ADMINISTRATIVE LAW

Study Guide, and Lecture Notes

(Semester I & II)

for

LLB Students

BY

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I. Preface

The Ghanaian Administrative Law is not well developed and there is not much done to create control mechanisms and at curbing abuse of administrative power. With the advent of independence of Ghana and its subsequent development, the provision of state services has increased. Also the progressive development of the mixed economy has ensured that the state plays an important role in an individual life. The body of administrative law has therefore existed at the same time to control and regulate this relationship – between the state and the individual. In addition to governing the relationship between various administrative agencies set up to implement public policies and those individuals or private bodies affected, administrative law also regulates and controls the relationship between these various agencies for example, the relationship between a minister of state and a local authority.

Every individual and the various organs of both central and local government engaged in administration – and naturally, every lawyer – requires a basic knowledge and understanding of administrative law. Their decision may affect what would normally be regarded as fundamental rights and freedom – i.e freedom of association, property rights, freedom of expression, the right to a fair pubic trail, the right to liberty, subject to a sentence imposed by a court of law, freedom on grounds of sexuality. Each involves an exercise of power conferred by law – either by statute or prerogative. It is here that administrative law sets itself to supervise the decision – maker in the exercise of power to ensure fairness.

The objective of this course of lecturers is primarily to present to the students and other readers of administrative law as it exist in Ghana. The work aims at introducing students at the undergraduate and at the postgraduate or masters level – whether in a university or polytechnical institute or school of public administration – to the basis and essentials of administrative law. The present work deals with administrative law with a special emphasis on Ghanaian cases and statutes. A numerous Ghanaian cases, practically all of

the reported cases to date, are cited and a good number of relevant Ghanaian statutes are used.

It should however, be noted that a substantial part of Ghanaian law is either to be found in English statutes, or is derived from it. Moreover, Common Law and Equity which form the very basis of Ghanaian law, are products of English case law. To this extent, much attention is paid to relevant English law and materials in the present work.

The present work is divided into six major chapters (Lectures), three for each Semester – which coincide with the course outline for the LL.B degree syllabus. Every student studying Administrative law initially requires a basic knowledge of some doctrines and principles in constitutional law (e.g. the concept of law, the rule of law, separation of powers, constitutionalism, common law and equity, etc.). The knowledge of divisions of the law in Ghana; the sources of law in Ghana; the court system in Ghana are also relevant. All these topics form part of the introduction to the study of Constitutional and Administrative Law.

In Lecture One, I give the formal definition of administrative law and further examine its constitutional basis. I then turn to draw a distinction between a constitutional law and administrative law as they exist in theory and practice. I also deal with the historical development of administrative law and the reforms in the last four decades. I also discussed here the sources and classification of administrative power; and delegated legislation.

Lecture Two critically examines judicial review of administrative action – i.e the concept of judicial review; judicial review of administrative decision; whether all decisions by public bodies are reviewable; to which bodies can application for JR be granted; what kinds of decisions are subject to judicial review and who may apply for judicial review?

In Lecture Three, we study the grounds (substantive and procedural) on which the ordinary courts may intervene to question an administrative decision or action, (eg. the grounds include the *ultra vires* rules, abuse of power, proportionality and natural justice).

The above three Lectures are designed to cover semester one of the academic year while the following three lecturers are for Semester Two.

In Lecture Four, I examine the various extra-judicial avenues of redress available where a dispute arises which lacks a legal remedy in the ordinary courts. These avenues are administrative tribunals, public inquires, commissions of inquires, the Commission on Human Rights and Administration of Justice (CHRAJ) and the SFO. Administrative justice is secured through these avenues as supplementary to the ordinary courts of law.

Lecture Five and Six consider public interest immunity and remedies in administrative law irrespectively.
At the end of each topic (Lecture) is a list of bibliography for further reading. Sample tutorial questions will be given to students at the end of each major topic for discussion. Some of the questions will be found useful to students preparing for examination in administrative law.

Some guidelines and techniques
This **study guide** is a condensed version of all of the important information you need to know in order to do well on a test. Since administrative law consist of rule after rule and draws links with other disciplines like constitutional law, it is seductively easy to make lots of notes. This is usually a mistake, because when you do this, you frequently find yourself writing out textbooks. It is better simply to give shorter and simplier account of relevant materials that is provided by the well known text books. To take care of this situation, I have summarized concisely here the cases and materials selected specially for the student to ultimately have a useful set of notes from which to quickly revise for examination purposes. Let me, however, remind the reader with the words from Glanville Williams, that "when studying law he/she has two aims. His or her primary and most important aim is to make himself or herself a lawyer. His secondary (but also very important) aim is to pass his or her law examination with credit. To a large extent these two aims can be pursued by the same means: for both purposes one must study cases either in the original law reports or in case books to understand the legal problems themselves and how legal arguments are conducted" (Williams, Learning the Law 1982).

The study of cases is an important element in administrative law. In view of that I have presented here some of the principal cases with basic facts, decisions of the courts and commentary in clear straight forward language. Other decided cases by CHRAJ which are similarly relevant are cited. The student is advised to also read full text from the law reports or from the titles listed under consult or from any other authoritative sources available. Why read cases in their original? It teaches you how to understand legal reasoning; it teaches you to distinguish and harmonize cases to suit your purpose; it reinforces your learning by repeating important points; it indicates relative weight of precedent.

Students often get confused about how they are expected to use their knowledge of law in examination so far as administrative law is concerned. Ideally, one should be able to follow the following steps:

i) Brief statement of the problem / facts / claim: (eg the question in issue is whether A is liable to B or not; or whether A and B belong to the same system or not);

ii) Presenting arguments (for and against your position) concerning the subject. If a person says X is true but does not say why X is true the person is unlikely to agree with the statement. If on the other hand a person says X is true because Y and Z show it to be true, the person have a basis for understanding.

iii) Statement of law: (Support arguments with specific and relevant authorities when applicable - case law, public policy, legal comment, statutes, information, ideas. More than one case for a question is relevant and the titles should be correctly stated in their original order, {<u>applicant</u> v <u>respondent (1921)</u>} underlined); where only one party is remembered you can simply state it this way (In Congreve's case… or In an action against Home office…….); where the name of both parties are forgotten you may at least indicate that (There is the proposition for the principle that……)

iv) Evaluation: (Give your legal judgment. Work only with the facts you have been given). You must humbly beg if you want to differ from a decided case or positive authority in your opinion.

v) Sum up in few sentences the outcome of disputes / problem and be free to use your personal discretion.

For extra credits the student must give good coverage of question, strong organizational structure, reasonable arguments, precise use of legal terms and a written style. For more tips, the student may refer to Strong S.I, "How to Write Law Essays and Exams", UK, 2003

II. Consult

1. H. W R. Wade, Administrative Law, 4th edition, Oxford 1982
2. A. W. Bradley and K. D. Ewig, Constitutional and Administrative Law 4th edn. pp 603 – 758, U. K. 1993
3. S.A. de Smith, Constitutional and Administrative Law, 4th edition, 1981
4. John Alder, General Principles of Constitutional and Administrative Law, 4th edition 2002
5. David Stott & Alexandra Felix, Principles of Administrative Law, London, 1997
7. The Constitution of the 4th Republic of Ghana 1992. (Chapters 6,9,23 and 24)
9. Decisions of the Commission on Human Rights and Administrative Justice (Ghana 1994-2000, CHRAJ, Accra (edited by S.Y Bimpong-Buta).

III. Table of Approved Citation

Instrument	First Division	Second Division	Third Division
Constitution	Article	Claus	Section
Statute	Section	Sub-Section	Paragraph
Bill	Clause	Sub-Section	Paragraph
Order	Article	Paragraph	Sub-Paragraph
Regulations	Regulation	Paragraph	Sub-Paragraph
Rules	Rule	Paragraph	Sub-Paragraph
Schedules	Paragraph	Sub-Paragraph	None

Note that, nearly all government orders (regulations, rules, schedules) made under statute are now generally called statutory instruments – see, the statute law revision act 1998 (Act 543)

IV. Table of Ghanaian Cases – Decided by the Courts and CHRAJ

1. Adofo v Attorney General
2. New Patriotic Party v Attorney General (31st December case)
3. NPP v Ghana Broadcasting Corporation
4. NPP V Electoral Commission
5. Dei Darke X11 (1991) 2 GLR SC 318
6. In re Oppong (Decd); Mensah v Bediako (1991) 2 GLR 357
7. Tsatsu Tsikata (No 1) v Attorney-General (No 1)
8. Tuffour v Attorney General
9. Re Akoto
10. Republic v High Court; Ex parte Agyei
11. Agyei Twum v Attorney General
12. New Patriotic Party v Inspector General of Police
13. Osman v Darko
14. Republic v Volta Region Chieftaincy Committee and Another, Ex parte Asor
15. Republic v committee of Inquiry (R. T. Briscoe) (Ghana) ltd. Ex Parte R. T. Briscoe (Gh)
16. Republic v PNDC Secretary, Ex Parte Oti
17. Republic v Otu Ex part Attorney General
18. Gbedemah v Awoonor Williams
19. Darkwa v the Republic
20. Akainyah v The Republic
21. Inkumsah v The Republic
22. Quayson v Attorney General
23. Kwpong v GCMB
24. Akosua Bedaabuo v Yaa Hima (1948-51) DC Land 232
25. Sfarijiani v Bassil (1973) 2 GLR 260
26. Dochie v State (1965) GLR 208
27. Mahama v Kotia (1989-90) GLR
28. Bilson v Apaloo (1981) GLR 15

29. Fattal and Another v Minister for Internal Affairs and Another
30. Republic v Liberty Press Ltd (1968) GLR 123
31. Kyereme v Adu (1962) 1 GLR 540, (1987-88) 1 GLR 137.
32. Foli v the State
33. Adjei Twum v Attorney General (2005-06) SC GLR 732
34. Ghana Commercial Bank v Commission on Human Rights and Administrative Justice (2003-04) SC GLR 91
35. Appiah v The Republic (1997-98) 1 GLR 219
36. Kunadu v Yiadom (1995-96) 1 GLR 8
37. Republic v High Court, Koforidua (1998-99) SC GLR 91
38. Charmant v Mensah (1982-83) GLR 65
39. Republic v Adansi Traditional Council (1972) 2 GLR 126
40. Ghanatta v Board of Trustees (1993-94) 1 GLR 316
41. Anin v Ababio (1993) 1 GLR 509
42. Akati v Nartey (1980) GLR 218
43. Watara v Republic (1974)2 GLR 24
44. Accra Heart of Oak v Ghana Football Association (1982-83) GLR 11
45. Aboagye v Ghana Commercial Bank (2001-2002),
46. Akosua Bedaabuo v Yaa Hima (1948-51) DC Land 232
47. Saawa v Dumah (1991) 1 GLR 452
48. Kpe koro v the republic (1980) GLR 580
49. Yakubu v Attorney –General (1993-94) 1 GLR 307
50. Ghana Bar Association v Attorney General and Another (1995-96) 1 GLR 598
51. State v Yankey (1966) GLR 208
52. Ellis and Woode family v Raffour (1975) 2 GLR
53. Anaman v Osei Tutu (1976) 1 GLR 111 @ 114
54. Vanderpuye v Nartey (1977) 1 GLR 428
55. Blay-Morceh v Ghana AirwaysCorporation (1972) 2 GLR 254-261
56. Frafra v Boakye (1976) 2 GLR 332
57. Awuni v WAEC
58. Republic v fast track high court, Ex-Parte CHRAJ (Richard Anane as interested party)
59. Bank of Ghana v Labone Weavers Enterprises Ltd

60. Nyameneba v The State (1965) GLR 723
61. CHRAJ v Social Security Bank Ltd High Court, Accra 21 August 1996 [C R 1994-2000]
62. CHRAJ (No 1) v AG (No 1), SC, Accra, 23 June, 1999 [CHRAJ Rep 1994-2000]
63. AG (No 2) v CHRAJ (No. 2), SC, Accra, 23 June, 1999 [CHRAJ Rep 1994-2000]
64. CHRAJ v Dr Richard Anani (MP) Sept 15th, 2006
65. The Republic v CHRAJ, Ex-parte Dr Richard Anane [March 13th, 2007] by Baffoe Bonnie
66. Benneh vThe Republic (1974) 2 GLR 47 per Apaloo JA
67. Tuffour v AG (1980) GLR 637
68. Tetteh v Norvor CHRAJ 1999 [1994-2000]
69. NPP v Electoral Commission, SC Suit No 11/93, 17 Aug. and 16 Sept.1993 appoint DCE
70. NPP v President Rawlings and AG, SC Suit No. 15/93, 3 May 1994 – appointment DC
71. NPP v President Rawlings and AG, SC 1993 [Can president be sued]
72. Samuel Appiah Ampofo v CHRAJ, SC July 2005 {CHRAJ Report 1994-2000]
73. Republic v Ghana National Museum Board, Ex-parte Nundo (1980) GLR 377
74. Republic v Ghana Railway Corp, Ex parte Appiah and Another (1981) GLR 752
75. Arkhurst v Ghana Museum and Mounments Board (1971) 2GLR
76. Sam v Comptroller of Customs and Excise (1971) 1 GLR 289
77. Republic v IGP, Ex – parte Cantare 1982 / 83 GLRD 54
78. Republic v Inspector – General of Police, Ex parte Wood (1973) 2 GLR 113
79. Homeku v The Director of Prisons (1982/83) GLRD 39
80. Kwapong v GCHB (1984 – 86) GLRD 10
81. Republic v Ghana Cargo Handling Company Ldt, Ex parte Moses 1980 GLR 206
82. Republic v State Hotels Corp, Ex parte Yeboah and Others (1980) GLR 875
83. Republic v Jasikan ASP, Ex parte Dzanyie-Kpor (1974) 2 GLR 303
84. Republic v IGP, Ex parte Addo (1974) 2 GLR 313.

V. Some general legal terms

Since reference is frequently made to case law, it is necessary to explain some basic technical terms. Below are 60 of such selected terms relevant to administrative law.

1. *Ad litem:* - a grant of administration for the purpose of action.
2. Agent: - a person having authority to transact business with another Person.
3. Appellate jurisdiction: - power of a court to hear an appeal.
4. *Audi alteram partem:* - a person should not be condemned without a fair hearing
5. Applicant: - a person who makes a formal request for a redness or relief.
6. *Bon a fide*: - in good faith
7. Caveat: - a notice in writing to the Registrar, warning him not to issue a grant of probate without giving notice to the person who is lodging the caveat (the caveator) or his solicitor
8. Civil Servants: members of the ministries who assist the Government in formulating and implementing government policies. Under the repealed Civil Service Act, 1960, they include persons holding posts created by or under that Act or posts created by any other enactment designated as Civil Service but excluding – members of the Civil Service Commission; the judicial branch; elected politicians; and other servants under the Public Service. Civil Servants under the Civil Service Law 1998, (PNDCL 327) consist of – all persons serving in civil capacity as in posts designated as Civil Service posts by or under the Civil Service law 1998 (e.g. Office o Head of State, Ministries, Government Departments at National levels and regional levels, Office of District Assemblies, Department of District Assemblies) and all persons holding posts designated as Civil Service post created by or under any other enactment, the emoluments attached to which are paid directly from the Consolidated Fund or other source approved by Government.
9. Consolidate Fund: - the general account with the Bank of Ghana, into which government receipts are paid and out of which payments are made in the form of standing charges, known as Consolidated Fund Services.
10. *Contra bonos mores*: Against good morals or manners.

11. *De die in diem*: from day to day.
12. *De facto:* As a matter of fact.
13. *De jure:* - As a mater of right.
14. *De novo:* - Anew, from the beginning.
15. Deed: - A written contract, signed, sealed and delivered.
16. Deed poll: - A deed by one party only, for example, to change his name.
17. *Delegate non protest delegare*: - Maxim, an agent cannot delegate his authority.
18. Distributive Justice: - is concerned with the allocation of rights, duties and burdens among the members of a community so that equilibrium is ensured (equal treatment before the law).
19. Estate: - a general term meaning, the property of a deceased person.
20 Estoppel: - a principle which precludes from asserting something contrary to what is implied by a previous action or statement or by pertinent judicial determination.
21 Ex officio: - by virtue of office
22 Ex post fact: - by a subsequent act. An ex post facts statute has a retrospective effect (see Phillip v Eyre 1870)
23. Fringe benefits: - things such as pensions, vocations and insurance that are granted to employees in addition to wages.
24. *Funtus officio*: - office or duties of a person terminated.
25. *Habeas corpus*: - a writ commanding a person who has the custody of another to bring the former before the court.
26. Indenture: - a deed; a written agreement between two parties.
27. *In ioco parentis*: - in the position of a parent.
28. *Inter alia*: - amongst other things.
29. *Inter vivos:* - during lifetime.
30. Intestate: - not having left a valid will.
31. *Intra vires*: - within one's legal powers.
32. Judicial review: - Control exercised by courts over procedure of statutory authorities and other subordinate bodies which may result in grant of prerogative orders, or declarations stating a person's right. It is concerned not with the decision (merits) of which review is sought but with a review of the manner of the decision–making process.
33. Jurisdiction: - Power of a court to hear and decide on a case; authority to

legislate; territorial limits within which legal authority may be exercised including those parts of the sea deemed as territorial waters.

34. *Jus:* - a right derived from a rule of law; a concept of Roman law
35. *Jus Gentium*: - The law of people i.e. Law of universal application
36. *Jus Cogens*: - Principle of general international law whereby a treaty would be invalidated if it departed from the body of principles or norms from which no derogation (deviation) is generally permitted (see, Vienna convention on law of Treaties, 1969, articles, 53, 64) Examples of *jus cogens* rules are those rules prohibiting genocide and the use of armed force [art 2(4) of UN charter].
37. *Jury*: - A body of persons (who are citizens and within a certain age group) selected according to the law and sworn to give a verdict on some matter according to the evidence. In general, the jury decides facts and the judge decides questions of law.
38. Latent ambiguity: hidden double meaning.
39. Lease: - the grant of the use of land or buildings for an agreed specified period.
40. Legacy: - a gift of pure personal property by will, to a legatee.
41. Legal estate personnel: - representative of the executor or administrator of the estate of adeceased person in whom is vested administration and distribution of the estate.
42. *Mandamus:* - an order requiring a person to do an act in connection with his official duties.
43. Moratorium: - an extension of time, made by a Government, for the payment of debts.
44. *Nemo judex in causa sua*: – which means that no one should act as judge in any matter if he or she has some kind of vested interest in the decision as all decision should be free from bias.
45. Petition: A written application asking for relief or remedy, as in a petition for divorce. Available only where statute or Rules of Supreme Court specifically prescribe it as a mode of procedure.
46. Prerogative: - a right or privilege exclusive to a particular individual or a body (subject to no restriction) e.g. prerogative of the president or an authority to commute a death sentence or pardon an offender (e.g. Art 72 of 1992 Constitution of Ghana) – prerogative of mercy).
47. Public Servant: - a person who works for the state or for local government such as a judge or a teacher, officers of internal revenue Service
48. *Quo warranto*: - prerogative writ requiring a person to show by what authority it

exercises a liberty or privilege.

49. Respondent: - one against whom a petition is presented or an appeal is brought

50. Solicitor: - one who may conduct legal proceedings or give advice on legal problems. In the UK one must have passed on examination of Law Society and possess a certificate authorizing him to practice. In Ghana once a person qualifies as a lawyer he become a solicitor, as well. There is no requirement for any special certificate to be a solicitor in Ghana.

51. State enterprises: - prescribed corporate bodies established under sector ministries for efficient and profitable operations with payment of dividends under the control of a Commission (see PNDC LAW 190)- e.g. Food Distribution Corporation; GBC, Ghana Film Industry, GIHOC, Ghana Film Industry Corporation; Ghana Water ad sewerage Corporation; Ghana Railways Corporation; New Times Corporation; Graphic Communications Groups Ltd.; Ghana National Procurement Agency; Ghana Supply Commission; Post and Telecommunication Corporation; State Construction Corporation; State Fishing Corporation; Tema Food Complex Corporation; Achimota Brewery Company; Bonsu Tyre Company Limited; Ghamot Enterprises Limited; Ghana Industrial Company Limited; the 10 Regional Development Corporations; etc. (there are over 50 of such prescribed bodies in existence in Ghana).

52. *Status quo, or Status quo ante*: - The state of things existing up to a given date.

53. Statutory Declaration: - A certificate made by virtue of the Statutory Declaration Act, and signed in the presence of a commissioner for oaths; declaring that the particulars are correctly stated.

54. Statutory Instruments: - Orders made by a Minister or Department under the power of a statute and having the force of law. Formerly called "Statutory Rules"

55. Subpoena: - A writ commanding the attendance of an individual in court under penalty if he fails to do so.

56. *Sui juris*: - Not subject to disability; of full legal capacity.

57. Sovereignty: - Political and legal concept relating to ultimate authority in a State. A State's freedom from external control.

58. Tort: (from '*tortus'*- distorted): Liability in tort arises from breach of a duty primarily fixed by law which is towards others generally, affording some measure of

compensation that will put the victim back to his/her original position as he/she would have been if he/she had not sustained the wrong (e.g. negligence, vicarious liability, etc.)

59. *Ultra vires*: Beyond one's legal powers or authority.

60. Waver: - relinquishing of a claim freely. The abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted. (See Banning v. Wright [1972] 2 All ER 987. It also mean surrender by operation of law.

LECTURE I

NATUR, PURPOSE AND DEVELOPMENT OF ADMINISTRATIVE LAW

1.0 Objectives

At the end of this lecture you should be able to:

- explain what is meant by administrative law and constituent elements;
- understand the differences between administrative and constitutional law;
- trace the development of administrative law in Ghana
- identify the sources and limitations of administrative power;

1.1 Definition and Nature of Administrative Law

(a) What Is Administrative Law?

According to Black's Law Dictionary, Administrative Law is:

> "*the Law governing the organization and operation of the executive branch of government (including independent agencies) and the relations of the executive with legislature the judiciary, and the public"*

Felix Frankfurter, in his book entitled "The Task of Administrative Law" defined it as:

> *" law which deals with the field of legal control exercised by law-administering agencies other than courts, and the field of control exercised by courts over such agencies"*

The role of the courts in this area is only to determine the ***legality*** of administrative **action** or **decision**. But a government policy which underpins a decision may not be challenged.

In addition to governing the relationship between various administrative agencies set up to implement public policies and those individual or private bodies affected, administrative law also regulates and control the relationship between these various agencies – for example the relationship between a minister and a local authority.

Administrative Law is divided into the following three parts:

1. The Statutes endowing agencies with powers and establishing rules of substantive law relating to those powers.
2. The body of agency-made laws, consisting of administrative rules, regulations, reports or opinions containing findings of facts, and orders, and
3. The legal principles governing the acts of public agents when those acts conflict with private rights

(b) Who are the subjects of administrative law?

S**ubjects** of administrative law or those qualified to take part in administrative legal relations are:

- Public bodies[1] (See, Figure 1 below as classified under three categories)
- Individuals that have legal capacity to carryout independently the rights and obligations defined by the administrative law of the state.

What is Public Law Body?

Judicial review under this category deals with public law bodies and the question has always been of how to identify a public body. In ***R v Panel on Take-Over and Mergers, exparte Datafin plc***, the body, which was subject to review exercised no statutory or prerogative powers and was not even based on a private contract or constitution. The court held that its functions were amenable to review of the panel's enormous *de facto* power to take decisions affecting the public and crucially, the fact that there was no other means by which those affected by the decisions of the panel could have challenged them in the court. The decision was followed in ***R v Advertising Standards Authority Ltd ex parte The Insurance Service pls (1989) The Times 14th July***. The ASA Ltd had investigated and upheld a complaint that the Applicant's insurance company's advertising leaflets were misleading and amounted to a breach of advertising standards. In granting the company's application for judicial review, the court indicated that the ASA exhibited

[1] **I**ndeed, a body may be defined as a public body and as such, be subject to the principles of administrative law, even though it was not established by, and did not derive its powers from government (David Stoff & Alexandra Felix, principles of Administrative Law, 1997, chapter 6).

similarities with the agency in Datafin and that though it had no statutory or common law powers, its functions brought it under public law.

This case may be contrasted with **R v Football Association ex parte Football League (1993) 2 All ER 833** wherein the Football League sought to form a Premier League and introduce consequent changes to its regulation. The Football League had a contractual agreement with the Football Association whereby it was permitted each year to operate the league. The Football League contended that the Football Association was amenable to review because it exercised monopolistic control over the game and controlled rules governing it. Dismissing the application, it was held that the Football Association was not discharging functions of a governmental nature and there was no evidence that its functions would be exercised by a governmental body if it did not exist.

To identify a public body, you have to look for:

a. Whether it has a statutory or common law duty,
b. What functions does it perform, and
c. Adequacy of legal control over its actions.

(c) What are the Objects of regulation under Administrative Law?

Objects are the legal relationship which appears between any of the subjects of administrative law (i.e. – a disputes between an individual and public official or between one and another public official)

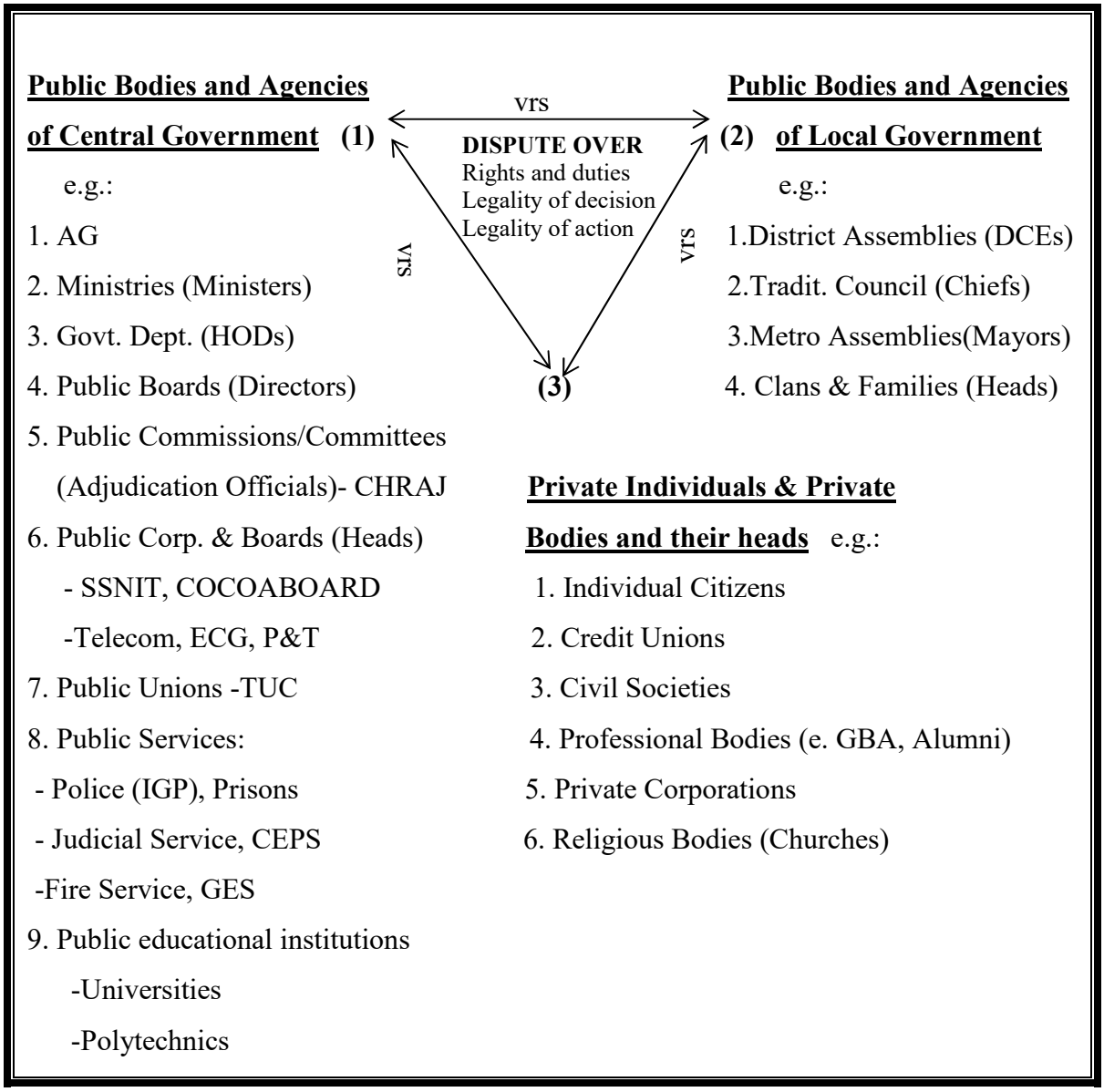


Fig: Potential Parties to Administrative Suit – by O.K Seneadza

(d) State Activities governed by Administrative Law

It is not intended to list all the numerous and varied activities of the state that affect its citizens. Indeed, not all of state activities are governed by administrative law. To give an idea of the areas that fall under administrative law we may list those concerned with the following:

(i) Social Services – such as Health, Education and Welfare

(ii) Running of Public Utility – such as supply of water, distribution of electricity, transport services, post and telecommunication services

(iii) Involvement of state with individuals rights, such as immigration control, licensing, town planning, housing, social security.

(iv) Administration of industrial relations and nationalization of industries

(v) Control of business environment – such as planning and building permission, regulations about pollution, consumer regulations, labeling & similar requirements, health & safety regulations (sanitation), noise control etc.

Whilst endeavouring to meet the requirements of countless laws of this sort, the individual may find that powers are being exceeded or abused. It is in these areas that administrative law seeks to control officials acting outside their statutory powers. We will look at these powers and their limitations under a separate topic later.

(e) The idea of political question and justiciability

There are matters which the court, mindful of the doctrine of separation of powers, consider to be purely of political nature and therefore reluctant to review. Matters such as the exercise of prerogative of mercy or issues of national security, and matters of policy may be regarded as non-justiciable. Thus, in the case of **Nottinghamshire County Council v Secretary of State for the Environment (1986) AC 240**, it was held that the court should not intervene to quash guidance drafted by the Secretary of State on the authority of Parliament, setting limits of public expenditure by local authorities, unless and until a statute provides otherwise, or it is established that the Secretary of State has abused his power. These are matters of political judgment for him and for Parliament.

1.2 Administrative Bodies and "Soft Law"

A range of administrative bodies formulate and implement policies on a day to day level. The administrative activities affect our lives not only in the form of binding laws and regulations but also by means of **"soft laws"-** but they are **persuasive and influential** on administrative behaviour.

