



# Judicial Review as the Tool to Uphold Rule of Law: Exploring its Conceptual Nucleus.

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## ABSTRACT

In any democratic society, rule of law is a crucial tool to maintain good governance. Ethiopia is striving to build democracy and rule of law. To that effect, it has promulgated different laws and policies in the past decades. It has enacted its first federal constitution in 1995. The Federal Democratic Republic of Ethiopia (FDRE) constitution in its preamble clearly provides that maintaining rule of law is one of the basic goals that the Ethiopian Nation Nationalities and Peoples strive to pursue. Even if different factors (for example such as culture and level of development) explain democratic and rule of law based society, role of vibrant judiciary (judiciary that actively supervise public authorities) is paramount. Conventionally, judicial organ is one of the three organs of government to which the power of interpreting the law is given. In Ethiopia too, the judiciary is made the ultimate law interpreter thereby maintain rule of law and good governance. So as to perform such an act, the judiciary should exercise its inherent power of judicial review.

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## 1. Introduction

In the modern world, establishment of administrative agencies has become a normal trend and the number of these agencies is rising in a drastic manner. In most of the time, administrative agencies are created to accomplish a certain legally defined act/government policy. Inherently these administrative organs have the power of execution of policies underlined in legislations. However, through delegation they are also equipped with the power of legislation and quasi-adjudication. While the accumulation of these three powers in one organ makes it to be flexible enough to make the appropriate decision, the accumulation of the three powers in one organ is also taken as contrary to the principles of modern government and considered a potential for governments to be autocrat and a threat to individuals' right.<sup>1</sup>

Together with other mechanisms, judicial review is designed as a response to this trait in order to make sure that public bodies exercise their powers within the bounds of the law. As indicated already, states may deploy different mechanisms by which they control the manner of exercise of public authority such as: human right institutions, media, control by parliament, executive control and control by administrative tribunals. The choice of institutional mechanism by states vary for different factors the discussion of which is beyond the scope of this article. But, common to all modern democracies is the empowerment of the regular courts to examine validity of administrative actions in light of their legality.<sup>2</sup>

The article covers discussions on the meaning and scope of judicial review, significance, grounds and limitations of judicial review.

While the scope of judicial review varies across jurisdictions, mainly the major patterns will be elaborated in the article. The journal article is confined to analysis of review of legality of administrative actions by ordinary courts.

## 2. Meaning and scope of judicial review

Like other legal concepts there is a difficulty in having a universally accepted definition of judicial review. Such a difficulty, one can attribute to the variations in legal systems of the rationality to utilize judicial review, variations in institutions with such power and the scope of the power when it is granted to ordinary courts. However, we can mention some often cited definitions of the concept for at least minimum clarity of the nature of the concept at operational level. In the new Encyclopedia Britannica, judicial review is defined as

"[T]he power exerted by the courts of a country to examine the actions of the legislative, executive and administrative arms of the government and to ensure that such actions conform to the provisions of the constitution"<sup>3</sup>

This definition takes the broader scope of power of courts to review governmental action against given state constitution. Courts can declare all kinds of acts of all branches of governments unconstitutional. But, the practice of judicial review in many jurisdictions includes examination of administrative actions based on other different grounds such as legality and reasonableness.

<sup>1</sup>(52VUKAN KUIC, Law, Politics, and Judicial Review in THE REVIEW OF POLITICS 270 (Cambridge University PressNo. 2,1990) 265-284)

<sup>2</sup>Ibid

<sup>3</sup>THE NEW ENCYCLOPEDIA BRITANNICA (15th ed., 1986).

Other points worth considering can also be identified from this conception of judicial review. Exclusion of Review of decision of lower courts by higher courts from judicial review proper is one important point.

Furthermore, this definition recognizes only the exercise of judicial review by courts. However, experiences of countries show us that reviewing on constitutionality ground can be conducted by other organs. For example in France, judicial review on constitutionality ground is the task entrusted to the constitutional council which is more of a political organ than a court. In the same manner, in general, in Ethiopia also interpreting all constitutional issues is given to a political organ known as The House of Federation while reviewing on other grounds left to courts.

We can also find other different, but related definitions. For instance in the United States, judicial review refers to the power of a court to review the actions of public sector bodies in terms of their lawfulness, or to review the constitutionality of a statute or treaty, or to review an administrative regulation for consistency with a statute, a treaty, or the Constitution itself.

