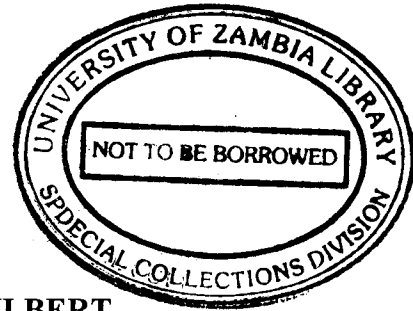


**SHORTCOMINGS OF JUDICIAL REVIEW AND HUMAN  
RIGHTS PROTECTION IN ZAMBIA**

**BY**

**CHAMA CHISHALA GILBERT**



Being a paper presented in partial fulfillment for the award of the Degree of Bachelor of  
Laws of the University of Zambia.

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February 2008.

The University of Zambia

School of Law

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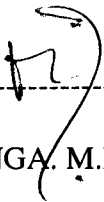
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**SHORTCOMINGS OF JUDICIAL REVIEW AND HUMAN RIGHTS  
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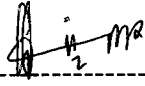
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## **DECLARATION.**

**I, CHAMA CHISHALA GILBERT**; Computer number 22054154, **DO HEREBY DECLARE** that the contents of this Directed Research Paper are entirely based on my own findings. The work used herein that is not mine, I have endeavored to acknowledge the same.

I therefore bear the responsibility for the content, errors, defects and omissions therein.

DATE: 6/02/08

Signature: 

## **DEDICATION**

This obligatory essay is dedicated to my parents, **MR CHAMA GILBERT KAMUKWAMBA (late)**, and **MRS MONICA CHITOSHI CHAMA**.

## **ACKNOWLEDGMENTS**

I would like to extend my utmost gratitude to my supervisor, Professor Mvunga for having dedicatedly and efficiently directed my work.

To my late Dad, it's been 14 hard years since you left us but I will forever cherish the time you spent with me and helped me realise the value of education.

Mum, it's been rough but we'll get there. It's not been easy raising four black kids on your own but you have done it and provided me with love and care even in hard times. Thank you for believing in me and I promise I won't disappoint you.

To my sisters, Chilu, Kabwe and Ng'andwe. Your contribution to my development is by no means minimal, thank you for being there and let's make mum proud through hard work and excellence.

Uncle Chama, you have been inspirational and encouraged me academically. Thank you for the financial and moral support. My cousins, Alex and Martin Musona. You guys have done so much for me. I'll forever be indebted to you guys. Thanks for the moral and financial support. Mr Martin, thanks man, this would not have been possible without your assistance with the printing and binding of this work.

My stay on campus would not have been worthwhile without the companionship of my good friends Wantemwa, Walubita, Edward, Chali, Libati, Chilufya, Erica and Alisheke. Maiwase, thanks for the encouragement and support during the time I was working on this research.

Lastly, but by no means the least, I give the highest praise and glory to my Lord and saviour Jesus Christ, without whom it would not have been possible to do this research.

## **ABSTRACT**

Mal-administration by public bodies is a vice that is ever present in all societies. One remedy or tool to fight this vice is judicial review, which is a public law remedy, by which an individual can challenge the legality of decisions, determinations, orders or even omissions of persons or bodies performing public functions. A number of criticisms have been leveled against judicial review leading to calls for reform in order to adequately address mal administration and particularly to reform judicial review into an effective tool for human rights protection. This research will consider whether these criticisms are justified. The essay considers a number of shortcomings of judicial review in the Zambian context and highlights the shortcomings of this public law remedy in the protection of human rights. Ways to address these shortcomings are suggested after which proposals for reform are made.

Chapter One is an overview of judicial review. It considers the nature of judicial review, the grounds for review and the law governing judicial review. Chapter Two then discusses the concept of legitimate expectation as a ground for judicial review and the limits or controls on judicial review in Zambia, particularly the concept of justiciability and exclusion of review by statutes. Chapter Three will consider the shortcomings of the concept of judicial review and the judicial review procedure, while Chapter Four will examine judicial review as a means of human rights protection and the shortcomings of judicial review as a means of human rights protection. Proposals will then be made to reform judicial review. Finally, Chapter Five will contain the conclusions and recommendations.

## **TABLE OF LEGISLATION**

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The Firearms Act, Chapter 110 of the Laws of Zambia.

The High Court Act, Chapter 27 of the Laws of Zambia.

The National Assembly (Powers and Privileges) Act, Chapter 12 of the Laws of Zambia.

The Supreme Court Act of England



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Finlay v. Canada (Minister of Finance) 1956 2 SCR 607

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IRC v. National Federation of Self Employed Small Business Limited 1982 AC 617

Ludwig Sondashi v. Godfrey Miyanda (sued as National Secretary of the Movement for  
Multi-Party Democracy) 1995/1997 ZR 1

Ludwig Sondashi v. The Attorney General SCZ judgement No. 27 of 2000

Mwamba and another v. The Attorney General SCJ No 10 of 1993

Nyampala Safaris Zambia Limited and others v. ZAWA and others SCZ NO. 6 of 2004

Re Nalumino Mundia 1971 ZR 70

R. v. Epping and Harlow General Commissioner ex parte Goldstraw 1993 3 ALLER 257

R. v. Home Secretary 1984 1 WLR 1337

R. v. Ministry of Agriculture 1991 1 ALLER 41

R. v. Panel on Takeovers and Mergers ex parte Guinness Plc 1990 1 QB 146

R. v. Secretary of State for Health ex parte US Tobacco International Inc. 1992 QB 353

Roy Clarke v. Attorney General 2004/HP/003

Schmidt v. Secretary of State 1969 1 ALLER 904

Smith v. East Elloe Rural district Council 1956 A.C 736

South East Asia Fire Bricks v. Non –Metallic Mineral Products Manufacturing  
Employees Union 1981 A.C 363

The People v. Livingstone Municipal Council ex parte Sinioti 1969 ZR 53

The People v. Luanshya Municipal Council ex parte Chendaeka 1969 ZR 69

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## **CHAPTER ONE**

### **Introduction**

This Chapter includes the introduction and other preliminary matters such as the problem statement, research questions and methodology. The Chapter will then consider the nature of judicial review, the grounds for review and the remedies that are available in judicial review proceedings. This will be done by firstly, considering the nature of administrative law and then examining the nature of judicial review. The grounds for judicial review will then be considered, after which the law governing judicial review will be discussed. The procedure for review as provided in Order 53 of the Rules of the Supreme Court will be outlined. Finally the remedies available in judicial review proceedings will be discussed.

Mal-administration by public bodies is a vice that is ever present in all societies. One remedy or tool to fight this vice is judicial review, which is a public law remedy, by which an individual can challenge the legality of decisions, determinations, orders or even omissions of persons or bodies performing public functions. This remedy or tool is increasingly being used as a means of human rights protection as persons or bodies performing public functions are the ones who commit human rights violations. Considering all the criticisms and calls for the reform of judicial review, it is necessary to consider not only some of the criticisms but whether these are justifiable reasons to initiate reform. At the core of these criticisms are the mechanisms in place to exclude,

limit or control judicial review such as justiciability and ouster clauses. It is therefore essential that the need for these limits be examined. Apart from the criticisms that have been repeatedly highlighted in various works, it is important to give some attention or consideration to other criticisms that may not be so publicised yet need to be considered in reforming judicial review. Lastly, considering the increasing use of this remedy as a means of human rights protection it is important to consider whether this is or can be an effective tool for human rights protection.

This study is divided into five Chapters. Chapter One includes the introduction and other preliminary matters such as the problem statement, research questions and methodology. The chapter further considers the nature of judicial review, the grounds for review and the law governing judicial review. Chapter Two then discusses the concept of legitimate expectation as a ground for judicial review and the limits or controls on judicial review, particularly the concept of justiciability and exclusion of review by statutes. Chapter Three will consider the shortcomings of the concept of judicial review and the judicial review procedure, while Chapter Four will examine judicial review as a means of human rights protection and the shortcomings of judicial review as a means of human rights protection. A number of proposals will also be highlighted. Finally, Chapter Five will contain the conclusions and recommendations.

## **Problem Statement**

Considerable literature has been written on the grounds for review, shortcomings of this remedy and its importance in human rights protection. In spite of this there is little literature on grounds for review based on legitimate expectation and on limiting or



control of judicial review. This research will therefore have an exploratory approach to the concept of legitimate expectation and consider the need to have or not to have limits or controls on judicial review actions. A number of criticisms have been levelled against this remedy leading to calls for reform in order to adequately address mal administration and particularly to reform judicial review into an effective tool for human rights protection. This research will consider whether this is justified and highlight some reforms that may be made.

## **Objective of the Research**

The main objective of this research is to consider the controls or limits on judicial review and its role as a tool for human rights protection.

Specific objectives of the study will be to:

- Consider the grounds for review, in particular the concept of legitimate expectation as a ground for review.
- Examine the nature of limits on judicial review actions and ascertain whether it is justifiable to have these limits.
- Identify certain shortcomings of this remedy and proposals for reform.
- Examine the role judicial review plays in human rights protection.

## **Research Questions**

1. Are the limits or controls on judicial review justifiable and if not is there need for reform?

2. Are certain criticisms against review valid and do they warrant reform?
3. Can judicial review be used as an effective means of human rights protection?

## **Research Methodology**

This study will mainly be based on secondary information, namely cases, statutes and textbooks as well as journal articles, paper presentations and student obligatory essays. Personal interviews will also be conducted with persons who are knowledgeable on the subject matter of research. Such persons will include judges, practicing lawyers and lecturers.

