



NATIONAL OPEN UNIVERSITY OF NIGERIA

SCHOOL OF LAW

COURSE CODE: LAW 443

COURSE TITLE: ADMINISTRATIVE LAW I

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COURSE GUIDE

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Introduction

This **Course – Law 443 (Administrative Law 1)** – is one of the Law Courses you are required to take in order to obtain your LL.B. degree. Building on your knowledge of the workings of the three arms of government – the legislature, the executive and the judiciary – the **Course** will acquaint and arm you with the legal regime governing the activities of governmental agencies – ministries, departments, and parastatals – in their delivery of goods and services to the citizens and other persons in Nigeria. The **Course** will demonstrate that the relationship amongst the tripod or trilogy of legislature, executive and judiciary is not all there is to law-making, law execution and law enforcement. But, much more than that, the **Course** will introduce to you the legal regime that authorizes or permits these governmental agencies whether at the Federal, State or Local government levels to make and enforce rules, regulations, bye-laws and policies in their various spheres of influence to the benefit or detriment of members of the public.

The **Course** comprises 16 study units, taking into consideration the convenience of students. Within the scope of its First Semester coverage, the **Course** promises to take you through the theory and practice of the structures of administrative agencies.

What You Will Learn in this Course

This **Course** is a 400 level course for students who are enrolled for the LL.B. degree programme. It is equally useful for persons who, though not interested in obtaining a degree in law, desire to know the rights, functions, responsibilities and liabilities of governmental agencies in their frequent or routine contact with members of the public.

In **Law 443**, you will learn the ambit of administrative law including, *inter alia*, its relationship with constitutional law, functions, utility, and classification. Also, you will be familiarized with the concept of the **rule of law**. Against the background of executive lawlessness and wanton disobedience of court orders by pre-2007 Nigerian leadership, it is on record that the present government – formerly under the rulership of late President Musa Yaradua but now under the headship of President Goodluck Jonathan – prides itself on the observance of the “rule of law.” But what the doctrine is really about in theory and practice would be fully examined. Also within your learning purview is the doctrine of **separation of powers**. You will learn the myth or reality separateness of the three arms of government – the legislature, the executive and the judiciary – and, most important, its manifestation in the Constitution of the Federal Republic of Nigeria (CFRN) 1999. Last but not least, you will learn the contours of delegated legislation. In specific terms, you will realize that the laws, rules and regulations that we are obliged to obey do not all emanate from the legislative arm of government but that governmental agencies are active participants in law-making. Note that in the course of our journey through the **Course**, we shall strive to roll back the frontiers of our ignorance and prejudices regarding public administration.

Having come this far in your pursuit of LL.B. degree, you need no special reminder as to the importance of cases as a source of authority in legal discourse. But, for emphasis sake, you have to prepare to read and digest cluster of cases especially landmark cases and cases that are elucidatory of previously unsettled issues of law. **Course Aims**

Within the scope of this First Semester, **Law 443** aims at equipping students with the basic knowledge of administrative law. In other words, it will expose the student to the workings of governmental machinery in the implementation of laws, rules, regulations, bye-laws and even regulations. More specifically, the aims of the **Course** include apprising the student of the knowledge of:

- (a) The scope and nature of administrative law;
- (b) Governmental agencies and their functions;
- (c) The powers and procedures of administrative agencies;
- (d) Legal concepts such as *ultra vires*, *intra vires*, excess of authority, etc; (e) Judicial interpretation of administrative acts;

Course Objectives

Upon successfully completing this Course, you should be capable of:

- (a) Knowing the relationship between administrative law and constitutional law;
- (b) Realizing the implications of classifying administrative acts into legislative, executive, judicial and quasi judicial;
- (c) Understanding what power can or cannot be delegated;
- (d) Assessing the effectiveness of extant administrative apparatus in Nigeria;
- (e) Contributing to the contemporary debate as to the need for revolutionary overhaul of the administrative machinery of Nigeria.

- UNIT 1** **Scope of Administrative Law**
- UNIT 2** **Administrative and Constitutional law distinguished**
- UNIT 3** **Administrative agencies**
- UNIT 4** **Classification of administrative powers**

UNIT 1 SCOPE OF ADMINISTRATIVE LAW

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main content
 - 3.1 Scope of Administrative law
 - 3.2 Definitions of Administrative law
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1.0 INTRODUCTION

Administrative law is that branch of the law that developed in response to the socio-economic functions of the State and the increased powers of the government. As the State developed, the relationship between inter-governmental agencies became complex; there was therefore the need to regulate the relationship as their complexity increased – a law that would regulate the relationship of the different agencies as well as act as checks on the exercise of powers of these governmental agencies; and also to defend the rights of citizens from governmental

Administrative law is a branch of public law. Public law is the branch of law regulating the relationship between the citizen and the State. Administrative law is a public law category in the sense that it deals with the intercourse between governmental institutions on the one hand and private individuals or corporations on the other. Because of the involvement of the modern State in activities hitherto the exclusive domain of non-governmental actors, there has been the need for governments to establish many agencies that is, ministries, parastatals, bureaus, departments, etc for the actualization and implementation of governmental projects

and programmes.

It is also a study of governance; congress or parliament creates authority, the President enforces that authority and the courts confine or discipline the exercise of that authority. Thus, the starting point for many administrative law cases is an act of congress or parliament that allows the agency to function.

For you to understand administrative law, it is essential that you have a broad idea of the nature and scope of administrative law

2.0 OBJECTIVES

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

- ❖ Define or describe the term administrative law;
- ❖ In your own words, analyze the nature and character of administrative law;
- ❖ Explain the relationship between administrators and citizens; and,
- ❖ Demonstrate the history and development of administrative law.

3.0 MAIN CONTENT

3.1 DEFINITION OF ADMINISTRATIVE LAW

It is indeed difficult to evolve a scientific, precise and satisfactory definition of administrative law. Many jurists have made attempts to define it, but none of the definitions has completely demarcated the nature, scope and content of the subject. Either the definitions are too broad, and include much more than necessary or they are too narrow and do not include all the essential ingredients.

Like many legal terms, 'administrative law' does not possess a universally acceptable definition. Therefore, each definition reflects the orientation of the definer. Nonetheless, several attempts have been made to define or, at least, describe the term. It is our intention to consider the various definitions that have been offered by scholars with a view to our abstracting the features common to them

Ivor Jennings defines administrative law as:

Administrative law is the law relating to the administration. It determines the organization, powers and duties of administrative authorities.

3.2 Criticisms of the definition

Even though this is perhaps, the most widely accepted definition of administrative law, it is not without its attendant criticism.

According to Griffith and Street, there are some difficulties associated with this definition. Firstly, it does not distinguish administrative law from constitutional law; secondly, the definition is seen as too wide. For the law which determines the powers and functions of administrative authorities may also deal with substantive aspect of such powers. For example, legislation relating to public health services, houses, town and country planning. But these are not included within the scope and ambit of administrative law. And thirdly, it does not include the remedies available to an aggrieved person when his rights are adversely affected by the administration.

Kenneth Culp Davis defines administrative law as follows:

“Administrative law is the law concerning the powers and procedure of administrative agencies, including, especially, the law governing judicial review of administrative action”.

According to Davis, an administrative agency is a governmental authority, other than a court and a legislature which affects the rights of private parties either through adjudication or rule-making.

This definition, though in one respect is proper as it puts emphasis on procedure followed by administrative agencies in exercise of their power, but it does not include the substantive laws made by these agencies. It has also been criticized on the ground that it does not include many non-adjudicative and yet administrative functions of administration which cannot be characterized as legislative or quasi-judicial. Also, is the fact that it puts an emphasis on the control of the administrative functions by the judiciary, but does not study other equally important controls, e.g. parliamentary control of delegated legislation, control through administrative appeals or revisions, and the like.

Administrative law is the law relating to the control of governmental power, other than the power of Parliament, and the body of general principles relating to the functioning (as opposed to structure) of public authorities: Wade & Forsyth. Its primary purpose is,

therefore, to keep the powers of government within their legal bounds so as to protect the citizen against their abuse: Wade & Forsyth

A first approximation to a definition of administrative law is to say that it is the law relating to the control of governmental power. A second approximation to a definition is:

Administrative law may be said to be the body of general principles which governs the exercise of powers and duties by public authorities.

The primary purpose of administrative law, therefore, is to keep the powers of government within their legal bounds, so as to protect the citizen against their abuse.

Professor P.A.Oluyede sees administrative law as that branch of our law which vests powers in administrative agencies, imposes certain requirements on the agencies in the exercise of the powers and provides remedies against unlawful administrative acts.

In the view of David Scott and Alexandra Felix, administrative law is broadly defined as the law which regulates the exercise of power conferred under the law upon governmental bodies. In this definition, the grant of power is not expressed but implied. One area that the above definition ignore, like Davis' definition is that the remedies invocable by persons who may be adversely affected by administrative acts. Thus, Bernard Schwartz definition of administrative law as that branch of law which controls the administrative operations of government, setting forth the powers which may be exercised by administrative agencies, laying down the principles governing the exercise of those powers, and providing legal remedies to those aggrieved by administrative actions.

It is crystal clear from the various definitions above, and as earlier pointed out, that there is no comprehensive definition of administrative law, and that it only depends on the view point of the definer.

3.3 Scope of Administrative law

The term 'administrative law' is one which has a comparatively narrow meaning. According to Freund (1911), administrative law 'has in relatively recent times gained acceptance as the best designation for the system of legal principles which set the conflicting claims for executive or administrative authorities on the one side, and of individual or private on the other.

What brought about this realization is that the exercise of power by the administration is at least of as great importance as the control of such power by the courts. An English writer expressed the view that 'administrative law should be regarded as the law relating to public administration, in the same way as commercial law consist of law relating to commerce or land.

Robson, writing in British government since 1918, feels that for the administrative lawyer to abdicate the law of public administration, leaving its development entirely to the political scientist, is to leave a great part of the law governing administration in the same wholly systematized state that the field covered.

The underlying area of what in effect is law making authority, exercised by officials, whose actions are not subject to ordinary court review, is a contemporary tendency of administrative law. The formulation and publication of executive orders and rules and regulations; hardly a measure passes congress the effective execution of which is not conditioned upon rules and regulations emanating from enforcing authorities. These administrative complements are euphemistically called 'filling in the details' of a policy set forth in statutes. But the 'details' are of the essence; they give meaning and content to vague contours. The control of banking, the professions, health and morals, in sum the manifold response of government to the forces and needs of modern society, is building up of a body of laws not written by legislatures, and of adjudications not made by courts and not subject to their revision.

A systematic scrutiny of these issues and a conscious effort toward their wise solutions are the concerns of administrative law. The broad boundaries and far reaching implications of these problems may be indicated by saying that administrative law deals with the field of legal control exercised by law in administering agencies other than courts, and the field of control exercised by courts over such agencies.

Administrative law also markedly influenced by the specific interests entrusted to a particularly administering organ, and by the characteristics – the history, the structure, the enveloping environment – of the administrative to which these interests are entrusted. Thus, 'judicial review' and 'administrative discretion' cannot be studied in isolation. The problems subsumed by 'judicial review' or 'administrative discretion' must be dealt with organically; they must be related to the implications of the particular interest that invokes a 'judicial review' or as to which 'administrative discretion is exercise.

The main object of the study of administrative law is to unravel the way in which these administrative authorities could be kept within their limits so that the discretionary powers may not be turned into arbitrary powers.

Swartz divides administrative law into three parts:-

1. The powers vested in administrative agencies;
2. The requirements imposed by law upon the exercise of these powers; and,
3. Remedies available against unlawful actions

3.3 THE GROWTH AND DEVELOPMENT OF ADMINISTRATIVE LAW

3.4 Growth and development in the U.S

It has been observed that we live in a changing world, a world of new moral concept but of outworn legal institutions. Even in the 19th century, administrative law was developing in the United States and today, it is in many phases of equal or greater importance than the judicial system developed through the common law. The causes of this new law originated in the fundamental changes which occurred throughout the past century in the social and industrial life.

Administrative law seemed to have developed from the most powerful forces – economic and social; as observed by Aristotle, the first of all causes and the principal one is necessity. The development of administrative agencies and of the law which governs them was a social necessity. If we look back to the continental U.S. of 1790, we find a nation occupied with tremendous territorial expansion – natural resources were tremendous, cheap immigrant labour flowed into the country – and mass production enormously elevated the standards of living. Demands for special regulation were made when striking abuses appeared but there was practically no sentiment for governmental control as a general principle.

Professor Dickinson has to some extent summarized the reasons for the growth of administrative law which were inherent in the legal system when he wrote:-

“The particular advantages which a system of regulation by government thus has over one of regulation by law differ in the different fields of regulation, but the different one in the matter of emphasis the respective advantages fall, with greater or less incidence, under one or more of the following heads :

- a. Regulation by government opens up a way for action to be taken in the public interest to prevent future harm where there would be no assurance that any action would be taken if the initiative were left wholly to interested individuals;

- b. It provides for action that will be prompt and preventive, rather than merely remedial, and will be based on technical knowledge which would not be available if it were taken through the ordinary course of law;
- c. It ensures that the actions taken will have regard for the interests of the general public in a way not possible if it were only the outcome of a controversy between private parties to a law suit;
- d. It permits the rules for the prevention of socially hurtful conduct to be flexible rules, based on discretion, and thus makes possible the introduction of order in fields not advantageously admitting the application of rules of a rigid and permanent character.

Professor Frankfurt summarized the reasons for the general growth of administrative law when he said:

“Administrative law is, in effect, a major response of law to the complexities of a power age. It constitutes the processes by which great activities of government – the activities that perhaps touch most people and touch them most intimately – are subdued by the reasons most appropriate to them. Most of the contemporary energy of law, it is now plain to all, runs into fresh channels. The new intervention of government into the affairs of men cannot be adjusted by the limited, litigious procedure, well enough adapted for ancient common law actions, or through hallowed instrumentalities.”

3.3.2 **Growth and development in Nigeria**

In its reception of English laws, Nigeria inherited English jurisprudence of administrative law into its domestic legal system at independence in 1960. Desirous of fast-tracking the socio-economic and political development of various societal sectors, the national leadership of the newly independent Nigeria adopted State-centred economy by which the country assumed responsibilities previously performed by private persons and corporations. The by-product of this was the necessity of creating myriad governmental agencies such as the railway corporations, marketing boards, etc.

Over and above the capacity of civilian governments, successive military regimes had a field day churning out series of agencies or tribunals. Such capacity was understandably fuelled

by the fact that the *modus operandi* of military regimes is to act with dispatch. At present, there are hundreds of governmental agencies charged with different functions including the delivery of goods and services, and the enforcement of certain rules and regulations.

The principal institution driving the machinery of administrative law is the executive branch of government. Thus, Section 5 of the Constitution of the Federal Republic of Nigeria (CFRN) 1999 provides that the executive power is vested in the President or Governor and may be exercised by him directly or through the Vice-President or Governor or Deputy Governor, Ministers or Commissioners and other officers of the public service. Such powers extend to the execution and maintenance of the CFRN and all laws made by the National Assembly and all matters with respect to which the National Assembly is competent to make laws. It is the process of executing this power that makes up the administrative arm of government and administrative law.

Therefore, the study of administrative law is the study of how the President carries out his enormous duties through the ministries, public corporations and other government agencies in accordance with the provisions of the constitution, thus maintaining the rule of law which is the president's primary function. Also, this study is important because it is through these agencies that citizens have their closest contact with government.

3.3.3 **Functions of administrative law**

A major function of administrative law is that it enables the task of government to be performed. This is made possible with the creation of administrative agencies by law, equipped with powers to carry out public policies as approved by parliament. Government makes policies and for these policies to be put into practical effect agencies are therefore created for its full implementation.

The second function of administrative law is that it governs the relations between an administrative agency and those individuals or private bodies over whose affairs the agency is entrusted with power. It is a means of control upon administrative power because it grants the individual power to challenge the action of an agency which is contrary to law or beyond the powers of the agency or which has adversely affected the individual.

A third function of administrative law is that it governs the relations between various administrative agencies. Finally, administrative law exist to ensure that public authorities take their decision in line or accordance with the law and it equally serve as a means of promoting accountability of public authorities.

3.3.4 Sources of law

Administrative law is not codified, written or well defined like the Contract, Penal Code, Criminal Code, Evidence Act or the Constitution. It is essentially an unwritten, uncodified or 'Judge-made' law. It has developed slowly in the wake of factual situations before the courts. In a welfare state, administrative authorities are called upon the perform not only executive acts, but also quasi-judicial functions. They used to deem the rights of parties and have become the fourth branch of government, a government in miniature.

The meaning of the sources of administrative law in this sense implies the origin of and places where administrative law could be derived. In this regard, we could examine the following sources:-

- a. Case law: these are pronouncements and decisions of judges on cases brought before them.
- b. Legislations and delegated legislation – as a source of law, they are the documentary laws made by Parliament in respect to administrative authorities. They are equally laws made by bodies that have been empowered by Parliament to act on its behalf. This source of administrative law has grown in importance because of the increases in the activities of government, which has gone beyond its traditional role.
- c. Books of Authority: books of learned writers on the subject equally serve as a source of administrative law.

In the U.S, the following are the sources of administrative law:

Administrative Procedure Act, Statutory Instrument Act 1946; Tribunals and Enquiries Act 1958; the Parliamentary Commission Act, 1962. In the U.K., since there is no written constitution, the bulk of administrative law is derived from the decisions delivered by the superior courts, the customary practices that are followed in the course of administration and so on.

4 CONCLUSION

In the beginning, Professor A.V. Dicey had declared administrative law to be foreign to the

British constitution, and incompatible with the rule of law, common law and constitutional liberty. Despite the influence he wielded, his theory has failed to stand the test of time. This is manifested in the fact that administrative law has become a recognized and independent course of study amongst researchers, and a decisive component in the effective governance of States around the world.

Since Nigeria got its independence in 1960, administrative law has grown by leaps and bounds especially with the government's involvement in, or even monopolization of, certain activities that were traditionally the usual domain of private individuals and corporate entities. On this score, it is important to note that, by virtue of S. 5, the CFRN 1999 gives a pride of place to administrative law.

We can conclude by saying that despite the many definitions of administrative law, its basic minimal attribute is that it governs or regulates the powers of administrative agencies, the procedures for exercising such powers and the remedies available to victims of such exercise.

5 SUMMARY

In this Unit, we considered the historical background and development of administrative law. This took us to the legal systems of the UK, the US and Nigeria. We also examined its nature, features and various definitions. We shall build on the knowledge acquired here in the subsequent Units of this Module.

6.0 TUTOR MARKED ASSIGNMENTS

1. Discuss the various definitions of administrative law and examine the scope of administrative law;
2. "The study of administrative law is not an end itself, but a means to an end". Explain with reference to the scope of administrative law.

6 FURTHER READING

1. Constitutional and Administrative law; A. W. Bradley and K. D. Ewing, 14th Edition; Longman

MODULE 1

- UNIT 1** **Scope of Administrative Law**
- UNIT 2** **Administrative and Constitutional law distinguished**
- UNIT 3** **Administrative agencies**
- UNIT 4** **Classification of administrative powers**

UNIT 2 ADMINISTRATIVE AND CONSTITUTIONAL LAW DISTINGUISHED

- 1.0** Introduction
- 2.0 Objectives
- 3.0 Main Content
 - 3.1 Relationship between Constitutional law and administrative law
 - 3.2 Administrative growth in constitutional matrix

1.0 INTRODUCTION

For a long time the similarity between constitutional law and administrative law had led to confusion between both because the latter was, until very recently, treated as an appendage of or annexure to the former. One of the reasons therefor is that the two were fused for a long time because English scholars such as Austin and Maitland hesitated to see administrative law as a body of law distinct from constitutional law.

Also A.V. Dicey's denial of the existence of administrative law in the UK in his exposition on the rule of law worsened the non-recognition of administrative law as an autonomous course of study. Moreover, this blurred relationship between administrative law and constitutional law was not helped by the fact that the UK operates an unwritten constitution.

Thus, it was usual for textbooks on constitutional law and administrative law to contain much of constitutional law and little of administrative law. However, with the recognition of administrative law as an independent course of study, the situation has since improved as we now find books that are exclusively devoted to administrative law and, more importantly, administrative law is no longer tied to the apron string of constitutional law.

2.0 OBJECTIVES

At the close of our study of this Unit, you shall be able to:

- Compare administrative law with constitutional law;
- Contrast administrative law with constitutional law.

3.0 MAIN CONTENT

Sometimes, a question is asked as to whether there is any distinction between constitutional and administrative law. Till recently, the subject of administrative law was dealt with and discussed in the books of constitutional law and no separate and independent treatment was given to it. In many definition of administrative law, it was included in constitutional law.

According to Maitland, while constitutional law deals with structure and the broader rules which regulate the functions, the details of the functions are left to administrative law.

According to Hood Phillips, 'constitutional law is concerned with the organization and functions of government at rest while administrative law is concerned with that organization and function in motion.

But the opinion of English and American authors is that the distinction between constitutional law and administrative law is one of degree, convenience and custom rather than logic and principle. It is not essential and fundamental in character.

3.1 Relationship between constitutional law and administrative law

Sometimes, a question is asked as to whether there is any distinction between constitutional law and administrative law.

Though in essence constitutional law does not differ from administrative law inasmuch as both are concerned with functions of the Government and both are a part of public law in the modern State and the sources of both are the same and they are thus inter-related and complementary to each other belonging to one and the same family. Strict demarcation, therefore, is not possible, yet there is a distinction between the two. According to Maitland, while constitutional law deals with structure and the broader rules which regulate the functions, the details of the functions are left to administrative law.

According to Hood Phillips, "Constitutional law is concerned with the organization and functions of Government at rest whilst administrative law is concerned with that organization and those functions in motion."

But the opinion of English and American authors is that the distinction between constitutional law and administrative law is one of degree, convenience and custom rather than that of logic and principle. It is not essential and fundamental in character. Keith rightly remarks: "It is

logically impossible to distinguish administrative law from constitutional law and all attempts to do so are artificial.”

Constitutional and administrative law both govern the affairs of the state. To the early English writers on administrative law, there was virtually no difference between administrative law and constitutional law. This is evident from the words of Keith: “It is logically impossible to distinguish administrative from constitutional law and all attempts to do so are artificial.” Some jurists like Felix Frankfurter even went as far as to call it “illegitimate and exotic”.

The root of all confusion in the United Kingdom is its lack of a written constitution. In a state with a written constitution, the source of constitutional law is the Constitution while the sources of administrative law include statutes, statutory instruments, precedents and customs whereas in the United Kingdom, this distinction is not very clear cut – it is in fact, quite blurred.

Due to this lack of clarity, it will be vital to observe the views of jurists and scholars on the difference between administrative law and constitutional law. According to Holland, constitutional law describes the various organs of the government at rest, while administrative law describes them in motion. Holland contends that the structure of the executive and the legislature comes within the purview of constitutional law whereas their functioning is governed by administrative law.

Jennings puts forward another view, which says that administrative law deals with the organization, functions, powers and duties of administrative authorities while constitutional law deals with the general principles relating to the organization and powers of the various organs of the State and their mutual relationships and relationship of these organs with the individual. Simply put, constitutional law lays down the fundamentals of the workings of government organs while administrative law deals with the details.

The fundamental constitutional principle, inspired by John Locke, holds that “the individual can do anything but that which is forbidden by law, and the state may do nothing but that which is authorized by law”. Administrative law is the chief method for people to hold state bodies to account. People can apply for judicial review of actions or decisions by local councils, public services or government ministries, to ensure that they comply with the law.

Whatever be the correct position, there always exist an area of overlap between constitutional law and administrative law.

3.2 **Administrative growth in constitutional matrix**

Since the English Constitution is unwritten, the impact of constitutional law upon administrative law in England is insignificant and blurred.

As Dicey observes, the rules which in other countries form part of a constitutional code are the result of the ordinary law of the land in England. As a result, whatever control the administrative authorities can be subjected to, if any, must be deduced from the ordinary law, as contained in statutes and judicial decisions.

But, in countries having written constitutions, there is an additional source of control over administrative action. In these countries there are two sources or modes of exercising judicial control over the administrative agencies – constitutional and non-constitutional. The written constitution imposes limitations upon all organs of the body politic. Therefore, while all authors attempt to distinguish the scope of administrative law from that of constitutional law, they cannot afford to forget not to mention that in a country having written constitution with judicial review, it is not possible to dissociate the two completely.

As in all common law countries, a delegated legislation can be challenged as invalid not only on the ground of being ultra vires the statute which confers power to make it, but also on the additional ground that it contravenes any of the fundamental rights guaranteed by the Constitution.

A non-legislative and a purely administrative action having no statutory basis will be void if it breaches any of those fundamental rights which set up limitations against any State action. Thus a non-statutory administrative act may be void if it violates rights guaranteeing equal protection; guaranteeing minority rights; guaranteeing freedom of speech, association, etc.; guaranteeing equality of opportunity in employment. Thus the court would strike down any administrative instruction or policy, notwithstanding its temporary nature, if it operates as discriminatory, so as to violate any fundamental right of the person or persons discriminated against. Non-statutory administrative action will also be void if its result affects a fundamental right adversely where the Constitution provides that it can be done only by making a law.

An administrative act, whether statutory or non-statutory, will be void if it contravenes any of the mandatory and justiciable provisions of the Constitution, falling even outside the realm of fundamental rights. In cases of statutory administrative actions, there is an additional constitutional ground upon which its validity may be challenged, namely, that the statute, under

which the administrative order has been made, is itself unconstitutional. Where the impugned order is quasi-judicial, similarly, it may be challenged on the grounds that the order is unconstitutional; that the law under which the order has been made is itself unconstitutional.

Constitutional law thus advances itself into the judicial review chapter in administrative law in a country like the USA or India. The courts in these countries have to secure that the administration is carried on not only subject to the rule of law but also subject to the provisions of their respective Constitutions. It can be observed that an attack upon the constitutionality of a statute relates to constitutional law and the constitutionality of an administrative action concerns administrative law, but the provisions of the same Constitution apply in both the spheres.

The object of both the common law doctrine of rule of law or supremacy of law and a written constitution is the same, namely, the regulation and prevention of arbitrary exercise of power by the administrative agencies of the Government. The rule of law insists that “the agencies of the Government are no freer than the private individual to act according to their own arbitrary will or whim but must conform to legal rules developed and applied by the courts”. The business of the written constitution is to embody these standards in the form of constitutional guarantees and limitations and it is the duty of the courts to protect the individual from a breach of his rights by the departments of the Government or other administrative agencies.