In the United Kingdom, the term judicial review refers to the power of the judiciary to supervise the activities of governmental bodies on the basis of rules and principles of public law that define the grounds of judicial review. It is concerned with the power of judges to check and control the activities and decisions of governmental bodies, tribunals, inferior courts etc.<sup>4</sup>

From these two definitions, one can easily identify the scope of judicial review. While the scope of the judicial power to control governmental bodies in United States is wider as it includes examining constitutionality of activities of all governmental organs, the scope of the same in United Kingdom is limited to review legality of governmental organs in light of legislations. This leads us to classify judicial review as statutory review and constitutional review as envisaged by many literatures.

### 2.1. Its Difference from Appeal and/or Merit Review

In terms of purpose and scope, merits review of an agency's decision is different from judicial review (technical review). The purpose of merits review action is to decide whether the decision which is being challenged was the 'correct and preferable' decision. If not, the reviewing body can overrule such decision and substitute it with a new decision it deems 'correct and preferable' under the given circumstance.<sup>5</sup> The issue in merits review is to test whether decision complained is 'right or wrong'. The process of merits review will typically involve a review of all the facts that support a decision. Merits review is said to be the responsibility of the executive, because the person or tribunal conducting the review 'stands in the shoes' of the original administrative decision maker. If the reviewing body would make a different decision, then that decision will be substituted for the original decision. As practices of different countries indicate, the power to conduct merits review of an agency's decision may be conferred to a court (in the form of appeal), a special tribunal, or a general administrative tribunal.

As a result, appeal to court is statutory in a sense that courts can examine administrative decisions by way of appeal if such power is expressly vested to the reviewing court by specific law.

The fundamental principle of judicial review is that "all power has its limits," and when administrative decision-makers act outside of those limits, they may be restrained by the judiciary<sup>6</sup>. From this follows that judicial review is a technical review in that while reviewing an agency's decision, the court is concerned with the legality or illegality of the decision under review. If the court finds out the decision is legal, it will not do anything on it even if the decision deems incorrect in terms of preference. But if the court finds out the decision against which review is sought is illegal or ultra vires, it can set it aside and order the concerned agency to reconsider the decision based on the directions of the court. The reviewing court does not substitute its own new decision in place of an agency's invalidated decision on account of illegality. So, compared to merit review, judicial review does not prevent wrong decisions; it, instead, prevents them from being made unjustly. It does not matter whether the judge who is reviewing the decision would himself or herself has arrived at a different conclusion to the administrative decision-maker. The decision will only be interfered if there was some illegality in the process by which it was made. The jurisdiction of the court is confined to quashing the decision and remitting the matter back to the original decision-maker for determination in accordance with the law. This may not always be satisfying- either for individual judges or for the party seeking relief- but it is often unfairness in the making of a decision, rather than the decision itself, that causes people the greatest distress<sup>7</sup>.

It is also good to clear the confusion that exists between appeal and review of the decision of administrative agencies. Even if both appeal and review are external remedies available to rectify possible mistakes of the administrative agencies in their decision making, the sources of power of courts in the two are different. judicial review is in most legal systems taken as constitutional right of citizens to present their case to the court of law in case their right is infringed by the administrative agencies<sup>8</sup>. even though agency establishing laws or other relevant law can expressly exclude judicial review of certain administrative acts, the conventional rule is that silence of such laws on the issue of judicial review do not practically preclude courts from examining challenged administrative actions. On the other hand, appeal on the decisions of the administrative agencies is taken as a statutory right<sup>9</sup>. Meaning; appeal is only possible when a statute provide for the existence of such remedy. So, as mentioned here in above, while the base of judicial review in modern democracies is constitutions, appeal is statutory in nature.

<sup>6</sup>Ibid

<sup>7</sup>Justice Peter McClellan, p.4

<sup>8</sup>Louis L. Jaffe, *Judicial Control Of Administrative Action* (Little Brown and Company Boston, Toronto, 1965, p 74

<sup>9</sup>Erry L. Mashaw, Richard A. Merrill And Peter M. Shane, *Administrative Law, The American Public Law System: Cases And Materials* 816(3rd Ed., West Publishing Co., 1992), p 786

<sup>4</sup>D. Longley, and R. James (1999), *Administrative Justice: Central issues in UK and European Administrative Law*, (Cavendish Publishing Limited, UK), p. 105

<sup>5</sup>Cane Peter, *administrative tribunals and adjudication*, oxford: publisher, 2009, p.4

## 2.2. Significance of judicial review

*"Judicial review can be characterized as the rule of law in action..."<sup>10</sup>.*

*Rule of law in action can be understood as every member of society including different branches of government bound to act in accordance laws of the society including their higher laws.*

Before starting discussion of specific significances of judicial review, it is worth mentioning that there are different arguments in favor of and against judicial review. Though many consider judicial review an enforcement of rule of law which in turn helps societies protect individual rights against governmental violation, there is also a wide range of criticism against such judicial function. Most arguments against judicial review of governmental actions particularly against their constitutionality emanate from undemocratic bases of power of judges to overrule popular laws and policies and amendment of constitutions undemocratically by unelected judges over time.<sup>11</sup> But, despite such contentions, many modern states have continued using courts to supervise particularly actions of administrative agencies with different attending significances. These are discussed below.

