TITLE PAGE

APPLICATION OF PREROGATIVE REMEDIES IN NIGERIA

BEING A THESIS SUBMITTED TO THE SCHOOL OF POSTGRADUATE, AHMADU BELLO UNIVERSITY, ZARIA, IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE AWARD OF MASTER OF LAWS,(LL.M) DEGREE

BY

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DECLARATION

I, Ali Yunusa, hereby declare that this Dissertation has been written by me. It is a record of my own research work. To the best of my knowledge,it has not been previously presented in any application for a higher degree.

Ali Yunusa



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CERTIFICATION

This thesis entitled - Application of Prerogative Remedies in Nigeria, is the product of my own research.

Therefore it meets the regulations governing the award of master of Laws - (LL.M) degree of the Ahmadu BelloUniversity, Zaria, and is approved for its contribution to knowledge and literary presentation.

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ABSTRACT

The research is aimed at creating awareness or acquainting readers, (non lawyers) with prerogative remedies; viz: certiorari, mandamus, prohibition and habeas corpus. These, were prerogative writs in England and were used for many purposes. For example, certiorari was used in Commanding an inferior court of record to "certify" to the Queen in the High Court of Justice some matter of a judicial character . It was used to remove civil causes of indictments from inferior courts of record or inferior tribunals into the High Court, that they may be better tried or re-tried if there has been abuse or error, on the face of the record. But the writ of certiorari, by the Administration of Justice (Miscellaneous provisions) Act of 1938, S.7 (Order 53) of the High Court of England, was replaced/named theorder of certiorari. This change in terminology, also affected the other prerogative writs; though habeas corpus was said to have retained its name and functions except for simplification of procedure. In Nigeria, all the prerogative writs/orders) were used as they were in England, except that not all the purposes which such writs were used in England are used in Nigeria. These prerogative writs found their way into the 1979 Nigerian constitution under the name - Judicial Review.

Mandamus is used to compel the person to whom it is directed to perform his duty or obligation required by law which he refused. Prohibition is to prevent inferior tribunal or court(s) of record from exercising its jurisdiction or exceeding its limits. Habeas Corpus, the most swift means of obtaining a remedy or redress, is used to bring up the body of a person imprisoned on a criminal charge, or in civil detention, to ascertain the legality of the person's detention.

Other remedies discussed include - declaratory Judgement, injunction, damages, recission, and restitution. These remedies could be available in respect of tortious acts or otherwise, depending on the circumstances of each case.

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ABBREVIATIONS

A.C.		Appeal Cases
A.C.R		Appeal Cases Report
A.E.R		All England Reports
A.L.J.R		Australia Law Journal Report
A.N.L.R.		All Nigerian Law Report
C.A.W		Court of Appeal West
C.L.R.		Common Law Report
M.L.R	-	Modern Law Report
N.C.R	-	Nigerian Criminal Report
N.L.R.		Nigerian Law Report
N.M.L.R		Nigerian Monthly Law Report
E.C.S.L.R.		East Central State Law Report
E.R		England Report
E.N.L.R		Eastern Nigerian Law Report
F.S.C.		Federal Supreme Court
F.S.		Federal Supplement
I.G.P		Inspector General of Police
K.B.		Kings Bench
St.Tr		State Trial
Unrep		Unreported
N.C.R.		Nigerian Criminal Report
F.S.C.		Federal Supreme Court
K.B.		Kings Bench
W.C.R		Workers Compensation Report
N.C.L.R		Nigerian Constitutional Law Report
Ibid		Ibidem
VS		Versus
Q.B.D.		Queen Bench Division
L.Q.		Law Quarterly
H.L.		House of Lords
N.R.L.R		Northern Region Law Report

KASHIM IB

Q.B.	Queens Bench
S.C.J.	Supreme Court Journal
N.W.C.R.	Nigerian Weekly Constitutional Report Op. Cit.
	The Book previously Cited
M.R.	Master of Rolls
N.S.W.S.R.	New South Wales State Report
U.S.	United States
S.C.	Supreme Court

INTRODUCTION

The Latin maxim "Ubi jus ibi remedium" simply means where there is a right, there is a remedy. For instance, in the English case - Ashby Vs White[1] the court explained the above maxim to the effect that an injured party or a person whose legal right has been infringed by another, is entitled to compensation by the tortfesor for his illegal or wrongfull act, which causes infringement to the person aggrieved. But before the development of law, the maxim was: "Ubi remedium Ibi Jus"; which means, where there is a remedy there is a right.

The word remedy is given the definition or description as the means by which the violation of a right is prevented , redressed or compensated. There are four kinds of remedies: Viz: (i) by act of the party injured , the principal of which are defence, recaption, distress, entry, abatement and seizure; (ii) by operation of law, as in the case of retainer, and remitter, (iii) by agreement between the parties, for example, by accord and satisfaction and arbitration and fourthly,(iv) by judicial process, for example, action or suit . This definition or description of remedy is one given by John in his dictionary[2] ordinarily a lay person will describe remedy as a solution' to a problem or difficulty.

At common law, it is a fact that the rights of individuals depend on remedies hence the latin maxims above.

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[1] (1703) 2LD. Raym, P.955.

[2] Osborne's Consise Law Dictionary, 6th (ed) (1974), P. 285.

P. A. Oluyede, in his book[3] says that a good legal system will produce efficient remedies and will regard such remedies as of utmost importance to the administration of Justice, He goes further to say that in Nigeria, we are lucky that our administrative law provides efficient remedies. The writer thinks that the most important thing to advert our minds to is the enforcement of such remedies and not otherwise it is a farce to say that we have efficient remdies but when it comes to enforcement, a problem arises in such a way that no positive or good thing comes out of the whole issues. In view of these facts, the role played by the High Court Judges can not be overemphasized (as they are the custodians of Law).

As we shall see later, prerogative orders or remedies are mostly procedural remedies, in the sense that to obtain such remedies, an application should be sought (in the High Court),and obtained before any action is taken towards the fulfilment of the objective. He[4] goes further to say that the anomalies in this area of our laws are that remedies are infact classified into three categories namely (vii) constitutional, for instance Gokpa Vs Police.[5] Where the appellant was tried and covicted by the magistate at a session held at ogoni on a charge containing six counts. Three of the counts were for stealing by person in public service, contrary to section 390 (5) of the Criminal Code and the remaining three for forgery, contrary to sectiol 467 of the same code.

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[3] Nigerian Administrative Law, (1988) U.P.L., P. 491.

[4] Ibid., P. 492.

[5] Gokpa Vs. Police (1961) 1 All N.L.R, P.423.

The only ground of appeal argued was that the trial contravened the provisions of section 21 (2) of chapter three of the second schedule to the Nigerian (Constitution) order in council 1960, on the ground that the appellant was not given afair trial. The trial took an un usual course and the magistrate found the appellant giulty and sentenced him as charged.

However, the appellant's appeal suceeded. The High Court, under the High Courtlaw, Section 38(1)(d) has the power to order a new trial. Therefore, the judge invoked this power (without prejudice) to the appllant and allowed a retrial before another megistrate. Appellant was released on bail. Such are the injustices occassioned on the part of some of the magistrates in this country. Assuming he has no counsel, his case would have been pathetic indeed. That is why it is always good if possible to retain the services of a counsel. It is understood that even where a party to a lis (suit) has no counsel, the state should provide hi with one, particularly in capital offences, lije murder.

The Second type of remedies is the ordinary private law remedies, such as damages injuction and declaration. These shall be discussed later. The third type of remedies is the public law remedies, that is, prerogative remedies mandamus, certiorari and prohibition, which is the focal point of our discussion.

Therefore, in the course of our discussion, we shall understand these prerogative remedies, their uses, when and where to apply for, the persons amenable to these orders, etc, etc.

Therefore, the aim of the research is to acquaint readers with the existence of such remedies and to throw some light on the functions of these prerogative remedies, the way and manner to adopt for their application in the high court. The history and development of these remedies will be dicussed as well, that is as obtained in England from where the orders originated.

However, the history and development of these nemedies, (or writs) as they were originally called, is not in detail.

Under English law, in addition to remedies in contract and tort, the principal machinery of review was provided by the prerogative remedies of certiorari, mandamus, prohibition and habeas corpus. By the Administration of justice (miscellaneous Provisions). Act, 1938, section 7, these prerogative writs were replaced by judicial orders obtained by application to the Queens Bench Division of the High Court of England. In Nigeria, this has been incorporated under judicial review and the procedure has been simplified. Section 42 of the 1979 Nigerian Coustitution is clear on this issue, Section 42(1) of the 1979 constitution provides:

> "Any person who alleges that any of the provisions of this chapter has been, is being or is likely to be contravened in any state in relation to him, may apply to the High Court in that state for redress".

According to Peter Cane[6], the prerogative orders, namely, certiorari, mandamus, and prohibition are so called because the function of controlling the

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[6] An Introduction to Administrative Law, 2nd (ed), (1992) Oxford, P. 11.

exercise of government authority was initially regarded as a prerogative[7]. Habeas corpus, the remedy that is highly regarded as the most swift means of obtaining redress, is mostly applied for in the high court when a person feels that his liberty has been or is likely to be impugned or deprived.

It should be noted that in administrative law, it is important to know the differences between decisions and acts (of the court of Law), especially as they relate to the prerogative orders and most importantly, when the question of remedies is to be determined. This is because to take decision to do some act and the real acting are two different things. Thus, the role of thecourt in this regard is highly commendable indeed. That is why the fourth chapter is devoted to this aspect. The Role of the High Court of Justice in the adjudication of the prerogative remedies.

Now the question of "decision" and "acts" of the Courts. It is important to note that courts are or should give reasons for decisions reached when delivering judgement. This is otherwise known in latin as "ratio decidendi", It is this that makes the decision a Precedent for the future. Both decisions and acts can be in valid in a public law and in this nespect,there is no particular reason to distinguish between the two. However, the distinction between acting and deciding to act can be important from the point of view of available remedies.

When an administrative authority has decided to do an act which is allegedly illegal or prejudicial to the applicant, but has not yet carried out the act, then the

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7 J.H. Baker, - An Introduction to English Legal History, 3rd (ed) (1990) London, P. 64.

applicant will want to challenge the decision to act and to obtain an order instructing that authority not to execute its - decision. In otherwords, the order of prohibition will be issued against that authority; prohibiting it from executing its decision. If, however, that authority refuses to perform its public duty; the applicant can invoke the order of mandamus, to compel that authority to perform its duty, Where, however, the authority has already acted, and the act is one which is reversible, then the applicant can invoke the order of certiorari, so that the authority's action could be investigated, whether it acted in excess of its jurisdiction or not.

An example, where an authority has granted planning permission to 'A' but building is yet to commence, 'B' might be able to get the planning permission revoked by the order of the court, which is an injunction.

But if authority's decision has inflicted irreparable damage or loss on the applicant (if it hs pulled down his home in pursuance of an invalid demolition order), the remedies of public law is going to be much less satisfatory for the applicant. In the circumstance, public law remedy will enable him to establish the illegality of the order, but unless the applicant can take advantage of some statutory provision for compensation, the applicant will have to establish an entitlement to damages in private law if the damage is to be made good by monetary compensation.

Public law remedies are not of much use to the individual who has suffered actual injury injury (whether physical or economical), as opposed to one who has an intangible grievance. The remedy of certiorari was at one time said to be available only if the

decision made was under a duty to act judicially.[8] The applicability of the rules of natural justice in particular circumstances (sometimes said to apply only to judicial functions). However, a turning point in this regard,[9] in effect, that the distinction between administrative and judicial functions was of no relevance to deciding whether a decision maker rightr to comply with the rules of natural justice or to the availability of judical review remedies. In other words, whether the decision made affected the rights of those subject to it or not. The work is comprised in this order.

Chapter one examines the concept of administrative law. In other words, what administrative law entails its meaning or definition, its nature and scope, the sources of administrative law, etc.

Chapter two is devoted to the history and development of the prerogative remedies as was obtained in England and later imported into Nigeria by local legislation the Supreme Court Ordinance of 1914 etc.

Chapter three takes into account the history and development of the writ of habeas corpus, the procedure for its application in the high court. The similarities and differences between the common law remedies and the private law remedies will be discussed, with a view of knowing the relationship that exist between such remedies.

Chapter four is the chapter in which the role of the High Court of Justice will be discussed that is, in relation to the adjdication of the prerogative remedies. Here, the organization of the judiciary in Nigeria prior to the introduction of the received English law shall

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8 2 - Vs. Electricity Commissioners Ex-parte electricity Joint Committee Co. (1924) 1 K.B. 171, Per Atkin LJ.

9 Ridge Vs. Baldwin (1964) A.C. 40.

be discussed. The establishment and jurisdition of the High Court in Nigeria, under section 234 of the 1979 constitution will be taken into cognizance.

The fifth chapter to or relates to the nexus between the prerogative remedies and the private law remedies. In other words comparative analysis of these remedies; viz: their similarities and differences.

Prerogative remedies, are writs (orders) which issued from the superior courts of record (in England) for various purposes including the prevention of inferior courts, or officials from exceeding their jurisdiction or limits, or of compelling them to exercise their functions in accordance with the law. In other words, to ensure the full measure of justice to the king's subject. These prerogative writs (orders) are: certiorari, mandamus, prohibition and habeas corpus. All these were within the jurisdiction of the King's Bench Division. But as well shall see later, the effect of S. 7 of the Administration of Justice (Miscellaneous Provision) Act., of 1938, changed these prerogative writs and they assumed new names and functions. Now these writs are known as "orders" and the procedure involved in obtaining them in the high court has been simplified particularly under Chapter Four (Fundamental Rights) of the 1979 constitution f Nigeria.

Other remedies discussed under this chapter are the private law or common law remedies, namely damages, recission and restitution.

CHAPTER ONE

THE CONCEPT OF ADMINISTRATIVE LAW

At common law, it is an undisputed fact that the right of individuals depend on remedies, hence the latin maxim - "Ubi jus ibi remedium" which simply means: Where there is a right there is a remedy[1].

According to P.A. Oluyede[2] "a good legal system will produce efficient remedies and will regard such remedies as of utmost importance as the administration of justice". He goes further to say that in Nigeria, we are lucky that our administrative law provides efficient remedies. However heis wary of the fact that the remedies are sometimes looked upon as some thing quite divorced from the legal policy to which they should support.

In my view, it is not that our administrative Law has provided efficient remedies, but the enforcement of such remedies is the problem . In this regard, the high court of justice, (Since the remedies we are concerned with are the ones obtainable only in the High Court of justice in each state) And as we have noted, the prerogative writs (orders) are mostly procedural remedies. The anomalies in this area of our laws, says Oluyede[3], are that remedies are infact classified into three categories, namely (i) the constitutional

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John Burke, Osborn's Conciese Law Dictionrary, 6th (ed), P. 334.

Nigerian Administrative Law, (1988) U.P.L., (Ibadan), P. 491.

Ibid., P. 492.

remedies, for instance[4], where the appellant was tried and convicted by the magistrate at a session held at Ogoni in Rivers state on a charge containing six counts. Three of the counts were for stealing by person in public service contrary to section 390 (5) of the Criminal code, and the remaining three for forgery, contrary to section 467 of the same Code. The only ground of appeal argued was that the trial judge contravened the provisions of section 21 (2) of chapter three of the second schedule to the Nigerian (constitution) Order in council 1960, on the ground that the appellant was not given a fair trial. The trial took an unusual course and the magistrate found the appellant quilty and sentenced him as charged.

However, the appellant's appeal succeeded. The High Court, under the High Court law, Section 38 (1) (b) has the power (without prejudice) to the appellant allowed a retrial before another magistrate. Appellant was released on bail.

Such are the injustices occassioned on the part of some (magistrates) in this country. Assuming he has no counsel, his case would have been pathetic indeed. That is why it is always good if possible, to retain the services of a counsel. It is understood that even where a party to a lis has no counsel, (in criminal matters) the state should provide him with one, particularly second type of remedies is the ordinary private law remedies such as damages, injunction and declaration. as we shall see later.

Gokpa Vs. Police, (1961) 1 All N.L.R., P. 423.

The third type of remedies is the public law remedies, that is the prerogative remedies of mandamus, certiorari, and prohibition, which are the focus of discussion. Therefore, in the course of this work, we shall understand these prerogative remedies, their uses nature when and how to apply for them, the persons amenable to the orders etc, etc.

Therefore, the aim of this research is to acquaint readers with the existence of these prerogative writs (now orders), their uses, and procedure involved in obtaining them in the High Court; history and development of such prerogative writs (orders), which of these orders to apply for and for the appropiate order/remedy to look for in case a litigant desires redress. This is particularly the case where a person's right may be infringed or impugned, but owing to a number of factors or reasons the litigant either leaves the matter to die (without resorting to the court for redress), or owing to lack of fund to retain the services of a counsel. There are lots of reasons particularly in the northern part of the country, for example, some muslim families, do not bother about litigations, because of the fact that in Islam there is the belief in destiny or what is legaly alleged to be Act of God. Therefore, what ever befalls a muslim, it is attributed to the wish of the Almighty Allah or Act of God even in cases of intentional murder. But in most cases, aggrieved persons resort to court for redress be it civil or criminal matter. Under English law, in addition to remedies in contract and tort, the principal machinery of review was provided by the prerogative writs of mandamus,

certiorari, prohibition, quo warrauto (now injunction). However, by the administration of justice (miscellaneous provisions) Act, 1938, section 7, these writs were replaced by judicial orders obtained by application to the Queen's bench Division of the High Court (in England). In Nigeria it is provided under judicial review and the procedure has been simplified; for example, laws of the federation , 1990. Each state in Nigeria has its own simplified procedare . For instance, in Borno state, it is under the Borno state High Court (Civil Procedure) Rules, 1985.

According to Peter Cane[5], the prerogative orders, of certiorari, mandamus, and prohibition, are so called because the function of controlling the exercise of governmental authority was initially regarded as a royal prerogative[6]. Habeas corpus, the remedy that is highly regarded as the most swift means of obtaining redress, is mostly applied for in the high court when an aggrieved person feels that his liberty has been or is likely to be impugned or deprived and he needed to be brought before the court physically.

It should be pointed out that in adminstitive law, (since it has to do with procedural aspect,) it is important to know the differences between "decisions" and "acts" of the court of law, more especially as they relate to the prerogative orders, and when the question of remedies are involved. The role

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Op. Cit.

J.H. Baker, An Introduction to English Legal History, 3rd Edition, (1990) London, P. 64.

of the courts and judges (of high court) in the administration of justice particularly as it relates to the question of prerogative orders can not be over emphasized. That is why the fourth chapter is devoted to this aspect- Role of the courts in the administration of the prerogative remedies.

In the question of decisions and acts of courts, it is important to note that courts are supposed to give reason(s) for decision arrived at when acting judicially. That is, "ratio decidendi". It is this ratio that makes the decision a precedent for the future. Both "decisions" and "acts" can be invalid in a public law sense, and in this respect, there is no particular reason to distinguish between the two. However, the distinction between acting and deciding to act can be important from the point of view of available remedies.

When an administrative authority has decided to do an act which is allegedly illegal but has not yet done it, the applicant can challenge the decision to act and to obtain an order instructing that authority not to execute its decision (Prohibition). If however, the authority has decided not to perform its duty, (in relation to public duty), the applicant will often be satisfied with an order requiring it to act if the act is one which is reversible, or if it could be undone. The applicant can challenge the decision to act and may seek for an order of the court, requiring the authority to undo its action.

An example in this case could be that an authority has granted planning permision to Mr. "A". but building has not yet started, Mr "B." might

be able to get - the permision revoked by the order of the court. But if the authority's decision has inflicted irreparable damage or loss on the applicant (If it has pulled down his house in pursuance of an invalid demolition order) the remedies of public law is going to be much less satisfactory for the applicant. In the circumstance, public law remedy will enable him to establish the illegality of the order, but unless the applicant can take advantage of some statutory provision for compensation, he will have to establish an entitlement to damages in private law if the damages is to be made good by monetary compensation.

Public law remedies are not of much use to the individual who has sufferred actual injury (whether physical or economic), as opposed to one who has an intangible grievance. The remedy of certiorari was at one time said to be available only if the decision made was under a duty to act judicially[7]. The applicability of the rules of natural justice in particular circumstances (sometimes said to apply only to judicial functions) However, a turning point in this regard[8] was to the effect that the distinction between administrative and judicial functions was of no relevance to deciding whether a decision maker ought to comply with the rules of natural justice or to the availability of judicial review remedies. In other words,

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R. Vs. Electricdity Commission, Ex-Parte Electricity Commissions (1924)1 K.B. P. 171, Per Atkin, L.J.

Ridge Vs. Baldwin (1964) A.C., P. 40.

whether the decisions made affected the rights to those subject to it. The work ie made up of six chapters and the sixth is on condusion and recommendations.

Chapter One relates to the concept of administrative law; that is, what administrative law entails, its definition, nature and scope. In addition, the sources of administrative law, will be discussed.

The second chapter is devoted to the history and development of the prerogative writs (orders). These are certiorari, mandamus, and prohibition.

The third chapter takes into accout history and development of the Habeas corpus and the procedure for its application in the High court . The fourth chapter deals with the role high court of justice plays in the administration of justice with regard to the prerogative orders. Here, the organisation of the judiciary before Nigeria became independant has been discussed at lenght. The establishment and original jurisdiction of the High Court in Nigeria, under section 234 of the 1979 constitution has been taken into consideration. The compostion of some courts, for instance, the High Court has been discussed in this

chapter. The problems of appointment and removal of judges, as they relate to Administrative law has beentaken into account. The fifth chapter relates to the relationship between the prerogative orders and

private law remedies, declaratory judgement and the advantages of declaratory judgement.

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1.1 THE PROBLEM OF DEFINITION

Many definitions of administrative law have been offered by writers such as Lord Jenning etc, According to him, administrative law is the law relating to administration or public administration[9]. Such a definition, is however simplistic. Briefly put, administrative law means that branch of law which vest power in administrative agencies, imposes certain requirements on the agencies in the exercies of the power and provides remedies against unlawful administrative acts[10]. Oluyede's definition is based on the English legal system which was imported into Nigeria by means of local legislation in 1863. The one and most important of such local legislation is the Supreme Court Ordinance of 1914, which introduced into Nigeria the rules of the English common law, the doctrines of equity and statutes of general application which were in force in England on the 1st day of january 1900[11].

As a branch of law, administrative law has been identified with constitutional law. This is because both the administrative and constitutional laws deal with government and fall within a domain of" ius publicum". Notwithstanding this affinity with constitutional law he branches are distinct: Maitland and Hood Philips say' that administrative law concerns itself with

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Jenning, Law and Constitution, Cap. 6, Vol. 1.

P.A. Oluyede, Op. Cit., P. 1.

But these laws known as the received English law, have been abolished or modified by Law Reform of 1990, Laws of the Federation.

the organization and structure of government. On the other hand, constitutional law emphasizes the workings and functions of government. Therefore, while constitutional law is limited to government as an immobile structure, administrative law deals with government and action/motion. Yardly in his book[12] described administrative law as "that law which is concerned with any aspects of the administration of the country, and in particular the law relating to government, the relationship between the state and the individual".

It is to be noted, however, that this definition does not describe with any precision the exact boundaries of administrative law. However, the general view is that there is nothing wrong with Yardly's definition of administrative law, because the nature of administrative law (particularly in England) is to defy such precise definitions).

Administrative law is a wide concept. It deals with many aspects of life, as the definition offered by Yardley indicates. Town Planning law, public health and the health service, tax administration and tax liability, access to education, control of freedom of movement, or of deportation of aliens, to mention few, are some areas, covered by administrative law. Administrative law deals with government and action or motion. Thus, in order to have an insight to what administrative law entails, we may consider briefly some definitions by various writers once more.

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Introduction to British Constitutional Law, 3rd Ediction (1969), P. 103.

Port, in his book - Administrative law, offers the definition as follows: "Legal rules either formally expressed by statutes or implied by prerogative which have as their ultimate object a fulfilment of public law". In an apparent criticism, Garner, in his book-Administrative law, agrees that administrative law does not merely consist of legal rules, but equally embraces ministerial statements, circulars, memoranda and decisions of local authorities and other administrative agencies.

E. C. S. Wade, and Hood Phillips, in their book constitutional law, go beyond the criteria of legal rules, ministerial regulations and administrative decisions. They offered a broader definition of administrative law to the effect that it is a branch of public law which is concerned with the composition of powers, duties and liabilities of various organs of government engaged in administration.

H.W.R. Wade, in his book Administrative law, adds the criteria of the manner in which such powers are exercised.

Further definition was postulated as follows:

> "Administrative law is that branch of law that concerns itself with the power structure, duties, functioning of government and its agencies as provided by law"[13].

It should be understood that all these powers are to be exercised and their functions performed within the defined limits of the law. Recourse or remedies are open to individuals who feel that their rights and liberties have been or

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3 Dr. Sowa's Lecture Notes, University of Miaduguri, 1984.

are being infringed by government or its agencies in the exercise of their powers and (or in the performance of their functions). Such remedies are obtainable in the Courts of law, for instance, high court of justice.

1.2 THE NATURE AND SCOPE OF ADMINISTRATIVE LAW

In the modern world, especially in developing countries like Nigeria, Ghana and other African (13) Dr Sowa's class lecture notes - Unimaid, 1984 countries, the scope of administrative law is ever widening. It is a discipline whose province concerns every aspect of public life to which government participates. The essence of administrative law is the attempt to strike a balance between) the capricious use of powers and activities of the government against the ights and liberties of the individuals or the public at large. Therefore administrative law deals with those substances, and procedures inherent in the administrative process at large. It also deals with the jidicial review of powers and exercise the functions performed. It is intersting to note that the whole kernel of the subject of administrative law is the control of power within the lawful compass[14]. This means that there is no tentative or acceptable definition of administrative law. Professor H.W.R. Wade[15], Says: "the powerful engines of the authority should not be allowed to be running amok". If the nature of administrative law is to be understood, it

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D.C.W. Yardley, Principles of Administrative Law, 2nd (ed) (1986), Butter (London), P. 15.

Administrative Law, 4th (ed), (1986).

must be realised that one function of the law is to enable the task of government to be performed.

Administrative agencies are created by law and equipped with powers to carry out public policies, drawn up within government and approved by parliament. The second function of law is to govern the relationship between an administrative agency and the individuals or private bodies over whose affairs the agency is entrusted with power. Thus the law serves as a control over the administration. The lawyer in his capacity, has to see to it that, his client does not suffer a wrong or does not lose in relation to his private life.