Functions of "soft law":

a) To guide official interpretation of policy

b) To regulate procedure

c) To setup voluntary standards of conduct

d) To impose managerial efficiency standards

Types of administrative bodies that normally create "soft law":

a) Executive agencies
b) Regulatory bodies
c) Advisory bodies
d) Local authorities

Let us look at each of these in more briefly.

a) Executive agencies

These are executive agencies and service providers set up under framework agreements, and are led by chief executives who have broad discretion as to the implementation of policy. These agencies have to meet performance targets imposed by the citizen's charter, but these are not legally binding, e.g. Police Service, Education Service, National Fire Service, Prisons Service, Judicial Service, Health Service Immigration, etc.

b) Regulatory Bodies

They monitor the activities of privatized industries. They have a broad mandate to regulate these industries by non legislative means e.g. Ghana Cargo Handling Company Board, Ghana National Museums Board, Ghana Cocoa Board etc. They are normally statutory bodies.

c) Advisory Bodies

These are bodies set up to advise the government or act in the interest of certain sectors of the society. Their decisions are non-binding, but influential e.g. Council of State

d) Local authorities

While the functions of local authorities have been greatly reduced through processes such as rate-capping, compulsory competitive tendering and the transfer of other important responsibilities, such as housing, to the private sector, there are important remaining functions on which local government makes rules and formulates policies:-

Setting of rents and determining tenancy conditions, production of development plans and a range of other local matters such as enforcement of compliance with hygiene and sanitation. They also share with the environmental Agency certain duties and power for

environmental protection that derive from community directives. In addition to these a local government may under the local government act make bye-laws for the whole or any part of the district but may not be binding on other areas that are outside their jurisdiction.

1.3 The distinction between Constitutional Law and Administrative Law

While Constitutional Law concentrates on subject areas like:

- Constitution – definition, historical development, sources, classification.
- The Judiciary – its role, socio-economic development, powers under the constitution, independence, accountability, public confidence, constrains etc.
- Parliamentary supremacy – law-making process; substantive, procedural and institutional limitations, privileges etc.
- The executive – its powers and control, the Presidential powers and limitations.
- The separation of power – by Montesquieu, Wade & Phillips, the 1992 Constitution of Ghana and separation of power and the control of power etc.
- Civil liberties – the Police powers and control; Public order (freedom of assembly and association); State protection of citizens and regional approach (fundamental human rights such as those under Chapter 5 of the constitution); freedom and independence of the media; public interest immunities etc.

Administrative Law strictly deals with subject areas such the following:

- Administrative power– Nature, sources, classification, development and limitations;
- Delegated Legislation – types, the need for delegation and control;
- Prerogative powers –existence, extent, relevance, judicial control;
- Judicial Review – preliminary hurdles, grounds for review, remedies procedure for apply for judicial review, its significance within the Ghanaian Constitution;
- Administrative Justice (Ombudsman) – Administrative Tribunals, CHRAJ, Commission of Inquiries, SFO, Media Commission;
- Local Government administration.

Note that, “the Rule of Law” is relevant to both constitutional and administrative law and could be treated under any of the two branches of law to tie together some of the central themes in both branches.

In the case of the Roman Civil Law system as in France, German or Italy, a clear distinction between the two branches of law can be drawn. For example in France under the “*droit administratif* and *tribunaux administratifs”* disputes concerning the exercise of administrative power are dealt with by specially constituted courts called “*Counseil d’Etat*”,

In the common law jurisdictions like Britain or Ghanaian, there is no precise demarcation between constitutional and administrative law, so far as judicial decisions in both areas are concerned. The same courts can handle cases relating to both constitutional or administrative matters. This is because administrative activities often interfere with constitutional issues.

For instance, the issue of passport and its control with regard to immigration, come under both constitutional law (i.e. determination of constitutionality of decision or interpretation of the Constitution in matters such as deportation or citizenship) and also administrative law where, for example, the Minister of Interior or Foreign Affairs uses official powers arbitrarily (*ultra vires)* in determining whether or not to issue traveling documents.

The distinction between a crime and administrative wrong, though capable of giving rise to some difficult legal problems, is quite simple. The firs thing to understand is that the distinction does not reside in the nature of the wrongful act itself. The same at may be both a crime and a civil or administrative wrong. Police power of search, arrest and detain in an operation can call for administrative action against the officer if he abuses those powers and a criminal action can also be taken against him if operation results in theft or death of a person. Prison officers may also face administrative action in the exercise of official powers (where the rights of convicted prisoners are abused) and a criminal action (where a prisoner is tortured or killed intentionally.

It is therefore difficult to draw a clear distinction between administrative law and other branches of law. A rough distinction may be drawn between constitutional law and administrative law by suggesting that constitutional law is mainly concerned with the structure of the primary organs of government, whereas administrative law focuses on the legal aspects of the ay-today administrative activity an how grievances are addressed. The lawyer should be concerned with the sources of administrative power and the adjudication of disputes arising out of the public services. The source of power is discussed below.

1.4 Historical Development of Administrative Law

Administrative law has grown up over the centuries to control and supervise the use of government powers. With advent of the welfare state and its subsequently development, the provision of state services has increased.

The progressive development of the mixed economy has ensured that the state plays an important role in an individual's life. The body of administrative law has therefore developed at the same time to control and regulate this relationship between the state and the individual. Judicial intervention to control excesses of government power can, however, be traced far back to the case – *Rooks v Wither (1589)*.

In developing the principles of judicial review to control actions of the administrative bodies, the courts needed also to provide appropriate remedies. They utilized here the so-called prerogative writs of **"certiorari"** (to quash a decision), **"prohibition"** (to prevent unlawful actions) and **"mandamus**" to compel the fulfillment of a public duty).

The post-war years witnessed a period of judicial restraint in controlling the act of government. In the 1960s, however, there were many examples of judicial interventionism with the landmark decisions of the house of Lords, in particular, in *Ridge v Baldwin (1964*), *Redfield v Minister of Agriculture (1968)* and *Aiminic v. Foreign Compensation Commission (1969)*

Ghanaian administrative law is rooted in the English common law. However, it is not as well developed and there is less of a conscious effort to create checks aimed at curbing abuse of administrative power.

1.5 Administrative Power and Duty [2]

In our definition of administrative law in the first section of this chapter, we came across the words '**Power'** and "**Duty"** as the core elements which need special attention in the study of Administrative law.

The concept of power is very broad and its exercise vary from one public body to the other. Hence, government agents and public bodies (CHRAJ, SFO, Labour Commission, Media Commission, EPA, etc)[3] are identified with a particular kind of power –either adjudicative power, or investigatory power, or legislative power, or all of these together.

Some public bodies also have special executive power:– to appoint board members; to dismiss board members (e.g. NIB); to issue directives; to grant or withhold consent in respect of specific acts of the corporation; to make contracts (SSNIT).

(i) Administrative Power: Is the power conferred by law (Act of Parliament or a Decree or delegated legislation) on a public body or public official to take a decision or act on its own discretion. And administrative power may itself give rise to a duty to act in a particular way. This is illustrated by *Pad field v. Minister of Agriculture 1968 (where the context of the statute requires the minister to refer a complaint to a committee of investigation).*

Administrative Power has two meanings:

- Capacity to act in a certain way (to provide service or purchase land on agreement based on independent judgment).

[2] Functions includes power and duties (under Article 295, Interpretation)

[3] Under PNDCL 42 Sec. 55, the Council has power to make statutory instruments (legislative power). CHRAJ under 7(1) of Act 456 has investigatory power and has also adjudicative as well as executive power to alter administrative decision. Also, Local governments have legislative power to make bye-laws; National House of Chiefs under Art 273 of 1992 Constitution has appellate jurisdiction (through a judicial Committee); Commission of Inquiry under Article 279(1) has power of the High Court or Justice of the High Court at a trial in certain respects.

- Authority to restrict or take away the rights of others (e.g. power to acquire land compulsory whether or not the owner wishes to sell, or power to license a trade or occupation). If power is not justified by law the courts will render *it ultra vires.*
- Discretionary – discretion is the right or privilege given an authority to act in certain circumstance and within given limits and principles on the bases of ones own judgment and conscience. Exercise of discretionary power – see, Article 296 of the 1992 Constitution. Where in the constitution or in any other law that discretionary power is vested in any person or authority –

  "(a) that discretionary power shall be deemed to imply a duty to be fair and candid; (emphasis mine)

  (b) the exercise of the discretionary power shall not be arbitrary, Capricious, or biased either by resentment, prejudice or personal dislike and shall be in acceptance with due process of law; and

  (c) where the person or authority is not a judge or other judicial officer, there shall be published by constitutional instrument or statutory instrument, regulations that re not inconsistent with the provisions of this Constitution or that other law to govern the exercise of the discretionary power".

ii) Administrative Duty: As act that is due by legal or moral obligation. A person is subject to a duty when the law commands or forbids him to do an act. A duty is to act by compliance without a choice so as to produce certain consequences depending on the nature and source of duty (e.g. routine work for which one receives payment or duty to pay levy). The duty to exercise discretion needs to be equipped with power. If the power of an authority is challenged in court he may rely on "duty" as justification for his action and failure to perform duty calls for a remedy of *Mandamus.* The general view is that, if the performance of a duty on behave of a superior authority is illegal or unreasonable, then the choice is either to perform or refuse to perform but either has its consequence. You comply and face any legal action that may arise or you disobey and face dismissal.[4]

[4] Under Common Law, as in the case of *Ridge v. Baldwin*, there is distinction between dismissal of a "Senior Officer" and a "Servant" In that case, a senior Officer can only be dismissed for a cause and is entitled to be heard before he is dismissed whereas, a Servant can be dismissed summarily.

1.6 Source and Classification of Administrative Power

(a) Legal Source of Administrative Power:

Government and public bodies derive power from two main legal sources:

i) ***prerogative*** (exclusive authority)

Decisions and actions of authorities with prerogative powers are normally not subject to judicial control or review (used to be exercised exclusively by the British Crown- e.g. summoning and dissolving parliament, appointing Bishops and Judges, exemption from most statutes – these are today nominal rather than substantial.

Case 1: Burma Oil Co v Lord Advocate (1965) the house of Lords held that the prerogative power to destroy property to prevent it falling into the hands of the enemy during the wartime did not take away the rights of the property owners to the payments of compensation.

It means, that the courts can also challenge the exercise of a power derived from the prerogative by reference to principles of reasonableness and fairness.

Case 2: in R v Criminal Injuries Compensation Board ex parte Lain (1967) the courts demonstrated a willingness to review the action of a tribunal established under the prerogative. This principle was confirmed by the court of appeal in R v Home secretary and criminal injuries compensation board ex parte (1995) Where the board's rejection of claims from victims of sexual grounds that it was arbitrary, irrational and unfair (the challenge failed on the merits)

Case 3: in *Lakers Airways v Department of Trade (1973*) Lord Denning was of the view that the courts could review an exercise of prerogative power. "The law does not interfere with the proper exercise of the discretion … but it can set limits by defining the bounds of the activity and it can intervene if the discretion is exercised improperly or mistakenly"

Prerogative of mercy:

Under Article 72(1) of the 1992 Constitution of Ghana, "*the President may, acting in consultation with the Council of State (a) grant to a person convicted of an offence a pardon either free or subject to lawful conduct; or (b0 grant to a person a respite, either indefinite or for a specific period, from the execution of punishment imposed on hi for an offence; or (c) substitute a less severe form of punishment for a punishment imposed on a person for an offence; or(d) remit the whole or part of a punishment imposed on a person or a penalty or forfeiture otherwise due to Government on account of any offence."*

The central issue for the present purposes is the extent to which the exercise of prerogative power is reviewable by the courts. The declared function of the courts in the context of judicial review is one of 'review' rather than **'**appeal'. The judges are concerned not with the decision but with the decision making process. It is not the source of the power which determines whether the courts can exercise their supervisory role. It is the nature of the power which determines whether the courts can entertain a challenge to an exercise of power.

ii) ***Statute law***

Apart from certain prerogative powers, legislations (including delegated legislations) is almost exclusively the source of administrative power. In Britain the principle of parliamentary supremacy ensures the primacy of Acts of Parliament. Statutes in Britain are, therefore, not generally subject t judicial review unless in direct conflict with European Community law (see, *R. v. Secretary of State for Transport, ex part Factortame* Ltd. 1994 1 ALL ER 910). However delegated legislation may be challenged in the British court of law (since such a power comes from a "parent statute" for a defined purpose).

In Ghana the principle of supremacy of parliamentary supremacy does not exist. The constitution is the supreme law of the Republic of Ghana. Hence acts of parliament and delegated legislations can be challenged where they contravene any provision in the constitution. Also, decisions and actions taken by public authorities which violate individual rights or are *ultra vires,* unreasonable and illegal are reviewable by the Ghanaian courts.

For example, the case concerning constitutional right to freedom of association and procession can be cited here – *NPP* v. *IGP* (per Hayford Benjamine), in which it was

contended that the Public Order Act, 1994 (Act 491) does not seek to place prior restraints on its realization, (i.e. Part 1 of the Act dealing with assembly and procession is unconstitutional). Also Public Order Decree (NRCD 68) which requires police permit prior to processions was regarded unconstitutional because it is inconsistent with Article 21(1)(d) of the 1992 Constitution and therefore considered null and void. It has an inherent limitation of a constitutional right. (See, E.K. Quashiegah's article on this issue in Ghana Law Journal, Vol. XX, 1996-1999

(b) Classification of Administrative Power

The pattern that emerged from the statute book with regard to the power of these public bodies is similar to the pattern of functions. The bodies are given a wide array of power that are virtually unchecked in the terms of the statute. It is also clear that if these powers were to be classified according to legal structure, they would be seen as to cut across the lines of **executive, legislative and judicial** authority. Let us look at these in more detail.

It is important to note, that classifying power as "judicial", "executive", "ministerial" etc is not useful in determining which powers might be subjected to procedural limitation.
The powers vested in the various bodies cut across judicial, executive and legislative lines. One reason for avoiding the use of such words is that they often have indefinite meanings.

(b) **Limitations of Administrative Power** Of course, there are many checks on the powers discussed above. Apart from limitations in case law the following limitations are discovered in the Ghanaian Statutes namely: Consultation; delegation of power; hearing right of individuals (an example of an internal hearing can be found in the Tax Commission Decree). Actions concerning unfair labour practice were heard by a Special Labour Tribunal under section 31 of the Industrial Relations Act (Repealed by the Labour Act. There is also a right of appeal from decisions of this tribunal under section 33 of the Act. Another form of control is public accountability (e.g. periodic auditing of reports, and submission of annual reports etc.)

1.7 Questions for Review and Discussion

1. Explain the differences and point of interaction between Administrative law and Constitutional law.

2. What do you understand by administrative power? Give the sources of administrative power and explain if there are any limitations to such powers.

Recommended Reading

Extracts from W. Dickey and F. S Tsikata "A Look at Administrative Law in Ghana" 1972, 9 UGLJ 1

LECTURE TWO

DELEGATED LEGISLATION

2.0 Objectives

At the end of this lecture you should be able to:

- explain the concept and essence of delegated legislation;
- list the different types of delegated legislation;
- evaluate the role of delegated legislation within the law-making framework; consider what measures are available to check and control the possible abuse of delegated legislative power.

2.1 Introduction

As we had already learnt in previous lessons the sources of administrative power may be found in Common Law prerogative (powers not shared with subjects or exclusive and unchallenged authority eg- relations to foreign affairs, national security) and Statute law (acts of parliament plus delegated legislation).

However, for the vast area of public action today, the source of power lies exclusively not in common law but statute law which includes delegated legislations. Delegated legislation is a form of subordinate delegation with certain checks and control as discussed below.

Out of the Statute law, delegated legislation plays a leading role so far as administrative law is concerned. This is a law-making power granted by parliament to government departments, and other subordinate bodies. For example the following Acts (framework acts) allow delegation of legislative power to other subordinate bodies:

- Civil Service Act, 1960 (s. 43) – gives the president the power to make regulations by legislative instrument when necessary for administration of Civil Service.
- EPA Act, 1994, (s. 2 (h)) – allows the Agency to make standards and guidelines relating to pollution of air, water and land.

- Statistical Service Law, 1985 (PNDCL 135) (s. 28) – allows the Council to make regulations by Legislative Instrument.
- CHRAJ Act, 1993 (Act 456) (s. 26) – permits the Commissioner and the Deputy to make regulations by Constitutional Instrument relating to investigation of complaints.
- Local Government Act, 1993(Act 462) (s.79) – allows District Assemblies to make bye-laws. Also s. 10 (2) states that, "a District Assembly shall exercise deliberative, legislative and executive functions".
- Legal Service Law, 1993 (s. 17) – the AG may, on recommendation of the Board by legislative instrument, make regulations for procedures concerning the service.

It is very rare that an act of parliament to contain all the provisions which are essential if scheme leaving the details to be filled in by subordinate legislation. Importantly, the resulting confusion of terms (including rules, regulations, orders, bye-laws and schemes) by which power is exercised resulted into the general term – Statutory Instrument – to unify all such procedures. This is illustrated in the figure below.

1. LEGISLATIVE ACT **Parliament / Military Council**	**2. DELEGATED LEGIS. Ministry, Govt. Dept, Pubic Board, Commission**	**3. SUB-LEGISLATION Subordinates: Sub-committee of Boards,**
Makes Primary Law or the framework for the executive organs in form of Acts oe Decrees	Makes Secondary Law in specific areas of specialization as Legislative Instruments (LI) by Ministries, or Executive Instruments (EI) or bye-laws by local govt. and metropolitan assemblies. It is flexible since law can change.	Makes rules, Orders, Codes. Procedures. It usually has *"delegates non potest delegare"* (delegated may not delegate his power

Fig.2: The structure of delegation of legislative power to a Subordinate body

2.3 Justification for Delegated Legislation[5]

A Special Committee on Ministers' Powers in Britain[6] (1932) reported that:

> "*We do not agree with those who think the practice is wholly bad. We see in it definite advantage, provided that the statutory powers are exercised and the statutory functions performed in the right way…But in truth whether good or bad the development of the practice is inevitable."*

In Britain, the volume of delegated legislation produced far exceeds the number of statutes enacted annually. [7]

The main reasons in support of the need for delegate legislation are:

a) Pressure upon parliamentary time: (attempt to enact all laws itself will collapse the legislative mechanism)
b) Technicality of subject-matter: (to facilitate consultation with expects who can readily understand the issues and they do not involve questions of principle or secrecy at the preparatory stages (as in the case of a drafted bill regarded as confidential document until it is read for the first time in parliament).
c) The need for flexibility: (to take care of unforeseen administrative difficulties which may appear, usually when a new public service is established or to prevent recourse of Acts to parliament for amendment when a scheme had began)
d) State of emergency: (executive authority to take quick action in time of national danger or disaster. Provision is made for such powers in the 1992 Ghanaian Constitution). To pass through the long parliamentary procedures will not be the ideal thing under emergencies or national disasters if quick action is needed).

[5]See, W Brandley and K.D. Ewig, Constitutional and Administrative law, 4th Edition, UK 1993, pages 626 -629 Criticism against delegation centers on whether the executive organ of government is not given greater power than they should be given and more than they need? Or if it is not a threat to parliament's primary function (to legislate power to the executive organ and its subordinate bodies to make laws on general policy)? The critics engaged themselves more with matters concerning - taxing power (system of custom duties)

[6] See, Cases and Materials 13.3

[7] In 1989, 2510 statutory instruments were published and by 1995 he annual figure had risen to 3,345.

2.4 Types of Delegated Legislation

The Statutory Instrument Act controls the publication and procedural requirements to be followed in the making of delegated legislation.

(a) Orders: Here force of law is given to acts f the government. Effectively the order is made by the appropriate Minister, with the formal assent of the Crown in the case of Britain and parliament in the case of Ghana. They are useful tools for formalizing matters of constitutional importance – (e.g. the fixing of date for a referendum). In Ghana the power to make orders tend to be authorized by the constitution and statute (e.g. power of President acting in consultation with Council of State to issue orders by proclamation published in the Gazette in time of emergency (Article 31(1) of 1992 Constitution of the Republic of Ghana) and under the Emergency Power Act, 1994 (Act 472).

(b) Regulations made by Ministers: Here authority is conferred by statute on the Minister in person to make regulations. For example, the Local Government Act, 1993 enabled the Minister to State. A wide range of power is conferred on Ministers by Parliament, allowing the Minister to make regulations, orders, rules etc. Some of these are listed above in the introductory section.

(c) Bye-laws: Delegated authority may be conferred on public authorities (e.g. local authorities) to make by-laws. Thus, the Local Government Act, 1993 empowered District Councils to make be-laws for the good rule and government of their area.

(d) Other types of delegated Legislation: Many other bodies are authorized to make delegated legislation. Groups such as the National Trust may create laws.

2.5 Control of Delegated Legislation

Although delegated legislation may be necessary, it is also clear that there must be mechanisms in place for preventing any possible abuse of delegated powers.

The existing means of control include:

(a) Parliamentary Control: The most obvious way is to ensure that the Parent Act is not itself drafted so as to devolve wide delegated powers which may be difficult to control. Normally delegated legislations are laid before Parliament through Select Committees on Statutory Instruments (depending on provision of the Parent Act). Under the Local Government Act 1993, for example, requires that

the bye-law is submitted to the Minister for approval or rejection (s. 9(3)) and to follow a given national or area model when determined by the Minister (s. 81).

(b) Political Controls: In addition to the scrutiny of subordinate legislation by Parliament and select committee, other political controls exist. These include – *Prior consultation* (various interest affected by proposals must be consulted if required by act of Parliament and the instrument comes into force as soon as published in *Gazette* or after a short while stated in the document itself); *Publications* (to follow laid down publication procedure and made public because ignorance of statutory instrument is no defense but failure to issue it may in certain circumstances be a defense)

(c) Judicial Checks: The power of the court in relation to statutes is confined to interpretation. In respect of statutory instruments their powers are wide as the court must first be satisfied that the provisions of the Parent Act have been complied with. If not, the resulting instrument will be *ultra vires* and void. An instrument may be declare void for the following reasons:

- *On substantive grounds* – a statutory instrument maybe held to be *ultra vires* if no power to make that particular instrument is conferred by the Parent Act.[8]
- *On procedural grounds* – ii) Where the exact procedure as lad down in the Parent Act has been complied with, the secondary legislation which has been created may be struck down. The likelihood of the court intervening will largely depend on whether the procedures are mandatory or directory. If mandatory, non-compliance s likely to make the instrument defective. If directory, the courts may take the view that non-compliance does not affect its validity. However, the court will adopt a stricter approach where the exercise of delegated legislation interferes with the liberty of the individual, excludes the citizen from access to the courts, imposes taxation or removes property rights without consultation or compensation.
- *Unreasonableness* – Delegated legislation may also e declared void on the grounds of unreasonableness on the principle in *Associated Provincial*

[8] See, *Chester v. Bateson* [1920] 1 KB 829 a regulation provided that no action could be taken before the court to recover the possession of a munitions worker's home without the consent of a Minister. The court held that this regulation is void because it affected a fundamental right.

Picture House Ltd. v. Wednesbury Corporation [1948] 1 KB 223 (now referred to as ' irrationality' y virtue of Lord Diplock's comments in the GCHQ case. Unreasonableness applies particularly to bye-laws.

In Kruse v. Johnson [1898] 2 QB 91, Lord Russell of Killowen CJ held that a bye-law which is unequal in its operation as between different classes, or which is an 'oppressive or gratuitous interference with the rights f the subjects' would be void.

2.6 Questions for Review and Discussion

1. Identify four reasons in support of the need for delegated legislation. What are these reasons? Which of them is the most important and why?

2. "The very concept of delegated legislative powers involves an uneasy confusion between executive and legislative authority" (Select Committee Report of 1977/78, UK) What does the Committee mean by this statement?

3. What criticism can be made of this form of law-making? Give two good examples of delegated power from the Ghanaian statutes.

Lecture 3

JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS

3.0 Objectives

By the end of this Lecture you should be able to:

- identify when a decision will be amenable to judicial review;
- recognize grounds for an application for judicial review;
- elect appropriate remedies;
- explain the procedure for an application for judicial review;
- appreciate the significance of judicial review in the Ghanaian Constitution.

3.1 Introduction:

Judicial review as practiced in Ghana and for the most countries with written constitution, such as US, deals with the power of the judiciary:

(a) To declare the constitutionality or otherwise of a legislative acts. It is the power to determine the unconstitutionality of laws or executive decisions and to declare them unenforceable (which concerns Constitutional Law) and

(b) To determine the legality of decisions made by a wide variety of administrative bodies (which concerns Administrative Law)

However in the UK, due to the unwritten nature of the constitution, the court has no power to declare an act of parliament as unconstitutional. Therefore, judicial review in the UK, usually refers to review of administrative decision.

Note that the power of Judicial Review must also be distinguished from Judicial Power. Judicial Power is the power vested in the courts to adjudicate over controversies between parties, to decide on the rights of parties and impose sanctions where necessary. In Ghana the judicial power is vested in the superior and inferior courts under Article 125(3) of the 1992 Constitution.

Judicial review of administrative decisions is concerned with the power of the court to check and control activities and decisions of the following:

(a) government bodies and agencies;

(b) tribunals and inferior courts, and

(c) certain private bodies whose decisions affect the pubic.

Generally, judicial review provides a way of keeping control over people or bodies whose actions and decisions affect the public.

In its reviewing capacity the court is basically looking to see whether a decision-making body has acted – *'ultra vires' or 'intra vires."*[9] If a decision-making body acts *ultra vires* the reviewing court has the discretion to intervene.

Although Parliament normally provides a right of appeal to an administrative tribunal against an administrative decision with a possible further right of appeal to a court, the courts can nevertheless intervene on various well established grounds to question a decision of a public authority.

Judicial Review of administrative decisions in this respect is concerned with the legality of the decision made (the manner of the decision-making process) and not with the merit of the particular decision such as calling of witnesses.[10]

Unlike UK, where it is said that the exercise of the power of judicial review over administrative bodies are discretionary, in Ghana, under Article 23 of the 1992 Constitution, administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed on them by law and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a court of law. Thus in Ghana, administrative bodies are limited by;

1. Express provisions of their enabling Acts and
2. Rules of fairness and reasonableness.

What is the differences between Appeal and Judicial Review?

Appellate court has the power to review a case and to substitute its own decision for that of the lower court. Appeal may be made on both the law and the facts of the case, so that

[9] ***'***Ultra ***vires'*** means beyond ones legal powers**.** ***'***Intra vires means within ones legal powers

[10] 1 In, Ghana Commercial Bank v The Commissioner, CHRAJ, (Supreme Court, 2002), Civil Appeal No. 11/2002 the Supreme Court was to determine whether the law gives courts the power to only review decisions of CHRAJ or if they can also go into the merits of the case by calling witnesses.

a full re-hearing may take place. Judicial review by contrast, is concerned solely with the manner in which the decision-maker has applied the relevant rules. It is thus procedural in nature. It is not for the court to substitute its judgment for that of the decision-maker to which powers have been delegated, but has kept within the rules laid down by statute and common law or the constitution.

What is the test to determine what decisions the courts can review?

The following questions are asked to determine whether a decision can be reviewed by the Courts or not.

(i) Is the body which has made the decision subject to judicial review?

(ii) Is the body in question subject to judicial review, is the decision itself by all standards and rules reviewable by the Courts?

(iii) Does the person who seeks to challenge the decision has sufficient interest himself/herself to do so?[11] For example, if it mater relates to his or her employment or property.

What decisions are not reviewable by the court?

Though a decision by a public body may be seen as "***ultra vires***" or "**breach of natural justice"** the courts will decline to review it if it is within a field which they regard as being "non-justiceable".

They include decisions in the areas of:

(i) Foreign affairs

(ii) Defence and national security (defence strategies cannot be made public through court procedures)[12]

(iii) Law enforcement (policy decisions of police, prisons)

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[11] Refer to Article 2(1) of 1992 Constitution of Ghana concerning enforcement of the constitution and requirement of standing. Note that an applicant in an action for judicial review of an administrative decision must have a sufficient interest in the matter to which the applicant relates. The justification for the requirement is to limit challenges of administrative decision-making in general to genuine cases of grievances and to avoid unnecessary interference in the administrative process by those whose objectives are not authentic.

[12] See, *Liversidge v Anderson* (1942). In some cases today, national security has been used as an excuse for all sorts of infringements on individual liberty (abuse of non-justiciable matters).

The issue of Capacity – "Locus Standi"

An applicant in an action for judicial review of an administrative decision must have a sufficient interest in the matter to which the application relates. The justification for the requirement is to limit challenges to administrative decision-making to genuine cases of grievance and to avoid unnecessary interference in the administrative process by those whose objectives are not authentic.

Reference may be made to Article 2(1) of the 1992 Constitution on the enforcement of the constitution and requirement of standing.

3.2 Grounds for Review

Lord Diplock in *Council of Civil Service Union v. Minister for the Civil Service* [1985] AC 374, provides a useful three-fold classification of the grounds, any one of which will render a decision *ultra vires* and these have been adopted into the Ghanaian system:

(a) Illegality;
(b) Breach of Statutory requirements
(c) Procedural impropriety.
(d) Unreasonableness of decision

You should bear in mind, however, that the grounds for judicial review are neither mutually exclusive nor exhaustive and some often overlap. What is important here is that if the decision is not *ultra vires* then there are no grounds for review. Let us now turn to each of the three categories of grounds for review.

(a) Illegality

A decision-maker cannot exercise any power that as not been conferred on him or her by law. Anything in excess or any abuse of powers conferred will be *ultra vires*. Powers are often conferred by statute. By interpreting the original statute the court will decide whether the decision in question is *ultra vires* and it may be *ultra vires* for one of the following reasons:

- ***The decision or activity is in excess of the powers conferred***

Case 1: In *AG v. Fulham Corporation* [1921] Ch 440 the Corporation was empowered under statute to maintain wash-houses but this power did not extend to the operation of a laundry. (Foreign Case)

Case 2: In Mixnam's Properties Ltd v. Chertsey Urban District Council [1965] AC 735, the Council had power to run a caravan site but this power did not extend to the imposition of regulations regarding contractual lettings between caravan tenants. (Foreign case)

- ***Abuse of Power***

Case 1: *Padfield v Minister f Agriculture, Fisheries and Food* [1968] AC 997, holds that Ministers are under a duty to use discretionary powers to promote Parliament's intention, and will be acting *ultra vires* if they act counter to the policy and objects of the Act in question. (Foreign case)
Case 2: In *Municipal Council of Sydney v. Campbell* [1925] AC 338, the Council has power to compulsorily purchase land required for 'carrying out improvements in or remodeling any portion of the city.' It was held to be an abuse of that power to acquire land to obtain for itself an expected increase in the value of that land as the result of development of adjoining land. (Foreign case)

- ***Error of law and /or fact***

Courts are more willing to review errors of law than errors of fact. Judicial review is not seen to be a suitable forum for factual disputes which involve cross-examination of witness.

In *Anisminic Ltd.* v. *Foreign Compensation Commission* [1969] 2 AC 147 it was held that by considering issues and asking themselves questions (i.e. the nationality of the successor in title) that they were not empowered to ask, the Foreign Compensation Commission had made an error in law which took them outside their jurisdiction.
(a leading foreign case)
Prior to this case there was an important distinction between errors of law "going to jurisdiction" (jurisdictional errors of law) and errors of law "within jurisdiction."

A decision-maker who erroneously interpreted the law as providing a power was said to make a "jurisdictional error of law." Any decision taken under that power would therefore automatically be *ultra vires* because he decision –maker did not have power to decide in the first place.

An "error of law within jurisdiction" is the type of error made by a decision-maker who errs in law whilst exercising powers conferred. This type of error will not automatically render the decision *ultra vires*. The courts have discretion to intervene if the error of law appeared on the record of the decision.
The House of Lords decision in *Animinic case* makes it (in most cases) unnecessary to make the above distinction. Their Lordship decides that error of law could be treated as

"going to jurisdiction" even when it was an error made in the process of exercising power conferred rather than an error in deciding whether the power existed. It would appear that all errors of law are jurisdictional errors, with a few exceptions.

