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MODULE STRUCTURE

I. Introduction
II. The Aim of the Module
III. Module Objectives [Learning outcomes]
IV. Assessment
V. Prescribed and Recommended Readings
VI. Time frame
VII. Study skills [Learning tips]
VIII. Need help [Studying at a distance]

The module is divided into 10 units. Each unit addresses some of the learning outcomes. You will be asked to complete various tasks so that you can demonstrate your competence in achieving the learning outcomes.
INTRODUCTION

Welcome to the Module on the Administrative Law (LPU 2962). When we talk about government, we think of not only the three arms of government discussed in Constitutional Law. It also encompasses other bodies, statutory bodies, civil servants and other appointed persons who perform various functions on behalf of the government. To regulate this big body of functionaries, the law that enacts institutions and bodies tends to prescribe their powers as well define the boundaries of such powers as well as mechanisms for redress in the event of improper exercise of public power given to the various administrators. This is the body of law known as Administrative Law.

This Module therefore introduces you to fundamental principles and concepts of administrative law. It also exposes you to case law, statutes, rules and orders which constitute the field of administrative law. It explores the various functions of administrative law as well as introduce you to the various legal controls of administrative power and process.

This is a second year course. It is assumed that you have taken some fundamental first year courses such as Legal Process and Constitutional Law from which the course draws some conceptual foundation. We hope that you will reflect on the content and activities in this module coupled with your experience in your areas of specialization to develop competencies to be able to successfully explain and analyse administrative law.
Aim

The aim of this module is to introduce you to the law regulating administrative law and process. You will also be introduced to the various legal controls of administrative power and process. Further, you are encouraged to think about and reflect on your successes and difficulties of the application of all the aspects of each unit.

Objectives

By the end of this course, you should be able to:

1. Explain various principles of administrative law.
2. Explain the law regulating powers and procedures of administrative organs of the state.
3. Identify various non-judicial systems of control of administrative power.
4. Explain judicial processes for control of administrative power and process in Zambia.
5. Critically analyse the effect of gender on administrative law, policy and process.

Assessment

Your work in this module will be assessed in the following three ways:

1. One test worth 25%
2. A written assignment worth 15%.
3. A written examination set by the University of Zambia at the end of the module (worth 60% of the final mark). In summary, you will be assessed as follows-

<table>
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<th>Continuous Assessment:</th>
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<tr>
<td>1 test</td>
<td>25%</td>
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<tr>
<td>1 written assignment</td>
<td>15%</td>
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<tr>
<td><strong>Final Examination:</strong></td>
<td><strong>60%</strong></td>
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Prescribed Readings


Recommended Readings


4. Mwansa, Ernest Chitimwa "Parliamentary oversight of the Executive through the Public Accounts Committee in Zambia: Has it been Effective?" LL.M Thesis. University of Zambia Library Special Collection.


Apart from this module, you are expected to read widely around all the topics covered in the module. You may find the references provided at the end of each unit useful, but you could also explore other sources of information, particularly the Laws of Zambia, the Rules of the Supreme Court of England, 1999 Edition and case law. Case law may be obtained from law reports, particularly Zambia Law Reports and law reports from other jurisdictions. You could also find useful information in Journals and Internet sources which have invaluable information.

**Time frame**

You are expected to spend at least 75 hours of study time on this module. In addition, there shall be arranged contact hours, both physical contact and through the online portal, with lecturers from the University from time to time during the course. You are requested to spend your time diligently so that you reap maximum benefit from the course.

**Study Skills**

You may not have studied by distance education before. Here are some simple tips for you to follow which will help you do better in your learning and keep you focused-
1. Set goals such as: I will succeed in this course. At the beginning of the module, break the lessons into manageable chunks. You might not have time to do a full lesson in one night, so plan how much you can do, then stick to it until you are done.

2. Establish a regular study/learning schedule

3. Determine what time is best for you to study

4. Have a dedicated study place with all the supplies you might need

5. Tell people what you are doing because only then are you more likely to stick to a course.

6. Ask someone to proofread your work before you submit it.

7. Reward yourself with whatever works for you, along the way.

8. If you do not understand something ask your local learning centre or your tutor, who will be able to help you.

9. Search for the meaning concepts, rules and principles instead of just memorizing.

10. Apply the concepts, rules and principles learnt to practical exercises and activities given in the module.

Need help?

In case you have difficulties during the duration of the course, please get in touch with the Director, Institute of Distance Education, or the resident lecturer in your province.

All enquiries in connection with the payment of fees should be directed to the Director, Institute of Distance Education:

The Director,
Institute of Distance Education,
University of Zambia,
P. O. Box 32379,
10101 Lusaka

10101 Lusaka
Coordinator, Learner Support Services (Land Cell): +260 978772248
Senior Administrative Officer
(Programme Development & Production) +260 977639993
IDE Land Line: +260 211 290719
IDE Fax: +260 211 290719
IDE E-mail: director-ide@unza.zm
http://www.unza.zm
UNIT ONE
INTRODUCTION TO ADMINISTRATIVE LAW AND PROCESS IN ZAMBIA

1.0 Introduction

Welcome to Unit one of the Module. In this Unit, you will be introduced to the subject matter of administrative law. The unit also introduces you to sources of law and discusses some important concepts of Administrative Law. It also gives you some background and historical context of administrative law in Zambia to help you appreciate and apply the various sources of law used in the module.

1.1 Unit aims

The aims of this unit are to:

1. Introduce you to administrative law.
2. Introduce you to sources of administrative law in Zambia.
3. Enable you determine the proper scope of administrative law.

1.2 Objectives

By the end of this unit, you should be able to:

1. Define administrative law.
2. Identify and explain the sources of administrative law in Zambia.
3. Explain the domain and scope of administrative law; and
4. Explain development of administrative law in Zambia.

Time required

You will require 6 hours to successfully complete this unit.
1.3 Definition of Administrative Law.

Activity

What do you understand by administrative law?

You probably came up with a number of answers to the above question. Your answers could have ranged from functions of administrative law to descriptions of public administration and the law regulating the public administration. As you may have noticed by attempting to answer the above question, it is impossible to give any precise definition of the phrase administrative law. We hope you will have a clearer concept of administrative law by the end of this unit.

Let us consider some of the definitions given by scholars below:

Administrative law has come to … be viewed as the study of the rules and procedures that on the one hand serve to promote good administrative practice in governmental agencies, and on the other hand provide mechanisms of redress, judicial or otherwise, when grievances have arisen as a result of decisions or actions of government. (B.L. Jones, Garner’s Administrative Law, 2005).

You will notice that the above definition is descriptive of the functions of administrative law. The definition is helpful in conceptualising the subject matter of Administrative Law.

Let us consider another definition given by Milton M. Carrow in Background of Administrative Law, 1948. He describes Administrative Law as:

… [The law] dealing with the powers of administrative agencies as they affect persons outside the government, with the process through which the powers are exercised and with the controls over such powers and processes.
The above definition also emphasises two important functions of administrative law, namely, empowering the public administration and control of exercise of administrative power.

Many scholars have attempted to define administrative law. Many of these definitions have been criticised for being too wide (Connie L Mah, 2013). You will also note that some of the definitions given above are merely descriptive of the functions of Administrative law without giving the proper domain or scope of administrative law.

A comprehensive attempt at defining administrative law should not only describe its functions but also give the domain of the subject matter. Administrative law can therefore be defined as the law that governs those who administer government affairs. It focuses on the procedures and powers used by public officers and institutions responsible for the performance of State functions. It is the branch of law that focuses on the laws governing the public administration of the Country. Administrative law prescribes the powers and functions of public officers as well as define the scope of those powers. It also provides the means for control of the exercise of those powers.

1.4 Conceptualising Administrative Law

Administrative law is a difficult subject to conceptualise. There is no clear course to follow when studying it as may be the case with other subjects such as the law of torts, the law of contract, constitutional law etc. ‘The subject is circular, for no one part of it can be studied satisfactorily in isolation before proceeding to the next’ (D.C.M Yardley, 1986). You are therefore encouraged to be open minded and take a rounded approach to your study of this course module.

Perhaps an understanding of the nature scope and function of administrative law can help us conceptualise the term ‘administrative law.’ This also helps us understand what is subject matter is suited for administrative law actions.
1.4.1 The Scope of Administrative law

In our attempt to conceptualize administrative law, you have been cautioned to identify the proper scope of administrative law. Identifying the proper scope of administrative law is desirable for purposes of facilitating the smooth running of the public administration. In your Legal Process Module, you may have come across the classification of laws into public law and private law. Administrative law is a branch of public law. It can be described as the study of rules and procedures that on one hand serve to promote good administrative practice in the public administration on the one hand, and on the other hand provide mechanisms of redress, when grievances have arisen as a result of decisions or actions of government (B.L. Jones, 1996). Administrative law keeps governmental powers within their legal boundaries so as to protect the citizens against abuse of power by public administrators.

Activity

Imagine you have been approached by Mr. AB who alleges that his motor vehicle, registration number ABC 1234 was involved in a road traffic accident. The details of the accident are that Mr. AB’s motor vehicle was run into by a Toyota Hilux GRZ 1234 belonging to the Ministry of Local Government. Mr. AB has heard that you are studying law at the University of Zambia. He wants to know if he can commence an administrative law action against the government and the driver of the motor vehicle in question. What advice would you give Mr. AB?

In your reflection, you may ask yourself what would be the appropriate action in the circumstances. You may also have remembered how such actions may be founded in the law of Torts and probably advised Mr AB to sue for damages in Tort. Perhaps you might want to pause and ask yourself, why not administrative law? Perhaps your advice was to commence an administrative law matter, why? Let us address some of the
important elements that would assist you in identifying the correct action to take in the given scenario by discussing what administrative is and is not.

The subject of administrative law is concerned with 3 aspects of public administration, namely, power, process and controls (Milton M. Carrow, 1948). It deals with the structure, powers and functions of the public authorities and bodies. It also addresses limits to their powers, the method and procedures for exercising those powers and functions. By control, administrative law is concerned with the safeguards provided against abuse of administrative power. Administrative law is also concerned with legal remedies available to the person whose rights and/or interests are negatively affected by the exercise of power by public authorities (Wade and Forsyth, 2007).

Administrative law covers a vast area. This is because it is potentially relevant to every use of public power or performance of public functions. The field of administrative law, to a large extent overlaps with constitutional law as well as other disciplines on governance such as political science and public administration. The relationship between constitutional law and administrative law is developed further when we consider the historical development of administrative law in Zambia. Suffice to mention that while both subjects are concerned with organs of the state and their relationship with one another and the citizens, administrative law is concerned only with one organ of the state, namely, the public administration.

Administrative law is distinct from political science in the sense that administrative law focuses on legal rather than political power. The distinction between administrative law and public administration is that the focus of administrative law is the legal control of administrative powers as opposed to the sort of issues that are of interest in management science such as efficiency, decentralisation, and management generally, which are the subject matter of public administration (Cora Hoexter, 2007).
Administrative law should also distinguished from judicial review. Judicial review focuses narrowly on the aspect control or checking of exercise of administrative authority by the courts while administrative law is wider in scope. It focuses both on empowering proper public administration as well control of administrative authority.

1.5 The domain of administrative law
Having attempted to distinguish administrative law from other areas of studies that address government and its relationship with citizens, let us now consider what subjects are fit for administrative law. This should help us advise our client Mr. AB in the scenario given in the activity above. Remember, not every governmental action solicits an administrative law intervention. What then is the domain of administrative law?

Traditionally, it was sufficient to look at the source of power to determine whether the decision maker is within the ambit of administrative law. It was sufficient to determine that the actor derives power from legislation (substantive or subordinate) and the fact that the decision affects public interest. This test is no longer true in modern society since the growth of the welfare state in the 20th century saw the expansion of public power into what formerly were considered private life such as consumer contracts, property rights and employment (Cora Hoexter, 2007) Further, privatisation of predominantly government enterprises saw functions that were considered as properly state functions being performed by private authorities. The relevant test that courts have now accepted involves not only an examination of the source of power but also the nature and of functions concerned to determine the public law element of the decision in question. Once the public law element is identified, administrative law will concern itself with exercise of administrative authority in form of rule-making, adjudicative or investigatory power of a discretionary character. The nature of functions, although not without problems, is therefore one the useful methods of identifying the domain of administrative law.
1.5.1 Problem Of The classification Of Functions

As stated above, in determining what matters are subject to administrative law, courts used a separation of functions test. With this test, there was a separation of functions into various categories at which levels of discretion would diminish. The higher the levels of discretion, the less administrative law intervention it would require. The functions were classified as follows:

1. Executive function which is policy making function. A person exercising executive functions has a wide discretion.

2. Legislative function which is the rule making function. Like executive functions, this level the authority exercises a lot of discretion.

3. Quasi-judicial functions in which the decision maker has to make decisions of a judicial nature. This should be distinguished from judicial authority of the judiciary that is given by the constitution.

4. Purely administrative functions for which there is relative degree of discretion although not much.

5. Ministerial functions for which there is no exercise of discretion.

The degree of control of the exercise of administrative power by the courts would differ according to the levels of discretion involved in the decision making. The courts’ power of review is greatest at the level with the least discretion, in this case ministerial functions. The greatest level of discretion is at executive functions at which level the courts are less likely to interfere.

There is however a problem with the separation of functions approach as you will notice that there is no clear separation of functions that public authorities perform. For instance, the duty of ensuring procedural fairness has become a relevant ingredient at all levels of exercise of administrative power, including decisions of a legislative nature. Traditionally,
strict adherence to procedural fairness would only be demanded when it came to quasi-judicial functions.

Further, the growth in privatisation has blurred the distinction between public and private functions. For instance, there are elements of public law in contracts when dealing with public procurement. Similarly, private persons and institutions are increasingly performing public functions such as licensing, security, electricity security, water supply, which have traditionally been public services.

1.5.2 The Functionary Test

By functionary we mean the person performing the administrative function. The functionary test requires that only a public officer should be subject to administrative law control. But this is not the end of the inquiry. This used to be the traditional source of power test. The test has expanded to look at not only the source of power but also the nature of the function as stated above. It is therefore not sufficient that the person in question is a public officer. A public officer is said to be performing public functions when his/her function seeks to achieve a collective benefit for the public or a section of the public. Public officers are also said to exercise public functions where they participate in matters of public interest or when amenability to their jurisdiction is by compulsion or coercion. Using this test, it is possible for traditionally private bodies to exercise public functions and are arguably amenable to administrative law control or remedies for any person who suffers loss at the exercise of their functions. It is also possible as for a public officer to perform private law functions which would be the case in the given scenario of the road traffic accident.

1.6 Sources of administrative law

All sources of law that you considered in Legal Process are sources of administrative law. These are the Constitution, legislation, delegated legislation, judicial precedent, English common law, equity, customary law and authored works. This section attempts to explain some sources of law within the context of administrative law.
1.6.1 The Constitution

The Constitution of Zambia is the supreme law of the land. It stipulates fundamental principles for the governance of the Country. The Constitution is a source of administrative law in that it creates many administrative institutions and ascribes powers and functions to them. The Constitutional also prescribes limits on exercise of power given by the Constitution. This prescription of power and limitations provides an important source for administrative law. The constitution also provides the standard against which legislation that creates administrative functions is tested against constitutional principles.

1.6.2 Legislation and Delegated Legislation

Legislation comprises of Acts of Parliament, also known as Statutes. These are enacted by Parliament since it is the law-making body of the Country. Parliament also has the powers, in accordance with the Constitution, to delegate its law-making functions to a lower body. Legislation that emanates from such delegation is referred to as delegated legislation. Both legislation and delegated legislation are an important source on administrative law in that some of the administrative agencies are created by Acts of Parliament. Since administrative law comprises of law that is made by and controls the administrative authorities, you can consider legislation and delegated legislation as important sources of administrative law.

1.6.3 Government Circulars

Administrative agencies are media through which administrative rules are made. One of the ways through which such rules are made is through government circulars. Whereas the Constitution and Acts of Parliament permit these administrative agencies to make laws, such laws are different from the law governing their powers and processes. See the case of Muyawa Liuwa v The Attorney General (1982) Z.R. 39

1.6.4 Judicial Precedent

Judicial precedent is also referred to as ‘judge-made law’. It emanates from judicial pronouncements that are made by the courts when deciding cases before them. With each judgement, the Courts set precedent that may either be binding or persuasive on themselves
and other courts. As judges are meant to interpret the law, any administrative laws enacted by Parliament or its delegate that is interpreted by the courts in cases properly before courts form part of administrative law. Judicial precedent is therefore an important source of administrative law in that courts often are called upon to determine whether public power was properly exercised. The exercise of public power is a subject of administrative law and thus court decisions in this regard inevitably form part of administrative law.

1.6.5 Conventions

Conventions refer to practices observed over time that are generally accepted as part of administrative law. Convention, in this regard, would also constitute customs and practices that are part of administrative law. Examples include rules of procedure and methods of practice which form part of the exercise of administrative authority. Such rules may over time crystallize into authority that is binding on them until changed by legislation or judicial decisions. Such rules are just as much a part of administrative law as the rules enacted by Parliament or judicial pronouncements.

