NATIONAL OPEN UNIVERSITY OF NIGERIA

SCHOOL OF LAW

COURSE CODE: LAW 444

COURSE TITLE: ADMINISTRATIVE LAW II

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ADMINISTRATIVE LAW II

COURSE GUIDE

Introduction

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1.0 Introduction

Administrative law 2 shall build on the lessons and principles of law you already learnt in Administrative law 1 in the first semester. Do not forget that administrative law is a compulsory course towards your award of LLB.

You shall be learning among several other concepts the doctrine of natural justice, division of administrative decisions, remedies available for administrative decisions. In addition, we shall also study the concepts of

prerogative remedies, pecuniary interest, and procedural fairness. Finally, you shall also learn about the local government administration in Nigeria paying attention to its history and how it faired under the military regimes and how it is fairing currently under the Constitution of the Federal Republic of Nigeria.

1.1 Objective

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

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

1.2 Study Units

We have broken the course into 6 modules comprising of 22 units. This is with the intention to make it easier for your understanding. It is important that you approach each module with an understanding of the previously module. To assist you, it is advised that you read the conclusion and summary of previous modules before studying the new module.

1.3 Tutor marked Assignments

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

1.4 Further Readings

Further readings and references are at the end of each of the units. Also note that cases are also in the course material. The cases are not for decoration and you are encouraged to read up as many of them you can.

Finally, enjoy your reading and try to relate the experience with day to day experiences in your work place. Do not fail to consult your facilitator or course coordinator for further clarification if need be.

Module 1

Administrative Powers

Unit 1

1.1 INTRODUCTION

When we talk about the concept of administrative powers, we talk of powers conferred by enabling statutes which stipulate and direct the manner and limits within which these powers are to be exercised. For instance, procedure for the governor or the President to sign a bill into law is well enshrined in legislative procedure that the executive would be acting *ultra vires* if it does not have recourse to the procedure before passing any bill into law. Also, the procedure

for the termination of employment of a staff is laid out and when there is a violation in such procedures the termination is voidable by a competent court.

At certain times government agencies and ministries are also faced with decisions making. The manner and way in which the decisions could be challenged are also a major aspect of the course. You shall study and learn the concept of *Mandamus, Certiorari* and other means of judicial reviews.

1.2 Objectives

The objective of the module is to introduce the student to the concept of administrative powers and the modus operandi of exercising such powers by people in authority. The course will also educate the students on the forms of review available for administrative decisions.

1.3 Main Content

Administrative powers are discretionary powers of an executive nature that are conferred by legislation on government ministers, public and local authorities, and other bodies and persons for the purpose of giving detailed effect to broadly defined policy. Examples include powers to acquire land compulsorily,

to grant or refuse licenses or consents, and to determine the precise nature and extent of services.[1]

1.3.1 Classification of Administrative Powers

The attempt to distinguish or classify the various powers and functions of administrative authorities had attracted controversies in academic and legal circles. However, in 1932, a breakthrough in this attempt was made in the Special Report of the British Committee on Ministers Powers. The definition portion of the committee's report is reproduced as follows:

"REPORTS OF THE BRITISH COMMITTEE ON MINISTERS POWERS:

a) **LEGISLATIVE POWERS:** Legislation is the process of formulating a general rule of conduct without reference to particular cases and operating in the future. The decision in the case of *Lakanmi and A.G West* is an instructive case to be referred to by the student in understanding legislative powers.

b) **EXECUTIVE POWERS:** Execution is the process of performing particular acts of issuing particular orders or of making decisions which apply general rules to particular cases.

[1] https://www.highbeam.com/Registration/Registration1

c) **JUDICIAL POWERS:** A true judicial decision pre-supposes an existing dispute between two or more parties and they involve four prerequisites.

i. The presentation (not necessarily orally) of their case by the parties;

ii. The ascertainment of any disputed facts by evidence adduced by the parties often with the assistance of argument on that evidence;

iii. The submission of arguments on any disputed question of law for a decision which disposes of the whole matter by a finding upon disputed facts and on application of the law of the land to the facts so found including a ruling upon any disputed question of law;

iv. A decision which disposes of the whole matter by finding upon disputed facts and on application of the law of the land to the facts so far, including where required. A ruling up and dispute question of law.

The attempts at the classification of administrative powers contained in the Special Report of the British Committee on Minister's Powers have over the years been acclaimed in government circles as commendable.

But in the academics, the classification of administrative powers and functions has attracted controversy as to the acceptability or correctness of the effort of

classification. The following views, comments and criticisms of the classification of administrative powers are worthy of note:

1.2 Professor Griffith and Harry Street in their book -*Principles of Administrative Law*, fourth edition at page 14- had this to say on the Report of the British Committee on Minister's power: "But the distinction between legislative, judicial and administrative action is often difficult to draw. A statute may empower an administrator to delegate part of his functions to some other authority. When he delegates, he may impose certain conditions (or rules). Legislation sometimes distinguished from the administration on the grounds that there is an element of generality about the rules they apply to at least a group of persons whereas in administration this does not require in a clear distinction since it is not also possible to separate what is general from what is particular or specific. So the judicial function merges into the legislative in the administrative.

Yet another difficulty concerns the use of the word 'judicial'. The courts themselves have interpreted its meaning differently in different contexts. Thus the administrative function is sometimes regarded as judicial and sometimes

not. Finally, no single administrative process involves the holding of hearings, the making of decisions, the laying down of principles and the taking of action. The true division of the power of the administration into legislative, administrative judicial is impossible for the categories is imprecise.

Interesting to note is the brief comment by **Prof. Benjamin** (*Principles of Australian Administration Law,* 1956 pg 104-106) on the Report of the British Committee on Minister's Powers. The following views were expressed on legislative, executive. "The committee itself admitted that there was great difficulty in defining legislative and executive power. Thus a power vested in a governmental authority to make grants to schools might appear on the surface of it to be plainly executive or administrative. But if the authority were to elaborate, in detail, the conditions under which it would regard the school as qualified for a grant and issues circulars setting out such conditions. This would seem to be in substance deformation of general rule. Indeed the distinction between that which is particular is a matter of degree.

1.4 Conclusions

From the above explanation it should be clear that dividing administrative functions is not as easy as it seems. Primarily you have learnt the challenges involved in so doing. You have also learnt that there is a fine line between administrative, executive and judicial responsibilities. Finally, it concluded that despite the challenges in finding the difference between the various administrative responsibilities that it is possible to do so especially in light of the principles of division of labour.

1.5 SUMMARY

Administrative powers are discretionary powers of an executive nature that are conferred by legislation on government ministers, public and local authorities. The attempt to distinguish or classify the various powers and functions of administrative authorities had attracted controversies in academic and legal circles. Professor Griffith and Harry Street in their book -*Principles of Administrative Law*, fourth edition at page 14 drew a distinction by stating that: "But the distinction between legislative, judicial and administrative action is often difficult to draw. A statute may empower an administrator to delegate

part of his functions to some other authority. When he delegates, he may impose certain conditions (or rules).

1.6 Tutored Marked Assignments

1. Dividing administrative powers is a major challenge? Do you agree? Discuss the challenges and breakthrough made by academic scholars over the years.
2. Discuss Legislative powers, Executive and Judicial Powers.

1.7 FURTHER READINGS

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

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

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

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

UNIT 2

JUDICIAL DECISIONS

2.1 Introduction

2.1 Introduction

In this Unit you shall learn about judicial decisions. A decision in some circumstances could be quasi judicial in nature, legislative or administrative. In addition, you shall also learn about the views of scholars like A.V Dicey on judicial powers and the personnel's who are able to make decisions.

2.2 Objective

The main purpose of this unit is to expose the student to the various divisions in decision making in administrative law. We shall examine the concept of quasi judicial powers in addition to the persons that can take administrative decisions.

2.3 Main Content

2.3.1 Administrative Decision

An administrative decision has two components – "administrative" and "decision". "Administrative" usually refers to the maker of the decision. Therefore, "administrative decision" usually means a decision made by a public official. The class of decision makers that are covered by this area of law is, however, one of the elements that may need reform, and will, therefore, be discussed in more detail later.

On the other hand the word "decision" is not referring only to "decisions" in the manner that term is ordinarily understood. Often the term is used to mean a final determination or adjudication. However, in this area of law, we can include within that expression all acts and omissions or conduct engaged in prior to the making of such a determination. Again, the Administrative law is the area of law that you will need to rely on if you wish to challenge a decision or action of a government official, department or authority. Administrative law may also apply when the person whose decision you wish to challenge is not a government officer but is exercising "public power" (e.g. a power granted to a person by a statute).

Administrative law usually only enables decisions (or actions) that is "administrative" in nature to be challenged. This means that there are other types of "decisions" made in government but *not* governed by administrative law. The following are examples of decisions that may not be governed by administrative law:

- legislative "decisions" (e.g. the making of laws; however, *delegated legislation* may be reviewable on a similar basis to administrative decisions);
- broad policy decisions (e.g. deciding to reduce a grants program);
- employment decisions (e.g. decisions to hire an employee; however, administrative law may apply to public service misconduct decisions);
- criminal cases (e.g. decisions to prosecute; however, it does apply to investigations); and
- contract decisions (e.g. decisions by government to enter into a contract; however, *tender* processes may be subject to some administrative law principles).

Examples of administrative decisions that you may be able to challenge under administrative law principles and mechanisms include:

- a decision by a Council to compulsorily acquire land;
- a decision by ASIC to declare a person not fit and proper to hold a financial services licence;
- a decision by a Minister not to grant a visa;
- a decision of Centre link to cease paying a benefit; and
- a decision to impose conditions on a licence.

Administrative decisions are usually made by government officers, but may also be made by people who are not government officers. If the decision involves "statutory power" then it is likely to be regulated by administrative law.

2.3.2 Quasi Judicial Powers

A quasi judicial decision pre-supposes an existing dispute between two or more parties and involves, the presentation (not necessarily orally) of the case by the parties; the ascertainment of any disputed facts by evidence adduced by the parties often with the assistance of argument. However, evidence adduced does

not necessarily involve the submission of argument on any dispute; disposes of the whole matter by a finding upon disputed facts and an application of the law to the facts so found including, where required, a ruling upon any disputed question at law.

Furthermore, on judicial/quasi judicial, the distinction between them is best on the fact that in deciding cases all that the courts do is to apply pre-existing law. The most that can be said is that the discretions of the court may differ in nature and extent from the discretion of the administrator. Contrastingly, on judicial/ quasi judicial and administrative', the distinction between judicial and quasi-judicial powers, on the one hand and administrative powers on the other react mainly on the asserted lack of dispute and learning procedure in the later case. It is almost clear that every governmental decision affecting members of the public is capable of producing a dispute, even though it may be a dispute between the government itself and members of the public who are affected. The presence or absence of a hearing procedure will usually depend on the particular legislation involved.

In the United States it is recognized that no real distinction can be drawn between administrative and quasi-judicial powers for the simple reason that the constitutional requirement for the main process in the 5th and 14th amendment will convert administrative powers into adjudicative powers by requiring *interalia* the giving of a fair hearing.

> *"The distinction between legislative and adjudicative action is traditionally regarded as vital because of frequent holdings by the court that hearings are only required when the action is classified as adjudicative. However legislative powers are defined in a similar way to that suggested by the committee on ministers powers and all other powers including licensing are classified as adjudicative."*

According to **Prof. A.C. Davies in his book**, *Administrative Law Treatise*, the difficulty of the classification of administrative powers in the United States of America observe as follows, "the historical rejection of a strict application of the theory of separation of powers as probably being attributable largely to the difficulty or impossibility of classifying all function. When Congress in 1789 empowered collectors of customs to resolve disputes concerning import duties was it granting judicial powers to the collectors? Did the collectors also exercise executive powers when the patent office issues a patent perhaps after first consulting a controversy? What kind of power did the department of state

exercise in granting a passport? After the steam boat inspection service was established in 1838. Did an inspector in deciding that a hull or a boiler was unsafe exercise judicial powers? Did the inspector to whom the ship's owner could appeal, exercise, judicial powers in resolving the dispute between the owner and the judicial inspector?

From the above illustrations, it clear that the issues of distinguishing between administrative decisions are of a thin line and can be described as streams from the same source but with different channels.

2.4Conclusion

Decisions or actions governed by administrative law are called "administrative decisions".[2] An administrative decision is one for the making of which the authority in question is not required to employ any of the processes, the argument and where the grounds upon which he acts are left entirely to his discretion. In the above unit we considered Administrative decisions and quasi judicial powers.

2.5 Summary

[2] http://www.lawhandbook.org.au/handbook/ch21s01s01.php.

We have considered various forms of administrative decisions and quasi judicial decisions. We also looked at the position in the United States. An important aspect that was highlighted is the respect for fair trial. You would recall that in Administrative law I you learned the doctrine of natural justice. It is therefore interesting to note that respect is in fact taken over an administrative action, the character of which is determined by the administrative decision. In the United States it is recognized that no real distinction can be drawn between administrative and quasi-judicial powers for the simple reason that the constitutional requirement for the main process in the 5th and 14th amendment will convert administrative powers into adjudicative powers by requiring *interalia* the giving of a fair hearing.