Factual issues which can be reviewed are:

i) jurisdictional questions of fact – where the existence of a particular state of affairs is a condition precedent.

ii) Non-jurisdictional question of act – where there is no condition precedent, judicial review may be available on the facts if it appears that a decision-maker has considered the facts and then decided unreasonably.

iii) Non-jurisdictional question of fact – there may also b grounds for judicial review on the facts if the decision-maker has failed to give proper weight to all relevant facts when coming to his or her decision.

- ***Unauthorized Delegation***

There is a presumption known as '*delegates non potest delegare'* – a delegate cannot delegate his or her authority. Where power is delegated to someone, e.g., by statute, that person cannot then sub-delegate that power to someone else.

In *Vine v. National Dock Labour Board* [1957] AC 488 the Board had power to dismiss Dockers, but a sub-delegation of that power to a disciplinary committee which then dismissed Vine was *ultra vires* and the dismissal was held to e unlawful

The **Carltona Principle** acknowledges that there will be widespread sub-delegation in central government departments – this is unavoidable, it would be practically impossible for a government Minister to exercise all powers personally.

Statutes have expressly authorized extensive delegation in local government administration, e.g. the Local Government Act, 1993.

(b) Breach of statutory requirements

Statutes conferring power on, for example, a Minister, often allow the decision-maker a certain amount of discretion[13]. Grounds for judicial review can arise when that decision-maker does not exercise discretion properly or abuse the discretion conferred.

[13] Discretion in te context of administrative law means – where a person is given discretion to decide, that person is expected to exercise sound judgment after considering all relevant factors whilst keeping an open mind sufficiently free from external influence.

A decision can be challenged when a decision-maker either:

- did not exercise discretion sufficiently free from outside influence, (the decision might be made on the basis that the decision-maker is limited by some outside rule; or allows someone else to decide for him or her; or the decision-maker develop a policy to aid decision-making, but has then refused to make exceptions apply policy without flexibility) .

  For example, a decision-maker who is required to take certain factors into consideration should have regard to the factors and take them into consideration rather than being dictated by those factors (*R v. Stepney Corp.* [1902]1 KB 37)

- abused the discretion conferred – where a decision-maker uses power for an improper purpose or to frustrate the legislative purpose; makes a decision on the basis of irrelevant factors or fails to take account of relevant factors; reaches a decision that is unreasonable in itself. This is much crossover with illegality.

Case 1: Municipal Council of Sydney v. Campbell [1925] AC 399 (briefed above)
Case 2: Padfield v Minister f Agriculture, Fisheries and Food [1968] AC 997, (above)
Note, that the above two cases fall into the two categories, namely:
- *illegality* and *irrationality.* How do you explain this?
Because, *Municipal Council of Sydney v. Campbell* is an example of "illegality" in that the Council were abusing the powers conferred and "irrationality" in that they were failing to exercise discretion conferred in the way intended as they were guided by irrelevant factors taken into consideration.

Similarly, *Padfield v Minister f Agriculture, Fisheries and Food* [1968] AC 997, is an example of "illegality" in that the Minister was abusing the power conferred and thwarting legislative purpose, and "irrationality" in that he was taking irrelevant factors into consideration. Also the Minister failed to provide reason for his decision so the court can decide that there was no rational basis for that decision.

(c) Procedural Impropriety (see Lecture 5)

There are two sides of this category:

- The decision-maker has failed to observe procedural rules as stipulated in a statute or secondary legislation
- The decision-maker has failed to observe the rule of natural justice or failed to act fairly

1. Failure to observe expressed procedural rules

The consequences of such a breach depends on whether the rules themselves are classed as **mandatory** or **directory** in nature. This distinction is important. If the rules are held to be mandatory then breach of the rules will lead to the decision being quashed on an application for judicial review. If the rules are directory then the decision is not automatically *ultra vires.* Unfortunately, Acts of Parliament do not always stipulate whether the rules are mandatory or directory.

The following are examples of rules which have been held mandatory:

- where the rule involves giving affected persons prior notice of a decision in order that they have sufficient time to make representations and objections;
- Where the rule involves the giving of notice of the right to appeal against a decision;
- Where the rule involves publication of a decision within a stipulated time;

The following are examples of rules held to be directory

- where the breach is a trivial nature;
- where those affected have not suffered substantial prejudice;
- where substantial public inconvenience would be caused if the rule was held to be mandatory.

Breach of mandatory rules would render decision *ultra vires* and the reviewing court could quash any decision made in breach of the mandatory rules

But if the procedural rules are directory in nature it is only there for of guidance and does not have to be followed to the letter. Breach of directory rules will, therefore, rarely render a decision *ultra vires.*

2. Failure to observe the rules of natural justice and failure to act fairly

The rules of procedure and laws of evidence governing court proceedings do not apply to other proceedings such as administrative tribunals. The courts have therefore introduced standards to ensure that such proceedings are conducted fairly. These standards are known as the rules of natural justice. The rules embody two concepts, namely:

- *Audi alteram partem* – which means that a person should not be condemned without a fair hearing
- Nemo judex in causa sua – which means that no one should act as judge in any matter if he or she has some kind of vested interest in the decision as all decisions should be free from bias.

i) The Right to a Fair Hiring – *audi alteram partem*

When will this rule apply? Prior to the House of Lords decision in *Ridge v Baldwin* [1964] AC 40 it was accepted that the rule of natural justice applied to decisions of a judicial nature, but confusion reigned over whether these rules also applied to administrative or executive decisions. Lord Reid said that the rules of natural justice can apply to administrative or executive decisions and should always be adhered to in the following types of situations:

- where someone is dismissed from office; or
- where someone is of deprived membership of a professional or social body; or
- where someone is deprived of property rights or privileges.

Lord Denning MR also stated in *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch. 149, that there is no distinction between 'judicial' and 'administrative' decisions and that the rules of natural justice applied wherever an individual has some 'right, interest or legitimate expectation.'

Case 1: (Foreign Case) In *Glynn* v. *Keele University* [1971] 1 WLR 487 a breach of natural justice was held to have occurred where a student was fined by the University without first being told the reasons why or being granted hearing. However, his relief was denied on grounds of futility, in that nothing he could have said would have made any difference. Also in *Ridge v. Baldwin [*1964] rules of natural justice required that the Chief Constable of Brighton should have been allowed a **hearing** and opportunity to **represent** himself and answer the case against him before his dismissed from the force by the Watch Committee.

What constitute a fair hearing? Where the full rules of natural justice apply a fair hearing will be expected to consist of the following:

a) adequate notice must be given to he person affected;

b) the person affected must be informed of the full case against him or her;

c) adequate time must be allowed for that person to prepare his/her own case;

d) the affected person must be allowed the opportunity to put forward his or her own case;

e) the decision-maker may be required to give reasons for his or her decision (to provide grounds for review)

f) the affected person may be able to cross-examine witnesses;

g) the affected person may be entitled to legal representation. (unless this is prevented by statutory rule)

Take note of the expression "must be" and "may be."

ii) *Nemo judex in causa sua*

Everyone is entitled to a hearing free from bias. Bias might arise in the following ways:

a) the decision-maker has a pecuniary interest.

In *Dimes v. Proprietors of Grand Junction Canal* (1852) 3 HL Cas 759 a decision of the court of Chancery was set aside because the Lord Chancery who gave judgment was a shareholder in the company which benefited from the decision.

If a decision-maker does have a financial interest in the outcome of the decision (provided the interest is not too remote), the decision will be quashed on review.

b) Actual bias – where a decision-maker has actually been biased in his or her decision the decision will be quashed on review.

c) Apparent bias – even if the decision-maker has not actually been biased at all, a decision may still be quashed if they have any professional or personal interest in the issues **– justice must be seen to be done**

Case: *R v. Sussex Justices, ex parte McCarthy* [1924] 1 KB 256 a conviction for dangerous driving (i.e., criminal proceedings) was quashed when it came to light that the justices' clerk was a partner in the firm of solicitors acting for the plaintiff n related civil proceedings, even though it was shown that there was no actual bias.
What is he test for apparent bias?
(a) Is there a real likelihood of bias? This was the test used in *Metropolitan Properties Co. (FGC) Ltd v Lannon.*
(b) Is there a reasonable suspicion of bias? This was the test use in *R v. Sussex Justices, ex parte McCarthy.*

(d) Unreasonableness

Grounds for review also arise when a decision-maker reaches a decision that no reasonable person would have made. Another ground which has recently emerged is the **Concept of Proportionality**, which confines the limits of the exercise of power to means which are proportional to the objective to be pursued. This doctrine has taken roots in the US and Canada. Even though in the matter of **R v Home Secretary ex parte Brind(1991) 1 AC 696,** the House of Lords was not prepared to accept that the concept represented a separate and distinct head of judicial review. However, UK judges appear

to agree that while proportionality is not part of the English law, it may be used to determine whether a decision has been irrational or not.

For example in ***R v Barnsley Metropolitan Borough Council ex parte Hook*** **(1976) 1 WLR 1052**, a market stall holder had his license revoked for urinating in public. Lord Denning MR quashed the decision, partly on the basis that the penalty was disproportionate to the offence.

Proving unreasonableness

Relevant and Irrelevant Considerations: If the agency acted on the basis of irrelevant considerations, or it can be shown that relevant considerations were ignored, then, the decision will be unreasonable. The basic principle was stated by Lord Esher *MR in* ***R v*** *St. Pancras Vestry* (1890) 24 QBD 371

> "the decision making body must fairly consider the case before it and not take into account any reason for their decision which is not legal. The agency takes into account matters which the court consider not to be proper for the exercise of their discretion, then in the eyes of the law they have not exercised their discretion"

Agencies should always bear in mind the purpose, usually referred to as the intendment of the enabling Act from which it derives its powers.

The leading foreign authority is *Associated Provincial Picture House Ltd. v. Wednesbury Corporation* [1948] 1 KB 223. The Corporation granted a license to the plaintiffs allowing them to operate on Sundays, conditional on them not allowing admission to children under 15. The plaintiffs argued that the condition was *ultra vires* on the ground of unreasonableness. The court of Appeal held that it was not unreasonable and stated that the test is not whether the court believes the decision to be so. The test is whether it is the sort of decision that a reasonable decision-maker would come to.

Unreasonableness, per se, is therefore a very high threshold test. Two standards of *Wednesbury* unreasonableness have emerged from *ex parte Smith case:*

1) Super-*Wednesbury* – involving 'soft-edged' questions, such as administrative decision only. The courts are unwilling to intervene and take a very low-intensity approach.

2) Cases involving more important issues, such as human rights or 'hard-edged' issues. The courts are more willing to intervene and exercise supervisory powers.

In the case of *R v Cambride Health Authority*, *ex parte* B [1995] 1 WLR 898 which involved a 10 year old girl dying from leukemia, the Court of Appeal were still unwilling to intervene, even though the issues concerned what could arguably be the most important human rights of all – the right to life itself . The girl concerned had a 10-20 percent chance of survival if she received a second bone marrow transplant and chemotherapy. Hospital doctors thought that the cost of the treatment for outweighed her chances of survival (£15,000 for chemotherapy and £60,000 for the bone marrow transplant). Her father sought judicial review. At first instance, L J held that the cost/benefit analysis used by the authority was not a sufficient reason to deprive the child of her right to life. The court of Appeal, allowing the health authority's appeal, held that the matter was not justiciable[14]. This indicates that the courts will not become involved in issues concerning allocation of scarce economic / financial resources even when human life is at stake.

See, also the South Africa case of *Soobramoney v Minister of Health, Kwazulu-Natal*[15], in which the appellant was in the final stages of chronic renal failure. His life could be prolonged by regular renal dialysis, but his condition was irreversible. Because of a shortage of kidney dialysis machines, the policy of the Department of health was to give priority to patients whose conditions were reversible. The appellant claimed that this was in breach of section 27 of the South-Africa Constitution which provides that "every one has the right to have access to healthcare services and no one may be refused emergency treatment. The constitutional court of South Africa held that section 27 had not been infringed by refusing the applicant dialysis treatment because there was a clause which stated that access to health-care shall be subject to availability and not simply to maintaining them in a chronically ill condition. The decision in the *Soobramoney case* is a justifiable deviation from the normal path as a matter of government policy and prioritization.

3.3 Judicial review and military regimes

The question has been often asked whether there is the possibility of judicialreview during military regimes. Military governments, usually after assuming the reins of government suspend or abrogate the constitution either in part or whole. However, in most cases, the judiciary is allowed to continue the exercise of the judicial power which it enjoyed under the suspended or abrogated constitution subject to provisions in the Establishment Proclamations of the military regimes.

[14] The justiciability of Directive principles of State Policy (DPSP) – the question of whether the provisions in Chapter 6 of the 1992 Constitution of Ghana are justiciable in the same measure as Chapter 5 on Human rights remain uncertain for many years. Can an action be brought against the State or its institutions for failing to promote just and reasonable access to public facilities and services or provide adequate means of livelihood and employment in accordance with law? Some regard it as a political question rather than a legal one to be determined by the courts.

[15] [1998] A.965

The judiciary has had various opportunities in answering the above question. For instance, in ***Fattal and Another v Minister for Internal Affairs and Another***, the two plaintiffs, Lebanese by birth, acquired Ghanaian citizenship by naturalization under the then Ghana Nationality Act of 1971, Act 361 in 1973 and 1976. In August 1978 the Supreme Military Council (SMC) passed the Ghana Nationality (Amendment) Decree, SMCD 172, which revoked the acquired citizenship of the plaintiffs. Deportation orders were then issued for the two by the Minister for Internal Affairs. In 1980 the plaintiffs invoked the original jurisdiction of the Supreme Court under the 1969 constitution (article 2 (1), seeking inter alia that SMCD 172 purporting to revoke their citizenship without a court order was ultra vires the powers of the SMC as being contrary to the National Redemption Council (Establishment) proclamation and the 1979 constitution and its continued operation was inconsistent with or in contravention of chapters 5, 9 and 12. The court in a majority decision dismissed the action and held inter alia that since 1966, military governments in Ghana had always reserved to themselves the legislative power to either enhance or curtail the judicial power vested in the courts. In the absence of a written constitution that delimited the powers of the various organs of state, a military government was at liberty to do what it likes by Decree which had the force of law. In the absence of constraint, restrictions or limitations on the legislative power, the laws enacted by the legislature, should be enforced by the courts.

The NRC by its Proclamation 1972, made the judicial power guaranteed by the 1969 constitution, and indeed all other existing enactments subject to Decrees passed by the council. The Court further stated that although SMCD 172 might appear unjust, unreasonable and even autocratic, yet it was not within the province of the Supreme Court to strike it down merely because it was an unjust or unreasonable law. The days when courts of law could embark on such an exercise were over. When SMCD 172 was enacted, there was no constitution holding the legislative power in leash and no court could have declared SMCD172 invalid, null and void. The Supreme Court could nullify an existing law only if at the time it was passed it was invalid or its continued existence conflicted with the constitution. The court was supreme only within the bounds of the constitution. The court has not within its environment nuances of supremacy, sovereignty or omnipotence. It could not redress injustices perpetrated by military regimes in the past under Decrees regularly enacted by them.

In his dissenting opinion, Taylor JSC said that the Supreme Court in one single sentence of the majority achieved a self-imposed limitation on its jurisdiction contained in the clear unmistakable and peremptory provision of article 1 (2) when the majority held,

> "the court can nullify an existing law only if at the time it was passed, it was invalid".

This is so unnecessary for the decision that it can only be hoped that this purported restriction of the jurisdiction of the Supreme Court will, without doubt, be studiously ignored.

3.4 Remedies given under Judicial Review

Remedies offered under judicial review are specified under article 33 of the constitution, 1992. These remedies are; certiorari, prohibition, mandamus which is all termed as prerogative writs and habeas corpus.

- **Certiorari**

  This is an order from a court requiring a decision or an action which has been taken by an administrative body or official or a quasi-judicial body to be brought up to the court and be quashed.

- **Prohibition**

  This is an order seeking to prevent an administrative body or official or an inferior court or a quasi-judicial body from exceeding its jurisdiction or from making a decision or taking an action which may warrant certiorari.

- **Mandamus**

  When a public body or official or an administrative body or a quasi-judicial body are supposed to exercise an authority or duty, but that body or official has failed to execute the authority or duty, mandamus may be issued to that body or official compelling it to perform its function

- **Declaration**:

  A statement of the legal position of the parties and is not accordingly a remedy per se. It states the position of the law. It also clarifies and confirms the law. "A declaration order cannot be enforced on its own but rights and remedies attendant on the declaration may be enforced through a separate action".

3.5 Procedure for Application for Judicial Review

(a) To write a letter before action: The applicant or lawyer should first write to the decision-maker in order to allow him or her the opportunity of remedying the situation. Failure to d this can result in application being rejected.

(b) To apply for leave for Judicial Review: The applicant has to apply for leave for judicial review as promptly as possible and in any event within three months in (UK) of the occurrence of the alleged 'wrong'. The court des have discretion to allow late application, but there would have to be very good reasons for the delay.

(c) Present position: The application is made 'ex parte' (without giving notice to the decision-maker in question) to the High Court judge by filling a notice form, together with supporting affidavit verifying the facts relied upon. The judge can determine the application for leave without the necessity of a hearing, unless the applicant requests an oral hearing in the notice.

Read the following cases:

Akuffo-Addo v Quarshie-Idun (1968) GLR 667 at 674.
Ridge v Baldwin
Council for Civil Service Union v Minister of Civil Service
Inkumsa v Jiagge (2 G&G) 313
Darkwah v the Republic
Bilson v Apaloo (1981) GLR 15
Tuffour v AG (1980) GLR 637

3.6 Questions for Review and Discussion

1. Distinguish between the roles of the court in its reviewing capacity with that of its appellate capacity
2. What is the purpose of standing requirement in Judicial Review? Wha are the advantages
3. What are the grounds for review in the following cases:

(a) *Padfield v Minister of Agriculture, Fisheries and Food* [1968]

(b) *Anisminic Ltd.* v. *Foreign Compensation Commission* [1969]

(c) *Ridge v Baldwine* [1964]

4. Why is it important to recognize the distinction between mandatory and discretionary procedural rules?

5. What constitute a fair hearing?

6. Des the doctrine of legitimate expectation fit into both categories of irrationality and procedural impropriety?

7. What test would you prefer to use if you were trying to establish bias?

8. Do you support judicial intervention via judicial review or do you think it is wrong in principle for a non-elected body (i.e. judges to have the power to interfere with the decisions and activities of public bodies?

9. "The power of judicial review in Ghana is designed to protect individual liberty and rights against arbitrary violation". How true is this, in the light of decided cases since in?.

10. In the light of decided case examine the instances in which the Supreme Court has courageously utilized its power of constitutional review under articles 2 and 130 of the 1992 constitution effectively or timorously constricted same.

11. Critically compare and contrast the practice of judicial review under the current constitutional arrangements of Ghana and USA. Illustrate your answer wit relevant cases.

12. Can employers sack without reasons under the Ghanaian Labour Act, 2003?

An Accra Fast Tract Court ruled that the Labour Act, 2003 does not compel employers in Ghana to provide reasons when they terminate the employment of employees.

The court said since a contract of employment was not like that of servitude (a state of being a slave), the employee could be "severed at any time and for any reason or none," but subject only to the service of the appropriate notice.

Mrs. Justice Irismay Brown, the judge, gave the ruling in the case in which the National Labour Commission (NLC) sought an order to compel Ghana Telecommunication Limited (GT) to make payments to a former employer of GT in accordance with the Commission's orders. The employee,

Ms. Afua Yebour, had lodged a complaint of unfair termination of appointment at the NLC when her employment as Corporate Communications and General Manager was terminated in February 2006. The Commission, after considering the dispute, said the "reservation of the right to dismiss without reason was contrary to Section 15 and 63(4) of the Labour Act 2003"

Section 15, among other things, states that "A contract of employment may be terminated by mutual agreement between the employer and the worker."
Section 63(4) states that the termination may be unfair if the employer fails to prove that the reason for the termination is fair or the termination was made in accordance with a fair procedure of this act" – for the right interpretation both sections must be read together.
The GT challenged the NLC's orders and refused to comply with it, citing unfairness and a breach of the rules natural justice in its defense.

In her ruling, however, Mrs. Justice Brown did not uphold the charge of unfairness against the NLC but said the findings of the NLC were "flawed, erroneous at law and at variance with the evidence adduced before it and, therefore, un-enforceable."
Accordinf to her, the interpretation by the NLC of Sections 15 and 63(4) of the Labour Act, 2003 that employers were mandated to assign reasons for the termination of contract making GT's action in terminating the employment contract of Ms. Yeboah unfair, was not the right interpretation. To her, the law made a distinction between dismissal (which connotes misconduct and dismissal without justification amounted to wrongful termination of contract and renders an employer liable for damages) and termination (which did not necessarily impute such connotations and no reasons have to be given but an employer, when sued, had to justify a dismissal to avoid liability[16].

13. Can the President of the of Ghana sack a Minister of State without giving reasons?

President Kuffuor, in 2007 revoked the appointment of some 8 Cabinet Ministers who choose to pursue their presidential aspirations. Again, the appointment of Kwamena Batels as Minister was also revoked by the president in 2008. Indications show that in all these circumstances no hearing was made before the decision of revocation.

Power of appointment

It is provided under article 78(1) a minister of State shall be appointed by the President with the prior approval[17] of Parliament from among members of Parliament or persons qualified to be elected…" Also under Article 297, the power to appoint a person into office in the Public Service includes the power to confirm appointment, to exercise disciplinary control over such person, and to remove such person from office.

[16] To some Labour expects, the court decision contradicted International Labour Organization (ILO) Convention which states under Article 4 that " the employment of a worker shall not be terminated unless with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service" Ghana has ratified the ILO Conventions and expressed its willingness to adhere to international norms.

[17] "Prior approval" has been interpreted by the Supreme Court in *J.H. Mensah v AG*, to mean parliamentary approval necessary before assuming Ministerial post. And ones approval is given there is no room to challenge the morality or integrity of the appointed person as established in the case of *GBA v AG.*

Power of sacking or revoking of appointment

Under Article 81, it is stated among other things that the appointment of a minister may end when revoked by the President. Again in Article 82(5) where parliament has passed a vote of censure, the president may revoke his appointment, unless the minister resigns. But in this case the law provides in 82(4) for hearing in defence. The principle that 'he who appoints disappoints' may apply in our case.

The question is whether it is mandatory for the President to give reasons for sacking?

There is no provision in the constitution that mandates the President to give reasons for the exercise of those powers mentioned above which some view as against the rule of natural justice and undemocratic. Be mindful of the powerful presidency established under Article 57 of the 1992 Constitution.

14. Does a 'fair hearing' always necessitate an oral hearing?

It is not always necessary for the hearing to be oral – Sometimes written representations will satisfy the rules of natural justice or the duty to act fairly. In R v. Race Relations Board, *ex parte* Selvarajan [1975] 1 WLR 186, I was held that the Race Relations Board was acting fairly in considering written witness statement as opposed to allowing an oral haring as the facts in the case were not in dispute. (Where the facts are not in dispute then written representation will suffice).

Lecture 4

THE RULE OF LAW

4.0 Objectives

By the end of his Lecture you should be able to:

- explain what is meant by 'Rule of Law'
- describe and evaluate Dicey's three principles of the rule of law;
- recognize the limitations of Dicey's three principles
- appreciate the contemporary significance of the rule of law.

4.1 Introduction

The rule of law is the principle[18] that those exercising a governmental function should be subject to legal control. As de Smith puts it 'power exercised by politicians and officials must have a legitimate foundation …based on authority conferred by law'. Described by Jeffrey Jowell as a 'principle of institutional morality', adherence to the rule of law means that the rights of individuals are protected from erosion or interference by those governing the State. Thu, Sir John Laws suggests that the rule of law is based on three ideas: freedom, certainty and fairness. The theory of rule of law became particularly important in England following the struggle between Parliament and the Crown I the 17th century and Parliament was victorious and gained supremacy. The British model of he rule of law owes much to Dicey

According to Ian Harden and Norman Lewis, 'Dicey provides the standard against which to judge constitutional propriety'. In his popular book*, Introduction to the Study of the Law of the Constitution* (1885), A. V. Dicey suggested that the rule of law has three meanings:

(a) It means the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness,

[18] The principle of the rule of law can be traced back to the writings of philosophers in ancient Rome and Greece e.g. Aristotle – to them above all man-made laws (positive law), there is a universal law ('natural law') which applies to all men everywhere and t all times (based on rules ordained by God.

of prerogative, or even of wide discretionary authority on the part of the government It means the people are ruled by law alone, and a citizen may be punished for breach of the law and not for anything else.

(b) It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land as administered by the ordinary law courts.

(c) The 'rule of law' means, that the constitution is the source of the rights of individuals (under written constitutions) and under unwritten one the constitution is the result of the ordinary law of the land (Common law and Statutes)

Quite apart from individual States adapting it as a standard, international bodies have also recognized the concept and have given it a more extensive and acceptable definition for universal application. In 1957, a colloquium was held in Chicago under the genera title of '*The Rule of Law as understood in the west'*. Here it was agreed that fundamental rights formed only one element of the rule of law. The other two were concerned with:

1) the institutions and the procedures whereby these rights were given effect;

2) a fair hearing with an independent judge.

Also, *The Declaration of New Delhi,* (1959) and *Conference of International Community of Jurists*" (an affiliate of UNESCO) have recommended to States to provide political and legal guarantee in the following areas:

(i) Governed by a representative body answerable to the people.

(ii) The citizen who is wronged by the Government should have a remedy.

(iii) Recognition of the minimum standards contained in the Universal Declaration of Human Right (1948) and other regional human rights treaties (e.g. freedom of religion, freedom of assembly and association, the absence of retroactive penal laws)

(iv) The independence of the judiciary, including security of tenure, proper grounds and procedures for the removal of judges.

(v) Justice for all and right to a fair trial, (nationals and foreigners) which include:

- Lawful detention in police cell and in prison custody [19]

[19] In 2008 "The Justice for all Programme", a personal initiative of the Attorney-General and Minister of Justice, Mr. Joe Ghartey, was instituted. The programme is to ensure speedy trials and free people who have been on remand unjustifiably for years whose offences are considered as misdemeanor (e.g. stealing, assault, abortion, threat to harm) and second degree felony (e.g. negligently causing harm to a person,

- The presumption of innocence.
- The right to legal advice and representation (legal service).
- The right of appeal.
- The absence of torture and unusual punishment to prisoners or detainees.
- Alibi to be entertained by the courts as part of pleadings (claim that one was elsewhere when an act occurred, in criminal cases).

4.2 Absolute Supremacy of the Law

Lawful arrest

If this decision is true then any decision made by those in authority must be made in accordance with the law. Fr example, a police officer or anyone else making an arrest may not proceed unless he or she is acting lawfully. Punishments can be imposed only by reference to the law. However, where alternative forms of punishment are available, this will involve the exercise of discretionary powers by the courts, although the judges are expected to act within law.

In Ghana, exercise of the power of arrest, the law requires that a person is detained for not more than 48 hours upon reasonable suspicion, but this is often violated. If it turns out after trial that no offence was committed, a person woefully detained can go to court to file a civil suit for wrongful detention. There are cases of police brutality to suspected offenders who have no form of compensation when later found to be innocent.

Government respect for law

The Government of the day must also respect the law. This is illustrated by:

Entick v Carrington (1765) 19, which has been described as 'perhaps the central case in the English constitutional law'. The defendant had broken into the Plaintiff's premises and seized papers. The Plaintiff brought an action for trespass, but the defendant argued that he had a warrant issued by the government authorizing the trespass and seizure of the papers. The court refused to accept this and decided that as the government lacked any authority to issue these warrants as such the warrant was illegal. Thus, in UK today, a

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defrauding, extortion, forgery). In most cases, the complainants have either lost interest or have persistently refused to appear before the court to testify leading to frequent adjournments. In some, the prosecutors have failed to institute legal proceedings or to continue. Some also are in custody because they have been grated bail but cannot satisfy the bail terms. In records as in Mach 2008, there were about 3,000 people on remand in the country's prisons which is an abuse of their human rights. Centre for Human Rights and Civil Liberties (CHURCL) has contracted some lawyer to defend such accused persons *pro bono.*

police officer cannot enter one's house unless he or she has the owner/occupier's consent or a lawful power to do so.

Judges applying laws that had been proscribed

Judges applying laws that had been proscribed in sentencing offenders (or an error of law on the face of the records which may be ascertained without recourse to any evidence other than examination of the record of the proceedings)[20]

Discretionary power of State

The courts may be reluctant to scrutinize the government closely in time of crises where even basic rights may be restricted by emergency legislations. Decisions taken to interfere with people's property such as compulsory acquisition of land for the public good (government acquired lands for the universities, airports, stadium, public places of convenience, etc) are often unreasonable and arbitrary. The question is how reasonable is the decision taken by a pubic authority? The difficulty today is how to settle the acceptable limits of discretionary power which is not fixed by law. The exercise of Emergency powers in Ghana or any part of Ghana by the President under Article 31 of the 192 Constitution (and in accordance with *The Emergency Powers Act,* 1994, Act 472) is also of concern where constitutional rights are often violated (for example, freedom of movement and association). There is the need for political and legal safeguards by which the exercise of discretional power may be controlled to avoid arbitrariness. Lord Action said 'absolute power corrupts'. Rules are preferred to discretion by Dicey's standard because there is certainty (awareness of precise requirement, uniformity of rule as published, rules provide for accountability of those who administer them.

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[20] **Case:** A 22 year old 'Abolo' seller, Theresa Azigi, was sentenced by Odumase-Krobo Circuit Court in Dec 2003 to 10 years imprisonment for causing illegal abortion while nursing a nine year-old baby. An appeal against the sentence by International Women Lawyers (FIDA), the African Youth Alliance (AYA) and two Law Students from the Ghana School of Law resulted in quashing the case on the bases that the trial judge erred in imposing a sentence of 10 years on the accused, when the law (section 58 of Act 29, as amended by PNDCL 102), stipulated a maximum sentence of 5 years. The Judge had the right to make a consequential order after quashing the sentence because the accused person had pleaded guilty to the offence and the court could correct the sentence. But as an unemployed adolescent who was not being supported by any of the fathers of three children and for already serving three months, consequential order was dropped and she was freed.

4.3 Equality before the Law

Dicey suggested that all citizens should be treated equally before the law. Therefore, as long as laws were applied equally, without irrational bias or unreasonable distinction, this aspect of the rule of law would be complied with. There are no privilege classes to whom it does not apply.

No matter ho attractive Dicey's theory of equality before the law may appear in theory, there are obvious exceptions to it in practice. Some of these exceptions include:

(a) President's immunity from prosecution while in office as president of the Republic [Article 57 (4), (5), (6)]; by virtue of his office he is unequal to ordinary citizens so far as prosecution and appearance before a court of law as a witness is concerned.

(b) Diplomatic immunity (Diplomatic Immunity Act)

(c) High Court Judges are immune from civil litigation for actions falling within their official jurisdiction. No legal action can be brought in respect of anything said or done by a judge in the exercise of his or her judicial functions.[21]

(d) Parliamentary privilege (parliamentarians cannot be sued for defamation in respect of proceedings in Parliament, Arts 115-120 of the Constitution).

