TASLIM ELIAS CHAMBER NOTE SERIES

ADMINISTRATIVE LAW I

Taslim Elias Chamber presents the first edition of its note series and casebook. The note series is divided into five separate documents for the five different courses in 200 level first semester. Then there is a casebook which combines cases from the five different courses in a general document. It is expected that using this note series, along with the regular textbooks and attending lectures should give the student an upper hand in their studies.

May the odds be ever in your favour.

Aliu Funmilola

Academic Secretary

Taslim Elias Chambers

For the 2016/2017 Executives

Recommended Textbooks

1. Administrative Law, Ese Malemi
2. Cases and Materials on Administrative Law in Nigeria, Iluyomade and Eka

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INTRODUCTION TO ADMINISTRATIVE LAW

Administrative law is one that is objectively broad as it encompasses several various laws and legal principles which govern and regulates activities of administrative agencies. An administrative agency is a body or organ of government which have been conferred upon the powers of rule making (delegated legislation), administrative adjudication, execution or implementation of public policies and enforcement of specific regulatory agendas.

Admin law can be broadly defined as that aspect of public law which regulates public organization, functions, powers, procedures of government and provides remedies. It regulates the exercise of powers conferred upon government bodies. It deals mainly with the administrative arm of government, how they are organized, how they operate, their functions and duties, powers and relations with other arm of government.

Administrative law can thus be defined as "a branch of public law which deals with the organisation, powers, procedures and functions of governmental and administrative authorities, their relationships with one another and provides remedies for members who have had their rights violated by these authorities or by unlawful administrative acts. It is a body of laws which govern the exercise of admin powers and prescribes remedies for its breach of laws. Admin law is very vital in a state. The absence of admin law can render the principle of democracy irrelevant as public officials may administrate according to their will and not to the salient principle of the rule of law.

Administrative law ensures the observance of the rule of law, accountability, transparency and effectiveness in the exercise of powers in the public domain.

Relationship with Constitutional Law

Admin law has often been confused with constitutional law. While some have argued that admin law is a branch of cons law, it is clear that both are separate entities interdependent and inter woven in terms of rules, remedies and principles. They both include

- Statutes
- Principles/rules
- Remedies
- Case law
- Application of cons law
- Implementation of both admin and cons law involves use of same government structures.

Administrative law is a branch of public aw dealing with the actual operation and control of government powers and duties of government authorities, and provides remedies for maladministration and other wrongful acts.

Constitutional Law on the other hand is the law relation to the constitution. It regulates the exercise of powers given by the constitution. Constitutional Law can best be defined as a body of rules or concepts which affect the making of a constitution, regulates the application, enforcement and interpretation of such constitution and provides remedies for wrongful and unconstitutional acts.

The basic distinction is that constitutional law is concerned with government at rest while admin law is concerned with government in motion. Admin law focuses on the activities and powers of administrative authorities while constitutional law focuses on the distribution of political power between the different organs of government and exercise of such powers.

Differences between Administrative and Constitutional Law

1. Admin law is the law relating to public administration while Constitutional Law is the law relating to the constitution
2. Admin law focuses on organisation, procedures, powers and functions of government and admin authorities while Cons Law focuses on, organization, structure and powers of government authorities conferred with constitutional powers.
3. Admin law regulates exercise of administrative powers while Cons Law regulates the exercise of constitutional powers
4. Admin law looks at matters relating to the public while Cons Law looks at matters relating to the constitution
5. Admin law deals with government in motion while Cons Law deals with government at rest (in situ)
6. Admin Law explain the structure; Cons Law states the structure of the law
7. Admin Law deals with public authorities; Cons Law deals with public and private authorities
8. Admin Law is concerned with the operation of government and executive; Cons Law is concerned with the totality of government powers.

Administrative law has borrowed several principles of cons law e.g. rule of law, separation of powers, supremacy of constitution. Admin law mimics the powers and functions of other arms of government with the consent of those arms and their supervision guaranteed e.g. delegated legislation, administrative adjudication.

Constitutional law is the supreme and highest law of the land thus if there is a dispute between admin law and cons law, cons law will prevail as admin law is subordinate to cons law.

Bureaucracy is a catalyst for separating cons law from admin law. We started with delegation of powers, ministries, department and agencies (MDAs) and Parastatals (pseudo-government agencies involved in commercial business). Admin law has birthed the principles of

- Ultra vires
- Reasonableness
- Rationality

Theories of Administrative Law

Harlow and Rawlings labelled the contrasting theories of law

Red Light Theory

CONTROL is the keyword here. There is a deep rooted suspicion of government power and a desire to prevent encroachment of state on rights of individuals. It looks at how government is to exercise power and seeks to limit theirs powers as an unfettered or uncontrolled power is prone to abuse or misuse. Law should be concerned with the legality of exercise of power. It focuses on controlling discretionary powers too. It ensures all public and private bodies only act in accordance with the law. It believes that the bureaucratic and executive powers of the state if unchecked will threaten the liberty of the citizens.

It also sees the judiciary as being autonomous; it should be independent and impartial. This theory displays a natural resistance to executive discretion. The theory believes administrative law is founded on the principles that power is conferred by law; power must be controlled and there must be reasonable restriction.

The criticism of this theory includes the point that it unduly makes government subject to the judiciary and does not tolerate discretion which is a part of government practice.

- **Ibrahim v. State; State v. Ilori;**
- **Iwuji v. Federal Commissioner of Establishment**

Green Light Theory

REGULATION is the keyword here. Government powers are meant to be exercised for the welfare of the people ie, Public Welfare. A priority in achieving this objective is to encourage the contribution of the state, regarded as an effective means of facilitating the delivery of communication goals. This is done by assuming responsibility for at least basic minimum standards of provision. It relates to expansion

of powers beyond security and policing to social welfare. This expansion of state has given rise to centralization os powers in some areas and broad territorial diffusion of power in some others. Theorists here supported introduction of policies aiming to develop public service provision. This theory focuses more on effectiveness as opposed to a pragmatic one which the red light adherents held. It is a regulator and facilitator to enable social policy to be implemented effectively and fairly. The theory is also largely based on the assumption that large scale government is a permanent feature of modern society. Basically, there is a more positive view of state power under this theory as it is seen as an instrument for giving effect to social policies which will benefit the people.

Amber Light Theory

ACCOUNTABILITY is the keyword here. This checks the excesses of government but not to the extent of content. The idea of commercialization and privatization arose. Public utilities, corporations etc have witnessed commercialization and some instances of privatization. There is the Public Finance Management Act to enhance accountability; which traces money or funds ie situations of misappropriation will be checked. Under this theory, there is also a positive view of state power but it differs from the green light theory on the issue of accountability. Green light sees political institutions as adequate to control the state power, amber light theory sees a need to develop administrative law principles and procedures to supplement the democratic, political controls over those who exercise the state power. It applies an important but restricted role for the courts and judicial review. Optimal balance between the internal administrative control and external political or judicial control over the administrative process.

Amber light theory is like a cross between the red and green light theories; it is dependent upon the two theories. It finds it necessary to have judicial or political control over administrative processes and at the same time judicial review should be balanced.

Functions of Admin Law

1. **Power**: It allows government perform its duties.
2. **Relationship**: It governs the relationship between the arms of government.
3. **Control**: It exercises control over public ministries. Parliamentary delegation of power should be closely monitored.
4. **Facilitation**: Positive principles to facilitate good administration which nclude adherence to natural justice. There should also be reasonableness and rationality in executive exercise of powers;

- **Shugaba v. Federal Minister of Internal Affairs;**
- **Olisa Agbakoba v. Director of SSS.**

5. **Remediation**: It secures and provides redress or remediation for those who have been victims of abuse of power by administrative agencies. Remedies include:

- **Mandamus**: This is an order from a higher court to a lower court or individual to perform an act it is legally supposed to do. It does so to let them correct an earlier action or perform a duty they had failed to do; **Akintemi v. Onwumechili**
- **Prohibition**: This is an order from a higher court to a lower court or person refraining them from exercising judicial or quasi judicial powers likely to adversely affect a person's civil rights and obligations; **Fawehinmi v. LPDC;**
  Shugaba v. Federal Minister of Internal Affairs.
- **Certiorari**: This is an order directing a lower court to forward its records to a higher court so as to ascertain into the legalities or otherwise of it, and quash any illegal act.
- **Writ of habeas corpus**: Habeas corpus literally translates to 'produce the body'. It is an order for a person being detained to be brought forward to a higher court so as to ascertain into the legality of the detention. The detaining authorities are asked to give reasons why such person should not be released from detention.