This means that administrative power ought to be controlled and should not be allowed to Jeopardise the interest of others. This brings us to the question of legal control of power, whether discretionary or otherwise. For instance, in Padfield Vs Minister of Agriculture, Fisheries and food[16], a minister was compelled to carry out his perfuntory and legal duty he was vested with discretionary powers but he misused it, hence the courts ordered him to perform his discretionary power accoding to law.

In Barnard Vs Carey[17]. Wilkin J. expressed the wisdom when he said:

> "In countries adhering to a system of equitable jurisprudence, it has long been considered an inherent power of the courts to grant relief against legislative enactments or

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(1968) A.C. P. 997.

60 F. Sumplement, P. 539.

executive orders which are found to be impossible of performance, contrary to accepted dictates of right, reason and good conscience. The benefit of constitutional government will be far remote from the people if such power should not vest in the courts".

In another development, an American judge, while commenting on the functions or power of the judiciary has said interalia, "America will never come to an end if the power to interprete laws does not lie with the judicial department" Similarly in Marbury Vs Madison[18] "It is emphatically the province and duty of the judicial department to say what the law is..."

Based on the decision in Padfield's case above, it will be quite interesting if we can explain the meaning of discretion. Lord Coke, in Rooke's case[19], held "discretion is a science or understanding to discern (18)(1803) I craunch 132; (19) Oluyede Cases and materials an constitutional Law in Nigeria. Univ. Press Ltd. Ibadan (1987). P 157 between falsity and truth, between wrong and right, between shadows and substance, between equity and colorable glosses and pretences, and not to do according to wills and private affection".

If the Minister, that is, in Padfield's case (Supra), had used his dicretionary power in accordance with the law, the court should have reasoned with his discretion but he did not use the discretionary power in accordance with the dictates of right, reason or conscience. That is why the court (by way

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18 (1803) I craunch 132.

19 Oluyede, Cases and Material an Constitutional Law in Nigeria. University Press Ltd., Ibadan (1987), P. 157.

of legal control of power) compelled the minister to use his discretionary power according to law and not according to his whims or caprice.

This, of course is apparent and to say otherwise will mean abdicating the judiciary of its functions (of interpreting the law). It is an accepted fact that the courts interprete the laws. Consequently, the chief justice of America, justice John marshall, stated clearly the court's role of interpreting the law in Marbury's case.

1.3 SOURCES OF ADMINSTRATIVE LAW

The sources of Nigerian administrative law are not of much difference from what is obtainable in other common law countries. As any other branch of public or private law, administrative law is part of the ordinary laws of the land. This differs in a position in Civil law countries, especially the French system which has fashioned and developed the "droit administratif" (administrative law) as a separate, special body of legal rules administered by special administrative courts which only deal with administrative matters. Of course civil servants are tried by special "courts" and not by ordinary courts which try the ordinary citizens.

We can see that such a legal system is not feasible in Nigeria. The sources of administrative law in Nigeria may therefore be categorised into three, viz:

(a) Constitutional provisions and

(b) Primary legislations. The latter, consists of Ordinances, Act of parliament, Decrees.

(c) Subordinate or secondary legislation, for instance, Local Government Bye- laws, or Edicts.

(d) Case law or part of the sources of administrative law in Nigeria.

We shall consider each of these Sources one after the other.

1.3.1 Constitution

From the colonial era various constitutions have set out the powers and functions or the various branches of government and specifically those of the executive and its allies or agencies responsible for administration. Sections 2 and 3 of the Nigerian Suspended Constitution of 1979 for instance, provide the Federal nature of Nigeria, That is, it divided Nigeria into Nineteen states, and the Federal capital city Abuja.

Administration of the country is entrusted to the Executive which consisted of the President, his Vice and his Cabinet Ministers. Part II of chapter 6 of the constitution 1979 vests administration of the state in the Governor of that state, his deputy and commissioners[20] see particularly S. 42 (1) of the 1979 constitution is clear in this regard.

Chapter 4 of the 1979 consitution, deals with Funcdamental right of individuals. Recently the fundamental Rights (Enforcement Procedune)

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20 Section 162(1) & (2) of the 1979 constitution of Nigeria.

Rules of 1979 was enacted to the effect that rights are enforced without fair[21] S.42 (i) of the 1979 coustitution is dear in this regard.

1.3.2 Primary Legislation

Primary enactments or legislation emanating from the Legislature also form another source of administrative law. Such enabling provisions can be determined by the authorities that had to extend administrative power for what purposes and the extent of such powers, local Government Bye- laws, Edicts or Decrees.

1.3.3 Subordinate Legislation

Although legislative power is vested in the legislature, parliament often entrusts some of these powers to subordinate law- making bodies which are extention of the executive branch of government. Subordinate legislation as a source of administrative law include, regulations and directives issuing from a minister . They include rules which may be made by a body such as the supreme Court government proceedings, Bye- laws of a local goverment authority and decisions of administrative bodies. They also include circulars memoranda issued by government departments, particulaly the civil service. Decisions of administrative tribunals which affect the rights of individuals, etc.

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1 Section 42(1) Ibid.

1.3.4 Case Law/Judicial Precedent

Most of the fundamental principles in administrative law are derived from the common law. These include principle of natural justice and those relating to prerogative order, and ordinary remedies available to the individual such as damages, injunction, and declaration. Perhaps the contribution of case law as a source of administrative law was best stated by Mitland when he said, in 1880 as follows: "If you take up a modern volume of the law reports of Queens Bench Division, you will find that about half the cases reported have to do with rules of administrative law source".

The right to fair hearing otherwise referred to as "audi alteram partem" is yetanother administrative law principle or rule. This is demonstrated clearly in Nakkuda Ali Vs Jayaratne.[22] The controller of a textile company in Ceylon cancelled - textile dealers licence in exercise of the power conferred upon him of revocation of licence on reasonable grounds that the dealer was unfit to continue as the licencee. The dealer sought for the revocation order to be quashed on the ground that the controller failed to give him fair hearing.

The Privy Council dismissed his appeal, holding that the controller was not acting judicially but administratively.

Similarly, in Ex-parte Black Burn Vs Metropolitan Police Commissioner,[23] the police commissioner revoked a car driver's ficence for

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22 (1951) A.C., P. 66.

23 (1968) 1 All E.R., P. 763 at P. 770.

misconduct. An informal inquiry was held, but Parker alleged that he was denied full opportunity to answer to the allegations made against him. His application for the order to be quashed was dismissed on the ground that the Police Commissioner was not acting judicially; but administratively.

In Obiyan case,[24] the then Mid- West state Governor, under S. 61 (5) of the then Mid- West constitution of 1963 revoked the appointment of the applicant as a member of the State Public Commission. The applicant argued that his dismissal was in breach of the" audi atteram partem" Rule, as he was not offered opportunity to present his case. The suppreme court ruled that the Governor was acting administratively in dismissing the applicant and that he was under no duty to act judicially.

It is interesting to note at this juncture that these three cases disclose that it was not clear when an administrative agency or official is said to be acting judicially or administratively. One would have thought, however, that where the power exercised amounts to executive encroachment of private right, the requirements of proper notice and an opportunity to be heard would be mandatory.

In the celebrated case of: Ridge Vs Baldwin,[25] the House of Lords displayed a bold judicial activism which was to give a new list of line to

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24 (1953) 2 All E.R., P. 737.

25 Ibid. A.C., P. 42.

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the rule requiring fair hearing. The House of Lords held that a chief constable who could only be dismissed for negligence or other unfitness as precribed by statute, was impliedly entitled to prior notice of the charge against him and a proper opportunity to answer charges against him before any powers of dismissal was exercised. Lord Reid rejected the view that before the "audi alteram partem" rule should apply, the power to be exercised must be analytically judicial and there must be a super added duty to act judicially. In his opinion, the rule can be invoked where there is a duty to decide what the right of an individual should or ought to be and not otherwise.

Equally important is Lord Denning's dictum in Selvarajan Vs Rese Relations Board,[26] Where he sought to formulate a general principle as follows:

> "Audi alteram partem rule applies where a person is likely to be subjected to pains or penalties or prosecution or to be deprived of remedies or redress or in some way adversely affected by any investigation or report".

Therefore, the accepted rule today is that whether a function is described as judicial or administrative is immaterial when the exercise of the function affects rights of the individual. It must be execised in accordance with the rules of natural justice. In other words, the administrative official/ body should act fairly.

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26 (1976) 1 A.C. 12 at P. 19.

In Denloye Vs Medical and Dental practioner Disciplinary Committee[27], the tribunal took decision as a court of law would do without reference or recommendations to any head of state, Governor or a minister, in a manner contrary to the principles of natural justice. The appellant suceeded because the enabling statute in the first place allows for appeal and secondly the appellant was able to prove his case.

Denloye Vs Medical and Dental practitioner Disciplinary Committee, the tribunal was charged with acts of corruption and neglect of a patient . The panel set up to investigate the matter went to the complainant's house and as the court usually does, (retiring to the locus), took evidence there. The medical practitioner was not, however, invited when the evidence was taken, moreso, his counsel was refused the particulars of the evidence taken at the complainant's house: The case was adjourned for judgement when subsequently the chairman reopened the case to adduce evidence. It was held that a tribunal has a right to determine its own procedure, but that it must act in accordance with the principles of natural justice. Justice karibi Whyte, however, criticised this judgement. According to him,".. to suggest as did their Lordships that the appellant should have been made a partner in the investigation of the allegations against him, is hardly fair to the continued effectiveness of procedure".

The aforementioned cases illustrate how important case law or precedent is in administrative law.

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27 (1968) 1 All N.L.R., P. 306.

CHAPTER TWO

2.0 HISTORY AND DEVELOPMENT OF PREROGATIVE WRITS (ORDERS)

2.1.1 Reception of English Administrative Law in Nigeria

Ordinance No.3 of 1863, Ordinance No.4 of 1876, No.17 of 1906, of 1908 and the Supreme Court Ordinance of 1914 all these imported into Nigeria the English legal system.

In particular, the most important piece of local legislation that introduced into this country the rules of the English Common law, the doctrine of equity and the statutes of general application which were said to be enforce in England on the first day of (January 1900 was the supreme court ordinance of 1914[28].

Thus the crown prerogative, the principles of constitutional and administrative law were all imported into this country.

On the basis of this development, Nigeria's constitution (prior to independance), was formaluted on the premise of the English common law of England.

Furthermore, - administrative law principles similar to those in Britain. Were introduced as a result of the importation of English statutes in Nigeria. It is an accepted fact that Nigeria has moved forward immensely in terms of technological development since independance. However, the fact-

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28 But most of these statutes of general application have either been abolished or modified by section 37 of the Law of the Federation of Nigeria, 1990. Worthy of note is the fact that some of these statutes which were Federal laws have been demoted to state laws while some retain their status as federal law.

remains that the principles of administrative law appear to remain unchanged. This, however, does not mean that the procedure by which some administrative remedies are obtained have not changed nor the methods by which administrative authorities are controlled.

Unlike in England, where the prerogative writs (orders) developed more or less independantly of each other and applied uniformly throughout the realm, in Nigeria, the reception and application of these prerogative writs were effected piecemeal, and by way of ordinances, to the colony of lagos, then to the protectorate of southern Nigeria and finally to the whole country[29].

As stated above, among the ordinances that imported the English law into Nigeria were the Supreme Court Ordinance of 1914, and No.3 of 1863 ordinance. In the colony of Lagos, in particular, Section 1 of the Ordinance No. 3 of 1863 provides that "all laws and statutes which were in force within the realm of England on the 1st day of january, 1863, shall be applied in the administration of justice so far as the circumstances will permit"[30].

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29 S.O. Aguolu, The prerogative writs and Orders Under Nierian Law & Constitution (1981) p.3; see also B.A. Bukar, The Writ of Habeas Corpus and Prerogative Remedies:New Dimention Under Nigerian Law, (LL.M Thesis) (1981) P. 1-2

30 C.K. Allen, Law in the Making, 7th (ed), (1964) Oxford University Press, P. 572.

Section 2 of No.3 of 1863 Ordinance goes futher to say that "No Act of parliament that was not inforce in England on the 1st day of January 1900 shall be inforce or applied in the administration of justice in this colony... unless the Act shall be extended to this colony by the Ordinace of the legislature of this colony"[31].

It needs not be mentioned that the above provisions of the ordinance allow the application of the English law in the colony of lagos. Understandably, the prerogative orders and the writ of habeas corpus form part of the English Common law. However, no sooner these provisions were allowed to be applied in the colony of lagos, no were they superceded by another Ordinance, that is, No.4 of 1870. This Ordinance was to the effect interalia, that the common law, the doctrine of equity and statutes of general application which were in force in England at the date when the colony obtained a local legislature, the 24th day of July, 1874, shall be in force within the jurisdiction of this court".

The effect of this subsequent Ordinance is that it allows the application of common law, the doctrine or principles of equity and the statutes of general application which were in force in England to be applicable in Nigeria including the doctrines ofequity, could not be applied in the colony of Lagos prior to the date/day the colony obtained its local legislature, that is the 24th day of July, 1874.

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[31] Ibid.

In The Southern part of Nigeria, the English law was extended by virtue oF Ordinance No.17 of 1906. In other words, the provision of Ordinance No.4 of 1876, which was applicable in the colony of lagos was also allowed to be applicable in the protectorate of southern Nigeria.

The question whether the same Ordinances that were applicable in the two protectorates - (Lagos and Southern Nigeria) were also extended to the NorthernProtectorate is simple to answer. This is because in 1900, the British colonial administration brought under its control the Northern part of Nigeria.

For instance, section 26 of the High Court laws of Northern Region,Provides inter alia; "The Jurisdiction conferred upon the court by section 24 and 25 shall, subject to the provisions of this law and rules of court be excised by the court in conformity with the law and practice for the time being in force in English".

This, in essence, means that the law and practice in relation to the prerogative writs in Nigeria, (Northen Region) shall be those that were in force in England, until local laws were enacted.

When the federal system of government was introduced in 1954, the regional legistures were given or confered with some autonomy in line with the federal structure of government to enact or make their own laws in respect of some matters. In the constitution, some matters are exclusively for the

Federal government while the regions could in repect of enactment of local laws, effect according to the circumstances in each region.

The order of certiorari, formerly known as writ of certiorari or commonly referred to as "certiorari", was used to express the King's readiness to be informed of grievances of his subjects. It was a royal demand for information[32]. It used to be issued by a superior court or tribunal to command an inferior court or tribunal[33] to certify the record upon which that inferior court or tribunal or even administrative body or authority bases its decision be it judicial or quasi - judicial.

The aim or purpose is to ascertain the legality of the decision of the inferior court or tribunal and if it is not according to law, or if the decision is prejudicial, the decision should be reviewed. It is of interest to note that certiorari will not issue unless there is something remaining to be quashed by court of law. In other words, certiorari will not be effective if the tribunal is not acting in its judicial or quasi - judicial capacity, having authority to determine the legal rights of persons.

In OWOLABI AND 2 OTHERS VS PERM. SECRETARY, MIN. OF EDUCATION[34], the respondent (the Minister of Education) ordered the

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32 R.V Manchester Legal Aid Committee, Exparte Brand (1952) 2 QB 413.

33 (1924) 1 K.B.P. 171.

34 Suit No. IK/4M/69, 6 May, 1969 (unrep.).

transfer of the financial administration and staffing of the school to the local Education officer, Ikeja, Lagos, S.58(1) of Education law of the then Western region States:

> "If either upon complaint by any person the Minister is satisfied that the Managers or government of any public primary or Secondary school have failed to discharge any duty imposed on them by or under this law..., the minister may given an order directing that they have acted wrongly and may be removed from office or as the case may be."[35]

Based on the above provision of the Education law, the Minister's directive is subject to be reviewed, in as much as he acted in a quasi - judicial capacity. If this is the case, then his action is amenable to the order of certiorari.

The Question before the court in that case (Owolabi and 2 ors), is whether the order of certiorari will apply to the order made by the Minister of Education (the Respondent). It is argued in that case that if the Respondent has authority to determine the issue and also has a duty to act judicially in arriving at a decision as he did then, an order of certiorari will lie against him if he exceeded his jurisdiction or if he acted contrary to the rules of natural justice. It can be said that the Minister of Education (the respondent) constitutes himself- as a "Tribunal" since section 58 of the Education law empowers him to remove from office any person who acts in contravention or upon complaint received concerning his activity.

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35 Sec. 58 (1) Education Law, W.R. Nigeria, 1959.

It should also be noted that the order of certiorari is awarded by the High court under its supervisory powers or jurisdiction. Therefore, it can either grant or refuse the order of certiorari depending on the circumstances of each case.

2.1.2 The Order of Certiorari

The Order of certiorari is a discretionary remedy. That is, it can not be invoked as of right. It is an order of the court of Queens Bench that a decision of an inferior jurisdiction in which a defect is alleged be transmitted to the court for scruitiny. Like mandamus, certiorari is of a prerogative character issued in the name of the state on the motion of some interested or aggrieved persons. In other words, certiorari is essenfiatly disciplinary or a superviory process.

In the 16th century, the order of certiorari was employed to control the procedure of subordinate judicial and governmental authorities; little if any distinction was made between judicial and administrative functions. However, in modern times, it is an accepted principle that the order of certiorari is applicable only to judicial or quasi-Judicial authority[36].

According to him, the distinction between the judicial,quasi- judicial, the legislative and the administrative, have been the bugbear of our administrative law and it is impossible to lay down any general test as to what

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36 C.K. Allen Law In the Making, 7th Ed. (1964) Oxford Univ. Press, P.572 .

is considered judicial for the purpose of certiorari[37] certiorari has been extended to the legal Aid committee[38].

2.1.3 Procedure for Certiorari

Application for certiorari or any review must be preceeded by leave of the court, and the application is made "ex-parte" to the court and accompanied by an affidavit. The applicant will depose to the facts on which he relies. The application for the order of certiorari must be brought within a Period of six months. In case the applicant fails to bring his application within the stipulated period of six months, then he has lost his chance and his application shall be treated as one brought out of time, and will be disregarded. In Nigeria, S. 42(2) of the 1979 constitution can be invoked in respect of the prerogative writs Further more, the High Court, in each state, is confered with power, by virtue of section 4 (8) and section 6 (6) of the 1979 constitution to review cases brought before them.

In Adeyemo Vs C.O.P[39] the judge said inter alia, "The requirement in order 2 (1) (4) of the Fundamental Rights (Enforcement procedure) Rules of 1979 are not mere formalities , but mandatory and intended to reassure the court that the proceedings are accurate and complete". The applicant, in

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37 Ibid.

38 R. Vs Manchester Legal Aid Committee, Ex-parte Brand, (1952) 2 Q.B. p. 413.

39 G. Fawehinmi Nigerian law of Habeas Corpus, (1986),p.282.

that case, applied for or requested for a writ of habeas Corpus under order 2 of the Fundamental Rights (Enforcement procedure) Rules, 1979, rather than under the Habeas corpus law. Under order 2 (1) (4) of the Fundamental Rights (Enforcement Procedure) Rules of 1979, the applicant should serve all parties who are interested in the proceedings, but he failed to comply with this requirement. The respondant objected to the application and was therefore struck out.

It should be noted that prior to the enactment of the High Court (Civil procedure) rules of the various states in Nigeria, there were no local rules governing the produre for application for Habeas corpus except in Lagos State. Under the Borno state (Civil Procedure) Rules of 1988, Order 41 rule 2, application for habeas corpus could made. The application shall be made ex-parte to the court and suported by a statement setting out the name and description of the applicant. It shall state the relief or remedy sought and shall be accompanied by an affidavit.

Where leave is not granted, (because the court has discretion in this respect), then it means that either the proceedings in question is one subject to appeal and time is limited by law for bringing of the appeal, or the court may adjourn application for leave until the appeal is heard or the time for appealing has lapsed.

However, if appeal is still pending before an inferior court, the High court may grant leave. In the case of QUEEN - VS- DISTRICT OFFICER &

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ANOR. ex - parte ETIM ATEM[40], an appeal was pending in another inferior court, but the High Court granted leave and said that certiorari will only be granted when alternative remedy means going to a tribunal where the applicant is not likely to get help to remedy the injustice done to him.

In STATE VS WOGU and ORS; ex-parte NWABIYI[41], the accused persons were charged under wrong section of the law which led to their conviction and sentence.

The customary court which convicted and sentenced them was manned by an unqualified personnel. The High Court did not waste time in granting the accused persons an order of certiorari to quash the conviction.

2.1.4 Grounds for Certiorari

The grounds for the award of the order of certiorari are many, but we shall consider among them the following:

It is common knowledge that a court will normally lean against awarding the order of certiorari where the person aggrieved can show no interest A person "aggrieved" is one who has a peculiar grivance of his own beyond some grievance sufferred by others in common with the rest of the public[42].

Examples of persons who can be said to be persons aggrieved include the following: (i) persons who have been deprived of their offices, for instance,

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40 (1961) All N.L.R.P.51.

41 (1965) N.M.L.R. P.219.

42 Ibid., P. 419.

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of SEWERS
in ARTHUR VS COMMISSIONER FOR YORKSHIRE[43], (ii) or those deprived of their proprietary rights, for instance in BEDFORDSHIRE C.C. ex-parte sear[44] (iii) or those who have been denied or deprived of an occupational licence, for instance, in BANJO and ORS VS ABEOKUTA URBAN DISTRICT COUNCIL[45] (who were denied license to operate their taxi cabs, despite the fact that they have complied with all the conditions warranting issuance of the licence), for instance, completion of forms, payment of certain fees, etc. etc.

Want or Excess of Jurisdiction

This arises when a person or body exercises power which he is not by law, empowered to do. In other words if a person or body does an act which in law is outside the scope of his legal jurisdiction or power, in such cases, or instance, the order of certiorari will issue to declare the illegal act void or contrary to law or to declare his act as one exercised in excess of hispower and therefore void 'ab initio. The case of RESIDENT OF IBADAN - VS - LAGUNJU[46], illustrates this point. In that case, the law - Appointment and Deposition of Chiefs ordinance of 1948, S.2(2) requires the Governor to make due enquiry and to consult with the persons involved in the selection

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43 (1734) 8 Mod, P. 331.

44 (1920) 3 K.B., p. 465.

45 (1965) N.M.L.R. 295.

46 14 W.A.C.A., P.549.

(in case of dispute or misunderstanding) and therefore to determine whether or not the selection has been done according to the native law nad custom.

After due enquiry and consultation by the Governor, he shall be the Sole Judge to decide whether or not the selection and / or deposition of the chief has been done as required by the law. The Resident (acting for the Governor), did not conduct enquiry, as equired by law. he unilaterally appointed one of the claimants according to his own whims or based on his own volition. The aggrieved individual applied for the order of certiorari to quash the decision of the Resident.

The West African Court of Appeal (W.A.C.A.) held among other things, that failure to make the enquiry as required by law renders action of the Resident "ultra vires" and therefore "void ab into". In other words, the order of certiorari was invoked against the Resident commissioner, because of lack of power in that the enquiry was not made as required by the law (S. 2 (2) of the Appointment and Deposition of Chiefs ordinance, 948).

Another interesting case akin to Lagunju's is that of THE ADMINISTRATOR, WESTERN NIGERIA Ex-parte Bamgbedu[47]. The applicant alleges that because of the vacancy existing in the office of the "Oliwo" of Ilishana, one Chief Aina oremusi was appointed by the King makers in 1958. This was subsequently given approval by the Olafin. S.15 Chapter 19, laws of the then Western Nigeria, requires the Minister's consent

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[47] (1963) W.N.I.R. P. 344

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in relation to the appointment. This was of course complied with. But after some time, the respondent was appointed by the king makers to fill the same vacancy but the Olafin declined approval, following which the Governor approved the said appointment. On an application to quash the approval of the second appointee, the court held that the second appointment made by the Governor in Council was made without jurisdiction as there was nothing to approve. The court pointed out that as soon as the king makers had appointed the first candidate, they became "functus officio", (having discharged their duty), but could make another appointment only if the first was set aside by the governor In council under S.16 Chiefs law, cap. 19 and that approving any subsequent appointment which the king makers purported to have made was a nullity . The court further stated that the governor in council has no power to approve subsequent appointments while the first appointment had not been set aside.

In QUEEN VS ADMINISTRATOR, WESTERN NIGERIA,[48] Charles, J. held: "void acts should be quashed. It is in the public interest that a patent nullity should be shown to be such, lest its evils be perpetrated by subsequent administrative action being taken in the belief that it has a valid basis".

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[48] Ibid, P. 99

Error of Law

This is the second ground upon which High courts take into account when considering the issue of whether certiorari is to be granted for quashing decision of an inferior court, or tribunal.

Error of law (on the face of the record) needs some explanations. Error of law may mean rejection or admission of inadmissible evidence, for instance, in R Vs - INDUSTRIAL INJUNRIES COMMISSIONERS, ex-parte ward,[49] where a tribunal mistook the burden of proof. That was held to be error of law on the face of the record. And in QUEEN VS LIEUTENANT GOVERNOR EARSTERN REGION ex-parte Okafor Chiagbana,[50] the West African Court of Appeal observed: "It is of course well settled that when it is sought to question a decision by means of writ of certiorari on the ground of error of law, the error must be apparent on the face of the rocord".

It should be pointed out that to this general rule, there are some exceptions, one of them being that where certiorari is sought on the ground of breach of Rules of natural Justice. breach of rules of natural justice is an exception to the general rule that where there is an error of law, the error must be apparent on the face of the record. In QUEEN VS ELECTORAL COMMISSIONER, WESTERN REGION AND ANOR. ex-parte Gabril

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[49] (1965) 2. Q.B. 112

[50] (1957) W.N.L.R.p.135

Etchie,[51] Taylor, J; held that hearsay evidenc was wrongly received and acted upon by the special registration officer. He stated as follows: "With respect, I submit that the learned judge was wrong to have refused, the application having come to the conclusion that inadmissible evoidence is admitted was erroneously admitted".

And in R.Vs Northumberland Compensation Appeal Tribunal ex-part shaw[52] Lord Denning M.R. stated:

"It is worthy of note that the decision in Industrial injuries case (Supra)portrays that where an inadmissible evidence was admitted, or admissible evidence was rejected, this is an error of law on the face of the record and the effect is that the court will disregard such cases and either declare it as null and void. or remit same to the court of first instance, for retrial or as the case may be. In STATE VS AG. CHIEF MAGISTRATE Ex-parte Mathew Elese and ors.[53] The application for the order of certiorari to quash was brought before the court. The facts of the case were that the Chief magistrate did not read and explain the charge to the accused person, as provided by S.215 of the Criminal Procedure Act, and for failure to read the charge as required by S.218 of th same Act.