So, what features typical of constitution can we extract from the above? They are provided below:

- (a) Constitution is the organic, supreme law or the grundnorm of a State;
- (b) All laws inconsistent with it are to the extent of their inconsistency void; (c) It regulates power distribution amongst the three arms of government;
- (d) It governs the relationship between citizens on the one hand and governmental agents on the other, and amongst governmental organs *inter se*;
- (e) It stipulates the rights and duties of citizens; and
- (f) It constitutes a code of governance in the hands of government officials.

On the other hand, administrative law is law relating to the power and the exercise of such power of an administrative agency and which controls the exercise of governmental powers through judicial reviews.

4.0 **Conclusion**

Although the relationship between constitutional law and administrative law is not very emboldened to be seen with naked eyes but the fact remains that concomitant points are neither so blurred that one has to look through the cervices of the texts with a magnifier to locate the relationship. The aforementioned veracities provide a cogent evidence to establish an essential relationship between the fundamentals of both the concepts. If doubts still persist, the very fact that each author, without the exception of a single, tends to differentiate between the two branches of law commands the hypothecation of a huge overlap.

5.0 **Summary**

In this Unit, we considered the features of both administrative law and constitutional law before we attempted a comparison and a contrast between them. In our discourse, we now know that, notwithstanding their similarities, they are, after all, separate courses of study.

6.0 **TUTOR-MARKED ASSIGNMENT**

1. Examine the statement that administrative law has always been an appendage of constitutional law till date.
2. “It is logically impossible to distinguish administrative from constitutional law and all attempts to do so are artificial” Keith. Discuss.

7.0 **REFERENCES/FURTHER READINGS**

1. Ese Malemi, *Administrative Law* (Lagos: Princeton Publishing Company, 3rd Edition, 2008).
2. B.O Iluyomade & B.U. Eka, *Cases and Materials on Administrative Law* (Ibadan: Obafemi Awolowo University Press Limited, 1992).

MODULE 1

UNIT 1 **Scope of Administrative Law**

UNIT 2 **Administrative and Constitutional law distinguished**

UNIT 3 **Administrative agencies**

UNIT 4 **Classification of administrative powers**

UNIT 3 ADMINISTRATIVE AGENCIES

1.0 Introduction

2.0 Objectives

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1.0 INTRODUCTION

In the Units we have dealt with so far in this Module, we have freely referred to ‘administrative agencies.’ What is an administrative agency? An administrative agency is a governmental authority in which the full paraphernalia of power – that is, legislative, executive, judicial, and quasi-judicial powers – resides. With governments the world over venturing into socio-economic and political activities that were hitherto mostly handled by individuals, there has been the need to create myriad of governmental agencies charged with the responsibility of implementing the projects and programmes of government

2.0 OBJECTIVE

At the end of this Unit, you will be able to:

- Define and describe an administrative agency.
- Differentiate between constitutionalized agencies and statutory agencies.
- Appraise the powers available to Federal and State agencies.

3.0 MAIN CONTENT

3.1 Definition of Administrative Agencies

According to the US Federal Administrative Procedure Act 1946, an administrative

“agency means each authority ... of the Government of the United States other than Congress, the courts.”

In other words, an administrative agency is constituted by the executive branch of government. You should note that the executive branch of government may be called an administrative agency because it implements the laws enacted by the legislature. Also, the executive arm may be so-called by virtue of the fact that there are constitutional provisions which expressly delegate power to it. Again, when an enabling Statute delegates power to an administrative agency, it is the executive that, in fact, inaugurates or empanels the administrative agency.

Kenneth Culp Davis has offered a more descriptive or functional definition of an administrative agency. According to him,

“Administrative agency is a governmental authority, other than a court and a legislative body, which affects the rights of private parties through either adjudication, rulemaking, investigating, prosecuting, negotiating, settling or informally acting.”

Another definition of administration agency is that:

Administrative agencies are lawmaking bodies with limited powers delegated by Congress. Administrative agencies specialize in specific issues that require expertise. Administrative agencies are established by Article 1 Section 1 of the federal constitution which reads: “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.” The “necessary-and-proper” clause in the eighth section of the Article 1 states that the Congress shall have power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers ... in any Department or Officer thereof.” (<http://system.uslegal.com/administrative-agencies>)

You should note that an administrative agency may be called by different names such as a commission, board, authority, bureau, office, officer, administrator, department, corporation, administration, division, or agency. Also worthy of note is the fact that for agencies that are created by the constitution or whose existence is constitutionally recognized, their powers and functions are to be found in the Constitution itself. On the other hand, the powers or functions of statutory agencies are contained in the enabling Acts. It is this cluster of powers and functions – with which they affect the private rights and obligations – that make administrative agencies tick.

Administrative agencies are ubiquitous in the sense that they are found everywhere – at the Federal, State, and local government levels. And administrative agencies appear to be jacks-of-all trade – doing those things that all the other arms or branches of government can do. For example, they are, like the legislature, authorized to prescribe rules and regulations; to, like the prosecutors and judiciary, empowered to determine whether or not the law has been violated and to impose penalty as appropriate; and to, like the President of the country, confer privileges on persons or institutions they deem fit.

3.2 Powers and Functions of some Federal Administrative Agencies

As we have earlier observed, agencies could be created either by the Constitution or by Statute. In the former, the Constitution directly recognizes or creates some agencies and vest in them appropriate powers and functions. As far as the latter is concerned, the National Assembly creates or authorizes the creation of agencies when it delegates power to an administrative agency. Recall that since the National Assembly has the exclusive capacity to legislate on the 68 items contained in the Exclusive List of the CFRN 1999, it is potentially the greatest creator of administrative agencies. Note that the status of the agencies created by the CFRN and by Acts of the National Assembly differs. Such difference is a direct reflection of the discrepancy between the constitution and a statute. We will now discuss some constitutionalized agencies and statutory agencies.

S. 153(1) of the CFRN directly creates many agencies including, *inter alia*, the Code of Conduct Bureau, Federal Character Commission, Federal Civil Service Commission, Federal Judicial Service Commission, and the Independent National Electoral Commission. By virtue of *S. 153(2)*, the composition and powers or functions of these bodies are contained in Part I of the Third Schedule to the CFRN. We shall look at them seriatim.

(a) Code of Conduct Bureau

The Code of Conduct Bureau, which consists of a Chairman and nine other members, is empowered in Paragraph 3 to:

- (a) receive assets declarations by public officers;
- (b) examine the declarations in accordance with the Code of Conduct or any law;
- (c) retain custody of such declarations and make them available for inspection by any citizen of Nigeria on such terms and conditions as the National Assembly may prescribe;
- (d) ensure compliance with and, where appropriate, enforce the provisions of the Code of

Conduct or any law relating thereto;

- (e) receive complaints about non-compliance with or breach of the provisions of the Code of Conduct or any law in relation thereto, investigate the complaint and, where appropriate, refer such matters to the Code of Conduct Tribunal;
- (f) appoint, promote, dismiss and exercise disciplinary control over the staff of the Code of Conduct Bureau in accordance with the provisions of an Act of the National Assembly enacted in that behalf; and
- (g) carry out such other functions as may be conferred upon it by the National Assembly.

You should note that the nucleus of the duties of the bureau is the prevention and control of corruption amongst public officers. These officers are required to periodically declare their assets so that any accretion to their wealth can be justified or queried. The bureau does this against the background of the Code of Conduct for Public Officers (Part I, Fifth Schedule). Any violation is forwarded to the Code of Conduct Tribunal (Part I, Fifth Schedule) for necessary action.

(b) Federal Character Commission

Set up by Paragraph 7 of the Schedule, the Federal Character Commission in Paragraph 8 has power to:

- (a) work out an equitable formula subject to the approval of the National Assembly for the distribution of all cadres of posts in the public service of the Federation and of the States, the armed forces of the Federation, the Nigeria Police Force and other government security agencies, government owned companies and parastatals of States;
- (b) promote, monitor and enforce compliance with the principles of proportional sharing of all bureaucratic, economic, media, and political posts at all levels of government;
- (c) take such legal measures, including the prosecution of the head or staff of any Ministry or government body or agency which fails to comply with any federal character principle or formula prescribed or adopted by the Commission; and
- (d) carry out such other functions as may be conferred upon it by an Act of the National Assembly.

(c) Federal Judicial Service Commission

Paragraph 12 of the Schedule establishes the Commission. It has power to:

- (a) advise the National Judicial Council in nominating persons for the appointment of the Chief Justice of Nigeria (CJN), a Justice of the Supreme Court, the President of the Court of Appeal, the Chief Judge of the Federal High Court, a Judge of the Federal High Court, and the Chairman and members of the Code of Conduct Tribunal;
- (b) Recommend to the National Judicial Council, the removal from office of the judicial officers specified in sub-paragraph (a) of this paragraph; and
- (c) appoint, dismiss and exercise disciplinary control over the Chief Registrars and Deputy Chief Registrars of the Supreme Court, the Court of Appeal, the Federal High Court and all other members of the staff of the judicial service of the Federation not otherwise specified in this Constitution and of the Federal Judicial Service Commission

(e) **Independent National Electoral Commission**

The Independent national Electoral Commission (INEC) is in Paragraph 15 empowered to, *inter alia*, organize, undertake and supervise all elections to the offices of the President and Vice-President, the Governor and Deputy Governor of a State, and to the membership of the Senate, the House of Representatives and the House of Assembly of each State of the Federation; arrange and conduct the registration of persons qualified to vote and prepare, maintain and revise the register of voters for election purposes. The Commission is also charged with the duty of registering political parties, and monitoring their organization and operation.

For a country like Nigeria that is still trying to find its democratic feet, the role of INEC cannot be overemphasized. The country has had the problem of electoral rigging every time elections are held with the latest being the 2007 elections that brought the different regimes at both Federal and States levels to power. You will recall that one of the reasons for Buhari and Atiku's seeking judicial invalidation of the election of the late President Yaradua was because of the massive rigging that

marked the elections. And Yaradua's inauguration of the Uwais Panel was borne out of his desire to put in place a system that would guarantee that every vote counts.

SELF ASSESSMENT EXERCISE 1

1. What is the meaning of an administrative agency?
2. Examine the powers and functions of some agencies created by the CFRN.

3.2.2 Statutory Agencies

In its capacity as the law-making arm of government, the National Assembly has enacted or is deemed to have enacted so many Statutes which authorized the establishment of administrative agencies. Such Statutes include the Economic and Financial Crimes Commission (EFCC) Act 2004, Independent Corrupt Practices Commission (ICPC) Act 2000, and NDLEA Act of 1989. Note that these statutes respectively established the EFCC, ICPC, and NDLEA.

(a) Economic and Financial Crimes Commission (EFCC)

This is an anti-corruption, anti-money laundering agency established to combat corruption, money laundering and other financial crimes. It was established by the Federal Government in response to the external stimuli generated by the Financial Action Task Force (FATF) on Money Laundering. FATF had declared Nigeria to be Non-Cooperating Country or Territory (NCCT), that is, a country which inadequately provided against money laundering.

Some of the functions of the Commission under S. 6 of the Act includes the investigation of all financial crimes including advance fee fraud, computer credit card fraud, contract scam, etc; the coordination and enforcement of all economic and financial crimes laws and enforcement functions conferred on any other person or authority; and the adoption of measures to identify, trace, freeze, confiscate or seize proceeds derived from terrorist activities, economic and financial crimes-related offences or the properties the value of which corresponds to such proceeds.

Additionally, S. 7 of the Act empowers the Commission to cause investigation to be conducted as to whether any person, corporate body or organization has committed an offence under the Act. Moreover, the Commission is empowered to cause investigations to be conducted into the properties of any person if it appears to the Commission that the person's lifestyle and extent of the properties are not justified by his source of income.

In a country like ours where many persons have assets or wealth whose origin they cannot confidently disclose, the relevant provisions of the Act are salutary. The EFCC appears to have

made some modest progress in its task of cleansing our corrupt system as manifested in the number of convictions it has recorded and, most important, the assets it has confiscated or forfeited. However, the EFCC appears not to be making use or good use of S. 7 as it tends to generally believe that its capacity to investigate a corruption allegation is dependent on the willingness of aggrieved members of the public to report to or petition the body.

(b) Independent Corrupt Practices Commission (ICPC)

The setting up of the ICPC in 2000 was about the first attempt by the country to tame the hydra-headedness of corruption both in high and low places. Under S. 6 of the Act, the Commission has a duty to receive and investigate any report of the conspiracy to commit or attempt the commission of the offence of corruption.

As we can notice clearly, the ICPC predated the EFCC. The relationship between the two agencies is that while the ICPC focuses more on corruption generally, the EFCC concerns itself with particular aspects of corruption bordering on financial crimes. There are, however, cases of overlap in their functions. This has generated calls by some individuals for the government to rationalize the two agencies.

(c) National Drug Law Enforcement Agency (NDLEA)

S. 3 of the NDLEA Act 1989 provides for the functions of the NDLEA. Some of them are the:

- Adoption of measures to eradicate illicit cultivation of narcotic plants and to eliminate illicit demand for narcotic drugs and psychotropic substances with a view to reducing human suffering and eliminating financial incentives for illicit traffic in narcotic drugs and psychotropic substances;
- Adoption of measures to identify, trace, freeze, confiscate or seize proceeds derived from drug-related offences or property whose value corresponds to such proceeds; and
- With a view to ascertaining whether any person has involved in offences under the Act or in the proceeds of any such offences, to cause investigations to be conducted into the properties of any person if it appears to the agency that that person's life style and extent of the properties are not justified by his ostensible source of income, taking such measures that may ensure the elimination and prevention of the root causes of the problems of narcotic drugs and psychotropic substances;

SELF ASSESSMENT EXERCISE 2

1. Distinguish the powers and functions of the EFCC from that of the ICPC.

4.0 CONCLUSION

In Nigeria, there are such agencies directly created or recognized by the CFRN unlike others which are the creation of Acts of the National Assembly. Some of these agencies are charged with responsibilities critical to the survival of the country. In this regard, the EFCC, the ICPC, and NDLEA are exemplary.

Administrative agencies are to be found in all sectors of the economy. In your environment, you should cultivate the habit of identifying such agencies and their functions and powers.

5.0 SUMMARY

In this Unit, we considered the meaning and description of administrative agencies, distinguished between agencies created by the CFRN and those established (or deemed to be established) by Acts of the National Assembly. With this, we close the discussion on administrative agencies and functions.

6.0 TUTOR-MARKED ASSIGNMENT

The status of Agencies created by the CFRN and Acts of the National Assembly is the same. Discuss.

7.0 REFERENCES/FURTHER READINGS

Bernard Schwartz *Administrative Law* (Toronto: Little, Brown & Co., 1976). CFRN 1999.

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

MODULE 1

- UNIT 1** **Scope of Administrative Law**
- UNIT 2** **Administrative and Constitutional law distinguished**
- UNIT 3** **Administrative agencies**
- UNIT 4** **Classification of administrative powers**

UNIT 4 THE CLASSIFICATION OF ADMINISTRATIVE POWERS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
 - 3.1 The problem of classification
 - 3.2 Distinction by the Committee on Ministerial Powers
 - 3.3 Limitations of the Classification
 - 3.4 Legal Significance for the classification of administrative powers
 - 3.4.1 The right to fair hearing and rule against interest and bias;
 - 3.4.2 Prerogative remedies;
 - 3.4.3 Duty to give notice;
 - 3.4.4 Sub-delegation;
 - 3.4.5 Ultra vires.
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor marked assignment
- 7.0 Further reading and references

1.0 INTRODUCTION

Earlier on in our study, we identified many governmental agencies. These agencies perform all the functions constitutionally assigned or allocated to the three arms of government to the benefit or detriment of persons within their jurisdictions. Persons to the detriment of whom power has been exercised would ordinarily need to be satisfied of the legality of such exercise. Otherwise, they are entitled to invoke the judicial process and, possibly, claim damages or compensation from agencies that have exceeded their authorities or acted *ultra vires*. In other words, victims of administrative power – persons aggrieved by the exercise of administrative power – would be able to seek judicial redress.

Therefore, it is usual to classify functions of administrative agencies as legislative or rule-making, executive or administrative, judicial or quasi-judicial. However, because of the glut of administrative agencies with different powers, there is often the difficulty in classifying their acts. Nevertheless, you should not gloss over the essence

of such classification

2.0 When we end this Unit, you will be able

to:

- Assess the complexities of classifying administrative power.
- Analyze the consequences of classifying administrative powers one way or another

3.0 Main Content

Administration today exercises not only what may be called traditional executive functions but also legislative, judicial and quasi-judicial functions.

The primary function of the administration or the executive arm of government is the maintenance and execution of public policies as set out in laws, written and unwritten. That is why **section 5 of the 1999 Constitution of Nigeria** defined executive powers to include the execution and maintenance of the constitution, all laws made by the legislature and all matters with respect to which the legislature has the power to make laws. Today, administration is not confined to the execution and maintenance of law; it goes further to play a significant role in initiating and formulating policy decisions. The bulk of the laws enacted by the legislature are initiated and drafted by the executive department. The reason is quite clear. He who wears the shoe knows where it pinches and calls for flexibility. The administration concerned with the day to day application of the existing laws knows best what defects or shortcomings there are in the legal systems and what modifications are necessary to update the system and make it efficient and defective in action.

3.1. Problem of classification

The dividing line between the three types of governmental functions -legislative, executive and judicial has never been clear-cut. It is in many cases, hazy and most confusing. The decision in **Lakanmin & Kikelomo Ola v. AG West & Ors (1974) ECSR 173** shows that the dividing line between these functions may never be clear. In that case, a function seen and treated by the Federal Military Government as legislative was held by the Supreme Court to be a piece of legislative adjudication which violated the principle of separation of powers enshrined in the **1963 Constitution i.e. Decree No 45 of 1968**

The reason for this confusion and indistinctiveness appears to lie in the fact that the administration exercises all these functions. All of them are lumped in the executive. Again, all these functions involve in one way or the other formulation, laying down or execution of policies.

Thirdly, all the functions, whether legislative, administrative or judicial, involve the exercise of discretionary powers and both executive and judicial arms of government make determinations of issues of law and fact.

Notwithstanding the difficulties associated with differentiating between these functions, attempts have been made to do so. This distinction is generally required because, whereas the administration has legitimate (Constitutional) mandate to exercise purely executive functions, it cannot validly exercise legislative or judicial functions without any statutory backing. Again, it is said that judicial functions must be exercised strictly in accordance with the rules of natural justice. Accordingly, certiorari or prohibition lies to control judicial but not administrative functions.

Therefore one of the problems of administrative law is how to draw the distinction or where to draw the line between the functions which are legislative, judicial and administrative so as to determine the appropriate procedure for exercising a given function.

Also, the courts have contributed to this confusion by their attributing inconsistent meanings to the functions and it is often difficult to say why a particular function has been classified in a particular way. In its 1932 Report, the British Committee on Ministers' Powers attempted defining and distinguishing these powers as follows: -

3.2 DISTINCTION BY THE COMMITTEE ON MINISTERIAL POWERS

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

According to the committee,

“administrative and quasi-judicial functions involve the exercise of a considerable amount of discretionary powers and must be vested in the ministers, while pure judicial functions must be exercised strictly in accordance with well-established rule of law.,

According to the committee's report:

“ a true judicial decision presupposes an existing dispute between two or more parties, and then involves four requisites-

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

(2) if the dispute between them is a question of fact, the ascertainment of the facts by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence;

(3) if the dispute between them is a question of law, the submission of legal argument by the parties; and

(4) a decision which disposes of the whole matter by a finding upon the facts in dispute and an application of the law of the land to the facts so found, including, where required, a ruling upon any disputed position of law”.

“a quasi-judicial decision equally presupposes an existing dispute between two or more parties and involves (1) and (2) but does not necessarily involve (3) and never involves(4). The place of (4) is in facts taken by administrative actions, the character of which is determined by the minister’s choice...”

“Decisions which are purely administrative stand on a wholly different footing from quasi-judicial as well as from judicial functions and must be distinguished accordingly.... in the case of the administrative decisions, there is no legal obligation upon the person charged with the duty of reaching the decision to consider and weigh the submission and argument, or to collate any evidence or solve any issue. The ground upon which he acts and the means which he takes to inform himself before acting are left entirely to his discretion.”

3.3 Limitations of the classification

Looking at the Report, we could perceive that the above classification is not without its problems for a power that is classified one way may, in fact or ultimately, possess the features of a different power. For instance, though we could easily understand the classification of legislative power vis-à-vis executive power, our declared understanding could become unfounded. Thus, a power that appears to be executive may turn out to be legislative. In respect of this, Benjafield and Whitmore note:

Thus a power vested in a governmental authority to make grants to schools if it is satisfied that they are being efficiently maintained might appear on the face of it, to be plainly executive or administrative but, if the authority were to elaborate in

detail the conditions under which it would regard a school as qualifying for a grant, and issue circulars setting out such conditions, this would seem to be in substance formulation of a general rule. Indeed the distinction between that which is general and that which is particular is a matter of degree.

If the above comments could apply to an area we thought we know pretty well, how about the classification of judicial and quasi-judicial powers? We tend to lose understanding as the classification progresses into the spheres of judicial and quasi-judicial categories. This is because it seems what is said about judicial classification is similarly written about quasi-judicial classification. On this, Benjafield and Whitmore are of the opinion that:

The distinction between judicial and quasi-judicial powers is based on the fallacy 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 courts may differ in nature and extent from the discretions of the administrator.

Our difficulty is even hardened when we are faced with the classification of the judicial, quasi-judicial and administrative. Commenting on the trouble with understanding administrative power, de Smith said:

A legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases. An administrative act cannot be exactly defined but includes the adoption of a policy, the making and issue of a specific direction and the application of a general rule to a particular case in accordance with the requirement of policy or expediency or administrative practice.

The source of the problem is the peculiarity of administrative administration that unifies the powers of law-making, implementation and enforcement in one agency. Put differently, we have this kind of problem because the doctrine of separation of power has no meaning to the fourth arm of government. According to Professor Griffith and Street:

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

In the U.S. it is recognized that no real distinction can be drawn between judicial, quasi-judicial and administrative powers because constitutional requirements of due process will convert administrative power into adjudicative powers by requiring, *inter alia*, the giving of a fair hearing. According to Prof. Davis, the conceptual approach is worthless and is not followed by the courts in the U.S. and, where disputed facts are in issue, the courts would require fair hearing even though the action might otherwise be classified as legislative.

SELF ASSESSMENT EXERCISE 1

1. Discuss the problems inherent in the classification of administrative power.
2. The problems of classification are more apparent than real. Do you agree?

3.4 LEGAL SIGNIFICANCE FOR THE CLASSIFICATION OF ADMINISTRATIVE POWERS

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

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

When an administrative authority's power is classified as judicial or quasi-judicial, the administrative agency is obligated to observe the rules of natural justice. In other words, in its deliberations, it must comply with the requirement of fair hearing and the rule against interest and bias. In *Fawehinmi Vs Legal Practitioner's Disciplinary Committee (1982) 3 N.C.C. 719* Fawehinmi published a book which was advertised in West Africa Magazine. When he was invited to appear before the committee, he refused and went to court because he alleged there was a likelihood of bias. The court upheld his argument. Conversely, if a power is classified as legislative, executive or administrative, the rules of natural justice do not apply. Note that the non applicability of the rules of natural justice to legislative, executive or administrative acts does not imply that the donee of power is at liberty to act purely to suit his whim and caprice. Cases abound when courts in Nigeria have nullified rules made by administrative agencies and sometimes certain offending provisions of the enabling statute are also nullified.

3.4.2 Prerogative Remedies

Prerogative orders of prohibition and /or certiorari are normally available to quash an administrative action classified as judicial or quasi-judicial. However, in the case of legislative, executives or administrative act an order of mandamus may lie to compel performance of a

public duty. In the case of **Banjo & Ors Vs Abeokuta Urban District Council (1962) N.M.L.R. 296** the court issued the order of mandamus to compel the council to grant licenses for operating taxis in their area to the appellant holding inter alia, that the council had no discretion in the matter once he had satisfied the stipulated requirements. Note also that the Fundamental Human Rights (Enforcement Procedure) Rules 1979 have liberalized the processes of prerogative remedies. Formerly, this issue of the correct remedy in administrative law was a major of dissatisfaction and led to considerable miscarriage of justice. Issues were settled on the nature of the remedy chosen by the plaintiff rather than the substance of his cause. Major reforms carried out and the introduction of application of Judicial Review has considerably ameliorated the situation. This has also been the method of choosing remedies introduced by the Fundamental Rights (Enforcement Procedure) Rules of 1979. The combined effect of these is to make the choice of remedies more flexible and easier for the plaintiff.

3.4.3 Duty to Give Notice

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

3.4.4 Sub-delegation

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

3.4.5 Ultra Vires

Where a power is legislative, an exercise of it may not be set aside by court on ground of been unreasonable, arbitrary, or ultra vires except for the instances it breaches the constitution or other statute. However where a power is administrative or executive, it will be set aside as ultra-vires on ground of unreasonableness, arbitrariness, mala fide etc. In **Unilorin Vs Adesina(2009) 25 W.R.N. 97** an issue came up for determination on whether court has jurisdiction to entertain matters on administrative affairs of a University. In his judgment Per Agube JCA commented “In so far as the award of a degree or certificate is concerned, the courts have no jurisdiction in the matter and any attempt by any court including the Supreme court to dabble into the arena of purely administrative and domestic affairs of a university may lead to undue interference and weakening of the powers and authority conferred on the universities by statute and will not be

justifiable or justified. He went on to say that “the courts are reticent in interfering in the domestic dealings of a citadel of learning and excellence such as a university, in situations where the university in the process of performing its functions under the law is found to have breached the civil rights and obligations of its students, the court will not hesitate to step in to remedy the grievances and grant reliefs for the protection of those rights and obligations.

4.0 Conclusion

Since separation of powers does not apply in the realm of administrative law, we could ordinarily suggest that it is unnecessary to classify administrative power or function into legislative, executive, judicial or quasi-judicial power. In other words, because all the powers exercisable by the three arms of government can be exercised by one single administrative authority, then there is no basis for classification.

However, even if only for theoretical purposes, it is worthwhile. This is because it allows for clarity of thought and conceptual elucidation. Though the problems of classification tend to be complex, discussing it stands us in a vantage position to better appreciate this area of administrative law.

Since classification determines the legal consequences attendant to the exercise of administrative action, we have added incentive to know the much we can in classifying power. We will surely be the better for it when we realize that such classification enables us to know that many administrative activities that victimize us can actually be redressed in the courts. Thus, the significance of practically itemizing the consequences of classifying administrative power one way or another cannot be overemphasized.

5.0 SUMMARY

In this Unit, we dealt with the classification of administrative powers or functions. We note that the essence of such exercise derives from the fact that the legal consequences of the exercise of such power necessarily depends on the classification. However, we understand that there are naughty problems confronting satisfactory classification. Nonetheless, we rounded off with a consideration of the importance of the classification itself.

