THE FUTURE OF ADMINISTRATIVE LAW & GOOD GOVERNANCE IN NIGERIA

By

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Introduction

I am very pleased to have the privilege of delivering the New Frontiers Lecture on the topic of Administrative Law and Good Governance in Nigeria.

Of course, I am not an expert on Nigerian administrative law, nor have I come all this way to suggest I have the answer to the problem of good governance in Nigeria. Sometimes it is helpful, however, to view a legal and political system from the outside. Just as I would look forward to your impressions of Canada and its attempt to address issues of federalism, civil liberties and legal pluralism in a multicultural society, so I hope I can share insights with you today which may be useful on the questions which confront Nigeria’s legal and political system and the role administrative law may have in advancing good governance.

The Search for Accountability

We live in an age defined by the search for accountability for governmental action. Accountability can be understood in two important but different senses. First, accountability may mean that government must answer to another body. For example, government action may be challenged through the courts or through the activities of an oversight body such as an Ombudsman or Auditor General with a mandate to assesses the efficiency or effectiveness or fairness of government action: Second, accountability may simply mean transparency, the right to expose government action to public scrutiny.
In each sense, accountability turns, I believe, on the key principles of administrative law.

**The Key Principles of Administrative Law**

Administrative law is an open-ended field of legal thought. Whereas constitutional law flows from a known source – the Constitution – administrative law has no clear boundary. It applies to all government action and action taken by public entities, though that action now may come in the form of the activities of a state owned business, or private regulatory body which exercises public powers, or spends public money, or takes the form of public-private joint ventures, and so forth. The same administrative law principles which apply to Prisons must also apply to Universities, and the same obligations which arise in the context of regulating electricity one day may have application in the regulation of farm animals the next. As the Canadian Supreme Court Justice Louis Lebel once wrote. Second, not all administrative bodies are the same. Indeed, this is an understatement. At first glance, labour boards, Police Commissions, and milk control boards may seem to have about as much in common as assembly lines, cops and cows! Administrative bodies do, of course, have some common features, but the diversity of their powers, mandate and structure is such that to apply particular standards from one context to another might well be entirely inappropriate. (*Blencoe v. British Columbia (Human Rights Commission)* 2000 SCC 44).

One working definition of administrative law which I found in a Nigerian source, Mr. Hassan Tanko Kyaure Esq., includes the following areas:

(i) The institutions and administrative process of central and local governments.
(ii) The principal sources of governmental legal powers, parliamentary and subordinate legislation.

(iii) The mechanisms by which citizens grievances in respect of governmental actions may be examined and, where appropriate, redress be offered. Such channels of redress may be parliamentary, administrative or judicial.

(iv) Public corporations.

(v) The administration of local government and the general legal principles applying to local authorities.

In a nutshell, Mr. Tanko wrote, “Administrative law is a branch of public law dealing with the actual operation and the control of the powers of government through administrative processes.” I think this is absolutely right in two different senses – both in describing the breadth of administrative law and also its focus on the lived reality of government operations. Administrative law does not live and breathe in the abstract world of legal principle, but rather takes its vitality from the practical contexts in which government decision-makers act.

Because administrative law covers so much, and its principles have the potential to be pervasive throughout the mechanisms of state action, I believe administrative law may be instrumental in achieving “good governance,” which I take to mean the effective, efficient, responsible and accountable conduct of state activity. Administrative law is just now emerging as a source of innovation and legal problem-solving in the common law world, and Professor Olong notes in his book on *Administrative Law in Nigeria* that:
A cursory look at the law reports in Nigeria before the late 1990s will reveal very little cases on administrative law. From 1995 to date, administrative law is beginning to take its pride and place having realized its importance in the development of any legal system (at p.5).

It is important at the outset also to distinguish administrative law, which is concerned with the activities and authority of government officials, and constitutional law, which is concerned with the distribution of power between various branches and levels of government through the written or unwritten constitution.