## **The Nature of Judicial Review and the Grounds for Review**

### **The Nature of Administrative Law**

Wade ably articulates the nature of administrative law. He states that:

“Administrative law deals with one aspect of the problem of power. During the last hundred years the conception of the proper sphere of governmental activity has been completely transformed. Instead of confining itself to defence, public order, the criminal law, and a few other general matters, the modern state also provides elaborate social services and undertakes the regulation of much of the daily business of mankind. The state has seized the initiative, and has put upon itself all kinds of new duties. Hand in hand with these new duties must go new powers. In order to carry out so many schemes of social service and control, powerful engines of authority have to be set in motion. To prevent them running amok there must be control, both political and legal. Ultimately the political control rests with Parliament, though in reality much power is in the hands of ministers and officials. The legal control is the task of the courts of law. This legal control together with a few special features of the political control provides the principal subject-matter of administrative law.”<sup>1</sup>

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<sup>1</sup> Wade, H.W.R. **Administrative Law**. 1965. Oxford University Press: Oxford. P. 1

The non judicial institutions and legal arrangements designed to control administrative action in Zambia include, the Commission for investigations, Commissions of inquiry and the parliamentary system. The legal control is by way of judicial review, which is arguably the single most effective means of controlling administrative actions considering the shortcomings of the non judicial means of control.

## **The Nature of Judicial Review**

Judicial review, sometimes called the supervisory jurisdiction, is the High Court's power to police the decisions made by public bodies.<sup>2</sup> It is one of the remedies against mal-administration by public bodies.

Alder notes that judicial review is about striking a balance between two competing concerns. On the one hand, the rule of law has been said to require that the legality of government action must be subject to review by independent and impartial tribunals. The principles of judicial review give effect to the rule of law. They ensure that administrative decisions will be taken rationally in accordance with a fair procedure and within the powers conferred by Parliament.<sup>3</sup>

On the other hand, the separation of powers requires the courts to check misuse of power by the Executive but also to avoid trespassing into the political territory of government.

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<sup>2</sup> Alder, John. **Constitutional and Administrative Law**. 5<sup>th</sup> edition. 2005. Palgrave Macmillan: Newyork. P.357

<sup>3</sup> Ibid p.357

Judicial review is regarded as a last resort method of challenge and there are procedural barriers to prevent its being too easily taken up.<sup>4</sup>

The legal basis of judicial review is disputed. One perspective, which draws inspiration primarily from liberal and republican ideas, bases judicial review upon the common law and packaged as the 'rule of law' according to which powerful bodies must act in accordance with the basic values of fairness and rationality. The other perspective- the *ultra vires* doctrine-relies on the doctrine of parliamentary supremacy and assumes that, because most government powers are created by Act of parliament, the court's role should be confined to ensuring that powers are exercised within the limits set out by Parliament.<sup>5</sup>

Judicial review is said to be concerned with the decision making process and not the merits of the decision.<sup>6</sup> Therefore, the High Court will not reconsider the whole decision but will only be concerned with ensuring that legal standards are complied with when making decision.

## Grounds for Judicial Review

Owing to differences in the legal basis of judicial review, there is no agreement on how to classify the grounds of review and textbooks take different approaches. The grounds

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<sup>4</sup> Ibid p.358

<sup>5</sup> Note that in Zambia it is the constitution that is supreme (constitutional supremacy) and not Parliament (Parliamentary supremacy).

<sup>6</sup> *Nyampala Safaris Zambia Limited and others v. ZAWA and others* SCZ NO. 6 of 2004

themselves are broad, vague and overlapping. The more favoured classification of the grounds is espoused by Lord Diplock in **Council for Civil Service Union v. Minister for Civil Service**.<sup>7</sup> The Zambian courts have adopted and applied Lord Diplocks classification in a number of cases.<sup>8</sup>

Lord Diplock in **Council for Civil Service Union v. Minister for Civil Service** rationalised the grounds of review as:

- (i) illegality,
- (ii) irrationality, and
- (iii) procedural impropriety.

The grounds can be relied upon either severally or jointly. Moreover the grounds are not conclusive in that other grounds might emerge such as the more recent concept of proportionality.

By 'illegality' it is meant that the decision maker must understand correctly the law that regulates his decision making power and give effect to it. Illegality covers 'narrow' *ultra vires* or lack of jurisdiction in the sense of straying beyond the limits set by the statute; errors of law, and in certain cases errors of fact; 'wide' *ultra vires* in the sense of acting for an ulterior purpose, taking irrelevant factors into account or failing to take relevant factors into account; and fettering discretion

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<sup>7</sup> Ibid P.362

<sup>8</sup> for instance in the case of **Nyampala Safaris Zambia Limited and others v. ZAWA and others (SCZ NO. 6 of 2004)** and **Roy Clarke v. Attorney General 2004/HP/003**

By 'irrationality', it is meant what can be 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 has applied his mind to the question to be decided could have arrived at it.

Procedural impropriety is the failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. A failure by a body to observe rules expressly stated in a statute warrants judicial review even though such failure does not involve any denial of natural justice. Alder notes that this ground covers bias, violating important statutory procedures, lack of a fair hearing and failure to give reasons for a decision.<sup>9</sup>

## **Law Governing Judicial Review**

The procedural law on judicial review is contained in Order 53 of the Rules of the Supreme Court of England. English law is a source of law in Zambia by virtue of various statutory provisions.<sup>10</sup> However, of importance to this discussion are the provisions of sections 9 and 10 of the High Court Act, Chapter 27 of the Laws of Zambia.

Section 9 (1) of the Act provides that "The Court shall be a Superior Court of Record, and, in addition to any other jurisdiction conferred by the Constitution and by this or any

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<sup>9</sup> Ibid P.362

<sup>10</sup> The English Law (Extent of Application) Act provides that common law, equity and English statutes shall have the force of law in Zambia. Furthermore The British Acts (Extention) Act provides for post 1911 English statutes that have the force of law in Zambia.

other written law, shall, within the limits and subject as in this Act mentioned, possess and exercise all the jurisdiction, powers and authorities vested in the High Court of Justice in England.” It is worth noting that the Constitution also confers on the High Court, unlimited and original jurisdiction to hear and determine any civil or criminal proceedings under any law except as to the proceedings in which the Industrial Relations Court has exclusive jurisdiction under the Industrial and Labour Relations Act.

Section 10 of the High Court Act further provides that “the jurisdiction vested in the Court shall, as regards practice and procedure, be exercised in the manner provided by this Act and the Criminal Procedure Code, or by any other written law, or by such rules, order or directions of the Court as may be made under this Act, or the said Code, or such written law, and in default thereof in substantial conformity with the law and practice for the time being observed in England in the High Court of Justice”.

In England, the supervisory or corrective jurisdiction is exercised by a Divisional Court (Queens Bench Division) of the High Court. Similarly, in Zambia, the High Court exercises supervisory jurisdiction and as such judicial review proceedings are commenced in the High Court using the procedure outlined in Order 53 of the Rules of the Supreme Court.

Before the procedure under Order 53 can be invoked, it must be cases appropriate for application for judicial review as articulated under rule 1. Rule 1 of Order 53 provides that

1-(1) An application for-

(a) an order of mandamus, prohibition or certiorari, or

(b) an injunction under (section 30 of the supreme Court Act 1981) restraining a person from acting in any office in which he is not entitled to act, shall be made by way of an application for judicial review in accordance with the provisions of this Order.

(2) An application for a declaration or an injunction (not being an injunction mentioned in paragraph (1) (b) may be made by way of an application for judicial review, and on such application the Court may grant the declaration or injunction claimed if it considers that, having regard to-

(a) the nature of the matter in respect of which relief may be granted by way of an order of mandamus, prohibition or certiorari,

(b) the nature of the persons and bodies against whom relief may be granted by way of such an order, and

(c) all the circumstances of the case, it would be just and convenient for the declaration or injunction to be granted on an application for judicial review.

Judicial review is only available to test decisions made by public bodies. If the body is a private body, the remedy will lie in private law and not public law proceedings. This was stated in **Ludwig Sondashi v. Godfrey Miyanda (sued as National Secretary of the Movement for Multi-Party Democracy)**<sup>11</sup> where the appellant sought judicial review of his expulsion from the respondent political party. It was held that the decision of a political party could not be reviewed as it was a private body and not a public body. His remedy was therefore in private law proceedings.

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<sup>11</sup> 1995/1997 ZR 1



Before one applies for judicial review, they must seek leave to apply for judicial review.<sup>12</sup>

The application for leave must be made *ex parte* by filling in a notice containing a statement of the name and description of the appellant, the relief sought and the grounds upon which it is sought, the name and address of the applicants solicitors (if any), and the applicant's address of service; and an affidavit which verifies the facts relied on.<sup>13</sup>

Leave is usually granted or refused without a hearing, though an applicant can request for a hearing. Where leave has been refused, the application may be renewed except where leave has been refused after a hearing.<sup>14</sup> The court may refuse to grant leave or relief if there has been undue delay in making an application. By Order 53, an application for judicial review must be made promptly and in any event within three months from the date when the grounds for the application first arose unless there is good reason for extending the period; statutory time limits for review are not affected.<sup>15</sup> Furthermore, leave shall be refused if the Court considers that the applicant does not have a sufficient interest in the matter to which the application relates.<sup>16</sup>

When leave is granted then if the relief sought is an order of prohibition or certiorari, and the court so directs, the grant shall operate as a stay of proceedings to which the application relates until the determination of the application or until the Court otherwise

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<sup>12</sup> Rule 3 of Order 53

<sup>13</sup> Rule 3(2)

<sup>14</sup> Rule 3(4)

<sup>15</sup> Rule 4

<sup>16</sup> Rule 3(7)

orders. If any other relief is sought, the Court may at any time grant to the proceedings such interim relief as could be granted in an action begun by writ.

After leave is granted, the application for judicial review is then made by originating motion or originating summons. The notice of motion or summons must then be served on all persons directly affected<sup>17</sup>, together with copies of the statement in support of an application for leave under Rule 3. No grounds shall be relied upon or any relief sought at the hearing except the grounds and relief set out in the statement. The court may however on the hearing of the motion or summons, allow an applicant to amend the statement and use further affidavits.

The matter is then heard and this is usually by affidavit evidence. However Rule 8 makes provision for applications for discovery, interrogatories and cross-examination. Upon hearing the matter, the court may then grant or refuse to grant the remedies sought. Where a party is dissatisfied with the decision of the High court, he or she can appeal to the Supreme Court.

