part of the applicant for mandamus.*

The legal duty must be of a public nature. '….to the performance by a person or body of some duty of public nature, and not merely of private character' *Ulegede v. Commissioner for Agric (supra)*

Self-assessment Exercise

Are there limitations to the order of mandamus?

2.4 Summary

Note that the prerogative writ of mandamus, like the other writs, have been replaced by a modified procedure. See Udo Udoma JSC in *Burma and Hawa v. Sarki (1962) 2 All NLR 62* where he said at page 69 that: 'in the absence of a prescribed procedure of attacking the exercise of powers by a Minister, the normal civil processes and the principles of the general law, including the prerogative orders, are, of course available to be invoked to advantage by an aggrieved person whose rights have been infringed'

2.5 References/Further Readings/Web Resources

Mandamus in Administrative Actions: Current Approaches. Duke Law Journal, Apr., 1973, Vol. 1973, No. 1, Administrative Law Symposium (Apr., 1973), pp. 207-217

Ese Malemi. Administrative Law. Princeton. 4th edition.

B.O. Iluyomade and B.U. Eka. Cases and materials on administrative law in Nigeria. Obafemi Awolowo University

HWR Wade & C.F. Forsythe. Administrative Law. Tenth edition.

Jenks, E. (1923). The Prerogative Writs in English Law. *Yale Law Journal*. Vol. XXXII Issue 6

2.6 Possible Answers to Self-Assessment Exercise

Self-assessment Exercise
Are there limitations to the order of mandamus?

Guide: it is a discretionary remedy therefore it may be refused to an applicant who has been guilty of delay, laches, or where the remedy is unnecessary.
Generally, a writ of mandamus can only be filed in limited circumstances. It can not be used to seek a review by an appellate court of an erroneous lower court decision.

Unit 3 Certiorari

Unit Structure

3.1 Introduction

Many of the present features of the writ of certiorari which is today, in our country, the chief means by which the courts review administrative action - can be understood only by a study of its early history. Like most of the English writs, it was originally a prerogative writ; i.e. it was issued by the King by virtue of his position as fountain of justice and supreme head of the whole judicial administration. But unlike most of its fellows, which have become what is known as writs ex *debito justitiae*, or writs of right, the certiorari has preserved to a great extent - perhaps to a greater extent than any other writ - its original characteristics as a prerogative writ.

3.2 Learning Outcomes

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

- discuss the historical development of certiorari;
- explain the applications of the remedy of certiorari in different jurisdictions such as the United States, Britain and Nigeria.

3.3 Certiorari

Certiorari was essentially a royal demand for information; the King, wishing to be certified of some matter, orders that the necessary information be provided for him. Lord Parker in the case of **R.v. Thomas Magistrates Court ex.p. Greenbaum** [1957] 55 LGR 129 summarised the law as to certiorari thus:

"Anybody can apply for it - a member of the public who has been inconvenienced, or a particular party or a person who has a particular

grievance of his own. If the application is made by what for convenience one may call a stranger, the remedy is purely discretionary. Where, however, it is made by a person who has a particular grievance of his own, whether as a party or otherwise, then the remedy lies *ex debito justitiae*…" Below are some cases in which certiorari was used at its earliest stage:

Beginning from the fourteenth century until the middle of the seventeenth century, the following seem to have been the main purposes served by certiorari:

(a) To supervise the proceedings of inferior courts of specialised jurisdiction - e.g., the Commissioners of Sewers, the Courts Merchant; the Court of Admiralty; the Courts of the Forests, particularly in order to keep them within their spheres of jurisdiction;
(b) To obtain information for administrative purposes: e.g., the sheriff is told to find out whether one who has been granted the King's protection is tarrying in the city instead of journeying;
(c) To bring into the Chancery or before the common-law courts judicial records and other formal documents for a wide diversity of purposes;
(d) To remove coroners' inquisitions and indictments into the King's Bench.

In-text Question

From some of the early usage of the writ listed above, what do you observe? There are characteristics that run across all of them which we shall discuss in 3.3.1 below.

3.3.1 Character of the Writ

Certiorari started as a way of controlling courts of specific jurisdiction after they had made a decision. It was actually a direction to a public authority to bring the record of its decision to the court (that is, to certify its record); the judges would then decide whether to quash the decision (see, e.g., Ex p Stott [1916] 1 KB 7). A learned author puts it this way: "certiorari was envisioned as a sort of fallback provision should the circuit courts of appeals prove, on occasion, to be surprisingly careless in deciding cases or issuing certificate" [Edward A. Hartnett, Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill 100 COLUM. L. RE].

It is from this characteristic that it derives its name as a quashing order. i.e an order used to bring up into the High court the decision of some inferior tribunal or authority for the purpose of investigating it and, where it does not pass the test, it is quashed – i.e to say, it is declared completely invalid so that no one needs to respect it. Thus, the writ of certiorari has

become known in some jurisdictions as an order to quash, that is, an order that cancels the decision of the government agency or body exercising public power in question. This was historically and traditionally understood to be a remedy against a decision of a lower (that is, 'inferior') court.

The writ will lie against any person having a legal authority to determine questions. See R .v. Electricity Commissioners (1924) 1KB 205 but would not lie against private or domestic character because this is incompatible with the public nature of prerogative orders.

The writ bears very plainly the stamp that was impressed upon it at its origin. Thus, for example, certiorari does not issue of course, as does the ordinary summons in an action; application has to be made to the proper court, and this may refuse or grant the application for the issue of the writ in its own discretion.' In the exercise of this discretion, the courts have laid down several rules by which they will be guided:

(1) They will not issue the writ if there is any other adequate remedy; i.e. certiorari is an extraordinary remedy. Adequate remedies have been held to exist where it is possible to obtain a writ of error, or to appeal.

(2) The courts have held that they will not issue a certiorari where the party applying for it is guilty of laches and has slept upon his rights.

(3) The courts will not issue a certiorari where substantial justice has been already done, or where very mischievous consequences will result from its issue, or for a mere defect in form or of jurisdiction.

(4) Finally, the courts have held that the certiorari may not be used simply for the purpose of the maintenance of the law. That is, persons applying to the courts for the issue of the writ must show to the satisfaction of the court that they have some special interest involved which is peculiar to themselves and that the issue of the writ will result to their advantage.

In-text Question
What are the uses of the writ of certiorari?

3.3.2 Uses of the Writ

It is one of the prerogative remedies by which an ultra vires act may be challenged.

