The Role of Administrative Law in the Promotion of Good Governance

COMMONWEALTH FUNDAMENTAL VALUES - ADMINISTRATIVE LAW, HUMAN RIGHTS AND THE JUDICIARY

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A. INTRODUCTION

1. At their Meeting in Harare in 1991, Commonwealth Heads of Government undertook to promote:

"the protection and promotion of the fundamental political values of the Commonwealth:

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

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

In very many countries in the Commonwealth today, there is growing awareness of the important role of law and legal institutions in the promotion and maintenance of good government. Often statistical evidence of the work-load on the courts demonstrates this, but even where this is not the case, the executive's legal responsibility for its decisions is seen as a dimension of the demand for democratic accountability. Certainly, the necessity for protecting the constitutional rights of the people, of minority groups and of individuals will not diminish in the coming years.

2. What is sometimes forgotten is the close link that exists between the protection of the constitutional rights of the governed, and the interest of governments in upholding the principles of sound administrative decision-making. The two matters are to be seen as two sides of the same coin, not as being mutually inconsistent.

3. It is not possible in a short discussion paper to review the complex trends in the recent development of public law in diverse Commonwealth jurisdictions. This paper seeks rather to focus attention on some broad issues that relate to recent developments and should be considered against the background of the different jurisdictions involved.

B. ADMINISTRATIVE LAW IN THE SETTING OF NATIONAL LAW

4. Hitherto, and on the evidence of legal textbooks, administrative law in general, and judicial review of administrative action in particular, have been seen as a phenomenon of national law - much influenced by the constitutional provision that exists within each country. In the United Kingdom, for example, emphasis is laid on the sovereignty of Parliament and on the responsibility of the Government to Parliament; courts formerly tended to treat judicial review of administrative action as essentially a matter of statutory interpretation, emphasising that the central issue was one of *vires* (did a public authority have statutory power to act as it did?).[1] The corollary of this approach is that, if only the draftsman of legislation uses clear enough words, there are no limits to the powers that Parliament may confer; and thus Parliament may cut down or exclude judicial review of executive decisions. On this view, although total exclusion of judicial review may not be intended, legislation at Westminster may render toothless the judicial lions that sit under the throne.[2]

5. Despite the fact that the United Kingdom has no written constitution to buttress the inherent

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1 In the decision by the English High Court holding unlawful the British Government's decision to fund the Pergau dam in Malaysia, *R v Secretary of State for Foreign Affairs, ex p World Development Movement Ltd* [1995] 1 All ER 611), one key issue involved interpretation of the Overseas Development and Co-operation Act 1980, but the significance of the decision goes far beyond this.

2 An attempt to do this came before the House of Lords in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147: there, by adopting a broad view of the concept of jurisdiction, the House of Lords deprived a legislative exclusion clause of much if not all of its effect. But it was European Community law alone, and not English law, which preserved the possibility of judicial review in *Johnston v Chief Constable, RUC* [1987] QB 129, [1986] ECR 1651.

jurisdiction of the courts, the judges in Britain are today more likely than in the past to emphasise that one fundamental of the legal system is a 'separation of powers' between legislature, executive and judiciary.[3] There have been developments in the law which make it difficult to explain judicial review as merely a refined form of statutory interpretation.[4]

6. In most Commonwealth countries, by contrast, the written constitution provides the foundation for the duty of the judiciary to resolve cases and controversies resulting from governmental action. Typically, the constitution sets up a formal framework based on the separation of powers, and imposes certain obligations on those entrusted with public administration, including the duty to protect the human rights that are guaranteed by the constitution. The constitution also provides safeguards (such as government accountability to the legislature, and judicial independence), which promote the integrity of the key institutions.

7. Although many constitutions contain common features, there is no uniformity in what they provide. Comparison of one constitution with another may show that a procedure to control the acts of government (for example, the office of ombudsman) is effectively provided for in state A, exists in a watered-down form in state B, and is absent in state C. Thus the mere existence of a written constitution does not necessarily promote a common level of standards. Even where the texts of two constitutions make the same provision for an ombudsman or a human rights commission, the ombudsman or commission may be much more successful in one country than in the other.

