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MZUMBE UNIVERSITY

FACULTY OF LAW

LECTURE AND SEMINAR QUESTIONS

IN

LAW 102: ADMINISTRATIVE LAW

FOR

BACHELOR OF HUMAN RESOURSES MANAGEMENT

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2011

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MZUMBE UNIVERSITY

FACULTY OF LAW

BACHELOR OF PUBLIC ADMINISTRATION (HRM, HSM, LGM&PSM)

SPECIAL AND STAGGERED SEMESTER 2006/2007

ADMINISTRATIVE LAW: LAW 102-SEMINAR QUESTIONS.

1. Define the term Administrative law. The growth and development of Administrative law has no justification whatsoever in the contemporary system of administration. Discuss
    - **HSM-**SHANGWE KIMATH, LINA TIMOTHY, THERESIA KAWISHE, NEHEMIA KAPYELAH, UPENDO MKALA, MAUNDI MOSES
    - **HRM B-**DORIS RUSHEKYA, MWEMBA B. MWEMBA, RACHEL GEORGE, SUZY SILAYO, CHARLES MALLYA, MGALU NASANIA, SALMA MOHAMED, GLORIA D. KASILO, SELESTINA MWANDA, TAWAQAL

2. Although the scope of administrative functions is wide yet not everything done by administrative organs fall within the ambits of administrative law. Critically discuss this contention.

3. Administrative law derives its justification from multiple numbers of authorities which act as sources of this branch of public law. With vivid examples elucidate the validity of this statement.
    - **HRM A-**JONAS JOSEPH, MWIKOKI NURDIN, OMARY HAWA, LUDOVICK ROSEMARY, JOHN NYANGO, JACKSON CHRISTOPHER, **HSM-**SILVANUS STEPHEN, PASCAL MGINA, MARY MWIDIMA, AISHA MTANDA, DAN KAWOGO, JAQUILINE JOHN, ANGELA GODFREY, NYAMASHEKI MANGUYA, AMANI LWABUTAILUKA, LILIAN MWANGA

4. The difference between administrative law and constitutional law is not one which is fundamental and in actual fact there is no clear or definite gap between the two laws. Is this statement correct?

5. The system of administration of public service in Tanzania is folded in such a way that there is no clear legal framework that provide for specific organs which deal with the welfare of public servants in Tanzania. Critically examine the validity of this statement.
    - **HSM-**JOSEPHAT, MALLEY THOMAS, HENRY BENDERA, LEONARD LUKOO, METHOD PESHA, GODFREY MVILLE, GODBLESS BEATUS, BENADA EMANUEL, JUSLINE BUKURU, PEPETUA MWAMBINGU
    - **HRM C-**MAWAKIPARA DAVID, MUMANGI JANETH, IBASSO MAKORI, MAHMOUD HAWA, ELIZABETH LANDA, MARY MARWA.
6. The powers of the President in as far as issues relating to public service in Tanzania are concerned, are enormous to the extent that when they threaten the major aim of the law in ensuring that public service is improved and becomes efficient in its operations. Discuss

7. *"When Tanganyika became a Republic in 1962 the prerogative power of the Crown to dismiss a civil servant at will did not devolve to the President. Instead the President could only remove a civil servant not at will but in public interest…Therefore the prerogative to dismiss at will has been abrogated"*.

   His lordship Mwalusanya, J in **JAMES F GWAGILO v ATTORNEY GENERAL** [1994] TLR 73 at p.76 (HC). Does this argument reflected in any way in Act no.8 of 2002 and its regulations?
    - **HRM C-**BALTAZARY NEEMA, CHRISTINA MATASHO, MSUNGU SAMWELI, WILFRED LAURA, THABITI SARAH, KISURE FARTHIA,
    - **PSM-**MBELE AUGUSTINO, ADAM JUMA,FRANK NORICE,ZINGA HELGA,AKIDA FARIDA,BARAKA MINJA, FRIDA URASA
8. The laws regulating public service in Tanzania guarantee for welfare of a

public servant from the start of his/her service till the end of it. And there is no way the security of tenure of a public servant can be put into jeopardy through any administrative act. With authorities justify this argument.

9. To what extent is it correct to say that the grading system of government (public service) employees is based on salary and that the control over public service depends on appointing authorities?

10. For one to serve in the public service of the United Republic of Tanzania has to meet certain qualifications provided under the law. And no one shall be appointed to serve in public service on the basis of any religious belief or political partiality. Discuss.
    - **LGM-**FLORA MGONJA, PIUS ANSELIM, CAROLINE ANG'WEN, KUKYAA MBUVA TRIZER, YONA KIBONA, ROBERT KIHOMO, CHAULA PRISTA, SIMBA MICHAEL.
    - **HRM B**-ELIZABETH MOSHI, GLORY LUCKFORD, ANDREW MELKIAD, EMMY MWASALWIBA, NEEMA LUSASI, VERONICA THOMAS, IRENE GABRIEL, JUDITH MUGASA

11. It is all the way correct to say that the Public Service Commission is the supreme organ in matters relating to welfare of public servants in the United Republic of Tanzania. No wonder to see this organ given overwhelming powers to undertake in as far as public service is concerned. Justify the validity of this contention

12. Employment contracts in public service falls into different types and each of such types of contracts have unique features of their own although to a certain extent they might be sharing certain common features. Discuss

13. *"Compulsory retirement of a civil servant or his removal from service in the public interest may be challenged in this Court on, among others, any of the following grounds: the legislation under which the impugned decisions was*

made is unconstitutional; the decision is mala fide ie, it is actuated by malice or some purpose other than that for which it is authorised by the law: malice would be held to exist where, for example, the alleged public interest, where removal is concerned, is founded upon non-existent facts; the decision is perverse, that is to say, one which no responsible man would have made." His Lordship Samatta, JK in **SAID JUMA MUSLIM SHEKIMWERI v ATTORNEY-GENERAL** [1997] TLR 3 (HC).

In the light of above quotation discuss the protections which a public servant can use whenever there is a question of unfair determination of his/her employment contract in the Public Service

- **LGM-**PETER MRESA, GODFREY EMMANUEL, NEEMA KASSAGAMA, NESTORY AMANI, MASTELA ALPHONCE, JABIR MAKOMBE, SEMAINDA NDABAGOYE,
- **HRM B-** MWANGA RAYMOND, GLORIA KINIGWA, JANE MNYANI, NEEMA MKILYA, SALMA CHISONGA, ESTHER FARAE, MARK EMANUEL

14. One of the unique features of the present law governing Public Service is the way the law is tailored to cover disciplinary mechanisms. Indeed the process is cumbersome and is intended to promote unnecessary delays in carrying out disciplinary actions. Critically discuss the validity of this statement.

15. *"The judge must give reasons for his decision: for by so doing, he gives proof that he has heard and considered the evidence and arguments that have been produced before him on each side: and also that he has not taken extraneous considerations into account. It is of course true that his decision may be correct even though he should give no reasons for it or even give a wrong reason: but, in order that a trial should be fair, it is necessary, not only that a correct decision should be reached, but also that it should be seen to be based on reasons; and that can only be seen if the judge himself states his reasons."* Sir Alfred Denning in his book **'The Road to Justice'** at p.29.

In the light of above quotation discuss the extent to which courts have tried to develop such duty to give reasons whenever administrative decisions come to the detriment of an individual person through the so called *'Nullum Arbitrium sine rationibus'* rule.

- **HRM A-**ANDONGWISYE GASTO, MBINILE ISSACK, JOSEPH FILOMENA, ANTHONY LAMECK, KIKULI MILIAM, MBWAMBO JUMA, GASPER MISTON, MAKOI LILIAN
- **HSM-**JACKSON MENGELE, NATHANIEL ESTOMIH, DELLA LIKUNAMA, NICE MSENDO, NJELA GODFREY, SHAO GODBLESS, NONGAKI SWEDI, MARRY NCHIMBI, GRACE ESTOMIH, VAILET MDETE

16. *"Although a decision of the Minister or Commissioner… is final and conclusive, that does not mean the decision is not subject to review by courts. That remedy is not excluded by those or similar words… No appeal will lie against decisions protected by such words or phrases, but an aggrieved party may come to this Court and ask for prerogative orders. Nullity of a decision is not protected by words `final' or `conclusive'."* His Lordship Samatta, JK (as he then was) in **TANZANIA AIR SERVICES LIMITED v. MINISTER FOR LABOUR, ATTORNEY GENERAL and THE COMMISSIONER FOR LABOUR** [1996] TLR 217 (HC).

    Does this quotation reflect the proper observation of the attitude of the courts towards ouster clauses in the control of administrative functions?

    - **HRM A-**MSANGI SOPHIA, CHUMA MASANJA, NAMUHISA DOROTH, NGWASI GEORGINA, HAMIS H.HAMIS, ISSAYA ADOLF,
    - **PSM-**ATHUMAN SELEMAN, ANTHONY J.MTAKA, ANTHONY ANASTAZIA, JOEL KAMONJO, MRAI HAMISI, ERASTO RACHEL, AVARISTA MKWIZU, ERICK GAUDENCE

17. *"The parliament cannot make laws for every eventuality. It is absolutely absurd to even think of it. The reality is that such legislative powers have to be*

delegated. And whenever such delegated powers are exercised, they have to be exercised intra vires. And to ensure that, certain safeguards must be set to control abuse of such powers" Discuss

18. Discuss the relevance of the doctrine of ultra vires in Administrative law. When is it applicable in controlling administrative actions?

19. One of the unique powers which the High Court of Tanzania has over other subordinate courts is the power to review decisions of various administrative organs and courts below it through judicial review. However the practise has revealed that application for judicial review involves some legal limitations and frustrations and it is not certain that whenever an application is made for it one can get the remedy sought.

    Critically discuss this statement showing, inter alia, necessary requirements for one to be able to seek remedy before the court through judicial review.

    - **PSM-**AYOUB LAIZER, SALEHE MGANGA, VULLA MAGRETH, BEATRICE THOMAS, MOHAMED ABDALLAH, AMIN MWAJUMA, ASHURA ABDALLAH, PENDO OWERU, RENALDA SHAYO, JOSEPH HUMPHREY
    - **HRM C-**JUMA JUMA, NICHOLAUS FRIDA, ANNA MTOKA, MICHAEL GUNEWE, GETRUDE NGAHEMELA, FRIDOLIN BELTILA,

20. *"I am not certain to say at what point in time executive functions, legislative functions and quasi-judicial functions of administrative organs can be distinguished. Even the courts have not been able to formulate any definite test for the purpose of making such classification. Yet I find it necessary to have such classification for the purpose of ensuring effective control of administrative actions."*

    Is this the correct position of Administrative law in as far as classification of the functions of administrative authorities is concerned? Justify.

21. *'Delegatus non potest delegare'*. Discuss
    - **HRM C-**MALIMIRU SAKUNDA, KALINGO HAPPY, BRIGHTON CHRISTINA, NELSON BAHATI, LIHANJARA GODFREY, GODFREY CHARLES
    - **LGM-**ROSE R.KIPOBOTA, MUSA MBYANA, CONSOLATA WELLA, GOODLUCK E.MLINGA, AZIZA SULEMAIN, GLORY MUSHI, SARAH G.D.CHUPA, JOSEPHINE MAGERE.

22. One of the cardinal principles of Natural Justice is *Audi Alteram Partem*. The scope of application of this rule has not been such narrow as most of scholars try to confine it. In actual fact this rule covers a wide scope of the process of hearing. Discuss
    - **PSM-**MAAJABU KIMWAGA, BAKARI DADI, OLIVER JOHN, STRATON STEVEN, GRACE MBEKERU, EZENIA MEDADI, LUCY DELTON, GOODLUCK KOMBA, MWANAFAKI TAMBI.
    - **HRM B-**SILVER NJAU, PERPETUA MHINA, CECILIA SAPANJO, RHODA RICHARD, REGINA DANNY, VERONICA THOMAS, JOEL BAHSIDYA,

23. *"…justice must be rooted in confidence and confidence is destroyed when right minded people go away thinking that the judge was biased…"* Lord Denning in **METROPOLITAN PROPERTIES CO LTD V LENNON AND ANOTHER** [1969] 1 QB 577 at 599 as quoted by His Lordship Bubeshi, J in **MHIDINI AHMAD NDOLANGA AND OTHERS v NATIONAL SPORTS COUNCIL AND ANOTHER** [1996] TLR 325 at 333. In the light of this argument discuss the *'Nemo debet esse Judex in propria causa'* rule and its application in various judicial decisions as against various administrative actions.
    - **HRM A-**MWAGIKE RICHARD, MEDA SAMSON, MSUMARI IBRAHIMU, MWASOMOLA KISA, CHIMTEMBO MARTHA, FORTUNATA MASSAWE, BUYEKWA SOSTHENES J, MAGANGA MAKEREMO.
    - **HSM-**NICODEMUS MMASI, JUSTIN SAMANGU, MACHIBYA MWAJABU, ERNEST JOHN, SIKALWANDA KISASU, JASMINE

KWEKA, MARIJANI SALMA, SELEMANI ALLY, APOLINARY MUSHI, MILLEY MADIKA.

24. *"Properly exercised the new powers of the executive lead to Welfare State, but abused they lead to the Totalitarian State. Without proper and effective control an individual would be without remedy, even though injustice is done to him"*. Discuss the validity of this statement pointing out the control mechanisms against abuse of administrative powers and remedies available to a victim of such abuse.

25. *"For all that we know mandamus is the procedure whereby a citizen with sufficient legal interest may apply to the High Court to compel a public officer to perform a public duty entrusted to him. It is said it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do something or not to do something; the duty itself being of an imperative nature."* His Lordship Mwalusanya, J (as he then was) in **JOHN MWOMBEKI BYOMBALIRWA v THE REGIONAL COMMISSIONER AND REGIONAL POLICE COMMANDER, BUKOBA** [1986] TLR 73 (HC).

    In the light of the above quotation, discuss necessary conditions required for order of Mandamus to be issued. Are the same conditions applicable for orders of Certiorari and Habeas Corpus?

    - **PSM-**MEHRUN MSAFIRI, CHARLES KEIZA, ALICE LUKENYA, TRYPHONE MKOLOTI, ABDALLAH KIKUNGU, VIVIAN BURCHARD, MALUSU CHIMGE, MOSHI PONERA, ROBERT SAIGURAN, UPENDO MALLYA.
    - **HRM A-**BUBELWA ROMWARD, NYEMO JULIUS, SADI MSHAM ELISANTE STEPHEN, ENOS MWAMIN, BERNAD EDTRUDA.