6.0 TUTOR-MARKED ASSIGNMENT

1. Assess the justification for the classification of administrative power or functions.

7.0 REFERENCES/FURTHER READINGS

1. B.O Iluyomade & B.U. Eka, *Cases and Materials on Administrative Law* p. 4 (Ibadan: Obafemi Awolowo University Press Limited, 1992).
2. Ese Malemi, *Administrative Law* (Lagos: Princeton Publishing Company, 3rd Edition, 2008).

MODULE 2 BASIC CONSTITUTIONAL CONCEPTS IN ADMINISTRATIVE LAW

UNIT 1 Separation of powers

UNIT 2 Rule of law

UNIT 3 Constitutional Supremacy

UNIT 4 Parliamentary Supremacy

UNIT 1 Separation of Powers

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1.0 Introduction

We are much used to the division of governmental power amongst the traditional three arms of government – the legislature, the executive and the judiciary. Under the doctrine of separation of powers, each of the three-some is restricted to perform within the ambit of its functions without, in any way, interfering with the duty of another. The CFRN 1999 maintains this compartmentalization in SS. 4-6. But further constitutional provisions limit the applicability of the doctrine in its classical manifestation.

However, in administrative law, the doctrine is inapplicable. Administrative agencies perform the duties that the three organs of government perform, that is, law-making, implementation, and enforcement. Because an agency is created not to observe the doctrine and since its activities negate any commitment to the doctrine, it is, therefore, right to conclude that the doctrine is irrelevant to it.

What we have said about administrative agencies is more or less equally true for the military regimes. Operating under the doctrine of legislative supremacy, the military establishment fuses legislative functions with executive functions so much so that members of the legislature are almost invariably members of the executive.

2.0 OBJECTIVES

At the end of this Unit, you will be able to:

- Assess the traditional doctrine of separation of powers.
- Apply the traditional doctrine to the CFRN 1999.
- Analyze the doctrine against the background of the activities of administrative agencies.

3.0 MAIN CONTENT

3.1 Meaning and Scope of Separation of Powers

The doctrine of separation of powers as historically understood is derived from the work of French jurist, Baron De Montesquieu. This doctrine is an elaboration of the study of John Locke's writings. Montesquieu was concerned with the preservation of political liberty. He said *'political liberty is to be found, only when there is no abuse of power'*.

The doctrine of separation of powers amongst the three arms of government is one of the central issues implicated in the governance of modern democracies and other jurisdictions which aspire to stabilize their governments. This is one of the devices used by the Anglo-American system of government to protect the rule of law and prevent the exercise of arbitrary power by the sovereign. Phillips and Jackson, citing Montesquieu who further opined that:

'constant experience shows us that every man manifested with power is liable to abuse it and to carry his authority as far as it will go...To prevent this abuse, it is necessary from the nature of things that one power should be a check on another....'

The doctrine stemmed from the observation of Locke of the conditions prevalent in seventeenth century England. The doctrine as we know it today is due to the work of the French Jurist, Montesquieu, who based his study on the works of Locke.

Separation of powers amongst the three arms of government is one of the central issues implicated in the governance of modern democracies and other jurisdictions which aspire to stabilize their governments. This is one of the devices used by the Anglo-American system of government to protect the rule of law and prevent the exercise of arbitrary power by the sovereign. From the outset, it is important to note that separation of powers can mean about three different things as follows:

- a. That the same persons should not be part and parcel of more than one of the three arms of government. In other words, if a person is a member of the Legislature, he should not simultaneously be a member of either the Executive or the Judiciary.
- b. That an arm of government should not interfere in the affairs of any other two arms of government. Put differently, it means, for example, that a member of the executive should do only those things that are within the schedule of duties of the executive, and desist from controlling or interfering with the legislature and the judiciary in the performance of their assigned functions.
- c. That one arm of government should not exercise the functions of another arm, that is, the judiciary, for example, should neither perform legislative nor executive roles.

The importance of the doctrine has been judicially recognized in **Liyange v. The Queen (1966) 1 W.L.R. 682** where the Judicial Committee of the Privy Council pointed out that there exists under the Ceylonese constitution a tripartite division of powers in the legislature, the executive and the judiciary and that it would be unconstitutional if the judicial function were allowed to be interfered with by the legislature by means of an Act of Parliament.

In Nigeria, delivering judgment on the operation of separation of powers in a presidential system of government, the Court of Appeal in the case of **Kayode v. The Governor of Kwara State (2005] 18 NWLR (Pt.957) 324 at 352** declared that:

“In a presidential system of government, which Nigeria is currently operating, there are three arms of Government: the Executive, the Legislature and the Judiciary. The functions of each are clearly defined and set out in the Constitution which is the grundnorm. Any action taken or to be taken by each arm must be within the provision of the said Constitution or else it will be declared *ultra v ires* the powers given to that arm of Government.”

Having itemized the possible meaning of the doctrine, we shall next consider the proponents of the doctrine.

John Locke

The concept originally stemmed from the observations of English jurist, John Locke, that to prevent arbitrariness there should be a constitutionally created government divided into the legislative power for creation of rules to protect rights; executive power by which laws are enforced; federating power which concerns the making of war, peace and external relations.

He said:

“it may be too great a temptation to human frailty, apt to grasp at power, for the same person who have the power of making laws; to have also in their hand the power to execute them, whereby they may exempt themselves from obedience to the laws they made and suit the law; both in its making and execution, to their own private advantage.”

Montesquieu

The concept in its modern form was first articulated by the French jurist, Montesquieu who, while predicating his exposition on the 18th century British constitution, contended that unless power is checked, it will be abused. To him, *“political liberty is to be found only when there is no abuse of power. But constant experience shows every man invested with power is liable to abuse it, and carry his authority as far as it will go. To prevent this abuse, it is necessary from the nature of things that one power should be a check on another...When the legislature and executive powers are united in the same person or body there can be no liberty. Again, there is no liberty if the judicial power is not separated from the legislature and executive. There would be an end of everything if the same person or body, whether of the nobles or the people, were to exercise all the three powers”*

Therefore, governmental power should be divided into the legislature, executive and judicial powers with mutual check on one another thus:

- (1) That the same persons should not form part of more than one of the three organs of government;
- (2) That one organ of government should not control or interfere with the exercise of its function by another organ; and
- (3) That one arm of government should not exercise the functions of another.

What Montesquieu means by this categorization is that if legislative and executive

functions are fused in one person or body of persons, the civil society faces the peril of the legislature enacting privative or oppressive laws which the executive will selfishly execute or implement. Likewise, if the same body or body of persons exercise legislative and judicial powers, there is the danger that the powers would be exercised arbitrarily for the legislator acting as the judge will interpret the law the way that best suit him or them. This will not augur well for the civil society. Therefore, there is the need for each arm to mind its own business as this arrangement best secures individuals against arbitrary exercise of power.

SELF ASSESSMENT EXERCISE 1

Explain the classical meaning of separation of powers

3.2 APPLICABILITY OF THE DOCTRINE

SEPARATION OF POWERS IN NIGERIA

Nigeria operated the British type of government popularly known as parliamentary government. In that system, the functions of government are assigned to the traditional organs of government so as to reflect the separation of powers. In reality however, there is no strict adherence to the doctrine. Nigeria operated this system of government until the military intervention in 1966. The doctrine of separation of powers was also adopted in the manner peculiar to British system. For instance, the exercise of judicial function was not rigidly restricted to the judiciary. In the case of **Attorney General Oyo State v. I.O. Adeyemi (Alaafin of Oyo) (1982) 3 N.C.L.R. 846 (as reported in Modern Trends in Administrative Law, J.N. Egwummuo, Academic Publishing Company, Enugu 2nd edition)**, a boundary commissioner was appointed to demarcate the boundary between Ogbomosho and Oyo communities. He made a decision which was later confirmed by an appeal tribunal. Subsequently, an action was filed in the High Court challenging the exercise. A declaration was sought that both the decision relating to the rights and obligations of persons should not be determined by any other body than the law courts. The High Court agreed with the contention and set aside both the commissioner's decision and its subsequent confirmation by an appeal tribunal. In the court of appeal, however, it was held, reversing the decision of the lower court, that separation of powers is the bedrock of a federal constitution like ours.

See further the case of **Lakanmi Ola and another v. Attorney General (Western State) (1971) 1 U.I.L.R. 20 (Sup. Ct)**, where the right of the citizen under sections 22 and 31 of the constitution was affected .

See also the case of *Government of Kaduna State v. The House of Assembly, Kaduna State and the Attorney General, Kaduna State (1981) 2 N.C.L.R. 444* where the court held that, the doctrine of separation of powers is enshrined under the 1979 constitution. Thus, the legislature has the constitutional right to enact laws regarding the local government in the state; and further that, this power includes power to amend and to repeal the laws whenever the need arises but such an amendment must not assume an executive function.

Separation of Powers under the 1999 Constitution

Under the 1999 constitution of the Federal Republic of Nigeria, separation of power is a fundamental constitutional principle. Relevant sections of the constitution place each of the basic powers of government in a separate branch. Section 4 deals with the legislative powers; section 5 deals with executive powers and section 6 is concerned with the judicial powers.

The decision in the case of **Lakanmi v. A.G Western Nigeria (supra)** helps put the concept in clearer perspective. The court in that case had recognized the importance of the concept of separation of powers by noting as follows:

“We must here revert once again to the separation of powers, which the learned Attorney General himself did not dispute, still represents the structure of our system of government. In the absence of anything to the contrary, it has to be admitted that the structure of our constitution is based on separation of powers – the Legislature, the Executive and the Judiciary. Our constitution clearly follows the model of American Constitution. In the distribution of powers, the courts are vested with the exclusive right to determine justifiable controversies between citizens and the state”

The 1999 Constitution, like the ones before it, has established the separation of powers in these two folds, that is, the Federation and the States as well as among the three arms of government at each level. The constitution does not specifically provide for the application of the doctrine as part of the system of government in the country. What it does is to set a clear division between the three arms of government at each level.

Analyzing the powers in i.e. Chapter V, VI and VII of the 1999 Constitution, we can deduce the following.

That the mode of entry into various arms or power of government has been detailed in the constitution. This is in order to check arbitrariness and impose a semblance of normalcy and order. This brings forth the doctrine of **Checks and balances**

It has been established that division of powers among the three arms of government simply means that, under the Constitution, it is the duty of the legislature to make laws while the executive implements.

The doctrine of Checks and balances arose as an outgrowth of the classical theory of separation of powers. The purpose was to ensure that governmental powers would not be used in an abusive manner. The doctrine has also been referred to as one of right of mutual control and influence. These checks are meant to keep any one branch from making disastrous policy or law that will harm the nation.

Checks and balances are the constitutional controls where separate branches of government have limiting power over each other so that no branch will become supreme.

The doctrine of Checks and balances states that governmental powers should be controlled by overlapping authority within the government and by giving citizens the right to criticize state actions and remove officials from office.

The removal of any individual exercising such power is not vested directly in that power but rather, in that other power. Hence, removal of a judge is sequel to the recommendations of the National Judicial Council and permitted on the approval of the Presidency.

Furthermore, there is a varying pattern in the means of appointment of government officials; this is to ensure separation of powers and duties. For instance, under the 1999 constitution, Section 231 (1) states that: appointment of a person to the office of Chief Justice of Nigeria shall be made by the President on the recommendation of the National Judicial Council subject to the confirmation of appointment by the Senate.

As part of the checks provided for in the Constitution, is the provision relating to the legislative power to monitor and oversee the Consolidated Revenue Fund. Section 80 (1) specifically provides that:

‘No money shall be withdrawn from any public fund of the Federation, other than the Consolidated Revenue Fund of the Federation, unless the issue of those moneys has been authorized by an Act of the National Assembly’

“No money shall be withdrawn from the Consolidated Revenue Fund of the Federation or any other public fund of the Federation, except in the manner prescribed by the National

Assembly.

Please read further sections 88 (1); 128 (1) of the 1999 Constitution of the Federal Republic of Nigeria for further powers of checks and oversight of the Legislative arm of government.

However, a check is put on the power by virtue of Section 88 (2) and Section 128 (2). The sections provide that the powers conferred on the National Assembly or State Houses of Assembly under the provisions are exercisable only for the purpose of enabling it to make laws with respect to any matter within its legislative competence.

The constitution further prescribes which arm of government may exercise what power as well as what functions they must perform, what this translate to is that no arm must directly or indirectly under any guise, wander into the boundary of the other. See further, the case of ***Senator Abraham Adesanya v. President of Nigeria (1981) All N.L.R.***

What is (are) the implications of the doctrine of separation of powers?

The Court of Appeal, per Salami JCA, in *Hon. Abdullahi Maccido Ahmed v. Sokoto House of Assembly & Anor (2002) 44 WRN 52* has held that there are three implications of the doctrine viz:

- a. That the same person shall not be part of more than one of the arms of government;
- b. That one branch should not dominate or control another arm. This is particularly important in the relationship between (the) and the courts;
- c. That one branch should not attempt to exercise the function of others.

The next thing for us to consider is the applicability of the doctrine to present-day operations of the organs or arms of government.

(a) Legislature and Executive

(i) Do the same persons or bodies form part of both the legislature and the executive?

By virtue of the provisions of the CFRN 1999, we can safely state emphatically that separation of powers is real in as much as the separateness or uniqueness of the powers or functions of the legislative and the executive arms is concerned. Thus, Sections 4, 5 and 6 of the CFRN provides respectively for the National Assembly, the executive and the judiciary. The effect of this is that no member of the legislature or National Assembly can be a member of the executive and vice versa. A practical or even extreme demonstration of this

position is S. 147(4) of the *Constitution of the Federal Republic of Nigeria 1999* which provides that:

Where a member of the National Assembly or of a House of Assembly is appointed as Minister of the Government of the Federation, he shall be deemed to have resigned his membership of the National Assembly or of the House of Assembly on his taking the oath of office as Minister.

(ii) Does the Legislature control or interfere with the functions of the executive and vice versa?

Here as well, we could say no. But it will all depend on what we really mean by ‘control’ or ‘interference.’ Nevertheless, it should be noted that the ingredients of control or interference are covered by the principle of checks and balances – a process through which the CFRN empowers the arms of government to carry out oversight functions on or to oversee or verify the functions of one another. Thus, Sections 88 and 143 CFRN respectively authorize the National Assembly to investigate the financial engagements or dealings of the executive and to impeach the President. Also, appointment of ministers by the president must be confirmed by the Senate though he can dismiss at will. The President may initiate bills but he cannot participate in National Assembly proceedings towards the passage of the bill. Where the bill is passed, it becomes law when the president signs the document. If he is not pleased with the bill as passed, he may withhold his assent or veto the document for a certain period. When the statutory period elapses, the bill as passed automatically becomes effective or operational as an Act of the National Assembly which must be implemented by the executive and interpreted by the judiciary. Similarly, treaties are negotiated by the executive but, before they are domesticated, they must, pursuant to S. 12, be approved by the National Assembly.

(iii) Do the Legislature and the executive exercise each other’s functions?

The primary function of the legislature is to enact laws while the executive is to implement those laws. But it is the case that because it would be impractical for the Legislature alone to enact laws, delegation of powers by the legislature to the executive (which includes administrative agencies) becomes inevitable. Armed with such delegated power, the executive and administrative agencies make rules and regulations. It should be noted that in contrast with the legislature which legislates principles (or generally), that is, on general principles, administrative agencies legislate particularly in great details. Therefore, S. 32 of the CFRN authorizes the President to make subordinate legislation regarding Nigerian

citizenship as follows:

The President may make regulations ... prescribing all matters which are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to the provisions of ..., and for granting special immigrant status with full residential rights to non-Nigerian spouses of citizens of Nigeria who do not wish to acquire Nigerian citizenship.

Note that on the issue of interference into the other's domain, it is the executive that commands the comparative advantage.

(b) Executive and Judiciary

(i) Do the same persons form part of the executive and judiciary?

Under the CFRN, a member of the executive cannot be a member of the judiciary. The only instances where a member of the executive may be a member of the judiciary or quasi-judicial body include where tribunals are established to pronounce on the rights and liabilities of citizens.

(ii) Does each of them control or interfere with the duties of the other?

Also, we could say no. But we could argue that to the extent that it is the executive that appoints and dismisses judicial officers (though subject, in many cases, to the approval of legislators), we may suggest that the executive have some measure of control over the judiciary. How about salary of judicial workers? Discipline, promotion, On the other hand, judicial decisions especially those unfavourable to the executive are usually perceived to be the judiciary's controlling or interfering in the functions of the executive.

(iii) Do the executive and the judiciary exercise each other's functions?

It is a notorious fact that, by virtue of delegation of powers and delegated legislation, judicial or quasi-judicial function is one of the functions performed by administrative agencies – an appendage of the executive. A practical example of such agencies would be a mobile court on environmental sanitation or traffic violations.

On the other hand, we may not run any risk of contradiction if we declare that the judiciary does not perform executive functions. But this is not totally correct. Notice that there are judges who perform administrative duties such as assignment of cases, administration of estates, winding up of companies, etc.

(c) Legislature and Judiciary

(i) Do the same persons exercise legislative or judicial functions? No

(ii) Does each of them control or interfere with the duties of the other?

The judicial arm may be said to control or interfere with the functions of the legislature to the extent that it interprets the laws enacted by the latter. You know that in doing so, the judiciary has been credited not just with interpreting the law but also altering or making the law. On the other hand, the legislature control or interference in judicial functions could be seen in the constitutional provision which authorizes it to confirm or approve the appointment or removal of judicial officers.

(iii) Do the legislature and the judiciary exercise each other's functions?

Generally, the legislature does not perform judicial functions. The same thing applies for the judiciary. But we must note that even the constitution empowers certain judicial officers to make rules of court for regulating the practice and procedure of the court over which they preside. See, for example, Sections 236, 248, and 254 CFRN 1999.

SELF ASSESSMENT EXERCISE 2

- Evaluate the applicability of the doctrine of separation of powers under the CFRN.

3.3 Application of the Doctrine to Administrative Law

It is important to note that the doctrine cannot be said to be applicable to administrative law. It is a unique feature of administrative law for a single administrative agency to perform legislative, executive, judicial and quasi-judicial functions. Let us take National Agency for Food and Drug Administration and Control (NAFDAC), for example. This is a federal government parastatal charged with the responsibility of, *inter alia*, certifying food and drugs fit for consumption. Under the enabling statute, the Director General is empowered to *legislate* or to make rules and regulations for the implementation of the statute and for effectively performing its duties. It is, of course, its responsibility to implement or *execute* the rules and regulations. In performing its judicial/quasi-judicial functions, it *decides*, for instance, whether or not to register a pure water manufacturing outfit; to issue licence for the operation of a pharmaceutical shop; etc. With this scenario, you can see that NAFDAC alone is the legislator, the executive and the judiciary all rolled into one. Against this background, you could deduce why it is inappropriate to suggest

the existence of separation of powers in administrative law.

3.4 Separation of Powers in a Military Regime

Under the military dispensation, the doctrine operates only as between the legislature and the executive on one side and the judiciary on the other. Another way of looking at it is that the doctrine operates the way it does in a parliamentary system of government. You will recall that in a parliamentary or cabinet system of government members of the legislature are equally members of the executive.

Nigeria had had many military regimes comprising legislatures that adopted different names such as the Supreme Military Council (SMC), the Armed Forces Ruling Council (AFRC), and the Provisional Ruling Council (PRC), etc. Under Decree 1 of 1984, for example, the head of the SMC was equally the head of the executive. Also, many members of the legislature were members of the executive.

Under the military, the principle of separation of power is a mirage. The first assignment usually undertaken by military dictators immediately they usurp power by unconventional means, to put some parts of the constitution in to abeyance. It is also noteworthy that the military combine both the executive and legislative powers, through the promulgation of decrees ousting the jurisdiction of the court and preventing the court from exercising the powers and/or duties conferred on it by the grundnorm.

4.0 CONCLUSION

The concern of separation of powers is the distinctness of each of the three arms of government. The doctrine of separation of powers rests on the tripod that the same persons should not form part of more than one of the three organs of government; that one organ of government should not control or interfere with the exercise of its function by another organ; and that one arm of government should not exercise the functions of another.

Generally, this doctrine is respected in constitutional law. Thus, the CFRN 1999 expressly allocates separate functions in SS. 4-6 to the legislature, the executive and the judiciary respectively. However, the same CFRN equally contains provisions which empower one arm of government to legitimately contravene the features contained in the tripod. Therefore, the legislature, for example, would perform oversight functions over, and even investigate the executive while the judiciary would involve itself in matters that are purely administrative.

In the realm of administrative law, we have found that the tripod is of no significance in the sense that a typical administrative agency does the work of all the three arms of government and more. In other words, the traditional wall of separation of powers collapses in the face of the reality that administrative agencies appear to be jack of all trade and master of all.

5.0 SUMMARY

From the foregoing, it is clear that the doctrine as originally conceived appears to be generally applicable in constitutional law, that is, amongst the three arms of government – the legislature, the executive and the judiciary. However, it is noteworthy that attempts to strictly implement the classical form of the doctrine are unfeasible and unworkable. In other words, strict separation is impossible and self-defeating due to the necessity for organs of government to cooperate in governmental administration. Under a Parliamentary system of government like the one practised in the United Kingdom, it is definitely not operational as between the parliament and the executive because members of the former are equally members of the latter. Under this kind of governmental relationship, separation of powers loses its essence and meaning.

In a presidential system Nigeria's, the three organs of government are mutually cooperative and interdependent. In order to ensure that no arm of government degenerates into a terrific island, there are constitutional provisions which empower the three arms to interfere with the duties of one another through checks and balances. The idea of checks and balances is an insurance against arbitrariness, and authorizes some of the things an arm of government is doing to be made available for investigation, vetting, concurrence or confirmation by another arm.

Thus, although *SS. 4, 5 and 6* of the *CFRN 1999* respectively allocate the law-making, implementing and the adjudicatory powers of the federation to the legislature, the executive and the judiciary, there are other constitutional provisions which empower one arm to oversee or verify the operations of another.

6.0 TUTOR-MARKED ASSIGNMENT

1. Compare and contrast classical doctrine of separation of powers with the

contemporary position on the doctrine.

2. Separation of powers is observed in administrative law and in military regimes.

How true is this statement?

7.0 REFERENCES/FURTHER READINGS

E.C.S. Wade & A.W. Bradley, Constitutional Law (London: Longman, 8th Edition, 1970).

MODULE 2 BASIC CONSTITUTIONAL CONCEPTS IN ADMINISTRATIVE LAW

UNIT 1 Separation of powers

UNIT 2 Rule of law

UNIT 3 Constitutional Supremacy

UNIT 4 Parliamentary Supremacy

UNIT 2 RULE OF LAW

1.0 Introduction

2.0 Objectives

3.0 Main Content

3.1 Historical Background

3.2 Meaning of Rule of Law

3.3 Analyses of Rule of Law

3.4 Contemporary Texture of Rule of Law

4.0 Conclusion

5.0 Summary

6.0 Tutor-Marked Assignment

7.0 References/Further Readings

1.0 INTRODUCTION

Rule of law is a doctrine that insists on the supremacy of law over the supremacy of man. In the age of absolutist sovereigns, there was no rule of law. If there was, it was subject to the whim and caprice of the king, the ruler, the head of State. He could do no wrong. He was the embodiment of sovereignty. However, with the people's sovereignty displacing the ruler's sovereignty, rule of law has been institutionalized in almost every legal system.

You should note that discretion is a sore point in any discussion of the rule of law. Discretion appears to be inconsistent with the proclamation of the rule of law. But modern State can hardly survive without it. Another issue that is worthy of examination is

the legitimacy of equality as espoused by the doctrine especially against the backdrop of many laws which promote unequal treatment or enforces affirmative action. Moreover, you should recall that rule of law has facilitated the growth and respect for human rights. Furthermore, the family of human rights keeps expanding as and when the need arises.

2.0 OBJECTIVES

At the end of this Unit, you will be capable of:

- Distinguishing between classical rule of law and contemporary rule of law
- Applying the doctrine of rule of law to the activities of administrative agencies.

3.0 MAIN CONTENT

3.1 HISTORICAL BACKGROUND

This concept of rule of law (which is synonymously referred to as *supremacy of law* or *constitutional supremacy*) is of great antiquity dating back to Greek times. The Greek philosopher, Aristotle said that **“the rule of law is preferable to the rule of any individual.”** There was a time when the king could do no wrong. It was not really a factual statement to say for all it meant was that the king was above the law. But Henry De Bracton wrote in the 13th century that “the world is governed by law, human or divine” and stated further that:

“The King himself ought not to be subject to man, but subject to God and to the law, because the law makes him King.”

Of course, Bracton was right for saying the King can do no wrong. That was then. But in contemporary times, that statement belongs to the trashcan of history. Notice how erstwhile government officials’ individual responsibility is frequently being engaged domestically and internationally for their ignoble role in violating the human rights of other persons. Note that rule of law is closely connected with such concepts as due process, natural law, democracy, fairness, etc.

3.2 MEANING OF RULE OF LAW

The term “Rule of Law means literally means the governance of law, the state of being governed by law through the agency of man i.e. a regime of government of law as opposed to a government based on the whims and caprices of man.

It is believed that the term 'rule of law' is Greek in origin having been associated with Greek aspirations, and particularly the renowned Greek philosophers Plato and Aristotle. It stems from the distrust which the Greeks had for human nature. They had observed that man is by nature self-centered and will stop at nothing to annihilate opponent and exterminate opposition.

Rule of law primarily means that everything must be done in accordance with the law. This implies that governmental organs and agencies must act in such a way that their conduct against the life, liberty and property of persons are legally justified or founded.

One of the most notable exponents of the concept is Albert Venn Dicey, Professor of English Law at Oxford. He recognized rule of law as comprising three meanings as follows:

- (a) Firstly, it means the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power and excludes the existence of arbitrariness, of prerogative or even of wide discretionary authority on the part of the government. That is, no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of the law established in the ordinary legal manner before the ordinary courts of the land.

According to him:

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

- (b) The second aspect of the rule of law is: equality before the law, or equal subjection of all classes to the ordinary law of the land administered by ordinary courts. Simply put, that no man is above the law; officials and private citizens are under a duty to obey the law; and that there are no administrative courts to which are referred claims by the citizens against the state or its officials.

Recall that Dicey contrasted the rule of law with the *droit administratif* of France. In the system obtainable in France, there are specialized courts established to hear matters involving government officials. In other words, the courts that determined issues amongst private persons were different from the ones that handled matters concerning public officials.

This practice was declared by Dicey to be inconsistent with the rule of law. And because such dual court system was non-existent in the United Kingdom, he had erroneously declared the latter to be lacking in administrative law. He was wrong.