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[51] (1951) K.B.P. 7111; (1952) 1 A.E.R.133 at P. 132

[52] (1951) K.B. 7111; (1952)1 A.E.R. 133 at p.132

[53] (1973) E.C.S.L.R. Vol. IV, part II, p.967.

It should be stressed that had the Magistrate read the charge to the accused person, as presented by the prosecution, the accused person would have had the chance or opportunity either to agree or deny the charge. But the Magistrate erred in law and as a result the accused was convicted and sentenced. However the order of certiorari was invoked to quash both the conviction and the sentence.

In QUEEN VS LIEUTENANT GOVERNOR EASTERN REGION, Exparte Okafor chiagbana[54] the judge stressed that where the order of certiorari is involved , then the error of law must be apparent on the face of the record. This is illustrated by Lord Denning M.R.(as he then was):

> "It is of course well settled that when it is sought to question a decision by means of writ of certiorari on ground of error of law, the error must be apparent on the face of the record,... there are, howevre, certiorari well known exceptions and one of them is where certiorari is sought on the ground of breach of rules of natural justice".

Breach of Natural Justitice

The principle of natural justice demands not only that those whose interests may be directly affected by an act or decision should be given prior notice and an adequate opportunity to be heard, but also that the tribunal should be disinterested and impartial. It is settled law that in English law, any judge who violates the maxim "nemo judex in cause sua" rule does not in cur

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[54] Ibid, p.

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civil liability , but prohibition may issue to restrain him from acting. This is clearly illustrated in R Vs DAVIDSON[55] and R VS EMERSON[56] respectively in the circumstance, the judge's adjudication may be impeached on appeal or by means of an application for certiorari to quash or for such other remedy as may be appropriate. Thus the aim of these principle of law or latin maxim is to ensure minumum procedural safeguard or procedural Fairness. In other words, the court ought to adjudicate in a manner that the case is disposed off without delay or frustration. Clearly, the rules of natural justice are rules based on procedural aspect and not substantive rules. This has been pointed out in R VS DEPUTY INDUSTRIAL INJURIES COMMISSION, ex-parte moore.[57] The rule against interest and bias usually expressed in the latin maxim:" nemo judex in cause sua", simply means that a "man must not be a judge in his own cause" (because of the possibility of partiality and unfairness) which will destroy public confidence in the decision - making process of the court or the administration. In R. Vs SUSSEX JUSTICES, ex-parte Mcarthy,[58] Lord Hewart stated as follows: Justice should not only be done, but should manifestly and undoubtedly be seen to be done".

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[55] (1913) 2 I.R. p. 342

[56] Ibid

[57] (1965) 1 Q.B.p. 456

[58] (1924) 1 K.B.256

In essence, this means that an individual who is a party to a lis or dispute, or who acted as a prosecutor can not take part in the decision. Other instances of likelihood of bias, could be seen in cases like that of R. Vs Caborne JUSTICES, Ex-parte Pearce,[59] the right test to disqualify a person from acting in a judicial or quasi-judicial capacity upon the ground of interest (other than pecuniary or proprietary) in the matter of the proceeding, a real likelihood of bias must be shown. A real likelihood of bias must be made to appear not only from the facts ascertained by the party complaining, but from such further facts as he might readily ascertain and easily verify in the course of his enquiries...

Where there has been a denial of natural justice before a court of summary jurisdiction, resulting in the conviction of a defendant, his remedy is not by case stated or appeal to quarter session, but by application to the High Court for an order of certiorari to remove and quash the conviction. Such an application, is to ascertain the facts; and the Court will look at the affidavit evidence filed in support of the application.

In R Vs- Deputy Industrial Injuries Comm. Ex-parte Moore,[60] while operating a crane in the course of her employment, the claimant, M, felt sharp pain on her back. Subsequntly, she was diagonised as having a

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[59] (1924), 1 K.B. 256 at 259

[60] (1965), 1 Q.B. 456

prolapsed intervertebral disc. Her claim for industrial injury benefit was refused by the insurance officer, and, on appeal by the local appeal tribunal. She appealed again under S.47 of the national Insurance (Industrial Injuries) Act, 1946 of England to the deputy industrial injuries commissioner. At the hearing, reference was made to medical opinions concerning the actiology of prolapsed intervertebral disc reported to have been expressed in two previous cases between other commissioners. Those opinions were put to the medical witnesses, called on behalf of the claimant and the insurance officer respectively and the latter expressed agreement with them. The claimant applied for an order of certiorari on the ground, interalia, that the deputy commissioner. had erred in law and that his decision was contrary to natural justice in that he had treated as evidence in the case between him matters which were not evidence, namely, the medical opinions expressed in previous cases.

Held, dismi.ssing the appeal, that assuming that the deputy Commissioner had treated the medical opinion given in previous cases as independent evidence in the case between him, he had not erred in law in so doing that proceedings between the industrial Commissioner and deputy commissioner under S.47 of the insurance) Act. 1946 of England warranted and governed by strict rules of evidence applicable trial. In OBADARA VS PRESIDENT, IBadan West District Council.[61]

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[61] (1955), 1 Q.B. p.41

According to professor de Smith, breach of the rules of natural justice must be established by affidavit.

It is submitted that the doctrine of natural justice is difficult to define. However, an attempted meaning of the doctrine or principle can be said to be that natural justice connotes an inherent right of man to have fair and just treatment in the hands of th rulers or their agents. If this is so, then what has been mentioned earlier that is, natural justice is a procedural safeguard or procedual fairness is true and thus needs no further explanation. It is therefore appropriate to note that decisions affecting the rights of the citizen must not be made a subject of ridicule or as will render him to redicule, but that before any person's right is made, ascertained or determined, such person(s) should be given a fair hearing (audi alteram partem) and the decision maker(s) must not be a party or parties to the dispute in question, or lis. He should have no any interst in the subject matter of the decision or dispute or other wise be biased (nemo judex in causa sua).

S.33 of Nigeria's 1979 Constitution provides for right of fair hearing. This right relates to the determination of civil rights and obligations of individuals. needless to say,thereofre that the right of fair hearing is a very essential right for a person to secure justice. Thus in case an aggrieved individual or party is denied the right to be heard eighter by a court of law or tribunal,or where the judge is biased, then there is denial of justice.

The right to fair hearing or fair trial includes opportunity to defend oneself in person or by a counsel of his choice. And a judge or tribunal must therefore adhere strictly to these two doctrines when determinig a person's right. And the parties to the lis, must disclose all facts which are true and relevant to their claim.

In R. Vs CAMBRIDGE UNIVERSITY,[62] Dr. Bentley was deprived of his academic degree in the University without notice or hearing. He applied for the order of mandamus to secure reinstatement. In the judgement, the judge ascribed it to the events in the garden of Eden when he said: "God did not condemn Adam and Eve without first of all calling upon them to answer the allegation of disobedience to the divine command". This means or implies that before Adam and Eve were subjected to punishment, for disobeying God's command not to eat the forbidden fruit of the tree they were enjoined not to touch the fruits or eat them. God gave them the right or opportunity to defend themselves. But when they could not give satisfactory or convincing reason or answer, they had to suffer the consequences of their act. In other words, they were liable to punishment when they failed to give answer for their unruly conduct. One can therefore say that the right of fair hearing was a natural right. This is why the judge in Cambridge case referred to Adam and Eve's episode as a clear example of the right to fair hearing. This right of fair

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[62] (1723) 1 Str. P.55

hearing is entrenched in section 33 of the 1979 constitution Nigerian Constitution.

In Cooper- Vs- WANDSWORTH BOARD OF WORKS,[63] public authority demolished a house belonging to another man without giving the owner of the house prior notice or even an oportunity to make representation on his own behalf. The public authority purported to have acted under a legislation which did not provide for any notice to be given to the owner of the house. The court invoked the justice of the common law to supply the omission of the legislation. Hence the owner of the house obtained damages for trespass.

The principle of audi alteram rule was reinforced in RIDGE VS BALDWIN[64] where the plaintiff (a chief constable) had been prosecuted on a charge of conspiracy but was acquitted. His employer (a Local Authority) relieved him of his post. The plaintiff was not given an opportunity of being heard before his dismissal. The House of Lords eventually granted a declaration to the effect that the dismissal was a nullity, as the audi alteram partem rule had been neglected.

This was clearly shown in DR. BONHAM's case[65] where a medical Doctor was fined by the Board of the college of Physicians on the ground that he

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[63] (1863) 14 C.B. (NS) p. 180

[64] (1963), 3 ALL E.R. p. 66

[65] (1910); 8 Co. Rep. p. 107

had breached the rules of the college. It was held, that the Board has no power to fine hi, because 'the Board' was a judge in its own case, as half the fine was payable to the said Board.

A Clear case of bias was pointed out in the case Dr. ALAKIJA VS MEDICAL DISCIPLINARY COMMITTEE.[66] The appellant, a medical practioner, contended that the medical disciplinary committee did not conduct the enquiry in accordance with the principles of natural justice, in that the Registrar who was in fact the Prosecutor took part in the committee's deliberations after the appellant and his legal representative or counsel had been asked to retire from the court room.

The supreme court held that the Registrar was neither by name nor by virtue of the position he held in the service of the Federal government a member of the Committee. Therefore he should not have remained with the committee during the consideration of the decision. Thus the decision of the Committee was held to be null and void having no effect whatsoever, because of the possibility of bias involved.

Simlarly, in YUSUF GARBA VS UNIVERSITY OF MAIDUGURI the same view was expressed. In that case, the Deputy Vice Chancellor of the University was a member of the panel set up by the University of Maiduguri to investigate the remote and immediate causes of the Violent student disturbances which rendered some top officials of the University of

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[66] (1989) 1 N.W.L.R. p. 550

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Maiduguri helpless, because of the destructive effect of the riot. Infact many officials, like the Vice Chancellor, then professor Jibril Aminu, Deputy Vice Chancellor Dr. Niki Tobi (now Professor), and several others. Lost some oftheir personal property. The court of first instance convicted the students (a handful of them). That is, those who were identified to have monitered the riot, or demonstration. But on appeal to the court of appeal in Jos, it was held that the decision of the court of first instance was improperly conducted in as much as the court relied on the recommendations or findings of the panel set up by the university of maiduguri, more so, the Deputy Vice Chancellor was among the members of the said panel. There's every likelihood of bias as there is no way he (Deputy Vice Chancellor) could exculpate the students,instead, he tried all he could in order to see that the affected students were found guilty or sentenced to a term of imprisonment. Moreso, he was also a victim of the riot. Therefore,the bias was evident. The court of appeal, held that the conviction should be set aside and it was done. The case reached the supreme court and the students gained the upper hand.

It is interesting to distinguish between procedural rules of natural justice and substantive rules of natural justice. This distinction was made in GODFREY NWARIBE - VS - PRESIDENT, EASTERN ORU AND ANOR.[67] The applicant contracted a marriage with the deceased's former wife, prior to the second marriage, the woman was conceived pregnant.

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[67] 8 E.N.L.R. 24

When she delivered, the child was given to the deceased's family, but her present husband (the applicant) objected on the ground that the native court had acted contrary to the principles of natural justice. The Court refused to grant the order sought by the applicant, that is, the order of certiorari. The court held that the procedure adopted by the applicant was wrong. According to the court, the right procedure the applicant would have adopted or invoked was to appeal against the decision of the court, because what was in breach was a breach of substantive law and not a breach of procedural fairness.

It follows, therefore, that where an individual's right is interfered with, encroached or violated without justification, the right which is open to him is fair hearing , as provided in S. 33 (1) of the 1979 constitution which provides as follows:

> 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 of law or tribunal established by law and constituted in such manner as to secure its independence and impartiality."

Needless to say, therefore, that the persons or body that has a duty to determine questions affecting the rights of citizens must be acting in "judicial capacity". secondly, the body must have exceeded its legal authority. These two conditions must exist before a body is said to have acted in excess of its jurisdiction, or that it acted contrary to law, or in contravention thereof.

In LOCAL GOVERNMENT BOARD- VS ARLIDGE,[68] it was pointed out that in so far as the expression "natural justice" is resorted to for other purposes, it is vacuous. However, in other cases, some court and commentators who declined to accept any form of justice as natural, may prefer to take their choice from among many, for instance", substantial justice, the essence of justice, fundamental justice, universal justice, national justice, the principles of British justice or justice without any epithet.[69] According to professor de Smith, in any event, the expression "natutal justice" was written into the statute book in 1969. But it appears that English lawyers prefer to use the expression "natural justice". They have their reason also for so doing. This may not be unconnected with the fact that the expression natural justice has close relationship between common law and moral principles, and that it has an impressive ancestry. For instance, in Greece, the inscription "No man is to be judged unheard", was inscribed in ancient times upon images in places where justice was administered.

In these cases, the expression natural justice has been attributed to the phrase "the requirements of natural justice". And more recently, an attack has been pursued and that the words "natural justice" encourages excessive legalism, therefore a simpler notion of the word "fairness" is preferred.

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[68] (1915) A.C.P. 120; See also (1929) 1 ch P. 602 at P. 624

[69] Professor de Smith Op. Cit P. 157

Lord Reid, in RIDGE VS BALDWIN, state among other things as follows: "..natural justice is so vague as to be practically meaningless", is tainted by the perennial fallacy that because something can not be cut and dried or nicely weighed or measured, therefore it does not exist".

This means or relates to criticisms people have, it is a figurative speech. It means there is nothing like natural justice. It follows. therefore, that the criticsms or misconceptions people have that there is nothing like natural justice is only subjective and such belief exists in the minds of those who hold them. The notion that expressions like fair justice, substantial justice, the essence of justice, the principles of British justice", etc, is only subjective phenomenon and holds no water, though their idea is pointing to the same meaning of the expression natural justice. Natural justice connotes an inherent right in man to have a fair and just treatment at the hand of the rulers or their agents.[70]

We now proceed and observe prohibition and as earlier pointed out, discussion on this will be of limited scope because of the similarities between prohibition and certiorari. Grounds for Refusal to grant - prohibition the order of prohibition is an effective remedy in administrative law. It will be available to an applicant to prevent the performance or continuance of administrative action which must be judicial or quasi-judicial

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70 B.O. Iluyomade et al B.U. Eka - Cases and Materials on Administrative law, in Nigeria, (1988) Obafemi Awolowo University Press Ltd, IIE-IFE Nig. P.131

in nature. Prohibition will lie where an administrative tribunal is yet to reach a decision. It is an effective remedy, just like the other prerogative orders of mandamus certiorari and habeas corpus. But it should be noted that in most cases these two orders are sought or prayed for together or simultaneously; depending on the situation or circumstances in each case. However, these two orders differ in their spheres of function. It is convenient to discuses them separately. We have already seen the functions of certiorari. It is discussed at length because of their importance or significance in procedural administrative Law. And in doing this, we have to take into account some concepts with which these orders relate, for instance, the notion that the "body has to act judicially". This simply means that the body or group of persons before whom redress or remedy is invoked, must be one which is recognised by law. It must have been conferred with the duty to act judicially or quasi judicial in nature. Thus prohibition will lie where an administrative tribuanl has not yet reached a decision, whereas certiorari is the appropriate remedy where action has already taken place or completed by court or tribunal. Also, if the decision arrived at is one which is not based on law, or , if prejudicial, the court's order of certiorari will be invoked, or in some instances, the order of prohibition, depending on the circumstance in each case.

It is submitted that the importance of stressing that certiorari can only issue to control judicial or quasi - judicial acts is not very helpful in modern times.. the distiction could be confusing. This, perhaps is due to

the fact that certiorari and prohibition are normally used to control specific statutory authorities, such as tribunals and bodies, and sometimes ministers. It has also been observed that some judges have allowed some verbal gymnastics to be introduced into the matter before them by maintaining that certiorari lay only to quash "judicial" and quasi judicial" acts. In the process, what would appear to be plainly administrative acts have been labelled judicial, quasi - judicial acts do not require the strict procedure of court, for instance, swearing of witness on oath, or presentation of documentary evidence; for instance, in R - Vs - Electricity commissioners (Supra), and seemingly judicial acts have been labelled administrative,[71] or executive acts, for instance, in Arzika - Vs - Governor, Northern Region. In ARZIKA'S Case, he sought the order of Certiorari to bring or transfer from one court to the other to quash the Ex-native office Holders Removal order, 1960, made by the Acting Governor of the then Northern Region. (The Legal Notice, No. 76 of 1960). He also sought an order of prohibition directed to the Governor of the Northern Region prohibiting him from further exercising his powers under S. 2 (1) of the Ordinance in relation to the appellant.

For the respondent it was argued that orders of certiorari and prohibition would not lie to the Governor because in making the removal order, he was not under any duty to act judicially. But counsel for the

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[71] (1961) All N.L.R.p. 379 See also B.O. Iluyomade et.al B.U. op cit.

applicant contended that the respondent was under an implied duty to act judicially. He further argued that under S.31 (2) of the 1960 Nigeria's Constitution, the court has a duty to issue the order of certiorari to the Governor, because the order made by him (Governor) had infringed the fundamental human rights, the freedom of movement and thus the appropriate way for the court to remedy the wrong done to the applicant was to issue orders of certiorari and prohibition.

The judge, while delivering his judgement, said (inter alia), this obviously imports consideration of policy. I therefore find that making of the order by the respondent was not a judicial act. It would be more appropriately called ministerial act or legislative act. Consequently neither certiorari nor prohibition will lie in this case. The application is misconceived in that the remedies sought by the applicant are not available to him. The applicantion was dismissed.

Similarly, in OKAKPU VS RESIDENT, PLATEAU PROVINCE[72] the appelant's applicantion for the order of certiorari as well as the order of prohibition was refused on the ground that the Resident's discretion to either revoke or renew licence, was not a judicial or quasi - judicial discretion but adminstrative. Therefore, the court was not obliged to grant the orders sought by the applicant. Although counsel for the appellant argued that the Resident's power under S.6 (1) of the Ordinance, was judicial or quasi

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[72] (1958) N.R.L.R. p. 5 . See also B.O. Iluyomade, op. cit p. 187

- judicial power which must be exercised according to the rules of natural justice. Moreso, each party must be given an opportunity of stating his own case. The argument was that the appellant was not given an opportunity of stating his case against the revocation of licence order by the Resident. It was pointed out by the court that the power or nature of the Resident's power of revocation was independent of whether it is a judicial or an administrative power... therefore the fact that the appellant was not given an opportunity of being heard is not a ground for interfering with the revocation of license by the Resident. The appeal was dismissed.

2.2 PERSONS AMENABLE TO CERTIORARI AND PROHIBITION

We have noted earlier that the orders of certiorari and prohibition could be issued only to a body having "legal capacity" "or" having a duty to act judicially". But we also observed that it is not in all cases that this basic rule or principle is applicable. In some instances, it may be difficult to ascertain whether a body is acting in a judicial capacity or quasi - judicially or administratively. The case of Malam Mohammed Arzika (Supra), has been discussed and the application for the order of certiorari failed for the reason given, so also is the case of Okakpu.

Going by the aforesaid, it is not always possible to stick to or adhere strictly to this principle or requirement, that certiorari and prohibition can be issued to a body acting in quasi - judicial capacity, or one which has a duty

to act judicially. With this in view, we can enumerate the person(s) against whom the orders of certiorari and prohibition could issue:

i) Inferior courts or tribunals. According to de Smith (in England), ecclesiastical courts are inferior courts so they are not amenable to the order of certiorari but to the order of prohibition only.

ii) The orders, both certiorari and prohibition could issue against administrative tribunals or bodies.

iii) The orders can issue to local authorities.

iv) It could also issue against statutory bodies, individual officers discharging public functions.

v) The orders are issuable against parastatals or department of state and Ministers.

It is, however, suggested that the order of certiorari and prohibition could not be invoked against the state. This is because the orders of certiorari and prohibition are commands of the court of law and disobedience to which has the effect of attachment.

By the words "Legal authority" or a body having a legal authority, means tht the3 body is legally recognised to have been established by law. Thus, corporations like National Eleectric Power Authority, (NEPA), Transport Service Corporations, for instance "Borno Express" Kano Line", etc. are having legal authority. In other words they have been created ot established by respective laws (Edicts) of their states. Therefore, they have legal authorities. This also

means that if they contravene a law, or if their agents or servants act wrongfully in the discharge of their duties, they are answerable to their illegal, act or omission. It this is the case, it could be said that such corporations are amendable to certiorari and prohibition.

However, the orders of certiorari and prohibition mya not be issued in certain situations. For instance, the orders cannot issue against a body or authority whose decision is discretionary.

Further more, the orders of certiorari and prohibition can not be invoked where contractual relationship is not yet entered ito or made. This type of case came up in R. Vs. MINISTRY OF HEALTH.[73]

The question whether certiorari will issue against non-statutory bodies discharging functions of a publicnature remains unclear. But in an English case of R. Vs. ASTON UNIVERSITY SENATE, Ex-Parte Roffery,[74] it was assummed that the proceedings of University authorities that had no statutory basis were reviewable by the order of certiorari. However, this assumption may be questioned on the ground that the responsibilities of such bodies may not be so manifestly public in nature and because inadequate attention was given to the contractual aspect of the relationship between student and University. For

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73 (1954) N.I.P. 79 decision of dehtal service committee & ministry investigation complaints against dentists

74 (1960) 2 Q.B.P. 538

instance in the case HERRING Vs. TEMPLEMAN[75] and R. Vs. POST OFFICE, exparte Byrne.[76]

Accdording to Professor De Smith,[77] the importance of determining whether certiorari or prohibition is available to challenge the validity of some intermediate stage in the decision making process has been reduced by the introduction of a single procedure in which an applicant may combine a request for a prerogative order and declaratory and injunctive relief.

2.3 GROUNDS FOR REFUSAL OF THE ORDER OF PROHIBITION

First, we consider some preliminaries militating against the grant of the order of prohibition, before we discuss the grounds for refusal to grant the order.

2.3.1 Conduct of the Applicant

Conduct of the applicant may disentitle him to a remedy whether certiorari or prohibition. For instance, an applicant who waives or has waived his right to object to a jurisdictional defect may be refused relief. But in cases of prohibition, a distinction has been drawn between those latent defects which can be waived and those which cannot. It is submitted that no assent can cure a "total" want of jurisdiction.[78]

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75 (1973) 3 All E.R.P. 569 at 584/5

76)rder 53 rule 8, rules of the supreme court, of England

77 Ibid.

78 (2) (1848) 5 D. and L.P. 669 at P. 674 Jones Vs. Own (1).

A total want of jurisdiction exists where the tribunal is without or lacks competence by reason of the status of the parties or the nature of the subject - matter[79]. But contingent defects of jurisdiction can be waived, the relevant decisions concerning the omission of preliminary procedural requirements, the existence of jurisdiction depends upon whether objection to the omission is taken at the proper time or not,[80] for instance,in JONES VS JAMES, and also MOORE VS GAMGEE[81].

The right to certiorari and prohibition may also be lost by acquiescence or implied waiver. Acquiescence means participation in proceedings without taking objection to the jurisdiction of the tribunal or body once the facts giving ground for raising the objection are fully known to the party for instance, LONDON CORN VS COX[82]. Refusal to grant the order of certiorari may also take the form of failing to object to the statutory qualification of a member of a tribunal, for instance, in R Vs WILLAMS, exparte Phillips[83] exceptionally appealing to a higher tribunal against the decision of the inferior tribunal or tribunal of first instance,

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79 (1855) 24 L.J. 223 Knowles Vs Holden

80 (1850) 19 L.J. 257 at 258 Jones Vs James

81 (1867) L.Q. 2 H.L. 239

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83 (1914) 1 K.B. 608 R Vs Williams, ex-parte Phillips

without raising the question of Jurisdiction.[84] Furthermore, the right to impugn proceedings for breach of the audi alteram partem rule,[85] or for disqualifying interest or likelihood of bias, may also be lost by acquiesence.

A party who is quilty of unreasonable delay in making the application for indicial review may be denied a remedy of certiorari or prohibitional assumption or exercise of jurisdiction . Thus if he seeks an order of prohibition, relief or remedy may be refused on the ground of undue delay if the court is of the view that to grant the order would cause substantial hardship, or be prejudicial to third party, or if it will be detrimental to good administration. whether delay is considered undue will depend upon the facts of each particular case[86] in[87] also in R Vs Aston University Senate, ex-parte Roffey.[88]

Tthe guiding principle is that the opportunity of obtaining an order of prohibition may be contrievably lost by a delay that leaves nothing for the court to prohibit. Also, where the relief sought is an order for certiorari, the court may deny leave to apply if three months have expired since the date of the proceedings impugned and to allow the order to issue would cause substantial

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[84] (1901) 2 I.R. 215 R-VS Commissioner of Valuation

[85] (1964) 44 (2d) 265 R. Vs Halifax and Dart mouth real estate Board.(1)

[86] (1880) 9 E.B.D. 741 R. Vs. Sheward.

[87] (1917) 33 T.C.R. 512 R Vs Glamorgan Appeal Tribunal ex-parte Fricker

[88] (1860) 2 Q.B.P. 538

hardship or prejudice to third parties, or would be dertrimental to good government.

It must be noted that even if the application is made within three months, certiorari may still be refused for undue and prejudicial delay. Note that in England, Limitation Act, of 1975, confers a wide discretion upon the courts to allow writs to be served outside the normal limitation period. In Nigeria, coresponding law is the Publi Officers Protectin Act of 1958.

From the foregoing it would appear that waiver, acquisecence and laches are not the only discretionary bars to the award of certiorari and prohibition. The court is entitled to have regard generally to the conduct of the applicant's circumstance of the case in deciding whether to grant him the remedy he seeks. For instance in Ex, part fry,[89] the "exceedingly foolish" and unreasonable conduct of the applicant was given as the ground for refusing the order of certiorari. And in R. Vs Kensignton I.T.C.,[90] application for prohibition was refused because applicant had mispresented and suppressed material facts in her affidavit.

2.4 TYPES OF PROHIBITION

There are two types of the order of prohibition:

i) Prohibition quosque; and

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[89] (1976) 2 Q.B.P. 538; Industries Canada Ltd. Vs. A.G. of Canada.

[90] (1954) I.W.L.R.P. 730

ii) peremptory prohibitionshould be understood particularly by practing lawyers.

