GOOD GOVERNMENT AND ADMINISTRATIVE LAW - AN INTRODUCTORY GUIDE

A MEMORANDUM BY THE COMMONWEALTH SECRETARIAT AND A PAPER PREPARED BY PROFESSOR A W BRADLEY AND DR C HIMSWORTH

In 1992 in Lusaka, Zambia, the Commonwealth Secretariat held the first in a series of administrative law workshops the object of which is to bring together senior pubic officials with a view to exposing them to an appreciation of the relationship between administrative law and good governance. The Lusaka Workshop gave birth to *The Lusaka Statement on Government under the Law* which Law Ministers endorsed at their 1993 Meeting in Mauritius as a notable contribution to administrative law and commended the principles it contained as valuable examples of good practice.

Subsequent workshops held in pursuance of the objectives of the series have not only affirmed the Lusaka Principles but they also have sought to develop these principles in ways that lend them to a more practical everyday application.

Arising from a perceived need of public officials, whose decisions and actions in the exercise of their public duties necessarily affect the general public in their everyday lives, and in response to a demand expressed in the course of the workshops, the Secretariat commissioned the preparation of a guidebook on administrative law and good government which could serve as a manual for all public officials to assist them, when carrying out their public duties, to act in accordance with the law.

The guidebook which has been prepared to assist ongoing work in furtherance of the promotion of the fundamental values of the Commonwealth accompanies this Memorandum in the form of a paper and is placed before Ministers for their information. The guidebook is being circulated separately to all the workshop participants and to governments in the form of a publication.

GOOD GOVERNMENT AND ADMINISTRATIVE LAW - AN INTRODUCTORY GUIDE

A Paper prepared for the Commonwealth Secretariat by Professor A W Bradley, Emeritus Professor of Constitutional Law, University of Edinburgh and Dr C Himsworth, University of Edinburgh

A. THE ROLE OF LAW IN GOVERNMENT

1.1 Within the Commonwealth today, two aspects of the role of law in government stand out. The first is the extraordinary diversity of constitutional systems of government within the many member states. Because of differences in their history and in current circumstances, states have very different structures for such matters as:

- the appointment or election of the head of state and/or the head of government;
- whether the country is a republic or a monarchy;
- the composition of parliament (whether in two chambers or one) and the form of elections;
- the relationship between government and Parliament;
- decentralising government to separate states (in a federal system) or to local government.

1.2 Secondly, despite this diversity, the legal systems of the member states share one common feature, namely the fundamental principle that, in a democracy, all powers of government and administration must be conducted in accordance with the law - and that every holder of public office is subject to the law.

1.3 The principle of 'government according to law' operates at two levels. First, at the level of constitutional law. In very many states, the constitution is placed in a position of supremacy over all other forms of law, including the laws made by Parliament itself. If there is any conflict between the terms of the constitution and the contents of an Act or ordinance, the courts must give priority to the constitution.

1.4 This important rule guarantees to citizens fulfilment of the 'promises' made in the constitution itself. It ensures that the legislators respect the human rights provisions in the constitution - and, in a federal system, that the devolution of power to states or provinces is upheld. Since the constitution is paramount, the 'fundamental law' which it contains binds those who exercise executive and legislative powers. Even the elected parliament must ensure that the laws it enacts comply with the constitution. If such laws do not so comply, they may be held by the courts to be 'unconstitutional'.

1.5 The second level at which the principle of 'government according to law' operates is that of administrative law. This branch of law applies where powers have been granted by legislation to central or local government, or to other public bodies - whether to provide services needed for the benefit of the whole community or to place under public control (by means of regulation) the economic activities of private persons or companies.

1.6 Just as legislation by Parliament must itself conform with the constitution, so too what Parliament has laid down must be observed by public authorities. In respect of public administration, it is the task of the courts to ensure that the terms of legislation are carried out and enforced by public bodies. How this can be done is examined later in this booklet. But the essential principle is that laws that have been made with constitutional authority, must not be ignored or subverted by private or public bodies.

1.7 An unfortunate but currently passing development has been the emergence in recent years of one-party or military regimes, during which undue pressures have been placed on the working of the normal principles of legality. In such situations, the role of the courts has been critical and the need for judicial review of administrative action is even more compelling.

1.8 It is worth recalling the words of Commonwealth Heads of Government meeting at Harare in October 1991. Having first re-affirmed their commitment to their belief in the liberty of the individual under the law, in equal rights for all citizens, and in the right of all individuals to take part in free and democratic political processes, the

Heads of Government undertook to promote "the protection and promotion of the fundamental political values of the Commonwealth:-

- democracy, democratic processes and institutions which reflect national circumstances, the rule of law and the independence of the judiciary, just and honest government;

- fundamental human rights, including equal rights and opportunities for all citizens regardless of race, colour creed or political belief".

It is the purpose of this booklet to work out the implications of these values for all those who are concerned in Commonwealth countries with government and public administration.

B. ACCOUNTABLE GOVERNMENT

2.1 The principle that public affairs must be dealt with on the basis of legality applies in an important way to the day-to-day conduct of government and administration. At the heart of the 'rule of law' doctrine, the principle of legality is one of several principles which promote accountable government. For accountability to be achieved, a public agency must be accountable to other public bodies which are able to scrutinise that agency's work from an independent position.

2.2 There can be no doubt that the central function of government - whether at the level of ministers, civil servants, public corporations or local authorities - is to govern. Those in office are given power and authority by the constitution and by Parliament to carry out their tasks on behalf of the people. They have statutory powers and duties, many of which are cast in broad terms to give both politicians and officials flexibility to discharge their responsibilities in the public interest.

2.3 What accountability requires, however, is that the powers given to government are neither absolute nor without limits. One of these limits on government is that these powers are exercised in accordance with principles of good administration.

2.4 These principles require that public administration:

- must be honest and not corrupt;

- must be conducted to serve the public at large, not the private interests of those in the public service;

- must observe the rules of good financial practice;

- must be efficient, responsive to the needs of the public, and conducted without undue delay or inconvenience to citizens.

2.5 Many more qualities could be added to this list. These indicators of good administration are endorsed in the education of all administrators. Indeed, systems of training, supervision and discipline within the public service are probably the most effective means of ensuring high standards.

2.6 But external systems of supervision and control are also essential. These include:

- financial audit (for example, by the Auditor-General);

- an ombudsman, or a citizens' protector, or a presidential commission of inquiry, to investigate injustice and maladministration and propose a remedy for the citizen whose complaint is justified;

- parliamentary supervision and control, for example in relation to delegated legislation, or by the use of committees of MPs;

- courts and specialised tribunals;

- human rights commissions, which may (depending on their mandate) investigate alleged violations of human rights and recommend appropriate remedies;

- integrity commissions, whose mandate may be to maintain proper standards of public life and to enforce codes of conduct for politicians and administrators.