2.5TUTORED MARKED ASSIGNMENT

1. Discuss the various times of administrative decisions listed.
2. Why is the principle of fair hearing important in administrative decisions?

2.6FURTHER READINGS

1. H.W.R. Wade, Administrative Law (Oxford: Clarendon Press, 3rd Edition, 1971).
2. Kenneth Culp Davis, Administrative Law and Government (Minnesota: West Publishing Co., 2nd Edition, 1975).
3. Stephen G. Breyer & Richard B. Stewart, Administrative Law and Regulatory Policy (Toronto: Little, Brown and Company, 1979).
4. William Wade & Christopher Forsyth, Administrative Law (Oxford, UK: Clarendon Press, 1994).

UNIT 3

Administrative Remedies

3.1 Introduction

Bearing in mind our discussion on administrative decisions and quasi judicial pronouncement, it is important that we consider the possible avenues for redress available to an individual who is not satisfied on how the decision was reached. In addition, considering your knowledge of the doctrine of natural justice, how would an a person affected by an administrative decision challenge such decisions.

3.2 Objective

The main objective of this unit is to analyse the procedure for the challenge of administrative decisions. In addition remedies are also considered.

3.3 Main Content

3.3.1 What is Judicial Review?

The judicial review of administrative decisions is a compendious description of the process whereby a Court determines whether or not decisions having an administrative character comply with the requirements of the law. The process includes the remedies the Court should provide in consequence of any non-compliance with the law. The law relating to "judicial review" includes both the "substantive" law and the "procedural" law. The substantive law governs the acts or omissions in question and the grounds upon which the Court can review those acts or omissions to determine whether or not they comply with the law. The procedural law includes the practices and procedures of the Court in undertaking such a review, together with the remedies available to a Court in the event the law has been contravened.

It is important to emphasise that the judicial review of administrative decisions is concerned only with the legality of those decisions. Judicial review is not concerned with the general merits of the decision under review, in the sense of whether the decision was the correct or preferable decision. The Court will only be concerned with factual issues to the extent that a breach of the law is said to have occurred in the determination of the facts. Further, in conducting a judicial review, the Court will only be concerned with policy to the extent that it is said that the application of any particular policy contravened the law. If the decision maker complied with the law in arriving at his or her conclusion, the Court has no power to intervene.

3.3.2 What is Merits Review?

The merits reviewer will be concerned with the identification of the legal principles governing the decision under review, however, the primary focus of merits review will be other factors relating to the decision under consideration. These other factors include the identification of relevant facts relating to the decision, the elucidation of any policy or policies appropriately applied in the administration of the power being exercised in the making of the decision and the application of that policy or policies to the facts as determined.

3.3.3 Distinction in Outcome between Merits Review and Judicial Review

The contrast in the powers available to a merits reviewer as compared to a judicial reviewer reflects the fundamental difference in the functions being undertaken by those reviewers.

After completing a review on the merits, it is usual for the merits reviewer to have power to substitute his or her decision for that of the original decision maker. By contrast, if a Court arrives at the conclusion that an administrative decision has been made in contravention of the law, its powers will generally be limited to the making of declarations or orders giving effect to that conclusion and setting aside the decision under review.

The usual result of such a conclusion is that the decision has to be made again by the decision maker, but this time according to the law as declared by the Court. In this way the Court confines itself to the determination of whether or not the law has been contravened and does not usurp the administrative powers and functions of the decision maker.

3.4 Conclusions

It is safe to conclude that no matter what manner of administrative power is used, there are certain remedies available for anyone who is not pleased with the outcome of such decisions. You should also note that while judicial review is purely based on the correctness of the procedure employed merit review deals with the rightness of decisions reached. It is invariably important to master the various procedures involved in reaching administrative decisions.

3.5 Summary

Administrative reviews encompass judicial reviews and merit reviews. The process includes the remedies the Court should provide in consequence of any non-compliance with the law. The law relating to "judicial review" includes both the "substantive" law and the "procedural" law. In contrast the contrast in the powers available to a merits reviewer as compared to a judicial reviewer reflects the fundamental difference in the functions being undertaken by those reviewers.

Finally, note that the major difference is the Court confines itself to the determination of whether or not the law has been contravened and does not usurp the administrative powers and functions of the decision maker in judicial remedy and merit reviews.

3.6 Tutored Marked assignments

1. Discuss the difference between a judicial review and a merit review?

2. What is the prime basis and concern for a judicial review?

3.7 Further Readings

1. Stephen G. Breyer & Richard B. Stewart, Administrative Law and Regulatory Policy (Toronto: Little, Brown and Company, 1979).

2. William Wade & Christopher Forsyth, Administrative Law (Oxford, UK: Clarendon Press,

Unit 4

4.1 INTRODUCTION

Considering our premise in unit 1 that administrative powers are divisible into legislative, executive and judicial powers, it is important for us to consider the legal significance and importance in the division. The question therefore is of what significance or importance is the classification of administrative powers? A resolution of this question is important in view of the rights and obligations conferred on parties affected by the exercise of these powers.

4.2 Objective

The main objective of this module is for you to understand that the divisions of administrative powers are not just there for academic purposes but actually have legal implications.

4.3 Main Content

THE LEGAL SIGNIFICANCE /IMPORTANCE OF CLASSIFYING ADMINISTRATIVE POWERS.

As a general rule, the following rights and duties are attached to parties as affected by the exercise of certain administrative powers. Where an administrative power is classified as judicial or quasi judicial, the administrative authority is bound to observe the right to fair hearing and rules of natural justice. See the following cases.

- *Aiyetan v. Lifor (1987)3NWLR 48 18 SC (pt 59);*
- *Adekunle v. University of Port Harcourt (1991)3NWLR 534 CA (pt 181);*
- *Merchant Bank Ltd v. Federal Minister of Finance (1961) All NLR 379;*
- *Okakpu v. Resident Officer Plato Province (1958) NRNLR 5.*
- *Okakpu v. Resident Officer Plato Province supra;*
- *Arzika v. Governor Northern Region (1961) All NLR 379;*

- *Eleko v. Government of Nigeria (1931) AC 669 PC.*

4.2 DUTY OF DUE NOTICE

Where a power is legislative or administrative there is no requirement to give notice as a general rule except where a statute provides that notice be given to persons likely to be affected or that they be consulted. See *Bates v. Lord Hail Sham (1971) 1WLR 1373.* However, where a power is judicial or quasi judicial then notice must be given to the person affected, failure of which the decision or action may be set aside for failure to comply with the rule of natural justice.

Where an administrative power or an action is judicial or quasi judicial a prerogative remedy such as an order of prohibition (an order of a superior court to an inferior court to stop and transfer a case to the former) or Certiorari may be issued to stop or quash it.

However, where an administrative authority acts in a legislative or executive capacity an order of court such as order of mandamus may not as a general rule

use against it to compel the performance of a public duty.[3] See the following cases:

- *Banjo v. Abeokuta Urban District Council (1965);*
- *Arzika v. Government of Nigeria;*
- *Eleko v. Government of Nigeria.*

4.4 Conclusion

The main basis of this unit has dealt with the importance of fair hearing as it affects the legal implications of administrative decisions. It is important for you to revisit the module on fair hearing rights as it deals with natural justice. You must also note that any decision which violates natural justice would be found null and void.

4.5 Summary

In summary you always bear in mind that the doctrine of natural justice is important for any administrative decision to be valid. You must also recollect that the rights to fair hearing and a judge not adjudicating over a matter in which he has an interest is germane. We shall be dealing with the issue of interest shortly in the course of the study.

[3] https://ecom.lsuc.on.ca/pdf/baconline/2005/en/cr/cr05_ch_13.pdf (last accessed June 6, 2011)

Thus, where a power is legislative or administrative there is no requirement to give notice as a general rule except where a statute provides that notice be given to persons likely to be affected or that they be consulted. However, where an administrative authority acts in a legislative or executive capacity an order of court such as order of mandamus may not as a general rule use against it to compel the performance of a public duty.[4]

Unit 5

Grant of Prerogative Remedies

5.1 Introduction

So far we have dealt with the nature of administrative decisions, its various divisions and the legal implication of such decisions. You have also studied the various judicial, quasi judicial remedies available to a person not pleased with the decision of an administrative body.

In this unit you will be learning more of remedies that are purely prerogative i.e not compulsory but the choice of the decision maker.

5.2 Objective

[4] https://ecom.lsuc.on.ca/pdf/baconline/2005/en/cr/cr05_ch_13.pdf (last accessed June 6, 2011)

The main thrust of this unit is to ensure that you understand the concept of prerogative remedies and also equitable remedies. You must ensure that you study the Nigeria authority in this Unit to enable your full comprehension of the topic.

5.3 Main Body

Where an administrative power or an action is judicial or quasi judicial a prerogative remedy such as an order of prohibition (an order of a superior court to an inferior court to stop and transfer a case to the former) or Certiorari may be issued to stop or quash it.

However, where an administrative authority acts in a legislative or executive capacity an order of court such as order of mandamus may not as a general rule be used to compel the performance of a public duty. See the following cases:

-Banjo v. Abeokuta Urban District Council (1965);

-Arzika v. Government of Nigeria;

-Eleko v. Government of Nigeria.

5.4 Prerogative and Equitable Remedies

The prerogative remedies all bear Latin titles, which is a reflection of their antiquity.

The three most commonly utilised are *mandamus, prohibition* and *certiorari*. The remedy of *mandamus* is, very generally speaking, available to compel the performance of a public duty. The remedies of *prohibition* and *certiorari* are available to ensure that decision makers exercise their powers according to law. The distinction between *prohibition* and *certiorari* is that the former is available to prevent such a decision maker from exceeding the law before he or she has done so. *Certiorari*, however, is available to correct a contravention of the law after it has taken place.

The remedy of *habeas corpus* is seldom utilised but nevertheless profoundly significant to the liberty of the individual, because it is available to determine the legality of the detention of any person. When the remedy is invoked, the person in detention must be brought before the Court and the lawfulness of that detention justified to the satisfaction of the Court. It has a long constitutional history and its availability reflects the importance with which the liberty of the individual is viewed in our society.

The last prerogative remedy is that of *quo warranto*. This remedy is available to prevent somebody from wrongly usurping or occupying a public office. It is seldom utilised and of limited practical significance. The two equitable remedies are the injunction and the declaration. The remedy of injunction is available to restrain a person from committing an unlawful act. It may be granted either on an interim basis, to protect rights and interests pending a final judicial determination of the issues, or on a permanent basis after the determination of those issues.

Equitable remedy of declaration enables the Court to declare that a decision, act or omission is unlawful and of no legal force and effect. Although there are no judicial powers of enforcement attached to such a declaration, the making of the declaration in itself will preclude a decision maker from lawfully enforcing or otherwise taking any action in reliance upon a decision which the Court has declared to be unlawful. Where the decision maker is a public official, it can be confidently expected that he or she will comply with the law as declared by the Court, without the need for specific powers of enforcement.[5]

5.5 Conclusion

[5] http://www.lrc.justice.wa.gov.au/2publications/reports/P95-DP.pdf

In this unit we have perused the concept of prerogative remedies available to any person alleging a violation of natural justice in an administrative decision. It is also concluded that the courts can issue orders against administrative decisions and official taking such decisions. Consequently, such orders are to be carried out to ensure redress. In the following unit we shall consider more of the remedies individually for better understanding of the position of the law.

5.6 Summary

Equitable remedies of declaration enables the Court to declare that a decision, act or omission is unlawful and of no legal force or effect. The prerogative remedies all bear Latin titles, which is a reflection of their antiquity. The three most commonly utilised are *mandamus, prohibition* and *certiorari*. The remedy of *mandamus* is, very generally speaking, available to compel the performance of a public duty to perform tasks which they are statutorily bound to perform.

Where the powers exercised are discretionary, it must be noted that there are no judicial powers of enforcement attached to such a declaration. Finally, the making of the declarations in itself will preclude a decision maker from lawfully enforcing or otherwise taking any action in reliance upon a decision which the Court has declared to be unlawful.

5.7 Tutored Marked Assignments

1. Discuss the concept of equitable remedies.

2. Briefly, attempt to draw distinctions between any two of the remedies available.

Unit 6

6.1 Introduction

As a follow up to our study in the previous unit, we shall be considering the various remedies specifically. Here you will learn the principles of certiorari, mandamus etc. It is important that you take cognizance of the various circumstances that each of remedies would be applicable.

6.2 Objective

Primarily at the end of this unit, you are expected to have a wholesome craps of the various prerogative rights available on administrative decisions and also their applications.

6.3 Main Content

6.3.1 Certiorari

The most common extraordinary remedy, *certiorari* allows the Superior Court to review and quash decisions of an inferior court or body which has exceeded its

jurisdiction. Its purpose is to correct what has already taken place. However, even if the reviewing court determines that there is basis to quash the order, it may remit the case back to the original judge for further proceedings.