6. It provides for framework for interaction between the government and the citizens.
7. Provides mechanisms for transparency, accountability, and good governance.
8. It ensures orderly development of a state.

Sources of Admin Law

1. Constitution: This is the first source. 'Where there is no source, there is no power.' – **Babangida v. Fawehinmi.**
   'Any exercise of power must derive from the law.' – **Eko Hotel v. AG Lagos State**.
2. Legislature: Every admin power must be derived from the constitution or legislation; the enabling law gives power to administrative agencies. These are called rule making powers through the process of delegated legislation. The enabling law is the primary law and the delegated legislation is also called subsidiary legislation. Every subsidiary legislation must be traceable to an enabling law made by the legislature for it to be valid.
3. International Practices and Treaties: Ordinarily, signing of treaties does not have the force of law. Section 12 of the Constitution provides that it must be domesticated before it can have the force of law, that is, it must have been passed into law by the National Assembly.
4. Delegated Legislation (biggest source)

- Regulations
- Statutory instruments
- Orders
- Bye-laws

- Executive policies
- Rules

Some powers are called discretionary powers and they are derived from legislation or delegated legislation. For customs and traditions (which can come by way of declarations) to become sources, they must go through Administrative Processing.

Classification of Admin Powers

1. Executive Powers

This is the process of performing particular acts, issuing particular orders or of making decisions. This is further classified into

a. Ministerial Powers: These are delegable powers. They are direct delegation from the enabling law. The question here is, "Who is the appropriate person to exercise such powers?" In **Nwosu v. Imo State Environmental Sanitation Authority,** the letter of dismissal was justified as there was ample evidence to show that the letter was duly directed by the Governor.

In **Ibrahim v. State**, the plaintiffs were charged and tried for arson and wilful damage of property. Information containing charges had been signed by a senior counsel on behalf of the Director of Public Prosecutions in which the Attorney General of Ondo had delegated his power to a subordinate staff in the Ministry of Justice. The delegation of power by the Attorney General of Ondo State though wide, was valid and constitutional and the information with which the appellants were charged for was valid and constitutional.

Ministerial powers are specific as to who is to exercise certain powers. Although, not all ministerial powers can be delegated.

b. Administrative Powers: This differs from ministerial powers in that ministerial powers are delegated by law for execution and implementation purposes while administrative powers are those exercised in the operation and activities of the administration. A wide spectrum of personnel is involved in administration, but ministerial powers can only be delegated to ministers, heads of offices etc. Administrative powers naturally are delegated powers, that is, routine powers; there is a hierarchy of powers.

c. Discretionary Powers: This is the power to make decisions according to one's personal judgment or initiative. There are two kinds

- Pure Discretion: The delegant can exercise the discretion however he wants but still subject to the principle of reasonableness and rationality.

In **Awolowo v. Minister of Internal Affairs, t**he plaintiff was charged with treason and brought an English lawyer to defend him in accordance with **Section 21(5)(c)** which provides that those charged with criminal offences can be defended by any lawyer of their choice. The Federal Minister of Internal Affairs refused entry of Mr. Gratien, the defense counsel of the plaintiff, acting in accordance to **Section 13** of the Immigration Act which granted him absolute discretion to prohibit entry of anyone into Nigeria. It was held that the Minister acted intra-vires and **Section 13** was not inconsistent with **Section 21(5)(c)** which isn't even an absolute right. It was therefore lawful to deny Mr. Gratien entry.

In **Iwuji v. Commissioner for Establishment, t**he plaintiff applied to the defendant for exercise of discretion to condone break in service for purpose of computation of pension in even of his retirement or withdrawal from public service. The Federal Commissioner did not exercise the discretion in his favour and so the plaintiff sued. Though, refusal to exercise discretion in favour of appellant was wrong because the Commissioner considered irrelevant factors, the appeal was denied because the appellant was not a confined officer as required by the rules for condonation of break in service and was therefore not entitled to have the Commissioner exercise discretion in his favour.

Discretion coupled with duty: The Minister is to exercise his discretion in accordance with some laid down provisions. Power is limited to what has already been stated. Anything in excess of that is ultra-vires.

See **Stitch v. AG Federation** where the appellant imported a car from Germany and it arrived on 3rd of April. She went to the Ministry of Commerce to obtain import license to secure the release of her car upon payment of import duty which was then $33^{1}/_{3}$%. The Minister kept telling her to check back. As the issuance of import license was then suspended by the Minister on the 21st of April, the rate had increased to 500% to which the appellant was then asked to pay. The Supreme Court rejected the reasoning that the Minister had unfettered power to grant or refuse import license without justifiable reasons because it would amount to saying his discretionary power is unchallengeable. The discretionary powers are to be exercised fairly and reasonably.

2. Legislative Powers

For admin authorities to exercise legislative powers, there must be an enabling law conferring rule making powers on it. This is called delegated, subordinate or subsidiary legislation and they have the same force of law as the enabling law made by the legislature. The Interpretation Act which defines law includes 'all subsidiary legislations and products of rule making powers.'

Legislative powers are non delegable powers. The principle of **delegatus non potest delegare** applies to further delegation of rule making powers. This means 'delegated powers cannot be further sub-delegated'. **Akingbade v. Lagos Town Council.**

3. Judicial / Quasi-judicial powers

Judicial powers are constitutionally vested in the judiciary by virtue of **Section 6**. Any power affecting the civil rights and obligations of a person is an adjudicatory power. Any exercise of adjudicatory power by the administration is known as Administrative Adjudication. Administrative agencies are legally allowed to exercise judicial or quasi-judicial powers. The judicial process typically applies to a court of law where a panel or body will be set up to determine disputes by looking at facts, applying laws and reaching a conclusion which will affect the civil rights and obligations of persons before it. Quasi-judicial powers involve listening to hypothetical questions (actual courts of law don't listen to hypothetical questions). It involves finding out who did something, what caused something and making recommendations but they do not involve making final decisions unlike judicial powers.

Exercise of judicial and quasi-judicial powers must meet the requirement of constitution and natural justice. They are also not delegable as further delegation may violate the principle of natural justice.

In a 1932 report, the **British Committee on Ministers Powers** reported that administrative powers could be classified as follows:

1. **Legislative powers or rule-making powers**: These are the powers of the administration to formulate general rules of conduct and these rules have the same force of law as the enabling statute from which they derive their validity. Where there is a conflict between a subsidiary legislation and an enabling statute, the enabling statute will prevail.
2. **Executive Powers**: They are exercised by the administration in performance of some particular acts; they include issuing of particular orders or making decisions which apply general rules to particular cases. This may be executive, ministerial or administrative.
3. **Judicial Powers**: This involves application of laws, rules and general principles of laws to disputes between two or more parties in a procedure that involves presentation of facts, submissions of arguments and a decision based on findings upon the dispute and application of law.
4. **Quasi-Judicial Powers**: This is similar to judicial powers but is devoid of presentation of arguments and it never involves a decision. It involves listening to hypothetical questions. It should be noted that exercise of judicial or quasi-judicial power is subject

to judicial review by courts of law by virtue of **Section 36** of the Constitution. Standard required of exercise of quasi-judicial power is less stringent and formal than that of judicial power.

5. **Administrative Decisions**: This involves the exercise of discretionary power. It may be purely discretionary or discretion coupled with duty. The law of discretion was established in **Iwuji v. Commissioner for Establishment.**

Legal Implications or Significance of the Classification

The classification is quite useful for the administrator and the court.

1. Natural Justice

This is a well known legal principle which is the basic or fundamental judicial right of an individual. It embodies the principle of fair hearing which requires any individual before a court or tribunal to be judged fairly and according to law not to the dictates of one's reasoning. It involves two legal maxims or rules to be adhered which are

- Audi Alteram Partem: This is a legal maxim which means 'hear the other side'. A person must not be judged without being heard.
- Nemo Judex In Causa Sua: This means 'one must not be a judge in his own case'. This is the rule against bias or interest.

When an administrative body exercises judicial or quasi-judicial powers, it will be bound by the rules of natural justice and any decision made without regard to principle of fair hearing will be illegal, null and void.

See **Alakija v. Medical Disciplinary Committee** where the committee ordered the appellant's name to be removed from the \Registrar of medical practitioners for two years and he appealed claiming the decision was conducted in a manner contrary to the principle of natural justice because the registrar of the profession was also the prosecutor who took part in the committee's deliberations. The registrar remained with the committee during deliberations when the appellants were made to leave. The principle of natural justice was violated owing to the Registrar staying with the committee during the deliberations as he became a judge in his own case contrary to the rule against interest or bias, nemo judex in causa sua. No man shall be a judge in his own case. The decision was thereby quashed.