2.7 These forms of scrutiny serve two broad purposes. First, they help to redress grievances of the public, by giving individual citizens a remedy for an injury done to them or by assisting them to obtain a remedy. Second, they provide a means of ensuring improvements in administration for the future.

2.8 Often, the redress of grievances can be combined with improving the quality of administration. Justice and fair play for the

individual complainant may lead to changes providing a better standard of service across the board. For this reason, although scrutinising bodies must be independent from government itself and may need to criticise executive action, they share with those in government the same goal, namely a higher quality of service for the public.

2.9 In the constitutions of many Commonwealth countries, the rights of the people to lawful and just administration are taken for granted rather than being spelled out. However, section 24 of the provisional Constitution of the Republic of South Africa provides as follows:

"Every person shall have the right to:-

(a) lawful administrative action where any of his or her rights or interests is affected or threatened;

(b) procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened;

(c) be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public; and

(d) administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened."

C. CONTROL BY THE COURTS

3.1 In the process of protecting the rights of the people to lawful and just administration, the courts, exercising their powers in administrative law, play a crucially important role. Their duty is to ensure adequate legal standards in the conduct of government. They operate by granting remedies to individuals and their power to do this can lead to lessons being drawn which assist in improving public administration.

3.2 The means by which the courts perform this function range widely. The criminal law (including anti-corruption laws) enforces minimum standards of honesty in public administration. In the civil courts, actions can be brought to enforce contracts entered into by governmental bodies, or to claim damages for injuries caused by the unlawful acts of public servants.

3.3 In many countries, individuals may exercise statutory rights of appeal against certain categories of administrative decision. Such appeals may go direct to the ordinary courts or they may go instead to tribunals, boards or committees established to hear particular types of appeal.

3.4 The main focus of this booklet is on the broad jurisdiction of the superior civil courts (which for convenience we will refer to as the High Court) to require public authorities to observe the law, in particular by granting judicial review of their decisions.

3.5 Access to the High Court for this purpose is often by a procedure known as an "application for judicial review". Although the court has a very broad power to decide on the legality of official decisions, the manner in which that power is used largely depends upon the court's own procedure and case-law. The law of judicial review is not confined to one specific area of government, such as the granting of permission to develop land or the licensing of traders. On the contrary, judicial review applies to virtually the whole range of governmental functions.

3.6 Judicial review often requires the High Court to apply broad principles of public law to the specific facts in the case before it. In doing so, the court must take account of relevant legislation, in particular the statute conferring the administrative powers in question. The court must decide what the text of that legislation means, a process which is carried out by the judges against a background of established principles of interpretation. These principles assist the court in deciding what the legislature intended to achieve in granting the powers under consideration.

D. JUDICIAL REVIEW OF PUBLIC ACTION - THE COURTS AT WORK

4.1 We have seen that judicial review of administrative decisions taken by public authorities - 'judicial review' for short - is based on the principle that government should be conducted according to law. This duty includes the duty to observe any requirements in the constitution that may relate to public administration.

4.2 If we take the example of a licence that an individual or a company needs to be able to open a new business, say an import and export trading business, a vehicle repair works, a mineral-working plant or a market stall. The need for a licence will

be found in an enacted law.[1] Without such an Act, a licence will not be required, since in general anyone is free to carry on activities that are not restricted by legislation. And in the absence of such an Act, no public authority is able to point to any power as the basis for requiring a licence.

4.3 Assuming that such an Act is in force, it will probably also cover such matters as the following:

- the identity of the licensing authority; that is, the public body or official with power to grant or refuse the licence;
- the procedure which an applicant must follow in applying for the licence;
- the procedure which the licensing authority must follow in making a decision;
- the fee, if any, that can be charged for dealing with an application and for issuing a licence;
- the matters which may affect whether or not a licence should be granted;
- whether members of the public or other traders have a right to object to the grant of a licence;
- whether any conditions may be imposed on the grant of a licence;
- whether an applicant can appeal against a refusal of a licence or the imposition of conditions and, if so, which body or official must decide the appeal.

4.4 Let us assume further that the individual applies for a licence and this is refused; he/she appeals to an appeals board, and the appeal fails. Assume too that the individual insists that the licence ought to be granted and asserts that the procedure was flawed and/or that the decision was wrong.

4.5 In such a case, because of the effect of the refusal of the licence on the applicant, he/she may come to the High Court and ask for judicial review of the decision. To succeed on judicial review, he/she must show that something has gone wrong in law that makes the refusal defective or invalid.

4.6 What kind of complaints might enable the applicant to seek judicial review? The following are examples of complaints which an applicant might have:

1. the licensing board refused the licence because the applicant was a member of a small church that was known to be critical of the government or because the applicant's brother was an opposition politician;
2. the application failed after someone in authority (an official, or a Minister) had told the applicant even before the application was made that the licence would never be granted;
3. the application failed because (in the case of a proposed cinema) the hall had no air-conditioning and no emergency exits;
4. the licensing board said that the licence would be granted only if the applicant would make an annual payment to the licensing authority;
5. the board refused a licence (for a vehicle repair works on land owned by the applicant), saying that the works would be unsuitable in that part of the town, even though the applicant had obtained a development permit from the land use planning authority;
6. a similar application was refused because there were already two vehicle repair works in the town and the board was told by their owners that they were running at a loss.

4.7 In all these cases, the applicant's primary grievance is that the licence was refused. But to succeed in an application for judicial review, the applicant needs to be able to show that the refusal occurred for a reason or by a procedure that was unlawful. Thus he/she must be able:

- by producing evidence, to show what went wrong; and
- to satisfy the court that the errors made were sufficient to invalidate the refusal.

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[1] The term used for primary legislation is not uniform and may include Act of Parliament, ordinance, measure etc. Here the term 'Act' will be used to refer to primary legislation. Secondary, or delegated, legislation may also be described by many terms (such as regulations, rules, schemes, orders, byelaws and so on).

4.8 Of course, the licensing board may not agree that anything went wrong, nor (if mistakes were made) that they were serious enough to make the refusal unlawful. In example 3, for instance, it would be surprising if a cinema licence could not be refused if a cinema had no emergency exits! But example 6 raises what may be a difficult point of law, since many Licensing Acts do not state whether a licence is a way of restricting the amount of competition in a particular trade or industry. Some licences are imposed as a means of raising revenue. Other licences are required in order to maintain minimum standards of public health, public safety and so on.