26. *"He is not a super-administrator to whom an individual can appeal when he is dissatisfied with the discretionary decision of a public official in the hope that he may obtain a more favourable decision. His primary function…is to investigate allegations of maladministration".* Is this the true notion of an Ombudsman? Relate this with the practice of it in Tanzania.
    - **LGM-**BEATRICE HENDRY, JULLY MINJA, HABIBA MTUNGUJA, MASSAWE NICOLAUS, ERICK KOMBE, EDSON MHOWERE, ALLY JUMA, KILOSA KAMBAYA,
    - **HRM B-**ASHA H. MGALLA, TULAHANGA MTETEMELA, PAUL AUGUSTINO, HADIJA AHMED, PETRONILA NDAHANI, SADICK WIKETYE.

27. The Human Rights Commission is a toothless backing dog and in any way cannot serve as a place where a victim of Human Rights abuse can run to. Critically discuss.

28. *"The proper tribunals for the determination of legal disputes in this country are the courts, and they are the only tribunals which, by training and experience and assisted by properly qualified advocates, are fitted for the task"* (Lord Romer). How far is this argument hold water in as far as the growing importance of administrative tribunals to the contemporary system of administration?
    - **PSM-**DAUDI C.MUSSA, GODFREY MARINE, TITUS KITULI, DAVID NOMBO, JANE MFUKO, EDA MWASOTE, MSHIGHAT RUDHIWANI, EVADINE HUMPHREY, ADINA EDWARD, DEBORA MWAKAJE.
    - **HRM C-**GRACE NGANGA, GHIKAS NATHALIA, KILEWELA EMMANUEL, SALIM FAUDHA, MWAIKOMBA KISA, HAULE ANECY

29. *"If tribunals were at liberty to exceed their jurisdiction without any checks by the courts, the rule of law would be at an end".* Discuss this statement by pointing out the ways in which decisions of administrative tribunals may be

challenged.

30. *'Rex non Potest Peccare'*. Discuss the notion of this Latin maxim in relation to the development of proceedings by and against the Government in Tanzania.
    - **LGM-**ESTHER NGEREZA, ELISIA J. MILLE, MNZAVA KIRUA, JORDAN KISSA K, KIWAMBE REUBEN, CONSOLATA MOLLEL, KAMIHANDA AMWESIGA, ONESMO CHRISTOPHER, KAWONG EPHRAIM, NURU JUMA.
    - **HRM C-**EMMANUELA PETER, YUSUPH RAHMA, KIRUMBI ALOYCE, JONAS CHRISTOPHER, EDINA OSCAR, MAJOGORO MTAKAMA

TOPIC 1: INTRODUCTION TO ADMINISTRATIVE LAW

Meaning of Administrative law

This law has been defined by a considerable number of scholars. Their various attempts to give the meaning of administrative law have given difficulties in getting a scientific, precise and satisfactory definition of administrative law. Hereunder are some of the definitions given by various scholars[1] in as far as their opinions as to what administrative law is

Ivor Jennings

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

This Ivor's definition, though accepted by some scholars, it is also criticized that;

- It does not distinguish administrative law from constitutional law
- It is a very wide definition which encompasses even substantive powers which might not be falling within the scope of administrative law
- It does not include remedies available to an aggrieved person when his rights are adversely affected by the administration.

Wade

Administrative law is the law relating to the control of governmental power. He argues that the primary object of administrative law is to keep powers of the government within their legal bounds so as to protect the citizens against their abuse.

M.P.Jain

He says;

> "Administrative law deals with the structure, powers and functions of the organs of administration, the limits of their powers, the methods and procedures followed by them in exercising their powers and functions, the methods by which

[1] As provided for in C.K.Thakker (Takwani)(1994) Lectures on Administrative Law, 2nd edn at p.3

their powers are controlled including the legal remedies available to a person against them when his rights are infringed by their operation."

Generally this law can be defined as the branch of public law which deals with powers and duties of administrative authorities, the procedure followed by them in exercising the powers and discharging the duties and the remedies available to an aggrieved person when his rights are affected by any action of such authorities.

Sources of Administrative law

Just like most of public laws and other laws, this branch of public law derives its authority from various sources. These sources may be grouped into two main sources;

a) **Major sources**

- **The Constitution**. Various administrative organs derive their powers and functions from the Constitution. Such organs include the President, Ministers, local government authorities etc. However the very same Constitution[2] provides for the rights of every individual and such constitutional rights have to be respect when exercising administrative functions. In that respect the Constitution becomes a major source of administrative law.
- **Statutes**. Most of administrative organs are statutory formed. They derive their powers and functions from various statutory instruments. Some statutes confer legislative powers, quasi-judicial powers, powers to maintain law, order and good governance etc. All these powers have to be exercised lawfully within such limits set by the particular Act of the parliament. In that sense statutes become one of the principal sources of administrative law.
- **Case laws/precedent**. Decisions by the supreme courts of the land in administrative disputes form one of the major bases of administrative law. Courts have always intervened in such cases where administrative organs have acted unlawfully to the extent of injuring or affecting individual rights. Using their inherent prerogative powers, courts have

[2] The Constitution of United Republic of Tanzania, 1977 as amended from time to time

been a reliable place for a victim to run to and get his respective remedy. Hence cases involving a dispute in administrative matter have been useful as sources of administrative law.

- **Received laws**. This includes the common law principles, doctrines of equity and such statutes of general application. All these have been, and still are, useful in such matters involving administrative disputes.

b) Subsidiary Sources

- Books by prominent jurists and opinions from prominent jurists

Development of Administrative Law

For almost last two centuries there had been an increase in the general functions of state. The traditional functions of a state such as securing the community against any external invasion (aggression) and internal strife together with dealing with such mechanisms of making the state be able to run itself (for instance through collection of taxes), have now proved to be not the only main functions of the state in the contemporary modern world.

Demographic revolution, increase in political activities, technological innovations and inventions and so forth, have all extended the general scope of the functions of state beyond those traditional ones. Involvement of public authorities in most of the aspects of life proves the extent of such increase in the functions of the state. The state is involving now in the general provision and distribution of various social services like education, health, water and sanitation, power supply to mention but few. This increase in the functions of the state has resulted into the growth and development of administrative law.

With this development, evolution of the modern administrative law has seen modern administrative law dealing with the way powers are acquired, how powers are distributed, how the same powers are used, and how misuse of power is prevented and remedied.

Hence this has given rise and development of a modern, complex and comprehensive

kind of public law which concerns itself with rules, procedures, regulations and legal principles geared towards the control of governmental powers. Most of these powers emanate from parliamentary legislations and others are mainly discretionary arising from the nature of the administrative organ responsible in performing such powers.

Reasons for the growth and development of administrative law

The following can be considered to be some of the factors that gave way to the development of administrative;

1. A rapid change in the philosophy as to the role played by the state.
2. Development in other alternative organs of settling disputes. Judicial system proved to be inadequate to be able to solve multifarious increase in number of disputes.
3. The legislative process was also inadequate to meet all the needs of the community in legislative matters.
4. Flexibility in the functions of administrative organs etc

Nature and Scope of Administrative law

This branch of public law deals mainly with powers of the administrative authorities, the way in which such powers are exercised where there is misuse of such powers, then how a person affected can be remedied. In this process this law regulates powers, procedures and acts of public authorities. The law tries to harmonize social welfare with the rights of individuals When powers are properly exercised they lead to the so called 'welfare state' but when the contrary is true they lead to the so called 'totalitarian state'. It is therefore the role of administrative law to try to create a balance in the exercise of such powers conferred upon administrative organs to ensure that there is no abuse of discretionary powers.

Various pieces of legislations do delegate some powers to administrative bodies. Such powers may include quasi-judicial powers, legislative powers, investigatory powers, directive powers, licensing powers etc. In the exercise of such powers the basis of administrative law comes into being so as to control rules and procedures that apply in such matters. It can therefore be said that this law deals with the establishment of authorities for protection of public interests and safeguard private interests against

administrative arbitrariness or excess of power.

It s scope

With this respect administrative law covers such aspects like political, judicial, parliamentary control of administrative organs. However it does not go to the extent of controlling policy making by ministers or the head of state. All public authorities vested with administrative powers fall under the ambit of the control of administrative law. The exercise of their powers may in one way or the other affect an individual person. Therefore administrative law is there to impose a system of checks and balances.

Constitutional law and Administrative law

It has been a tendency among different scholars to treat these two branches of public law as synonymous. In actual fact the two kinds of public law are both concerned with functions of the Government and they share the same roots or sources. However the two laws have some slight differences which make them to be treated as different types of public laws. For instance according to Maitland, while constitutional law deals with structure and broader rules which regulate the functions, the details of the functions are left to administrative law. And according to Hood Phillips;

> Constitutional law is concerned with the organisation and functions of Government at rest whilst administrative law is concerned with that organisation and those functions in motion.

Other scholars say that the distinction between constitutional law and administrative law is one of degree, convenience and custom rather than that of logic and principle. In other words they argue that there is no fundamental distinction between the two laws.

Functions of Administrative law

There are various functions of administrative law some of which are;

1. Regulatory and Control function. Administrative law is there to regulate and control the exercise of administrative powers by ensuring that both mandatory and discretionary powers are properly exercised, that is, are exercised within the ambits of the law that confer such powers. Arbitrary use of such powers cannot be tolerated in the process of performing administrative functions.

2. Imperative function. This is a commanding function which compels administrative organs to perform such powers conferred to them from various sources.
3. To enhance good administration through adherence to the principles of natural justice and other administrative principles
4. To enhance accountability, transparency in the process of governance. It is in the interests of the public that for all such matters that affects individual rights, public authorities should act in a manner that justice will manifestly seen to be done.
5. To enhance democratic participation of individuals in such matters that affects their rights. An individual should be given an opportunity to participate in such a process to which the end results of it might affect in one way the rights of such an individual.
6. To balance and harmonize conflicting interests between the interests of the community at large and those of individuals.

TOPIC 2: THE PUBLIC SERVICE

In Tanzania the major law regulating the Public Service is the Public Service Act, 2002 (Act no.8 of 2002) as amended by Act no.19 of 2004, This Act repeals the Civil Service Act, 1989 (Act no.16 of 1989). The latter Act replaced the Civil Service Act, 1962 (Cap 509).

The term 'Public Service' has not been defined in the Public Service Act rather as per section 3 of the Act, there is the term 'the Service' which has been defined to mean the public service of the United Republic of Tanzania. However, under Regulation 3 of the Public Service Regulations, 2003, public service has been defined to mean;

> "the system or organisation entrusted with the responsibility of overseeing the provision or directly providing the general public with what they need from their government or any other institution on behalf of the government as permissible by laws and include the service in the civil service; the teachers service; the local government service; the health service; the immigration and the fire and rescue service, the executive agencies and the public institutions service and the operational service."

The very same definition of public service is given under the Public Service Scheme, 2003. A public servant has been defined under Section 3 of the Act to mean a person holding or acting in a public service office. The term Public Service Office has been defined under the very same section.

ORGANS OF CONTROL OF THE PUBLIC SERVICE

THE PRESIDENT

Article 36 of the Constitution of the United Republic of Tanzania, 1977 as amended time to time empowers the President to establish or abolish any office in the public service. The President has been conferred with numerous powers to appoint various officials in the public service. The Public Service Act also confers the President power to appoint various heads in the public service. Sections 4, 5, 9, and 14 of the Act envisage powers of the President to appoint various persons to discharge various duties in various organs in public service.

Apart from power to appoint, the President also is conferred power to remove or dismiss public servant from his office. The procedures in the event of a dismissal of a public servant from his office are provided under section 23 of the Act. The power to remove is provided under section 24 of the Act.

The President has influence in a number of issues pertaining public service. That is, apart from having power to appoint, remove and dismiss public servants from their offices, the President also has the following role to play in as far as the Public Service is concerned;

- Responsible in filling vacancies in the public service
- Responsible in administering oath or affirmation to various officials appointed in various posts of public service
- Responsible in approving such offices established to perform functions of the Public Service Commission as per section 15 (2) of the Act
- Receiving report of annual operations of the Public Service Commission before it is tabled before the Parliament
- Responsible in giving written permission to any person to disclose any information which comes to the knowledge of the President in the course of performing his functions under the Act.
- May delegate any such functions vested on him
- May act as an appellate organ in case of any such appeal arising out of a decision of any disciplinary authority subject to the provisions of section 25 of the Act.

THE CHIEF SECRETARY

The Chief Executive of the Public Service of the United Republic of Tanzania is the Chief Secretary who is the appointee of the President. As per section 4(1) of the Act, the President is empowered to appoint the Chief Secretary who shall be the Chief Executive officer of the service.

The Chief Secretary is also the head of the public service and the secretary to the cabinet. His major role is to provide leadership, direction and image to the service.

FUNCTIONS OF THE CHIEF SECRETARY

These are provided for under section 4(3) of the Act and they include;

a. To ensure that public servant in the service are motivated
b. To ensure that public servant in the service are efficient and effectively performing
c. To ensure that the service is free from corruption and other unethical tendencies.
d. To be responsible for confirmation of public servants appointed by the President
e. To improve public accountability by promoting focus on result, service quality and customer satisfaction in public service performance
f. To be a disciplinary authority in respect of public servants appointed by the president

He is under the law the highest ranking disciplinary authority in the service and may in that capacity and in relation to any servant exercising all or any of the powers delegated to a disciplinary authority.

Under section 5 of the Act there other Executives who also take part in the administration of the public service and these are;

a. A Chief executive officer in respect of each ministry, extra ministerial department, region or local government authority in the Government of the United Republic who also is known as permanent Secretary for that Ministry
b. Regional Administrative Secretary for the Region or the Director of the local government authority
c. A Chief Commanding Officer in respect of Immigration service
d. A Chief Commanding Officer in respect of the fire and rescue services
e. Deputy permanent secretaries and ambassadors
f. The Regional and District Commissioners

As per section 6(3) every head of department or division shall be the authority in respect of the appointment, confirmation and discipline of employees in the operational service under his department or division.

The authority in respect of appointment, promotion, discipline and registration of teachers shall be the Teachers Service Department established under section 15 of the Act.

The general administration of public service is on the hands of the Chief Secretary assisted by Permanent secretaries.

THE PUBLIC SERVICE COMMISSION

It is established under section 9 of the Act. It is composed of a Chairman and not more than six other members appointed by the President. The commission deals with all servants falling under the categories of;

- The civil service
- The local government service
- The health service
- The teachers service
- The immigration and the fire and rescue services
- The executive agencies and the public institutional service
- The operational service

Section 9(6) sets out the persons who are not qualified for appointment as member of the Commission.