But if the power is classified as a legislative, executive or administrative power, the rules of natural justice will not apply. In **Arzika v. Governor of Northern Region,** Arzika sought an order of certiorari to quash the ex-native office holder's removal orders made by the acting Governor of the Northern Region. He also sought an order of prohibition to prohibit the governor from further exercising his powers. The

making of an order by the respondent was not a judicial act but rather the governor exercised a ministerial/legislative act. Neither certiorari nor prohibition will be granted as they can only work for administrative powers classified as judicial or quasi judicial powers.

2. Granting of Prerogative Remedies

Prerogative orders of prohibition and/or certiorari are usually available to quash an administrative act that is judicial or quasi-judicial in nature but not a legislative or executive power. In **Banjo v. Abeokuta Urban District Council,** the plaintiffs argued that defendants be compelled to issue permits to them as taxi owners nd had no discretion to refuse them of t as stated by the local law governing them. If a body departs from rules laid down in the law empowering them to perform its public duty, an order of mandamus would lie against them compelling them to perform their public duty.

3. Duty to Give Notice

For a legislative or administrative power, there is no duty on the part of the administrator to give notice or even consult any person whether or not he is likely to be aggrieved by the action unless there is an express provision in the enabling statute imposing such duty. See **Bates v. Lord Hailsham** where the solicitor applied ex parte to restrain committee acting under delegated powers from making a certain order on the ground that the committee was obliged to give more consultation time. There is no right to be heard or consulted before making of primary or delegated legislation except expressly provided by statutes.

But for judicial powers, an administrative body is bound to give notice to any person that will likely be affected.

4. Sub-Delegation and Ultra-Vires

The general rule is **delegatus non potest delgare** – a person to whom a power has been delegated cannot further sub delegate that power – but administrative authorities may be permitted to sub delegate without express or implied authority, powers which are classified as executive or ministerial powers but not judicial or quasi-judicial powers or legislative powers. In **AG Bendel v. AG Federation,** it was held that neither the Senate nor House of Representatives can delegate their legislative functions to a committee nor as such, no committee of either House or a joint committee of both Houses pass a bill into law. The joint finance committee has

no power to decide whether a bill shall be passed into law, as it is incompetent to take over the legislative powers of the National Assembly. The legislative powers of the National Assembly are not delegable.

5. Ultra-Vires for Unreasonableness

Where a power is a legislative one, exercise of it may not be declared invalid on the ground that it is unreasonable or arbitrary or ultra vires except instances where it breaches the constitution or other statute and so forth whereas a power that is administrative or executive may be attacked on such grounds.

6. Privileged Evidence

Unless there is an express statutory provision to the contrary, evidence given before an administrative proceeding is not covered by the common law rule of absolute privilege which is available in regular court proceedings, subject of course to the law of perjury.

DELEGATED LEGISLATION

This is a process whereby non-legislative bodies are authorised by an Act of Parliament or any enabling statute to make rules, orders and regulations with a view to carry out general intention of the Act. Every delegated legislation has the same force of law as the enabling statute made by the parliament. Every rule making power is traceable to an enabling statute; all delegated legislations must have their origins, they cannot stand alone. Every rule making power not traceable to an enabling statute or law will be regarded as null and void. When admin agencies exceed powers given them, it will be deemed as ultra-vires.

In **Williams v. Majekodunmi** the plaintiff brought action against the restriction order on him when a state of emergency was declared. The defendant argued that the order restricting the plaintiff's movement to a distance of three miles from a certain address in Abeokuta was in the public interest, order and safety. This restriction was held to be in breach f the fundamental human rights as the plaintiff should not have been among those that were restricted. The order made under the Emergency Powers (Restriction Orders) Regulation was delegated legislation made pursuant to the Emergency Powers Act. It was illegal, and ultra-vires, there was nothing in the evidence of the defence which proves it was reasonably justifiable to restrict the plaintiff's movement.

The laws made by the Parliament are called primary/parent/enabling laws. While the rules made by the admin bodies are called subordinate or subsidiary legislations. They are subordinate in that it is made by a body on which Parliament has conferred limited powers to make laws and which laws are always subject to abrogation, amendment or alteration by the Parliament. These subordinate legislations can be in form of

- Rules and regulations
- Orders
- Directives
- Circulars
- Bye-laws

Statutory powers are not to be exercised arbitrarily but properly, fairly, reasonably and in conformity with the constitution or other relevant statutes.

There are 2 classes of delegated legislation

i. Contingency Legislation: This is the legislation which are made but which application is dependent on certain factors.
ii. Supplementary Legislation: These ones have the force of law without precondition

Factors for a proper delegation

Whether the right of a person is breached, or legal action is is brought against the donor of power, it becomes imperative whether or not the relevant factors for a proper delegation were considered before the delegation was done in the first place. The following factors are considered

a. Power must be delegable
b. There must be a delegation of the power
c. There must be a proper delegation
d. Delegation must be to a proper or appropriate officer

a. Power must be delegable

Certain power may not be delegated by one branch of government to another because they are highly personal to the person with the power. For a power to be delegable, it must be in respect of a duty which may be performed by another person. Powers cannot be delegated include

- Duties to be performed personally
- Rule making powers; power to impeach; power to declare war; power to create or admit new states
- Judicial or quasi judicial powers
- Duties involving exercise of discretion

b. Power must be delegated

There must be proof that the power was indeed delegated. Before a delegated power may be exercised, it must have been delegated by the right authority. However if the power was not delegated but the act in one capable of being ratified, then the appropriate authority that should have delegated the power can ratify the action that was taken by the delegatee. There is no need for an elaborate mode of delegation, a memo or directive is sufficient to delegate the power

In **Anya v. Iyayi**, the purported removal of the plaintiff from service by the University of Benin was void as the power was not delegated, so the defendant could not claim protection under the **Public Officers Decree No 17 of 1984**. This decree provided that the Head of State could dismiss or remove any public officer from office in the public interest, or retire any public officer in the public interest. **Section 4(2)(i) & (ii)** provided for any other person authorized by him. In this case, there was no proof of delegation of powers of the Head of State to the officer in question.

Meanwhile, in **AG Kaduna v. Hassan,** the plaintiff respondent challenged the entry of a nolle prosequi terminating criminal proceedings which he had interest in as not being validly entered. The Attorney general is permitted by the constitution to delegate his duties, including entering a nolle prosequi. On appeal, the Supreme Court held that the nolle prosequi was not validly entered because the Attorney general did not delegate the power to do so.

In **Ibrahim v. State**, the plaintiffs were charged and tried for arson and wilful damage of property. Information containing charges had been signed by a senior counsel on behalf of the Director of Public Prosecutions in which the Attorney General of Ondo had delegated his power to a subordinate staff in the Ministry of Justice. The delegation of power by the Attorney General of Ondo State though wide, was valid and constitutional and the information with which the appellants were charged for was valid and constitutional.

c. There must be a proper delegation

The power can be delegated in various ways including by a mere directive or instruction. However where there's a particular mode of delegation required by law, then the power must be delegated in accordance with that particular mode or method. In **FRN v. Osahon,** the defendants were charged by the prosecution appellant police officers. They filed a motion to quash the charges on ground that the police officers were not officers of department of the Attorney General who was appropriate authority to prosecute. The appellant were competent to institute criminal proceedings as they were covered by the words "any other authority or person or person" in **section 174(1).** A police officer can do so by virtue of **Section 174(1)(b)** of the constitution which empowers the Attorney General to take over and continue any prosecution that may have been instituted by any other authority or person, and this can be envisaged to include police officers backed up by **Section 23 of the Police Act.**

See also **Comptroller of Nigerian Prison Ikoyi v. Adekanye**

d. Delegation must be to an appropriate officer

This means the delegate must have the required status to exercise the power. Power cannot just be delegated to anyone, if the power is delegated to one who does not have authority to exercise it, any act done in pursuance of the power will be invalid, null and void. See **Nigeria Air Force v. James** where the respondent was among those who conspired and stole the Nigeria Air Force funds and they were subsequently sentenced by the general Court Martial to 50 years imprisonment. The orders of the

general court martial were properly convened. The delegation must be given to those with power and authority to exercise such power.

Sub-delegation of Power

This is when the delegate of the power sub delegates to another person. The enabling law must have authorizes such sub-delegation, it will be invalid, null and void. The general rule for sub-delegation is the Latin maxim **delegatus non potest delegare** meaning a delegated power cannot be further sub delegated, that is, unless expressly or impliedly authorized by the enabling statute. See **Bamgboje v. UNILORIN**. Legislature might state in enabling statutes that delegated powers may be further delegated to other persons under certain conditions.

The problem is that sometimes statutes are silent as to whether a power can be sub delegated.