1.6.6 English Common Law and Doctrines of Equity

These form part of administrative law in that many aspects of administrative law that were developed through the English Common law system have not been changed by statute. Since Zambia largely inherited its administrative process from the English law system, most of the common law applicable in the UK is still applicable to Zambia. Further, under the English legal system, equity follows the law, which means that so far as the common law produces an injustice, equity could be invoked to redress the situation. For example, if the use of discretionary powers leads to an unjustifiable violation of an individual’s fundamental right, equity could be invoked to redress the situation.

1.6.7 Customary law

Zambia has a dual legal system. Customary law is a source of administrative law in so far as it ascribes public power and provides methods of control of such public power. Examples of customary law public authority include, chiefs and head men and women.
Activity

Critically discuss the sources of administrative law in Zambia

1.7 Unit Summary

This unit introduced you to administrative law. It has also attempted to delineate the scope and subject matter of administrative law. It has also given you the various sources of administrative law in Zambia. The unit sets the foundation for your interaction with more detailed concepts of administrative authority, discretion and control of administrative authority you will study in the proceeding units.

1.8 References and suggested Readings

Statutes


Case Law


Books


Carrow, Milton M. Background of administrative law (New York: Orangeburg) 1948


University Press. 2014.

**Other sources**

UNIT TWO
HISTORICAL DEVELOPMENT OF ZAMBIA’S ADMINISTRATIVE PROCESS

2.0 Introduction

Welcome to unit two of the module. In Unit one, you were introduced to the subject matter of administrative law. You also considered the sources of administrative law. You noticed some references to traditional conception of administrative law, which would best be appreciated after studying the historical development of administrative law in Zambia. In this unit, you will trace the development of administrative law and process in Zambia. You will also appreciate the importance of constitutional developments in the growth of administrative law and process in Zambia. The last part of the unit specifically analyses the relationship between Constitutional Law and administrative law and highlights the constitutional content of administrative law in Zambia. You are expected to rely on your knowledge of Zambia’s political history to appreciate the effects of the political developments on administrative law. We also expect you to utilise your knowledge on the historical developments of the legal system which you studied in Legal Process.

1.1 Unit Aims
The aims of the unit are to:

1. Trace the history of administrative law.
2. Introduce you to the constitutional context of administrative law.

You will require at least 3 hours to successfully complete this unit.

2.1 Unit Objectives
By the end of this unit, you should be able to:

1. Explain the historical development of administrative law in Zambia.
2. Identify significant constitutional developments that have shaped the development of administrative law in Zambia.
3. Analyse the constitutional context of administrative law in Zambia.

2.3 Historical background
As you may have noted from Unit 1, Administrative law is concerned with governmental powers. Until independence, in 1964, Zambia was under British rule. After independence, the new government committed itself to the realisation of a humanistic society. Under the humanist leadership philosophy, the government was in charge of providing social amenities to the Zambian people. Since the end of the one-party rule in 1991, successive Zambian governments have committed to transforming Zambia into a democracy. They have declared their interest in improving the welfare of the people. It is the primary responsibility of the State to meet the socio-economic needs of the Zambian people and to ensure that fundamental human rights are respected, promoted and protected.

Although all organs of the State are equal in importance, a huge part of the public administration is the responsibility of the executive organ. The administration of a country entails formulating policies and implementing those policies. It also entails implementing laws made by Parliament (including delegated legislation) in accordance with the governance structure and principles. Policies and laws are meant to address the many challenges the Country faces. The Legislature and the Judiciary also play an important role in governance. The constitutional function of the Legislature is to make laws while the Judiciary is charged with interpretation of laws and protecting rights of the people. Both the Legislature and Judiciary also carry out some administrative functions in fulfilling their constitutional functions.

In terms of the administrative structures, the 1964 Constitution, inherited from the colonial masters, provided for certain key institutions that would be responsible for administration. Subsequent Zambian constitutions have reinforced the creation of these institutions. However these institutions have not always been adequate. The creation of new institutions
has not alleviated the problem of their adequacy to meet the envisaged transformation. This is because these institutions have largely been adopted with little or no adjustment to the Zambian social and economic context. Many administrative agencies that have been created since independence have largely followed the western style of administrative process. Over the years these administrative agencies have shaped the administrative process in Zambia.

These institutions and systems will be discussed in the subsequent units. For now, it is important to note that administrative agencies and systems can be created by the Constitution and by legislation.

**Activity**

1. Identify at least three administrative agencies created by the 1991 Constitution.
2. How were these agencies used to ensure proper administration of the Country?

**2.4 Constitutional Foundation of Administrative Law**

Under this section, we look at the constitutional foundation of administrative law. As you may have noted, administrative law is that law that regulates the public administration. We have also noted that the Constitution creates a number of administrative agencies in addition to allocating powers to the three arms of government.

In unit one, we attempted to differentiate administrative law from constitutional law in our quest to discover the domain and subject matter of administrative law. It may sometimes be difficult to draw the line between constitutional law and administrative law. This is largely because many aspects of administrative law are dependent on the constitutional makeup of a country. It is however important to note that although administrative law bases its authority on powers granted by the Constitution, there is a difference between constitutional law and administrative law. Before you proceed to discuss the constitutional foundation of administrative law in Zambia, answer the following questions by way of revision of your constitutional law module:
Activity

1. Explain the differences between the Zambian and British Constitution.
2. Explain the features of the Zambian Constitution.
3. Give examples of some principles of Zambia’s Constitutional law

Zambia has a concrete type of constitution. This means that Zambia has a document (referred to as the Constitution of the Country) which contains the most important laws of the land and which are ordained by the people of Zambia. The Constitution of Zambia commands superiority over all other laws that are enacted by the Zambian Parliament or customary law that are inconsistent with the provisions of the Constitution (Art. 1(1) of the Constitution of Zambia). Britain on the other hand has an unwritten constitution.

The Constitution of Zambia provides for the establishment of the main institutions of government, prescribes their powers and their relationship with one another. Thus our constitutional law refers to the laws that govern the formal rules of how the Country will be organised and how various State organs will be established and what functions, powers and duties they will have (Parts VI-X of the Constitution).

The constitutional foundation of administrative law incorporates the following principles and doctrines:

1. Constitutional supremacy;
2. Constitutionalism;
3. Separation of powers; and
4. The rule of law.

Before we relate these principles to what others have said about them, what do you understand by each one of them?
Let us examine each of these principles and how they affect Zambia’s administrative law.

2.4.1 Separation of Powers

Reflection

In your own words, explain the principles of separation of powers. Identify the various arms of government and explain how they relate to one another.

In reflecting about the above questions, you may have identified the three arms of government, namely, the Executive, Legislature and the Judiciary. You may however wonder what this constitutional principle has got to do with administrative law. If you recall in unit 1, we identified two functions of administrative law as empowering public administration and controlling the exercise of administrative power. The doctrine of separation of powers as promulgated by A.V. Dicey promotes the idea of separation of governmental functions between separate functionaries. The principle requires that these functions of government should not be versed in one person and that each governmental body should not usurp the powers of the next.

The principle of separation of powers is embodied in Zambia’s constitution which allocates executive functions to the President and the civil service, law making functions to the Legislature and interpretation of laws and adjudication to the Judiciary. There is however no strict separation of functions as the Executive is given power to make subsidiary legislation, the Legislature has power to make judicial decisions in respect of its members whereas the judiciary can be said to make law when they interpret law or enact rules of procedure. The Judiciary can also be said to be performing executive functions such as supervision of estates of minors or giving of licences to money lenders.

The effect of the principle of separation of powers on administrative law can be summed up as follows: Courts should not usurp powers that are allocated to the Executive and public administration. Similarly, courts should desist from making laws, which is the function of
the Legislature. The value of this separation is to ensure that administrative law promotes good administration and control maladministration. In exercising the control function, administrative law mechanisms should not cripple the smooth operation of the public administration.

2.4.2 Rule of Law

Reflection

What do you understand by the phrase “rule of law”? Why do you think it is important to administrative law?

The rule of law is yet another important principle of constitutional law that guides administrative law. The rule of law as postulated by A. V. Dicey entails the following:

1. Law is better than anarchy. Laws must be faithfully and correctly executed by administrative officials.
2. Government according to law. No person is punishable or can be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before ordinary courts of the land.
3. Equality before the law. No person is above the law…every person is subject to the ordinary law and amenable to the jurisdiction of ordinary courts.

According to the principle of rule of law, governmental power should be exercised in the manner prescribed by law. When applied to the public administration, every exercise of administrative power must derive its authority from a legal provision and not arbitrarily or according to the whims and caprices (sudden, impulsive, unpredictable) of the administrator. Arbitrary means not planned or chosen for a particular reason, not based on reason or evidenced; based on preference other than reason or necessity. Administrative law seeks to ensure that administrative power is regulated by law and is exercised within the confines prescribed by law.
The rule of law also entails equality before the law. This has been translated to mean that there must be an independent judicial body to which everybody should be subjected to. The principle of equality before the law makes requires that all persons including government agencies and public administrators should be amenable to the jurisdiction of the courts. The rule of law therefore gives legitimacy to ordinary courts to review administrative actions without subjecting them to special courts or tribunals. You will however notice when in the subsequent unit on administrative controls of administrative power, that this requirement to subject administrative matters to ordinary courts is not strictly followed as the law has created tribunals for administrative convenience.

2.4.3 Constitutional Supremacy

The doctrine of constitutional supremacy can be summed up as follows:

1. All institutions derive their legitimacy from the people through the constitution.
2. All law is subject to the constitution.

All acts or omissions should be in conformity with the Constitution.

**Activity**

Contrast constitutional supremacy with parliamentary sovereignty which entails the following:

1. Parliament can make and unmake any law whatsoever. No person or body is recognised by law as having a right to override or set aside the legislation of parliament.
2. Parliament can alter maximum duration of its life; confer legislative and judicial powers on organs of the executive; exclude access to court.
3. Courts have no jurisdiction to question validity of enactments of Parliament.
4. Royal prerogative to make law exists at the sufferance of Parliament.

Legislation is a combined act of the queen plus the 2 houses of parliament.
The doctrine of Parliamentary Supremacy has a legacy on Zambia’s legal system and judicial policy. Judges are often faced with conflicting ideas of defending the will of parliament vis a vis constitutional supremacy.

See **In re Nalumino Mundia (1970) Z.R. 70** where it was held that the High Court has no power to interfere with exercise of jurisdiction of national assembly in the conduct of its proceedings.

See also:


Attorney General v Speaker of National Assembly and Ludwig Sondashi, SCZ No. 6 of 2003

The doctrine of constitutional supremacy has challenged the traditional domain of administrative law as follows:

1. Whereas statute could make a provision excluding review of exercise of executive authority, it is now possible to challenge such authority based in the supremacy of the constitution which gives original and unlimited power to the judiciary to safeguard human rights and protect the constitution.

2. Courts have power even to review exercise of discretionary authority and that Parliament being subordinate to the constitution cannot enact legislation that ousts the courts’ jurisdiction.

Ultra vires as a ground for review has been broadened to include moral legitimacy of the constitution and principles of constitutional democracy.

### 2.3.4 Constitutional Principles and values

Article 8 of the Constitution sets out the following national values and principles:

(a) Morality and ethics;

(b) Patriotism and national unity;

(c) Democracy and constitutionalism;

(d) Human dignity, equity, social justice, equality and nondiscrimination;
(e) Good governance and integrity; and
(f) Sustainable development.

Article 173 sets prescribes values and principles of the public service which include:
(d) Encouragement of people to participate in the process of policymaking;
(e) Prompt, efficient and timely response to people’s needs;
(g) Accountability for administrative acts;
(h) Proactively providing the public with timely, accessible and accurate information; and
(i) Merit as the basis of appointment and promotion.

These values apply to all levels of government and state institutions.

2.4.5 Centrality of human rights

The effects of having a written constitution is that it elevates the position of human rights which are entrenched under the Zambian Constitution.

Some instances of maladministration are therefore a domain of constitutional law since they centre on infringement of entrenched rights. This has somewhat narrowed the scope of administrative law.

Activity

Discuss the extent to which the Zambian Constitution affects administrative law in Zambia

2.5 unit summary

This unit has introduced you to the historical development of administrative law in Zambia.
It has also looked at some constitutional law principles that shape administrative law in
Zambia. The next chapter introduces you to Zambia’s administrative process to contextualise your study of administrative law.

2.6 References and Recommended Readings


UNIT THREE

ZAMBIA’S ADMINISTRATIVE PROCESS

3.0 Introduction
Welcome to unit three of this module. In this unit, you will be introduced to Zambia’s administrative process. You should note that the detailed study of the structure and functions of the public administration are typically a subject of public administration. The structures of governance discussed in this unit are based on constitutional and legal provisions. Whether or not they are operational is a matter for your consideration and reflection.

3.1 Unit aim
The aim of this unit to introduce you to the structure and functions of the public administration to provide the contextual basis for your engagement with the concepts of power and control that are covered in the subsequent units.

You are required to spend at least 4 hours on this unit.

3.2 Unit Objectives
By the end of this unit, you should be able to:

1. Identify the various institutions and agencies that exercise administrative functions.
2. Identify the sources of administrative authority.
3. Explain the various systems for control of administrative authority at every level of the administrative process in Zambia.

3.3 Values and principles of public service

Reflection
In your own words, what do you understand by “public administration”? What about public service? Why should the law be concerned with the public service?

The Constitution of Zambia has set out values and principles intended to guide functionaries engaged in the public service. In case you have an idea of values of principles of public service, explain what they are.

The values and principles of public service that are contained in the Constitution of Zambia are intended to guide governance at all levels. The Constitution defines “public service” as:

- service in the Civil Service, the Teaching Service, Defence Force and National Security Service, the Zambia Correctional Service, the Zambia Police Service, Emoluments Commission, State Audit Commission, Lands Commission, Electoral Commission, Human Rights Commission, Gender Equity and Equality Commission, the Anti-Corruption Commission, Drug Enforcement Commission, the Anti-Financial and Economic Crimes Commission, the Police and Public Complaints Commission, and service as a constitutional office holder, service in other offices, as prescribed.

Article 173 (1) of the Constitution sets out the following governance values and principles that should apply at all levels of governance:

1. Maintenance and promotion of the highest standards of professional ethics and integrity;
2. promotion of efficient, effective and economic use of national resources;
3. effective, impartial, fair and equitable provision of public services;
4. encouragement of people to participate in the process of policymaking;
5. prompt, efficient and timely response to people’s needs;
6. commitment to the implementation of public policy and programmes;
7. accountability for administrative acts;
8. proactively providing the public with timely, accessible and accurate information;
9. merit as the basis of appointment and promotion;
10. adequate and equal opportunities for appointments, training and advancement of members of both gender and members of all ethnic groups; and
11. representation of persons with disabilities in the composition of the public service at all levels.

These values and principles should be adhered to at every level of government. The object of these values is to ensure that the public administration is efficient and accountable to the people it serves. Administrative law is one of the mechanisms by which Zambia seeks to enforce these values and principles. There is also a constitutional obligation to ensure that there is gender equality in filling government positions and an obligation to include youth and persons with disabilities (article 259 of the Constitution of Zambia).

Reflection

What do you think is the value of ensuring equal representation of all gender in government positions? What about youth and persons with disabilities? Do you think Zambia is succeeding in implementing these constitutional obligation for equal representation in terms of gender, youth and persons with disabilities?

3.4 The National government

Zambia is a democratic state with a unicameral parliament. The President is the Head of State and Government. According to article 90 of the Constitution of Zambia, executive authority derives from the people and must be exercised in a manner compatible with social justice and for people’s wellbeing and benefit.
Reflection

What do you understand by social justice? Give examples of ways by which the Constitution and laws of Zambia ensures that the President is accountable to the people in the exercise of executive functions?

The president exercises executive functions through cabinet. Cabinet is composed of the President, the Vice president, Ministers and the Attorney General as an ex-officio member is responsible for performing executive functions. At national level, administrative functions of governance are performed by public officers appointed by the President directly or by a relevant Service Commissions created by the Constitution or by statute. (Article 185 of the Constitution).

According to article 91, the President or the President’s delegates are expected to uphold the following values in exercise of executive power:

1. respect, uphold and safeguard this Constitution;
2. safeguard the sovereignty of the Republic;
3. promote democracy and enhance the unity of the Nation;
4. respect the diversity of the different communities of Zambia;
5. promote and protect the rights and freedoms of a person; and
6. uphold the rule of law.

You will notice that these are constitutional values that are supposed to guide the exercise of administrative authority. A public administrator has the obligation of not only ensuring efficient management of the public administration, but also to uphold human rights and freedoms and respect for the rule of law. The Constitution of Zambia also provided for devolution of government. Devolution of power is intended to reduce the concentration of
power from the central government to the local levels. Devolution of power is of the systems by which administrative authority is limited by deconcentrating the power.

3.5 General Principles of devolved governance

The Constitution defines “devolution” as ‘a form of decentralisation where there is a transfer of rights, functions and powers or an office from the central government or State institution to a subnational authority or the bringing of a service that is provided at central government level to, or opening of a branch of a public office or institution at, a subnational level, and the word “devolved” shall be construed accordingly.’

Activity

In your own words, explain what you understand by devolution. Give examples of devolved governance. Is there a difference between devolution and decentralization?

Decentralization is difficult to define. It involves the transfer of power and administrative functions from the central government to local government units. Devolution results in political and administrative autonomy to provinces or districts. In decentralisation, functions and government authority are delegated. In devolution, functions and government authority are vested on local authorities on an autonomous basis by a separate legal arrangement (Beyani, 1984).