He wrote in criticism of the French administrative system which he used as a basis for rejecting the emergence of an administrative arm of government in England. However, the administrative arm of government has become an indispensable or inevitable hallmark of modern system of government with more and more powers entrusted to administrators to do. This is because of the need for the government to be more responsible for the proper functioning of the socio-economic and political system, and the welfare needs of the people.

(c) Lastly, the Rule of law may be used as a formula for expressing the fact that with us the laws of the Constitution, the rules which in foreign countries naturally form part of the constitutional code, are not the source but the consequence of the rights of individuals as defined and enforced by the courts.

In the case of *Governor of Lagos State v. Ojukwu*, (1986) 1 NWLR 621 AT 647 Oputa, JSC (as he then was) conceptualized the rule of law in the following words:

The rule of law presupposes that the state is subject to the law, that the judiciary is a necessary agency of the rule of law, that the Government should respect the right of individual citizens under the rule of law and that to the judiciary, is assigned both by the rule of law and by our constitution the determination of all actions and proceedings relating to matters in disputes between persons, Governments or authority.

In the same vein, in his own conceptualization of the rule of law in the same case, Obaseki, Jsc (as he then was) had this to say:

Rule of law primarily means that Government should be conducted within the framework of recognized rules and principles which restrict discretionary powers which Coke colourfully spoke of as a golden and straight method of law as opposed to the uncertain and crooked cord of discretion.

Lastly, emphasizing the centrality of the concept of rule of law to constitutional democracy and

good governance, the Supreme Court in *Miscellaneous Offences Tribunal v. Okorafor* (2001) 18 NWLR (Pt. 745) 310 @ 327 said as follows:

Nigerian constitution is founded on the rule of law, the primary meaning of which is that everything must be done according to law. It means also that government should be conducted within the framework of recognized rules and principles which restrict discretionary powers.

The doctrine of Rule of Law is one of the pillars upon which true democracy and good governance is established upon. Historically, the concept is rooted upon the theories of early philosophers, who in their own ways proffered various definitions to the doctrine. Aristotle expressed the view that the Rule of Law was preferable to that of any individual.

In the 17th century, John Locke commented on the concept of Rule of Law that:

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

What John Locke meant in essence was that the Rule of Law meant that all governmental powers was to be exercised and determined by reasonably laid down law and not by the whims and caprices of anybody or authority. However, the widely accepted and authoritative definition of the concept was proffered by Albert Venn Dicey.

SELF ASSESSMENT EXERCISE 1

1. Discuss the ingredients of rule of law

3.3 ANALYSES OF THE RULE OF LAW

We will now attempt some analyses of the Diceyan three-fold meaning of the rule of law.

- (1) The First meaning of the Rule of Law is that 'no man is punishable or can lawfully be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land.
- (2) The Second Meaning of the Rule of Law is that no man is above law. Every man whatever be his rank or condition. is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.

(3) The Third meaning of the rule of law is that the general principle of the constitution are the result of judicial decisions determining the rights of private persons in particular cases brought before the court

(a) **Regular laws v. Discretionary Laws**

We totally agree with Dicey's position that everything be done in accordance with the law. We equally have no objection to his concern over arbitrary powers exercisable by government officials. But the point that would easily recommend his theory to disapproval is his opposition to the grant or exercise of wide discretionary power. You will recall that discretion is one of the features of administration. Note that most of the powers vested in governmental agencies by enabling statutes by the legislature are mostly discretionary power. Where the Legislature fails to grant discretionary powers to the administration, chances are that the wheel of government will grind to a halt. Without it, the legislature would probably be a jack of all trade in the art of legislation being a master of none. In the final analysis, the citizens will suffer. It must be noted that 'wide discretionary power' may not be wild after all because the authority that grants power to the administrative agency has some measure of control over the donee.

Kenneth has castigated the rule of law that abhors discretionary exercise of power as extravagant version of rule of law because their abhorrence lacks foundation in rules or principles. For example, the President of a country – who intends to provide hitherto non-existing welfare package for certain categories of citizens – may have to come up with policies, rules or principles which will break new constitutional grounds. In other words, such measures cannot be bound by much of extant rules or principles because welfarism has become a recondite medium of meeting the needs of the people. Likewise, the courts cannot be expected to operate strictly by fixed rules. In fact, it is because there are no many fixed rules that you have cases in courts. Kenneth alluded to the fact that:

- (i) For an offence that carries a penalty of a maximum of 10 years, the judge has a discretion to convict and sentence from between 1-10 years. The law merely fix the boundary of the discretion but none within the boundaries;
- (ii) When the Supreme Court overrules itself or sweeps away pre-existing precedent, it does so by discretion;
- (iii) The emergence or supremacy of equity over common law rules was a vote-

of-no-confidence on the (rigid) rules and the victory of discretion;

(iv) When the equity of today hardens into (rigid) rules, then reform would become necessary.

In support of the above analyses, Wade & Phillips said that:

If it is contrary to the rule of law that discretionary authority should be given to government departments or public officers, then the rule of law is inapplicable to any modern constitution.

(b) Equality v. Inequality

You should note that equality of all before the law means that everybody is equal before the general law. This is without prejudice to the fact that there are special laws which apply to certain classes of people. For example, the Children and Young Persons Law 1947 applies essentially to children and young persons. Its application to any adult is coincidental. Take another example from S. 308 of the CFRN 1999. It Immunes only the incumbent President, Vice-President, Governor and Deputy Governor from both civil and criminal legal or court process no matter the gravity of their conduct. Any other official or any other Nigerian for that matter is not entitled to the constitutional privilege. As domestic officials enjoy immunity so also are members of the diplomatic community in this country. Customary international law and the Privileges and Diplomatic Immunities Act 1962 immunes them as well from civil and criminal liabilities.

In relation to the concept of equality, a full realization is hindered by various socio-economic and legal considerations. Undoubtedly, the concept being nebulous has been given different meanings in different cases. For example, in the Former Eastern bloc, it meant the rule of law irrespective of its content or nature once it was legal and good for the State. The break-up of the East bloc had perhaps proved the fallacies of such argument, even though it can be said that it still exists to some extent in Islamic cultures. In the Western world, such law, before it accords with the rule of law, must have certain minimum content as enumerated below:

- (i) Equality before the law subject to exceptions;
- (ii) No punishment except for written laws;
- (iii) Regularity of law;
- (iv) An independent judiciary to pronounce on an act of government and individuals when contrary to the law;
- (v) The guarantee of certain basic rights and or freedom; and

(vi) Lack of arbitrariness.

It is debatable whether the minimum content is really applicable to a democratic Nigeria. But there was certainly no debate about its doomed fate in the years of military dictatorship. This is predicated on the fact that the military, upon assuming power, usually abrogates or suspends some parts of the Constitution including the fundamental human rights provisions of the Constitution. The decrees of the legislative body – SMC, AFRC – negated the rule of law. Many courts had no choice but to give their blessings to such decrees. However, there were some innovative judges who declared that rule of law was alive and well even in such autocratic regimes.

This is because rule of law presupposes the existence of a particular kind of higher law to which everyone in the society is subject. The military, however, in coming to power suspend and modify this higher law which is a form of a constitution and continues to rule by different decrees which are quite irregular and uncertain. Also, a later decree supersedes the former and the rights that are in existence today may tomorrow be taken away. Despite this, some fearless judges still demand strict compliance with the provisions of extant decrees.

The importance of this concept to administrative law cannot be over emphasized. This is as a result of the fact that the main purpose of administrative law is to keep the confines of the administration within the limits of the law as represented by the constitution in a civilian regime and decrees during a military rule.

(c) **Basic Rights**

Dicey states that the constitution is the result of the ordinary laws of the country. In other words, the fundamental rights enjoyed by citizens derived from the ordinary laws of the land or from the decisions of the courts, not from any special guarantee by the constitution.

3.4 CONTEMPORARY TEXTURE OF RULE OF LAW

In contemporary times, the rule of law has come to mean or to be referred to as the following:

(a) **Respect for the Decisions of Court**

You will recall that the late President Yaradua's mantra or sing song was *rule of law*. The context for his attachment to the doctrine principally derived from the notoriety of the immediate government of Obasanjo to disobey court decisions at will. It fits into the scheme

of the rule of law for court rulings and decisions and other processes of court to be obeyed. The situation is the same even where such decision is null and void. It is the duty of a law-abiding citizen to get the court to declare the nullity of such decision but until then such decision must be obeyed. A decision that is null could make the law or the legal system to be unjust. According to natural legal philosophers, an unjust law deserves to be disobeyed. However, according to Thomas Aquinas, such laws may still be obeyed despite their unjustness if doing otherwise will cause social disorder.

(b) Respect for Human Rights

Respect for human rights has become the basic template for determining whether or not the government is rule of law-compliant. Human rights are the freedoms, liberties, immunities or benefits which are inherent in human beings in a civil society. They predate the individual or the society. Such rights are to be found in Chapter II and Chapter IV of the CFRN 1999. See the African Charter on Human and People's Rights (Ratification and Enforcement) Act 2004, through which Nigeria domesticated its obligations to observe human rights under the African Charter on Human and People's Rights 1981. See also the following cases:

Fawehinmi v. Gen. Sani Abacha & Others, (1996] 9 NWLR (Pt. 475) 710 CA. and *Governor of Lagos State v.Ojukwu*. [1986]1 NWLR (Pt. 18) 621 SC.

(c) Recognition of New generation of Human Rights

In the beginning we had the first generation – *International Covenant on Civil and Political Rights (ICCPR) of 1966*, Adopted and opened for signature, ratification and accession by GA Resolution 2200A (XXI) of 16 December 1966, and entered into force on 23 March 1976 – and the second generation – *International Covenant on Economic, Social and Cultural Rights (ICESCR) 196* Adopted and opened for signature, ratification and accession by GA Resolution 2200A (XXI) of 16 December 1966, and entered into force on 3 January 1976 – of rights. However, because of the dynamism of human rights its categories are not closed. Consequently, human rights have been categorized into miscellaneous generations of rights.

4.0 CONCLUSION

Rule of law presupposes the doing of everything according to law, that is, that there is the absolute predominance of regular laws over privative laws or discretionary laws; equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts; and the guarantee of certain basic rights.

The doctrine of rule of law is popular because there is hardly any legal system that does not contain, at least, the tenets of the doctrine. Discretionary power or the exercise thereof is one practice that the doctrine condemns because it allows individuals to apply their own personal conviction without necessarily resorting to the law. But because of the complexity of modern State and the complicated nature of its problems, there is the necessity to entrust administrative agencies with the power to act discretionarily in deserving circumstances – circumstances unforeseen.

In its modern manifestation, rule of law has given rise to, for instance, new generation of rights or human rights such as the rights to development, environment, etc.

5.0 SUMMARY

In this Unit, we examined rule of law in its traditional form and in its modern ramification. We equally attempt some analyses and, finally, looked at the contemporary scope of the concept.

6.0 TUTOR-MARKED ASSIGNMENT

1. Even in contemporary times, rule of law remains what it was in classical era.

Discuss.

7.0 REFERENCES/FURTHER READINGS

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UNIT 3 CONSTITUTIONAL SUPREMACY

UNIT 1 Separation of powers

UNIT 2 Rule of law

UNIT 3 Constitutional Supremacy

UNIT 4 Parliamentary Supremacy

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3.0 Main Content

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1.0 INTRODUCTION

Constitutional supremacy is closely related to the rule of law. The latter is general while the former is particular. Constitutional supremacy is a concept that rejects the rule of man but prefers the management of the affairs of men and things by institutions established in accordance with law. It seeks to avoid a situation where the whim and caprice of man would determine the nature or character of benefits or burdens available before any person or groups of persons.

In the CFRN, the concept is alive and well especially when we look at the detailed provisions of Chapter IV which provides for the fundamental human rights of the citizens. We must recall that these provisions are to be read or understood in the light of judicial interpretation.

The concept is particularly significant for Nigeria in so far as it seeks to assure everyone including the minority groups of equal protection as can be deciphered through provisions on human rights and on Federal Character.

2.0 OBJECTIVES

At the end of this Unit, you will be in a position to:

- Assess constitutional supremacy against the background of the CFRN
- Apply the concept in your dealings with your family members, colleagues, business partners.

3.0 MAIN CONTENT

3.1 Meaning of Constitution

Constitution is a document having a special legal sanctity which sets out the framework and the principal functions of the organs of government of a State and declares the principles governing the operation of those organs. In other words, Constitution is the supreme document of a politically organized State. For example, the Constitution of the Federal Republic of Nigeria (CFRN) 1999 is such a document. Constitution can best be defined or described by its utility as follows:

- (a) It is the basic document of a State which guides the relationship amongst the three arms of government in their management of the affairs of State;
- (b) It regulates the rights and duties and privileges of public officials,
- (c) It governs the relationship between these governmental actors on the one hand and the citizens on the other; and
- (d) It codifies the corpus of rights of citizens.

Constitution may be written or unwritten. A State which governs its citizens on the basis of the above fundamental legal concepts codified in a document is said to operate a written Constitution. States in this category include the US, India, Canada, and Nigeria. On the other hand, a State which administers the affairs of its territory without any such document is claimed to run an unwritten Constitution. A ready example is the United Kingdom. The advantage that the written Constitution has over the unwritten one is that it is easily accessible to everyone. In other words, it is a convenient document of reference. Whether written or otherwise, the Constitution is a roadmap meant to guide the legislature, the executive, the judiciary and the administrative agencies in their governance of the State.

3.2 Constitutional Supremacy

The term 'supremacy' indicates the highest authority or rank and could even be known as being in an all-powerful position. The concept of constitutional supremacy is predicated on the Constitution. It is a specie of the doctrine of rule of law. The relationship between the two is that the latter is the ultimate precursor of the former. Constitutional supremacy is, as the phrase implies, the rulership or sovereignty of the Constitution. Inherent supremacy stems from the generic character of the constitution. The constitution is the authoritative statement of the law on a subject; where a legislative authority claims to legislate in addition to what the constitution had enacted, it must show that, and how, it has derived its legislative authority to do so from the constitution. The content of the constitution is not determined by compliance with

any natural legal requirements or preceded by other binding material legal instrument. The constitution is the primacy regulator of basic social relations. The supremacy of the constitution in a contemporary nation has been recognized to be the constituent component of the constitutional state founded on the rule of law. In constitutional supremacy, it is the constitution.

Constitutional supremacy refers to the system of government in which the law-making freedom of parliamentary supremacy cedes to the requirements of a Constitution. It refers to the system of government in which the law making freedom of parliamentary sovereignty abandons to the requirements of a constitution as the constitution is supreme. It could be inferred that all laws passed has to be in line with the constitution.

Under the Kenyan constitution, Article 2 (1) provides for the supremacy of the constitution that : the constitution is the supreme law of the republic and binds all persons and state organs at both levels of government.

Article 2 (b) provides that : the validity of the Constitution is not subject to challenge by or before any court or any other state organ.

Further by section 2 (4), any law, including customary law that is inconsistent with the constitution is void to the extent of its inconsistency and any acts or omission in contravention of the constitution is invalid.

There are several implications that constitutional supremacy has for citizens.

First, it signifies the rule of law as opposed to the rule of man. The further implication of this is that everybody is equal before the law; and no power can be exercised arbitrarily over the citizens. Again, it means that the citizens benefit from the human rights provisions of the Constitution. For example, Chapters IV and II of the CFRN

1999 respectively provide for civil and political rights, and social, economic and cultural rights. Note that while Chapter IV is enforceable, Chapter II is not. But we must keep in mind that that a right is not enforceable today does not detract from the possibility of its being enforceable in the future. And, in any case, the mere fact that it is codified will assist rulers and the ruled alike in their conduct of private and public affairs.

The meaning of the constitution as a fundamental law and as a supreme judicial act has been established ever since the time of F. Lassal in Continental Europe as well – albeit with some degree of inconsistency, in view of the Magna Carta Act since the reign of King Edward III in England.

Constitutional supremacy has a universal effect encompassing all physical and legal persons within the nation state territory. Therefore, compliance of legislation to the Constitution is an immediate effect of constitutional supremacy.

Constitutional supremacy was made abundantly clear in the case of *Ukpe v. Nkem* (2003) AHRLRL 208 NgCA2000) per Wali JSC in 442 B when he said:

“I have no hesitation in coming to the conclusion that any customary law that sanctions the breach of an aspect of the rule of law as contained in the fundamental rights provisions guaranteed to a Nigerian in the Constitution is barbarious and should not be enforced by the court”.

Pats-Acholonu JCA also said;

...time was when the law governing the native community was force of custom – good or bad, and whether repugnant or not. Now in the 21st century, we are governed by a living law – the Constitution fashioned after the Constitution of the older democracies”.

In *A.G Abia State v. A.G Federation* [2002] 6 NWLR (Pt. 763) 264, the Supreme Court, referring to S. 1(1) & (2) reiterated the hierarchy of our laws as follows:

The Constitution is what is called the Grundnorm and the fundamental law of the land. All other legislations in the land take their hierarchy from the provisions of the Constitution. By the provisions of the Constitution, the laws made by the National Assembly come next to the Constitution; followed by those made by the House of Assembly of a State. By virtue of S. 1(1) of the Constitution, the provisions of the Constitution take precedence over any law enacted by the national Assembly even though the National Assembly has the power to amend the Constitution itself.”

In the same vein, the Court of Appeal in the case of *Amaechi v. INEC* [2007] 9 NWLR (Pt. 1040) 504 at 533 said as follows:

“The Constitution of the Federal Republic of Nigeria is the grundnorm of the country. It is, in fact, the “fons juris” from which all other laws flow and derive their validity. It is the organic law which prescribes rights, duties, powers and responsibilities of all the organs derivable from it. Courts are organs created by the Constitution and it is the Constitution majorly and principally that defines their jurisdiction. It is the substantive law which makes provisions for the procedural laws or other statutes applicable in the various courts established by it.”

Also, in the case of *INEC v. Musa* (2003) AHRLRL 192 (NgSc), it was held per Emmanuel Olayinka Ayoola that:

“Firstly, all powers, legislature, executive and judicial, must ultimately be traced to the constitution. Secondly, the legislative powers of the legislature cannot be exercised inconsistently with the Constitution. Where it is so exercised, it is invalid to the extent of its inconsistency. Thirdly, where the constitution has exhaustively in respect of any situation, conduct or subject, a body that claims to legislate in addition to what the constitution has enacted must show that it has derived the legislative authority to do so from the constitution. Fourthly, where the constitution sets the condition for doing a thing, no legislation of the National Assembly or of a State House of Assembly, can alter these conditions in any way, directly or indirectly unless of course, the constitution itself as an attribute of its supremacy expressly so authorized.”

What the Supreme Court has restated is that the CFRN tops the hierarchy of the Nigerian legal order. Paraphrasing Kelsen, the Constitution is the basic norm, or the grundnorm, which occupies the highest position in the normative legal order. Every other law within the normative system of norms must be validated by the grundnorm, that is, such law must not be inconsistent with the grundnorm. Any inconsistent law is, to the extent of such inconsistency, null and void. Simply put, the Constitution is superior to all other laws. Thus, in the Nigerian legal system, all laws including Acts of the National Assembly are inferior to the CFRN. You should note that this reasoning is unaffected by the competence of the National Assembly to amend or modify the CFRN.

We understand that, generally speaking, each of the arms of government is independent in its own ‘territory. However, that independence does not empower any arm of government to violate or to act inconsistently with the Constitution. The issue arose in the case of **A.G. Bendel v. A.G. Federation & 22 Others**. [1982] All NLR 85 SC.

SELF ASSESSMENT EXERCISE 1

1. Explain what is meant by constitutional supremacy
2. The idea of constitutional supremacy is not applicable to ‘internal affairs’ of an arm of government. Do you agree?

3.3 Constitutional Supremacy & Some Human Rights

The fertile ground on which constitutional supremacy is usually tested is in relation to the protection or violation of Chapter IV which provides for fundamental human rights *viz* - the right to life (S.33); right to dignity of human person (S.34); right to personal liberty (S.35); right to fair hearing (S.36); right to private and family life (S.37); right to freedom of thought, conscience and religion (S. 38); right to freedom of expression and the press (S. 39); right to peaceful assembly and association (S. 40); right to freedom of movement (S. 41); right to freedom from discrimination (S. 42); and right to acquire and own immovable property anywhere in Nigeria (S. 43). We shall take a sample of these specific provisions as interpreted by case law.

(a) Right to Fair Hearing

In connection with the right to fair hearing, S. 36(1) provides:

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

Fair hearing comprises so many ingredients. First, it contains the Latin maxims – *audi alteram partem* and *nemo judex in causa sua*. *Audi alteram partem* means that the other side must be heard. In other words, a court, tribunal or arbitral body must not determine a matter upon hearing only one side to the dispute. Any decision produced by that approach or process is a nullity. *Nemo judex in causa sua* means no judge can be a judge in his matter. It is a rule against bias, a rule that disqualifies a person occupying an adjudicatory office from seating in judgement over a matter in respect of which he has an interest. See the case of *Alakija v. Medical Disciplinary Committee*[1959] 4 F.S.C. 38.

Here, a medical practitioner alleged that the Medical Disciplinary Committee (MDC) did not conduct the enquiry in compliance with the rules of natural justice in the sense that the Registrar who was actually the prosecutor participated in the Committee deliberations that convicted him. The Supreme Court accepted the contention of the appellant to the effect that the decision of the Committee was unconstitutional for violating the rule against bias.

Under S. 36(5) (c), a person charged with a criminal offence is entitled to defend himself in person or through the agency of a legal practitioner of his choice. This provision came up for consideration in the case of *Awolowo v. Minister of Internal Affairs*[1962] L.L.R. 177. The issue was whether the legal practitioner contemplated by this provision could be one from any jurisdiction. In what one may suggest to be an act of judicial legislation, the Supreme Court held that the chosen legal practitioner must be the one who is qualified or competent to practice in Nigeria as of right.

(b) Freedom of Association and Assembly

Pursuant to S. 40, every person is entitled to assemble freely and associate with other persons, and in particular he may form or belong to any political party, trade union or any other association for the protection of his interests.

Under this provision, every citizen can associate or assemble for a common purpose provided it is a peaceful one. In other words, they must not associate or assemble in a manner as to breach the peace of the land. Nigerians are used to agreeing or disagreeing with one governmental policy or another. One of the avenues through which they vent their disapproval of a policy is by associating to aggregate their grievances for the attention of the powers that be. Because the government of the day was intolerant of such associations, it had always resorted to regulating or abrogating the associations. Associations like National Union of Nigerian Students (NUNS) [which later metamorphosed into the National Association of Nigerian Students (NANS)], Academic Staff Union of Universities (ASUU), amongst others, had experienced one form of ban or another.

In a good faith or bad faith bid to avoid breach of the peace anytime there was a rally or protest, the National Assembly enacted the Public Order Act 1979 Cap 42, LFN, 2004. Pursuant to the Act, the Governor of a State through a Police Officer is empowered to regulate or stop assemblies, meetings and processions. Any person who is desirous of convening any assembly or meeting or of forming any procession in any public road or place of public resort must apply for and obtain the licence or permit of the governor. Any violation was punishable by fine and imprisonment. It so happened that many genuine applications were turned down by the Police and any rally or protest organized in the absence of such approval was declared unlawful and the organizers arrested and detained.

However, in the recent case of some political parties against the Inspector General of Police, the Court of Appeal declared that the Public Order Act was unduly restrictive of the freedom of association and assembly and, therefore, unconstitutional. In the suit instituted by 12 political parties, the Federal High Court, Abuja Division, in 2005, had voided the Public Order Act Cap 382, Laws of the Federation of Nigeria 1990. Besides, the Federal High Court judge also issued an order of perpetual injunction restraining the Inspector-General of Police, his agents, privies and servants from preventing aggrieved citizens of Nigeria (including the plaintiffs) from organizing or convening peaceful assemblies, meetings and rallies against unpopular government policies. Dissatisfied with the decision, the IGP appealed.

On Monday, 10 December 2007, a three-man panel of the Court of Appeal, Abuja Division, dismissed the appeal. The presiding justice, Justice Rabiun Danladi Muhammad, JCA, said that the offensive provision of the Public Order Act requiring Nigerians to procure police permit before holding rallies was not only barbaric but also alien to the nation's democracy.

(c) Freedom of Movement

By virtue of S. 41, every citizen of Nigeria has the right to move freely throughout Nigeria and to reside in any part of thereof, and no citizen of Nigeria shall be expelled from Nigeria or refused entry thereto or exit therefrom. However, the facts of *Shugaba V. Minister of Internal Affairs* revealed Federal Government's brazen violation of this provision when its agents deported or expelled a Nigerian – Shugaba Abdulrahman Darman – out of Nigeria in order to satisfy parochial party sentiments. Shugaba, the applicant – who was a member of the defunct Great Nigeria People's Party (GNPP) and the majority leader in the Borno State House of Assembly – was deported by the Federal Government and its agents from Nigeria to Chad on 24 January 1980. In an application brought under the Fundamental Rights (Enforcement Procedure) Rules 1979, the applicant sought the enforcement of his fundamental rights and for redress against his unlawful deportation from his native country and unlawful interference with his freedom of movement in Nigeria.

The Court found that the deportation of the applicant was a product of political victimization by members of a rival political party – National Party of Nigeria (NPN) – and declared the action of the respondents oppressive, arbitrary, unconstitutional, null and void.

3.4 Importance of Constitutional Supremacy

The concept is particularly important to a multi-ethnic, multi-religious country like Nigeria where variety is the spice of life. Several segments of the Nigerian society complain bitterly

of governmental neglect and marginalization, and claimed that, though they contribute significantly to the baking of the national cake, they are edged out in its sharing. You should recall that some of these bottled up sentiments have frequently found manifestations in religious and political crises, in agitations from the Niger Delta, and in outright criminality. In order to ameliorate, if not erase, these perceptions from our national consciousness in a peculiar country where the majoritarian principle of democracy seems to unduly favour persons from the three major ethnic groups to the detriment of other minority ethnic groups, the Constitution provides specially for human rights, and Federal Character, amongst others.

Federal character is an affirmative governmental policies geared towards giving a sense of belonging to every federating State (and, by extension, every citizen) in the administration of the country. The essence is to guide against a situation where a few persons or group of persons are placed in the commanding heights of our socio-economic and political administration at the expense of other citizens. They are copiously provided for in the CFRN. The relevant part of S. 14 provides as follows:

(3) The composition of the Government of the Federation or any of its agencies and the conduct of its affairs shall be carried out in such a manner as to reflect the federal character of Nigeria and the need to promote national unity, and also to command national loyalty, thereby ensuring that there shall be no predominance of persons from a few States or from a few ethnic or other sectional groups in that Government or in any of its agencies. See also *S. 14(4)* which comprises equivalent provisions relating to the federating States, local government councils and governmental agencies.