The primary law should therefore be studied to find out whether sub delegation of power could be implied. Power not involving discretion are sub delegable. Ministerial powers are presumed to be sub delegable but legislative, judicial, quasi-judicial powers cannot be sub delegable because they directly affect citizens. Meanwhile executive or administrative powers can be sub delegable.

A person who delegates power does not relinquish rights of such power and therefore can revoke and resume such power. See **Anakwenze v. Aneke**

Duties of the Attorney General are delegable. See **Ibrahim v. State**

Duties which cannot be sub delegated include

a. Duties which have to be performed personally
b. Duties which involve discretion
c. Judicial or quasi judicial powers
d. Legislative or row making powers

The most important thing to note is that

- functions or duties should be delegable,
- delegation should be to an appropriate officer,
- there should be appropriate supervision and monitoring of delegated powers.

Reasons or Arguments in favour of Delegated Legislation

1. Parliament does not have all the time and capacity to deal with the volume of legislation required by the state. Delegated legislation helps to lessen work thereby facilitating and enhancing law making process.

2. Technicality:

   Parliament is often required to legislate on technical matters and so members may not be able to compete simply legislate on them. Delegated legislation helps to authorize those with relative skill and knowledge to legislate on matters. **Nigeria Air Force v. James**

3. Time:
   Delegated legislation saves the time and energy Parliament would have spent on making subsidiary legislations.

4. Brings government nearer to the people.
   This is so because administrative law maker is often somewhere in the locality and hence, inputs of the people can be heard and treated.

5. Quick response in times of emergency.
   In times of emergency, Parliament may not be able to sit and deliberate with the slow parliamentary procedures hence delegated legislation is very helpful as immediate and urgent decisions are better made by an administrative authority

6. Flexibility
   Delegated legislation is less formal and less rigid in terms of amendments, alteration, updating or repealing. Delegated legislation allows for flexibility, adaptability and a quick response to administrative problems.

7. It saves cost for Parliament.

Importance of delegated legislation

i. Needs of men are infinite.
ii. Increased complexity of modern government
iii. Tendency to come closer to the people in order to improve the economic and social condition.

Arguments against delegated legislation

1. Abrogation of legislative power
   Delegated legislation sometimes amounts to usurpation or abdication of power of legislature to make laws as the way and manner the power is conferred might be so wide, it could lead to abdication of legislative powers. An administrative law maker has wide discretionary Powers. The delegation may even be embedded with phrases like, "if the minister is satisfied", "as he deems fit", "in his opinion" etc. Such phrases confer too much power on administrative bodies. See Williams v. Majekodunmi; Doherty v. Balewa

2. lack of efficient control
   Parliamentary control is often insufficient. The legislature lacks the time and mechanism for efficient control of the administration to prevent abuse of delegated legislation. Requirement of laying delegated legislation before Parliament is rarely ever enforced. Also, administrative control is not effective because there is no way the administration can effectively check itself. Judicial control is unsatisfactory because judicial intervention happens after him has been doing.

3. Contrary to the doctrine of separation of powers
   Delegated legislation is often criticized because it is an exception to the doctrine of separation of powers and it should be unacceptable that persons other than Parliament should make laws. It is not proper that those who are not the elected representatives of the people should make laws which would directly affect the life of its citizens.

4. inadequate publicity
   Absence of Provisions for adequate antecedent and/or subsequent publicity has been on inducing cause for alarm. There's no general provision making publicity compulsory and as such, lack of publicity may render knowledge of existing law uncertain and many people may break such laws without intending to do so.

5. It reduces the supremacy of Parliament.

6. It encourages arbitrariness and dictatorship.
   The executive being given too much delegated legislation is prone to executive lawlessness. See Military governor v. ojukwu

7. Lack of consultation
   No general provision for consultation of concerned interests before the relevant subordinate authority to whom power has been delegated to go-ahead to make search delegation.

Methods of Delegation

1. Simple delegation
   Legislation confers power to make regulations on administration to carry into effect objectives of principle enactment. Such powers are written clearly and they are really straightforward.. See **Merchant Bank v. Minister of Finance**

2. Enumeration of subjects on which regulations may be made (Delegation by enumeration of subject matter)

Primary Law and enumerates subject matter. **Section 305(3)** is a good example as it enumerates circumstances under which the president has the power to issue a proclamation of state of emergency. But it should be taken into consideration that when Constitution confers legislative powers on the administration, administration will be regarded as exercising original legislative power. Except a contrary intention is shown with subject matters on which regulations may be made is enumerated into statute, the court is likely to interpret enumeration as a delimitation of scope of rule making authority of administration. Based on principle of **expressio unius est exclusion alterius**, that is, express mention of one thing is exclusion of all other things. **Stitch v. attorney general Federation**.

3. Regulations made subject to a condition or obigation

Some of the conditions which delegated legislation may be subjected to include

i. exercise of powers by an appropriate Authority. Enabling law would designate a particular authority or person to exercise rule making Powers conferred on the administration. **Okoro v. Delta Steel Croporation, Nwosu v. Imo State Environmental Commission**

ii. Obligation to publish: Enabling law sometimes provide that before a rule making power can have the force of law, they must be published, this is a requirement of old interpretation Acts. Local courts are required by local government to publish by bye-laws in official Gazette before they come into force. It is necessary in order to educate the public about the existence of delegated legislation. **Edet v. Chief of Air Staff, Popoola v. Adeyemo.**

4. requirements of confirmation of approval by minister

Enabling law may require that such delegated legislative instruments be laid before legislature or Minister for approval, confirmation or consultation. See **Section 238 and 147(2)**

5. Requirements of laying before the legislature

Enabling law may also require such rules made by the delegant must be laid before either the Senate or House of Representatives. **Section 32**

6. Sub delegation (delegation code with power to sub delegated)

Control of delegated legislation

1. legislative control

Legislative procedure for making laws affords legislation to delegate power and determine extent of power to be exercised. This could be done by imposing procedural standard to which a delegant is obliged to observe. Procedures include

a. full-scale debates on enabling bills before they are enabling laws. This narrows down scope of power and have delegated power clearly defined.

b. Requirement of laying before the legislature.

c. Legislative committees. **Section 62** vests power in National Assembly to set up committees on various issues.

d. Investigative powers: Section 88 gives power to investigate conduct of MDAs with a view to promote efficiency in governance and eradicate corruption.

e. Prescribing or imposing rule making or procedural standard.

f. Revoke the power

g. State how the power should be exercised

2. Executive control

a. Power of appointment and dismissal

This is the power of the donor to appoint or fire administrative law maker (personnel)

b. Submission of proposal rules to relevant authority.

This is for sighting, consideration, approval, modification, suspension or outright rejection.

c. Revocation of delegated power

A statutory power to delegate includes power to revoke when desired. See **Ondo State University v. Folayan**

d. Prior Consultation

This depends on language of enabling law, whether imperative or directory. If imperative, any disregard of it will render such rule null and void.

3. Judicial control

Delegated Legislation is subject to scrutiny of the courts in exercise of power of judicial review. This is to check exercise of delegated power by declaring them Ultra vires that is, when an Administration goes beyond its delegated limits. Some factors may impede exercise of judicial review, for example principle of locus standi and doctrine of ripeness.

Courts may grants relief subject to

- rule of having recourse to administrative remedies
- doctrine of ripeness
- Locus standi
- ultra vires
- right of action
- right of appeal
- possession of jurisdiction

Judicial review is commonly granted by court where delegated legislation is challenged for breach of rules of natural justice, lack of fair hearing or other failure to observe due process of law. Remedies that could be granted include

- Declaration of Rights
- Mandamus
- Certiorari
- Prohibition
- Injunction
- Writ of habeas corpus
- Damages
- offer of apology

Doctrine of Ultra Vires

Justification for this doctrine is to determine whether the administrative body has performed the acts authorized by the enabling law. Subsidiary legislation must really be in uniform with the enabling laws. Validity of such subsidiary legislation may be challenged is inconsistent with enabling law. Ultra vires is any act beyond the power of a body as provided by law. It is not the same thing as illegality. An act could be legal and still be ultra virus because person lacks the power to do so.

Substantive Ultra vires

This occurs when the nature or contents of powers exercised is inconsistent with what the enabling law provides.