Within administrative law, there are three administrative law principles which I believe deserve specific focus, as each also plays a role in setting the foundation for good governance:

The first principle is that no government authority is unlimited. All legislative grants of power, or powers from other sources, in other words, come with limits. The rule of law dictates not only that these boundaries exist, but also that they may be enforced through recourse to the courts.

Nigeria’s Supreme Court has held that the essence of the rule of law is that:

(a) The state is subject to the law;
(b) The judiciary is a necessary agency of the rule of law;
(c) Government should respect the rights of individual citizens; and
(d) The judiciary is assigned the role to resolve disputes between government and individuals or groups. (See Military Governor of Lagos State v. Ojukwu (2001) F.W.L.R. (Pt. 50). P.1779 at 1783).

This is slightly different than how the Canadian Supreme Court has formulated the concept:

The rule of law is a foundational principle. This Court has described it as “a fundamental postulate of our constitutional structure” (Roncarelli v. Duplessis, [1959] S.C.R. 121, at p. 142) that “lie[s] at the root of our system of government” (Reference re Secession of Quebec, [1998] 2 S.C.R. 217, at para. 70). …

The rule of law embraces at least three principles. The first principle is that the “law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power”: Reference re Manitoba Language Rights, at p. 748. The second principle “requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order”: ibid., at p. 749. The third principle requires that “the relationship between the state and the individual . . . be regulated by law”: Reference re Secession of Quebec, at para. 71. (See also British Columbia v. Imperial Tobacco Canada Ltd.,
The Supreme Court of Nigeria’s description of the rule of law emphasizes the supervisory jurisdiction of the courts, while the Supreme Court of Canada’s description emphasizes the aversion of the rule of law to arbitrary state power. Ultimately, any effective framework for the rule of law requires both elements. Importantly, though, for administrative law, the rule of law is animated not simply by the pronouncements of courts, but also by the daily actions of government officials.

The rule of law requires, foremost, that those actions be authorized by law – or, put differently, that government officials cannot acts as an authority unto themselves if the rule of law is to have meaning. And, where the government differs with the courts on the scope or meaning of the rule of law, it must be the view of the court that prevails, subject to the constitution itself being amended. As the Nigerian courts have observed, the alternative to the rule of law is “anarchy and chaos.” (See, for example, Re Mohammed Olayori Suit No. M/196/69).

The limit on government authority imposed by the rule of law also has distinct implications for countries like Nigeria and Canada that are also based on the model of federalism. In such countries, an additional limit on governmental authority arises where a federal official is exercising a power which in fact relates to a local governmental authority or vice versa.

The second principle of administrative law which plays a formative role in good governance is that those subject to government decisions are entitled to procedural fairness, also referred to as the “rules of natural justice” or simply “due process.” Procedural fairness flows from the idea, captured in
Nigerian proverbs as well as the religious principles of many faiths, that the other party to a dispute deserves to be heard. Fairness in the administrative law sense, includes two key concepts: the right to a fair hearing and the right to an impartial decision-maker:

(a) As Justice Oputa has observed, the right to a fair hearing may be the single most consistently recognized protection in Nigeria. The right to be heard (audi alteram partem), includes adequate notice and sufficient disclosure to provide meaningful input into the decision-making process, and the right to reasons for a decision. A fair hearing before an administrative decision-maker, of course, is not the same as a fair trial before a Judge. Reasons may be informal but still sufficient. A written hearing will sometimes be appropriate rather than an oral hearing with cross-examination. The essence of administrative law principles is that they are variable, and depend on the context.

There are at least two fundamental purposes behind the right to a fair hearing: the first is functional and the second is moral. The functional purpose is that hearing from the people affected by a decision is likely to produce better decisions; the moral purpose is that even where it will not have an impact on the decision, an affected person nonetheless has an independent right to be heard.

(b) A twin procedural concern to the right to a fair hearing is the right to an independent and impartial decision-maker (nemo debet esse judex in propria sua causa).
At common law, it is not necessary to show actual bias, but rather than a reasonable person would apprehend bias. As the Supreme Court of Nigeria observed in *Olawole Abiola v. FRN* (1995) 7 NWLR (Pt. 415).