The effect of these two orders of (prohibition quosque and peremptory prohibition) is that while the former has the effect of allowing the proceedings to continue on the condition that the offending party of the proceedings is first of all removed, in the latter, the whole proceedings is brought to a stand still. In other words, the proceedings will ~~ot~~ not be continued . For instance, in Olaleke Obadara and Ors. Vs the President Ibadan Council.[91] Appllenats were charged before a customary court with various offences. However, they pleaded or raised a preliminary objection on the ground that the presideht of the customary court was biased. The particulars of bias was that the counsel appearing in the case is also material withness. The supreme court applied R. Vs. Cambarene Justices[92] and held that to disqualify a person from acting in a judicial or quasi - judicial capacity upon the ground of interest (other than pecuniary or proprietary interest) the subject- matter be indicated. In this case, bias or real likelihood of bias was not proved. Thus, order nisi for prohibition was discharged . In other words, a peremtory prohibition was applied for.

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[91] (1965) N.M.L.R. 39

[92] I.Q.B.41

2.4.1 The order Of mandamus

The word "mandamus"simply means 'we command'. It is a high constitutional writ (now order) which used to issue in the King's name from the High Court of Justice on application to the King's Bench Division to some person or body to compel the performance of a public duty where no other remedy or means of redress was available. Mansfield J. in R. Vs BAKER [93] stated as follows: "it was introduced to prevent disorder from a failure of justice, and defect of the Police. Therefore, it ought to be used upon all occasions where the law has established no specific remedy, and where there is injustice and good government there ought to be one..."

According to Blackstone, mandamus is issued for an infinite variety of other purposes.

Thus the order of mandamus is a device for securing Judicial enforcement of public duties. Lord Denning M.R. in R. Vs METROPOLITAN POLICE COMMISSIONER, EX-PARTE BLACKBURN[94] said:

> "...mandamus is a very wide remedy which has always been available against public officers to see that they do their public duty. It went in the old days against justices of the peace both in their judicial and in their administrative function. The legal status of the Commissioner of Police is still that he is a justice of the peace, as well as a constable. No doubt the party who applies for mandamus must show that he has sufficent interest to

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93 (1762), 3 Burr, 1265, at 1267; de Smith Judicial Review of Admin. Action 4th (ed) (1980) Stevens & Sons Limited (London), P. 538.

94 (1968) I All E.R. P. 770

be protected and that there is no other equally convenient remedy... once this is shown the remedy of mandamus is available".

It follows, therefore, that the order of mandamus is one of the means by which an aggrieved person and who has clearly established that his right has been infringed or interferred with or deprived can regain his right or freedom and that the duty which the defendant refuses to perform must be one of a public nature; for instance, mandamus could be implored to compel the performance of a public duty which the defendant refuses to do, for instance, where an authority refuses to give the complainant licence for instance, in Banjo's case supra.

In Banjo and Ors Vs ABEOKUTA U.D.C.[95] and STATE VS ELECTRICITY CORPORATION, exparte savage[96]. In this former case, the applicants by virtue of the Administration of justice (Crown proceedings) Law of 1959, and order 59, Rules 3 (1) (2) of the Rules of Supreme Court of England, filed a motion - exparte, for leave of court to obtain the order of mandamus. In other words to compel the said council to issue to the applicants licence, because it is a public duty which the committee refuses to carry out/ perform despite the fact that applicants had fulfilled all the requirements or conditions for the issuance of the said permits, viz payment of

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[95] Ibid., H.W.R, Wade-Admin. Law 4th (ed) (1977) P. 599.

[96] 8 E.N.L.R. 53.

fees, filling in the forms. etc. The Road traffic law, by section 3 (2) (3) and (4) requires the applicants or any person applying for licence to pay a prescribed fee and make their applicantion in the prescribed forms . It suffices to say that all the applicants complied with these requirements. However, the Council or licensing Authority refused to issue them with the licence, hence their application for the order of mandamus to compel the Authority to issue them with the licence or licensing permits.

Section 7 (1) of the Bye- law (Ogun state) prohibiting any person from driving a motor vehicle without a licence on a high way, unless he is licenced for the purpose under this section, and that no person shall employ another person to drive a motor vehicle who is not licenced . By sub- section 3 of section 7 of the said Bye - law, the licencing authority shall on receipt of an application in the prescribed form grant a license to drive a motor vehicle to any person applying for it.

It is evident that the Bye- law does not provide for any discrimination or spell out persons who shall not be qualified for the licence. Therefore, there is no basis for the authority to refuse the applicants the said permits; moreso each of the said applicants has fulfilled all conditions for the issuance of the licence or permit. It stands to reason, therefore, that it is a moot question whether the licencing authority has reason to refuse the applicants the licence, except where in the said Bye - law, a clause is made or provided for such a discretion to be excercised. But this has not been provided in the Bye-law.

It is unforunate for the secretary of the said authority to have denied the licence to the applicants. The secretary, among other things said "in view of large number of taxis in the area of jurisction of the council, no further permits will be issued".

In case of the statement made by the secretary of the Licencing Authority in Banjo's case supra, one would love to ask whether the secretary exercised discretionary power by refusing to issue out the permits. If the answer is affirmative , was the discretion exercised according to law ? In that case, (Banjo's case), the court said- "if a body against whom an order of mandamus is sought departs widely from the conditions laid down in the law empowering the body to perform its public duty, mandamus will lie against it".

Mandamus was issued to compel the secretary of the council to issue the application with the permits or licence. Similarly, in SHITTA BEY - VS - FEDERAL PUBLIC SERVICE COMMISSION,[97] the court issued an ordr of mandamus against the federal government, compelling it to reinstate the applicant until he (applicant) is properly removed in accordance with the Civil Service Rules.

In R. VS WESTERN URHOBO RATING AUTH exparte Odje and ORS[98]. The application sought was one for leave to apply for an order of mandamus, which order was directed against the Urhobo Rating Authority, to

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[97] (1921), S.C, 40

[98] (1961) All N.L.R. 796.

compel the said authority to stay execution in respect of all taxes against which the applicants have appealed and for such further order (s) as the court may deem fit to make.

Earlier, an application was made by the applicants for an order to stay execution, but was refused. It is important to note that an order of mandamus is one made in order to compel the performance of a public duty. It is, however, a discretionary power. In R VS ALL SAINTS WIGAN[99], this issue of discretionary power of the order of mandamus was pointed out; for instance, conduct of applicant may have been unmeritorious, e.g. suppressing material facts in an affidavit or (breah of contract; or if he has been unreasonable.

In URHOBO's case (supra), the application for the order of mandamus was refused on the ground that the order sought is a discretionary one and therefore the Authority can not be compelled to act contrary to the law or Act. it was held, among other things, that the granting of a stay of execution is discretionary and therefore the application was regarded as misconceived. The application for the order of mandamus was therefore refused on that ground. The judge said inter alia:

"The granting of a stay of execution is discretionary and where a person or authority is empowered to exercise discretion in a matter, he cannot be compeled to do so by a higher authority. In the circumstances, I

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[99] (1876) 1 A.C. 611 at 620.

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consider the present application misconceived". Thus the application was refused.

It is important to note that the reason given in Banjo's case supra, was different, that is, for the refusal, because in that case, the application was one for an order of mandamus to compel the performance of a public duty- to issue licence or permits to the applicants, but the secretary used his discretion in refusing to issue the permits. However, in an application for the order of mandamus, the court found out that his refusal to issue out the permits amounted to misuse of discretion, because he did not use his discretion according to law. Moreso, he was acting in a judicial or quasi-judicial capacity. Therefore mandamus was issued against him to compel him perform his duty.

In LAYANJU VS ARAYE[100] which was an appeal against a judgement making absolute a Rule nisi for a writ of mandamus to compel Ezekiel Taiwo, the Are of Ire, to give his approval for the appointment of the applicant, Emmanuel of Ire, Esa, as the ESA of Ire according to native law and custom. The application was allowed after a long debate or heated argument by both counsels to the parties. The applicant had been in the office for quite some time, until he was served with a writ of mandamusn to vacate his office. The respondent asserts his right to the writ on the ground that after the demise of his predecessor, he had been duly appointed Esa by the

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[100] (1959) 4 E.S.C. 153.

Ibitun family and that the Are had no option under native law and custom, but to recognise him as such.

It is settled law that where a person has a discretion, a writ of mandamus will not be granted to compel that person to exercise his discretion in a particular manner (Urhobo's case). In the circumstance, the respondent could only establish his right of the writ by showing that Are had no discretion in the matter, and that the recognition of the respondent was a duty which the Are had refused to discharge or perform.

Although mandamus has been referred to as an extraordinary remedy, awarded only if no alternative remedy was equally convenient or effective, it will still lie in quite a wide range of situations. Thus the order of mandamus could issue in the following circumstance:

i) To compel a tribunal, a Minister or local authority to entertain an appeal or application in respect of which they have wrongfully declined jurisdiction;

ii) To compel a body (having legal authority) to carry out a duty to give reason for a decision or to give adequate reasons;

iii) To require a local authority to provide minutes and render accounts for inspection.

iv) If an authority requires to exercise a discretion in a matter and that authority fails to consider it on its merits because it has improperly sub-delegated its powers, or if it acted under dictation, or fettered its own

discretion by an authorised promises, or a rigid self-imposed rule, mandamus will lie against such an order or authority.

v) Mandamus will also lie to order an authority which has abused its statutory discretion, for instance, by rejecting an application on the basis of legally irrelevant consideration, to hear and determine the latter according to law, for instance, in PADFIELD VS MINISTER OF AGRICULTURE[101] where the House of Lords held that the Minister had regard to irrelevant considerations and had failed to promote the implied purposes of the Act, and an order of mandamus was therefore issued to direct him (the minister) to consider the applicant's complaint according to law.

The facts of the case are that under a statutory provision, the Milk marketting Board had fixed prices to be paid to producers in each of the eleven regions in England and Wales. Producers from the south-east region wanted an increase in the basic paid to them by the Board. But they could not get a majority on the Board for their view. Under the Act, they could and did make a complaint to the Minister of Agriculture who has power to appoint a committee to investigate and report on such complaints. The Minister refused to appoint a committee for that purpose. He claims that he has a free discretion to do as he deems fit, in relation to appointing a committee for the investigation. But he was induced to give reason for his refusal. The judge

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101 (1968) A.C. 997

then remitted the case to the queen's bench Division with a discretion to require the Minister of Agriculture to consider the complaint made by the appellents according to law. After this decision, the Minister reluctantly referred the complaint to the Committee of investigations which reported that the Milk marketing scheme was contrary to the reasonable interests of the complainants and was not in the public interest. But the Minister told the House of Commons that after considering all the issues and implications involved, including wider questions of policy, that were beyond the scope of the committee's inquiry, he had concluded that it would not be in the public interest for the Committee's conclusion to be implemented. In other words, he (Minister) refused the committee's report or recommendation.

By way of comment, if examined critically, the Minister's refusal, important as the decision is in that case, or as the case has been , in the evolution of judicial attitude, the case itself involved a procedural aspect of administrative decision- making; in that, the minister was ultimately to uphold the Board resorting to legislation.

The order of mandamus can not be invoked where statute does not provide, thus an aggrieved individual, whose rights have been infringed or in any way curtailed, may not avail himself on application for the order of mandamus.

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Thus in R Vs EZEKIEL TAIWO, ex-parte Araye[102], section 34 (1) (4) of the former Western region Appointment and Recognition of Chiefs Law, 1954, provides that: "Notwithstanding anything in any written law whereby or where under jurisdiction is conferred any court, whether such jurisdiction is original, apellate or by way of transfer, no court shall have jurisdiction to entertain any civil cause or matter instituted for the determination of any question relating to the selection, appointment, installation, deposition or abdication of chiefs".

The supreme Court held that the court has no jurisdiction in such civil cause or matter even where proceedings are by way of application for the order of mandamus.

It should be understood generally, that where a decision of a statutory body is void, order of mandamus may be obtained to compel that body to hear or determine he matter according to law. But if the decision is one which is voidable, order of certiorari to quash prevails or accompanies order of mandamus. That is, to compel the body to determine the issue or matter according to law. On the other hand, nothing stops an aplicant from resorting to an application for the order of mandamus provided this has been entrenched in the enabling statute. But where a statute neither provides for redress nor mentions anything relating to any remedy, it appears that the

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[102] 4. F.S.C. 154.

courts should execise discretion, whether to grant the order or not, but in doing so, they have to take into account the interest of justice and not for fancy.

According to S.I.O Aguolu[103], the order of mandamus is a residuary remedy which issues as a last resort where there is a right but there is no remedy to enforce it. In R. Vs METROPOLITAN POLICE COMMISSION ex-parte Blackburn,[104] an order of mandamus was invoked to compel a police officer to enforce certain provisions of the law. Simlarly, in STATE Vs ELECTRICITY CORPORATION OF NIGERIA, ex-parte Savage[105], the applicant had fulfilled all necessary conditions to qualify him to have electricity light connected to his house, but the corporation failed to do so, despite repeated warings or demands. The applicant obtained an order of mandamus to compel the said Corporation to perform its public duty in favour of the applicant's demand.

In relation to Ezekiel Taiwo's case, which we have already observed, section 34(1) (a) of the Appointment and Recognition of chiefs law 1954 of the former western Region of Nigeria provides as follows: Notwithstanding anything in any writtenlaw whereby or where under jurisdiction is original, appelate or by way of transfer, no court of law shall have jurisdiction to entertain any civil cause or matter instituted for

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103 The Prerogative writs and Orders Under Nigerian Law And Constitution, (1981), star printing and Publishing Company Ltd. Enugu, (Nigeria), P. 59

104 Ibid.

105 Ibid

the determination of any question relating to the selection, appointment, installation, deposition or abication of chief."

It is crystal clear from the provisions of this law that section 34 (2) thereof, defines "civil cause" as including proceedings by way of a prerogative writ (mandamus) inclusive. And the supreme Court held that the courts have no jurisdiction in such civil cause or matter, even where proceedings are by way of application for order of mandamus. The application for the order of mandamus was refused because applicant has no legal right to enforce. Moreso, the respondent has discretionary power to decide who was "Esa" chief.

Section 33 (1) of the 1979 Constitution gives room for an aggrieved person (in civil cause or, matter) to seek for redress in a court of law in furtherance of the exercise of his legal right, or in the determination of his legal right. Thus in relation to Ezekel's case section 33 (1) of the 1979 Constitution, can be said to be outrageous in that respect.

It should pointed out also that the Constitution of Nigeri does not give room for any law to prevail over the constitutional provisions. Section 1 of the 1979 Nigerian Constitution provides: If any other law is inconsistent with the provisions of this constitution, this consititution shall prevail, and that other law shall to the extent of the inconsitency be void".

IN MARBURY VS MADISON[106] action was brought or filed under section 13 of the Judicial Act of 1989 of the U.S. Chief J. Marshall stated as Follows:

> "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interprete that rule. If two laws conflict with each other, the court must decide on the operation of each. So if a law be in opposition to the constitution, if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably with the law, disregarding the consititution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty".

When examined critically, Marbury's case has many issues involved, one being that it has to do with the question of interpretation, that is, USA section 13 of the judicail Act of 1989 under which the case was filed. The argument in that case is that section 13 of the Judicial Act is in contravention of the American consitution, which is why the judge makes it clear when he made the above statement.

In the action, a writ of mandamus against the secretary of state was sought, directing him to deliver to Marbury the Commission of his appointment as justice of peace which was signed by the out-going chief justice of the federation. The action was brought under section 13 of the judicial act of 1789,

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106 (1803), I Craunch, P. 137

which provided that the supreme court shall have power to issue the writ of mandamus in cases warranted by principles and usages of the law to any court appointed or persons holding office under the authority of U.S. of America.

It is worthy of note that madison was holding the post of secretary of state under the provision, but did not deliver to Marbury, the commission of his appointment before the incumbent president went out of office. The in-coming President was of another party or belonged to a different party from that of the out-going president. It is not surprising, therefore, that the beneficiary of the appointment (Marbury) will face some frustrations.

Under section 13 of the judicial act of 1789 of the USA, the court had power to issue the writ of mandamus wherever the remedy is appropriate in the disposition of the case before the Supreme Court, either on appeal if in its original jurisdiction the case could have been dismissed on the ground that the matter did not fall under the original jurisdiction which was restricted affecting ambassadors, ministers, etc. in cases where a state is a party . But the court, through C.J. Marshall, interpreted S. 13 of the Judicial Act to mean that it conferred additional original jurisdiction on the Supreme Court and therefore section 13 was considered in conflict with article 3 of the American constitution, which deals with the supreme Court's original jurisdiction.

Furthermore, it must be pointed out that in Marbury's case, the President was not affected by the order or writ of mandamus. Therefore it

could be said that since the issue was not enforced on him in real, the decision remains dormant.

Perhaps it will be interesting to note the criticisms levelled against Marbury's case. Some of these criticisms include the following that:

i) It was obiter based on or upon a wrong interpretation of section 13 of the judicial act of 1789, and therefore can not be considerd as a valid constitutional principle;

ii) It was a clear violation of the doctrine of separation of power;

iii) The court has arrogated to itself the power to decide broad constitutional issues on ground of policy, thus substituting its own judgement for that of the other department (legislature).

According to professor Muhammed Imam, of ABU Faculty of Law, in Nigeria, these constitutional provisions relating to judicial activism or functions, have clearly been entrenched in the constitution, which relate to judicial power, either of the federation or state governments.

S.6 of the Nigerian constitution confers on the judiciary the power to interprete the law. The case of 2/3 of19 is still fresh on our minds. The court had to interprete the law and had ruled accordingly. Having said much on the order of mandamus, let us now consider the ground for the award of the order of mandamus:

7.2.3 Grounds for the Award of Mandamus

i) The duty which the defendant refuses to perform must be one of a public nature, for instance, in Banjo and Others Vs Abeokuta Licencing Authority.

ii) The person aggrieved must have demanded the public duty to be performed in relation to him but refused or denied by the person refusing to discharge the public duty. In such instances, mandamus will issue to compel. "the defendant" to perform the duty required of him and which is of a public nature. It must be noted, however, that the plaintiff must establish or have the requisite locus standi. In other words, the person who invokes the order of mandamus must have sufficient interest in order to warrant for his application or prayer for mandamus. In Ezekiel's case, the applicant failed to obtain th order of mandamus. For the simple reason that he could not establish a valid legal right against the other contestants for the chieftancy, More so, the respondent has discretion to decide who among the two claimants is the right candidate for the chieftancy . On that basis, the order of Mandamus was refused.

iii) Mandamus will also lie in order to order a Board to hear an application for instance, in Criminal injuries Compensation Board ex-parte Clowes[107] where orders of certiorari and mandamus were granted.

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[107] (1977) 1. W.L.P.

iv) It is suggested, also that if a domestic tribunal wrongfully declines jurisdiction in a particular case mandamus will issue provided that its jurisdiction is regulated by statute, (but not if its jurisdiction is based merely on contractual or other statutory[108] foundation. But, if its functions are of public nature, different will be the position, Mandamus will lie to compel the respondent or defendant to perform the duty imposed on him by statute. For instance, if a Vice-Chancellor refuses or denies a lecturer his degree without cause. Mandamus can lie to compel him (the Vice Chancellor) to restore his degree. This is clearly illurated in R vS Cambrindge University,(supra)" where Dr. Bently had been deprived of his academic degree, but on application for the order of mandamus,the vice Chancellor was ordered to restore the applicant's academic degree.

2.4.2 Bodies Or Persons Against Whom The Order Of Mandamus Can Issue

Under this head, we shall consider the bodies or persons already noted in the preceding discussion that the duty to be performed by the respondent or defendant, must be of a public nature and that the application for mandamus is usually preceded by a request or application for leave to apply for the order. Similarly, the court can not grant the order of mandamus where the applicant has other alternative remedies.

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[108] (1964) N.Z.L. P. 369

The order of mandamus, as we now know it, is a means or device for securing the performance by inferior court or tribunal and/or adminstrative authorities of their duties to execise their jurisdiction and discretion according to law. According to de-Smith, the difficulty stems mainly from the vagueness of the concept of duty as it appears in these contexts. The proposition is that courts and tribunals have a duty to determine cases within their jurisdiction (except in so far as an arbitral tribunal may be entitled to refuse to entertain a matter referred to it . For instance, in R. VS Industrial Court, exparte A.S.S.T, where a statutory tribunal was acting in a quasi-private capacity). Therefore courts, tribunals and administrative bodies in general, have a duty to exercise their statutory discretion in one way or the other when the circumstances warrant for the exercise of discretion. Thus wrongful refusal to exercise jurisdiction or discretion in such circumstances, is a breach of duty redressible by an order of mandamus. Also refusal to adjudicate or to exercise discretion may be conveyed not only by express words, but also by such forms of conduct as determiningg a question different from that submitted, sub-delegating the power of decisions to another body, acting under the dictation of another body, purporting to determine the matter by reference to a predetermined rule of policy without reference to the particular merits of the case in hand, or postponing or adjouning consideration of the matter in a manner that is tantamount to a refusal to decide it.

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In view of the foregoing facts, there is little or no doubt that the order of mandamus will lie to compel a tribunal to state a case for instance R, V WATSON exparte Bretharton.[109] When a statute requires a tribuanl to give reason (s) for its answer, action, or decision, and where a statute requires a tribunal to give reason(s), mandamus will compel the tribunal to give adequate reason applicants owned two houses in London, which, with three other houses, presented an unbroken facade in the North- west corner of the square (St. James Square). The houses were the subject of a preservation order, under section 29 of the Town and Country Planning Act, 1947. The applicants wished to pull down the two houses and to construct modern buildings and they objected to the order. An inquiry was held by an inspector to the Minister of Housing and Local Government who reported that neither of the two houses was intrinsically such special architectural or historic interest as to warrant the confirmation of the order; but the minister, by a letter, differing from his inspector's conclusions confirmed the order, his reason being that he was satisfied that the buildings possess a considerable degree of architectural and historic interest and he has accordingly decided to confirm the order. The applicants applied to the High Court under section 31 of the Town and Country Planning Act, of 1959, asking that the Minister's decision be quashed on the ground that he had erred in law in

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[109] (1965) 1, Q.B.P. 377

deciding that two houses, not intrinsically of such a special or architertural or historic interest be demolished. The judge (Megaw J.) dismissed the appeal, holding that the Minister had not erred on the question of principle and construction. In other words, the order sought by the applicants, that is, the order of mandamus, was refused because the enabling statute (the Town and Country Planning Act,) makes provision for the Minister's action.

In Dr. Bentley's Case[110] that is , in R. Vs. University of Cambridge, the writ of mandamus was granted to restore him to his academic degree, which had been unlawfully taken away by the Vice- Chancellor's court of cambridge University . In this case, mandamus is said to have worked against the Vice-Chancellor of the University.

It is also on record that the order of mandamus can be made to enforce a police officer to prosecute offenders against the law, for instance, in R Vs Metropolitan Police Commissioner, ex-parte Blackurn[111] (Note Lord Denning's dictum in this case).

On the whole it is clear that the scope of the order of mandamus is widening today and having developed from a piece of purely administrative machinery (originaly, the writ of mandamus was merely an administrative order from the sovereign to his subordinate), but later

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110 (1723) St. Tr. P. 557

111 Ibid., 95

made generally available through clerks, Sextons, Scavengers to restore an alderman to presidency an attorney to practice.

Now, Mandamus is applicable in a wide variety of cases, particularly in enforcing a duty that is of a public nature. According to Mansfield J., writ of mandamus has been granted to adminstrative lecturers, clerks, sextons, and scavengers... to restore an alderman to presidency, an attorney to practice in an inferior court, etc.

Disobedience to a mandamus is a contempt of court punishable by fine or imprisonment. Mandamus is therefore like an injuction; both are commands from the court that some legal duty be performed. The need to distinguish between these two remedies (injunction and mandamus) is of vital importance. Injunction is an equitable remedy and it is rare to find injunctions outside private law. Mandamus, on the other hand, as a common law remedy, is granted only if there are no other alternative or convenient, beneficial remedies. Mandamus is used in pubic law and not private law. Thus the suitability, convenience, utility and/or efficacy of the order of mandamus in asserting legal rights cannot be over emphasized in our modern age. It was and still remains a high consitutional as well as a procedural remedy in the courts of law.

Section 161 of the 1979 constitution, the president may grant any person convicted of an offence created by the National Assembly a pardon, either free or subject to lawful conditions. He can also grant pardon to any

person a respite either for an indefinite or for a specified period of the execution of any punishment imposed on that person for such an offence.

The grant of pardon by the president under this section also includes substituting a less severe form of punishment imposed on that person for such an offence.

It is interesting to note that both Gowon and Ojukwu were granted pardon by the Shagari adminstration. He can as well remit the whole or any part of any punishment imposed on that person for such an offence or any penalty or for feiture otherwise due to the state on account of such an offence. However, the power of the president under subsection 1 of section 161 of the 1979 constitution is subject to the condition that he must have consulted with the council of state. This is a serious limitation on the president's power, under this head.

Decree No. 50 of 1991 is akin to section 161 and 173 of the 1979 constitution; to the effect that the president has to consult with the council of state and if the council so decrees, then the president can grant pardon.

CHAPTER THREE

HISTORY AND DEVELOPMENT OF HABEAS CORPUS

In order to understand the history and development of Habeas corpus as a means of obtaining relief or in cases of depravity of liberty of an individual there is need to begin with its history as obtained in England where it originated. It is also of interest to note how Habeas corpus came to be adopted in Nigeria. In other words how it was incorporated into our local or indigeneous law and how the courts adjudicated in cases involving habeas corpus.

In England the right to liberty originated and developed in the historical setting of feudal society, that is, during the feudal era in Europe. The king or influential Lords could arrest innocent persons or citizens without just cause thereby depriving such citizens their personal liberty. It was as a result of this Urgly situation that individuals or victims of circumstance, complained, hence the right to liberty developed which usurped in relief to victims and subsequent enforcement of such liberty, Thus it could be stated that as a result of this depravity of individuals liberty, the magna charter and the Bill of Rights developed in England. The end result was the security of personal liberty against arbitrary arrest by the monarchs, in 1688. The right to personal liberty that is the right of an individual against arbitrary arrest is clearly stated in Darnels case.[112]

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112 (1627) 35st Tr. P.I.

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In this case, Lord Charles 1 resorted to a forced loan in a bid to raise revenue without parliamentary approval, and his agents had detained a number of subjects who refused to contribute.

This Darnel's case was a case of major constitutional importance in England at that time in hisitory. And the court held that they (the victims) were detained "per special mandatum domini regis".

As a result of arguements in relation to the detention or the cases for committal of the prisoners and whether the court was entitled to bay the prisoner, the arguement was put in the kings bench and in greater details, in the parliamentary proceedings which led to the petition of rights. Thus the bond of contention in Darnels case was whether the failure to disclose the grounds for the detention by the mona rchs entitled the prisoners to be bailed out until they were brought to trial. The answer was in the affirmative.

