

## The Harare Declaration: The Role of the Judiciary and the Protection of the Rule of Law

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Among the many laudable achievements of the Commonwealth Secretariat, there can be no gainsaying the fact that it has been very active in the areas of promotion of good governance and the Rule of Law as well as promotion of a culture for the protection of human rights. It has performed the former through organisation of regular meetings of Commonwealth Heads of Government, such as the one held in Singapore in 1971 which produced the Declaration of Commonwealth Principles, and another in Kingston in 1975 and yet another in Harare in 1991, to mention just a few. One common thread which runs through these meetings is a recognition and reaffirmation by Commonwealth Member States of their common inheritance of history, language, culture and above all commitment to the Rule of Law and good governance. The Harare meeting produced the Harare Commonwealth Declaration, 1991 (to be herein referred to simply as the Commonwealth Declaration).

But before I consider this important document in any detail, I should mention a second line of activity of the Commonwealth Secretariat which, coincidentally had produced another Harare Declaration. With Interights (International Centre For The Legal Protection of Human Rights) it has every year from 1988 to 1993 organised and sponsored six Judicial Colloquia on the Domestic Application of Human Rights Norms and Government under The Law - at Bangalore (India), Harare (Zimbabwe), Banjul (The Gambia), Abuja (Nigeria), Balliol College, Oxford (U.K.), and Bloemfontein (South Africa) Although each of them produced its very useful conclusions, what is important in view of the theme of this paper is that the second colloquium held in Harare in 1989 produced what is now referred to as The Harare Declaration of Human Rights, of 1989 (to be herein referred as the Declaration).

So, we have before us two Harare Declarations, one by the Commonwealth Heads of Government and the other by eminent Judges and Jurists of the Commonwealth in a judicial colloquium. But let me add quickly that although they emanated from two different bodies, there were substantial similarities in their targeted objectives and results. It can be said that:

1. Each re-affirms the importance of, and the commitment of the Commonwealth to, the promotion and protection of human rights. By each accepting that the

International Bill of Human Rights is the cornerstone of international human rights, each expressly or impliedly accepted such positive rights as liberty, equality of rights of individuals under the law, security of human beings, fair trial and effective remedy by competent national tribunals, freedom of movement, peaceful assembly and association, nationality, right to own property and right to take part in the government of one country. These are guaranteed, also they express their commitment to certain freedoms such as freedom from discrimination, torture, arbitrary arrest, detention and exile and degrading and inhumane treatment.

2. Each accepts it as a fact that due to modern developments, particularly in the areas of communication and transportation, the world is no longer locked in the cast iron confinement of cold war, isolationist territorialism, or other physical or ideological constraints. Rather the current theme is universality - democracy everywhere and justice for all - in the spirit of the United Nations and other international institutions.

3. Both the Heads of Government on the one hand and the Judges and Jurists on the other reaffirmed their strong collective commitment to the principles of justice and the Rule of Law and independence of the judiciary.

4. Whereas in the Commonwealth Declaration the Heads of Government addressed such political issues as the future of the Commonwealth, the importance of development administration, South Africa, disarmament sanctions, Namibia, Mozambique, Angola, Belize, Cyprus, the Mediterranean, the Middle East, Asia, terrorism, drug abuse, world economic order and other and global issues, in the Declaration, the Judges and Jurists underscored the vital role of judges and jurists in the promotion and enforcement of human rights, their necessary preparation and equipment for carrying forward their task in that regard and their correct approach thereto.

5. In a nutshell, both documents laid special emphasis on good governance as a *sine qua non* for security, peace and progress in the Commonwealth.

My assignment is to take the judicial angle and take a closer look at the role of the judiciary in the proper execution and furtherance of these vital objectives, a separate paper having been prepared from the point of view of the Attorney-General.

## ESSENCE OF GOOD GOVERNANCE

In the best tradition of the Commonwealth, indeed all common law countries, the essence of good government is to rule according to law and social justice. The aspect of social justice which deals with distributive justice is in the province of the responsibility of the politician and, therefore, outside the scope of this paper. What concerns us here is justice according to law; justice administered by the courts. In short, we are concerned with the Rule of Law.