Section 10(1) provides for the functions of the Commission and some of them include;

a. To assist the President in relation to such matters relating to the service as the President may require
b. To issue guidance, to monitor and conduct merit based recruitment in the public service
c. To facilitate the appointment to posts in the public service
d. To ensure that service schemes are formulated and implemented effectively
e. To facilitate, monitor and evaluate performance by officials in the service to secure results oriented management

The Commission may require any employing authority to provide information which the commission may need for carrying out its functions. Membership in this Commission ceases in accordance with the provisions under Section9 (8) of the Act.

EMPLOYMENT CONTRACTS IN PUBLIC SERVICE

As per section 3 of the Act, a public servant is a person holding or acting in a public service office. A person can serve in the service of the United Republic of Tanzania through appointment to the public service office by any competent appointing authority through the laid down procedures.

The term appointing authority has been defined under section 3 of the Public Service Act, 2002 to mean any person or authority exercising powers of making appointment to any public service office. On the other hand the term 'appointments' has been defined under the Public Service Scheme, 2003 to mean recruitment of persons in the Public Service and it includes first appointments or appointments on promotion.

As per Regulation 3 of the Public Service Regulations, 2003, Appointment may be;

- On Contract
- Temporary
- Part time
- Acting
- Permanent
- On Promotion

The terms of the Service are provided under Clause 29(1) of the Public Service Schemes, 2003 where such terms include;

- Permanent and Pensionable
- Agreement or Contract
- Temporary month to month
- Operational Service
- Daily paid

Appointments in the Public Service are governed by the;

- Constitution of the United Republic of Tanzania 1977 as amended from time to time
- Act no.8 of 2002
- Public Service Regulations
- Public Service Recruitments Code of Practice
- Public Service Code of Ethics and Conduct
- Public Service Professional Codes of Ethics and Conduct
- Administration Instructions or Orders

The person to be recruited in the Public Service has to meet some necessary qualifications or requirements provided under Clause 31 of the Public Service Schemes, 2003. Such qualifications are;

- Academic qualification
- Professional Competency
- Age qualification
- Good character and integrity
- Experience
- Citizenship

Clause 32 of the Schemes provide for the persons who cannot be appointed in the Public Service. In all processes of appointments, the principles governing selection shall be based on merits, fairness, open competition and the prescribed qualifications. This is as per Clause 35 of the Schemes.

In the process of appointment, where it happens that one of the candidates is aggrieved with appointment procedure then he can complain to the appointing authority concerned and where dissatisfied he can further appeal to the Public Service Commission.

Once appointed in the Service, a public servant has to be accountable to all his acts done under his supervision. He will also be accountable to all those who are senior to him in his department. The hierarchy of accountability is provided under Clause 39 of the Schemes. The most senior public servant is accountable for the actions of all

public servants below him.

TERMINATION OF APPOINTMENTS IN PUBLIC SERVICE

As per Clause 45 of the Schemes, the appointment in the public service can be terminated/ determined or come to an end by either;

- Removal or retirement on public interest

Removal in Public interest is provided under section 24 of the Act subject to the provisions under Regulation 29 of the Public Service Regulations, 2003. The power to remove a person from the office on the reasons of public interest is conferred to the President. Different from the Civil Service Act, 1989, the Public Service Act when read together with its regulations requires particulars of the grounds warranting the exercise of powers of the President.

The term 'remove' and 'retire' were interpreted to mean one thing in the case of ***The Permanent Secretary[Establiments] and A.G v Hilal Hamed Rashid & 4 Others Civil Appeal No.64 c/f no.66 of 2002***, ***Court of Appeal of Tanzania at Dar es Salaam[Unreported*** and that of ***The A.G v Said Juma Shekimweri, Civil Appeal no.11 of 1998[Unreported]***

- Retirement on medical grounds

The procedure to terminate appointment of a public servant on medical grounds is provided under Regulation 30.

- Retirement on abolition of office or re-organisation of department

The procedure on termination of a public servant on abolition of office or re-organization of department for facilitating improvements in the organization of the office to which a public servant belongs is provided under Regulation 31

- Age of retirement

The procedure for termination of a public servant on age retirement is governed by provided under Regulation 32. The compulsory age retirement is when a person attains the age of sixty years. However one can voluntarily retire from his office upon attaining the age of fifty five years. The provisions of this Regulation

and Act have to read together with the Public Service Retirement Benefits Act, 1999 (Act no.2 of 1999).

- Contesting constitutional leadership or elective political post

Termination of a public servant from the office upon contesting any constitutional leadership post or any elective political post is provided under Regulation 34.

- Retrenchment or redundancy

Under Act no.8 of 2002 the term Retrenchment has not been defined nor there is any section providing for the procedure of how is it going to be undertaken. Even under Regulations this term has neither been defined nor the procedures for it being described.

However under Section 38 of the Employment and Labour Relations Act, 2004(Act no.6 of 2004), Retrenchment is termed as termination for operational requirements. The term operational requirements has been defined under Section 4 of Act no.6 of 2004 to mean requirements based on the economic, technological, structural or similar needs of the employer.

Before any process of Retrenchment, the employer shall;

1. Give notice of any intention to retrench
2. Disclose all relevant information on the intended retrenchment
3. Make proper consultation prior to retrenchment

- Disciplinary grounds

Provisions relating to disciplinary authorities, disciplinary proceedings and all such matters relating to discipline of public servants are found under Regulations 35-49 of the Public Service Regulations, 2003.

Before and disciplinary action is taken against any public servant there must be;

- preliminary investigation
- The public servant must be given notice of the charge against him
- The public servant must be afforded an opportunity to be heard

During disciplinary proceedings, a public servant accused of any such allegations which requires disciplinary action to be taken against him, may face any of the following from the disciplinary authority;

- Relieved from his duties and functions pending the outcome of the investigation
- Interdiction-its meaning is provided under Regulation 3
- Suspension
- Where suspended, shall not be entitled to any salary. But shall be paid an alimentary allowance
- Where dismissed shall lose some of his privileges

Dismissal of the public servant in accordance to the procedures under section 23 of the Act requires that;

a. A disciplinary charge has to be preferred against the public servant
b. The public servant has been afforded adequate opportunity to answer the charge
c. An inquiry has been held into the charge in accordance with regulations made under s.34 of the Act

Any public servant aggrieved with any decision from any of the disciplinary authorities has right to appeal. This is a constitutional right provided under Article 13(6)(a) of the Constitution of United Republic of Tanzania, 1977 as amended from time to time. However the Constitution does not give a guarantee for one to Appeal in all proceedings. Such Constitutional right has to be exercised subject to other written laws.

Right to appeal for a public servant in disciplinary proceedings is provided under Section 25 of the Act read together with Regulation 60. The organs which can serve as appellate bodies in such appeals from various disciplinary authorities are;

1. The President
2. The Public Service Commission

The decision of any appeal by the President is final. The time to appeal is provided under Regulation 61 and the procedures for one to appeal are provided under Regulation 62. Neither the Act nor the Regulations provide for the appeal to the ordinary court of law. This implies that the only way for one to have access to the court is by way of Judicial Review, the power which is vested only to the High Court and where one is further aggrieved by the decision of the High Court can appeal to the Court of Appeal of Tanzania.

RIGHTS WHICH A PUBLIC SERVANT IS ENTITLED TO HAVE

Once appointed in the public service office, the Public Servant is entitled to have;

- On first appointment, free transport for himself, spouse and not more than four children and two dependants from his home to the working station-Regulation 13
- Subsistence allowance-Regulation 13
- Promotion based on merit, effectiveness and efficiency in his performance, skills and personal qualities-Regulation 15
- Remunerations-Regulation 20
- Salary in accordance to the salary scales for the public servants-Regulation 20
- Annual leave granted once per year-Regulation 97
- Better working environment and opportunity to have training and develop his skills
- Compensation for injuries or death arising out of and in course of employment-Regulation 110
- Recognition and respect for his dignity regardless of hierarchy in the Service-Clause 40 of the Schemes
- To claim and enquire on any issue pertaining his service, etc

DUTIES WHICH A PUBLIC SERVANT HAVE

While performing his functions in any public service office, the public servant shall have the following duties

- Take all reasonable precautions to protect his health and any health hazards-Regulation 106 and 110
- To be loyal to the President of the United Republic of Tanzania

- To respect and cooperate with his fellow at work place and elsewhere within the Public Service
- Obediently implement the policies of the ruling party-Clause 49
- Be neutral and impartial while delivering service to the public-Clause 50
- Serve with high standard of wisdom and integrity-Clause 52
- To maintain confidentiality of all information which are confidential, etc

Read and discuss the following cases and any other cases of your own, to supplement whatever you have studied in this Topic;

- *James F. Gwagilo v A.G [1994] TLR 73 [HC]*
- *The Permanent Secretary[Establiments] and A.G v Hilal Hamed Rashid & 4 Others Civil Appeal No.64 c/f no.66 of 2002, Court of Appeal of Tanzania at Dar es Salaam[Unreported*
- *The A.G v Said Juma Shekimweri, Civil Appeal no.11 of 1998[Unreported]*
- *Said Juma Muslim Shekimweri v A.G [1997] TLR 3 [HC]*
- *Twikasyege Mwaikombe v Mbeya Regional Trading Co.Ltd [1988] TLR 237*

N.B;

TAKE NOTE OF WHATEVER YOU WERE TAUGHT IN YOUR LECTURE SESSIONS AND WHERE YOU FIND IT DIFFICULT TO COMPREHEND WHAT YOU WERE TAUGHT AND WHAT IS PROVIDED IN THIS HANDOUT, THEN CONSULT YOUR FELLOW STUDENTS FOR DISCUSSION. IF THE PROBLEM IS NOT SOLVED THEN SEEK ANY OTHER ASSISTANCE.

TOPIC 3: POWERS, LIMITATIONS AND CONTROL OF ADMINISTRATIVE AUTHORITIES

The concept of Power

This refers to the ability conferred on person or body by law to determine, by his own will directed to that end, the local relations of himself or others. Power differs from a right in that there are no accompanying duties.

Powers can be public, that is, those which are vested by the state in its agent or employee; can be private, that is, those entrusted on one person against another; and can be general, that is, those which are by law incident to an office.

The exercise of power may be discretionary or mandatory. It is discretionary when there is freedom of choice put on a competent authority to decide whether to act or not whenever deemed fit so to do. It is mandatory when there is duty to act and failure to do so raises legal consequences.

Powers vested on administrative organs are falling under the following categories;

I. ADMINISTRATIVE POWERS

These are such powers exercised by government officials in course of implementing the policy of the government and expediency in governmental processes. These are neither legislative nor judicial. They can be statutory, that is, where the action by administrative authority derives its legitimacy from the statute or the constitution; or they can be non-statutory, that is, where such powers are unregulated by any statute. These, non-statutory powers, are basically exercised depending upon discretionary powers vested on the authority concerned. They include administrative instructions, formulation of policies, etc.

II. LEGISLATIVE POWERS

The primary function of making laws is vested on the parliament. However the parliament cannot in all such circumstances be able to meet all social needs of having legal instruments to regulate certain urgent matters. It is on this essence that some of the administrative authorities have been vested powers to legislate on some matters.

This therefore is the power to make rules or regulations called by-laws. This power to make by-laws is what is termed as '**delegated legislation'**. This occurs when the function of legislation is entrusted to organs other than the legislature by the legislature itself.

RATIONALE BEHIND DELEGATED LEGISLATION

- Shortage of time for parliamentary sessions
- Technicality
- A need to have flexibility in unforeseen events
- A need to cover quick actions in time of emergency
- Increasing in activities of modern administration
- A need to have laws which are practicable and which can be changed according to the changing circumstances

The fact that administrative organs are empowered to legislate does not remove the fact that such powers are left without limits. They have to be exercised in conformity with the parent Act that confers such powers. When such power is abused then the by-laws enacted will be declared ultra vires.

CONTROL OVER DELEGATED LEGISLATION

I. JUDICIAL CONTROL

Delegated legislation can be controlled by the court through the so called judicial review. By invoking the doctrine of ultra vires, the High court will be able to test the vires of the delegated legislation by applying two major tests;

a) Substantive Ultra vires

The power vested on the authority must be exercised within the limits provided by the law. Delegated legislation must be within the borders provided by its parent Act or the Constitution. One cannot legislate even on matters which the law did not confer power on him. Substantive ultra vires of a delegated legislation can be in the following ways;

- Where the parent Act is unconstitutional

- Where the delegated legislation does not conform to the parent Act
- Where the delegated legislation is unconstitutional
- Unreasonableness
- Mala fide
- Sub delegation
- Exclusion of judicial review
- Retrospective effect

b) Procedural ultra vires

This occurs where the delegated legislation fails to comply with certain procedures prescribed by its parent Act. These procedures may be;

- Requirement of notice of intention to make subsidiary legislation by a particular authority
- Requirement of consultation to some persons or group of persons who are likely to be affected by a particular legislation
- Requirement of publication of the subsidiary legislation

Where the parent Act specifically provide for such requirements and any of them failed to be complied with, that can be a sufficient ground of challenging the vires of the legislation. However procedural requirements will only invalidate delegated legislation where such requirements are mandatory.

II. PARLIAMENTARY CONTROL

The parliament does not delegate its legislative powers to executives and leave such powers to be exercised without its control. And the parliament does not delegate such power to anyone rather to only such organs specified by it in the statute that confer such power. As pointed out in ***Lohia Machines Ltd .v. Union of India***[3] that the underlying object of parliamentary control is to keep watch over the rule-making

[3] [1985] 2 SCC 197

authorities and also to provide an opportunity to criticise them if there is abuse of power on their part.

Legislative control can be effectively exercised through the following ways;

- **Laying on Table**; This is intended to serve two purposes, that is, to inform the legislature as to what rules have been made by the executive authorities and to provide an opportunity to the legislators to question the rules made or proposed to be made.
- **Scrutiny committees**; These are committees formed by the parliament itself with a view of strengthening its power of control over delegated legislation

THE DOCTRINE OF DELEGATUS NON POTEST DELEGARE

This is the doctrine which applies in all kinds of powers vested on administrative authorities. According to it, a delegate cannot further delegate his power. It emanates from the essence that the law that confers certain power on a certain person did not mean to extend such power to any other person other than the one to whom such powers are conferred to. The rationale is that powers must only be exercised by only that person to whom such powers are entrusted to.

However, strict applicability of this rule has proven to be impossible with an increase in governmental activities. It is therefore imperative that some of the powers of certain organs have to be delegated to other authorities to facilitate administrative actions.

This doctrine applies also on delegated legislation for the fact that it is not possible for a delegate to sub-delegate legislative powers conferred on him to any other person unless where expressly or by necessary implication is provided by the parent Act.

The conditions necessary are;

- That, if the parent Act permits sub-delegation, then such power has to be sub-delegated only to the persons specified.

