

The Lusaka Statement on Government Under the Law

**A Memorandum by the Commonwealth Secretariat and
a Paper prepared by the Hon Rodger Chongwe, SC, MP, Minister of Local Government and
Housing, Zambia**

The relevance of administrative law to just and honest government has never been more significant than today. Inherent in the Harare Commonwealth Declaration is the recognition by Commonwealth Heads of Government that the protection and promotion of fundamental rights of their peoples requires adherence, inter alia, to democratic processes, the rule of law and protection of the independence of the judiciary.

Prior to Harare, the Legal Division, now retitled the Legal and Constitutional Affairs Division of the Commonwealth Secretariat had initiated a series of judicial colloquia on the domestic application of international human rights norms. These colloquia have continued. In October 1992, a workshop, the first of its kind, was held in Lusaka, Zambia bringing together members of the judiciary, lawyers, academics, senior civil servants and other government representatives as well as the media, to discuss ways in which the administration of government business can be improved. The initiative for the Lusaka workshop, taken by the Commonwealth Secretariat, stemmed from suggestions made in the past by the Hon Rodger Chongwe, SC, MP, Minister of Legal Affairs of Zambia at the time, who had called for the strengthening of the judicial remedies available to members of the public who may feel aggrieved by the actions or decisions of government officials. It therefore seemed appropriate to us to invite the Hon Chongwe, to prepare this paper to aid the discussion by Law Ministers the agenda item relating to the Harare Declaration. At the end of the workshop the participants had agreed a concluding statement which is appropriately called **the Lusaka Statement on Government under the Law** which is in large measure an amplification of the just and honest government aspects of the Harare Declaration and which Ministers are invited to endorse.

*Legal and Constitutional Affairs Division
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THE LUSAKA STATEMENT ON GOVERNMENT UNDER THE LAW

1. Introduction

The four-day workshop on Administrative Law organised by the Commonwealth Secretariat drew its participants from Judges of the High Court and the Supreme Court, Permanent Secretaries, members of the Police Force and lawyers in the Ministry of Legal Affairs. The participants discussed fundamental issues relating to a just and honest government in the context of administrative law and practice including the role of the courts, the citizen's rights of redress and ways in which civil servants and Ministers should exercise their discretionary powers. The Lusaka Statement on Government under the law is reproduced in this article and appears as Appendix A. Those of us who studied constitutional law under the guidance and readership of "The Law of the Constitution" written by Professor Albert Venn Dicey are familiar with the Professor's comments that the English Common Law knew no administrative law. According to Professor Dicey, this phenomenon of the English Common Law distinguished it from the Civil Law of France where administrative law was then largely practised. Professor Dicey's lectures were delivered at the turn of the last century and if he were today to rise from his grave, he would be somewhat surprised to find that administrative law is very widely practised in the common law jurisdictions. These jurisdictions include the United Kingdom itself, the United States of America, Canada, Australia and New Zealand where the presence of Administrative Law Courts abound. The question may be posed; what has led to this growth and popularisation of administrative law? The answer would appear to me to be in the growth of administrative and executive power during the major part of the present century. Dicey would have remembered, if he were to come back today, of a letter which was written to him in 1896 by that great legal historian, Professor F.W. Maitland in which he said "the only direct utility of legal history (I say nothing of its thrilling interest) lies in the lesson that each generation has an enormous power of shaping its common law."¹ In so stating, Maitland was a greater prophet than even he could have foreseen; for, "it is the common law legal history which has enabled the present generation to shape the development of our administrative law by building on but un-

¹ See Cosgrove - The Rule of Law: Albert Venn Dicey: Victorian Jurist (1980) page 177.

