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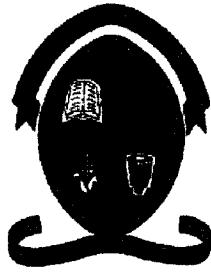
## **JUDICIAL REVIEW AND THE PROTECTION OF HUMAN RIGHTS IN ZAMBIA**

### **A CRITICAL EVALUATION OF ORDER 53 IN THE PROTECTION OF HUMAN RIGHTS**

**BY: SIMON M. KAPILIMA**

**RESEARCH PROJECT SUBMITTED IN PARTIAL FULFILMENT  
OF THE AWARD OF A BACHELORS DEGREE IN LAW.**

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BY:

**SIMON MULENGA KAPILIMA**

**L.L.B. 2003.**

**Research Report submitted to the University of Zambia in Partial fulfillment of the  
Requirement for the Award of a Bachelors Degree in Law.**

# THE UNIVERSITY OF ZAMBIA

I recommend that the obligatory essay prepared under my supervision by  
SIMON MULENGA KAPILIMA entitled;

## **JUDICIAL REVEAL AND THE PROTECTION OF HUMAN RIGHTS IN ZAMBIA**

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## **ABSTRACT**

Human Rights have become a burning issue world over, more so with the current wind of Liberal Democracy sweeping across the whole world, which entails achieving and sustaining a good Human Rights record by individual Countries.

This presentation therefore, endeavours to examine human rights from a different perspective, i.e. different from the traditional view of human rights abrogation through unconstitutional means involving the state and its administrative agencies, but rather those violations suffered at the hands of individuals. Through a well recognized means of Judicial Review of administrative action by the Courts, the paper examines the role of the judiciary through decided cases. The focus of the work is centred on illustrating how the process of Judicial Review has been used to protect the violated rights of individuals from administrative organs and also how the violations can be effectively addressed through Judicial Review, a concept of study in administrative and Constitutional Law. The essay will look at Judicial Review as a concept and the State through its administrative agencies as a custodial of human rights laws.

## **ACKNOWLEDGEMENT**

It is difficult to recognize and acknowledge all the many individuals and institutions whose contribution made the realization of this research paper possible. But, undoubtedly the first acknowledgement must be made for complete support and encouragement given to me by my research supervisor Dr. Chanda (Dean, Undergraduate, School of Law), secondly my Permanent Secretary Mrs J. Mapoma for giving me the opportunity to undertake this study. I am greatly indebted for their dedication, expert direction and valued advice.

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## **DEDICATION**

My special thanks go to my vibrant young family, for having given me the opportunity to undertake my studies.

I cherish your ever green love and understanding.

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## CHAPTER 1

### 1.0 INTRODUCTION AND BACKGROUND

Human Rights affects virtually every sphere of life be it economic, social, political, cultural or religious. It is, therefore, imperative that we examine the extent to which Judicial Review can be said to protect human rights in Zambia vis avis the vast powers that are given to administrative bodies by the delegated powers. Thus, whereas citizens are asked to accept delegated legislation as a necessary evil, it is recognized that the Judiciary has an important role to play in ensuring that an ever-powerful executive acts within its legal constraints. But at the core of any study of administrative law lies the concept of **JUDICIAL REVIEW** and it is to this area that we must turn, within the context of Human Rights protection in Zambia.

The protection of Human Rights is espoused in most African States as a National duty in which the states are mandated by the citizens to safeguard and protect the fundamental Rights and freedoms of the individuals by way of enshrining the rights in the constitution. Human Rights are those rights, which every human being possesses and is entitled to enjoy simply by virtue of being human <sup>1</sup>. The promotion and protection of human rights is addressed at the international, regional and national levels. Current international human rights obligations are rooted in the Charter of the United Nations<sup>2</sup>.

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<sup>1</sup> Permanent Human Rights Commission, National Plan of Action, 1999- 2009, Pg 3

<sup>2</sup> Ibid, pg 3

Established on Universally accepted principles of human dignity, the founding of the UN represented a critical point in the evolution of human consciousness. In this regard, the promotion and protection of human rights, however, is the primary responsibility of every nation.

Zambia has had a bill of rights, though United to civil and political rights, entrenched in the republican constitutions since independence in 1964.

Human rights can be traced back to the writings of such political philosophers as John Locke, Thomas Hobbes and Rousseau, John Locke's theory begins with an account of the state of nature. It is a condition in which men are free and equal, but it is not "a state of licence" in which they may prey on each other<sup>3</sup>. The state of nature has a law of nature to govern it which obliges everyone which is that law, teaches all mankind, "by that, being all equal and independent no one ought to harm another in his life, health, liberty or possession," This is because all are "the workmanship of one omnipotent and infinitely wise maker .....sent into the world by his order and about his business".

Locke argued that the establishment of a government, but not an absolute government was the proper remedy for an organized society, but he went on to say that a political society exists only where men have agreed to give up their natural powers and to erect men of authority to decide disputes and punish offenders<sup>4</sup>. This, he said, could only be done by an agreement and consent. He

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<sup>3</sup> Locke John, the second treatise of government, pg. 23.

<sup>4</sup> Ibid pg 5.

further holds that, the purpose of government is to safeguard man's natural rights; he maintains that these rights belong to him in the state of nature.

What Locke, in essence was seeking to defend was the principle that Governments ought not to violate human rights but that in giving up their rights in the state of nature, they in return expect the government ought not to violate them and their rights by laws framed in conformity with the law of nature. In a nutshell, Locke was propounding that human beings possessed certain natural rights which were God given, but further tried to justify and rationalize the exercise of state and the role of the individual in a state.

The contract of John Locke could be said to have culminated into the constitution as we know it today, as well as other international instruments such as conventions, caveats e.t.c of various forms and specifications all guaranteeing the upholding of human rights by states that are signatories and who either ratified or acceded to the instruments.

The first action by the UN to codify international human rights standards was the unanimous adoption by the UN General Assembly of the Universal Declaration of Human Rights (UDHR) on 10 December, 1948 and by progressive measures, national and international, to their universal and effective recognition and observation.

The UDHR proclaims a range of Civil and Political rights, including among others, the right to life, liberty and security of persons, protection against arbitrary arrest, detention or exile, freedom of movement, the protection of the

law, including the right to a fair trial, freedom of expression, association and assembly. Under the UDHR, rights and freedoms may be restricted only for the protection of the rights and freedoms of others and meeting the just requirements of morality, public order and the general welfare of society. The restrictions are valid only if they can be justified in a democratic society and are provided for under the law, and not exercised merely through administrative fiat<sup>5</sup>. International human rights law is embodied principally in the international covenant on civil and political rights (ICCPR) and the International covenant on economic, social and cultural rights (ICESCR), both adopted by the UN General Assembly in 1966, and which together transform to what the UDHR has declared into legally binding terms.<sup>6</sup>

It has been observed that human rights are mostly asserted at the International level, however, their implementation and promotion in the

domestic arena is largely the preserve of the individual governments or states. The domestic effect of human rights norms cannot be assessed in the abstract on the basis of studying the written constitution of a given country or on the basis of its record of ratification of international human rights treaties. Indeed, despite written constitutions embodying justiciable human rights provisions modeled on the international instrument, it is impossible to ignore the extent to which human rights have been infringed in many parts of Africa. What counts is whether the courts of law apply human rights norms in their concrete

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<sup>5</sup> Permanent Human rights Commission, National Plan of Action, 1999–2009, Pg 4

<sup>6</sup> The Universal declaration of Human Rights, 1948

decisions and whether these decisions are adequately and correctly executed or enforced,

In Zambia Article 28 of the Constitution states that if any person alleges that any of the provisions of Articles 11 to 26 (Bill of Rights) has been, is being or likely to be contravened in relation to him/her, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply for redress to the High Court.