### 2.2.1. Judicial review as an element of rule of law

Rule of law understood as strict compliance to law by all segments of societies can be enforced by different mechanisms such as: parliamentary control of executive bodies and their agencies, control by media, control by human right institutions and judicial control.etc. of the different mechanisms of control of administrative agencies, judicial review is regarded as one important element. In one case, function of judicial review was described as:

Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by the law and the interests of the individual are protected accordingly.<sup>12</sup>

This is to say that judicial review insures that those who exercise executive and administrative power must be subject to the law to the extent individuals affected by their actions subject to law. It then follows that, within the limits of their jurisdiction and consistent with their obligation to act judicially, courts should provide whatever remedies are available and appropriate to ensure that those possessed of executive and administrative powers exercise them only in accordance with the laws which govern their exercise. And this guarantees executive bodies and their agencies exercise their power to promote public interest so that individual rights or interests can only be touched on for a greater benefit. It also forces public bodies to implement public interest without affecting individual rights in case of possibility. This way, judicial review can also promote good governance. To the extent that the courts are impeded from exercising judicial review of administrative decisions, the rule of law is

negated.<sup>13</sup> It has now become a strongly held view that judicial review forces care

### 2.2.2. Judicial review as a measure of accountability and individual rights

Theoretical discussions and practices of different jurisdictions also show that judicial review in addition to determining the content and scope of application of rule of law can function to promote a measure of accountability particularly on part of decision makers and reviewers of the same decisions at the executive and administrative level.<sup>14</sup> It has now become a strongly held view that judicial forces care in administrators and reviewers in their adjudicative process.<sup>15</sup> The point in this case is that by encouraging independence and integrity of administrative decision makers, judicial review forces them to not toe a particular policy line and not succumb to political pressure to decide in a particular way, but contrary to the public interest. This is because, a decision maker who knows that his/her decision is subject to crucial review by independent institution will not have a courage to pass decisions contrary to policy goals of a given law. This places decision makers in the administration in an institutional pressure to maintain their integrity to serve the public. The court by way of review also offer security to those who honestly attempt to make findings on facts and the law as presented no matter what political actors expect them to decide. Possible sanctions against those tempt to decide arbitrarily or on the basis of irrelevant considerations as the result of judicial review thus serves as a measure of accountability.

Administrative decisions on the basis of irrelevant considerations of facts or in violation of policy goals of relevant laws can be given for different reasons. Pecuniary interest or personal bias of the individual decision maker or external pressures from higher-ups can be the reasons.

In Ethiopia, taking the increasing tendency of rent seeking on part of the public( as the government admits), where people in public office have showed a tendency of using public power for their personal gains, judicial review can help a lot in at least reducing the intensity of the problem. Though it is not the only institutional solution for the recurrent problem of accountability- an element of good governance, judicial review can still help the country in general and the region under study in particular to establish the culture of accountability in the public sector at least over time.

In developmental state literatures, we find that states pursuing developmentalism requires a meritocratic and autonomous bureaucracies which play a leading role to guide the direction and pace of development of their countries.<sup>16</sup> Autonomy of the bureaucracy is both from political and narrow group interest pressures. This demands an institutional mechanism which offers honest bureaucrats a security of their autonomy in their decision making process and sanctions

<sup>10</sup>Amy street, judicial review and the rule of law, judicial reform discussion paper, published by( the constitution society, London, 2013, p12.

<sup>11</sup>Frederick F.Blachly and Miriam E. Oatman, some consequences of judicial review, Brookings institutions, Washington D.C. 1929, P501-511, P 501

<sup>12</sup>Church of Scientology v Woodward (1982) 154 CLR 25, 71 per Brennan J.

<sup>13</sup>The Hon Sir Gerald Brennan, 'The Mechanics of Responsibility in Government' (1999) 58(3) Australian Journal of Public Administration 3- 9.