Pursuant to Article 14(3), the Federal Government is very sensitive to the issue of appointment of ministers, ministers of States, heads of governmental parastatals, etc. What the government does is to try as much as possible to appoint persons to offices on the basis of equality of the federating States. In order to demonstrate the seriousness with which the principle of Federal Character is viewed, S. 153 of the CFRN sets up some Federal Executive Bodies including the Federal Character Commission. Paragraph 8 of the Part 1 of the Third Schedule of the CFRN provides for the powers of the Commission as follows:

(1) In giving effect to the provisions of S. 14(3) and (4) of this Constitution, the Commission shall have power to –

- (a) work out an equitable formula subject to the approval of the National Assembly for the distribution of all cadres of posts in the public service of the Federation and of the States, the armed forces of the Federation, the Nigeria Police Force and other government security agencies, government owned companies and parastatals of the States;
- (b) promote, monitor and enforce compliance with the principles of proportional sharing of all bureaucratic, economic, media and political posts at all levels of government;
- (c) take such legal measures, including the prosecution of the head or staff of any Ministry or government body or agency which fails to comply with any federal character principle or formula prescribed or adopted by the Commission; and
- (d) to carry out such other functions as may be conferred upon it by an Act of the National Assembly.

The principle of constitutional supremacy ensures that these special provisions cannot be tampered with so easily. Thus, the procedure for amending certain provisions of the CFRN is rigorous and laborious. For example, under S. 9(3), an Act of the National Assembly for the purpose of altering constitutional provisions, States creation and Chapter IV of the CFRN cannot ordinarily be passed; it must be approved by not less than $\frac{4}{5}$ majority of the members of each House of the National Assembly and the resolution of Houses of Assembly of not less than $\frac{2}{3}$ (majority) of all the states of the federation. See the following cases:

***Adamolekun v. Council of the University of Ibadan* [1968] N.M.L.R. 25; [1967] 1 All N.L.R. 213 and *John Kolade v. A.G Lagos State* [1982] 2 N.C.L.R. 771**

From the perspective of administrative law, the significance of this constitutional concept can be seen from the fact that its enforcement guarantees the maintenance of the rule of law. Notice that where there is rule of law or constitutional supremacy, the excesses of administrative agencies can be curbed. You will recall that one of the strong criticisms against administrative agencies is that, in exercising all the functions of all the three arms of government – they tend to wield wide, wild, if not absolute powers. However, because of the intervention of constitutional supremacy, every authority or agency is mandated to act strictly in accordance with the law. This translates to promoting the interests and rights of citizens.

SELF ASSESSMENT EXERCISE 2

1. How meaningful is constitutional supremacy to Nigeria?
2. Nigeria needs good leaders more than it needs constitutional supremacy. Discuss.

4.0 CONCLUSION

Constitutional supremacy is the opposite of parliamentary supremacy – the subject that forms the focus of the next Unit. Deriving from the doctrine of rule of law, it presupposes that every conduct by the arms of government (including governmental agencies) and citizens must be justified or validated by the Constitution. The Constitution is the grundnorm, the basic norm from which all other norms in the normative order derives their validity.

The CFRN, particularly Chapter IV therein, has been the traditional litmus test of the supremacy or otherwise of the Constitution. In civilian democracies, the Courts have always had no difficulty proclaiming and reiterating the reality of the concept. Undoubtedly, there have been decisions that we may not support. But, irrespective of our personal sentiments, the most important thing is that it is the principle that is upheld or claimed to be upheld at the end of the day. The importance of the concept cannot be overemphasized especially when we realize the sensitivity and the volatility of the Nigerian State as a result of its diversity in politics, religion, culture, language, etc. more pointedly, the concept serves as a reference point for all and assists in silencing groups who, otherwise, would have applied their base sentiments in handling the affairs of the citizens and of the country.

5.0 SUMMARY

In this Unit, we examined the constitution, constitutional supremacy, and some representative human rights, and the importance of constitutional supremacy in the complex political entity called Nigeria.

6.0 TUTOR-MARKED ASSIGNMENT

1. In what way has the CFRN demonstrated the constitutional supremacy in the Nigerian legal system?

7.0 REFERENCES/FURTHER READING

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UNIT 1 Separation of powers**UNIT 2 Rule of law****UNIT 3 Constitutional Supremacy****UNIT 4 Parliamentary Supremacy****CONTENTS****1.0 Introduction****2.0 Objectives****3.0 Main Content****3.1 Scope of Legislative Supremacy****3.2 Some Exceptions to Legislative Supremacy****3.3 Legislative Supremacy vis-à-vis and the Federal Republic of Nigeria****3.4 Legislative Supremacy in Military Regimes****4.0 Conclusion****5.0 Summary****6.0 Tutor-Marked Assignment****7.0 References/Further Readings****1.0 INTRODUCTION**

Of all the many constitutional concepts, legislative or parliamentary supremacy stands out. This is because of the fact that it appears to run counter to our tradition or convention of rule of law, constitutional supremacy, etc. It is a concept that promotes the superiority of the will of man over that of law. It is practised in the UK. Notwithstanding its seeming absoluteness, parliamentary supremacy is subject to some exceptions especially with the fact that the UK, being a responsible member of the international community, cannot be heard to elevate such concept to the international plane. You must note that despite Nigeria's romance with parliamentary system of government, it did not go as far as experimenting with the concept. Ever since the 1960s, Nigeria has reflected its preference for constitutional supremacy till date. It is equally important to note, however, that we have had our own share of the bitter pill that legislative supremacy represents in the period Nigeria was governed by the military.

2.0 OBJECTIVES

At the end of this Unit, you will be in a position to:

- Appraise the concept of legislative supremacy as applicable in the United

Kingdom;

- Evaluate the reality of legislative supremacy in military regimes anywhere in the world.

3.0 MAIN CONTENT

3.1 Parliamentary sovereignty

Parliamentary sovereignty or legislative sovereignty is a legacy of the British parliamentary practice which arose out of the conflict between the Crown and Parliament. It is a legal concept which means that an elected body of men (by whatever name it is called, whether parliament, congress, house of representatives, etc.) can pass any law on any topic which affects the interests of persons. According to Hood Phillips:

The most important characteristic of British Constitutional law is the legislative supremacy of the United Kingdom. Positively, this means that Parliament can legally pass any kind of law whatsoever; negatively, it means that there is no person or body whose legislative power competes with or overrides it.

The sovereign legal power in the United Kingdom lies in the Queen in Parliament, acting by Act of Parliament. An Act of Parliament generally requires the assent of the Queen in Parliament, acting by Act of Parliament generally requires the assent of the Queen, the House of Lords, and the House of Commons, and the assent of each House is given upon a simple majority of the votes of members present. The power of an Act of the sovereign Parliament, howsoever, is boundless. See the case of **Jackson v. A.G (2005) 56 1 A.C. 262**

As the name implies, parliamentary supremacy means that the parliament is supreme. In other words, it does not share equal or coordinate status with the other arms of government. Put differently, it is superior to the executive and even the judiciary. A ready example of where parliamentary supremacy reigns is the United Kingdom. According to Sir Erskine May:

“The parliament can pass any laws unjust and contrary to sound principles of government, but it is not controlled in its discretion and when it errs; its errors can only be corrected by itself.”

Under the traditional rule, any previous Act of Parliament can always be repealed by a later Act.

Acts of the most fundamental kind, such as the Habeas Corpus Act 1679, the Bill of Rights 1688, the Act of Settlement 1700, the Statute of Westminster 1931, the European Communities Act 1972 and the Human Rights Act 1998 are just as easy to repeal, legally speaking, as is the Antarctic Treaty Act 1967. No special majorities or procedure are needed. The ordinary, everyday form of Act of Parliament is sovereign and can affect any legal consequences whatsoever.

Parliamentary sovereignty means that parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.

One consequence of parliamentary sovereignty is that the country has no constitutional guarantee. In other countries there is normally a written constitution, embodied in a formal document, and protected as a kind of fundamental law, against amendment by simple majorities in the legislature.

Also, if two Acts of Parliament conflict, the later Act must prevail and the earlier Act must be repealed by implication to the extent of the conflict. The court in *Thoburn v. Sunderland* where the court held that fundamental constitutional statutes (in this case the European Communities Act 1972) were repealable only express words and not by mere implication. Parliament cannot bind its successors. Parliament cannot therefore, modify or destroy its own continuing sovereignty, for the courts will always obey its latest command.

Parliamentary supremacy fits perfectly into the legal theory of John Austin who defined law as the command of the uncommanded commander, that is, law made by a politically superior sovereign to be obeyed by the politically inferior subjects. In the scheme of legislative supremacy, the legislature is the supreme authority. The direct manifestation of its superiority is its absolute powers to amend the Constitution and to repeal laws. In doing so, it can reconfigure the status of the other arms of government. Legislative supremacy implies that the

court cannot question the validity of an Act of Parliament. In fact, the courts take as given the validity of Parliamentary Acts.

Parliamentary sovereignty, as it is now, affects the position of judges. They are not the appointed guardians of constitutional rights, with power to declare statutes unconstitutional, like the Supreme Court of Nigeria subject only to the overriding law of the European Union; they can only obey the latest expression of the will of Parliament. Nor is there own jurisdiction sacrosanct. They lack the impregnable constitutional status of their other counterparts in other jurisdictions like the United States or here in Nigeria. They cannot insist, for example, that power should be subject to 'due process of law' and similar guarantees, if a statute should try to infringe them. They can only obey the latest expression of the will of Parliament. If they go too far in interfering with administrative affairs, Parliament may retaliate by legislation.

Another aspect of parliamentary supremacy is that ministers are responsible to it, both individually and collectively, through the Cabinet. Parliament is the body before which ministers are called upon to account, and without the confidence of which they cannot continue. But here again, the theory is far from reality. The party system means in practice that, in anything but the last resort, the government controls the parliament. This is especially evident in the process of litigation. Bills are drafted by government departments and are often driven through Parliament by the party whips and inadequate time for many of their clauses to be properly considered.

The Position under Written Constitution

The doctrine of legislative supremacy distinguishes the United Kingdom from those countries in which a written constitution imposes limits on the legislature and entrusts the ordinary courts or a constitutional court to decide whether the acts of the legislature are in accordance with the constitution. In **Marbury v. Madison 1 Cranch 137 (1803)**, the US Supreme Court held that the judicial function vested in the court necessarily carried with it the task of deciding whether an Act of Congress was or was not in conformity with the constitution

The legislature or parliament is the arm of government charged with the responsibility of making laws for the peace, order and good government of a State. In Nigeria, for example, S. 4 of the CFRN 1999 vests such powers in the National Assembly at the Federal level, and in each of the State House of Assembly at the state level.

The legislative powers of Nigeria are shared mainly between the Federal Government (as

represented by the National Assembly) and the State Government (as represented by the State House of Assembly). While the National Assembly has exclusive competence to legislate on the 67 specific matters listed in the Exclusive Legislative, the State House of Assembly shares with the National Assembly the competence to legislate on matters enumerated in the Concurrent List subject to the doctrine of covering the field.

In the exercise of its powers to make laws, the National Assembly has the capacity to delegate part of its law making powers to administrative agencies. It does this when it enacts an Act, providing only for general principles. Subsequently, pursuant to the enabling Act, the administrative agency so created enacts detailed rules and regulations for fulfilling the purposes of the Act and other allied objects. Because the National Assembly is the principal and the administrative agency its agent, the latter cannot exceed the scope of its authority. In order to guide against administrative abuse of powers, the National Assembly controls the administrative agency in a variety of ways.

In addition to the law making functions and pursuant to the principle of checks and balances, the National Assembly also carries out oversight functions especially on the executive and, to a limited extent, on the judiciary. For example, it can investigate the Executive, impeach the President or the Vice President, and approve presidential appointments, etc.

Note that a fundamental feature of legislative supremacy is the principle of ministerial or collective responsibility. This means that the body of ministers, otherwise known as the cabinet, is collectively – and not individually – responsible for the success or failure of the incumbent government. In other words, they swim or sail together. Also, in violation of the doctrine of separation of powers, the minister is simultaneously a member of the legislature.

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SELF ASSESSMENT EXERCISE 1

1. Analyze the nature and scope of parliamentary sovereignty.

3.2 Some Exceptions to Legislative Supremacy

Because every general rule begets an exception, you should note that the legislature is not totally an absolute *supremo*, John Austin's uncommanded commander. It is, after all, limited in its powers. First, it can neither bind itself nor its successors. In *Ellen Street Estates Ltd v.*

Minister of Health, Maugham L.J. said that:

The legislature cannot, according to our Constitution, bind itself as to the form of subsequent legislation, and it is impossible for parliament to enact that in a subsequent statute dealing with the same subject matter, there can be no implied repeal. If in a subsequent Act parliament chooses to make it plain that the earlier Statute is being to some extent repealed, effect must be given to that intention just because it is the will of parliament.

Secondly, the supremacy of the British parliament is subject necessarily subject to its international obligations. As a responsible member of the international community, the UK has rights and duties under international law, especially those arising from the Conventions to which it is a signatory. On the principle of *pacta sunt servanda*, every State is bound to discharge the obligations it has undertaken. And no State is at liberty to plead the sanctity or even supremacy of its domestic legal system in order to override or defeat such obligations. Therefore, the supremacy of the British parliament is subject to its obligations within the Commonwealth, and to the European Union, amongst others.

In the third place, parliamentary supremacy is without prejudice to people's sovereignty. In the past, sovereignty was exercised by or at the pleasure of the absolute ruler. In contemporary times, however, the ultimate provenance of sovereignty is the people. They have the inalienable right to vote in and vote out governments. It is only when they first perform this civic right or duty that the subsequent talk about parliamentary sovereignty may be meaningful.

3.3 Legislative Supremacy vis-à-vis the Federal Republic of Nigeria

You should recall that Nigeria adopted the parliamentary system of government in the First Republic that spanned between 1960 and 1966. Note that the governmental system was operated without the concept of legislative supremacy. Save in aberrational military regimes, Nigeria has never operated parliamentary or legislative supremacy. This is demonstrated by the fact that the nature of an entrenched constitution which Nigeria has operated since 1960 under its civilian administrations has been incompatible with the theory of legislative supremacy. For the avoidance of doubt, Nigeria runs governments based on constitutional supremacy. This means that the CFRN is the only litmus test for determining the legality or validity of any law or conduct. Thus, **Section 1 of the CFRN 1999** provides as follows:

- (1) This Constitution is supreme and its provisions have binding force on all authorities and persons throughout the Federal Republic of Nigeria.”
- (2) The Federal Republic of Nigeria shall not be governed, nor shall any person or group of persons take control of the Government of Nigeria or any part thereof, except in accordance with the provisions of this Constitution.
- (3) If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void.

See the case of *Oladele v. Nigerian Army (2004] 6 NWLR (Pt. 868) 166 C.A.*

3.4 Legislative Supremacy in Military Regimes

We have stated generally to the effect that legislative supremacy is an anathema in Nigeria. However, there is an exception in military regimes. Military intervention in the political rulership of the country is, pursuant to S. 1(2) CFRN 1999 (and the equivalent provisions in past Constitutions) is aberrational, abnormal, extraordinary, and unlawful. But, because a (legal) revolution is a social fact, successful military coups tend to transform the initial illegal act of the actors into a legitimate act. According to Kelsen:

A revolution...occurs whenever the legal order of a community is nullified and replaced by a new order in an illegitimate way, that is, in a way not prescribed by the first legal order itself. It is in this context irrelevant whether or not this replacement is effected through a violent uprising against those individuals who so far have been legitimate organs competent to create and amend the legal order.... From a juristic point of view, the decisive criterion of a revolution is that the order in force is overthrown and replaced by a new order in a way which the former had not itself anticipated.

Civil or human rights advocates would ordinarily find this unacceptable but we still have to separate the law from our emotions or sentiments. This is another way of saying that we should distinguish the law as it is from the law as it ought to be.

When the military strikes, the first thing it does is to suspend or modify parts of the pre-existing Constitution that governed the operations of the persons and institutions it has overthrown. Thus, Decree No. 1 of 1984 was fully entitled: Constitution (Suspension and

Modification) Decree No. of 1984. The Decree usually abrogates democratic institutions such as the legislature and the executive, political parties, etc. On the other hand, it suspends or modifies constitutional provisions bordering on the independence of the judiciary and the protection of human rights of citizens.

In a military government, the concept of legislative supremacy is real. The military enacts Decrees and they put it beyond doubt that the Decrees are supreme and incapable of being declared null and void by the judiciary. For example, S.6 of the Constitution (Suspension and Modification) Decree 1966 provides that no question as to the validity of any Decree or any Edict shall be entertained by any court of law in Nigeria. This provision has been replicated in almost every decree that the military has ever promulgated.

The golden opportunity for the military to unambiguously assert its legislative superiority over the judiciary presented itself in the aftermath of **E.O Lakanmi & Kikelomo Ola v. Attorney General (Western State) & Others.** [1971] 1 University of Ife Law Reports 201.

The main issue for determination was whether the powers of the military government of 1966 derived from the pre-existing 1963 Constitution or whether it was a product of revolutionary coup d'état *a la* Kelsen's theory on revolution. The Supreme Court held, *inter alia*, that the military was not a product of revolution, that it derived its powers from the 1963 Republican Constitution, meaning that its powers were finite or limited.

SELF ASSESSMENT EXERCISE 2

1. With military regimes as reference point, critically examine the concept of legislative supremacy.

4.0 CONCLUSION

We are much used to the theory that the three arms of government are equal and coordinate and that no one is superior or inferior to another. But legislative supremacy constitutes a rude exception to this widely-held view. It asserts that the parliament or legislature stands in a position over and above the executive and the judiciary. In fact, the legislature can legislate on any matter and in any manner that may negatively affect the status of the other organs of government. It is practiced in the UK. But we note that there are exceptions because nothing is absolute in life.

In Nigeria, parliamentary supremacy is, generally speaking, unheard of. Ours is rooted on constitutional supremacy. This claim remains valid even when one alludes to Nigeria's brief stint with parliamentary democracy between 1960 and 1966. Noteworthy, however, is the fact that military regimes are typical examples of what legislative supremacy looks like.

5.0 SUMMARY

In this Unit, we dwelt on legislative supremacy, the exceptions thereto, its theoretical relevance to Nigeria, and its manifestation in military regimes.

6.0 TUTOR-MARKED ASSIGNMENT

1. The claim to legislative superiority by military regimes is unacceptable especially against the background of the fact that they assume power by unconstitutional means. Discuss.

7.0 REFERENCES/FURTHER READINGS

1. Hans Kelsen, *General Theory of Law and State* 117 (New Brunswick, London: Transaction Publishers, 2006).
2. H.W.R. Wade, *Administrative Law* (Oxford: Clarendon Press, 3rd Edition, 1971)

MODULE 3

Unit 1	Delegated Legislation
Unit 2	Justification of Delegated Legislation
Unit 3	Validity of Delegated Legislation
Unit 4	Control of Delegated Legislation

UNIT 1 DELEGATED LEGISLATION

CONTENTS

1.0	Introduction
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	3.4 Classification of Delegated Legislation
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1.0 INTRODUCTION

You will recall that our discussion in Module 2 shows that faithful commitment to the doctrine of rule of law espoused by A.V. Dicey negates the existence of administrative law – the law governing administrative agents. He had postulated that it would be contrary to the rule of law for administrative agencies to participate in administration. The implication of this is that there would be no administrative agents let alone any discussion regarding the delegation of power to them.

One of the most significant developments of the present century is the growth in the legislative powers of the executives. The development of the legislative powers of the administrative authorities in the form of the delegated legislation occupies very important place in the study of the administrative law. We know that there is no such general power granted to the executive to make law it only supplements the law under the authority of legislature. This type of activity namely, the power to supplement legislation been described as delegated legislation or subordinate legislation

Similarly, under the doctrine of separation of powers, which allocates distinct roles to the three arms of government – legislature, executive and judiciary – there is ordinarily no place for any other (fourth) arm of government. But administrative agencies have assumed the status of the veritable fourth arm of government. And one of the manifestations of this development is the existence of delegated legislation.

Details are provided below.

2.0 OBJECTIVES

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

- The donors and the donees of delegated power
- The history of delegated legislation

3.0 MAIN CONTENT

3.1 History of Delegated Legislation

The formal process by which a Bill become an Act has never been the sole method of legislation. In the earliest years of Parliament, it was difficult to distinguish between enactment by the King in Parliament and legislation by the King in Council. Even when legislation by Parliament and legislation had become a distinct process, broad power to legislate by proclamation remained with the Crown. In 1539, by Henry VIII's Statute of Proclamations, royal power to issue proclamation 'for the good order and governance of the country was recognized to exist and such proclamations were to be enforced as if made by Act of Parliament. One reason given for the Act was that sudden occasions might arise when speedy remedies were needed which could not wait for the meeting of Parliament; the Act contained saving words to protect the common law, life and property.

The late 19th century saw a great increase in the delegation of legislative power to government departments and other bodies, granted piecemeal as need arose. After 1918, some lawyers and politicians became concerned at the wide legislative power of government departments.

A.V. Dicey's proposition on the rule of law did not reckon with delegated legislation. In fact, he declared delegated legislation unconstitutional or unlawful. However, delegated legislation exists just to assert the contrary, that is, that delegated legislation is a practice recognized by law. Since the 16th century in the UK, there have been Acts of Parliament which had delegated power to the executive. For instance, the *Poor Law Amendment Act 1834* marked a new chapter in the vesting of delegated powers in the executive. The Act gave to the Poor Law Commissioners, who had no responsibility to the Parliament (such responsibility was later

established in 1847) powers to make rules and orders for the 'management of the poor.' Notice that the Act entrusted to the Commissioners not only the responsibility of spelling out details of the execution of the Act; it also placed policy formulation at their disposal. Delegated legislation is a feature of modern governments principally because of government's active intervention in socio-economic, educational, political and welfarist needs of citizens. Delegation of legislative authority by the Parliament to the executive branch increased astronomically in the 19th century with the ending of the period of *laissez-faire* and the coming of 'collectivism.' Because it realized its inability to cope with the newly created responsibilities, Parliament had to surrender power to make detailed legislative rules to administrative agencies.

With the post-1945 emergence of the Welfarist State, delegated legislation was at its height.

In contemporary times, the need for governments to meet the needs of the electorate or citizens has led to an upsurge in the creation or proliferation of administrative agencies. Consequently, rules and regulations promulgated by administrative agencies are far more in number than laws enacted by the legislature. This is another way of saying that donees of power even do more than donors do in fact.

Delegated legislation in Nigeria

Law making in Nigeria is constitutionally the function of the legislature, and the law-making powers of the legislature derives from the Constitution as a grant of authority direct from the people by whom the constitution is framed. Section 4 of the 1979 and 1999 Constitutions vests the legislative powers of the Federal Republic of Nigeria in the National Assembly, and the legislative powers of each state in the House of Assembly of that state. Apart from these constitutionally established legislative bodies, no other person or body can validly make or unmake any law in the country.

Law making involves the determination and declaration of policies in the form of legislative enactments, whereas executive functions call for the application or implementation of the policies contained in the laws made by the legislature.

3.2 Definitions

It is very difficult to give any precise definition of the expression 'delegated legislation.' It is equally difficult to state with certainty the scope of such delegated legislation. Mukherjea, J. rightly says: '*Delegated legislation is an expression which covers a multitude of confusion. It*

is an excuse for the legislators, a shield for the administrators and a provocation to the constitutional jurists...'

According to Salmond, legislation is either supreme or subordinate. Whereas the former proceeds from sovereign or supreme power, the latter flow from any authority other than the sovereign power, and is, therefore, dependent for its existence and continuance on superior or supreme authority.

Delegated legislation, thus, is a legislation made by a body or person other than the Sovereign in Parliament by virtue of powers conferred by such sovereign under the statute.

A simple meaning of the expression 'delegated legislation' may be given as: 'When the function of legislation is entrusted to organs other than the legislature by the legislature itself, the legislation made by such organs is called delegated legislation.'

Legislation itself has been defined as:

"A law passed by Parliament or other law maker such as decree or edict or a military government."

"legislation is the process of passing a law. Many laws made by parliament may contain a provision, empowering the authority that will administer the law to make further laws or regulations to enable it carry out its functions. The laws made by parliament is known as the primary or parent law, while the rules and regulations made by the administrative authority under the power to make law delegated by parliament is known as subsidiary legislation or delegated legislation"

It has also been defined as:

"The rules and regulations made by any person or body authorized to do so by an Act of the legislature."

All acts of delegated legislation are made under the authority and with reference to the conditions laid down in the parent Act. The court emphasized this point in the case of **Williams v. Dr. M.A. Majekodunmi** (1962) W.R.N.L.R 174 at p. 178 when it held that:

"the fact is that the laws of Nigeria begin with the primary laws passed by the legislature itself, and then go to give the subsidiary legislation made by persons or bodies authorized by the legislature to supplement its enactment"

Delegated legislation is law made by an administrative agency. Such subsidiary legislation comes in the form of rules, regulations, byelaws, policy decisions, directives, etc. It is important to note that the concept of 'subordinate legislation' implies the existence of the beneficiary and the benefactor of the power or authority to make subordinate legislation. This is another way of saying that the beneficiary of the power to make delegated legislation occupies a position lower than that of the benefactor. Thus, the benefactor is the repository or embodiment of power, part of which power he donates or cedes to the beneficiary.

Delegation of Power

Delegated legislation is a consequence of the delegation of powers. Put differently, the authority of an administrative agency to make or enact delegated legislation emanates from the power delegated to it by the Constitution or an enabling statute. According to Black's Law Dictionary, delegation of power is "a transfer of authority by one branch of government to another branch or to an administrative agency." In other words, delegation of power is the vesting of the authority of law making in a governmental agency. The power is delegated by someone who or an institution which ordinarily could exercise it himself or itself but, because of some contingencies, decides to grant that power to a subordinate. The question may then be asked: who is the donor of the power that is exercised by administrative agencies?

Generally, donation of power is used in two senses: constitutional sense and administrative sense. Constitutionally, the donor is the people of a country because it is in the people that sovereign power resides. Thus, *S. 14(2)(a)* of the *CFRN 1999* declares that "sovereignty belongs to the people of Nigeria from whom government through the Constitution derives all powers and authority." The people exercise this sovereignty through their elected or appointed representatives. And what is the relationship between the people and the Constitution? The Preamble to the Constitution emphatically explains the relationship when it declares that "WE THE PEOPLE ... make, enact and give to ourselves this Constitution." Although the Constitution may not pass the autochthony test, the presumption remains that the people are the authors of the Constitution, and the donors of power. You should note that the people confer delegated power either through the constitution or through statutes.

Administratively, the legislature is the donor of power. In other words, it is the National Assembly of the Federation or the House of Assembly of a State that vests power in administrative agencies. It is in this latter (administrative) sense that we are mainly concerned.