## Remedies

There are six remedies that may be sought in proceedings for judicial review, namely; *certiorari*, prohibition, *mandamus*, declaration, injunction and damages. An applicant can apply for more than one remedy in an application. *Certiorari*, prohibition and *mandamus* originate in public law and are referred to as prerogative writs. Prerogative writs were

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<sup>17</sup> Rule 5(3)

writs brought by the king against his officers to compel them to exercise their functions properly and to prevent them from abusing their powers.<sup>18</sup>

*Certiorari* is an order which quashes the original decision. It is a discretionary remedy. *Mandamus* is an order commanding an inferior court or person to perform a public or statutory duty. Prohibition on the other hand prohibits an inferior tribunal from continuing to exceed its jurisdiction, or from committing some threatened excess of jurisdiction.<sup>19</sup>

Having outlined the nature of review and the grounds for review, the next Chapter will discuss the concept of legitimate expectation as a ground for review and the limits or controls on review, particularly the concept of justiciability and exclusion of review by statutes.

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<sup>18</sup> Phillips, O.Hood, Jackson Paul. **O.Hood Phillips' Constitutional and administrative Law**. 6<sup>th</sup> edition. 1978. Sweet and Maxwell: London. p. 620

<sup>19</sup> Wade, H.W.R. **Administrative Law**, opt. cit., P 98.

## CHAPTER TWO

### **Legitimate Expectations, Ouster clauses and Justiciability**

This Chapter will discuss the concept of legitimate expectations as a ground for judicial review and the limits or controls on judicial review, particularly the concept of justiciability and exclusion of review by statutes. This will be done by firstly, having an exploratory approach to the concept of legitimate expectation. The shortcomings of the limits on judicial review will then be discussed in the *Zambian context*.

#### **The Doctrine of Legitimate Expectations**

A recently recognised doctrine in English as well as Indian law, the doctrine of legitimate expectations is the 'latest recruit' to a long list of concepts fashioned by the courts for the review of administrative actions.<sup>20</sup> Tackwani further notes that the doctrine has an important place in the development of the law of judicial review.

The principles of natural justice apply in cases where there is some legal right which is likely to be affected by an act of administration. Good administration, however, demands observance of the doctrine of reasonableness. In other situations also where the citizens legitimately expect to be treated fairly, the doctrine of legitimate expectation has been developed both in the context of reasonableness and in the context of natural justice.<sup>21</sup>

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<sup>20</sup> Takwani, C.K. *Lectures on Administrative Law*, 3<sup>rd</sup> ed. 1998. Eastern Book Company: Lucknow. p. 278

<sup>21</sup> Takwani, C.K. *Lectures on Administrative Law*, opt. cit., p. 278

The concept of legitimate expectation made its first appearance in the case of **Schmidt v. Secretary of State**<sup>22</sup> wherein it was held that an alien who was granted leave to enter the United Kingdom for a limited period had legitimate expectation of being allowed to stay for the permitted period. The doctrine was reiterated in the case of **R. v. Home Secretary**<sup>23</sup> where alien students were refused extension of their permits as an act of policy by the Home Secretary. It was held by the Court of Appeal that although the students had no right of extension, revocation of permits would be contrary to 'legitimate expectation'.

A legitimate expectation arises where the citizen has been led to believe by a statement or conduct of the government that he is singled out for some benefit or advantage of which it would be unfair to deprive him. The expectation might be generated by a promise or assurance either announced generally or given specifically to an individual.<sup>24</sup>

Tackwani provides a number of instances that illustrate the doctrine.<sup>25</sup> The promise of a hearing before a decision is taken may give rise to a legitimate expectation that a hearing will be given. Likewise, a past practice of consulting before a decision is taken may give rise to an expectation of consultation before any future decision is taken. Furthermore, the actual enjoyment of a benefit may create a legitimate expectation that the benefit will not be revoked without the individual being given a hearing.

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<sup>22</sup> 1969 1 ALLER 904

<sup>23</sup> 1984 1 WLR 1337

<sup>24</sup> Alder, J. Constitutional and Administrative Law, opt.cit., p. 373

<sup>25</sup> Takwani, C.K. Lectures on Administrative Law, opt.cit., p.278

He further notes that on occasions, individuals seek to enforce the promise or expectation itself by claiming that the substantive benefit be conferred. Decisions affecting such legitimate expectation are subject to judicial review.<sup>26</sup>

The existence of a legitimate expectation may have a number of consequences. Firstly, it may give *locus standi* to a claimant to seek leave to apply for judicial review. Secondly, it may mean that the authority ought not to act so as to defeat that expectation without justifiable cause. It may also mean that before defeating a person's legitimate expectation, the authority should afford him an opportunity of making representations on the matter. The claim based on legitimate expectation can be sustained and the decision resulting in denial of such expectation can be questioned provided the same is found to be unfair, unreasonable, arbitrary or violative of principles of natural justice.<sup>27</sup>

The doctrine of legitimate expectations however has a number of limitations. In the case of **Attorney General of New South Wales v. Quin**<sup>28</sup> it was held that the concept of legitimate expectation is only procedural and has no substantive impact. Another limitation is that the doctrine does not apply to legislative activities. In the case of **R. v. Ministry of Agriculture**<sup>29</sup> it was held that the doctrine cannot preclude legislation. Furthermore, the doctrine will not apply if it is contrary to public policy or against the security of the state. In the case of **R. v. Secretary of State for Health ex parte US**

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<sup>26</sup> Takwani, C.K. Lectures on Administrative Law. opt.cit p. 278 in support of this proposition Takwani cites Clive Lewis. Judicial Remedies In Public Law p. 97.

<sup>27</sup> Takwani, C.K. Lectures on Administrative Law. opt.cit., P.280

<sup>28</sup> 1990 64 AUST LJR 327

<sup>29</sup> 1991 1 ALLER 41

**Tobacco International Inc.**<sup>30</sup>, the company had opened a factory in 1985 with a grant for the production of oral snuff. The government made the grant available notwithstanding its awareness of the health risks of the product. Later, the government, on the advice of a committee, announced its intention to ban snuff. The company sought judicial review relying on legitimate expectation based on the government's action. However, it was held that even though the applicant had a legitimate expectation that expectation could not override the public interest in banning a harmful substance.

The doctrine of legitimate expectation, however, in essence imposes a duty to act fairly. Legitimate expectations may come in various forms and owe their existence to different kinds of circumstances. With regard to the grounds for review discussed earlier, it can be classed under procedural impropriety.

### **The Doctrine in Zambian Jurisprudence**

Despite the importance of the doctrine of legitimate expectations in the development of the law on judicial review, there are few reported Zambian judicial decisions on this branch of the law. Furthermore there is little literature on the subject. It is recommended that the use of the doctrine as a ground for review be encouraged particularly through academic writing. Furthermore, since the rules on standing in Zambia are not sufficiently liberal, the doctrine can be used to give *locus standi* to a claimant to seek leave to apply for judicial review.

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<sup>30</sup> 1992 QB 353

## **Statutory Exclusion of Judicial Control**

In discussing the statutory exclusion of judicial review, the law on ouster clauses in England will be considered after which the law in Zambia will be discussed. The shortcomings of the statutory exclusion of judicial review in Zambia will then be highlighted.

## **English Law on the Exclusion of Judicial Control**

In an attempt to protect decisions from challenges, which may impede or otherwise affect their implementation, a statute may provide that there should be no challenge by way of judicial review other than within a specified period. Statutes exclude judicial control to protect decisions from challenges which may impede or otherwise affect their implementation. In the case of **South East Asia Fire Bricks v. Non –Metallic Mineral Products Manufacturing Employees Union**<sup>31</sup> Lord Frazer noted that the reason for keeping questions remitted to the industrial court away from the ordinary courts may be that its functions are not purely judicial.

Phillips observes that statutes have purported or appeared to exclude the jurisdiction of the courts by the use of various drafting formulae, though with scant success.<sup>32</sup> Similarly, Wade notes that despite there being a strong presumption that the legislature does not

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<sup>31</sup> 1981 A.C 363 p. 373

<sup>32</sup> Phillips, O.Hood, Jackson Paul. O.Hood Phillips' Constitutional and administrative Law. 6<sup>th</sup> edition. 1978. Sweet and Maxwell: London. p. 632



intend access to the courts to be denied, many statutes have contained words designed to oust the jurisdiction of the courts.<sup>33</sup>

Thirdly, Phillips identifies a different kind of provision found in some Acts which set a time limit in which the validity of the order may be challenged in the High Court and specifying the permitted grounds of complaint and stating that subject to these provisions the order may not be questioned in any legal proceedings. In the case of **Smith v. East Elloe Rural district Council**<sup>34</sup>, a challenge to the validity of a compulsory purchase order was limited to a six week period following the date of the confirmation of the order. If not challenged within that period, the order shall not be questioned in any legal proceedings whatsoever. Mrs Smith sought to challenge the order after six years on the basis that the council clerk had acted in bad faith. The House of Lords held that after the six weeks period a compulsory purchase order could not be challenged even on the ground that it had been procured in bad faith.

Wade notes that exclusion clauses today frequently accompany the granting of an express right to challenge the validity of an order or decision during a limited time.<sup>35</sup> This is due to this kind of formulae being effective in ousting the courts jurisdiction after a certain time as was decided in the case of **Smith v. East Elloe Rural district Council**. Furthermore Order 53 rule 4 provides that judicial review applications shall be made promptly and in any event within three months from the date when the grounds for the

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<sup>33</sup> Wade, E.C.S., Bradley, A.W. Constitutional and Administrative Law. 10<sup>th</sup> edition. 1985. Longman: London. P. 670

<sup>34</sup> 1956 A.C 736

<sup>35</sup> Wade, E.C.S., Bradley, A.W. Constitutional and Administrative Law, opt.cit., P. 670

application first arose. However, rule 4(3) provides that this will not prejudice any statutory provision that has the effect of limiting the time within which an application for judicial review may be made. It is therefore possible to oust the court's jurisdiction by limiting the time within which to bring an action.