In Zambia, there are two procedures of realizing fundamental freedoms. We have Judicial Review which was imported from England, where there is no written constitution and this is provided for under Order 53 of the Rules of the Supreme Court. We have the Civil Rights rules promulgated in 1969, which outline the procedure for petitioning, when any right in the **PART III** (Bill of Rights) is violated. Therefore, **JUDICIAL REVIEW**, is imperative both for strengthening participating democracy and for the realization, promotion and protection of basic human rights in the quest for justice.

## **1.1 STATEMENT OF PROBLEM**

The concept of judicial review as a means of protection of the individual's right and liberties has greatly been viewed as a fantastic fiction or serious misunderstanding of judicial control of administrative agencies, with regard to its scope of application, especially that it is a transplanted concept from England, where there is parliamentary sovereignty as opposed to our local scenario which is a constitutional democracy. The judiciary therefore, has a

unique ability and responsibility for enforcement, promotion and protection of human rights. The responsibility rests upon the judiciary in ensuring that the rule of law is upheld, thereby protecting individuals from the powerful engines of Administration.

It has been argued by Prof. **William Wade** in his book, 'Administrative law' that judicial review on the face of it provides a picture that is intended to restrain the engines of government from tramping on individual rights, such as the right to employment, health, education, to mention but a few.<sup>7</sup>

However, the above picture in the use of judicial review as the means of redress of human rights violations has on the ground been a different story because there are numerous procedures to be met before one can qualify to use remedies, such as *locus standi*

(sufficient interest), *obtaining of leave of the court, etc.* which eventually make it difficult for the ordinary citizen to succeed in his/her quest for the upholding of human rights. In this regard, the role of Judiciary in upholding the fundamental human rights is undeniably paramount in sustaining the rights of individuals.

## **1.2 OBJECTIVES OF THE STUDY**

The major objectives of the study are:

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<sup>7</sup> Wale, Administrative law Pg 10

- b) To determine whether or not the provisions of Order 53 are being abused by organizations, thereby violating individual human rights.
- c) To assess whether organs of government through delegated legislation do violate human rights provisions as guaranteed by Part B of the Constitution (i.e. the bill of rights).

### **1.3 RESEARCH HYPOTHESIS**

- (i) Individual rights have greatly been violated by administrative bodies even though the remedy of judicial review is recognized as a means of seeking redress to the Courts of law.
- (ii) The courts of law have not effectively checked administrative action through the use of judicial review remedies.
- (iii) Judicial review remedies such as Prerogative Orders of Certiorari, Mandamus, and Prohibition have not protected the Rights of individuals instead they have been used to significantly trample the very rights which they are intended to protect.

### **1.4 SIGNIFICANCE OF THE STUDY**

Constitutionalism has some major fundamental correlative elements some of which the legal limits of arbitrary power and complete political responsibility



of the government to the governed. In a democratic country like Zambia, which has a constitution with a Bill of Rights for the protection of fundamental human rights should be the bedrock of constitutionalism, through the courts of law.

In the light of the above, while the study is intended for academic purposes, at the end it may also be used as a reference and contribute to the body of knowledge on Human rights law and will provide reference materials to others who might want to dwell deeper into the subject.

## **1.5. METHODOLOGY**

The methodology for the proposed study will be essentially by secondary data sources like books and other published and unpublished works on the subject. Much resort will be made to decided cases (case law) and international human rights instruments. In addition, the assessment of the possible legal issues arising from judicial review, advanced opinions from experts of the specific fields of study.

## **1.6 ORGANISATION OF THE DOCUMENT**

The document is divided into four chapters. The first chapter is the introduction and back ground in which a brief account of judicial Review and Human rights law is espoused. A definition of human rights and judicial review are also outlined. The chapter further gives a general exposition of the main international human rights documents, and a historical account of judicial Review. The statement of the problem, objective of the study, Research hypothesis, significance of the study and the methodology are also highlighted.

The second chapter gives an outline of judicial Review of executive actions, its meaning, and rationale with special reference to the ultra vires doctrine and how it is used by the courts to control administrative powers. The third chapter discusses the scope of Judicial Review in Zambia and the integration

of human rights norms in the judiciary. In addition, the procedure for making an application for Judicial Review and the Administration of Justice is discussed. The fourth and final chapter looks at international limitations on rights, developing a judicial process for integrating human rights norms and reforming judicial review in order to effectively uphold human rights.

## CHAPTER TWO

### JUDICIAL REVIEW OF EXECUTIVE ACTIONS: ITS MEANING, RATIONALE AND THE ULTRA VIRES DOCTRINE.

This chapter shall look at Judicial review and its rationale with special reference to the Ultra Vires doctrine and how it is used by the courts to control administrative powers.

Up to until 1984, the text books traditionally defined the grounds for judicial review as being Ultra-Vires caused by the breach of a rule of natural justice, or cause by the failure to follow a procedural requirement prescribed by statute or caused by a body acting in excess of its legal jurisdiction or abusing its powers by acting in contravention of the “**Wednesbury Principles**”. The only exception was a ground for review, revived in **R Vs Northumberland compensation Appeal tribunal ex p shaw**” of error of law on the face of the record. This was an exception because the body was acting within its jurisdiction when taking the decision (i.e. intra vires) but the decision had been reached via an erroneous interpretation of the law recorded in its proceedings.<sup>8</sup>

It is widely accepted that government, particularly the Executive is a very powerful organ with far reaching powers. Where these powers are not controlled in terms of use the citizenry is likely to suffer the consequences of misuse or abuse of such powers.

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<sup>8</sup> (1952) All.ER Pg 210

Professor Garner, an eminent writer in Administrative law, states in his book Administrative Law that one of the main objectives of Administrative Law is to provide a control over the administration by an outside agency strong enough to prevent injustice to the individual while leaving the administration with adequate freedom to enable it carry out efficient government <sup>9</sup>.

He goes on to say “traditionally the place of this outside agency has been filled .....by courts of Law” <sup>10</sup>

One of the traditional ways of controlling administrative powers is Judicial Control. Judicial Control of Administrative powers refers to the power vested in the superior courts to adjudicate upon the propriety or otherwise of the actions of the administrative authorities.

## **1.0 JUDICIAL REVIEW OF EXECUTIVE ACTIONS IN ZAMBIA: THE GROUNDS:**

Judiciary Control of administrative actions in Zambia can be summed up on basically the following grounds: (1) Contravention of the Constitution; and (ii) where the action of an administrative authority is Ultra Vires.

The two grounds shall be examined in turn.

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<sup>9</sup> Garner administrative law, 5<sup>th</sup> edition (London, Butherworths 1979) P. 122

<sup>10</sup> Ibid, Pg. 122

(a) **Contravention of the Constitution:**

An administrative action can be declared void or nullified if it contravenes the constitution, which is the supreme law of the land. This is usually when it attacks the spirit of the Bill of Rights (i.e. Part III of the Constitution of Zambia). However, sometimes such contravention may not concern the Bill of Rights, for example in the matter of **Kang'ombe Vs Attorney General**,<sup>11</sup> where the issue involved the president's power to set aside the decision of the Teaching Service Commission when it (the Commission) had already reached a decision. It was held that the matter was not "under consideration" and, therefore, that the president's action contravened the Constitution.

(b) **Where an Administrative Authority acts Ultra Vires:**

**Ultra Vires** is the main ground of judicial review. The term **Ultra Vires** is understood to mean 'outside power or excess power so that where one acts outside or in excess of his power, his act will be declared **Ultra Vires** and void<sup>12</sup> power even though widely defined, has some ascertained limits and that parliament is unlikely to intend the Executive to be the Judge of the extent to which it can use its own powers. Therefore, if it can fairly be implied that the powers were given some particular purpose, exercise for any other purpose will be illegal for<sup>13</sup> where an act is shown to be **Ultra Vires** the effect is that it is null and void as earlier stated and of no legal effect.

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<sup>11</sup> (1973) Z.R, Pg. 114

<sup>12</sup> Andrew Beale, Essential Constitutional Law, (1997) Pg. 54

<sup>13</sup> Attorney General V. Fulhan Corporation (1921) Ich 440

The doctrine of **Ultra Vires** as understood or used in Administrative law has three main limbs, namely, procedural **Ultra Vires**, substantive **Ultra Vires** and abuse of power.