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. Committal of an accused at a preliminary inquiry, in the absence of evidence on an essential ingredient in a charge, is a reviewable jurisdictional error. A discharge based on terse and uninformative reasons can successfully result in *certiorari* and corrective committal. To challenge a search warrant, *Certiorari* is used to quash a search warrant if the applicant can show a jurisdictional error was made.

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.

6.3.2 Habeas Corpus

Probably the most famous prerogative remedy, it brings a party before a Superior Court judge to enable a release order from unlawful imprisonment. It is a method of reviewing detention when there is no statutory method available. A judge can continue the detention and direct lower courts to do something (such as conduct a bail hearing).

Habeas Corpus may be sought:

i. To review detention when a statutory review is not held (*mandamus* could also be sought to order the hearing to take place).
ii. Where there are no statutory reviews.
iii. To correct a sentence miscalculation.
iv. To prevent or end segregation of an inmate from the general prison population.

v. To join a constitutional challenge to legislation governing interim proceedings such as bail.

vi. To allow interpretation of custody provisions of the *Young Offenders Act*.29

6.3.3 Mandamus

By this remedy, the Superior Court commands an official or an inferior court to perform a particular act or restore a right or privilege which it has taken away. It forces the performance of legal duties by inferior officials who have failed or refused to perform them.

Mandamus may be invoked:

i. To review the quashing of an Information.

ii. To review refusal to issue a subpoena.

iii. To compel a hearing concerning shackling of the accused in court.

iv. To compel disclosure at preliminary inquiry.

6.3.4 *Procedendo*

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

Procedendo is sought:

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

ii. To expedite a case.

6.3.5 Prohibition

Most often, this is used to remove the case to the Superior Court so that an inferior court or body is prevented from proceeding. The purpose is to stop the proceedings and prevent an error of jurisdiction from taking place. Prohibition is used:

i. To stop a judge from presiding because of possible bias. For example, it was sought unsuccessfully to remove a judge who had previously prosecuted the accused.

ii. To stop a preliminary inquiry or coroner's inquest. Prohibition can be brought if a preliminary inquiry judge exceeds jurisdiction and makes provisional conclusions.

6.3.6 Quo Warranto

This mediaeval royal writ enquired by what warrant a party claimed to exercise a particular right, especially in jurisdiction. In England, it was used from the 1200s up to its abolishment in 1938. Its later use was to try the right to be elected to municipal office. It is now of historic interest only.[6]

6.4 Conclusion

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

The remedies available are limited in effectiveness since the courts are concerned, in theory at least, only with the legality of the process rather than

[6] https://ecom.lsuc.on.ca/pdf/baconline/2005/en/cr/cr05_ch_13.pdf

whether the decision under challenge was the correct one. Furthermore, all the remedies are discretionary. The court may take into account such factors as delay in seeking the remedy, the futility or usefulness of granting it, and the hardship caused to others by granting it.

The five remedies available in common law judicial review proceedings are:

- Declaration
- Injunction
- Mandamus
- Prohibition
- Certiorari

A ***declaration*** (sometimes called a declaratory order or declaration of right) is a formal statement from the court that a decision, act or procedure is unlawful. The government will normally comply with the spirit of the decision; the problem is that a declaration is not *legally binding*.

When a court makes an injunction, it may order the body which has acted unlawfully to take a particular action (a *mandatory* injunction) or, as is more

usually the case, it may order that a particular unlawful course of action cease (a negative injunction). The courts are not inclined to make mandatory injunctions because they involve the court in continual supervision of the conduct of the person or body. A court will only issue an injunction if it is satisfied that the body which has acted unlawfully may, or will, continue to do so - that is, it is a discretionary remedy. This also applies to a declaration.

Mandamus is an order requiring a public body or official to perform a duty which it has failed to perform. The important point here is that the body or tribunal must be shown to have failed to carry out a duty.

Prohibition is an order to a lower court, tribunal or similar decision making body requiring it to cease proceedings. This order should be sought where a body has failed to exercise its jurisdiction properly or failed to provide natural justice, and these proceedings are continuing. After a decision-making body has finished its proceedings and made an order, the appropriate remedy is an order for certiorari to quash (that is, to set aside) the decision. Where a decision has been made but the decision maker failed to exercise jurisdiction properly or to

provide natural justice, the order sought will be certiorari (that is, to quash or set aside the decision).[7]

6.6 Summary

In summary, you are to bear in mind that committal of an accused at a preliminary inquiry, in the absence of evidence on an essential ingredient in a charge, is a reviewable jurisdictional error. A discharge based on terse and uninformative reasons can successfully result in *certiorari* and corrective committal. To challenge a search warrant, *Certiorari* is used to quash a search warrant if the applicant can show a jurisdictional error was made. Human rights is highly premised on the exercise of the remedy of habeas corpus. Probably the most famous prerogative remedy, it brings a party before a Superior Court judge to enable a release order from unlawful imprisonment. It is a method of reviewing detention when there is no statutory method available. By these remedies, the Superior Court commands an official or an inferior court to perform a particular act or restore a right or privilege which it has taken away. It forces the performance of legal duties by inferior officials who have

[7] http://www.lawhandbook.sa.gov.au/ch07s02s07s02.php

failed or refused to perform them. Finally, you must bear in mind that the exercise of prerogative remedies are discretionary in nature.

6.7 Tutored marked assignments

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

6.8 Further Readings

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

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

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

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

5. Kenneth Culp Davis, Administrative Law and Government (Minnesota: West Publishing Co., 2nd Edition, 1975).

6. Stephen G. Breyer & Richard B. Stewart, Administrative Law and Regulatory Policy (Toronto: Little, Brown and Company, 1979).

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

Module 2

Unit 1

The Rule against Sub- Delegation

1.1 Introduction

We considered the basis of various remedies available to an aggrieved person. Subsequently, we shall examine the basis on which some infractions may arise. Recollect that we had learnt a decision may be wrong and therefore violate the principles of natural justice. We are now going to consider the factors and situations that maybe responsible for such infractions. In this module we are learning about the rule against sub-delegation.

1.2 Objective

In administrative law it is important that decisions taken are taken by the correct persons statutorily empowered to do so. The main objective of the module is to ensure your understanding of the rule of delegation and sub-delegation.

1.3 Main Content

1.3.1 Delegation

To delegate a duty is to ask someone else to act on behalf of an officer with responsibility to do so. However, in some circumstance because of volume of schedule, an administrative officer may sub delegate a duty to another. We shall now consider the rule against sub-delegation. The issue of sub-delegation is a situation where someone is statutorily required to carry out a particular duty or function and the person decides to sub-delegate such responsibilities. This doctrine is captured in the latin maxim *Delegatos non delegare.* For example an executive or ministerial power or function may be delegated however; a legislative and judicial or quasi- judicial power cannot be sub-delegated. See *A.G Bendel State v. A.G Federation (1982) 3NCLR 1SC.* We shall thus in this module examine how the courts treat outcome of sub delegated responsibilities and the various rules and reasons why it is not encouraged.

1.3.1 Techniques Developed By the Courts for Getting Around the Rule against Sub-Delegation.

Consistent with the maxim *delegatus non potest delegare*, at common law, a Minister cannot delegate a statutory power to another Minister. However, any

member of the Executive Council may exercise any function, duty, or power exercisable by or conferred on any Minister (by whatever designation the Minister is known) "unless the context otherwise requires". It is not a power to delegate, but a power for any Minister to exercise portfolio Minister's powers.

(a) Scope of the rule against sub-delegation

The maxim *delegatus non potest delegare* does not necessarily mean the absence of an express power of delegation. An authority on which a power has been conferred must carry out all the steps preliminary to the exercise of the power itself. Depending on the nature of the authority, of the power – legislative, judicial or administrative - and the tasks required, these steps may be carried out by someone else on behalf of the authority.[8]

This point was illustrated in *Jeffs v NZ Dairy* Production Marketing Board, [9] where the Privy Council found that the Dairy Board had a duty to act judicially on zoning applications and no power to delegate any of its powers or functions. Despite this, their lordships said that it would have been permissible for the Board in regulating its own procedure to appoint a person or committee to hear

[8] Laws of New Zealand, Administrative Law, para 49, (on www.lexisnexis.com, last accessed 5 June 2011).
[9] [1967] NZLR 1057 (PC).

evidence and submissions and that in some circumstances it might be sufficient for the Board to have before it and to consider an accurate summary of the relevant evidence and submissions, provided that summary adequately disclosed the evidence and submissions to the Board.

McGechan J in *McInnes v Minister of Transport*, [5] it was found that the duty of the Minister to consult before making a land transport rule had been adequately carried out by the Land Transport Safety Authority on his behalf. McGechan J found that there was no delegation of the Minister's consultation function to the LTSA but that the Minister merely engaged the authority to carry out the statutory prerequisites on his behalf. "It was a case of the Minister choosing how to get a job done.[10]

(b) Exception for Ministers? - the Carltona principle[11]

In differentiating the situation of a delegation or "devolution of authority", reference has been had to the Carltona line of cases which, subject to anything in statute, may suggest that the general prohibition on sub delegation of statutory powers at common law is now largely irrelevant to Ministers.

[10] H Ct Wellington, CP 240/99, 3 July 2000, McGechan J.
[11] http://en.wikipedia.org/wiki/Carltona_doctrine

In *Carltona Ld v Works Comrs*[12] Lord Greene MR, noted that the functions given to Ministers are "so multifarious that no minister could ever personally attend to them". It was reiterated that the duties imposed upon ministers and the powers given to them are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case. In addition, it was further restated that "Constitutionally, the decision of such official is, of course, the decision of the minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority. The whole system of departmental organisation and administration is based on the view that ministers being responsible to Parliament will see that important duties are committed to experienced officials. If they do not do that, Parliament is the place where complaint must be made against them."

The Carltona principle has since been relied on in a variety of cases including *Oladehinde v Secretary of State*[13] where decisions required to be taken by the Secretary of State in relation to immigration matters had actually been taken by authorised immigration officers.

[12] [1943] 2 All ER 560 (CA).
[13] [1990] 2 All ER 367.

In the Court of Appeal,[13] Lord Donaldson commented that the Ministers involved had used language which was not as precise as it might have been, having spoken of 'delegation' of powers, "although it is quite clear that what they were describing was authority to act on behalf of the Secretary of State." He went on to say that "This is something different from delegation. The civil servant concerned acts not as the delegate, but as the alter ego of the Secretary of State. 'Devolution' might be a better word".[14]

In the House of Lords Lord Griffiths again referred to the situation as "devolution" and noted:

'It is well recognised that when a statute places a duty on a minister it may generally be exercised by a member of his department for whom he accepts responsibility; this is the Carltona principle. Parliament can of course limit the minister's power to devolve or delegate the decision and require him to exercise it in person'. The cases suggest that all that is required for a departmental official to exercise a power of a Minister is that the official has the Minister's

[14] See LexisNexis Professional Development Public and Administrative Law 2007 – Jenny Cassie Paper Page 2.

authority. The conferral of such authority may be done informally or, it would seem, merely by implication.

1.4 Conclusion

The Carltona principle only applies to administrative, and not legislative or judicial functions.[15] However, Ministers are not of course the only public office holders with multifarious administrative tasks. This has led the courts to consider whether the principle should also extend to other public offices. Carltona and other authorities established that when a Minister is entrusted with administrative functions he may, in general, act through a duly authorised officer of his department. This result depended in part on the special position of constitutional responsibility which Ministers occupy. However, it is also on the recognition that the functions of a Minister are so multifarious that the business of government could not be carried on if he were required to exercise all his powers personally.

1.5 Summary

In brief must be able to recollect that while the delegation is possible it is more difficult for ministerial responsibilities to be sub-delegated as opposed to executive responsibilities. We have also learnt extensively the Carltona

principles and its application on trying to find a soft landing ground ministerial delegation. This is wholly based on the magnitude of the requirements of ministerial functions.

1.8 Tutored marked assignment

1. Can all administrative functions be delegated?
2. Discuss extensively the principle in the Carltona case and how it can be applied to Nigeria.

Unit 2

RESPONSIBILITIES OF DELEGATEES

2.1 Introduction

With the knowledge of what duties can be delegated and which cannot be delegated we are now going to consider the responsibilities required of a delegate. Recollect that in module 1 we had mentioned that we shall be studying the various concepts of interests of administrative officers. Consequently, were a delegation is rightly done, is the delegatee at liberty to conduct the duties in any manner? This shall form the main thrust of this unit.

2.2 Objective

The main purpose of this unit is to ensure that you know what is expected of any delegate in ensuring that he carries out his work tritely with little recourse to administrative remedies.

2.3 Main Content

For a statutory power to be exercised validly under a delegation the following points must be met:

1. The delegatee must have jurisdiction, that is, a valid delegation to make the decision;
2. The decision must be authorised by the Act under which it is made;
3. Any procedures or conditions required by law or imposed under the terms of the delegation must be followed; and
4. The delegatee must comply with administrative law principles of fairness etc

In addition, the delegatee as an employee may have duties to his or her employer which will apply when exercising the powers, such as an obligation to act with reasonable care and skill, to act in good faith in performance of the employee's duties, and not to disclose the employer's confidential information.