(e) Special powers (e.g. the police, public health inspectors, customs officers etc.) are in possession of special powers which are not enjoyed by ordinary member of the public.

(f) Practical differences – arguably the extent to which one may obtain legal redress may be limited to one's age, sex, race, education, profession, or social status.

4.4 Constitutional rights of individuals

The right and duties of citizens are expressly codified in the Constitution[22]. Thus, in Ghana, anyone wanting to know their constitutional rights must look at Chapter Five of

[21] See, Anderson v. Gorrie (1998) OB 66, in respect of jury verdict or in respect of words spoken by parties, counsel or witnesses in the course of judicial functions.

[22] In UK with its unwritten constitution the rights and duties of citizens, apart from the constitution, can be found in statues and case law and Dicey said that the unwritten British constitution is a product of the ordinary law of the land. It is argued that, a written constitution in Germany in German in the 1930s failed to stop Hitler from coming to power; the same is true with Idi Amin in Uganda and Saddam Hussein in

the 1992 Constitution relating to fundamental human rights and freedoms. Other rights can be found under Chapter Six concerning basic human rights such as the right to work, the right to good health care and the right to education which are expressed under the Directive Principles of State Policy; and under Chapter Seven relating to the right to vote. These rights are protected by the courts as provided by the Constitution under article 33.
In line with Dicey's point of view there are two advantages in this sort of constitutional arrangement for any country like Ghana:

(a) For every right enjoyed by a Ghanaian citizen there is a corresponding remedy. For example, since the law provides that there is freedom from arbitrary arrest, if a police officer seeks to arrest an individual arbitrarily, a court will provide a remedy – compensation in the form of damages in civil action for false imprisonment.

(b) The Constitution being the supreme law of the land, as expressed in Article 1(2)) of the 1992 Constitution, has a special 'legal sanctity' and great symbolic value. A dictator may think twice before tearing up a constitution, in view of the public loyalty which many the constitutions attract, notwithstanding the military interventions that suspended our previous constitutions.

Contemporary illustrations of the Rule of Law

- Adequate control of the executive to prevent abuse of power (*ultra vires)*
- Right to representation and reasonable government (Legislature not to pass discretionary laws with reference to individuals or minority groups)
- The principle of the rule of law should be of assistance to judges in the area of statutory interpretation and be used as a rule of evidence whereby everyone is, *prima facie*, equal before the law.

4.5 Questions for Review and Discussion

1. Ca you think of any permissible exceptions to the principle of equality before the law?
2. Do you consider that the courts have abdicated their constitutional responsibility for controlling the executive in times of crisis or public emergency? (Read *R v Secretary of s*

Iraq. To Dicey, a written constitution is merely a piece of paper, which is only as strong as the way it is interpreted.

State for the home Department, ex parte Cheblak. Bear in mind the political context in which it was decided.

3. To what extent are the exceptions to equality before the law justifiable in the Ghanaian context.

4. Draw a distinction between 'rules' and 'discretion' by stating the advantage and disadvantages of each of them.

5. Explain Professor Geoffrey Wilson's that 'the rule of law is not in fact a rule of law' but rather 'a conventional obligation which lies…on government and the legislature'.

Lecture 5

THE RULES OF NATURAL JUSTICE (PROCEDRAL FAIRNESS)

5.0 Objectives

By the end of his Lecture you should be able to:

- explain what is meant by "Natural Justice'
- describe and evaluate three principles of natural justice;
- recognize the limitations of the principles of natural justice
- appreciate the contemporary significance of natural justice.

5.1 Introduction

There are two fundamental rules used in the administration of justice by the courts and by any person or institution that is to resolve dispute between people. Where the two rules are not complied with, whatever decision which will be arrived at will be declared null and void. These two fundamental rules are:

1. Hear the other side or listen to the other side or hear both sides of a dispute before arriving at a decision
2. No man should be a judge in his own cause. This rule has been stated as the rule against bias. Every person who is settling a dispute should be a person who is neutral, impartial, independent and does not have any interest or whatsoever in the outcome of the case

5.2 RULE 1: Hear the other side. (*audi alterem partem*)

The person making the report to either a chief or an elder or the court is known as the **complainant** or the **plaintiff**. The person against whom the complaint is being made is the **accused person** or in a civil case, **the defendant**. Where the case is filed in the court, the plaintiff issues **a writ of summons** and adds a **statement of claim**. These two documents are served on the **defendant**. If the defendant decides to contest the case, he will file a **Statement of Defence**. The court will then fix a date and the plaintiff will enter a **witness box** and give **oral evidence** and may tender document if any, in support of his case. The defendant will then **cross-examine** him to test the credibility of his story. The plaintiff will call **witnesses** if any, in support of his case. The defendant will also enter the witness box and tell his side of the story and will be cross-examined by the plaintiff. He may also call witnesses in support of his case. This rule of natural justice has now been complied with because

the plaintiff has given evidence and the defendant has also given evidence. The court will then fix a date for **judgement**.

Criminal cases

In a criminal case, the person charged with the offence is known as the **Accused Person.** The first person to give evidence is the **complainant**, that is to say, the victim of the crime. After giving evidence, witnesses may be called in support of the **charge**. However, the 1992 constitution provides that, the accused person has the rights to remain silent and cannot be compelled to give evidence because, he is presumed to be innocent. See Article 19 (10) of the constitution, 1992. He is not compelled to give evidence because, he is presumed to be innocent. See Article 19 (2) (c).

Secondly, it is the duty of the police or the prosecution **to lead evidence to proof beyond reasonable doubt** that the accused person committed the crime. Where they are not able to do so, the accused person will be **Acquitted and Discharged.** Where the evidence led by the prosecution is so strong, it is better for the accused person to enter the witness box and defend himself or throw some doubt on the evidence of the prosecution.

In the case of **Accra Heart of Oak v Ghana Football Association (1982-83) GLR 11,** the audi alterim partem rule (i.e. hear the other side) came to play. The brief fact of this case is that after a football match played between Accra Hearts of Oak and Dumas on Sunday 29 March, 1981, some spectators who were at the stadium expressed their dissatisfaction with the referee's handling of the match by indulging in acts of hooliganism which resulted in a considerable damage to property at the stadium.

Although there was no evidence that the wanton acts of hooliganism and destruction were committed by supporters of Hearts, the Ghana Football Association, in a press release, decided to ban Hearts from playing any "home" match at the Accra Sports Stadium until further notice. And further, that the Ghana Football Association would decide the venue at which Hearts would play their "home" matches from time to time. Hearts brought this action for an injunction to restrain the defendants from acting upon the said press release on the ground that they were not heard before the decision to ban them was taken. The defendants conceded that the plaintiffs were not heard before the punishment was imposed. They contended, however, that the plaintiffs had not disclosed any proprietary interest in the stadium which ought to be protected by the grant of an injunction.

On granting the application for an interim injunction, Korsah J (as he then was) held;

> "Counsel for the plaintiffs has reminded me that the rule that no condemnation should be pronounced behind the back of a man who has had no opportunity to appear and defend his interest either personally or by his proper representative dates from the time of Adam. He says, God asked of Adam: "Where art thou? Has thou eaten of the tree whereof I commanded thee that thou shouldst not eat?" And the same question was put to Eve also. We are not told whether any question was directed to the serpent. But then it was not a man and the rules of natural justice probably did not apply to it.
>
> To me, the law is clear and unambiguous; all judgments, even foreign judgments of a country which permit condemnation behind the back of a man, when repugnant to this rule of natural justice, cannot be enforced in Ghana. Where, however, a man has been given the opportunity to appear and answer charges against him, and does not avail himself of the opportunity, he cannot be heard to plead a breach of this rule."

He held futher;

> "In my judgment, an act or decision consequential upon a contravention of the audi alteram partem rule may be restrained by prohibition or an injunction or set aside by certiorari.
>
> By far the most persuasive argument pressed upon me by the defendants is that the courts are ill-suited for proceedings of this nature. But where the principles of natural justice are breached, there is no forum superior to the courts where redress can be sought."

Also, in the case of **Aboagye v Ghana Commercial Bank (2001-2002),** the appellant who was a senior manager of the Ghana commercial bank answered to queries received from the disciplinary committee of the bank in connection with some payments made by him without going through due process. The bank referred the matter to the BNI for further investigations. A report was issued at the end of the investigations. The disciplinary committee recommended to the executive council after further investigations without notice or affording the appellant a hearing, that the appellant be warned and his salary reduced by one notch after he was found for negligence of duty.

Without affording the appellant any further hearing, the executive committee recommended to the board of the bank that the appellant be warned of his negligence and be reduced by four notches of his grade. The board also, not affording the appellant any further hearing, dismissed the appellant for gross misconduct. A petition by the appellant to the board was refused.

The appellant sued in the high court, inter alia, damages for unlawful dismissal of which his claim was upheld by the high court. On an appeal to the court of appeal by the defendant bank, the judgement of the high court was reversed. The plaintiff made a further appeal to the Supreme Court.

The Supreme Court unanimously allowed the appeal. In her judgement, Banford Addo JSC (as she then was), commenting on the issue of the audi alteram partem (hear the other side) rule held;

> "Just as in a civil proceeding, proper service of notice on a defendant is a condition precedent to fair trial, so also in this case, a proper notice to the plaintiff is sin qua non to fair hearing of the case against him. If this is neglected to be done, a final decision will be declared a nullity. . . The rules of fair trial include the audi alteram partem rule, which implies that it is the authority exercising disciplinary power which ought to afford the plaintiff the opportunity of being heard and he should be informed of the charges and the date and the place of trial. . . . furthermore, a query is not the same thing as a disciplinary charge or notice of an ongoing disciplinary proceedings"

5.3 RULE 2: The rule against bias (*nemo judex in causa sua*)

This rule simply means that, a person sitting to decide a dispute should be independent, neutral and what is more important, he should not have any interest, however slight it may be, in the outcome of the case. The following factors may be taken into account in decided whether there is a real likelihood of bias by the person sitting on the matter;

- Where one of the parties is a very close relative and is related by blood to the judge
- Very close friend
- Bitter enemies

Examples;
A and **B** appear before a judge in a divorce petition. **B**, the woman is not related to the judge but when the petition is granted, **B** will marry **C**, a friend of the judge.

A and **B** are fighting over a company and the case goes before the High Court and the High Court Judge has bought shares in the company, there is a real likelihood of bias.

A party to an action should raise an objection to a particular Judge or Magistrate hearing a case where he has evidence that there is likely to be bias.

Case: ***Akosua Bedaabuo v Yaa Hima*** **(1948-51) DC Land 232**

In this case, there was a land dispute between two women, **A** and **B** which was held by a panel of five members which gave judgement for B, the defendant. After the judgement was given, the president of the panel married **B**, the defendant. **A** appealed against the judgement. The court which heard the appeal ordered that, a different panel should hear the matter again because the court was of the view that there was a real likelihood of bias.

In the case of ***Saawa v Dumah*** **(1991) 1 GLR 452,** the defendant-applicant, a queen mother, allegedly insulted the plaintiff - respondent at Cape Coast and was sued in the District Court Grade II, Ajumako. The district magistrate referred the case to one E, a chief, for an amicable settlement out of court. That failed and the case was returned to the court. When the applicant appeared before the district magistrate, he insulted her and made derogatory remarks about her position as a queen-mother. The applicant in the instant application to the High Court sought an order to transfer the case to the District Court, Grade II, Cape Coast or any other court in Cape Coast for hearing and determination on the ground of bias. In an affidavit in support of the application, the applicant also objected to the venue because the cause of action arose in Cape Coast and not at Ajumako. The respondent in an affidavit in opposition, maintained that the court at Ajumako had the same jurisdiction as the one in Cape Coast and that the applicant's affidavit had no weight with regard to the conduct of the magistrate and ought not be entertained by the court.

In granting the application for transfer, Dove J, held;

> "I accept the applicant's version of what happened on 27 November 1986 at the District Court, Grade II, Ajumako. The question is, does the magistrate's conduct amount to bias?
>
> Bias has been said to be prejudice and in a judicial capacity could mean deciding a matter without reference to the evidence. A judge or magistrate is entitled to promote reconciliation between the parties before him, it is not his function to force them to settle their differences. The magistrate's conduct as set out in paragraph (10) of the applicant's affidavit gives the impression that he had already made up his mind about the liability of the applicant for the claim made against her. In these circumstances, I do not see how he can adjudicate with an open mind."

Cases: Rule against bias

1) Republic v Constitutional Committee (1968) GLR 1050

2) Quist v Kwarteng (1961) GLR 605
3) Sasu v Amua Sakyi (1987-88) 2 GLR 221
4) Interim Executive Committee of Apostolic Church v Interim Executive Council (1984-86) 2 GLR 118
5) Akayie v Ediye (1977) 2 GLR 70
6) Budu v Caeser (1961) GLR 176
7) Mbrah v Johnson (1973) 2 GLR 213
8) Amadu v Mohammed (2007-2008) 1 SC GLR 58
9) Republic v Asokore Traditional Council (1976) 2 GLR 231
10) Republic v Asankare Traditional Council (1989-90) 2 GLR 592
11) In re Amponsah (1960) GLR 140
12) Republic v High Court, Kumasi (2005-2006) SC GLR 312
13) Sallah v Attorney General (1970)
14) Republic v Akuapim Traditional Council (1975) 2 GLR 362
15) Republic v Numapaw (1997-98) 2 GLR 368
16) Agyekum v Asakum Engineering (1992) 2 GLR 635
17) Abass v The Republic (1997-98) 1 GLR 708
18) Republic v Adrie (1987-88) 1 GLR 624
19) Addai v Anane (1973) 1 GLR 144

Cases: hear the other side

1) Republic v Peprah (1997-98) 1 GLR 1011
2) Boye doe v Tei and others (1997-98) 1 GLR 997
3) Republic v High Court, Denu (2003-2004) SC GLR 907
4) Awuni v WAEC (2003-2004) SC GLR 471
5) Laguda v Ghana Commercial Bank (2005-2006) SC GLR 388
6) Republic v Attorney General (1982-83) GLR 311
7) Republic v Central Disciplinary Committee (1973) 2 GLR 299
8) Republic v Frimpong (1973) 2 GLR 459
9) Aidoo v Commissioner of Police (1964) GLR 653
10) Republic v High Court, Bolgatanga. Ex parte Hawa Yakubu (2001-2002) SC GLR 53
11) Kobeah v Tema Oil Refinery (2003-2004) 2 GLR 1033

12) Agyekum v The Republic (1974) 2 GLR 398
13) Republic v Half Assini District Court (1968) GLR 780
14) Republic v Assua Ex parte Bluwey (1973) 2 GLR 283
15) Republic v Keta District Magistrate (1971) 2 GLR 459
16) Air liquid v Anim (1991) 1 GLR 460
17) Akunor v Okan (1977) 1 GLR 173
18) Mensah v Issah (1979) 1 GLR 424

5.4 The new Evidence Rule (evolving as a third rule)

The third rule is that a decision, whether administrative or adjudicative, must be based upon logical proof or material evidence. Adjudicators and decision-makers should not base their decisions on mere speculation or suspicion or spirituality. Rather, they should be able to clearly point to the evidence on which the inference or determination is based. Evidence such as arguments, allegations, photos and documents presented by one party must be disclosed to the other party, who may then subject it to scrutiny.

In the practice of many traditional leaders (chiefs), not only material evidences are admitted but also spiritual evidence (sorcery, witchcraft or wizardry) and also spectral evidence (based on dreams and vision). In this situation diligent inquiry is made by consulting the ancestral spirits for their determination. Mostly the accused persons are found guilty. This goes against the requirements for admitting evidence.

5.5 Questions for Review and Discussions

1) Basabasa and his wife, Shariatu has been married for so many years. They contributed money and bought a house in Kumasi. Sometime in 2007, the marriage broke down beyond reconciliation and Basabasa filed a petition in the high court, Kumasi, for the following reliefs.
    - A dissolution of the marriage.
    - A declaration that, he Basabasa should be declared the owner of the house.

During the hearing of the case, Basabasa's witnesses refused to give evidence in support of his case. Shariatu called only one witness. On 31 october, 2009 the high court judge Shadey, who is Shariatu's identical twin sister gave her judgement as follows;

By court

"I have carefully examined the evidence of the parties. I direct that the house be sold by the registrar of the court. From the evidence, the two parties could not tell how much each of them contributed. I direct the registrar of this court to share the money equally to the two parties"

Basabasa has come to see you to appeal to the Court of Appeal against the judgement of the High Court. According to Basabasa, there was a breach of the two rules of natural justice. Was there any breach of the two rules of natural justice? Give very good reasons for your answer. Illustrate your answer with decided cases.

2) Mensah and Yaa Dufie were married under customary law in January 2006. In September 2007, they each contributed 20,000 Ghana Cedis and bought their matrimonial home in Kumasi. In January 2008 the marriage broke down beyond reconciliation. Mensah made a formal complaint to Nana Kwaku Basabasa, Yaa Dufie's senior brother and Head of Family. A customary arbitration was held during which Mensah and Yaa Dufie gave evidence and called withnesses in support of their case. Nana Kwaku Basabasa gave an award to the effect that since he was dissolving the marriage, the house should be sold and the proceeds shared equally between Mensah and Yaa Dufie. A few days after the customary arbitration, Mensah issued a writ of summons in the High Court, Kumasi against Nana Kwaku Basabasa and Yaa Dufie asking for the relief-:

"a declaration that the customary arbitration held by Nana Kwaku Basabasa and Yaa Dufie in his home is null and void as there was a breach of rules of natural justice" mensah's solicitor, Mrs Achiaa Bonsu in a detailed statement of claim states that there was real likelihood of bias by Nana Kwaku Basabasa as he is the senior brother of Madam Yaa Dufie. Bring out the main issues posed by this problem and resolve them with the help of decided cases. Give reasons for your answer.

SEMESTER II

Lecture 6

ADMINISTRATIVE JUSTICE

6. 0 Objectives

By the end of his Lecture you should be able to:

- explain what is meant by "Administrative justice"
- describe and evaluate the functions and powers of quasi-judicial bodies.
- recognize the limitations of the powers of administrative tribunals
- appreciate the contemporary significance of administrative bodies

6.1 Introduction

(a) The Concept of Administrative Justice

The term "administrative Justice" might seem a contradictory. These bodies or agencies have **powers and procedures** resembling those of a court of law or judge. There are, of course, marked differences in the way these bodies make decisions. They can be grouped into three categories by virtue of the powers and functions given them by law.

i. **Public tribunals:** These special courts, called people's courts or public tribunals, established by PNDC in August 1982 under *Public Tribunals Law of 1984* as a separate system for administering justice alongside the country's regular courts. They included National, Regional, District and Community public tribunals. Under the Fourth Republic, the public tribunals were incorporated into the existing court hierarchy; Financial Administration Tribunal
ii. **Commissions of Enquiry**; established by a constitutional instrument.
iii. **Quasi-judicial bodies** such as: CHRAJ, EOCO, Labour Commission, Judicial Committees of the various houses of chiefs, Traditional Councils, Reconciliation Committee of the Department of Social Welfare and Community Development.

These administrative bodies are not to be regarded as courts with full judicial powers, neither as part of machinery of administration but are statutory bodies given powers to adjudicate and promote the welfare of society. They are to supplement the court system in the administration of justice. As such they could become a well founded and broad –

based as any other kind of adjudicating body embodied in human institutions. Their main function is to find out the facts and to apply the law in the resolution of disputes. Some have strict judicial function[23] others have loose one.

(b) Why the need for administrative bodies to adjudicate?

One may ask why the need for extra-judicial avenues for redress of grievances between citizens and the organs or agencies of central and local government when political avenues like the internal complaint procedures within a ministry or department, and the ordinary courts are available.

The government today plays an important role in all aspects of an individual life due to its increased involvement with the economic and social life of the community. This relationship is bound to give rise to all kinds of disputes which simply cannot be settled in the ordinary courts of law. Not only because they lack jurisdiction. But also because the courts are already burdened with their existing legal work and could not possibly take on additional jurisdiction without the risk of a complete breakdown.

The court procedure is – slow, formal, detailed and costly and may not attract a person seeking quick, cheap and informal settlement of his or her claim. He or she may find a tribunal more attractive and above all, accessible as the legal profession does not have a monopoly of representation. He may prefer his case to be presented by an accountant, a medical doctor, a trade union official or a social worker rather then a lawyer. Certain matters are more appropriate for a tribunal than a court. For example, a dispute between a citizen concerned with his rights and a minister, government department, public board, local authority or public official can be settled without recourse to a court. Besides, certain disputes involve specialized knowledge and the court cannot be expected to

[23] The "Aviation Tribunal" in UK. In that country for example, there is a council on tribunals originally set up by the Tribunals and Inquires Act (1971) which serves as an **advisory body** which keeps under review the working of a large number of tribunals in that country. They include: Civil Aviation Authority (its licensing function) and The National Insurance Tribunals. In Ghana this structure is absent
There are also in the UK bodies which may be regarded as tribunals but which do not fall under the supervisory jurisdiction of the Council of Tribunals such as – the Criminal Injuries Compensation Board, the Legal Aid Committee, Rent Tribunal and many professional disciplinary bodies (e.g. Solicitors Disciplinary Tribunals).

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provide this. For example, in UK the determination of the extent of disability or injury is a task performed by a doctor on a "pensions tribunals" and this task could not be adequately discharged by a court presided over by a judge.

(c) In comparing tribunals with the courts, the following differences emerge:

(i) No formal rules of evidence or procedure apply

(ii) Appointment and dismissal of members is the responsibility of the minister concerned

(iii) Members need not have legal qualifications with the exception of certain tribunals.

(iv) Tribunals are not composed of Judges or Government Officials but normally they are constituted of members of the public sometimes coming from groups such as trade unions and employers' organizations or persons with specialized qualification (eg. in medicine or land valuation)

(v) Can not award penalties but only make recommendations.

Nevertheless, the ordinary courts do exercise their supervisory jurisdiction over tribunals and intervene where there is a clear breach of the rules of natural justice (on procedure grounds) or where one of the grounds (substantive *ultra vires,* abuse of power) for judicial intervention applies.

(d) General Principles: Their operation is normally based on the following principles:

(i) Fairness

(ii) Public hearing

(iii) Legal representation

(iv) Reasonable decision

(v) Provide right of appeal

(vi) Decision in writing.

(e) General function: Their function is to find out the facts and to apply the law in the resolution of disputes. Some, however, have strict judicial function (like the Civil Aviation Tribunal in UK), others exercise regulatory function in judicial way. They are

not concerned about issues of policy but of rights and duty. Just like the courts, they are in theory independent from the executive interferences.

6.2 Administrative Tribunals

(i) Definition:

According to Black's Law Dictionary, an administrative tribunal is "an administrative agency before which a matter may be heard or tried as distinguished from a purely executive agency" They are specialized administrative agencies allowed by statutes to exercise judicial function.

These are specialized bodies permanently set up by statutes and occasionally established under Prerogative as in UK (Ghana has no royal Prerogative), to adjudicate matters involving rights and duties of citizens and government bodies, which cannot be settled in the ordinary courts either because of lack of jurisdiction or a person seeking quick, cheap and informal settlement.

There may be an ultimate right of appeal to a court of law when conferred by statute. For example, there is a right to appeal from the decisions of "Labour Commission" under the Industrial Relations Act of Ghana. Although the right to appeal from decisions made by statutory bodies is not created extensively by the statute, such rights exist. Such appeals sometimes lie to Special Tribunals (as in UK) or to the Courts.

(ii) Classification:

It is not easy to classify the many tribunals which exercise judicial functions in relation to specific branch of government, or to draw a sharp line between those bodies which may be classified as tribunals and those which may not.[24]

[24] In the UK, a list of tribunals under the supervision of the Council on Tribunals is published annually in the council's report and classified according to existing branches of government. In the report for 1991-1992, the list includes:- Agricultural Land Tribunals; The Civil Aviation Tribunals; The Data Protection Register Education Appeal Committees (dealing with admission of pupils to schools); Immigration Appeal Tribunals; Industrial Tribunals; Mental Health Review Tribunal; VAT Tribunal; Traffic Commissioners; Social Security Tribunals.

These tribunals can further be classifieds by their subject matter; for example, those dealing with the following matters:

1. Social Security and Social Services
2. Land, Property and Housing
3. Economic activities, Licensing and Taxation
4. Industrial activities

However, it is more useful to analyze tribunals in terms of the following general consideration (because in some tribunals the parties are private individuals like Landlord v. Tenant, or Employer v. Employee; while in some other cases it is an individual v. a government department or Authority. The following questions are relevant.

1. What is the composition of the tribunal? Tribunals are not composed of government officials but rather of members of the public, based on special qualification.
2. Who appoints the members of the tribunal and who has power to dismiss – by President or Minister concerned?
3. What are the powers and jurisdiction of tribunals?
4. What procedure is followed by tribunals and how formal is it? (public hearing or hearing in private; right of legal representation, legal advise and right to appeal
5. Are their decisions binding or just persuasive precedents for future tribunals?

Specialized tribunals created under the Ghanaian statutes for the adjudication of disputes in specialized areas include the following:

6.3 Commissions of Inquiry

(i) Commissions of Inquiry are quite different from the concept of **Public Inquiries.** The latter is set up by Government Ministries and Departments to give citizens affected (potentially) by a government proposal, a right to be heard and to enable them raise any reasonable objections before a final decision is made. Public Inquires are an important aspect of the administrative process in addition to the Tribunals. In the UK they also come under the supervision of the council on tribunals. There are numerous

circumstances where a public inquiry becomes an essential prerequisite before a decision is made. An inquiry might be held for example – when a major road, a power station or an airport is planned to be constructed or even the creation of new regions in Ghana as under the NPP government, which is likely to affect a community or residents of the planned area. Public inquiry precedes the planned action.

Commissions of inquiry are interim or temporary bodies set up by the President of the Republic **by a constitutional instrument[25]** to inquire into any matter of urgent public importance. He may do that on any of the following three conditions:

(a) On his own initiative (when deem it necessary) or,

(b) On the advice of Council of State to do so or,

(c) Upon the resolution of Parliament requesting him to do that.[26]

Generally, a Commissions of Inquiry are set up in three circumstances

(a) Where serious allegations of corruption or improper conduct are made against those in public service.

(b) Where a matter of public concern which may not be adequately dealt with before the ordinary courts

(c) Where a matter threatens the national security and tribal unity or instability of the republic.

(ii) Commissions of Inquiry and Committees of Inquiry

It is equally important at this stage to take a look at the issue of whether there is any distinction between a "commission of inquiry" and "a committee of inquiry" – a distinction, which assumed great constitutional significance after the decision in ***Osman v Darko***. In that case the Supreme Court held that;

> "the meaning of the term "commission of inquiry in article 71 [of the 1969 Constitution] could not be extended to include committee of inquiry".

[25] Power conferred by constitution on President (Executive) to issue a written document stating members of the constituted Commission, term of reference and procedure.

[26] Art 278 (1) of the 1992 Constitution.

This case was cited in Republic v Volta Region Chieftaincy Committee and Another, Ex parte Asor and interpreted to mean, "**a committee of inquiry is an inferior body to a commission of inquiry**".

None of these decisions, however, provided the essential criteria for distinguishing between the two. Apparently in reaction to these decisions subsequent enactments have provided that "**commissions of inquiry include committee of inquiry**".

That, however, still leaves unresolved the question of the essential distinction between the two, which leads to one being roped into the other by legislative fiat.
It is suggested that there is apparently no strict difference in essence between the two. In practice it appears, however, that the term commission of inquiry is reserved for those appointed by the president using a constitutional instrument whilst those established by ministers, government departments and private entities are often named committees of inquiry. This practice might have been influenced by the distinction,

Which by the Committee of Experts, which drafted the 1992 constitution sought to draw between "**the findings of a judicial or quasi-judicial commission of inquiry and the finding of a less formal fact finding inquiry**".

The focus of this paper is on commissions of inquiry appointed by the president by a constitutional instrument under article 278 of the 1992 Constitution. However, most of the discussion her4e will also be relevant for the other types of commissions of inquiry described above.

(iii) Requirements for appointment
The commission appointed under **clause (1) of Article 278** may consist of a sole commissioner (to sit alone) in exceptional circumstances, or may consist of two or more persons (one of whom shall be appointed as the chairman of the commission), which is more frequent in practice.

In clause (3) of Article 278 **"**A person shall be appointed a sole commissioner or the chairman of a commission of inquiry under the said article unless he or she is

(a) a Justice of the supreme court of judicature or
(b) a person qualified to be appointed a justice of the superior court of judicature
(c) a person who has held office as a justice of the superior court of judicature or
(d) a person who possesses special qualifications or knowledge in respect of the matter being investigated.

The need for the establishment of an impartial and independent commission of inquiry has been the concern of all and has engaged the attention of legislators for some time. To the drafters of the 1969 Constitution such inquiries should be conducted "**independently of both the Executive and Parliament**". This notwithstanding, a look at the law relating to commissions of inquiry in Ghana reveals a preference for entrusting the appointment of such bodies to the Executive branch of government. The danger with such a scheme has been the tendency for commissions of inquiry to be appointed to "confirm" the views or perceptions of the Executive on the subject matter of the inquiry and casting doubt on their independence and impartiality. Azu Crabge J. A. in ***Gbedemah v Awoonor Williams*** stated the obvious when he noted, "**a commission of inquiry is an agency or organ of the executive".**

Being an agent the tendency to listen to the "masters" voice is real. The withdrawal of the Andani faction from the activities of the Wuaku Commission investigating events leading to the beheading of the Ya-na citing bias and executive manipulation is also a case in point. Complaints of lack of independence and executive manipulation have been levelled especially against commissions of inquiry appointed to investigate allegations of corruption of former government officials. A perception, which is sometimes, confirmed in some of the White Papers issued on reports of such commissions of inquiry.

The procedure for the appointment of commission of injury often leads to these allegations on impartiality and lack of independence, appears, however, not to be very much different from that which pertains in other jurisdictions. In Britain for example the procedure is that "**where it has been resolved by both Houses of parliament that it is expedient that a tribunal be established for inquiry into a definite matter described in the resolution as of urgent public importance a tribunal is so appointed either by the Crown or a Secretary of State**". Thus in both countries the appointment is done by the Executive on the request of parliament.

The problem in Ghana, however, seems not to be with the procedure of appointment but with the individuals manning the process. It is suggested that although this procedure can be maintained, specific provision should be made expressly guaranteeing the independence of such commission of inquiry, as has been done for other institutions of state such as the Commission on Human Rights and Administrative Justice. Also the appointment of the Commissioners could be done on the advice of the Council of State.

(iv) Subject Matter of Inquiry

The history of Commissions of Inquiry in Ghana shows that commissions of inquiry have been appointed to inquire into various matters. These include matters such as to make proposals for a new constitution, to look into the administration of the police service, to look into the functions of state owned enterprises, to study the phenomenon of bribery and corruption in Ghana, to inquire into the assets of former government officials, and to inquire into catastrophic events like the stadium disaster and the beheading of the Ya-na, the Paramount chief of Dagbon in Northern Ghana. Generally however, commissions of inquiry are appointed to inquire into extremely important matters. As Lord Kilmur noted

> "**the procedure should be invoked for weighty and important matters, for it is only then that the sacrifices on the part of the individual can be fairly demanded**".