- That, the person sub-delegated must act within the powers conferred on him by a delegate
- That, where there are conditions stipulated by a delegate to the sub-delegate, then such conditions must be fulfilled.

III. QUASI JUDICIAL POWERS

Judicial powers are powers which involve determination of a question of law or fact by reference to pre-existing rules or standards. They declare rights and impose obligations upon parties affecting their civil rights.

Judicial powers are based upon investigation subject to certain procedural attributes contemplating an opportunity for presenting a case, ascertainment of facts by means of evidence if dispute be question of fact; and if the dispute be a question of law, the presentation of the legal arguments.

On the other hand, quasi-judicial powers are not judicial powers per se. These are powers which have some attributes of judicial powers but not all.

Although quasi-judicial powers are not judicial per se, yet there is a duty to act judicially for any person exercising quasi-judicial powers in all such matters which might affect the freedom of liberty of any individual.

Sub-delegation of judicial powers

Different from other powers like administrative powers, judicial powers cannot often be delegated. Lord Denning in ***Barnard v National Dock Labour Board***[4] stated that;

> "While an administrative function can often be delegated, a judicial function rarely can be; no judicial tribunal can delegate its functions unless it is enabled to do so expressly or by necessary implication."

PRINCIPLES OF NATURAL JUSTICE

[4] [1953] 1 ALL ER 113

The expression 'natural justice' has not been consistently defined by most of scholars. There is no clear and acceptable definition of this expression although it widely applied in various jurisdictions.

The growth of the principles of natural justice has an impressive history. It took its roots from ancient times and neither common law nor any other jurisdiction can claim to be the founder of these principles. In fact they have relationship with moral principles which describe what is right and what is wrong.

The modern concept of natural justice has only received modifications in relation to the need of the contemporary world. They are actually applicable depending on the facts of each particular case as noted by Tucker, L.J in ***Russel v Duke of Norfolk***[5] that;

> "There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth."

English law recognizes two cardinal principles of natural justice which are;

NEMO DEBET ESSE JUDEX IN PROPRIA CAUSA/NEMO JUDEX IN CAUSA SUA

This is known as the rule against bias, that is, no man should a judge of his own cause. It rests on the grounds that justice should not only be done, but manifestly and undoubtedly be seen to be done.

The judge should be impartial and neutral and must be free from bias. The judge is supposed to be indifferent to the parties to the controversy. He should not be an interested party to the dispute. He must be in a position to act judicially and to decide the matter objectively.

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[5] ***[1949] 1 ALL ER 109***

TYPES OF BIAS

Pecuniary Bias

This is sometimes known as 'monetary interest' or 'economic interest' which implies that a judge should not have any such interest in the dispute in which he is adjudicating.

In ***Dr. Bonham's case***[6], Dr. Bonham, a doctor of Cambridge University was fined by the college of physicians for practising in the city of London without the licence of the College. The statute, under which the College acted upon, provided that the fines should go half to the King and half to the college. The claim was disallowed by Coke, C.J as the College had a financial interest in its own judgement and was a judge in its own cause.

In another case of ***Dimes .v. Grant Junction Canal***[7] where it was observed that all tribunals must take care that all their decrees are not influenced by their personal interest, but to avoid the appearance of labouring under such an influence.

It is therefore to say that pecuniary interest in the proceedings, however small it is, would wholly disqualify a member from acting as a judge.

Personal Bias

This refers to the way the judge is related to one of the parties in dispute and the way such relationship might influence decision making of the particular judge. Such relationship not be positive only but even a negative relationship/enmity between a judge and one of the parties may disqualify a judge from the proceedings.

Therefore if a judge is;

A relative /friend/business partner of one of the parties, or

An enemy/professional rival of one of the parties, or

An employer who is determined employment contract of his own employees, or

A victim of the allegations put against the accused.

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[6] [1610] 8 Co. Rep .113

[7] ***[1852] 3 HL 759***

In all these circumstances the judge will not be allowed to determine such proceedings since the likelihood of his decision to be influenced by personal bias will be great. However the fact that there is likelihood of bias will depend basically on the facts of each particular case.

Subject matter Bias/Official Bias

The fact that a judge has interest in the proceedings and such interests relates to the subject matter of litigation does not directly disqualifies a judge from determining the dispute before hand. What needs to be proved is to what extent such interest influences the outcome of his decisions.

The test of likelihood of bias

The proof of the existence of bias is that of the substantial possibility of bias. It was stated by Vaugham Williams in ***R v Sunderland***[8] that the court will have to judge as a reasonable man would judge of any matter in the conduct of his own business. In ***R v Sussex Justices***[9], Lord Hewart answered the question on the test of bias that such question of whether there was a real likelihood of bias depends not upon what actually was done but upon what might appear to be done. Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice.

It is in the interest of justice that when the judge sits to decide the matter should have in mind no interest related to the parties or the subject matter of the dispute before him. This was emphasized by Lord Denning in ***Metropolitan Properties Ltd v Lannon***[10] who stated;

> "The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking the judge was biased."

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[8] ***[1901] 2 KB 357***

[9] ***[1924] 1 KB 256***

[10] ***[1969] 1 QB 577***

AUDI ALTERAM PARTEM

This principle of natural justice means hear the other side or no man should be condemned unheard or both the sides must be heard before passing any order.

This principle is of the great importance that a man should not be curtailed his freedom or liberty without being afforded an opportunity to be heard. In ***R v Camborne Justices***[11] it was stated that a man party is not to suffer in person or in purse without an opportunity of being heard.

There are almost two major requirements in this rule. These are;

- **Notice**

  It is required that before any action is taken against any person, the condemned person must be given notice to show the cause against the proposed action and such notice must invite him to give his explanation against allegations put on him.

  In ***R v University of Cambridge***[12], Dr Bentley was deprived of his degrees by the Cambridge University on account of his alleged misconduct without giving any notice or opportunity of hearing. The Court of King's Bench declared the decision as null and void. According to Fortes cue, J, the first hearing in human history was given in the Garden of Eden. The Court observed;

  > "Even God himself did not pass sentence upon Adam, before he was called upon to make his defence."

  Requirement to give notice is necessary even where the statute which confers power does not provide for such duty to give notice. If at all the decision which is to be taken will have adverse impacts on the party to which such decision is taken against, then the notice must be given prior to such decision.

- **Hearing**

  One important aspect of this principle is right to be heard. If a person is given notice but not afforded an opportunity to submit his defence, then any action

[11] ***[1955] 1 QB 41***

[12] ***[1723] 1 Str 757***

arising thereafter will be void. In a landmark case of ***Ridge v Baldwin***[13], the Plaintiff, a chief constable had been prosecuted but acquitted on certain charges of conspiracy. In the course of the judgement, certain observations were made by the presiding Judge against the plaintiff's character as a senior police officer. Taking into account those observations, the Watch committee dismissed the plaintiff from service.

The plaintiff appealed to the Court of Appeal which affirmed the decision of the Watch committee on the ground that the committee was acting as an administrative authority and was not exercising judicial or quasi-judicial power, and therefore the principles of natural justice did not apply to their proceedings for dismissal.

The plaintiff was aggrieved by the decision of the Court of Appeal and appealed to the House of Lords. The House of Lords sitting as a full bench of five lords reversed the decision of the Court of Appeal and held that the power of dismissal could not be exercised without giving a reasonable opportunity of being heard and without observing the principles of natural justice. The order of dismissal was therefore held to be illegal.

However the term hearing in as far as principles of natural justice are concerned does not mean that it should oral/personal hearing. A person is not entitled to personal hearing unless such right is conferred in the statute. Therefore the absence of an express requirement of oral hearing leaves a tribunal or court with discretionary power to determine which way could be used to afford a person in dispute the chance to be heard.

In ***M.P. Industries v Union of India***[14], it was observed that;

> "It is no doubt a principle of natural justice that a quasi-judicial tribunal cannot make any decision adverse to a party without giving him an effective opportunity of meeting any relevant allegations

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[13] ***[1963] 2 ALL ER 66***

[14] ***AIR 1966 sc 671***

> against him but the said opportunity need not necessarily be by personal hearing. It can be by written representation. Whether the said opportunity should be by written representation or by personal hearing depends upon the facts of each case and ordinarily it is in the discretion of the tribunal."

So it is not a sufficient ground of setting aside a decision if the only ground is that the person was denied personal hearing to the proceedings. What is important is that all relevant circumstances have been taken into account before taking the impugned action.

In some legal proceedings, one of the parties, if not all, might be unable to represent his case before the court or tribunal. This in one way or another may affect his opportunity to defend his rights as against the other party to the dispute. The law therefore has afforded parties right to be represented by a Counsel or any other person authorized in that behalf.

Lord Denning observed in ***Pett v Greyhound Racing Association***[15] that;

> "When a man's reputation or livelihood is at stake, he not only has a right to speak by his own mouth. He has also a right to speak by counsel or solicitor…"

However the right to have legal representative in proceedings is not absolute since there are some statutes which do not allow, for instance, advocates appearing before certain proceedings. Therefore sometime the nature of the person who appears on behalf of the party to the proceedings may differ depending on the statutory limitations.

NULLUM ARBITRIUM SINE RATIONIBUS

For long administrative law has only recognized two cardinal principles of *audi alteram partem* and *Nemo judex in causa sua* as the only rules of natural justice.

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[15] ***[1968] 2ALL ER 545***

Judicial decisions have developed another principle which is *'Nullum Arbitrium sine rationibus'* that is the right to be given reasons for the decision made.

This principle arises on the rationale that recording reasons for the decision reached introduces clarity and excludes arbitrariness and satisfies the party concerned whom the order is passed. Lord Denning observed in his book **'The Road to Justice'** at p.29 that;

> *"The judge must give reasons for his decision: for by so doing, he gives proof that he has heard and considered the evidence and arguments that have been produced before him on each side: and also that he has not taken extraneous considerations into account. It is of course true that his decision may be correct even though he should give no reasons for it or even give a wrong reason: but, in order that a trial should be fair, it is necessary, not only that a correct decision should be reached, but also that it should be seen to be based on reasons; and that can only be seen if the judge himself states his reasons."*

The increasing functions and powers of the Government and its departments have created the possibility that such powers may easily be abused by such persons to whom such power has been vested and therefore subjecting the rights of individuals into eminent danger.

The position has been that although administrative functions can be far different from judicial functions yet the duty to give reasons for the decision made is one of the fundamentals of good administration[16]. In ***M.P. Industries v Union of India***[17]**,** it was stated that;

> "There is an essential distinction between a court and an administrative tribunal. A Judge is trained to look at things objectively, but, an executive officer generally looks at things from the standpoint of policy and expediency. The habit of mind of an executive officer so formed cannot be expected to

[16] This is as per Lord Denning in ***Breen v Amalgamated Engg. Union [1971] 1 ALL ER 1148***

[17] ***AIR 1966 SC 671***

change from function to function or from act to act. So it is essential that some restrictions shall be imposed on tribunals in the matter of passing orders affecting the rights of parties: and the least they should do is to give reasons for their orders."

In Tanzania one of the famous cases that discussed this right to be given reasons for the decision made is the case of ***JAMES F GWAGILO v ATTORNEY GENERAL***[18]

PROCEDURAL REQUIREMENTS AND LEGITIMATE EXPECTATION

PROCEDURAL REQUIREMENTS

Normally the statute which confers power to certain authority provides also for the procedures in which such powers can be exercised. Procedural requirements may either be mandatory or discretionary. All these may either be expressly provided in the statute or impliedly inferred from the nature of the practice or the wording of the statutory provisions.

Mandatory procedural requirements

The statute sometime may provide expressly that when exercising certain power, the administrative authority shall follow certain procedures stipulated either in the statute itself or in its regulations. Failure to comply with the laid down procedures renders the wholly decisions or action taken to be illegal. This constitutes the so called procedural impropriety.

However in some statutes the provisions of it do not provide for some specific procedures to be followed in carrying out certain decisions yet it is implied from the nature of the decision itself that certain procedures should be taken before reaching any decision which will adversely affect the rights of certain individuals. For instance one is expecting that before any decision to dismiss any person from his service, the victim must be afforded right to be heard as part of natural justice. Failure to do so, even where the statute is silent, amounts to procedural impropriety.

Discretionary procedural requirements

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[18] ***[1994] TLR 73 (HC)***

These are procedures which are taken to facilitate the whole process of decision making in administrative actions. They are not mandatory but are taken by administrative authority to ensure that their exercise of powers is achieved in a proper manner. These may be found in the following ways;

- Where the statute gives power to the authority concern to choose among several procedures which one to follow in carrying out its decision. But it has to be noted that failure to choose any of the given procedures amounts also to procedural impropriety. The discretion here is limited only to the power to choose.
- Where the statute gives power to the authority to apply any procedure which the authority shall deem it necessary for the facilitation of its exercise of power.

THE DOCTRINE OF LEGITIMATE EXPECTATION

This doctrine is also a product of judicial decisions particularly in an attempt to extend the scope of judicial review of administrative actions. It emanates from the fact that a person may have certain legitimate expectation of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment.

This legitimate expectation arises in;

- Either an express promise given by a public authority
- Or from the existence of a regular practice which the applicant reasonably expected would continue

In such circumstances the court may protect such legitimate expectations by insisting on the public authority to act fairly. It is the doctrine which has been developed in the context of the principles of natural justice and reasonableness.

The concept of legitimate expectations was discussed in the case of ***Schmidt v Secretary of State***[19] where it was held that an alien who was granted leave to enter the U.K for a limited period had legitimate expectation of being allowed to stay for the

[19] ***[1969] 1 ALL ER 904***

permitted period.

In ***A.G of Hong Kong v Ng Yuen Shiu***[20] Lord Fraser stated that;

> "When a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as the implementation does not interfere with its statutory duty"

It is the duty of the applicant to satisfy the court on the basis of his legitimate expectation in order for the court to invoke its powers of judicial review. If at all the applicant successfully establishes such foundation, then it will be the duty of the public authority to justify the action taken by him against the applicant. It will be for the court to consider in its own discretion whether the applicant's legitimate expectations override the basis of the decision taken by a public authority. If the answer is in affirmative then the court will continue to grant relief but after taking into consideration matters of public interest.

The consequences of a claim based on legitimate expectations are that the decision taken by a public authority may be declared unreasonable, unfair, arbitrary or one which has violated principles of natural justice.