## THE RULE OF LAW

In ordinary parlance, the expression Rule of Law, derived from the French phrase *le principe de légalité* (the principle of legality), means a state of governance based on principles of law and not the rule of men. Dicey saw it as entailing:

- (i) Absence of discretionary powers in the hands of government officials - a rejection of arbitrariness.
- (ii) That the act of governance must be according to the ordinary laws of a country, administered by ordinary courts - that is absence of special privileges for government officials and public functionaries; that every body must be governed by and according to law duly passed by the appropriate organ of government and administered by the ordinary courts.
- (iii) That the rights of the people must be determined according to law.

Sir Edward Coke also propounded:

- (iv) That no-one is above the law.

The point that must be emphasised is that the concept of the Rule of Law represents an ethical code for the government's exercise of its powers in any democratic country. It has both positive and negative aspects - its dos and don'ts. Its powers must be exercised according to the constitution, the laws and the rules, including the rule of natural justice - as interpreted and applied in ordinary courts and tribunals.

## MODERN APPLICATION

In trying to apply the concept of the Rule of Law to our present day principle of good governance within the Commonwealth, it must be observed that most Commonwealth countries, with the exception of Great Britain, have constitutions which are not only written but supreme. Whereas in Britain most of Coke's and Dicey's ideas of the implications of the Rule of Law still hold good, it is important for courts in countries where the written constitution, and not parliament, is supreme, to note that the concept of the Rule of Law has wider implications. In such countries, it implies:

- (i) That the constitution is the yardstick of measurement of the validity of all laws, regulations, and

rules and that any of them which is inconsistent with or runs contrary to the letters or the spirit of the constitution can and ought to be declared *ultra vires* and void to the extent of the inconsistency. Several cases decided by the Supreme Court and the Court of Appeal of Nigeria illustrate this principle. Reference may be made to *Anretioila v Labiyi* [1977] 4 NWLR (PT.63) 34, CA, *Hausban (Nig.) Limited v Irinoye* [1989] 2 NWLR (PT. 104) 458, *AG Ogun State v Aberuagba* [1985] IN WLR (PT.3) 395, SC. Every court in such a country should therefore see the constitution as the organic law from which other laws must draw their validity.

- (ii) It also implies that each arm of government or agency thereof confine itself within its area of responsibility, in accordance with the constitution and must not abut into the province of the other arm. This is the doctrine of basic structure, according to the Supreme Court of India in the case of *Kesavananda Bharati v State of Kerale* [1973] 4 SCC 225.

A similar line was taken by the court in the case of *Indira Nehru Ghandi v Raj Navain* [1975] Supp. SCCI and *P Sambamurthy v State of AP* [1987] ISCC 362. The same was taken by the Court of Appeal and by the Supreme Court of Nigeria in the case of *Ojukwu v Governor of Lagos State* [1985] 2 NWLR 806, CA and *Governor of Lagos State v Ojukwu* [1986] IN WLR 621, SC in which the governor used armed soldiers and policemen to evict Chief Ojukwu from a property in dispute between him and the government while the case thereon was pending in court. In the Court of Appeal, I held that whatever right of self-help that might have been available to the Executive it terminated when the matter was turned over to the courts for adjudication. I relied upon the principle of separation of powers enshrined in sections 4, 5 and 6 of the Constitution, 1979. The great French political thinker, Montesquieu, had in his *Spirit of The Laws*, in the 18th century, thought that the secret of success and stability of the British Constitution was the separation of legislative, executive and judicial functions of government among the three arms thereof. Although, as Professor G H Sabine has observed,<sup>1</sup> he started upon wrong premises and based his judgement upon evidence which was substantially defective, his main conclusion in this regard has been accepted. He said:

"Political liberty is to be found only when there is no abuse of power. But constant experience shows us that every man invested with power is liable to abuse it, and to carry his authority as far as it will go ... To prevent this abuse it is necessary from the nature of things that one power should be a check

on another ... There will be an end of everything if the same person or body, whether of the nobles or of the people, were to exercise all three powers".<sup>2</sup>