Under article 278 of the 1992 Constitution, a commission of inquiry can be appointed to inquire "**into any matter of public interest**". Public interest has been defined in article 295 of the Constitution to include any right or advantage, which insures or is intended to inure to the benefit generally of the whole people of Ghana

Thus there exist constitutional limitations on the scope of matters, which can be the subject matter of inquiry by a commission of inquiry appointed under the Constitution. The fact, however, remains that the decision to appoint a commission of inquiry is pre-eminently a political decision for the government. This decision is not reviewable by the courts unless it can be shown that some constitutional or statutory limitation has been breached. However, once it has been determined that a commission be established, any

decision about the nature of the inquiry might become reviewable by the court in the exercise of its powers of judicial review.

In ***Republic v committed of Inquiry (R. T. Briscoe) (Ghana) ltd. Ex Parte R. T. Briscoe (Ghana) Ltd.*** The Supreme Military Council (SMC) by Executive Instrument No. 142 set up a committee of inquiry into the activities of R. T. Briscoe (Ghana) Ltd. in relation to the exchange control laws of Ghana. In this application, counsel for the applicant argued that the applicant, a limited liability company of a private not a public character, could not be the main object of investigation of a committee of inquiry. In rejecting this submission, it was held that although an examination of legislative policy before 1972 would seem to limit the scope of commissions of inquiry to matters of public interest or importance, where the acts of a private limited liability company or a private individual impinged on the national economy or other areas of national activity to such an extent as to be likely to adversely affect national aims and objective, that would be a matter of public concern or importance which could properly form the subject matter of inquiry by a committee of inquiry. This case and the ruling should not be understood to represent a departure from pre 1972 "legislative police" but as a continuation of it in another aspect of national life. Indeed it is not wholly true to say that such was the legislative policy before 1972 for in 1966 the affairs of NADECO, a private company, were the subject matter of inquiry. What is of essence here is the extent to which the activities of the private entity impact on national affairs.

In ***Republic v PNDC Secretary, Ex Parte Oti***, the validity of the appointment a committee of inquiry appointed to inquire into the choice of a chief was challenged on the ground that jurisdiction in chieftaincy matters was the preserve of the House of Chiefs and traditional councils. In rejecting this submission it was held that by the provisions of section 6(1) of the Provisional National Defense Council (Establishment) Proclamation (Supplementary and Consequential provisions) Law 1982 PNDCL 42, the PNDC as the legislative authority was vested with very wide powers to set up a committee of inquiry into any matter of public interest and although the law did not specify what constituted matters of public interest, it was obvious that the PNDC had the discretion to determine what matters were of public interest and accordingly it had power to appoint a committee of inquiry into a chieftaincy matter when satisfied that it was in the public interest.

Although this decision may have been right at the time it was given, (at that time there was no Constitution and the executive and legislative powers were not clearly separated,) its implications must be explored for it leaves open a window of opportunity through which the executive may act and frustrate the work of other state institutions, in the instant case the House of Chiefs. It can create a situation whereby two institutions of state can come out with two different conclusions of the same subject matter – a clear recipe for confusion. Indeed in the instant case the government withdrew the matter, which was before the Ga Traditional Council and appointed a panel to hear and determine the case.

It is in a similar light that the true scope of the phrase "any matter of public interest" should be discussed and interpreted. **Prima facie** the only limitation on subject matter of inquiry is that it should be in the public interest. One can, however, ask whether it will be in the public interest and hence constitutional to appoint a commission of inquiry to inquire into a matter which is **sub judice**. On the ordinary meaning of the phrase the answer will be in the affirmative. This position is further strengthened by the fact that where the framers of the constitution wanted to limit the scope of inquiry of an investigative body it said so expressly. The maxim is **expression unius est exclusio alterius** (the express mention of things of the same class implied the exclusion of those not expressly mentioned). Thus article 219(2) of the 1992 Constitution provides that the Commission of Human Rights and Administrative Justice shall not investigate a matter which is pending before a Court or judicial tribunal. It can however be argued on the contrary that such a stance would amount to interference with the work of the judiciary and in breach of article 127 of the 1992 Constitution.

So far such an issue has not seriously arisen under the 1992 Constitution but it was a similar act by the Executive, which formed the genesis of the case of ***Republic v Otu Ex part Attorney General.*** In that case the defendants had been served with charges under the Armed Forces Act 1962 (Act 105). Before the trial a commission of inquiry was set up to investigate the activities of the defendants which activities formed the subject matter of the criminal prosecution. They appeared before the commission but refused to be sworn asserting the privilege against self-incrimination. They were cited for contempt but subsequently discharged. Be that as it may, commissions of inquiry appointed under

the Constitution seem to have adopted some self-restraint. Thus the commission of inquiry set up to investigate the international transfer of players declined to inquire into cases which were "pending before court or had previously been determined by the courts having "regard to the difficulties which the commission might encounter if it assumed jurisdiction over [such] issues"

(v) Powers of the Commission

Under Article 279(1): It shall have the powers, rights and privileges of the High Court at a trial in respect of:

(a) enforcing the attendance of witnesses and examining them on oath, affirmation or otherwise;

(b) compelling the production of documents and

(c) the issue of a Commission or request to examine witnesses abroad.

279(2) A Sole Commissioner or Chairman of a Commission or a member of a Commission of enquiry shall not be liable to any action or suit in respect of any matter in the performance of his functions

(vi) Functions of the Commission

Article 280 (1) provides: A Commission of Enquiry shall:

(a) It shall make full, faithful and impartial inquiry into any matter specified in the instrument of appointment;

(b) report in writing the result of the inquiry; and

(c) furnish in the report the reasons leading to the conclusions stated in the report.

280(2) Where a commission of inquiry makes an adverse finding against any person, the report of the commission shall, for the purpose of the constitution, be deemed to be the judgment of the High Court; and accordingly, an appeal shall lie as of right from the finding of the commission to the Court of Appeal

208(3) The President shall, subject to clause (4) of this article cause to be published the report of the commission of inquiry together with the 'White Paper on it within months after the date of the submission of the report by the Commission.

4. When the report of a commission of inquiry is not to be published, the President shall issue a statement to that effect giving reasons why the report is not be published.
5. A finding of a commission of inquiry shall not have the effect of a judgment of the High Court as provided under clause (2) of this article, unless

(a) Six months have passed after the finding is made and announced to the public; or

(b) The government issues a statement in the *Gassette* and in the national media that it does not intend to issue a White Paper on the report of the commission whichever is the earlier.

(c) The right of appeal conferred by clause (2) of this article on a person against whom a finding has been made, shall be exercisable within three months after the occurrence of either of the events described in clause (5) of this article or such other time as the High Court or the Court of Appeal may, by special leave and on such conditions as it may consider just, allow.

281. (1) Except as may be otherwise ordered by the commission in the interest of public morality, public safety or public order, the proceedings of a commission of inquiry shall be held in public.

(2) Subject to the provisions of this Chapter, the Rule of Court-Committee established under article 157 of this Constitution shall, by constitutional instrument, make rules regulating the practice and procedure of all commission of inquiry and for appeals from commissions of inquiry.

(vii) Rules of Procedure.

The need to follow the right procedure before arriving at a legal conclusion, especially when that conclusion has implication for the rights of individual is an essential aspect of the rule of law. The law abhors arbitrariness hence many decisions have been quashed on grounds of procedural irregularity. A commission of inquiry must follow certain laid down procedures before its conclusion can stand the test of the law. It is, however, in a rather different position from courts of law: they may be manned by people not skilled in the law, do not exercise judicial power, are characterized by great deal of informality and

are usually set up to inquire into maters which may be nothing more than rumours. This may be so notwithstanding an attempt in its terms of reference to broadly define the commission's work. As Keeton notes,

> "In a court of law definite charges are preferred against specific persons who therefore have full opportunity to prepare and at the same time give the court focus. A tribunal of inquiry on the other hand has the difficult task of conducting a general inquiry into matters, which are sometimes based upon nothing more than rumours. In such a case, therefore, a very great responsibility devolves upon the tribunal itself in respect of the difficult question as to how far the inquiry should range and what kind of inquiry it shall receive".

Owing to the above and the possible adverse consequences that the findings of such commissions of inquiry may have on the individual, the procedure adopted by commissions of inquiry has been the concern of legislators and the judiciary. This might have accounted for the departure from section 5 of the Commissions of Inquiry Act 1964 (Act 250) (which allowed the commission to prescribe its own rules of procedure) to the resent provision in article 281(2) of the 1992 Constitution which enjoins the Rules of Court Committee to make rules regulating the practice and Procedure of all commissions of inquiry. This provision existed in both the 1969 and 1979 Constitutions but so far no such rules have been made.

The drafters of the 1969 Constitution however attempted to provide some useful guides. They noted,

> "as a guide we think that a commission of inquiry should not be bound by the ordinary strict rules of evidence applicable in courts of law. A person duly summoned before a commission of inquiry should not be regarded as a witness of any particular party. He must be considered to be a witness of the commission. Such a person should therefore give formal evidence as to the matters related by him in his written statement to the commission and then be subjected to cross-examination by counsel on behalf of the commission to test the accuracy of his statement and to deal with matters which are not dealt with in his statement. He should be liable to examination on behalf of any person affected by the evidence given or that person himself and should be subject to re-examination on behalf of the commission when this is required".

The Court of Appeal in **Darkwa v the Republic** also noted,

> "that a committee of inquiry like a commission of inquiry was a fact finding tribunal not a criminal trial. Its work implied the discovery of truth, which ought to be balanced against the interest of the individuals. It therefore has a duty to ascertain the truth before making a finding. Its nature partook of the exercise of judicial function i.e. the taking of decisions and thus it had a duty to do what was reasonable in the circumstances. Because of these considerations a committee of inquiry had certain obligations. It had the obligation to be candid and fair, to

> observe the audi alteram paterm rule and a bounden duty to observe the rules of natural justice . . . the person against whom an allegation was made should be permitted to challenge the very allegation against him and have a right to call evidence to support his contentions. The basic procedure consisted of collecting evidence, taking statements from witnesses, presenting their evidence, testing the accuracy of the evidence and finally finding the facts".

Lord Diplock, in Mahon v Air New Zealand also noted

> "the rules of natural justice that are germane in the exercise of an investigative jurisdiction are these; the first rule is that the person making a finding in exercise of such jurisdiction must base his decision upon evidence that has some probative value…. The second rule is that he must listen fairly to any relevant evidence conflicting with the finding and any rational argument against the finding that a person represented at the inquiry whose interest may be adversely affected by it may wish to place before him or would have wished if he had been aware of the risk of the finding being made. The technical rules of evidence applicable to civil and criminal litigation form no part of the rules of natural justice. What is required by the first rule is that the decision to make a finding must be based upon some material that tends logically to show the finding and that the reasoning supportive of the finding if it be disclosed is not logically self-contradictory. The second rule requires that any person represented at the enquiry who will be adversely affected by the decision to make a finding should not be left in the dark as to the risk of the finding being made and thus deprived of any opportunity to adduce additional material of probative value which had it been placed before the decision maker, might have deterred him from making the finding even though it cannot be predicted that it would inevitably have had that result."

The proceedings at commission s of inquiry have also engaged the attention of scholars in other jurisdictions. In Britain a Royal Commission chaired by Salmon L.J. reviewed the whole procedure in 1966 and came out with certain recommendations. In order to minimize the risk of injustice to individuals the commission identified six "cardinal principles" that all tribunals established under the Tribunals of Inquiry Act 1921 should observe. In summary these are:

1. That the Tribunal should be satisfied that each witness called was really involved in the subject matter of the inquiry;
2. That every witness should be informed of any allegations, and the substance of the evidence, against him;
3. That he should have an adequate opportunity of preparing his case and of being assisted by legal advisers;
4. That he should have the opportunity of being examined by his own solicitor or counsel;

5. That all material witnesses a person wishes to be called should, if reasonably practicable be called; and
6. That every witness should have the opportunity of testing any evidence which affect him by cross-examination conducted by his own solicitor or counsel.

The absence of well-defined procedural rules represents a challenge to all commission of inquiry. It does not, however, in any way derogate from their duty to make "a full, faithful and impartial inquiry". The guiding principle should be that their procedure should accord with fairness, natural justice and the legitimate expectations of the affected persons. Again although the absence of statutory procedural rules provides commissions of inquiry with a wide latitude to determine their own procedure, the court will intervene when there is very "**good reason**". This power to intervene is in line with the courts supervisory jurisdiction over lower adjudicating authority. The courts are however slow to intervene. As Lord Woolf admonished,

> "tribunals such as this often have the most difficult task to perform. They are set up without guidance as to the precise procedures, which they have to follow. They have to work out that procedure for themselves. The will inevitably know more about the problems of the particular area into which they have to enquire than can be known by the supervising court . . . Tribunals are entitled to determine their procedure for themselves. The court should only interfere when there is some very good reason for them to do so".

(viii) Witnesses before Commissions of Inquiry.

Under article 283 of the Constitution a witness before a commission of inquiry is entitled to the same immunities and privileges as if he were a witness before the High Court of Justice. By this provision such a witness is entitled to all the privileges under part VI of the Evidence Decree 1975 ((NRCD 323) as may be relevant to the proceedings of the commission and such other privileges as are evolved by the common law.

Any such privilege must, however, be claimed. In Akainyah v The Republic it was held that although a witness before a commission of inquiry may be privileged from answering self-incriminating questions, the role of the commissioner in the proceedings is the same as the role of a judge before whom a witness appeared at a trial. The judge as a matter of practice should warn a witness that he was not obliged to answer incriminating questions but there seemed to be no rigid rule of law to that effect. It was for the witness to claim the privilege by objecting to answer. Therefore, the fact that a witness was

ignorant of his rights should not prevent the court from utilizing his evidence in subsequent criminal proceedings bought against him.

The operation of the exclusionary rules on privilege often poses a problem to the activities of commissions of inquiry whose ultimate aim is to ascertain the truth. This is because the operation of this exclusionary rule has the effect of "hiding" the truth. This may influence the attitude of the commissioner and the problem is exacerbated by the mass illiteracy and ignorance, which may prevent people from knowing and asserting the privilege. It is suggested that in a situation where a witness because of ignorance is not able to claim a privilege the commissioner must weigh all the relevant considerations, such as the object of the inquiry, the probative value of the information as well as the effect the disclosure will have on the witness in order to come to a conclusion which will best serve the ends of justice.

In the absence of specific statutory provisions to the contrary, statements made and evidence given during proceedings at commissions of inquiry can be used against the individual in a subsequent criminal action. This immunity may even extend to civil proceedings for at common law a rule exists that where a public inquiry is set up by a statutory authority and conducted judicially, witnesses given evidence before it may be absolutely immune from civil proceedings arising from their evidence. This rule is founded on the public policy objective that witnesses should give their testimony free from any fear of being harassed by an action on allegation whether true or false that they acted from malice. A case in point is Trapp v Mackie. In this case the appellant was dismissed as a headmaster by the local education authority of which the respondent was chairman. Pursuant to the appellant's petition, the Secretary of State set up an inquiry with Queen's Counsel as commissioner under the Education (Scotland) Act 1946 to investigate the dismissal. The inquiry was held in public, the procedure adopted being similar to that in a court of law. Evidence was given inter alia by the respondent. The commissioner concluded that the dismissal was reasonably justifiable and reported to the Minister who accepted the conclusion. The appellant then brought proceedings against the respondent alleging that he had given maliciously false evidence to the inquiry thereby influencing its decisions. The respondent succeeded in having the action dismissed on the grounds of this evidence being absolutely privileged. On appeal the

House of Lords held that absolute privilege could apply to evidence given in proceedings which although did not finally determine the issue raised formed part of the decision making process and the nature of this inquiry indicated that such a privilege would apply.

An important right of a witness recognized under the Constitution is the right of legal representation. Article 282(1) provides that,

> "Any person whose conduct is the subject of inquiry by a commission of inquiry, or who may, in any way be implicated or concerned in the matter under inquiry, is entitled to be represented by a lawyer at the inquiry; and any other person who may consider it desirable that he should be represented by a lawyer shall be allowed to be so represented".

The significance of codifying this right cannot be underestimated for the common law guaranteed no such right of legal representation before a commission of inquiry. The commission had a discretion as to the extent it will accord a right of legal representation. This will usually depend upon how seriously the proceedings will impact upon the applicant's interest or rights. Relevant considerations in such a case will include whether the charge and potential penalty are sufficiently serious, whether the applicant is able to represent him or herself adequately, whether the case involves complex issues of fact or law and the general need to ensure that all parties are provided with the same opportunities to protect their interest. Although the Constitution guarantees (by the use of the word "shall") the right to legal representation, the scope and content of the right may have to be defined on a case by case basis and that factors above may be relevant in that direction. This is because legal representation raises questions of cost, efficiency and delay. Indeed some have counselled against the excessive use of lawyers in such inquisitorial proceedings. In the words of Blom-Cooper

> "there does not seem to be any necessity for legal representatives to anticipate prejudice to their clients' cases by way of involvement in the questioning and, be it noted cross-examination of witnesses at what is meant to be a fact finding process and not a legal contestation. Lawyers hired by witnesses should be able to provide their clients with private advice and assistance outside the inquiry room, but not to assume adversarial roles inside it".

(ix) Commissions of Inquiry and Courts of Law.

That a commission of inquiry is not a court of law cannot be doubted. In **Inkumsah v The Republic**, it was held that to say that because a commission of inquiry exercises

certain specified powers of the High Court it is a Court is a **non sequitur**. A commission of inquiry is not a court of law. The existence of institution with trappings of a court of law, which are not courts of law, abound. A long line of authorities also exists for the proposition that a commission of inquiry do not exercise final judicial power.

Notwithstanding the above a commission of inquiry under article 279 of the 1992 Constitution has the powers of the High Court or a justice of the High Court at trial in respect of enforcing the attendance of witnesses and examining them on oath, affirmation or otherwise; compelling the production of documents and the issue of a commission or request to examine witnesses abroad. This provision raises a number of interesting issues. Does it for example give the commission power to punish for contempt as the High Court can do? The judges developed the law of contempt as a means by which the courts may prevent or punish conduct that tends to obstruct, prejudice or abuse the administration of justice. Great care is needed, however, in the application of this branch of the law since it restricts freedom of expression. The law is that a commission of inquiry if not given specifically the power to punish for contempt cannot do so. This is a reflection of a broader proposition that at common law a commission of inquiry possesses no coercive powers. It must transmit any allegation of contempt to the High Court. This was the procedure prescribed under section 7 of the Commission of Inquiry Act 1964 (Act 250) which procedure was applied in **Republic v. Otu, Ex parte Attorney General**. A radically different approach was adopted under the national Liberation Council (Investigation and forfeiture of Assets) Decree 1966 NLCD 72 as amended by NLCD 129. Under this enactment commissioners were empowered to punish witnesses for contempt or perjury in the same manner as a judge of the High Court could do. In **Inkumsah v The Republic**, this power was exercised by the Jiagge Commission with the blessing of the Court of Appeal. In the light of this history what interpretation is to be put on article 279 of the 1992 Constitution? Does it allow a commission of inquiry to punish for contempt or merely to site a person for contempt? It is suggested that the latter is the case. This is because the former interpretation will allow commissions of inquiry to exercise "**final judicial power**" in breach of article 125 (3) of the 1992 Constitution. Such considerations might indeed have influenced Parliament when it enacted in section 8(1) (b) of the Commission of Human Rights and Administrative Justice Act, 1993 (Act 456) that

> "the commission shall for the purposes of performing its functions under this Act have power to cause any person contemptuous of any such subpoena to be prosecuted before a competent court".

Another issue relates to the enforcement of the power of a commission of inquiry to compel the production of document. Specifically it relates to the proper forum to be used to enforce this power in the light of the provisions of article 135(1) of the 1992 Constitution which provides that

> "the supreme court shall have exclusive jurisdiction to determine whether an official document shall not be produced in court because its production or disclosure of its contents will be prejudicial to the security of the state or will be injurious to the public interest".

This provision imposes two restrictions on its invocation namely:

1. The document must be an "official document"
2. The issue of its production must have arisen "in court"

A commission of inquiry as noted above is not a court and so it can be argued that it cannot on its own invoke article 135(1). This argument may however pale into insignificance if it is noted that as regards the power to compel the production of documents article 279(1) of the constitution gives a commission of inquiry "**the powers**" of the High Court. Thus if the High Court has power to invoke article 15(1), a commission of inquiry must also have that same power. Another issue relates to the production of private documents. The High Court has elaborate procedure for securing the production of documents. A commission of inquiry, it is suggested, cannot resort to these procedures, as it may amount to exercising "final judicial power". Here again resort must be had to the High Court for help. The above analysis shows that there is more to the provisions of article 279(1) than what one gets from a cursory reading of it. Its meaning, significance and implication can only be fully appreciated when read with other provisions of the Constitution and the law on the practice and procedure of the High Court of Justice.

(x) Adverse Findings, Deemed to be Judgment of High Court

Before the enactment of the 1979 Constitution, the true scope and effect of a finding by a commission of inquiry was not precisely defined. The practice was for specific enactments to be made to implement the findings of specific commissions of inquiry. The Commission of Inquiry (Implementation of findings) Decree 1974 (NRCD 261),

attempted to provide a universal scheme for the implementation of findings of commissions of inquiry. This consideration coupled with appreciation of the serious legal consequences that emanated from findings of such commission exercised the minds of the framers of the Constitution 1979. They reasoned that;

> "having regard to the fact that the findings and recommendations of a commission of inquiry can have serious legal consequences for persons affected thereby, not to mention the possible adverse impact on the reputation and image of such persons in the society we consider it necessary that a person adversely affected by such findings or recommendations should be able to challenge the soundness or legality of such findings or recommendations in the court".

It was accordingly proposed and enacted that where a commission of inquiry makes adverse findings against any person, the report of the commission of inquiry shall for the purpose of this Constitution be deemed to be a judgment of the High Court of Justice and accordingly an appeal shall lie as of right from the Commission to the Court of Appeal. This provision has been repeated in article 280 of the 1992 Constitution.

What are the incidents of "deeming" the report to be a judgment of the High Court? It has been suggested for example that the phrase "**deemed to be judgment of High Court**" is only for the purpose of conferring a right of appeal. This interpretation, it is suggested, is too narrow for other provisions do exist in the constitution, which confers a right of appeal without deeming the decision being an appeal from a judgment of the High Court. Indeed a right of appeal is only by statute. Thus a broader interpretation must be put on the phrase "**deemed to be a judgment of the High Court**", with all the incidents attached thereto such as **enforcement, appeal, and estoppels**.

The application of the concept of **estoppel** to the findings of commissions of inquiry needs, however, to be further explored especially in the light of the limited application of the concept in administrative law. Estoppels have many facets one of which is **estoppel per rem judicatam**. This is a doctrine, which prevents parties to a judicial determination from litigating the same question over again except in proceedings by way of appeal or judicial review. The rationale for this rule is founded on two principles: first, that it is in the public interest that there be finality to litigation; and second, that no one should be

harassed twice for the same cause. In order that a defense of **res judicata** may succeed, it is necessary to show that;

(1) There has been a final judgment by a court of competent jurisdiction. A judgment is final if it is determinative of the issues between the parties and conclusive on the merits.

(2) The parties are the same and litigating in the same capacity.

(3) The issues in the proceedings in question are the same as that which was litigated in the previous proceedings.

The doctrine of **estoppels per rem judicatam** is by no means confined to courts of law in the strict sense. To Acquah JSC

> "the plea of res judicata is not confined only to the normal courts".

Lord Holt CJ also noted in **Philips v Bury** that

> "the law hath respect not only to courts of record and judicial proceedings there but even to all other proceedings where the person who give judgment or sentence hath judicial authority":

To what extent therefore can the rule of **estoppels per rem judicatam** be applied to findings of commissions of inquiry? This point was considered in the Australian case of Accident Compensation Commission v Detar. The court noted;

> "that the principle embodied in the Latin phrase which are essential to any civilized legal system are founded on the proposition that it is in the general interest of the community that there be an end to litigation and that no one should be placed twice in jeopardy for the same cause. Only the clearest language in an Act of Parliament could produce inequality before the law in that respect. The requirements of the doctrine of estoppels per rem judicatam are often expressed as judicial decisions pronounced by a judicial tribunal. But the tribunal does not have to be one of the regular courts. A statutory tribunal is counted as a judicial tribunal for these purposes…… There are extremely few cases in which a civil authority had been held incapable of making any pronouncement having the effect of res judicata. Notwithstanding that a conciliation division makes a recommendations and not a determination of nomine we think that since its recommendations are given operation and effect by the statute it should be regarded as a judicial tribunal for the purpose of the doctrine".

Although an adverse recommendation by a commission of inquiry may operate as **estoppels per rem judicatam** certain questions remain. First who are the parties to the proceedings of a commission of inquiry? The principle is that the doctrine operates where the parties to the previous proceedings are the same and acting in the same capacity. For the plea to be successful therefore there must be the proper identification of

the parties. Investigations of commissions of inquiry are usually not directed at any particular person and indeed persons invited are usually invited as "**witnesses**". Indeed if it is the government or the appointing authority which is going to raise the plea it may be doubted whether it was a "**party**" to the proceedings. They are also not usually set up to settle disputes between parties. In the European Gateway, the Secretary of State for Transport exercising his powers under Section 466 of the Merchant Shipping Act 1894 ordered a formal investigation into a collision between two ships; The Speedlink Vanguard and The European Gateway. The court of formal investigation found that the cause of the collision was faulty navigation on the part of both vessels but that the major blame lay in the navigation of the European Gateway. In this action the owners of Speedlink relying on the findings of the investigation sought to recover damages from the owners of the European Gateway. The latter in turn denied liability and counter-claimed for damages whereupon the plaintiffs pleaded inter alia estoppel. Steyn J rejected this plea. He reasoned that in that investigation there was no lis between the ship owners and that the court was not a court of competent jurisdiction on the question of civil liability. The court had been set up to investigate the causes of the collision and suggest solutions. He noted;

> "there is no lis between the contending ship owners. Prima facie this factor militates cogently against the submission that the court of formal investigation was acting as a court of comment jurisdiction between the two contending ship owners. After all, the conception of a judicial function is inseparably bound up with the idea of a suit between parties, which it is the duty of the court to decide between those parties".

Second, the nature of the proceedings at commissions of inquiry may also prevent the court from rigidly adhering to the doctrine. Although proceedings at such commissions resemble court proceedings they usually depart from the strict rules of evidence applied in courts of law. They are usually characterized by informality. This may affect the status of the finding being considered as having been based on the merits.

Third the apparent want of the requirement of mutuality from a reading of article 280(2) may also influence the attitude of the court towards such proceedings and any such plea founded on their report. Under the said article only "**adversefindings against any person**" are deemed judgments of the High Court and hence can prima facie found a plea of estoppels per rem judicatam. Consequently it is only one party to the proceedings who

can raise the plea in for example, a civil action to recover money found to have been illegally appropriated by the defendant whose conduct had been the subject of inquiry. This party will usually be the appointing authority. In such a trial the findings of the commission may be only of evidential value to the defendant subject to the rules on privilege, which may indeed limit his ability to rely on the findings. As was noted above the requirements of the doctrine of **estoppels per rem judicatam** must apply equally to both parties to any dispute and only the clearest language in an Act of parliament could produce inequality before the law in that respect. This may be seen as one such legislation. There may however be policy reasons for this apparent bias. It may represent an attempt not to fetter the ability of the state to bring individuals to book. For example if a commission of inquiry is set up to investigate allegation of corruption against a public officer but he is exonerated it must be possible for the state to adduce fresh evidence to secure his criminal conviction or for him to incur civil liability in court without being fettered by any plea of estoppels. In a criminal action, however, the report of a commission of inquiry serves only as evidence and no plea of **autrefois acquit or autrefois convict (which pleas are an aspect of estoppels per rem judicatam in criminal actions)** can be founded on the report. Proceedings at a commission of inquiry are not criminal trials and do not purport to be such. It is thus suggested that although it is possible to found a plea of **estoppels per rem judicatam** on the report of a commission of inquiry, a lot of Considerations may influence the court in its assessment of whether or not all the elements listed above have been met. As we noted by **Coussey JA in Basil v Honger**

> "the plea of res judicata prohibits the court from enquiring into a matter already adjudicated upon. It ousts the jurisdiction of the court."

The courts generally do not take kindly to doctrines that purport to oust their jurisdiction

(xi) Adverse Findings as a Ground of Disqualification for Position of Member of Parliament and President

Grave consequences may flow from findings of a commission of inquiry. Adverse findings serve as a ground for disqualifying a person from standing for the position of Member of Parliament or President. Article 94(2)(d) specifically provides that;

> "a person shall not be qualified to be a member of parliament if he has been found by the report of a commission or a committee of inquiry to be incompetent to hold public office or is a person in respect of whom a commission or committee of

> inquiry has found that while being a public officer he acquired assets unlawfully or defrauded the state or misused or abused his office or willfully acted in a manner prejudicial to the interest of the state and the findings have not been set aside on appeal or judicial review".

This provision traces its origin to article 71(2) (d) (ii) of the 1969 Constitution 1969. It was this provision, which was invoked and applied in the celebrated case of **Gbedemah v Awoonor-Williams**. In that case, the plaintiff had lost an election to the Notional Assembly to the defendant. The defendant had accordingly being sworn in as a member of the National Assembly. In this action, the plaintiff sought inter alia a declaration that by virtue of Article 71(2) (b) (ii) of the 1969 Constitution the defendant was not qualified to be a member of the National Assembly. It was established as a fact that the defendant had been found by the Jiagge Commission established under the National Liberation Council (Investigation and Forfeiture of Assets) Decree NLCD 72 as amended to have unlawfully acquired assets whilst he was a public officer. By a majority decision the court of Appeal held that having been found by a commission of inquiry to have unlawfully acquired assets whilst being a public officer he was disqualified by virtue of the provisions of the Constitution. It must be noted that in this case the right of appeal against the findings of the Commission had been denied the defendant. The decision must therefore be read in the light of article 280 of the 1992 Constitution, which provides for a right of appeal.

One issue which immediately comes to mind on a reading of Article 94(2)(d) is the question as to why the provision seems to be restricted to acts done "**while being a public officer**". It had been proposed by the Committee of Experts that the provision should be made to apply to everybody. They reasoned that,

> "the Committee saw no reason why the sanction should not be equally applicable to transgressors who are not public officers. Any person who is quilt of the above acts should be unfit to hold public office or enter parliament".

This proposal did not find its way into the Constitution. It is suggested that the approach favoured by the Committee of Experts is preferred. There is not such material difference between acts done by a person in his private office and those done by a public officer when those acts are of a corrupting nature. They may both adversely affect the society and deserve equal treatment and reprimand from the law.

Again what committee or commission of inquiry does article 94(2) (d) envisage? In the introductory part of this paper, an attempt was made to distinguish at least four types of institutions which all have the character of a commission of inquiry. The problem specifically relates to the issue of whether the provision extends to cover finding of what was termed purely "**domestic commissions of inquiry**" and those set up by "**administrative governmental bodies"**. This problem is made even more challenging by the introduction of this new provision in article 94(4), which talks about "**judicial**" and "**quasi-judicial commissions**' without any criteria for distinguishing between them. On this distinction the Committee of Experts noted

> "the committee felt that a distinction had to be drawn between the findings of a judicial or quasi-judicial commission of inquiry in the findings of a less formal felt finding enquiry".