But before we proceed, it must be stated – at least for conceptual clarity – that the legislature is the direct donor and the citizens the indirect donors of power exercised by administrative agencies.

Nature and Scope of delegated legislation

Delegated legislation means legislation by authorities other than the Legislature, the former acting on express delegated authority and power from the latter. Delegation is considered to be a sound basis for administrative efficiency and it does not by itself amount to abdication of power if restored to within proper limits. The delegation should not, in any case, be unguided and uncontrolled. Parliament and State Legislatures cannot abdicate the legislative power in its essential aspects which is to be exercised by them. It is only a nonessential legislative function that can be delegated and the moot point always lies in the line of demarcation between the essential and nonessential legislative functions. The essential legislative functions consist in making a law. It is to the legislature to formulate the legislative policy and delegate the formulation of details in implementing that policy. Discretion as to the formulation of the legislative policy is prerogative and the function of the legislature and it cannot be delegated to the executive. Discretion to make notifications and alterations in an Act while extending it and to effect amendments or repeals in the existing laws is subject to the condition precedent that essential legislative functions cannot be delegated authority cannot be precisely defined and each case has to be considered in its setting. In order to avoid the dangers, the scope of delegation is strictly circumscribed by the Legislature by providing for adequate safeguards, controls and appeals against the executive orders and decisions. The power delegated to the Executive to modify any provisions of an Act by an order must be within the framework of the Act giving such power. The power to make such a modification no doubt, implies certain amount of discretion but it is a power to be exercised in aid of the legislative policy of the Act and cannot :

i) travel beyond it, or

ii) run counter to it, or

iii) certainly change the essential features, the identity, structure or the policy of the Act.

Under the constitution of India, articles 245 and 246 provide that the legislative powers shall be discharged by the Parliament and State legislature. The delegation of legislative power was conceived to be inevitable and therefore it was not prohibited in the constitution. Further, Article 13(3)(a) of constitution of India lays down that law includes any ordinances, order bylaw, rule regulation, notification, etc. which if found in violation of fundamental rights would be void. Besides, there are number of judicial pronouncements by the courts where they have

justified delegated legislation. For e.g. *In re Delhi Laws Act case*, AIR 1961 Supreme Court 332; *Vasantlal Magan Bhav.*

State of Bombay, air 1961 SC 4; *S. Avtar Singh v. State of Jammu and Kashmir*, AIR 1977 J&K 4.

While commenting on indispensability of delegated legislation Justice Krishna Iyer has rightly observed in the case of **Arvinder Singh v. State of Punjab**, AIR A1979 SC 321, that the complexities of modern administration are so bafflingly intricate and bristle with details, urgencies, difficulties and need for flexibility that our massive legislature may not get off to a start if they must directly and comprehensively handle legislative business in their plentitude, proliferation and particularization Delegation of some part of legislative power becomes a compulsive necessity for viability.

A provision in a statute which gives an express power to the Executive to amend or repeal any existing law is described in England as **Henry viii Clause** because the King came to exercise power to repeal Parliamentary laws. The said clause has fallen into disuse in England, but in India some traces of it are found here and there, for example, Article 372 of the Constitution authorizes the president of India to adopt pro Constitutional laws, and if necessary, to make such adaptations and modifications, (whether by way of repeal or amendment) so as to bring them in accord with the provisions of the Constitution. The State Reorganization Act, 1956 and some other Acts similar thereto also contain such a provision. So long as the modification of a provision of statute by the Executive is innocuous and immaterial and does not effect any essential change in the matter

3.4 Classification of Delegated Legislation

Delegated legislation – which is synonymous with subordinate legislation or administrative legislation may be classified in either of two ways: classification according to nomenclature and classification by procedure.

(a) Classification by Nomenclature

Apart from being referred to by such appellations as rules or regulations, delegated legislation may be called by other names such as order-in-council, byelaw, direction, directive, order, etc. Generally, the existence of such wide vocabulary enables us to enjoy the benefit of variety.

But, because all these words do not mean one and the same thing, there is the need to separate the wheat from the chaff, at least, in order to achieve some consistency. Nigeria has not made

any attempt to specifically define the terms. The Donoughmore Committee in the UK recommended that:

The expression ‘regulation,’ ‘rule’ and ‘order’ should not be used indiscriminately in statutes to describe the instruments by which the law-making power conferred on ministers by parliament is exercised. The expression ‘regulation’ should be used to describe the instrument by which the power to make substantive law is exercised, and the expression ‘rule’ to describe the instrument by which the power to make law about procedure is exercised. The expression ‘order’ should be used to describe the instrument of the exercise of (a) executive power, (b) the power to take judicial and quasi-judicial decisions.⁶³

However, it should be noted that, in the great majority of cases, Nigerian statutes make do with ‘rules’ or ‘regulations.’ Therefore, apart from academic reasons, the UK recommendation may not be of practical relevance in delegated legislating in Nigeria.

(b) Classification according to Procedure

The CFRN 1990 or an Act of the National Assembly usually confers power on the administrative agency or the head thereof to make order, regulations, directions, rules, etc. See, for instance, SS. 170 and 206 CFRN 1999 which respectively delegate power to the Federal Civil Service Commission and State Civil Service Commission; and S. 305 which empowers the President in the event of a state of emergency. You may also need to see SS. 236, 248, and 254 of the CFRN 1999 which respectively authorize the Chief Justice of Nigeria (CJN), the President of the Court of Appeal and the Chief Judge of the Federal High Court to make rules for regulating the practice and procedure of their various courts. Note that S. 42(3) of the CFRN 1979 (which is *in pari materia* with S. 46(3) of the CFRN 1999, gives power to the CJN to make rules with respect to the practice and procedure of the High Court. By virtue of the provision, the CJN made the *Fundamental Rights (Enforcement Procedure) Rules 1979*.

SELF ASSESSMENT EXERCISE 1

1. Examine the history of delegated legislation
2. Legislation or delegated legislation has the same status. Discuss.

3.5 Delegated Legislation under the CFRN 1999

The powers of the three arms of government – the legislature, the executive and the judiciary – are enumerated in *SS. 4-6* of the *CFRN 1999*. Of these, the only arm that is competent to make law for the Federation or any part thereof is the Federal Legislature, otherwise known as the National Assembly – which comprises the Senate and the House of Representatives – and States Legislatures, otherwise known as Houses of Assemblies. Each of the 36 States has a House of Assembly. Thus, *S. 4* of the *CFRN 1999* provides, *inter alia*, as follows:

1. (1) The legislative powers of the Federal Republic of Nigeria shall be vested in the National Assembly for the Federation which shall consist of a Senate and a House of Representatives.
- (2) The National Assembly shall have power to make laws for the peace, order and good government of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative List set out in Part I of the Second Schedule to this Constitution...
- (6) The legislative powers of a State of the Federation shall be vested in the House of Assembly of the State.
- (7) The House of Assembly of a State shall have power to make laws for the peace, order and good government of the State or any part thereof with respect to the following matters....

Noteworthy is the fact that, apart from express delegation of power contained in the body of the CFRN, it is in this law-making arm that the competence to delegate legislative power to administrative agencies resides. Deriving its power from the CFRN, the Federal or State legislature enacts Acts or Laws, as the case may be, and, depending on the occasion, empowers or authorizes the head of the relevant agency to make rules or regulations for efficient operations of the enabling Act or Law as he may deem fit. Some of the donees of power could be the President, Ministers, Governors, Ministers, Commissioners, Heads of Departments, Local Government Councils, Statutory or Public Corporations, Special Boards, Professional Bodies, etc.

Though formally a capitalist State, Nigeria's economy is still centrally organized, that is, it is government-controlled. The direct effect of this is that the government involves itself in so many activities – such as education, agriculture, science and technology, arts and culture, sports, etc – touching on the lives of the people. In so doing, the legislature has to enact laws which, amongst other things, establish agencies. Such agencies are invested with the:

- (a) Power to effect the objects of the enabling Statute;
- (b) Rule-making powers to make delegated legislation; and
- (c) Quasi-judicial powers, for example, powers to consider the application or representation

of interested parties in the issuance of permits or licences.

In invoking any or all of the powers given them, administrative agencies make rules and regulations binding on persons, and the liberties and estates of persons coming within their spheres of influence. There is no gainsaying that the powers available to these agencies are enormous. But can't we do without delegated legislation? With the doctrines of rule of law and separation of powers, can a responsible government not deliver the goods and services to the people?

Because of the invaluable roles that administrative agencies perform, criticism of their existence has been replaced with the argument for the limitation of their powers in order to check abuses. Thus, the 1932 UK Report of the Committee on Ministers' Powers presented to the Parliament regarding delegated legislation stated, *inter alia*:

We do not agree with those critics who think the practice of delegated legislation is wholly bad. We see in it definite advantage, provided that statutory powers are exercised and the statutory functions performed in the right way. But risks of abuse are incidental to it, and we believe that safeguards are required, if the country is to continue to enjoy the advantages of the practice without suffering from its inherent dangers. But in truth whether good or bad the development of the practice is inevitable.

The inevitability of administrative legislation certainly resonated in the Nigerian case of *Williams v. Majekodunmi* (*supra*) where, amongst other things, Bairamian, F.J. said that:

“The volumes of our laws begin with the primary laws passed by the legislature itself, and go onto give the subsidiary legislation made by a person or body authorized by the legislature to supplement its enactments. The convenient method of legislation has been in use over the years, and there are specific provisions in the Interpretation Act, which regulate the making and effect of subsidiary legislation. It is a fair inference that everyone who assisted in the framing of the constitution, and in particular the legal advisers who attended the conference, were all aware of this method of legislation, and there was no intention to require that every bit of legislation made after independence had to be made by the legislature itself, whether Federal, Regional or else it would be of no effect...”

SELF ASSESSMENT EXERCISE 2

1. Evaluate the scheme of delegated legislation under the CFRN 1999

4.0 CONCLUSION

Before the doctrines of rule of law and separation of power, the edifice of delegated legislation cannot stand. But because of the utility of the participation of administrative agencies in legislation process, delegated legislation has become an inevitable concept in governance. The reality of delegated legislation is manifest in the saying that it takes two to tango, the two here being the donors of power and the donees of power. The donors are ultimately the people who donate such power to administrative agencies – the donees of power – through the media of the Constitution and the people. You should note that the relationship between donors and donees is that of the superior and the inferior, the master and the servant. Thus, the donee accepts to exercise the power so given subject to the conditions of grant stipulated by the donor.

Against the backdrop of the history of delegated legislation, which we have traced beyond the shores of this country, delegated legislation has been well captured under the Nigerian legal system through constitutional provisions and statutory enactments. While the former derives directly from the CFRN 1999, the latter emanates from the legislative activities of the National Assembly at the Federal level and States Houses of Assembly at the state levels.

5.0 SUMMARY

In this Unit, we considered delegation of power upon the basis of which we examined delegated legislation. We equally looked at the historical antecedents before we dwelt on its manifestations in the Nigerian legal system.

6.0 TUTOR-MARKED ASSIGNMENT

1. Assess the merits or demerits of delegation of powers through the Constitution and Statute.

7.0 REFERENCES/ FURTHER READINGS

1. J.F. Garner & B.L. Jones, *Garner's Administrative Law* (London: Butterworths, 6th Ed., 1985).
2. T.F. Yerima & B. Abegunde (Ed.), *Essays on Administrative Law in Nigeria* (Ado Ekiti: Petoa Educational Publishers, 2006).
3. William Wade & Christopher Forsyth, *Administrative Law* (Oxford, UK: Clarendon Press, 1994).

MODULE 3

Unit 1	Delegated Legislation
Unit 2	Justification of Delegated Legislation
Unit 3	Validity of Delegated Legislation
Unit 4	Control of Delegated Legislation

UNIT 2 JUSTIFICATION OF DELEGATED LEGISLATION

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
 - 3.1 Justification of Delegated Legislation
 - 3.2 Criticism of Delegated Legislation
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment
- 7.0 References/Further Readings

1.0 INTRODUCTION

We looked at the concept of delegated legislation in the immediately preceding Unit. Measured merely by volume, more legislation is produced by the executive government than by the legislature. All the orders, rules and regulations made by ministers, departments and other bodies owe their legal force to Acts. Parliament is obliged to delegate very extensive lawmaking power over matters of details, and to content itself with providing a framework of more or less permanent statutes.

Administrative legislation is traditionally looked upon as a necessary evil, an unfortunate but inevitable infringement of the separation of powers. Justification for such delegated legislation is to be found in the inability of the three traditional arms of government – the legislature, the executive and the judiciary to effectively cover the field of governance or administration. In other words, such justification rests on the inevitability of administrative agencies in making rules and regulation for the smooth running of the modern day State. Thus, delegated

legislation is, in the words of Wade, traditionally considered as a necessary evil, an unfortunate but inevitable infringement on the separation of powers.

Be that as it may, you should note that delegated legislation is not the darling of everyone. This is because there are lots of criticisms directed against the concept. The central argument is that despite its inevitability, delegated legislation vests wide power in the hands of those lacking in direct citizens' mandate – administrative agencies.

2.0 OBJECTIVES

At the end of this Unit, you would be able to explain:

- The factors contributing to the utility of delegated legislation
- The criticisms trailing the concept of delegated legislation

3.0 MAIN CONTENT

3.1 Justification of Delegated Legislation

Lots of factors have been identified as constituting the justification for or founding the basis of or the inevitability of delegated legislation. We shall examine some of them below.

(a) Reduction of Parliamentary Workload

Casting our mind back to classical rule of law and separation of powers, the legislature should be directly responsible for all legislation. However, because there are so many activities requiring legislative attention or action, the legislature cannot be expected to legislate alone. If only the legislature were to legislate for these activities, it would be unduly weighed down for lack of the personnel, facilities, and the time to do so.

Consequently, the legislature would be unable to efficiently and promptly deliver goods and services or, in democratic parlance, the dividends of democracy, to the electorate or citizens. This may be politically costly to the legislature as it may have to contend with mass protests, demonstrations, and even a vote-of-no-confidence.

Thus, there is the need to give authority to administrative agencies to embark on administrative legislation. In other words, delegated legislation releases the pressure upon the legislature and enables it to concentrate on principles and not details.

(b) Enabling Experts to Legislate on Technical Matters

Another justification for resorting to administrative legislation lies in the technicality of the subject matter over which the legislature may have to legislate. In no genuine democracy is any legislator required to possess a degree in a particular field to be eligible for election into office. In other words, the legislator does not necessarily have to be an expert in any field the most important thing being his acceptance or choice by the electorate.

Under this arrangement, the legislative body is a mixed grill of persons. Even where there are in-house experts versed in a particular area in relation to which a bill has been presented, they may still not be satisfactorily knowledgeable to such an extent as to be able to take their non-expert members along through to the passage of the bill. The above scenario is worse in a country like Nigeria where the literacy rate is still low.

Under the Constitution of the Federal Republic of Nigeria 1999, eligibility for election into the National Assembly does not include possession of professional academic training. In fact, a member of the Senate or House of Representatives need not have a university degree. The implication of this is that they will be unable to fully appreciate the nature and character of draft bills particularly technical ones – for example bills relating to science and technology, computer science, biotechnology, genetics, etc – forwarded to them simply because they are not learned in the areas covered by the bills. It is, therefore, pragmatic to cede regulation of these areas to experts in the ministries or parastatals from which the bills emanate. Apart from encouraging professionalism, this approach promotes efficiency and enhances effective service delivery. Thus, The British Committee on Ministers' Powers in 1932 said, amongst other things, that:

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

(c) Provision against unforeseen circumstances

Legislation may require some measure of flexibility so as to take care of future contingency and unforeseen circumstances in the execution of government policies. In this connection, delegated legislation enables the legislature to provide ready-made or customized and prompt response to future emergencies or contingencies such as natural disasters, drought, strikes, religious strife, socio-economic and political crises, etc. At the time of the happening of any of

these events – a period that calls for prompt and effective reaction – the National Assembly may not be in a position – for instance, it may be on recess – to do anything the occasion demands because its tedious procedures will not let it. In times of emergency, measures cannot await the usual proceedings and it may thus be necessary and desirable to confer wide discretionary powers on the delegate of power, e.g. the president. This is so where summary or temporary action must be taken, e.g. declaring an area as danger zone. See **William v. Majekodunmi [1962] 1 All N.L.R 412**

Therefore, delegating powers to an administrative agency or executive is designed to overcome the bureaucracy that could undermine the capacity of the country or any part thereof to promptly respond to any eventuality. For example, under *Section 305 of the CFRN 1999*, the president has power to declare a state of emergency in any State of the Federation and, more important, is vested with the power to make rules and regulations for the administration of the State affected. Notice that the regime of President Olusegun Obasanjo invoked emergency provisions against Plateau State.

(d) Delegated Legislation as a medium of bringing an Act into effect

There are times when, though an Act has been enacted the legislature, the provisions of the Act cannot come into operations because of the paucity of funds, inadequate personnel, or other logistics problems. This is a convenient place where the legislature has to delegate the relevant governmental agency to effectuate the Act or a part thereof as and when the identified inadequacies are addressed. The operation of the Act may be postponed or its operationalization entrusted to the agency because persons and groups that would be affected by the Act have not yet been sensitized or educated as to the provisions of the Act. In this case, the legislature will simply authorize the agency to bring the provisions of the Act into effect when it is satisfied that those persons and groups have been sufficiently sensitized or mobilized for the law.

SELF ASSESSMENT EXERCISE 1

- Discuss the merits of delegated legislation in Nigeria.

3.2 Criticism of Delegated Legislation

There are criticisms of the constitutional or statutory delegation of legislative power to administrative agencies. Incidentally, such criticisms are rife amongst adherents of strict application of the doctrines of rule of law and separation of powers. Streatfield J. in *Patchet v.*

Leathem appears to have summarized the gravamen of the aversion for delegated legislation as follows:

Whereas ordinary legislation, by passing through both Houses, is thus twice blessed, this type of so-called legislation is at least four times cursed. First, it has seen neither House of Parliament; secondly, it is unpublished and is inaccessible even to those whose valuable rights of property may be affected; thirdly, it is a jungle of provisions, legislative, administrative or directive in character and sometimes difficult to disentangle one from the other; and fourthly, it is expressed not in the precise language of an Act of Parliament or an Order in Council but in the more colloquial language of correspondence, which is not always susceptible of the ordinary canons of construction. In no particular order, we shall consider some of the criticisms below:

(a) Contravention of the Doctrines of Rule of Law & Separation of Powers

The doctrine of rule of law posits, *inter alia*, that legislation should adhere to the usual procedures stipulated for law-making. Such procedures are expressly enumerated in the CFRN 1999. In considering bills before it, the National Assembly follows or is guided by these procedures so much so that the end product – Acts of National Assembly – can truly be said to emanate from the national Assembly. However, in delegation legislative power to administrative agencies, the legislatures, non-legislature, and most important, mere government appointees, the leeway to enact rules and regulations that would affect the rights, liberties and properties of citizens. Again, the doctrine of separation of powers insists that each of the three arms of government should faithfully stick to assigned duties and refrain from interfering in the affairs of another. In the scheme of the CFRN, this means that the legislature, which is the law-making arm of government, should, to the exclusion of any other arm or governmental agency, make laws. Implied in this is the prohibition of any other arm or administrative agency from interfering in the law-making powers of the legislature. Unfortunately, this is exactly what delegation of power by the legislature to the administrative agency causes the latter to do.

(b) Administrative Powers are too Expensive

Allied to the above is we have stated that while the legislature makes laws to cover general policy only, an administrative agency legislates in particular details. In other words, Administrative legislation fleshens the skeleton of a Statute or an Act of the National Assembly. But it so happens that those details the drawing up of which is vested in the

agency are the most important and most impactful on the man in the street. In other words, matters often left to the agency to fill in the details are those affecting the people most and it is undesirable that this is not left to elected representatives. It is usual for an average voter to expect his representative at the legislative house to defend his interest by participating in the discussion of those details before they have the force of law. Those details that are worked out by the administrative agencies and dressed up as rules and regulations come into existence without any direct input from the legislators. To that extent the rules and regulations are, in the words of Streatfield J., miss out in National Assembly double blessings.

(c) Administrative Agencies Possess too much Discretion

Another ground for castigating power delegation to an administrative agency is that the enabling provisions usually contain wide, subjective phrases such as 'if he is satisfied,' 'as he deems fit,' 'in his opinion,' 'if the minister is of the opinion,' etc. For example, S. 114 of the Federal Road Safety Commission Act 2004 Cap F19 Laws of the Federation 2004 empowers the Director of the Commission to make such other regulations as, *in his opinion*, are necessary and expedient for the purposes of reducing the rate of road accidents and are in conformity with the public safety on the highways. Similarly, Section 51 of the Immigration Act 2004 Cap 11 authorizes the minister in charge of immigration to make all such regulations as, *in his opinion*, are necessary or expedient for giving full effect to the provisions of the Act and for the due administration thereof. The argument goes that these legislative strategies entrust enormous powers to mere appointees rather than elected representatives of the people.

(d) Inadequate Control

It is alleged that the legislative body lacks the time to actually watch over the administrative agency because of its tight schedule in law-making so that administrative misconduct may be committed without the donor of power being able to do anything to halt the practice the only exception being S. 88 of the CFRN 1999 [which empowers the National Assembly to conduct investigations on the activities of the executive]. This gives room for judicial intervention through the declaration of an act as *ultra vires*. However, the opportunity for this declaration may not arise or arise late where aggrieved persons decide to let sleeping dog lie either because they are pacific or because they lack the time and money to expend in litigation. So, access to justice would depend on the chance litigation of a victim of governmental act. Even where the judiciary finally acts, it does so only when the damage has already been done.

(e) No Publication or Publicity

It is usual for bills submitted to the National Assembly to be public knowledge. At the time such bills finally become law, many people would have been aware of their intents and purpose. Conversely, this is not the case with administrative legislation. Rules and regulations and even bye-laws are not, in most cases, published. One gets to know of the administrative prohibition of a conduct at the level of enforcement. Unfortunately, there is no general mandatory provision requiring the administrative agency to adopt antecedent or subsequent publicity of delegated legislation so as to make many people aware of the rules and regulations. This is a serious oversight on the part of the legislature particularly when we know that our legal system is founded on the belief that ignorance of the law is no excuse. See section 22 of the Criminal Code. So, what would be the fairness in requiring the individual responsibility of persons who innocently or ignorantly violated the provisions of rules and regulations which were never publicized or published?

(f) Less Satisfactory Drafting of Administrative Legislation

Law-making procedures of the legislature is so stringent, scrupulous and rigorous that at the reading and debating stages, any procedural or substantive error in drafting could be corrected. In other words, it is the exchange of ideas amongst legislative members over the pros and cons of the draft bill that makes the bill, and the law, better. On the other hand, administrative legislation does not observe these procedures. So, the rules and regulations issuing out from these agencies are more often than not fraught with clerical and substantive errors and bad drafting which ultimately affect the clarity and certainty of the rules and regulations.

(g) Emergency Regulations often Violate Human Rights

One of the reasons we advanced to support the justification for delegated legislation was that where the legislature grants power to an administrative agency to make rules and regulations, it enables the donee to respond to emergencies or contingencies at a time the legislature would not have been able to do so. As good as the ceding of power is to the agency, we must admit that regulations rolled out in emergency situations are often privative and violative of basic human rights of citizens.

Under the common law, as applicable in the statutory laws of many countries, such agency,

sensing a 'clear and present danger' to national security and welfare restrict the civil rights of individuals. Under this rule – the doctrine of necessity – the interest of the State is promoted over and above that of the individual. It reflects the utilitarian principle of the maximum happiness of the greatest number, leaving minorities to their own fate. A case that supported this doctrine is *Liversidge v. Anderson* (1942) A.C. 206 HL. But the dissenting opinion of Lord Atkin – upon the basis of which *IRC v. Rossminster Ltd* (1980) A.C. 952 HL overruled *Liversidge v. Anderson* – is worth quoting in some details:

In this country, amidst the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.

4.0 CONCLUSION

There is no doubt that there is legitimate apprehension over the delegation of legislative power to a body that should ordinarily be far removed from the precincts of legislation. However, it is worth noting that in the beginning, the criticism against delegated legislation was absolute in the sense that no form of delegated legislation was to be tolerated. But in realization of the utility of delegated legislation, there appears to be a general consensus on the inevitability of delegated legislation. In contemporary times, emphasis is on concerns about ways and means of curtailing abuse of delegated power.

SELF ASSESSMENT EXERCISE 2

1. Critically examine the criticisms of delegated legislation.

5.0 SUMMARY

In this Unit, we basically considered the concept of delegated legislation, its justifications and criticisms. Regarding the former, we considered the definition of delegated delegation, delegation of power and the donors and donees of power. Thereafter, we looked at the justification of delegated legislation and rounded off with the criticisms.

6.0 TUTOR-MARKED ASSIGNMENT

1. The criticism of delegated legislation is unnecessary because administrative legislation is indispensable to the success of modern governments. Do you agree?

7.0 REFERENCES/ FURTHER READINGS

T.F. Yerima & B. Abegunde (Ed.), *Essays on Administrative Law in Nigeria* (Ado Ekiti: Petoa Educational Publishers, 2006).

MODULE 3

Unit 1	Delegated Legislation
Unit 2	Justification of Delegated Legislation
Unit 3	Validity of Delegated Legislation
Unit 4	Control of Delegated Legislation

UNIT 3 VALIDITY OF DELEGATED POWER

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
 - 3.1 Validity of Delegated Power
 - 3.2 The Rule against Sub-delegation
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment
- 7.0 References/Further Readings

1.0 INTRODUCTION

Having come this far in this module, this Unit looks at the appropriate way of donating and exercising power. With all the numerous powers placed at the doorsteps of the agencies, there is the need to guide against procedural allocation or exercise of power.

In our country where so many people tend to claim both what belongs to them and what does not, it is of the essence that certain principles or rules are put in place so that we will be able to honor power properly delegated and ignore those that have no such provenance.

Similarly, regarding the exercise of power, there is the need to know whether the donee of power must without any exception perform that task personally or vicariously. This is because acts that ought to be personally carried out but actually carried out vicariously risk being declared null and void pursuant to the legal maxim of *delegatus non potest delegare*. In order for an agency not to indulge in expending or, actually, wasting tax payers' money doing what would be declared invalid, it is essential to, from the outset, get the agency sensitized enough to do only that which it can lawfully do.