Certiorari may be sought to challenge the preliminary inquiry, committal or discharge. *Certiorari* may be granted to quash the committal or discharge (because there is no appeal available) if the applicant can show that the judge acted in excess of assigned statutory jurisdiction or in breach of the principles of natural justice.

The purpose is to enable the superior court to review that record in order to adjudge the legality of the decision based on it. If the decision does not pass the test, it is quashed – that is to say, it is declared completely invalid, so that no one need respect it.

The *certiorari* remedy has utility since it can result in return of the items seized and in an effective declaration that the search was warrantless, thus reversing the later onus at trial for admissibility of the evidence obtained from the search.

To challenge a trial judge's publication ban. A third party affected by the ban, such as the media, can use *certiorari*.

To quash a subpoena, although the usual remedy is an application to the trial judge, *certiorari* can be used to quash a subpoena; to challenge an order for a third party to produce counseling or other such records. Finally, it can be used to challenge an order for costs.

Lord Devlin noted in the case of R v. Fulham Rent Tribunal ex.p Zerek [1951] 2 K.B. 1 @ 11 that the order of certiorari [and prohibition] is concerned with public order, it being the duty of the court to see that inferior courts confine themselves to their own limited sphere.

See generally the cases of Adefemi Adeniyi v. Governing Council of College Yaba College of Technology (1993) 7 SCNJ 304; Arzika v. Governor of Northern Nigeria (1961) All NLR 374
This order is available against government and public authorities but not against private person(s) and bodies, see *R v. His Honour Judge Sir Donald Hurst*

3.3.3 Judicial or Quasi-judicial Acts?

The contention on judicial or quasi-judicial acts still extends to prerogative writs. In this regard, the issue is whether the tribunal or body against which the prerogative writs are being sought is acting either judicially or quasi-judicially. Let us examine this through the cases.

In ***Arzika v. Governor, Northern Region*** **(1961) All N.L.R. 379**, the applicant, a former native office holder applied for an order of certiorari to quash a removal order made against him under the Ex-Native Office Holders Removal Ordinance. It was argued on behalf of the respondent that neither certiorari nor prohibition can lie against the Governor, because in making a removal order he was not under any duty to act judicially. Again, the court had to determine when a function is judicial

or quasi-judicial, in which case, certiorari will lie to quash the determination if it has been made in breach of natural justice.

The issue that has plagued the courts is: when is an act judicial? In Iyere v Duru, (1986) 5 NWLR Pt. 44 at 665, the court stated that 'judicial' refers to the discharge of duties exercisable by a judge in court or to administrative duties which need not be performed in court. See also, the case of Ridge v Baldwin (student should revisit case under fair hearing) where the court held that the criteria should be the nature of the power exercised and its effect on an individual.

Be that as it may, the position of the law regards the distinction between judicial/quasi-judicial remains largely unsettled. In fact, it still remains an integral part of the remedy of certiorari and the court still use it as a yardstick in the award of certiorari. According to Elias, C.J.N. in Obiyan v. Military Governor of Mid-Western State (1974) 1 N.M.L.R. 181 at 188 that

'*The general proposition that certiorari lies only to quash judicial or quasi-judicial acts and not purely administrative acts remains true today, despite Lord Reid's criticism of it, (on the quite separate point that, in acting judicially or quasi-judicially, the inferior body or tribunal must observe the principles of natural justice), in the oft-cited case of Ridge v. Baldwin'*

Also, in the case of **Fela Anikulapo-Kuti & Africa 70 Organisation Ltd. v. Com missioner of Police, Lagos State 5 C.C.H.C.J., 797 (1977)** the application was for certiorari to quash an order in the letter addressed to the proprietor of a hotel where the plaintiffs were scheduled to give performance, ordering that they should not be allowed to do so because the police entertained "a serious apprehension that any performance by the band may occasion serious public disorder." At the time the order was made, the report of the Board of Inquiry into the disturbance at the residence of the plaintiffs was being awaited coupled with the fact that the police felt that owing to the prevailing atmosphere in Lagos, it was not in the interest of peace to allow the plaintiffs to appear in public performances. Dosunmu, J., held in Anikulapo Kuti that the Commissioner of Police exercising his powers under section 5 of the Lagos State Public Order Act, 1973 was acting administratively, hence the order was purely an administrative one made in accordance with policy and expedience for maintaining law and order against which certiorari would not lie.

On the other hand, there is the Supreme Court case of Re Kubeinje, where the State Public Service Commission had sent a letter transferring a chief magistrate to another post in the State Ministry of Justice. The letter stated that if he were not disposed to accept the transfer, he should consider

himself dismissed from the service. The applicant proved at the hearing that the commission had no power to force a transfer on him as he had not asked for it; and that the decision to remove him was taken without giving him a hearing or trying him of any charge as required by the relevant civil service regulations. It was submitted for the respondents that the letter sought to be quashed was only a "conduct pipe reflecting the effect of the deliberations of the Public Service Commission and not the proceedings sought to be quashed by the applicant in his application". In effect, there was no record of proceedings of the commission before the court for the purpose of being quashed. The response of the court was that the argument was simply "artificial in the extreme." per Coker, J.S.C., at p. 110 went on to state:

"We conclude without any doubt whatsoever, on the first leg of the appeal, that the point made by the learned Solicitor-General about the absence of the formal records of proceedings of the Public Service Commission is not valid, that the document (the letter in dispute) is what the applicant recorded, and rightly so, as the offending proceedings which he desired to be quashed and that in law inasmuch as the document which initiated the entire proceedings culminating in the issue (of the letter) is also part of the record, the records of the High Court were complete."
Since there was a finding that the contents of the letter were in breach of natural justice as the commission did not afford the chief magistrate an opportunity to state his case, it was untenable to contend that certiorari would not lie whereas it is normal that it is issued.

In ***Obiyan v. Military Governor, Mid-Western State*** where the Full Court of the Supreme Court rejected an application for certiorari to quash the order of the Governor revoking the appointment of a member of the State Public Service Commission on the ground that the order was ultra vires from the Governor and contrary to the rules of natural justice. It was held that the Governor had to consider the matter of the appellant's dismissal from the point of view of government policy and/or expediency and he was not in that process under a duty to act judicially. Elias, C.J.N., expressed the view that:
'*As regards the general issue of the procedure adopted in this case by the applicant in the Court below, we think it at least doubtful whether certiorari is an appropriate remedy for challenging the validity of a statute or other document requiring an interpretation.... An action for a declaration is the appropriate means of challenging the validity of legislation or a document in need of construction.*

This is the dividing line between this case and Anikulapo-Kuti where there was no finding of breach of natural justice, the commissioner of police was not acting judicially and although he would be required to act fairly, there was no requirement that he must offer the applicant an

opportunity to be heard before taking a policy decision in those circumstances. Again, the breach of a right to be heard is a breach of fundamental rights. And although the particular right which the applicants in Kuti alleged was contravened is recognised by the Constitution, the execution of the powers of the Police in the circumstances did not assume the nature of determining an issue. Accordingly, the commissioner of police had no legal authority to determine questions affecting the rights of persons and thus was not acting judicially in order to attract the order of certiorari.