- **Stitch v. AG Federation;**
- **Salako v. Alao;**
- **INEC v. Musa.**

Procedural Ultra vires

This occurs when the laid down procedures for delegation a power is not followed by the administrative authorities. See **Section 352.**

- **Adeniyi v. Yabatech**
- **AG Bendel v. AG Federation.**

RULE MAKING PROCEDURE

Administrators make decisions, policies and rues. And they consider a lot of factors when making these decisions including

- Identifying the problem; is it a public problem?
- Nature of problem to be dealt with
- Character or nature of persons to be affected
- Alternative means of solving problems
- Nature of decision, policy and rule to be made
- Type of administrative agency to enforce the law
- Nature of enforcement to be adopted

There are four various procedures to be adopted for administrative rule making or decision making:

1. Investigational Procedure
2. Consultative Procedure
3. Auditive Procedure
4. Adversary Procedure

These procedures came into use in the order they have been listed and no single model can guarantee a correct or accurate rule making process.

Investigational Procedure

This is the investigative decision making process. Investigate, ordinarily, means to examine, inquire, find out etc. Under this procedure, investigation is carried out into the situation at hand to discover needed information before any action or decision is taken. Administrative authorities usually set up a panel or body to investigate matter and submit report of findings back to the authority which will make a decision or take action based on such report. This procedure is like a parliamentary hearing therefore parliamentary proceedings is a good example of this method. During these proceedings, members who are representatives of the people, input their opinions and share their views in those discussions and deliberations. Parliament takes investigative steps before taking some action thereto. Similarly, administrative authorities may employ investigative procedures in rule-making and decision making and use its skill to gather relevant information it needs to take action.

Consultative Procedure

Consult ordinarily means to seek information, advice or opinion of another. This procedure involves consulting interested/affected parties, that is, those with special and vast knowledge on the issue at hand, before any action is taken or any rule is made. Administrative authorities basically consult affected parties and obtain expert advice before rule making. It may send proposed rules and regulations to affected parties for comments and opinions. And then, it can engage in discussions with stakeholders in resolution of differences as may be necessary.

This procedure is a very participative one. It has also been standardised to a great extent with establishment of public corporations and agencies. This is because many of the statutes creating such bodies provide for statutory governing boards with members from various backgrounds who meet often to make decisions or set rules for running of such bodies. Examples of statutory bodies which have statutory boards or councils which members consult each other and advise before rules/actions are taken include all statutory bodies of government, whether owned by government or not, or they're independent bodies e.g. NAFDAC, SON etc or regulatory bodies of professionals e.g. ICAN, NBA, APCN (Advertising Practitioners Council of Nigeria). Apart from their statutory duties, they also

- Furnish administrative authority with information and suggestions
- Present views and information received from stakeholders
- Educate affected parties on proposed rules or actions

This procedure is very relevant and useful as it carries the public along so as to avoid opposition to government policies and actions. An enabling law may order that consultations to be held with stakeholders, interest groups etc and such order must be complied with. If law is silent, administrative authorities can decide to consult or not.

Effect of non-consultation

When there's a legal duty to consult, failure to do so will render the purported act invalid on grounds of procedure. This is called procedural ultra-vires. In **Popoola v. Adeyemo,** Section 9 Chiefs Law of Oyo State provided that any declaration made without consultation of the ruling house was not binding. The parties were involved in a chieftancy dispute with consultation was necessary to resolve. The plaintiffs sued the defendants claiming they weren't members of the ruling house and should not be consulted for appointment to vacant Obaship. The above section can't be used to accommodate inclusion of a person or house ineligible for chieftaincy declaration and declaration made without conformity to required consultation isn't binding.

See also **Agricultural, Horticultural & Forestry Industry Training Board v. Aylesbury Mushroom.**

Arguments for Consultative Procedure

1. Administrative authorities can't claim absolute or exclusive monopoly of rule-making procedure as teaming up with the public sounds more reasonable
2. Views of stakeholders and affected parties are heard and if relevant, are accommodated
3. Collective input and wisdom of the people is pooled to develop the society.

Arguments against Consultative Procedure

1. Cumbersome and time-wasting
2. Expensive
3. Public may be of little o no help especially when its a technical issue
4. Doesn't allow for absolute exercise of power.

Auditive Procedure

This is the hearing law making procedure. It is the making of administrative decisions or rules after hearing of stakeholders. It is meant to supplement other rule making procedures. It is designed to let other interested parties express their views and for rule making agencies to receive fruitful suggestions. The procedure is similar to a court which hears parties' sides before concluding. Administrative authority allows interested parties put forth their opinions and notice of holding of such hearing is usually published in the mass media, that is, there are duly announced hearings which interested parties can appear.

Formal rules of evidence may not be observed unless they are needed to promote orderliness. This procedure is commonly restored to in the event of acquisition of lands for public purposes under the town planning law or Land Use Act.

Advantages

1. Notice of proposed rules or decisions are brought to the affected parties, who are then given a hearing
2. Access to people and their views

This procedure is usually supplementary and could be a statutory requirement or pre-condition which must be observed. The people should be enlightened before proposed rules take effect; this ensures there's no opposition.

Adversary Procedure

This is the trial law making procedure. This involves hearing in accordance with court proceedings such as submission of evidence, cross examination etc. Here, a commission or panel is set up to find out the cause of a problem and hear the representations and arguments of stakeholders or interested parties for or against a proposed decision, before action is taken.

It is similar to the administrative adjudicative process. Interested parties present evidence and arguments are allowed to support factual conclusion. When the panel is set up, it receives petitions from the people. The parties are more or less seen as litigants who argue their case before the panel. Admin body applies less formal procedural rules and the goal is fact finding. Strict rules of evidence are therefore relaxed and this is to enable discovery of as much facts as possible.

After the hearing, admin body compiles everything. Reports usually embody

- Evidence
- Findings
- Recommendations

The government upon receiving such report studies it and bases it proposed decisions and rules on it. This kind of procedure is more suitable for resolution of grave or burning issues of public interest.

Discretion whenever it is given must be exercised fairy, reasonably and according to law.

- **Board of Education v. Rice;**
- **Padfield v. Minister of Agriculture;**
- **Stitch v. AG Federation**

Publication of Rules and Decisions

Bringing of proposed rules, regulations, and policies to the notice of stakeholders, interested or affected parties or general public as case may be.

1. Antecedent Publication: Prior notice or publication of proposed rules and regulations so that public can comment and input suggestions before such proposed decisions are passed into law. It prepares public for operation of new rules. No general law in Nigeria providing for antecedent publications. Section 1 of English Publication Act 1893, which has been repealed, provided that proposed rules made under any Act were to be published within 40 days. Where there's a failure of antecedent

publication, court would declare the rule, decision, policy void on procedural grounds.

2. Subsequent Publication: Publication of rules, decisions or subsidiary legislation after they have been passed into law. This is to notify the public of the rules or action which have taken place. No general provision requiring publication of rules. However, specific statutes sometimes make provision for publication of subsidiary legislation. Federal and State Government usually publish law in several ways

- In the Federal or State Gazette
- In the volume of laws for Federation or State
- Any other manner notifying the people e.g. letter, posters, newspapers and other media.

Enabling statute may provide for effect of failure to publish, that is, rendering rules and actions invalid and ineffective. This is an exception to **ignorantia legis non excusat**: ignorance of the law is no excuse. A plea of ignorance would succeed for those who broke the rules in instances that reasonable steps were not taken to notify the public of presence of such rules. Where statute is silent in consequences, courts take one of these two views

i. Where Publication is Mandatory

If content of statute indicates mandatory publication, failure to do so will render actions or decisions invalid, null and void.

ii. Where provision for Publication is Directory

If provision is merely directory, absence of full compliance is okay. Total failure to publish may not affect validity of rules and actions.

But when there's obvious publication, ignorance of the law is no excuse.

Factors to consider in making decisions (Procedural Problems)

Administrative rule makers consider various factors before making decisions, policies and rules

1. Character of parties affected

This varies widely even when only those regulations that bear upon private interests are considered. It varies not only with number and identifiability of the parties which have obvious bearing on the practicability of adequate notice, but with vast differences in extent to which groups are organized so as to safeguard their interests. Organized groups are heard or consulted more readily than those that aren't, and of those that aren't organized, consists of many ordinary citizens who will be unrepresented unless government agency itself promises to protect their interests. Group organization is very important to the development of a consultative type of procedure.

2. Nature of problem to be dealt with

In government operations affecting private interests, its evident that there is less occasion for permitting interested parties to be heard with regard to proposed regulations than there is when rule making operates in regulatory manner. In conduct of public service, some assume commercial significance that some formality of rule making is called for. In government activities regulating health and safety, occasional urgency and technical nature of problem tend to minimize need for formality in rule making procedure. Where important economic groups are affected by proposed regulations, there are strong grounds for according procedural recognition to their stake.