Limitations on the doctrine of legitimate expectation

This doctrine is not absolute. It has its limitations which are;

- It is only procedural and has no substantive impact
- It cannot be applied to preclude legislation
- It cannot be applied against public policy or security of a state

CONTROL OF ADMINISTRATIVE ACTIONS

Administrative organs are empowered to perform various powers which once used contrary to the limits provided by the law may result into violation of rights of certain individuals. Such powers may either be administrative, judicial or legislative. Administrative law provide for the safeguards of ensuring that the powers are used

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[20] ***[1983] 2ALL ER 346***

within the ambits of the law. The following are the ways used to control administrative actions;

JUDICIAL CONTROL

The courts are empowered to control the actions of administrative organs by the following ways;

1. **Appeal**

The right to appeal to a court against a decision of the administration depends on the existence of some statutory provision conferring such a right in the particular circumstance. Right to appeal is a creature of statute; there is no inherent right of appeal. The statute may provide right to appeal from one public authority to the higher public authority and the latter being final and conclusive. In other instances such right may be extended by the statute to ordinary courts of law.

If one is aggrieved by the decision of a public authority may appeal to the ordinary court of law either on point of law or on point of fact. Sometime one may appeal against the whole decision and therefore asking the appellate authority to substitute its own decision on the merits for that of the administration. That is to say to decide the matter afresh.

On appeal, the appellate body has power to reverse the decision made by the lower authority, to order retrial, or give any such orders as it deems fit.

2. **Judicial review:**

This is inherent jurisdiction vested on the High Court, that is, the jurisdiction which does not owe its origin to statute. In that sense it is different from appellate functions which are statutory. However, judicial review is regulated by various statutory instruments in its operation and its limitations.

The essence of this supervisory jurisdiction is to ensure that statutory powers are not usurped, exceeded or abused and that procedural and substantive duties are complied with. It is the jurisdiction which is founded on the doctrine of ultra vires which require that agencies created by statute have only such powers as statute has conferred upon them.

There are several grounds which one can employ to challenge a decision of a public authority through judicial review. However these grounds have to be

studied in the understanding that they sometimes bear a very small line of distinction between one another and in some cases more than one ground can form the basis of a challenge within a single case.

Lord Diplock in ***Council of Civil Service Union v Minister for the Civil Service***[21] stated three major categories of the grounds[22] for judicial review, and he stated as follows;

> "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 ground on 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. This 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."

Let us discuss the three heads of the grounds[23] of judicial review

a) Illegality

This can further be sub-divided into;

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[21] [1985] AC 374

[22] It has to be noted that there is no universal classification of the grounds of judicial review. Various scholars have tried to give their own way of classification of such grounds. In actual fact these grounds tend to overlap one another and in a broader sense they all encompassed in the doctrine of ultra vires.

[23] The Court of Appeal of Tanzania in ***SANAI MURUMBE AND ANOTHER v MUHERE CHACHA [1990] TLR 54 (CA)*** stated six grounds for judicial review. The court stated as follows;

> "The High Court is entitled to investigate the proceedings of a lower court or tribunal or a public authority on any of the following grounds, apparent on the record. One, that the subordinate court or tribunal or public authority has taken into account matters which it ought not to have taken into account. Two, that the court or tribunal or public authority has not taken into account matters which it ought to have taken into account. Three, lack or excess of jurisdiction by the lower court. Four, that the conclusion arrived at is so unreasonable that no reasonable authority could ever come to it. Five, rules of natural justice have been violated. Six, illegality of procedure or decision."

- **Excess of jurisdiction**

The powers conferred on administrative authority must be exercised only within the ambits of the law. If the limits are exceeded, then the exercise of such power is ultra vires.

- **Absence of power**

There is no exercise of power unless provided under the law. Any purported exercise of the power which does not exist under the law is ultra vires.

- **Unlawful delegation**

The law requires that only those bodies to which powers are entrusted must exercise such powers. A person can only delegate his powers if he has been expressly empowered to do so. If one delegates his function unlawfully to another person and such powers are used to the detriment of another individual, then such delegation can be challenged as ultra vires.

- **Error of law on the face of records**

The action of administrative authority may also be challenged on point of law where the authority reached its decision basing on improper position of the law.

- **Improper motive/purpose**

This is where the authority, though not actuated by ill-will, it exercises in good faith its power but not for the purpose intended in the statute but for different purpose. That is to say the power has been used for collateral purpose.

b) Irrationality

This can further be sub-divided into;

- **Failure to exercise discretion**

Sometimes the authority is required to apply its mind to the facts and circumstances of the case at hand. If one is acting mechanically, that is, without due care and caution or without a sense of responsibility in the exercise of its discretion, then there is failure to exercise discretion.

- **Unreasonableness**

The term unreasonable is ambiguous and one cannot get an express definition of it. It is normally referred according to the circumstances of each case. This term may include irrelevant or extraneous considerations, improper or collateral purpose, etc. Lord Wrenbury in ***Roberts v Hopwood***[24] stated that;

> "A discretion does not empower a man to do what he likes merely because he is minded to do so-he must in the exercise of his discretion do, not what he likes, but what he ought. In other words, he must, by use of his reason, ascertain and follow the course which reason directs. He must act reasonably."

The test normally is whether a reasonable man could have come to a decision in question without misdirecting himself or the law or the facts in material respects. If the conclusion is so unreasonable then the court will intervene.

- **Irrelevant consideration**

Statutory power must be exercised on the basis of the ground provided under the statute. If the authority takes into consideration irrelevant considerations or extraneous considerations, the exercise of such power will be ultra vires. Similarly, where the authority leaves out relevant considerations the exercise of power will be bad.

- **Mala fide**

This means ill-will, dishonest intention or corrupt motive. The power may be exercised maliciously, out of personal animosity, ill-will or vengeance or fraudulently and with intent to achieve certain goal foreign to the statute. Bad intent or malice can be either malice in fact (one which infer personal bias or oblique motive) or malice in law (one which the administrative action is contrary to the objects, requirements and conditions of a valid exercise of power).

- **Fettering discretion**

Discretionary powers must be exercised after considering individual cases. Imposing fetters on ones own discretion by adopting fixed rules of policy

[24] [1925] AC 578

amounts to imposing fetters on discretion and may lead to failure to exercise discretion.

- **Acting under dictation**

This happens where a body entrusted with certain powers of carrying out decision surrenders such power under the influence of another authority which has not conferred such by under the law. So the entrusted body will purport to give the decision of its own which in actual fact has been influenced by the other authority. In that case such decision is ultra vires and amount to abdication and surrender of discretion.

c) Procedural impropriety

This can further be sub-divided into;

- Failure to follow statutory procedures
- Breach of rules of natural justice

3. Revision and Reference

POLITICAL CONTROL OF ADMINISTRATIVE ACTIONS

This can appear in the following forms;

A. PARLIAMENTARY CONTROL

The government is accountable in all its acts to the parliament. This power of the parliament is derived from the Constitution as per Article 63(2). The parliament receives various reports from the government, deliberate on such reports and where necessary questions the government on anything that might be arising out of the implementation of the government duties.

The control of the parliament over the government can well be elaborated in the doctrine of ministerial responsibility.

THE DOCTRINE OF MINISTERIAL RESPONSIBILITY

This doctrine explains how ministers are collectively and individually held responsible for the actions done on their official capacities. In the parliament, all

ministers represent the government and are responsible to answer all such questions put against them by the members of the parliament. An argument raised by one minister in the parliament has to be supported by other ministers. Ministers work as one team in defending actions taken by the government and where such actions are challenged in the parliament. Ministerial responsibility is found in two levels;

- **Collective ministerial responsibility**

This refers to responsibility of all the ministers in defending any such action which has been taken by the government and which reflects the image of the government at large. All ministers are responsible in implementing any such resolution passed by the cabinet. If there is no mutual agreement on any matter raised in the cabinet, then ministers will have to vote and the majority decision shall form the stand of the government on the particular issue and all those who were not in agreement with the issue are supposed to take the stand of majority otherwise one will have to resign from the government. An example of the minister who went against the consensus of the cabinet and resigned was Augustino Lyatonga Mrema in 1995.

As per Article 54 of the Constitution of United Republic of Tanzania, the chairman of the Cabinet is the President and members of the Cabinet include the vice-president, prime minister, president of Zanzibar and all ministers. Article 53(2) of the Constitution establishes the doctrine of ministerial responsibility particularly on collective ministerial responsibility.

- **Individual ministerial responsibility**

A minister is individually responsible in respect of such actions which arose under his ministry. If there is any act taken by officials under a certain ministry, then the minister concerned shall be held responsible by the parliament for such act. Where the minister fails to persuade the parliament on the actions taken by his ministry in preventing any particular loss to happen, then such ministry will be forced to resign from his office. Example of ministers who resigned from their posts in response of the pressure from the parliament are Prof. Simon Mbilinyi, Iddi Simba, Kigoma Ally Malima etc.

SHORTCOMINGS OF THE DOCTRINE OF MINISTERIAL RESPONSBILITY

- The doctrine presumes that the minister knows each and everything within his ministry while in actual sense he is not.
- The president appoints ministers among the members of the parliament and therefore weakens the size of members of the National Assembly who remain to question the government.
- Multiparty system may be fruitless in as far as making the government accountable to the parliament where most of members of the National Assemble are from the ruling party and therefore will tend to defend their government against those of opposition parties.
- The fact that the minister has failed to perform his duties effectively in one ministry does not bar the President from appointing him to head another ministry.

B. CONTROL BY PUBLIC OPINION

This may be in form of anonymous letters written by members of the public to the public officials explaining their complaints towards certain action taken by the administration, or asking for measures to be taken against certain official who has been seen to abuse the powers vested on his public office.

It can also take form of demonstration to show people's discontent against certain measures taken by the government. Also it can take forms of petitions and agitations in working places.

C. CONTROL BY PRESS

In the present system of governance, the role of press is of vital importance in ensuring that there is constant communication between the people and their government. It is also important to note that media can be the tool for building the government but also can be the weapon of criticising it heavily.

D. INTERNAL ADMINISTRATIVE CONTROL

This involves control from higher public authorities to lower authorities. It is exercised by way of appeal from one authority to another within the administrative

organs. It also involves supervisory powers vested on one authority against the other. For example, the Regional Commissioner is in charge of all administrative matters within his region and he is empowered by the law to ensure that administrative matters are going well within his locality.

PREROGATIVE ORDERS AND EQUITABLE REMEDIES

PREROGATIVE ORDERS

Under Common law the sovereign was considered to be the source of justice. It was vested with the so called prerogative powers in the interest of justice. Such powers were intended to be used as a shield in upholding the rights and liberties of subjects and in providing effective safeguards against arbitrary exercise of power by public authorities. The orders were exercised by issuing the so called prerogative writs. These writs include the following;

a. Habeas corpus

This is one of the most ancient writs known in the Common law of England. The Latin phrase 'habeas corpus' means 'have the body'. Honourable Mapigano, J in ***SHEIKH MOHAMMAD NASSOR ABDULLA v THE REGIONAL POLICE COMMANDER, DAR ES SALAAM REGION AND TWO OTHERS***[25], explained this remedy to mean;

> "This remedy has its roots in England. At common law the prerogative writ of habeas corpus is directed to a person who detains another in custody and commands him to produce or have the body of that person before the court for a specified purpose. The most important specie of habeas corpus is that which is called *habeas corpus ad subjiciendum*. This commands the person to whom it is directed to produce the body of a person detained, with the day and cause of his caption and detention, to do, submit to and receive whatsoever the court shall direct. We are told that this writ was formerly much used for testing the legality of imprisonment for political reasons, especially during the reigns of the Stuarts. Besides the efficacy of the writ in liberating the subject from illegal confinement in a public prison, it also extends its influence to remove every unlawful restraint of personal freedom in

[25] [1985] TLR 1 (HC)

> private life, availing, for example, to release a person from a place where he has been unlawfully banished. It is part of the law of this country."

Therefore from such explanation it can be stated that the major objective of the writ of habeas corpus is to enable the court to deter mine the justification of one's confinement and where it finds out that there is no legal justification then the person who has detained another will be ordered to release him. It is therefore to say that the condition for issuing it is only where there is unlawful detention. This was emphasised in **R v Home Secretary**[26] that;

> "The question for a habeas corpus court is whether the subject is lawfully detained. If he is, the writ cannot issue, if he is not, it must issue."

This writ can be issued against any person or authority that has illegally detained or arrested the other.

b. Mandamus

This means command. It is an order of the High Court issued against a public authority compelling it to perform a public duty imposed upon it by the Constitution or any other law. Honourable Mwalusanya, J [as he then was] explained the necessary conditions for an order of mandamus to issue in the case of ***John Mwombeki Byombalirwa v The Regional Commissioner and Regional Police Commander, Bukoba*** [1986] TLR 73 (HC). In his observation, the judge stated the following conditions

- the applicant must have demanded performance and the respondents must have refused to perform;
- the respondents as public officers must have a public duty to perform imposed on them by statute or any other law but it should not be a duty owed solely to the state but should be a duty owed as well to the individual citizen;
- the public duty imposed should be of an imperative nature and not a discretionary one;

[26] [1941] 3 ALL ER 104

- the applicant must have a locus standi, that is he must have sufficient interest in the matter he is applying for;
- there should be no other appropriate remedy available to the applicant;

The rationale behind the order of mandamus was stated in the case of ***Shah .v. A.G***[27] where it was held that a government official cannot refuse to perform a duty which a government through the parliament has imposed upon him.

The application for the order of mandamus involves two major stages. These include; first, the applicant will seek for the leave of the High court and in it shall state the facts alleged in form of sworn/affirmed affidavit, second, the application will be instituted and the notice will be sent to all such persons who will be affected by the order and they shall have right to oppose such application.

c. Certiorari

This is an order sought to quash the decision of a public authority, tribunal or subordinate court where the purported decision is ultra vires. The purpose of this order is to ensure that inferior courts and quasi-judicial authorities act within the ambits of their jurisdiction. Where such bodies usurp their jurisdiction, then the decisions arising thereafter shall be quashed by the High court through an order of certiorari.

Conditions necessary for a writ of certiorari to issue were discussed by Lord Atkin in the case of ***R v Electricity Commissioners***[28]. Such conditions include;

- That the judicial or quasi-judicial body must have legal authority
- That such authority must be in respect of determining questions affecting rights of subjects
- It must have duty to act judicially
- The authority must have acted in excess of its authority

Honourable Masanche, J while describing the order of certiorari in the case of

[27] [1970] EA 543

[28] [1924] 1 KB 171

ABADIAH SELEHE v DODOMA WINE COMPANY LIMITED[29] stated that;

> "The law about orders of certiorari and mandamus is quite clear in this country, and I can do no better than quote my brother Samatta J. (as he then was) in the case of ***Moris Onyango v The Senior Investigating Officer Customs Department Mbeya Criminal Application No. 25 of 1981***; wherein he said:
>
> *It is entirely correct preposition to say that an order of mandamus is a discretionary remedy. The order is not one of right and it is not issued as a matter of course. The purpose of the order is to supply defects of justice. It will therefore issue where there is no specific legal remedy for enforcing the specific legal right claimed or where, although there is an alternative legal remedy, such mode of redress is considered by the court to be less convenient, beneficial and effectual. As a general rule the court will refuse to issue the order if there is another convenient or feasible remedy within the reach of the applicant*[30] "

One can apply for an order of certiorari on jurisdictional grounds [that is either abuse of jurisdiction, excess of jurisdiction or lack of jurisdiction], error on the face of records, fraud and violation of the principles of natural justice.