(i) **Procedural Ultra Vires.**

This is a form of Ultra Vires which can take the form of either: not following stipulated mandatory procedures or failing to obey the twin rules of natural justice when under to do so.<sup>14</sup> The Zambian case was of **Katongola Vs Attorney General**<sup>15</sup> is instructive of this point, where an Immigration Officer was demoted. The Case concerned mainly with the Public Service Commission regulations.

It was held, on the substantive question, that the demoting authority had no power to do so and in any case that the procedures as to demotion laid down in the Public Service Commission regulations were not followed and that the action was therefore null and void.

(ii) **Substantive Ultra Vires**

This is a form of **Ultra Vires**, which occurs when an administrative authority has done something he has no power to do<sup>16</sup>. Where an authority does anything he has no power to do, such an act will be **Ultra Vires** and void. This is because the source of authority relied upon by the administrative authority is

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<sup>14</sup> Mumba, S.K. "legal controls of Administrative powers" Zambia

<sup>15</sup> 1973/HP/227 unreported

<sup>16</sup> Andrew Beale (1997) Essential, Constitutional Law, 2<sup>nd</sup> Edition pg 34

statutory and as such, the power or powers should be exercised in conformity with the express words of the statute and should comply with certain legal requirements<sup>17</sup> such as good faith.

In **Kang'ombe Vs Attorney General**<sup>18</sup>, the President did not have power to dismiss Mr. Kang'ombe at the time when he intervened. This was because the matter was no longer "under consideration" by the Teaching Service Commission. Had he intervened before they (Teaching Service Commission) decided the matter, the President's action would have been Intra-vires. By the fact that the matter was not "under consideration" the President's action was held to be Ultra-Vires and void.

The English case of **Attorney General Vs Fulham Corporation**" also goes to demonstrate what Ultra-Vires entails. In this case, the Local Authority (Council) had power to run municipal baths and wash-houses.

By starting to operate a municipal laundry (to which the public brought their clothes to be washed not by themselves, but by employees of the Council), it was acting beyond its powers and an injunction was accordingly granted to restrain the Council from continuing to carry on the practice.

Some writers express the principle of substantive Ultra-Vires in terms of "jurisdictional facts."<sup>19</sup> If a statute confers jurisdiction on an administrative body in certain defined factual situations, and if one of the essential elements

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<sup>17</sup> Cartona Ltd. V. Commissioner of Works (1943) 2 ALLER 560 - 564

<sup>18</sup> [1973] ZR pg 114

<sup>19</sup> Garner, J.F, Administrative law, 5<sup>th</sup> Edition (London Butherworths, 1979) P. 147



of these factual situations is absent in the particular case, the body will be without jurisdiction and any decision taken in purported exercise thereof will be **Ultra-Vires**.<sup>20</sup>

In the Zambian case of **R Vs Chilemba**,<sup>21</sup> where the respondent was deported to another country, it was noted that an indigenous Zambian cannot be deported to another country because deportation is only exercised in relation to a non-Zambian. It is clear that the statute conferring power to deport envisages a pre-condition, which is being a non-Zambian.

### (iii) Abuse of Power

If an administrative authority has abused his power, he is said to have acted **Ultra-Vires**. An authority vested with discretionary powers will be acting **Ultra Vires** if he abuses his power. The various ways through which such a body may be said to have abused its powers have been considered by courts in many cases yet it is not clear on what truly constitutes abuse of power<sup>22</sup>.

However, abuse of power may take any of the following forms disregard of public policy, proceeding from improper motives or bad faith; exercising power with malicious intent or capriciously or even unreasonably.<sup>23</sup>

Some writers have chosen to take these as forms of **Ultra-Vires** and not merely incidents of abuse of power.

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<sup>20</sup> Garner, J.F, Administrative law, 5<sup>th</sup> Edition (London Butherworths, 1979) P. 147

<sup>21</sup> Zambia law journal, 1967, P. 101

<sup>22</sup> Mumba S.K., Judicial Review of Administrative Powers PH.D. Thesis. 1983. P 337.

<sup>23</sup> Wade, H.W.R., Administrative Law (Oxford University Press. 1982)P. 337.

For the purposes of this study the author shall additionally look at acting from improper motives, bad faith and unreasonableness as forms of Ultra-Vires.

#### **(iv) Acting from Improper Motives**

Where a purpose or purposes for which a statutory power has been conferred is expressly stated in the statute, use of such a power for another purpose is Ultra-Vires and void. An example is the case of **Sydney Municipal Council Vs Campbell**<sup>24</sup> where the Council had purported to use a statutory power conferred on it for the express purpose of acquiring land to effect improvement in the city centre, not for that purpose, but in order to ensure that the lands' enhanced value, that would accrue as a result of improvements that were being carried out on the adjoining land, would benefit the City Council rather than the private owner. The Privy Council declared the action of the City Council to be void, notwithstanding acknowledgment that the action was taken bonafide in the interest of the City's residents.

Sometimes, however, the statute does not spell out the purpose for conferring the power.

In such a case the court must consider the statute in its totality and determine what proper and improper purposes may be implicit therein<sup>25</sup>

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<sup>24</sup> (1925) A. C 338

<sup>25</sup> Garner, J.F. Administrative Law, 5<sup>th</sup> edition (London, Butherworths, 1979) P 126

#### **(v) Bad faith**

The concept of “Bad Faith” eludes precise definition, but in relation to exercise of statutory powers it may be said to comprise dishonesty (or fraud) and malice.<sup>26</sup> A power is exercised fraudulently if its repository intends to achieve an object rather than that for which he believes the power to have been conferred. The intention may be to promote another public interest or private interest.

A power is exercised maliciously if its wielder is motivated by personal animosity towards those who are directly affected by its exercise<sup>27</sup>

#### **(vi) Principle of Reasonableness**

Where an administrative authority is vested with the discretion to decide or act on a matter, such authority must exercise his discretion upon reasonable grounds. “A discretion does not empower a man to do what he likes merely because he is minded to do so – he must in the exercise of his discretion do, not what he likes but what he ought. In other words, he must, by the use of his reason, ascertain and follow the course which reason directs. He must act reasonably”<sup>28</sup>.

Decisions which are extravagant or capricious will therefore, be impugned by the court for want of reasonableness. The test of what is reasonable or not is the standard indicated by a true construction of the

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<sup>26</sup> Evans J.M. de Smith’s judicial review of Administrative Action

<sup>27</sup> Roncorelli V. Duplessis [1959] SCR 1 & 1

<sup>28</sup> Roberts V. Hopwood [1925] A.C 578 at 613

Act which distinguishes between what the statutory authority may or may not be authorised to do.

The facets of the Ultra-Vires doctrine as discussed above are not sacrosanct but do sometimes overlap.

For example, the Kang'ombe case, referred to earlier, demonstrates instances of both procedural and substantive Ultra-Vires.

It is now important to address ourselves to the issue of consequences of an act being declared Ultra-Vires or outside jurisdiction. Is it void or voidable?

### **1.1 Consequences of an Ultra-Vires Act.**

Generally, where a mandatory procedure is breached the result is that the action is null and void whereas non-compliance with a directory procedure will be voidable and can be remedied.

As to who decides whether a procedure is mandatory or merely directory, this is dependent on the court. However, practice has shown that it normally depends on the practical effect of the power in question.

In assessing the importance of a provision, particular regard may be had to its significance as a protection of individual rights that may be adversely affected by the decision and the importance of the procedural requirement in the overall administrative scheme established by the statute.

Furthermore, much may depend upon the particular circumstances of the case in hand. Although “nullification is the natural and usual consequence of disobedience”<sup>29</sup> breach of procedural or formal rules is likely to be treated as an irregularity if the departure from the terms of the Acts is of a trivial nature.