3. Character of administrative decisions

Some degree of discretions is usually involved in rule making. Regulations for routine operations of a public office involve an appraisal of factors bearing upon efficiency and administrator responsible. There really isn't need to obtain facts from outside interests. Like in regulations concerning health, imposing of restrictions to prevent the spread of epidemic; although it bears heavily on private interest, decisions involved are of an expert character and there isn't really need for hearing or consulting affected groups. Where however, discretion involves choice of ends to be served, need for hearing or consulting is marked.

4. Types of administrative agencies exercising rule making functions

If a non expert Assistant Secretary of Commerce is to recommend regulations on flights, means by which he'll inform himself on matter he's to control are likely to be different from those employed by board of inspectors concerned with preservation of safety in navigation. If a board is to make decisions on economic consequences, formal hearing or consultation may be an efficient means of bringing relevant factors before all members at the same time, whereas a single official might inform himself more easily using investigation procedure.

5. Character of enforcement which attaches to a regulation also affects procedure

If regulation is subject to challenge in all of its aspects after its promulgation, there is no need for advance formalities. If it binds affected parties by only requiring them to comply with certain procedures in matters, it is not likely for it to be that influential in its effects to warrant advance hearings or consultations regarding content. Where however, regulations provides parties with alternative of compliance or loss of property or liberty, with no/limited application to challenge correctness, need is evident for antecedent opportunity to influence its content or be heard in regard to it.

CONTROL OF ADMINISTRATIVE POWERS

Administrative powers refer to the sum total of powers of administration exercised by government and public authorities. These powers may be legislative, executive (ministerial and administrative), judicial or quasi-judicial. Some abuses or misuse often occur in the exercise of administrative powers.

There is the need to control the powers of the administrative authorities because administrative powers are prone to misuse. Power, if not fettered or controlled can be disastrous. Just like discretion, power, whatever its nature and extent, must be exercised fairly, reasonably and in accordance with the law. Powers of government must be properly limited and controlled to protect rights of citizens, and when the administrative authority has acted contrary to the law, there must be adequate remedy to the aggrieved person. One of the aims of admin law is to limit oiwers of public authorities and grant remedies when there's a breach. The British Committee on Ministers Powers claims the risks of abuse are inherent in exercise of administrative powers. Sir Maurice Lynford Gwyer once stated: "An unfettered exercise of power is certainly good for no one, and government departments are no exception to this rule."

Means of controlling Administrative Powers

1. Legislative Control
2. Executive Control
3. Judicial Control or the power of Judicial Review
4. Ombudsman: A body protecting rights of citizens against maladministration and administrative wrongs by investigating claims of an aggrieved party regarding certain public or administrative and resolving disputes. The official Ombudsman in Nigeria is the Public Complaints Commission.
5. Petitions
6. Appeals
7. Protests
8. Public Opinion Polls

There are also judicial and non judicial or extra judicial remedies.

Legislative Control

1. Requirement that the proposed lines of actions, rules and regulations be laid before the legislature after which the parliament may debate and approve it, reject it, amend it or suspend approval. **Section 32**
2. Amend law and enlarge membership of relevant government or admin authority and provide for a governing council, board of directors or other relevant body to oversee or direct its affairs. Such law could also provide for some inbuilt check or remedy system.

3. Amend the law and put in place such condition precedent or subsequent or a procedure to be followed, notices to be served or waiting period to be observed in exercise of such powers.
4. Repeal law establishing admin authority thereby abolishing the relevant government agency
5. Legislature may invite relevant members of executive to explain government action and then pass a vote of confidence or no confidence, thereby putting pressure on such official to sit up, and on the executive to drop such official or curb his excesses. The official may even resign due to bad image.
6. Pass laws as the case may be, to regulate a problematic body, industry or sector of society.
7. Legislature can ban or prohibit such measures or activities not in general interest of the country.

Executive Control

This is to ensure administrative agencies work within legal limits o powers delegated to them

1. Issuing directives, either general or specific as to the mode of discharging duties such administrative agencies are charged with
2. Issuing a caution, query or otherwise, calling the officer or body to order
3. Suspension from duty
4. Demotion
5. Removal or Termination of Service: This is the power to hire and fire personnel. This act must be done in accordance with the law and not just any how for instance, so that the principles of natural justice and fair hearing are not breached. It is a last resort and must only be used in appropriate cases where no lesser measure would suffice. This power shouldn't be used with malice in order to protect innocent people. If termination isn't done properly, it may taint innocent staff with criminal connotation or defamatory status. The President and other appropriate authorities under him can select and appoint personnel and remove them when they are no longer required. Sometimes termination can be so severe, it has effect of damaging one's career which can be likened to a death sentence. Cyril B Rogers Wright v. Legal Practitioners Disciplinary Committee where the defendant was found liable for champerty and the respondents ordered his name to be struck out for life from the roll of legal practitioners. Cyril appealed and the West African Court of Appeal reversed it but was of the opinion that he should be punished so he was given a lesser punishment.
6. Transfer of relevant staff to another function
7. Require submission of proposed rules or decisions etc for perusal and approval before implementation
8. Directing appropriate department e.g. Police, Code of Conduct Bureau, Ministry of Justice, EFCC, ICPC etc to prosecute or initiate judicial proceedings against authority at petition of aggrieved party after such complaint has been thoroughly investigated and found to be true and deserving of legal action
9. Setting up commissions of inquiry to look into affairs of relevant department and make recommendations to government on how to improve it.

10. Implementations of such laws as have been pasted by the Parliament in regulating relevant authority.
11. Scrapping the relevant administrative agency
12. Liaising with relevant agency with a view to curbing excesses
13. Taking any other step to improve or receive situation.

LOCAL GOVERNMENT

Section 7 establishes the local government and the Fourth Schedule delineates its functions. Section 8 explains the procedure for the creation of new local government areas. Section 162 talks about the financing of the local governments. The House of Assembly is to create a local government transitional council. See **AG Abia v. AG Fed.**

Advantages of the local government system

i. It facilitates local development
ii. By providing employment, it reduces rural-urban brain drain
iii. Devolution of powers to local government curbs excessive concentration of power in the centre
iv. Brings government nearer to the people
v. Tailoring of local solutions to local problems
vi. It foster social cohesion
vii. Fosters accountability

Disadvantages of local government

i. High risk of power capture by local elites and cabal
ii. Misuse of authority
iii. Creates potential conflict
iv. Inter-regional inequalities may lead to increased insecurity

Functions

1. The functions of the local government are set out in the **Fourth Schedule** to include

a. The consideration and the making of recommendations to a State commission on economic planning or any similar body on –
- the economic development of the State, particularly in so far as the areas of authority of the council and of the State are affected, and
- proposals made by the said commission or body;
b. collection of rates, radio and television licences;
c. establishment and maintenance of cemeteries, burial grounds and homes for the destitute or infirm;
d. licensing of bicycles, trucks (other than mechanically propelled trucks), canoes, wheel barrows and carts;
e. establishment, maintenance and regulation of slaughter houses, slaughter slabs, markets, motor parks and public conveniences;

f. construction and maintenance of roads, streets, street lightings, drains and other public highways, parks, gardens, open spaces, or such public facilities as may be prescribed from time to time by the House of Assembly of a State;
g. naming of roads and streets and numbering of houses;
h. provision and maintenance of public conveniences, sewage and refuse disposal;
i. registration of all births, deaths and marriages;
j. assessment of privately owned houses or tenements for the purpose of levying such rates as may be prescribed by the House of Assembly of a State; and
k. control and regulation of –

- out-door advertising and hoarding,
- movement and keeping of pets of all description,
- shops and kiosks,
- restaurants, bakeries and other places for sale of food to the public,
- laundries, and
- licensing, regulation and control of the sale of liquor.

The functions of a local government council shall include participation of such council in the Government of a State as respects the following matters -

a. the provision and maintenance of primary, adult and vocational education;
b. the development of agriculture and natural resources, other than the exploitation of materials
c. the provision and maintenance of health services; and
d. such other functions as may be conferred on a local government council by the House of Assembly of the State.

PUBLIC SERVICE, CIVIL SERVICE AMD PUBLIC ADMINISTRATION

Public sector is the realm where government operates for the benefits of the citizenry unlike the private sector where the individual operates. Public service is an organization made up of public servants who are recruited based on their skills or qualification. The constitution created the public service. The public service is responsible for managing the resources of a nation on behalf of the people who are the owners of the resources.

Conceptual Clarification

i. The Civil Service: This means the government, its agencies and all the people who work for them. It comprises the career personnel of the Presidency, Ministers, Extra-Ministerial Departments, National Assembly and the Judiciary
ii. The Armed Forces, Police and other Security Organizations
iii. Parastatals or Public Enterprises

Meaning of Public Service

Section 169 establishes a civil service for the Federation encompassing ministerial department, statutory corporation, judiciary, legislature, educational institution, financially wholly or principally owned by government at local, state and federal levels, Nigeria police force or armed forces and other organizations in which the federal government or state government owns controlling share or interest. This country's government bureaucracy is the public service. This is because the government at whatever level operates through the civil service. Public service are service oriented not profit oriented. Note that public services provided by private sector are regulatory bodies monitoring activities of these private providers.