The locus classicus laid down in Darnel's case is this: that the king possesses no power that supercedes the common law adjudicastory powers. In other words, the king has no arbitrary power to arrest individuals without just cause or justified reason.

As a corollary to the above , we can discuss briefly the habeas corpus Act, 1640, that is, in relation to having an insight into the habeas corpus as a means of obtaining a remedy in respect of deprivation of personal liberty . In 1640 (in England), the parliament set out to curtail the prerogative claim for the power of detention and the Habeas corpus Act,1640

abolished all the councillor courts including the Star chamber and specifically provided that any one imprisoned by order of the king or council should have habeas corpus brought before the court without delay with the cause(s) or reason(s) for imprisonment known. Section 6 of the Habeas corpus Act, 1640, provided that judges are to pronounce upon the legality of the detention within three days time and bail, discharge or command the prisoner accordingly. Sections 4 and 5 of the same act imposed fines and made judges liable for violation of these provisions. Despite all these, the Habeas Corpus Act, 1640 could not be said to have been successful or effective. There were indications that crises within the state could not be resolved by law alone.

Apart from this, it is on record that habeas corpus was used in civil cases.[113] The court ordered the release of a prisoner who was committed for unlawful medical practice by the college of physicians. The court also released an irate citizen who had been committed by his mayor for contempt.[114]

3.1 PROCEDURAL DEFECTS OF HABEAS CORPUS

The courts, in the 17th century in England, began to show certain lack of confidence in the habeas corpus as a means of testing the legality of detention or imprisonment, despite its general acceptance that it is always available for such purposes . The writ (habeas corpus) has always been used

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[113] Dr. Alphonso's case (1640) 2 Bulst, P.259

[114] (1640) Bults, P.259

in challenging prerogative power. In Chambers vs Green,[115] a prisoner was committed by the council for contempt, but was bailed out when the court was not satisfied as to the behaviour exhibited by the prisoner as it was alleged that it had been contemptous. And in 1610, the court had to take its time to consider the case of Addis, who had been detained by order of the chancellor for certain matters, concerning the king. There was no decision but it is suggested that the case is indicative of judicial reluctance in matters of state. However, in 1614, in Les Burners[116] cases Lord coke held that a prisoner was not bailable if committed by the council., But a year later, that was in 1615, in two separate cases, Lord coke refused to bail out prisoners who were committed by the court. Gradually, it came to be known that prisoners committed by the power of the state was being abused. Thus the issue came to an application for habeas corpus. Interestringly, the procedure or requirement in respect of habeas corpus is still being maintained today in both countries (England and Nigeria) and probably other countries that have adopted the British legal system.

In Nigeria, the habeas corpus came to be introduced by the common law, though sometimes regulated by statutes.[117] Thus the Jurisdictional

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115 (1875) 44 L.J. ch. 600

116 Ibid.

117 Habeas Corpus Acts, of 1679, and 1816; The Habeas corpus laws of western and midwesten Regions, Cap. 42, laws of western Nigeria' Habeas corpus law , lagos state, cap. 50, 1973.

basis for its application in the High court of justice, could be seen as provided under section 42 of the 1979 constitution and section 44 of the 1989 constitution respectively. Other statutes by which habeas corpus could be invoked in the High court include the various High court laws of Civil Procedure Rules. For instance, in Borno state, habeas corpus proceedings is provided in order 41 of the Hight Court Civil (Procedure) Rules of 1988 , that is, Edict N0. 3 of 1988.

Inview of the above, any individual who alleges that his civil rights have been deprived can apply to the High court for redress by the invocation of the habeas corpus. The writ of habeas corpus is thus of high constitutional and administrative importance. It has been referred to as "... an extraordinary remedy which is issued upon causes shown in cases where the ordinary legal remedies are inapplicable or inadequate[118] Lord Birken head, in Secretary of state for Home Affairs VS - O Brien[119] held: "It is a swift and imperative remedy in all cases of illegal restraint or confinement.... It has through the ages been jealously maintained by courts of law as a check upon the illegal usurpation of power by the executive at the cost of the liege . Thus habeas corpus is a remedy obtainable in the high court in all cases of wrongful deprivation of personal liberty as guaranteed by S.32 of the 1979 counstitution, which is equivavent to S.21 of the then Republican constitution of Nigeria, 1963 (as amentded by Decree No. 1 the constitution (Suspension

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[118] Halsbury Laws of England, Vol. II, 3rd ed. P. 26

[119] (1923) A.C. 603.

and modification) Decree 1966. In Agbaje Vs. Commissioner of police[120] Ademola A. Said inter alia" Now on the application of chief Alhaji Abdul Mojeed Mobolanle Agbaje, The High court , Ibadan, caused a writ of habeas corpus to issue on 12 June 1969 on the commissioner of Police western state..."

The substance of the applicant's Complaint was that he was unlawfully detained in the police station, Ibadan, by the commissioner of police. (31/5/1969 - June 12, 1969) when his application was heard by the High court. The applicant swore to an affidavit to the effect that he repeatedlly demanded the reason or authority for his detention at the police station, but no one answered him. Not only this, he wrote letters to the same effect but got no reply.

The Commissioner of police , on his part filed a return to the writ, to the effect that he detained the applicant and based his authority for so doing under order Exts. 1 and 2, said to have been made by the Inspector General of police, who acted under and by virtue of powers vested in the Inspector - General of police by section 3 (1) of the Armed Forces and Police (Special Powers) Decree No. 24 of 1967.

Aguda J,. after reviewing the facts found out that the facts deposed to by the applicant were not challenged in any way by the commissioner of police.

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120 (i) Suit No. CAW/81/69 - of August, 1969.

The Judge then considered the laws applicable and concluded inter alia"... I hold that the detention of the applicant under orders dated 31st may 1969 and 4th june 1969, Exts. 1 and 2 respectively is unlawful and the applicant is entitled to be released under those orders".

On appeal against that judgement by the commissioner of police , all the judges concurred that the appeal must be considered and decided on pure law. The first qustion was therefore asked: what is a writ of Habeas corpus and when does it issue ?" The answer was simply given that the writ of Habeas corpus is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from unlawful or unjustifiable detertion-whether in prison or in private custody. The purpose is to inquire into the causes for which a subsject has been deprived of his liberty.

It was further pointed out that by the writ of prerogative remedy the High court and the judges of that court at the instance of the subject aggrieved, command the production of that subject and inquire into the cause of his imprisonment or detention . If there be no legal justification for the detention, the party is ordered to be released. The writ is applicable as a remedy in all cases of wrongful deprivation of personal liberty . And even where the restraint is imposed on civil grounds under claim of authority, the legal validity of that claim may be investigated and determined.

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The court concluded that the authority for all these propositions (Laws and facts) is to be found on page 24 of volume II, Halsburys laws of England, 3rd ed.

It is clear from the foregoing that the prerogative remedy (habeas corpus) could be applied for in the high court where there is deprivation of liberty and it is applicable whether in criminal or civil cases.

There are other cases which illustrate the efficacy of the Habeas corpus. Until recently, Order 53 of the Supreme court practice in England governed proceedings in prerogative writ. However in the various states in Nigeria, the High Court (civil procedune) rules brought changes in this regard. see p. 109 supra.

A legal practitioner in Nigera, Gani Fawehinmi, in his book[121] makes remarkable achievement in the development of habeas corpus in Nigeria. In Akaza Vs. Commissioner of Police[122] the applicant applied to the High court for a writ of habeas corpus on the ground that he was unlawfully detained by the Nigeria police.

The detention was pursuant to the Armed Forces and police (special powers) Decree No. 24 of 1967. The complainant contended that the detention order was outside the purview of Decree 24 of 1967 , in that it ordered his detention in civil prison or police station.

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121 (ii) Habeas Corpus Rules in Nigera (1986) P.8

122 4 East Central state law Report, 19.... P. 443

The court granted the application on the ground that "Police custody" is not synonymous with "police station" and therefore invoked the powers conferned by the rules of the supreme court of England, that is order 54 rule 4 to order the state commissioner of police to release the applicant forth with.

It should be noted that the writ of habeas corpus (as we shall see later) could be issued against a court martial. In the Head of Federal Military Government and Commander in- chief of the Armed forces of Nigeria - Vs- Assistant Director of prison, Ex-parte Mordi[123] the court stated as follows:

> "The court by means of the prerogative orders of certiorari, prohibition or by writ of habeas corpus can Supervise so far as excess of jurisdiction is concerned military tribunals (including court martials) which are established by the Army Act of 1960 for adjudication upon offences against military law".

It was also pointed out that the return to a writ of habeas corpus does not require minute correctness if the substance of the facts are stated. It must however contain the truth of the matter and convey sufficient information to the court to enable it to see the grounds of the validity of the detention of the person detained.

From this , it is dicernible that where the executive is challenged in relation to excessiveness of it powers of detention, the court with its

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[123] Gani Fawehimi - Nigeran Law of Habeas Corpus (1986), P. 17

inherent powers , can inguire into the true position of the circumstances warranting the detention or deprivation of liberty of the subject.

Apart from this, detaining an applicant in a wrong venue is a ground for testing the validity of detention, for instance, in Akaza Vs. commissioner of police earlier noted.

Similarly, in Okeowo - VS- Inspector General of Police[124], the court, on the application of the complainant who applied for a writ of habeas corpus to secure his release from detention, said that he was detained on the 2nd day of may 1978 at Ikoyi Prison, but the return of the Deputy superintendent of police indicated that the complainant did not get to Ikoyi prison until 5th day of may, 1978. The (complainant) was therefore held or detained at Ikoyi prison either on the 2nd or 5th day of May 1978. The court held as follows.

> "The detention order No. 267 which was signed by the IGP is a nullity, in that it falls outside the provisions and scope of Decree No.24 of 1967. This is because it shows on record that Okeowo was detained at Ikoyi Prison on the 2nd May 1978, while the Director of Prisons service said he was not there till the 5th day of may 1978".

Prisoners committed by the power of the state was being abused hence the issue came to a head on an application for habeas corpus. In

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[124] Gani Fawehinmi, op cit, p. 181.

Onayemi Vs-Onayemei[125] the applicant was arrested and detained by the Police. But after investigations were carried out, it was discovered that the detention was unlawful. His application for habeas corpus was granted on the premise that " Police station" is not the same thing with "police custody".

The difference between "police station" and "police custody" could mean the same thing it may as well be that a police custody could mean any place of confinement by the police, in a bid to take the detainee to the police station , which is the permanent office, meant for discharging of their duties whereas a police custody could be any room or houses where a person is or could be detained temporarily with a view of taking such person to the police station.

The court ordered the commissioner of police to release the applicant on the authority of order 54 rule 4 of the supreme court of England which was applicable in Nigeria. If it were now , the order to relaese the applicant would be acording to S.42 of the Fundamental Rules (Enforcement Procedune) Rules, of 1979 or 5.32 of the 1979 Nigerian constitution which ever is applicable.

At this stage we can consider the grounds for awarding an application for habeas corpus. In other words, the circumstances in which the court can grant an application for habeas corpus.

3.2 GROUNDS FOR THE AWARD OF HABEAS CORPUS

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125 (1965) I All N.L.R.P. 362.

From the foregoing discussions, we have noted that the habeas corpus can issue in many instances particularly in cases of wrougful detention. In Other words, where a person's liberty has been deprived by way of arrest or detention, either in police custody or private custody. In such circumstances, the aggrieved person or the person in detention will require to know why he has been detained or deprived of his right to move freely in the street or where there is an allegation against a person whether in civil or criminal matter and such person whether in Civil or criminal matter and such person is arrested and detained . If such person feels that his detention is unlawful he seeks for an explanation or reason for his detention.

The court, in fulfilment of its duty will have to investigate the circumstances leading to the arrest and detention. If the circumstances warranting the arrest/detention is based on law, or is lawful the detention will contine. But if the ciruumstances warranting the arrest or detention is unlawful or unjustified in law the court will declare the wrongful act illegal or unlawful and so will give an order for his immediate release.

Another ground on which or by which habeas corpus could be awarded is where there is an error of law on the face of it . It may also be due to lack of evidence to justify the detention order. In R VS- Governor of Brixton prison ex-parte sarno,[126] the writ of habeas corpus was directed to the

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126 B.O. Iluyomade et. al. Cases and Materials on Administrative Law in Nigeria, (1980) Ibadan, p. 204 (1916) 2 K. B. 742.

officer- incharge of the establishment where the applicants were detained but as the facts show, evidence of other witnesses was given by affidavit . In the Judgement, Viscount Maugham said.

> "The court accepted the accuracy of the statements in the affidavits of sir John Anderson and of the respondent and though there was ample esidence to enable the court to come to the conclusion that sir John Anderson had reasonable cause to believe the appellant to be a person of hostile association and that by reason there of it was necessary to exercise control over him. Ishould hesitate to differ from the divisional court in such a case , but I must add that in my apinion, this conclusion which was also that of the court of appeal, was right . If so, it follows that the return was a good return, that the application for the writ properlyfailed, and that this appeal must be dismissed".

The judge, after a short historical survey of the writ of habeas corpus, went on to say, inter alia.

> "So far as the question of the power of the court to examine the return to the habeas corpus is concerned, it is dealt with in sections 3 and 4 of the Habeas corpus Act, but the sections are confined to cases where persons have been confined or restrained of their liberty other wise than for some criminal or supposed cirminal matter and except persons imprisoned for debt or by process in any civil suit. In other cases, which are plainly under habeas corpus at common law, the judge was given power" to examine into the truth of the facts set forth". in the return although the return be good and sufficient in law...."

The whole gamut of the issue in this case is that the law under which this person had been detained is deffective or ambigous hence the

appellants claim against his detention or confinement. The affidavit sworn to in respect of the detention of the applicant of being a hostile witness thereby justifying his detention according to the court, is in order and the appellant's claim orappeal was dismissed.

The judge quoted with approval from a passage in the judgment of Goddard, L.J. as follows:

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

The counsel to the applicants challenged the detention of the applicants on two substantive grounds:

1) That the affidavit if the applicants and the exhibits attached showed that their detention and arrest which is the subject matter of the application was the result of their failure to pay a deposit or instalment of the sum of money ascribed as due from them in Annexure 'A' and exhibit A.

2) The second ground is that the order for the appellant's detention is bad for ambiquity.

This is because the order under which the appellants were arrested and detained read at the top in these words:

Armed forces and police (special powers) decree, 1967, However, the words "and police" have been crossed out in the same way as the same words are crossed out in the second line of paragraph 2 of the order. This gives the impression that the powers of arrest and detention under which they were detained are being exercised by the Armed forces. No. endeavour has however, been made to show which of the atternative charges is levelled against the applicants hence the charge is bad for ambiguity.

According to 5.1.0. Aguolu, in his book[127], The Writ of Habeas Corpus may serve many useful purposes not available to a detainee who has been charged to court and who is applying for bail.

The reason is that a counsel will prefer to apply for habeas corpus for his client even where the accused has already been charged to court. This means that a counsed shall be doing more duty or justice to his client if he (counsel) applies for the writ of habeas corpus as opposed to an application for bail. Moreso, application for bail may be refused if for instance, granting of bail will be dangerous or where it will tamper with investigation in relation

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127 The Prerogative Wite and Orders Under Nigerian Law and Coustitution, (1981)Nigeria, Page 91.

to the case in question. But incase of an application for Habeas corpus, the court will grant it, provided the detention

is illegal or wrongful.

The third ground upon which the writ of habeas corpus may issue is where a court lacks jurisdiction to try a case but assumes jurisdiction and tries the case. In such instances, the court of Appeal will give an order to quash the sentence or judgement. This lack of jurisdiction extends to court- martial. The case of Gwaram VS - Superintendent of Prisons[128] illustrates this point- the applicant was serving a sentence passed by a court of competent jurisdiction although the court failed to comply with some requirements of the native courts law. In an application for a writ of habeas corpus, the court held that the High court would not grant habeas corpus to a person serving sentence passed by courts of competent jurisdiction.

It should be pointed out that in this case, if the court had tried it in excess of its jurisdiction, the position would have been different.

In relation to the second proportion of law that the writ of habeas corpus could issue against a court - martial (where it assumes jurisdiction wrongly) the case - the Head of federal military government Vs. Assistant Director of prisons. Ex- parte Mordi[129] the judge stated clealy among others as follows:

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128 Gani Fawehinmi - Nigeria Law of Habeas Corpus (1986) P. 17, Post for Julisdicational Review, P. 22.

129 (1988) 3 NWLR, Part 85, P. 729 at P. 753.

"The court by means of the prerogative orders of certiorari, prohibition or by writ of habeas corpus can supervise so far as excess of jurisdiction is concerned; military tribunals; (including court-martials) which are established by the Army Act of 1960 for adjudication upon offences against military law"[130].

Where a court fails to comply with statutory procedure or requirement the court will, on an application for habeas corpus, strike out the case until the procedure is strictly complied with. In Adeyemo Vs. Commissioner of Police[131], the applicant applied for a writ of habeas corpus under orders 2 of the Fundamental Rights (Enforcement Procedure) Rules of 1979, which he would have done under the habeas corpus law. Under order 2 (1)(4) the fundamental rights (Enforment Rule), the applicant is required to serve all parties who are or might be interested in the proceedings but he failed to comply with this requiment. The respondent objectd to the application for habeas corpus and his application was struck out on that basis.

3.3 PROCEDURE FOR APPLICATION OF HABEAS CORPUS

Having considered the circumstances warranting the grant of habeas corpus, we can as well consider the procedure to adopt when a person seeks this remedy. We have noted that failure to abide by procedural requirement (in the application of habeas corpus) may render the proceedings nugatory. That is why it is appropiate to discuss and know the procedure

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130 Ibid, P. 22 at P. 26

131 (1988) 3 NWLR, part 85, P. 729 at P. 753.

involved in the application for habeas corpus. This is particularly important for practitioners. They should be conversant with court procedures so as to avert disppointment or embarrasment in court. Inview of the above statement, we shall first of all consider the procedural requirement under section 42 of the 1979 Nigeria's constitution. Later, we observe the procedure under the Borno state High Court (Civil procedure) Rules of 1979. Otherwise Known as "Edict No. 3 of 1988". The procedure under section 42 of the constitution is this .

Order 2 (1)(2) of the Fundamental Rights (Enforcement procedure) Rules, 1979, provides that an application for leave shall be made to a High court or a federal High court. The application for leave is first of all made ex-parte" The application is supported by an affidavit, which sets out the relief sought and the grounds upon which the remedy is sought[132]. It should be pointed out that the application for leave must be made within a period of twelve months; otherwise the application may be refused. when the application for leave is granted, the application shall be made by notice on motion or by originating summons to the court, that is, the High court or Federal High Court, which ever is applicable. When this is done, there must be at least eight days between the service and the day named

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132 Order 1, Rule 2(3).

therein for hearing[133] Under order 4, of the Fundamental Right (Enforcement Procedure) Rules of 1988, the person required or the detainee is required to be brought before the court and reasons for his subsequent release can be heard. His release is based upon the reasons for his detention, if they are genuine, the detention continues, but if such reasons are flimsy or lack substance Justifying for his detention, the detainee will be released immediately. This point is butressed by order 6 rules 1(1)(2) of the Enforcement procedure rules which provides as follow:

At the hearing of any application, motion, or summon, the court concened may make such orders, issue such writs or give such direction as it or he may consider just or appropiate for the purpose of enforcing or securing the enforcement of any of the fundamental right, provided for in the constitution, that is, Nigeria's constitution of 1979.

3.4 PROCEDURE UNDER ORDER 41

The second procedure we shall consider is that as obtained under order 41 of the Borno state High Court (Civil procedure) Rules of 1988 which is the same as (Edict No. 3 of 1988).

Order 41 R. (1) provides that where a person is alleged to be wrongly detained,an application may be made for an order that he be produced in court

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133 Order 2, Rules 1,2,5,6, & 34 of the Fundamental Rights (Enforcement procedure) Rules of 1979.

for the purpose of being released from detention. Rules 2 (1) says no application under rule 1 shall be made unless leave therefore has been granted in accordance with this rule. While rule 2(2) goes to provide that application for such leave shall be made ex-parte to the court and shall be supported by a statement setting out the name and description of the applicant , the relief sought and the grounds on which it is sought; it shall also be supported by an affidavit verifying the facts relied upon.

The affidavit shall be made by the detainee but where the detainee is unable owing to the detention (to make the affidavit) the application shall be accompanied by an affidavit to the like effect made by some other person, which shall state that the person detained is unable to make the affidavit himself.

The applicant then files in the court, the application for leave not later than the day preceding the date of hearing and shall at the same time lodge in the, court enough copies of the statement and affidavit for service on any parties as the court may order. Having complied with all these procedures, the judge may then (in granting leave) impose such terms as to giving security for cost as it he thinks fit. He may make an order for the release of the person in detention (the provision of paragraph one not withstanding) Furthermore, the judge may direct that an originating summons be issued in form 2 of the Fundamental Rights (Enforcement) Rules, 1988, or that the application be made by notice of motion in form 3 of the Fundamental

Right (Enforcement) Rules 1988, or he may adjourn the ex-parte application so that notice there of may be given to the person against whom the order for the release of the detainee is sought. It is a requinement under this rule also that every party to an application under rule one to supply every other party copies of the affidavits which he proposes to rely upon at the hearing.

Under order 3 rule 1, of the (Enforcement) Rules 1988, the judge without prejudice to rule 2 (6) heaving the application may in his discretion, order that the person detained be brought before the court. Such discretion can not be impugned because it is according to law.

3.5 PERSONS AMENABLE TO HABEAS CORPUS

It is a cardinal principle of law that habeas corpus should be used as a means of securing the liberty of a person detained unlawfully. It is submitted that the person or authority who orders for detention of another shall be served with the order of habeas corpus, for instance in Agbaje Vs-Commissioner of police[134] as we have already noted the writ of habeas corpus was served on the commissioner of police , who ordered for arrest and subsequent detention of the applicant. The aim of serving the person or authority ordering for arrest or detention of the applicant is to ascertain the legality of the arrest and /or detention. In other words, he (the person or authority) ordering for the detention shall file a return, justifying his act. If

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134 OP Cit. see the facts of this case on page 6.

it is found to be in accordance with law, then the detention order is valid , but if otherwise, then the detainee will be released immediately.

In Tai Solarin's case, the detention was made pursuant to Decree No. 2 of 1984 . His wife brought an action for his release under an ex-parte motion. The detention was predicated or premised on the fact that he (Tai Solarin) was a danger to Nigeria's security.

His counsel argued that the detention had no legal basis whatever, that the signature of the then chief of staff, (Brigadia Tunde Idiabon), should have appeared in ink on the detention certificate which also should contain the name of the detainee, and where he should be detained. All these were not complied with, yet, the arrest was made. The counsel coutented that the arrest and detention were baseless/unlawful.

The court after thorough investigations discovered that the detention was of course illegal and therefore wasted no time in granting the order for his release. That is to say, the order for his release was made to the person or authority that ordered for Tai solarin's arrest and detention. This authority could be the then (N.S.O.) Nigerian Security Organization.

In Alhaji Shugaba Darman Vs- Fedral Minister of Internal Affairs[135] Which was a case of deportation during Shagari era, the applicant was ordered by the Minister of Internal Affairs, to be deported out side Nigeria on the ground that he is not a bonafide Nigerian. Moreso, he had no valid papers

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135 (1980) 2 N. C. L. R. P. 459

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or authority warranting his stay in the country. The deportation order was challenged on the ground .that the applicant is a bonafide Nigerian and should not be deported outside Nigeria at all. The writ of habeas corpus was evoked. And on appeal to the court of appeal, Jos it was held that he being a bonafide Nigerian citizen, can not be subject to a deportation order. The court awarded him the sum of three hundred and fifty thousand naira as damages.

It remains to say that the order- habeas corpus, was directed to the minister of internal Affairs. This means, in essence that the deportation order emanated from the office of the minister of Internal Affairs. The minister's purported power of deportation was predicated on section I of. Immigration Act of 1963. This was understood from the fact that the minister was or acted administratively, though his power was whittled down by the order of the court.

From the foregoing , we can understand that the writ habeas corpus, can issue for a variety of reasons. One being to enquire into the legality of arrest and detention . Secondly, in order to safequard the liberty of a person who is unlawfully detained. In Eshugbayi Eleko Vs. officer Administering Government of Nigeria[136] (Indeminity for deportation).

On August 6, 1925, the acting Governor purported to make an order under the ordinance in the following terms.

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136 (1949) 19 N.L.R.P.45; (1928) A.C.459;(1931) A.C.662

"Whereas Eshugbayi a native chief holding the office of Eleko in the colony has with my sanction been deposed and removed from his office and whereas native law and, custom requires that the said Eshugbayi shall leave the area over which on August 19, the Attorney General moved to stay or dismiss this action as being frivolous and vexations and that it is an abuse of the process of the court. The motion was again heard by the acting chief justice and on september 7, 1925, he ordered that the action be dismissed on these grounds. The appellant again gave fresh notice of motion for leave to issue a writ of habeas corpus and the acting chief justice gave judgement refusing the motion. The learned judge held that the orders of august 6, and 8 repectively had been validly made and that the detention of the appellant was therefore lawful. On further appeal by the appellant, it was argued for him that it is the right of any imprisoned person to apply successively to every tribunal competant to issue a writ of habeas corpus and that each tribunal must determine such an application upon its merits unfettered by the decision of any other tribunal of co- ordinate jurisdiction even if the grounds urged are exactly the same.

It was held that the learned judge was wrong in refusing to hear the application on its merits and the appeal must be allowed. It was also held that the appellant will have the costs of his appeal, the costs of his application before jew J. does not abide by the result of the hearing.

CHAPTER FOUR

THE ROLE OF THE SUPERIOR COURTS IN THE APPLICATION OF PREROGATIVE REMEDIES/ORDERS

4.0 INTRODUCTION

4.1 Introduction of the prerogative writs in Nigeria -

4.2 Components of the Rule of Natural Justice:

4.2(i) Nemo judex in causa sua

4.2(ii) Audi alteram partem

4.3 Military Tribunals -

4.4 prohibition

4.5 Certiorori-

4.6 Mandamus-

4.7 Habeas Corpus -

4.8 Declaratory Judgment -

4.9 Injunction -

4.0 INTRODUCTION

After the amalgamation of the Northern and Southern Nigeria, in 1914 by Sir Frederick Lugard, a single Supreme Court was established. In the Same year,a single native Courts Ordinance was enacted providing for the establishment of Native Courts throughout the country. There were

also certain judicial re-organisations after 1914 though we need not go into details in this regard . But it is a fact that the unitary system of judicial administration which was established for the whole country continued undisturbed until 1954 which was the year the judiciary was regionalised as well as the public service.