hampered by our legal history."² Ministers of law as administrators of the law are concerned mainly with administrative justice both at the level of the quasi-judicial tribunals and the courts. In the early 1960s when I was at the Law School, it was generally thought that the prerogative orders of certiorari, prohibition and mandamus only lay against persons or bodies with judicial or quasi-judicial functions and did not lie against an authority exercising administrative powers. This distinction between judicial and administrative activities was swept away in 1964 by the decision of the House of Lords in England in *Ridge v Baldwin* 1964 AC 40. As Administrators of the law, we are concerned mainly with administrative justice both at the level of the quasi-judicial tribunals and the courts. Today judicial review lies against an inferior court or tribunal or against any persons or bodies which perform public duties or functions. In *R v Panel on Take-overs and Mergers Ex-parte Datafin Limited* (1987) 1 All ER 564, the English Court of Appeal held that the judicial review would lie against the take-over panel notwithstanding the fact that it is part of the "self-regulatory system" in the city, and does not derive its authority or powers from statute or the exercise of the prerogative.

In Zambia, with the political change that has taken place and with the determination by the new rulers to introduce economic and political reforms, our country has seen an unprecedented development of new laws affecting the lives of our people and the creation of statutory bodies, agencies, tribunals and ministerial powers under those laws. In turn these laws have placed demands on all those entities that make decisions. The Zambia Privatisation Act, the Securities Act, The Investments Act, The Financial Institutions Act, The Local Government Act, 1991 and the Bank of Zambia Amendment Act illustrate the new laws recently added to our Statute Book. The Local Government Act, 1991 has restored the autonomy and independence to the City, Municipal and District Councils which was taken away from them by the provisions of the Local Administration Act of 1980. The latter piece of legislation has since been repealed. Because of the growth of the power of the executive branch of government and the wider range of powers exercised by Administrators, it has become very necessary for their decision-making process to be reviewed.

2. Concept of Natural Justice

An individual seeks justice at the hearing of his case by administrators and finally when the administrator's decision comes up for judicial review. Not only does he expect and demand that the rules of natural justice are followed strictly by the administrator but he also expects to gain easier access to the courts to challenge ad-

ministrative action which adversely affects his rights. These expectations are rightly claimed by the individual as it is a fact that the executive in this country and elsewhere has assumed a disproportionate control over the social and executive life of the citizens; for example, the granting or refusal of licenses, and the conferring and withdrawal of privileges at an ever increasing rate. The welfare of an individual has therefore come to depend more on his rights against the executive rather than on his rights against fellow citizens. The Neil Report on administrative guidelines for the courts which was produced by a private body in England in 1988 makes very good reading. The Report's recommendations consists of good administrative guidelines for the court to adopt and adapt for appropriate circumstances and in the view that I take would form a good basis for an administrative law reform statute. At the closure of the four-day workshop, I made remarks in my speech regarding the intention by the Ministry of Legal Affairs to draft a bill styled the Administrative Justice Act in order for us to streamline administrative law in Zambia. To be included in the bill will be a statement of principles defining what constitutes good administration.

3. The Decision in R V Panel on Take-over and Mergers Ex Parte

DATAFIN LIMITED

The decision in this case lays down principles which constitute good public administration by stating that:

- (a) Good administration is concerned with substance
- (b) Good administration is concerned with speed in decision making
- (c) Good administration requires proper consideration of the public interest
- (d) Good administration requires proper consideration of legitimate expectation of interests of individual citizens however rich or powerful they may be and whether they are natural or juridical persons; and
- (e) Good administration requires decisiveness and finality unless there are compelling reasons to the contrary.

As has already been said elsewhere in this article, the Zambian Government has taken bold steps to liberalise the economy. This has meant the deregulation of most of the administrators' powers. The dangers of bureaucracy and corruption may play havoc in such a fertile field. This may stifle investment. In some instances investors have had to go to great lengths to obtain a commercial license of any kind. Our Administrative Justice

2 Civil Service [1984] 3 All ER at page 955.

Act which is being proposed will include provisions that will eliminate bureaucracy and at the same time require licensing authorities to observe statutory requirements for the granting of licences.

