Commonwealth Workshop on
ACCOUNTABILITY, SCRUTINY AND
OVERSIGHT
Canberra, 23 – 25 May 2001

Accountability Mechanisms : Judicial Checks
On Government

by
Cyrus V. Das*
President,
Commonwealth Lawyers Association

Introduction

A noticeable feature of government in the 20\textsuperscript{th} century has been its growth and size. The development of the welfare state in the west and the birth of the new Commonwealth with governments geared towards a controlled or socialist economy, were largely accountable for this factor. An adverse by-product of this development has been the all intrusive nature of government. It today penetrates almost all aspects of life. Governments cannot be ignored by any individual even if one retreats to the mountains.

In the result, the quest for a return to limited government is gaining popularity as a political philosophy. Meanwhile, the means and methods of keeping governments in check and accountable for their decisions continues to be an engaging concern.

The challenge from a judicial standpoint was well stated by the late Lord Denning. He was one of the early judges to address this issue. In the first of his post-retirement books\textsuperscript{1} he said:

\textit{“In the present century the Government has concerned itself with every aspect of life. We have the Welfare State and the Planned State. The Government departments have been given much power in many directions. They set up tribunals and inquiries. They exercise...”}

\textsuperscript{*} LLB (Hons) PhD., Past President Malaysian Bar Council
\textsuperscript{1} The Discipline of Law (London), 1979, Butterworths. There was, of course, earlier, Lord Hewart's, The New Despotism (1929, London) that spoke of the increasing bureaucratic powers of government.
unfettered discretion. They regulate housing, employment, planning, social security, and a host of other activities. The philosophy of the day is socialism or collectivism.

But whatever philosophy predominates, there is always a danger to the ordinary man. It lies in the fact that all power is capable of misuse or abuse. The great problem before the Courts in the 20th century has been: In an age of increasing power, how is the law to cope with the abuse or misuse of it? It was nearly 30 years ago that I said at the end of my little book Freedom under the Law:

Our procedure for securing our personal freedom is efficient, but our procedure for preventing the abuse of power is not... Let us prove ourselves equal to the challenge.6

In June 1998, representatives of various Commonwealth auxiliaries3 met at Latimer House, Buckinghamshire for a colloquium on the principles of good governance based on the Harare Declaration. The result was a set of guidelines, now called the Latimer House Guidelines for the Commonwealth4 on good practice governing relations between the Executive, Parliament and the Judiciary. The Guidelines have since been endorsed by the Chief Justices of the Commonwealth at their biennial meeting in Edinburgh in September 2000. It is presently under consideration by the Commonwealth Ministers of Law before being submitted to CHOGM for formal endorsement. In dealing with executive accountability (see Part VI),5 the Guidelines have recommended that “Commonwealth governments should endorse and implement the principles of judicial review enshrined in the Lusaka Statement on Government under the Law”.

The doctrine of judicial review, adverted to in the Guidelines, is the single most important judicial method by which the executive government is made accountable for its decisions. Judicial review has seen a remarkable development over the last three decades, both in the United Kingdom and elsewhere in the Commonwealth, leading an English judge to describe it as the greatest achievement “in his judicial lifetime”.6

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2 Ibid, at pp.61-62.
3 Commonwealth Lawyers’ Association, the Commonwealth Legal Education Association, the Commonwealth Magistrates’ and Judges’ Association and the Commonwealth Parliamentary Association.
4 The proceedings of the colloquium have since been published: see Parliamentary Supremacy And Judicial Independence: A Commonwealth Approach Ed. John Hatchard and Peter Slinn (Cavendish Publishing Ltd, London, 1999)
5 Accountability of the Executive to Parliament: Parliamentary procedures should provide adequate mechanisms to enforce the accountability of the executive to parliament. These should include:
   (i) a committee structure appropriate to the size of Parliament, adequately resourced and with the power to summon witnesses, including ministers. Governments should be required to announce publicly, within a defined time period, their responses to committee reports;  
   (ii) standing orders should provide appropriate opportunities for members to question ministers and full debate on legislative proposals;  
   (iii) the Public Accounts should be independently audited by the Auditor General who is responsible to and must report directly to parliament;  
   (iv) the chair of the Public Accounts Committee should normally be an opposition member;  
   (v) offices of the Ombudsman, Human Rights Commissions and Access to Information Commissioners should report regularly to parliament.
6 See Lord Diplock in R v. IRC exparte Small Businesses Federation (1982) AC 617 @ 641.
We may now look briefly at the functioning of judicial review as an accountability mechanism.