In 1954, Nigeria adopted a fully written constitution through the concept of Federalism. However, Nigerian constitutional history was much earlier than that date (1954) precisely the adoption of a Federal constitution took place in 1951 but this was more or less partial because the judiciary and the public service were not regionalised. In effect the judiciary became a regionalised item under the 1954 Federal constitution subsequently, a federal supreme court was established[137].

The Judiciary having been regionalised (in 1954 a provision was made in the 1954 constitution to the effect that High court of justice be established in the regions. Section 142 (1) 1954 constitution provides: "Subject to the provisions of this section, the legislature of a region may, by law enact under this order establish courts of justice for the region in particular (without prejudice) to the generality of the foregoing power, establish a High Court of justice for that reign".

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[137] See S. 138, the Nigerian Constitution, order in Council, 1954.

It is not mentioned whether the prerogative writs (orders) were to be applied, but we are aware that with the introduction of the English Law in Nigeria, in 1863, the prerogative writs(orders) were also said to have been introduced into Nigerian legal system. But the British influence was restricted some how to the southern part of the country.

In the Northern part of the country, the earliest contact with the British was in (1885)[138] that was when the Royal Niger company sent an envoy to sokoto. At that point in time, the North had a highly centralised if not autocratic regime of Emirs and Chiefs.

The administrative and judicial policy adopted by the British prior to the amalgamation of the Northern and Southern protectorates in 1914 was that the Emir were subordinates to the British colonialists and they (Emirs), were to obey the Laws of Britain. The Rulers were to govern their people not as independent but dependent rulers. In other words, their status was to be that of wakils or Governors, excising only such Jurisdiction as might be conferred on them by law[139].

From the foregoing, it is discernible that the British policy led to virtual absence of court of justice established by the British on English pattern at the commencement of British Admin. in the Northern Region[140].

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138 Fideelis E.U. The Courts and Administration of Law in Nigeria (1989) Nigeria, P. 59.

139 Order in council of 27th December, 1899.

140 Fidelis, E.U - Op cit.

Notwithstanding this fact, the whole areas were pleaded "to obey the laws of Nigeria" It is common nowledge that with no courts of justice established, by the british Administration, the community had to administer their judicial system which had been in existence long before the advent of the British administration. The North was influenced by the uthman Danfodio Jihad and therefore islamic law was practiced (save for Tiv area or the "middle belt") and the british saw no reason to have disturbed the islamic judicial system predominantly in the North.

The order in Council of 1899. Conferred on the High Commissioner in Southern nigeria to make proclamations having the force of law[141]. As a result, the High commission enacted protectorate courts proclamation No. 4 of 1900 . Under that enactment, three types of courts were established for the protectorate of N. Nigeria namely: (i) a supreme court, (ii) provincial courts (iii) Contentment Courts[142]. The supreme court was conferred with both appellate and supervisory Jurisdiction . It also had power to deport a felon to any part of the protectorate or other portion of the majesty's Dominions abroad, The provincial courts were courts of record and they had jurisdiction in criminal and Civil cases, including treason, felonies and offenses deemed to be congnisable by the court. There was no right of

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141 See order in council , dated 27th day of december, 1899.

142 The protectorate courts proclamation, No.4 of 1900

appeal from the provincial courts[143]. Interestingly, the provincial courts had power to issue writs of Habeas corpus and granting of equitable injunctions. There was a right of Appeal in civil cases only.

As for the contentment courts which were constituted under sections 22-33 of the protectorate courts proclamation No. 4 of 1900, they were manned by cantonment magistrates who were appointed by the High court commissioner. However, proclamation No 7 of 1902, replaced the earlier provision. Appeal could be made against decisions of the cantonment magistrates[144].

The cantonment court had jurisdiction in civil causes or matters to the value of ₦(5) or less. It also had jurisdiction in criminal jurisdiction if the offense does not carry with it punishment exceeding 30 days or a fine of ₦10. It is not mentioned, like in the case of the provincial courts, whether the contentment court had jurisdiction or power to issue the prerogative writs (orders).

From the foregoing, we observe that the main stream of judicial administration in the Northern protectorate lay with the native courts. This was because the system of the Alkali courts were well organised and there was no need to disturb them[145]. The question whether the Alkali

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143 Section 6 of the protectorate courts proclamation, No. 4 of 1900

144 Section 7 of No. 7 1902 proclamation.

145 See Lord Hailey's Book - op cit, P. 61

courts could entertain matters relating to the prerogative writs has not been stated.

The High court in carrying out one of its functions- (interpreting statutes), has to ascertain the meaning of a statute before it can apply it and in doing so, it is guided by certain principles which are described as rules of interpretation, or construction. This principle assumes the following:

i) That a legislator uses the right to express his intention.

ii) That he is reasonable and consistent.

iii) That he legislates with a practicable object in view.

The first aim is to arrive at an interpretation which the words of the statute can fairly bear and which yield practicable result with due regard to the object of the statute and the ultimate aim is to arrive at an interpretation which achieves harmony among the provisions of the statute as a whole and which also produces consistency with relevant provisions, if any in other statutes.

Thus the interpretation act of 1964 and the interpretation law of a state, if any, should be read side by side or in conjunction with a view of getting a conducive interpretation . It is in the light of this view that section 6 (5) (9) of the 1979 constitution provides that, (i) the supreme court, (ii) the federal High court (iii) the court of Appeal, (iv) a state High court, (v) the sharia court of Appeal of a state and (vi) customary court of Appeal are categorised as superior courts of record this means that such courts have a

In most cases, the English law introduced and modified the indigenous or customary laws, for instance, English law was statutorily received in lagos on the 24th day of july 1874[146]. In Queen Vs The Governor in council, W. Nigeria ex-part Oyebola[147] Duff J. stated as follows:

> "Our law on certiorari proceedings is based on the English law"
> And in Quesn Vs The Administer, W, N, Ex-prate Bamgbedu[148], Charles J. held.
> "The jurisdiction of this court (High court) to issue the prerogative writ of habeas corpus and the prerogative orders of mandanus prohibition and certiorori is beneficial inheritance from the old court of king's bench of England".
> These two cases is a clear testimony of the fact

that the prerogative writs (Now orders) became part of

Nigerian law and where indigenous laws were not modified they were administered as English received laws. In England, the writ of certiorori was couched in commanding fashion demanding certain record on records to be sent forthwith to the king's courts for examination or to be reviewed.

In R. Vs Nor thumper land compensation Appeal tribunal, Ex-part shaw[149], Singleton E.J saidi:

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146 See - Laws of the colony of lagos (1901) , vol 1.

147 (1962) W.N.L.R. 360, at P. 364.

148 Ibid, 344 at P. 349.

149 (1952) I all E.R P. 128.

> "Error of law on the face of the record has always been recognised as one of the grounds for the issue of an order of certiorori. I can find no authority for saying that in this respect there is any distinction to be drawn between proceedings of a criminal nature and civil proceedings".

It follows that certiorari will issue if on the face of the record, there is any defect in point of form appearing on the face of the record of the tribunal. Accordingly the control excised by a superior court of record (High Court), in Nigeria or the court of King's bench in England; is not limited to its appellate capacity but extends to a supervisory capacity. In other words, the control extends not only to seeing that the inferior tribunals keep within their jurisdiction, but also of seeing that the inferior tribunals observe the law . The control by the High court is excised by means of a power to quash any determination or decision by a tribunal which on the face of it offends against the law, as in the case cited (R-V-North unberland compensation Appeal Tribunal Ex-part show).

4.2 COMPONENTS OF THE RULE OF NATURAL JUSTICE

4.2 i) Nemd judex in cause sua:

Certiorari will also issue where the principle " Nemo judex in cause sua" (No man should be a judge in his own case) in abused. In Queen Vs the Ag provincial secretary Uyo Ex- parte Imeh.[150] It was held that the order of certionari would be granted to guash a conviction of the applicant because

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150 (1959) E.R N. L.R.P 59.

the Native court which tried him in the case of native court Vs J.D Imeh[151] was a party to the case. It was also held that applicant was not given opportunity to plead to the second charge nor was given opportunity to be heard. The judge, among other things said.

> "If the native court is the prosecutor, is it not against the principles of natural Justice for the Native court to be the judge in its own matter"[152]

In other words the applicant was condemned unheard. Fidelis E U[153] maintains that the main reason why a man should not be a judge in his own case is to obviate any possibility of bias or partiality which militates against the administration of justice. This in essence means that we are not interested in what transpired between the interested party and the accused during the trial, but what will or might appear to happen which will be detrimental, but what will or might appear to happen which will be detrimental to the applicant.

Having considered the nemo Judex rule, we can as well take into account the other segment of the Rules of natural justice, that is, "Audi alteram partem", which simply means hear the other side.

4.2 ii) "Audi Alteam Partem" (Hear the Other Side)

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151 Imam clan Court Criminal suit Nos. 371/57; 373/57.

152 (1959) E.R.N.L.R.P60.

153 Fidelis E.U - Op cit, P. 181

The principle postulated in this case is that a party be given opportunity to prepare and state his answer to a charge or allegations against him. Thus a breach of this rule will render a decision of an inferior tribunal voidable and such a decision will be avoided if and when matter is taken up before the high court of justice. The courts in applying this principle.

In Queen Vs the Governor in council would lie to Adebo[154] the High court held that certiorari would lie to deposing that the applicant as Olofin of Ilishan because the chief was not given an adequate opportunity to prepare his defence against the charges made against him nor was he heard in the determination of a matter which affected his rights and interests; the Governor in council being retained in the determination of such issues to act judicially.

It is a cardinal principle of natural justice that each party be heard and given adequate opportunity in that regard and this is embedded in any enactment requiring an inquiry to be made by a member of the executive or any other person before making any decision. Where the rule is contravened; the High Court will intervene. Consequently, in Queen Vs the Resident Ijebu province Ex-parte Oshunlaja[155] where the Governor in council approved the appointment of a chief whose appointment was made without "due inquiry" Ademola C.J (as he then was) said inter alia:

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154 (1962) W.N.L.R.P. 93.

155 (1959) E.R.N.L.R. 59;.

> The court is precluded by law from interfering in the matter of selection of a chief it will therefore not interfere out it will be standing between the executive and the members of the public.... and if something is being done which is contrary to natural justice or certain things required by law are not done, it will interfere."

It is not clear from the this judicial statement whether certiorari can lie despite an express provision in an enactment excluding the order. It is submitted that normally when an enactment, e.g. (Act of parliament) expressly excludes the order of certiorari the High Court is bound by such a statute.

However, such an enactm nt coeld not provide a shield against irregularities nor will the High Court feel precluded where an inferior tribunal is challenged before it for acting in excess or without jurisdiction, or in breach of the rules of natural justice; or contrary to certain sections of the law and thus revealing an error of law on the face of its records. For instance, in R.V merely[156] the judge stated that the jurisdiction of the court is not taken away (in respect of grant of writ of certiorari) unless there be express words to take it away.

The Federal supreme court, in R-V- the Governor in council Western Region, Nigeria, Ex-parte Ojo,[157] was of the opion that "It is settled law" that despite words taking away certiorari, the court will issue certiorari for manifest

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156 (1910) 2 I.R. 695 at P. 742-3.

157 (1962) W.N.L.R. P.62.

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defect of jurisdiction in the tribunal which made the order, and the objection may be founded on the character and constitution of the inquiry, or the absence of some preliminary proceedings which was necessary to give jurisdiction to the inferior court.

From the foregoing, it is evident that neither certiorari nor privative provisions in the statutes are generally effective, as the courts will feel more obliged to interfere where there is a clear case of an inferior tribunal acting without jurisdiction or in excess of its jurisdiction or where there is a breach of the rule of natural justice by failure to give aparty affected an adequate opportunity to be beard, or present his own case.

4.3 MILITARY TRIBUNALS

Under this head, we shall consider whether military tribunals are amenable to orders of the High Court in respect of criminal or civil matters. The first question we may wish to consider is whether military tribunals are inferior bodies? The answer is in the affirmative Secondly, whether certiorari or any of the prerogativ olders could be invoked against itsdecision it is subm tted that since military tribunals are inferior tribunals, they are therefore subject to control by the High Court through the order of certiorari as well as other prerogative orders including babeas corpus. this fact may be feasible in England, for instance, in Grant Vs Gould[158] Generally the courts are usually reluctant to interfere with the

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158 (1972) 2 H.B, where Lord Lough Borough said.

determination of military tribunals where they act within jurisdiction but fail to observe certain rules, such as audi alteram pattern. That is where a decision was reached by a military tribunal "as disciplinary authority of a disciplined service."

The idea behind such a "judicial restraint" is to forestall any interference which might operate to weaken discipline in the armed forces. Apart from this fact, it is also based on the fact that since the granting of the prerogative orders is discretion, it is left to the courts to use their judgments in carrying out the task.

> "Naval courts martial, military Courts martial of Admirality, Courts of prize, are all liable to the controlling authority which the courts of westminister hall have from time to time erercised.

Thus in Queen Vs- The officer commanding 2nd Battalion, Ex-parte Uangbaoji[159]. The applicant had been dismised for millitary offences contrary to the Royal Nigerian Military forces Act, 1960.[160] He applied for an order of certiorari on the ground that he was not given an opportunity to be heard nor allowed to call witness in his defence.

Counsel for respondent contended inter alia; that even if the court had jurisdiction to issue an order of certiorari, it should nonetheless refuse to make the order as that would be prejudicial to military discipline. It was

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159 (1962) All N.L.R., P. 268.

160 No. 26, of 1960.

held that the high court has jurisdiction to issue an order of certiorari to quasj a decision of a military tribunal where such a decision was reached without jurisdiction. However, the court dismissed the application, being discretionary. The court has to dismiss the application, unless special circumstances are shown calling the discreation being exercised the other way round. In this case we have observed that there was deniel of right to be heard and to call witnesses.

It is submitted that if allegations of deniel of right to be is established, certiorary should issue to quash the decision of a military tribunal. The fact that a man should not be condemed unheard (as we have earlier noted), is a sacred rule natural justice. It should be stressed that the laws of God and man give the aggrieved person an oppurtunity to make his defence. Thus in the King Vs-University of Cambridge,[161] it was asserted inter alia, "Even God Himself did not pass sentence upon Adam, before he was called upon to make his deference."

Furthermore, where an aggrieved party makes an application for the order of certiorari, It ought to be granted "Ex debitor justitiae", that is, a remedy which the applicant gets as of right. For example, a writ of habeas corpus, and the court has not the general discretion which it would have when the application is made by one of the public who is not personally affected.

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161 (1723) 1 St. Tr., 55, at P. 56; 93 E.R.P. 698, 704 per fortescue J. University decision to deprive B. of his degrees was declared a nullity because he (B) had not been first heard in his own defence.

It is axiomatic that the military generally exhibit flamboyancy in the day to day activities of their lives , particularly when in full regalia. Military tribunals should therefore be more cautious in deciding cases brought before them, that is, if at all they are conscious of the fact that their decisions or determinations might be quashed by the High Court of Justice by means of the order of certiorari (If they fail to observe the elementary principles of justice). Therefore, the High Court should issue certiorari in cases where the order ought to lie otherthan for absence or excess jurisdiction on the part of a military tribunal. professor D.C Holland vehemently argues [162] that the civil courts should keep a vigilant eye on courts martial and exercise a strict control over them.

In addition to the above facts, It is imperative that discipline should not be jeopardised, it is equally necessary that justice must not only be done but must be seen to be done. The ego in the military generally, should be curtailed to its lowest ebb, if the rule of law is to prevail in our society.

We can now consider prohibition, that is, how the High Court administers it if cases involving its application is brought before it.

4.4. PROHIBITION

Prohibition is a prerogative issued out of the High Court- principally to restrain an inferior tribunal/body from exceeding its limit or jurisdiction.

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162 (26) See The Law of courts martials, (1950) 3 C.L.P., P.173 especially at P. 174 et seq.

Osborne, in his law Dictionary[163] says that the oder of prohibition is used not only to restrain an inferior Court from execising its jurisdiction, or acting contrary to the rules of natural justice, but also to control a minister or public authority in the exercise of their judicial or quasi-judicial functions.

In England, prohibition was a powerful weapon of the court of the King's bench in earlier times, that was when the court was competing with other courts for jurisdictions, for instance, the ecclesiastical court and Admiralty Court. based on this fact, prohibition is more powerfull instrument than certiorari. This is because prohibition can issue to prevent unauthorised proceedings in an ecclesiastical court, certiorari on the other hand, can not; certiorari will not lie to review the decision of an ecclesiastical court. For instance, in E-Vs- Chancellor of St-Edmundsbury an Ipsunich Diocese Ex-parte white,[164] where it was held

that certiorari does not lie from the court of Kings Bench to an ecclesiastical court because of the availability of prohibition. The judge inter alia said: For the reasons which I have attempted to state. Iam of opinion that, as a matter of principle, the ecclesiatical courts administering eclesiastical law must at all times be treated as outside the am bit of the writ of certiorari, and for that reason the present appeal must, in my judgment fail. Appeal was dismissed.

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163 A concise Law Dictionary, (1964) P. 267.

164 (1948) 1 K.B. P. 195

The question whether disobedience of the order of prohibition carries without punitive measure is in the affirmative. This is because the penalty for its disobedience is attachment and committal for contempt. As to the rules governing the issue of prohibition, is similar to that of certiorari, the only difference being that prohibition can not issue where a final decision has already been given or passed. In the case of certiorari, even if a final decision has been given by an inferior tribunal, certiorari can still be issued. In practice, it is wise to apply for these two orders to gether so that while the one prevented, the other cured. None the less it is the fact that the effect of our order of prohibition is not merely to prevent the making of an order should it aware in time, but also prevent the enforcement of it should it arrive after it has been made. Therefore, where an application is made for prohibition and certiorari, the High Court may grant prohibition if it is not too late, that is, if the inferior tribunal has not made a decision but if it has made a decision on a matter, certiorari m ght issue to quash such decision.

Where an inferior tribunal commences its function in a manner not authorised by a statute an order of prohobition wil issue to nullify its action . In other words, it is better to nib its action in the bud, by the order of prohibition instead of waiting for the tribunal to complete its proceedings and later invohe the order of certiorari to quash its decision. In Queen Vs-Thomas ors, Ex-parts Ekundayo (P. 192) Fidelis E.U's Book) an application was made for an order of prohibition to restrain the first and second

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defendants from proceedings with the Itsekiri communal Land Trust commission of Inquiry in excess of the Jurisdiction conferred on them by statute, in that they appointed or allowed the third and fourth defendants as counsel and accountant respectively to the said com ission of inquiry. having ascertained the allegative proved, Oyemade J. held that prohibition should issue to restrain the commission from proceedings with the said counsel and the accountant. However, the commission was allowed to go on with its proceedings without the two representation to present the case for the commission as that was not authorised by statute. Having considered the order of prohibition, we can now take into account the order of certiorari.

4.5 CERTIORARI

Court lacking jurisdiction - judgment contrary to principles of natural justice - see the state - Vs Abudu and Anor.[165] In this case a Nigerian couple after having merived under customary law went to western germany, where they married in the Registry and the church. Husband later obtained dissolution of marriage in a customary court grade II. without testifying and without the wife being heard. Heldi:

i) It was an error on the face of the proceedings of the lower court to have made an order that the applicant should pack out of the plaintiff's house when such a claim was not brought before it.

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165 (1967) N.M.L.R.P. 269.

ii) Since the applicant was not heard and there is no record of any evidence given by the plaintiff, the proceedings offend against one of the essential characteristics of natural justice which is that a party to a case has a right to be heard cases cited:[166]

R. Vs Northumberland compensation Appeal Tribunal ex-part shaw.[167] Walsall Overser V- London North Western Rly. Coy.[168] Kanda - Vs- Govt. of malaya. The judge granted the applicants request and ordered that the order of certiorari be issued in order that the judgement of the lower court be quashed.

The judge inter alia said: on the whole , I have no hesitation in granting applicant's prayers on all the three grounds and I hereby order that the proceedings in the customary court grade I be , and is hereby quashed and all the ancillary orders arising there from are also nullified.

There shall be no order as to costs.

4.6 MANDANUS

- It is a judicial remedy
- It is issued at the discretion of the court/Judge.
- Usually issued when the there is no other remedy available. In
- Doctor Bentley's case[169]

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166 (1952) 1 All E R. 122.

167 (1878) 4 A.C.30.

168 (1962) A.C 322.

169 See Balckstone Commentaries, Vol.3, P110.

- A broader description of the writ was given as follows:

> "Mandanus or mandatory writs are very ancient, as old as Edward the first, it not older, and the two main ends of them are to expedite justice and to prevent oppression in great bodies of men, such as corporation returns of mandanus are answers to the king's commands; they therefore ought to be true and clear, and indeed they require the utmost certainty, even much greater than the indictment; for that may be traversed; but here the king can't traverse, but if the return be not clear, a peremptory mandanus goes; for if the party quibbles or prevaricates, he is supposed not to be able to give beter answer".

Its punitive measure is attachment and committal for contempt . That is, where it is disobeyed or suppressed. mandamus- will not issue unless demand is made and the respondent requires to perform it. The dicretion must be a judicial discretion. By magna charter the grown is bound neither to deny justice to anybody, nor to delay anyone in obtaining justice. There must be a public duty required to be done and on request failure which mandamus will lie. In Layanju - V - Araoya,[170] the respondent who was required by the native law and custom to give approval to the appointment of the applicant to a chieftancy known as the Esa of Ire refused to do. It was held that mandamus should issue to compel him to perform the public duty of recognising the applicant in accordance with notce law and custom.

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170 (1959) 4 F.S.C. P. 153.

Similarly, in R-V Ozogula II, Ex-part Ekpenga,[171] the Federal supreme Court of the then Western Nigeria, orderd the appallant by mandamus to perform certain traditional ceremonies which by the customary law he was under a duty to perform on the death of a class of cheifs.

In view of the decision in Ozogula's case, the question raised in layanju- Vs- Araoye is said to be answered, in the sense that where a native law and custom requires a person to perform certain functions which the people regard as "sine gua non" in a particular chieftancy or other matter, and such function is not repugnant to natural justice equity and good conscience, then there is a duty of a public nature which occasions the order of mandamus.

R - Vs- The comm of In land. Revenue, (in re-nathan)[172] Bowen L.G stated that a writ of mandamus is a high prerogative writ, invented for the purpose of applying defects of justice.

One very important consideration in the issuance of mandamus is that the applicant must have requested the respondent to perform his duty but he refuses. Furthermore, for mandamus to issue, it is necessary to establish a specific legal right in the applicant who may not have a corresponding specific legal remedy.

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171 (1958) W.R.N.L.R. P.36.

172 Now vide fawehimi Vs Akilu (1987) 1 N.W.L.R. (part 51),P.554, Garba Vs - Unimaid, (1986) 1 N.W.L.R (part 18), P.550.

In Azuike - Vs- The senior Education officer,[173] the applicant was a candidate at the first school leaving Exam of the E. Nigeria Ministry of education, he claimed that he was successful in the second examination. Certificates were given to his colleagues who were successful but was not given to him. None of the other candidates who passed the exam received any communication from the Ministry of education intimating them that they were successful in the said exam. The applicant in support of his claim for mandamus, to compel the respondent to issue him with certificate; submitted a document which shows that his and the certificates of some others were (1) wit held".

The High Court of Justice held that the application should be refused.

Reason being that the applicant could not substantiate his claim or legal right.

Another interesting case Nayak - Vs- Benjamin Barucha[174] Chagla C.J. stated"

> "When a writ of mandamus is asked for, the first question that the court has to determine is whether there is any statutory obligation upon the officer concerned, and the next question is whether the officer had failed to discharge that abligation"?

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173 Unrep, but decided in the High court of Aba Judicial Division, suit No. A/M/29/1963, on 21st Norvember, 96.

174 Fidelis E.U Op cit, P.200.

In conclusion, it could be seen that the order of mandamus is much wider in scope than certiorari and probihition. This is because mandamus may lie in cases where neither certioarari nor probihition may lie. For instance, where the proceeedings of an inferior tribunal are regular on their face and the tribunal acted within its jurisdiction neither certiorari nor prohibition may lie. However, if such tribunal, as we have seen, has been influenced by extraneous or extra-judicial consideration, mandamus will issue to compel the inferior tribunal to act according to law [175].

Where the high court requires a magistrate court to carry out certain instructions, but the magistrate court refuses, for instance, where the facts of a complaint constitutes a criminal offence, the court shall entertain it and issue criminal process whether summons or warrant of arrest depending on the nature of the offence (5.80 C.P.A). If a magistrate refuses an order of mandamus will be issued against him.

"You must have the body A great bulwark of liberty of the invidual".

(1) Michael Babalola Omotosho - (Applicant)

-Vs-

Inspector General of Police[176] Return not accordance with returns filled instead of one -Effect of ord. 53 rr. 14 and 16.

(1951) Bombay L.R. 654, at P. 666.

Siut No. M/241/78.

The application was brought under order 53 of the High Court (civil procedure)Rules, 1972 for an order that a writ of habeas corpus be issued and directed to the respondent to have the body of the applieant's father brought before the High court upon grounds set out in an affidavit sworn to by the applicant.

An order nisi was made on 22/12/78 and duly served on the respondent who filed a return to the writ on 15/1/79 and 11/1/79 respectively.

Held: (i) it is well established that a detainee is to be discharged or remanded barely upon the Return and nothing else . The return reguired to be filed to the writ must in its face show a Nalid authority for the detention of the applicant's father.

ii) Order 53 or 14 empowers the court and the judge in chambers to give direction as to the return of a writ and such return should be immediate.

Therefore, the detainee is discharged and respondent is obliged to make a return in accordance with court order. Cases referred to:

- Bushell's case (1670), Vaugh, 135
- R.V Armiger (1662), 1 keb, 272, 83 E.R. 940

Homi Rustamjee Bordivalla - V - sub- Inspector Biag and ors.[177] A barrister was arrested in Lahore, India, and his haheas corpus application was suppressed. The Lahore High Court Fined the two officers responsible for

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[177] (1944) A.I.R (Lah.) P. 196.

that for contempt ofcourt Rs100m and 50 each. In addition stern warning was issued by the court against any attempt to disobey the writ -(habeas corpus).