2.3.1 Liabilities of delegators and delegates

The question of the respective liabilities of delegators and delegatees will depend on the facts alleged in any particular case. In some cases, civil proceedings may be brought against both the person acting under the delegation and the delegator. Liabilities may also depend on the immunities or indemnities which protect those persons.

2.3.2 When should delegations be made?

It would not be impossible for boards of entities to carry out all tasks in an organisation themselves, nor would it be an efficient use of resources. Consequently, most boards of statutory entities will delegate the management of the entity to a chief executive, with a power for that person to sub-delegate further to other employees. Most public organisations will also put in place formal financial delegations. So far as delegations of statutory powers go, this will depend on the size of the organisation and its internal structure, the types of powers that have been conferred on it, or where the powers are conferred on an individual, on him or her, and the statutory scheme. In some cases, the statutory scheme may give alternatives to delegation.

In determining what delegations are appropriate, those responsible for the exercise of the power should consider carefully the appropriateness of decisions being taken at a more junior level and should also anticipate the needs of the department or entity. For example, if a department or entity has a series of branch offices where decisions are taken then the original delegation must anticipate sub-delegation down to that level. In some cases, it may be appropriate to delegate certain types of decisions, and reserve other types for someone higher up the delegation chain.

Delegations by a board to employees, or to other persons where permitted by the legislation, are an example of decision-making under a board's authority. Some entities give their chief executives day-to-day management responsibilities, such as hiring staff. Other entities give this role to the board, even if it ultimately chooses to delegate the responsibility to its chief executive. The board's choices on what and to whom it may delegate are often restricted by legislation that prescribes processes and conditions for delegation. Statutory functions and powers should, in general, reside in board members, who are selected for their knowledge, skills and experience.

2.3.3 Delegations when conflicts occur

In addition to general delegations, public office holders may also consider the desirability of a one off delegation of a function or power when faced with a situation of conflict of interest. The propriety of using the power of delegation to avoid any appearance of bias in the determination of a dispute has been judicially noted.[15] For statutory Crown entities, the Crown Entities Act's strict conflicts of interest provisions, which disqualify members of Crown entity boards from acting where they are "interested" in a matter involving the entity, could in some circumstances prevent a board from forming a quorum, or in the case of a statutory officer who is a Crown entity, such as the Retirement Commissioner, prevent that person from acting at all.

2.4 Conclusion

Conclusively, from the forgoing it is safe for us to assume that delegation in its entirety is not prohibited by law. However, it is trite for us to be equipped with the knowledge that how a delegate handles such responsibilities is important. Finally, we note that delegatees must act in line with the terms of reference of the delegating authority.

[15] *Charlesworth v Comptroller of Customs*, H Ct, Ak, M 2350/91.

2.4 Summary

Do not forget that in addition to general delegations, public office holders may consider the desirability of a one off delegation of a function or power when faced with a situation of conflict of interest. Also in determining what delegations are appropriate, those responsible for the exercise of the power should consider carefully the appropriateness of decisions being taken at a more junior level and should also anticipate the needs of the department or entity.

2.5 Tutored marked Questions

1. Discuss sub-delegation and the premise on which it can be embarked on
2. Discuss the basis for authenticating sub-delegation.

2.6 Further Readings

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

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

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

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

5. Kenneth Culp Davis, Administrative Law and Government (Minnesota: West Publishing Co., 2nd Edition, 1975).

6. Stephen G. Breyer & Richard B. Stewart, Administrative Law and Regulatory Policy (Toronto: Little, Brown and Company, 1979).

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

Unit 3

Formalities of delegation

3.1 Introduction

Now that you are well versed with the rule of delegation and sub-delegation it is important that we learn the formalities of delegation. In other words are there specific features that must be present in any presumed delegation. To what extent are the formalities important in ensuring that an administrative actions is not void or voidable.

3.2 Objective

At the end of this unit, you must have learnt the basic form of ensuring that a delegation is right and properly done. Note that where the form of a delegation is wrongly done, it ensures a slow activity in the wheel of administration.

3.3 Main Content

3.3.1 Formal requirements

Not all statutory delegations provisions require delegation to be in writing, but for evidential reasons it is desirable that they be so and be recognisable as delegations.

In *McInnes v Minister of Transport,* [16] it was argued that even if there was no formal delegation in place, the Land Transport Safety Authority's performance agreement with the Minister recognised that it was carrying out the Minister's consultation function under the Land Transport Act 1998 and this met the requirements of a delegation in writing. McGechan J noted that the performance agreement was made for a different purpose, to set targets, no more and opined that "Statutory delegations require, and customarily receive, greater specificity and formality." By contrast the Court of Appeal in the same case specifically made no finding on whether the performance agreement was sufficient to meet the statutory requirement for writing but instead exercised its discretion not to invalidate the rule, on the basis that the tasks delegated orally in breach of the requirement for writing were lower level and the ultimate decision, to make the rule had been made by the Minister, not the delegate.[48]

3.3.2 To positions, not individuals

For ease of administration, delegations should where possible be to positions or, where appropriate, classes of persons, rather than named individuals.

[16] Supra.

Nonetheless, even in this case, care will be needed in any restructuring exercises to ensure that any delegations continued to be relied upon remain valid.

3.3.3 Parameters of delegations

A delegation should clearly set out what statutory power or function is delegated and the authority for the delegation. It should also include any consent to sub-delegation deemed appropriate, whether of all or any of the functions and powers delegated.

The delegation should also set out any conditions or restrictions on exercise of the power or function delegated. In this regard, it is normal to require delegated powers to be exercised in accordance with policy and within operational guidelines. However, as with any statutory power, it is important that a discretionary power which is delegated is not fettered by too strict guidelines.

The Court of Appeal approved the following statement in *Westhaven Shellfish Ltd v Chief Executive of the Ministry of Fisheries & Anor*[17] 'While the chief executive can state a policy, the decision makers must keep their ears open. They must indicate, or at least reserve, a power to depart from the policy and a willingness to exercise that power.

[17] [2001] 1 NZLR 158, 173, para 45.

They must bear in mind and conform to the purposes of the legislation under which they are making decisions.[18] It is good practise also to include in the delegation a requirement for the delegatee to report at intervals on the exercise of the power, so that the delegator can monitor its exercise and ensure his or her own duties in relation to the power are being met.

Transparency is also an important formality that is required of a delegation. It is clear that the importance of members of the public knowing who in fact made the decision affecting them and the extent of that person's authority is germane. In accordance with this principle, many of those acting under delegated authority cite the authority for their acts when exercising powers delegated to them.[19]

While not required by statute, many larger public offices keep a delegation register showing what delegations are in force, and where they are not open-ended, noting the dates at which attention should be given to renewal. [50]

3.4 Conclusion

[18] LexisNexis Professional Development Public and Administrative Law 2007 – Jenny Cassie Paper Page 13

[19] Public and Administrative Law Reform Committee *Powers of Delegation: Working Paper*, Wellington, New Zealand, November 1984, 1

Important to take along with you as we round off this unit is that while delegations do not have stringent formalities, it is obviously trite that certain structures be maintained. The importance of ensuring that delegations are reduced in writing and clearly spelling out the core terms of such delegation is encouraged. Finally, transparency is a core aspect of delegation so as to ensure that the public are carried along in the discharge of administrative functions.

3.5 Summary

Formalities are not required by statute; however, many larger public offices keep a delegation register showing what delegations are in force. Consequently, both the delegate and the delegate bear in mind and conform to the purposes of the legislation under which they are making decisions. It is also trite that the delegation should also set out any conditions or restrictions on exercise of the power or function delegated. In this regard, it is normal to require delegated powers to be exercised in accordance with policy and within operational guidelines.

You have thus learned the importance of documentation in administrative circle. This in effect makes procedure crystal and reduces grey areas in following up on decisions and implementations.

3.6 Tutored marked assignment

1. Why should administrative procedures be transparent?
2. If an administrative delegation is not reduced into writing, such delegation is void? Discuss

3.7 Further readings

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

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

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

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

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6. Stephen G. Breyer & Richard B. Stewart, Administrative Law and Regulatory Policy (Toronto: Little, Brown and Company, 1979).

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

Unit 4

Ultra Vires Acts

4.1 Introduction

So far we considered the principles of delegation and sub-delegation in administrative law. We have also looked at the formality of delegation. In this unit we are studying the concept of Ultra Vires. Do note that in the circumstances that a delegate acts out the terms of reference of the authority delegating that such acts are deemed to be voidable if found to be ultra vires.

4.2 Objective

Our main aim in this unit is to determine what makes an act *ultra vires* **and the effect** thereof.

4.3 Main Content

Ultra vires is a Latin phrase meaning literally "beyond the powers", although its standard legal translation and substitute is "beyond power". If an act requires legal authority and it is done with such authority, it is characterised in law as ***intra vires*** (literally "within the powers"; standard legal translation and substitute, "within power"). If it is done without such authority, it is *ultra vires*. Acts that are *intra vires* may equivalently be termed "valid" and those that are *ultra vires* "invalid".

In corporate law, *ultra vires* describes acts attempted by a corporation that are beyond the scope of powers granted by the corporation's objects clause, articles of incorporation or in a clause in its Bylaws, in the laws authorising a corporation's formation, or similar founding documents. Acts attempted by a corporation that are beyond the scope of its charter are void or voidable. In addition the following must be noted:

1. An *ultra vires* transaction cannot be ratified by shareholders, even if they wish it to be ratified.

2. The doctrine of estoppel usually precluded reliance on the defense of *ultra vires* where the transaction was fully performed by one party
3. *A fortiori*, a transaction which was fully performed by both parties could not be attacked.
4. If the contract was fully executory, the defense of *ultra vires* might be raised by either party.
5. If an agent of the corporation committed a tort within the scope of his or her employment, the corporation could not defend on the ground the act was *ultra vires*.

Under constitutional law, particularly in Canada and the United States, constitutions give federal and provincial or state governments various powers. To go outside those powers would be *ultra vires*; for example, although the court did not use the term, in striking down a federal law in *United States v. Lopez* on the grounds that it exceeded the Constitutional authority of Congress, the Supreme Court effectively declared the law to be *ultra vires*.

In UK constitutional law, *ultra vires* describes patents, ordinances and the like enacted under the prerogative powers of the Crown that contradict statutes

enacted by the King-in-Parliament. Almost unheard of in modern times, *ultra vires* acts by the Crown or its servants were previously a major threat to the rule of law.

In administrative law, an act may be judicially reviewable for *ultra vires* in a narrow or broad sense. Narrow ultra vires applies if an administrator did not have the substantive power to make a decision or it was wrought with procedural defects. Broad *ultra vires* applies if there is an abuse of power (e.g., Wednesbury unreasonableness or bad faith) or a failure to exercise an administrative discretion (e.g., acting at the behest of another or unlawfully applying a government policy). Either doctrine may entitle a claimant to various prerogative writs, equitable remedies or statutory orders if they are satisfied.[20]

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

However, where a power is administrative/ executive it will be set aside as *ultra vires* on grounds of unreasonableness, arbitrary. In *Alfry v. Farrell (1896) 1QB*

[20] http://en.wikipedia.org/wiki/Ultra_vires

836, a bye-law regulating weight and measures was declared unreasonable and bad.

4.4 Conclusion

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

4.5 Summary

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

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

4.6 Tutored marked assignment

1. In how many areas of law can *ultra vires* doctrine be applied?

2. Under what circumstances are administrative decisions voided for been *ultra vires?*

4.7 Further readings

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

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

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

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

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6. Stephen G. Breyer & Richard B. Stewart, Administrative Law and Regulatory Policy (Toronto: Little, Brown and Company, 1979).

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

Module 3

THE DOCTRINE OF NATURAL JUSTICE

Unit 1

1.1 Introduction

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

1.2 Objective

The core of this module is to extensively examine the doctrine of natural justice since it is a prime basis for the operations of any administrative decision. At the

end of the module, it expected that you shall be able to identify when administrative decisions are violated.

1.3 Main Content

1.3.1 History of the Doctrine

According to Roman law certain basic legal principles are required by nature, or so obvious that they should be applied universally without needing to be enacted into law by a legislator. The assertion in the United States' Declaration of Independence, "We hold these truths to be self-evident," expresses some of this sentiment. The rules or principles of natural justice are now regularly applied by the courts in both common law and civil law jurisdictions. Natural justice operates on the principles that man is basically good, that a person of good intent should not be harmed, and one should treat others as one would like to be treated.[3]

Natural justice includes the notion of procedural fairness and may incorporate the following guidelines:

- A Right to Advanced Warning. Contractual obligations depriving individuals of their Rights cannot be imposed retrospectively.
- A person accused of a crime, or at risk of some form of loss, should be given adequate notice about the proceedings (including any charges).
- A person making a decision should declare any personal interest they may have in the proceedings.
- A person who makes a decision should be unbiased and act in good faith. He or she therefore cannot be one of the parties in the case, or have an interest in the outcome. This is expressed in the Latin maxim, *nemo iudex in causa sua*: "no man is permitted to be judge in his own cause".
- Proceedings should be conducted so they are fair to all the parties - expressed in the Latin maxim *audi alteram partem*: "let the other side be heard".
- Each party to a proceeding is entitled to ask questions and contradict the evidence of the opposing party.
- A decision-maker should take into account relevant considerations and extenuating circumstances, and ignore irrelevant considerations.