Thus, certiorari will lie:
[W]here it is established before the High Court that a statutory body (or may be an inferior court) with limited powers has abused that power and that such abuse does and continues to affect prejudicially the rights of that citizen. Such abuse may take the form of noncompliance with the rule or rules of procedure prescribed for that body; it may be exemplified in the denial of the right to be heard in one's defence; it may consist of irregularities which are tantamount to a denial or breach of natural justice; indeed, it may take the form of an assumption of jurisdiction to perform an act unauthorised by law or a refusal of jurisdiction where it should be exercised. The list is not exhaustive but those are the cases in which certiorari has always been issued by the Courts of King's Bench

See further: ex p. Keasly, [1939] 2 K.B. 651. 118. Kanda v. Government of Malaya, [1962] A.C. 322; Board of Education v. Rice, [1911] A.C. 179; R. v. Liverpool

Self-Assessment Exercise

Read the cases of Amaka v Lt. Governor W.R (1956) 1 F.S.C. 57; Harts v. Military Governor of Rivers State (1976) 2 FNR 215; Gani v. LPDC (1985) 7 SC 178 What do you observe from the above cases? What is the position of the courts in the use of ‘judicial’ ‘quasi-judicial’ or administrative acts?

3.4 Summary

From the above, you can see that certiorari, in the early times was used for many different purposes; but its use has gradually trickled down to mainly, a remedy to bring up for review any decision or order of an inferior tribunal or administrative body. Another thing to note about certiorari is that, its great period of development as a means of controlling administrative authorities actually began in the latter half of the seventeenth century.

3.5 References/Further Readings/Web Resources

Alex Carroll. Constitutional and administrative law. Foundational Series Pearson, Ninth edition.

B.O. Iluyomade & B.U. Eka. Cases and Materials on Administrative Law in Nigeria. Second edition.

3.6 Possible Answers to Self-Assessment Exercise

Read the cases of Amaka v Lt. Governor W.R (1956) 1 F.S.C. 57; Harts v. Military Governor of Rivers State (1976) 2 FNR 215; Gani v. LPDC (1985) 7 SC 178 What do you observe from the above cases? What is the position of the courts in the use of 'judicial' 'quasi-judicial' or administrative acts?

Guide: The conclusion to be reached, from the line of cases, that certiorari only serves to remove judicial acts, and so, the doctrine of judicial acts, according to a learned author, is still very much a vital test for the award of certiorari.

Unit 4 Locus Standi

Unit Structure

4.1 Introduction

The doctrine of *locus standi* is one of the factors which limit access to court and to judicial review. The doctrine is concerned primarily with whether a particular claimant is entitled to invoke the jurisdiction of the court. It is distinct from the issue of justiciability and ripeness, though all combined to narrow access to justice. The rule of *locus standi* is frequently employed by the courts to shut many litigants out of the temple of justice, particularly lawsuits filed to question the actions of public authorities. Thus, l*ocus standi* is interwoven with the notion of jurisdiction. The issue of who should be allowed to invoke the judicial process has been a subject of debate in many jurisdictions. Policy arguments abound for and against the doctrine. It is remarkable that while the rule of *locus standi* is progressively being relaxed in many jurisdictions, Nigeria courts seem to have held on tenaciously to the strict application of the doctrine - unperturbed by the wind of change blowing all around the world.

4.2 Learning Outcomes

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

- discuss the meaning and nature of locus standi;
- analyse the general principles under which the doctrine operates;
- discuss the legal basis of the doctrine;
- discuss the doctrine of locus standi viz-a-viz judicial review.

4.3 Meaning and Nature of Locus Standi

Legal standing or locus standi is the term for the ability of a party to demonstrate to the court, sufficient connection to and harm from the law or action challenged to support the party's participation in the case. Otherwise, the court will rule that the plaintiff "lacks standing" to bring the suit and will dismiss the case without considering the merits of the claim.

The court in **Attorney-General, Kaduna State v. Hassan (1985) 2 NWLR 2 (Pt. 8) 483** defines *Locus standi* as legal standing before the courts. See also **Akilu v. Fawehinmi (No.2) {1989} 2 NWLR (Pt. 102**); See further **Abraham Adesanya v. President Federal Republic of Nigeria (1981) 2 NCLR 385**. A more understandable explanation of this is that it is the ability of a person or organisation to sue or to be sued.

Locus standi is the right of an individual or group of individuals to bring an action before a court of law for adjudication. It is used interchangeably with terms like "Standing to Sue" or "Title to Sue".

The doctrine of *locus standi,* or standing, determines the competence of a plaintiff to assert the subject matter presented before the court *Adenuga v. Odumeru* [2003] FWLR (Pt. 158) 1258.

Since an individual lacking *locus standi* is an incompetent plaintiff, it follows that, in public law, government can exceed or abuse its powers with impunity provided no such "qualified" litigant seeks the intervention of the court**.** Barry Hough, "A Re-examination of the Case for a Locus Standi Rule in Public Law" @ http://eprints.bournemouth.ac.uk/2905/1/86.pdf accessed on 15/06/13

Locus standi is one of the factors inhibiting human right protection and promotion in Nigeria, particularly in relations to public injury or public wrong or infraction of a fundamental right; it is an important issue confronting the public in seeking redress for unconstitutional acts or administrative wrongs. Indeed, the doctrine raises question like: who should have standing or legal capacity to challenge an administrative act or omission or commission which is injurious to the public without affecting any private right?

See the judicial definition of locus standi in the Nigerian cases of See ***Attorney-Gen, Kaduna State v. Hassan*** *(*1985) 2 NWLR (Pt.8) 483; ***Akilu v. Fawehinmi*** (No. 2) [1989] 2 NWLR (pt.102) 122; **Abraham Adesanya v. President, Fed Rep of Nigeria** (1981) 2 NCLR 385. Note also, Obaseki J.'s dictum in Abraham Adesanya's case where he discussed the fundamental characteristics of locus standi.