4.9 When such a dispute comes to court, the judge must decide whether the applicant has a good case in law, or whether the licensing board acted in a lawful manner. In this situation, much will depend on what the Licensing Act says. Sometimes, but not always, the Act may indicate clearly what the relevant indicators are for granting or refusing a licence. If this is not the case, the court will have to interpret the Act to decide the proper scope of the board's powers and duties.

4.10 If the applicant succeeds, the court will quash (set aside) the refusal; this means that the original application for a licence still stands and must be considered afresh and the court may order that this should occur. However, if the court is not persuaded by the applicant's case, the application for judicial review fails.

4.11 Another illustration of the crucial role of the judges in interpreting legislation is to be found in the situation where a licence has been held for some time but is then cancelled by the licensing board.

Example: suppose that A has had a licence for a cinema and has run it well for five years; recently, some complaints are made about him (for example, that he is often drunk or abusive to customers, that he shows unlicensed films, or that the equipment in the cinema keeps breaking down); because of these complaints, the licensing board decide to cancel the licence. This means that the cinema must close down.

4.12 Before taking this decision, the licensing board must be certain: -

(1) that it has power to revoke the licence;

(2) that it may use this power for reasons such as those stated above;

(3) that the complaints are in fact well-founded (and not the result of malice or gossip); and

(4) that the licence-holder is told of the complaints and is given a full opportunity to respond to them before the board decides to cancel the licence.

4.13 Point (4) illustrates the importance of judicial interpretation of the law. Even though there are no words in the Licensing Act requiring the licensee to be given notice of the complaints, the court will apply the rules of natural justice. This means that the licensing board must give the licensee notice of the complaints and the opportunity of a hearing before a decision to revoke the licence is taken. If the board does not do this, the court will hold:

(1) that the board took the decision without properly informing itself as to the facts; and

(2) that the board did not act fairly in revoking the licence.

Subject to what the Act itself states, the court will probably rule that the Licensing Act did not authorise the board to take away the licence without the licensee having had a hearing on the allegations against him.

4.14 After considering these illustrations of judicial review in action, we now look in more depth at the law that applies in this area. We look first at the grounds of judicial review, before considering in section F. the remedies which the High Court may give, the rules about who may seek judicial review, and some questions about procedure.

E. THE GROUNDS OF JUDICIAL REVIEW

5.1 In many countries whose legal system has evolved from the English common law, the grounds upon which the courts may review official decisions have been developed by the courts over many years. The law is not identical in every legal system, and in any given country the national High Court must take account of relevant provisions of the Constitution and of relevant legislation. What follows in this section is a summary of the general grounds for seeking judicial review.

(I) **Acting without powers (or acting in excess of powers)**[2]

Examples:

(1) Byelaws were made by a Minister which treated apparatus used solely for receiving satellite TV as a 'radio station' and imposed a heavy licence fee ($1500) for installing the apparatus and an annual renewal fee ($500). The court held that the byelaws were 'ultra vires', since the TV receiver was not capable of being treated as a radio station (the court also considered the fees imposed to be grossly unreasonable).

(2) A Local Government Commission with power to make regulations about the conduct of local elections made a regulation that every candidate must have a minimum education of standard 7: this was held by the High Court to be beyond the Commission's powers, since the power to regulate the conduct of elections does not include power to regulate the educational qualifications of candidates. The right to be a candidate for election was quite separate from the conduct of the elections, and was dealt with in the Local Government Act. (The Commission would probably also be exceeding its power to regulate the conduct of elections if, for instance, it stipulated that the business of local councils must be conducted in the English language - but not if it made rules about the opening of polling stations.)

(3) A regional government decided that land which under a statutory improvement scheme was reserved as an open space should be allotted to a medical trust for the purpose of building a private nursing home on the land. The court held that the decision was contrary to the improvement scheme and that the building of a private nursing home was not an 'improvement' of open space.[3]

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[2] The Latin phrases 'ultra vires'(beyond powers) and 'intra vires' (within powers) are often used in relation to this ground of review.

[3] The court also held that residents in the vicinity of the land had sufficient interest in the future of the open space to seek judicial review (on standing to sue, see para. 6.9 below).

Just as it is unlawful for a public authority to act without powers, or to exceed such powers as it has, so too breach of duty by an authority is unlawful. Thus, where an electoral registration officer has a duty to maintain a public register of persons entitled to vote, it is a breach of duty to fail to keep a register at all, to keep the register secret, or to omit from the register the names of persons who are entitled to vote.

(II) **Act of the wrong person (improper delegation or assumption of power)**

Example: While the Registrar of Companies is abroad, an assistant registrar makes a decision removing company X from the register. Under the Companies Act, the Registrar had delegated to the assistant power to register new companies, but not power to remove a company from the register. The court would be likely to hold the decision by the assistant registrar unlawful in the absence of proper delegated authority (but not if, for the period of the Registrar's absence abroad, the assistant registrar had been formally appointed as Acting Registrar.)

(III) **Acting by the wrong procedure**

Example: where an Act requires four weeks public notice to be given before a licensing board's meeting, the board meets privately without giving any notice of its meeting, and during that meeting decides to refuse an application from Y for a licence. The board has the power to refuse a licence, but in doing so must observe the procedural rules laid down in the Licensing Act. Failure to observe an important procedural rule may cause the decision to be held unlawful. (But not every minor technical irregularity or defect of procedure will invalidate the decision, particularly if the board can show 'substantial compliance' with the set procedures.)

(IV) **Acting in breach of natural justice (or unfairly)**

(a) denial of the right to a fair hearing

Examples:

(1) where a police officer is alleged to have abused his powers by assaulting a young woman and

is dismissed from the police without being told of the allegation and with no opportunity to defend himself against it.

(2) where a diplomat accused of misappropriating public funds in an embassy abroad is retired compulsorily without a hearing since (according to the Foreign Ministry) it would take too long for the true facts to be discovered.

(b) decision affected by bias

Examples:

(1) where a licensing board always favours one group of applicants or is always prejudiced against another group (for example, on religious, political or ethnic grounds)[4]

(2) where an official or a Minister (or a close relative) has a personal financial interest in a decision that he/she must make (for instance, where a Minister's wife owns the only mill in a small town and permission to open a second mill is sought by another person).

(3) where a Minister has said in a public speech that he/she is never going to grant a permit or licence to a particular individual or group.