- Justice should be seen to be done. If the community is satisfied that justice has been done, they will continue to place their faith in the courts.[4]

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

1.3.2 **NATURAL JUSTICE AS AN ARM OF THE RULE OF LAW IN NIGERIA**

The principle of natural justice is the foundation for the fundamental right to fair hearing, which is guaranteed under section 36 of the Constitution of the Federal Republic of Nigeria, 1999. The right composes of two guiding principles: the *Audi Alteram Partem* and *Nemo Judex in Causa Sua* rules. The principle of natural justice has featured prominently in decisions by judicial, quasi-judicial

and administrative bodies affecting Nigerian citizens. There are several grounds upon which a court may invalidate the decision of a body or tribunal vested with the duty to take decisions that affect the rights of a citizen.[21]

According to Etudaiye, to a very great extent, substantial justice is coterminous with natural justice. See the case of *Oliko V. Okonkwo.*[22] There can be no doubt that fair hearing is in most cases synonymous with natural justice. There is no doubt that fair hearing is a rule of natural justice for the concept of natural justice is definitely wider in scope than the doctrine of fair hearing. On the other hand the two views cannot be said to be diametrically opposed to each other. For fair hearing indeed covers a substantial space of the field called natural justice. In that sense it is also accurate to hold the view that fair hearing is *in most cases* but not in all cases synonymous with natural justice. Thus, once fair hearing has been ensured in the procedure in arriving at a decision, it is irrelevant that the tribunal arrived at an erroneous, even an unfair, decision.

1.4 Conclusion

[21] *Head of the Federal Military Government v. Public Service Commission & Anor., Ex Parte Maclean Okoro Kubeinje*: (1974) 11 SC 79.
[22] Unrep. B/1/78 delivered on 17.05.79.

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

1.5 Summary

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

1.6 Tutored Marked Assignments

Discuss comprehensively the doctrine of natural justice.

1.7 Further readings

1 Oyewo, AT, *Cases and Materials on the Principles of Natural Justice in Nigeria* (Ibadan: Jator Publishing Co, 1987) at p. 2.

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

3. Iluyomade, BO and Eka, BU, *Cases and Materials on Administrative Law in Nigeria* (Ile-Ife, Nigeria: University of Ife Press, 1980) at p. 131.

4. Oretuyi, SA, "Discipline of Students: A Vice-Chancellor Must Observe the Rules of Natural Justice" (1981) 12(1) *Nig. LJ* 82.

Unit 2 The Twin Pillars of Natural Justice

2.1 Introduction

With your knowledge of the concept of natural justice, it is important that we learn about the twin pillars or components that make it up. In view of this we shall be studying to very important aspects of legal theory; the right to be heard and the right not be judged by anyone with an interest in a matter. It is important that you have recourse to daily activities of even happenings in biblical early times where some of the concepts where use.

2.2 Objective

The main objective of this unit is for you to have a legal understanding of what the components that make up natural justice are. At the end of this module you shall be able to describe the twin pillars which you will need in virtually all areas of your legal practice.

2.3 Main Content

There are two widely acclaimed principles of natural justice which have been hailed as "the twin pillars of the rules of natural justice and indeed the bastion of the rule of law in a civilized and organized society." The concepts are;

a. the Audi Alteram Partem Rule (Hear The Other Side); and

b. the Nemo Judex In Causa Sua (No One Shall Be A Judge In His Own Cause) Rule.

The two principles together entail that a person must be availed a fair hearing. The Supreme Court decision in *Garba & Ors. v. The University of Maiduguri*23 where many cases dealing with fair hearing were highlighted. In that case, the chairman of an Investigating Panel which tried the Appellants was a Deputy Vice Chancellor of the University who was a victim of the rampage the students were alleged to have committed. The Supreme Court held that a likelihood of bias is discernible since the Deputy Vice Chancellor was not only a witness in this panel but a judge at the same time. The Supreme Court established that fair hearing in Nigeria is not only a common law requirement, but also a statutory and a constitutional requirement and that when the Vice Chancellor assumed the disciplinary powers, he became not a court but a tribunal established by law acting in a quasi-judicial capacity. Thus he was bound to act judicially, comply with the constitutional requirements of fair hearing and pass the qualification test to assume judicial functions.

The Court went ahead to hold, per Oputa JSC: It is my humble view that fair hearing implies much more than hearing the appellants testifying before the Disciplinary Investigation Panel; it implies much more than summoning the Appellants before the Panel; it implies more than other staff or students testifying before the Panel behind the backs of the appellants; it implies much more than the appellants being given a chance to explain their own side of the story. To constitute a fair hearing whether it be before the regular courts or before Tribunals and Boards of Inquiry the person accused should know what is alleged against him; He should be present when any evidence against him is tendered and he should be given a fair opportunity to correct or contradict such evidence.

It must be emphasised that the consequence of the breach of the right to fair hearing which admits of no excuses is that any decision reached in breach of the rule must be set aside. In the famous case of *Kotoye v. Central Bank of Nigeria*27 the Supreme Court held that:

The rule of fair hearing is not a technical doctrine. It is one of substance. The question is not whether injustice has been done because of a lack of hearing. It is whether a party entitled to be heard before deciding had in fact been given the

opportunity of a hearing. Once it is concluded that a party was entitled to be heard before a decision and he was not given that opportunity, the order or judgment thus entered is bound to be set aside.

In *Adigun v. A-G OF Oyo State & 18 Ors.*,28 the Supreme Court also said: The Appellants do not have to show injury or prejudice. It is implicit in the very act of denial because the denial is an injury to the right of fair hearing guaranteed by the Constitution and rules of natural justice.

It further held that if the rules of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice.

No authority illustrates this position more than the one of *Adedeji v. Police Service Commission*[23] where the Supreme Court expressed the following view: We are therefore not satisfied that when the circumstances of this case are looked into, adequate opportunity was given to the appellant to meet the case or the facts of the case known to the Commission. It is possible that the appellant is corrupt and did commit the offence alleged against him, that is not what we have to consider. Was the case against him sufficiently brought home to him

[23] (1968) NMLR 102.

that one can say that the requirements of natural justice were sufficiently observed on the facts and circumstances? … We hereby order that the writ should go and the letter dismissing the appellant is hereby declared inoperative, void and of no effect.

The true test of fair hearing is the impression of a reasonable person who was present at the trial whether from his observation justice has been done in the case. The reasonable man should be a man who keeps his mind and reasoning within the bounds of reason and not extreme. And so if in the view of a reasonable man who watched the proceedings, the principle of fair hearing was not breached; an appellate court will not nullify the proceedings.[24] The above dictum accords well with the principle that justice must not only have been done but must be *seen* to have been done. If the reasonable man cannot see that justice has been done, then invariably justice has not been done.

What is clear then is that any administrative body which fails to observe these rules acts contrary to the principles of natural justice with the resultant effect that any judgment grounded on this breach will not stand even where it is

[24] *Orugbo & Ors. V. Una & Ors* (2002) 11 NSCQR 537 at p. 550

palpable that the accused is wrong or guilty and the determination of that administrative body will be held to be null and void and of no consequence.

2.3.1 The Audi Alteram Partem Rule

This is the doctrine that in coming to a decision the deciding authority must hear all the parties. This doctrine was formulated with precision in the case of *Ridge v. Baldwin*[25] where Lord Hudson said: No one, I think, disputes that three features of natural justice stand out: (1) the right to be heard by an unbiased tribunal; (2) the right to have notice of the charge of misconduct; and (3) the right to be heard in answer to those charges.

The rule now seems to have been summarised as follows:

a. that a person knows what the allegations against him are;

b. that he knows what evidence has been given in support of such allegations;

c. that he knows what statements have been made concerning these allegations;

d. that he has a fair opportunity to correct and contradict such evidence; and

[25] 35 (1963) 2 ALL ER 63

e. that the body investigating the charge against such person must not receive evidence behind his back.

Without much ado, the Supreme Court has evolved a set of principles, standards so to say, by which the test of fair hearing may be said to have been met and these are not too dissimilar to the above. One of those cases is *Baba v. Nigerian Civil Aviation Training Centre* where the Supreme Court formulated the following standards for a fair hearing before a judicial or quasi-judicial body. In order to be fair, the hearing must include the right of the person to be affected:[26]

a. to be present all through the proceedings and hear all the evidence against him;

b. to cross examine or otherwise confront or contradict all the witnesses that testify against him;

c. to have read before him all the documents tendered in evidence at the hearing;

[26] The Supreme Court decision in *Oyeyemi V. Commissioner for Local Government, Kwara State & Ors.*

d. to have disclosed to him the nature of all relevant material evidence, including documentary and real evidence, prejudicial to the party, save in recognized exceptions;

e. to know the case he has to meet at the hearing and have adequate opportunity to prepare for his defense; and

f. to give evidence by himself, call witnesses if he likes, and make oral submissions either personally or through a counsel of his choice.

To be present all through the proceedings and hear all the evidence against him

Denloye v. Medical and Dental Practitioners Disciplinary Tribunal.[27]

In that case the sole issue was whether the Medical and Dental Practitioners Investigation Panel denied the Appellant a fair hearing. The panel met and received evidence from certain persons but neither the Appellant nor his witnesses were called at the meeting. The Appellant was subsequently summoned to appear before the Panel. The evidence taken prior to this date was not made available to him or his counsel and when the counsel asked for it, the Chairman of the Investigation Panel refused to produce it. He stated

[27] (1968) 1 ALL NLR 306.

categorically that they were confidential and for the exclusive use of the Panel. In the circumstances of the case the court set aside the decision of the Disciplinary Committee. The court held that the procedure adopted by the Panel was unknown to law as the Panel had deprived the Appellant of his right to be present at the hearing and did not make available the evidence taken against him in his absence to him or to his counsel on repeated request. *To cross-examine or otherwise confront or contradict all the witnesses that testifies against him*

Denloye v. Medical and Dental Practitioners Disciplinary Tribunal where the court held that a breach of the rules of natural justice had ensued when the respondent did not make available to the Respondent or to his counsel the evidence taken against him in his absence in spite of repeated request nor make the witnesses available for cross-examination.

In *Jalo Guri & Anor. v. Hadejia Native Authority*[28] the Appellants who were convicted under "hiraba" (Highway robbery) law of Maliki were set free by the Supreme Court because the lower court adopted not only an inquisitorial procedure but also failed to some extent to observe the principles of natural justice, equity and good conscience. The "hiraba" law was declared inoperative

[28] (1959) 4 FSC 44.

when the exposition of its application forbids any accused person to be given either an opportunity of defending himself or any chance of questioning any of the witnesses for the prosecution. Oputa JSC, in *Garba v. The University of Maiduguri*:[29]opined that to constitute a fair hearing whether it be before the regular courts or before Tribunals and Boards of Inquiry the person accused should know what is alleged against him; He should be present when any evidence against him is tendered and he should be given a fair opportunity to correct or contradict such evidence.

To have read before him all the documents tendered in evidence at the hearing:

In *R. v. Director of Audit (Western Region) & Anor. Ex Parte Oputa & Ors.,*[30] the Director of Audit wrote to the Appellants and certain other councillors calling on them to show cause why they should not be surcharged in respect of a certain sum in accordance with the provisions of a certain law. Many of the councillors failed to reply and those who did reply failed to satisfy the Director that a surcharge should not be made and were accordingly surcharged though given a right of appeal to the Minister. Though the Appellants exercised this right they challenged the Minister's final decision upholding the surcharges by

[29] (1961) ALL NLR 659.
[30] (1961) ALL NLR 659.

certiorari on the ground that the Minister came to his decision without hearing them or giving them a further opportunity to be heard. The trial judge came to the conclusion that a fair inquiry had been held. On appeal the Federal Supreme Court held that the Appellants petition was forwarded to the Ministry without any intimation that the Appellants wished to supplement the document, and no further submissions were received before the decision of the Minister was communicated to the Appellants. All relevant documents were forwarded to the Minister and there is nothing to show that the Director of Audit made further representations, which required a further explanation from the Appellants.

To have disclosed to him the nature of all relevant material evidence, including documentary and real evidence, prejudicial to the party, save in recognized exceptions

In *Adedeji v. Police Service Commission*45 the appellant who was an Assistant Superintendent of Police was served with a letter by the Respondent in which he was accused of corruption and contraventions of certain general Orders. He was required to make representations why he should not be dismissed for the offences. He wrote a reply but was eventually dismissed. He challenged his dismissal but was confronted at the High Court with a four foolscap page counter affidavit which contained allegations which were not in the letter querying the appellant. The Court dismissed his case. He appealed to the Supreme Court which held that the letter did not sufficiently appraise the Appellant of the case against him giving him sufficient opportunity to state his case in rebuttal in view of the fresh allegations in the counter affidavit and that adequate opportunity was not given to the appellant to meet the case or the facts of the case known to the Commission.