**Scrutiny of Administrative Action**

Judicial review of administrative action is concerned with the right of a person, whether citizen or not, to challenge and question governmental decisions adversely affecting him. It could be under any of the wide variety of circumstances in which governments make decisions affecting the rights of persons, ranging from matters relating to life and liberty down to the ordinary licensing cases involving livelihood.

The past decade has seen the Courts of the Commonwealth innovating new juristic technics to advance the doctrine of judicial review. The cases dealing with them are too numerous to enumerate or discuss in this paper. However, the general approach to judicial review is now compendiously set out under three broad headings (by no means exhaustive) and possibly a fourth. These headings are: (a) illegality, (b) irrationality, (c) procedural impropriety, and the possible fourth being (d) proportionality.  

Today, these are the general grounds on which the executive decision-maker is called to account or explain any decision he has made which is challenged in the Courts. The fourth ground, of proportionality, is in practice absorbed under the heading of "irrationality" although there is considerable opinion that it should stand on its own. However, a distinct ground has always been "bad faith" or "mala fide".

On the first ground of "illegality", it is incumbent on the decision-maker to satisfy the Court that the decision he took was one that he is entitled to take as being authorised by law and that in making the decision he has not gone outside the parameters set for him by the statute. If he exceeds his limits, his decision becomes illegal as one that is made without jurisdiction or authority. This principle is a powerful weapon in the armoury of the courts to ensure that government keeps within its limits in decision-making.

The second ground of "irrationality" comes into play where the decision-maker although acting within the limits confided in him by law makes a decision which is so unreasonable and in defiance of logic that it is assumed that he had failed to take into account relevant factors or had taken into account irrelevant factors in arriving at his decision. In such cases the Court will hold that the decision-maker had not made a decision contemplated by the statute under which he had acted and set it aside.

Under the third head of "procedural impropriety", the Courts hold that it is important that the decision-maker observes procedural fairness towards the

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7 See Lord Diplock in Council of Civil Service Unions v. Minister for the Civil Service (1984) 3 All ER 935 @ 950.

8 See Lord Greene in Associated Picture House Ltd v. Wednesbury Corporation (1947) 2 All.E.R. 680 at 682: "Bad faith dishonesty - those of course, stand by themselves".
person who will be affected by the decision. This in most cases brings into play the classic rules of natural justice, namely, that the person affected must be given an opportunity to make representation unless that right has been clearly excluded by statute. Secondly, a right not to have the decision made by a person who is likely to be biased towards him. More recently, the courts have evolved the doctrine of legitimate expectation as a basis for the right to be heard. Thus, for example, where there are a class of persons who are likely to be affected adversely by a change in government policy, they have a right to be heard if under the pre-existing policy there was a reasonable expectation of a hearing before a decision was made.\(^9\)

As an adjectival rule to the above, there is often now implied a duty on the part of the decision-maker to give reasons for his decision although the statute under which he acts may be silent on the question. There are several reasons why this duty is justifiably implied. They are discussed in an informative article by the Indian Attorney General on the subject. He encapsulated the rationale behind this development as follows:

"In the first place, a duty to give reasons entails a duty to rationalize the decision. Reasons therefore help to structure the exercise of discretion, and the necessity of explaining why a decision is reached requires one to address one's mind to the relevant factors which ought to be taken into account. Secondly, furnishing reasons satisfies an important desire on the part of the affected individuals to know why a decision was reached. Basic fairness requires that those in authority over others should tell them why they are subject to some liability or have been refused some benefit. Thirdly, rational criticism of a decision may only be made when the reasons for it are known. This subjects the administration to public scrutiny and it also proves an important basis for appeal or review. Above all, giving of reasons enables courts and tribunals to effectively and meaningfully exercise their appellate or supervisory powers."\(^10\)