A Judge should not hear a case if he is suspected of partiality because of consanguinity, affinity, friendship or enmity with a party or because of his subordinate status towards a party because, he was or had been a party’s advocate. Also natural justice demands, not only that those whose interest may be directly affected by an act or decision should be given prior notice as adequate opportunity to be heard, but also that the tribunal should be disinterested and impartial.

While questions of bias may be clear where a decision-maker has a financial interest in a decision, or a family member who stands to gain a private advantage, there is less certainty where the alleged bias relates to the cultural or ethnic identity and experience. Consider the dilemma which arose in the context of a Canadian trial judge in *R.D.S. v. The Queen* (1997) 151 D.L.R. (4th) 193 (S.C.C.). In that case, the trial Judge (who was African-Canadian), was hearing a case involving an African-Canadian youth, charged with assaulting a police officer. The only two witnesses at trial were the accused himself and the police officer. Their accounts of the relevant events differed widely and the case turned on credibility. The trial Judge indicated that without accepting everything that he said, the accused's evidence had raised a doubt in her mind. She concluded that the Crown had not discharged its evidentiary burden to prove all the elements of the offences beyond a
reasonable doubt. The trial Judge concluded her reasons with the following comments:

The Crown says, well, why would the officer say that events occurred in the way in which he has relayed them to the court this morning. I am not saying that the Constable has misled the court, although police officers have been known to do that in the past. I am not saying that the officer overreacted, but certainly police officers do overreact, particularly when they are dealing with non-white groups. That to me indicates a state of mind right there that is questionable. I believe that probably the situation in this particular case is the case of a young police officer who overreacted. I do accept the evidence of [R.D.S.] that he was told to shut up or he would be under arrest. It seems to be in keeping with the prevalent attitude of the day.

The case reached the Supreme Court on the question of whether these comments gave rise to a reasonable apprehension of bias, where a divided Court issued four separate sets of reasons. Writing for what turned out to be the majority judgment on this issue, Cory J. observed:

The requirement for neutrality does not require Judges to discount the very life experiences that may so well qualify them to preside over disputes. It has been observed that the duty to be impartial:
does not mean that a Judge does not or cannot bring to the bench many existing sympathies, antipathies or attitudes. There is no human being who is not the product of every social experience, every process of education, and every human contact with those with whom we share the planet. Indeed, even if it were possible, a Judge free of this heritage of past experience would probably lack the very qualities of humanity required of a Judge. Rather, the wisdom required of a Judge is to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave.

True impartiality does not require that the Judge have no sympathies or opinions; it requires that the Judge nevertheless be free to entertain and act upon different points of view with an open mind. [Canadian Judicial Council, Commentaries on Judicial Conduct (1991), at p. 12.]

It is obvious that good Judges will have a wealth of personal and professional experience, that they will apply with sensitivity and compassion to the cases that they must hear. The sound belief behind the encouragement of greater diversity in judicial appointments was that women and visible minorities would bring an important perspective to the difficult task of judging.
See for example the discussion by The Honourable Maryka Omatsu, "The Fiction of Judicial Impartiality" (1997), C.J.W.L. 1. See also Devlin, supra, at pp. 408-409.

Regardless of their background, gender, ethnic origin or race, all Judges owe a fundamental duty to the community to render impartial decisions and to appear impartial. It follows that judges must strive to ensure that no word or action during the course of the trial or in delivering judgment might leave the reasonable, informed person with the impression that an issue was predetermined or that a question was decided on the basis of stereotypical assumptions or generalizations. (at paras. 119-120).

On the facts of this case, Cory J. held that the comments by the trial Judge were “unfortunate”, “worrisome” and “come very close to the line” but when considered in light of the submissions and evidence in the case, did not in his view give rise to a reasonable apprehension of bias.