From the cases considered, it is clear that while it may be desirable at times to oust or exclude the jurisdiction of the courts, this largely depends on the wording of a particular statute. Viscount Simmonds rightly observes that 'anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the court... but it is our plain duty to give the words of an Act, their proper meaning.'<sup>36</sup>

## **Exclusion Clauses in Zambia**

There is a dearth of judicial decisions on exclusion clauses in Zambia. But since exclusion clauses are a feature of legislative drafting in Zambia, they have to be studied, albeit only briefly, together with English law on the subject in anticipation of the future development of Zambian law.<sup>37</sup> Having discussed the English law on exclusion clauses, the law on exclusion clauses in Zambia will now be discussed after which the shortcomings of such clauses in Zambia will be discussed.

The most widely used exclusion clause in Zambia is the finality clause. This is one whereby the decision made is said to be "final". This was provided for in the Hotels Act

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<sup>36</sup> **Smith v. East Elloe Rural district Council** 1956 A.C 736

<sup>37</sup> Mumba Stanley, K.C. *Judicial Control of Administrative Powers in Zambia, With Comparative Reference to English Law* Vol (1). 1983. PhD Thesis submitted to the University of Birmingham. (unpublished). p. 314

1950 (repealed)<sup>38</sup> in relation to decisions of the minister on appeal from the decision of the Hotels Board in the matter of licensing of hotels. Similar clauses are provided for in the Roads and Road Traffic Act<sup>39</sup>, and the Forests Act<sup>40</sup>. In some statutes the finality clause was coupled with a clause stating that the decision "shall not be called in question in any proceedings whatsoever" or words to that effect<sup>41</sup>.

Section 34 of the National Assembly (Powers and Privileges) Act provides that "Neither the Assembly, the Speaker nor any officer shall be subject to the jurisdiction of any court in respect of the exercise of any power conferred on or vested in the Assembly, the Speaker or such officer by or under the Constitution, the Standing Orders and this Act."

Does this section exclude the jurisdiction of the courts?

Mumba<sup>42</sup> notes that the courts have already conceded that their jurisdiction has been effectively excluded by this exclusion clause. In the case of **Re Nalumino Mundia**<sup>43</sup> it was held that the Courts have no power to review decisions of the National Assembly or any of its sessional standing committees if such decisions relate to the internal proceedings of the House.

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<sup>38</sup> Section 11 of Chapter 251 (repealed)

<sup>39</sup> Section 121, Chapter 464 of the laws of Zambia

<sup>40</sup> Section 38, chapter 199 of the laws of Zambia.

<sup>41</sup> S. 19(2) of the Trades Licensing Act, Chapter 707 (repealed) and s. 18(3) of the Factories Act, Chapter 514 (repealed)

<sup>42</sup> Mumba Stanley, K.C. Judicial Control of Administrative Powers in Zambia, With Comparative Reference to English Law Vol (1). 1983. PhD Thesis submitted to the University of Birmingham. (unpublished).

<sup>43</sup> 1971 ZR 70

However, the High Court in the case of **The People v. The Speaker of the National Assembly ex parte Nkumbula**<sup>44</sup> has given a restrictive interpretation to this principle holding that where a duty was created by the Constitution, then the Speaker of the House was subject to the supervisory jurisdiction of the high Court for failure to perform such a duty.

It can therefore be concluded that section 34 of the National Assembly (Powers and Privileges) Act does not completely oust the jurisdiction of the courts. A similar opinion is held by Mumba<sup>45</sup> and Kapilima.<sup>46</sup>

It is difficult to speculate on the attitudes of the Zambian courts towards these various forms of statutory exclusion of their powers of judicial review. Fortunately, there have been cases in which the courts have dismissed administrative decisions taken under statutes which themselves contained exclusion clauses. Cases like **The People v. Luanshya Municipal Council ex parte Chendaeka**<sup>47</sup> and **The People v. Livingstone Municipal Council ex parte Sinioti**<sup>48</sup> are in point. Both cases arose under the Trades Licensing Act<sup>49</sup> which provided that “any person who applies to a licensing authority may, if he is aggrieved by the decision of the licensing Authority...appeal against such

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<sup>44</sup> 1970 ZR 97

<sup>45</sup> Mumba Stanley, K.C. Judicial Control of Administrative Powers in Zambia, With Comparative Reference to English Law Vol (1), opt.cit

<sup>46</sup> Kapilima S.M. judicial Review and the Protection of Human Rights in Zambia: A Critical Evaluation of Order 53 in the Protection of Human Rights. 2003. Obligatory Essay. (unpublished).

<sup>47</sup> 1969 ZR 69

<sup>48</sup> 1969 ZR 53

<sup>49</sup> Chapter 707 (repealed )

decision to the minister. The decision of the minister in respect of an appeal under this section shall be final and shall not be questioned in any court.”<sup>50</sup>

The High Court was not daunted by this exclusion clause. In the case of **Chendaeka**<sup>51</sup> it went on to issue certiorari quashing a decision of the respondent Council, while in the case of **Sinioti**<sup>52</sup> the court went on to review the Council’s decision but declined to quash it on the merits of the case. From these two cases it can be inferred that courts in Zambia, as in the United Kingdom have little regard for exclusion clauses.

Recently however, the Supreme Court in **Ludwig Sondashi v. The Attorney General**<sup>53</sup> appears to have more readily conceded to the ouster of the Courts jurisdiction by statute. This case involved section 12(7) of the Firearms Act which stated that “the decision of the Minister on an appeal in terms of this section shall be final and shall not be questioned in any proceedings.” The High Court held that this provision ousted the jurisdiction of the Courts. On appeal to the Supreme Court, it was held that section 12(7) was correctly interpreted by the learned trial Judge as protecting the decision of a Minister from being challenged in any proceeding which includes any court proceedings.

### **Shortcomings of the Statutory Exclusion of Review in Zambia**

While previous works have argued that the Courts jurisdiction can be ousted by express statutory provisions, which is in fact the law in Zambia as stated by the Supreme Court in

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<sup>50</sup> Section 19, Chapter 707.

<sup>51</sup> Supra

<sup>52</sup> Supra

<sup>53</sup> SCZ judgement No. 27 of 2000

the case of **Ludwig Sondashi v. The Attorney General**<sup>54</sup>, this essay departs from this premise by noting that exclusion clauses can be criticised for excluding the jurisdiction of the courts and as such denying the courts their role of policing decisions of public bodies. What is desirable is not complete ouster of jurisdiction but setting a time limit within which actions may be brought. This is the emerging trend even in the United Kingdom where the concept is drawn from. Courts should therefore have little regard for exclusion clauses other than those that set a time limit within which an action may be brought.

### **The concept of Justiciability**

Justiciability is a concept which defines the judge's view of the suitability of the subject matter to be judicially reviewed. There are some cases in relation to which the courts prove to be exceedingly reluctant to review. In Zambia matters of policy are for cabinet to formulate, so an applicant cannot impugn a policy determined by cabinet, nor a matter such as the exercise of prerogative power and most importantly, issues of national security. Tackwani observes that justiciability is not a legal concept with fixed content, nor is it susceptible to scientific verification. There is not and there cannot be a uniform rule regarding scope and reach of judicial review applicable to all cases. It varies from case to case depending upon subject matter, nature of rights and other relevant factors.<sup>55</sup>

Furthermore he notes that the power of judicial review relates to the jurisdiction of the courts whereas justiciability is hedged by self imposed judicial restraint. A court exercising judicial review may refrain to exercise its powers if it finds that the

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<sup>54</sup> SCZ judgement No. 27 of 2000

<sup>55</sup> Takwani, C.K. Lectures on Administrative Law, 3<sup>rd</sup> ed. 1998. Eastern Book Company: Lucknow. P 239

controversy raised before it is not based on judicially discoverable and manageable standards. Moreover the area of justiciability can be reduced or curtailed. Even when exercise of power is bad, the court in its discretion may decline to grant relief considering the facts and circumstances of the case.<sup>56</sup>

In the case of **Council for Civil Service Union v. Minister for Civil Service**<sup>57</sup> it was suggested that some matters are 'non justiciable' meaning not appropriate for judicial review. This might be because of their political sensitivity or because the courts lack the expertise to deal with them or because the legal process may be unsuitable owing to the wide range of matters involved.<sup>58</sup>

If the courts consider that a certain power is not justiciable, they will not review the exercise of that power. Lord Roskill in the case of **Council for Civil Service Union v. Minister for Civil Service**<sup>59</sup> gave the following as indicative and non-exhaustive examples of powers that would not be reviewable:

"Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of parliament and the appointment of ministers as well as others are not, I think susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process. The courts are not the place wherein to determine whether a treaty

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<sup>56</sup> Ibid P.239

<sup>57</sup> 1985 AC 374

<sup>58</sup> Alder, j. Constitutional and Administrative Law, opt.cit. p. 358

<sup>59</sup> 1985 AC 374, p. 418.

non-justiciable matters is non-exhaustive. This entails uncertainty in the law, which is not a desirable attribute of a legal system.

It is therefore submitted that while the doctrine should be maintained, non-justiciable matters should be clearly stated in the law on judicial review contained in an Act of Parliament. This would bring about certainty in the law and also be of help to individuals in determining whether or not to seek judicial remedies. There would also be need to provide for mechanisms on how an individual can seek redress in matters that are considered non-justiciable. This could be by way of setting up tribunals.



## **CHAPTER THREE**

### **Shortcomings of Judicial Review**

This Chapter will consider the shortcomings of the concept of judicial review and the judicial review procedure in Zambia, other than those discussed in Chapter Two. This will be done by firstly, considering the more articulated criticisms such as the need for standing and the judge's discretion to grant leave and whether these criticisms are justified. The paper will then consider criticisms relating to the lack of expertise in judicial review matters, statement of reasons for administrative actions, lack of interaction between judges and administrators and the style of presentation of judicial decisions in the Zambian context. Lastly, criticisms relating to English law as a basis of the procedure in Zambia will be discussed.