(V) Exercising discretion perversely or unreasonably

In administrative law, a discretionary decision is made whenever a public body or official has a choice to make between two or more possible courses of action (for example, where the available funds for a certain purpose (say, awards for higher education) are limited and a choice must be made as to who is to receive them. Provided the discretion has been exercised lawfully, there will be no basis for judicial review of the merits of the decision. However, discretionary powers must be exercised 'reasonably' and this requires (amongst other things) that the administrator:

- has properly understood the extent of the powers;
- has taken all relevant considerations into account;
- has not been influenced by irrelevant considerations;
- has made the decision after giving consideration to the full circumstances and has not 'fettered' the discretion by applying a rigid rule or policy that had been adopted in advance.

Even when no obvious defect of this kind exists, an administrator may be held to have acted 'unreasonably' or 'perversely' when he/she makes a decision which is so unreasonable in all the circumstances that no reasonable official in that position could properly have made such a decision.

Examples:

(1) where L has by hard work built up a trading business over many years, and one day one of her employees gets into dispute with an awkward customer and uses bad language: if this is an isolated incident, and L disciplines her employee, it could not be reasonable to bring the business to an end by revoking her licence, for example, on the order of a high official or Minister who knows the customer and decides to throw his weight around to show L who is in charge;

(2) where the Licensing Act permits a licence to be refused on one of five stated grounds and M's application is refused without the licensing board considering which, if any, of the five grounds applies to the application[5].

In some jurisdictions, particularly when executive action has affected fundamental rights protected by the constitution, it is possible to claim that the action taken is 'disproportionate' when the public interest in and reasons for the action are compared with the effect on the individuals' rights.

(VI) Abuse of power, or exercising a discretion for improper purposes

Example: where a local council has power to

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4 This decision would also appear to be discriminatory and thus in breach of the constitution.

5 Such a decision may also be in breach of natural justice, since it is quite possible that the authority has taken into account something alleged against the applicant without identifying what this is. This example also illustrates the importance of the duty to give reasons.

acquire land that is needed for road-widening and uses this power to acquire N's land, the true reason being that N has antagonised many councillors by publicly criticising the council's policies. A statutory power granted for one purpose may not be used for a quite different reason.

(VII) **Acting contrary to the constitution (for example, by infringing fundamental rights of an individual or a group)**

Examples:

(1) a town clerk refuses permission to a religious or political group to hold a meeting in a public hall, because he disapproves of the religious or political views of the group;

(2) a decision terminating a contract with a bookshop to supply books to the Ministry of Education because the bookshop's owner is a woman;

(3) a decision refusing to enter certain families on the election register because they support an opposition party.

(VIII) **Acting in breach of a person's legitimate expectations**

An individual may have a 'legitimate expectation' that a public authority will follow a certain procedure in his or her case either (A) because he/she has been assured by an official that the procedure will be followed or (B) because it has been the constant practice of the authority to follow that procedure, and (C) the individual has relied on either the assurance or the constant practice, only to find that it has not been followed.

Examples:

(A) a nurse from overseas, who has a limited permission to remain in the country, wants to return to her home for compassionate reasons; she writes to the immigration department and receives a reply assuring her that if she returns within two months, she will be permitted to re-enter the country. After only one month, when she tries to enter the country, the immigration officer refuses her permission to do so, even when she has shown him the department's letter.

(B) a trader has been in business for many years and his trading licence has always been renewed annually by sending in a renewal application by post and enclosing a cheque for the licence fee. This year, when he does the same as in all previous years, he learns that his licence has not been renewed because he should have attended the licensing authority in person and paid the fee in cash. He is told that all he can do is to apply for a new licence next year.

In some Commonwealth jurisdictions, the concept of legitimate expectation has been used in developing the practice of consultation before certain kinds of decision are made. Where, for example, a Minister has power to make rules about the qualifications applying to professional or economic groups (doctors, accountants, surveyors etc.), they may well have developed an unbroken practice of consultation, even if there is no statutory requirement to consult. If the Minister departs from this practice, or does not allow sufficient time for those consulted to reply, a court may hold that the legitimate expectations of the group in question have been breached.

(IX) **Failure to give reasons where there is a duty to do so**

Sometimes an Act expressly requires reasons to be given for a particular decision, for example where permission for the development of land is refused or a licence is refused, or where an appeal against a Minister's decision has been decided by a tribunal. There may also be particular circumstances in which a certain decision will be held unfair or arbitrary if reasons are not given for it, or where the High Court in judicial review proceedings may require reasons to be given. However, there is no general rule in administrative law that reasons must be given for all decisions.

As we shall see below, this is one matter on which the requirements of good administration may make up for any weaknesses in the law.

5.2 In this section we have tried to identify the principal grounds on which administrative decisions are vulnerable to judicial review. Frequently a single decision may be challenged on more than one of these grounds, and often there is no hard and fast demarcation between them. In some but not all Commonwealth jurisdictions, the judges are prepared to take a 'broad brush' approach to judicial review. As was said by one leading judge (Sir Robin Cooke, President of the Court of Appeal in New Zealand):

"The administrator must act fairly, reasonably and according to law. That is the essence and the rest is mainly machinery."

F. JUDICIAL REVIEW: REMEDIES, PARTIES AND PROCEDURE

(I) Remedies

6.1 In section E, we summarised the main grounds on which the High Court may hold that an official decision was unlawful or was taken improperly. Where such grounds exist, the court may issue an order quashing the defective decision and, if required, it may order the official or board concerned to consider the matter again and decide it in accordance with the law.

6.2 Sometimes, when the decision of a board or tribunal is under review, it may be clear that a different decision would have been made but for an error which the board or tribunal made as to the law; here, the court may substitute for the defective decision the correct decision that should have been made. Usually, however, it is not for the court to be concerned with the merits of a particular decision - the court's role is confined to issues of legality.

6.3 Where a public authority has a duty to act in certain circumstances (for example, if a licensing board must produce its register of decisions upon request of any licensee) and the authority refuses to carry out this duty, someone entitled to have the duty performed may ask the court to order the authority to perform its duty.

6.4 The court may also have power to grant an injunction or an interdict restraining the public authority from acting unlawfully in the future.[6] Such an order must be obeyed, since anyone (including a public officer) who disobeys such an order will commit 'contempt of court' and will be at risk of being sent to prison.

6.5 In some cases, it is enough for the court to make a declaration of the rights of the parties, since this should ensure that in future the same mistakes as to the law are not repeated. Failure to observe such a declaration is not contempt of court, but any failure to do so might be likely to lead to further applications for judicial review.