Part IX of the Constitution sets out principles of devolved governance. It states that government should be devolved from national government to local government. The Constitution sets out the following principles of devolved governance in article 147 as follows:

1. good governance, through democratic, effective and coherent governance systems and institutions;
2. respect for the constitutional jurisdiction of each level of government;
3. autonomy of the sub-structures; and
4. equitable distribution and application of national resources to the sub-structures.
The local government is to be exercised through substructures funded by government. The idea behind devolution is to make the substructures autonomous with sufficient funding.

**Reflection**

Do you think Zambia adheres to the above principles of devolved governance? What law or policies have been put in place to implement the above principles of devolved governance in Zambia?

### 3.6 The Provincial Government

The provincial government consists of Provincial Minister, Permanent Secretary and other staff as prescribed (Article 150 (1) of the Constitution of Zambia). The Provincial Secretariat performs provincial functions.

The Provincial Minister is appointed by President from among Members of Parliament (MPs). This is contrary to what was submitted in the Technical Committee draft Constitution. Provincial ministers were supposed to be appointed from outside National Assembly. What do you think motivated the Technical Committee to recommend that Provincial Ministers should be appointed from outside Parliament?

The Provincial Minister is head of government at provincial level. The Provincial Minister should ensure that policies are implemented in all districts in the province. The Provincial Minister should also ensure that concurrent functions of the province and the local authorities are performed in accordance with the Constitution and the law.

### 3.7 The Local Government

**Activity**

What you understand by the local government? Give examples of local government authorities in Zambia.
The local government system in Zambia is based on democratically elected councils. The Councils are mandated to promote democratic and accountable exercise of power. The Constitution requires the local government to ensure that substructures offer services in equitable manner.

Article 152 (1) of the Constitution of Zambia provides for functions of the local authority as follows:

1. to administer the district;
2. to oversee programmes and projects in the district;
3. to make by-laws; and
4. perform other prescribed functions.

The national and provincial government should not to interfere in the operations of the local government. In terms of structure, the local government is headed by an elected mayor who is assisted by councilors. Apart from the mayor and councilors, the Constitution also provides that not more than three local chiefs elected by chiefs in the relevant district be part of the local government authority (Article 153). Councilors are collectively and individually accountable to national government and residents of ward in the performance of their functions.

**Activity**

Apart from collectively accounting to the central government, identify 2 other methods by which the local authorities are held accountable to the people.

**3.8 Chieftaincy**

What is your understanding of the chieftaincy in Zambia? Do chiefs perform administrative functions? Are chiefs subject to administrative law?

The above questions are important in situating the chieftaincy as an administrative agency. Zambia has a dual legal system consisting of the general law and traditional customary
law. Chiefs are the leaders of their chiefdoms. The chieftaincy exists in accordance with customs and traditions the people, and is a recognised administrative authority in Zambia. The chieftaincy is a corporation sole with power to sue or be sued and can hold property in trust for subjects.

The Chiefs Act, Chapter 287 of the Laws of Zambia contains the functions. The main function of chiefs as prescribed by the law has largely remained the preservation of public security. Chiefs can arrest people committing a breach of peace. The Constitution recognises broader functions of chiefs such as making a chief councilor once elected by chiefs to represent the chieftaincy on the council. Chiefs are also responsible for management and control of natural resources within the area of their chieftaincy. At national level, the influence of the chieftaincy is through the House of Chiefs.

Activity

Using practical examples, demonstrate how devolution of power furthers objectives of administrative law.

3.9 Unit summary
In this unit, you identified the institutions that are responsible for the public administration in Zambia from the local government through to the central government. The unit provoked you to interrogate some provisions of the Constitution on power structures and functions. The next unit introduces you to key concepts of administrative law that you will encounter as you navigate this module and analyse administrative law.

3.10 References and Recommended Readings

Statutes
The Constitution of Zambia
Chiefs Act, Chapter 287 of the Laws of Zambia.
Local government Act, Chapter 281 of the Laws of Zambia
Urban and Regional Planning Act, No. 3 of 2015,

Other sources

UNIT FOUR

KEY CONCEPTS IN ADMINISTRATIVE LAW

4.0 Introduction

Welcome to Unit four. In Unit three, you looked at a synopsis of Zambia’s administrative process and institutions. This unit introduces you to key concepts in administrative law. The concepts in this unit will be useful for your further analysis of administrative law.

4.1 unit aim

The aim of the unit is to introduce you to key concepts in administrative law.

You will require at least 6 hours to study this unit.

4.2 Objectives

By the end of this unit, you should be able to:

1. Conceptualise administrative power.
2. Analyse the processes by which administrative power is exercised.
3. Analyse concept of administrative discretion and its limits.

You will require 5 hours to study this unit.

4.3 Power, Process and Function

Power, process and function are important concepts in administrative law. This is because, as you noted in unit 1, administrative law is concerned with the exercise of administrative power and function. It is also concerned with the process by which administrative power is exercised. Concern with process is one of the means through which administrative law controls the exercise of administrative power to ensure that it is not abused as well as protect the rights and freedoms of people who are affected by exercise of administrative power. Let us look at these terms in more detail.
4.3.1 Power

Reflection

Before we consider other people’s definition of power, describe power in your own words. What about administrative power, what is your understanding of it?

Black’s Law Dictionary defines power as the ability to act or not to act. It also defines power as a person’s capacity for acting in such a manner as to control someone’s response. According to Webster’s Dictionary, powers means the ability to act so as to produce some change or bring about some event.

In relation to administrative law, Milton Carrow states that:

Applied to administrative agencies, legislatures and courts …power is exercised when an authoritative determinant is made affecting persons or property. Formally, these are issued in the form of rules and orders, statutes and decisions. Informally, powers are exercised through machinery established to effect settlements of disputes by the courts or administrative agencies.

Power as therefore the ability to affect legal rights of people. It is the authority that a public administrator has to make decisions and perform functions that have a legal or binding force to those to whom the exercise of authority is directed. Administrative law is concerned with the exercise of power in that it examines the rules that assign administrative power as well as systems of control of administrative power.
4.3.2 Process

Activity

In your own words, define the term “process” and illustrate what the term means. Why do you think process is important in administrative law?

Once you have answered the above question, compare with what is said below.

Black’s Law Dictionary defines “process” as ‘procedure or proceeding’. Process is important as it determines the legitimacy of the outcome of the process. The outcome of an administrative process may take the form of a rule, an order. The product of an administrative process is often what may be subject of an administrative law challenge. Various organs of the state can exercise power in various processes. These processes are expected to yield a tangible result such as a rule or order or court judgment; depending on the organ that is exercising the power. A law that gives power to a public administrator may also prescribe the process that should be followed. Even where the process is not prescribed, administrative law is concerned to ensure that there is procedural fairness so as to protect the rights and interests of persons affected by the exercise of administrative power.

4.3.3 Function

In your own words, explain what you understand by function. Why do you think it is important in administrative law?

According to Black’s Law Dictionary, function means an activity that is appropriate to particular business; office; duty. It could also be described as the “a job to be done” (Milton Carrow, 1948).

The three terms, power, process and function are sometimes used interchangeably in administrative law to denote exercise of administrative authority.
4.3.4 Duty

This is a simple word that is difficult to define any further. Blacks Law dictionary defines it as a legal obligation that is owed or due to another and that needs to be satisfied. It is an obligation for which somebody else has a corresponding right. A duty denotes an element of obligation on the duty bearer towards the person to whom it is owed. The obligation may be moral, legal or a legitimate expectation that governmental power would be exercised within the boundaries prescribed by law.

Having attempted to define the above key concepts, let us further analyse their application in administrative law. As earlier noted, administrative is concerned with the exercise of administrative power by public authorities. One of the important factors to consider when determining the scope of administrative law is the source of power, the nature of functions and the mechanisms for control of administrative power.

4.4 Sources of power

What do you understand by a source of power? Where do public administrators derive their power?

There are various sources of administrative power which are further discussed below.

a) Legislation

Administrative power is mostly derived from legislation in form of Acts of Parliament. Legislation also creates duties. However, the bulk of administrative authority is given in form of power. As defined above, duties are obligatory whereas power is framed in such a manner as to give some element of discretion. Legislation usually defines power and prescribes the process by which the power is to be exercised. Power that is derived from legislation is the easiest to understand compared to other sources. Disputes on administrative law are invariably an issue of construction of statutes to find scope of the power given.
In terms of construction, the person reading the statute has to establish whether the legislation gives discretionary power or imposes a duty on the public administrator. Discretionary power is usually couched in permissive language such as “may” or “it shall be lawful”. Duties are usually couched in obligatory language such as “shall” or “must”. However, it is not always from the language used. Courts often resort to rules of statutory interpretation to give a proper construction of the intention of Parliament.

b) **Delegated legislation**

Article 67(1) of the Constitution gives Parliament authority to confer the power to make statutory instruments with the effect of law on any person or authority power. Statutory Instruments are defined in section 2 of the *Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia*, as “any proclamation, regulation, order, rule, notice or other instrument (not being an Act of Parliament) of a legislative, as distinct from an executive, character”.

When rule making is delegated, the delegate should ensure that all rules, regulations, by-laws or orders that are made are in conformity with the parent or main Act enacted by Parliament. Any provision of a statutory instrument which is inconsistent with any provision of the parent Act is void to the extent of the inconsistency (section 20(4) of Cap 2).

Delegated legislation is a source of power. It is also a function in that it may be challenged as a form of improper exercise of administrative authority by the Minister or whoever is delegated to make the rules.
Reflection

Read article 167(3) of the Constitution of the Constitution. Compare the article with section 20 of the Interpretation and General Provisions Act. Based on your reading of the 2 provisions, in what circumstances can a statutory instrument be challenged? Is section 20 of the Interpretation and General Provisions Act consistent with article 167 of the Constitution?

c) Prerogatives

Prerogative powers are another source of administrative power. Prerogatives originate from royal prerogatives of the crown in England. Courts use prerogative to describe crown power that is not statutory. Prerogative power is recognised especially where exercise of the power affects individual rights. In Zambia, prerogative power would be the equivalent of executive power that is given to the President by the Constitution. Examples include the power to create ministries, grant pardons, to summon or dissolve Parliament or sign international treaties.

d) Contractual powers

Public authorities frequently acquire power by contract. Administrative law would normally be concerned with contractual power that derives from statutes, such as cabbage collection licences under the Environmental Management Act. Administrative law is not concerned with contracts that are made purely in exercise of commercial liberty. Such contracts are regulated by the ordinary law of contract.
4.5 Scope of Power

In your own words, explain what you understand by jurisdiction. How do courts determine the scope of power given by legislation, contract or prerogative, where applicable?

As general rule of interpretation, a statutory power is construed as impliedly authorising everything that may be incidental or consequential to the power. The law need not lists every likely event that may arise in the course of exercising power given by law. Section 25 of the Interpretation and General Provisions Act states that:

Where any written law confers a power on any person to do or enforce the doing of an act or thing, all such powers shall be understood to be also given as are reasonably necessary to enable the person to do or enforce the doing of the act or thing (emphasis added).

One of the functions of administrative law is to ensure that administrative authority is not exercised arbitrarily. This is done by limiting administrative power in order to minimise abuse. In this regards, this rule of construction is interpreted narrowly. Administrative law also imposes a duty on the administrative officer or authority who is given administrative power to act within the boundaries of the law. Any act that falls outside the boundaries defined by statute is challenged for being ultra vires (beyond the powers). To determine the proper scope of administrative power, courts use the concept of jurisdiction to define the extent of the power.

4.5.1 Jurisdiction

Jurisdiction refers to objective boundaries of administrative authority and the way in which the authority would be controlled traditionally by courts and other legal controls. When determining the jurisdiction of administrative power, the following have guidelines are used.
1. Liberty to error
It is inherent in all discretionary power that it includes the power to decide freely, whether wrongly or rightly, without liability to correction, within the area of discretion allowed by law. To enforce this principle, certain statutes give immunity to public authorities when they act in good faith. The test applied to determine the extent of the liberty is the level of discretion given. The highest level of discretion will receive the lowest level of control. In such instances, the administrator has a free hand. The administrator’s decisions cannot be questioned except by appeal process.

**Activity**

Compare and contrast an appeal and a review.

2. Principle of objectivity
Another guide to determining the jurisdiction of administrative power is the principle of objectivity. This principle requires that the person who is given administrative power should not be judge of its jurisdiction. Judicial authority is exempted from this principle as judges are given authority to determine the extent of their own jurisdiction.

3. Ultra vires
The ultra vires principle provides the objective boundaries of jurisdiction. The term “ultra vires” is synonymous with “outside Jurisdiction” or “in excess of power”.

### 4.5.2 Jurisdictional and Non-jurisdictional facts
Because of the principle that a power that is given by statute implies authority to do everything necessary and incidental to the exercise of that power, administrative law only interfere where the fact in question is a jurisdictional fact. A jurisdictional fact is a fact which is condition precedent to the exercise of administrative power. It is a factual situation
that must exist before administrative power is invoked. For instance, the Health Professions Act no. 24 of 2009 states at s. 8, “the [Medical] Council shall register a health practitioner as medical doctor.” For a person to be registered by the Medical Council as a medical doctor, that person must be a medical doctor. Being a medical doctor is a condition precedent for registration as a medical doctor. Where there is a dispute regarding the jurisdiction of the Medical Council to register a medical doctor, the fact of whether or not the person registered is a medical doctor would be a jurisdictional fact to be determined. The power to determine jurisdictional facts inevitably lies with the court even where the law says “if the Council is satisfied”.

Where the law sets up boundaries or conditions precedent. This is strictly speaking, an example of ultra vires, if such conditions are not followed. Statutory conditions are almost always said to be jurisdictional issues. The law however sometimes prescribes that the administrator determines some jurisdictional issues. The determining factor would be the intention of Parliament, which is a matter for statutory interpretation.

Legal power also defines the scope of power by stating whether the authority is discretionary or ministerial. “Discretionary power” refers to the freedom to decide on a course of action, from several options. Discretionary power is the ability to make decisions or act according to one’s own judgment. It is statutory power conferred by legislation or delegation to a minister or any other governmental official.

Ministerial power on the other hand is defined as an action or decision that conforms to an instruction or approved procedure. This kind of power does not involve discretion or policy making. The courts provide a means of checking or controlling ministerial power. The principle of ultra vires helps the courts achieve this. This principle can be discussed from a narrow and broad sense. From a narrow sense, it captures the idea that those to whom power is granted should only exercise that power within their designated area. In a broad sense it provides a justification for constraints upon the way in which power is given to a minister.
Another important concept on scope of power relates to determining the person to whom the power is assigned. The common law principle of *delegatus delegere non potest* is directive in this regard. Where a statute expressly confers a certain power on a public authority, such authority should not be delegated to another authority who is not the person on whom the power is expressly conferred. Where such power is delegated without express authority of the empowering provision, a decision made by the delegate is subject to review for want of authority or on grounds of illegality. There must be authority to delegate in the empowering provision. Even where there is a power to delegate, the courts, using the classification of functions were stricter when it came to exercise of power involving discretion which is ordinarily not delegable. Read the case of *Reverend Lameck Joshua Kausa v The Registrar of Societies (1977) Z.R. 195 (H.C.)*.

**4.6 Express Requirements and Conditions for exercise of public power**

Legislation sometimes sets conditions for the exercise of public power. These conditions may be in form of directives, procedural requirements or prescription of time within which the power must be exercised.

**4.6.1 Mandatory and Directory Conditions**

Legislation may set conditions about procedure for exercise of certain powers. Where such conditions are mandatory or directory. Failure to observe a mandatory condition is fatal and may render exercise of power invalid. Where the condition is merely directory, non-observance of the condition would not matter much and the court ought to defer to the procedure adopted by the functionary. The distinction is however not clear as the same condition may be both mandatory and directive. Sometimes legislation prescribes the consequences of non-compliance with a given condition.
4.6.2 Procedure and formal requirements

Procedural safeguards are often imposed for the protection of persons likely to be affected by the decision. Such procedural safeguards are normally regarded as mandatory. We will look in more detail on procedural safeguards in Unit 5 under procedural justice.

4.6.3 Time Limits

Where time limits are prescribed by legislation, delay in exercising power within the prescribed time limit may be fatal. For instance, section 5 of the Lands Act provides that consent to assign or transfer land is supposed to be given in 45 days. Where no answer is given after the expiry of the 45 days, consent would be deemed to have been given.

Where any written law confers any power or imposes any duty, the power may be exercised and the duty shall be performed from time to time as occasion requires (section 24 of the Interpretation and General Provisions Act). There is an exception where the decision affects legal rights, in which case the argument on finality becomes relevant. The courts would require that once made, such decision would not be recalled or revised. If the authority has powers of review, there is need for such power to be expressly stated by the empowering statute. Mistake may be an exception to the rule of finality.

4.7 Administrative discretion

Administrative discretion generally refers to the freedom to decide on a course of action, from several options. It implies the ability to make decisions or act according to one’s own judgment. The following are some important points to note concerning administrative discretion.

1. Delegation is not allowed. Kausa v Attorney General; Folayinka Esan v Attorney General Selected Judgment No. 47 of 2016. (Notice declaring appellant as PI signed by Immigration officer with Minister’s declaration as provided under s. 35 of the Immigration and Deportation Act.)