Despite the consolidation of actions in which an applicant can seek the prerogative orders as well as damages, injunction and declaration, there are a number of criticisms that have been levelled against judicial review and the judicial review procedure.

#### **The Need for Leave to Apply for Judicial Review**

The granting of leave to apply for judicial review is of importance in judicial review proceedings as no application for judicial review will be heard without leave of court<sup>62</sup>. The application for leave should contain a statement of the relief sought and the grounds

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<sup>62</sup> Rule 3(1) of Order 53

upon which it is sought. It should also be accompanied by an affidavit verifying the facts relied on. These help the judge to ascertain whether the application has any merit.

Leave will not be granted where the Court considers that the applicant does not have a sufficient interest in the matter.<sup>63</sup> Furthermore, leave will not usually be granted where the applicant has not exhausted alternative remedies such as a right of appeal. Lord Donaldson stated in the case of **R. v. Epping and Harlow General Commissioner ex parte Goldstraw**<sup>64</sup> that “except in exceptional circumstances, the judicial review jurisdiction will not be exercised where other remedies are available and they have not been used.”

The need for leave empowers the court to dispose of applications for judicial review summarily without taking evidence or hearing submissions of the body alleged to have acted unlawfully. It is meant to protect public bodies from being harassed by applicants making ill-founded challenges. In the case of **IRC v. National Federation of Self Employed Small Business Limited**<sup>65</sup> Lord Scarman stated that “leave enables the court to prevent abuse of busy bodies by cranks and other mischief makers. I do not see any other purpose served by the leave requirement.” Furthermore, Lord Donaldson in the case of **R. v. Panel on Takeovers and Mergers ex parte Guinness Plc**<sup>66</sup> noted that the leave stage assists in case flow management, as it ensure prudent management of limited judicial resources.

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<sup>63</sup> Rule 3 (7) of order 53 of the Rules of the Supreme Court of England.

<sup>64</sup> 1993 3 ALLER 257

<sup>65</sup> 1982 AC 617

<sup>66</sup> 1990 1 QB 146

While other works have argued that the need for leave to apply for judicial review should be abolished, it is submitted that the need for leave should be maintained. In considering the need for leave in Zambia one needs to note that while countries like India and Canada decided to give individuals justice by using a human rights approach by making judicial review a matter of right not requiring leave, the British system, which Zambia has adopted, is to keep away perpetual contenders hence judicial review is not a matter of right. While it may be argued that the low levels of literacy and poverty in Zambia suggests that very few people can bring Court proceedings thereby eliminating the threat of having 'mischief makers' and 'perpetual contenders', it is the authors submission that with the increase in *pro bono* services and the possibility of representation by an organisation or interest group entails that access to the courts is not too restricted. There is still need even in the Zambian context to maintain the need for leave to apply for judicial review.

### **Locus Standi (The Need for a Sufficient Interest)**

Perhaps one of the most criticised aspects about judicial review is the need for standing in judicial review matters. Rule 3 (7) of order 53 provides that before leave is granted to apply for judicial review the applicant must have a sufficient interest in the matter to which the application relates. Standing is therefore of importance in judicial review proceedings in that without standing there can be no leave granted and without leave one cannot apply for judicial review.

Having a sufficient interest in the matter, also referred to as *locus standi* or standing is not just required in judicial review matters. It is also required in constitutional matters and in *habeas corpus* proceedings. *Locus standi* may be defined as “the right to bring...proceedings, the right to challenge an act or decision of a public body.”<sup>68</sup>

The Supreme Court in the case of **Mwamba and another v. The Attorney General**<sup>69</sup> noted that in considering *locus standi* there is need to balance two aspects of the public interest, namely desirability of encouraging individual citizens to participate actively in the enforcement of the law and the undesirability of encouraging meddlesome private ‘Attorney Generals’ to move the courts in matters that don’t concern them.

The justification for standing lies in the need to limit challenges to administrative decision making to genuine cases of grievance and to avoid unnecessary interference in the administrative process by those whose objectives are not authentic. The applicant in judicial review proceedings may be an individual whose personal rights and interests have been affected by a decision or an interest or pressure group desiring to challenge a decision which affects the rights and interests of members that belong to that group or society.

Whether or not an applicant has standing is examined in two stages, firstly when leave to apply for judicial review is sought and when the merits of the case are known.<sup>70</sup>

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<sup>68</sup> **FTJ Chiluba and Another v. National Media Corporation Ltd and Others** 1991/HN/52 (unreported)

<sup>69</sup> SCJ No 10 of 1993

<sup>70</sup> **IRC v. National Federation of Self Employed Small Business Limited**

If the administrative action which the applicant wishes to challenge interferes directly with the applicants personal or public rights or has adverse financial consequences for him then he has standing in the matter.

### **Shortcomings of the Need for a Sufficient Interest in Zambia**

Order 53 does not address the issue of what sufficient interest exactly is. It is therefore up to the courts to determine what they consider as constituting sufficient interest and what does not. The guidelines that are provided by English decisions are not sufficiently liberal. In fact the government has admitted that there are restrictive provisions regarding standing in Zambia.<sup>71</sup>

These restrictive provisions should be removed and perhaps reform should take the Canadian position where Courts have made the position of standing in public interest matters very clear.<sup>72</sup> In Canada, a person who may not have personal or direct interest in a public matter may still have standing if in the court's discretion the issue is justiciable, serious as well as the applicant being genuinely concerned about the matter. In addition there should be no other way of bringing the matter before court.<sup>73</sup>

Having liberal rules on standing ensures that interest groups or other bodies can seek redress where the individual concerned cannot commence litigation owing to various reasons such as poverty and ignorance. In India, judges have provided a conducive

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<sup>71</sup> Governance: National Capacity Building Programme for Good Governance in Zambia. 31<sup>st</sup> March, 2000. p. 78

<sup>72</sup> Ibid p. 32

<sup>73</sup> **Finlay v. Canada (Minister of Finance)** 1956 2 SCR 607

environment in which liberal standing, particularly in public interest matters has flourished.

On the other hand, proponents of the need not to liberalise the rules on standing argue that this will open the floodgates of litigation. Longwe submits that considering the environment within which the rules on standing operate with respect to the political, economic and social conditions, there is need for liberal rules on standing.<sup>74</sup> Similarly, Professor Scott notes that the fear that wide standing will open the floodgates of litigation is unfounded. He states that the idle and whimsical plaintiff, a litigant who litigates for a lark, is a spectre which haunts the legal literature, not the court room.<sup>75</sup>

In England, if a person does not have *locus standi* he must use a different procedure called the relator action. This is an action brought by the Attorney-General 'on the relation' (at the instance) of some other person. The Attorney-General represents the public interest. However, the costs must be paid by the relator. The Law Commission (No 226, 1994) recommended that if the applicant for judicial review was not directly affected by the decision under review, the court should have discretion to decide whether it was in the public interest for the application to be heard.<sup>76</sup>

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<sup>74</sup> Longwe, P.M. **Locus Standi in Judicial Review Matters: A Review**. 2001. Unpublished. Obligatory Essay.

<sup>75</sup> Desmith, Woolf and Jowell. **Judicial Review of Administrative Action**. 5<sup>th</sup> edition. 1995. Sweet and Maxwell: London. P. 100

<sup>76</sup> **Judicial Review**. [www.lawteacher.net](http://www.lawteacher.net).

## **Lack of Expertise in Judicial Review Matters**

It is widely acknowledged that it is important to pay attention to the credentials of the individuals who undertake the task of administrative review<sup>77</sup>. Administrative review is a specialist jurisdiction, and should be undertaken by people with appropriate expertise.

One of the shortcomings of judicial review in Zambia is that there is a lack of expertise in judicial review matters. Few judges are experts in the area of administrative law. Furthermore, any judge of the High Court can determine a judicial review matter even though lacking expertise in that area of the law. By requiring expert judges to determine judicial review matters, the quality of decision making will be enhanced and decisions that have been criticised such as the cases of Derrick Chitala and Ludwig Sondashi will no longer be a common feature in Zambian case law.

Having highlighted this problem in judicial review in Zambia, the ways in which this deficiency can be overcome will be discussed.

The lack of expertise in judicial review matters is not just peculiar to Zambia, this feature is present even in other jurisdictions. However, some jurisdictions, notably Australia, are making significant strides to remedy this. In Australia, the Kerr Committee Report recommended that “a specialist Court be established which will in the course of time

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<sup>77</sup> Creyke, R. McMillan, J (ed). **The Kerr Vision of Australian Administrative Law**. 1998. The Centre for International and Public Law: Canberra. p. 14

develop an expertise of its own and be in a position to work creatively in the administrative area”.<sup>78</sup>

Similarly, Zambia can remedy the lack of expertise in judicial review matters by providing for a specialist division in the High Court similar to the Commercial registry with expertise in the area of administrative law. A division of the High Court is suggested since establishing a new court will be more costly. Judges with expertise in the area of administrative law could then be assigned to this division of the Court. In appointing judges, the Judicial Service Commission and the President can be encouraged to appoint lawyers with wide administrative experience to ensure that the high Court is equipped with judges with the much needed expertise in administrative law matters. Furthermore judges in the specialised division would need to be familiarised with the issue and challenges in public administration through seminars and workshops.

## **Statement of Reasons**

In Zambia, a public official or authority is not obliged to state the reasons for making a particular decision. When reviewing decisions, the Court does not inquire into the reasons for the decision but whether or not it was unlawful<sup>79</sup>.

This is a deficiency in judicial review in Zambia in that the benefits of the statement of the reasons for an administrative decision are not realised. Justice JS Lockhart notes that

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<sup>78</sup> Ibid p. 15

<sup>79</sup> **Nyampala Safaris Zambia Limited and others v. ZAWA and others (SCZ NO. 6 of 2004)**



“Preparation of reasons is sometimes an onerous requirement and can be expensive. I am satisfied, though, that the majority of administrators who have directed their minds to the issue would agree that the existence of the requirement for reasons has led to improved decision-making procedures and that better decisions have been the result”.<sup>80</sup>

Apart from improved decision making and better decisions, the statement of reasons enables the person affected by the administrative decision to learn a great deal more about the decision than they were able to find out at common law, and thus better to assess whether they have grounds for challenge.