2.0 OBJECTIVES

At the end of this Unit, you will be capable of:

- Distinguishing valid power from invalid power
- Evaluating the claims of persons who pretend to possess valid power

3.0 MAIN CONTENT

3.1 Validity of Delegated Power

For power to be said to have been validly and regularly granted to an administrative agency, the following conditions must exist:

(a) The power must be delegable

There are certain powers that cannot be delegated by one arm or branch of government to another but must be performed by the repository of such power. Such powers include:

- (i) Powers that require personal performance;
- (ii) Powers involving exercise of discretion;
- (iii) Judicial or quasi-judicial power
- (iv) Legislative powers such as the power to declare war, the power to impeach, and the power to create new States.

A state which takes the view that the legislative procedure followed in prescribing the terms and manner of distribution of the finance of the Federation is not in accordance with the procedure laid down in the Constitution has a justiciable dispute. A legislature which operates a federal written Constitution in which the exercise of legislative power and its limits are clearly set out has no power to ignore the conditions of law making that are imposed by that Constitution which itself regulates its power to make law. See the case of *A.G Bendel State v. A.G Federation & 22 Ors. (1981) 1 ALL NLR 85 S.C.*

(b) There must be a delegation of power

Generally, for a delegated legislation to be so-called, the donor of power must have actually granted such powers to the agency. Where, in the event that the agency acted without prior authorization, the repository of power may ratify the agency act, that is, if such act is amenable to ratification. See the case of *Anyia v. Iyayi. (1993), 7 N.W.L.R. Pt. 305 p. 290 S.C.; see also the case of Nwosu v. Imo State Environmental Sanitation Authority (1990) 2 NWLR Pt. 135 p. 688 S.C.*

(c) There must be a proper delegation

There are so many ways of transferring power to another person or authority – orally, in writing, by deed, etc. No matter the chosen method of transfer of power or delegation, the most important thing is that the donor must effectively communicate such transfer to the donee. Furthermore, where a particular or special method of delegation is

required or specified by law, then the power must be delegated according to the method specified by such law. See the case of **PHMB v. Ejitagha (2000) 11 NWLR Pt 790, p. 362**; *Comptroller of Nigeria Prison Service, Ikoyi v. Adekanye (2002) 15 NWLR Pt. 790 SC* and *Unipetrol Nigeria Plc v. Edo State Board of Internal Revenue*.⁷⁸

In the case of *Comptroller of Nigeria Prison Service, Belgore JSC* as he then was delivering the judgment of the Supreme Court explained the law thus:

“It is clear from the provisions of section 160 of the Constitution that the Attorney General’s powers of public prosecution is not exclusive; the ‘any other authority or person’ in subsection (1) can institute and undertake criminal proceedings. The Central Bank of Nigeria and the Nigerian Deposit Insurance Corporation are also authorities that can institute criminal proceedings under the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree 1994; see section 24 thereof; the Attorney General can institute and undertake criminal proceedings”

(d) Delegation must be to an appropriate officer or authority

The donee of power must be an appropriate officer or authority to exercise the power. For example, if the National Assembly enacts the National Health Act, it is taken for granted that the power of delegated legislation would be transferred to the Minister of Health. But where, for any reason, the National Assembly grants such power to the Minister of Labour, such delegation would be null and void because the Minister of Labour is ill-suited to make rules and regulations in the Ministry of Health.

SELF ASSESSMENT EXERCISE 1

1. Under what conditions can power be said to have been properly delegated?

3.2 The Rule against Sub-delegation

When the Constitution or a Statute delegates the power of law-making to an administrative agency, is that agency seized of the power or authority to entrust the performance of that function to another agency or body. In other words, can the delegate sub-delegate its power to another delegate? The general position is captured by the Latin maxim *delegatus non potest delegare* meaning that “a delegate may not sub-delegate its power unless and except he is expressly or impliedly authorized so to do.” Put differently, a person or authority charged with the duty of law making is not at liberty to surrender that power to a different person or body. See the case of *A.G Bendel State v. A.G Federation and 22 Ors (supra)*. In this

case, the President and Commander-in-Chief sent the Allocation of Revenue (Federation Account, etc) Bill 1980 – outlining a new formula for the distribution of the amount standing to the credit of the Federal Government amongst the Federal Government, State Governments and Local Governments – to the National Assembly for consideration and passage by virtue of S. 149 of the CFRN 1979. The Joint Committee of the National Assembly worked on the bill and reverted back to the National Assembly. Subsequently, the National Assembly passed the *Allocation of Revenue (Federation Account, etc) Act 1981*. The question for determination by the Supreme Court was whether it was lawful for the National Assembly to delegate its legislative functions to its Committee. The court answered in the negative and annulled the Act. Note the comments of Fatai Williams, CJN as follows:

“... a legislature which operates a written Constitution in which the exercise of legislative power and its limits are clearly set out has no power to ignore the conditions of law making that are imposed by that constitution which itself regulates its power to make law.”

However, there are exceptions to this general rule. First, the Constitution or the enabling Statute may itself expressly authorize the agency to which power is being delegated to; likewise, delegate it to some other authorities. Under S. 5(1) (a) of the CFRN 1999, the executive powers of the Federation is vested in the President who may exercise same either directly or through the Vice President and Ministers of the Government of the Federation or officers in the public service of the Federation. In other words, the Constitution expressly permits a situation the President performs the duties of his office either personally or vicariously. For equivalent provisions regarding the Governor of a State, see S. 5(2) (a) CFRN.

Many Statutes or Acts of the National Assembly contain express provisions which permit the head of an agency to act personally or through the agency of his lieutenants. For example, S. 17 of the Prisons Act empowers the Minister of Internal Affairs to delegate any of his functions under the Act to a public officer in his ministry or to an officer in the Civil Service of a State, as the case may be. You should note that a decision in favour of sub-delegation is sustainable only where the words in the enabling or parent Acts are plain and unambiguous.

But what happens if the Statute is silent on sub-delegation? This is one area where the donee of power must be careful because if he sub-delegates to a wrong person, the eventual exercise of such power risks judicial invalidation.

Also, you should note that the maxim does not apply to an agency exercising purely ministerial functions (such as the signing of documents); executive or administrative functions (such as the issuance of licenses, permits, etc). In other words, unless there is any clear indication to the contrary, an agency performing ministerial, executive, or administrative functions can sub-delegate to another delegate. It is important for you to note again that unless the law provides otherwise, note that legislative, judicial or quasi-judicial function, duties involving the exercise of discretion, and duties required to be performed personally cannot be sub-delegated.

SELF ASSESSMENT EXERCISE 2

1. Under what circumstances may the donee of power be competent to sub-delegate such power to another?

4.0 CONCLUSION

Because it is of the essence that the power of a person or agency which seeks to deprive others of their rights and liberties is validated or traceable to a legitimate authority, considering the validity of delegated power is significant. This is the more so in our country where so many persons and organizations arrogate to themselves powers to which they are, as a matter of law, not entitled. Thus, the frequency of such ‘passing of’ makes an examination of this Unit necessary.

Similarly, we have looked at the rule against sub-delegation. It is important that the objects or victims of power be acquainted with the rights, duties and limits of agencies so that, in appropriate cases, they may be able to invoke judicial process against excessive agency acts. After all, one of the foundational rationales for the existence of administrative law is providing avenue for those aggrieved by administrative activities to seek redress.

4.0 SUMMARY

In this Unit, we considered the validity of power and the rule against sub-delegation.

6.0 TUTOR-MARKED ASSIGNMENT

1. The rule against sub-delegation may be a check on the excesses of administrative agencies. Discuss.

7.0 REFERENCES/ FURTHER READINGS

T.F. Yerima & B. Abegunde (Ed.), *Essays on Administrative Law in Nigeria* (Ado Ekiti: Petoa Educational Publishers, 2006).

MODULE 3

Unit 1	Delegated Legislation
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UNIT 4 CONTROL OF DELEGATED LEGISLATION

CONTENTS

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2.0 Objectives
3.0 Main Content
3.1 Legislative Control
3.2 Executive Control
3.3 Consultation
3.4 Consultation and Good Governance
4.0 Conclusion
5.0 Summary
6.0 Tutor-Marked Assignment
7.0 References/Further Readings

1.0 INTRODUCTION

We now realize that much power is placed at the disposal of administrative agencies either by the Constitution itself or by an Act of the National Assembly. But we equally know that to whom much is given much is expected. This is another way of saying that the investiture of enormous powers on these agencies is coupled with the requirement that they must act responsibly. Some of the ways of making them act in this manner are through the processes of legislative control, executive control, and judicial control. Consultation is another way of administrative control. In this Unit and in this Semester, only legislative and executive controls will be examined. Judicial control is reserved for next Semester.

Although there are various provisions requiring administrative agencies to carry the legislature along in its 'law-making,' the legislature turns out not to be performing its oversight function. It is true that the legislature cannot possibly do in details what administrative agencies do. In fact, were it to be so capable, there may be no necessity for administrative agencies. In not leaving up to the expectation of controlling the agencies, legislature may be arming the arsenals of its critics.

In this Unit, therefore, we will look at controls from the perspectives of the legislature and executive, and consultation.

MODULE 3

Unit 1	Delegated Legislation
Unit 2	Justification of Delegated Legislation
Unit 3	Validity of Delegated Legislation
Unit 4	Control of Delegated Legislation

CONTENT

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2.0	OBJECTIVES
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1.0 INTRODUCTION

Whatever prejudices might have existed against delegated legislation in the past, today it has come to stay. At present, in almost all countries, the technique of delegated legislation is resorted to and some legislative powers are delegated by the legislature to the executive. It must be conceded that in the present day legislative powers can validly be delegated to the executive within permissible limits. At the same time, there is inherent danger of abuse of the said power by executive authorities. The basic problem, therefore, is that of controlling the delegate in exercising his legislative powers.

2.0 OBJECTIVES

At the end of this Unit, you will be able to assess the:

- Intricacies of legislative control of agencies
- Utility of consultation against the background of good governance.

3.0 MAIN CONTENT

3.1 LEGISLATIVE CONTROL

Indeed, it is incumbent on the legislature, as the donor of legislative power to the executive, to exercise control over the power so donated otherwise the donation may turn into abdication. Generally, two methods of legislative control of delegated legislation are well known - the control through the enabling Act and through various legislative committees. On the former method of the control is the insertion of some condition precedent or subsequent or both for the enactment of the law in the enabling Act. This can be instanced with the Foreign Judicature Act 1890. According to the Act, every Order-in-Council made pursuant of the Act shall be laid before the House of Parliament forthwith after it is made, if the Parliament be then in session and if not, forthwith after the commencement of the next session of the Parliament. Obviously, the requirement here is simply mere laying without further condition

(a) Laying before the Legislature

Laying instruments before the legislature comes in various forms as follows:

- (i) Cases where the Statute merely requires administrative rule or regulation to be laid before the Parliament prior to its coming into operation. The mandate here is for the administrative agency to notify the legislature of its proposed rules and regulations or decisions. Neither the agency nor the legislature is obliged to do anything more. For example, this is the approach adopted in relation to the citizenship provisions of the CFRN 1999. S. 32(1) empowers the President of the country to make regulations prescribing all matters which are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to the provisions on citizenship. Pursuant to Section 32(2), the President can make rules and regulations with regards to citizenship. However, such delegated legislation must be laid before the National Assembly.
- (ii) Cases where the rule or regulation is required to be laid subject to the negative resolution' period. The implication of this requirement is that such administrative legislation remains valid unless and until the legislature takes the positive step of invalidating or annulling it. In most cases, except there are real irresistible reasons to

intervene, the legislature will not pass any negative resolution on the rule or regulation because, in any case, it may not actually have the time to do so. Therefore, this clause is most common in enabling statutes.

- (iii) Cases where the instrument is laid subject to ‘affirmative resolution.’ The meaning of this is that the regulation cannot come into effect unless an affirmative legislative resolution is passed. In other words, the agency decision cannot be enforced or implemented unless it receives the blessings of the legislature.

You should note that this measure is ideally most effective since it largely settles or takes care of the allegation that delegated legislation is a pretext under which the legislature abandons or surrenders its constitutional role of legislation to administrative agencies. The idea is that if the implementation of a rule or regulation is made subject to the affirmative resolution of the legislature, chances are that the latter will ultimately have the opportunity of performing oversight functions over the administrative agency and its subordinate legislation. However, because the legislature really lacks the time to devote to such details covered by rules and regulations, there are very few statutes that would postpone the effectiveness of a rule or regulation until the legislature approves.

- (iv) Cases where the Statute requires a draft of the delegated legislation to be laid before the Parliament. Here, we are dealing with situations similar to the ‘affirmative resolution’ scenario. Under this head, however, we are concerned with a draft of the rule or regulation. There may be nothing more needed on the part of either of the parties once the draft is laid. The draft may just be for the information or notification of the legislature. But, whatever be the case, the legislature will not have the time to painstakingly peruse the draft.

SELF ASSESSMENT EXERCISE 1

Enumerate and discuss the various ways in which the National Assembly may control an administrative agency.

3.2 EXECUTIVE CONTROL

As the name implies, executive control over a donee of power is exercised by the executive branch of government. The control is exercisable in many ways including:

(a) Power to Hire and Fire

We have noted that when the legislature statutorily establishes an agency, it is the executive branch that is charged with the duty of implementation that actually appoints and inaugurates the natural persons who would pilot the affairs or see to the day-to-day running of the activities of the agency. Therefore, where any appointee of the agency misconducts himself or conducts himself in a manner that the appointor finds unacceptable, the latter may not hesitate to wield the big stick by firing him. However, there are instances where the so-called appointor cannot single-handedly remove the erring appointee without recourse to another body. This often happens where the Constitution or an Act of the National Assembly denies legal force to any purported appointment or removal of an appointee from office without the approval or confirmation of the Senate. See, for example, S. 2(3) of the EFCC Act 2004 which makes the President's appointment of members of the Commission subject to the ratification of the Senate.

(b) Submission of proposed rules, regulations, policy decision, etc, to the supervisory authority. Because of the uproar that unscrutinized administrative legislation may attract from the members of the public to the embarrassment of the supervisory authority, the latter usually requests the agency to submit its programme of action including rules, regulations, etc for its perusal or input. The ultimate purpose is to ensure that administrative legislation does not become unpopular amongst the persons or groups that would be affected by it. Also, it would be in the self-interest of the supervisory authority not to allow its subordinates to make a rule or regulation that would be unacceptable to its appointors. For example, any regulation that any of the hospitals owned by the Federal Government wants to implement must be tabled before the Ministry of Health for perusal or vetting.

3.3 CONSULTATION

Here, the enabling statute mandates the subordinate legislator to 'consult' with certain bodies either named specifically or generally before exercising the power to legislate. There are some

ancillary issues that may arise when consultation is required. We will briefly consider them below:

(i). *What is Consultation?*

Consultation defies precise meaning. The case of *Rollo v. Minister of Town & Country Planning 1948] 1 All ER 13 CA*, gave some insight as to the meaning of the term. Under *S.1 (1)* of the English *New Towns Act 1965*, the minister was under an obligation to consult with ‘any local authorities which appear to him to be concerned’ before making an order designating an area as the site of a new town. Bucknill, LJ, said:

“On the one side the minister must supply sufficient information to the local authority to enable them to tender advice, and on the other hand, a sufficient opportunity must be given to the local authority to tender that advice.”

What the above quote demonstrates is that it takes two to tango – consultation succeeds only when the minister or the head of the agency on the one hand and the persons or groups to be consulted efficiently perform the roles expected of them. Therefore, as the above quote demonstrates, the minister or the head of the administrative agency must supply sufficient information to the persons or groups to be consulted in order to enable them give informed critique, suggestion or advice. Put differently, the minister must not give information that is misleading or withhold certain information that may influence the decision of the consultees.

We may add that – in view of the peculiarity of our country which is still low in education – such sufficient information must necessarily include facts (and implication of the proposed decision). We may recall the Toxic Waste Dump incident in 1987. Therein, toxic consignments imported from Italy were dumped in Nana’s property in Koko village, Delta State, with the consent of Nana who apparently was ignorant of the deadly nature or contents of the packages.

(ii) *Who must be consulted or who may be consultees?*

Persons or groups to be consulted are usually specified in the enabling Act. They are usually persons or bodies that may be interested in or affected by the rule or regulation. Let us assume that there is an existing Act of the National Assembly known as the *Freedom of Information Act (FIA) 2009* which, *inter alia*, empowers the Minister of Information to make rules that would regulate how Nigerians would access publicly held information. Before such minister embarks on such administrative legislation, he might be required to consult the print and electronic media, lawyers, human rights activists, etc. because persons who would be most aggrieved by the effectuation of the subordinate delegation would belong to any or all of these groups. Even where the enabling Statute does not or is silent on the requirement of consultation, it would not be inappropriate for the minister to discretionarily consult such critical groups. You should note that any such discretion must be exercised reasonably otherwise there will be judicial review.

(iii). *Consequences of failure to consult*

Let us distinguish between failure to consult (at all or properly) and failure to heed advice proffered during proper consultation. In the former case, the courts are likely to hold that there was a breach of a mandatory procedural requirement of the enabling Act rendering the subordinate legislation null and void. See, **Agricultural, Horticultural and Forestry Industry Training Board v. Aylesbury Mushrooms Ltd [1972] 1 All ER 280; [1972] 1WLR 190.**

In the latter case, the courts will decline intervention. This is because the minister or the head of the agency has done all that is legally required of him to do. If he has consulted the category of persons or groups he was required to consult by inviting them or by being receptive to their comments, observations and suggestions, he is not bound to implement a particular suggestion or to implement it in a particular way. In other words, the consultees are entitled to their say in the same way that the minister is entitled to his ways or decisions. There is no obligation to be dictated to by those consulted.

SELF ASSESSMENT EXERCISE 2

1. Explain the types and character of consultation.

3.4 CONSULTATION AND GOOD GOVERNANCE

Against the background of much maladministration in several facets of our national life, the importance of consultation cannot be overemphasized. Basically, consultation is an avenue for persons interested in a particular governmental policy to make observations, suggestions or input for good or better governance. In other words, consultation assists in promoting 'good governance' or in avoiding governmental failure.

Good governance is a term of statecraft that is generally perceived as a normative principle of administrative law which obliges the State to perform its functions in a manner that promotes the values of efficiency, non-corruptibility, and responsiveness to civil society. According to the United Nations High Commissioner for Human Rights (OHCHR), the good governance possesses five cardinal attributes of transparency, responsibility, accountability, participation and responsiveness. In other words, good governance is all about prudent management of resources for optimal efficiency.

The principle of good governance was first used by the World Bank in 1989 as an anti-corruption tool with the inherent capacity to promote socio-economic rights in States plagued with corruption. Incidentally, corruption is endemic in many developing countries including Nigeria. Its existence either reflects bad governance or represents governmental failure. In fact, it is antithetical to good governance.

Against the foregoing background, therefore, consultation may be one way of checking the excesses of many agencies which apply agency budgets or, more aptly, tax payer's money, in a way or manner that offends the principle of utility, that is, by failing to satisfy the greatest happiness of the greatest number. You would recall that there are many pot-holed roads around you which the agencies and local government authorities have failed or neglected to fix. It may interest you to know that in the offices of these agencies it has been documented that many of these roads have been done for so much amount of money. Notice that, quite frequently, there is deliberate mis-prioritization of projects or programmes for selfish interests. There are instances where a local government chairman would use government resources to tar the close leading to his house while abandoning the access road that

the people use frequently.

Where consultation – a veritable tool for compelling administrative agents to refrain from conducting themselves corruptly or from wasteful expenditure – is institutionalized, chances are that the people would be able to decide or determine the scope of decision taken by administrative authorities.

4.0 CONCLUSION

The saying that power corrupts and absolute power corrupts absolutely is, indeed, true of delegated legislation. It is subject to abuse and it has, in fact, been so subject. This background justifies the intervention of control whether at the level of the legislature, the executive or the people.

We have seen that there are many ways in which the legislature may control administrative agencies but, to the extent that such control appears not to be real, we could suspect that those donees of power may actually be their own masters. However, because executive control is more direct and personal, it appears to be more efficient than legislative control.

Consultation is a medium for the people to participate in the governance of their affairs. It is ideally a guarantee against maladministration or abuse of power or of office. The tool is the more important when we realize that Nigeria is a country that has been crippled and still being crippled by endemic corruption. It is expected that an efficient consultation system would recruit the people into the battle against corruption for the ultimate end of enthroning good governance in our land.

5.0 SUMMARY

In this Unit, we dealt with legislative and executive controls, consultation, and the connection between consultation and good governance.

6.0 TUTOR-MARKED ASSIGNMENT

1. Consider the existing loopholes in efforts to control administrative agencies and suggest remedial measures.

7.0 REFERENCES/ FURTHER READINGS

Ndiva Kofele-Kale, “Good Governance as Political Conditionality” (Democracy and Good Governance, ICASSRT, 1999)

MODULE 4

Unit 1	Decision and Rule Making Procedures
Unit 2	Types of Rule Making Procedures
Unit 3	Publication of Decisions and Rules
Unit 4	Control of Administrative Powers

UNIT 1 DECISION AND RULE MAKING PROCEDURES

CONTENTS

1.0 Introduction
2.0 Objectives
3.0 Main Content
3.1 Meaning and Scope
3.2 Considerations in Rule Making Procedures
4.0 Conclusion
5.0 Summary
6.0 Tutor-Marked Assignment
7.0 References/Further Readings

1.0 INTRODUCTION

We have seen that the Constitution or the legislature can delegate power to an administrative agency. In exercising such power, the agency enacts delegated legislation by making rules, regulations, etc. But, for the agency to do this, there are processes or procedures it must follow. That is the crux of decision and rule making.

OBJECTIVES

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

- Differentiate between the types of rule-making procedures.

3.0 MAIN CONTENT

3.1 Meaning and Scope

Ese defines administrative decision or rule in an inclusive and enumerative manner. To him, it means or includes:

- (a) Administrative laws, rules and regulations;
- (b) Administrative decision, policy, determinations, or directives to act one way or another; and
- (c) The choice of a course of action from among alternatives to deal with a public problem.

However, the definition offered by Iluyomade & Eka appears to be narrower in the sense that they define rule-making as the issuance of regulations or the making of determinations which are addressed to indicated but unnamed and unspecified persons or situations.

But there they are actually talking of the same thing because, shorn of all embellishments, decision or rule making is no more than delegated legislation. The donee of administrative power has the capacity to enact such delegated legislation. This legislation can also be referred to as subsidiary legislation, administrative legislation, administrative law making, administrative rule making, or administrative decision making. Since we have already considered the constitutional and the legislative mode of donating power to administrative agencies, our concern here is to closely look at the law making procedures of these agencies. One thing that we must remember is that decision or rule-making may equally come in the form of supplement to, amendment or repeal of, existing rules, regulations or policies. In the next sub-head we shall look into the factors that administrators consider in making rules, regulations, decisions and policies.

SELF ASSESSMENT EXERCISE 1

Describe administrative decision or rule

3.2 CONSIDERATIONS IN RULE MAKING PROCEDURES

There are various procedural problems which accompany delegated legislation. And there are various factors which may affect the type of procedure to be adopted by a particular agency or person. For example, whilst antecedent consultation may be employed in relation to a regulation affecting Spare Parts Traders Association, it may be unreasonable with regard to a regulation affecting all Nigerian students. Also, the procedure to be adopted by a single official could be different from that of a high powered technical committee. There are five main factors which affect these considerations. They are enumerated and discussed

below:

(a) The Characteristics of Parties Affected

These may vary widely. For instance, whether or not antecedent consultation or prior notice is workable in terms of their number, whether or not they can easily be identified and whether or not the persons affected are organized. Where applicable, it is necessary to always consult with stakeholders, and harmonize or balance the competing or conflicting interests of all stakeholders.

(b) Nature of the Problem to be dealt with

When the problem is a mere routine of the public service or government, for example, the period within which a particular form must be returned or the time to see a particular officer, prior notice is usually unnecessary. Also, sometimes the matter to be dealt with may be of such urgent or technical nature as to reduce the need for such procedure. The procedure may, however, become of utmost importance where, for instance, the regulation will affect fundamental rights or economic and financial interests of some people. In such cases, procedural formalities may be accorded before certain rules or regulations are made. In the absence of any express provision for such, the administrator is at liberty to proceed more freely.

(c) Characteristic of Administrative Determination

More often than not, most active rule making involve the exercise, to some extent, of some discretion involving either the aims to be served or the means of attaining such aims. In such a case, it may not be practicable to consult affected interests. For example, if the minister of Health is to make regulations for stopping the spread of an epidemic what is involved may be of such a technical nature that affected interests may not be consulted. This is for practical reasons because even if persons to be affected are educated in the conventional sense, such education is inadequate to enable them appreciate the decisions of the administrator.

(d) Types of Administrative Agencies

Whether or not the procedure would be required could be a function of whether the

administrative agency is manned by one person or by a group of persons. In certain instances, two or more administrative agencies may be competent to make decisions regarding the same matter. In that case, what one agency does would be influenced by what its sister agency has already done. For example, the Police, the ICPC and the EFCC are all empowered by the Statutes establishing them to, inter alia, combat corruption. So, if the EFCC has investigated a particular corruption case, the ICPC does not need to duplicate such investigation. If the matter is to be properly handled by the ICPC, all that would be done is for the EFCC to hand over the matter to the ICPC together with the result of its investigation and exhibits and evidence. Then, the ICPC will proceed from there.

(e) Nature of Enforcement

If it is subject to challenge in all its facets after promulgation, this may dispense with formality in its making. If it binds the affected parties only by requiring them to fulfil some procedural requirements, advance hearings may be unnecessary. But if the regulation requires the persons affected to disobey the regulations on the pain of loss to liberty or estate, then there is the need to allow for an antecedent opportunity for the prospective targets or victims of the enforcement to influence the decision. In other words, if the regulation is to be self-enforcing with grave consequences on people's rights, antecedent regulations would be necessary.

SELF ASSESSMENT EXERCISE 2

What do administrative agencies consider in rule making procedures?

4.0 CONCLUSION

Administrative rules and regulations, policies, directives, etc, all come under the general name of *delegated legislation*. Whatever the nomenclature adopted, they are the means through which administrative agencies carry out their responsibilities. But much more important, however, are the factors that predominate in the minds of these agencies before they finally decide on a course of conduct or action.

5.0 SUMMARY

In this Unit, we considered the administrative rules and regulations and the factors administrative agencies consider in deciding one way or another.

6.0 TUTOR-MARKED ASSIGNMENT

In determining administrative policies and decisions, administrative agencies act purely in accordance with their personal sentiments. Do you agree?

7.0 REFERENCES/FURTHER READINGS

Ese Malemi, *Administrative Law* (Lagos: Princeton Publishing Company, 3rd Edition, 2008).