This view which was accepted by James Madison, one of the founders of the United States, found expression in the Constitution of the United States. It has also been accepted in the written constitutions of many states of the Commonwealth. Applying the principle in *Ojukwu's case* (supra), I had no difficulty in finding that the action of the Executive at a time when the case was pending in court was unconstitutional. Agreeing with me, the Supreme Court called the action of the Executive "executive lawlessness" which tantamounted to a deliberate violation of the Constitution. Obaseki, J S C, summed up the point at page 636 where he stated:

"In the area where the Rule of Law operates, the rule of self help by force is abandoned ... Once dispute arises between a person and government or authority and the dispute has been brought before the court, thereby involving the judicial powers of the state, it is the duty of government to allow the law to take its course and allow the legal and judicial process to run its full course."

Problems sometimes arise when a country has fallen into a military regime, and not under a civilian government. The Military often passes laws which virtually collect all the powers of the three arms of government into one. The recent experience in Nigeria where the Chief Executive decided upon report that an election had been rigged and ought to be nullified is a case in point. One may ask: why was it not left to the judiciary to examine all the available evidence about the election and alleged rigging to find out whether in fact it was rigged contrary to the report of all the international observers? However, as this is still a live issue, I shall confine this paper to normal democratic situations.

(iii) The third implication of the concept of Rule of Law in such a state is that each arm, functionary and/or agency of government performs its functions properly according to the constitution and the laws and that no-one within the state is above the law. The position and functions of each of them are usually defined and circumscribed by the constitution and the laws.

Each of them is expected to perform within the purview of the constitution and the law: any act outside the ambit of the constitution and the laws is unconstitutional or unlawful.

(iv) The fourth implication of the concept is that every individual in the state enjoys a plenitude of his fundamental rights which have been selected, enshrined and guaranteed in the constitution of his country as well as other human rights stated in in-

ternational instruments, general or regional, to which he is entitled by virtue of their ratification and incorporation by his state. In this regard, it is noteworthy that the two Covenants of 1966, one on Civil and Political Rights and the other on Economic, Social and Cultural Rights, which set out to transform the 30 Articles of the universal Declaration of Human Rights (1948) - "The common standard of achievement for all peoples and all nations" - to a code of binding international law have, through adoption of multilateral treaties, been incorporated into the laws of many Commonwealth countries through ratification and accession. By June, 1987, the International Covenant on Economic, Social and Cultural Rights had 90 state parties, 19 from the Commonwealth. By the same time, the International Covenant on Civil and Political Rights had 87 state parties, 17 from the Commonwealth.<sup>3</sup> Many more states have since followed suit. These Covenants now constitute the core of international human rights law, as universally agreed, and define and underscore the obligations of states with respect thereto. Added to these are the Conventions on Slavery, Genocide, Torture, Refugees, Apartheid, Racial Discrimination, Discrimination Against Women and one on The Rights of the Child. Furthermore, there are Regional Covenants to which many of the countries of the Commonwealth are parties. The European Convention on Human Rights, The European Charter, The Inter-American convention on Human Rights come within this category. I scarcely need to mention that an obligation which a state has undertaken under international law is as binding as one, say, under a contract in municipal law. Besides, experience shows that most manifestations of turmoil and violence in society in different parts of the world are traceable to violations of these rights, which states have undertaken to protect but fail to.

(v) The next implication of the concept is that no person within the state shall suffer any criminal or civil disability without due process of law. At common law the courts have always insisted that all procedure - criminal, civil and administrative - must always be not only lawful but also fair and reasonable. No discretion given to any authority is deemed to be absolute: *Padfield v Minister of Agriculture* [1968] AC 997. The concept of unfettered discretion to an administrative body is a constitutional blasphemy. As first conceived in the United States, (See e.g. *Bank of State v Cooper*, 2 Verg. 599, 603 (1831) and *White v White* 5 Barb 474, 484 (1849)) and it later found constitutional expression in the 14th Amendment to the U S Constitution, the expression simply means that legal procedure must be lawful, fair and feasible in the

light of existing values and capabilities.