4. Distinction Between Private and Public Law

The popular view today is that where a person seeks to establish that a decision of a person or body of persons infringes rights which are entitled to protection under public law, he must, as a general rule, proceed by way of judicial review and not by way of an ordinary action whether for a declaration or an injunction or otherwise (see *O'Reilly v Mackman* 1982 3 All ER 1124). If a person commences an ordinary action where he should have applied for judicial review, the action will be struck out by summary process... "It would ... as a general rule, be contrary to public policy and as such an abuse of the process of the court to permit a person seeking to establish that a decision of public authority infringes rights to which he was entitled to protection under public law to proceed by way of ordinary action and by this means to evade the provisions of Order 53 of the Rules of the Supreme Court for the protection of such authorities (See Lord Diplock at page 1143.)" The intention of the proposed *Zambian Administrative Justice Act* is to override the above decision so that:

- (a) the term public law should cease to exist as the key to identifying cases that require an application for judicial review;
- (b) the leave requirement should be abandoned;
- (c) the court should have a right to order that proceedings wrongly commenced by a Writ of Summons should continue as if they were proceedings for judicial review.

A statutory provision will be included to solidify the natural justice principles so that administrators will follow rules of natural justice in their decision-making process. It is fundamental to fair procedure that both sides are heard in accordance with the *audi alteram partem* rule. This is the most far-reaching of the principles of natural justice since it embraces almost every question of fair procedure or due process. It is broad enough and it includes the rule against bias.

Under the *European Convention on Human Rights and Fundamental Freedoms* in Article 6(i) and the *Universal Declaration of Human Rights* in Article 10, it is provided that:

"In the determination of his civil rights and obligations or of any criminal charges against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." Although "civil rights and obligations" may have a technical meaning which will not include administrative matters generally, the *European Court of Human Rights* has held that these words include the rights determined by an administrative commission

and therefore falls within the ambit of administrative law.

5. The Principle of Legitimate Expectation

In the case of the *Council of the Civil Service Unions and others v the Minister for the Civil Service* (1984 3 All ER 935) the House of Lords elucidated the principle of legitimate expectation as meaning that the decision of the tribunal or of the Minister must affect some other person in the following manner:

- (a) by altering rights or obligations of that person which are enforceable by or against him in private law;
- (b) by depriving him of some benefit or advantage which either:
 - (i) he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it and on which he has been given an opportunity to comment;
 - (ii) or he has received assurance from the decision-maker that it will not be withdrawn without first giving him an opportunity to advance reasons for contending that it should not be withdrawn.

To most of our ordinary people, what has been stated here would appropriately be dismissed by them as legal trivia. To him the question is whether the judge hearing his case is sufficiently activist and sensitised in deciding in his favour in the face of the omnipotent power vested in Ministers, top administrators, and their minions.

6. The Role of the Courts

In my part of Africa, our judges have been somewhat reluctant to take a strong and activist stance where the liberty of the person has been affected. This perhaps can be explained away by the attitude of the authority which in most applications for prerogative writs took the view that the State was right and where the Courts decided in favour of the citizen, the State immediately reversed that decision by taking a political decision. The citizen expects balanced and fearless decisions from the Courts in cases where administrators have made decisions which have affected the citizens' rights. For our *Zambian judges*, I would safely say that during the latter part of the one-party state rule of our country, they had shown their courage and fortitude that as a court they could decide in favour of the citizen where his rights were violated against the State. On the other hand, the State machinery itself had matured; it was no longer necessary to reverse the court's decision by rearresting the defendant outside the courtroom. In the case of *James Chanda Kasamanda v the Attorney-General*

(Supreme Court of Zambia Appeal Number 5 of 1989 unreported), in which the appellant was detained under Regulation 33(i) of the Preservation of Public Security Regulations on the grounds that the appellant had communicated Zambian intelligence matters to South African intelligence officers; it was proved at the hearing of the case that the additional grounds upon which the appellant was detained did not exist at the time of his detention. The Supreme Court held that the grounds of detention must exist at the time that the detention order is made otherwise there can be no legal basis giving rise to such detention. These grounds must be furnished to the detainee in writing and in a language that he understands as a matter of urgency; and in any event not more than 14 days after the commencement of the detention in compliance with the provisions of Article 27(1)(a) of the Constitution. The appellant's appeal was allowed and he was set at liberty.