To know the case he has to meet at the hearing and have adequate opportunity to prepare for his defense

In *Aiyetan v. Nigerian Institute for Oil Palm Research (NIFOR)*[31] the appellant, an employee of the Respondent, a statutory corporation was invited before a board

31

of inquiry testify as a witness to testify as to the loss of some money with which a fellow employee absconded. The appellant testified as a witness and gave useful suggestions in regard to how such an occurrence can be avoided in future. The respondent later dismissed the appellant from his employment on the ground that the board found him guilty of negligence. The Supreme Court held his dismissal to be a serious and fatal breach of the rules of natural justice since there was nothing on the face of the invitation which could have given the appellant the notion that he was in the line of fire, or that his conduct was to be probed particularly as he must have felt that he had been discharged and acquitted by a court. The appellant was not informed of the case against him or given an opportunity to defend himself as he had been invited to testify to the loss of money, not to his role in the loss. The exchanges between him and the board of inquiry were no more than could be expected between a mere witness, which is what the appellant was, and a Panel.

Authorities abound too for the other requirements such as that the person to be affected must be availed the right to give evidence by himself, call witnesses if

he likes,[32] and make oral submissions either personally or through a counsel of his choice.[33]

2.3.2. The Nemo Judex in Causa Sua Rule

The Latin maxim *nemo judex in causa sua* is the shorthand expression for the rule against bias and interest. This means that a man must not be a judge in his own cause. The actual bias or the real likelihood of bias, prejudice, partiality or unfairness that arises from that anomaly would decimate public confidence in the administration of justice by the courts or tribunals. It has been defined as follows: 'Bias in its ordinary meaning is opinion or feeling in favour of one side in a dispute or argument resulting in the likelihood that the judge so influenced will be unable to hold an even scale'.[34]

In *Umanah v. Attah & Ors*,[35] , judgment delivered on 29th September, 2006 where the Supreme Court sought to clarify the distinction when it is said that a judgment has been obtained by fraud and when it is said that it has been tainted by bias as a result of its pecuniary interest. The latter the Court said, "means

[32] *Kano N.A. v. Obiora* (1960) NNLR 42
[33] *Ogboh & Anor. v. The Federal Republic of Nigeria* 10 NSCQR 498 at p. 508 – 509.

[34] 49 *Kenon & Ors. V. Tekam & Ors*. (2001) 7 NSCQR 147 at p. 168.

[35] *SC 255/2005*

that the judgment so obtained is induced by bias or real likelihood of bias not that it was obtained by fraud".[36]

In *Bamigboye v. University of Ilorin & Anor*., Ogundere, JCA considering the term offered a more illustrative definition. He defined it to mean that the trial or proceedings has been influenced, inter alia, by corruption or favouritism or by the tribunal descending into the arena, and thereby discarding the role of an arbiter, and participating in the battle.

2.3.3 Bias and Natural Justice

Bias has been compartmentalized into two: pecuniary and/or proprietary bias on the one hand and non-pecuniary bias on the other. It would appear, following the decision in *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lennon*,[37] that a direct pecuniary interest in a matter automatically disqualifies a judge from his role as such. In practice however, the decisions upturned owing to pecuniary bias are not so prevalent in the Nigerian jurisdiction. This is due to the practice in this country where litigants can petition the National Judicial Council where

[36]http://www.nigerialaw.org/Dr%20Ime%20Sampson%20Umanah%20%20v%20Obong%20(ARC.)%20Victor%20Attah%20&%20Ors.htm which was last visited on 07/04/08.

[37]

they are aggrieved. We shall be discussing pecuniary interests later on in this course material.

In cases of non-pecuniary bias, it appears that what is paramount is the propensity of the fact, in its appearance to the reasonable man, to becloud and taint the judgment of a judicial arbiter.[38] Thus all forms of non-pecuniary bias, be they policy bias or bias formed on the basis of personal animosity, family or professional relationship, will be measured against the yardstick of its reasonable likelihood to taint a judgment.[39]

Thus if it would appear to a reasonable man that the fact in issue has the propensity to leave this impression in the mind of the arbiter, the form of non-pecuniary bias in issue would vitiate a decision.

It follows then that a person who is a party to dispute or who acted as counsel for one of the parties may not sit in judgment over the same matter in view of the apparent likelihood that his emotions may tilt. In *Umenwa v. Umenwa & Anor*.[40] a lawyer appeared for a party in a case and on becoming a judge also sat to decide the dispute. He was held to have descended into the arena. In such

[38] *Mohammed v. Nigerian Army* [2001] 1 CHR. 470 at p. 482.
[39] *Oyelade v. Araoye* (1968) NMLR 41
[40] (1987) 4 NWLR (Pt. 67) 407

cases, the whole decision of the court is vitiated and the judgment would be void.[41]

Similarly it has been held that foreknowledge of the primary facts of a case is an aspect of bias for "where a judge has foreknowledge of the facts he does not come to the dispute with an openness of mind that would enable him to hold an even scale. Therein lies the unfairness".[42] There the court however drew the line between that situation and one in which the parties and the subject matter are different and came to the conclusion that that would not amount to a foreknowledge of the facts.

In *Oyelade v. Araoye*[43] the decision in *Obadara v. President Ibadan West District Grade B Customary Court*[44] in holding that in the rare cases where it could be proved that a decision had actually been affected by the bias of the person making it would no doubt be conclusive but that while suspicion is enough, the courts do not appear to require proof that actual bias operated on the mind of the person making the decision and that a real likelihood of bias may be shown. Similarly, Ogundere, JCA in *Bamigboye v. University of Ilorin* also observed that

[41] *Sandy V. Hotogua* (1952) 14 WACA 18.
[42] *Kenon & Ors. V. Tekam & Ors*
[43] (1968) NMLR 41.
[44] (1965) NMLR 39.

"bias is always difficult to prove save in proven cases of bribery; and that is why the law stipulates that a mere likelihood of bias suffices".

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

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

vague suspicion of whimsical, capricious and unreasonable people should not be made a standard to constitute proof of such serious complaints.[45]

2.4 Conclusion

From the above extensive study on natural justice it is concluded that, the determination whether fair hearing has been complied with depends on the facts of each case.[46] It is said that no two set of facts are the same. Each set must be examined to determine whether fair hearing has been employed or not. There is a tendency now, arising from the decision in the *Ceylon University* case[47] to include *mala fides* or bad faith on the part of the employer in the genre of interest or bias. This attitude is not entirely correct as Warrington L.J. has held:

> *My view then is that the only case in which the court can interfere with an act of a public body which is, on the face of it, regular and within its power, is when it is proved to be in fact ultra vires, and that the references in the judgments in the several cases cited in argument to bad faith, corruption, alien and irrelevant motives, collateral and indirect objects and so forth, are merely intended when properly understood, as examples of matters which, if proved to exist, might establish the ultra vires character of the act in „question. This way of describing the effect of bad faith should not be used to blur the distinction between ultra vires act done bona fide and an act on the face of it regular but which will be held to be null and void if mala fides is discovered and brought before the court.*[48]

[45] *Ojengbede V. Esan & Anor*. (2001) 8 NSCQR 461at p.471.
[46] *Orugbo V. Una & Ors* 11 NSCQR 537, 563.
[47]
[48] *Short V. Poole Corporation* (1926) Ch 66

2.5 Summary

The principles of natural justice, going by the law that it is dependent on the facts of each individual case, cover a very wide scope. The foregoing has been an attempt to prune it down to manageable limits for a better comprehension while also pointing out its pitfalls arising from ignorance of fundamental principles by litigants; and all these against the background of a nation governed under a supreme constitution as well as a common law tradition.[49]

The rationale for this is exemplified in the dictum of Blackburn, J in *R v. Rand*[50] that: It is not only of some importance, but it is of fundamental importance that justice should not only be done, but should be seen to be done. Some of the most definitive restatements of the law have been occasioned by the Supreme Court which has held in the case of *Garba v. The University of Maiduguri* that since the Chairman of the Investigating Panel which tried the appellants was the Deputy Vice Chancellor of the University and was a victim of the rampage, the necessary inference to be drawn was that there was a real likelihood of bias

[49] http://www.etudaiyeandco.com/publications/the_doctrine_of_natural_justice_as_an_arm_of_the_rule_of_law_in_nigeria.pdf
[50] (1866) LR 1 QB 230.

since the Deputy Vice Chancellor was thus a witness and a judge at the same time.

2.6 Tutor Marked Assignments

1. Bias may not be a pillar in the doctrine of natural justice but it has a definite role. Discus?

2.7 Further readings

- *Legal Practitioners Disciplinary Committee v. Fawehinmi (1985) 2 NWLR 300 (pt 7) S.C.;*
- *Federal Civil Service Commission v. Laoye (1989) 2NWLR 652 SC (pt 106);*
- *BSCSC v. Buzugbe (1984) All NLR 372 S.C.;*
- *Olue v. Enenwali (1976) 1 NWLR 44;*
- *Obadara v. President Ibadan Great B Customary Court (1964) All WLR 31.*
- Bernard Schwartz, Administrative Law (Toronto: Little, Brown & Co., 1976).

- David Scott & Alexandra Felix, Principles of Administrative Law (Great Britain: Cavendish Publishing Ltd, 1997).
- Foulke's Administrative Law (London: Butterworths, 6th Edition, 1986).
- H.W.R. Wade, Administrative Law (Oxford: Clarendon Press, 3rd Edition, 1971).

Module 4

PROCEDURAL UNFAIRNESS

Unit 1

1.1 Introduction

Considering our previous study of merit review and on the back drop of your knowledge of natural justice we shall study procedural unfairness. Remember that administrative law deals mainly with the procedure and manner in which a decision is reached by an administrative organ. In what manner therefore can a decision be vacated for being procedurally unfair?

1.2 Objective

The aim of this module is for you to have a better understanding of an administrative procedure is and what irregularities could make a procedure an unfair one.

1.3 Main Content

1.3.1 What is Procedural Fairness?

Procedural fairness comprises two broad common law rules designed to ensure fair procedures are followed in the making of decisions which affect the rights, obligations or legitimate expectations of individuals. The two rules or limbs, expressed in traditional terms, are:

1 The decision maker must afford a "hearing" in appropriate circumstances; and

2 The decision maker should not be biased or seen to be biased.

Any breach of the rules of procedural fairness is a very serious matter. It is described as a "jurisdictional error". If procedural fairness is denied, the decision can be said to be a decision not lawfully made, and is not a decision in law or in fact (eg: *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 76 ALJR 598). It will be as if the decision was never made.

The right to a “hearing” is a technical expression in administrative law.[51] It means many things, depending upon the circumstances of the particular case, the nature of the inquiry; the subject matter; and the rules under which the decision maker is acting.

"The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention.

The critical question in most cases is not whether the principles of natural justice apply. It is: what does the duty to act fairly require in the circumstances of the particular case? In this respect the expression "procedural fairness" more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case. The statutory power must be exercised fairly, i.e, in accordance with procedures that are fair to the individual considered in the light of the statutory requirements, the interests of the individual and the interests and purposes, whether public or

[51] (see: *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 77 ALJR 699 at [105]).

private, which the statute seeks to advance or protect or permits to be taken into account as legitimate considerations."

Major aspects of the hearing rule that might affect an administrative decision are set out in the following propositions:

1. A person should have matters adverse to that person or that person's application put to that person for comment or evidence before an adverse decision is made.

2. A decision-maker should not make a decision having had regard to undisclosed material being adverse information that was credible, relevant and significant to the decision to be made without first putting that material to the relevant person.

3. A decision-maker should bring to a person's attention the critical issue or factor on which the decision is likely to turn so that the person may have an opportunity to deal with it.

4. A decision-maker should not mislead a party as to the importance of a factor to the decision-maker (either actively or impliedly).

5. A public decision-maker should have regard to any promise (express or implied) or regular practice adopted by the decision-maker in the making of

particular decisions when a failure to do so may result in some unfairness in the procedure now adopted

6. A public decision-maker should ordinarily continue to comply with any procedural promise or representation (express or implied) or regular practice unless the proposed change is first put to the affected person and an opportunity for that person to put a response as to that proposed change is allowed.

7. In inquiries or in matters where there is no fixed issue, a public decision-maker should first notify affected parties of defined relevant issues in respect of which there is a possibility that he or she might make findings adverse to them and permit an opportunity for them to respond the most troublesome aspect of the hearing rule is determining what is its content.