**Scrutiny of Legislative Action**

A downside of the Westminster system is the inadequacy of the checks and balance mechanism. In practice, the executive authority effectively controls the legislature from which it is drawn. In cases where there is an overwhelming majority by a single party in the legislature, the absence of any control on government through the legislative mechanism is patently obvious. The term "elective dictatorship" was used by a distinguished English Judge to describe the untrammeled power of Parliament and the Executive in those circumstances. He said:

"(A) principal cause of its (i.e. freedom's) impairment has been, in truth, the absolute legislative power conferred in Parliament, concentrated in the hands of a government aided with a Parliamentary majority, briefed and served by the professionalism of the Civil Service, and given a more than equal chance of self-perpetuation by the adroit use of the power of dissolution. When such a government is indoctrinated with the false political doctrine of mandate and manifesto, or

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when it is perpetuated in office until a suitable moment for dissolution occurs by an unprincipled bargain by another party equally threatened with electoral defeat, the expression 'elective dictatorship' is certainly not a contradiction in terms, though it may contain an element of warning of where we are tending rather than statement of despair at where we have arrived.\(^{11}\)

In those circumstances, judicial control of legislative action or of the constitutional steps purportedly taken by government, is the only alternative. It is less apparent in countries that practice the doctrine of parliamentary sovereignty but very effective in countries that have adopted the doctrine of constitutional supremacy, namely, that all legislative steps and constitutional action must conform to the yardstick of a superior legal document which is the Constitution of the nation. Most of the new Commonwealth countries of the post-colonial era have opted for the latter system as their grundnorm. This has accordingly enabled the Courts of these countries, if so disposed, to undertake judicial surveillance of legislative action. The methodology employed is through the doctrine of ultra vires. The courts are obliged to respect the proper role of Parliament as the lawmaker but reserve the right to determine if the law made by Parliament, when challenged, conforms with the Constitution. If it does not, the law or so much of it that violates the Constitution is struck down. It is an enormous power exercisable by the courts and remains, as will be discussed below, the principal reason for the Executive's disenchantment with the Judiciary in many countries.

Examples of the exercise of this power by the Commonwealth courts are legion, but a few examples would suffice. Thus, for example, if the central legislature in a federal structure purports to enact a law properly reserved to the state or the provincial legislature, the law would be struck down as an unauthorised trespass.\(^{12}\) Alternatively, if the Constitution had stipulated the conditions for law-making, it will not be open to the legislature to ignore it. A law in defiance of such condition would be declared invalid.\(^{13}\)

On the subject of scope of the legislative power, an important question has been the extent of the amending power of the legislature itself as regards the Constitution that established it. The methods by which the written Constitutions of the Commonwealth countries may be amended or altered vary from country to country. In a few like Australia, the method is by way of popular referendum, but in most it is done by an act of the legislature itself usually with a weighted majority as a condition before the measure is said to have passed muster. The essential question is the extent to which the legislature may amend the Constitution as to alter it from its original theory. The best treatise on this subject emanates from the Indian Supreme Court in what is popularly called the **Fundamental Rights** case\(^{14}\) which held by the process of implication that the amending power of Parliament does not extend to amending the Constitution by altering its basic features. These features were identified as, supremacy of the Constitution; republican and democratic form of government; its secular

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character; the separation of powers of the organs of government, and its federal character.\textsuperscript{15} The decision is a remarkable case of judicial activism which effectively limits the seemingly unlimited power of Parliament to amend the Constitution.\textsuperscript{16}

Another important aspect of judicial scrutiny is the review of governmental action taken in the sphere of delegated legislation or what is conveniently called executive law-making. An insistence that executive law-making takes place strictly under the conditions provided for it ensures that this important power, which in reality is a legislative power, is strictly kept in check.\textsuperscript{17}