   Should be distinguished from lawful agency although the line is thin.
2. Surrender, abdication or dictation of authority by another is a ground for control of exercise of discretionary authority.

3. Over-rigid policies or precedent are not desirable in exercise of discretion.

4. There should be no fetter of discretion by contract or estoppel.

4.7.1 Abuse of Discretion

Legislation sometimes gives unbound discretion to administrative authorities. Administrative law seeks to control administrative authority and guard against abuse of discretion using the following principles and features:

1. All power has legal limits.

Limits to discretionary power may be given by the empowering legislation or by recognised principles of law. Lawful exercise of administrative power is intended to fall within a defined area of jurisdiction. The principle of objectivity is useful in determining the jurisdictional boundaries for the exercise of administrative discretion. In the case of Attorney General v Roy Clarke (2008) Z.R. 38, the Supreme Court stated that “there is nothing like unfettered discretion immune from Judicial Review. We want to emphasize that in a Government under law, like ours, there can be no such thing as unreviewable discretion”.

Activity

Read the case of Maxwell Mwamba and Stora Solomon Mbuzi v the Attorney (1993)3 LRC 166. In your opinion, are there any limits on the powers of the president to pardon offenders?

2. Courts frown upon arbitrary power and unfettered discretion. To curb abuse of power, courts have devised principles that require that power should be exercised reasonably and in good faith. Irrelevant considerations should not be taken into
account when exercising administrative power. In determining whether discretion has been exercised reasonably, courts take the view that Parliament could never intend to give power to act in bad faith. Read the case of **R v Commission for Racial Equality Ex p. Hilligton LBC [1982] QB 276.**

Let us look at some case examples to which the principle of reasonableness has been applied to limit discretionary power:

a) In the case of **R v Home Secretary ex p. Bentley [1994] QB 349,** Walkins LJ stated that if, for example, it was clear that the Home Secretary had refused to pardon someone solely on the grounds of their sex, race or religion, the courts would be expected to interfere and in our judgment would be entitled to do so.

In **Sharp v Wakefield [1891] AC 173,** it was held that when it is said that something is to be done within the discretion of the authorities, that something is to be done according to the rules of reason and justice, not according to the private opinion, according to law not humour. It is not to be arbitrary, vague or fanciful but legal and regular. And it must be exercised within the limit, to which an honest man committed to the discharge of his office ought to confine himself.

This principle of objectivity was affirmed by the Supreme Court of Zambia in **Attorney General v Roy Clarke (2008) Z.R. 38.**

3. Courts should limit themselves in a way that strikes the most suitable balance between executive efficiency and legal protection of the citizen.
4. Courts must at all time confine themselves to applying recognisable principles of law since at all costs, they must not expose themselves to the charge of usurpation of executive power. (There should be a right balance between judicial activism and usurpation of power rightly assigned to the executive arm of government).

4.6. 2 Courts’ control of discretionary authority.

Courts control the exercise of administrative power by defining the relevant scope or jurisdiction of the power. The justification for judicial interference with exercise of administrative power is adherence to rule of law. In performing this control function, courts have devised a network of principles that require that power should be exercised reasonably, in good faith, for proper purpose only, and in accordance with the spirit as well as the letter of the empowering Act (and the Constitution). The necessary caution is that in limiting administrative discretion, courts should not itself usurp the power rightly assigned to the executive as doing so would offend the constitutional principle of separation of powers.

Activity

In the case of **Reverend Lameck Joshua Kausa V The Registrar Of Societies (1977) Z.R. 195 (H.C.)** the court stated:

‘Judicial functions imposed on the Registrar must be performed by him personally while purely administrative functions can be carried out through subordinate officers.’

Discuss the above quotation as it relates to the concepts of power and delegation in administrative law.
4.8 Unit Summary
This unit has discussed the key concepts in administrative law. It is important for you to understand the key concepts to be able to apply them to the administrative processes and systems of control under administrative law. The next unit introduces you to procedural justice in the context of administrative law.

4.9 References and Recommended Readings


Hoexter, Cora. Administrative law in South Africa. Cape Town: Juta & Co Ltd. 2007


UNIT FIVE

PROCEDURAL JUSTICE

5.0 Introduction
Welcome to unit five. In this unit, you are introduced to the various procedural safeguards that administrative law puts in place to promote good administrative processes and protect the public from abuse of administrative authority.

5.1 Unit Aim
The aim of this unit is to introduce the concept of procedural justice as it is applied to administrative process.

You will require at least 4 hours to successfully complete this unit.

5.2 Objectives
By the end of this unit you should be able to:

1. Explain the rules of natural justice and their significance in administrative law.

2. Analyse various legal provisions on procedural fairness in the exercise of administrative authority and their application.

5.3 Procedural fairness

Activity
In your own words, explain what you understand by fair procedure? Why do you think administrative law is concerned with procedural fairness?

Procedural fairness refers to fair procedure. In relation to administrative law, procedural fairness demands that public administrators follow fair processes when exercising administrative law. Procedural fairness guarantees the right to fair administrative process.
It also promotes the right to participation by people who are likely to be adversely affected by the exercise of administrative authority. Procedural fairness has the value of legitimising the outcome of an administrative function. In this sense, procedural fairness is not secondary. It is part and parcel of decision making process. Procedural fairness is so important to the exercise of an administrative function such that if requirements of procedure are not followed, an administrative function may be declared void. Procedural fairness legitimises wide administrative powers given by substantive law. Procedural rules restrict administrative freedom and may be costly in terms of time and money, but the restriction should be seen more as protective and promoting efficiency so long as courts do not let them run amok. A decision made in compliance of procedural fairness requirements will be acceptable and of good quality. Justice and efficiency are complimentary.

In Zambia, there is a Constitutional mandate for procedural fairness under article 173 (1) which includes the following:

a) Encouragement of people to participate in the process of policy making;

b) Accountability for administrative acts;

The Bill of Rights also contains provisions on procedural fairness under article 18. The obligation for procedural fairness is not restricted to court but also other bodies performing adjudicative functions. To this effect, article 18(9) states that:

(9) Any court or other adjudicating authority prescribed by law for determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.

Other procedural fairness principles and procedures are found in various pieces of legislation, examples of which are considered below.
**5.4 The rules of natural justice**

In your own words, explain what you understand by natural justice. What procedural obligations do the rules of natural justice impose of public administrators? Compare your responses with the explanation below.

Natural justice can be defined as the natural sense of what is right or wrong. It also implies fairness. In administrative law, natural justice refers to rules that courts have devised to ensure fairness in the administrative process. The principle of natural justice is applied widely in administrative law. It also applies to exercise of discretionary power. Rules of natural justice apply to judicial powers, administrative powers, and sometimes powers created by contract. For instance, the Employment Act requires every employer who terminates employment on grounds of conduct to afford the employee an opportunity to be heard on the charges. In administrative law, natural justice comprises 2 fundamental rules of fair procedure, namely:

1. A person may not judge in his/her own cause (*nemo judex in re sua*), which is the rule against bias; and
2. A person’s defence must always be fairly heard (*audi alteram partem*).

Traditionally, natural justice has been confined to these 2 rules although in some cases, judges have extended it to the requirements to give reasons for a decision and decisions to be based on evidence of probative value. The 2 principles are espoused below.

**5.4. 1 The rule against bias**

The rule against bias is popularly known by the Latin expression, “*nemo judex in re sua*.” This means that a judge is disqualified from determining a case in which he/she may, or may be suspected to be biased. The rule also applies to persons performing administrative functions. Before we examine some, what are some of the instances in which an administrator may be biased or perceived to be biased?

Let us examine the rule against bias in more detail.

1. Causes of prejudice
There are a number of causes of prejudice that have been identified from case law. They include the following:

a) Direct pecuniary interest however slight.
   Any direct pecuniary interest results in automatic disqualification. The line is drawn where interest is too slight or remote to be appreciated. The extent of interest will be determined on a case by case basis.

b) Intermingling of functions
   A person performing a judicial function will be disqualified from adjudicating on a matter that the person judging has participated in the making of the decision on which the person is called to decide. If judge was only a member of a larger group that decided, it might be decided on the question degree of involvement of the judge.

c) Personal relationships may result into actual or perceived bias. A judge is expected to abstain from a decision where the judge has a personal relationship with any of the parties involved. What would amount to such bias in such cases is determined on a case by case basis. Read the case of Locakbail (UK) Ltd, Regina v Bayfeilds Properties Ltd [2000] QB 451; [2000]1 All ER 64.

2. The test of bias
   The test for bias is that of “real likelihood of bias” understood as possibility rather than probability. The relevant question to ask is “given the interest of the functionary, it is likely that he or she is biased?” One need not establish that it was in fact probable that the administrator was or could be biased. In the case of R v Gough [1993] AC 646. Porter v Magill [2002] 1 All ER 465, the following was set as the test for biasness:

   The Court must first ascertain all circumstances which make a hearing on the suggestion that the Judge was biased. It must then ask whether those circumstances would lead a fair minded and informed
observer to conclude that there was a real possibility or a danger the two being the same that the tribunal was biased.”

The test is not that of a fair minded person. The courts assume the position of the fair minded administrator construed as a reasonable person. The question of bias would normally be determined in a court of law. By the time the matter comes to court, the court would be armed with the necessary evidence on the factors that gave rise to the challenge. The court would therefore no longer be concerned with appearance of bias, but with actual bias, however unconscious.

3. Exemptions to the requirement of compliance with the rule against bias.

Do you think the rule against bias may be unreasonable in certain instances? Are there any instances where the rules may be waived? Compare your responses with the notes below.

Although a strict requirement of procedural fairness, natural justice must, in certain instances, give way to necessity. For instance, where there is no suitable person to substitute the apparently biased decision maker. This is intended for administrative convenience. This usually arises in instances where the law vests authority in a specific public officer. In such instances, the power cannot be transferred to another person as such transfer of authority is a type of *ultra vires*.

Another instance in which the rule against bias may be waived is where statute seeks to exempt the rule against bias. If that is the intention of the statute, it must say so expressly and clearly. Another exception is where the protection against bias is waived by the person subjected to the authority of the administrator. A person may waive the requirement to comply with the rule against bias by continuing to subject oneself to the jurisdiction of the administrator after becoming aware of the administrator’s disqualification.
4. Effects of prejudice.

If the decision is objected to in court under an action for judicial review, it would be *ultra vires* and as such void. The decision would only be declared void if the claimant had not waived the disqualification of the administrator. Where there is an avenue for appeal, the decision only becomes void after determination of the appeal.

5.4.2 Right to a fair hearing

Before we discuss the importance of this rule of natural justice, describe what you would consider a fair hearing. Are there instances where a fair hearing must be held? Do you think this requirement can be waived?

The right to a fair hearing is expressed by the Latin expression “*Audi alteram partem*” which is translated as “hear the other side”. In R v Chancellor of University of Cambridge (1723) Str 557, Foretescue J expressed the right to a fairing as follows: “even God himself did not pass sentence on Adam before he was called upon to make his defence.”

Traditionally, the nature of power being exercised dictated whether or not there was a mandatory requirement for a fair hearing. Using the qualification of the nature of functions, only exercise of judicial and quasi-judicial power required strict adherence of rules of natural justice while purely administrative power did not need strict adherence to rules of natural justice.

The decision in *Ridge v Baldwin* [1964] AC 40 challenged the classification of power as the basis for natural justice requirements. In that case, it was held by Lord Reid that natural justice should be applied universally. It is therefore no longer necessary to determine the nature of power being exercised. Natural justice requirements would have to be observed even when the administrator is performing purely administrative functions.

Let us now consider the requirement for fair hearing in more detail, including describing some of its features.
1. General Aspects of Fair Hearing
   a) It usually depends on the subject matter. There are no rigid rules as to format.
   b) Requirements for natural justice depend on circumstances of the case, nature of inquiry, authority under which tribunal is acting and subject matter to be dealt with etc.
   c) Necessity may waive requirement for fair hearing, for instance, a hearing may be dispensed with in cases of emergency.

2. Legitimate expectation
   In Re Westminster CC [1986] AC 668 at 692, the Court stated that ‘…the duty of consultation may arise from a legitimate expectation of consultation aroused either by a promise or by an established practice of consultation.’
   This position was upheld by Lord Diplock in the case of Council for Civil Service Union v Minister for Civil Service Unions [1985] AC 374.
   Whether an expectation exists or is in fact legitimate is a question of fact and requires investigation of many circumstances. If a statute clearly dispenses with the requirement for a hearing, the statute would override the expectation.

3. Procedure for hearing
   A hearing is usually oral but it may be sufficient that the person has been given an opportunity to make representations in writing.
   For an oral hearing, the following should be observed:
   a) Consider all relevant evidence which a party wishes to submit;
   b) Inform every party of all evidence that has been taken into account;
   c) Allow witnesses to be questioned (cross examination);
   d) Allow comment on evidence and argument on the whole case.
   e) Fair hearing requirements should not be sacrificed for speed. Necessary adjournments should be allowed to ensure the process is exhaustive.
4. Reasons for a decision are not strictly an aspect of natural justice but a value of fair process.

5. Hearing after process would be allowed, but usually before a different tribunal the first tribunal would be biased.

6. Examples of cases where the right to hearing is necessary include:
   a) Where the administrator exercises wide discretionary power.
   b) Policy questions – where a claim relates to a power that is in form of policy making, it may be sufficient for the claimant to make written submissions.
   c) Licensing and commercial regulation. Read the case of Zhen Qing Wang v Health Professions Council Of Zambia 2012/HK/339 (Unreported)
   d) Offices and employment. Read the case of Lusaka City Council V Mumba And Others (1976) Z.R. 53 (H.C.)
   e) Suspension from office.
   f) For offices held at the pleasure of the appointing authority, there is usually no requirement for a hearing.

7. Exceptions to the rule on fair hearing include
   a) Where legislation suspends the requirement for a hearing. In Zinka v Attorney General (1990 – 1992) Z.R. 73, a case in which the claimant challenged the revocation of his licence during emergency, the Court held that the Constitution suspended common law principles of natural justice.
   b) National security is also one of the grounds upon which requirements for a fair hearing may be suspended or not followed.
   c) Where a claim of procedural irregularity would not give a different outcome to the decision or function.
5.5 Procedural requirements under the law
Different statutes that give administrative power may provide for procedural safeguards. Where such procedural safeguards are not sufficient, courts will employ rules of natural justice to supplement statutory provisions.

Activity
With the aid of authorities, explain how the courts have applied the common law principles of natural justice to advance objectives of administrative law.

5.6 Unit summary
This unit has introduced you to the concept of procedural fairness as it is applied to administrative law. The unit has discussed the principles of natural justice and highlighted that some laws contain provisions to safeguard procedural fairness. It has also directed you to instances in which strict adherence to requirements for procedural fairness may be waived to enhance administrative efficiency. The next unit introduces the topic of control of administrative power, particular, judicial review of administrative actions.
5.7 References and other Recommended Readings

Case law
Council for Civil Service Union v Minister for Civil Service Unions [1985] AC 374.
Locakbail (UK) Ltd, Regina v Bayfeilds Properties Ltd [2000] QB 451; [2000]1 All ER 64
R v Chancellor of University of Cambridge (1723) Str 557.
Zhen Qing Wang v Health Professions Council of Zambia 2012/HK/339 (Unreported).

Books
Hoexter, Cora. Administrative law in South Africa. Cape Town: Juta & Co Ltd. 2007
UNIT SIX
JUDICIAL CONTROL OF ADMINISTRATIVE ACTION IN ZAMBIA: INTRODUCTION

6.0 Introduction
Welcome to unit six. In unit five, we looked at procedural requirements that should be adhered to whenever a person charged exercising administrative authority is exercising that authority. This unit introduces you to the subject of control of administrative power. There are various systems and methods of control of administrative power, particularly, judicial control of administrative authority. It begins by explaining judicial control of administrative power and the justification of the courts to exercise oversight over exercise of administrative authority. It ends by listing the types of applications in which courts may exercise control over exercise of administrative authority.

6.1 Unit Aims
The aims of this unit are:
1. To introduce you to the system of control of administrative power.
2. To introduce various methods by which courts control the exercise of administrative authority.

You will require at least 2 hours to successfully study this unit.

6.2 Objectives
By the end of this unit, you should be able to:
1. Explain the rationale for control of administrative authority.
2. Explain the justification for judicial control of administrative authority.
3. Identify some of ways by which courts control exercise of administrative authority.
Reflection

1. What do you understand by the term “control”?  
2. What justification do courts have to have authority to control public administrators in their exercise of power?  
3. Could courts’ power to control exercise of administrative power contradict the constitutional law principle of separation of powers?

6.3 Courts power to control exercise of administrative power
In your answers to the reflection, you may have noted that courts have power to control exercise of administrative power by virtue of their constitutional mandate. If so, you are right. This because the Constitution gives power to the judiciary to supervise other arms of government in order to protect the sovereignty of the constitution, human rights and the rule of law. The exercise of administrative power by public administrators inevitably affects the rights of individuals, which the courts are supposed to protect, in many ways. The law has created mechanisms to control abuse of public of authority and protect individual’s rights, the rule of law and the Constitution. Article 134 of the Constitution of Zambia as amended by the Constitution of Zambia (Amendment) Act gives the High Court unlimited and original jurisdiction in civil and criminal matters and to review decisions as prescribed. The powers of the High Court must be exercised within the limitations permitted by law including the rules of practice and the Common law. (Read the case of Zambia National Holdings and United National Independence Party v The Attorney General (1994) ZR 115 on the meaning of unlimited jurisdiction).