Some examples of the decided content of the hearing rule in the legal cases (depending on the circumstances of the particular cases) are as follows:

1 The right to receive notice of a hearing;

2 The right to receive notice of matters to be dealt with at a hearing;

3 The right to legal representation;

4 The right to an interpreter;

5 The right to make submissions (written or oral); call evidence and/or cross examine witnesses; and

6 The right to receive a transcript and/or other evidence.

1.3.1 Why Accord Procedural Fairness?

The common law requires administrative decision-makers to accord procedural fairness to applicants or parties at all times. According to Mark A. Robinson If administrative decision-makers do not accord it to the applicant or to the parties, their decision or parts of it (if it is severable) will be liable to be rejected by the court in any judicial review court action.

Further, an administrative decision may be declared by a court to be void (or made without power or unlawfully made) under the principles of judicial review of administrative decisions in administrative law. Procedural fairness, which is a classic administrative law ground of review of government decisions.

1.3.2 Bias

The bias rule of procedural fairness is that a decision maker must not be personally biased (actual bias) or be seen by an informed observer to be biased

in any way in the hearing of or dealing with a matter during the course of making of a decision.

The rules in this area are broadly the same in respect of courts, tribunals and for executive decision makers. The apprehension of bias principle has its justification in the concept that judges, tribunal and statutory decision-makers should be independent and impartial. The essential question is whether there is a *possibility* (real and not remote) and not a *probability* that a decision-maker *might* not bring an impartial mind to the question to be determined. The question is answered by reference to whether the fair-minded lay observer *might* reasonably apprehend that the decision-maker *might* not bring an impartial mind to the resolution of the issue to be decided.

Bias may arise from:

- interest - pecuniary or proprietary;
- conduct;
- association;
- extraneous information; or
- from some other circumstance.

Regardless of the substantive outcome of a government investigation, it is important that parties involved know that the process used to reach that outcome was fair. The two concerns—substance and process—go hand in hand. Complaints about process lead to concern that substantive results are flawed, whereas a fair, predictable, and transparent process bolsters the legitimacy of the substantive outcome.

Indeed, we hear complaints about process as frequently as we hear complaints about substantive outcomes. Moreover, the symbolism of events, like the ability to meet with final decision makers, should not be underestimated. The ability to present one's case and have a fair hearing before the decision to bring an action ensures that the government decision maker knows all the arguments against an action, while simultaneously providing the party with the confidence that all relevant arguments have been considered.

1.3 Conclusion

From the foregoing, we can see that procedural fairness has a great flavour of natural justice. Importantly, it reiterates the *dictum* of Lord Dening that justice must not only be done but must also to be seen to be done. Consequently, all

administrative decisions and actions must all work in tandem to ensure that the process and outcome of decisions are seen to be a fair one in all ramifications.

1.4 Summary

Procedural unfairness occurs when a court, tribunal or administrative authorities adopts a procedure which ensures that one side or party is put at a disadvantage. The commonest form is where one party is heard and the other party deprived the opportunity of a hearing or where there is no procedural equality between the parties.

In examining procedural fairness, one must bear in mind the concept of "practical justice" as introduced by the Chief Justice Gleeson in the High Court case of *Re Minister for Immigration and Multicultural Affairs;*[52] where, in discussing the manner in which procedural fairness cases are approached by the courts, he said: "Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice."

The kinds of practical injustices that may occur in the context of the work of an administrative decision-maker are numerous. Most of them are unforeseen. By

[52] *Ex parte Lam* [2003] HCA 6.

spending some time and considering some of them and some appropriate responses, administrators might be able to minimise their exposure to having their determinations rejected.

Finally, a flexible obligation to adopt fair procedure that is appropriate and adapts to the circumstance of the particular case is important.

1.5 Tutor Marked Assignment

1. What is procedural fairness?

2. What is the basis of Procedural Fairness?

3. Discuss the various grounds for determining that an administrative procedure is fair?

1.6 Further Readings

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

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

3. See the various footnotes of internet resources.

Unit 2

2.1 Introduction

In this unit you shall learn the concept of procedural justice and the various models. Do bear in mind that this concept finds greater expression in other climes outside Nigeria. However, because of the impact of globalisation, it is important that you are abreast with this concept.

2.2 Objective

The aim of studying this concept is to equip with knowledge of practices outside the Nigeria Legal System which can still be applied in Nigeria. However, you will learn that the concept is the same with the concept of natural justice that you have already learnt.

2.3 Main Content

Procedural justice refers to the idea of fairness in the processes that resolves disputes and allocates resources. Procedural justice is related to discussions of the administration of justice and legal proceedings. This sense of procedural

justice is connected to due process (U.S.), fundamental justice (Canada), procedural fairness (Australia) and natural justice (other Common law jurisdictions), but the idea of procedural justice can also be applied to non legal contexts in which some process is employed to resolve conflict or divide benefits or burdens.

Procedural justice concerns the fairness and the transparency of the processes by which decisions are made, and may be contrasted with distributive justice (fairness in the distribution of rights or resources), and retributive justice (fairness in the rectification of wrongs). Hearing all parties before a decision is made is one step which would be considered appropriate to be taken in order that a process may then be characterised as procedurally fair. Some theories of procedural justice hold that fair procedure leads to equitable outcomes, even if the requirements of distributive or corrective justice are not met.

In A Theory of Justice, the philosopher John Rawls distinguished three ideas of procedural justice:[1]

1. *Perfect procedural justice* has two characteristics: (1) an independent criterion for what constitutes a fair or just outcome of the procedure, and (2) a procedure that guarantees that the fair outcome will be achieved.
2. *Imperfect procedural justice* shares the first characteristic of perfect procedural justice--there is an independent criterion for a fair outcome--but no method that guarantees that the fair outcome will be achieved.
3. *Pure procedural justice* describes situations in which there is no criterion for what constitutes a just outcome other than the procedure itself.

The theory of procedural justice is controversial, with a variety of views about what makes a procedure fair. These views tend to fall into three main families, which can be called the outcomes model, the balancing model, and the participation model.

2.3.1 The outcomes model

The idea of the outcomes model of procedural justice is that the fairness of process depends on the procedure producing correct outcomes. For example, if the procedure is a criminal trial, then the correct outcome would be conviction of the guilty and exonerating the innocent. If the procedure were a legislative

process, then the procedure would be fair to the extent that it produced good legislation and unfair to the extent that it produced bad legislation.

This has many limitations. Principally, if two procedures produced equivalent outcomes, then they are equally just according to this model. However, as the next two sections explain, there are other features about a procedure that make it just or unjust. For example, many would argue that a benevolent dictatorship is not (as) just as a democratic state (even if they have similar outcomes).

2.3.2 The balancing model

Some procedures are costly. The idea of the balancing model is that a fair procedure is one which reflects a fair balance between the costs of the procedure and the benefits that it produces. Thus, the balancing approach to procedural fairness might in some circumstances be prepared to tolerate or accept false positive verdicts in order to avoid unwanted costs (political) associated with the administration of criminal process.

2.3.3 The participation model

The idea of the participation model is that a fair procedure is one that affords those who are affected by an opportunity to participate in the making of the decision. In the context of a trial, for example, the participation model would require that the defendant be afforded an opportunity to be present at the trial, to put on evidence, cross examination witnesses, and so forth.

2.4 SUBSTANTIVE UNFAIRNES

This is where a court, tribunal or administrative authority approaches its adjudicatory functions with a mind closed or a mind influenced by factors extraneous to its proper role as an umpire.

In the Court of Appeal case of *Eriobuma v. Obiorah*[53] Tobi JCA as he then was said, it was stated that "in a charge of bias, the integrity, honesty or formality of purpose and the judges traditional role of holding the balance in the matter a question he is branded or seen as one whom leaves his exalted, respected and traditional arena of impartiality to descend unfairly on one of the parties outside all known canons of judicial discretion". In addition, the respected jurist went

[53] (1988) 8NWLR 622-629.

on to state that; 'the judge is said to have a particular interest, a proprietary interest which cannot be justified on the scale of justice as it parades that interest recklessly and parochially in the adjudication process to the detriment of the party he hates and to the obvious advantage of the party he likes. The judge at that level is incapable of rational thinking and therefore rational judgment. The conduct of the judge invariably and unequivocally points to the one trend and it is that you will give judgment to the party he favors at all cost, come day or night, come rain or sunshine. Such is the terrible state of mind of the biased judge or one who is likely to be biased. The law recognizes a number of causes of bias. I should confine myself to only one and that is the one relevant to this appeal, it is foreknowing or previous knowledge of a case. This arises when the judge at one time or the other had done something in the matter to the extent that it cannot be said to be a completely neutral person or stranger to it'. *See Oyelade v. Araonye (1968) NMLR 46; also Kujore & ors v. Otubanjo (1974)9 NSCC 424. In Oni v. Odeyinka & ors (1998) 8NWLR 425 (pt 562).*

2.5 Conclusion

Like all social phenomenon there is no one model that is advocated. Primarily, it should be noted that the main premise of whatever model that is adopted the main focus will be to ensure fairness and equity.

2.6 Summary

We have learnt procedural justice and substantive unfairness. We have also learnt that a judge or someone in a decision taking position administratively must ensure he does not show an unfair attitude in discharging his responsibility. We however, note that the theory of procedural justice is controversial, with a variety of views about what makes a procedure fair. These views tend to fall into three main families, which can be called the outcomes model, the balancing model, and the participation model. The idea of the outcomes model of procedural justice is that the fairness of process depends on the procedure producing correct outcomes.

2.7 Tutor Marked Assignment

1. Discuss the various outcome models.
2. Which outcome model is the best model in your view and why?

3. What is the relationship between procedural justice and natural justice?

2.8 Further Readings

1. Refer to footnotes and internet sources.
2. Read the cited judicial authorities.

Module 5

Circumstances That Should Disqualify a Judge, Magistrate, Tribunal, Administrator or Person Exercising Quasi Judicial Function from Adjudicating.

Unit 1

1.1 Introduction

At this point of our study of administrative law, you recall that we have studied natural justice, judicial remedies and procedural fairness cum procedural justice. You must therefore address your mind to the factors that may trigger off the previous studies. Based on this, we are studying in this module

circumstances that should possibly disqualify a person from getting involved in administrative or judicial decisions.

1.2 Objective

The objective of this module is to ensure you are able to identify with ease circumstances that should disqualify an administrative or judicial officer from getting involved in a decision making process.

1.3 Main Content

The circumstances or interest that may disqualify a person from adjudicating a matter are many and cannot be exhaustively enumerated. They may differ from one case or matter to another. However they include the following:

I. Pecuniary interest:

   Dims v. Grand Junction Canal Company (supra);

II. Relationship with a party or parties such as kingship, friendship, family, employment, association etc.

   - Deduwa v. Okolo Dudu (1976) 9-10, SC 329;
   - Abiola v. FRN (1995) 7NWLR 1, SC (pt. 405);

- Secretary Iwo Central A.G v. Abia (2000) 8 NWLR 115 SC (pt. 667);
- Akuh v. Abuh (1988)8nwlr 696 (pt. 85).

- iii. Previous participation, decision or involvement in a matter, see Fri-Obuna v. Obiorah (1999) 8NWLR 616 (PT. 628-629); Obudurah v. Ibadan, grade & customary (supra); Garba v. University of Maiduguri.[54]

iv. Foreknowledge of facts of a case;

v. Hobnobbing with a party;

vi. Unwarranted verbal attack on a party;

vii. Feeling biased, partisan or on becoming comments in favour of a party.

viii. Descending into the arena in power of one side;

ix. Combining the function of a judge with that of a prosecutor with another party: Garba v. University of Maiduguri supra; NBA Disciplinary Committee v. Fawehemi.

[54] (1986)1NWLR 550 SC (pt. 18).

x. Inhibiting or denying a party from effectively stating his case: Okoduwa v. State (1988) 2NWLR 333 SC (PT 176); Olaye v. MBPT (1997) 5NWLR 5506 CA.

xi. Personal attitude, his hostility, one side inclination of the judge other interests or circumstances which the inference or suspicion of a real likelihood of bias may be drawn.

1.3.2 Pecuniary interest

A conflict of interest may be: actual, that is your personal interest actually affects the way you behave in your role as councillor; perceived, it might appear to others that your personal interest could affect the way you behave in your role as councillor; potential, your personal interest could affect the way you behave in the future.

Consequently, pecuniary interest could be a financial interest or a financial benefit or disadvantage indirect pecuniary interest - where a person with whom you have a close relationship has a financial interest non-pecuniary bias - a predisposition towards a certain outcome based on some emotional or other interest.

Examples of "pecuniary interests" include: increased or decreased sales or profits for a business - or something that might lead to this, such as a decrease in competition or an increase in the number of customers employment benefits (offers of paid employment, increases in salary, commissions, bonus payments, promotions) provision of labour or services loan of a vehicle increased or decreased value of a property free advertising. You may also have a pecuniary interest because a "close associate" has a pecuniary interest in the matter before council or a council committee.