**Scrutiny of the Police Power of the State**

A significant development of the last few decades has been the growth of a strong human rights jurisprudence by the Courts of many Commonwealth countries. Admittedly it is stronger in some countries than others. But it has been aided considerably by two factors. The first is the adoption by many of the newly emergent countries of the post-colonial era of a written Constitution which is declared to be the supreme law of the land. Secondly, the incorporation within the written Constitution of a Bill of Rights which guarantees to the individual certain fundamental human rights. Since coercive action against the individual is nearly always taken by the executive in the name of the State, it is left to the judiciary to hold the line between justifiable action and an abuse of power. In the hands of a strong judiciary, mindful of its role as the bulwark between the citizen and the state, these fundamental guarantees become a reality, but in the hands of a weak judiciary subservient to the might of the Executive, the promise under a bill of rights remains illusory.

It is not possible under present constraints to make a survey of the performance of the various Commonwealth Courts in the defence of fundamental rights. However, the steps taken in this regard by the Indian Supreme Court are noteworthy and may be cited by way of illustration. In a slew of cases, the Indian Supreme Court has declared for the rights of an accused person under a variety of circumstances, of which some examples are the right to legal aid,\textsuperscript{18} protection against custodial violence\textsuperscript{19} or any form of physical mutilation\textsuperscript{20} or the handcuffing and parading of under trial prisoners.\textsuperscript{21}

A further point may be noted. In the discharge of its legal role as the guardian of the written Constitution, the Indian Supreme Court has recognised that often those whose rights are denied are ignorant of it or otherwise do not have the means to assert their rights. In an innovative development, the Indian

\textsuperscript{15} The categories of basic features have been enlarged incrementally in subsequent cases eg. to include the right to free elections: Indira Gandhi v. Raj Narain \textit{AIR} 1975 SC 2299.

\textsuperscript{16} The doctrine has been adopted by some Commonwealth countries and rejected in others: see G. Morgan, \textit{The Indian Fundamental Rights} case (1981) 30 ICLQ 307.

\textsuperscript{17} See the Privy Council in Teh Cheng Poh v. Public Prosecutor (1980) AC 458.

\textsuperscript{18} Hoaskot v. State of Mahastra \textit{AIR} 1978 SC 1548.


Supreme Court has given redressal in a class of cases called “public interest litigation” where the traditional rules of locus standi and of formal pleadings before the Court have been discarded in favour of mere notice to ignite the jurisdiction of the Court to take action. The purport of this innovation has been aptly summarised as follows:

“Public interest litigation has been fashioned by the Indian courts in the context of the violation of the human rights of those people who are unable, for various reasons, to move the courts for a redressal of their wrongs. Such groups can be the poor, economically disadvantaged, or those socially disadvantaged or handicapped including women, who are unable to move the court or who cannot afford the cost of legal services. Often these groups do not know how to set the system of justice in motion. The courts have been moved by others – whether they are social workers, journalists, law teachers or social welfare organisations, for the benefit of such disadvantaged groups. Public interest litigation was thus permitted to secure the release of bonded labourers, for the welfare of inmates of special institutions like mental asylums; for securing the rights of undertrials and other prisoners, and even of destitute children, and so on. Procedural requirements have also been relaxed when required.”

It may be noted, since we meet here in Australia, that the absence of a fundamental rights chapter in the Australian Constitution has not deflected the Australian Courts from giving recognition to these rights in an effective way where they stand violated whether it be freedom of speech or of the right to equality or freedom of the person. Various approaches have been taken to achieve this result the most notable being the implied fundamental rights theory.

The approach of these Commonwealth courts illustrate the important role played by the judiciary in ensuring executive accountability where fundamental rights are violated by coercive state action.