In-text Question
What is legal standing?

4.3.1 Jurisdiction over Public Concerns – The Origin of the Doctrine

Paul Craig noted that the English courts in the past restrictively construed *locus standi to* challenge public authorities and public interest issues, even when standing seemed accorded by specific statutes. **Lord Wilberforce** provided the reason for the narrow approach in the English case of ***Gourietv. Union of Post Office Workers*****, [1978] A.C. 435 at 477-8** *w*here he stated,

…. private rights can be asserted by individuals, but . . . public rights can only be asserted by the Attorney-General as representing the public. In terms of constitutional law, the rights of the public are vested in the crown and the Attorney-General enforces them as an officer of the crown. And, just as the Attorney-General has, in general, no power to interfere with the assertion of private rights, so in general no private person has the right of representing the public in the assertion of public rights. If he tries to do so his action can be struck out.

Self-Assessment Exercise

Discuss the requirements of locus standi in two different jurisdictions and compare with Nigeria. Specially, student should take from one civil and common law jurisdiction. Are there similarities? Note down the differences in requirements.

4.3.2 Requirements of Locus Standi in Nigeria

An aggrieved party seeking judicial intervention is always required to establish his *locus standi.* This implies that the person must show that:

(1) He has sustained direct personal injury; or
(2) He is in imminent danger of sustaining some direct injury as a result of the law, exercise of public power, act, omission, or issue in question.

The application of locus standi by Nigerian courts, especially lately has been scandalously narrow and too restrictive leading to increasing limitation to the court.

4.4 Procedural Requirement

The law also lays down some procedure that must be followed such as:

- Leave of court must be obtained and the remedy is discretionary. In the UK, by virtue of the Supreme Court Act of 1981 (known as the Senior Courts Act 1981, renamed by the Constitutional Reform Act 2005 Sch.11 (1) para.1 provides that "no application for judicial review shall be made unless the leave of the High Court has been obtained."

Rationale and policy argument for the doctrine. The need to exclude busybodies/vexatious challenges.

This is not without its attendant problems. The problems of this are that:
(i) the indeterminacy of the busybody test;
(ii) the manner in which it disguises value judgments about the claim rather than about the individual applicant; and,
(iii) the manner in which it confuses public law with private law adjudication.

We shall consider these problems:

4.4.1 Indeterminacy Test

It is quite impossible to identify a busybody with any clarity. It would be a straightforward matter if the label could simply be applied to any self - appointed representative of a wider group of individuals, or any advocate of the public interest; but the judicial approach is more sophisticated. Self-appointed representatives of the public have been held to have legitimately nominated themselves to challenge the administration in matters which are not their exclusive concern. The Greenpeace and the World Development Movement were held competent in respect of the environment and overseas aid respectively.

See the cases of **R v. Inspectorate of Pollution ex p. Greenpeace No.2 [1994] ALL ER 329;**
R v. Secretary of State for Foreign Affairs, ex p. The World Development Movement [1994] 144 NLJ 1708; Gillick v. West Norfolk &Wisebech Area Health Authority [1986] AC 112.
R v. Inland Revenue Commissioners ex p. National Federation of Self Employed & Small Businesses Ltd [1982] AC 612.

4.4.2 Value Judgment

The guiding criteria should simply be (i) the legal merit and (ii) whether the applicant is capable of effectively advocating the issue raised. The court has an inherent jurisdiction to strike out abusive vexatious or frivolous claims, so a *bona fide* litigant with an arguable case which is not vexatious, frivolous nor an abuse of the process ought not to be denied standing if they can mount an effective challenge.

4.4.3 The Floodgate Argument

The argument asserts that if any individual can bring proceedings to enforce a public duty, it is literally open to everyone to do so. See the case of *Iveson v. Moore* I Ld. Raym 486, 492 (1699) where the court observed that "if one man may have an action, for the same reason a hundred thousand may" and the courts would be flooded with claims. There is therefore the need to protect public bodies from litigation which is perceived as wasteful; public administration is not to be impeded or delayed by wasteful challenges by 'busybodies'.

Lord Cairns in ***Attorney-General Ex ReiMcWhirter* v. *Independent Broadcasting Authority* (1973) Q.B. 629 at 640** also commented on the requirement for the consent of the Attorney General.

In-text Question
Differentiate between the floodgate argument and the value judgement.

4.5 Locus Standing and the Separation of Powers

It has been argued that locus standi is a consequence of the separation of powers and two arguments have been employed to buttress the proposition. The first asserts that *locus standi* ensures that the courts adjudicate individualised disputes; political questions affecting the common good are properly a matter for the administration**.** A similar argument focuses on the question of the enforcement of the laws. This asserts that the community should be able to decide whether to enforce its own laws and that this decision should reside with democratically accountable public bodies rather than private individuals who are ill-equipped either to identify or to advocate the public interest. These two issues can be further explained below.

4.5.1 Political Issues

The argument broadly stated is that standing doctrine is required to prevent the court becoming lured into making political decisions. The principal responsibility for enforcing a public duty lies with the Attorney-General. The Attorney-General may however fail to enforce a public duty or law with the interested citizens unable to do anything because of the requirement of *locus standi.* Writers such as Griffith, Waldron and Tomkins have long opposed the expansion of legal controls on

government, preferring instead to accord primacy to political accountability.

Theoretical/policy arguments to relax the rule of locus standi
The arguments in favor of liberal judicial posture to the question of legal standing rest on the following constitutional considerations:

(a) The rule of law argument

(b) Substantive public interest arguments *Sierra Club of Canada v Canada (Minister of Finance*1999] 2 FC 211, 237 *R v Felixstowe Justices ex p Leigh.*

Judicial Attitude of Nigerian Courts to Locus Standi Vis-À-Vis Availability of Judicial Review of Administrative Actions
One major obstacle that Applicants seeking the judicial review of Administrative actions face in Nigeria is the question of locus standi or capacity to sue. One of the earliest decided cases on this point in Nigeria is ***Olawoyin v. Attorney-General of the Northern Region*** *[1961] 1 All NLR;* ***Senator Adesanya v. President, Federal Republic of Nigeria and Anor****[1981] 2 NCLR 32*

It must be pointed out that **Section 6(6) (b)** of the **1999 Constitution** does not confer locus standi on any litigant but merely allows the court to determine any question as to his civil rights and obligations. But he must show that his civil rights and obligations have been infringed before **Section 6(6) (b)**, which vest judicial powers in the court and provides forum for litigation, will enable the court to look into a person's grievance. See Fawehinmi v. Akilu. (1987) 4 NWLR (PT.67) 7971987) 4 NWLR (PT.67) 797; T*homas v. Olufosoye* 1987) 4 NWLR (PT.67) 797.
In *Fawehinmi v. Akilu* (1987) 4 NWLR (PT.67) 797, the Supreme Court departed from *Adesanya* and *Olufosoye's* cases and introduced what is now known as **the neighbourhood test** in determining locus in criminal cases.