8. Potentially, at least, the effectiveness of administrative law is liable to be much influenced by constitutional provision for the protection of fundamental rights. In general, all public authorities must respect the guaranteed rights of citizens in the decisions which they take in the exercise of their functions. Moreover, many Commonwealth constitutions include in their Bill of Rights a provision which vests in the High Court original jurisdiction for giving effect to the guaranteed rights, including the power of giving such relief as it may consider necessary for enforcing those rights.[5] This jurisdiction would appear to be intended to prevail over contrary provision made in ordinary legislation. If so, it would follow that, for instance, even though a State Proceedings Act excludes the court from giving injunctive relief against a state official or government department, the High Court has jurisdiction, and possibly a duty, to issue such relief if it is necessary to protect an individual's constitutional rights. The same would apply to legislation which sought to exclude judicial review of decisions taken that affect the guaranteed rights.

C. THE LINK BETWEEN ADMINISTRATIVE LAW AND THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS

9. By contrast with an approach to the legal control of government which is confined to national parameters, the international system for the protection of human rights provides an important source of principles for the exercise of state power. Multilateral treaties, such as the International Covenant for the Protection of Civil and Political Rights and regional Conventions for the protection of human rights, express values associated with the rule of law and depend for their effective fulfilment both on the conduct of governments and on the functioning of independent courts of law in the countries which adhere to the treaties. Where human rights are infringed, international remedies are of course important, but they are essentially a residual form of redress, and can scarcely provide accessible, day-to-day recourse against the infringement of rights.

10. To make the point in more specific terms, it is impossible to imagine how the protection for the fundamental rights declared by such treaties can be

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[3] See e.g. *R v Home Secretary, ex parte Fire Brigades Union* [1995] 2 All ER 244. The separation of powers has been considered in recent articles by two British judges, namely by Sedley J in "The Sound of Silence: Constitutional Law without a Constitution" (1994) 110 LQR 270 and by Laws J in "Law and Democracy" [1995] PL 72.

[4] For the judicial review of non-statutory powers, see *CCSU v Minister for the Civil Service* [1985] AC 374 and *R v Panel on Take-overs and Mergers, ex parte Datafin plc* [1987] QB 815. The judicial review of prerogative powers was examined by Professor J Ll J Edwards for the Mauritius Meeting of Commonwealth Law Ministers in 1993 in his paper, "The Office of the Attorney-General - New Levels of Public Expectations and Accountability" LMM (93)24. On whether the ultra vires rule is the true basis of judicial review, see D Oliver [1987] PL 543.

[5] See e.g. Constitution of Botswana, s 18 (Enforcement of protective provisions).

achieved within a member state unless the executive's acts are subject to an effective system of review in national courts. Why is this?

11. These treaties declare the existence of certain civil and political rights, such as freedom of the person, freedom of expression, freedom of religion, freedom of association, the right to respect for an individual's private and family life, freedom from discrimination on racial or ethnic grounds, and so on. If such primary human rights are to be respected in a country's legal system, these rights imply the existence of a further right, the right of the individual to have a court adjudicate on the legality of government conduct which affects him or her, or, put more shortly, the right of the individual to administrative justice.[6]

12. The right to administrative justice is, for instance, declared in section 24 of the provisional Constitution of South Africa in these words:

"Every person shall have the right to:

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

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

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

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

13. The existence of these rights necessarily imposes a duty on the state to ensure that there is effective machinery for the judicial review of administrative action, that principles of fairness and legality are observed by those who exercise power, and that reasons for executive action are provided.