Thus, while the majority of the court found that the comments did not constitute a reasonable apprehension of bias, that majority split on the question of whether it was desirable and appropriate that the trial Judge refer to her own “personal understanding and experience of the society” in which she lived and worked. When combined with the dissenting Judges who concluded the comments were both inappropriate and reflected bias, this leads to the result in the case being that first, the comments did not render the decision legally invalid, but second, it would have been preferable in the eyes of the majority had the trial Judge not addressed the social context
surrounding that assessment in her reasons. We are thus left with unresolved questions: when should the ethnic or cultural origin of decision-makers play a role in the analysis for reasonable apprehension of bias? What is the legal significance of social context in the accountability of decision-makers? These are questions with which we continue to wrestle.

The third principle of administrative law which I believe provides a foundation for good governance is that government action must be rational – it cannot be arbitrary or based on discriminatory, corrupt or improper factors. This principle is fundamental to a society governed by the rule of law but also requires a balance to be struck between the legitimate needs of the state and the protection of its citizens.

In the United Kingdom, this principle was developed primarily in the context of administrative discretion and became known as “Wednesbury unreasonableness” named after the 1948 case in which the House of Lords set out the grounds on which judicial interference with administrative discretion would be justified, including arbitrariness, bad faith, improper purposes and irrationality. The U.K. has now modified this approach in light of the Human Rights Act, 1998 and its framework of proportionality for the substantive review of government action. In Canada, our focus has been on government action which must be justified by reasons, and reasons which must demonstrate that decisions have an objective basis in evidence or relevant information. The Supreme Court recently rearticulated the “reasonableness” standard of review which the Court uses when exercises of discretion by government officials are challenged:

Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come
before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. (Dunsmuir v. New Brunswick 2008 SCC 9, at para. 47).

While these three principles continue to provide fixed roots to administrative law, its branches continue to evolve. For example, in Nigeria and elsewhere in the common law world, the rules of natural justice historically applied only to decisions that were characterized as judicial or quasi-judicial – decisions, in other words, that resolved people’s rights in adjudicative settings. But what about the many decisions by government which are not judicial but rather administrative, and deal with the allocation of state benefits or with the application of state policies?

In Aiyetan v. Nigerian Institute for Oil Palm Research [1987] NWLR (Part 59) 48, 76-77, for example, Kairibi Whyte, JSC, observed that natural justice is “rooted in the minds of all
fair-minded people” and “not confined to determinations of a judicial nature.” The power of administrative law is that it may apply throughout government decision-making, from the decisions of local officials around land use and water rights to the decisions of federal ministers around national security and economic development. A small change to the culture of one government office through the principled application of administrative law (a decision, for example, to provide transparent criteria or brief written reasons for a decision, or an opportunity for a reconsideration on certain grounds if a decision seems out of step with those criteria) can, like a pebble thrown in a river, give rise to wide ripples.

While administrative law may have its greatest impact in the work of front-line decision-makers, importantly, it has at its source the force of constitutional principle. This commitment to fairness in Nigeria is entrenched in s.36 of the Constitution of the Federal Republic of Nigeria, 1999, which includes, in part:

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

(2) Without prejudice to the foregoing provisions of this section, a law shall not be invalidated by reason only that it confers on any government or authority power to determine questions arising in the administration of a law that affects or may
affect the civil rights and obligations of any person if such law –

(a) provides for an opportunity for the persons whose rights and obligations may be affected to make representations to the administering authority before that authority makes the decision affecting that person; and

(b) contains no provision making the determination of the administering authority final and conclusive.

(3) The proceedings of a court or the proceedings of any tribunal relating to the matters mentioned in subsection (1) of this section (including the announcement of the decisions of the court or tribunal) shall be held in public.

The Constitution, augmented by the common law and other accountability legislation, provides the foundation from which to develop administrative law principles. The principles of administrative law represent a vital thread weaving throughout not just Nigeria but the common law world, and providing a foundation for the legal accountability of state actors. But how might administrative law lead to good governance? This is where I hope the experience of Canada might be helpful.