The statement of reasons ensures better administration arising from improved decision making. This would considerably reduce the number of challenges to administrative decisions in Zambia.

## **Lack of Interaction between Judges and Administrators**

Judicial review of administrative actions is meant to ensure that administrators act lawfully. This entails that administrators must be aware of the principles that Courts use in determining the lawful exercise of power. Without this knowledge administrators will continue to act unlawfully even though they meant to act lawfully and in good faith.

Similarly, judges need to be equipped with principles of public administration to ensure that even as they interfere in the exercise of power by public authorities, it is with these principles in mind.<sup>81</sup>

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<sup>80</sup> Creyke, R. McMillan, J (ed). **The Kerr Vision of Australian Administrative Law**, opt.cit., p. 77

<sup>81</sup> Creyke, R. McMillan, J (ed). **The Kerr Vision of Australian Administrative Law**, opt.cit., p. 47

While efforts are being made in other Commonwealth jurisdictions such as Australia, to encourage interaction of judges and administrators, this is not the case in Zambia. There is therefore need to stimulate interaction between judges and administrators so that each can understand better the others' perspective. One way to stimulate such interaction is by having roundtable discussions as well as holding workshops. The holding of workshops for judges would not be new in Zambia. Recently, a workshop was held for judges so as to keep them abreast with the latest developments in the area of human rights, HIV/AIDS and the law<sup>82</sup>.

## **Style of Presentation of Judicial Decisions**

Closely, related to the need for closer interaction between judges and administrators is the style of presentation of judicial decisions. In promoting a better understanding between judges and administrators, judges must also realise that their style of presentation of their decisions does not make for ready communication with most administrators. Curtis in an article, The Vision Splendid: A Time for Reappraisal notes that "if written decisions are intended to have a normative effect on agency decision making they must be written in such a way that they can be read and understood by those whose normal discourse is very different."<sup>83</sup>

In Zambia, various styles of presentation are used in court decisions. Usually, the Court states the facts, then discusses the law applicable after which the Court applies the law to

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<sup>82</sup> Sicalwe, P. **Judges Seminar on HIV/AIDS, the Law and Human Rights**. ZARANNEWS April-June 2007. Zambia Aidslaw Research and Advocacy Network :Lusaka p. 1

<sup>83</sup> Creyke, R. McMillan, J (ed). **The Kerr Vision of Australian Administrative Law**, opt.cit., p. 47

the facts and gives its decision. However, in some cases, the court will state that the facts will appear in the judgement. There is need to have a simple style of presentation of decisions whereby the principles that are supposed to have a normative effect on the agency are clearly set out and can be understood by the official or authority concerned.

It is submitted that the deficiency regarding the style of presentation of judicial decisions can be overcome by specialised judges under the specialised division of the High Court.

### **Application of English Law in Zambia**

A criticism that is peculiar to Zambia's system of judicial review is that to do with the application of English law in judicial review matters. Section 10 of the High Court Act provides that:

"The jurisdiction vested in the Court shall, as regards practice and procedure, be exercised in the manner provided by this Act and the Criminal Procedure Code, or by any other written law, or by such rules, order or directions of the Court as may be made under this Act, or the said Code, or such written law, and in default thereof in substantial conformity with the law and practice for the time being observed in England in the High Court of Justice."

From this section, by virtue of which Order 53 is the law that governs judicial review, it is clear that the application of English law is to be in 'substantial conformity with the law and practice for the time being observed in England'. This therefore makes the law on judicial review procedure somewhat uncertain in that the court may decline to strictly follow the procedure outlined under Order 53 and instead substitute its own procedure.

This counters the purposes and attributes of a good legal system, particularly certainty, which Munalula observes is a desirable attribute of law<sup>84</sup>.

While this argument may seem far fetched it is illustrated in the case of **The People v. The Attorney General exparte Derrick Chitala**.<sup>85</sup> In this case, the High Court judge refused to grant leave to apply for judicial review because the relief sought was not available against the President and his Cabinet. The Supreme Court supported this view when the application for leave was renewed. The Court further went on to examine whether the decisions which were the subject of the application for judicial review can be quashed on the grounds of 'illegality', 'irrationality', and 'procedural impropriety' and the relief of *mandamus* granted. The Court found that the decisions could not be quashed on these grounds and that *mandamus* could not be granted, therefore leave was refused.

The effect of this decision is that even if one has a sufficient interest in the matter leave will not be granted if the court is of the view that the case, as presented with the documents filed with the court in support of an application for judicial review, reveals that the application will not succeed on merit.

The soundness of this procedure is questionable as it is not required under Order 53 to prove that an applicant for judicial review is going to succeed in his application, before leave is granted. The hearing of the application for leave is not meant for the court to determine the case substantively. It is designed to allow the court to weed out cases,

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<sup>84</sup> Munalula, M.M. **Legal Process: Zambian Cases, Legislation and Commentaries**. 2004. Lusaka: UNZAPress. p.5

<sup>85</sup> SCZ judgement no 14/1995

which are on the basis of the documents present before the court, frivolous. Being a Supreme Court decision and bearing in mind the principle of *stare decisis*, this precedent is dangerous and unhelpful to ensuring the rule of law, if it is enforced, in that a number of legitimate actions will be unchallenged.

However one must equally appreciate that the provisions of section 10 cannot be faulted as the situation or conditions in England are not similar to Zambia's. There is therefore need to apply English law subject to local circumstances. However, owing to the potential for abuse of applying laws in substantial conformity with the law observed in England, there is need to enact our own laws to govern judicial review. There is little reason why Zambia should not have its own laws on judicial review when smaller jurisdictions such as Tobago have their own laws.

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It is submitted that the law on judicial review should be contained in an Act of Parliament as opposed to the Rules of Court which are subsidiary or delegated legislation. There is therefore need to have an Act to confer a judicial review jurisdiction on the High Court. The Act should deal with all aspects of judicial review, at the same time reforming features of the Common Law such as justiciability and the statutory exclusion of judicial review, which have been identified to have deficiencies in Zambia.

## **Conclusion**

While it is appreciated that judicial review and the law relating to judicial review has certain shortcomings, certain criticisms levelled against judicial review may not be

justifiable. For instance the need for leave may be said to be of no essence as some jurisdictions do without it and that it is not human rights spirited. However it must be remembered that there is need to protect public bodies from being harassed by applicants making ill-founded challenges. Furthermore other jurisdictions may take a human rights spirited approach towards judicial review by not requiring leave, Zambia on the hand seeks to protect public bodies as the case is in the United Kingdom. The need for standing in judicial matters, as in other matters is justified. However what is needed is to embrace or provide for more liberal rules on standing that do not restrict access to the courts by individuals or interested organisations.

While traditional criticisms focus on the procedural law, it is equally important to focus on criticisms relating to the lack of expertise in judicial review matters, the restatement of reasons and interaction between judges and administrators. Addressing these criticisms would ensure better administration, thereby reducing the number of challenges to actions of administrators.

As regards the challenges posed by the application of English law as the procedural law governing judicial review, these challenges can be curtailed to a large extent if Zambia enacted its own procedural law on judicial review. There is little reason why, after so many years of independence and so much development in judicial review jurisprudence, we should not have our own laws governing judicial review.

## **CHAPTER FOUR**

### **Judicial Review as a Means of Human Rights Protection**

This Chapter will examine judicial review as a means of human rights protection. This will be done by considering the nature of human rights, and the generation, protection and enforcement of human rights particularly in the domestic context. Thereafter the relationship between judicial review and human rights will be considered. Finally, the shortcomings of judicial review as a means of human rights protection will be discussed.

#### **The Nature, Protection and Enforcement of Human Rights**

That certain fundamental rights belong to human beings as such, and can therefore be called 'human rights' without qualification, first found popular expression in the American Declaration of Independence (1776): 'we hold these truths to be self evident that all men [sic!] are created equal ; that they are endowed by their creator with certain unalienable rights' ; and in the French Declaration of the Rights of Man and the Citizen (1789) where a solemn declaration is made with reference to ' the natural, inviolable, legitimate and sacred rights of man [sic!]' .<sup>86</sup>

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<sup>86</sup> Clive Dillon-Malone. **Towards a Consistent Ethic of Human Rights**. Zambia Law Journal Vol 35. 2003. UnzaPress: Lusaka. p. 30

Human rights can be defined as moral rights which human beings claim on the basis of what they are by nature. These moral rights are also legal rights.<sup>87</sup> Anyangwe<sup>88</sup> on the other hand, states that 'human rights mean the rights of humans or the rights of man'. And since all human beings have the same basic nature and have it equally, the rights based on this nature (i.e., human rights) are necessarily universal and held equally by all.

Anyangwe<sup>89</sup> notes that "the state is duty bound both under international and national human rights law, to respect, protect promote and fulfil fundamental human rights and freedoms. It can now no longer treat the individual or peoples just as it pleases. It must respect at least the fundamental rights relating to the dignity of the person. If it deviates from human rights standards it can be called to account by relevant actors."

The primary responsibility for the enforcement of human rights at national level lies with the state and its organs. Foremost amongst these organs are the courts. Courts administer justice. This key function includes the protection or enforcement of human rights. Paper guarantees of human rights are meaningless if there are no courts sufficiently independent to enforce them. The idea of human rights implies that the state must provide an adequate system of remedies to which victims of human rights abuses may resort in order to obtain adequate relief.<sup>90</sup>

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<sup>87</sup> Clive Dillon-Malone. **Towards a Consistent Ethic of Human Rights**, opt.cit., at p..36

<sup>88</sup> Anyangwe,C. **Introduction to Human Rights and International Humanitarian Law**. UNZAPress: Lusaka p. 1

<sup>89</sup> Anyangwe,C. **Introduction to Human Rights and International Humanitarian Law**. , opt.cit., P. 207

<sup>90</sup> Anyangwe,C. **Introduction to Human Rights and International Humanitarian Law**. , opt.cit., P. 212



As regards the applicable human rights norms, Anyangwe notes that the municipal courts normally apply national human rights law as contained in the bill of rights or a similar document. Furthermore they would also normally apply international human rights law and a wide range of provisions of a human rights nature in various disciplines of the law such as constitutional law, administrative law, and family law.