7. Conclusion

The nature and scope of judicial review of administrative action as a remedy is concerned with reviewing and not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself. It is therefore important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. In the words of Lord Diplock in the case of the Council of the Civil Service Unions and Others v the Minister for the Civil Service, judicial review is aimed at remedying "illegality," "irrationality" and "procedural impropriety" in the decision making process by a member of the executive or by an Administrator.

Concluding statement of the Workshop on Administrative Law held in Lusaka, Zambia, from 12-15 October 1992

THE LUSAKA STATEMENT ON GOVERNMENT UNDER THE LAW

MEMBERS of the Government of the Republic of Zambia, the judiciary and the civil service, meeting in Lusaka on 15 October 1992 together with members of the legal profession, the media and the wider public [see pages 34-39 for details] at the conclusion of a three-day seminar organised by the Commonwealth Secretariat, adopted the following statement drawn up in the light of the proceedings at the seminar:

WE express our joint belief in the central place enjoyed by an independent, impartial and informed judiciary in the realisation of just, honest, open and accountable government. These are the hallmarks of the democratic

society which our people are guaranteed by our Constitution, and which our people are entitled to expect.

WE believe that it is entirely consistent with best democratic practices for the actions of governments to be scrutinised by the courts at the instance of citizens, to ensure that decisions taken and administrative practices followed comply in all respects with the Constitution, with relevant statute and other law, and with best administrative practices - namely that administrative decisions be taken fairly, reasonably and according to law. In developing our jurisprudence in this area, the fundamental human rights provisions of our Constitution are of particular importance.

BY providing for judicial review of administrative action, the law provides not only a means for citizens to seek redress where they believe they have a grievance against official action, but also for them thereby actively to promote good administrative practice. In the non-judicial sphere the office of the Investigator-General also plays a most important role.

THE essential requirements of administrative law are that administrative action be confined to areas authorised by the law; that the rules of natural justice be followed; that each case be dealt with on its merits and without taking account of extraneous factors; that similar cases be treated in the same way; and that persons taking decisions should not have any personal or other interest in the outcome.

THE following principles reflect good administrative practice and in many instances are enforceable through the courts.

GUIDING PRINCIPLES

An administrative authority, when exercising a discretionary power should:

1. pursue only the purposes for which the power has been conferred;
2. be without bias and observe objectivity and impartiality, taking into account only factors relevant to the particular case;
3. observe the principle of equality before the law by avoiding unfair discrimination;
4. maintain a proper balance between any adverse effects which its decision may have on the rights, liberties or interests of persons and the purpose which it pursues;
5. take decisions within a time which is reasonable having regard to the matters at stake;
6. apply any general administrative guidelines in a consistent manner while at the same time taking account of the particular circumstances of each case.

Procedure

7. Availability of guidelines: Any general administrative guidelines which govern the exercise of a discre-

tionary power should either be made public or communicated (in an appropriate manner and to the extent necessary) to the person concerned, at his or her request, whether before or after the taking of an act concerning the person;

8. Rights to be heard: In respect of any administrative act of such a nature as is likely to affect adversely his or her rights, liberties or interests, the person concerned should be entitled to put forward facts and arguments and, in appropriate cases, submit evidence which should be taken into account by the administrative authority; in appropriate cases the person concerned should be informed, in due time and in an appropriate manner, of these rights;

9. Access to information: Upon request, the person concerned should be informed, before an administrative act is taken and by appropriate means, of all factors relevant to the taking of that act;

10. Statement of reasons: Where an administrative act is of such a nature as to affect adversely the rights, liberties or interests of a person, the person concerned should be informed of the reasons on which it is based either by stating the reasons in the act itself or, upon request, by communicating them separately to the person concerned within a reasonable time;

11. Indication of remedies: Where an administrative act is given in writing and which adversely affects the rights, liberties or interests of the person concerned, it should indicate the specific remedies available to the person as well as any time-limits which may be involved.