For example a minor typographical error in the notice of a licence could be disregarded<sup>30</sup> or if serious public inconvenience would be caused by holding them to be mandatory, or if the court is for any reason disinclined to interfere with the act or decision.

The doctrine of **Ultra-Vires** is mainly called into play due to the wrong use of discretionary powers.

## 1.2 NEW CLASSIFICATION

The categorization of the ground of review changed with the judgment of Lord Diplock in the leading case of Council of Civil Service Unions V. Minister for the Civil Service.<sup>31</sup>

The first ground according to Lord Diplock called it “illegality” the second “irrationality” and the third “Procedural” “impropriety”. That is not to say that further development on a case by case basis may not in course of time add

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<sup>29</sup> Maxwell on interpretation of Statutes (London) Sweet & Maxwell Ltd., 1962 P 363

<sup>30</sup> RV Dacorum, ex parte E.M. I Cinemas (1971) All. ER 666

<sup>31</sup> (1985) Council of Civil Servants Service Union’s V. Minister for the Civil Service Pg. 26

further ground. By “illegality” as a ground for judicial review, he meant that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it. Whether he has or not is par excellence a justifiable question to be decided, in the event of dispute, by those person, the judges, by whom the judicial power of state is exercisable. By “irrationality” he meant what can now be succinctly referred to as “Wednesbury unreasonableness” .....it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. The third head can be called “ Procedural impropriety” rather than failure to observe basic rules of Natural justice, because the head cover failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of Natural justice.

This chapter has outlined the various categorization of the grounds for judicial review because it provides a useful checklist to apply to the problem scenario in the examination. When exercising their supervising jurisdiction, Judges first concern themselves with the question of whether the decision maker was acting within their vires (illegality). If the answer to this question is in the affirmative, then the judges turn to the next question of whether it can be made out that the decision makers abused their power (procedural impropriety and irrationality). Therefore through the cited cases,the chapter has shown how courts have reviewed the actions of judicial review and its associated rationale.

## **CHAPTER THREE**

### **1.0 THE PROCEDURE FOR MAKING AN APPLICATION FOR A JUDICIAL REVIEW AND THE ADMINISTRATION OF JUSTICE**

#### **1.1.1 ORDER 53**

This chapter outlines the procedures to be followed in an application for judicial review and the administration of Justice.

The initial concern of any litigant in administrative law is which procedure should be adapted to commence an action. In essence the two types of procedure available reflect the public law and private law divide. An application for a judicial review will have the high court as the court of first instance. Thus the procedure to be adopted is prescribed in the Rules of the supreme court (white book). In particular, order 53 (ord 53) contains the rules relating to an application for a judicial review.

Up until 1977, this procedure did not allow for cross-examination on affidavits, discovery, interrogatories or the private law remedies of damages, declaration or injunction to be added to the claim for the prerogative orders of mandamus, certiorari and prohibition. Responding to the law commission Report' remedies in Administrative law 1976' these deficiencies were removed by rules of the Supreme Court.<sup>32</sup>

In particular, order 53r7 allows a claim for damages if damages would have been available in an action started by writ, and order 53 r8 allows for the

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32 (amendment No. 3) 1977 (51 1977 No. 1955)

discovery of documents, administering of interrogatories and cross – examination of deponents on

affidavits. These procedural reforms were later enshrined in section 31 of the Supreme Court Act 1981.

The other procedural obstacles remained. The justification being that the courts needed greater control over public law proceedings than private law proceedings that the essence of proceedings was speed and that it was important to channel these actions to the specialist judges assigned to the crown office List.<sup>33</sup>

#### 1.1.2. LEAVE AND LOCUS STANDI

Order 53 r 3 requires the obtaining of leave of the court. Order 53 r 3 (7) only allows leave to be granted where the applicant has a sufficient interest, known by the Latin tag LOCUS STANDI. The leading decision of **RV. IRC, exp. National Federation of self-employed and small businesses**<sup>34</sup>, establishes that the issue of sufficient interest may be considered at both the leave stage and the hearing, although the test applied at the different stages may not be the same.,

Authors and Judges have argued that the requirement of leave is necessary in order to eliminate frivolous and vexatious or hopeless applications without the need for inter partes judicial review hearing. In view of this, no application

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<sup>33</sup> Beale Andrew, Essential Constitutional law, 2<sup>nd</sup> edition. (London, Cowerd Publishing Limited, 1995) P. ( 61)

<sup>34</sup> (1982) ALLER, P 245



for judicial review may be heard without obtaining such leave. In Zambia there has been another .....

### 1.1.3. Leave to apply:

Authors and judges have argued that the requirement of leave is necessary in order to eliminate frivolous vexation or hopeless applications without the need for inter partes judicial review hearing. No application for judicial review may be heard without such leave. Not disregarding the learned opinion of the noble authors and judges, it is here to be observed that the justification for leave is unfounded both in principle and in law and it is based on bad faith. Professor Wade agrees with this view when he says "*in principle it seems wrong to impose this special requirement on proceedings against public authority that ought not to be treated more favorably than other litigants*"<sup>35</sup> He argues that this requirement for leave does not exist in procedures for judicial review in Scotland, Canada, and New Zealand. Therefore it can be argued that if the requirement for leave was as essential as it is portrayed, it would have formed a common denominator of all the judicial systems, just as the appeal system is not foreign in any legal systems. The requirement for leave is therefore optional in nature and therefore cannot form a distinctive feature of judicial review. In Austria, there is no requirement for leave because it was objected to by the Administrative Review Council as wrong for 'sound reasons of principle and pragmatism.' Indeed one may agree that leave is wrong in principle.

(a) In the first place, one realizes that a 'constant intestine struggle' still exists between government's authority and civil liberty. Standing as they do,

an ordinary citizen is placed in an awkwardly weaker position. In such a situation it would not be unreasonable to argue that a judicial review system that assumes the role of an ardent referee against government rough play must be framed in such a way as to favour a citizen against government's powerful machinery. Contrariwise the requirement of leave in its present form favors the government.

- (b) Leave is granted at the discretion of a single judge sitting in chambers. This may be abused especially where a highly political case is involved, consequently depriving the poor citizen of the justice one is supposed to be entitled to.
- (c) It is said that leave enables unmeritorious and frivolous cases to be disposed of summarily if an arguable case cannot be shown<sup>35</sup>. The problem with this test is that it has no substance because there is no universally accepted standard to determine what 'frivolous, vexations and unmeritorious' matter is. A single judge still has to decide what is frivolous or unmeritorious.
- (d) Leave betrays the rationale and purpose of judicial review. "Judicial control is the ultimate safeguard for the ordinary citizen against unlawful action by what would otherwise appear to be more powerful administration."<sup>36</sup> Therefore there should be no barrier against a safeguard as this would amount to placing a Safeguard against a safeguard.
- (e) Doing so puts government in an even stronger position than it already enjoys.

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<sup>35</sup> Wade and Forsyth administrative law, P 677

<sup>36</sup> D.C.M. Yardley, administrative Law, P. 42

It is here submitted that leave only creates a rubber stamp of justice and creates a give and take situation where one party has nothing to give. To agree with this view one must answer the Question, should someone who feels injured ask for permission to obtain justice?

One principle of rule of law is that the government must not enjoy any more than necessary privileges than the private bodies or persons<sup>37</sup>. It is contended here that leave is one such unnecessary privilege enjoyed by government in breach of the principle of rule of law. Further to the above reasons impugning the validity of leave is the fact that when one is suing in tort or contract, one does not have to obtain leave although he might be suing the government department. Therefore why should there be a valid justification for leave in judicial review as if the said government department becomes different organ in judicial review?

Finally there is a fiction, whether legal or otherwise, embodied in leave to which even judges remain hypnotized. This lies in the overlap between the determination of leave and the main application. It is rare, if not impossible, that a judge will determine application for leave without determining the substantive issue at the same time. For when a judge finds that the matter is frivolous or unmeritorious he is in effect saying that the whole application for judicial review would not succeed even if leave were to be granted.