It is suggested that article 94(2)(d) should be construed as referring to only commissions of inquiry of a public character and must not be extended to "purely domestic commissions of inquiry". Reference in that provision to "while being a public officer" adds a public coloration to the said article. To extend the provision to purely domestic commissions whose procedure and powers may be entirely different from those public commissions may create great hardship for individuals.

(xii) Publication of Report and the White paper.

A commission of inquiry is obliged to report in writing the results of its inquire. As the Commission is appointed by the President its report is sent to the president who must cause it to be published together with the White Paper on it within six months after the date of the submission of the report or where the report is not to be published issue a statement to that effect giving reasons why the report is not to be published. This requirement of publication represents an attempt to satisfy the public's right to know. A commission of inquiry is the guardian of the public interest since they are appointed to inquire into matters of "**public interest**". The White Paper is a statement of the government's position on particular issues addressed in the commission's report. It represents the governments view on the issue. The mandatory requirement for a White Paper to accompany the publication of the report of commissions of inquiry was introduced in the 1979 Constitution but no specific reason was assigned for its introduction. It could however be seen as an attempt by the Executive to maintain some degree of control over the findings of the commission whilst at the sametime allowing the public to know the policy measures the government is taking on the report.

The contents of the White Papers have been many and varied. They range from statements of appreciation and commendation for good work done to those rejecting or accepting specific findings and the policy initiatives to be taken thereon. Whatever be the case, however, the content of the White Paper as well as the actions that could be taken on it are not at large. The White Paper cannot be used as a tool for arbitrary action. In **Quayson v Attorney General**, the appellant was a prison officer who appeared before a commission of inquirey appointed by the government to investigate a prison escape. The commission submitted its report and the government released a White Paper on the report. The Commission made no recommendation as to the punishment to be meted out to the appellant; but the government purporting to be acting on the basis of the commission report directed in the White Paper that the services of the appellant be dispensed with. The government reasoned, contrary to the report of the commission, that the failure of the Commission to recommend punitive sanctions was an oversight. In granting his application for certiorari it was held that the commission's failure to recommend sanctions was deliberate and the statements in the White paper were diametrically opposed to the clear unambiguous and plain language of the Commission's report. Even though the government was not bound by the findings and recommendations of the inquiry it was equally not permissible in law for government to purport to act on a finding or recommendation where none existed. This decision imposes limitations on what can be done on the basis of the reports of a commission of inquiry. This is a legitimate restraint for were that not the case there would actually have been no need to set up the Commission. In **Kwpong v GCMB (Consolidated),** it was held that the White Paper contained policy directives of the government, consequently where a person misapplied the directions contained therein and thereby injure the legally protected rights of a person the latter could bring an action to vindicate his rights.

Indeed the courts have been cautious in their treatment of executive actions purportedly based on the findings of commissions of inquiry. **In Darkwa v The Republic** the appellant had had adverse findings made against her by a committee of inquiry. She was subsequently retired from the police service by a letter based on the recommendations of the committee of inquiry. In the instant proceedings the court set aside the report of the committee for breach of natural justice and consequently held that her purported dismissal based on the recommendations of the committee could not stand.

There is also the need to monitor the implementation of findings of commissions of inquiry to avoid a situation where scarce resources are spent on these commissions only for the findings to gather dust in some offices. The implementation of such findings is largely the responsibility of

the Executive and often influenced by political considerations and expediency. As a result of this it often happens that the findings are either not implemented at all are or modified in material respects. To ensure that findings of commissions of inquiry are implemented greater public awareness of the findings and the force of public opinion is often required. Parliament also has a crucial role to play in this area. By effectively exercising its oversight responsibilities it can put pressure on the Executive to implement findings of commissions of inquiry.

(xiii) Some of the Constitutional Instruments setting up Commissions of Inquiry under the Second, Third and Fourth Republics of Ghana

Second Republic 1969-1972

1. Commission of Inquiry (Tax Review) Instrument 1970
2. Commission of Inquiry (Bribery and Corruption) instrument 1970
3. Commission of Inquiry (Duffor Traditional Area) instrument 1971
4. Commission of Inquiry (Samaraboi Disturbances)instrument 1971

Third Republic 1979-1981

1. Commission of Inquiry (Release of 5 prisoners from Ussher Fort Prisons) instrument 979
2. Commission of Inquiry into Diamond Industry in Ghana instrument 1980
3. Commission of Inquiry into payment of compensation on the lands acquired by government for development projects) instrument 1980.
4. Commission of Inquiry (Communal disturbances) instrument 1981
5. Commission of Inquiry into Ghana Education Service instrument 1980

Fourth Republic 1992 –2002

1. Commission of Inquiry (International Transfer of Football Players) Instrument 1999
2. Commission of Inquiry (Accra Sports Stadium Disaster) instrument 2001 (Okudzeto Commission)
3. Commission of Inquiry (Yendi Events) instrument 2002 (Wuaku Comm)

Note that Commissions (Committees) of Inquiry were set up during the military regimes under the **decrees**. Some of them are:

1. Commission of Inquiry into Civil Service Strike, 3rd to 8th November, 1978 (Apatu-Plange Commission) under NRCD
2. Commission of Inquiry into Yendi Skin Affair 1972 under NRCD 299[27]

6:4 The Commission on Human Rights and Administrative Justice (CHRAJ)

(i) Introduction

The search for appropriate measures and an institution to investigate the abuse of power and infringement on individual rights and freedoms in Ghana dates back to 1966, precisely nine months after the overthrow of the Convention Peoples Party (CPP) government. The first pragmatic step taken by the National Liberation Council (NLC) in this direction was the establishment of a special independent body named "Expedition Committee", with the duty to develop a more effective and efficient mechanism for the redress of grievances between public authorities and individuals in the country.

A review of the recommendations of the committee by the drafters of the 1969 Constitution led to the insertion of a Parliamentary Commissioner for Administration (hereafter referred to as the Ombudsman) into that constitution for the first time and this was again re-enacted by the 1979 Constitution.

The development of the ombudsman as an institution in Ghana was interrupted by the unconstitutional regimes which introduced their own mechanism of investigating administrative injustices and corruption of public officials. The National Redemption Council (NRC), which overthrew the Progress Party (PP) government on 13th January 1972 in a coup d'etat, established an investigation division under a "Special Action Unit" purposely to deal with abuse of power by public officials.

The 1969 Constitution, did not make it mandatory for the PP government (during the Second Republic) to appoint somebody to the office of ombudsman. All that the Government did was to pass the Ombudsman Bill into Law

[27] Abudulai v Andani of Dagomba dynasty - where the nomination and enskinment of Mohamed Abudulai was found to be null and void and therefore was to give way to Andani to be the Ya-Na of Dagbon.

It was under the 1979 Constitution (during the Third Republic), that Ghana had an ombudsman office in practice. The 1979 constitution not only stipulated that an ombudsman office be established but also went further to enjoin the Government to appoint a person to the office of ombudsman one year after the coming into force of the 1979 constitution. However, that office operated for only two years and again was suspended by a military government (the Provisional National Defence Council).

In a number of respects, the Ombudsman during the Third Republic, was more effective as a means of providing redress for citizens mistreated by government authorities than judicial and parliamentary remedies. However, the Ombudsman was not set up as a replacement for other existing institutions namely, the

Legal Aid Board and the Internal Legal Aid Board and the Internal Complaint Procedures but in order to remedy their deficiencies and to fill gaps they created.
Legal Aid Board and the Internal Complaint Procedures but in order to remedy their deficiencies and to fill gaps they created.

The Ombudsman system, from the chronology of events, reveals that it never had a sustainable process of evolution in Ghana because of the frequent change of government and was further saddled with numerous operational problems. In particular, there was some overlap between the range of administrative actions, the statutory right of appeal or judicial review proceedings. Also, the office of Ombudsman in the Second and Third Republics was not accessible to a majority of the citizenry.

As a consequence of the tortuous path and the ugly scars left behind by the ombudsman institution in Ghana, the committee of experts of the 1992 Constitution saw the need for the establishment of an independent body – a commission on Human Rights and Administrative Justice (hereafter referred to as "the Commission") to awaken Ghanaians to their constitutional rights, investigate violation of such rights and assist individuals in taking legal action against violation of such rights.

The Commission is not only to uncover maladministration and corruption but also to enable civil servants wrongly accused of such offences to clear their names.

The establishment of Commission on Human Rights and Administrative Justice (CHRAJ) is unique in the sense, that it is the first time in the constitutional history of Ghana, and perhaps other nations, that a legal machinery has emerged as an institutional model combining the functions of three distinct human institutions namely:
- Human Rights Office, Ombudsman Office and Corruption Office- with the purpose of effectively protecting human rights and freedoms as well as checking abuse of administrative power and corruption of public officials.

The social, economic and political experience of Ghana has had a tremendous influence on the emergence of this institution, especially the general concern for developing "a culture of respect" for fundamental human rights and freedoms. The reasons for this are obvious. Past regimes in Ghana (especially, the unconstitutional governments) were characterized by systematic and large scale violations of fundamental human rights and freedoms which were challenged or condemned by human rights organizations, professional bodies and social movements at different levels

The initial stage of the evolution of CHRAJ has seen the application of two approaches to its institutional framework.

There are those who considered CHRAJ as a powerful and effective adjudicating body exercising judicial functions. Others viewed it as a loose and ineffective institution with some of its functions resembling those of other existing administrative tribunals.

On subjects of this nature, one can scarcely have it both ways, but at least one can see that whichever position one opts for, the other side may still have some merits. There is no argument about the need for an institution which can enhance good governance, fairness and enforce fundamental human rights in Ghana, but there can be lots of arguments about the merits of contrary positions offered by various groups and individuals on the above issues.

Is CHRAJ a quasi-judicial body?

It is considered necessary to go into the seeming argument and try to clear the air as to CHRAJ being a quasi-judicial. The commission has been mostly seen to possess quasi-judicial functions which srt of make them a quasi judicial body but, case law seems to suggest otherwise, that is, according to case law, CHRAJ is purely an investigative and educational body which lacks judicial capacity of any form. In THE COMMISSION ON HUMAN RIGHTS AND ADMINISTRATIVE JUSTICE v. ATTORNEY GENERAL [23/06/99] WRIT NO. 3/96, Charles Hayfron Benjamin JSC (as he then was) said;

The Plaintiff [CHRAJ] owes his existence from — THE COMMISSION ON HUMAN RIGHTS AND ADMINISTRATIVE JUSTICE ACT (Act 456). It is therefore necessary at the outset to examine the Act and to distinguish the purpose of the Plaintiff from the manner he seeks to effect it and the scope and ambit within which such function may be exercised. The long title to the Act sets his purpose out clearly thus:

"AN ACT to establish a Commission on Human Rights and Administrative Justice to investigate complaints of violence of fundamental human rights and freedoms, injustice and corruption; abuse of power and unfair treatment of persons by public officers in the exercise of their duties, with power to seek remedy in respect of such acts or omissions and to provide for other related purposes."

. . . it is clear that the objects of the Plaintiff are investigative and educational. For the purposes of effective exercise of its investigative objects, the Plaintiff has certain powers akin to those of the regular Courts and Tribunals. But it must be said that in exercising those powers the Plaintiff does not thereby constitute a Court or Tribunal properly so called nor does he thereby assume any jurisdiction to do anything in his investigations. However, the Plaintiff may institute legal action "before any Court in Ghana and may seek any remedy which may be available from that Court."

Clearly the Plaintiff has no judicial power nor does he in the performance of his function thereby assume any jurisdiction cognizable at law.

(ii) <u>Laws Setting up CHRAJ</u>

For the Commission on Human Rights and Administrative Justice to be legally and constitutionally recognized by the people and for their investigations and findings to be binding on the people of this country, the constitution, constitutional instrument and an Act of Parliament have been passed to give it the required legal backing.

(a) The Constitution

Chapter 18 of the 1992 Constitution forms part of the supreme law of Ghana upon which CHRAJ is founded and from which the commission derives its rights and obligations. Article 216 of this document states *inter alia:*

There shall be established by an Act of parliament within six months after parliament first meets after the coming into force of this constitution, a commission on Human Rights and Administrative Justice which shall consist of

(a) A commissioner for Human Rights and Administrative Justice, and

(b) Two Deputy Commissioners for Human Rights and Administrative Justice

(b) The CHRAJ Act

Subject to the above provision in Article 216 of the 1992 Constitution, Parliament in October 1993 enacted the Commission on Human Rights and Administrative Justice Act, 1993 (Act 456) to establish the Commission. An introductory section of the Act states:

An Act to establish a commission on Human Rights and Administrative Justice to investigate complaints of violations of fundamental human rights and freedoms, injustices and corruption, abuse of power and unfair treatment of persons by Public Officers in the exercise of their duties, with power to seek remedy in respect of such acts or omissions and to provide for other related purposes

(c) **Constitutional Instrument (CI)**

It is stated in section 26(1) of the CHRAJ Act, that;

Subject to the provisions of the Constitution and to any Act of Parliament made under the Constitution, the Commission shall make, by constitutional instrument, regulations regarding the manner and procedure for bringing complaints before it and the investigation of such complaints.

In exercise of the law-making powers conferred on the Commission by the above Act of Parliament, a Constitutional Instrument (No.7) is provided which

spells out clearly complaint and procedure regulations of the Commission and constitutes the acceptable standard for the operation of the Commission.

The above legal documents together form the legal framework for the existence and functioning of the Commission.

(iii) <u>Functions of CHRAJ</u>

FUNCTIONS OF CHRAJ

The functions of the Commission can be found in article 218 of the constitution. As noted earlier in the judgment of Hayfron Benjamin JSC (as he then was), the functions of the Commission can be broadly categorized into two; investigative and educational. The functions under article 218 are generally going to be discussed under these two headings.

The Investigative Functions of CHRAJ

Article 218 (a) – (c) of the constitution provides; "**The functions of the Commission shall be defined and prescribed by Act of Parliament and shall include the duty;**

(a) **to investigate complaints of violations of fundamental rights and freedoms, injustice, corruption, abuse of power and unfair treatment of any person by a public officer in the exercise of his official duties;"**

(b) **to investigate complaints concerning the functioning of the Public Services Commission, the administrative organs of the State, the Armed Forces, the Police Service and the Prisons Service in so far as complaints relate to the failure to achieve a balanced structuring of those services or equal access by all to the recruitment of those services or fair administration in relation to those service;**

(c) **to investigate complaints concerning practices and actions by persons, private enterprises and other institutions where those complaints allege violations of fundamental rights and freedoms under this Constitution.**

These allegations, when found to be true, are remedied by the commission making certain orders. Among the many complaints of abuse of human rights that the commission has dealt with are sexual harassment, issues of domestic violence, and the like.a

The decision of the Supreme Court in the recent case of **REPUBLIC V FAST TRACK HIGH COURT, ACCRA; EX-PARTE CHRAJ. HON DR. RICHARD ANANE (INTERESTED PARTY)** has in a way, stifled the investigative powers of CHRAJ under paragraphs (a) to (c) of clause 218 of the constitution. These paragraphs have to do with the investigations of complaints by the commission.

The brief facts of the case, as contained in the judgment of Wood CJ (president of the panel) are as follows;

> **. . .** the Applicant, the Commission on Human Rights and Administrative Justice (CHRAJ), purportedly acting under article 218(a) of its constitutional powers, without
> ca formal complaint from an identifiable complainant and on its own initiative, investigated allegations of corruption and abuse of office made in the media against the interested party, Dr. Richard Anane. The investigations culminated in adverse findings of abuse of power and perjury against him, and recommendations, inter alia, that he be removed from office.
>
> Not satisfied with these findings and recommendations, the Interested Party, instituted proceedings under Order 55 of the High Court Rules . . . challenging their constitutionality. . .
>
> On the 13th of March 2007, the Fast Track High Court granted the certiorari application and quashed the findings, decisions and recommendations of the Applicant Commission.
>
> Dissatisfied with the turn of events, the Applicant Commission has instituted these proceedings, pursuant to article 132 of the 1992 Constitution, praying for an order of certiorari to quash the said decision of the Fast Track High Court on grounds neatly encapsulated in the notice and the accompanying affidavit. . .

To make long story short, the Supreme Court granted the application of the commission by quashing the decision of the Fast Track High Court, however, by its majority decision of 4-1, they sort of affirmed the lower court's decision, by arriving at the same conclusion which is to the effect that CHRAJ could not commence investigation into instances of allegations, as

contained in paragraphs (a) – (c) of article 218 without a formal complaint lodged with the Commission.

In choosing what she described as a hybrid approach to aid her in interpreting the word "complaint", Wood CJ said;

> In the ordinary course of events, where a person (natural or legal) is empowered to investigate complaints or certain matters, in the absence of any express or implied authority to the contrary, natural law and common logic or sense dictates that the power is exercisable only when a complaint- an expression of dissatisfaction- from an aggrieved person is lodged with the person so charged to conduct investigations. . .
>
> I proceed in my analysis of the article 218 (a) on the principle also that the words as used were carefully debated and chosen by the framers of the constitution with a view to it forming a logical, consistent, and harmonious whole, not a disjointed, incoherent or inconsistent piece. Under the articles (a)-(c), the Commission is to investigate complaints simpliciter against those persons named therein and of and concerning those matters under reference. Interestingly, in the case of article 218 (c), the reference is not simply to complaints qua complaints (compare (a) and (b)), but "complaints of allegations of fundamental rights and freedoms" under the Constitution. This, in my respectful view, reinforces the point that a formal complaint is a prerequisite where the word "complaint" is used. If the framers had intended that broad, liberal meaning of complaint, which includes media and public fora allegations, they would have treated the article 218(c) in the same vein as article 218(e) and completely done away with the word "complaint."
> . . .
> It is by design, certainly, not by accident, that although article 218(a) makes specific reference to violations of fundamental human rights and freedoms, as well as corruption, yet, separate and specific provisions, covering the same matters violations of fundamental rights and freedoms and corruption, to the total exclusion of the other subject- matters, are again separately catered for under articles 218 (c) and 218(e) respectively. As already noted, the very wording of article 218(c) shows formal complaints are required to trigger the investigative process. The choice words are "complaints of allegations", implying that the complaints are made up of allegations. I think if the intention was to have complaints mean both formal and informal, and we should remember that these are to be constituted by allegations made in the public domain, not made to the Commission, but outside of it, the framers need not have added the word "allegations", for we would be contending with a tautology.
> . . .
> Based on these analyses, I cannot but hold that the word "complaint" is limited to formal complaints made to the Commission, by an identifiable complaint; not necessarily the victim, but an identifiable complainant, armed with a complaint .

> . . Had the article 218(a) stood alone, had there being no article 218(e), my conclusions would have been different.

Brobbey JSC, also in his opinion, forming part of the majority's said;

> Therefore, if the CHRAJ has to investigate fundamental human rights and freedoms under Article 218(a) or 218(c), there must be in existence human beings whose rights or freedoms can be said to have been violated: Those human beings have to be known or specified. It follows that those human beings who are the complainants have to be identifiable complainants.
> . . .
> The specific question before this court affects only 218(a). Before the applicant can commence investigation under 218(a), there must be an identifiable complainant who may be an identifiable individual or identifiable body corporate.

Article 218(e) also provides;

> "to investigate all instances of alleged or suspected corruption and the misappropriation of public moneys by officials and to take appropriate steps, including reports to the Attorney-General and the Auditor-General, resulting from such investigations".

In this instance, CHRAJ is mandated to investigate acts specified in the preceding article however it must be well noted that the article provides for "alleged or suspected corruption and the misappropriation of public moneys by officials" so in this instance, CHRAJ does not need a formal and identifiable complaint before it can set its investigative machinery in motion. CHRAJ can therefore, on its own initiative, investigate the acts stated above in the article and the Court in the Richard Anane case supra, is of the same view. In that case, Wood CJ said;

> Crucially however, under article 218 (e), formal complaints are not needed to trigger the Commission into action. Indeed under it, all that is required to set the CHRAJ's investigative machinery into gear is to make allegations or raise suspicion over certain specified matters. From its clear wording, the only limitation is that those matters must relate to corruption or the misappropriation of public moneys by officials. It does not cover abuse of office or human rights violations by officials, or other persons, natural or legal. This, I believe is the place for media and public fora allegations.

The controversies which normally arise from the article are; the question of what constitute corruption and what kind of misappropriation of public funds is being talked

about. Also whether officials in the article should be explained to mean only public officials who misappropriate public funds.

It is however worthy to note the wording of the said article. It provides ". . . public moneys by officials" and not ". . . public moneys by public officials"

Article 230 of the 1992 Constitution of Ghana empowers the commission, in regards to investigations of complaints, to make rules etc. the said article provides;

> Subject to the provisions of this Constitution and to any Act of Parliament made under this Chapter, the Commission shall make, by constitutional instrument, regulations regarding the manner and procedure for bringing complaints before it and the investigation of such complaints.

Educational Function

CHRAJ also has educational functions and this can be found under article 218(f) which provides; to educate the public as to human rights and freedoms by such means as the Commissioner may decide, including publications, lectures and symposia;

On this, Wood CJ in the Richard Anane case said;

> The role of the Commission as per its Ombudsman functions is not limited to only investigations as provided in particular under article 218(e), but the equally important role of educating the public on human rights and freedoms as provided under article 218(f) . . . Indeed, the Commission can investigate media and public fora allegations of human rights violations, such as, TROKOSI and FEMALE GENITAL MUTILATION, CHILD TRAFFICKING ETC pursuant to article 218(f), but, with the sole aim of educating the public, which itself is a very important jurisdiction . . .

(iv) <u>Matters Susceptible to the Jurisdiction of CHRAJ</u>

The Commission has jurisdiction over a wide range of matters. However, not every matter will be subject to investigation. Those allowed by Section 7(1) of CHRAJ Act include-

- Complaints of violation of fundamental human right (eg. sexual harassment, unlawful arrest and detention, any from of torture or brutality by police and security agents, discrimination, etc.);
- Instances of alleged or suspected corruption of officials;
- Misappropriation of public money by officials;
- Non-compliance with a provision of the Code of Conduct by a public officer;
- All forms of injustices;
- Treatment of any person by a Public Officer in the exercise of his or her official duty (eg partiality, showing bias whether because of colour, sex or on any other grounds; faulty procedures, giving advise which is misleading or inadequate etc;
- Labour related complaints (eg severance pay, unfair dismissals, social security deduction, vacation of post, wrongful appointment or removal from office etc.);
- Property related complaints (eg land title, inheritance, confiscation, tenancy.);
- Family related complaint(eg paternity, child custody disputes, child maintenance).

The Commission has full investigative power over all the above mentioned matters which are basically of social and economic dimensions. It has power to issue subpoenas requiring the attendance of any person before the Commission; produce any document or records relevant to any investigation or examination abroad; enter any premises at any time to carry out investigation; cause prosecution of any person contemptuous of any subpoena; bring an action before any court in Ghana and seek any remedy which may be available.

What makes the powers of the Commission *prima facie* extraordinary and at times misleading is that, in addition to the traditional adjudication powers**,** it has also legislative and executive powers.

It has legislative power to make regulations regarding the manner and procedures for bringing complaints before it which is derived form the statute. It has executive power to alter a department decision or award a compensation. Ministries and government

departments are under strong pressure to accept findings of the Commission to avoid prejudicial political implications.

All these diverse powers vested in one institution, to some extent, interfere with and undermine the powers of other organs of state and are, therefore, inconsistent with the provisions which guarantee the independence of these organs. We should concern ourselves with the problem of ensuring that the exercise of these powers which are essential to the realization of the values of our society should be effectively controlled in order that it should not itself be destructive of the values it was intended to promote.

Fortunately, the same statute which confers power on the Commission also limits it. Such limitations are of two kinds: **procedural -** which limit the method of carrying out the statutory mandates; and **substantive -** which are created where statutes prescribe the purpose for which power is not justified by law and is said to be *ultra vires*. This principle has been the basis for development of extra judicial bodies including CHRAJ.

(v) Public Bodies and Authorities Excluded from the Jurisdiction of CHRAJ

There are many who are grappling with many legal questions raised by the exclusion of certain public bodies and authorities from jurisdiction of CHRAJ.

In particular we may want to know whether and in what circumstances CHRAJ can investigate complaints against or summon to appear before it, certain public bodies and executive authorities such as the following:

a. President of the Republic of Ghana [28]
b. A Minister of State [29]

[28] *NPP v President Rawlings and AG,* SC 1993 [Can president be sued or be made a party to court or a tribunal proceedings]. Allegations of corruption and conflict of interest against President Kuffuor was not supported by CHRAJ after its preliminary investigation in the matter of a hotel alleged to have been registered in the name of the president's son John Addo Kuffuor (alias Chief Kuffuor) with the help of one Mrs Gizelle Yazii. The refusal to support the allegation was in pursuit of Art. 218 ad Chapter 24 of the 1992 Constitution.

c. The Chief Justice [30] or Commissioner of Administrative Tribunal

With reference to certain constitutional and statutory provisions, CHRAJ has limited powers to investigate and decide on any matter or complaint against any of the above listed executive authorities (while in office) for varied reasons.

For purposes of functional analyses, let us consider these bodies under the following two classifications:

i Public bodies and authorities exercising judicial or quasi-judicial functions.

ii Public bodies and authorities which are exercising executive functions or with powers emanating from the constitution.

(i) The Chief Justice, Judges of the Superior Courts; a Chairman of a Circuit Court or a Tribunal, persons exercising judicial or quasi-judicial functions, are all excluded from CHRAJ's jurisdiction on grounds that CHRAJ is not a judicial authority (though has adjudicating powers) and is not directly concerned with the operation of the judiciary. The exclusion of these judicial authorities must be seen to conform with the

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[29] *CHRAJ v Dr Richard Anane (MP) and Minister for Road Transport* (Sept 15th, 2006) by Mrs. Anna Bossman. CHRAJ decision was in pursuant to Chapter 18 and 24 of the 1992 Constitution and S 7 and 18 of CHRAJ Act (Act 456) to investigate into allegations of **corruption, conflict of interest** and **abuse of power** by a public officer. He was found guilty of the charges of :

- Corruption – improper and corrupt payments or remittances b/n 2001 and 2004
- Misuse of State resources on a private person in 2002 while in UK on official duty
- Causing the State to incur expenses on a private person in 2003 – Esther's hotel bills

It did not investigate an extra-marital affair that the Minister had with one Alexandra O'Brien resulted in the birth of a child when he was on World Health Monitor Programme (WHMP). Decision was in pursuant to the Criminal Code 1960 (Act 29) s 239 – 244; Art 284 of the 1992 Constitution (on conflict of interest). CHRAJ **recommended** that the President severely sanction Dr Anane by relieving him of his post as a minister of state for abusing his power and bringing his office to disrepute; to apologize to the Parliament for misleading it and apologize to the people o Ghana and the government for bringing the office to disrepute. The decision was later overturned by the Supreme Court in an appeal for review. See, *The Republic v CHRAJ, ,Ex-parte Dr Richard Anane* [March 13th, 2007] per Baffoe Bonnie. (an order of *Cetiorari t*o quash the decision claiming the decision and recommendations violate Chapter 24 and Art 218(a) of 1992 Constitution as well as s 7(1) and s7(1)(e) of CHRAJ Act. The Court felt CHRAJ cannot initiate an action itself but need an independent complainant.

[30] Section 113 of Courts Act, 1993 (Act 459) states that:
A Judge or Chairman of the Superior Courts, a Judge of the Circuit Court, a Chairman of a Tribunal and panel members of Regional, Circuit and Community Tribunals shall not be liable for any matter or thing done by them in the performance of their function

underlying policy of the creators that CHRAJ was not established to replace existing legal institutions or safeguard them but to supplement them by providing protection for the citizen in his or her dealings with the executive where otherwise they do not exist.

(ii) The most controversial and intensively debated matter has been the exclusion from CHRAJ's jurisdiction executive functionaries, in particular, the President of the Republic. Reasons for the exclusion of the President is based more on a theoretical foundation with different lines of approaches and arguments more than legal reasoning.

In the past the courts applied a *"source test",* asking whether the public authority's powers emanate from an Act of parliament. Of course, the courts may today apply the *"function test",* asking whether the public authority is performing a public function or whether particular decisions made by them have clear "public" element. If the answer is in the affirmative, then exclusivity becomes questionable in that respect.

In the practice of nations, however, the job of being a President of a country is regarded as the highest honour, dignity and privilege which could not be challenged The one holding that position takes precedence over all others in the country.
According to article 57(1) of the Ghanaian Constitution (1992);

"there shall be a President of the Republic of Ghana who shall be the Head of State and Head of Government and Commander-in-Chief of the Armed Forces of Ghana.

Hence the President is excluded from liability to proceedings in any court for the performance of their functions or to any civil or criminal proceedings while in office as affirmed by article 57(4) of the Ghanaian Constitution (1992).

This is only limited to the President of the Republic. It should, however, be borne in mind that the Vice-President and Speaker of Parliament are potential Presidents in that order whenever the ruling President dies, resigns or is removed from office or absent from the country. This freedom gives them the sound mind, self-confidence and full authority to make their own decisions and to lead the nation on the right path.

Consequently, it is provided in article 88(5) that:
"The Attorney-General shall be responsible for the institution and conduct of all civil cases on behalf of the state and all civil proceedings against the state shall be instituted against the Attorney-General as defendant.

This implies that these executive authorities, by virtue of their offices, cannot appear in person before the Court, CHRAJ or any other administrative tribunal but it does not rule out legal action against them.

In applying the principle of immunity of the president from prosecution, the Supreme Court, came to a similar conclusion in the case of *New Patriotic Party v. President Rawlings(1994)* [31]

It implies, therefore, that the Commission can investigate a complaint against or ask to appear before it, a former President or any former executive authority under its special powers of investigation[49] and within the stipulated time period. One reason for the

[31] In that case, the court had to determine whether the president, in performance of his executive functions, was amenable to court proceedings as a party or should be represented by the Attorney-General in the light of article 57(4) and 88(5) of the Constitution. It was held by all the judges that the immunity from court proceedings granted to the president in the performance of his executive functions under article 57 (4) did not extend to (a) court proceedings for prerogative writs and (b) actions brought under article 2 of the Constitution relating to the enforcement of the constitution. In effect, all the judges agreed that the executive acts of the President, while in office, could under article 54(4) be challenged under the two circumstances. The point of departure, however was that whereas majority were of the view that in such circumstances it would not be proper to make the President a party to the action as the defendant.
Judges (per Amua–Sekyi and Aikins JJSC) thought otherwise. They were of the view that the words *"any person*" in article 2(1) (b) should be construed to include the president of the Republic, so the President could be called upon to answer alleged infringement of constitutional provisions. These views were unanimously dismissed on the basis of past decisions on similar cases.

Their Lordships in the majority (per Abban, Bamford – Addo and Ampiah JJSC) were of the view that even though under article 57(4) the official acts of the president could be challenged under the two circumstances, such actions should be brought against the Attorney–General only as the defendant and not against the President, in accordance with article 88 (5) of the constitution quoted in the text.

Article 57(6) serves well in balancing the equation of exclusivity, which states *inter alia:*

Civil or criminal proceedings may be instituted against a person within three years after his ceasing to be president in respect of anything done or omitted… during his term of office…

exclusion of courts of law and certain bodies from jurisdiction of CHRAJ is that the latter will be a threat to the efficient conduct of statutory functions of these bodies if not curtailed judiciously.