The order of certiorari can not be granted in such relationships which are governed by private law, eg contractual relationships. In the case of ***Assistant Registrar of Buildings v Fredrick G Kibwana***[31] the Court of Appeal of Tanzania stated that;

> "…certiorari being a discretionary remedy for the courts to issue, it cannot be issued in this case where there is already a contractual relationship between landlord and tenant - a relationship of a commercial or business nature. The recourse to the courts of law to adjudicate on the breaches of contract would be a better procedure."

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[29] [1990] TLR 113 (HC)
[30] Also see the case of Lakaru v Town Director (Arusha) (1986) TLR page 326.) B

[31] 1987 TLR 84 (CA]

d. Prohibition

This writ was defined in the case of East India Commercial Co. v. Collector of customs[32] where the Supreme Court of India stated that;

> "A writ of prohibition is an order directed to an inferior Tribunal forbidding it from continuing with a proceeding therein on the ground that the proceeding is without or in excess of jurisdiction or contrary to the laws of the land, statutory or otherwise."

Conditions necessary for a writ of prohibition to issue are;

- There must be a proof that a judicial or quasi judicial body has no jurisdiction or it acts in excess of jurisdiction vested on it.
- There must be proceedings pending before a judicial or quasi-judicial authority. If the proceedings have been terminated and decision given, then it cannot be issued
- If the proceedings are partly out of the jurisdiction of the particular body then it can be issued only against such matters which the judicial or quasi-judicial body lacks jurisdiction.

e. Quo warranto

This means 'what is your authority'. It is a public remedy issued against an occupier or usurper of an independent substantive public office, franchise or liberty. It is an order intended to call the person to show before the court by what authority he holds the office, franchise or liberty. If the holder has no authority to hold the office he can be ousted from its enjoyment.

As stated in ***University of Mysore v Govinda Rao***[33], the procedure of quo warranto intends to give power on judiciary to control executive action in the matter of making appointments to public offices against relevant statutory provisions.

Conditions necessary for the writ of quo warranto to issue are;

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[32] AIR 1962 SC 1893

[33] AIR 1965 SC 491

- The office must be of public nature
- The office must be of an independent character/substantive character
- The office must be statutory or constitutional
- The holder must have asserted his claim to the office. One can be challenged even where the procedures in his appointment were not complied with. For instance if there was failure to comply with swearing/affirmation procedure.

EQUITABLE REMEDIES

These are remedies which are available to a person aggrieved by administrative action but in the particular circumstances there is no possibilities of him to be able to obtain prerogative writs which are subject to the discretionary power of the court. In such circumstances a person can resort to ordinary equitable remedies which are;

i. Declaration

A declaratory judgement is that which states the rights or the legal position of the parties as they stand without altering them in any. This remedy may be applied together with other remedies in suitable cases. This remedy merely states the correct legal position of a certain situation without requiring anyone to do anything. The major purpose is to allow the parties in any issue which is at its early stages.

ii. Injunction

It is an equitable remedy issued by the court to the party to proceedings before it, requiring it to refrain from doing, or to do, a particular thing/act.

It is a judicial process by which one who has invaded, or is threatening to invade the rights, legal or equitable, of another, is refrained from continuing or commencing such wrongful act.

In **Metropolitan Asylum District v Hill**[34], the relevant Act empowered the authority to build a hospital for children for treatment of small-pox. An injunction was obtained by neighbouring inhabitants on the ground of nuisance.

[34] [1881] 6 AC 193

An order of injunction is a discretionary one. However such discretion has to be exercised judicially. Conditions necessary for this order to be granted are;

- The plaintiff must be an aggrieved person
- The plaintiff must be entitled to get assistance from the court
- There should be no other alternative remedy

TOPIC 4: ADMINISTRATIVE TRIBUNALS & INQUIRIES

A tribunal is an independent adjudicatory body which is normally set up by statutes to deal with certain disputes arising under the particular statute or other statutes. Tribunals share some characteristics of the ordinary court of law although they are not courts per se.

Powers to adjudicate do not make any adjudicatory body a 'tribunal'. Such powers must emanate from the statute and not merely from mutual agreement between two parties under dispute.

Examples of tribunals include Ward Tribunals established under the Ward Tribunals Act, 1985 to deal with civil matters; the District Land and Housing Tribunals established under the Courts(Land dispute settlements) Act, 2002[Act no.2 of 2002, the Trade Practices Tribunal established under Section 4 of the Fair Trade Practices Act, 1994 [Act no.4 of 1994].

RATIONALE BEHIND EMERGENCE OF TRIBUNALS

Increasing in a number of government activities gave rise of the tribunals. Although it is the right of any person to have access to the court whenever he feels dissatisfied of anything which he is deemed under the law to be entitled to, yet the procedures in court of law are not such friendly to each and everyone who seek remedy before it. This makes tribunals to be favourable alternatives of dispute resolutions.

Generally it can be said that the rationale behind emergence of tribunals is based on the following reasons;

1. Modern governmental activities give rise to many disputes which cannot be solved by applying objective legal principles or standard. This has necessitated the emergence of tribunals.
2. A need to have bodies which can take preventive measures.
3. A need to have bodies which can effectively enforce preventive measures taken by administrative authorities.
4. Since administrative organs are also policy makers, then it is necessary to have

bodies which can easily enforce departmental policies and other relevant factors. Hence administrative tribunals are one of such bodies which can effectively enforce administrative policies.

5. A need to have institutions which have specialized jurisdiction, that is, to have adjudicatory bodies which shall be composed of persons who are experts in matters relating to the nature of disputes intended to be solved by a particular body/tribunal. In other words one can say that the idea of expertise is linked to the type of decision which tribunals are going to make.

   For instance, if the case is on mental health or fair rent, one is expecting to see a person who is expert in that field to offer his technical skills in deciding the dispute before hand. However this does not mean that the role of a lawyer is negligible. The lawyer will be needed since the whole process of decision making will be based on the background of statutory scheme.
6. Flexibility in their proceedings. When carrying out their decisions, tribunals must both administer a clear set of rules and maintain a high measure of flexibility in their decisions so that justice in individual cases prevails over mere consistency.
7. The ordinary court system has proved inadequate to be able to deal with all the cases brought before it. There are many cases which are pending before the courts. It is therefore for tribunals to be the other centres of adjudication to reduce number of cases which are instituted in ordinary courts of law.
8. Cheapness, accessibility and freedom from technicality.

Although tribunals have such reasons for their emergence, they are not the substitutes of the ordinary courts of law.

DIFFERENCES BETWEEN TRIBUNALS AND ORDINARY COURTS

The fact is that all courts are tribunals but the converse need not necessarily be true. Therefore the two can be distinguished as follows;

1. Courts of law form part of the traditional judicial system which is one of the organs of the state while Tribunals are agencies, statutory bodies, formed to deal with specific matters which mainly fall under the executive

arm of the government.

2. The jurisdiction of ordinary courts to determine civil suits extends to all suits of civil nature except where expressly barred by the law while tribunals have jurisdiction on to determine specific matters statutorily conferred. However not all courts have general jurisdiction. Some have been established to determine specific matters, eg Labour Court established under the Labour Institutions Act, 2004.
3. Judicial personnel like judges in ordinary court are free from the vices of the executive while in administrative tribunals are entirely in the hands of the Government.
4. A court of law has power to determine the 'vires' of the legislation while administrative tribunals cannot.
5. Courts of law are composed with well trained personnel in the field of law and these are Judges, magistrates and advocates who appear before the court while Tribunals are not necessarily require such composition of well trained legal personnel.
6. Courts of law are strictly bound by rules of evidence and procedures while Tribunals are not always bound by strict rules of evidence and procedures unless where the statute that establishes a particular tribunal provide for the same.
7. Courts of law have powers to control the exercise of powers of the tribunals through Judicial Review, Revision and Appeal.

SIMILARITIES BETWEEN TRIBUNALS AND COURTS OF LAW

Despite such differences as explained herein above, these two organs share some common similarities which include;

1. That they derive their legality from various statutory instruments and the Constitution of United Republic of Tanzania, 1977 as amended time to time.
2. That both are adjudicatory bodies which deal with disputes between parties and in so doing they determine the rights and liabilities of the parties in disputes. On this it was stated in the case of ***Associated Cement Co. Ltd V P.N. Sharma AIR 1965 SC 1595*** that the basic and the fundamental feature which is common to both the courts and the

tribunals is that they discharge judicial functions and exercise judicial powers which inherently vest in a sovereign state.

3. That both are governed by the principle of neutrality and impartiality while deciding the dispute before them. Although in some circumstances administrative tribunal can be an interested party to dispute in which it is adjudicating, however in all such circumstances, the duty to act judicially is there for the purpose of ensuring that justice prevails.

One thing to be noted is that not all Tribunals are administrative. Professor Wade says that the expression 'administrative tribunals' is misleading for various reasons;

- That every tribunal is a result of an Act of Parliament and not by Government
- That decisions of such tribunals are judicial rather than administrative
- That not all tribunals deal with cases in which Government is a party
- That Tribunals are independent bodies

PRACTICE AND PROCEDURES OF ADMINISTRATIVE TRIBUNALS

As it has been noted earlier, tribunals are not strictly bound to follow strict rules of evidence and procedure. They are not required to adhere to technical rules of evidence. Therefore hearsay evidence, admissibility of documents, the issues of burden of proof etc can be decided depending on the circumstances of the dispute and not relying on the strict rules of evidence.

The supreme court of India had this to say in the case of ***State of Mysore v Shivabasappa AIR 1963 SC 375***;

> "Tribunals exercising quasi-judicial functions are not courts and therefore they are not bound to follow the procedure prescribed for trial of actions in courts nor are they bound by strict rules of evidence. They can, unlike courts, obtain all information material for the points under enquiry from all sources, and through all channels, without being

> fettered by rules and procedure which govern proceedings in court. The only obligation which the law casts on them is that they should not act on any information which they may receive unless they put it to the party against whom it is to be used and give him a fair opportunity to explain it. What is a fair opportunity must depend on the facts and circumstances of each case but where such an opportunity had been given, the proceedings are not open to attack on the ground that the enquiry was not conducted in accordance with the procedure followed in courts."

When deciding any matter before it, administrative tribunal is expected to give reasons for any decision made. Giving reasons is considered to one of the cardinal principles of natural justice. This duty was emphasized in the case of ***M.P. Industries v Union of India, AIR 1966 SC 671*** that;

> "The condition to give reasons introduces clarity and excludes or at any rate minimises arbitrariness; it gives satisfaction to the party against whom the order is made; and it also enables an appellate or supervisory court to keep the tribunals within bounds. A reasoned order is a desirable condition of judicial disposal"

The decision of administrative tribunal can be challenged by the following ways;

1. **By Appeal.** This is a constitutional right which has to be exercised subject to the statute that establishes a particular tribunal. Where the statute provide for a right to appeal against the decision of a tribunal then such right can be exercised where a person is aggrieved by the decision made by the tribunal. Sometimes a statute may provide right to a appeal not to the ordinary court of law but to the higher public authority whose decision shall be final and conclusive. In other cases right to appeal is made to the ordinary court of law.
2. **By revision.** Decisions made by administrative tribunals can be revised by higher authorities or ordinary courts of law upon application from the party which is dissatisfied with the decision of the particular tribunal. Sometimes the law may grant supervisory power which gives mandate to the court to call for the records of proceedings a particular tribunal and satisfy itself with the way the decision was reached. Such revisory power can go to the extent of

reversing the decision which was made.

3. **By reference.** Sometimes the tribunal on its own motion and where the law provide for the same may refer its decision to the Higher authority or ordinary court of law so that the latter can satisfy itself on the way proceedings were conducted or seek for the proper interpretation of the law.
4. **By Judicial Review.** Some statutes which establish administrative tribunals grant them power to hear and give final decisions on the matters brought before them. In such circumstances they tend to oust the jurisdiction of ordinary court to determine such particular matters by way of appeal. Provisions of law which oust the jurisdiction of courts are sometimes known as finality clauses. These e norm seen in two major ways;
    - That where the statute does ot pro for right to appeal revisi r reference to any higher authority against the order passed by administrative tribunal or authority
    - Where the statute expressly provides that the decision made by the administrative tribunal or authority is final and conclusive.

Where the Jurisdiction of the ordinary court of law is ousted by the use of finality clauses, then a person aggrieved can only have remedy by way of judicial review. This is the power vested on to the High Court and appeal from it lies to the Court of Appeal of Tanzania.

The court can exercised this power where;

- The tribunal acted without jurisdiction
- Failed to exercise its vested jurisdiction
- Acted on bad faith [*mala fide*]
- There is failure to observe rules of natural justice
- There is an error of law on the face of the records
- The order made was ultra vires the Act which establishes the particular tribunal
- The tribunal based its decision on irrelevant considerations
- The decision made is not supported by any reasonable evidence.

Although some of the Tribunals have been given power to give decisions which are final and conclusive, yet such decisions can be quashed by the court where these tribunals exceed their jurisdiction. It at all individuals would have not given the opportunity to challenge arbitrariness of some of the decisions of administrative tribunals, then the fate of justice would be put into jeopardy as pointed out by Lord Denning in ***R v Medical Appeal Tribunal [1957] 1 QB 574***, where he stated;

> "If tribunals were at liberty to exceed their jurisdiction without any check by the courts, the rule of law would be at an end"

INQUIRIES

Some administrative decisions are very important and once carried out may in one way affected some individual rights positively or negatively. It has therefore been the tendency of most of statutory instruments to require a process of inquiry before any administrative decision is passed. The process of inquiry therefore in this respect can be said to be merely a stage in the process of arriving at an administrative decision[35].

There are basically two kinds of inquiries;

- **Statutory Inquiries.** These are those which are provided under various statutes for the purpose of facilitating proper decision making. For example, the Public Service Act, 2002 provides that before any disciplinary action is taken against a public servant there must be an inquiry undertaken to establish whether the allegations put against the public servant are true.
- **Non-statutory Inquiries.** These are such inquiries which are made depending on the need arising in the society. Where a public authority considers it for public interest to conduct an inquiry, then a commission is formed to investigate and collect necessary information which shall form a report to be submitted to the authority concern for further considerations. Such report is normally not binding to the authority to which it is submitted.