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<sup>37</sup> P. 16 ante

#### 1.1.4 SUFFICIENT/INTEREST

One may recall that the court will only grant leave to apply for judicial review if an applicant has a sufficient interest in the subject matter of the application.

The justification it is alleged, is that requirement;

(b) Prevents a proliferation of a class of persons popularly known as private attorney generals.<sup>38</sup>

However one may also agree that the requirement of sufficient interest is not only known to judicial review. Sufficient interest ensures that the person bringing an action is a Proper party not because he is keenly interested in the state of affairs, but that he is himself affected.

#### 1.1.5. UNDUE DELAY

Order 53 r4 requires that an application ... “shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the court consider that there is good reason for extending the period”.

In considering such an extension, judges in the House of Lords made clear in **RV Diary produce Quota Tribunal, exp Caswell**,<sup>39</sup> that a court should have consideration of section .13 (6) and (7) of the Supreme Court Act 198. Thus no extension must be granted of the effect of granting the relief sought, would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.

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<sup>38</sup> *ibid*, Pg 16

<sup>39</sup> (1989) 1WLR 1089,3AllER205.

“This is not to say, however, that order 53 r4 offers a three months limitation period. An application for judicial review can be struck out on the grounds of undue delay even when it is initiated within a three –month period.

It is to be observed that such a provision as relates to time is not only bad in principle but also unjust. The following are the reason :

- (a) The primary requirement as to time is ‘ promptly.’ The implication of this state of affairs is that even where an application for leave has been made within three months as provided, there could be cases where leave would still be refused because, on the facts, the application had not been made promptly .<sup>40</sup> The extension of time is because the applicant had not acted promptly. Surely this is too much protectionism of administrative body and a contradiction of the aim and rationale of judicial control of administrative agencies. This is further unreasonable in all sense and for all intent and purposes. Its justification can be explained on reasonable grounds.
- (b) The cases and rules governing renewal of writs do not apply or are of no assistance to determine whether to grant or to refuse the extension of time for leave to move for judicial review. The justification is that judicial review being public law; there is no true *inter partes*. The only question therefore is whether having regard to all circumstances of the case there was undue delay Even where there are good reasons for delay the judge still reserves discretion to refuse to grant leave to move for judicial review. The ZRA case refereed to hereinbefore is a classic example.

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<sup>40</sup> As in *RV independent Television Commission exp TVNL Ltd* (1991) *The Times*, December, 30

- (c) Even where there are good reasons for delay the judge still reserves discretion to refuse to grant leave to move for judicial review.. This is a contradiction of the principle that an application for judicial review must show that the applicant has exhausted all administrative remedies available to him because the judiciary does not possess any general supervisory power over administrative agencies. In such situation the applicant is placed in an awkward situation as to what right thing to do. If the exhausts administrative remedies, time will lapse; if he does not exhaust such administrative channels, the application will be refused on the principle of exhaustion of administrative channels. Therefore in such a situation, judicial review becomes a gamble based on trial and error. The time limit presumes that one has to finish all the administrative channels within three months. But that is to depart from bureaucratic reality so prevalent in government departments.
- (d) Where the applicant fails to apply for leave promptly but the judge nevertheless grants the applicant an extension of time at the leave stage, the delay will still carry with it inevitable consequences of undue delay, that is to say, that court hearing a substantive application for judicial review will still be at liberty to refuse relief on the grounds '*substantial hardship*' or detrimental to good administration.

#### **Grounds for review – the problem of words.**

As already noted, judicial review can only be heard and determined if the applicant shows that there is justifiable issues or arguable case.

To show an arguable case the applicant will rely on any of the known grounds for review. Thus order 53 r 3 (2) provides that an application for leave shall contain, inter alias, the relief sought and the grounds upon which it is sought. There is a divergence of terminology used in classifying the grounds for judicial review and opinion does not seem to be the same. Lord Diplock observed.

*“judicial review has I think developed to a stage today when one can conveniently classify under three heads the ground upon which administrative action is subject to control by judicial review. The first ground I would call illegality, “ irrationality,” and the third “ procedural impropriety.”*<sup>41</sup>

The opinion of Lord Diplock therefore is that these terms illegality, irrationality or procedural impropriety are heads or umbrella terms under which grounds for judicial review can be classified, that is to say, the grounds for judicial review fall under any of these heads. On the contrary, Professor DCM Yardley confines himself to the traditional classification of the grounds for judicial review and he discusses these as the equivalents of Lord Diplock’s heads – that is to say ultra vires, breach of national justice and error of law. He argues that illegality; unreasonableness, improper motives bad faith and other are grounds that under one head, that is, ultra vires. Looking at the true meaning of vires (as relates to jurisdiction), one tends to agree as does professor Yardley that ultra vires other than illegality is the umbrella term .

#### **1.1.6 APPEAL AND REVIEW**

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<sup>41</sup> Council of Civil Service union’s V. Minister for the Civil Service (1985) Pg. 26

Appeal is said to be different from judicial review in that whereas appeal it involves the rehearing of all or part of an issue that has already been dealt with and results in the substitution of the original decision with a new one upon all or part of the merits, review is said to be far more basic. It said judicial review involves a consideration of some aspect of the original proceeding which may rob it of any validity or existence in law.

The therefore court determines the fundamental issue not the merits. It is strongly observed that this difference is both artificial and superficial. The following is the analysis:

**“ The rehearing of all or part of an issue.”** This is not difference any more than it is a mere assertion.

It is also a vague statement if not misleading. Firstly, what does ‘rehearing’ mean? If it means the fresh hearing of the whole or part of the main issue of the original action then rehearing is not only distinctive of appeal. This would mean that an appellate court will hear evidence as presented from the witness box and concern itself with the entire procedural rules or examination and cross-examination etc. however , this is not the case both in practice and in law especially in Zambia. For example the Supreme Court in Zambia is a court of Record.<sup>42</sup> This means that it determines the dispute in question by reference only to the record in the court below and that cannot be said to the rehearing but possibly reference to what was heard in the Court below. Similarly, in judicial review proceedings the court determines the matter by referring to what had actually been determined by the decision making body and therefore

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<sup>42</sup> Sec. 31 and 38 of SC Act Cap. 25 of Laws of Zambia



relying only on affidavit evidence. That cannot be said to be so strictly different that it should deserve a different name and procedure. When one bases the difference between judicial review and appeal on the principle or rehearing. One possibly has in mind the appeal that lie to the Subordinate Courts. For example in Zambia, Subordinate Court exercise appellate jurisdiction over the local Court.<sup>43</sup> Rehearing therefore is not a distinctive feature of appeal. In fact the reverse is the truth save where the statute provides to the country.

Review is said to “**involve a consideration of some aspect of the original proceedings**”

With due respect to such a proposition, it is contend here that this statement is a similarity rather than the difference between appeal and review. This alleged element is a difference between judicial review and the ordinary action at its original stage (at trial) because a trial Court is concerned with all facts not with one aspect of the facts. However, on appeal, the court is concerned with specific aspect of aspects of the original proceedings. The court does not gloss over the whole trial. The force of this argument is reinforced by the fact that on appeal the appellant has to file the grounds of appeal.<sup>44</sup>

these grounds are specific aspects of the original proceedings in the tribunal or court below. The court will not determine any issue not raised in the notice of memorandum of appeal as the ground for appeal. If appeal were a ‘rehearing’ then the requirement of grounds would be superfluously otiose.

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<sup>43</sup> Section 58 (2) of the Local Court Act Cap states “An appeal from a local court shall be dealt with by way of rehearing”.

<sup>44</sup> Order 44 r 5 (5) of Subordinate Court Act Cap 28

Appeal **“result in the substitution of the original decision with a new one.”**

Barnett Hillarie<sup>45</sup> puts it this way “ in the case of appeals, where the appeal is successful it will usually result in a new decision being substituted for the previous decision. In some instances a new trial may have to be ordered for a fresh decision to be reached. In the case of review, a successful case will result in the previous decision being nullified or quashed but no new decision will be put in its place. Instead, the body in relation to which a successful application for judicial review has been made will be directed to predetermine the case according to the correct rules and procedure, and it is by no means inevitable that the decision reached according to the lawful procedure will be more favorable to the individual than the original decision.”