(v) Subject Matters Excluded from the Jurisdiction of CHRAJ [32]

Matters which are outside the jurisdiction of the Commission are listed in section 8 (2) of CHRAJ Act. as quoted below .

(a) a matter which is pending before a court or judicial tribunal; or

(b) a matter involving the relations or dealings between the Government and any other Government or an international organization; or

(c) a matter relating to the exercise of the prerogative of mercy.

The implication of paragraph (a) is that the commencement or conduct of civil or criminal proceedings before any court of law or judicial tribunal in Ghana precludes the Commission from investigating such matters. This confirms the principle, that the Commission is not established purposely to usurp the functions of legal institutions which exist to administer justice and equity.

Paragraph (b) covers actions taken in matters certified by the Minister of Foreign Affairs and other ministers of State affecting relations or dealings between the Government of Ghana and any other Government or any international organization of States or Governments; actions taken in any country or territory outside Ghana by or on behalf of any officer representing or acting under the authority of the President in respect of Ghana

In paragraph (C), the exercise of prerogative of mercy by the president under Article 72 of the 1992 Constitution and certain functions of the Supreme Court relating to the prerogative of mercy (Section 9 of Courts Act, 1993) are excluded from the ambit of the Commission. This is an exclusive right of the President or an authority on behalf of

[32] In the case *AG (2) v CHRAJ (2*) the AG called for court injunction restricting CHRAJ from continuing to violate the constitution. The case concerns whether CHRAJ can investigate maters on the basis of indemnity clause and matters concluded by governments before 1993 and if that does not contravene Chapter 18 of the 1992 Constitution and s 34 of Transitional Provision.

the President to commute a death sentence or pardon an offender or substitute a less severe form of punishment for a punishment imposed on a person for an offence. This exemption excludes a potentially wide range of political and security decisions of the President from the ambit of the Commission provided they are in the national interest.

(vi) <u>Decisions of CHRAJ and Enforcemet</u>

As provided in section 18(1) of CHRAJ Act, the Commission after investigating a matter within its jurisdiction is to report its decision and the reasons for it to the appropriate authority concerned and is expected to make such recommendations as it thinks fit. The Commission is to submit a copy of its report and recommendations to the complainant. Section 18(2) states further, that

> If within three months after the report is made no action is taken…., the Commissioner, may after considering the comments, if any, made by or on behalf of the department, authority or person against whom the complaint was made, bring an action before any court and seek such remedy as may be appropriate for the enforcement of the recommendation of the Commission.

Enforcement: The above provision makes decisions of the Commission non-binding on courts but may be enforced by court action. This interpretation has created uncertainty among judges and legal authorities, in particular, about how to enforce the decisions made by CHRAJ.

Some of the issues raised at different fora and levels include:
Whether the CHRAJ Act gives courts a power of judicial review only or they can also go into the merits of the case before them and by calling witnesses? Under the circumstance, would the court reverse the decision of CHRAJ? Should the proceedings of CHRAJ be exhibited by court during enforcement proceedings? Where the court refuses to enforce the decisions of CHRAJ, should it not refer the matter back to CHRAJ with appropriate directives? On what ground should the courts dismiss a writ from the Commission?

Although the courts have full powers to review decisions subject to such conditions as prescribed by rules of court, they are concerned with procedural defects rather than with the merits of a decision made by CHRAJ. This distinction is not contained in s18(2) of the Act. [33]

Review: The Commission has the power to review its own rulings and decisions when there is the need. The question, whether it has the jurisdiction to review decisions of another public commission such as a decision made by the National Labour Commission or by a public tribunal remains unanswered because of the jurisdictional uncertainties.

6.5 Economic and Organized Crime Office (EOCO)

EOCO was established by the **Economic and Organized Crime Office, Act, 2010 (Act 840**) as a specialized agency to monitor and investigate economic and organized crime and on the authority of the Attorney General prosecute these offences, to recover the proceeds of crime and provide for related matters

1. **Repeal and savings**

76(1)The Serious Fraud Office Act, 1993 (Act 466) is repealed by this Act.

76(2) Despite the repeal of Act 466, regulations, orders, directions, appointments or any other act lawfully made or done under the repealed enactment and in force immediately before the commencement of this Act shall, subject to modification made to them by this Act, be considered to have been made or done under this Act and shall until reviewed, cancelled, withdrawn or terminated continue to have effect.

2. **Transitional provisions**

[33] In a landmark decision in a case involving *CHRAJ v. AG*, the Supreme Court presided over by Hayfron-Benjamin, J.S.C. dismissed the writ of the Commissioner invoking the court's assistance to resolve a conflict in the relative positions of the parties vis-à-vis their respective functions under the 1992 Constitution. The reason for which the Supreme Court judges unanimously dismissed all claims by the Plaintiff Commission was that this litigation arises and the several arguments of the parties have been advanced on the total misapprehension of the fundamental differences between a "function" and a "jurisdiction".

77(1) The rights, assets, liabilities of and properties vested in the Serious Fraud Office established under the Serious Fraud Office Act, 1993 (Act 466) immediately before the commencement of this Act and persons employed by the Serious Fraud Office are transferred to the Office established under t
his Act.

(2)Proceedings taken by or against the Serious Fraud Office may becontinued by or against the Office.

(3) A contract subsisting between the Serious Fraud Office established under the Serious Fraud Office Act, 1993 (Act 466) and any other person immediately before the commencement of this Act shall subsist between that person and the Economic and Organised Crime Office established in this Act.

3. Functions of the Office

S3.The functions of the Office are to

(a) investigate and on the authority of the
Attorney-General prosecute serious offences that involve

(i) financial or economic loss to the Republic or any State entity or institution in which the State has financial interest,

(ii) money laundering,

(iii) human trafficking,

(iv) prohibited cyber activity,

(v) tax fraud, and

(vi) other serious offences;

(b)recover the proceeds of crime;

(c) monitor activities connected with the offences specified in paragraph (a)to detect correlative crimes;

(d) take reasonable measures necessary to prevent the commission of crimes specified in paragraph (a)and their correlative offences;

(e) disseminate information gathered in the course of investigation to law enforcement agencies, other appropriate public agencies and other persons the Office considers appropriate in connection with the offences specified in paragraph (a); (f)co-operate

with relevant foreign or international agencies in furtherance of this Act; and(g)perform any other functions connected with the objects of the Office.

4. Governing body of the Office

4(1) The governing body of the Office is a Board consisting of

(a) a chairperson;

(b) the Executive Director,

(c) one representative of the Inspector-General of Police not below the rank of Assistant Commissioner;

(d)one representative of the Narcotics Control Board not below the rank of director,

(e) one representative of the Attorney-General‟s Office not below the rank of Principal State Attorney;

(f) one representative of the Ghana Revenue Authority not below the rank of director;

(g) one lawyer in private practice with at least ten years experience nominated by the Ghana Bar Association;

(h) one chartered accountant with at least ten years experience nominated by the Institute of Chartered Accountants; and

(i) one person with intelligence background and not below the rank of director nominated by the Minister responsible for National Security.

S4(2)The President shall appoint the members of the Board in accordance with article 70 of the Constitution.

S.5.The Board shall formulate policies necessary for the achievement of the objects of the

Office.

5. Powers of the Office

Powers of the Office authorized officers to exercise powers of police

S18.The Executive Director, Deputy Executive Directors and officers authorized by the Executive Director shall exercise the powers and have the immunities conferred on a police officer in the Criminal and Other Offences (Procedure) Act, 1960 (Act 30), the Police Service Act, 1970 (Act 350) and any other law related to a police officer. Request for information

S19(1)The Executive Director or an authorized officer of the Office may by notice in writing require

(a) a person or a representative of an entity whose affairs are to be investigated, or

(b) a person who in the opinion of the Executive Director is a proper person to assist with an investigation being conducted by the Office to appear before the Executive Director at a specified date and place to answer questions or furnish the Office with information related to a matter relevant to the investigation.

(2) Where a person required to furnish the Office with a document is unable to produce the document, the Executive Director shall request the person to state where the documents is or the reason for the inability to produce the document.

(3) Where a document is produced before the Office, the Executive Director or an authorized officer of the Office shall make copies or extracts from the document and request the person producing the document to provide explanation on the contents of the document where necessary.

(4) A person or a representative of an entity who appears before the Executive Director or an authorized officer of the Office has right to be represented by counsel of that person's or representatives choice at any stage of the process.

(5) Where a person or an entity willfully refuses, conceals or otherwise fails to produce a document required by the Executive Director or an authorized officer, that person or representative commits an offence and is liable on summary conviction to a fine of not more than two hundred and fifty penalty units or to a term of imprisonment of not more than three months or to both in the case of an individual and in the case of an entity, to a fine of not more than

one thousand penalty units.

6. Power to search and remove documents

20.(1)The Executive Director shall a pply to the Court, without notice to the person or entity specified in the application, to issue a warrant authorising a police officer to enter premises in the possession of or under the control of the specified person or entity to search and remove a document specified in the application if

(a) the person or entity required to produce a document to the Office fails or refuses to produce the document,

(b) the Executive Director is of the opinion that the service of the notice to produce a document shall prejudice the investigation, or

(c) it is not practicable to give a disclosure notice requiring the production of the document.

(2)An authorized officer of the Office shall accompany the police officer authorized to execute the warrant.

(3)The authorized officer of the Office shall prepare an inventory of the documents retrieved in duplicate and hand over a copy of the inventory to the person or entity from whom the document was retrieved.

(4)The Office may take possession of the document for a period necessary for the investigation or trial and any proceedings subsequent to trial.

(5)A person or entity from whom a document has been retrieved is entitled to apply to the court within twenty-one days after the date of retrieval, for an order

(a)to set aside the search, removal or retrieval, and

(b) for the restoration of the document.

7. Application and pre-emptive measures

Application of this Part to PNDCL 236 22.This part applies to the Narcotic Drugs (Control Enforcement and Sanctions) Act, 1990 (PNDCL 236) in relation to the proceeds from the sale, profit or income earned and property acquired or likely to have been earned or acquired through trading in narcotic drug.

8. Mutual legal assistance

S32. Where,

(a) the Executive Director suspects that property obtained from the commission of a serious offence is situated in a foreign country, or

(b) a foreign country requests assistance from this country to locate or seize property situated in this country suspected to be property obtained from the commission of a serious offence within the jurisdiction of the foreign country,the provisions of the Mutual Legal Assistance Act, 2010 (Act..) shall apply.

9. Issuing Orders

EOCO is authorized to issue the following orders for serious economic offences including:

1. Freezing of asserts Order (S35)
2. Declaration of property and Income Order (with he help of AG)
3. Confiscation Order (S51)
4. Pecuniary Penalty Order

6.6 Questions for Review and Discussion

1. Are the Decisions of CHRAJ Binding on the Courts?

A question may be asked, whether decisions of the commission are binding on the court. In an attempt to answer this question, one must consider the scope of section 18(2) in relation to the question. Section 18(2) of Act 456 provides;

> If within three months after the report is made no action is taken which seems to the Commission to be adequate and appropriate, the Commissioner, may after considering the comments, if any, made by or on behalf of the department, authority or person against whom the complaint was made, bring an action before any court and seek such remedy as may be appropriate for the enforcement of the recommendations of the Commission.

The question to be asked is thus; 'which decisions are said to be binding on the courts and are decisions of CHRAJ one of those? The court structure, generally, is provided under article 126 of the constitution, 1992, with the Supreme Court at its apex. Therefore, all decisions of the Supreme Court are binding on the courts below. Also decisions of the Court of Appeal are binding on the High Court and inferior courts. The decisions of the High Courts are also binding on all other inferior courts and adjudicatory bodies. These are decisions that are binding on a court, as the case may be, depending on the level of the court in the court structure. It is important however to note that decisions of courts of co-ordinate jurisdiction are not binding. For example, a decision of a High Court in Kumasi cannot be cited as a binding precedent in an Accra High courts because they are of co-ordinate jurisdiction. In the case of **ASARE V**

DZENY (1976) 1 GLR 473 – 481, in delivering the judgment of the Court of Appeal (full bench), Azu Crabbe CJ, said;

> "A judge of the High Court is not bound to follow the decision of another judge of co-equal jurisdiction; he may do so as a matter of judicial comity. This position of the High Court with regard to stare decisis was clearly expressed by Lord Goddard C.J. in Police Authority for Huddersfield v. Watson [1947] K.B. 842 at p. 848, D.C.:
>
> "I think the modern practice, and the modern view of the subject, is that a judge of first instance, though he would always follow the decision of another judge of first instance, unless he is convinced the judgment is wrong, would follow it as a matter of judicial comity. He certainly is not bound to follow the decision of a judge of equal jurisdiction. He is only bound to follow the decisions which are binding on him, which, in the case of a judge of first instance, are the decisions of the Court of Appeal . . ."

In summary, decisions or precedents which a court is obliged to follow is what constitutes a binding decision on a court. Decisions of CHRAJ are therefore clearly not binding on our courts, especially, as the commission is under the supervisory jurisdiction of the courts.

2. To what Extent are the Courts Bound to Enforce the Decisions of CHRAJ ?

A second question which may arise has to do with the enforceability of the decisions of CHRAJ. Article 218 (d)(iii)and (iv) deals generally with the enforceability of decisions of CHRAJ. The said section provides;

(d) to take appropriate action to call for the remedying, correction and reversal of instances specified in paragraphs (a), (b) and (c) of this clause through such means as are fair, proper and effective, including -

(iii) bringing proceedings in a competent Court for a remedy to secure the termination of the offending action or conduct, or the abandonment or alteration of the offending procedures; and

(iv) bringing proceedings to restrain the enforcement of such legislation or regulation by challenging its validity if the offending action or conduct is sought to be justified by subordinate legislation or regulation which is unreasonable or otherwise ultra vires;

Clearly, CHRAJ has no enforcement powers. It depends on a court of competent jurisdiction to give effect to their decisions. In GHANA COMMERCIAL BANK LTD. HIGH STREET, ACCRA v. THE COMMISSIONER, CHRAJ OLD PARLIAMENT HOUSE, ACCRA. [29/01/03] C.A. NO. 11/2002., Brobbey JSC said;

> Investigating violations of fundamental human rights is one thing, and enforcing the decisions or recommendations of the Commission is another matter altogether. The Constitution envisages that judicial powers are essential in order to enforce the decisions or recommendations of the Commission. That is why care has been taken to ensure that enforcement of the decision or recommendation of the Commission should be referred to the courts. By article 125(3) of the Constitution, judicial power in the country has been vested in the Judiciary. The Commission is not part of the judiciary. Just like the provisions in the Constitution and those in Act 456, the case referred to rightly makes it clear that the Commission has no judicial powers. For the purpose of performing its functions, it has some powers similar to those exercised in the courts, especially in article 219 of the Constitution. Those powers however do not constitute the Commission into a court. . .
>
> When the Commission has made its recommendation or taken its decision that is not complied with, the law requires the Commission to refer the decision or recommendation to the courts for enforcement. When reference is made to the court for enforcement, the court is to order the enforcement of the decision within the framework of laws it was set up to operate. If nothing at all, this will seem to be emphasized by the Constitutional provision that the Commissioner "may seek any remedy available in that court."

It must be noted, however, that not all decisions of CHRAJ are given enforcement by the court. Atuguba JSC, in the same case said;

> I also agree that when CHRAJ seeks to enforce its decisions through court action the court cannot give effect to them, if they are, without or in excess of jurisdiction, perverse or procured by fraud or manifestly wrong. The Constitution or Parliament cannot have intended otherwise.

As an investigative body, there are certain basic tenets which must be adhered to. Sometimes CHRAJ's decisions have been quashed by the courts for various reasons,

such as lack of jurisdiction, a breach of the rules of natural justice, procedural impropriety, etc.

Having the above discussion in mind, one may ascertain whether the courts have the discretion to choose whether to enforce the decisions of CHRAJ or not because of its non binding nature? It must be noted that there have been some instances where the decisions of CHRAJ have been quashed by the courts for various reasons, such as lack of jurisdiction, a breach of the rules of natural justice, etc. As stated earlier, emphasis must be made that, CHRAJ not being a quasi-judicial but an administrative body is under the supervisory jurisdiction of the courts. The courts in so doing may issue certain orders which it deems fit, including certiorari to quash the decision of CHRAJ (Anane's case as elaborated above).

3. Can the courts of its own volition, quash a decision of CHRAJ where it had not acted ultra vires or had done everything correctly?

With respect, the answer is NO. If the decision of CHRAJ is devoid of any encumbrances, legal or procedural, then the court have no choice but to give effect to the decision of the Commission. Atuguba JSC is of this same opinion. In the **Ghana Commercial Bank case** supra he said;

> If a party is otherwise dissatisfied with CHRAJ's decision, he can, for example, seek redress under the supervisory jurisdiction of the High Court or Supreme Court, otherwise the decision binds him. It is CHRAJ which is entrusted with its functions under the Constitution and the CHRAJ Act; and its jurisdiction, cannot, subject to the exceptions I have endeavoured to state, be subverted by any other authority.

"**. . . any other authority**." as provided in Atuguba's quote above includes the court, hence, barring any challenge to the validity of the decision, the court has no choice but to enforce it. The court therefore cannot be said to have any discretion to decide not to enforce CHRAJ's decisions which are competent and free from all encumbrances. The courts therefore has no such discretion.

In conclusion, it is clear that the decisions of CHRAJ are not binding on the courts because the courts are not obligated to enforce any decision made by CHRAJ. On the contrary, it is the courts prerogative to determine whether a decision qualifies to be enforced by them.

4. The Commission on Human Rights and Administrative Justice (CHRAJ) has been described as a toothless bull dog by some commentators. Do you agree? Your answer should reflect relevant decided cases

Lecture 7

PUBLIC INTEREST IMMUNITY

7.0 Objectives

By the end of his Lecture you should be able to:

- explain what is meant by "public interest immunity" and "discovery"
- describe and evaluate the conditions upon which a claim could be based
- recognize the limitations to immunity
- appreciate the contemporary significance of application of interest immunity

7.1 Introduction

(a) Discovery: In order to establish the liability of a party to an action or to establish ones defence to an action it may be necessary to request relevant documentation from the opposing party. The legal process of compelling a party to produce document or answer questions (interrogate) is known as **discovery.** This action is part of the pre-trial (interlocutory) before the main trial and is kwon as **Crown privilege** in UK in the past[1]. past[1].

A claim of public interest immunity serves to prevent the disclosure of documents or the answering of interrogatories. It can, therefore, prejudice the ability of the other side to pursue a cause of action. Since the Ghanaian administrative law is structured almost on the English system and has adopted some of the basic principles, it is necessary to briefly discuss the origin and bases of the concept of public interest immunity of the English system.

(b) On what basis could a claim of crown privilege be sustained?

In *Duncan u Cammell Laird & Co. Ltd.* (1942) [2], the House of Lords established two grounds on which a claim could be based:

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[1] At that time, such a claim was available only to the Crown and was commonly referred to as Crown Privilege. This restriction no longer exists.

[2] In this case a submarine named "Theties" built by Cammell Laird sank in 1939 during test with 99 losses of lives. An action in damage for negligence was taken by representatives and dependents of deceased against the company (Cammell Laird). The Admiralty directed Cammell Laird not to produce

- Content – where contents of a particular document(s) for which privilege was claimed, demanded that the documents not be disclosed as being injurious to public interest.
- Class – where documents belong to a class of documents (defined b law) which must not be disclosed to public knowledge or to the courts.

According to Simon Viscount with reference to the above case, a claim of public interest immunity is justified only when disclosure will be **injurious** to public interest.
If the court was of the opinion that a ministerial objection was not taken in good faith or there was no reasonable ground, the court would overrule the objection and order disclosure.

(c) Who determined whether a claim of crown privilege was justified?

Duncan u Cammel Laird & *Co Ltd*. established that a claim of Crown privilege made in proper form on the grounds of public interest by a minister was conclusive and not open to challenge. This, however, was open to executive abuse and became subject to judicial criticism. Judicial intervention and reform eventually came with the landmark decision of the House of Lords in *Conway u Rimmer* (1968)[1] which modified the concept. The term Crown privilege was abandoned with the decision of the House of Lords in *R v Lewes Justices ex parte Home Secretary (*1973) [non-disclosure not to be perceived as Crown prerogative to be exercise in the 'state' interest]

7.3 <u>The modern application of public interest immunity</u>

The issues to be addressed n considering this include:

(a) For what types of document can immunity be claimed on the class ground?

According to *Duncan u Cammell Laird,* the public interest would justify a claim of privilege on the class ground where;

- Disclosure would be injurious to national defence;

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certain documents to the court including paper of design of the submarine, operation manual, and a notebook of a painter for claim of public interest immunity which was granted on that basis.

[1] A Probationary Police Constable was prosecuted for the theft of a torch, acquitted but dismissed from the force. He brought an action in tort for malicious prosecution against his former Superintendent. On an application for discovery (to disclose report made on him by his superior) to the court, the home Secretary claimed privilege on class basis but after inspection of the report by the court it ordered the document to be disclosed since the claim of privilege could not be justified in the public interest.

- Disclosure would be injurious to good diplomatic relations;
- Non-disclosure was necessary for the proper functioning of the public service.[1] (keeping a class of documents as secrets)

In *Conway*, Lord Reid concluded that no definition of what classes of documents would justify a public interest immunity claim was possible. Public interest was, therefore, the determinative issue.

Information received **in confidence** and, in particular, that which might reveal the name of an information, has been the subject of claims for immunity. Confidentiality also arises in the context of investigation into complaints on the conduct of the police. The Court of Appeal has determined that such documents are a class subject to public interest immunity[2]. This area is, however, now regulated by the House of Lords' decision in *R u Chief Constable of the West Minlands Police ex parte Wiley* (1994).

(b) Who can make a claim for immunity?

At one time, only the Crown could enter a claim of Crown privilege and this was regardless of whether the Crown was in fact a party to the action. As the concept of public interest immunity has developed, however, it is no longer the exclusive preserve of the Crown. Immunity can be claimed by any of the parties to an action.

(c) Who determines the public interest?

In *Conway u Rimmer* (1980), the House of Lords (overruling *Duncan u Cammell Laird* (1942) on this point) established that the court is the final arbiter of a claim for public interest immunity. However, this power was to be residual and it would be most unlikely that the court would intervene where a claim was made on the **contents** ground.

(d) Can a claim of immunity be made in the context of criminal proceedings?

In its origins, it was unclear whether Crown privilege could be claimed in the context of a criminal trial. The consequences of allowing such clams would be sever. It might be

[1] It was this ground that was to become particularly abused and subject to criticism. Privilege came to be routinely claimed for records of discussions within government departments on te basis that to allow disclosure would be a threat to candor within the public service.

[2] *Neilson u Laugharne* (1981))

that an accused would be hindered in preparing a defence. More recently, cases have suggested that a claim of public interest immunity is permissible in such a context, for example R *u Governor of Brixton Prison ex parte Osman* (1991).

In the 956 Statement by Lord Kilmuir LC, it was provided that:

> *"We also propose that if medical document, or indeed other documents, are relevant to the defence in criminal proceedings Crown privilege should not be claimed"*

(e) Does a Minister have a power or is he/ she under a duty to claim immunity?

A further issue raised in the *Matrix Churchill* cases was whether a minister could be under a duty to sign a public interest immunity certificate. The Attorney General, relying on *Makanjuola u* MPC (1992), was of the view that such a duty existed. Sir Richard Scott, however, in his subsequent report into the "Arms to Iraq Affair" disagreed.

In *ex parte, Wiley,* the House of Lords undertook a general review of the law of public interest immunity. It concluded that such a claim does lie in civil or criminal proceedings. A claim can be justified only if the public interest in preserving confidentiality outweighed that in securing justice.

Further, documents obtained in a police investigation of a **complaint** would not attract immunity on the class ground. They may attract immunity only where the public interest demanded so. Subsequently, in *R u Keane* (1994), Lord Taylor CJ concluded that if the material for which immunity was being clamed might prove the defendant's innocence or avoid a miscarriage of justice then the balance was resoundingly in favour of disclosure.

(f) Can immunity be waived?

The issue here is whether immunity can be waived by either the potential claimant for immunity or by the person who actually made the statement for which immunity is claimed. Immunity cannot be waived where disclosure would be prejudicial to the

public interest. Where that prejudice is, however, based on maintaining confidentiality that confidentiality can be released by the giver of the information.

7.4 The laws on public interest immunity in ghana

(a) The Constitutional Source

The 1992 constitution stipulates that in Art 135 that:

The Supreme Court shall have exclusive jurisdiction to determine whether an official document shall not be produced in court because its production or the disclosure of its contents will be prejudicial to the security of the state or will be injurious to the public interest. [135(1)]

Where any issue referred to in clause (1) of this article arises as to the production or otherwise of an official document in any proceedings before any court, other than the supreme Court, the proceedings in that other court shall be suspended while the Supreme Court examines the document and determines whether the document should be produced or not; and the Supreme Court shall, make the appropriate order. [Art.135(2)]

The proceedings of the Supreme Court as to whether an official document may be produced shall be held *in camera* [Art 135(3)]

(b) Statutory Source

The Evidence Decree, 1975 Section 106 stipulates that:

Except as otherwise provided by section 107 or by other enactment, the Government has a privilege to refuse to disclose and to prevent any person from disclosing a **state secret** unless the need to preserve the confidentiality of the information is outweighed by the need for disclosure in the interest of justice. [s 106(1)]

A **"state secret"**[1] is information considered confidentially by the Government, that has not been officially disclosed to the public, and which would be prejudicial to the security if the state or injurious to the public interest to disclose. [s 106(2)]

The Government's privilege under subsection (1) may be claimed only by the member if the National Redemption Council responsible for administering the subject matter which the secret of state concerns, or by a person authorized in writing to claim the privilege by such member. [s 106(3)]

In an action in a court when the Government's the court under subsection (1) is claimed, other than for an official document, the court may determine the claim itself, or, on its own motion or at the request of a party to the court of Appeal for determination. [s 106(4)]

Concerning information, Section 107 states that:
The Government has a privilege to refuse to disclose and to prevent any other person from disclosing the identity of a person who has supplied to the Government information purporting to reveal the commission of a crime or a plan to commit a crime. [s 107(1)]

The Government does not under this section have privilege to refuse to disclose a communication from such a person except to the extent necessary to protect the identity of the person from disclosure. [s 107(2)]

The Government's privilege under this section may be claimed by person authorized by the Government to claim the privilege. [s 107(3)]

[1] See also, State Secrecy Act 1962 (Act 101)

The Government has no privilege under this section if the identity of the informant has been disclosed to the public by the Government or the informant or it the informant appears as a witness in court in an action to which his communication relates.
[s 107(4)]

If the Government claims its privileges under this section and the circumstances indicate a reasonable probability that the informant can give testimony necessary to a fair determination of guilt or innocence in a criminal action, the court may on its own motion and shall on the motion of the accused dismiss the action. [s 107(5)]

Concerning Trade Secrets Section 108 states that:
The owner of a trade secret or a person authorized by the power of trade secrets has a privilege to refuse to disclose and to prevent any other person from disclosing the trade secret unless the value of the disclosure of the substantially outweighs the disadvantags caused by its disclosure. [108 (1)]
In making his determination as to the existence or otherwise of the privilege the presiding officer shall consider whether the trade secret is adequately protected by patent, trade mark, copyright or other law and whether adequate protection can be provided by disclosure of the trade secret in chambers of any other appropriate manner. [s 108(2)]

When disclosure of a trade secret is required a court, on its own or at the request a court, on it own or at the request of any party, may take such actions to protect the further disclosure or unauthorized usage as may be appropriate.

Political votes:
According to Section 109, a person has a privilege to refuse to disclose how he cast his vote at public election or referendum conduced by secret ballot unless sufficient evidence has been introduced to support a finding of fact that the vote was cast illegally.

Note: Section 92. (1) Subject to subsection (2), the presiding officer may not require closure of information claimed to be privileged in order to rule on the claim of privilege.

(2) When a court is ruling on a claim of privilege under section 105, 106 or 107 relating to state secrets, informants, and trade secrets and is be privileged, the court may require the person form whom disclosure is sought or a person authorized to claim the privilege, or both, to disclose the information

(3) If the judge determines that the information is privileged, neither he nor any other person shall ever disclose, without consent of a person authorized to permit disclosure, what was disclosed in the cause of the proceedings in chambers.

7.5 <u>Questions for Review and Discussions</u>

Lecture 8

THE EXERCISE OF DESCRETIONARY POWER BY STATE / PUBLIC OFFICIALS

8.0 Objectives

By the end of his Lecture you should be able to:

- explain what is meant by "discretionary power" and its exercise
- describe and evaluate the relevance of discretionary power.
- recognize the limitations of the discretionary power
- appreciate the contemporary significance of reasonablesness

8.1 Introduction

Discretionary power can be operationally defined as the power to choose between alternatives, usually conferred by law. Discretionary power dilutes the certainty of the law because it offers the official of the state the power to make choices.

8.2 Importance of Discretionary Power

- It offers flexibility in the exercise of governmental power
- It ensures that institutions have a measure of flexibility and it enables them to take into account new situations
- It keeps law abreast with the changing pace of society.

The basic mode for the exercise of discretionary power in Ghana is the constitution and statutes and the second mode is through judicial review.

8.3 The 1992 Constitution and Discretionary Power

The constitution confers and constricts the exercise of discretionary powers

NB conferment here means to create, to establish or to permit. The constitution creates a wide range of circumstances where discretionary power is conferred. Examples of such situations are as follows;

- Appointment and dismissal of certain public officers. e.g. the appointment of ministers and their dismissal by the president. See article 78(1) and article 81(a).
- Initiation of judicial proceedings by the AG i.e. article 88 (3) and(5)
- Allocation of funds
- Sanctions and benefits etc.

Discretionary power is liable to abuse. Because of this, for a lot of people, discretionary power is the conferment of absolute power. Under the constitution therefore, discretionary power is limited or fettered. This means that, the constitution itself provides baselines or boundaries or thresholds for the exercise of discretionary power, beyond which acts of discrimination may be declared null and void.

Article 296 provides:

> "Where in this Constitution or in any other law discretionary power is vested inany person or authority: -
>
> (a) that discretionary power shall be deemed to imply a duty to be fair and candid;
>
> (b) the exercise of the discretionary power shall not be arbitrary, capricious or biased whether by resentment, prejudice or personal dislike and shall be in accordance with due process of law; and
>
> (c) where the person or authority is not a judge or other judicial officer, there shall be published by constitutional instrument or statutory instrument, regulations that are not inconsistent with the provisions of this Constitution or that other law to govern the exercise of the discretionary power."

The exercise of discretionary power must be fair and candid and that, failure to do this will constitute a breach.

Article 296 of the 1992 fourth republican constitution of Ghana, establishes a positive duty and counter balance it with a negative obligation. To have a clearer picture, read article 296 in conjunction with article 23

See also; *Awuni v West African Examination Council* (2003-2004) SC GLR 471
Tema Development Corporation v Atta Baffour (2005-2006) SC GLR 121

Case; *Associated Provincial House Ltd v Wednesbury Corporation* (1948) 1 KB 223.