According to Fidelis E.U,[178] old common law rules regarding habeas corpus modified and more effective by statute. Therefore when we use the term habeas corpus simpliter, we mean Habeas Corpus ad subjiciendum. As pointed out earlier, the prerogative writs as part of the common law of England have been "received" or to be more apposite, "inherited" in Nigeria as part of our legal system. The rules governing the writ as modified in 1679 continued to operate in many parts of Nigeria. Later recently, the Western region enacted a law known as the Habeas Corpus Law.

S. 3 of the Habeas corpus law of the Western region prescribes punisjment for any Judge who disobeys the orders of the writ.[179]

For instance, if application is made to a judge on vacation, the prisoner may apply to another judge, provided he produces a copy of the warrant of commitment or of an affidavit that a copy of the warrant was refused to be given to the applicant by the person to whom the prisoner is detained . Upon request in writing by the applicant attested and subscribed by 2 withnesses present at the making there of, a writ of habeas corpus under the seal of the court directed to the officer or person in whose custody the prisoner is detained.

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[178] Ibid.

[179] See cap. 42, Laws of the Western region of Nigeria, Vol. II.

See Nwabueze[180] in Nigeria, the orders of mandamus prohibition and certiorari have replaced the former prerogative writs of the same names. Therefore, it is a misnomer to use the name prerogative writs, as in Layanju - Vs - Araoye.[181]

The prerogative orders are aldernative remedies. This was pointed out clearly in Hauwa and Burma - V- Sarki[182] where Udoma J. Observed inter alia:

> "In the absence of a prescribed procedure of attacking the execise of power by a minister, the normal civil processes and the principles of the general law, including the prerogative orders, are of course, avaiable to be invoked to advantage by an aggrieved person".

4.7 HABEAS CORPUS

"If any judge refuses any writ of habeas corpus required by this (section 3) to be issued upon being moved for as aforesaid, he shall forfeil to the prisoner or person aggrieved the sum of five hundred pounds to be recovered by action for debt in any court of competent jurisdiction".

Fedelis E.U Further says- inter alia, it is however hard to see cases in our seciety today where an individual can arrogate to himself the power to imprison say his debtor , without the authorities intervening where, therefore, an inferior tribunal acts without jurisdiction and a person is sent

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180 The Machinary of justiceinNigeria, (1963) P. 171.

181 (1959) 4 F.S.C. 154 at P 155.

182 (1962) 2 All W.L.R.P. 62.

to prison thereby habeas corpus will issue to deliver him from the illegal imprisonment. Thus in Re Native court of Onistsha.[183] "Who was a witness for the defence in a charge against two men in a native court was himself brought before the same court on a charge of inciting two men to perform second burial in away contrary to native law and custom. Instead of convicting him for the charge, the native court convicted him on what was thought to be an offence but for what the accused never charged. The court members recorded a conviction "Accused one (1) year I.H.L. (imprisonment with hard labour) for refusing to ask peace from Obi Kosi (The chief) and complainant" He was accordingly sent to prison to serve term.

He applied to the station magistrate who was vested with the power to review the decision of the Native court, but the magistrate refused to exercise his statutory power. No appeal lay to the higher court that is, the High court . Where upon the prisoner applied to the Supreme Court for habeas corpus, on the ground that the court acted without jurisdiction. Few. J. Held that as the native court acted without jurisdiction, the Supreme court had power to interfere to remedy the wrong in the interest of justice. Consequently habeas corpus was issued for the release of the applicant from the illegal detention.

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183 (1962) 2 All W.L.R. P. 62 Particularly at P.69.

Where a person is kept in prison after expiration of his term of imprisonment, the writ of habeas corpus will issue to deliver him. This is demonstrated clearly in Gwaram Vs - Superntendent of prisons.[184]

Equally , habeas corpus will lie to deliver a person from unjustifiable restriction imposed by the order of the executive. In Eshugbayi Eleko - Vs - officer Admin. the Government of Nigeria.

The Governor of Nigeria, purpoting to act under the deposed chiefs renewal ordinance, ordered the appellant to leave the colony of Lagos and the province of Abeokuta. The order was disobeyed. The Governor then ordered that the said Eleko be deported forthwith to Oyo. Eleko was ordered into custody and while he was there he applied for writ of habeas corpus contending:

i) That he was a native chief;

ii) That he had not been deposed; and

iii) That there was non native law and custom which required him to leave the area, and that consequently the conditions did not exist entitling the Governor (under the ordinance).

The privy council allowed Eleko's appeal.

DECLARATORY ACTION

A declaratory action is one given as a result of an action instituted by either of the parties to a suit. One of the adavntages of a declaratory action

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184 (1960) N.R.N.L.R., P.5.

is its flexibility. In this sense, the declaratory relief and coercive relief are taken into account. The former can not be tempered with where some compromise might be desirable . The latter, on the other hand, the court may rule for the plaintiff but assesses damages leniently or attach conditions to an injunction. In other words, coercive, relief must be rendered in favour of one of the parties. There fore declaratory relief does not render itself to such compremise as does the coercive relief.

In a classic authority on declarations Fletcher Maoultan L.J., in an application made on behalf of the Attorney - General to have the suit dismised, said:

> "The court would not permit a plaintiff to be driven from the judgement seat except where the cause of action is obviously bad and almost uncontestably bad"[185].

In Hanson Vs - Rad chiff U.D.C; Lord Sterndale, MR, expatiating on the wide powers of the court to make declaratory orders observed:"

> "In my opionion, inter alia; the power of the court to make a declaratory judgement where it is a question of defining the right of two parties is almost unlimited and I might say only limited by its own diseretion. The discretion should of course, be exercised judicially but it seems to me that the discretion is very wide"[186].

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185 (1911) 1 K.B. 410.

186 (1922) 32 Ch. 490 at 507.

The above dictum was quonted with approval by the Nigerian supreme Court, in Ewarami - Vs - African Continental Bank Ltd[187]. The respondent was employed by the appllants. After some time the respondent was in disposed and was attended to by a Doctor who issued a sick Leave Certificate which was admitted at the hearing during the proceeding at the benin High Court. He was unable to give evidence in the court because of his ill- health. He wanted his salary to be paid by the appellants but they refused to pay him on the ground that he refused to go on transfor which is a gross misconduct. That the letter of tranfer , dated the 3rd of August, 1973 was not given to his client respondent then issued a writ claiming a declaration that he was still in the employment of the appellants and also twenty thousand naira (₦20,000) as general damages. The judge gave Judgement in favour of the respondent, declaring that his dismissal from the employment of the appellants was null and void, that he was still in the employment of the appellants.

> However, on appeal Irikefe J.S.C said, among other things:
> "No action or other proceedings shall be open to objection on the ground that a merely declaratory judgement or order is taught thereby and the court may make binding declaration of right whether or not any consequential relief is or could be claimed or not".

The dicturm in Hanson's case (Supra) was adopted. Similarly, Lord Denning L.J., in Taylor Vs - National Assistance Board,[188] remarked:

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187 (1978) 4 S.C 99. but cited as (1978) 3 S.C 99.

188 (1974) 1 N.M.L.R. 82 In a Nigerian case Nigerian ports Authority Vs Panalpina World Transp. Ltd the same reasoning in Taylor's case was adoppted and ors (Ibid)

"The remedy of declaration is available at present day so as to ensure that a board of other authority set up by parliament makes its derermination are judicial or disciplinary or as here administrative determinations. The remedy is not excluded by the fact that the determination of the board is by statute made final. Parliment gives the impression of finality of decisions of the board only on the condition that they are reached in accordance with the law, and the Que n's court can issue a declaration to see that the condition is fulfiled".

According, to Lord Denning's dicturn, as noted, is a restatement o' his views on the immense powers of the court in granting a declaratory relief, as a review authority over the exercise of their powers by statutory tribunals.

Aguda J., in his judgement in Benjamin OLatunji Vs - The Registrar, Co-operative societies[189] stated as follows:

"It may well be that before very long the prerogative orders, with their autiquated technical machinery having served their term historically, will diwindle almost into insignificance as they have in the United State - Under the showdow of this expanding and liberal form of action, that is, declaratory action."[190]

In conclusion, we observe that the courts adopt a liberal attitude in granting declaratory reliefs with glaring pronouncements on this form of remedy. Furthermore, the remedy of declaration can be invoked in cases of

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189 (1968) N.M.L.R. 393.

190 Ibid.

wrongful dismissal either by government or private organisations for instance, in Ewarami's case[191].

INJUNCTION

Injunction is an order of the court or decree by which a party in an action, is required to do or refrain from doing a particular act. Injunctions are either restrictive (preventive) or mandatory (compulsive in nature). In relation to time, injunctions are either interlocutory or interim, or perpetual. The latter injunction is granted only after the plaintiff has established his legal right and there is actual or threatened infringement by the defendant.

An interlocutory injunctioh may be granted at any time after the issue of the writ to maintain things in status quo. (as they were before). The court must satisfy itself that there is a serious question to be determined at the hearing and that on the facts the plaintiff is probably entitled to relief.

In England injunctions were only granted by the chancery court, but are now available in any division of the High court.[192] Once an injunction is granted it is enforced by com ittal for contempt of court for any breach. Injunction, in a broader sense, is inclined towards equality, that is, it is an equitable remedy, (through a judicial order), restraining the commission or continuation of a wrongful act. Compared with the other judicial remedies, Injunction operates mostly as a private law remedy.

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191 Ibid.

192 (1978) 3. S.C 99.

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Where an injunction forbids commission of an act, or continuation thereof, it is said to be prohibitory, but where it orders a positive act to be done as a reparation, it is mandatory injunction. The latter kind is hardly or rarely granted.

In the field of public law, the value of injunction was enhanced by 5.9 of the Adm nistration of justice (misc. provisions) Act, 1938 (which abolished information in the nature of quo warranto) - And provided that "In any case where any person acts in an office in which he is not e titled to act and an information in the name o' quo warranto would , but for the provision of the foregoing sub-section, have lain against him, the High Court may grant an injunction restraining him from so acting and may (if the case so requires declare the office to be vacant"[193]. For more details see[194].

In Akintola - Vs - Aderemi and Adegbenro[195] the High court was of the view that the removal of the then premier was contrary to the constitution of the region, consequently the appointment of the second defendant as the premier of Western Region by the Governor of the region was invalid.

In conclusion, it must be stressed that courts/judges, as custodians of justice, should not be too expensive, nor should they be plaqued by problems of delay and unneecessary formality. It is com On knowledge

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193 See sections 24 (5), 36 & 37 Vict. C 66.

194 Keeton G.W. An introduction to Equity, (1960), 5th ed. P. 327.

195 Sec 25 of the High Court Law (Northern Nigeria), cap. 46, Laws of Northern Nigeria, (1963) Vol II.

that sometimes due to different types of (weaknesses in the courts, tribunals of different types are oftern set up, for instance, Rent Tribunals , etc. Therefore, it stands to reason that such weaknesses or lapses in the courts should be viewed or checked vigorously so as to forestall the problem of quick dispensation of justice to the people. Therefore the role of the superior courts can not be overemphasized in the administration of justice, particularly where some one's legal interest or right has been impugned either by government, individual(s) or other wise. Justice must not only be done, but must be seen to be done. Consequently, the courts should live up to expectation at all times.

CHAPTER FIVE

5.0 RELATIONSHIP BETWEEN THE PREROGATIVE ORDERS AND PRIVATE LAW REMEDIES

In order to know the relationship that exists between the prerogative orders and private law remedies, it is important to have an idea of what the former as well as the latter remedies mean or the functions they perform. In other words, knowing their similarities and differences, that is, how do they function as remedies in relation to legal rights.

The prerogative orders, namely certiorari, mandamus and prohibition are equitable remedies and are discretionary in nature. This means to grant them on an application, the judge can either grant or abdicate, depending on the rights being claimed or the nature of the claim itself.

Also the prerogative orders are sometimes referred to as non-statutory remedies, whereas the common law remedies namely declaration, injunction, damages and statutory right of appeal are statutory remedies, or may be referred to as constitutional or private remedies.

Further more, we are to appreciate the fact that where there is an alternative remedy for instance, right of appeal or where the applicant is yet to exhaust his chances of obtaining a remedy in relation to his claim, the court may decline from responding positively towards his claim. As an example, where certiorari is sought as a remedy or where mandamus is invoked and the applicant still has the chance, say of appeal, or where the respondent promises to fulfil his undertaking, the remedy of certiorari or

mandamus can not be invoked. This is because the court takes into account the circumstance(s) in which the respondent finds himself. For instance, if the court grants an injunction to compel the respondent to do or carry out an impossible act, then the applicant can not succeed.

Declaration or declaratory judgment is another remedy in administrative Law. It is made in order to ascertain or determine the legal rights of parties involved. The essence of a declaratory judgment is that it states in unequivocal terms the right of parties in relation to the issue in question. This means that once the rights are determined, the court can not change its mind or succumb to the other claimant's demand; except where he makes an appeal to the appeal court. For instance, where a contract was formaly agreed upon by both parties, particularly if a written contract and one of the parties later wishes to withdraw from the contract. In such a case; the court is not obliged to go back on its words, provided the most important element (consideration) of the contract was fulfilled or performed. It can also be in a form of interpretation. For instance, where the meaning of some provisions in a Will is to be ascertained, or where a statute applies to a particular case, for example, S.I of the Land Use Act, 1978 vests all land comprised in the territory of each state in the Federation in the Governor of that state and such land is held in trust and administered for the use and common benefit of all Nigerians.

This means that under section I, of the Land Use Act, 1978, if a court declares or makes a declaratory judgment in relation to right in land and invokes

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this section, no other method could be implored to stop or contradict this provision in relation to land matters, once there is a dispute as to tittle to it. But the other party who fails to do so, the party that proves his tittle is the owner of the said land. For instance, in Abdullahi Vs Bulama.[196] The plaintiffs brought an action against the defendant who was a village head for a declaration of tittle to land which the latter had reallocated. There was no dispute of evidence that the land had been abandoned.

It was held that the chief had a reversionary power in a community land which had been abandoned. Therefore it was right that he (chief) reallocated the land to another person. This is a sort of declaratory judgement.

Settlement, is yet another way by which a person acquires tittle to land in Nigeria particularly in traditional practice. This arises as a result of early settlement. For instance, in Ajala Vs Awodele[197]. Plaintiffs claimed a declaration of tittle and injunction to restrain the defendant from entering on to a parcel of land. The plaintiff's claim was based on early settlement. The court in its decision in favour of the plaintiff observed as follows:

> "Settlement is one of the traditional modes of acquisition of land and it is irrelevant to argue that the tittle is defective because his ancestors had no grant from any body".

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196 Suit No NEM/59A/75.

197 (1971) NMLR 127.

In view of the above, it is a known fact that in Nigeria, declaratory judgment is of particular importance because in cases where it is difficult or cumbersome to determine or ascertain the right remedy, or for some other reason(s), the ordinary remedy is unsatisfactory, declaratory judgment will provide the remedy. It should be noted that disobedience to a declaratory order amounts to contempt of court. But the party that is not satisfied with the order of the court can enter an appeal. In case of prerogative orders, disobedience to any of the orders (writs) will not amount to contempt of court and penalty may be imposed on the party that defies the court order.

5.1 EFFECT OF DECLARATORY JUDGMENT

As we have noted from the foregoing, a party is in a position to know the other chance open or available to him in furtherance of obtaining a remedy.[198] It is a known fact that a declaratory judgment is a discretionary remedy, which means that the judge is not obliged to grant the remedy sought, but will depend on the circumstances of the case. In particular, court will refuse or decline the order to speculators and busy bodies, or those who ask hypothetical questions[199].

Similarly, declaration could be denied to those who have no sufficient interest in the subject matter, particulary in family land or property. The truth is that under this type of interest for example a claim to land, no one has

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198 Wade H.W.R. Administrative Law, 4th ed (1977), Claremont press Oxford, English, P. 500

199 Harison Vs. Croydon London, Borough Council, (1968) Ch. P. 479.

any inalienable right in family land and the interest of any individual is limited to his life time where he died testate or intestate. In other words, he has no power in law, to convey any part of it to his children. Whether he left a will or not, that is, under customary law.

In Ehigie -Vs- Ehigie,[200] it was held that the position of the child who succeeds all the propertybecomes the father of the family. Certainly as far as the property, especially the land is concerned, he holds the land as trustee for the heirs. Therefore, he can not alienate it without their consent.

In 1953 the advantage of declaratory judgment was brought to light in an English case of Barnard Vs - National Dock Labour Board[201]. Dock workers had been suspended from employment for refusing to operate a new system for unloading of raw sugar. Notices of suspension were sent out by the port manager and the men appealed unsuccessfully to the statutory appeal ribunal. They were dismissed from service . After a prolonged strike, the men began actions for declaration that their dismissal had been illegal. It was held that the dismissal was wrong. Reason being that discoveries (of documents) indicate that the strikers were suspended by the port manager personally and not by the Local Board. In other words, the suspension order was illegal. As a result, a new aspect to the case was precipitated,

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200 (1961) W.N.L.R. 307 at P. 309.

201 (1953) 2Q B 18 see Borie, The Advantages of the Declaratory Judgment in Admin. Law 18 MLR P. 138 see also Eweluka; Declaratory Judgment in Nigerian Public Law, 8 NLJ (1974), P.42.

since the discovery disclosed their suspension to be irregular under the statutory scheme. The applicants obtained a declaration to this effect and were therefore successful.

It should be pointed out that if the strikers had applied for an order of certiorari, they could not have succeeded for the simple reason that the time within which to apply for certiorari (six months) would have lapsed. Secondly, they would not have obtained discovery of documents if they had applied for the order of certiorari. Lord Dinning, M.R. (as he then was) put the matter on the broadest plane when he said:

> "It is axiomatic that where a statutory tribunal sits to administer justice, it must act in accordance with the law. parliament clearly so intended. If the tribunal does not observe the law, what is to be done. The remdy of certiorari is hedged round by limitations and may not be available. Why then should not the court intervene by declaration and injunction? If it can not so intervene, it would mean that the tribunal could disregard the law, which is a thing no one can do in this country."

The importance of this is that the litigants are encouraged to circumvent the limitation of certiorari and instead, resort to declaration; sometimes certiorari is an obstacle to justice, in that the time within which to seek for remedy is only (six months).

In Vine - Vs - National Dock Labour Board,[202] a dock worker had been invalidly dismissed but the House of Lords granted him declaration. The

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202 (1957) A. C. 488.

Question arose as to whether a planning permission was needed for quarrying operations and if so, whether conditions imposed by the minister were valid. This Question came up in PYX granite CO ltd - Vs Ministry of Housing and Local Government.[203] Lord Denning stated as follows:

> "I take it to be settled law that the jurisdiction of the high court to grant a declaration is not to be taken away except by clear words."

The position being that the time limit for the writ of certiorari had expired and the Quarrying company asked for declaration as to its right. The House of Lords granted the order and the ministrer's arguement that the right remedy if any, was certiorari was rejected on the ground that the two remedies are not in any way mutually exclusive. In other words, each of these two orders (certiorari and declaration), could be awarded separately.

In another development, in the court of appeal, Lord Denning again praised declaration as a means of avoiding the confusion caused by the nominal restrictions of certiorari to, judicial, functions since that confusion (according to him) had not yet been removed by Lord Reid in the celebrated case of Ridge Vs Baldwin.[204] In this case, the complainant applied for declaration against his dismissal from service and was successful on that ground, though according to Professor de Smith, certiorari would have been the appropriate remedy and that prohibition would have stopped the police

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203 (1960) A.C. 260.

204 (1964) A.C. 40 at P. 64-65

authorities from committing further unlawful acts. Therefore, declaration was entered infavour of the complainant.

In Ekundare Vs the Governor in council,[205] the plaintiff applied for declaratory judgement for membership of a dissolved Local Council. The Court held that the right to membership of a dissolved Local Council was a public right and that the Attorney should have been joined as a co-plaintiff. However, it was decided that the plaintiff's action can not be maintained because the Governor in Council, having dissolved the local govt. Council, acted executively and therefore his action can not be questioned in court. The plaintiff's claim was dismissed.

In Awolowo Vs Federal Ministry of internal Affairs[206] the applicants applied for both certiorari and injunction against the Minister's order. The Minister of Internal Affairs acted in conformity with S.13 of the Immigration Act of 1963, and thereby prevented Mr. Gratian a (British Lawyer) and (Awolowo,s counsel) from entering the country for the purpose of defending the said applicant. The court refused the applicant's application taking into account the fact that the minister's order can not be challenged in a court of law. In other words, the application for declaration and injunction was refused. The rejection by the minister of Internal Affairs was based on internal security of the nation.

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205 (1961) All N.L.R. 149.

206 (1962) L.L.R. 177.

In Williams Vs Maje-kodunmi,[207] the plaintiff brought and claimed a declaration inter alia; that the restriction order served on him was illegal and ultra vires the defendant and an injunction was therefore prayed for to restrain the defendant, his servants and/or agents from giving effect to the restriction order served upon the plaintiff.

The Attorney General of the Federation said the plaintiff was restricted in the interest of public order and public safety in the then western region. Against that background, the plaintiff asked the court to consider the scope of the restriction order and said that is it excessive to restrict his movement to such rigorous degree and unnecessary for the purpose of maintaining public order. According to the plaintiff there was in fact no proof in respect of himself, that there was any ground for restricting him at all. He invited the court to lean in favour of fundamental right.

The Court drew conclusion upon the evidence adduced in the case and upon that alone. The judge concluded and passed judgement that upon the evidence, that there should be no need for an in junction.

It was also pointed out that the defendant will no doubt take note, and so will the police of the court's decision, but it was emphasized that the plaintiff should have liberty to apply for an injunction when it becomes necessary, or when the need arises. Declaratory judgement was granted with liberty to the plaintiff to apply for an injunction.

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207 (1962) All N.L.R. 413.

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We can now consider the advantages of declaration:

5.2 ADVANTAGES OF DECLARATORY JUDGEMENT

(1) It affords a speedy remedy.

(2) Cheapness- declaratory judgement is much cheaper to obtain than the other remedies.

(3) Declaratory judgement avoids protracted litigation.

(4) Declaratory judgement enables negative relief sought to be given; it also affords a means of aborting threatened litigation.

(5) Declaratory judgement could be given where no other relief or relief could be awarded or available.

5.2.1 Advantages Of Declarations or Declaratory Judgement

We shall discuss each of the under listed advantages of declaratory judgement. The advantages of this admirable remedy include the following:

1) It affords a comparatively speedy remedy. This is because the superiority of the jurisdiction in point of speed and finality over the processes of arbitration (adjudication) has been demonstrated in an English case - VANTOL LTD - VS FAIRCLOUGH DODD AND JONES LTD.[208] There was a dispute between the buyer and seller about the terms of a contract dated November 1, 1950 for the perchase of certain oriental oils. The matter was

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208 (1955) W.L.R. P. 642.

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heard as a commercial cause by Mc Nair J. on 5th may 1955. In the course of judgement, his Lordship said:

> ".... if the parties had been minded to make use of the machinery of this court in January or February of 1951, the whole matter could have been disposed of in two or three months,... since there has been a dispute between the parties about the effect of that contract to ask this court for a declaratory judgment which could have been given with possibly a delay of a week or so even while the contract was still running".

In Southerland Shire Council Vs Levendekken. [209] Street J discussed the litigation in Associated products and distribution Pty. Ltd Vs Sunkist Holdings Ltd,[210] as an example of the expeditious use of the declaratory remedy. The judge said:

> "The availability of a declaratory relief and the procedural simplicity of that jurisdiction enabled that dispute to be heard and disposed off by a single judge of this court within two weeks from the commencement of the suit".

It is also useful where the defendant intends to act unlawfully. Declaration can often be a means of aborting threatened litigation which would have been involved and complex if it had been initiated. Perhaps the most famous example of the negative declaration is the decision of the court of

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209 (1970) I.N.S.W.R 356, at 365.

210 (1967) 41 ALJR 61.

appeal in Guaranty trust Co. of New York Vs - Hanny and Co.[211] where the plaintiffs against whom an action was brought in America for the recovery of money paid to them on a Bill of exchange, brought an action in England, while the case was pending before the American court, claiming a declaration that they were not bound to repay the moneys. Majority of the court held that such action was maintainable.

From the foregoing, we understand that declaratory reliefs are many and simple and any person can go to court to seek for this remedy whether or not the claim is a matter of fact or law, It is the duty of the judge or the Court to declare or ascertain the position of each party or claimant in the suit. There are other adavantages of declaration among which include the following:

i) Declaration can be made in circumstances where no other relief would be available, and where it is therefore the only possible remedy. For instance, a closer examination of the cases in private law shows that there are at least three classes of cases of which this is true:

(a) Situations where the absence of an atternative remdy is due to the fact that the parties have not permitted their dispute to get to the point where either of them has a cause of action in the traditional sense, that is,

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211 (1915) 2 KB, 536.

where the praties, alternative remedies are potential only. This type of situation arises in the third example cited above (David Jones Ltd Vs - leventhal).

In that case, the parties have rival contentions as to the meaning of the contract between them, but neither party wishes to assert his view to the point where he would, if wrong, repudiate the contract.

Secondly in a case where an alternative remedy would be available, but not an alternative remedy of equal suitability . For instance, Bawn Pty Ltd Vs metropolitan Meat industry Board.[212] The plaintiff, a wholesale butcher, delivered animals to the defendant for slaughtering, certain of the plaintiff's carcasses were condemned on condemnation, the defendant was required by statute to pay such reasonable compensation as it determined to the owner. The defendant purported to determine the compensation on the basis of the net worth to the Board of the condemned material but the company claimed that the defendant should have regard to the market value to the plaintiff of the condemned material. Plaintiff also claimed that the defendant had wrongfully taken into account the cost to the defendant of disposing of the condemned material. The judge declared that the defendant's decision was vitiated by its considerations and in effect declared the true basis on which the compensation should be determined. He declared in effect that the true value

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212 (1971) 1 NSWLR 47.

of meat determined on a proper basis was considerably in excess of 20C per 100 pounds determined by the Board.

Thus it could be concluded that an atternative remedy was available to the plaintiff (order of mandamus). However, even this remedy was available it would not have been efficacious as declaratory relief, because in proceedins for a mandamus, the court would be unable to declare the formular according to which the valuation of the condemed carcasses should be calculated.

Where the plaintiff has no other remedy available to him whether actual or potential, adequate or inadequate, then declaratory relief could be of advantage. In Peterpan Manufacturing -Vs- CorsetsSilhoutte [213] Gibson J. observes, that the declaratory remedy "has created a new cause of actionin so far as it relates to declaratory judgement in actions in which no consequential relief is or could be claimed, or in which there is no cause of action independant of rule the new cause of action consist in part of subjective conclusion in the exercise of a judicial discreation that the case is one for granting a remedy by way of declaration".