However to create such a distinction is failure to look at matters objectively. To say that in judicial review matter the court does not substitute its own decision is not entirely true. The illustrative examples are those involving certiorari and mandamus. An order of certiorari is one that quashes the original decision. But to quash simply means to reject or to refuse to accept and this is a term which is common in many other ‘ordinary proceeding.’ For example more often than not we hear that the appellate Court has quashed the conviction in a criminal case. A retrial may be ordered and the trial Court not bound to alter the original decision but only to make a decision according to the new directions from the appellate court. In proceedings for certiorari where there is no direction for a tribunal to reconsider the case, it would not correct to say that the decision has not changed.

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<sup>45</sup> In Constitutional and Administrative Law (1998) 2<sup>nd</sup> ed. Pg 913

### 1.1.7 PRIVATE LAW ACTION

By contrast, private law actions against public bodies are commenced by ordinary writs issued in the plaintiff's own name. In the important decision of the House of Lords in **O'Reilly V. Mackman**,<sup>46</sup> it was, however, held to be an abuse of the process of court to allow an action to continue by way of writ when it should rightly have been commenced under the order 53 procedures with all its constants. In view of this of the above, Lord Wilberforce had this to say:-

*"We have not yet reached a point at which mere characterization of a claim as a claim in public law is sufficient to exclude it from consideration by ordinary courts. To permit this would be to create a dual system of law with the rigidity and procedural hardships for the plaintiff which it is the purpose of recent reform to remove."*

With all the great respect, we are indebted to these words. The essence of public/private law split is simply one of mere classification. It is a fiction.

Therefore there is no need to exclude judicial review from consideration by the ordinary court.<sup>47</sup> This would simply be to invite undue rigidity and procedural hardships for the plaintiff. Indeed that would be contrary to the intention and purpose of the 1977 procedural reforms whose essence was to simplify procedure on application for remedies could still be granted had an action been begun by an ordinary action, than judicial review. In this regard, the question of private law or

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<sup>46</sup> (1983) ALLER, Pg. 45

<sup>47</sup> It is the view of this argument that in public law matters ordinary judges wear a veil of public law and act as public law judges

public law is simply one of mere words, which should not debar people from the justice they deserve. After stating: Professor Dias argued, “the distinction between public and private law is quite arbitrary.”<sup>48</sup>

In fact there are cases where it is permissible to litigate public law matters in private law proceedings. One instance is where the public law issue arises only as collateral and not as a substantive matter. Another is where the other party does not –to-case basis.<sup>49</sup> This only shows that public law/private law split is not a rule but mere rhetoric which is left to chance. For, in fact, if all parties chose not to object for example to impugning public authority’s decision by private law procedure then there would be no such a split. Therefore a religious adherence to such a split would be founded on no good faith.

Finally, it is provided<sup>50</sup> that if the relief being sought in judicial review proceedings is declaration, an injunction or damages and the court considers, on the facts, that the instead of refusing the application the court may direct that proceedings continue as if they had been begun by an ordinary writ. However, the reverse is not the case. The court will not have power to continue an ordinary action as an action for judicial review. There is no good reason for doing so apart from that such a procedural discretion is not expressly provided for under order 53 r23. The court will thus strike the action out for it to commence afresh by an application for judicial review. It must be pointed out that such a view is not only unfair to the innocent but also constitutes procedural absurdity. For if the court has express authority to go

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<sup>48</sup> Dias (1985:246)

<sup>49</sup> O’Reilly V. Mackman (1983) XAC 237, 385:3 A11 ER 1124, 1134

<sup>50</sup> Order 53 r 9 (5)

one way forwards then there is also an implied authority to do the reverse. There would be nothing wrong or costly to do that. All it requires is an order that the action shall proceed and as a judicial review hearing. This would be cheaper and just for the applicant and even for the respondent, because in many cases, by the time the applicant begins a fresh action, the three months time limit for applying for leave to move for judicial review will have expired and therefore any judicial review application is likely to fail on the ground of delay. It is therefore the contention here that the public/private law split is unfair, unnecessary arbitrary, and a failure to reconcile judicial review to justice and rule of law in strictu sense.

#### **1.18 THE SCOPE OF JUDICIAL REVIEW - THE ZAMBIAN CASE**

Article 94 of the Constitution provides the extent of the power of the high Court of Zambia to review administrative actions. The Court has unlimited and original jurisdiction to hear and determine any civil or criminal proceedings under any law. The position is, however different in the UK where the courts have such jurisdiction as is prescribed in legislation enacted by Parliament.

Both Section 31 of the Supreme Court of the England and Order 53 of the Rules of the Supreme Court govern applications for judicial review. They identify the remedies available and the procedure to be followed to obtain public law remedies.

In Zambia, the Constitution has conferred upon the High Court original and unlimited jurisdiction to hear and determine any issue. There is no limit to the issues which may be presented before the court.

It is the Constitution which has prescribed that the High Court shall have unlimited and original jurisdiction to hear and determine any civil or criminal proceedings under any law and such jurisdiction and powers as may be conferred on it by the Constitution or any other law.

The only limitation on the jurisdiction which applies to the High Court is on matters which have been specifically reserved to the Industrial Relations Court under the Industrial Relations Court Act.

For instance the Industrial Relations Court can hear and determine a complaint by a person alleging that his employment has been terminated or has suffered penalties or disadvantages in employment on account of his tribe, sex, marital status, religion, political opinion or affiliation or status. The Industrial Relations Court may order a reinstatement or damages or both if the allegations have been established.

But the High Court cannot entertain such applications or complaints. This is so because such matters have been exclusively reserved to the Industrial Relations Court by the Constitution and the Industrial and Labour Relations Act provides that such complaints shall be heard and determined by the Industrial Relations Court.<sup>51</sup>

This limitation is imposed by the Constitution itself and not by an Act of Parliament. It is the Constitution which also recognises the provisions of the Industrial Relations Court Act on jurisdiction .

The language of Constitution also envisages that the Constitution or an Act of Parliament may confer jurisdiction on the High Court on other matters, but it is difficult to see what these matters may be, since the Article 94 already confers unlimited and original jurisdiction on the High Court, except for matters reserved to the industrial Relations Constitutions.

The decision of the Supreme Court in **Zambia National Holdings and Zambia National Independence Party V The Attorney**<sup>52</sup> is sound, but cannot be supported on the reasoning expressed by the Court. It is helpful to proceed on the premise that matters which may be presented before the High Court, in any case be it civil criminal or otherwise can be presented before the High Court, except those reserved for the Industrial Relations Court.

The meaning of unlimited and original jurisdiction does not relate to remedies, which may be granted by the High Court. Article 94 does not relate to remedies, so that it would be perfectly legal for an Act of Parliament to limit the remedies that the High Court can issue. It is on this premise that legislation which limits the remedies or the sentencing powers in criminal cases, which

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<sup>51</sup> See section 108 of the Industrial and Labour Relations Act.

<sup>52</sup> SCZ Judgement No. 4 of 1994 The case arose out of the decision by the President to compulsorily acquire the New UNIP party headquarters. The appellant lodged a petition challenging the President's decision. The applicants proceeded by invoking the provisions of the constitution. The appropriate cause of action should have been in administrative law by applying for judicial review of the President's decision to compulsorily acquire the property in issue. The remedy since they objected to the acquisition of the property, should have been an order of certiorari quashing the decision of the President.

may be given by the High Court are constitutional. Section 16 of the State Proceedings Act does not violate Article 94 of the Constitution, because it limits the remedies, which may be ordered by the Court, but does not limit the case which may be entertained.