**Toward Good Governance**

The legal foundations of administrative law as I have described them have developed in Canada over the post WWII era much as they have in Nigeria in the post-colonial era. Administrative
law took on its modern form in Canada in the struggle to recognize deference by courts toward the decisions of tribunals, agencies and boards because of their special statutory authority and their special expertise, particularly in the labour context.

While the proper relationship between administrative bodies and courts remains a preoccupation in Canada, more innovation has come in the sphere of procedural fairness and the doctrines of impartiality, independence, and the duty on administrative decision-makers to provide adequate reasons. New frontiers in Canadian administrative law include procedures for administrative bodies to consult with those affected by their decisions about the standards to be applied – for example, through notice and comment procedures for regulatory rules - and accountability legislation which, in response to public outcry and media exploitation, requires ever more reporting by administrative bodies and government in relation to expenditures, service standards, ethics and operations.

Change may happen for many reasons, but a response to public opinion will often lie at the bottom of most of those reasons. For example, the heads of all public agencies in Canada’s largest Province of Ontario now have a legal obligation to have their expenses vetted by the Integrity Commissioner. It was a front page headline in Ontario last year that a public body responsible for the digitization of health records had given untendered contracts to consultants who billed the public purse for muffins, coffee and newspapers! Of course, the fact that the size of the contracts, the work performed and the itemized expenditures were all available to the media and the public is itself an accomplishment, but there is always another layer or level of oversight to develop in response to a scandal.

The evolution of administrative law in Canada, as a result of these developments, has taken many of these principles from the sphere of judicial review of administrative action to the sphere
of Parliamentary oversight. For example, Canada has witnessed just in the last decade a dramatic rise of accountability legislation and accountability officers to enforce that legislation.

At the federal level of government alone, Canada now boasts the following Parliamentary accountability officers:

- A Privacy Commissioner
- An Access to Information Commissioner
- A Public Service Commissioner
- A Public Sector Integrity Commissioner
- A Conflict of Interest and Ethics Commissioner
- A Lobbying Commissioner
- A Parliamentary Budget Officer
- An Auditor General

These offices are established as Parliamentary offices, so they are appointed and funded as part of direct legislative action, as opposed to most executive tribunals and boards which are appointed and funded by the executive branch of government. Each of these bodies is aimed at advancing the goal of good governance, and in particular, transparency, accountability and justification on the part of government actors. As indicated earlier, many of these bodies were created as a consequence of a large scandal and/or public inquiry into alleged wrongdoing, most recently the 2006 Inquiry in a scandal involving advertising agencies receiving large contracts from the federal government and then funneling political donations to the Liberal Party which was then in power. I served as the Integrity Commissioner for the City of Toronto, a position created in 2004 following a messy scandal at the City involving the purchase of computer equipment and the unchecked, behind-closed-doors lobbying of municipal officials.
Some of the new oversight bodies now themselves have given rise to scandals, as occurred this past year when it came to light that the Public Sector Integrity Commissioner, established to protect whistle-blowers, had not undertaken a single successful investigation leading in response to allegations of wrongdoing. Canada’s experience demonstrates that the mere presence of legislation and legislative officers cannot alone lead to meaningful accountability. Political leadership is required (as well as other elements of civil society, such as meaningful and free elections, a free and independent media, and so forth).

Institutions of oversight, of course, exist in Nigeria as well, such as the Civil Service Commission, Electoral Commission and Judicial Commission, The Code of Conduct Bureau, Economic and Financial Crimes Commission, and The Independent Corrupt Practices and Other Related Offences Commission (ICPC) contribute to the existing infrastructure of oversight, and one could look to the accomplishments of the Public Complaints Commission (Ombudsman) a relatively successful example of this model. The Public Complaints Commission has broad investigatory powers but little or no enforcement power. It may make recommendations but must rely on political or executive authorities to implement them.