Further, it was provided in section 10 of the Administrative Procedure Code, 1964, that a reviewing court shall hold unlawful and set aside agency action, finding and conclusion found arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law".

This provision was interpreted and enforced in many cases decided by the US Supreme Court, including *Citizen to Preserve Overton Park Inc. v Volpe* 425 F. 2d. 79 (1970) and *Barlow v Collins* 397 US 159 (1970). So, the concept of due process is one which has set a standard test of validity for all persons or authorities for their exercise of their discretion. Such a discretion cannot be exercised arbitrarily or absolutely. This is another important implication of the Rule of Law.

(vi) The last, but not least, important implication of the Rule of Law concerns all those who have to decide issues affecting the rights and freedoms of individuals in a state. I am dealing with it last, not only to emphasise its importance but because it covers another area in which the Commonwealth Secretariat has carried out and sponsored a special and important exercise. Moreover, it covers an area in which all who have to decide anything in government - heads of government, ministers, public and corporation servants come face to face with most members of society. The principles are even applicable to non-government organisations - trade unions, professional bodies, and so on - all areas of our judicial review.

From the 12th to the 15th of October, 1992, the government of Zambia in collaboration with the Commonwealth Secretariat, under the able leadership of Mr Jeremy Pope, mounted a workshop on Administrative Law, at which all sectors of The Administration and corporate bodies in Zambia were represented by 109 officers. I happened to have been one of the three Consultants, the other two from the United Kingdom and India. The need for and importance of this workshop was informed by the frequency with which administrative decisions were upset by the courts when they came under judicial review.

The situation is not peculiar to Zambia. Indeed, in the United Kingdom by 1974 the number of cases in which administrative decisions were upset by the courts in exercise of their power of judicial review had risen to 1,230 in England and Wales and to almost the same number in Scotland. The urgent need was felt for government to give some guidance to those who had to decide for government and its agencies as to how they could do so without falling foul of the law. The Management and Personnel Office of the Cabinet Office had to issue an

administrative pamphlet titled "The Judge Over Your Shoulder" for these purposes. This has been very helpful in reducing the number of faulty decisions in the United Kingdom. In Nigeria, suspected wrong-doers in government,<sup>4</sup> in the Universities,<sup>5</sup> in professional bodies<sup>6</sup> and so many other areas have had decisions against them aborted or reversed by the Courts.

Back to Zambia: after the workshop and after fully deliberating upon and considering the issues raised by such decisions, a final statement now known as "The Lusaka Statement of Government Under the Law" was issued. Concluding that judicial review of such decisions was not only a desideratum but an absolute necessity a number of guiding principles which, if implemented, could avoid the undesirable and unpleasant consequences of any upset were issued. For reasons of limitations of time and space, I shall set out only the general guidelines.

### 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 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."

Then it proceeded to set out the desirable procedure and dealt with such specific issues as availability of guidelines, right to be heard, access to information, statement of reasons and indication of remedies. Then it also examined the issue of judicial review, implementation, the role of administrators and the judiciary and factors which can enable the set procedures to function properly. These are in my view, the attributes of the Rule of Law as well as the essentials of good governance in the process of deciding issues in a democratic state.

### THE JUDICIAL ANGLE

It must be conceded that in a democratic state, a constitution and laws with a human face, clear and unambiguous statements of principles and of rights and

freedoms in the constitution and other international instruments which have been incorporated into the laws of the particular state, good laws and rules of their application are all essential. But without an efficient, courageous, knowledgeable, incorruptible and independent judiciary all those fine statements in the constitution and the laws will come to very little in practical terms, because they will not be effective. This is because the judges of a democratic country are the guardians of its constitution, the promoters and enforcers of human rights, the interpreters and enforcers of all laws, the adjudicators in any dispute between the citizen and the state or between citizens *inter se*.