The following are the functions of the judiciary in a democratic state:

1. Resolving legal disputes between citizens and between citizens and the state;

2. Protecting fundamental rights of citizens;

3. Guarding the constitution; and
4. Miscellaneous functions including administration of estates, appointment of trustees, among other functions.

6.4 Methods of Judicial Control of Administrative Power

Courts use different methods to control the exercise of administrative power by public administrators. The methods of control include, statutory applications to quash an administrative function, appeals from decisions of public administrators, applications for habeas corpus, judicial review and collateral challenges.

Activity

In your own words, can you explain and describe each of the methods used by the Judiciary to control exercise of administrative power. Compare your response with the brief explanations given below.

6.4.1 Statutory Applications

Several statutes provide procedures for application to quash decisions of an administrative authority. Examples include; section 81 of the Lands and Deeds Registry Act provides for a procedure to apply to court for removal of a caveat. We shall look at some examples of these when we look at judicial review in the proceeding units. Otherwise, the bulk of examples would be what may be classified as the administrative role of the court and rarely reported in case law, unless a dispute arises.

6.4.2 Appeals

An appeal is a process by which a person who is dissatisfied with a decision takes the decision to a higher authority for the higher authority to remake the decision appealed against. A person or authority who exercises appellate power makes the decision from the same facts and stands in the same position as the original decision maker. A person determining an appeal looks at the merits of the decision appealed against. A number
of statutes that provide for dispute resolution mechanisms under the statute also make provision for appeals from decisions of administrative authorities.

6.4.3 Writ of Habeas Corpus

The other method that is used to control the exercise of power by administrators with authority to detain people under the law is issuing a writ of habeas corpus. The provisions on writ of habeas corpus are designed to protect individuals against arbitrary arrest and detention by the state. The remedy under this procedure safeguards the freedom of movement and liberty of individual as protected by the Constitution. The right to liberty can only be limited or derogated under the circumstances listed by the in article 13 of the Constitution. Article 13 of the Constitution also contains procedural safeguards for any person who is arrested on detained. One of the safeguards is that the detained person, if not released on bail or bond, should be taken before a court to answer charges against the detained person.

A person who is unlawfully detained can issue a writ of habeas corpus out of the High Court for an order to compel the arresting of detaining officer to present the arrested person before court to explain why the arrested person should not be released from detention. The procedure for this application is provided under Order 54 of the Rules of the Supreme Court of England (1999 Edition). The Rules of the Supreme Court of England apply to Zambia by virtue of Section 10 of the High Court Act, which empowers the Court to use the practice and procedure obtaining in England in the High Court of Justice in default of rules of procedure in the local legislation. Habeas corpus is a constitutional law remedy. As such, we will not discuss it in further detail in this module.

6.4.4 Collateral challenge

Another way by which courts may exercise control over exercise of administrative power is through a collateral challenge also known as an indirect challenge of exercise
of administrative authority. For example, a person who is prosecuted for contravening a statute or administrative order can, in his/her defence, challenge the instrument pursuant to which the person is being prosecuted against as being unlawful. Such matters are usually litigated using the substantive and procedural rules of the law under which the action is brought. For example, if a person is prosecuted in a criminal matter, the challenge of authority will be brought as a defence to the criminal matter. As such, we will not focus on collateral challenges in this module, except to mention that they are a way through which administrative authority.

6.4.5 Judicial review

Judicial review is traditionally a Common Law relief. It is not provided for under the Zambian Constitution and laws. The procedure applicable is order 53 of the Rules of the Supreme Court of England (1999). The grounds for review were developed by the Common Law. The development of jurisprudence on judicial review in Zambia is heavily influenced by English jurisprudence. However, when you read English case law on the subject, you should be mindful of the differences in the constitutions of Zambia and England which have affected the scope of the power of review and how the grounds have been developed and are applied in Zambia. We will spend considerable time on judicial review in the module because courts typically use judicial review to control the exercise of administrative power under administrative law.

Unit activity

With the aid of case law, explain the types of control that the courts exercise on exercise of administrative power.

6.5 Unit Summary

This unit has introduced the judicial control of administrative authority. It has pointed point the various methods by which courts control exercise of administrative authority. Apart
from judicial review, the rest of the methods follow the substantive law on which they are made and the procedure as prescribed in the law or the general civil procedure law. Judicial review is a special power that the court has to review administrative authority which is the typical method under the common law. The next three units are devoted to judicial review to give you a deeper understanding of the process and governing law.

6.6 References and prescribed readings

Statutes
Lands and Deeds Registry Act, Cap 185 of the Laws of Zambia.
The Rules of the Supreme Court of England, 1999 (White Book)

Case Law

Books
E.G.S Wade and A. W. Bradley, Constitutional and Administrative Law, (Chapter 34)
H. W. R. Wade, Administrative Law, (Chapters 13, 14 and 15)

Other resource
UNIT SEVEN
JUDICIAL REVIEW OF ADMINISTRATIVE AUTHORITY

7.0 Introduction
Welcome to unit seven. In unit six, you were introduced to judicial methods of control of administrative authority. We also noted that judicial review is the traditional method for challenging administrative authority under administrative law. Other challenges, although provide a system of judicial control of administrative power are either be part of the larger issue in another area of substantive law such as a defence to a criminal offence or would otherwise be exercise of an administrative function by the court.

7.1 Unit Aims
The aims of this unit are:
1. To introduce you judicial review as a method of control of administrative authority.
2. To discuss the rationale and justification for judicial review of administrative authority.

You will require at least 2 hours to successfully study this unit.

7.2 Objectives
By the end of this unit, you should be able to:
1. Define judicial review.
2. Analyse the foundation and justification for judicial review in Zambia.
3. Explain the law applicable in judicial review proceedings.
4. Discuss the various limitations and challenges of judicial review as a means of control of administrative actions.

7.3 justification for Judicial Review
In your own words, why do you think courts have been given the power to control administrative power? Don’t you think giving this power to courts could offend the
constitutional principle of separations of powers? Let us consider the justification for judicial review.

Judicial review refers to the power that courts have to review decisions made and actions taken by other organs of the state when they perform administrative functions in order to determine whether their decisions or actions are made or done within the limits prescribed by law. In this regard, the Constitution gives authority to courts to validate or invalidate administrative actions. Judicial review is a process through which the courts scrutinize administrative powers of the executive and legislature to ascertain their legality.

Judicial review therefore operates on the premise that courts have the power to determine whether administrative powers have been exercised according to law and whilst ensuring procedural fairness. It allows a person who is affected by a decision of public administrator to challenge that decision in court.

The court in exercising its powers under judicial review should be cautious not to overstep its boundaries into the functions given to the other arms of government by the Constitution. One of the ways by which the law limits the power of the courts to protect the separation of powers is by insisting that judicial review should not concerned with the merits of a particular decision, but with whether the decision by a public officer has been correctly made. By so insisting, courts are not supposed to step into the shoes of the public administrator. Their role is to look at the law and process governing the decision and ensure that the public administrator acts within the provisions of the law.

The objectives of judicial review can be summarised as follows (Halaire Barnett, 2011):

1. To ensure that statutory provisions are correctly interpreted and applied by public administrators;
2. To ensure that discretion conferred by law is lawfully exercised;
3. To ensure that decision makers act fairly; and
4. To prevent violation of individual rights as a result of exercise of power and also compensate those whose rights are violated by bad administration.

7.4 Scope of Judicial Review

Having established the justification of judicial review, what do you think is the proper scope of judicial review? Compare your answers with the ones provided below.

As you read many books on administrative law, you will note that it is not very easy to define the scope of judicial review as the law keeps developing. Traditionally, judicial review was concerned with making sure that inferior tribunals and bodies do not act outside their statutory powers. The traditional grounds for review were *ultra vires* and failure to observe the rules of natural justice. Judicial review has now grown to an extent where grounds for review have greatly expanded to include reasonableness, proportionality and fairness of a decision. The expansion in grounds of review has consequently challenged the scope of judicial review. We will examine the grounds for judicial review in more detail in Unit 8.

There are at least four factors that are used to determine the scope of judicial review which we consider in more detail below. Firstly the subject matter of judicial review should be justiciable subject matter under judicial review. Secondly, when exercising jurisdiction under judicial review, the court will review the decision and would not consider it as an appeal. Thirdly, the public law element and fourthly, the nature of remedies that a court would grant.
7.4.1 Subject matter of judicial review

Reflection

Why do you think that the subject matter is an important factor? Write down your answer and compare it to the reasons given below.

It is important to ascertain the subject matter of judicial review to avoid encroaching on the jurisdiction of other organs of the state. Remember, the law is interested in protecting the constitutional principle of separation of powers by ensuring that the judiciary does not itself encroach on the powers that are constitutionally assigned to other state organs. This defeats the constitutional law principle of constitutionalism, which seeks to control or limit the use of power by all organs of the State. As earlier noted, the principle of constitutionalism, among others, justifies the administrative law practice of judicial review. If the judiciary effectively checks the use of power by the executive and the legislature, the executive and legislature must equally be able to check the use of power by the judiciary. All organs of the State ought to respect and adhere to the doctrine of separation of powers whilst effecting checking the exercise of power within the limits allowed by the Constitution and legal framework as a whole. The real value of the doctrine of separation of powers lies in maintaining the balance of power among the various organs of the State.

Based on this principle, certain subject matter are cannot be determined under judicial review. This is determined by the principle of justiciability. In upholding this principle, courts have traditionally shunned from reviewing matters that are considered political questions or strictly issues of policy which are the proper function of the executive. Strict adherence to the doctrine of separation of powers or its misinterpretation by some members of the judiciary unreasonably limits the scope of judicial review. In Re Nalumino Mundia (1971) ZR 70 (HC) the Petitioner applied to the High Court for an order of certiorari...
directed to the Chairman of the Standing Orders Committee of the National Assembly, requiring him to remove an order suspending him from the National Assembly. He argued that the Order was violated and that the National Assembly’s own Standing Orders. The Court held that it does not have power to interfere with the exercise of the jurisdiction of the National Assembly in the conduct of its own internal proceedings. This case illustrates the fact that even though the decision questioned was that of a public body (i.e. the National Assembly), the Courts were reluctant to review the decision of the public body for fear of abrogating the doctrine of Separation of Powers. Whether this decision of the High Court is correct depends on whether one thinks the matter was a subject of judicial review or not. Various legal practitioners have held different views on the matter.

Further, many administrative decisions or actions are excluded from judicial review by Statutes. The Constitution permits Parliamentarians to enact laws in line with the Constitution. If such laws exclude certain matters from being reviewed by the Courts, an aggrieved party may not have recourse in judicial review.

Activity

Article 267(4) of the Constitution of Zambia as amended by the Constitution of Zambia (Amendment) Act, No. 2 of 2016 provides as follows:

“A provision of this Constitution to the effect that a person, an authority or institution is not subject to the direction or control of a person or an authority in the performance of a function,

does not preclude a court from exercising jurisdiction in relation to a question as to whether that person, authority or institution has performed the function in accordance with this Constitution or other laws”
Based on understanding of this section, discuss the principle of justiciability in the context of Zambia’s constitutional and administrative law.

7.4.2 Review and Appeal

Judicial review is concerned with review of decisions and is not an appeal. This is closely connected to the issue of separation of powers. The court in judicial review will not substitute its decision with that of that of an administrative authority. For this reason, judicial review is said to be procedural in nature as it concerns itself not with the substance of the subject under review, but rather the process by which the decision was arrived at. The effect of an appeal is that the decision appealed against is replaced with a new one. A review will have an effect of nullifying the decision where the review is successful.

7.4.3 Public law element

Connected to the issue of subject matter for judicial review is the restriction of judicial review to decisions of public bodies. Judicial review is available only to check the decisions of public bodies exercising public functions, and not private bodies or public bodies when they exercise private law functions. Some private bodies may make decisions that affect the public but those decisions would not be amenable to judicial review. For example, a political party may decide to expel its Member of Parliament (MP), and call for fresh elections. Members of the constituency where such an MP hails will not be entailed to apply for judicial review of the decision of the political party notwithstanding that public resources were used to vote this person into office, and will be used for the by-election. In the case of Ludwig Sondashi v. Godfrey Miyanda (1995-1997) Z.R. 1 the appellant was expelled from the respondent’s political party and sought judicial review and a declaration of wrongful expulsion. The Court held that the wrong procedure had been used to challenge the Party’s decision. The Court held that the internal affairs of a political party were private matters and thus judicial review could not lie against the political party. Similarly in Nkumbula v. The Attorney General (1978) Z.R. 388 HC the United National
Independence Party was held to be a club and therefore not subject to judicial review, but private law.

In determining whether or not the body whose decision is being challenged on an application for judicial review is a public body as opposed to private body, the courts look at the functions exercised. In the case of *R v. City Panel on Takeovers and Mergers Ex Parte Datafin Limited* [1987] QB 815, the City Panel was subject of judicial review despite its lack of statutory source of power. This was because it was a body exercising public functions analogous to those which could have been, in the absence of the Panel, exercised by a governmental department. Accordingly, if a body is set up under a statute then the source of power brings the body within the scope of judicial review. However, the court in *R v. City Panel Takeovers* recognised that in some cases the matter is unclear and if this exists, it is necessary to look beyond the source of power and consider the nature of the power being exercised.

1.4.4 Public Law Remedies

Judicial review can only be commenced at the discretion of the Court. This means that, by law, an applicant must be granted leave to apply for judicial review by the Courts. If the courts do not see the need for judicial review, they will not grant the leave to apply for it. You will look at these challenges more clearly when you look at the grounds for review and remedies.

7.5 Law Applicable

Zambia’s administrative law is largely based English Common Law. This is one of colonial legacies of the country. Judicial review is a principally a common law remedy that enables the Court to exercise its constitutional function of defending the constitution and providing checks on other arms of government. There is no constitutional right to fair administrative action nor is there a statutory provision enabling judicial review applications. The common law is applicable pursuant to article 7 of the Constitution of Zambia as read together with
the English Law (Extent of Application) Act, Cap 11 of the Laws of Zambia which provides for application of the common law subject to provisions of the constitution and other written provisions.

In terms of procedure, Section 10 of the High Court Act, Cap 27 of the Laws of Zambia provides that the High Court shall in default of local law on procedure, apply in substantial conformity, the law and practice as obtaining in the High Court of Justice in England provided that the Civil Court Practice 1999 (the Green Book) of England or any other civil court practice rules issued after 1999 in England shall not apply to Zambia unless they relate to matrimonial causes.

The case of **Dean Mung’omba & Others v Peter Machungwa & Others (2003) Z.R. 17** is instructive on the use of the White Book as a source of law in Zambia. The court in that case held as follows:

1. There is no rule under the High Court which Judicial Review proceedings can be instituted and conducted. Thus, by virtue of Section 10 of the High Court Act Chapter 27 of the Laws of Zambia, the High Court is guided as to the procedure and practice to be adopted.
2. The practice and procedure in England is provided for in Order 53 of the Rules of the Supreme Court (RSC).
3. Order 53 is comprehensive. It provides for the basis of judicial review: the parties; how to seek the remedies and what remedies are available.

In 2002, the English Law (Extent of Application) Act was amended to include the proviso in the section 10 of the High Court (Amendment) Act No. 16 of 2002. This amendment was interpreted by the Supreme Court in **Zambia Wildlife Authority & Others v Muteeta Community Resources and Board Development Co-operative Society SCZ Judgment No 16 of 2009** to mean that the entire provisions of the RSC in the white book edition
(including decided cases) are now Zambian law by statute and as such binding on Zambian courts. This is the same in proceeding jurisprudence on application of Order 53. (See also: The People v The Principal Resident Magistrate Ex parte Faustine Kabwe and Aaron Chungu SCZ Judgment No. 17 of 2009; Ruth Kumbi v Robinson Kaleb Zulu SCZ Judgment No. 19 of 2009)

In 2011, the English Law (Extent of Application) Act was amended by the English Law (Extent of Application) (Amendment) Act No. 6 of 2011 by removing subsection (e) of section 2 which provided. This amendment means we have returned to the original position where the White book is applicable as *cassus omissus* in our own procedural rules. Derrick Chitala (Secretary of the Zambia Democratic Congress) v Attorney General SCZ Judgment No. 14 of 1995. You should beware of the statutory changes when reading case law on applicability of English law.

7.6 Limitations of Judicial Review in Zambia
In as much as administrative actions are subject to judicial review, there are a number of limitations regarding the extent to which such review can effectively be applied. These include:

i) controversy over subject matter for judicial review;

ii) public/private law divide;

iii) Discretionary nature of remedies; and

iv) Strict rules of determining justiciability.

**Unit Activity**

Answer the following questions:

1. Explain the rationale for judicial review.

2. What is the proper scope of judicial review in Zambia?

3. What is the law applicable to judicial review proceedings in Zambia?
7.7 Unit Summary
In this unit, you have been introduced to judicial review as a method of control of administrative power. It has discussed the rationale and justification for judicial review. You also looked at the scope of judicial review and the law applicable. The next unit examines grounds for control of administrative power under judicial review.