Section 34 of the National assembly (Powers and Privileges) Act is an interesting provision. Unlike the section 16 of the State Proceedings Act, which specifically deals with the issue of relief which may be ordered by the Court against the State, section 34 deals with the jurisdiction of the Court. It provides that neither the Assembly, the Speaker, nor any officer is subject to the jurisdiction of any Court in respect of the exercise of any power conferred or vested by or under the Constitution, the Standing Orders and under the National Assembly (Powers and Privileges) Act. Apart from some incremental changes introduced in 1976, this has been the language of section 34 since the enactment of the legislation in 1956, as Legislative Council (Powers and Privileges) Ordinance No. 34 of 1956.

The said provisions does not and cannot be taken to mean that courts in Zambia cannot inquire into the exercise of the power of the Speaker, the Assembly or an officer of the Assembly conferred by the Constitution, the Standing Orders or the Act itself. Section 34 does not oust the jurisdiction.

The question which may be posed is: Who has the power to determine whether the power exercised by the Assembly, the Speaker or officers of the Assembly are indeed vested in the Assembly, the Speaker or the officers under the National Assembly (powers and privileges) Act, the Constitution or the



Standing Orders? It would no doubt be absurd to contend that the Assembly itself has the power to determine the question.

This would undermine the basis of the system of government which is founded on rule of law as opposed to the rule of men. The dangers inherent in contending otherwise, is that the Assembly or the Speaker may purport to assume powers which he may not have. It is the duty of the Court to interpret the relevant provisions of Act, Constitution and Standing Orders and make the necessary findings.

The Constitution is founded on the principle of separation of powers. According to Article 62 of the Constitution the function of the National Assembly and all its officers acting together with the President is to legislate. The responsibility of interpreting the law vests in the judicature, which according to Article 91 of the Constitution consists of the Supreme Court of Zambia, the High Court of Zambia and any other that may be prescribed under an Act of Parliament. Section 34 does not limit the jurisdiction of the Court to review exercise of the power by the Assembly, Speaker or officers. The Court has the jurisdiction to hear any complaint or issue raised against the Assembly, the Speaker or against the officers of the National Assembly and it is for the Court to determine whether the subject matter complained of or which is the subject of the application before the Court falls within the competent jurisdiction of the Assembly. If the Court hold that that the subject matter which is the cause of the complaint is within the competence of the Assembly, the Speaker or the officer of the National Assembly, the Court will uphold the

action taken. But if it is found that the Assembly or the Speaker has exercised powers which he does not have under the Act, the Constitution or the Standing Orders, the Court will say so and make such directions or orders as may be deemed fit to correct the position.

Not even in the United Kingdom, where there is no written constitution in the traditional sense, is there a complete ouster of judicial review into the activities of Parliament.

In the case of **British Railways Board v. Pickin**<sup>53</sup> Lord Denning observed “*it is the function of the Court to see that the procedure of parliament itself is not abused, and that undue advantage is not taken of it. In doing so the court is not trespassing on the jurisdiction of Parliament itself. It is acting in aid of Parliament and, I might add, in aid of Justice*”.

It is also worth noting that the Constitution in Zambia is the supreme law of the land. Article 1 (2) of the Constitution of 1991 provides “*this Constitution is the Supreme law of Zambia and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void*”.

It follows that if it is contended that the section 34 of the National assembly (Powers and privileges) Act bar the court from inquiring into the exercise of powers conferred on the assembly, the Speaker or the officers of the Assembly, then section 34 is ultra vires Article 94 of the Constitution as it is detracting from the jurisdiction conferred by the powers of judicial review on

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<sup>53</sup> (1974) WLR 208

the part of the Court. The Court still has to examine whether what has been done is intra vires the Constitution, the National Assembly (Powers and Privileges) Act and the Standing Orders.

The Scope of judicial review by the high Court is unlimited in Zambia, except for matters expressly reserved for the Industrial Court. It follows that the high Court can hear a complaint against any one in Zambia and adjudicate on it as provided by law.

Notwithstanding the fact that article 94 of the Constitution describes the extent of the powers of review by the Court, the scope of judicial review, in administrative law, is largely linked to the development of the ancient prerogative remedies and the circumstance in which the remedies are available at common law.

#### **1.1.9 WHO MAY BRING JUCICIAL REVIEW PROCEEDINGS; STANDING TO SUE**

In this part we examine the issue of standing that is whether an applicant's interests have been sufficiently affected by the decision which he seeks to challenge. In the absence of standing, the Court has no jurisdiction to exercise its supervisory powers over impugned Governmental action. How the issues of standing are decided has a bearing on who has access to courts. In issue is the question whether it is right, as a matter of principle, for a person with a

meritorious case challenging the validity of the Government action, to be turned away because he has not been affected by the decision being challenged. Is, there some government action which can be challenged in Court, which have not affected any one? If the answer to the question is not affirmative then the role of the Court becomes that addressing wrongs rather than that of judicial review which involves the maintenance of rule of law

**(a) The Rationale for the Rule on Standing**

Every system of Government has to address two competing interests – the need to encourage citizens to actively participate in the enforcement of the law, and the undesirability of encouraging professional litigants who invoked the jurisdiction of the court in matters which do not concern them. The conflict has been resolved by developing principles which help to determine who has locus standi or standing to bring proceedings.

There are a number of arguments in favour of restricted access to the court by any member of the public for purpose of challenging an administrative action which he does not approve. The power of the court to award costs and the doctrine to deter unmeritorious limited and scarce resources should not be used to provide a forum for frivolous claims. The proper function of the central and local government should not be unnecessarily disrupted to the disadvantage of other members of public by having to contest the proceedings. The courts must reserve their power to interfere with the working of Government to those situations where there is an application before them by someone who has been adversely been affected by the unlawful conduct on which the complaint is made. In administrative actions which can affect

sections of the public, it is important that the proceedings are brought by persons who, because they are interested in the outcome of the case or otherwise, are in a position to ensure that full argument in favour of the remedy which is sought are presented before the court. It is important that courts restrict themselves to their correct constitutional role, and not become involved in determining issues which are not justifiable.

There are also arguments in favour of a more liberal approach to the issue of standing. This is so in judicial review proceedings, since it is important, in the interest of the public generally, that the law should be enforced. The policy should therefore be to encourage and not to discourage public-spirited individuals and groups, even though they are not directly affected by the action being taken, to challenge the unlawful administrative action.

Safeguards other than the issue of standing exist to guard against unmeritorious application. In the case of judicial review there is the requirement of leave and the opportunity to apply to have the proceedings struck out if there is no standing of action of the proceedings as it will be an abuse of the court. Where there are strict rules as to standing there is always the risk that no one will be in a position to bring the proceedings.

In Zambia the view that, if the courts took a liberal stand on the issue of standing, they would be overwhelmed by a flood of frivolous actions cannot be supported by evidence. The level of literacy and interest in government activities is very low. There are very few people who know or even understand why Government action is being challenged. The extent of the powers

exercised by government action is being challenged. The extent of the powers exercised by government and the strong presidency which has been created makes all arguments against the liberalization of the rules on standing untenable.

In a country where the vast majority of the people have no disposable income and do not have enough to eat, they can not be expected to meet the cost of litigation, which is often very high. The government is under an obligation to explain to the people what is being done. There is no legislative mechanism to compel government to make the necessary information available to the general public. The position of Zambia supports the relaxation of the rules on standing.

## **CHAPTER FOUR**

### **1.1 DEVELOPING A JUDICIAL PROCESS FOR INTEGRATING HUMAN RIGHTS NORMS.**

The task of identification of the appropriate human rights norms and its ambit is relatively simple in a country like Zambia with a constitutional 'bill of rights'; The principles are set out and their constitutional status makes it clear that they must prevail over inconsistent laws and government conduct.