Normally inquiries are held in controversial cases in order to come up with something

[35] This is as per Lord Greene, MR in B.Johnson and Co. Ltd V Minister of Health [1947] 2 ALL ER 395

which administrators can use to reach proper decisions. In other words, inquiries are there for the purpose of advising administrative organs of what real transpired for the aim of making reasonable decision. Inquiries normally involve limited issues and cover a specified geographical area with a limited time.

In some special circumstances the government may establish non-statutory inquiries to investigate issues considered to be of public interest and concern. E.g is the Nyalali Commission Inquiry; the Kipenka's Commission of Inquiry; Kissanga's Commission of Inquiry; Shivji's Commission of Inquiry etc.

The outcome of the inquiry may result in legislation being introduced or some of the laws being amended or repealed. Not all the recommendations made by any inquiry shall be implemented by the authorities concerned. This is to say, the decision to follow or not to follow what the report of the inquiry says lies on the authority which established such particular inquiry.

The process of inquiry takes into account;

- Nature of the persons to form the commission of inquiry
- Nature of the issue which the inquiry is formed to undertake.
- The nature of persons to be examined.
- Mode of collection of information necessary for the report
- The size of population to be examined
- Geographical area
- How the issue is serious to the public interest
- Cost implications

THE PROCESS OF INQUIRY

In the process of inquiry the procedures must ensure that there is a balance between the rights of individuals who will be affected by the outcome of the process and the general interests of the public. Rules of natural justice have to be adhered in order to ensure a fair decision making at the end. In the case of ***Bushell v Secretary of State for the Environment [1981] AC 75***. Lord Diplock stated that inquiries were to be regarded as quite distinct from courts of law. However inquiries have to be governed

by a need to conduct themselves in such a way as to guarantee fairness to those who would be affected by any decision that followed from the proceedings.

Inquiries help the decision-maker to have sufficient, clear and precise reasons for the decision reached. This helps any appellate organ that will determine any appeal which arises out of such inquiry since the reasons for the decision made will be spelt out. The only issue before the court will be whether the reasons are adequate to amount to the decision made or whether the process of carrying out such decision was conducted properly.

It can therefore be said that investigations and inquiries help in law making, law enforcement, adjudication of disputes, licensing, collecting information, supervision, etc.

DISTINCTION BETWEEN TRIBUNALS AND INQUIRIES

These two organs have the following differences;

1. While tribunals find the facts and solve the dispute, on the other hand the Commission of inquiry makes inquiry and reports to the authority that has established it.
2. Decisions of Tribunals are binding to the parties to which they are made while decisions of Commission of Inquiry are generally mere recommendations/advisory opinions.
3. Tribunals are statutorily formed while Inquiries are sometimes formed on the discretion of a public authority not necessarily by the statute.
4. Most of Inquiries are temporary and are established where there a need of so doing and exist till when the report of inquiry is handed over the authority concerned while Tribunals are permanent bodies statutorily formed to determine matters specified under the law that establishes it.

SIMILARITIES BETWEEN TRIBUNALS AND INQUIRIES

1. Both can be subjected to supervisory powers of the ordinary courts of law.
2. The proceedings of both can be subject of judicial review by the High Court.
3. Both have duty to act in fairness and within their powers
4. The composition of both does not necessarily require persons who are lawyers

5. They are both not bound by strict rules of evidence and procedures

TOPIC 5. The Ombudsman's Office and the Human Rights Commission

Introduction

The term 'Ombudsman' means a delegate, agent, officer or commissioner[36]. The Oxford Concise Dictionary defines this term to mean an official appointed to investigate individuals' complaints against maladministration, especially that of public authorities. It is generally an institution of the government charged primarily with the function of safeguarding citizens against abuse or misuse of administrative powers by the executive. It is the body that inquires on any allegations of mal-administration and recommends on the appropriate steps to be undertaken.

Origin

This institution developed at the first time in 1809 in Sweden and came to be accepted in other countries worldwide. It was developed generally to serve for the following purpose;

a) To make inquiry into complaints made by the citizens against abuse of discretionary powers
b) To investigate on acts of maladministration or inefficiency in administration
c) To recommend to appropriate authorities on necessary steps to be taken

The person who alleges to this institution is not supposed to lead it on investigation rather will leave the body to inquire and establish whether the allegations are correct or not.

Development of Ombudsman office and Human Rights Commission in Tanzania

Soon after independence, Tanganyika, later Tanzania, was transformed from a multiparty state into a single party state. TANU was the only political party that was allowed to carryout political activities. In actual fact the party had a very strong voice in all political matters including the way the government run its activities. This was

[36] See C.K. Takwani [1994] Lectures on Administrative Law 2nd edn, at page 344

what is known as the eve of party supremacy.

Realizing the danger of having a single party in political activities that would render to possibility of abuse of powers by administrative officers, the Presidential Commission[37] was formed in 1964 to inquire on among other things on certain policies which would necessarily provide the framework for political, economic and social activity. Upon completion of this task, the Commission recommended, inter alia, on the establishment of the Permanent Commission of Enquiry. This came after the rejection of introduction of the Bill of Rights in the Constitution.

On 22nd July, 1965 when the Interim Constitution came into force, it contained a separate Chapter Six on the Permanent Commission of Enquiry [hereinafter to be referred to as PCE]. Even after the Constitution of United Republic of Tanzania, 1977 came into force, the PCE was one of the creatures of it. It was found under Article 129 of the Constitution. This was the first Ombudsman in Tanzania charged with powers to inquire on any alleged act of maladministration affecting citizens.

Jurisdiction and Composition

The PCE was established to operate in both parts of the Union, that is, Tanzania mainland and Zanzibar. However, in practise, up to 1984 the jurisdiction of it was extended only to Tanzania Mainland. Jurisdiction of it in Zanzibar was only to such persons in the service of the United Republic of Tanzania.

The PCE consisted of the Chairman and not more than four members all appointed by the President. Persons serving in the offices of the Minister, Speaker, Judge, Judicial Officer, Civil Service, Electoral Commission, Local Government, Political Party, Members of Parliament, House of Representative, were among such persons who were not allowed to serve as members of the PCE as per Article 130[2] and Section 4 of the Permanent Commission of Enquiry Act, 1966[38]. If one is appointed as a member of the Commission from such listed offices, then he ceases to hold such office. A member of the Commission ceased to be a member where;

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[37] The Presidential Commission on the Establishment of a Democratic One-Party State

[38] Act no. 25 of 1966

- He accepted any office which disentitled him to be a member of the Commission
- His tenure to the office expires [3 years in the office]
- Removed from the office by the President where he failed to perform his duties on the reasons of body or mental infirmity or misbehaviour
- He voluntarily resign from the office or dies

Functions of the PCE

Article 129 of the Constitution provided for the functions of the PCE. It was empowered to enquire into the conduct of any person in respect of the exercise, or abuse, by him of the functions or authority of his office. The Commission made an enquiry when

a) The President directed it make an enquiry
b) The Commission itself thought it desirable to make an enquiry in respect of an allegation or complaint made.

The President had power to stop any investigation which was carried out by the Commission. The report of investigation was made to the President together with the recommendations thereof. The President was not bound to act on the recommendations made. The PCE also was required to prepare annual reports of its activities which were to be laid on the National Assembly. However such reports were not supposed to disclose the identity of persons referred therein.

Constitutional and statutory Restrictions imposed on the Commission

The PCE had no limitless powers. There were some restrictions imposed by the laws establishing it and these were;

a) It had no power to make any inquiry against the Union President or the President of Zanzibar
b) Had no power to inquire on any decision passed by any judge, magistrate or any judicial officer in the exercise of his judicial functions
c) The President had power to stop it from entering in any premises if he is of the opinion that such entry would prejudice national security or international relations

d) The President had power to stop production of any evidence to the PCE on reasons similar to the one above
e) The President had power to stop any process inquiry if it is against public interests

Powers and Privileges of the PCE

Despite all such restrictions provided by the law on the PCE, the Commission had certain powers and privileges which were necessary for effective performance of its duties. Such powers and privileges were like;

a) It had power under Sectio12[1] of the Act to enter into any premises to carry out investigation after giving appropriate notice
b) It had power to compel attendance of witnesses and production of documents
c) As per Section 18 of the Act, no inquiry made by the Commission which could be questioned before the court of law
d) As per Section 19 of the Act, members of the Commission had absolute immunity against any legal action if they were acting in course of their official duties
e) Communications made between the Commission and its clients were highly privileged and could not be given as evidence before a court

Weaknesses of the PCE

The Commission was facing a number of criticisms which weakened its position;

a) It was a purely advisory body since it could not enforce its own recommendations
b) Its functions depended on the President since the latter had powers to intervene in most of the activities vested on the Commission
c) It was part of the Executive and therefore very difficult to control its counter-parts
d) It started at the time when the Bill of Rights was not enshrined in our Constitution and therefore most of the violations could not have been enforced in courts

e) Since it lacked power to disclose the identity of the persons inquired to the National Assembly, then it was not easy to get much assistance from the National Assembly to challenge actions of the Government
f) Since most of its investigations and recommendations were confidential, then there was no room for members of the public to know clearly the way the Commission conducted its duties and the end results

THE COMMISSION FOR HUMAN RIGHTS AND GOOD GOVERNANCE

Introduction

The 13th Constitutional Amendments of 2000[39] introduced and established the Commission for Human Rights and Good Governance repealing the former Permanent Commission of Enquiry. Such amendments were to the effect of repealing Part I of Chapter 6 of the 1977 Constitution and replaced it with a new Part I which now carters for the Commission for Human Rights and Good Governance [hereinafter to be referred to as CHRGG]. Article 129[1] of the Constitution of United Republic of Tanzania, 1977 as amended from time to time establishes CHRGG. It is therefore the constitutional creature.

Those constitutional changes were reinforced with the enactment of the Commission for Human Rights and Good Governance Act, 2001[40]. The Act repealed the Permanent Commission of Enquiry Act, 1966. It was enacted to provide for the functions, powers, privileges and other matters of CHRGG. The laws regulating matters of the CHRGG are the Constitution of the United Republic of Tanzania 1977, as amended from time to time; the Commission for Human Rights and Good Governance Act, 2001; and the Commission for Human Rights and Good Governance [Appointments Procedure for Commissioners] Regulations, 2001[41].

Composition

Article 129 [2] of the Constitution provides for the composition of CHRGG. The Commission is composed of;

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[39] Vide Act No. 3 of 2000

[40] Act No. 7 of 2001

[41] G.N No. 89 of 2001

a) A Chairman, who should be a person qualified for appointment as Judge of the High Court or Court of Appeal
b) A Vice-Chairman appointed depending on which part of the Union the Chairman comes from
c) Not more than Five Commissioners appointed from amongst persons who have knowledge, experience and a considerable degree of involvement in matters relating to human rights, law, government, politics or social affairs
d) Assistant Commissioners

As per Article 129 [3] of the Constitution, all Commissioners and Assistant Commissioners shall be appointed by the President after consultation with the appointment committee established under Article 129 [4] of the Constitution. Although there is no express provision in the Constitution and in the Act as to who appoints the Chairman and the Vice-Chairman, yet in light of Regulation 9 of G.N No. 89 of 2001 the process for the appointment of commissioners applies also on the Chairman and Vice-Chairman.

Appointment Procedures

These are governed by G.N No. 89 of 2001 read together with the Constitution and the Act. In short the process involves the following steps;

a) There shall be public advertisement for the posts of Chairman, Vice-Chairman, Commissioners or Assistant Commissioners. The advertisement shall be published in both parts of the union in three consecutive days in three leading English and Swahili newspapers that have wide circulation followed by three successive advertisements on national and private television stations.
b) After expiry of 21days, there shall be screening process for the purpose of short listing the names of candidates
c) The short listed applicants shall be submitted to the Appointments Committee which shall notify those short listed candidates in manner stipulated in [a] above to appear for interview
d) The interview shall be conducted by the Appointment Committee
e) The Appointment Committee shall submit to the President the names of the candidates recommended to be appointed

Functions of the Commission

Article 130 [1] of the Constitution provides for the functions of the Commission which are further extended to fifteen functions under Section 6 [1] of the Act. In short such functions include;

a) To receive allegations and complaints in the violation of human rights
b) To investigate or inquire into complaints concerning practices or actions by persons holding office in the service of the government, public authorities or other public bodies including private institutions and private individuals where those complaints allege abuse of power, injustice, unfair treatment of any person, whether complainant or not, in the exercise of their official duties, etc

Status, powers and Competence of the Commission

As per Section 13 [1] of the Act, the Commission is the public office in the service of the United Republic of Tanzania. The Commission as per Article 130 [2] of the Constitution and Section 14 [1] of the Act is an independent department which shall not act under the control of any person or authority. However, the President is empowered to issue any order or directive which shall be complied by the CHRGG. As per Section 17 [1] of the Act, the status of the decisions reached by the Commission is mere recommendations to appropriate authorities. However as per Section 15 [3] of the Act, the Commission is empowered to institute proceedings in Court and seek appropriate remedy.

Restrictions imposed on CHRGG

Both, the Constitution and the Act, prohibit the Commission from investigating the following;

a) A matter which is pending before a court or other judicial tribunal
b) A matter involving the relations or dealings between the Government and any foreign state or an international organization
c) A matter relating to the prerogative of mercy
d) A matter which the President directs otherwise

Successes of the Commission

Since its establishment, the Commission has succeeded on the following;

a) Raising awareness on the general public on the functions and powers vested on it and how can the citizens enjoy its services
b) Investigating some of the complaints of the citizens and recommending on necessary measures to be undertaken. A good example here is the investigation in the famous **NYAMUMA VILLAGE CASE**[42] where the Commission came to a conclusion that there were violations of human rights and principles of Good Governance.
c) Recently the Commission has resolved the dispute on its Jurisdiction in Zanzibar and now it has open its offices in that part of Tanzania

Weaknesses of the Commission

Despite such successes, the Commission face the following critics;

a) That, just like its predecessor PCE, the Commission also depends on the way the President would exercise his powers against the operation of the Commission
b) That, the restrictions imposed on the Commission as per Section 16 of the Act, waters away its powers to intervene in some of the issues which might be of public importance
c) Reports of the Commission are sent to the National Assembly through the Minister and this may influence the content which is to be tabled before the National Assembly
d) That, the Commission remains to be generally an advisory body since it cannot enforce its own recommendations unless it does so through an order of the Court
e) Just like its predecessor, the CHRGG also is privileged with a practise of secrecy and confidentiality on some of its information and communication which if not carefully used can be abused and remove the whole idea of having a democratic organ which is transparent in its activities.