In the case of *Akinnubi v Akinnubi* (1997) 2 NWLR (Pt.486) 144**,** the Supreme Court went back to its position in Adesanya and Olufosoye in determining locus.

In *Adediran v Interland Transport Ltd* (1991) 9 NWLR (pt 214) 155, the Supreme Court conferred standing on private citizens to bring an action in public nuisance. And this decision must be taken as extending or perhaps overruling Adesanya's case. In *Badejo v Ministry of Education & Others*1990) 4 NWLR (Part) 143, p. 254, the Supreme Court held that a person affected by an Act which also affected the general public can complain of a violation of his rights even though other persons affected do not want to complain.

The above authority sums up the attitude of Nigerian Courts to the doctrine of locus standi. A careful perusal of all the Supreme Court cases from **2002 to 2012** on this subject shows that our Courts have not enlarged the scope of locus standi. For instance, the cases of Inakoju v. Adeleke (2007)4 NWLR (Pt. 1025) 423;

- A.G. Lagos State v. Eko Hotels Ltd (2006)18 NWLR (Pt. 1011) 378;
- A.G. Adamawa v. A.G. Federation (2005)18 NWLR (Pt. 958) 581;
- Fawehinmi v. I.G.P (2002)7 NWLR (Part 767) 606;
- A.G. Federation v. A.G. Abia State (2001)11 NWLR (Pt.725) 689;
- Yesufu v. Governor of Edo State (2001)13 NWLR (Pt. 731) 517;
- A.G. Anambra v. A.G. Federation (2007) 12 NWLR (Pt. 1047) 4;
- Nyame v. F.R.N. (2010) 7 NWLR (Pt. 1193) 344 e.t.c.

For an applicant to succeed in seeking redress for review of an administrative action, he must still show that he has a special interest or alternatively, if he must show that he has sufficient interest in the performance of the duty sought to be enforced, or that his interest will be adversely affected. See **Nyame v. F.R.N.** (2010)7 NWLR (Pt.1193) 344 at p.400; See also **A.G. Anambra State v. A.G. Federation** (2007)12 NWLR (Pt.1047) 4 p. 94 – 95 where the Supreme Court decline jurisdiction to the A.G. of Anambra State on the basis that it is only Mr. Obi, the State Governor, that had interest in the matter and that the rights of Anambra State had not been infringed.

4.6 Summary

This unit looked at one of the fundamental restrictions on access to court. As Wade put it, the judges fear that they may 'open the floodgates' so that the courts will be swamped with litigation and ……fear also that cases will not be best argued by parties whose personal rights are not in issue. The feeling that the law must somehow find a place for the disinterested, or less directly interested citizen in order to prevent illegalities in government which otherwise no one would be competent to challenge.

The liberalisation of the principle of locus standi has made it possible for the court all over the world to recognise a general interest in any litigant on a matter as sufficient to have locus standi. So, the concept of individual interest, changed to special interest, again to class interest and now to sufficient interest.

4.7 References/Further Readings/Web Resources

Craig, P. (2011). *Administrative Law* (6th Edition), London: Sweet & Maxwell at page 794.

Scott, K.E. (1973). Standing in the Supreme Court: A Functional Analysis' *Harvard Law Review* 86, 645 at 674.

Murphy, J. (1980) in *Australian Conservation Foundation Ltd* v. *Commonwealth* 146 C L R 493 at SS7-R

4.8 Possible Answers to Self-Assessment Exercise

Self-assessment Exercise

Discuss the requirements of locus standi in two different jurisdictions and compare with Nigeria. Specially, student should take from one civil and common law jurisdiction. Are there similarities? Note down the differences in requirements.

The position in other jurisdictions

In most other jurisdictions, there is a distinction between the test of *locus standi* to sue in private law cases and public law cases. In private law cases, the court looks at the cause of action to see if the Plaintiff has standing to sue, while in public law cases, the test is the existence of sufficient interest.

In England, following the liberal interpretation of sufficient interest. See the case of R .v. Felixstowe J.J. Ex Parte Leigh; R.v. Inspectorate of Pollution Exparte Green peace (No. 2) 1994) 4 ALL ER 328; R.v. Foreign Secretary, Exparte World Movement Limited, 1WLR 386 (1995) R.v. Secretary of State for Foreign and Commonwealth Affairs Exparte Rees- Mogg, QB. 552 (1994)

United States

In States, the Supreme Court has stated, "the question of locus standi is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues". *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

There are a number of requirements that a plaintiff must establish to have standing before a federal court. Some are based on the case or controversy requirement of the judicial power of **Article Three of the United States Constitution**, where it is provided that:
"**The Judicial Power shall extend to all Cases . . . [and] to Controversies . . ."**

The requirement that a plaintiff have standing to sue is a limit on the role of the judiciary and the law of **Article III** standing is built on the idea of separation of powers. *Allen v. Wright*, 468 U.S. 737, 752 (1984).

Standing requirements in the US
There are three standing requirements:

- Injury;
- Causation;
- Redressability.

Other recent developments are:

Tax payer standing;

Standing to challenge statute.

For the position in Ghana, see the case of TUFFUOR V. ATTORNEY GENERAL1980) G.L.R. 637 and the case of UNITED DEMOCRATIC PARTY (UDP) & ORS VS. THE ATTORNEY GENERAL OF THE GAMBIAN Unreported) SUIT NO S.C.C.S. NO: 3/2000 a judgment delivered on February 14, 2001 for the Gambian position.

MODULE 5

Unit 1 Declaratory Judgement

Unit Structure

1.1 Introduction

The discretionary nature of the equitable remedy of declaratory judgment throws up a whole lot of contentious issues for academic discourse as to the applicability and efficacy or otherwise of these remedies in view of the fact that they are not granted as of rights (*ex debito justitia)*. Thus, leaving the matter entirely at the discretion of the court would work hardship which equity came to remedy or mitigate. Hence, the need for the courts to exercise their discretion judicially and judiciously, as discretion is like an unruly horse which if not controlled would go wild even to the unimaginable extreme. Furthermore, the potency of these remedies spurs up a lot of intellectual discourse, as the remedies are often not respected especially by the government. Similarly, declaratory judgment if not backed up with other remedies would be honoured more in disobedience than in observance, hence the weakness of the remedy of declaratory judgment.