7.8 References and prescribed readings
Statutes
English Law (Extent of Application) Act, Cap 11 of the Laws of Zambia
Case Law
Dean Mung’omba & Others v Peter Machungwa & Others (2003) ZR 17
Re Nalumino Mundia (1971) ZR 70 (HC).
Zambia Wildlife Authority & Others v Muteeta Community Resources and Board

Books
UNIT EIGHT
GROUND FOR JUDICIAL REVIEW

8.0 Introduction
Welcome to unit eight of the module. In this unit, we continue looking at judicial review as a method for controlling exercise of administrative authority. Particularly, we look at the grounds for judicial review.

8.1 Unit Aims
The aims of this unit are:

1. To introduce you to grounds for judicial review as developed under common law.
2. To equip you with the relevant skills to analyse case law on grounds for judicial review in Zambian.

You will require at least 2 hours to complete this unit.

8.2 Unit objectives
By the end of this unit, you should be able to:

1. Explain the common law grounds for judicial review.
2. Analyse case law to assess how the grounds for judicial review have been developed in the Zambian jurisdiction.

8.3 Grounds for Judicial review
In your own words, what do you understand by the phrase grounds for judicial review? When we speak of grounds for review, we are talking about the reasons why a person would seek judicial review of a decision of or exercise of public administrative power. In Zambia, Judicial review depends on common law grounds. This is because Zambia does not have a constitutional right to just and fair administrative practice, nor does it have a statute on administrative law. Under the common law, there are three main grounds that were summarized by Lord Diplock in Council for Civil Service Union v Minister for the
Civil Service [1985] AC 374, [1984] 3 All ER 935 as illegality, irrationality and procedural impropriety. These grounds have been upheld in several Zambian cases including Derrick Chitala v. The Attorney General SCZ Judgment No.14 of 1995.

The grounds of review are not absolute but may be expanded to include grounds such as proportionality. Let us discuss these grounds in more detail.

7.3.1 Illegality

The ground of illegality challenges exercise of administrative authority as being in excess of the power given by law (ultra vires) or contrary to the laid down law. It is the ground that actions the rule of law. According to Lord Diplock in Council for Civil Service Union v Minister for the Civil Service cited above, the decision maker must understand correctly the law that regulates his/her decision making power and must give effect to the regulating law. Illegality is broader than the common law concept of ultra vires. This is because strict adherence to the ultra vires principle promotes the doctrine of parliamentary sovereignty, but does not adequately protect individual rights of citizens which is one the objectives for controlling administrative authority. Under the broad construction, illegality is broadly construed to include the constitutional legality of the empowering provisions. It also covers grounds where an administrative authority acts with improper motives, takes into consideration factors that ought not to be taken into consideration and/or fails to take into consideration factors that he/she ought to.

Having stated that illegality covers a broader ground than the ultra vires principle, what are some of the questions one ought to ask to determine whether the public administrator exercised his/her authority in a lawful manner? Compare your responses to the below questions:


2. Did the authority exceed the powers authorised by the empowering provision (statute or regulation)?

3. Did the authority misconstrue his/her powers?
4. Did the administrator fetter his discretion or fail to act? Read the case of *Padfield v Minister of Agriculture Fisheries and Food* [1968] 1 All ER 694.

### 7.3.2 Irrationality

In your own words, explain what is meant by irrationality. What do you think would be the pertinent questions to answer in determining whether or not a public administrator acted in a rational manner? Compare your answers with the below explanation.

Irrationality questions the rationality of the decision sought to be challenged by an aggrieved person. The test for irrationality under Common Law is the Wednesbury unreasonableness formulated in the case of *Associated Provincial Picture House Ltd. v Corporation* [1948] 1CB 223, 1947] 2 All ER 680. The ground applies to a decision which is so outrageous in its defiance of logic or accepted moral standard that no sensible person who had applied his mind to the question to be decided could have arrived at it. Under this ground, the court will inevitably venture into the merits or substantive grounds. The relevant test is however not what the court would have decided under the circumstances, but rather whether a rational decision maker placed in similar circumstances as the one questioned would have arrived at a different decision.

### 7.3.3 Procedural imprropriety

This ground covers failure by an administrative tribunal to observe procedural rules that are expressly laid down law and denial of natural justice which we looked at in unit 5.

### 7.4 Problems of categorisation of grounds

When you read a number of cases on judicial review, you will notice that many applicants use 2 more ground of review in relation to the same facts. This shows you that the categorisation of grounds is not watertight. In many instances, the grounds appear to be
overlapping.¹ In Boddington v British Transport Police 1998 2 All ER 203, Lord Irvin stated the following:

Categorisation of types of challenge assist in an orderly exposition of principles underlying our developing public law. But these are not watertight compartments because the various grounds for review run together. The exercise of power for an improper purpose may involve taking irrelevant considerations into account or ignoring relevant considerations; and either may lead to an irrational result. The failure to grant a person affected by a decision to a hearing, in breach of principles of procedural fairness, may result in a failure to take into account relevant considerations.

This demonstrates that although grounds of review tend to be categorised, you may find them overlapping depending on the facts of individual cases.

**Unit Activity**

State the facts and holding in the following cases:

- Frederick Jacob Titus Chiluba V Attorney-General Appeal Number 125 Of 2002

In your opinion, did the court in each of the above cases properly analyse the grounds review within the constitutional context of Zambia?

**8.5 Unit Summary**

In this unit, you have looked at the common law grounds for judicial review which are used by the Zambian courts. The unit also demonstrated that the grounds of review though classified are not watertight and may overlap in certain cases. The unit also demonstrated that the ground of review are not absolute, further grounds such as the principle of

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proportionality are examples of the development of the traditional Common Law grounds of review. The next Unit gives you an overview of the procedure for judicial review proceedings.

8.6 References a Recommended Readings

Cases
Associated Provincial Picture House Ltd. v Corporation [1948] 1CB 223, 1947] 2 All ER 680
Boddington v British Transport Police 1998 2 All ER 203
Council for Civil Service Union v Minister for the Civil Service [1985] AC 374, [1984] 3 All ER 935
Frederick Jacob Titus Chiluba v Attorney-General Appeal Number 125 of 2002
Padfield v Minister of Agriculture Fisheries and Food [1968] 1 All ER 694

Books
UNIT NINE
PROCEDURE FOR JUDICIAL REVIEW

9.0 Introduction
Welcome to Unit nine of this module. In this Unit, we continue looking at judicial review of administrative actions and/or decisions. This unit focuses on the procedure for bringing judicial review proceedings before the court. The procedure for judicial review is different from the procedure for other civil applications. It is therefore important for us to explain the procedure in administrative law as you may not look at it with much detail when you study the module for civil procedure.

9.1 Unit Aims
The aims of the unit are to:

1. Explain the jurisdiction of the High Court in judicial review proceedings.
2. Outline the procedure applicable to judicial review proceedings.

You will require at least 3 hours to complete this unit.

9.2 Unit Objectives
By the end of this unit, you should be able to:

1. Explain the procedure for judicial review;
2. Discuss the jurisdiction of the High Court in judicial review proceedings.
Activity

1. Read part VIII of the Constitution of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016 to familiarise yourself with the judiciary and powers of each court.


9.3 Jurisdiction of the Court in judicial review proceedings

Having read Part VIII of the Constitution of Zambia, you should now be well familiar with the establishment of courts in Zambia and their various powers. Judicial review proceedings are tried in the High Court. Article 234 of the Constitution gives the High Court original and unlimited jurisdiction to determine any matter under any law subject to provisions in the Constitution and laws. In terms of procedure, the law applicable is Order 53 of the Supreme Court Rules, 1999 also known as the white book which is applicable to Zambia.

9.4 Law applicable

In your module for Legal Process, you looked at the various sources of law in Zambia. The sources of administrative law in Zambia have also been highlighted in Unit one of this Module. Judicial review proceedings are commenced in the High Court. The procedure that is followed in the High court for various matters is provided under section 10 of the High Court Act, as amended by Act No. 16 of 2002, which provides that:

The jurisdiction vested in the Court shall, as regards practice and procedure, be exercised in the manner provided by this Act … 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. Provided that the civil court practice of 1999 or any other rules of practice issued after 1999 in England shall not apply unless they relate to matrimonial causes.

The above provision empowers the High Court to adopt procedure observed in the High Court of England where the local law does not provide for practice and procedure. Judicial review is one such action for which there are no provision in the local law for procedure. The High Court relies the procedure set out in Order 53 of the Rules of the Supreme Court, 1999, with necessary modifications as far as the circumstances under the Zambian legal system permit.

Activity

Read the following cases:


Explain the application of English procedural law to Zambian Courts.

Having discussed the source of law for the procedure, let us now look at how a matter for judicial review is determined and what documents are filed in court. We also look at who can bring an action for judicial review and against who? What documents are filed? How is and where the hearings are held?

9.5 Parties to Judicial Review Proceedings
The term “parties” in litigation refers to people who are engaged in a dispute on which the court must make a determination. The term includes persons who sue, are sued or are likely to be affected by an order of the court. In judicial review proceedings, the person who moves the court is known as the applicant. The person against whom an action is brought is referred to as the respondent. In this section, we discuss more about the parties to enable
determine whether judicial review is the correct course of action to take when presented with an issue of maladministration.

9.5.1 The Applicant

In Judicial review proceedings, there are certain restrictions on who can commence judicial review proceedings which flow from the one of the objectives of administrative law, namely, to empower smooth administration. The procedure therefore places restrictions on who can commence an action for judicial review as a way of protecting the public administration from unnecessary challenges. The applicant in judicial review proceedings should therefore be the person with *locus standi* to issue judicial review proceedings. By *locus standi*, we mean a person whose interests have been directly or sufficiently affected by the decision the person seeks to challenge.

Rules 3 (1) and 3 (7) of Order 53 provide as follows:

1. No application for judicial review shall be made unless leave of the Court has been obtained in accordance with this rule...
2. The Court shall not grant leave unless it considers that the applicant has sufficient interest in the matter to which the application relates.

An Applicant must therefore satisfy the court of their standing to sue before the application for judicial review can proceed to the substantive stage.

Activity

Using the standard set in rule 3(7) of Order 53, list examples of what would amount to sufficient interest in a matter.
9.5.2 The Respondent

Judicial review is a public law remedy concerned with the exercise of public administrative authority. Before an action for judicial review can be commenced, the applicant must ascertain that:

a) The decision maker is a public person or body,
b) The decision maker is exercising “public law” powers and not merely by agreement of the parties; and
c) The decision, will, if validly made, lead to administrative action or abstention from action, by an authority endowed by law with executive powers.

The test used by the courts to determine the public law element of the power is the source of power and the nature and function of the power.

a) The source of power

Any individual or organisation exercising statutory power or acting under subordinate legislation was traditionally thought to have been public. However, this test is only valid as far as it relates to determination of the public law component. What is more important is the nature of the challenged decision. It ought also to be properly seen as a “public law” function.

b) Nature or functions of power

The traditional analysis of functions by public bodies was that they were “judicial,” “quasi-judicial,” “administrative or managerial” or “executive” in nature. The first three types of functions generally attracted judicial review. However the content of natural justice or the duty to the act fairly would differ according to the judicial extent of the functions concerned to determine the amenability of the proposed respondent to
judicial review, and whether the precise conduct challenged is a “public law” action or decision.

Judicial Review will therefore lie against the improper exercise of public power. In determining the nature of power challenged, one should be mindful of the special position of the Zambian Constitution. Using the constitutional framework, you should distinguish between legislative functions which are not amenable to judicial review from administrate or executive functions.

Judicial review will not lie against a body or person performing private functions (Law v National Greyhound Racing Club Limited [1983] 3 All ER 300). Take note of the holding of the Supreme Court concerning who should be a respondent in judicial review proceedings in Dr. Ludwig Sondashi v Brigadier General Godfrey Miyanda, MP (Sued as National Secretary of the Movement for Multi-Party Democracy) (1995-1997) Z.R. 1.

The Supreme Court commenting on whether or not a decision by a political party to expel its member was amenable to judicial review stated that:

In this case we have no hesitation in agreeing with the learned trial judge that a political party so far as its domestic concerns are concerned is a private association and its tribunals deal with private law not public law. We say this despite the fact that the result in this case would be that the appellant would lose his seat in Parliament, which of course is a public matter, but that fact in itself does not affect the functional status of the tribunal about which the court is being asked to concern itself, that is, as a private tribunal. In this connection, it is of interest to note that in the United Kingdom the cases of John v Rees and Others (1) and Lewis v Heffer & Others (2) which were cases relating to the
Labour Party, a political party in the United Kingdom, in which it was argued that decisions had been improperly arrived at according to the rules of the organisation, were both commenced by writ, and similarly, in this country, cases relating to domestic tribunals such those of political parties should be commenced by writ.

Judicial review would therefore not be the correct procedure when the decision challenged is not a public law decision.

**Reflection**

Can a private person or firm be a respondent in a judicial review application? Give reasons for your answer and support it case law.

9.6 The Application for judicial review

An applicant in judicial review proceedings cannot proceed until leave of court (permission) is given to proceed with the application. There are therefore 2 stages the hearing of judicial review proceedings set out in Order 53 of the Rules of the Supreme Court, 1999, namely:

i) Leave stage; and

ii) Substantive hearing.

The 2 are discussed in detail under this section.
9.6.1 Leave Stage

This is the first stage in the judicial review proceedings. At this stage, the court is interested in establishing the following:

1. The applicant must demonstrate “sufficient interest” in the matter;
2. The applicant should have a case sufficiently arguable to merit investigation at a substantive hearing;
3. The applicant must apply for leave promptly and in any event within 3 months from the date of the decision challenged (unless the court enlarges time); and
4. The applicant has exhausted all local remedies.


The purpose of leave was stated by Lord Diplock in the case of R. v. Inland Revenue Commissioners, ex p. National Federation of Self-Employed and Small Businesses Ltd [1982] A.C. 617, p.642; [1981] 2 All E.R. 93, p. 105. According to Lord Diplock the purposes of the leave stage are to:

i) prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error; and

ii) remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.

To serve the above purposes, a court hearing an application for leave to commence judicial review proceedings should only grant the order for leave, if on the material available and
without going into the matter in depth, the court thinks that there is an arguable case for granting the relief claimed by the applicant. In *R. v. Secretary of State for the Home Department, ex p. Rukshanda Begum* [1990] C.O.D. 107, the Court of Appeal held that the test to be applied in deciding whether to grant leave to move for judicial review is whether the judge is satisfied that there is a case fit for further investigation at a full *inter partes* hearing of a substantive application for judicial review. The applicant must therefore state all material facts at the application for leave, to help the court decide if there is a case suitable for determination on the merits.


**Forms and pleadings**

Under this section, we look at the forms and pleadings that are filed in an application for judicial review. Caution should be taken when reading the Rules of the Supreme Court (White Book) and the forms so that they are applied within the context permitted by the Zambian legal system. For example, under Order 53 rule 3(2) where the rules say ‘file in the crown office,’ the phrase has to be substituted by “the High Court” so as to apply the English rules in substantial conformity with the Zambian legal system.

According to Order 53 rule 3, an application for leave must be made ex-pate to a judge by filing:

(a) A prescribed form known as a notice of application for judicial review (Form No.86A on volume 2 of the White Book) containing a statement of the following:

(i) The name and description of the applicant;

(ii) the relief sought and the grounds upon which it is sought;

(iii) the name and address of the applicant’s advocates (if any); and
(iv) the applicant’s address for service; and
(v) an affidavit verifying the facts relied on.

Leave may be granted ex-parte without a hearing unless a hearing is requested or is ordered by the court. The court hearing the application for leave can grant the leave absolutely, grant leave with conditions or on terms or refuse the application for leave. According to Order 53 rule 3(4), where the application is refused or granted with terms, the application can be renewed to a judge sitting alone in the Queen’s Bench division. The application of this rule in Zambia where the High Court does not have different divisions is that the dissatisfied applicant appeals to the Court of Appeal. Before the amendment to the Constitution in 2016, such appeals went to the Supreme courts as demonstrated by the case of Derrick Chitala (Secretary of Zambia Democratic Congress) v Attorney General S.C.Z. Judgment No. 14 of 1995.

Where an application is seeking an order of prohibition or certiorari, the court may order that the leave should operate as a stay of the proceedings to which the application relates until determination of the matter or when the court orders.

9.6.2 Substantive Application
After the court has granted the leave to commence judicial review proceedings, the matter would proceed to the substantive stage.

Forms and pleadings
Order 53 rule 5 prescribes the manner in which the application for judicial review is made after grant of leave. The application is made by filing a notice of motion to a judge in open court unless the court directs that the application should be made by originating summons in chambers. The application must be made within 14 days of the grant of leave.
The motion should be set for hearing within after at least 10 days from the date when the motion is served on the interested parties unless the court directs otherwise. The applicant should also serve the respondents, or all parties concerned with affidavits and grounds relied on.

**Hearing**

The hearing of judicial review proceedings is held *inter partes* (all parties attend). The court has power to hear any person who claims to be likely to be affected on application of that person. This power is exercised notwithstanding the fact that the person who wishes to be heard was not served with the motion and affidavits. The High Court when hearing applications for judicial review exercises the same powers to grant interlocutory reliefs as it does in other proceedings subject to limitations on reliefs discussed in the section on reliefs.