Like all of the Nigerian oversight bodies I have been studying, however, their resources and staffing are quite limited, their ability to enforce their mandate circumscribed by factors beyond their control, and their impact thus far on Nigerian political and legal culture uncertain at best. Notwithstanding the existence of this accountability structure, successive international studies from organizations like Transparency International have concluded that corruption in Nigeria remains resilient, debilitating, and some would say, as intractable a problem as ever. Such organizations have consistently called for expanding and strengthening oversight bodies, increasing their
resources and capacity and enhancing their legislative independence and enforcement powers.

Based on my experience, the enhancement of the authority of oversight bodies, while desirable and necessary, is unlikely to achieve good governance. That goal only will be realized when the embrace of rule of law ideals, transparency and integrity comes from within the executive branch of government, not through the outside enforcement of the legislative or judicial branch or their various offices and officers.

Canada has its good governance challenges, to be sure, but I believe we may be nearing that important tipping point, where rule of law ideas and ideals have begun emanating not just from the court or the accountability officers, but also from within the executive branch. One important ingredient in this recipe for augmenting this culture of accountability has been, in my view, a commitment to the administrative law values discussed at the outset of my remarks – the principle that all government action must be authorized by law and take place within legal limits, the principle of procedural fairness and the principle of transparency through reasons.

These principles work best not when they are embedded in the decision-making process, part of the training of a merit-based, politically neutral public service, and reinforced by managers, and ultimately ministers. What begins with small concrete measures to demonstrate fair, reasonable and transparent decision-making can lead to meaningful and lasting change.

Administrative law may be an effective mechanism of achieving greater oversight and transparency precisely because it does not seek to second-guess the authority of political officials to make policy and spending decisions based on their democratic mandate. Unlike constitutional change, political constituencies rarely seek either to champion or subvert
administrative law developments. Administrative law appears technical and dry, and simply sets out the procedural steps and outer boundaries which enable government decisions to be made within the bounds of the rule of law. The very fact that it is unlikely to be seen as controversial makes administrative law potentially transformative. Administrative law may be particularly important in countries like Nigeria and Canada which are defined by cultural, ethnic, religious and linguistic minorities and where achieving a common ethic of public service and trust in government institutions cannot be taken for granted.

Let me give you an example of the potential of administrative law from my own office. When I became Dean of the Law School, I received a steady stream of requests from well-wishers among my colleagues and staff for meetings. I welcomed them. At the end of each meeting, the colleague or staff member instantly turned into a petitioner, with a request for funding for a particular initiative, conference, trip or piece of equipment. This, I soon learned, was the real source of power for a Dean, as certain requests would be granted and others not, for reasons undisclosed, and pursuant to no particular process. This source of power was also, of course, a real source of liability.

The Dean’s Office was seen as a place to make deals not as a place of principled decisions. Those who received negative answers to their requests assumed it was because of personal enmity or a lack of loyalty and acted accordingly. I decided there had to be a better way. I consulted colleagues and staff, developed guidelines with criteria for the disbursement of special project funds, sometimes involving the recommendations of a selection committee or an expert in the field, and requests now must come in writing and within an informal application period. If an initiative cannot be funded, I provide a brief note setting out why. I feel through this modest
reform that I have ceded none of my authority – I still ensure the criteria for funding advance the strategic priorities which I have sought to achieve as Dean. But a little bit of administrative law can change an administrative culture. Now there are fewer well-wishers seeking a meeting with me - but those who do come or who I meet in the halls, have more trust in my office and more confidence in the expenditures over which I preside. And once a step is taken down the road, the only question becomes what is the next step (there is no turning back)!

Conclusion
The power of administrative law to change a culture of decision-making is the New Frontier which I believe is worth further exploration. To achieve such a culture change, I would conclude we need not simply more entities with oversight mandates or new commitments to crack down on corruption or goals to achieve greater accountability, but rather leadership from within the state to promote these values and transparency from without so demonstrate those values are being promoted. In this way, administrative law may hold the key for advancing not only good, but also just, governance.

Thank you again for the opportunity to share these reflections and I look forward to following Nigeria’s continuing journey with kindred interest.
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