1.2 Learning Outcomes

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

- discuss the subject by defining and clarifying the subject matter as well as taking a voyage into the historical evolution of the equitable remedies of declaratory judgment;
- discuss the applicability and effectiveness of the subject matter in Nigeria. Part three discusses the applicability and effectiveness of the subject matter in the United Kingdom.

1.3 Conceptual Framework and Analysis

Declaratory judgment is a judgment declaring the legal rights of a party. ***Hanson v. Radcliffe UCD*** **[1922] 2 Ch. 490 at p. 507 per Lord Sterndale.** It is the declaration of the legal rights and obligations or the relationship of the parties in a matter with or without making any consequential orders. A declaratory judgment is usually the first prayer that an applicant or plaintiff asks from the court and which a court usually gives first or proceeds from.

A declaratory judgment is a judgment of a court that declares the rights, duties, or obligations of one or more parties in a dispute. It resolves indeterminacy in the law or in its application to facts.

According to Iluyomade and Eka, a declaratory judgment is an equitable remedy which may be granted at the discretion of the court.

In-text Question
What factor(s) influenced the development of the remedy of declaratory judgment?

1.3.1 Historical Evolution of Equitable Remedy of Declaratory Judgment

Historically, equitable remedies of declaratory judgment and injunction were only granted by the Courts of Equity in England. The common law court could only grant legal remedies but could not grant equitable reliefs or remedies. Hence, equity evolved to mitigate the severity or harshness of the common law. A litigant would have to shuttle between two buses of obtaining legal remedies in the common law court and proceeding to the court of Equity to obtain equitable remedy.

In Nigeria, the remedy of declaratory judgment, just like other equitable reliefs became applicable in Nigeria vide the various reception statutes;

Section 32 of the Interpretation Act infra; Section 26 of the High Court Law Cap. 49 Laws of Northern Nigeria which received the doctrines of equity, the common law of England as well as the statutes of general application in Nigeria, accordingly, Section 32 of the Interpretation Act.

1.3.2 Applicability and Effectiveness of Declaratory Judgment

1. *Declaration as a Tool for Challenging the Validity of a Decision*
   See Sofekun v. Akinyemi & Ors, 1980] ALL NLR 153; Also, *Adeniyi v. Governing Council of Yaba College of Technology, (1993*] 6 NWLR (pt 300) 436; *Faponle v. U.I.T.H.B.M* [1993] 6 NWLR (Pt. 300) 436
2. *Declaration as a Tool for the Settlement of Disputed Points of Law*
   See the case of A*ttorney General of Bendel State v. Attorney General of the Federation & Ors.* 1981] ALL NLR 85; [1982] 3 NCLR 135; [1981] 10.SC.1. See also the cases of *A.G. Fed. & Ors v. AG Abia & Ors* (2002) 6 NWLR (pt.763) 391; [2002] 17 WRN 1; *AG Lagos v. AG Federation* [2002] 6 NWLR (pt 763) 264; *Fawehinmi v. Babangida* [2003] 3 NWLR (pt 808) 604

3. *Declaratory Judgment as Effective Tool for Testing the Validity of Legislation*
   This was aptly demonstrated in the case of *INEC v. Balarabe Musa*. [2002] 6 NWLR (Pt 763) 264

4. *Declaratory Judgment as Tool for the Enforcement of an Existing Right*

5. *Declaratory Judgment as Effective Tool for Enforcement of Conditions Precedent or Observance of Procedural Requirements*
   C*huke Arah Akunnia v. A. G. Anambra State*, [1977] ALL NLR 118; [1975] 5 SC 161

6. *Declaration as Effective Tool for Ascertaining the Extent of Power Exercisable by Public Authorities*
   In circumstances of uncertainty, it may be necessary and indeed crucial for a public body to secure a judicial declaration for the purpose of resolving doubts about its powers, rather than act in peril.

7. *Effectiveness of Declaratory Judgment: Availability of prerogative* order does not exclude declaratory judgment.

8. *Declaratory Judgment is Effective in Declaring Excess of Jurisdiction Ultra vires*

A declaratory judgment is a potent tool for declaring that a decision made in excess of jurisdiction is void and of none effect. *Cooper v. Wilson* [1937] 2 KB; *Barnard v. National Dock Labour Board* [1952] 2 QB 18; *Vine v. National Dock labour Board* [1957] AC 488; *Abbot v. Sullivan* [1952] 2 Ch. 276

9. *Effective Tool in Upholding the Rules of Natural Justice*

10. *Effective Tool in Declaring Invalid a Decision Obtained by Fraud*
Where a decision has been obtained by fraud, a declaratory judgment would be a potent tool in declaring such decision invalid.

11. *Effective Tool in Declaring Invalid Decisions Obtained in Error. Pyx Granite Co., Ltd v. Ministry of Housing and Local Government*, 1958] QB 554, CA. See also *Taylor v. National Assistance Board* [1956] P. 470

12. *Effective Tool in declaring Inoperative exercise of public power in bad faith*
Where a public body exercises its power in bad faith, such acts may be declared inoperative. Short v. Poole Corporation [1926] Ch. 66, at 90-91

13. *Effective Tool in Declaring Invalid the Wrongful Exercise of Discretion by Public Bodies or Authorities*
See Associated Provincial Pictures Houses Ltd v. Wednesbury Corporation [1948] 1 KB. 233-234; Prescott v. Birmingham Corporation [1955] Ch. 210

14. *Effectiveness of the Remedies of declaratory Judgment and Injunction Over Prerogative Remedies*
What mandamus cannot do; a declaratory judgment can do.

Self-Assessment Exercise 1

A declaration is not exactly a remedy (it is often described as 'relief' rather than as a remedy). It does not order the public authority to do this or that. Yet it changes the legal position, by making it impossible for the defendant to dispute the claimant's legal position. **Discuss the American position on declaratory judgment**

Requirement of Controversy

A party seeking declaratory relief under the statute must present an *"actual controversy"* in order to satisfy the "case or controversy" requirement of Article III of the Declaratory Judgment Act. *Ashwander v. TennValley Authority*, 297 US. 288, 325 (1965)

In-text Question
Why do you think the declaratory remedy is discretionary?