Limitations on Judicial Review: The Executive Strikes Back

The judicial review function of the Courts is understandably much criticized by the Executive as an unwarranted interference with the due administration of the State. The argument is age-old and founded on the anti-majoritarian principle that judges being unelected officials should not exercise such an awesome power to set aside laws enacted by the elected representatives of the people. The argument reflects a considerable misunderstanding of the judicial function in a democracy. An appropriate riposte was given by the former Chief Justice of India, P.N. Bhagwati as follows:

“The argument has been that in a bona fide democracy, the majoritarian rules should prevail and that the majoritarian government would become a hollow shell, if a duly elected, legally constituted body of the people’s representatives is denied the right and the ability to respond to the people’s majoritarian wishes as expressed by their representatives. Why should an undemocratically constituted body of judges, who are not responsible to the people through the

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22 See Justice Sujata V. Manohar, The Indian Judiciary and Human Rights in Democracy Human Rights and the Rule of Law, supra, note 10 at p.150.
23 See for example, Australian Capital TV Pty Ltd v. Commonwealth (1992) 177 CLR 106.
A disturbing trend against judicial intervention has been the attempt by the legislature to protect or immunize executive decisions from any challenge in court by the enactment of “ouster clauses” or what is generally called “privative clauses” in administrative law. The attempt continues notwithstanding the Anisminic decision in 1969 that such ouster clauses do not completely exclude judicial review of decisions which are made in error of jurisdiction or in breach of natural justice. A typical ouster clause would say that the decision “shall not be called in question in any court of law”. A nisminic had decided that a decision in error of jurisdiction is not a real decision and therefore not protected by the ouster clause.

However, it is not uncommon today for ouster clauses be drafted more widely to overcome the Anisminic decision. A typical clause would read that the decision “shall be final and conclusive and shall not be challenged or called in question in any court” or alternatively that “no court shall have jurisdiction to entertain or determine any application, question or proceedings in whatever form on any ground”. The ouster of judicial review in a literal sense seems complete. Often such widely worded ouster clauses are found in preventive detention laws or emergency laws that give wide powers to the Executive. The legislative intent is very clear and some courts find they have no alternative but to give effect to the terms of the statute. For example the Nigerian Supreme Court in Wang & Others v. Chief of Staff Supreme Army Headquarters, Lagos ruled that an ouster clause in a military decree effectively barred legal proceedings, with the Chief Justice lamenting that “on the question of civil liberties the law courts of Nigeria must as of now blow muted trumpets”.

It is submitted that a passive approach to ouster clauses, in the face of important executive decisions they invariably seek to protect, is unjustifiable. A robust approach is called for in full appreciation of the proper role of the courts. In the words of Mason J. (as he then was) of the Australian High Court

25 Anisminic Ltd. v. Foreign Compensations Tribunal (1969) 2 AC 147.
26 (1986) LRC (Const) 319.
27 Ibid at 330
“notwithstanding the wide and strong language in which these clauses have been expressed, the courts have traditionally refused to recognise that they protect manifest jurisdictional errors or ultra vires acts”. Likewise the approach of the Indian Supreme Court is to refuse to give literal effect to an exclusion clause even if it seeks to protect a decision of the Head of State; if the decision is based on grounds which are absurd or perverse or mala fide or is a wholly extraneous and irrelevant ground, the decision has been held to be impugnable.

Conclusion

Judicial review has sometimes been provocatively termed “government by the judiciary”. As stated it is much criticised by the executive branch of government, but alternatives are limited if non-existent, and it would not be acceptable that the executive audit itself or be its own ombudsman.

Judicial review is even more significant in new democracies where accountability is not an assured thing. In closing we may look at what Justice Enoch Dumbutshena, the late Chief Justice of the Zimbabwe Supreme Court had to say of its importance:

“Let me say this: a regime of laws that guarantee justice, does not necessarily prevent those judges who are executive minded from believing that the executive is supreme. The Zimbabwe situation has shown that some judges believe that they owe their existence to government and refuse to do anything that might disappoint the government.

Yet it is important for the sustenance of the rule of law for the executive and the legislature to subordinate themselves, like any other body, to the authority of the law. Judicial review of administrative actions brings impulsively the government and its various organs before the discipline of the law. The government justifies its actions in the courts of law.”

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29 See Minerva Mills Ltd v. Union of India AIR 1980 SC 1789.