In Zambia, the norms contained in the Constitution are stipulated under Part Three of the Constitution (the Bill of Rights). It must be noted that the rights protected under the Constitution are limited in that they do not include second and third generation rights. The rights contained therein are:

- (a) the right to life, liberty, security of the person and the protection of the law;
- (b) freedom of conscience, expression, assembly, movement and association;
- (c) protection of young persons from exploitation;
- (d) protection for the privacy of one's home and other property and from deprivation of property without compensation.

Article 28 provides for the protection of the rights stipulated in the Bill of Rights. "If any person alleges that any of the provisions of Articles 11 to 26 inclusive has been, is being or is likely to be contravened in relation to him, 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 which shall hear and determine any such application, and which may, make such order, issue such writs and give such directions as it may consider

appropriate for the purpose of enforcing, or securing the enforcement of any of the provisions of Articles 11 to 26 inclusive.”

## **The Relationship between Judicial Review and Human Rights**

Universally, the power of judicial review is posited to be a substantial factor in the protection of human rights, particularly during periods of crisis or instability. It is expected that the courts exercising the power of judicial review would serve as guarantors of individual human rights.<sup>91</sup>

One characteristic of human rights is that they are claims upon the state. The government must therefore act to protect the individual's rights against private invasion and government officials must themselves respect human rights.<sup>92</sup>

Judicial review is meant to check the misuse or abuse of power by public bodies. Since the abuse of power may take various forms it is possible and in fact it does happen that in abusing its power or acting unlawfully, a public body or official may at the same time be infringing on the guaranteed rights of an individual. In this regard judicial review is being increasingly used as a means of human rights protection.

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<sup>91</sup> Marriott Wardman Park, Omni Shoreham, Washington Hilton. **Is Judicial Review a Likely Tool to Curb Human Rights Abuse? Two Hundred Years of Practice in the U.S. Supreme Court.** 2005. Paper presented at the annual meeting of the American Political Science Association. Washington, DC. [www.allacademicinc.com](http://www.allacademicinc.com).

<sup>92</sup> Anyangwe, C. **Introduction to Human Rights and International Humanitarian Law.** UNZAPress: Lusaka P. 23.

The above scenario is illustrated, more recently by the case of **Roy Clarke v. Attorney General**<sup>93</sup> where an action arose out of the violation of the Constitution and of an Act of Parliament by the same set of facts. This was an application for leave and at the same time, for the leave granted to act as a stay against the deportation of the applicant by the Minister of Home affairs under section 26(2) of the Immigration and Deportation Act. The deportation was pursuant to a satirical article in THE POST newspaper. The Court found that the applicant's constitutional rights were violated i.e. freedom of expression and the right not to be discriminated under Articles 20 and 23 of the Constitution. At the same time the Court found that there was procedural impropriety in the manner the decision was made. The Court quashed the deportation for violating the Constitution, violating section 26(2) of the Immigration and Deportation Act, for procedural impropriety and for being a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it.

### **Shortcomings of Judicial Review as a Means of Human Rights Protection in Zambia**

Anyangwe observes that the idea of human rights implies that the state must provide an adequate system of remedies to which victims of human rights abuses may resort in order to obtain adequate relief.<sup>94</sup> It also implies the existence of easy accessibility to the courts, and a willingness and readiness on the part of the state to respect court decisions.

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<sup>93</sup> 2004/HP/003

<sup>94</sup> Anyangwe, C. **Introduction to Human Rights and International Humanitarian Law**. UNZAPress: Lusaka p. 212

## **The Presence of Alternative Remedies**

Judicial review procedure as a means of human rights protection poses a challenge as regards the presence of alternative remedies. It is trite law that leave to apply for judicial review will not usually be granted where the applicant has not exhausted alternative remedies or has other remedies available to him or her.

In cases where an action arises out of the violation of both the Constitution and an Act of Parliament as in the case of Roy Clarke, it is therefore possible that the Court may refuse to review the decision of a public body as it is within the courts discretion to grant leave where other remedies are available. Kapilima submits that in enhancing judicial review as a means of human rights protection there is need to reform judicial review so that even though there are alternative remedies, one can still bring an action.<sup>95</sup>

### **Standard of Proof and the Basis of Review**

One of the difficulties that arise is that in petitions under article 28, the state has a higher standard of proof than the petitioner as it has to justify the taking away of a right as being necessary and justifiable in a democratic society. Furthermore, a petition calls into question the merits of the decision while judicial review inquires into the decision making process itself and not the merits of the case.

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<sup>95</sup> Kapilima Mulenga Simon. **Judicial Review and Protection of Human Rights in Zambia. A Critical Evaluation of Order 53 in the Protection of Human Rights.**2003. Unpublished.Obligatory Essay

## **Procedural Barriers Restricting Access to the Courts**

Anyangwe observes that the idea of human rights implies the existence of easy accessibility to the courts, and a willingness and readiness on the part of the state to respect court decisions<sup>96</sup>. From this observation it appears that judicial review is not well suited for redressing human rights violations as its procedure has barriers to restrict access to the courts such as the need for leave and standing. Furthermore concepts such as justiciability and the statutory exclusion of review further restrict access to the courts.

## **Limitation of Remedies**

Rule 7 of Order 53 provides for the payment of damages if damages would have been available in an action started by Writ. In instances where the unlawful actions of the public body or official infringe on the fundamental rights and freedoms of the individual, he cannot seek damages if he proceeds by way of judicial review as this does not fall within the ambit of rule 7. This is despite the fact that he may have suffered injury due to the action taken by the public body or official.

Furthermore interim relief by way of injunction is not available in judicial review matters. Justice Musonda notes that unlike in judicial review proceedings where one cannot get injunctive, one can get such relief in petitions under the Civil Rights Rules.<sup>97</sup> This therefore restricts the remedies that are available to a litigant.

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<sup>96</sup> Anyangwe, C. **Introduction to Human Rights and International Humanitarian Law**, opt.cit., p. 212

<sup>97</sup> Interview With Justice Musonda Philip, High Court of Zambia Judge, 1<sup>st</sup> February, 2008. Lusaka.

It is proposed that these limitations on remedies pose a challenge to the use of judicial review as a means of human rights protection and should be removed. There should be no limitations on the awarding of damages and injunctive relief must be available to a litigant. The only limitation, as with other remedies should be that the remedies are discretionary. In Ireland, it has been made possible to claim for damages in an application for judicial review. Similarly, the limitations on remedies in Zambia can be removed in order to enhance judicial review as a means of human rights protection.

### **Limitations on Evidence**

Order 53 restricts the kind of evidence that is used to determine judicial review matters to affidavit evidence. However rule 8 gives the Court discretion to allow deponents of affidavits to be interrogated or cross-examined. Justice Musonda acknowledges that judicial review is not a trial and as such the evidence in human rights petitions is wider<sup>98</sup>. Kapilima notes that in cases of human rights violations, interested organisations may sometimes want to give evidence or testimony but due to this limitation, they cannot do so.<sup>99</sup> It is further submitted that with sufficiently liberal rules on standing interested organisations will be able to commence proceedings and as such should be allowed to give evidence.

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<sup>98</sup> Interview With Justice Musonda Philip, High Court of Zambia Judge, 1<sup>st</sup> February, 2008. Lusaka.

<sup>99</sup> Kapilima Mulenga Simon. **Judicial Review and Protection of Human Rights in Zambia. A Critical Evaluation of Order 53 in the Protection of Human Rights.** 2003. Unpublished. Obligatory Essay.

## Conclusion

Having considered what human rights are, and their protection and enforcement by the courts, it cannot be denied that judicial review has a role, and a significant role to play in the promotion and protection of human rights. The current state of the law leaves it ill-suited to effectively promote and protect human rights. This is largely due to the receipt of English Law where it was not intended for human rights protection<sup>100</sup>. Justice Musonda further notes that in India, The United States of America and Canada, judicial review is used both for impugning the decision maker and human rights violations<sup>101</sup>.

However bearing in mind the fact that there exists a procedure under article 28 of the Constitution to enforce the fundamental rights contained in the bill of rights, it cannot be expected that judicial review should be reformed to solely suit such actions. Judicial review is meant to check abuse of power irrespective of whether such violates ones rights. While taking the view that reforming judicial review should not be on the basis of fashioning it towards human rights protection alone, it is not to be taken that judicial review does not have a role to play in human rights protection. Judicial review still has a role, and a significant one, to play in protecting human rights. It can be effectively used to protect rights not guaranteed under the Constitution such as the non-justiciable rights contained in the Directive Principles of State policy.

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<sup>100</sup> Interview With Justice Musonda Philip, High Court of Zambia Judge, 1<sup>st</sup> February, 2008. Lusaka

<sup>101</sup> Ibid

## **PROPOSALS FOR REFORM OF JUDICIAL REVIEW**

Having discussed the shortcomings of judicial review in Zambia and how these can be addressed, the essay now proceeds to outline proposals for the reform of Judicial review in Zambia.

### **Enactment of Zambian Law on Judicial Review**

Having articulated the need for Zambian Law to govern judicial review, it is proposed that Parliament should enact legislation on judicial review. This proposed Act should deal with most aspects of judicial review by codifying the common law at the same time reforming those problematic features of the common law to suit the Zambian situation.

In particular the Act should confer a judicial review jurisdiction on the specialised Division of the High Court. Furthermore it should incorporate the grounds for judicial review and clearly outline the procedure for judicial review.

### **Justiciability and the Statutory Exclusion of Review**

One of the shortcomings of judicial review in Zambia is that limits on judicial review in English law have been included in Zambia. It is proposed that these limits be removed. In the case of statutory exclusion of judicial review, there should be no place for the exclusion of the jurisdiction of the courts in a constitutional supremacy as Zambia where adjudicatory power is vested in the Judiciary and unlimited and original jurisdiction vested in the High Court. The law on judicial review should therefore clearly state that



provisions in statutes excluding the supervisory jurisdiction of the Courts are ineffective, save for those that impose a time limit within which to challenge a decision.