1.4 Discretionary Nature of the Remedies

An important characteristic of declaratory judgment is that it is a discretionary remedy which was conferred by the rules of court. The Declaratory Judgment Act confers on the federal courts discretion in determining whether to *"declare"* the rights of litigants. The Supreme Court emphasised that the statute permits, but does not require, a federal court to issue a declaratory judgment. Wilton, 515 U.S. at 286-87.

In *Colo. River Water Conservation Dist. v. United States*, 424, U.S. 800, 813, the Court held that the federal courts generally have a *"virtually unflagging obligation"* to entertain and resolve disputes within their jurisdiction and may abstain from exercising that jurisdiction only under *"exceptional circumstances"*.

Because of its discretionary power, the courts have always prevented its abuse by preventing spectators and busybodies and those who have no sufficient interest. This position was clearly stated by the court in Lord Dunedin in the case of ***Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd [1921] 2*** AC 438 at 488 that: '*the question* (brought before it*) must be real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought*'.

Thus, the Court's exercise of discretion should be informed by a number of prudential factors, including:

(1) considerations of practicality and efficient judicial administration;
(2) the functions and limitations of the federal judicial power;
(3) traditional principles of equity, comity and federalism;
(4) Eleventh Amendment and other constitutional concerns; and
(5) the public interest. Scottsdale Ins. Co. v. Flowers, 513, F. 3d 546 544 (6th Cir 2008)

Self-Assessment Exercise 2

Are there limitations on the remedy? Support your answers with legal authorities.

1.5 Summary

The declaration is very common, and very important. Often, in determination cases, a declaration will be added to the quashing order to settle the basis on which any new determination would have to proceed.

A declaration states the law on the issues in dispute. A claimant with no entitlement to any other remedy can ask the court simply to say that an action of a public authority was (or would be) unlawful. It is unlike a mere statement of the law given in reasons for judgment, because it is a judgment. In conclusion, declaratory judgements play a fundamental role in settling disputes before they reach the point where a right is infringed. This we can see in the plethora of cases discussed in this unit.

1.6 References/Further Readings/Web Resources

Bray, S. (2010). Preventive Adjudication. University of Chicago, *Law Review* **77**:1275, 1281.

B.O Iluyomade & B.U Eka. Cases and materials on administrative law in Nigeria. Second edition. Obafemi Awolowo University Press.

1.7 Possible Answers to Self-Assessment Exercises

Self-Assessment Exercise 1
The American position
The Supreme Court in the United States have repeatedly observed that the issuance of declaratory relief should have a strong deterrent effect rendering remedies that are more coercive unnecessary. If a declaration of rights alone does not deter parties or officials from proceeding (or continuing) to violate federal law, the Declaratory Judgment Act (As amended in 2007) specifically authorises the party in whose favor the declaration is rendered to seek *"further necessary or proper relief"* to aid enforcement of the judgment. **Powell v. Mccormack 395, U.S/ 499 (1969). See the case of *Public Service Commission of Utah v. Wycoff Co. Inc.*, 344 US 237 (1952). Also available at http://supreme.justia.com/cases/federal/us/344/237/**

In ***Green v. Mansour 474 US 64, 72, (1985)***, it was held that the propriety of issuing a declaratory judgment may depend upon equitable considerations. But in the case of ***GULFSTREAM AEROSPACE CORP. v. MAYACAMAS CORP.*****485 US 271, 310 (1988)** the Court held that actions for declaratory judgments are neither legal nor equitable.

Self-Assessment Exercise 2

Are there limitations on the remedy? Support your answers with legal authorities.

Guide: Did your discussion or research reveal the points below?
A declaration is partly redundant, since prerogative remedies are easily available in a claim for judicial review. A declaration binds a public

authority only in the way in which any legal duty binds it, and not in the way in which a compulsory order of a court binds.

Unit 2 Injunction

Unit Structure

2.1 Introduction

Injunction is an order of court addressed to a party to a proceeding before it and requiring him to refrain from doing, or to do a particular act. According to Prof. Fabunmi, it is an order of court which propels a party to do or refrain from doing an act. It is an equitable remedy issuing at the discretion of the court, and unlike a declaration, it has a sanction attached to the order to be enforced. It can issue against individuals, government or public authorities and bodies. According to the Supreme Court in *Ohakim v. Agbaso* [2010] 19 NWLR (pt1226) 172 at p. 228. Paras. C-E An injunction is a judicial process or mandate operating *in personam* by which upon certain established principles of equity, a party is required to do or refrain from doing a particular thing.

2.2 Learning Outcomes

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

- discuss the conditions under which injunctions are granted;
- discuss the types of injunctions we have and the application of injunction in other jurisdictions.

2.3 Injunction

According to the Supreme Court in *Ohakim v. Agbaso (supra)*, an injunction is a judicial process or mandate operating *in personam* by which upon certain established principles of equity, a party is required to do or refrain from doing a particular thing. The Court went further to classify injunction into two broad categories namely:

a. Mandatory; and
b. Prohibitory injunctions.

According to the Court in the aforementioned case, under prohibitory injunction, there are perpetual, interlocutory, interim, quia timet, mareva and anton piller injunctions.

In-text Question
What is an injunction?

2.3.1 Principles Guiding the Grant/Refusal of Injunction

For the conditions for grant, see generally the cases of *American Cynamid Co. v. Ethicon* [1975] 1 ALL ER 504 per Lord Diplock.; *Obeyan Memorial Hospital v. AG Federation & Anor.* [1987] 3 NWLR (pt 60) p. 325; *Globes Fishing Industries v. Coker* [1990] 7 NWLR (Pt. 162) p. 265. Such conditions would include:

- for protection of right or prevention of injury according to legal principles;
- where the injury complained of is trivial;
- *Savage v. Akinrinade,* [1964] LLR 238, it was refused on the ground that it would cause greater hardship;
- It cannot be granted in respect of a completed act. See also *Buhari v. Obasanjo* [2003] 17 NWLR (pt 850) 587 SC

Note that the award of injunction is discretionary in nature, though the discretion must not be arbitrary. ***Busari vs. Edo State Civil Service Commission* [1999] 4 NWLR (Pt 599) p. 365 @ 378**. Like its counterparts in Britain and United States, the Court is minded at all times to exercise its discretion based on *established principles and practice* having regard to the surrounding circumstances of each case. In this regard, various matters are taken into consideration.

In-text Question
What factors do the courts consider in granting or refusing the award of an injunctive remedy?