14. These themes have been examined in depth in the influential series of judicial colloquia organised by the Commonwealth Secretariat (in conjunction with Interights) on the domestic application of international human rights norms (Bangalore, 1988; Harare, 1989; Banjul, 1990; Abuja, 1991; Oxford, 1992; Bloemfontein, 1993). Similar issues have also been explored in the series of Workshops on Administrative Law organised by the Commonwealth Secretariat between 1992 and 1995, and in the Lusaka Declaration which emerged from the first Workshop. These workshops have led to the recent publication by the Commonwealth Secretariat of a booklet primarily intended for administrator, *Good Government and Administrative Law - An Introductory Guide.*

15. If international norms apply to national systems of administrative law in this way, the implications for Commonwealth governments include the following propositions:

(1) that administrative justice is not an optional extra to be provided as and when other governmental priorities permit;

(2) that fair administrative procedures are a fundamental of the civil society;

(3) that judicial review does not exist by grace and favour of the executive or legislature;

(4) that governments should not seek statutory power to make decisions affecting individuals and minorities which are 'final and conclusive' for all legal purposes.

16. One conclusion that may be drawn, and which is not always recognised, is that judicial review of official action (regarded as a matter of administrative law) and constitutional remedies for the protection of guaranteed rights serve common purposes.

D. THE CONSTITUTIONAL AUTHORITY OF THE JUDICIARY

17. The purposes which have been described will not be achieved unless the national judicial system is capable of undertaking an onerous task of adjudication in administrative matters which in some respects goes well beyond the ordinary duties of trying and sentencing criminals, enforcing commercial contracts, determining property disputes and so on. Many constitutions guarantee the independence and impartiality of the judiciary, but in practice a legal system may not be accustomed to enabling questions involving a potential conflict

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[6] The question is discussed in the European context by A W Bradley, "Administrative Justice: a Developing Human Right?" (1995) 1 European Public Law 347.

between governmental authority and individual rights to be resolved in the courts. In common law jurisdictions, such questions are generally decided by the ordinary civil courts and not (as in France and some other European countries) by separate administrative courts with jurisdiction limited to questions of public law.

18. It is no part of the courts' duty in any system of judicial review to substitute themselves for the government. But it is fundamental to a system of judicial review that scrutiny of public administration by the courts is not limited to local councils and other subordinate bodies, but extends to the acts and decisions of central government. Government agencies, for their part, must be willing to contemplate that their decisions may be challenged in the courts on grounds of legality.[7]

19. As well as the need to establish the authority of the courts to resolve such questions, the question of access is important. How much is achieved if access to the courts is open only to wealthy corporations and multinational companies, and recourse to a judicial remedy is beyond the reach of ordinary citizens? Even in countries which make some provision for legal aid, governments may be reluctant to fund legal aid if this will encourage litigation against public authorities and government departments. Again, in some but not all jurisdictions, recourse to the courts in matters involving the government may involve the use of legal procedure which is outside the ordinary experience of most legal practitioners.

E. PROCEDURES OF THE COURTS

20. Where access to the courts exist, what kind of justice will be available to an individual litigant once he or she gets to court? In some systems, judicial review of administrative action depends too much on the minutiae of out-dated court procedures.[8] In contrast to this, wherever the process of judicial review is in a healthy state today, the emphasis is on principles rather than technicalities. In the opening paragraph of the recent new edition of an authoritative work,[9] the editors state: "In all developed legal systems there has been recognition of a fundamental requirement for principles to govern the exercise by public authorities of their powers. These principles provide a basic protection for individuals and prevent those exercising public functions from abusing their powers to the disadvantage of the public. ... [In recent years] Coherent principles have steadily evolved in a number of areas of administrative law and disfiguring archaisms have been removed".

Judicial review ought to be less concerned with procedural technicalities than with securing "the articulation of acceptable principles governing the exercise of public functions and the vindication of the rights of the individual against the state".[10]

21. The mere retention of ancient and venerable remedies (for example, the old prerogative writs of certiorari, prohibition and mandamus) without reform is likely to hamper the development of clear principles of public law.[11] Where the old procedures survive, a litigant's initial choice of remedy may have a crucial (and arbitrary) effect on both the grounds and procedure of judicial review, with the result that a litigant may fail on grounds other than the substantive merits of the case. A

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[7] In *M v Home Office* [1992] QB 270, the relationship was neatly encapsulated when Nolan LJ, adopting a submission made to him by Stephen Sedley QC, referred to the need for mutual respect between the judges and the executive and accepted that "the proper constitutional relationship of the executive with the courts is that the courts will respect all acts of the executive within its lawful province, and that the executive will respect all decisions of the courts as to what its lawful province is".