**Appeals**

The Appeals against Judicial proceedings lie to the Court of Appeal. An appeal may lie against an order denying leave to apply for judicial review or against the substantive application.

**Unit activity**

Answer the following questions:

1. What do you understand by the phrase practice and procedure?
2. Which court has jurisdiction over judicial review matters?
3. What is the procedural law applicable in judicial review matters?
4. How many stages are there and what happens at each stage of application?

**9.6 Unit Summary**

This unit has discussed the procedure for judicial review. It has looked at the rules governing commencement and prosecution of a judicial review matter. The next unit looks at the remedies that may be granted in a judicial application.
9.7 References and Recommended Readings

Statutes
Part VIII of the Constitution of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016
Order 53 of the Rules of the Supreme Court, 1999

Case Law
Derrick Chitala (Secretary of Zambia Democratic Congress) v Attorney General SCZ Judgment No. 14 of 1995
Law v National Greyhound Racing Club Limited [1983] 3 All ER 300
Ludwig Sondashi v Brigadier General Godfrey Miyanda, MP (Sued as National Secretary of the Movement for Multi-Party Democracy) (1995-1997) Z.R. 1

Books
UNIT TEN

REMEDIES FOR JUDICIAL REVIEW

10.0 Introduction
Welcome to Unit ten of this module. In this Unit, we look at the remedies for judicial review. This is the last unit that discusses judicial review of administrative actions. The chapter has cited several authorities to illustrate and explain the remedies. You are required to read the cases in full to fully appreciate how the remedies are applied.

10.1 Unit Aims
The aims of the unit are to:
1. Identify remedies for judicial review.
2. Discuss the remedies for judicial review.

You will require at least 4 hours to complete this unit.

10.2 Unit Objectives
By the end of this unit, you should be able to:
1. Explain the remedies for judicial review;
2. Discuss the common law remedies for judicial review.

10.3 Remedies for judicial review
In your own words, explain what you understand by the term remedy. Why are remedies important in legal proceedings? List the public law remedies you know.

Order 53 rule 1 of the Rules of the Supreme Court, 1999, provides as follows:

(1) An application for—
(a) an order of mandamus, prohibition or certiorari, or
(b) an injunction under section 30 of the Act 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 an application the Court may grant the declaration or injunction claimed if it considers that, having regard to—
(a) the nature of the matters 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.

The underlined are the reliefs that the High Court may order in an application for judicial review. In addition to the underlined reliefs, Order 53 rule 7 provides that the court can award damages where the applicant has pleaded for damages arising from the matter to which the action relates and the court is convinced that the matter could be suitable for award of damages.

Rule 2 of Order 53 states that the reliefs set in in rule 1 can be claimed in the alternative or in addition if it arises out or, connected to or related to the same matter. Let us discuss the remedies in more detail and their application in Zambian courts.

**10.3.1 Certiorari**

Certiorari is discretionary remedy that is given to quash a decision which has been made. The remedy is not intended for prospective decisions of a public officer. Certiorari will not lie unless something has been done or a decision has been made which the court can quash. It is different from prohibition in that prohibition is not available unless there is something that remains to be done that the court can prohibit. Historically, certiorari was used to control the judicial functions of inferior courts and tribunals, but today this remedy is available against all public bodies.

An order of certiorari may be made in order to quash a decision for excess or lack of jurisdiction, error of law on the face of the record, unfairness and breach of the rules of
natural justice, or decisions made in bad faith or produced by fraud or perjury (R v Bolton JJ, ex parte Scally [1991] 1QB 537, [1991] 2 All ER 619). In The People v. Minister of Information and Broadcasting Services ex parte Francis Kasoma 1995/HP/2959, an order of certiorari was issued by the High Court to quash the decision of the Minister to create a statutory body known as Media Council of Zambia. The decision was quashed on the premise that it was made in bad faith, and that the rules of natural justice were never observed in that the people who were to be affected by the decision were never heard before the decision was made.

A court that quashes a decision has power to remit the decision to the decision maker so that a decision can be made in accordance with the judgment passed by the court. The court can also order a stay of the decision after granting leave where the applicant is seeking an order of certiorari.

10.3.2 Prohibition

The remedy of prohibition is given to prohibit ongoing or the future decisions and determinations of some public and quasi-public bodies which may be challenged by way of certiorari. Prohibition is not available unless something remains to be done, which the court can prohibit. It is often convenient to apply for both certiorari and prohibition. Certiorari lies to quash what has already been done and prohibition to prohibit the public body from continuing to do that which is not within its authority to do. It is a discretionary remedy and is to be granted easily.

10.3.3 Mandamus

The remedy of mandamus is given to compel the performance of a public duty in all cases where there is a legal right but no specific legal remedy for enforcing the right. Applicants often seek orders of certiorari and mandamus together, for instance certiorari to quash an unlawful decision, with mandamus to compel the public body to re-take that decision in accordance with the law, demonstrated by the case of The People v. The Attorney, ex parte, Derrick Chitala SCZ Judgment No, 14 of 1995 in which the applicant applied for
certiorari to quash the decision by government to have the constitution enacted by parliament and mandamus to compel the government to have the constitution brought into effect by way of constituent assembly and referendum as recommended by the Constitution Review Commission. See also The Minister of Information and Broadcasting Services the Attorney General V Fanwell Chembo & Others SCZ Judgment Number 11 of 2007.

Statutory tribunals may be ordered by mandamus to “hear and determine according to law.” Such a tribunal may have refused to hear the case, or may have acted in a manner amounting to a refusal. Mandamus may lie to compel a chief of police to enforce the law. Read the case of R v Metropolitan Police Commissioner ex parte Blackburn [1968] 2 QB 118, [1968] 1 All ER 763, R v Metropolitan Police Commissioner, ex parte Blackburn (No. 3) [1973] QB241.

An applicant before applying for mandamus must prove that he had demanded performance of the duty and that performance has been refused by the authority obliged to discharge. Mandamus, as a remedy enjoys a close relationship with the other remedies. Mandamus is not the appropriate means of enforcing a duty to abstain from acting unlawfully. If a public authority threatens to act ultra vires, the appropriate remedy will be prohibition, an injunction or a declaration, and not an application for mandamus not to exceed the powers conferred by law. If an inferior tribunal exceeds its jurisdiction, prohibition and not mandamus lies to compel it to stay within legal bounds, and certiorari, not mandamus lies to prevent it from acting upon its final order.

**Discretion in Certiorari, Mandamus and Prohibition**

The remedies of certiorari, prohibition and mandamus are discretionary. The court will in all cases consider whether the conduct of the applicant is such as to dis-entitle him/her the relief. This may be due to undue delay in making the application, unreasonable or unmeritorious conduct, acquiescence in the conduct complained of, or waiver of the right to complain. The court may not grant an order which is unnecessary or futile. The court
may refuse mandamus where practical problems would arise from making the order, or where the form of the order would require detailed supervision by the court, or where the applicant has already obtained that which he sought to obtain by way of judicial review.

Activity

Briefly explain the discretionary remedies for judicial review.

10.3.3 Declaration

A declaration states the right of the parties without any reference to the enforcement of those rights, and although binding, cannot as such be enforced. It is a formal statement by the court pronouncing upon the existence or non-existence of a state of affairs. It declares what the legal position is and what the rights of the parties are. A declaratory judgment must be contrasted with an executory, or coercive judgment which can be enforced by the courts. In the case of an executory judgment, the courts determine the respective rights of the parties and then order the defendant to act in a certain way. For example, to pay damages or to refrain from interfering with the plaintiff’s right. If the order is disregarded, it can be enforced by official action, usually by levying execution against the defendant’s property or by imprisoning him for contempt of court. A declaratory judgment, on the other hand, pronounces upon the existence of a legal relationship but does not contain any order which can be enforced against the defendant. The court may for example declare that the applicant is a Zambia citizen, where the citizenship of the applicant is in issue before the court, or that the notice served on the applicant by a public authority is invalid and of no effect, where the legality of the service is in issue. A declaration pronounces on the legal position.

Courts would usually only grant a declaration where the applicant has real interest in raising a question of law, and where there is another party who has a true interest in
opposing the declaration sought. In deciding whether to grant a declaration or grant an injunction the court must have regard to:

1. The nature of the matters in respect of which relief may be granted by order of mandamus, prohibition and certiorari;

2. The nature of the persons and bodies against whom the relief may be granted by such orders; and

3. All the circumstances of the case. It must consider that it would be just and equitable to make a declaration or grant an injunction.

The court expects a public body to abide by a declaration, even though it is not an order. In *Webster v London Borough of Southwark* [1983] QB 698, [1983] 2WLR 217, a local authority which defied a declaration that it was to make a hall available for an election meeting faced contempt proceedings.

**10.3.4 Injunction**

An injunction is an order that compels the party to act or restrain from acting in a certain matter. An injunction granted on an application for judicial review is indistinguishable from an order of mandamus and prohibition. An injunction may be granted to prevent ultra vires acts by public bodies. The main importance of the injunction in Order 53 proceedings is that, unlike the prerogative orders and declarations, it may be granted at an interlocutory stage on an interim basis to preserve the status quo until a final hearing of the case. Breach of an injunction would make the person against whom the order is made liable to contempt proceedings. The factors considered in determining whether or not an injunction is the appropriate remedy are outlined under declarations above.

**10.3.5 Damages**

The court may award damages where, and only where, the applicant has joined a claim for damages to his application and the court is satisfied that if the claim had been made in private law proceedings, the applicant would be awarded damages (Order 53 r 7(1)). It
follows that unlawful actions or decisions, or instances of maladministration, do not themselves given rise to an award of damages. The applicant must show, for example a breach of contract or negligence on the part of the public body.

Applicants may also claim on the basis of the tort of misfeasance in public office. This is available only against public officer who have exceeded their powers or acted in bad faith or without reasonable cause, and who have been actuated by malice against the applicant (Bourgoin SA v Ministry of Agriculture, Fisheries and Food [1985] 3 All ER 545, R. v. Chief Constable of Police (1989) 1228, [1989] 1 All ER 1025, and Jones vs. Swansea City Council [1990] 3 All ER 737.

Activity

Explain the circumstances under which a court may give the remedies of injunction, declaration and damages in an action for judicial review.

6.3.6 Interlocutory relief: Injunction and Stay

An injunction is a judicial remedy by which a person is ordered to refrain from doing (restrictive injunction) or to do (mandatory injunction) a particular thing. An interlocutory injunction is granted before the completion of the proceedings. The court has the power to grant an interlocutory injunction or an interim stay. An injunction has the benefit of enforceable sanction. An injunction cannot be ordered against the state. See Section 16 of the State Proceedings Act; See also In Zambia National Holdings and Zambia National Independence Party v The Attorney SCZ Judgment No. 3 of 1994; Factortame v Secretary of State for Transport [1990] 2AC 85, [1989] All ER692. One may obtain a stay against the state as was held in Wynter Kabimba vs. Lusaka City Council and the Attorney General SCZ Judgment No.13 of 1995. See also R v Secretary of State for Education and Science, ex parte Avon Country [1991] 1QB 558.
Where a court concludes that a public body’s decision is susceptible to judicial review, a concomitant to granting leave will, if necessary be to maintain the status quo pending the determination of the full application.

Interim relief may be granted in one of the two forms:

1) an interlocutory injunction, and possibly
2) a stay of proceedings.

1. Interlocutory injunction

An interlocutory injunction is one granted before the trial for the purpose of preventing any change in the status quo from taking place until the final determination of the merits of the case. Interim injunctions may be prohibitory or mandatory.

The test to apply in determining whether or not to grant an interlocutory injunction in an application for judicial review is broadly similar to that applied in private law proceedings (see the case of Factortane Ltd. v Secretary of State for Transport (No. 2) [1991] AC 603). But the nature of public law litigation require some modifications to the test at the interlocutory stage.

The first question as to the adequacy of damages as an adequate alternative remedy will usually be less relevant. In judicial review, there will often be no alternative remedy in damages because of the absence of any general right to damages for loss caused by unlawful administrative action per se. In cases involving the public interest, for example, where the party is a public body performing public duties, the decision to grant or withhold interim injunctive relief will usually be made not on the basis of the adequacy of damages but on the balance of convenience test. In such a case the balance of convenience must be looked at widely taking into account the interest of the general public to whom the duties are owed.
Read the case of Dean Namulya Mung’omba Bwalya Kanyanta Ng’andu and Anti-Corruption Commission V Peter Machungwa, Golden Mandandi and Attorney-General SCZ Judgment No. 3 of 2003.

2. Stay of Proceedings

Under Order 53, the court is empowered to grant a stay of proceedings where the application is for an order of certiorari or prohibition. Where leave is granted to apply for judicial review the court will usually grant an injunction in order to maintain the status quo. Authorities are divided on the scope and effect of the stay in the UK. The Court of Appeal in R v. The Secretary of State for Education and Science, ex p. Avon C.C [1001] 1 QB 558, at 561 where it was held that the term includes executive decisions and process by which the decision was reached and may be granted to prevent a minister from implementing a decision. See also R. v Secretary of State for the Home Department ex p. Muboyai [1992] 1 QB 244. On the other hand the Privy Council in Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies Limited [1991] 1 W.L.R. 500, at 556 where the court held, obiter, that a stay of proceedings is merely an order which puts a stop to the further conduct of proceedings in court or before a tribunal at the stage which they have reached. The object is to avoid the hearing or trial taking place. The position in the UK awaits clarification by the House of Lords.

In Zambia the position R v. The Secretary of State for Education and Science, ex p. Avon C.C., has been followed. In Wynter Kabimba vs. Lusaka City Council and the Attorney General SCZ Judgment No.13 of 1995, the Supreme Court stayed the implementation of the decision by the Minister of Local Government transferring the applicant to another district, until after the hearing and determination of the case on merit. The stay was granted after the Minister had already made the decision to transfer the applicant. The effect of the stay was to stop the implementation of the decision and maintain the status quo until after the matter was determined on merit.
It must, however, be noted that the decision of the Privy Council in *Minister of Foreign Affairs, Trade and Industry v. Vehicles and Supplies Limited* [1991] 1WLR. 550, at 556 was never mentioned in arguments before the Supreme Court. Similarly in *The People v. Minister of Information and Broadcasting Services, ex p Francis Kasoma*, 1995/HP/2959, the court granted a stay of the Minister’s decision to create the Media Council of Zambia. Due to the express prohibition against the issuing of injunctions against the State or public officer, applications for “stay” is the most viable option, if the intention is to maintain the status quo until after the determination of the case on merit.

The principal features of a stay is that, unlike an injunction, it is an order directed not at a party to the application but at the decision making process of the court, tribunal or other decision maker, or administrative body or officer. Again authorities are divided as to the effect of non-compliance with the stay. One view is that an order for stay is not capable of being breached by a party to the proceedings, or anyone else, and may not be enforceable by contempt proceedings. The other view is that a stay is an order of the court breach of which will be punishable as a contempt of court. Although this has never been considered by the court, there is a strong possibility, given the court’s position on the stay, so far, that the courts in Zambia will take latter position on the stay.

In Zambia where an interim injunctive remedy is not available against the state, public officers or Ministers, the stay is an important injunctive interim remedy.

**Activity**

Based on your reading of Zambian cases cited in the module, what are the most awarded remedies by Zambian courts in judicial review proceedings?

**10.4 Unit summary**

The unit has taken you through the various remedies available for judicial review proceedings. The remedies have been discussed with the aid of case law and statutory provisions. This chapter closes the discussion on judicial review of administrative action.
The next two chapter introduce you to some of the non-judicial mechanisms for control of administrative power.

10.5 References and Recommended Readings

Statutes

Order 53 of the Rules of the Supreme Court, 1999
State Proceedings Act, Chapter 71 of the Laws of Zambia

Case Law

Bourgoin SA v Ministry of Agriculture, Fisheries and Food [1985] 3 All ER 545.
Dean Namulya Mung’omba Bwalya Kanyanta Ng’andu and Anti-Corruption Commission v Peter Machungwa Golden Mandandi and Attorney-General SCZ Judgment No. 3 of 2003
Factortame v Secretary of State for Transport [1990] 2AC 85, [1989] All ER692
Jones vs. Swansea City Council [1990] 3 All ER 737, [1990] 1 WLR 1453
R v Metropolitan Police Commissioner ex parte Blackburn [1968] 2 QB 118, [1968] 1 All ER 763
R v Metropolitan Police Commissioner, ex parte Blackburn (No. 3) [1973] QB241
R. v Secretary of State for the Home Department ex p. Muboyyi [1992] 1 QB 244

The People v. The Attorney, ex parte, Derrick Chitala SCZ Judgment No, 14 of 1995
The Minister of Information and Broadcasting Services the Attorney General V Fanwell Chembo & Others SCZ Judgment Number 11 of 2007.

The People v. Minister of Information and Broadcasting Services ex parte Francis Kasoma 1995/HP/2959


Wynter Kabimba vs. Lusaka City Council and the Attorney General SCZ Judgment No.13 of 1995


Books
UNIT ELEVEN
NON-JUDICIAL CONTROL OF ADMINISTRATIVE AUTHORITY

11.0 Introduction
Welcome to Unit eleven of this module. You are almost at the end of this unit. Units six to ten took you through various ways through which courts control the exercise of administrative authority with more emphasis on judicial review as the major way by which the High Court controls the exercise of administrative authority. This unit proceeds to look at control of administrative authority. It introduces you to non-judicial mechanisms for control of administrative authority.