How does the constitution define civil service?

"civil service of Federation" was defined in **Section 318** to mean service of the Federation in a civil capacity as staff of the office of the President, the Vice-President, a ministry or department of the government of the Federation assigned with the responsibility for any business of the Government of the Federation;

"civil service of the state" means service of the government of a state in a civil capacity as staff of the office of the governor, deputy governor or a ministry or department of the government of the state assigned with the responsibility for any business of the government of the state."

Meaning of civil service

This can be defined as permanent body of officials who implement government policies, programmes and decisions. It is a body of workers who work for any branch or department in government. The body ensures that policies and programs of government are carried out. The civil service is a body of public officers who implement government policies. They perform mainly administrative and executive functions. The civil service is broken into different departments; each called a Ministry headed by a Minister at the federal level and a Commissioner at the State level. They are the political heads of the Ministry. The administrative head of the Ministry is the Permanent Secretary, also known as the Director General.

Hierarchy of Staff in Civil Service

i. Administrative: e.g. the high ranking officials
ii. Executive: those charged with the day-to-day implementation of policies
iii. Professional: lawyers, doctors etc.
iv. Clerical: clerks, typists etc.
v. Auxiliary: cleaner, driver.

Characteristics

1. Permanence: The civil service is a permanent body of officials who implement government policies. Life in office isn't determined by the lifespan of a particular government. Government come and go but the civil service always remains.
2. Anonymity: Civil servants are to be seen and not heard. They do not receive praise or blame publicly.
3. Neutrality: Civil servants are to remain politically neutral irrespective of personal opinion. They should be fully dedicated to the government in service.
4. Impartiality: They should discharge their functions without fear or favour.

Functions

Their functions include but are not limited to:

i. Advising government
ii. Policy formulation
iii. Policy implementation
iv. Programme planning
v. Drafting bills
vi. Budget preparation
vii. Quasi-judicial functions
viii. Providing social services
ix. Intermediary role between government and the public
x. Educates and enlightens the public

Rights & Privileges

Section 172-173 guarantees their rights.

- To receive pension; pensions and salaries are reviewed every five years and they shall not be taxed
- Any benefit one is entitled to shall not be altered to their detriment

Parastatals and Public Enterprises

Parastatals are operational arm of government ministries established to provide services to the populace. And the services they provide are actually complex to warrant them being established as separate bodies outside normal operations of government departments. They are guaranteed some degree of autonomy by the law setting them up.

Differences between Public Service and Civil Service

Public service is broader in scope than civil service as it includes not only those working in normal government department and ministries but also statutory corporations providing public services. No Nigerian statute and even the Interpretation Act defines the term 'public servant'. Rolwatt J in Great Western Railway v. Batter defined public servant as "a person who occupies public office independently of his person."

The 1999 Constitution defines public service in **Section 318** as "service of the Federation in any capacity in respect of Government of Federation."It goes on to include

- Clerks and staff of the National Assembly or of each House of the National Assembly
- Member or staff of the Supreme Court, Court of Appeal, Federal High Court, High Court of FCT, Sharia Court of Appeal of FCT, Customary Court of Appeal FCT, or other courts established for the Federation by the Constitution or Act of National Assembly;
- Member or staff of commission or authority established for the Federation by Constitution or by an Act of National Assembly
- Staff of area council
- Staff of statutory corporation established by an Act of National Assembly
- Staff of educational institution established or financed principally by the Government of the Federation
- Staff of company to which Government of Federation or its agency owns controlling shares
- Members of officers of the armed forces of the Federation or the Nigeria Police Force or other government security agencies established by law

"public service of a State' means the service of the State in any capacity in respect of the Government of the State and includes service as:

- Clerk or other staff of the House of Assembly;
- member of staff of the High Court, the Sharia court of Appeal, the Customary Court of Appeal; or other courts established for a State by this Constitution or by a Law of a House of Assembly;
- member or staff of any commission or authority established for the State by this Constitution or by a Law of a House of Assembly;
- staff of any local government council;
- staff of any statutory corporation established by a Law of a House of Assembly;
- staff of any educational institution established or financed principally by a government of a State; and
- staff of any company or enterprise in which the government of a State or its agency holds controlling shares or interest;

The constitution defines public service to widely include the armed forces, judicial or legal services, general public service of the federation, joint public service, public service of each state, education service, and police force and so on. Public service is sometimes distinguished from civil service. Professor de Smith defined a civil servant as a Crown Servant (other than political or judicial office holder or member of the armed forces) appointed directly or indirectly by the Crown and paid wholly by the funds provided by the Parliament and employed by a department of Government.

Civil service in the constitution is defined as service of the Federation in a civil capacity as staff of the office of the President, the Vice-President, a ministry or department of the government of the Federation assigned with the responsibility for any business of the Government of the Federation.

It is apparent that public service comprises a broader content that civil service. Civil service can be said to be a vital part of the larger organization known as public service. A public servant is therefore anyone employed in one of the services promoted wholly or mainly with funds from public revenue and includes the civil service, teaching or university service, police force, armed forces, public corporation, local government service, judiciary etc.

Every civil servant is a public servant but not every public servant is a civil servant.

STATUTORILY FLAVORED EMPLOYMENT

There have been fears that government may act in ways affecting employment of public servants. How secure is the employment of the public servant? The position of public servant, that is, Crown Servants, under common law will be examined.

PUBLIC SERVANT UNDER COMMON LAW

Old common law rule was that a public servant under British Crown, whether civil or military, had no tenure and his position was subject to the absolute discretion of the Crown. See **Dunn v. The Queen** and **Shenton v. Smith.** Even when tenure was for a fixed period of time, it was still subject to public policy.

i. A public servants employment was for the good of public
ii. It won't continue when it no longer served the public good.

It was thought that the power of the Crown to determine or dispense with their services was not to be limited. They operated a doctrine of employment at pleasure of Crown which had serious consequences for the public servants.

1. He could be dismissed without any reason being assigned for it
2. He could be dismissed without being heard, that is, denied right to fair hearing
3. He couldn't ask for specific performance if found he was wrongfully dismissed. The law denied him protection and his only remedy was an appeal to the Crown.

However this principle wasn't an absolute one and in some exceptional cases, the Crown was restricted from dismissing servant at will. Some public servants held office with good behaviour and could only be removed 'for good cause being shown'. **Terrel v. Secretary of State of Colonies**

RECEPTION OF COMMON LAW INTO NIGERIA

Strict common law principle of employment at pleasure of the Crown was received into Nigeria by virtue of our colonial history. Reception statutes made laws on or before 1st of January, 1900 applicable. The principle was applied mechanically without considering socio-political peculiarities of environment in which it was applied. See **Martins v. Federal Administrator General** where court affirmed common law as applicable in Nigeria in dismissal of public servant.

The law then was that a public servant held office at the pleasure of the State. The position of the public servant was worse than that of the servant in a pure master-servant relationship in the private sector. Public servant could be dismissed at any time for good or bad or no reason at all. Ordinary servant can recover damages for wrongful termination of employment. But the public servant had no rights against the Crown or State under common law and could not even sue for wrongful termination as seen in **Sunmola v. Federal Administrator General**. This was the situation till decision of Supreme Court in **Shitta Bey v. Federal Public Service Commission**

CURRENT POSITIOM OF NIGERIAN LAW

In **Shitta Bey's Case,** the appellant was removed from service contrary to the Civil Service Rules and he sought a declaration against it. Despite this, the Commission refused to re-instate him and High Court and Court of Appeal approved of the refusal. However the Supreme Court, in a decision propounding doctrine of security employment of public service in Nigeria though otherwise, stated that the Civil Service Rules governed conditions of service of public servants and they have constitutional force, and it vests public servants with legal status which makes relationship with respondent, although a master-servant one, beyond mere master-servant relationship. The Supreme Court further held Nigeria is a Republic not a Crown and had nothing to

do with employment at the pleasure of the Crown. The court ordered the applicant to be reinstated. Other cases have followed this doctrine include **Olaniyan v. University of Lagos.**

The law in Nigeria gradually discarded idea of employment at pleasure and recognized that the public servant whose employment was protected by the Civil Service Rules couldn't be dismissed from office except in accordance with the provisions of their rules or statutes. A public servant also cant be dismissed without assigning reasons for his dismissal and granting him fair hearing.