6.6 The fact that an application for judicial review succeeds does not usually entitle the applicant to compensation or to damages from the public official or authority whose decision was quashed. But if, say, the unlawful action interfered directly with the individual's property or liberty, he/she may be entitled to damages for any civil wrong (tort or delict) committed at civil law. There may also be a right to claim compensation or damages for interference with an individual's fundamental rights under the constitution.

(II) Who are the parties to judicial review proceedings?

6.7 In judicial review proceedings, the applicant for judicial review of a decision must usually be the person who is directly affected by the decision in question: for example, the trader who is refused a licence, the owner of land who is refused development permission, the police officer who is dismissed without a hearing, the foreigner who is refused permission to stay in the country. Sometimes the decision will directly affect the applicant's liberty, rights of property or freedom to contract; sometimes it will only deprive him/her of an interest in securing a certain benefit to which he/she is not entitled as of right.

6.8 Where an administrative decision adversely affects a collective person (such as a company, a parastatal undertaking, a trade union, a co-operative or a religious group), that person may seek judicial review in its own name. If such a body does not in law have corporate personality, officers or leading members of the group may apply for judicial review in their own name. A public body with corporate status, such as a town council, is generally able to apply for judicial review of an administrative decision which adversely affects it, but in some Commonwealth jurisdictions the system of local government may not permit this.

6.9 If an applicant has no direct interest in the decision which he/she seeks to review, this might

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[6] In some but not all states, the constitution or an Act of the legislature may make it impossible for such an injunction or interdict to be obtained against a government department or a Minister. The case-law on this question includes M v Home Office [1994] 1 AC 377 (UK) (injunction properly awarded against Secretary of State in judicial review proceedings) and Zambia National Holdings Ltd v Attorney General of Zambia [1994] 1 CLR 98 (Zambia) (no injunction may be awarded against the state).

justify the High Court in rejecting the application on the ground that the applicant has no 'standing to sue' (in Latin, no 'locus standi') or no 'sufficient interest'. Some Commonwealth jurisdictions are stricter than others in the rules of 'standing to sue' which they apply. One frequent problem is where the decision subject to review is a decision taken in the public interest and it affects the public at large (for example, a decision to build on an open space in an urban area, or to permit exploitation of a natural resource in a way which will harm the environment and the local community). In such cases, will any individual with resources to bring legal proceedings be able to show that he/she has standing to sue? One solution is to permit 'public interest' litigation - for example, where a voluntary organisation formed to defend the interests of a particular group or locality applies for judicial review on behalf of all those affected. A broad approach to the question of standing to sue may be required by the constitution, especially when an individual is seeking to enforce fundamental rights under the constitution.

6.10 When an application for judicial review is made, the applicant must usually identify the public body, board, tribunal or official who made the decision or on whose behalf the decision was made, and such a body or official will be able to defend the decision against judicial review. If no public body can be identified as having made the decision, and if it was taken by a private employer or a company, this may indicate that the decision is outside the area of administrative law, and is a matter purely of private law. The demarcation-line between a public and a private body for this purpose is often not clear, and much may depend on the general structure of public authorities within a country, and the approach taken to the mode in which economic and social needs are met (whether by public action, private action or a combination of both modes). For example, a hospital or a school may be privately owned but may be publicly funded and may perform public functions; so too, many parastatals are likely to have both private and public functions.

(III) **Procedure of judicial review**

6.11 The procedure for seeking judicial review differs from country to country, but in some it is simply called 'application for judicial review'. In states which apply procedures derived from the English common law, the various remedies have names such as certiorari (an order quashing a decision), prohibition (an order prohibiting an unlawful decision from being made) and mandamus (an order requiring a legal duty to be performed).

6.12 If an individual (or a relative or friend of a detainee acting on his behalf) claims to be unlawfully detained, he/she will in many countries be able to invoke the procedure of 'habeas corpus'. If an application for habeas corpus succeeds, the court will order the detained person to be set free.

6.13 Sometimes an Act of Parliament which empowers a public authority to take certain action also specifies the procedure by which individuals may apply to the courts for a decision as to the legality of the action. Such an Act may also lay down the procedure to be used, the time limit which applies, who may apply to the court and so on.

6.14 Other Acts may seek to protect particular decisions from being challenged by judicial review by using phrases like "The decision shall not be questioned in any court" or "Publication of this order shall be conclusive evidence that the order is properly made and conforms with the powers conferred by this Act". Such phrases may have the effect of cutting down the scope for judicial review, and may sometimes exclude any effective opportunity for doing so. However, in many countries the courts are not sympathetic to judicial review being excluded in this way and refuse to give such 'exclusion clauses' their full effect. Where a constitution authorises the High Court to protect the individual's fundamental rights, exclusion clauses of this kind contained in an Act of Parliament will not achieve the desired effect if they are considered by the court to be contrary to the constitution.

6.15 The High Court will require there to be reliable evidence to be given by or on behalf of the applicant before it will grant an application for judicial review. The official or public authority whose decision is sought to be reviewed will have an opportunity to put in their own evidence against the application. However, in an emergency when a public authority is about to take action (like pulling down someone's building) which adversely affects that person, he/she may come to the court for a temporary injunction (or interdict) to prevent the building from being demolished until there has been time for relevant evidence to be submitted to the court. In such an emergency, the public authority may not have a chance to present its side of the case until after the temporary injunction has come into effect.

6.16 The rules which govern the giving of evidence to the court in judicial review cases differ from country to country, according to the established procedures of its High Court. In many judicial review cases, whether the court is able to make a fully informed decision will depend upon the relevant official documents being made available in evidence; usually the court needs to be able to read the text of the decision challenged, the reasons for it, correspondence relating to it (including any explanations given) and so on. Because the outcome of judicial review cases is nearly always significant for the public interest, as well as for the private interests affected, the High Court may adopt an approach that requires disclosure by both sides of all relevant documents. Since judicial review is often concerned with the nature of the decision-making process, usually more documents are held by the public authority than by the applicant for review.

6.17 In exceptional circumstances, where there are vital public interests which may be threatened if certain matters are produced in evidence (for example, national security, defence and international relations), a public authority may seek to protect particular documents from disclosure. Public interest immunity, as this is sometimes known, may be claimed by a Minister responsible for the area of government in question, but a claim of public interest immunity ought to take effect only when the court has been satisfied that it is being made for good reason and that the claim should outweigh the public interest in the administration of justice.

6.18 In many countries, much ignorance and uncertainty exist, even amongst the legal profession and public servants, about the powers and procedures of judicial review. This is partly because many of the rules have grown up over the years and are based on previous decisions of the courts, rather than being located in Acts of Parliament.