It must be pointed out that the position usually assigned to the judiciary by most, if not all, the constitutions of such countries is a delicate but most vital one. It is expected, as the guardian of the constitution, to oversee the functions and roles of the other two arms of government. At the same time, it is expected to play its constitutional role with reasonable care, caution and restraint; it is not expected to throw its weight about or open its mouth with reckless abandon.

Several cases decided in Nigeria during the Second Republic (1979 - 1983) show how the national judiciary ably played this role with the requisite care, caution and restraint. In the case of Shugaba Abdulrama Darman v The Federal Ministry of Internal Affairs [1981] 1 NCLR 4, the courts held that the President exceeded his executive powers when he tried to deport a citizen from his country. Similarly, in Attorney-General, Bendel State v Attorney-General of the Federation & 19 Others [1982] 3 NCLR 1, the Supreme Court checked the National Assembly from abusing its legislative power by delegating its legislative powers over a money bill to a committee of nineteen rather than having it dealt with by the whole membership of the Assembly as contemplated by the Constitution.

But the courts had always to apply their delicate powers in this respect with necessary care, caution and restraint. It always refused to interfere with matters which were the exclusive preserve of and the internal affairs of the other two arms of government. Adefarasin, C.J., made this point very clear in the case of Senator B C Okwu v Senator Dr Wayes & Others. [1981] 2 NCLR 522, at pages 527-528 where he was called upon to adjudicate on aspects of the new Standing Rules of the senate. He stated:

"I am of the firm view that the courts cannot interfere with the internal affairs of the National Assembly or the arrangement or conduct or organisation of its business. The court cannot sit in judgment over its deliberations or otherwise reverse its decision unless there has been a violation of any provisions of the constitution .... With respect, this court (and if I may say so, any court in Nigeria) cannot interfere in the internal proceedings of the Legislature. Any such interference would amount to

an arm of the Government (in this case the judiciary) imposing its control in the house of another, who is master there".

Similar pronouncements were made by other Judges and other courts in the system.<sup>7</sup>

## OTHER LIMITATIONS

In view of the topic of this paper, other limitations to the exercise of judicial power ought to be mentioned. Paramount is the issue of jurisdiction. The court must always satisfy itself that it has jurisdiction before it can exercise its power. Without jurisdiction any exercise of its powers will be contrary to the concept of the Rule of Law. See: Bronik Motors Ltd. v Wema Bank Ltd. (1983) 6 SC 158. Akin to this is the court or judge being called upon to perform a function which is not judicial, such as being asked to give its/his advisory opinion in advance, say, in order to forestall future litigation. The court or judge must always resist and refuse to play such a role. As early as 1792 the issue arose in the United States. In Hayburn's case where the judicial arm was required to give its advisory opinion on a legislation under consideration by Congress and the Executive, the Supreme Court of the United States stated:

"That neither the legislative nor the executive branches can constitutionally assign to the judicial any duties but as are properly judicial, and to be performed in a judicial manner. That the duties assigned to the circuit courts by this act are not of that description (as) it subjects the decisions of these courts, made pursuant to those duties, first to the consideration and suspension of the Secretary at War, and then to the revision of the legislature, whereas by the Constitution neither the Secretary at War, nor any other executive officer, nor even the legislature, are authorised to sit was a court of errors on the judicial acts or opinions of this court".

It follows from what I have been saying that no member of the judicial arm of government has a constitutional role to hover around the corridors of power, be they of legislative or executive power. Such a manoeuvre erodes the independence of the judiciary. Also, as the basic function of the judge is to interpret and apply the constitution and the laws in matters in litigation before the courts, such extra-judicial undertakings, no matter how necessary for the other arms of government, are unconstitutional. Exercise of judicial power is limited to "cases", and "controversies": Marbury v Madison, 1 Cranch. 137, 2 L. Ed. 60 (1803). The proper adviser of government in such a case is the Honourable Attorney-General with his Ministry of Justice. The next important limitation to the exercise of judicial power is the question of standing. Without a *locus standi*, a plaintiff cannot prosecute a suit on an issue as the court has no business with busybodies. See Adesanya v The President [1981] 5 SC 112. Where a plaintiff has a *locus*

*standi* and there is a dispute or controversy with his adversary over a justiciable issue, then there is a cause suitable for judicial resolution. Other questions, which often go with standing but are procedural rather than going to the *vires* of the court are those of ripeness and limitation by statute. The court cannot to into the case of all unless in fact the cause of action has accrued and is not statute-barred.