As regards justiciability, it is proposed that the suggested legislation on judicial review should provide for non-justiciable matters and offer alternative remedies for such matters such as Tribunals.

### **Leave to Apply for Judicial Review and Locus Standi**

The need for leave should be maintained in order to keep away perpetual contenders and mischief makers. However, the rules on the granting should be liberalised so that even where alternative remedies are available the Court may still grant leave.

As regards the rules on standing, it is proposed that more liberal rule on standing be provided for. The suggested legislation should clearly state who has standing. It is proposed that the common law rules be codified. Furthermore, to ensure they are sufficiently liberal, it may be provided that a person who may not have personal or direct interest in a public matter may still have standing if in the court's discretion the issue is justiciable, serious as well as the applicant being genuinely concerned about the matter. To further ensure increased access to the Courts relator action can be encouraged.

### **Limitation of Remedies**

It is proposed that in the light of the limitations of the remedies available in Zambia, the Court should be able to grant interim relief before the consideration of the claim. The

suggested legislation should thus increase the range of remedies to include injunctions and damages.

### **Lack of Expertise in Judicial Review Matters**

It is proposed that the establishment of a specialist Division of the High Court comprising judges with experience in the area of administrative law will go a long way in ensuring that judicial review in Zambia, becomes an expert function.

### **Statement of Reasons**

It is proposed that the law should be amended to provide for the statement of reasons for a particular decision by an administrative authority when required to by an affected person. This would help in better public administration, thereby preventing mal-administration which judicial review seeks to remedy.

### **Interaction between Judges and Administrators**

While traditional criticisms and proposals for reformation have focused on substantive and procedural law, this essay departs from such criticisms by noting that judicial review is meant to ensure that administrators act lawfully .This entails that administrators must be aware of the principles that Courts use in determining the lawful exercise of power, just as judges need to be conversant with public administration principles. It is proposed that interaction between judges and administrators be stimulated and encouraged. This could be done through workshops and seminars.

## CHAPTER FIVE

### CONCLUSIONS AND RECOMMENDATIONS

The main objective of this research was to consider the controls or limits on judicial review and its role as a tool for human rights protection. Specifically, the study sought to:

- Consider the grounds for review, in particular the concept of legitimate expectation as a ground for review.
- Examine the nature of limits on judicial review actions and ascertain whether it is justifiable to have these limits.
- Identify certain shortcomings of this remedy and proposals for reform.
- Examine the role judicial review plays in human rights protection.

In undertaking this work three research questions were posed. Firstly, are the limits or controls on judicial review justifiable and if not is there need for reform? Secondly, are certain criticisms against review valid and do they warrant reform? Lastly, can judicial review be used as an effective means of human rights protection?

The nature of judicial review and the grounds for review as rationalised in the case of **Council for Civil Service Union v. Minister for Civil Service** have been discussed. However, these grounds are not conclusive in that other grounds might emerge. Recently recognised is the doctrine of legitimate expectations as the 'latest recruit' to a long list of concepts fashioned by the courts for the review of administrative actions. This doctrine, that Tackwani acknowledges as having an important place in the development of the law of judicial review, holds that where the citizen has been led to believe by a statement or

other conduct of the government that he is singled out for some benefit or advantage of which it would be unfair to deprive him, he can bring an action on the basis of legitimate expectation if the authority does not grant that benefit or advantage. Furthermore such expectation gives the citizen standing in judicial review matters.

### **Are the Limits or Controls on Judicial Review Justifiable and if not is there need for Reform?**

The law on judicial review in Zambia has a number of limits or controls as received from English Law. While concepts such as justiciability and the exclusion of judicial review by statutes are justified under common law, there is little justification for these limits or controls in Zambia.

Firstly, the statutory exclusion of judicial control in Zambia cannot be justified owing to constitutional supremacy and the original and unlimited jurisdiction of the High Court. It is submitted that there should be no statutory exclusion of judicial control in Zambia except where a statute limits the time within which an action may be brought.

Secondly, justiciability in the Zambian context denies a victim of mal-administration recourse to the judicial process and brings about uncertainty in the law as the list of non-justiciable matters is not defined. This is not a desirable attribute of a legal system. It is submitted that this limit is not justified but should be maintained. However there is need for reform, which should clearly state non-justiciable matters.

## **Are Certain Criticisms against Review Valid and do they Warrant Reform?**

The most criticised aspects of judicial review in Zambia are the need for leave and *locus standi*. Previous works have called for the abolition of these rules as they restrict access to the courts.<sup>102</sup> While drawing on these works for the criticisms of these aspects of judicial review, this essay departs from previous works by highlighting the role and importance of these rules and the need to maintain them. Furthermore, proposals are made to reform these rules so that they do not restrict access to the Courts.

This essay further identifies other shortcomings of judicial review in the Zambian context. These criticisms relate to the limits or controls on judicial review that have been received in Zambia from English law such as justiciability and the statutory exclusion of review. The shortcomings of these limits in Zambia are articulated and proposals are made to remedy these shortcomings. It is proposed that the statutory exclusion of judicial review be abolished and that the concept of justiciability be reformed so that non-justiciable matters are clearly provided for in the law governing judicial review to be contained in an Act of Parliament.

Criticisms relating to the lack of expertise in judicial review matters, the need for a statement of reasons and the lack of interaction between judges and administrators in Zambia are also discussed. This essay thus shifts from the traditional focus on criticisms hinged on judicial review procedures. In highlighting these criticisms and how they can

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<sup>102</sup> Kapilima Mulenga Simon. **Judicial Review and Protection of Human Rights in Zambia. A Critical**

**Evaluation of Order 53 in the Protection of Human Rights**, opt.cit. and Longwe, P.M. **Locus Standi in Judicial Review Matters: A Review**, opt.cit., are some of such works.

be curtailed, it is hoped that once the said proposals are effected this will result in better administration on the part of administrators and better decision making. Among the suggested remedies for such criticisms are the establishment of a specialised division of the High court so that judicial review can be an expert function and the stimulation of increased interaction between judges and administrators as well as the statement of reasons for a particular decision.

As regards the challenges faced in the application of English law in judicial review matters, particularly Order 53, there is little reason why Zambia should not have its own laws on judicial review when smaller jurisdictions such as Tobago have their own laws. There is need to enact our own laws to govern judicial review. The essay articulates the need to have our own Zambian law to govern judicial review, which law should deal with most aspects of judicial review by codifying the common law at the same time reforming of those problematic features of the common law to suit the Zambian situation. It is proposed that this law should particularly confer a judicial review jurisdiction on the specialised Division of the High Court proposed. Furthermore it should incorporate the grounds for judicial review and clearly outline the procedure for judicial review.

### **Can Judicial Review be used as an Effective Means of Human Rights Protection?**

Justice Musonda notes that Zambian law on judicial review comes from England where it was not intended for human rights protection. In other jurisdictions such as India and the United States of America, judicial review is used both for impugning a decision maker

and human rights violations. These two jurisdictions do not have separate processes as in Zambia.<sup>103</sup>

The power of judicial review is posited to be a substantial factor in the protection of human rights. It is expected that the courts exercising the power of judicial review would serve as guarantors of individual human rights and freedoms. However the fact that judicial review is not meant to protect human rights violations alone but address the abuse of power by public officials means that certain features do not make it effective in human rights protection. This is not to say that it cannot be used to protect human rights, even with its shortcomings as a means of human rights protection, judicial review still has a role, and a significant one, to play in protecting human rights. It can be used to protect rights guaranteed under the constitution as well as rights not guaranteed under the Constitution such as the non-justiciable rights contained in the Directive Principles of State policy.

The shortcomings that judicial review has as a means of human rights protection, include: the difficulties that arise where an action arises out of the violation of the Constitution and of an Act of Parliament by the same set of facts as in **Roy Clarke's case**; the presence of alternative remedies where ones human rights and freedoms are violated; procedural barriers to restrict access to the courts such as the need for leave and standing, lack of access to the courts is not desirable as the idea of human rights implies the existence of easy accessibility to the courts; restricting the kind of evidence that is

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<sup>103</sup> Interview With Justice Musonda Philip, High Court of Zambia Judge, 1<sup>st</sup> February, 2008. Lusaka

used to determine judicial review matters to affidavit evidence; and restricting the remedies that are available to a litigant, particularly damages or compensation.

Despite previous works calling for the reform of judicial review so that it can be a more effective tool of human rights protection, this essay departs from this position by stating that there is a procedure under article 28 of the Constitution to enforce the fundamental rights contained in the bill of rights. It cannot be expected that judicial review should be reformed to suit such actions. Judicial review is meant to check abuse of power irrespective of whether such violates ones fundamental rights. Reform should be on the basis of enhancing the purpose for which judicial review is meant, to check the abuse of power and mal-administration by authorities. Therefore, while serving this purpose it can only be used, to the extent that it can, as a means of protecting human rights.

## **Recommendations**

### **Law Development Commission**

It is recommended to the Law Development Commission and Law Association of Zambia to lobby for the enactment of our own law to govern judicial review proceedings taking into account the circumstances prevailing in Zambia. Furthermore such law should confer judicial review jurisdiction on a specialised division of the High court.

### **The Judiciary**

It is recommended to the judiciary, particularly the Judicial Service Commission, to ensure that in the appointment of judge's people with experience in the area of



administrative law are appointed to the bench to ensure that judicial review can become an expert function on Zambia. Furthermore, efforts should be made to stimulate and encourage interaction between judges and administrators by way of workshops and seminars. There is also need for more training for judges especially in the area of contemporary developments in administrative law.

### **University of Zambia School of law**

It is recommended to the school of law to encourage academic writing in the area of administrative law particularly on concepts such as justiciability, statutory exclusion of judicial control and the concept of legitimate expectations. These are among the areas in which there is little Zambian literature available.

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