Where a country has a 'bill of rights' but has not entrenched it constitutionally, the situation is more complex. The status of such bills of rights is sometimes described as quasi-constitutional. The norm is readily identified, but it may be uncertain whether it was intended to prevail over inconsistent laws or government conduct. It can be argued that principles in an entrenched 'bill of rights', can be used for interpretative purposes and in judicial review and petitions under the civil rights rules 1969

Where a country has adopted such a bill, there is a presumption that the Government's laws and actions are intended to be in conformity with the 'bill of rights'. There is also a presumption that government conduct and executive and judicial discretion are to be exercised in accordance with the 'bill of rights'; only a clear intention which override the 'bill of rights' can rebut this

presumption. Moreover, if the norm at issue can be described as a fundamental norm upon which governmental institutions of the country are predicated, the presumption of conformity cannot be rebutted. Similarly, such a norm may have the effect of invalidating inconsistent legislation and government conduct.

Where the country has neither an express constitutional nor an entrenchment 'bill of rights', identification of a judicial norm is usually difficult. The search is for implied constitutional principles. It is argued at a minimum the protection of life, the protection of basic liberties like the right to fair trial, and the democratic liberties like freedom of political, speech, the right to participate in governance and voting, fall into the category of fundamental norms upon which the governance of the modern state is predicated. But they may not be restricted to these notions. Previous Judicial decisions pronouncing on fundamental rights and human rights norm. In addition, international obligations assumed by the country may indicate adherence to basic norms of human rights. Thus the Australian High Court has treated a human rights guarantee in an international covenant signed but not ratified by the Australian Government as creating a legitimate expectation that administrative decision makers would act in conformity with the convention.

Judicial resource to fundamental human rights norms must be open and transparent. This requires that the norm used be identified and justified. The emerging international concurrence on basic human rights norms, increasingly internally by the signing and adoption of international protocols, should aid in



this process. The trend to adopting formal bills of rights, often constitutionalized, may also assist.<sup>54</sup>

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<sup>54</sup> See eg. The Canadian Charter of Rights and freedoms, enacted in 1982, Israel's Basic law; Human Dignity and freedom, enacted in 1992, and South Africa's Bill of rights chapter 12 of the Constitution of the Republic of South Africa enacted in 1996.

## 1.2 INTERNAL LIMITATIONS ON RIGHTS

Most modern bills of rights recognize that rights are not absolute.

Even ‘Bills of Rights’, cast in absolute language, like the United States ‘Bill of Rights’, have of necessity been interpreted by the Courts to recognize the rights are not absolute and must be limited internally. Reports of the European Court of Human Rights, Series A No. 103 (July 1986) Sometimes Court orders on human rights violations require the state to take active steps. In **Christine Mulundika & Seven others Vs The People**<sup>55</sup>, the Appellants challenged in the Supreme Court the constitutionality of section 5 (4) of the public order Act, which provided that:

“Any person who wishes to convene an assembly, public meeting or to form a procession in any public place shall first make an application in that behalf- to the regulating officer of the area concerned and if such officer is satisfied that such assembly, public meeting or procession is unlikely to cause or lead to a breach of the peace, he shall issue a permit in writing authorizing such assembly, public meeting or procession and specifying the name of the person to whom it is issued and such conditions attaching to the holding of such assembly, public meeting or procession as the regulating officer may deem necessary to impose for the preservation of public peace and order”

The Supreme court, held this section unconstitutional as it was a hindrance to the right to organize and participate in a public gathering is inherent in the freedom to express and to receive ideas and information without interference. Thus, section 5 (4) of the public Order Act, was held to contravene Articles 20 and 21 of the constitution, consequently, it was held to be void and invalid for

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<sup>55</sup> (1995 – 1997) ZR Pg. 20

unconstitutionality. The state amended section 5 (4) by among other things substitution the word application by notification. In recent times every major political issue has found its way to the Court and the judiciary has navigated what can best be described as a careful cause.

An earlier case that raised interesting issues and on which a decision for the applicant did radically change the course of Zambian Political history is that of **Nkumbula Vs Attorney General**<sup>56</sup>. Nkumbula as National Congress Leader petitioned the High Court to prevent the introduction of the one party state on the grounds that:-

- (i) Its introduction was not for the ‘public welfare’ within the meaning of those words in inquiries act and
- (ii) Its introduction would infringe his rights under section 23 of the Constitution (i.e. freedom of association).

The court of appeal’s judgment which was delivered by Baron Judge President, described Nkumbula’s appeal as an academic exercise and he went on:

*“ it is unthinkable to suggest that a government of a country elected to run an ordered society is not permitted to impose whatever constitution restrictions on individual liberties it regards as necessary to enable it to govern to the best advantage of the benefit of society as a whole ”.*

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<sup>56</sup> (1972) ZR. Pg 204

This case shows to what extent human rights violations are perpetrated by the courts, as to the judge in this case, majoritarianism should not be countered.

The majority can make any law it deems fit.

In **Lewanika et al Vs Chiluba**<sup>57</sup> in a Presidential petition grounded on the citizenship of the President and the petitioners put forward a man claiming to be the President's father who was a Congolese and was prepared to go a forensic test called "DNA". The Supreme Court, Sakala J.S as he then dissenting, held that, will be violative of his privacy. The Courts elevated a private right above a societal right, as Zambians were entitled to know whether they are being ruled by a foreigner. In any event, by becoming President the no. 1 public figure under 'fish tank' theory or the public official doctrine, he had traded in part of his privacy. The Court held back the test that has resolved hundreds and hundreds of murders, as it is determinative and Zambians were denied the scientific evidence to determine their President's paternity. The fundamental principal of civil liberties is that 'Rights may be derogated from if the derogation is in public interest' and this principal was assailed in this Judgment. For a human right to be a matter of entitlement there is need for a legal mechanism to implement or enforce it. Human rights protection and promotion demands more than the mere existence of a bill of rights in the constitution.

### **1.3 THE NEED FOR REFORMING JUDICIAL REVIEW**

It has been recognized that the expression of international conventions and other entrustments is insufficient, by itself, to secure effectively, the protection of human

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<sup>57</sup> (1993) Z.R. Pg 5

rights. Serious consideration should be made to developing awareness among national judges and applying such norms within domestic jurisdiction.

Judicial review under Part III of the constitution of Zambia, often, but not always, served only to illustrate the awareness of judicial review rather than its strengths in upholding human rights. Therefore judicial review is rendered ineffective and introspective, just as political power without judicial review may become self-seeking, autocratic and self-justifying.

In the light of the above, judicial review speaking impressionistically, and it may therefore be an impression which not all would share may be reformed to ensure that the ideal purpose it is meant to perform is achieved- over the past, judicial review can be said to be termed a settled rather than a vibrant remedy of chidings the abuses of administrative actions. With the recognition of part III of the constitution of Zambia (1996), judicial review will have a key role to play.

The role of the Human Right Commission in the regard is also to be of importance charged with the various responsibilities with regard to the protection of human rights in Zambia, it can also through an act of parliament be empowered to assist individuals when bringing court proceedings, including judicial review, it may also, providing it meet, the standing requirement proceedings are especially significant for judicial review. It would be idea in renaming leave “ **preliminary consideration**; and suggests a test whereby the applicant discloses ‘**a serious issue**’ rather than the present test of showing an **arguable case**’. Judges would in this vain be required to make a request for refusing leave.

In the area of locus standi, individual applications with legal personally' would continues to have standing, but only in matters where they have been personally adversely affected by the decision. In public interest challenges, a broad discretion as to standing needs to be recognized. This can be done by introducing the Human rights act through parliament which will narrow standing requirement (rather than sufficient interest test) for judicial review proceedings.

Therefore, the role of the courts, particularly with regards to what is compatible with convention rights, will be crucial and often determinative one . Under the new systems, with the Human rights act recognizing, the various injustices faced by individuals in their noble quest to have justice dispensed ,the courts will basically be involved in true issues which are constitutional as between the alleged administrative body which is in violation of the right of the individual and litigants whose rights has been trampled by the powerful organs of the state.

In this way judicial review will be set out to be at the forefront of constitutional development of unprecedented significance in the protection of human rights.

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