When none of the above limiting factors are present in a case and the matter is properly before the court, then the court in a democratic country can then exercise judicial powers over it. Unfortunately the military sometimes intervenes, but, as I have stated, the military in government is an aberration which I do not want to deal with in this paper. But, happily, experience in Nigeria during the Second Republic (1979 - 1983) shows how as elsewhere the judiciary was able to fulfil its role. It played a very well its role as the guardian of the Constitution: I have already cited *Shugaba's Case* (supra) and the case of *Attorney-General of Bendel State v Attorney-General of the Federation* (supra where it checked the excesses of the Executive and the Legislature respectively). I have shown how it applies restraint in so doing. It also ably protected the fundamental rights and liberties and enforced other rights and obligations of individuals. I cited the case of *Ojukwu v Governor of Lagos State* (supra) in this respect. When it found itself in the political arena by being called upon to adjudicate in cases of disputed election then, as it could not like its US counterpart avoid it because it raised a political question it tried to do its best, although no less a person than Professor B O Nwabueze thought that the judiciary should have been saved the pains.<sup>8</sup> By invocation of its powers of judicial review, it intervened in many administrative decisions that were made contrary to principles or the rules. I referred to cases of *Garba* (supra) and *Laoye* (supra), as examples.

The above are but instances of the important roles of the judiciary in a democratic state. I believe it is apposite to conclude this paper by quoting and adopting part of the Lusaka Statement where it says:

"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".

I should quickly add that there are two faces to the coin, two co-ordinates to justice and the Rule of Law, to wit; the bench and the bar. It hardly needs emphasis here that Attorney-General is the Chief Legal Adviser of the government, particularly in the discharge of its legislative functions and, in practical terms, to its delegate the Executive, as well as the official head of the bar. The position and functions of the Attorney-General are, however, outside the purview of this paper, much as I would have liked to draw from my two-and-a-half experience as an Attorney-General. But I would simply make to short points. So much of proper guidance of the other two arms of government depends on the Attorney-General. It is also important to emphasise that when the judicial arm does its work well, but has to, and does, decide against the government, it does not do so because it wants to be confrontational. It had to do so in the true spirit of its constitutional function and duty: it is by the constitution a constructive opposition to government. As such, it supports when it can properly do so; it guides when it needs to; and it blocks when it must.

## REFERENCES

1. See Sabine: *A History of Political Theory* (ed).
2. See *The Spirit of the Laws*, Book 11, Translation by T Nugent.
3. See: Seighart: *An Introduction to the International Covenants on Human Rights* (Commonwealth Secretariat) at pp.2-3.
4. See eg. *Laoye v Federal Civil Service Commission* [1987] 2 NWLR 652 S C, *Garba v Federal Civil Service Commission* [1988] 1 NWLR 449, SC.
5. See eg. *Garba v University of Maiduguri* [1986] 1 NWLR 550, SC.
6. See eg. *Legal Practitioners Disciplinary Committee v Fawehinmi* [1985] 2 NWLR 300. SC.
7. See Chigbue J in *Bello v Sani & Others* [1981] 3 NWLR 831; Balogun, J, in *Ladejobi v A G Federation* [1981] 3 NCLR 563; The Court of Appeal in *A G Oyo State v L O Adeyemi (Alafin of Oyo) & Others* [1981] 3 NCLR 846; and Nasir P Kazeem, Nnaemeka-Agu, K Whyte and JJCA (as they then were) and Eite, JCA in *President of Nigeria v Adesanya* [1981] 3 NCLR 306.
8. See: Nwabueze: *Nigeria's presidential Constitution 1979 - 1983*, Chapter 14.