<sup>14</sup>Mary Crock, 'Privative Clauses and the Rule of Law: The Place of Judicial Review Within the Construct of Australian Democracy, in S Kneebone (ed) Administrative Law and the Rule of Law: Still Part of the Same Package?, Australian Institute of Administrative Law, 1999, 57, 80

<sup>15</sup>Ibid

<sup>16</sup>Chalmers Johnson, supra note 2

those who tend to abuse their institutional autonomy/captured by particularistic interests. And as mentioned above, though judicial review is not the only mechanism to do so, it still can have paramount significance in consolidating capacity of the state bureaucracy.

Added, judicial review is also regarded as the best means for individuals to protect their rights and get enforced them in case of violation.<sup>17</sup> In modern time, government is the sources of many benefits. This is particularly true in states where governments make large amount of intervention both to speed up development and decide the distribution and redistribution of resources.<sup>18</sup> What follows is that individual's right to review of decisions in relation to the administration of those benefits (distribution and redistribution of resources/benefits) is as important as the entitlement to bring an action in the courts to enforce a right against a fellow citizen. Taking the relative accessibility of courts to citizens compared to other institutions devised to control public administration, this function of courts is of greater importance.

### 2.2.3. The function of consistency and precedence

It is a well-known practice in many jurisdictions that administrative tribunals are among institutions that review decisions by executive bodies and their agencies. But, one limitation of such a practice, some scholars agree, is the fact that it does not establish a precedent owing to the fact that each case is to be reviewed by administrative tribunals on its merit.<sup>19</sup> In contrast to this precedential value of rulings of tribunals, rulings of regular courts on legality of administrative decisions is believed can serve as precedential value and provide a direction on elements of administrative law for administrative decision makers.<sup>20</sup>

Talking about the process by which judicial review influences the exercise of discretionary authority by front line administrative decision makers, a certain author found that judicial standards( judicial interpretations in reviewing administrative decisions) can be disseminated by: informal guide lines, circulars, operational memoranda, directives, codes and oral instructions which, collectively, may be characterized as "soft law".<sup>21</sup> Though the degree of influence of soft law on administrative decision makers may vary from state to state depending on how much government lawyers reach judicial standards in the realm of administration, it cannot be excluded even in our country. Over time judicial standards can also lead policy makers to include such standards as principles of their good administration in future directives and regulations.

As dissemination of judicial standards in relation to the question of "how the administration ought to reach decisions" through the mentioned channels inform decision makers uniformly, one may then as a matter of natural consequence

expect that judicial review can promote consistency and coherence in bureaucratic decision making. Consistent and coherent bureaucratic decision making can in turn foster efficient governance. The idea that consistency in bureaucratic decision making( partly because of judicial review as mentioned above) is also supported by a recent research which found that judicial review, as claimed traditionally is not antithesis, but promoter of efficient government.<sup>22</sup> This is especially important for states like Ethiopia who has declared to transform their economy with the help of efficiently intervening government.

### 2.2.4. Anticipatory reaction effect

So far, we have seen the significance of judicial review as the result of actual court decisions against administrative acts. Judicial response to administrative actions by way of their reviewing power can result in promoting accountability of administrative organs, retaining rule of law, serving as precedents for administrative bodies to make informed decisions and hence consistency. Protection and enforcement of individual rights is also one significance of the same role of courts.

Recent studies on other additional significance of judicial review also came up with a new insight. A study on the impact of institutional presence of judicial review in the relationship between the legislative body and courts in Israel showed that presence of judicial review has the anticipatory reaction effect on part of participants in the law making process.<sup>23</sup> By anticipatory effect, they meant that even if courts do not interfere actively/actually to invalidate bills for their unconstitutionality, the presence and probability of review of laws by the judiciary forced many legal advisors of the government and the parliament of the country to anticipate what courts may do in relation to the constitutionality of their bills and went some times to the extent of changing content of the laws before becoming effective to avert risk of judicial rejection.<sup>24</sup> The study also shows that as part of this effect, some group interests in the government and legal advisors use judicial review as a threat to prevent the enactment of certain bills, resulting in to negotiation between political actors for an inclusive policy and laws.<sup>25</sup>

What we can understand from this result of the study is that judicial review can also significantly affect the anticipatory reaction of different administrative agencies that have extensive power of rulemaking by delegation in Ethiopia. If administrative bodies can anticipate that their regulations ((which can be the basis of many decisions in the lower bureaucracy) will be reviewed by courts for their consistency with parent acts, they will be forced to consider all the principles and procedures of fairness in the same laws. This in turn, the researcher believes can enhance incorporation of fundamental values and procedures of fairness by regulations and directives of the administrative agencies; with the ultimate effect being fairly fair administrative decisions.