In Re Barnato,[214] it was stated that a declaratory judgement is an equitable remedy and may be granted at the discretion ofthe court. But there has to be a real controversy and not merely a hypothetical problem. Therefore, the

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213 (1963) 15 LGRA 38 at 53.

214 (1949) 1 A11 ER 515.

writ or remedy is available to an individual who claims that his private rights have been infringed by either an individual or the government or its agents.

All the above are examples in which declaratory relief or remedy could arise . Interesting enough are the advantages of declaration as we have observed so far. It remains to say that in the case of the prerogative remedies which are or could be available only where there is no alternative remedy or relief and like mandamus, even where it may be granted, the effect may not be as effective as that of a declaratory relief. As for certiorari, it is available where an inferior court or tribunal acted in excess of its jurisdiction, or where it is desirable that the inferior court or tribunal's order should be quashed. In other words, its primary purpose is to review the record of an inferior court and adjudge the legality of its decision. Certiorari as we are aware, will not lie unless an act has been done that a superior court can quash. Prohibition, on the other hand, would lie where administrative tribunal or court has not yet reached a decision. Therefore, we can say that while certiorari looks at the past (acts), prohibition looks at the future (acts). And as for habeas corpus, it is a known fact that it will not lie where there is an alternative remedy, though it is considered to be the most swift means of obtaining personal liberty in all cases of wrongful detention. The

writ ofhabeas corpus, according to some legal writers is[215] of high constitutional and administrative importance in the common Law countries of the world. It is also referred to as ... an extraordinary remedy which is issued upon cause shown in cases where the ordinary legal remedies are inapplicable or inadequate.

Another remedy available to the plaintiff is injunction it could not be enforced because the plaintiff's right to movement is only at its early stage, and that was done in order for him to assert his right without resorting to the other alternative remedies. In other words, the plaintiff's right to movement was not at stake as to attract the more immediate remedy, that is an injunction. It is clear that the court gave the plaintiff an option either to apply for declaration or an injunction.

In Burma Hawa VS Usman Sarki,[216] the plaintiffs claimed against the defendant (Federal minister of internal (Affairs) the following:

i) A declaration against the minister's orders that plaintiffs should leave Nigeria and remain outside it;

ii) That his action (orders) were illegal, unconstitutional and therefore invalid;

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215 Aihe D.O. et al - Cases and Materials on constitutional Law in Nigeria, (1987) UPL.P153.

216 (1962) 2 All N.L.R. P. 62.

iii) That they should be awarded an injunction to restrain the defendant, his servants/ agents from interfering with their rights to return to and remain in Nigeria.

After reviewing the facts and the preliminary points raised by counsel, the judge, Udo-Udoma J. asked the following Questions:

i) Are orders illegal and unconstitutional?

ii) Had the Minister the power to make the order omplained of ?

After submissions of both counsel; the judge ruled in favour of the plaintiffs. In other words, declaratory judgement was granted to the plaintiffs.

Injunction, as we have already noted, is another remedy, an equitable remedy of course; but it is a discretionary remedy. Therefore like a declaratory judgement an application for an injunction could be refused or awarded depending on the circumstances in each case. In Ayoola Vs Ogunjimi,[217] plaintiffs produced a plan covering the area of land in dispute which the other claimant could not produce. Declaratory judgment was granted for the party that produced the plan of the land in dispute.

Considering the weight to be attached to declaratory judgement and injunction, it could be said that the weight to be attached to an injunction

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217 (1964) 1 All NLR 188.

should be more. This is because it is an enforceable right just as is the case with a declaratory judgement.

In Limited Public Workers VS Mit chell[218] certain employees of the Elective Branch of the Federal Government sued for an injunction against members of the Civil Service Commission to prohibit them from enforcing the provisions of a statute which forbade such employees from taking part in any of the above political management or political campaigns and also for a declaratory. judgement of the unconstitutionality of those processions.

They did not allege that they had violated the statute or that they were threatened with disciplinary action, but only that they desired to engage in acts of political management and a political campaign. It was held, by the majority that this did not present a justifiable issue, that is, it was a" friendly case." or a test Case".

It should be pointed out that the court has power to make a declaration whether there is a cause of action or not at the instance of a party interested in the subject matter. This point was demonstrated in Guaranty trust Co. of New York Vs Hanny.[219] In that case, it was held that the court has power to make a declaration in relation to legal right. And in Dwarkadas Vs Sholapur Spinning Co.,[220] it was held that only a person whose rights have

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218 (1947) 330 U.S 75.

219 Ibid.

220 (1954) S.C.A. 732; A.I.R (1954) S.C. 119.

been affected by a statute may impugn its constitutional validity and that a person's right must be directly or immediately threatened. Similarly in line with the general rule in the United states of America, the point was made clear that the party who invokes the power must be able to show not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement and not merely that he suffers in some indefinite way in common with people generally.[221]

In Crouch Vs the common Wealth[222] the Question was: "What is a sufficient interest as to sustain a claim?" It was held that an allegation that the plaintiff's business was hampered by the necessity of obtaining permits under an alleged invalid law was sufficient interest to sustain the action.

Unlike certiorari and prohibition, declaratory Judgement and injunction are not limited to the requirement that the defendant must be under a duty to act judicially.

5.3 INJUNCTION

It is important to remember that injunction, like declaration and damages, is a discretionary remedy and my not be granted depending on the circumstance(s) of the case. It is equally, important to note that unlike declaration the likely consequence of an injunction ncludes: (i) Imprisonment, (ii) fine and (iii) any other punitive measure the court may impose. Understood from this point, we

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221 Massachusetts Vs Mellon (1923)262 U.S,447 at p.488.

222 77. C.L.R. 339.

appreciate the fact that *"an injunction is an order of the court of law which commands or forbids the person to whom it is directed to do a particular act or thing whether positive or negative depending on the circumstance of the particular issue or case."* Kerr, says:[223]

> "A writ of injunction may be described as a judicial process whereby a person was required or refrain from doing a particular thing according to the exigency of the writ".

In another development[224] the author has this to say about injunction: "An injunction is a judicial process whereby a party is ordered to refrain from doing or to do a particular act or thing". An Australian legal writer on this point says that an injunction is an order of an equitable nature restraining the person to whom it is directed from performing a specified act, or in certain exceptional cases, requiring him to perform a specified act".

We are to appreciate the fact that these are only descriptions and not the definitions of an injunction. These descriptions (though accurate) are only in general sense. In DOLTON Potteries Ltd. Vs Bronottle[225] Hope. J. held that an order for the specific restitution of chattels was not an "injunction" within the meaning of R.8A of the 4th schedule to the Equity Act of 1901 (of England). Thus it should be noted that all court orders forbid or command one

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223 See his book Injunctions, 6th ed, (1927), p.1.

224 (1971) 1 NSWLR 591.

225 Per Millet J.in ISC Technologies Ltd Vs- W.K. Radcliffe (English High Court of Justice, 7th december (1990) unreported); R.P. Meager et al-Equity Doctrines and Remedies, (1992) P. 531.

person to whom they are directed to do some act, but not all court orders are injunctions. Legal usage alone and not logic decides which court orders can and which can not accurately be described as injunctions.[226]

Following from the above we can seethe differences as well as the similarities between prerogative remedies and the common law remedies.

5.3.1 Diferences

1. Injunction, consequences are attached to its orders, that is, *imprisonment or the imposition of fine.*
2. Application- Injunction could issue against the government or its agencies, or parastatals in their official capacity. It issues against administrative or legislative orders.
3. Injunction could be issued against improper exercise of discretion, for instance, in Padfield Vs Minister of Agriculture which we have already noted.
4. Injunction is a statutory remedy and is granted even where there is an alternative remedy.

5.3.2. Similarities

1) Like the prerogative remedies, an injunction could be discretionary, depending, however, on the circumstances of each case. For instance, where to grant it will be of negative effect

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226 *Ibid.*

on the part of the respondent , then the court will decline from ganting the order.

2) Like declaration, injunction could be granted in order to stop or prevent the illegal act of the defendant. In the same way, like declaration, injunction could be granted in order to compel the doing of a positive act, intended or not.

3) Like declaration and certiorari, injunction could be granted in cases where a person's legal rights or interest has been violated or infringed. For instance, in Crouch Vs the Commonwealth.[227] The question before the court in this case was; "what is a sufficient interest as to sustain a claim". And the answer was simple; that an allegation that the plaintiff's business was hampered by the necessity of obtaining permits under an alleged invalid law was sufficient interest to sustain the action.

We shall now consider damages as a common law remedy in relation to legal rights.

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5.4 DAMAGES.

The range of remedies available for breach of confidence varies with the nature of the claim made. If contractual or tortious there will be the legal remedy of damages plus equitable remedies principally the injunction (which we have already discussed in the auxiliary jurisdiction in aid of legal rights

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227 Ibid.

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of the plaintiff. In Peterpan Manufacturing Vs- Corsets. Silhouette,[228] an account of profits was granted but the case was presented as having both a contractual and purely equitable duty of confidence. We should note that in the ordinary course of business an account of profits is not a contractual remedy in tort, on the other hand, it is sometimes an important remedy, for instance, in passing off cases. Thus the aim of a remedy of this nature is to compensate the loss incurred by the plaintiff.

To talk of damages as a remedy, we can say that it is always in connection with compensation. And to grant it is obvious. That is, once the plaintiff or the injured party establishes his claim, the court has no option than to grant the compensation required. There are damages awarded in tort actions, others in relation to contracts, etc. As to the former type of damages (tortious) awards are made in lump sum, that is, the award is made once and for all. In other words there is no possibility of increasing it or decreasing it later because of changes in the situation (that may likely occur in future). In assessing the damages in the great majority of cases where the injuries are relatively minor, there is no real problem. This means in essence, that in assessing minor damages the plaintiff is likely to be completely recovered and back to his business long before the damages are assessed and the whole episode is by then past history . But the problem arises in assessing lump sum remedies, that is, whenever there is regions injuries- whose effects may still

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228 (1963) R.P.C, 54.

can blame the judges if they often go wrong in their predictions- though nobody knows how accurate their predictions are because no research has ever been conducted into this problem. [229]

Other remedies under common law include the following:

(a) Recession

(b) Restitution

RECESSION

The term recession is used in five sences to describe the situation where a party to a contract upon a breach by the other party of a condition, elects to treat the contract as no longer binding upon him. For instances, in shevill Vs Builders Licensing Board. [230] In such circumstances, both parties are discharged from further performance of the contract. However, rights already acquired are not divested or discharged and causes of action which have accrued from the breach continue unaffected. This means that the contract is determined or "rescinded" only in so far as it executory and therafter, the party default is still liable for damages.

Secondly, breach arising by operation of Law, specific provision may be made in contracts, upon the occurence of stipulated event for one, either or both of the parties to have a right to rescind.The content of the term will depend upon the provisions made in the contract which may, for example,

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229 sometimes facts emerge which are disquieting for instance, in King Vs Spouts (Kemp and Kemp), The Quantum of damages, 11th suppt; London, (1973) damages were awarded to a man of 25yrs old on the footing that he would live 30 yrs but nifact he died one month after the trial.

230 (1982) 149 CLR 628 at 625-46

be felt long after the damages are assessed are incurred. In relation to this, we can advert our minds to the method adopted by the Pearson Commission in the assessment of damages of this nature.

The Commission estimates that about 7-% of all tort claims (including claims in fatal cases) involved future earnings loses after the trial or settlement of the claim, and these are the claims which raise problems with lump sums. It is submitted that in such cases, the judge often has to make two wholly different set of predictions at the date of the trial in order to calculate the appropriate sum. First, he has to predict what would have happened to the plaintiff if he had not been injured a prediction which obviously can not be verified or falsified by subsequent events. Secondly, the judge may have to predict what is now likely to happen to the plaintiff. For instance, he may have to make a prognosis as to the probable outcome of the plaintiff's injuries: will the plaintiff make a complete recovery ? if so, how long will it take? If not, what residual degree of disability may there be? How will this affect the plaintiff's earning capacity? Will the plaintiff suffer further pain and discomfort ? Will he die sooner than he might have done otherwise ? In the case of certain type of injury, there is always a risk in brain damage cases and arthritis is a common risk ever bones are severely fractured. These risks are often low, (eg. the risk of epilepsy following brain damage is often put at one in ten), but lump-sum damage awards must take account of the risk. Obviously these are very difficult questions indeed, and therefore nobody

require restoration of the original position or only release the parties from further performance. In such cases, the parties will have chosen to describe what is to take place as rescission but what is meant thereby is a matter of interpretation of the agreement.

The third is the mode of formation of the contract and the surrounding circumstances. If, for example, the other party misrepresents and the other party feels aggrieved, the latter can do either of the following things:

i) To rescind the contract and then confirming it and then he should intimate his election, by words or conduct to the other party. The result is to dissolve the contract abinitio. In such cases, plaintiff may rescind the contract or transaction of his own motion and recover upon an action in assumptive the value of that with which he had parted;[231]

ii) He could also sue in conversion for chattels he had surrended to the defendant.[232]

From the foregoing, we have noted that the operative part in the three types of rescission is that of the party and intervention of the court and not a necessary pre condition.

Fourthy (though not limited to the contract), is that type of recission which in the eye of equity is improperly procured by innocent party, but

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231 See Hill Vs Perrott (1810) 3 Taunt P274; 128 ER, P.109.

232 Prosier et al - On Torts 5th ed . paras. 94 & 105.

material misrepresentation. For example, equitable fraud, undue influence, breach of fiduciary duty or other unconscionable conduct even though the disposition or transaction is neither void or voidable at law. If the subject-matter is equitable interests or chattles, there can be no question of legal intervention and the matter is perforce lies in the exclusive jurisdiction of equity.

The fifth type or use of the term rescission is one dictated by statute. A statute may prescribe "rescission" as a remedy for the mischief with which it attempts to deal. For instance, section 7 and schedute 1 of the Contracts Review Act of 1980 (of North South wates England) which prescribes remedies which have about them the flavour of rescission, but do not use that expression to describe what the legislature is about.

By illustration, where a consumer is supplied with goods but there has been a breach of a condition implied by the Act, which provides that the consumer may recover "as a debt" any consideration he paid for the goods, while the goods revests in the other party.

RESTITUTION

This is a writ by which a defendant successful in an appeal is restored to all he has lost by the execution of the judgement which is reversed; the writ by which stolen goods were formerly restored to their true or original owners.

The trial court has power to order that stolen goods or the proceeds thereby be restored to the owner or their value be paid to the owner from

money taken from the person convicted on his apprehension. This power of the court may also be exercised infavour of an innocent purchaser who has been ordered to restore stolen goods to the true or lawful owner.[233] Where there is doubt about the tittle to the property, the order is suspended for twenty- eight days and if there is an appeal the order is suspended until the determination of the appeal. If the appeal is successful, the order for restitution is annulled. However the court of Appeal may annul, or vary the order.[234]

This means that these remedies- declaratory judgement and injunction) are availabe against administrative acts, whether legislative, executive or judicial. They are also available against improper exercise of discretion, for instance, in Padfield Vs Minister of Agriculture. Under a statutory provision, the milk marketing Board had fixed prices to be paid to producers in each of the eleven regions in England and Wales. Producers from the south east region wanted an increase in the basic price paid to them by the Board. But they could not get a majority on the Board for their view. Under the act, they could and did make a complaint to the minister of Agriculture. The Act empowers the Minister of Agriculture to appoint a committee to investigate and report on such complaints. The minister refused to appoint a committee for that purpose; he claimed that he has a free discretion to do as he deems fit in relation to the appointment of a committee for the

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233 S.28 of the Theft Act, 1968; S.6 of the Criminal Justice Act, 1972, Schedule 5.

234 Theft act, ibid, Schedules 3, Part III; Criminal Appeal Act, 1968, Sections 30 $42. Criminal Damages Act, 1971, S.8 (2); Osborne's Concise law Dictionary, (1974), P. 291.

investigation. The judge remitted the case to the Queens Bench Division, with a discretion to require the minister of Agriculture to consider the complaint made by the appellants according to law. A committee to that effect was set up to investigate the issue in question and submitted its report. But the minister refused the committee's recommendation, holding that he had absolute discretion to either accept or refuse the recommendation set up by the committee on the investigation. Held, that the minister's discretion must be in consonance with the spirit of the law. In chairman, Board of in land Revenue versus Rez Callah and Sons Ltd. the judge said interalia: if a person neglects to render a return of income after he has been required to do so by "the board", he commits an offence and the court has power to punish him appropriately under S. 74 of the ordinance (Income Tax ordinance)". This section 74 requires that Tax payers are to report to the Federal Board of inland Revenue, any failure to pay tax, (in come tax) or what is referred so as "returns" for the 1958 and 1959/60. The defendants violated the provisions of this law or Ordinance of 1958 and therefore subject to penalties. S. 53 of the said Ordinance on the other hand, empowers the Board to use its discretion in making an assement "according to the best of its judgement", Thus the Board has discretion under this statute.

CHAPTER SIX

From the foregoing, it is discernible that the study reveals the following facts: Chapter one examines the concept of administrative law as a branch of public aw which has its origin from the English Common Law. It is concerned with the nature of the powers of public authorities, especially with the manner of their execise in relation to public health, housing, town and country planning among others.

Thus administrative law can be said to be a body of rules which aims at reducing the areas of conflict between the administrative agencies of the state and the individuals.

The important functions of administrative law are:

i) to enable the task of government to be performed.

ii) to govern the relationship between an dministrative agency and the individuals, or private bodies.

iii) it serves as a control over the administration.

iv) It also serves as a check against legislative enactment or executive orders which are found to be impossible of performance.

We have also observed that the sources of administrative law in Nigeria are not different from those obtainable in other common wealth countries.

Therefore, the concept of administrative law is not limited to administration, but extends to or acts as a modern natural law limitation on the powers of the state.

The second chapter relates to the history and development of the prerogative writs, now designated as 'orders'. History asserts that each of these prerogative writs developed on its own, but were applied uniformly - throughout the realm (in England). However, in Nigeria, the reception and application of the prerogative writs (orders) was in piecemeal. And as noted , after the adoption of these orders, in Nigeria, the local ordinance of No. 4 of 1870, effected some changes - to the effect that the English common law, the doctrine of equity and the statutes of general application which were infore in England inter alia, shall be inforce within the jurisdiction in Nigeria though not earlier than the 24th day of July, 1874.

Furthermore, we examined since independence that Nigeria has established a federal system of government, the regional legislatures were conferred with some powers to enact their own laws in respect of some matters, while others were exclusively reserved for the federal government.

Under Nigeria's 1979 constitution, these prerogative writs/orders have been re-named prerogative orders and referred to as judicial review.

The institutions or bodies amenable to the orders of certiorari and prohibition, as we have noted, are among others - inferior tribunals or courts, administrative or local authorities, parastatals of government,

etc. It is understandable that the guiding principle is that the opportunity of obtaining an order of prohibition may be lost by a delay that leaves nothing for the court to prohibit.

In Britain, the statute of Limitation of 1975 vests a wide discretion upon the courts to allow writs to be served outside the normal limitation - period. In NIgeria, it is the Public Officers Protection Act of 1958, and the various High Court Civil procedure Rules.

The order of Mandamus, as noted, is a high constitutional writ which used to issue (In Britain), in the King's name from the High Court of Justice in order to compel the performance of a public duty where no other remedy was available. The main aim was to prevent disorder fr m the failure of justice and defects of the police. The whole gamut of the order ofmandamus was for a variety of purposes and it is common - knowledge that where there is injustice, and good governance, there ought to be one. Says Lord Denning; Mandamus was introduced in order to avail injustices of the peace, both in their judicial and administrative functions.

The third chapter critically examines the habeas Corpus, which was developed as a result of deprivation of personal liberty of individuals in Britain.Therefore, the right of personal liberty developed inthe historical setting of feudal society during thefeudal era in Europe. This was because the influential lords could order for the arrest of innocent citizens without any cause. thereby depriving such citizens their right of personal liberty. Thus

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Habeas Corpus was enacted to guard against arbitrary arrest and/or detention by the Monarchs - in 1688. It is clear, therefore, that Habeas - Corpus, from time im emorial, was issued for a variety of purposes. This purpose is still maintained today under the Nigeria law, that is, in the application of the preprogative orders as well as the Habeas Corpus, styled judicial review otherwise known as constitutional remedies under the 1979 Nigerian constitution.

In chapter four we observed the traditional role of the courts, for instance, in this case of Tindal V wright[235] Where it was said: "The court will not decide a point of law which has become academic, even though both parties are anxious to have it determined aand though it is a matter of public importance on which a government department desires the guidance of the court with a view to introducing an quentin legislation if necessary".

It is evident from the above that it is the duty of the court to interprete laws and not to enact laws, though the courts can advise as to amendment of some legislations where it is deemed necessary to do Thus the traditional role of the courts is to interprete laws. And in doing this, the judges should not misinterprete based on their whimsical desires or arising out of the burning desire for material gain. Judges should be impartial in discharging their perfuntory duties. Therefore Courts should be concerned with real issues placed before them and not those that are theoretical in form which may be academic, hypothetical, fictitious or

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235 (1922) 38 T.L. R. 521.

abstract in nature. For instance. as we noted in Vine Vs- national Dock Labour Board Moreso, it is not enough that the plaintiff is eager to obtain a declaration and the defendant ready to oppose it. Infact both parties must have a substantial interest in the action, taking into cognizance, the weight of evidence adduced by each party to the suit.

It is wortly of note that where a plaintiff's claim for a declaration is not based on concrete and convincing facts out of which a dispute has arisen the justiciability or otherwise of the issue before the court comes into question.

Consequently the question whether an issue before the court is justiciable is distinct from the question whether the plaintiff has " has locus standi to sue or assert his right. However, these two questions are so interrelated that to draw a line of demarcation between them may not be conceivable. This is because both are hinged on justiciability , that is, if the issue before the court is theoretical or a "test case", often referred to as a "friendly case" then the court declines jurisdiction, meaning that such issue is not justiciable. This also means the plaintiff lacks or has no interest to protect.

In chapter five, we note the relationship between the prerogative orders and the private law remedies, while the former is a creature of statutes, the latter are common law remedies, namely, damages, injunction, restitution, etc. We also note that the prerogative remedies are discretionary in nature. In other words, these remedies are available at the discretion of the judge in the

sense that these remedies or orders are available only where no other remedies exist or are readily available. The private law or common law remedies, on the other hand, are constitutional remedies granted as of right, for instance, the right of appeal.

In order for a person to invoke the prerogative remedies/orders, such a person has to establish his legal right. Similarly, a claim should be backed up by establishing a legal right in the case of the private law remedies, for instance, in cases of declaratory judgement. Furthermore, for the prerogative orders or remedies, disobedience to their orders does not amount to contempt of court, but it does constitute a contempt in the case of disobedience of the private law remedies or orders, particularly disobidience to an injunction.

Generally, the differences and similarities between the prerogative orders and the private law remedies are as follows:

i) In case of an injunction, consequential acts go with its orders, that is, where there is breach or disobedience to orders.

ii) Even where there are alternative remedies, injunction can still be issued, unlike in the case of the prerogative orders.

iii) In case of damages, it is awarded in order to compensate the loss incurred by the plaintiff.

Damages are of different types:

a) there are those that are tortious where awards are made in lump sum.

b) There are those that are made based on the loss incurred.

Therefore, in assessing damages, we have to take into account the quantum of damages to be awarded: how equivalent a loss is measured in terms of the damages awarded or injuries sustained, eg. in libel cases, where there is serious injury whose effect may still be felt long after the damages are assessed, the method adopted by the PearsonCommission in assessing the damages can be commendable to certain extent. This is because the judge takes into account the following:

i) What would have happened to the plaintiff if he had not been injured ?

ii) What is now likely to happen to him - will he make a complete recovery, if so, how long will it take ? If not, what residual degree of disability may there be ? How will this affect the plaintiff's earning capacity in future ?

iii) Will the plaintiff suffer further pain and discomfort ?

iv) Will he die sooner than he might have done otherwise ?

These and other rating questions are difficult questions to answer and the judge who predicts wrongly as to what might have happened to the plaintiff or what will happen to him in future, etc is beyond the reasoning of any mortal. Therefore, in assessing damages of such nature, it is a better

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view that it should be the discretion of the family of the deceased (where dealth arises) as to the compensation to be made. In some instances, the family of the deceased may even forfeit the compensation on the ground that what *God proposes, no man can set it asunder.*

RECOMMENDATIONS

At this juncture, the following recommendations are made in relation to the prerogative remedies/orders:

1) That Nigerian courts/judges while adjudicating in relation to the prerogative orders, should be more flexible in allowing an aggrieved person(s) that is, whose interest has been injured to invoke his right without delay . This is because justice delayed is justice denied. Moreso, justice means uphotding of rights and the punishment of wrongs by, the law.

2) Where cases of claim of right are brought before the court, even though the time limit within which such a claim should have been made has elapsed, the court should first of all find out why the delay and if the reason is genuine or reasonable, for instance, due to lapses on the part of the investigatory body, the claim should be granted. Reason being that there might have been difficulties in obtaining sufficient evidence to sustain such a claim.

3) Application for judicial review should not be restricted to three month, that is, the limitation time to bring a claim, but should be

extended to say, five months, or to a "reasonable time". This is because a claimaint may be handicapped for the simple reason of being poor, many a times one hears in courts that lack of money was the reason for bringing his case/claim belatedly. In other words, he had no money to retain a counsel. Therefore courts should consider such cases without malafides.

4) Unnecessary long period of detention before trial is a matter to be considered in passing a sentence. This is because, by law, a person detained in prison custody or that of the police, should be brought before the court for trial within twenty- four hours. Where this constitutional proviso is abused, then there is breach of that person's constitutional right . A judge, should not be belligerent.

Where a particular court or judge has no jurisdiction either to try or impose punishment, such a court/judge should not waste time in transfering that particular case to the court that has (jurisdiction over the issue in question. This means the applicant should not be left in suspense not knowing what to do, particularly where he has no counsel. In such instances, the court should advice the applicant as to what step he should take in relation to his case, but not to remain silent or indifferent pertaining to the case before him over which he lacks jurisdiction.

Finally, it is apparent that the relationship between the prerogative remedies/orders and the other private law remedies sometimes overlap in terms of a right. Eg if this happens , the courts may consider the circumstances of each case, provided there is a legal right occassioning the claim. In other words, the courts are to allow remedies to be invoked inter-changeably, in as much as the claim is as of right.

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