If you have a pecuniary interest, you are in breach of the legislation if you participate in voting, even if you vote against your own interest. Your participation in the process is a breach of the legislation even if the outcome does not appear to benefit you as an individual. The purpose of the legislation is to protect the validity of the *process* of council decision-making, not the *outcome*. There is a risk you could (or it might appear that you could) influence others to decide in a particular way that favours you, even though you do not personally vote in your own interest. It does not matter whether you *actually* acted in the best interests of the community and not your own personal interest. What it

important is that there is no risk of it *appearing* as though you have acted in your own interest.[55]

1.4 Conclusion

Any form of interest has the capability of crippling an administrative decision or action. Judicial decisions also are not spared of the rule of interest. It is trite to state that a judge must not descend into the arena least he gets his vision beclouded by the dust he stirs.

Consequently, a delegate must as a matter of integrity disclose any interest in an action and the same goes for an administrative officer, judicial officer or even the legislative officer.

1.5 Summary

You have a pecuniary interest when, if a matter before council, or any other committee, is decided in a particular way you: will gain, lose or save money, gain a financial advantage, or suffer a financial disadvantage; could be expected to gain, lose or save money, gain a financial advantage, or suffer a financial

[55] http://www.dpac.tas.gov.au/__data/assets/pdf_file/0004/56722/Pecuniary_interest_info_sheet.pdf

disadvantage; or are reasonably likely to gain or lose money, gain a financial advantage, or suffer a financial disadvantage.

Pecuniary interest could be a financial interest or a financial benefit or disadvantage indirect pecuniary interest - where a person with whom you have a close relationship has a financial interest non-pecuniary bias - a predisposition towards a certain outcome based on some emotional or other interest.

1.5 Tutor marked Assignment

1. What is pecuniary interest?
2. What are examples of pecuniary interest?
3. Where an administrative officer is related to staff facing a disciplinary action in an organisation will he be stopped from participating in the panel? Discuss with the aid of decided cases.

1.6 Further Readings

It is important that you read the cases cited in this module to enable you appreciate various circumstances in which interest can arise and also be challenged.

Module 6

Action by and against state, Corporation including local government councils.

Unit 1

1.1 Introduction

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

1.2 Objective

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

1.3 Main Content

The Local Governments

In the light of the modern age, man has come to realize the beauty and efficiency that stems from attention, commitment, concern, communication, close supervision and a reasonable degree of diligence. This is no farfetched reality as

it applies to humanity at all levels: employment, academics, businesses, religion, relationships and operation of the government. Nigeria, having taken cue, has three tiers of government: Federal, States and Local Governments. The Federal Government operating at the national level; the State Government operates at the state level; the Local government operating at the grass root level- closest to the citizens of the country in their locality. It is expected that these three tiers of government work together for the good of all the citizens and smooth administration of Nigeria

1.3.1 The Origin of Local Government System in Nigeria

The Local government is the third tier of government. It is also referred to as the grass root government because it is the government closest to the people . Grass root administration flashed its first glint in Nigeria on January 1, 1900 with the proclamation of the Protectorate of Northern Nigeria by the British Government. It was known as Indirect Rule System. Under this system a large province would be administered by a Resident, assisted by District officers with civil servants, emirs, village heads and others chosen from a small privileged

group who were answerable to their superiors as regards their respective areas of authority.

As a result of the success recorded by the indirect rule system in the north, it was equally implemented in the southern provinces after the amalgamation.[56] The Western Province was not left out of this system, as it obliged very well too. Initially, the implementation of the indirect rule system in the Eastern Province did not follow precedent,[57] but was eventually, alongside all parts of the country in total acceptance and under the administration of the Indirect Rule System.

1.4 Conclusion

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

1.5 Summary

[56] The bringing together of the Northern and Southern Protectorates to form Nigeria in 1914.
[57] This accrued to the fact that the traditional tribal structures of the Eastern Provinces were less suitd to the system of Indirect rule- The traditonal tribal structures of Emirs and Obas, as it applied in the North and West repectively, were not exactly the same in the East.

Local governance found its way into the amalgamated Nigeria with its success in the northern part of the country. It is also the closet strata of governance to the masses with the Federal and State government operating at higher levels.

1.5 Tutor Marked Assignment

1. Give a history of local government in Nigeria.

Unit 2

Local Government Reform in Nigeria

2.1 Introduction

With the knowledge of the advent of local government in Nigeria, we take note that since independence the structure has changed tremendously. In this unit we learn the various reforms that the system has undergone in Nigeria. We shall also discuss the impact of the military regime on local government in Nigeria.

2.2 Objective

Our objective here is for you to take note of the various reforms that the local government structure of Nigeria has experienced over time.

2.3 Main Content

The indirect Rule system led to the establishment of Native Authorities between 1890 and 1930. The main purpose of this was to maintain a degree of law and order. The first native authority ordinance regarded traditional rulers as native authority. This was effortlessly done in the North but in the South pointing out who these traditional rulers were posed a problem. This resulted in the first reforms in the 1930s and 1940s leading to the establishment of chief-in-council and chief-and-council in place of sole native authorities. The Chief-in-council comprised of chiefs and members of council. The chief presided at all meetings and was at liberty to either uphold the majority opinion of the council or act with discretion, taking whatever action he deemed fit and informing the Governor of the region subsequently. On the other hand, in the Chief-and – council, the chief was obliged to act in accordance with the advice of the council. In this regard, representatives of British trading interests and missionaries were appointed into the native authorities. The process of appointment of nominated members restrained nationalists from being appointed to serve on the councils. This grounded the necessity for further reforms in the native authorities.

Between 1950 and 1955, Lagos and the former Eastern and Western States saw the first largely elected government council based on the British Whitehall

model. In the then Western regions and Lagos, the traditional rulers constituted not more than 25% of most council. But then, the changes in the North were at a less speedy rate.

At this period the legal frame work for local governement was provided by the Eastern Region Local Government Ordinance of 1950, the Western Region Local Government Law of 1952 and the 1954 Native Authority Law in Northern Nigeria. With this the councils were bestowed with a wider range of responsibilities including primary education, police, judiciary, health, etc. This was in accordance with the implementation of the colonial government's ten year welfare and development plan (1946-1956). Added to their responsibility, the councils also enjoyed, to a large extent, a measure of autonomy in financial, personnel and general administrative matters. It may thus be inferred that the duration of the 1950s served as pupilage for councils in modern local government throughout Nigeria.

Between 1960 and 1966 the responsibilities of the local authorities was reduced. The local government (Amendment) law 1960, in the Western region, abolished the councils' power to levy education and general rates on the basis of need.

There was a high rate of default in the payment of property rates, in Lagos, including government institutions, which slashed the revenue of local councils. The situation in the East was not a far cry from this up until the civil war 1967. The North saw gradual changes in the structure of councils as the number of elected or appointed non-traditional office holders becoming members of local authorities increased. As a result, local authorities had smooth operation in carrying out their duties, with some measure of success for more tasking operations such as primary education. [58]

With collaborative effort, the state government and federal government began some extensive reform of local government. The aim of this reform was, 'to make appropriate services and development activities responsive to local wishes and initiatives by devolving or delegating them to local representative bodies; to facilitate the exercise of democratic self-government close to the grass roots of our society and to encourage initiative and leadership potential; mobilisation of human material resources through the involvement of members of the public in their local development, and , to provide a two-way channel of

[58] None the less, some state governments made some changes in the structure of their councils in 1969 and 1971.

communication between local communities and government (both State and Federal).'[59]

As a result of this, a uniform system of local government was developed for Nigeria. The 1976 reforms, defined local government as, 'the third tier of government operating within a common institutional framework with defined functions and responsibilities.'[60] Incidental to this, the local government gets statutory grants from Federal and State Government, and is expected to bring development to the rural areas. 'According to the 1976 reform, 75 percent of members of the council are to be elected through the secret ballot on a no-party basis under the direct and indirect systems of election. The remaining 25 percent are to be nominated by the State government. Following the reform, the Federal Government in 1977, allocated 5 percent of federally collected revenue to local government.'[61]

The development function of the local government was reaffirmed in the Section 7(3) of the 1979 Constitution, and by the provisions of Section 7(7) of the same

[59] Otive Ogbuzor, 'Local Government Reform and Constitutional Review in Nigeria'
[60] ibid
[61] ibid

constitution, the local government councils were to be democratically elected.[62] 'During Babangida regime (1984-1992) there were certain reforms aimed at ensuring local government autonomy. These included the abolition of the Ministry of Local Government; establishment of executive and legislative arms in local councils; and direct allocation to local government without passing through State government. The regime also increased local government statutory allocation from 15 percent to 20 percent with effect from 1992.'[63]

2.4 Conclusion

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

2.5 Summary

[62]' Unfortunately, during the Alhaji Shehu Shagari regime (1979-1983), the constitutional provisions were neglected. No elections were held and sole administrators were appointed. The Mohammadu Buhari regime (1983-1984) continued with the system of sole administrators.'

[63] Some state governments have been known to have hijacked and diverted Federal government's allocation to local governments. This is why one of the features of the reform during Ibrahim Babangida's regime was to make allocations directly to local governments without going through state government.

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

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

Unit 3

Local Government and the Military Regime and the 1999 Constitution

3.1 Introduction

With the birth of civil war in Nigeria, there descended long years of military rule in the country. The military regimes dealt a huge blow to the development of the third tier of government due to its lack of respect for the rule of law and constitutionality.

In this final unit, we learn how the local governments faired under the military and currently under the constitution.

3.2 Objective

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

3.3 Main Content

Undeniably, Nigeria's story can never be completely told without the unapologetic mention of the military. As regards this, the local government is not left out. Following the military's interference with Nigeria's political operation in 1966, all the local government councils were abolished and sole

administrators[64] were appointed. None the less, from the military regime stemmed a major reform of the local government system in Nigeria, in 1976, such as the stipulation that 25% of the members of the council are to be nominated by the State Military Governor. Furthermore, the election of the chairman of the council would be by ratification of the State Governor.[65]

3.3.1 Local Government Administration under the 1999 Constitution of the Federal Republic of Nigeria

Local government administration is recognized under the 1999 Constitution.[66] Consequently, by virtue of Nigeria operating a democratic system of government and the existence of the 1999 Constitution there is a statutory obligation ' that there be periodic elections into the councils of these local governments as is the case with the federal and states' political institutions. This becomes imperative as local governments are seen as training grounds for higher level of political responsibilities in the federation'. [67]

[64] This was purely autocratic and violated the principle and implementation and participatory nature of democracy.
[65] This led the basis of the interference in the conduct of the affairs of the local government by civilian and military Governors till date.
[66] The system of local government by democratically elected government councils is under this constitution guaranteed, and accordingly, the government of every state shall, subject to the Section 8 of this constitution, ensure their existence under a law which provides for the establishment, structure, composition, finance and functions of such councils.
[67] Kule Awotokun, 'Local Government Administration under the 1999 Constitution in Nigeria'

Today it is the status quo that, 'The local government is the third tier of the administrative structure in Nigeria. There are 774 local government areas (LGAs) in the country. The functions of Local Governments, as spelt out in the Constitution, are as follows:

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

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

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

d. Licensing of bicycles, trucks (other than mechanically propelled trucks), canoes, wheel barrows and carts;

e. Establishment, maintenance and regulation of markets, motor parks and public conveniences;

f. Construction and maintenance of roads, streets, drains and other public highways, parks, open spaces, or such pub- lic facilities as may be prescribed from time to time by the House of Assembly of a State;

g. Naming of roads 'and streets and numbering of houses;

h. Provision and maintenance Of public conveniences and refuse disposal;

i. Registration of births, deaths and marriages;

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

k. Control and regulation of:

i. out-door advertising and hoarding,

ii. movement and keeping of pets of ail descriptions,

iii. shops and kiosks, .

iv. restaurants and other places for sale of food to the public, and

v. laundries.

The local government councils also work hand- in-hand with State governments on issues such as:

a. the provision and maintenance of primary education;

b. the development of agriculture and natural resources, other than the exploitation of minerals, and

c the provision and maintenance of health services.

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

The Chairman is normally elected, but can, under special circumstances, also be appointed. He/she supervises the activities of the local government and presides over all meetings of the Council.

All members are enjoined by law to meet, as far as practicable, the aspirations of the people who elect them. Committees, focusing on specific issues, play very

important roles in the day-to-day business of the Council. They assist the Councils in decision-making and are usually required to report their discussions to the Councils.

A Local Government Council is the pivot of socio-economic planning and development in its area of authority. Being also the tier of government closest to the people, it is considered a most important facilitator of economic and social development at the grassroots.'[68]

3.4 Conclusion

The local governance model is one to be encouraged. However, the situation in Nigeria has suffered tremendous set back especially during the military rule. Sadly, while the law provides for an excellent position on the modus of running local governance its implementation is at its lowest ebb.

You may recall that in the current democratic dispensation some states are yet to conduct elections into the local government. What is your reaction to this position?

[68] http://www.onlinenigeria.com/links/adv.asp?blurb=143 (August 10, 2011)

3.5 Summary

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

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

3.6 Tutor Marked Assignment

Critically analyse the local government system under the military regimes in Nigeria and the current democratic dispensation.

3.7 Further Readings

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