UNIT 2 TYPES OF RULE MAKING PROCEDURES

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
 - 3.1 Rule Making Procedures
 - 3.2 Investigational
 - 3.3 Consultative
 - 3.4 Auditive
 - 3.5 Adversary
 - 3.6 Exercise of Discretion in Decision and Rule Making
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment
- 7.0 References/Further Readings

1.0 INTRODUCTION

In administration, matters of procedures are as much important as substantive issues. This is because the procedure adopted could be very determinative of the worth of the substantive rules you get at the end of the day. For example, the procedure adopted by a criminal court could either make or mar the evidence of the defence.

In the process of rule making, administrative agencies adopt one form of procedure or another depending on the occasion. It could be investigational, consultative, auditive or adversary. But you should note that the approach taken is usually a function of the environment. Despite the utility of consultation, however, Nigeria lacks an established record of consulting interested persons, perhaps, because enabling Acts do not require it.

Finally, the role of discretion in administration should not be overlooked especially because administrative agencies cannot succeed without one form of discretion or another.

2.0 OBJECTIVES

At the end of this Unit, you will be able to:

- Appraise the various rule making procedures of administrative agencies.

3.0 MAIN CONTENT

3.1 Rule Making Procedures

The interface amongst the factors that influence administrators in their decision making has produced many types of administrative rule making procedures. For the purpose of our convenience, we will categorize them into four groups as follows:

3.2 Investigational Procedure;

3.3 Consultative Procedure

3.4 Auditive Procedure

3.5 Adversary Procedure

We shall consider them serially.

3.2 Investigational Procedure

As the name implies, this procedure is investigational. In other words, this is the stage where the administrative agency arms itself with the required information in order to come up with an informed decision and sound rule or regulation. There are several ways in which it could carry out its investigations. It may set up a committee, a panel, a commission or a team to investigate the issues involved in a particular matter. In order to discharge its responsibility, such body would seek facts and information, make inquiries, hold hearings, and examine memoranda or reports. For example, following its acknowledgement of the fact that the 2007 Presidential Elections that brought his government to power was fundamentally flawed, late President Yaradua established the Uwais Panel to, *inter alia*, examine the problems associated with the conduct of elections and to recommend measures for conducting free and fair election in the country.

Upon the conclusion of its assignment, the panel would usually submit its report of its findings (including its recommendations) to its creator, that is, the body that constituted it. Thereafter, such creator will decide on what to do with the report. It may fully, substantially, partially accept the recommendations contained therein. In the worst of cases, it may reject the recommendations. It is quite usual for the government to issue a white paper on the submitted report wherein it will make its views known as to the acceptance or

rejection of the recommendations.

A classical example of this procedure is the parliamentary or legislative hearing. For example, in the course of its proceedings whether or not relating to the passage of a bill, President of the Senate or the Speaker of the House of Representatives invites the Senators or Representatives affected by a particular problem or issue (e.g. flooding, erosion, or pollution, etc.) to address the parliament on the facts, the circumstances of the people, and on possible remedial or ameliorative measures. Those invited to address the parliament obtain their information from their constituencies, print and electronic media, internet, etc. In certain cases, the representatives of the people or of human rights or environmental rights bodies may be permitted to directly address the parliament or to submit memoranda, reports and recommendations.

What the parliament – the donor of power – can do in terms of investigations, administrative agencies – the donees of power – can equally do.

In the final analysis, it is at the discretion of the body to which a report is submitted to decide the weight it attaches to the recommendations in its making decisions, rules, regulations, policy statements and, most important, in the action it takes.

3.3 Consultative Procedure

To ‘consult’ means to obtain information, advice or opinion of a person or body. This consultative procedure is the process by which an administrative agency gets interested persons or those to be affected by its decisions involved in the arrangements leading to the coming into effect of its rules, regulations and policies. It is a participatory procedure in the sense that it is an avenue for stakeholders to take part in the way and manner decisions or actions affecting them are taken. Persons that are usually consulted are stakeholders with special knowledge on the issues in question. In such consultation, the administrative agency obtains information or facts it does not already have or information or facts that supplement the one it already have. In the process, it may obtain expert knowledge or advice either from individuals, or groups.

In order to elicit informed response from the stakeholders, it may send the proposed rules and regulations or policies or proposed line of action to the stakeholders for comments, observations, objections or suggestions. With a view to ironing out or resolving identified differences, it may also enter into discussions, correspondences, or negotiations with the

interested persons.

The consultative system has over the years been institutionalized as manifest in the establishment or creation of statutory or governing boards, councils, or committee for administrative agencies. The remit of these statutory or governing bodies is to make policy decisions and formulate general rules or regulations for running such agencies. Before doing this, they consult amongst themselves and advise on important proposed decisions, rules or regulations or actions before they are adopted, published or implemented. It is noteworthy that members of these statutory or governing bodies are drawn from different backgrounds, professions, etc. The effect of this is that members bring their wealth of diverse knowledge and experience to bear on any proposed decision or action. Ultimately, the rules, regulations, policies or actions that are implemented would be fairly acceptable to all or, at least, to the majority and, most important, they would be less contentious or controversial.

Again, it is significant to remember that, in addition to their statutory duties, the members perform the following functions:

- (i) Furnishing the administrative agency with information and suggestions;
- (ii) Presenting views and information they received from stakeholders to the agency; and
- (iii) Rolling back the stakeholders' frontiers of ignorance, misinformation or prejudices by educating the stakeholders on the duties, decisions, rules, regulations and proposed actions of the administrative agency.

The utility of such in-house consultative body cannot be over-emphasized in view of the intricacies and the technicalities of the issues involved and the large number of persons that time may not permit the administrative agency to consult. Where an enabling act requires the administrative agency to consult stakeholders, such consultation must be carried out. However, where the law is silent on consultation, the agency is not bound to hold one. But, it is not improper for the agency to discretionarily hold one. In this regard, recall the comments of Sir William Graham-Harrison in his evidence before the British Committee on Ministers' Powers:

“No minister in his senses ... would ever think of making regulations without, where applicable, giving the persons who will be affected thereby or their

representatives an opportunity of saying what they think about the proposal.”

In Nigeria, only a few statutory enactments stipulate consultation. See, for example, *Section 2 of the Legal Practitioners Act No. 33 of 1962*. There is no established practice of consultation. Arguments often preferred against it is that it is expensive and that the public often have nothing to offer. Whilst this may be so, it should be noted that consultation is, undoubtedly, important because it enables objectionable proposals to be properly evaluated by administrative agencies before they take any action. Such consultation would drastically reduce discontent amongst those to be affected by the rule or regulation. There may be no formal procedure for doing this. But where a formal procedure is expressly required, failure to comply may render the act void on procedural ground. See the case of: ***Bates v. Lord Hailsham [1972] I.W.L.R. 1373***.

Regarding those enactments that are silent on the issue of consultation, the agency simply follows the law by not conducting any consultation especially when such steps are geared towards implementing unpopular policies or self-enhancing programmes. However, a worthy administrative agency should be guided by the above comments of Sir William Graham-Harrison.

SELF ASSESSMENT EXERCISE 1

1. Explain investigational procedure.
2. Discuss the nature of consultation.

3.3.1 Effects of Non-Consultation

Where the enabling Statute imposed a duty to consult and the agency failed to observe such in duty, anything decision, rule, regulation or action that comes out therefrom is liable to nullification on the ground of procedural *ultra vires*. See the case of *Agricultural, Horticultural and Forestry Industry Training Board v. Aylesbury Mushroom Ltd* See also the case of *Popoola v. Adeyemo(1972) 2 ECLR 48* a case involving chieftaincy dispute where Olatawura, JSC said that:

“Once it is established that those entitled to be consulted or those who ought to know, such as members of the ruling houses were shut out or excluded from the exercise leading to the registration of a Chieftaincy Declaration, it will be unjust to rely on such a declaration. It will amount to a violation of the right of those entitled to be consulted”.

Contrast the above case with *Bates v. Lord Hailsham of St. Marylebone & Ors (1971) 1 W.L.R 1373* where the Court of Chancery held, *inter alia*, that the function in contention was legislative and not administrative, executive or quasi-judicial as a result of which the administrative agency was not bound by the rules of natural justice or by the general duties of fairness to consult all bodies that would be affected by its order.

3.3.2 Justification for Consultative Procedure

Why should an agency consult stakeholders before it takes any decision or action? There are certain factors justifying such approach including:

(i) It allows for the cross-ventilation of ideas to the end that objectionable laws, rules, regulations, order, decisions, policies, or proposed action are reviewed or abandoned. Ultimately, the administration process is the better for it because whatever the agency comes up with at the end of the day would be quite harmonious with the wishes and aspiration of the people. In order words, unnecessary rancour and bitterness are avoided and frivolous litigation prevented.

(ii) The process enables administrative agency to acquire useful information and knowledge from the stakeholders. This pool of knowledge and information can be a useful database for the present and for future proposals.

Conversely, arguments against consultation include the following: (i)

It may be time wasting and expensive; and

(ii) The idea of consultation assumes that the stakeholders have something to offer on the basis of their training, academic background and consciousness. But, more often than not, especially in this part of the world, stakeholders lack the basic knowledge, technical orientation and consciousness to meaningfully contribute to the consultation process.

3.4 Auditive Procedure

This is the hearing procedure akin to the judicial process whereby the judge listens to both sides to the dispute before making his decision. Here, stakeholders present their views orally or by submitting memoranda or other documents. The notice as to the convening of such

hearing is usually published in electronic or print media in order to enable interested parties to attend. No formal rules are required save those necessary for orderly conduct or behaviour of the stakeholders. The advantage of this procedure is that interested parties are given prior notice in order to enable them participate in the process.

3.5 Adversary Procedure

This is the trial law making procedure. Interested parties are formally heard the way they would be heard in a court proceeding before the agency makes its decision. An example of this process is where a tribunal, a commission, a panel or committee is set up to investigate the cause of a problem and to hear the representations and submissions of stakeholders. Note that the parties could present their case in person or through their legal representatives. Though its workings are similar to that of the courts, it should be noted that rules adopted by the tribunal or panel are less formal than those utilized by the conventional courts.

You should note that the main remit of this body is fact-finding. At the end of its proceedings, it compiles and submits the report of its findings together with its recommendation to the appointing authority. Note that the report usually comprises the formal record of all the evidence presented by the parties at the hearing, their findings, and recommendations. Upon its receipt of the report, the appointing authority studies it and bases its proposed decision, rule or regulation thereon.

3.6 Exercise of Discretion in Decision and Rule Making

You will note that an agency is usually empowered to exercise discretionary power in arriving at a particular decision, rule, regulation, or policy. Generally, in exercising such discretion, the agency is not amenable to interrogation. However, there are instances where even though the agency has discretion, the court requires it to exercise it fairly, reasonably and lawfully. A case that demonstrates this point is *Padfield v. Minister of Agriculture*(1968) 1 All E.R 694 HL. See also: *Fawehinmi v. Akilu*(1987) 1 NWLR (Pt 67) 797 S.C, and *Stitch v. A.G. Federation*(1986) 5 NWLR (Pt. 46)1007 SC.

In *Padfield's case*, the minister had discretion to order an investigation into complaints regarding the administration of the Milk Marketing Scheme. However, the minister refused to refer Padfield's complaint to a committee of inquiry. For this, Padfield sued the minister. The House of Lords held on appeal that the minister's failure to order an inquiry was prejudicial to the aims and objects of the parent Statute, the Agricultural Marketing Act 1958.

SELF ASSESSMENT EXERCISE 2

1. Evaluate the effects of non-consultation.
2. Explain the scope of the auditive and the adversary procedures

4.0 CONCLUSION

There are procedures peculiar to certain organizations. Administrative agencies are no exceptions. As a result of the fact that they constitute the fourth organ of government and because they are close to the grassroots, the procedures they adopt in the making of rules and regulations are unique.

The issue of consultation deserves some attention especially because it encourages participatory government and responsive and responsible governance. In other words, it makes the people to see the government as their own which they will strive to assist to succeed in the delivery of goods and services as efficiently as possible.

Also deserving of mention is the issue of discretion usually exercised by administrative agencies. We all know that discretion is second nature to administrative agencies but what we are much more concerned about is the way and manner such discretion is exercised.

5.0 SUMMARY

In this Unit, we looked at the various procedures for making rules and regulations, the incidents attendant to the failure to consult, and the nature of discretion exercised by administrative agencies.

6.0 TUTOR-MARKED ASSIGNMENT

1. Critically examine the procedures involved in rule making
2. What role does discretion play in rule making?

7.0 REFERENCES/ FURTHER READINGS

Ese Malemi, *Administrative Law* (Lagos: Princeton Publishing Company, 3rd Edition, 2008).

UNIT 3 PUBLICATION OF RULES AND REGULATIONS

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
 - 3.1 Publication
 - 3.2 Antecedent Publication
 - 3.3 Subsequent Publication
- 4 Conclusion
- 5 Summary
- 6 Tutor-Marked Assignment
- 7 References/Further Readings

1.0 INTRODUCTION

You will recall that in every legal system, ignorance of the law is no excuse. This is a mere supposition designed to aid law enforcement. In actual fact, there are so many people who are ignorant of the law and they get firsthand knowledge of the existence of that law when they are found on the wrong side of the law. In order to overcome a circumstance whereby genuinely ignorant persons are punished merely because ignorance of the law is no excuse, States try as much as possible to publish their laws in volumes. In Nigeria, for example, we have the Laws of the Federation of Nigeria (LFN), the most recent edition being those of 2004.

Unfortunately, however, there is no general law mandating administrative agents to publish their rules and regulations. The backlash of this is that most violators of rules and regulations are punished not because they actually intended violating them but because ignorance of the law is no excuse.

2.0 OBJECTIVES

At the end of this Unit, you shall be able to:

- Appreciate the worth of delegated legislation by reason of its adherence to the demands of publication
- Educate persons interested in delegated legislation on steps to take against an

administrative agency that fails to publish or publicize its rules or regulations.

3.0 MAIN CONTENT

3.1 Publication

Publication of rules and decisions is the act of bringing the decision, rule, regulation, policy of the administrative agency to the knowledge of the stakeholders or the general public, as the case may be. Such publication may be antecedent publication or subsequent publication.

3.2 Antecedent Publication

This is the prior publication of proposed rules or regulations or action by the administrative agency for the notice or information of stakeholders. In addition to its role of giving advance notice, the notice assists in preparing the minds of interested persons and all those who would be affected by the agency decision. Generally, there is no law which mandates antecedent publication in Nigeria. However, where the enabling statute imposes such obligation on the agency, the agency is bound to comply.

In the UK and in the US, for example, there is a general requirement for the agency to publish its proposal before it becomes effective. Under S. 1 of the *English Publication Act 1893* (now repealed by the *Statutory Instruments Act 1946*), proposed rules, regulations, etc, made pursuant to an Act of Parliament were required to be published in the London Gazette and interested parties given a period of 40 days from the date of such publication to make their views known on the matter. Unfortunately, however, the *Statutory Instrument Act 1946* that repealed the English Publication Act 1893 does not contain a provision on antecedent publication. But that does not mean that administrative agents would not embark on antecedent publication because many enabling statutes require such publication. Even where there is no such requirement, it is in the interest of the agency concerned to follow the agencies' habitual practice of antecedently publishing their proposals for the information of stakeholders. Otherwise, the agency's proposed rules risk unpopularity.

In the US, S. 4 of the *Administrative Procedure Act 1946* (which has been re-designated as Freedom of Information Act 1966) provides as follows:

Notice

General notice of proposed rule making shall be published in the Federal register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include: a statement of time, place and nature of the rule-making proceedings; reference to the authority under which the rule is proposed; and either the terms or substance of the proposed rules or a description of the subjects and issues involved.

Procedure

After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making, through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose

Where the enabling statute specifically provides the consequence of the failure of the agency to comply with the requirement of antecedent publication, then that consequence shall be invoked in the event of such agency failure. Otherwise, it lies within the powers of the court to, depending on its assessment of the situation, annul the proposal or to give a less coercive order.

SELF ASSESSMENT EXERCISE 1

1. Explain antecedent publication and its applicability in Nigeria.

3.3 Subsequent Publication

The other type of publication is that of subsequent publicity, that is, after the law is made. See, for example, S. 22(3) of the *Interpretation (Miscellaneous Provisions) Act 1964* which makes provisions for such publication in a Federal or State Gazette in relation to rules of court. But note that this provision does not apply to administrative rules and regulations generally. Note, however, an equivalent section is missing from the revised Interpretation Act 2004. Consequently, there is no general provision imposing the duty of subsequent publication on agencies save to the extent that particular enabling Acts so provide. See, for example, S. 10(2) of the *Nigerian Citizenship Act 1961* which requires such subsequent publicity. You should recall that

the government has perfected some practice of periodically publishing existing laws through, for example, the Laws of the Federation of Nigeria (LFN), or publication in Federal or State Gazette.

You should note that publication to the general public (which includes the stakeholders) can also be accomplished through the print and electronic media. In ministries, departmental offices and local government councils, publication can be consummated by pasting notices on notice boards provided within their premises. Even local governments can go to the extent of pasting these notices in strategic locations in the streets within their jurisdiction. And in the extreme of cases, where the matter involved is really a local matter, the local government councils can disseminate the information through traditional rulers and chiefs who in turn engage the services of town criers to ultimately announce the information to the people.

3.3.1 Effect of Failure to subsequently publish

Where the enabling Act mandates the agency to subsequently publish, it will often specify the effect of non-compliance. It may, for example, declare the proposed decision to be invalid, ineffective, null or void. For example, *S. 7(2) of the Nigerian Research Institute Act 1964* provides that the effect is to render the regulation a nullity. In the UK and the US, non-publication means no liability for contravention, being an exception to the maxim: *ignorantiam legis neminem excusat*.

In Nigeria, where the statute does not prescribe the effect of non-compliance, the court has classified the effects into mandatory or directory, depending on the overall effect, for example, where great public inconvenience would result from holding them mandatory or where it relates to the performance of the statutory duty, the court will hold that non-compliance is directory.

Where, however, rights would be affected it will be mandatory. See the case of:

Onuorah v. Livinus Mbadugha & Another (1984) 5 SC 79

In the UK, *S. 3(2) of the Statutory Instrument Act 1946* provides that in proceedings against a person who has breached the rules, regulations or instruments, it is a defence for him to assert that the instruments had not been issued or that reasonable steps were not taken to bring the rules or regulations to public notice. Similarly, *S. 3(a) of the US Freedom of Information Act 1966*, no person is in any manner to resort to any organization or procedure that has not been subsequently published. This constitutes

an exception to the general legal rule of or *ignorantiam juris non excusat* (ignorance of the law is no excuse).

It tells much of the inefficiency of the Nigerian legal system that, despite the sanctity of the

principle – of the ignorance of the law not being an excuse – therein, no concerted effort is made to dutifully publish every rule, regulation, bye-law, policy, decision, or intended action by an agency knowing full well that these are the parastatals of government that have several contacts with the people at the grassroots daily. It is worse to find that most of these people get to know of the existence of such rules, regulations, bye-laws, policies, or decisions at the point of enforcement, that is, when they have been arrested or when they are being prosecuted (by some mobile courts, etc) to the detriment of their personal liberty or property. In this connection, let us end this Unit by recalling the apt statement of Karibi-Whyte, JSC in *Popoola v. Adeyemo (1992) 8NWLR (Pt. 257) 1 at 26* as follows:

“The purpose of publication is to acquaint the public with the law and to provide an opportunity for criticism. These are the best and surest safeguards against authoritarianism and abuse of power. They constitute an effective insurance against clandestine exercise of arbitrary power.”

SELF ASSESSMENT EXERCISE 2

1. In the Nigerian legal system, subsequent publication is rare. How true is this statement?

4.0 CONCLUSION

Publication is a means of notifying the ignorant of a policy, measure, decision, etc. Its importance is the more noticeable when the persons to be informed are those whose freedom or property may be at risk upon violation of such policy, measure, decision.

In some advanced jurisdictions such as the UK and the US, publication of rules and regulations is an institutionalized tradition. In Nigeria, however, this is not the case. The effect of this is that most persons get to know of the existence of one administrative rule or regulation at the point of their apprehension for violating the said rule or regulation.

There is, therefore, the need to establish a mechanism where Nigerians would be entitled to be informed of the making of delegated legislation.

5.0 SUMMARY

In this Unit, we considered antecedent and subsequent publication of delegated legislation.

6.0 TUTOR-MARKED ASSIGNMENT

Write a proposal to the National Assembly on the need to enact an Act mandating every administrative agency to embark upon antecedent and subsequent publication.

7.0 REFERENCES/ FURTHER READINGS

Ese Malemi, *Administrative Law* (Lagos: Princeton Publishing Company, 3rd Edition, 2008).

UNIT 4 CONTROL OF ADMINISTRATIVE POWERS

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
 - 3.1 Means of Control
 - 3.2 Legislative Control
 - 3.3 Constitutional Control
 - 3.4 Executive Control
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment
- 7.0 References/Further Readings

1.0 INTRODUCTION

The enduring problem usually associated with delegated legislation is the very wide powers vested in administrative agencies. You should recall that these agencies equally exercise wide discretionary powers.

In order to ameliorate the temptation of administrative agencies to slip into excesses, there are several means of control.

2.0 OBJECTIVES

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

- Analyze the various means of controlling administrative agencies
- Critique the inadequacy in existing means of control.

3.0 MAIN CONTENT

3.1 Means of Control

The need for control of rule-making power is due to the dangers often associated with such powers. This is because administrative powers are prone to abuse and can easily become arbitrary if unchecked. There are safeguards within and outside the system of

administration itself. We are, however, mainly concerned with control outside the administration, which may be parliamentary, presidential, executive or, perhaps, military.

3.2 Legislative Control

There are several ways in which the Legislature may control the activities of the executive branch and administrative agencies. Some of them include the following:

(a) Amending the law setting up the administrative agency with a view to making it more effective and responsive to the demands of the people;

(b) Repealing the law establishing such agency and, *ipso facto*, abolishing the agency; (c)

Inviting a minister or head of an agency

This is usually done where there are grey areas in the operations of the ministry or agency or where there is public outcry against their conduct or, at any rate, where there are unfavourable media reports of their incompetence or insensitivity.

Under this type of control, which Nigeria operated in the First Republic, there is the requirement of laying before the full House of Parliament which may take various forms:

(a) Mere laying without further direction

Often, such laying is just for the information of the parliament. (b)

Laying subject to Annulment, Amendment or Disallowance

For example, under *S.10(3)* of the *Nigeria Citizenship Act 1961*, such regulation becomes void if not so late and the parliament exercises its powers within specified days after which it comes into effect or lapses.

(c) Laying subject to Affirmative Resolution. For instance, *S. 5* of the *Emergency Powers Act 1961* provides that regulations made by the president become void if not approved by a resolution of both Houses within 4 months.

(d) Another parliamentary procedure which is in force in England but never existed in Nigeria is through having Standing Committees to consider the legislation.

SELF ASSESSMENT EXERCISE 1

Explain legislative control of administrative agencies.

3.3 Constitutional Control

You should note that it is the legislature or the National Assembly that enforces the constitutional control. This type of legislative control operated under the 2nd Republic and it is similar to the one that exists under the U.S Constitution. It is, however, very different from that of the parliamentary type of control and it is not so laborious. This is because the duty of control is left more in the hands of the courts, under the doctrine of separation of powers. Thus, this type of control tends to be more indirect through the requirement of certain standards to which the administration must conform. But

there are some forms of control. Under *S. 32* of the *CFRN 1999*, for example, the president has the power to make regulations concerning certain aspects of citizenship. Such a regulation must be laid before the National Assembly. The purpose of this provision is not clear but, according to Nwabueze, this is not the legislature properly so-called since the power is derived directly from the constitution. The reason of such lack of control is, perhaps, because the president is directly responsible for the action of his ministers. Worthy of note is the provision of *S. 88* of the *CFRN 1999* which gives the National Assembly the power to direct investigations into any matter or thing for which it has the powers to make laws and into the conduct of affairs of any person, authority, government department or minister charged with the responsibility of executing the laws of the National Assembly and so on. The purpose of this is to expose and prevent corruption, inefficiency or waste and to enable it make laws or correct defects in existing ones. Whilst this is not a direct type of legislative control, it is there is no doubt that it can indirectly be used by the legislature to control the power of delegated legislation. Under the military, this type of control is probably more absent in the absence of any express constitutional-type control. Undoubtedly, due to the legislatively unlimited powers of the military power, it can be exercised if desired.

3.4 Executive Control

The executive is aware of the need to supervise subordinate legislation in order to keep executive family within the bounds of law. This is essential because of the

concept of collective responsibility under the parliamentary system of government which makes it imperative to call the executive to be careful so as to avoid controversy. In England, for example, there's the legal committee of the cabinet which is charged with the screening of subordinate legislation. In the US, the president shares such power with the senate and the situation in Nigeria is similar to that of the U.K in some respect and that of the US as well.

The most potent of such powers of control being exercised by the minister on his subordinate is through the appointment of the board of statutory corporations. Though these corporations are in theory independent and charged with dealing with particular social matters, they each have a parent ministry, so that the minister can give general direction as to their operation. This executive control can also be seen within the hierarchy of control in each setting. More specifically, the executive control administrative powers through the following ways:

(a) Issuing general or specific directives regarding the way administrative agencies should carry out their duties.

(b) Requiring the agency to submit its proposed decision, rules, regulations, budget, etc, for examination or vetting before implementation.

(c) Directing relevant agencies such as the Police, Ministry of Justice, ICPC, EFCC, Code of Conduct Bureau, etc, to initiate criminal proceedings or to prosecute erring officials such as those accused of corruption and money laundering.

(d) Setting up a panel of inquiry to look into the activities of the relevant agency and to make recommendations to the government. Note that the executive often resorts to this measure although the reports are usually not acted upon because of several reasons including the need not to rock the boat of the influential persons found culpable by those panels

(e) Issuing a query or caution to an erring officer. (f)

Suspending the officer from duty.

(g) Demoting the officer to a lower rank or status.

(h) Transfer or re-deployment of the erring officer from his present office to a different one.

(i) Removal, retirement or termination of service:

SELF ASSESSMENT EXERCISE 2

1. How does the CFRN control administrative agencies?
2. The executive is the most competent body to control administrative agencies. Do you agree?

4.0 CONCLUSION

Because power corrupts and absolutely power corrupts absolutely, there is always the need by the donor of power to nip in the bud any tendency on the part of the donee to exceed its power. Such necessity is the more justified when persons who may be affected by any misuse of power are very many.

Thus, there are various ways by which administrative agencies can be restrained from exceeding their powers.

5.0 SUMMARY

In this Unit, we examined the various ways in which administrative agencies may be controlled.

6.0 TUTOR-MARKED ASSIGNMENT

With the various means of controlling administrative agencies, there is little or no room for maladministration. Discuss.

7.0 REFERENCES/ FURTHER READINGS

Ese Malemi, *Administrative Law* (Lagos: Princeton Publishing Company, 3rd Edition, 2008).