- **Adeniyi v. Governing Council of YABATECH;**
- **Olatunbosun v. NISER;**
- **Essien v. University of Calabar;**
- **University of Calabar v. Inyang.**

LEGAL SIGNIFICANCE OF NIGERIAN MODERN POSITION

The above decision established the principle that public servants are protected by legal status, that is, their employment is statutorily flavoured by the statute creating their establishment. This position differs from that of ordinary master-servant relationship. The ordinary servant can only receive damages while the remedies of specific performance, reinstatement and mandamus cannot be sought. This provides a clear distinction between a public servant with legal status and an ordinary servant.

1. Who is a servant with legal or special status?
2. What are the legal consequences of such status?

A servant with legal status is one whose employment is protected by the statute in the sense that the office which he occupies is specially created by statute. He is also an employee whose employment is governed by provisions of the Constitution or by the Civil Service Rules. Such office is invested with statutory flavour. In **PC Imoloame v. WAEC**, **Karibi Whyte JSC** stated that 'there's an employment with statutory flavour hen appointment and termination is governed by statutory provision....in **Ridge v. Baldwin**, it was stated that employment with statutory flavour arises where the body employing the man is under some statutory or other restriction as to the kind of contract which it makes with the servants or grounds on which he can dismiss them."

It is settled law that a servant with legal status is one whose contract of service is governed by constitutional or statutory provisions. The employee has a legal status higher than that of the ordinary servant.

What then are the legal incidents or consequences?

1. Employment can only be terminated in accordance with the provisions of the governing statute or Constitution. Breach of governing provision cannot result in unilateral repudiation of contract. Any unilateral repudiation outside the statute will be ultra-vires and void. Non compliance with statute on termination results in ineffective use of power to terminate.
2. Employment cannot be terminated without notice: An employee qualified by appointment to a permanent position, should be presumed, cannot be terminated without notice. In such case, misconduct should be alleged and proved against the public servant before termination is valid. See the case of **Adeniyi v. Governing Council of YABATECH.**
3. Right to be granted fair hearing before his employment can be determined: A public servant, unlike the ordinary ones has right to insist on being granted fair hearing before his employment can be determined. Even when the employer wants to dismiss them, the principle of natural justice dictates that the servant cannot be lawfully dismissed without being made aware of the allegations against him and being presented with the opportunity to defend himself. See **Olaniyan v. University of Lagos.**
4. Availability of damages and other legal remedies: Unlike the ordinary servant who is only entitled to damages, the public servant with legal status is entitled to that and other legal remedies e.g. specific performance, mandamus and reinstatement like in **Shitta Bey's Case**.

Public servants now enjoy enhanced security as they cannot be dismissed from work without strict compliance to the rules governing their employment. Despite all these, protection accorded public servants is not available to everyone in the public service.

LIMITS OF PROTECTION / EXCEPTIONS TO GENERAL RULE

What are the limits to the protection granted to public officers with statutorily flavoured employment? It was actually never stated in **Shitta Bey's Case** that ALL public servants are protected by legal status. Instead, it stated that since Shitta Bey's employment was governed by the Civil Service Rules, a statue pursuant to the Constitution, his employment was protected by legal status. But where employment terms are not specifically protected, benefits of legal status cannot be claimed/ Doctrines of freedom and sanctity of contract dictate that parties can agree upon any term of employment.

1. Statutory bodies, being legal persons, can enter into contracts creating legal status and can enter into contracts devoid of statutory flavour. If one enters into the contract of employment with statutory body and contract is governed by terms other than the Civil Service Rules or statutory provision, he cannot enjoy legal status of a protected servant simply because he's employed in the public service. In **David Osuagwu v. AG**

Anambra, the appellant was initially given permanent employment as the Dean of Students Affairs of a university. They found out she retired from the Ministry of Education and thought it was improper to employ her in permanent capacity so her employment was changed to a contract appointment. When her appointment was terminated, she claimed she had not been given fair hearing and the provisions of the University Edict on employment were not followed. It was held that the termination of her employment depended on the contract between employer and employee. Provisions of the Edict were only applicable to regular employees stated in the section and not those whose terms of contract are specially stated and exterior to that of the normal employees.

2. Statutory bodies can contract with employees outside statutes establishing them and such employees may not be protected by legal status. See the locus classicus case of **Fakuade v. OAU Teaching Hospital Complex Management Board** where the appellant was a nurse in the hospital and was queried and then later given letter of termination of employment. She claimed that being an employee of the teaching hospital, her employment was subject to the provisions of the University Teaching Hospital Decree and was therefore protected by legal status. Her appointment contract however provided that either party could terminate contract by giving one month salary notice. The Supreme Court held that the fact that an organisation is a statutory body does not mean conditions of services of its employees must be of special character ruling out incidence of mere master servant relationship.

   Where contract of employment does not include legal status, it cannot be acquired by mere association with a statutory body or the public service. Terms and conditions of employment must be considered.

CHALLENGES OF CIVIL SERVICE: IS IT EFFECTIVE FOR NATIONAL GROWTH

Nigeria's Federal Civil Service has been problematic; weak government structure, weak accountability, lack of control, over staffing, redtapism and so on. Government therefore tries to improve its activities and focus on reform of bureaucracy. Nigerian Civil Service has undergone several reforms as government continues trying to improve efficiency of civil service.

Problems facing the Civil Service

1. Political instability
2. Political interference
3. Frequent change of ministerial heads
4. Poor pay and conditions of service
5. Lack of qualified personnel
6. Corruption or bribery
7. Overstaffing
8. Nepotism and tribalism

Control of Civil Service

1. Ministerial Control
2. Control by Public Civil Service Commission
3. Legislative Control
4. Judicial Control
5. Control by the Public Complaints Commission

The powers of the Public Civil Service Commission include powers of employment, promotion, transfer, discipline, retirement, sanction, termination and dismissal. Termination and dismissal are extreme and should be done carefully.

CODE OF CONDUCT BUREAU

The Code of Conduct Bureau is a body set up to look into complaints against civil servants and ensure public officers don't abuse their powers. **Section 153** establishes the Code of Conduct Bureau. **Section 172** states that a person in public service of Federation shall observe and conform to the code of conduct while **Section 209** provides the same requirements for public service of State. That is, everyone in the public or civil service is to observe the provisions of the Code of Conduct Bureau and Tribunal Act. It's a statute dealing with complaints of corruption, embezzlement, abuse of office and so on.

Third Schedule of the Constitution; Part 1 enumerates the powers and composition of the Code of Conduct Bureau. **Section 1** states that it comprises a Chairman and nine other members who shall not be less than fifty years old and must leave at the age of 70. **Section 3** states its powers:

- Receive asset declarations by public officers
- Examine the declarations
- Take and maintain such declarations
- Ensure compliance with and enforce provisions of the code of conduct
- Receive complaints about the non-compliance with the code of conduct and investigate such complaints, then refer it to the Code of Conduct Tribunal
- Appoint, promote, dismiss, control staff of Code of Conduct Bureau
- Other functions by the National Assembly

The Code of Conduct Bureau and Tribunal Act was enacted in 1991. Section 1 explains role of the Bureau while **Section 20** begins to talk about the tribunal.

THE BUREAU

Section 1 establishes the Code of Conduct Bureau. **Section 1(2)** establishes the position of the Chairman and 9 members. **Section 2** states the purpose of the Bureau which is to maintain high standard of morality in conduct of government business and ensure

that the actions and behaviour of public officers conform to the highest standard of public morality and accountability. **Section 3** discusses its functions which have been listed above. The Code of Conduct Bureau covers the behaviour expected of both political and public servants.

THE TRIBUNAL

Section 20(1) establishes the Code of Conduct Tribunal. **Section 20(2), (3) & (4)** discusses its composition, qualification, and appointment of the Chairman and 2 members. **Section 23** gives the tribunal the power to impose punishment and this is without prejudice to criminal offences.

- **Section 23(2)**: the punishments include vacation of office, disqualification from holding public office for not more than 10 years, seizure of property acquired in abuse or corruption.
- **Section 23(3)**: They shall not be without prejudice to criminal offences
- **Section 23(4):** Appeal

Section 24 discusses its proceedings and **Section 25** gives it the power to issue search warrants

But does the Code of Conduct Bureau and Tribunal Act have quasi-judicial or quasi-civil or quasi-criminal jurisdiction?

Also, does the Act contravene the provisions of the Constitution? The Act states that public officers must declare their assets within 15 months in **Section 15** while the Constitution requires public officers to declare their assets within 3 months.

Section 20 of the Act is a duplication of **paragraph 15(1)** of the Fifth Schedule of the Constitution.