6.19 There is however no good reason that prevents the main rules of judicial review being contained in a short Act of Parliament, which can if necessary be supplemented by procedural rules made by the High Court. The text of such a model Act is contained later in this booklet. It must be read with care, since it does not directly state the law in any one jurisdiction, but it may serve as a guide to important features of this branch of the law.

G. Conclusions

7.1 It was said above (in para. 2.2) that the one certain function of the government is to govern. In other words, the existence of the state as the organising framework for life in human communities today calls for both the structure of government and the performance of tasks on which the public's lives, security and well-being depend.

7.2 The development of judicial review as a means of controlling government varies much from country to country, according to the state of economic and industrial development, social awareness, and the accessibility of legal services.

7.3 In particular cases, judicial review may seem hostile to a particular decision or policy of government. Sometimes opponents of the government may institute judicial review proceedings as an additional way of expressing their opposition. However, political opposition and political motives are never grounds for a successful application for judicial review.

7.4 The concern of the courts must always be with upholding principles of law and legality. The courts are not to be identified with the policies or preferences of sectional groups or parties.

7.5 When judicial review is working well, the lessons to be learned from the decisions of the courts deserve to be understood by all in the public service. (Sometimes a court's decision may make it necessary for an amending Act to be passed or fresh regulations made.) Where a country has an ombudsman, able to investigate areas of administration and to report publicly on his/her findings, valuable lessons may be learned when the ombudsman makes a finding of maladministration or reports on poor standards of public service. The questions to be asked include: what went wrong? what were the reasons for those mistakes? are there means of ensuring that the same mistakes are not repeated?

7.6 While the courts and the ombudsman observe different procedures, they are both concerned with scrutinising the process of administration. The lessons to be learned from the results they achieve often share much in common. Indeed, the grounds on which public decisions may be reviewed in the courts often overlap with the indicators of poor administration which an ombudsman will detect. Thus senior officials need to understand the powers that are in law available to them in a given situation; if they do not understand the powers that they are supposed to be exercising, this is likely to lead to decisions which in law are defective, and also to maladministration.

7.7 To obtain the full advantages both of judicial review and of the ombudsman's power of investigating complaints by citizens, officials need to learn from both systems of control. Some unacceptable forms of administration would be criticised both by a judge and by the ombudsman. Two examples may be given.

7.8 The first is that of legitimate expectations (see ground VIII in section E above). An ombudsman would surely criticise conduct by a public authority which at one moment gives an assurance to an individual as to what is to happen to her and later on goes back on that assurance.

7.9 The second example is the giving of reasons for decisions (see ground IX in section E above). Even though the law does not require reasons to be given for every administrative decision, where a public official must act in the public interest in reaching a decision, he/she must have some reasons for that decision, and must be able to say what they are. (If there are no such reasons that can be given for a discretionary decision, the decision would appear to be an arbitrary one.) Those reasons should be recorded in writing and kept on file. If necessary, such reasons may be notified to those affected by the decision. The experience of the public service in very many countries is that better decisions are made if the decision-maker thinks out what should be done in an orderly and systematic way, and records the reasons for the decision at the time. Failure to record reasons for a key decision would be criticised by an ombudsman, or (as the case may be) by the court. As we have already seen, in certain situations the courts may hold that fairness requires the giving of reasons. Moreover, the giving of reasons may enable someone who has a right of appeal against the decision to decide whether it is worthwhile to appeal.

7.10 These examples illustrate ways in which administration can be improved if public servants take account of both the findings of the ombudsman, where the office exists, and of the decisions of the courts.

7.11 In 1992, at the conclusion of the first Commonwealth Workshop on Administrative Law, held in Zambia, the assembled ministers, judges, civil servants, lawyers and law teachers adopted what has come to be known as the Lusaka Statement. This Statement has been endorsed at other such Workshops and it was also approved by Commonwealth Law Ministers in 1993 at their meeting in Mauritius as a useful guide to the subject of government under the law. The Statement emphasises both the importance of government being conducted in accordance with law, and also the main practical conclusions which flow from a commitment to government according to law. A copy of the Lusaka Statement is annexed to this booklet.

THE JUDICIAL REVIEW OF ADMINISTRATIVE ACTION - A MODEL LAW FOR COMMONWEALTH JURISDICTIONS

General Comment

This model law has been prepared for two main purposes: (1) to provide a basis for legislation in those Commonwealth jurisdictions that have not in recent years reformed their own procedures for judicial review; (2) to re-state the main essentials of the law of judicial review, including the grounds of review, since a short and accessible re-statement of the law should dispel much uncertainty and ignorance that exists about this important area of the law.

The procedure outlined in this model law is primarily intended to apply to the judicial review of administrative action. However, in many Commonwealth jurisdictions, such review on administrative law grounds may well also involve questions relating to the enforcement of fundamental rights guaranteed by the constitution and the proposed procedure is intended to enable this to be done in the same proceedings. Since the constitution in these countries usually vests jurisdiction in the High Court to enforce the guaranteed rights, the proposed model law would be inconsistent with the constitution if it sought to limit the width of that jurisdiction.

Although the model takes the form of an Act of Parliament, many of its provisions are limited to procedural matters, and in some jurisdictions it would be straightforward to deal with these matters by the making of new Rules of Court. However, not all provisions in the model can be dealt with in this way, since (for example) section 9 deals with matters of substantive law, namely the grounds on which judicial review may be based.

In preparing this model, reference has been made (inter alia) to the following sources:
Administrative Justice Act 1983 (Cap. 109B, Barbados)
Judicial Review Procedure Act (Revised Statutes of Ontario 1990, c.J.1)
Alberta Rules of Court, Parts 56 and 56.1
Federal Court Act (Revised Statutes of Canada 1985, c. F-7)
Judicature Amendment Act 1972 (No. 130) (New Zealand)
Supreme Court Act 1981, s. 31 (U.K.) and Rules of the Supreme Court, Order 53 (England and Wales)
"Administrative Law: Judicial Review and Statutory Appeals", Report No 226 by the English Law Commission, 26 October 1994
Rules of Court (Scotland), Chapter 58
Administrative Decisions (Judicial Review) Act 1977 (Australia)
Fundamental Rights (Enforcement Procedure) Rules 1979 (Federal Republic of Nigeria).

An explanatory comment is appended at the end of each section of the model Bill.

A Bill for an Act to regulate the procedure for the judicial review of administrative action, to re-state the grounds for the exercise of judicial review and for related matters.

Jurisdiction of the High Court

1. (1) This Act applies to the jurisdiction referred to in subsection (2) and, subject to the Constitution, to such other jurisdiction by way of supervision or review as may be conferred on the Court by the Constitution or by or under any law.