[8] Some Commonwealth jurisdictions have not even experienced the reform of writ procedure (whereby the prerogative writs became prerogative orders) which in the United Kingdom occurred in the Administration of Justice (Miscellaneous Provisions) Act 1933.

[9] See De Smith, Woolf and Jowell, *Judicial Review of Administrative Action*, 5th edition 1995.

[10] *Ibid.*, p. 13.

[11] Nomenclature may not be of the first importance, but in 1994 the English Law Commission recommended that the Latin titles of the prerogative orders be dropped and that the court should be empowered to make mandatory, prohibiting and quashing orders: *Administrative Law: Judicial Review and Statutory Appeals*, Law Com No 226, 1994, p 72.

specific instance of this danger is that in an unreformed system of remedies, the rules of standing to sue (*locus standi*), or the rules as to evidence, may differ according to the remedy that an individual seeks. For there to be an effective administrative law jurisdiction, the rules of court must provide a generalised and flexible procedure, to enable an application to be determined in accordance with the relevant principles of review, at the behest of any individual or group having a serious (or sufficient) interest in the matter.

22. One scheme for procedural reform is contained in Part II of the booklet, *Good Government and Administrative Law - An Introductory Guide*, already mentioned. That scheme reflects the recent practice of some Commonwealth countries in opting for a generalised, public law procedure of 'application for judicial review'. However, other ways of meeting the need for reform have been developed in some Commonwealth jurisdictions; in Australia, for example, law reformers in 1995 considered whether the way forward was to develop procedure enabling the reviewing court to exercise its jurisdiction through the remedy of a 'public law declaration'.[12] While numerous forms of procedural reform are possible, there can be no doubt that the existence of ancient and poorly understood 'forms of action' is likely to inhibit the development of effective means of review.

23. One matter for discussion in the context of reform is whether the substantive grounds for judicial review should be included in the reform or whether changes should be confined to procedural matters. There is a strong case to be made for accompanying procedural reform with a restatement of the substantive grounds,[13] but any restatement must be phrased in an open-ended manner and not in a way which might obstruct future development of the law - affecting matters such as the duty to give reasons, proportionality and legitimate expectations.

[12] See P Bayne, "The Reform of Judicial Review - a New Model?", paper presented to the 1995 Administrative Law Forum, held in Canberra on 27-28 April 1995. I am grateful to Mr Charles Beltz of the Administrative Review Council, Canberra, for supplying me with a copy of this paper.

[13] As is stated in Part II of the booklet, *Good Government and Administrative Law - an Introductory Guide*.

F. COMPLEMENTARY ROLE OF THE OMBUDSMAN

24. When the substantive grounds of judicial review are summarised, it will be seen that they all relate to the duty of public authorities to exercise their functions lawfully, reasonably and by proper procedure. As Sir Robin Cooke, President of the New Zealand Court of Appeal, said in 1992 at the Oxford Colloquium,

"It would be something of an over-simplification to say that all the principles of administrative law can be stated in ten words. But 45 years of learning, researching, teaching, practising and adjudicating the subject have left the impression that this is not very far from the truth. The administrator must act fairly, reasonably and according to law. That is the essence and the rest is mainly machinery".[14]

25. In the case of particular powers of government which are suitable for judicial decision, it may be possible to provide a right of appeal on the merits to a court or to a specially constituted tribunal. But, except where an appeal on the merits is justified, any formulation of the grounds of judicial review must maintain the distinction between (a) the process of judicial review and (b) procedures for appealing on the merits against executive decisions. Further, the process of judicial review cannot sensibly be extended to include every situation in which an individual has cause to complain at the way in which he/she has been treated by officials. Even where an effective system of judicial review exists, there may also be a need for the creation of an ombudsman to deal with a wide variety of individual complaints about poor performance of administration.