2.3.2 Types of Injunction

2.3.2.1 Interim Injunction

Principles guiding the grant of ex parte interim injunction. There is a real urgency. *7-Up Bottling Co. Ltd v. Abiola & Sons Ltd* [1995] 3 NWLR (pt383) 257. It could be accompanied with affidavit of urgency.

a. It must be for a certain date usually the next motion date;
b. Granted to preserve the *res*;
c. Real impossibility of bringing such application on notice and serving the other party;
d. Satisfactory undertakings as to damages and must not be guilty of delay.

2.3.2.2 Interlocutory Injunction

Principles Guiding the Grant of Interlocutory Injunction

a. The applicant must show that there is a serious issue to be tried at the hearing of the case; *American Cynamid Co. v. Ethicon* [1975] 1 ALL ER 504
b. The applicant must show that the balance of convenience is on his side. In other words, he must show that it would more serve the interest of justice by the grant rather than by the refusal of the application.

The applicant must show irreparable harm or that damages is not adequate compensation for his damage or injury

2.3.2.3 Mareva Injunction

See *Maviera S.A. v. International Bulkcarriers S.A.* [1980] 1 ALL ER 213. See also the earlier case of *Nippon Yusen Kaisha v. Karageorgis* [1975] 3 ALL ER 282.

For grounds for refusal, see the Nigerian case of *Sotiminu v. Ocean Steamship Nig. Ltd & Ors*, it was refused on the ground that the applicant had failed to satisfy the court on the requirement for the grant but granted in the case of *Trade Bank Plc v. Barilux* [2003] 55 SCNJ 42. See also *Durojaiye v. Conbtinental Feeders Ltd* [2001] 10 NWLR 657

2.3.2.4 Anton Pillar Injunction

The practice for the granting of search order or anton piller order is rooted in the House of Lords' case of *Rank Films Distributors Ltd v. Video*

Information Centre [1980] 1 ALL ER 213. See also the earlier case of *Nippon Yusen Kaisha v. Karageorgis* [1975] 3 ALL ER 282

2.3.2.5 Quia Timet Injunction

Note that the remedy of injunction were only granted by the Courts of Equity in England. The common law court could only grant legal remedies but could not grant equitable reliefs or remedies. Hence, equity evolved to mitigate the severity or harshness of the common law. A litigant would have to shuttle between two buses of obtaining legal remedies in the common law court and proceeding to the court of Equity to obtain equitable remedy.

In Nigeria, the remedies of declaratory judgment and injunction, just like other equitable reliefs became applicable in Nigeria vide the various reception statutes such as Section 32 of the Interpretation Act infra; Section 26 of the High Court Law Cap 49 Laws of Northern Nigeria which received the doctrines of equity, the common law of England as well as the statutes of general application in Nigeria. See Section 32 of the Interpretation Act.

2.4 Applicability of the Remedy of Injunction

In-text Question
There are different conditions for the grant of the remedy of injunction. Discuss the factor of balance of convenience.

The remedy cannot be granted as a matter of course; there are conditions for the grant such as:

- prima facie case
- irreparable damage
- balance of convenience
- inadequacy of damages
- undertaking to pay damages

Effectiveness of the Remedy of Injunction in Nigeria
Ojukwu v. Military Governor of Lagos State
AG Lagos v. AG Federation

Self-Assessment Exercise

Compare and contrast the application of injunction in UK and US.

2.5 Summary

Injunctions require someone to do or to refrain from doing something that the court describes - just like mandatory and prohibiting orders. But their history is entirely separate from the prerogative writs. Injunctions are developed in equity as a judicial order in private law, to restrain a tort or other unlawful action. An injunction is a remedy for forbidding the commission of some unlawful act; it is applied in situations to compel persons to whom it is addressed to do or to refrain from doing a specified act. From your knowledge of Equity, you are well aware that it derives from the Court of Chancery, and like other equitable remedies, is discretionary remedy. The Court in granting the equitable remedy of injunction must ensure that the Applicant has presented the Court with material evidence and not just a clever submission by such an Applicant on the reliance or weakness of the Defendant's case. Consequently, the Court is expected to satisfy itself that the justice of the case merits the declaration over other equitable remedies.

2.6 References/Further Readings/Web Resources

Fabunmi, F.O. (2006). *Equity and Trusts in Nigeria.* Ile-Ife: Obafemi Awolowo University Press, p. 343; Halsbury Laws of England (3rd Ed) Vol 21 p.343;

Snell, Principle of Equity (27th Ed) p. 624

2.7 Possible Answers to Self-Assessment Exercise

Self-Assessment Exercise

Compare and contrast the application of injunction in UK and US.

Equitable Remedy of Injunction in the United Kingdom

In the UK, generally the High Court has power to grant either an interim or a final injunction in all cases where it *'is just and convenient'* to do so. This power is contained in Section 37 of the Senior Court Act 1981. The county courts have similar powers under Section 38 of the County Courts Act 1984. However, the County courts do not have the power to grant either search orders (anton piller) or freezing (mareva) injunctions. Such orders are reserved for the High Court.

Factors Guiding the Grant/Refusal of Interim Injunction in the UK

See American Cyanamid Co. v. Ethicon limited (supra)

Whether there is a serious question to be tried;

Whether the balance of convenience is in favour of granting the order;

Whether damages would be an adequate remedy.

*See the case of Watson vs. Croft Promo-port Ltd (*2008] EWHC CIV 759)

The case of ***Talaris (Sweden) AB v. Network Controls International Ltd*** [2008] EWHC 2930 (TCC) confirmed that the guidelines set by the House of Lords in the *American Cyanamid Case* should still be applied and stated further that the guidelines be considered in a *three-stage process* namely:

a. Whether there is a serious question to be tried.
b. Would damages be an adequate remedy for a party injured by the Court's grant/refusal of injunction?
c. Where does the ″balance of convenience" lie?

Injunction in the United States of America

Injunctions

A plaintiff seeking injunction must demonstrate the likelihood that they would succeed on the merit of the underlying case. Also, he must show the likelihood that he would suffer an irreparable loss or harm if the injunction is not granted. Courts review requests for injunction by balancing the hardship the parties would experience if the injunction is not granted or refused. *Sw. Voters Registration Educ. Project v. Shelley*, 344 F. 3rd at 914, 917 (9th Cir. 2003). Also, *In re Wilbourn* 590 So. 2nd d, 1381, 1384 (Miss 1991.

Duration of an Injunction

See the Supreme Court decision in the case of *Brown v. Plata*, 131 S.Ct. 1910 (2011)