(2) It is hereby declared that the Court has jurisdiction to review the decision or act of any subordinate court, tribunal, board, department, council, Minister, civil servant or other body or officer exercising public functions under any law.

(3) In this Act:

(a) the expression "the Court" shall mean the [High Court] exercising the jurisdiction referred to in sub-section (1);
(b) the expression "decision or act" shall include any failure or omission to take a decision or to act where there is a duty to do so;
(c) the expression "decision-maker" shall mean the court, tribunal, board, department, council, Minister, civil servant or other body or officer whose decision or act is subject to an application for judicial review made under this Act;
(d) the expression "public functions" shall include the judicial, quasi-judicial, legislative and administrative functions of any public authority or officer;
(e) the expression "supervisory jurisdiction" shall mean the jurisdiction which is referred to in sub-section (2).

(4) The decisions or acts subject to the supervisory jurisdiction shall include decisions or acts taken or made by or in the name of the President or Vice-President, [the monarch], the Cabinet and the Prime Minister, except for decisions or acts which are subject to contrary provision contained in the Constitution or any Act.

[Comment. The aim of subsections (1) and (2) is not to confer a wholly new jurisdiction on the High Court but to declare that the present supervisory jurisdiction exists and to ensure that it is exercised in future in accordance with the Act, along with comparable jurisdiction conferred by the Constitution or any other law. The purpose of subsection (4) is to make clear that all decisions taken within the executive branch of the state are subject to judicial review, except where the Constitution or an Act provides to the contrary.]

Procedure of application for judicial review

2. An application to the Court for the exercise of the supervisory jurisdiction in respect of any decision or act shall be made by means of an application for judicial review in accordance with this Act.

[Comment. The Act is intended to be capable of operating without the making of any Rules of Court, but it is likely that some Rules of Court would be desirable for the purpose of regulating matters of procedure, and these are authorised under section 3.]

Rules of Court

3. (1) Rules of the Court may provide for the procedure to be followed in respect of applications for judicial review, and for the manner in which evidence may be given to the Court in such proceedings.

(2) Such Rules may in particular provide that: -

(a) no application for judicial review shall be made unless on a preliminary application [petition/ summons/ motion] the leave of the Court has been obtained for the making of such an application; and
(b) such leave shall not be granted unless the Court considers that the preliminary application [petition/

summons/motion] discloses an arguable case.

[Comment. Subsection (2) requires an appropriate Rule of Court to be made if it is desired to make the procedure of application for judicial review subject to a preliminary leave stage. If a preliminary leave stage is not required, no Rule of Court need be made. By subsection (1), Rules of Court may provide for other matters, such as the form of application, service of notice on interested parties etc.]

Standing to apply for judicial review

4. The Court shall not entertain an application for judicial review unless either: -

   (a) the applicant has a sufficient interest in the matter to which the application relates; or
   (b) the Court is satisfied in the circumstances of the case that it is in the public interest for the application to be decided by the Court.

[Comment. This clause draws on both the Administrative Justice Act (Barbados), section 6 and on the recommendations made by the English Law Commission in its Report in 1994.]

Time limits

5. (1) Subject to subsections (2)-(6), an application for judicial review shall be made within the period of three months beginning with the date when grounds for the application first arose.

   (2) The Court may refuse an application made within the period of three months if it is satisfied: -

      (a) that in the circumstances of the case there has been undue delay in making the application; and
      (b) that to grant the relief sought would, because of such delay, cause substantial hardship to, or would substantially prejudice the rights of, any person, or would be seriously detrimental to good administration.

   (3) Where an application for judicial review is made after the period of three months, the Court may allow the application to proceed if it is satisfied -

      (a) that there is good reason for the application not having been made at an earlier date; and
      (b) that if the relief sought were granted, it would neither (i) cause substantial hardship to, or substantially prejudice the rights of, any person, nor (ii) be seriously detrimental to good administration.

   (4) Where the application concerns any judgment, order, conviction or other decision, the date when grounds for the application first arose shall be taken to be the date of the judgment, order, conviction or other decision, unless there is good reason why a later date should be adopted for this purpose.

   (5) In considering whether the applicant has acted without undue delay or has shown good reason for delay for the purposes of this section, the Court shall take into account any steps taken by the applicant to pursue any other remedies that were open to him.

   (6) Subsections (1) to (5) are without prejudice to any Act which for any specific class of decision or act limits the time within which an application for judicial review may be made to a period being not less than four weeks.

[Comment. This section draws upon the present position relating to time-limits in the English High Court, although some of the drafting is original. The three-month limit was supported by the English Law Commission in 1994, but in many Commonwealth jurisdictions the difficulties of securing access to legal resources could justify the time-limit being longer than three months. In several Commonwealth jurisdictions, such as Scotland and Barbados, no specific time limit exists; the law of Barbados treats undue delay (not defined) as a reason why the Court may refuse relief:

"The Court may, if it thinks fit, refuse to grant any relief under this Act if it considers that there has been undue delay in making the application for judicial review, and that the grant of the relief sought would cause substantial hardship to, or would substantially prejudice the rights of any person, or would be detrimental to good administration." (Administrative Justice Act, s. 8)]

Alternative remedies

6. The Court may in its discretion refuse an application for judicial review if it is satisfied that there was available to the applicant another remedy, whether by way of appeal, review or recourse to a court, tribunal, public official or other authority, which would have enabled - (a) the substance of the application to be considered in an effective manner; and (b) appropriate relief to be awarded to the applicant.

[Comment. The aim of this clause is to give guidance to the Court as to the manner in which it should exercise its discretion in respect of alternative remedies. In several jurisdictions, for example New Zealand, the Court may grant an application for judicial review "notwithstanding any right of appeal possessed by the applicant in relation to the subject-matter of the application" (Judicature Amendment Act, s. 4(1)).]

Remedies

7. (1) Without prejudice to section 8, on an application for judicial review the Court may grant by way of relief the following remedies:

   (a) an order quashing the decision or act under review;
   (b) an order [injunction/interdict] prohibiting the decision-maker or any other person from taking further action in a specified matter;
   (c) an order requiring the performance of a public duty, including a duty to make a decision or to hear and determine any case;
   (d) a declaration of the legal rights, duties and interests of the parties, where it is just and convenient for the Court to make such a declaration;
   (e) an award of damages, restitution or the recovery of a sum due in law, where grounds for such an award exist in law; and
   [(f) such other relief as may be necessary to give effect to the fundamental rights enumerated in Part ... of the Constitution].