Review

12. An act taken in exercise of a discretionary power should be subject to judicial review by a court or other competent body; however this does not exclude the possibility of a preliminary review by an administrative authority empowered to decide both on legality and on the merits.

13. Where no time for the taking of a decision in exercise of a discretionary power has been set by law and the administrative authority does not take its decision within a reasonable time, its failure to do so should be open to review by a competent authority;

14. A court or other independent body which controls the exercise of a discretionary power should possess such powers of obtaining information as are necessary for the proper exercise of its functions.

Implementation

15. In their implementation, the requirements of good and efficient administration, the legitimate interests of third parties and major public interests should be given due weight, but where these requirements make it necessary to modify these principles in particular cases or specific areas of public administration, every endeavour

our should be made to conform with these principles and to achieve the highest possible degree of fairness.

ADMINISTRATIVE law in these and other ways provides a firm basis for the guidance of ministers of government and civil servants in the discharge of their duties. By upholding these principles, the judiciary serves the public interest, not only in specific cases but by providing both guidelines for future administration and remedies where these are appropriate and proper procedures have not been followed.² There is thus a creative tension between two branches of government - the executive and the judiciary - which endures to the public benefit. While it lies to the government to make and execute policy, it rests with the judiciary to ensure that policies are both made and implemented within the parameters prescribed by our Constitution and by our country's laws, and for its decisions in these as in other matters to be respected.

HOWEVER the judiciary has a broader role than this. In a democracy, the people can exercise their franchise only periodically and are empowered to remove from office those who fail to honour the trust and responsibility reposed in them. On a daily basis, it falls to the judiciary no less than to members of the legislature to hold the executive accountable under the Rule of Law, and to ensure (on the people's behalf) that government takes place on a constitutional basis and under the law. This includes ensuring that minorities and minority interests are protected under the law, for although the government is chosen by the majority, it must, in a democracy, rule for all.

FOR such procedures to function properly it is essential that:

- * the executive ensures that senior civil servants enjoy appropriate security of tenure and have a full appreciation of, and are encouraged to discharge, their own responsibilities for good administrative practice, and of the proper role of the judiciary;
- * senior civil servants ensure that their own staff receive appropriate training and guidance in good administrative practice and the basic requirements of administrative law, so as to ensure that best administrative practice is followed and that the room for individual citizens to feel aggrieved is minimised;
- * the judiciary be well-versed in the judicial review of administrative action (including, if need be, the establishment of a Division within the High Court comprising specialist judges) and be adequately resourced with up-to-date legal materials, including promptly produced Zambian law reports;
- * the legal profession be equipped both through proper training in law faculties and through continuing legal education programmes to discharge their own vital function in preparing cases that

should be brought before the courts for consideration;

- * the general public be informed - and be kept informed - of their rights and fact that the law can provide redress in cases of arbitrary, discriminatory and unfair administrative action by government, and be assured of appropriate access to legal aid; and
- * the legal procedures for judicial review of administrative action be reviewed, and kept under regular review, to ensure that it meets the expectations of Zambian society and reflects best prevailing Com-

monwealth practices.

IT IS OUR belief that if the above programme of action can be implemented effectively, the quality of administration will be consistently improved and sustained, to the ultimate betterment of the lives of all our citizens. We therefore solemnly pledge ourselves to its fulfilment and urge others who may have a part to play to join us. Our people are entitled to no less.

Lusaka

Zambia

15 October 1992