26. Judicial review is as much concerned with the duties of public authorities as it is with the rights and interests of private persons. The grounds of judicial review may indeed be rephrased as norms of decision-making, as suggested by Sir Robin Cooke above. Thus a public official must exercise the powers vested in him or her, and not the powers vested in another official; they must understand the limits on their powers and must not act outside those powers, nor seek to exercise them for extraneous, irrelevant or improper purposes; they must act by

[14] Sir Robin Cooke, "Empowerment and Accountability: the Quest for Administrative Justice" (paper for the Judicial Colloquium at Oxford in September 1992), Developing Human Rights Jurisprudence, Vol. 5, Commonwealth Secretariat 1993, pp. 81-88.

a fair and proper procedure, and this may necessitate giving a hearing to those affected by a decision before it is made.

27. In a similar way, the lessons to be learned from the investigations and reports of an ombudsman can be stated in the form of principles of good administration.

28. What is essential is that the norms which emerge from judicial review of administration should be fully consistent with norms that emerge from review and scrutiny by an ombudsman.[15] Both the courts and the ombudsman require administrators to base their decisions upon a proper understanding of their legal powers, and to act in good faith, without malice, for reasons of public and not private interest, and without improper discrimination. By looking both at decisions of courts and at reports of ombudsmen, we can find out what the duties of administrators are. On the basis of judicial decisions, it is possible to state **principles of lawful administration**; on the basis of ombudsmen's reports, it is possible to state the **principles of good administration**. The two sets of principles are not identical, but they have much in common, and they should not be giving conflicting signals to officials.

G. TRAINING OF CIVIL SERVICE IN LEGAL AWARENESS

29. One fundamental conclusion is that there cannot be good government which is not lawful government. Ministers and civil servants need to be aware of this requirement, just as they need to be conversant with the rules of accountability for public expenditure. This theme has been emphasised at the Commonwealth Secretariat's Workshops on Administrative Law already mentioned, and the booklet, *Good Government and Administrative Law - an Introductory Guide*, has been prepared with this need in mind.

30. There are indeed many ways in which the training and education of those holding public office or employed in the public service can be organised. However, if the general argument developed in this paper is accepted, then in every country the Law Officers and lawyers in the public service have a role to play in contributing to the education and training programme - and it would be a false economy not to recognise the need for this.

H. CONCLUSION

31. I do not summarise the main issues touched on in this paper: they are apparent from the sub-headings which I have used. But it might be appropriate to quote a passage from the late Mr H. M. Seervai, an outstanding constitutional scholar, who died in Bombay on 26 January 1996 at the age of 89, 46 years to the day after the Indian Constitution came into effect. For 17 years (1957-74), he had been Advocate General of Maharashtra, he frequently appeared in leading constitutional cases, and his Critical Commentary on the Indian Constitution has passed through four editions. During an impressive speech to the Fifth Commonwealth Law Conference in Edinburgh on 26 July 1977, on the subject "The legal profession and the state: the place of law officers and ministers of justice", Mr Seervai had this to say: "Respect for the law is essential to a free society; and that respect is secured not only by the free and fearless administration of justice by an independent judiciary but also by a fair and even-handed executive enforcement of the law. Administration of justice by independent judges is taken for granted in upholding and enforcing the law in a free society. The part played by the executive government in the administration of justice and in enforcing law appears less obvious, however, because administration of justice is only a part of the manifold functions of the executive government - but it is not a less important part for that. Courts cannot do justice if the executive fails to discharge its duty of enforcing the law."[16]

This was said in the particular context of criminal justice. But I have no doubt that these words deserve to be applied to the subject-matter of this discussion paper.

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[15] See A W Bradley "The Role of the Ombudsman in relation to the Protection of Citizens' Rights" [1980] CLJ 304, 324-332.

[16] Journal of the Law Society of Scotland, 1977, pp. 265-268.