   (2) Where the Court quashes an decision or act to which the application relates, it may in addition remit the matter to the court, tribunal or other authority concerned with a direction to reconsider the matter and to determine it in accordance with the Court's order.

   (3) Any of the remedies mentioned in subsection (1) may be applied for together or separately in an application for judicial review; and the Court may grant one or more of them as law and justice may require, and whether applied for in the original application or not.

[Comment. The drafting of subsection (1)(a)-(c) intentionally avoids use of the common law terms of certiorari, prohibition and mandamus. Subsection (1)(e) enables damages or restitution to be awarded in the same proceedings, but only where legal grounds for the award of such compensation exist (for example, in the civil law of tort or as a constitutional remedy for the enforcement of fundamental rights). The remedies available to the Court are broad enough to include the power to order that someone who is unlawfully detained should regain their liberty, but the law of habeas corpus is not affected: see section 12 below. Subsection (2) is derived from section 9 of the Administrative Justice Act (Barbados), and subsection (3) is from section 5(3) of the same Act.]

Interim relief

8. (1) On an application for judicial review, the applicant may seek such form of interim relief as may be necessary in the interests of justice pending the disposal of the application by the Court.

(2) Where the interests of justice so require, the Court may make an order granting interim relief notwithstanding that the Court has not at that stage granted leave for the making of an application for judicial review for the purposes of section 3(2).

[Comment. Subsection (2) is needed only if Rules of Court have been made under section 3(2) providing for a preliminary leave stage. If so, subsection (2) would allow the Court to grant interim relief as a matter of urgency, while adjourning for further consideration the question whether leave for the application for judicial review should be granted.]

Grounds of review

9 (1) The grounds on which the Court may grant relief by way of the remedies mentioned in section 7 are:

(a) that the decision or act under review was contrary to law, was based on an error of law, or involved a breach of the applicant's constitutional rights;
(b) that the decision or act was outside the powers of the decision-maker, was made in excess of jurisdiction, or involved a breach of or failure to perform a duty;
(c) that in the procedure leading to the decision or act under review, the decision-maker:

(i) failed to observe conditions or requirements prescribed by legislation;
(ii) was in breach of the principles of natural justice or fairness; or
(iii) failed to comply with a person's legitimate expectations;

(d) that the decision or act involved an abuse of power, an improper purpose or the perverse exercise of discretion;
(e) that the decision-maker did not take into account considerations which ought to have been taken into account, or took into account irrelevant considerations;
(f) that the decision or act was affected by fraud, bad faith or malice;
(g) that the decision-maker acted on instructions from an unauthorised person; and
(h) that there was no evidence upon which the decision-maker could have made a conclusion of fact that was material to the decision or act.

(2) Where the sole ground of relief established is a defect within subsection (1)(c)(i), which the Court finds has given rise to no substantial wrong or miscarriage of justice, the Court may refuse relief.

[Comment. Subsection (1) draws upon earlier statements of the grounds of judicial review enacted in Barbados and Australia but the drafting is original. Subsection (2) is based broadly on the Judicature Amendment Act (New Zealand), s. 5. and the Ontario Judicial Review Procedure Act, s. 3.]

Power of the Court to require reasons

10. (1) Except where the Constitution or an Act of Parliament provides to the contrary, where a person makes an application for judicial review under section 2, he may request the Court to order the decision-maker to provide a statement of the reasons for the decision or act within a period specified by the Court.

(2) Where a request for an order under subsection (1) is made, the Court shall, if satisfied that the interests of justice and fairness so require, order the decision-maker to provide a statement of reasons within a period specified by the Court.

(3) Where an order under subsection (2) has been made, the Court shall in exercising its supervisory jurisdiction take into account the statement of reasons provided by the decision-maker in response to the order or (as the case may be) the failure to provide such a statement.

[Comment. Although there is no general duty at common law to provide reasons for an administrative decision at the request of an individual who is adversely affected by it, it is increasingly recognised in the case-law of many states that administrative justice often requires the giving of reasons, particularly when judicial review has been sought. A duty to provide reasons for certain classes of official decisions was included in the Administrative Justice Act of Barbados, Part II. Section 10 is restricted in its effect to situations in which an application for judicial review has been made. However, the fact that the Court has the power to order the giving of reasons is likely in practice to encourage public authorities to give reasons.]

Transfer of proceedings

11. (1) Where either -

(a) an application is made for judicial review and the Court considers that the subject of the application should properly have been made the subject of a [writ or other procedure] for enforcing a private right; or

(b) an action has been started by way of a [writ or other procedure] which the Court considers should properly have been made the subject of an application for judicial review, the Court may, if the interests of justice so require, order that the application or the action by writ (as the case may be) shall be treated as having been instituted by the proper procedure.

(2) When the Court exercises its power under sub-section (1)

(a) it may impose such conditions as it thinks fit (including in its discretion the payment of costs) upon the parties; and

(b) it shall specify, in respect of the action or application as the case may be, the procedural steps which are deemed to have been completed and those which remain to be performed.

[Comment. Since this Act makes provision for a distinct form of procedure to be known as an application for judicial review, to be available in respect of the acts and decisions of public officials and authorities, there will inevitably be some instances in which an applicant may have difficulty in knowing whether he/she should apply for judicial review or should go by ordinary procedure. This clause enables an inappropriate choice of procedure to be corrected by the Court without requiring the applicant/plaintiff to start proceedings all over again.]

Habeas corpus

12. Nothing in this Act affects the law of habeas corpus, but

(a) where an application for judicial review is made when an individual is detained as a result of a decision or act which is subject to the supervisory jurisdiction of the Court, the Court may in the exercise of its powers under sections 7 or 8 order the release of an individual who is unlawfully detained;

(b) an application for judicial review may be brought concurrently with an application for a writ of habeas corpus.

[Comment. This section is (except for paragraph (a)) derived with amendment from the Administrative Justice Act of Barbados, section 11(a) and the Ontario Judicial Review Procedure Act, s. 11(2).]

The State [the Crown]

13. This Act binds the State [the Crown].

[Comment. This section may well be strictly unnecessary in view of the earlier provisions of the Bill. But it would be unfortunate if, without it, it could be argued that a State entity (or the Crown, where a monarchy exists) fell outside the scope of this legislation.]

Short title and commencement

14. (1) This Act may be cited as the Administrative Justice (Judicial Review) Act.

(2) This Act shall come into force on such day as the [President/ Minister of Justice] may by order appoint.

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:

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 discretionary 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 **Right 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 limits for the taking of a decision in exercise of a discretionary power have 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 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. 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 of 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 Commonwealth 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