11.1 Unit Aims
The aims of the unit are to:
1. Introduce you to non-judicial mechanisms of control of administrative authority.
2. Identify the role non-judicial institutions in controlling the exercise of authority by public administrators.

You will require at least 2 hours to complete this unit.

11.2 Unit Objectives
By the end of this unit, you should be able to:
1. Identify alternatives to judicial control of administrative authority.
2. Discuss the role of non-judicial bodies in controlling the exercise of administrative power.

11.3 Non-judicial control of administrative power
Activity

1. In your own words, explain what you understand by non-judicial control of administrative power.
2. List examples of mechanisms that you think have jurisdiction to control exercise of administrative power

There are various channels, apart from courts, in which administrative power may be challenged. We are using the phrase “non-judicial” to sum up the various alternatives to court when it comes to controlling the exercise of administrative power. These are sometimes referred to as administrative authorities. Broadly, the alternative also watchdog institutions that are created by the constitution which are clothed with jurisdiction to check the exercise of administrative power, although these are constitutional as opposed to administrative law mechanisms. The type of channel would most of the time be dictated by the relevant statutory provisions giving power to administrative authorities. Non-judicial control mechanisms have a number of advantages against judicial mechanisms which we will consider in further detail below. When Parliament gives power to a public administrator, it often provides for systems of redress to person affected by exercise of administrative power. These include the following:

1. Conferring new jurisdiction on courts;
2. Creating a machinery to resolve disputes or inquire into the maladministration such as creation of tribunals;
3. Leaving authority to the authority with primary responsibility for scheme, such as through internal administrative appeals or requirements for public inquiry before making certain decisions.
4. The Constitution has created autonomous institutions to control exercise of administrative authority e.g. the Human Rights Commission and the Public Protector. These are classified Constitutional mechanisms as opposed to administrative

Let us begin with administrative mechanisms.
11.4 Administrative Institutions

These are administrative mechanisms created by law to control exercise of administrative authority and provide redress to people who are adversely affected by improper exercise of administrative authority.

11.4.1 Administrative Tribunals

Administrative tribunals are bodies or institutions created by legislation to provide redress for disputes arising out of the exercise of power given by law. In Zambia, tribunals are created by various statutes e.g. Lands Tribunal Act, No. 39 of 2010; Tax Appeals Tribunal Act, No. 1 of 2015; Capital Markets Tribunal under the Securities Act, No. 41 of 2016. Some tribunals are functional while others are not.

Tribunals may be permanent or ad hoc. Permanent tribunals are those that are created and operate even when no specific matter is brought before them. Examples of Permanent tribunals include the Lands Tribunal, Tax Appeals Tribunal, and Capital Markets Tribunal. Ad hoc tribunals are not created permanently. They are created as and when need arises to address a specific matter for which they are created. Examples of ad hoc tribunals include tribunals created under the Parliamentary and Ministerial Code of Conduct Act, Chapter 16 of the Laws of Zambia.

Another important distinction to be made concerning tribunals is that some tribunals are created as first instance tribunals. This means that they have original jurisdiction to entertain matter brought before them. A good example of first instance tribunal is Lands Tribunal. There are also appellate tribunals which have jurisdiction to entertain matters on appeal from the decision of the administrator. A good example of an appellate tribunal is the Tax Appeals Tribunal.

The following are the advantages of Tribunals compared to courts
1. Tribunals are usually composed of people who have specialised knowledge in the subject matters that they determine.

2. Tribunals are less formal than courts. They therefore arguably produce flexible and fair outcomes.

3. Tribunals tend to give economical solutions.

4. Flexible procedures

5. There is no monopoly by the legal profession in tribunals. The right of audience is usually liberalised. For example, Section 12 of Inquiries Act states that a person can be represented by counsel or other person.

6. Safeguard is that almost all tribunals are obliged to give reasons for their decisions and their decisions are appealable to court on questions of law.

Several statutes create mechanisms for appeal or review of exercise of administrative authority to a tribunal. For example, decisions of Lands Tribunal are subject to appeal to the Court of Appeal. There is usually a mandatory requirement for fair procedures regardless of nature of hearings. Read the case of *Christopher Lubasi Mundia v Attorney-General (1986) Z.R. 37 (S.C.)*.

**Activity**

Read Lands Tribunal Act and the Tax Appeals Tribunal Act. List the qualifications of each member of the tribunal as prescribed by law. What expertise does each member of the tribunal bring to the respective tribunal?

**11.4.2 Commissions of inquiry**

Another administrative mechanism for control of administrative authority is the appointment of commissions of inquiry under the Inquiries Act, Chapter 41 of the laws of
Zambia. Section 2 of the Inquiries Act empowers the president to appoint a Commission of Inquiry in matters that the president considers of public welfare. Examples of Commissions that have previously been appointed by the president under the provisions of the Inquiries Act include constitutional review commissions, the Legal and Justice Sector Reforms Commission.

Commissions of inquiry operate within the terms of reference issued by the president. Upon completion of inquiry, a recommendation is made to the president who then acts on the recommendation. Commissions enjoy broad powers of investigations in any matter of individual injustice or administrative abuse of power or authority including power to summon witnesses to appear before them. People who appear before commissions can appear in person or through counsel of their choice. On completion of investigation, the Commission submits report to the President who makes a decision. The President is however not bound to follow recommendations of the Commission.

Activity

List advantages and disadvantages of commissions appointed under the Inquires Act against courts in controlling exercise of administrative power.

11.4.3 Appeals to ministers

Some statutes provide for a system of appeals to a minister. Examples of such provisions include section 115 of Environmental Management Act and section 16 of Societies Act, Chapter 119 of the laws of Zambia. If the appeal to the minister is the only mechanism provided by the statute, a person who is not satisfied by the decision of minister can challenge the decision before the court.
11.4.4 Public hearings

Certain laws provide for public hearings as precondition to making of certain decisions. For example, the Environmental Management Act, No. 12 of 2011, Environmental Impact Assessment Regulations No. 28 of 1997, Regulations 8(2) and 10(2) of the Environmental Protection and Pollution Control (Environmental Impact Assessment) Regulations require a developer to ensure that the views of all interested and affected persons are taken into account when preparing an Environmental Impact Statement. See the obiter dicta in *Martha Kangwa & 29 Others v ZEMA & Others SCZ No. 49 of 2014*.

Public hearings are usually conducted so that people who are most affected by the administrative decision have a chance to be consulted on the decision. There is usually an obligation to give reasons as to why views have not been considered. There is often a reserve power to refer the matter to review by the court.

12.5 Constitutional oversight Bodies

Constitutions provide for autonomous oversight bodies to control exercise of governmental power and protect rights of people who may be grieved by exercise of governmental authority. The typical institutions are Ombudsmen and national human rights institutions (NHRIs). The 1974 Resolution of the International Bar Association (ABA) sets out traditional functions of an ombudsman as follows:

An office provided for by the constitution or by action of legislature or parliament and headed by an independent high-level public official who is responsible to the legislature or parliament, who receives complaints from aggrieved persons against government agencies and employees or who acts on his/her own motion and has power to investigate, recommend corrective action and issue reports.

The importance of ombudsman offices is to provide a safeguard to ordinary citizens against
wide discretionary powers of government. Ombudsman offices mainly 2 types: NHRIIs and Ombudsman (Public advocate). Ombudsman offices are effective when they are independent of government interference. The Paris Principles relating to the status of national institutions Competence and responsibilities adopted by the United Nations Human Rights Commission by Resolution 1992/54 of 1992 (Paris Principles) have identified key conditions for effectiveness of ombudsman offices. The key conditions for effectiveness are (i) composed of independent appointee; (ii) members enjoy satisfactory conditions of service; (iii) adequate funding. Let us look at Zambia’s ombudsman institutions in further detail.

11.5.1 Human Rights Commission

Zambia’s Human Rights Commission is established pursuant to Article 230 of the Constitution of Zambia. It was first established in 1996 under article 25 following the 1993 Bruce Munyama Commission of Inquiry into human rights violations under the one party state. The Commission recommended establishment of a permanent human rights commission. According to article 230 of the Constitution, the Human Rights Commission should ensure that the Bill of Rights is upheld and protected. The jurisdiction of the Commission is investigation of human rights violations although it can also investigate instances of maladministration of justice that is of a human rights nature. The Human Rights Commission of Zambia (the Commission) can investigate government and private entities accused of violating human rights.

The functions of the Commission are provided by Constitution and the Human Rights Commission Act, Chapter 48 of the Law of Zambia in section 9 as follows:

a) investigate and report on the observance of rights and freedoms;

b) take necessary steps to secure appropriate redress where rights and freedoms are violated;

c) endeavour to resolve a dispute through negotiation, mediation or reconciliation;

d) carry out research on rights and freedoms and related matters;

e) conduct civic education on rights and freedoms; and
f) perform such other functions as prescribed.

The powers of the Commission are set out in section 10 of the Human Rights Commission Act as follows:

The Commission shall have powers to investigate any human rights abuses-
(a) on its own initiative; or
(b) on receipt of a complaint or allegation under this Act by-
   (i) an aggrieved person acting in such person's own interest;
   (ii) an association acting in the interest of its members;
   (iii) a person acting on behalf of an aggrieved person; or
   (iv) a person acting on behalf of and in the interest of a group or class of persons.

(2) The Commission shall not have powers where a matter is pending before a court.

11.5.2 The Public Protector

The office of the Public Protector is established by article 243 of the Constitution. The office was first established in 1974 as “Commissioner for Investigations” following recommendations by the Chona Constitution Review Commission when transitioning to the One Party State. The office was created by Commission of Investigations Act, Chapter 39 of the laws of Zambia. The powers and procedures for conducting the Public Protector’s work are prescribed in the Public Protector Act, No. 15 of 2016. The following highlights important sections of the Act on powers. Kindly read the full text of the Act.

1. Functions – section 6 of the Public Protectors Act.

Unit Activity
Answer the following question:

1. Using the principles set out in the Principles and on the reading of the legal provisions on office of the public protector, discuss the effectiveness of Zambia’s public protector.
2. Give examples of instances of maladministration that may be investigated by Zambia’s Human Rights Commission.
3. List the advantages and disadvantages of administrative tribunals over courts of law in controlling exercise of administrative authority.

11.6 Unit Summary

This unit has highlighted some of the non-judicial mechanisms for controlling the exercise of administrative authority. The systems were discussed in terms of administrative and constitutional mechanisms. The next unit, which is the final unit focuses on one of the important constitutional mechanisms, namely control by parliament, which is equally important to learn for student of administrative.

11.7 References and Recommended Readings

Statutes

Capital Markets Tribunal under the Securities Act, No. 41 of 2016.
Environmental Management Act, No. 12 of 2011.
Lands Tribunal Act, No. 39 of 2010
Parliamentary and Ministerial Code of Conduct Act, Cap 16.
Public Protector Act, No. 15 of 2016
Inquiries Act, Chapter 41 of the Laws of Zambia.
Societies Act, Chapter 119 of the Laws of Zambia.
Tax Appeals Tribunal Act, No. 1 of 2015.

Case Law

Martha Kangwa & 29 Others v ZEMA & Others SCZ No. 49 of 2014

Books

Other resources
UNIT TWELVE
PARLIAMENTARY CONTROL OF ADMINISTRATIVE AUTHORITY

12.0 introduction
Welcome to Unit twelve of this module. Congratulations for reaching the last unit of the module. In unit eleven, you were introduced to some of the non-judicial mechanisms for control of exercise of administrative authority. In this Unit, we look at Parliamentary control of administrative authority. Parliamentary control is typically a constitutional law function, although it is an important aspect for students of administrative law to engage with. In this unit, we use the term parliament and parliamentary interchangeably to refer to functions performed by the national Assembly and/or Parliament. You are encouraged to read all the resources that are cited and recommended to enable you fully engage with the topic.

12.1 Unit Aims
The aims of the unit are to:

1. Explain the ways by which Parliamentary provides checks on exercise of public power by public administrators.
2. Discuss parliamentary controls of administrative power.

You will require at least 3 hours to complete this unit.

12.2 Unit Objectives
By the end of this unit, you should be able to:

3. Explain the remedies for judicial review;
4. Discuss the common law remedies for judicial review.
Activity

Based on your knowledge of constitutional law, list and explain some of the functions of the National Assembly and Parliament.

12.3 Parliamentary Control of Administrative Authority

As you may recall under the discussion of separation of powers, one of the important features of the separation of powers is a system of checks and balances. Through this system, Parliament performs a key function in controlling executive and governmental power. The controls are principally done in three distinct ways, namely:

1. Oversight on executive functions;
2. Oversight on public spending; and
3. Oversight of legislation

The 3 broad areas are further discussed below.

12.3.1 Oversight over executive functions

In your own words, explain what you understand by executive functions. Can you give examples of executive functions which Parliament checks? Compare your responses with the below discourse.

Parliamentary oversight over executive functions is principally done in 3 ways, namely, through parliamentary questions to ministers, debates in Parliament and Parliamentary Committees.

1. **Parliamentary questions**

Parliamentary questions provide members from all political parties an opportunity to interrogate ministers on current issues and events. The questions provide a useful way in which back benchers can raise their concerns publicly and expect a ministerial answer. The limitations of the process are as follows:
a) The process is only effective when Parliament is in session. The main criticism of the process is that when the Speaker is appointed by President, the scheduling of questions may favour agenda of executive. To improve the effectiveness of the system, it may be necessary for the Speaker to be appointed using a fairly independent procedure and be given mandate the schedule the sittings of parliament.

b) The other limitation of the system relates to conflict of interests between the politicians, namely Members of Parliament (MPs), and the people that they represent. Ideally, recall of MPs are supposed to ask questions on behalf and over and above the agenda of the political parties they represent.

c) The other limitation relates to the competence of MPS to effectively present questions of their constituencies. MPs are supposed to be equipped with the necessary information and skill to effectively monitor exercise of administrative power, including subjects that may be technical. The issue of competence also relates to the representation of minorities such as women, children and people with disabilities who may not be elected as MPs.

2. Parliamentary debates.
Standing orders present an opportunity for debate. Government business tends to take priority. Members can seek the permission of the speaker to hold debates on matters of public importance. The limitations of this process include:
   a) access to information;
   b) willingness of MPs to question the executive about their action or inaction; and
   c) Independence of the Speaker.

3. Parliamentary committees.
These normally comprise all political parties. The principal role of Parliamentary Committees is to oversee key areas of public life such as health and education among others. Parliamentary Committees are composed of MPs possessing certain qualifications
and expertise relevant to the Committee’s mandate. The Committee can also summon experts on matters of concern. Limitations of this process of control include:

a) Limited access to information;

b) Committees may not address individual grievances resulting from maladministration;

c) Lack of expertise by members.

Activity

Discuss the various systems of control that Parliaments employs to provide checks on exercise of executive functions

12.3.2 Oversight over Public Spending

National Assembly provides oversight over public spending in a number of ways. First, MPs approve expenditure through enactment of Finance Control and Management Act. Parliament also approves annual budget bills through enactment of Appropriation Acts. Additional expenses are approved through enactment of Supplementary Appropriation legislation. The ideal situation is avoid supplementary budgets so that the Appropriation Act is comprehensive. Supplementary appropriation should only be accepted in matters of emergency.

Another way by which National Assembly controls exercise of administrative authority is through the Public accounts committee. The Public Accounts Committee ensures that public expenditure is in line with the approved budgets. The Auditor General submits a report to Parliament for its scrutiny. Administrators are called to appear before the public accounts committee to answer queries on their spending based on the Auditor General’s report.
The limitations on effective exercise of this control function include:

a) Lack of or limited expertise of members;
b) Inadequate publicity;
c) Corruption; and
d) The lack of transparency in procurement processes.

12.3.3 Oversight over Legislation

The vast majority of laws are government inspired. Members should debate bills and approve them. The following are some of the limitations on the effective control over legislation by the National Assembly:

a) Limited access to information;
b) Limited or lack of expertise in appreciating effects of the bill on rights – partnership with NHRI could be useful.
c) Limited opportunities to introduce private members bills.
d) Inadequate research facilities and capacity.
e) Lack of independence by parliamentarians in the absence of strict provisions on floor crossing.

In conclusion, you will note that National Assembly can provide useful checks on exercise of administrative authority when its limitations are well noted and minimised.

Unit activity

1. Discuss the main ways by which parliament provides check on exercise of public power.
2. What are some of the limitation to the effective provision of control by Parliament?
12.4 Unit Summary
This unit has discussed the main ways through which Parliament exercises control over exercise of administrative authority. The unit sums up the course module on administrative law.

12.5 References and Recommended Readings


Books

Other resources
MODULE SUMMARY

This module has given an introduction to administrative law in Zambia. It began with a discussion on the administrative process in Zambia, definition of administrative law, the relationship between administrative law and constitutional law in Zambia, sources of administrative law and key concepts in administrative law. It then proceeded to discuss the scope of administrative law in Zambia and the concept and processes of judicial review in Zambia. It concluded by discussing the judicial and non-judicial mechanisms for control of administrative action in Zambia. The module identified various methods by which courts control or check the exercise of administrative authority. More attention was given to judicial review of administrative authority as the principal method for judicial control of administrative authority under the common law. The module ends with a discussion of non-judicial mechanisms for control of administrative authority, including control mechanisms established by the constitution.