This case established a baseline for the exercise of discretionary power which is known as the **Concept of Reasonableness.** Under this Concept, the exercise of discretionary power is only deemed to be valid and lawful if it is deemed to be reasonable. Thus a decision maker must reach a conclusion that could be deemed to be reasonable by another competent decision maker in that same position and having to make the same decision. In his judgement, Green M.R. wrote;

> "For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J. in *Short v. Poole Corporation* [1926] Ch. 66, 90, 91 gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another."

In effect what Green MR, is saying is that, where a decision maker in making a decision take into account things he ought not to take into account, the decision will be deemed to be unreasonable. Where he also fails to take into account things that he ought to take into account, the decision will be deemed be unreasonable

See also the case of *Council for Civil Service Union v the Minister for the Civil Service* (1984) AC 374. Lord Diplock's dictum establishes three main tests; Illegality, Irrationality and Procedural impropriety
He wrote;

> "Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can

conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognized in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice."

"By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable."

"By "irrationality" I mean what can by now be succinctly referred to as "*Wednesbury unreasonableness*" (*Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v. Bairstow* [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review."

The principle of reasonableness is uniquely practiced in the United Kingdom. Other European countries go by the proportionality test. Under this test, the court will examine the effect of the decision on the right of the person affected vis a vis the public purpose sought to be promoted by the decision.

Read the following cases;

Ghunter Youngstown Sheet and Tube Company v Sawyer

Nixon v Sirica / Nixon v the U.S.

Tuffuor v Attorney General (1980) GLR 637

Asare v Attorney General (2003-2004) SC GLR 823

8.4 Questions for Review and Discussion

Discuss the criteria laid down by the English House of Lords in decided cases for court review of the exercise of discretionary power and indicate their usefulness to the application of concept of Rule of Law in general and in particular article 296 of the constitution of Ghana, 1992 in particular.

LECTURE 9

CHIEFTAINCY AND LOCAL GOVERNANCE

9.0 Objectives

By the end of his Lecture you should be able to:

- explain what is meant by "Chief" in Ghana and their position in governance
- describe and evaluate the functions and powers of chiefs.
- recognize the limitations of the powers of chiefs
- appreciate the contemporary significance of chieftaincy

9.1 Introduction

It must be noted that not all tribes in Ghana have chiefs as their political heads. Before the coming of the Europeans, there were some states that were acephalous in nature (they did not have one political head). Other areas had chiefs who were their political head. According to the constitution however, traditional constitutional government revolves around chieftaincy.

Local governance comprises a set of institutions, mechanisms and processes through which citizens and their groups can articulate their interests and needs, mediate their differences, exercise their rights and obligations at the local level. Local Governance deals with small communities including the villages. Under the Fourth Republic of Ghana, Local governance includes the chieftaincy institution and local government

9.2 Who is a Chief?

The constitution has provided a definition of who a chief is. Article 277 provides,

> ". . . "Chief" means a person, who, hailing from the appropriate family and lineage, has been validly nominated, elected or selected and enstooled, enskinned or installed as a chief or queen mother in accordance with the relevant customary law and usage."

It must be noted from the definition, the words **". . . who, hailing from the appropriate family and lineage, has been validly nominated, elected or selected. . .**" These days, certain traditional areas make people who do not hail from their area chiefs because of their support for the improvement of their area. It must be noted that, the constitution do not recognize these individuals as chiefs because they do not hail from the appropriate family or lineage.

Another problem that arises from the definition is the term "**appropriate family**" as used in the definition. "**Appropriate**" here, to a large extent, means acceptance. It can therefore be inferred that appropriate family as used in article 277 means the family which is historically accepted, among a group of people, as the family which produces chiefs. To find out in this context what constitute an accepted family, a historical investigation ought to be conducted. This problem, to a large extent, has to deal with the fact that our culture is undocumented

A third difficulty that arises from the definition is the issue of ascertaining the relevant customary law and usage, for an enstoolment or enskinment cannot take place without going through the dictates of the relevant customary law and usage. This is very difficult as we do not have a regime of ascertained customary law in Ghana. Article 11(3) provides;

> "For the purposes of this article, "customary law" means the rules of law which by custom are applicable to particular communities in Ghana."

The phrase "**. . . which by custom are applicable to particular communities in Ghana**" goes a long way to establish the fact that, in Ghana, there is multiplicity of customs. It must also be noted that article 11 makes it evident that the constitution has

created room for these multiple customs. Not only this, but also the difficulty to ascertain the proper interpretation of these customary laws and usages.

9.3 Chieftaincy in the 1969, 1979 and 1992 Constitutions

Apart from the 1960 Constitution, a critical study of the country's constitutions shows that chieftaincy has successively and modestly featured in the 1969, 1979 and 1992 Constitutions. For instance, in the 1969 Constitution was the provision that the institution of chieftaincy together with its traditional council as established by customary law and usage was guaranteed (Article 153). Article 154 (1) further stated that there shall be established a National House of Chiefs, which was to consist of five members each from all the Regional Houses of Chiefs. The House was to handle matters which involve chieftaincy from the regions and to advise government and the relevant authorities on chieftaincy matters. This provision, thus, created the platform for the chiefs and ruling government personnel to interact while performing their duties.

The 1979 Constitution also kept faith with the 1969 Constitutional provisions on chieftaincy, and for instance guaranteed the institution of chieftaincy together with its traditional councils. For example Article 177 (1) emphatically stated that, the institution of chieftaincy together with its traditional councils as established by customary law and usage is hereby guaranteed. In pursuant of this, sub-section 2 stated that Parliament shall have no power to enact any legislation:

i. which confers on any person or authority the right to accord or withdraw recognition to or from a chief; or
ii. which in any way detracts or derogates from the honour and dignity of the institution of chieftaincy.

It is significant to note that the 1992 Constitution has further strengthened the position and role of chiefs and consequently maintained the already existing political dualism where chieftaincy existed and operated side-by-side with the national government. As far as the position of chiefs is concerned, the relevant clauses contained in the 1969 and 1979 Constitutions were largely maintained in the 1992 Constitution. For instance,

Articles 271, 272, 273, 274 and their clauses reflected the provisions of the 1979 Constitution relating to the National and Regional Houses of Chiefs, their judicial functions and advisory activities on customary law. The 1992 Constitution also provided for mandatory appointment of chiefs to the following bodies: Article 89 (2b): the President of the National House of Chiefs to be a member of the Council of State, the highest advisory body to the President of the Republic. Article 153 (m): representatives of National House of Chiefs to be members of the
Prisons Council (PC). Article 233(1): two representatives of the Regional House of Chiefs on the Regional Co-ordination Council (RCC).

Article 256 b (i) a representative of the National House of Chiefs on the Regional
Lands Commission (RLC). Article 261 (b): representative of the Regional House of Chiefs on the Regional Lands Commission (RLC). Meanwhile, the same Constitution departed from the previous Constitutions in stating in Article 276 (i) that chiefs should not take part in active politics and that those who wished to do so, for example to stand for election to parliament, should abdicate. This implies that the two political systems, to some extent, run parallel to each other (Kwabia, 1988). On the whole, chieftaincy has successively featured modestly in the 1969, 1979 and 1992 Constitutions of the Republic of Ghana, and it has helped in carving the two systems of rule in the country – chieftaincy and national government. Unlike the First Republic during which every effort was made by the government to strip chiefs of their power, successive
Republics after the First, recognized and favoured the status, role, and economic base of the age-long institution, thereby consistently creating a dual system of rule since independence. What is worthy of note is that, while aspects of the constitutional provisions create representations of chiefs within the national government structures, thereby creating relationship between the two political systems, there are also provisions which seek to ask office holders of each of the two political systems to keep their distance, thereby creating a dualism between the two political institutions. It is also important to note that these constitutional provisions are not comprehensive enough to control and regulate the prevailing dualism in the country. In other words, the diverse relations between the chieftaincy institution and local government have the

semblance of a legal framework, which is not enough to effectively control and regulate actions of stakeholders within the dualism.

9.3 Structures of the chieftaincy institution

I. The Houses of Chiefs

II. Chiefs are allowed to be appointed to various institutions and organs under the constitution such as the Council of State

I. The Houses of Chiefs

This represents a corporate institution that is designed to regulate affairs of chieftaincy in Ghana. Under the constitution, there are two level houses of chiefs and these are;

- The National House of Chiefs
- The Regional House of Chiefs

Functions of the House of Chiefs

The National Houses of Chiefs performs the following functions;

- Advisory function in relation to customary law. Any organ or body charged with a responsibility relating to chieftaincy will have to turn to the Houses of Chiefs for advice

- Research, interpretive and codification functions. There is an attempt to codify all the customary law in Ghana so that it is easily ascertainable.

- Customary law reforms, that is removing, all dysfunctional or outmoded laws. This function is in consonance with article 26(2) which provides;

  "**All customary practices which dehumanize or are injurious to the physical and mental well-being of a person are prohibited**."

  They have this function also because they are seen as an embodiment of customary law.

- Other functions assigned by parliament
- Plays a quasi-judicial function in the sense that the national house of chiefs has jurisdiction to entertain and listen to complaints and matters affecting chieftaincy. For complaints, the first point of call is the regional house of chiefs. Appeal shall then lie to the national house of chiefs and then to the Supreme Court. The body that plays this function is the Judicial Committee of the National House of Chiefs.

II National House of Chiefs

Article 271 deals with the National House of Chiefs. The said article provides;

> "(1) There shall be a National House of Chiefs
> (2) The House of Chiefs of each region shall elect as members of the National House of Chiefs, five paramount chiefs from the region.
> (3) Where in a region there are fewer than five paramount chiefs, the House of Chiefs of the region shall elect such number of divisional chiefs as shall make up the required representation of chiefs for the region."

Regional Houses Of Chiefs
Article 274 also generally caters for Regional Houses of Chiefs. Clause 1 of article 274 provides;

> "There shall be established in and for each region of Ghana a Regional House of Chiefs."

Article 274 makes it mandatory for every region to have a regional house of chiefs. They hear appeals from traditional councils within the regions, bordering on nomination, installation, election, etc. of a person as a chief and also undertake some study and makes recommendation for the resolution of chieftaincy disputes.

Finally, they are supposed to make a compilation of the applicable customary laws in the region

9.4 <u>Who is disqualified from being a chief?</u>

Article 275 provides;

> "A person shall not be qualified as a chief if he has been convicted for high

treason, treason, high crime or for an offence involving the security of the State, fraud, dishonesty or moral turpitude."

ARE CHIEFS ALLOWED TO TAKE PART IN ACTIVE PARTY POLITICS

Chiefs are barred from engaging themselves in active party politics. Article 276(1) provides;

> "A chief shall not take part in active party politics; and any chief wishing to do so and seeking election to Parliament shall abdicate his stool or skin."

It must be noted that, this provision does not bar chiefs from engaging in political activities or holding public offices. In fact, article 276(2) makes it clear. It provides;

> "Notwithstanding clause (1) of this article and paragraph (c) of clause (3) of article 94 of this Constitution, a chief may be appointed to any public office for which he is otherwise qualified."

Barring chiefs from active party politics by the constitution is to keep the unifying nature or role of the office of the chief.

9.5 Five main difficulties facing chieftaincy in Ghana

1) Issues of eligibility and succession.
   Until the customary law of a particular area is ascertained, it will be very difficult to really know who is eligible to rule as chief.

2) Issues of transparency and accountability.
   This is a very difficult problem faced by the chieftaincy institution as they do not account to their subjects how their possessions are being used. How will there be an effective chieftaincy in this modern world without transparency and accountability.

3) Problems of conflict and political instability.
   A perfect example is the Yendi chieftaincy dispute. Most of these conflicts

have to deal with succession.

4) Issues of recognition or de- recognition.

The chieftaincy act provides that a chief needs no recognition from any authority before carrying himself as such. The issue of recognition or de-recognition started from the colonial era. The constitution provides that for a chief to be recognized by the government, the chief must be gazetted. This in effect creates some sort of tension between the government and the said chief as the government can decide that even though one has been duly elected and enstooled or enskined as chief, because he has not been gazetted, he will not be accorded the necessary courtercies. A perfect example is with the present Ga state problem.

5) The relationship between the traditional state and the modern state. Monarchism and republicanism are two regimes of governance. Whiles republicanism is about election, accountability, transparency, etc, monarchism is about non-election, entitlements etc. The problem therefore is how these two regimes of rule can come together and work as one. The problem manifests itself very well when it comes to reconciling the chief, who is supposed to be a traditional head and hence under no one and the presidency, an institution which has been elected by majority of the people and who is also supposed to be the head. In terms of relationship, among the two, who is the head? The constitution however has insulated chieftaincy from regulation that is why the word "guaranteed" is used in article 270(1). Guarantee here means endorsement. For example, in the modern state, it is parliament that has the power to levy taxation yet in some traditional areas, chiefs levy taxes on their subjects

9.1 Questions for Review and Discussions

With the aid of relevant authorities, identify the key challenges confronting the

administration of the institution of chieftaincy in Ghana and suggest workable reforms.

Lecture 10

REMEDIES IN ADMINISTRATIVE LAW

10.0 Objectives

By the end of his Lecture you should be able to:

- differentiate between private law remedies and administrative law remedies
- describe and evaluate the types of administrative law remedies
- recognize the application and defenses to these remedies
- appreciate the contemporary significance of administrative law remedies

10.1 Introduction

Def. Remedy is the relief or redress given by court. It is the means provided by law to recover rights or obtain redress or compensation for a wrong. The term '***ubi jus ibi'*** expressed in the case of *Asbby v White* [1703] meaning – where there is right, there is remedy – remain a common law principle.

The 1992 Constitution in article 23 provides that, "Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed on them by law, and persons aggrieved by the exercise of such acts and decisions ***shall have the right to seek redress*** before a court or other tribunal."

So in Ghana the right to challenge decisions of administrative officials and bodies and to obtain appropriate remedies from the courts is not a mere legal right, but a constitutional one. This brings us to the question: "what may a person ask for and/or receive from a court when that person challenges the decision of an administrative official or body that adversely affects his right? Depending on the nature of the injury sustained, the aggrieved person may ask for and receive from a court an order of injunction[1] (to restrain the defendant from continuing with the violation), damages[2] (monetary compensation for the injury) or any of the prerogative writs.

According to the Black's Law Dictionary, prerogative writs, also known as extraordinary writs are writs issued by a court in the exercise of its discretionary power. A writ is a court's written order demanding the addressee to do or refrain from doing some specified act.

10.2 The Five Types of Administrative Remedies

There are basically five types of prerogative writs:

i. Certiorari
ii. Prohibition
iii. Mandamus
iv. Quo Warranto
v. Habeas Corpus

It should however be noted that within the Ghana Legal System, not every court has the power to issue the prerogative writs even though injunctions and damages can be granted by any court. The power to grant and issue any of the prerogative writs is reserved for only those courts that have "**supervisory jurisdiction**" or the "**power of judicial review"** over other lower courts and administrative bodies.[3]

[1] Order 55 r 2, High Court(Civil Procedure) Rules 2004, C.I. 47
[2] Ibid
[3] Article 162 of the 1992 Constitution of Ghana defines supervisory jurisdiction to include jurisdiction to issue writs or orders in the nature of habeas corpus, certiorari, mandamus, prohibition and quo warranto.

This presupposes that these remedies are available only at the High Court[1] and the Supreme Court. They are the only two courts that have been granted original supervisory jurisdiction under the Constitution[2]. The supervisory jurisdiction as its name suggests is the jurisdiction of the High Court and the Supreme to supervise or review decisions of courts lower than them as well as decisions of administrative officials, commissions and committees of inquiry among others with the view to ensuring that they operate within the limits of their powers and comply with legal and procedural requirements. The Supreme Court exercises its supervisory jurisdiction over the Court of Appeal and the High Court; while the High Court in turn exercises it supervisory jurisdiction over courts lower than the High Court, as well as administrative officials, and other bodies exercising judicial or quasi-judicial powers.

The end result of the exercise of the supervisory jurisdiction is the issuance of the prerogative writs. It should be noted that "supervisory jurisdiction" and "judicial review" can be used interchangeably as has already been indicated.

The application for prerogative writs is however in a class of their own. In situations where only a direct order from the court can remedy an administrative impropriety, prerogative writs will be resorted to. An application for an order in the nature of *mandamus,* prohibition, *certiorari* or *quo warranto against* the decision of an administrative official or tribunal is required to be made by way of an application for judicial review to the High Court.[3]

An application for judicial review must be made to the High Court by motion. The motion must be supported by an affidavit by or on behalf of the applicant containing the following particulars:[4]

- the full name, description and address for service of the applicant
- the facts upon which the applicant relies;

[1] Article 33(2) expressly clothes the High Court with the power to grant these remedies in cases where human rights and freedoms have been are being or is likely to be violated.
[2] See Articles 141 and 132 of the 1992 Constitution respectively.
[3] Order 55 rule 1 of The High Court Civil Procedure Rules C.I 47
[4] Order 55 rule 4 of C.I 47

- the relief or remedy sought by the applicant and the grounds on which he seeks the relief or remedy; and
- the full name, description and address for service of the person directly affected by the application.

CERTIORARI (QUASHING ORDERS)

Certiorari is a discretionary remedy sought before the High Court in instances where the legality or procedural propriety of an exercise of ***judicial power*** is in issue. Francois JA (as he then was) in the case of *Republic v. The President, National House of Chiefs, Ex parte Akyeamfour II*[1], stated that acting judicially means "an obligation on a body to hear evidence from both sides and come to a judicial decision".

SCOPE OF THE ORDER

The scope of certiorari in relation to the inferior courts is such that, before the High Court will grant the remedy of certiorari, the inferior court must have exercised its judicial power:

- In excess of its jurisdiction (*ultra vires*)
- against the rules of natural justice[2] or
- based on an error of law on the face of the record[3]

The scope of the order of certiorari is not limited to only the exercise of judicial power by the inferior courts, but it is also applicable to all bodies that act judicially i.e. committees of inquiry, judicial committees, constitutional or statutory bodies like CHRAJ, the Labor Commission, etc. In reiterating this point, Lord Atkin in the case of *R v. Electricity Commissioners* [1920] said "wherever anybody of persons having legal

[1] [1982-83] GLR 10,CA

[2] These principles of natural justice include the right to be heard (*audi alteram patem*) and the rule that no man should be a judge in their own case (*nemo judex in causa sua*)

[3] In *Republic v High Court, Accra; Ex parte Industrialization Fund for Developing Countries and another [2003-2004] SCGLR 348,* this court held that certiorari (or prohibition) was a discretionary remedy which would issue to correct a clear error of law on the face of the ruling of the court. In the case of an error not apparent on the face of the record, the avenue for redress is by way of an appeal.

authority to determine questions affecting the rights of subjects and having the duty to act judicially act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs".

In the *Republic v. The President, National House of Chiefs, Ex parte Akyeamfour II* earlier mentioned, an application for certiorari to quash the registration of a chief in the National Register of Chiefs was refused on the grounds that the act of entering a name on a register was a purely administrative matter, and not the exercise of judicial power as there was no obligation on National House of Chiefs to hear evidence from both sides and come to a judicial decision.

PROHIBITION

This is a discretionary remedy granted by the courts to prevent the inferior courts and other administrative bodies that exercise judicial powers from exceeding their jurisdiction or acting against the rules of natural justice.

SCOPE OF THE ORDER

The scope of prohibition is similar to that of certiorari in that it is only available against a body that is acting judicially. "The difference between certiorari and prohibition is only that whereas certiorari looks to remedy ***past errors***, prohibition looks to the ***future to prevent what will be done from being done***. What goes on for the former equally applies to the latter. The authorities make it also clear that it is not just any error that has the effect of ousting a court of its jurisdiction, but that for an error to have any such effect it ought to be basic and fundamental."[1]

The case of In *Re Appenteng (Decd); Republic v High Court, Accra; Ex parte Appenteng and another* [2]is very authoritative in stating the scope of prohibition. An order of prohibition was sought by two of the three executors of a will, against the

[1] Per ANSAH JSC. In *The Republic v High Court, Accra; ex-parte Ghana Medical Association*. SC, 25TH April, 2012

[2] *[2005-2006] SCGLR 18*

continued exercise of jurisdiction by a High Court judge in respect of an aspect of the administration of the estate of the deceased.

It was held that "Prohibition is not meant to prevent a person or a court from exercising general judicial functions; it is rather to challenge an attempted exercise of the judicial function in specific jurisdictional situations, i.e., *for excess or absence of jurisdiction or departure from the rules of natural justice* such as the existence of actual bias or strong likelihood of bias or interest; and an applicant for prohibition or certiorari is not restricted by the notion of *locus standi*, i.e. he does not have to show that some legal right of his is at stake…"

MANDAMUS

This is also a discretionary remedy that the High Court grants by ordering the performance of a particular public duty. In explaining what mandamus is in the case of *Mould v De Vine*[1], Her Ladyship Jiagge J (as she then was) said that "an order of mandamus is one requiring an act to be done and may be made where a body charged with a public duty to do an act has failed to do so".

In the above case, the Waterworks Department refused to reconnect the pipeline of the applicant's house for water supply until she had paid the arrears of water bills owed by the former occupant of the house. The applicant was granted the order on the grounds that "The Water Supply Authority has a duty to the public to supply water and must show good cause why water should not be supplied to any member of the public." The court also considered that the applicant had the legal right to have the water reconnected to her premises.

SCOPE OF THE ORDER

"The writ of mandamus is of a special value in such cases where there is a legal right but no specific legal remedy for enforcing such right. Where there is an alternative effective legal remedy for the legal right, this will usually cause the court to refuse to exercise its discretion in favor of the applicant and decline to issue an order of mandamus."[2]

[1] [1962] GLR 533-535

[2] Date-Bah S.K. in his article "Notes and Comments: Mould v De Vine: A Successful Invocation of Mandamus Against a Public Utility Supplier" 1970 vol. VII UGLR

The court will only grant the order of mandamus where there is no other action at law which will be a complete satisfaction of the issue. Thus, in the case of *Mould v Devine*, it would be noticed that there was no alternative remedy available to the applicant; neither in tort (for negligence of the Waterworks Department) or contract (no prior agreement between the applicant and the Department). In a later case of *Re Botwe and Mensah* [1971] 2 G.L.R. 285 it was held that "a condition precedent to the grant of mandamus was a prior demand by the applicant that the respondent perform his public duty, which demand must have been ignored."[1]

It is observed therefore that

- The writ is only granted to compel the performance of duties of a public nature and not for the enforcement of a private right.
- The court will not grant mandamus where there is an alternative cause of action available to the applicant.[2]
- The applicant must have made a prior demand on the defendant to perform the public duty which demand was ignored.

QUO WARRANTO

This remedy comes in the nature of an injunction. An injunction by way of *quo warranto* is an order of the court directed against any person acting in an office in which he is not entitled to act to restrain him from so acting, and if necessary to declare the office vacant.

SCOPE OF THE ORDER

In *Republic v. Sagoe II; ex parte Baffo V* [1979] GLR 378, Osei-Hwere J, observed that "for an injunction by way of *quo warranto* to issue... these essential requirements must prevail, namely,

a. the office must be created by statute;
b. it must be an office of public nature; and of a permanent character;
c. it must be substantive (that is, independent and not merely ministerial to another's will) and

[1] Walter Dickey & Fui Tsikata, A look at Administrative Law in Ghana [1972] vol. IX UGLJ 135—172
[2] Ibid

d. there must have been [actual] usurpation, i.e. not merely a claim, but the defendant must have been in use and possession of the office and acting in it."[1]

What the above means is that positions which are not created by statute like executive positions in clubs, associations and other private *organizations are not amenable to the order of quo warranto*. In the University setting, positions that could be challenged by a writ of *quo warranto* will be those created by the Act establishing the University itself or others created by Statutes made by the University Council pursuant to the Act. And the other important thing to note is that the order will not be made against a person who is merely making claims that he is the one holding, or supposed to be occupying, a particular office, but rather the person who has actually taken steps to exercise the functions of that office when he has no authority so to act.

HABEAS CORPUS

This is a discretionary remedy ordered by the courts in instances where an allegation is made by a person that he is being unlawfully detained. The application is made to the High Court or any Judge of that Court for an enquiry into the cause of the detention. The court will require the person or authority detaining the applicant to file a return (statement) detailing and/or justifying the detention. If the court is of the view that the reasons provided in the return are unlawful or otherwise unjustifiable, it will order the release of the person detained. The right to an application of habeas corpus is provided for in section 1 of The Habeas Corpus Act of 1964[2].

Section 2 of the Act provides that "The High Court or the Judge thereof to whom an application is made under section 1 of [the] Act shall immediately enquire into the allegation of unlawful detention and may make an order requiring the person in whose custody the applicant (or the person on whose behalf the application is made) is detained,

(a) to produce the body of the person so detained before the High Court on a day specified in the order, and

[1] At pp. 384 & 835
[2] (Act 244)

(b) to submit a report in writing stating the grounds of the detention."[1]

SCOPE OF THE ORDER

Osei-Hwere J, (as he then was) described the order of Habeas Corpus as "the greatest bequest made to us by the common law in ensuring the liberty of the citizen."[2] However the writ of habeas corpus would not be granted to a person lawfully committed to prison or where the effect of the grant would be to review or question the decision of an inferior court on a matter within its jurisdiction. See *R. v. Morn Hill Camp (Commanding Officer); Ex parte Ferguson*[3]Also, where the return (i.e., the report required from the person or authority detaining the applicant) shows that the applicant is in execution (i.e., serving a sentence) under the judgment of a competent court, an affidavit would not be allowed to traverse those facts. Thus in Carus Wilson's Case (1845) 115 E.R. 759, Lord Denman C.J. said "…that our form of writ does not apply where a party is in execution under the judgment of a competent Court".

However Cecilia Koranteng-Addow J (as she was then) explained in the case of *Republic v Director of Prisons and Another; EX PARTE SHACKLEFORD*[4], 'where the applicant, as in the instant case, alleged that he was never tried or there was no conviction or sentence, the court would be duty bound to go beyond the warrant of commitment to determine its authenticity.'

In conclusion the writ of habeas corpus is available to protect the liberty of the individual. If a person is unlawfully detained by the police, or by an administrative body or official or is unlawfully committed to prison, the writ will be granted to require the authority or person authorizing the detention to come and justify it, and upon that person's failure to do so, the detainee will be released. The remedy is however not available where the applicant is serving a lawful sentence of a court. But if the allegation is that the person was sent to prison even without any lawful court judgment

[1] Section 2 of the Habeas Corpus Act, 1964 (Act 244)
[2] *Republic v. Commanding Officer of the Third Battalion of Infantry, Ghana Army: Ex parte Kwaku* [1974] 2 G.L.R. 340 at p. 345
[3] [1917] 1 K.B. 176, D.C
[4] [1981] GLR 554

or order, then the High Court will inquire into it, and order his release if it is satisfied that the person is being unlawfully detained.

10.3 Injunction and Damages

A person who is aggrieved by the decision of an administrative official or body may seek an injunction[1] from a court to restrain the person or body from continuing with the violation or ever repeating the acts amounting to the violation. An injunction therefore is an order of a court prohibiting a person, his agents; servants or assigns forthwith, from engaging, continuing or repeating the performance of certain actions on the pain of punishment by the court.[2]

Interim (Interlocutory) Injunction

Normally in any court action, including actions for judicial review of administrative actions, the final determination of the matter will take some time. But the nature of some cases will be such that if the applicant for judicial review should wait till the end of the case for the court to grant him a remedy, the harm he seeks to prevent by bringing the action will have been caused and the judgment given by the court at the end of the day will serve no purpose. Consider a situation where a final year student is for some reason being prevented from writing his last semester examinations by the University Examinations Board. If he sues the university, it will take several weeks or months for the case to be finally and conclusively determined, by which time the exams would have been over with the consequence that he cannot graduate. In such a circumstance, immediately the action is filed in the court, the applicant can request for an order to restrain the University from preventing him to write the exam until the case is conclusively determined. This type of injunction granted to the applicant in the meantime while the substantive action is still pending in the court is what is known as Interim or Interlocutory Injunction.

[1] Order 55 r 2 of CI 47

[2] A person who disobeys an injunction, or any other order or directive from a court for that matter, may be held in contempt of the court and be liable to imprisonment.

The grant of any injunction including interim injunction is discretionary. This means that certain conditions must be established to the satisfaction of the court before an interim injunction is granted by the court.

Conditions for granting Interim Injunctions

a. **Prima Facie Case**: The applicant for interim injunction must show a prima facie case. This means that without even going into the merits of the case, the court must be satisfied that the case is a serious one and not any frivolous or vexatious claim. In *Owusu v Owusu Ansah* (2007-2008) SCGLR 870 the Supreme Court explained it to mean that the application on the face of it must disclose that "the applicant has *a legal right at law or in equity* which the court ought to protect by maintaining the status quo until the final determination of the action on the merits". In the examination scenario given above, it will be obvious that the student as part of his right to education has the right to sit for the University examination and so in those circumstances, the court is likely to consider that he has a prima facie case.

b. **Hardship to the Applicant**: It must also be shown to the satisfaction of the court that if the injunction is not granted, the applicant will suffer an irreparable harm by the time the action is finally and conclusively heard, and that such a harm cannot be compensated for by way of awarding damages. So again it will be seen in the examination scenario that if the order is not granted to restrain the University from preventing the student to write the exam, the exams will be over by the time the case is finally determined, and by that time the student may have lost his chance to graduate. Any compensation that is paid to such a student if he wins the case may not be enough compensation for missing the opportunity to graduate with his mates and all the opportunities that may have come with that. If the court is satisfied that such is the situation the applicants' case presents, then it is likely that the order will be granted. See *American Cyanamid Co v Ethicon Ltd.*[1975] 1 All ER 504, at 509 & 510.

c. **Interest of the defendant**: It must also be shown that by granting the interim injunction, the interest of the defendant will also not be irreparably harmed. This is because the order is going to prevent the defendant from exercising some genuine right he may have until the final determination of the case. The court must therefore strike a balance between the interest of the applicant and the interest of the defendant. Where granting the order will cause more irreparable harm to the defendant than the applicant, the order will not be granted. So in a case where the defendant is a public body or a person exercising public functions, the court will consider whether or not the grant of the order will seriously injure the public interest. If the public interest will not be harmed by the order then the court may grant it. In the case of the student who is being prevented from writing an examination, it will be seen that granting the order against the University to prohibit its officials from preventing the student from writing the exam is unlikely to cause any harm to the University. Indeed if at the end of the final determination of the case, it is realized that the student was not eligible to write the exam, they can always cancel the result. But for the student, the damage is one that can jeopardize his whole life or career.

Consequently, the above are the conditions the court will consider and satisfy itself of before granting an order of interim injunction. Another type of injunction known as "perpetual injunction" is the injunction a court grants after it has conclusively heard and determined the case. This will usually be granted if there is the likelihood that the matter that brought the applicant to court may be repeated by the defendant. Such orders will be granted to restrain the defendant or his agents from ever again engaging in such conduct. It must be noted however that the grant of perpetual injunction by the court is also discretionary. So, for instance where the court is of the view that the action by the administrative official or body is not likely to be repeated, an injunction will not be granted. It may be granted only where the violation is continuing or is likely to be repeated.

Finally if the applicant has suffered some monetary or other losses by reason of the administrative decision, the court may grant damages (monetary compensation) only, or it may grant it in addition to an injunction. In all cases, person asking for an injunction from the court must prove that they have a right that has been infringed or being infringed and that if the order is not granted the violation will continue or be repeated.

10.4 Questions for Review and Discussions