Differences between PCE and CHRGG

[42] It is cited as **IBRAHIM KOROSSO AND 135 OTHERS V THOMAS OLE SABAYA AND 2OTHERS, CASE NO. HUB/S/1032/2001/2002/MARA.** In this application the complainants were complaining against eviction from their residences in Serengeti District in a way that infringed fundamental rights and violations of the principles of Good Governance.

a) The former had no power to institute proceedings in court and seek appropriate remedy while the latter has that power
b) Appointment procedures in the former were entirely relying on the powers of the President but in the latter the President has to make consultation with the appointment committee
c) The latter was formed at the eve where there was no Bill of Rights in the Constitution and the state was under single party system which hindered effective operation of it while the latter is operating in circumstances where by information can be derived from various political sources and humanitarian activists.

NOTE THAT:

These notes should only be used to guide you in your studies and discussions. You are advised to get copies of the laws cited herein so as you can equip yourself with further information necessary for this Topic.

TOPIC 6: THE PROCEEDINGS BY OR AGAINST THE GOVERNMENT

The law governing suits by or against the government in Tanzania is the Government Proceedings Act, 1967[Act no.16 of 1967]. It is the predecessor of the law governing such proceedings in colonial period which was the Government Suits Ordinance, 1921.

THE HISTORY OF GOVERNMENT PROCEEDINGS IN ENGLAND

Originally at common law, the crown/state was protected against civil liabilities on the basis of the latin maxim *'Rex non potest peccare'* that is, 'the King can do no wrong'. This was sometimes known as the doctrine of sovereign immunity which arose from the notion that the English monarchy was sovereign and could not be liable for damage to its subjects[43]. The doctrine originated in the case of ***Russel v Men of Devo [1778]2 T.R.667*** where it was held that unincorporated town could not be liable for damage caused by a defective bridge.

The only claim which could be brought against the government was by way of a writ known as 'petition of rights' limited to contract and some property actions. However with the expansion of government activities including increasing economic relations with private persons increased instances of wrongs committed by government servants/ agents against private persons. Using petition of rights only proved to be inadequate since the procedures to get writs were conservative, complicated leading to many complaints.

Democratic struggles in 1920's demanded among other things a need to equate the government with other persons equally before the court of law. Changes were seen in England through the Crown Proceedings Act, 1947 which abolished the procedure of petition of rights and made it possible for the government to be sued in all civil wrongs.

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[43] See the case of ***Steelman v City of New Bern[1971] 279 N.C 589***

IN TANZANIA

Although in England the Crown Proceedings Act, 1947 was passed to enable the Government to be sued just like other private persons in court of law, yet in British colonies, including Tanganyika, it was not easy for one to sue the Government. After independence the law governing suits by or against the government was inherited from the one which was used in colonial period. However in 1967 the Government sent a bill to the parliament that led to the enactment of the Government Proceedings Act, 1967[Act no.16 of 1967] which did not come into effect until 1974 following the amendments made to that law through Act no.40 of 1974.

The 1974 amendments introduced the so called minister's consent/ministerial fiat to any proceedings instituted against the Government. Section 2 of the amendments repealed section 6 of the Government Proceedings Act, 1967 and replaced it with a section that read as;

> 6. Notwithstanding any other provision of this Act, no civil and proceedings may be instituted against the Government without the previous consent in writing of the minister:
> Provided that no such consent shall be necessary for the making of the Government the party to any interpleaded proceedings.

Section 7 was also repealed and replaced with the section that made it compulsory for any proceedings against the Government to be instituted to the High Court. Where the Government instituted proceedings against individual person in a court subordinate to the High Court and such defendant raises a counterclaim against the Government, then amendments in Section 10 were to the effect that such defendant must seek consent by the minister under Section 6 and then the magistrate shall transfer such proceedings to the High Court for trial.

That position of the law received a lot of criticism from various scholars and human rights activists on the basis that;

- It was very absurd to give a party to Court proceedings right to agree to the proceedings brought against it.
- Requirement of consent brought about procedural complications since

sometimes the minister could withhold his consent when he considers it that it will be to the government detriment when the dispute reaches to the court of law.

- Requirement of consent infringed the Constitutional Right of all persons to have access to the court of law by subjecting such right to the Minister's consent.

The constitutionality of Section 6 of the Government Proceedings Act, 1967 was challenged in the case of ***Peter Ng'omango v. Gerson M.K. Mwangwa and Attorney General, [1993] TLR 77*** where the High Court declared Section 6 of the Government Proceedings Act, 1967 which gave a necessary requirement of having Minister's consent as unconstitutional.

Despite that position in ***Peter Ngomango's case***, yet the Government did not take necessary steps to make amendments to such law and there the very same law was then challenged in the case of ***Kukutia Ole Pumbun and Another v Attorney General [1993] TLR 159[CA].*** It this case the Court of Appeal referring to Peter Ngomango's case was of the very same view that section 6 of the Government Proceedings Act, 1967 violated the basic human right guaranteed under Article 13[2] and 30[3] of the Constitution and that it impeded access to justice.

The position in Zanzibar was different from that of Tanzania-mainland. That while in Zanzibar, as per Section 60 of the Civil Procedure Decree [Cap 8 of the Laws of Zanzibar 1958 series] there was no requirement of minister's consent rather if one wanted to sue the Government had to serve a notice of his intention to sue the Government sixty days before instituting proceedings and within that notice he must state the nature of his claim and the place where the cause of action arose. This was stated in the case of ***Himidi Mbaye v The Brigade Commander of Nyuki Brigade, High Court of Zanzibar, Civil Case no.8 of 1981 [Unreported]***. In this case Honourable Msumi, J observed that the purpose of serving a notice of intention to sue the Government was intended to make it become aware of the nature of the claim which the plaintiff is claiming against it and where possible to settle the matter outside the court.

Following such ruling of the court in ***Kukutia's case***, the Government moved a Bill to the Parliament to make amendments on Section 6 of the Government Proceedings Act, 1967. Amendments were effected through Act no. 30 of 1994. These amendments came up with the following requirements to a person who wanted to bring action against the Government;

- That person had to give ninety days notice of his intention to sue the Government
- That such notice must be served to the Government Minister, Department or Officer concerned
- The copy of the claim must be served to the Attorney General

The law further stated that in all suits against the Government the proceedings shall be instituted against Attorney General and a copy of the plaint shall be sent to the Minister, Department or officer alleged to have committed such wrong.

It further maintained that all suits against the Government shall be instituted in the High Court by filing it in the Registry to which the claim arose.

PROCEEDINGS AGAINST THE GOVERNMENT

From the above discussion it can be stated that the old common law maxim that the 'King can do no wrong' is neither part of the contemporary common law system neither is it our part in our system in Tanzania. This was emphasized by Honourable Samatta, JK [as he then was] in ***Mwalimu Paul John Mhozya v The A.G High Court of Tanzania at Dar es Salaam, Civil Case no. 206 of 1993 [Unreported]***, where he said;

> "The notion, apparently harboured by some people in this country, that the President of the United Republic is above the law is subversive of the Constitution and the laws. All Government leaders, including the President, are, like the humblest citizen, bound to comply with the laws of this country. **The maxim the King can do no wrong has no place in our law even if the word 'President' is substituted for the word 'King'.** Everyone and every institution or organisation in this country is enjoined to pay respect to the principle of supremacy of the law."

[Emphasis is mine]

Therefore in Tanzania, the Government, just like other individual persons can be sued in a court of law in actions like;

- Torts
- Contracts
- Detinue,etc

Section 3 of the Government Proceedings Act, 1967 provides that the Government shall be subject to all proceedings those liabilities in contract, quasi-contract, detinue, tort and in other respect to which it would be subject if it were a private person of full age and capacity and any claim arising therefrom may be enforced against the Government in accordance with the provisions of the Act.

As per Section 7 of the Act, all civil proceedings against the Government may be instituted only in the High Court and shall be instituted against the Attorney General. The law of limitation in civil suits is also applicable in all suits against the Government in the same manner as in private persons.

VICARIOUS LIABILITY OF THE GOVERNMENT

In torts, the Government can be held vicariously liable for the torts committed by its servants. The plaintiff is going to sue the servant who committed the particular tort and the Government as the master if at the entire tort was committed in course of doing official duties. As stated in the case of ***Rev. Christopher Mtikila v The Editor, Business Times & Augustine Lyatonga Mrema [1993] TLR 60 [HC]*** it was stated that no provision of the Government Proceedings Act, 1967 or any other legislation takes away the common law right to sue a Government servant who commits a tort in the course of his official duties. This implies that although the Government can be held liable for torts committed by its servants in official duties yet the servants are not exonerated from liabilities for such torts committed by them. The right to sue the servant is not affected by the right to sue the master.

Section 3[2] of the Act provides that "No proceedings shall lie against the Government in tort in respect of any act or omission of a agent of the Government

unless the act or omission would, but for the provisions of this Act, have given rise to a cause of action in tort against that servant or agent or his estate".

This provision connotes that the liability of the Government shall arise where it is only established that such liability on tort have arisen against the servant or agent or his estate. In all such circumstances it has to be established that the servant was actually acting in official duty. The liability in torts cannot be extended to the Government where the servant was acting in the frolics of his own.

ALTERNATIVE NOTES ON GOVERNMENT LIABILITY

- The law governing liability of the government in Tanzania is the Government Proceeding Act, (*Cap. 5*) R.E 2002.
- Before 1994 any body who wanted to sue the government had first to seek permission from the same government through the AG or the minister responsible for justice.
- The High Court of Tanzania in the case of **Peter Ng'omango Vs Gerson Mwangwa**,(1993)TLR.77 was the first to attack the requirement of consent. That decision was followed by the Court of Appeal decision in **Pumbun and Another vs. AG**, (1993)TLR 15
- Section 3 of the Act provides that the government shall be subject to all proceedings those liabilities in contract, quasi- contract, detinue, tort and in other respects to which it would be subject if it were a private person of full age and capacity and any claim arising therefrom may be enforced against the government in accordance with the provisions of this Act.

QUASI CONTRACT

- With a view of protecting innocent persons, courts have held the government liable to compensate the other contracting party on the basis of quasi-contractual liability. The law is that if the goods delivered are accepted or the work done is voluntarily enjoyed, then the liability to pay compensation for the enjoyment of the said goods or service arises. This liability is not based on the subsisting contract between the parties rather on the basis of the fact that something was done by one party for the other and the said work so done has been voluntarily accepted by the other party.
- The court in ***Fobrosa v. Fairbairn*** explained the doctrine as follows;

  > *Any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of , or some benefit derived from, another which is against conscience that he should keep.*

- The doctrine applies as much to corporations and the government as to private individuals.

Contractual Liability

- If a person enters into a contract with the government and is entitled to certain benefits thereunder, he can approach a court of law for redress. Breach of contract by the government, according to C.K Takwani;(2003) **Lectures in Administrative Law ,** is classified in three categories;
- (i) Where the petitioner makes a grievance of breach of promise on the part of the state in case where an assurance or promise made by the state he has acted to his prejudice.
- (ii) Where the contract entered into between the person aggrieved and the state is in exercise of a statutory power under certain Acts or Rules framed thereunder and the petitioner alleges a breach on the part of the state.
- (iii) Where the contract entered into between the state and the person aggrieved is not statutory but purely contractual and the rights and liability of the parties are governed by the terms of the contract and the petitioner complains about breach of such contract by the state.

LIABILITY IN TORT:

- Since the State is a legal entity and not a living entity, it has to act through human agency. i.e. its servants
- Hence the discussion is on the liability of the state for the tortious acts of its servant that has to be considered.
- Vicarious liability refers to a situation where one person is held liable for acts or omission of other person. Winfield explains the doctrine of vicarious liability thus;

  The expression vicarious liability signifies the liability which A may incur to C for damage caused to C by the negligent act or other tort of B. It is not necessary that A shall have participated in any way in the commission of the tort nor that a duty owed in law by A to C shall have been broken. What is required is that A should stand in a particular relationship to B and that B's tort should be referable in a certain manner to that relationship.

- Thus it follows that the master may be held liable for the torts committed by his servant in the course of employment.

The doctrine of vicarious liability is based on two maxims;

(i) Respondeat superior (let the principal be liable) and

(ii) Qui facit per alium facit per se (he who does an act through another does it himself)

Lord Brougham observed;

> *The reason that I am liable is this, that by employing him I set the whole thing in motion; and what he does, being done for my benefit and under my direction, I am responsible for the consequences of doing it.*

- The doctrine of vicarious liability is based on social convenience and rough justice.
- An employer will only be liable for torts which the employee commits in the course of employment. There is no single test for this, although Parke B famously stated in **Joel v Morison** (1834) 6 C&P 501 at 503, that the servant must be engaged on his master's business, not 'on a frolic of his own'.
- An employer will usually be liable for (a) wrongful acts which are actually authorised by him, and for (b) acts which are wrongful ways of doing something authorised by the employer, even if the acts themselves were expressly forbidden by the employer (Salmond & Heuston on the Law of Torts, 1996, p443). Liability for criminal acts will also be considered.

The indemnity principle

- There is a term implied at common law into contracts of employment that an employee will exercise all reasonable care and skill during the course of employment. An employee who is negligent is in breach of such a term and the employer who has been held vicariously liable for the tort may seek an indemnity from the employee to make good the loss. **Read** also **Section 4** of the Government Proceeding Act.

Jurisdiction and Procedure:

- Section 6(2) provides that no suit shall be instituted against the government unless the claimant previously submits to the government minister, department or officer concerned a notice of not less than ninety days of his intention to sue the government, specifying the basis of his claim against the government and he shall send a copy of his claim to the AG.
- 6(3) All suits against the government shall, after the expiry of the notice be brought against the AG and a copy of the plaint shall be served upon the government ministry, Department or officer that is alleged to have committed the civil wrong
- All proceeding against the government shall be instituted in the High Court by delivering in the registry of the High Court within the area where the claim arose. Section 6(4) and Section 7.

Judgment and Execution:

- Section 16 provides that where there is an order including an order as to costs made by the court in favour of a person against the government, the proper officer of the court shall, issue a certificate containing particulars of the order.
- If the order provides for the payment of money by way of damages or other reliefs, or of costs, the certificate shall state the amount so payable and the permanent secretary to the or such other Government accounting officers as may be appropriate shall, pay to the person entitled the amount appearing in the certificate. Section 16(2)
- No execution, attachment or similar process shall be issued out of any court for enforcing payment by the government of any money or costs referred to in this section. Section 16(3)
- Subject to the provision of this Act, any order made in favour of the government against any person in any civil proceedings to which the government is a party may be enforced in the same manner as an order made in an action between private persons. Section 17.