<sup>17</sup>Mary Crock, supra note 18

<sup>18</sup>Chalmers Johnson, supra note 2

<sup>19</sup>Ron McLeod AM, the scope of judicial review, administrative council of Australia discussion paper for reform, 2003, p25

<sup>20</sup>Ibid

<sup>21</sup>The term "soft law" is one of several terms adopted to convey a range of non-legislative guidelines, rules and administrative policies. It was adopted in the context of codes of ethics in Angela Campbell and Kathleen C. Glass, "The Legal Status of clinical and Ethics Policies, Codes, and Guidelines in Medical Practice and Research" (2001) 46 *McGill Law Journal*473-489.

<sup>22</sup>Peter Cane, understanding judicial review and its impact: in *Marc Hertogh and Simon Halliday, judicial review and bureaucratic impact: international and multidisciplinary perspectives* (p 15-43), Cambridge university press, 2008

<sup>23</sup>Ibid

<sup>24</sup>Dan Illouz, anticipatory effects of judicial review, the Hebrew University of Jerusalem, 2012 p 6-8

<sup>25</sup>Ibid

This is particularly important in our country in general and in the region under study in particular where the executive arms of governments at federal and regional levels is strong. Even if actual judicial review may be a rare case owing to different factors; legal illiteracy, cost of litigation and access to legal representation etc., the institutionalization of judicial review of administrative acts can thus have the effect of forcing administrative bodies to vet the legality of their actions to avoid the possibility of judicial attack of their regulations or decisions

In addition to this significance of anticipatory effect of judicial review on the behavior of the executive body and its agencies, one can also derive logically that fear of judicial declaration of their decisions or regulations void would create the opportunity for the bureaucracy to bargain with and solicit consensus from stakeholders on some potentially controversial development policies and projects. This is indeed one institutional feature (embedded bureaucracy) which bureaucracies in democratic developmental states need to own to make their country a success story.<sup>26</sup> Participatory policy making which then is helpful to attain equitable growth among all segments of society can create the opportunity for having inclusive development policies and less challenge against administrative laws enacted to implement such policies in courts.

The question one may raise here is what if laws establishing and empowering both make rules and decisions fail to provide principles and procedures of fairness as outlined in the constitution. There are only two possible answers to this question. The first one is to send the laws on which administrative case or subject matter of judicial review is based to the organ responsible to interpret the constitution: be it federal or regional depending on the nature of the case. The second possibility is that even if enabling law does not provide the principles and procedures of fairness which administrative bodies need to follow, regular courts can still examine administrative acts on the basis of constitutional values and principles of fairness and rule of law. But, this demands one institutional condition. Regular courts should not be stripped from exercising such power expressly by laws as is the case at the federal level.<sup>27</sup>

### 2.3. Grounds and remedies of judicial review

As discussed in above, judicial review has different meanings in different jurisdictions with the implication on scope and ground of review by courts to be different in different jurisdictions. As a result, depending on the jurisdiction of courts, judicial review could represent review of constitutionality of legislations and administrative actions, review of legality of administrative actions and court decisions. This shows one to expect difference in grounds of review among jurisdiction depending on the nature of judicial review. In countries like USA where regular courts have the power to adjudicate constitutional disputes the grounds of judicial review includes constitutionality of administrative actions. But, this does not mean that administrative actions cannot be reviewed on other grounds than their constitutionality such as legality. But, as it is mentioned somewhere in this paper, the theory of hierarchy of laws in

the same country puts the constitution as part of and top of all laws.

However, in countries like Ethiopia and UK, where the law making organs are sovereign, subject to supremacy of their constitutions, courts as mentioned here in above do not have the power to adjudicate constitutional controversies. Because of this, courts do not review administrative actions on the grounds of their constitutionality, but on grounds defined in other public laws. From this one can gather the point that by ground of judicial review, it does mean that causes on the basis of which people can apply to regular courts to seek review of administrative actions.

In a related fashion, one may legitimately ask the consequence that follows judicial review particularly to those who apply for judicial examination of administrative actions. Courts are expected to provide remedies to applicants after successful review of administrative actions and the remedies that courts may render are of two kinds: public law and private law remedies.<sup>28</sup> Public law remedies are remedies which courts provide to protect public interest and ensure the proper functioning government organs where as private law remedies are those to be granted by courts for sake of protecting and enforcing individual rights<sup>29</sup> such a distinction of remedies is not however to imply that public law remedies has nothing to do with protecting individual rights and interests though there is difference in terms of weight. Similar to grounds of judicial review among jurisdiction, there is also variation in the kind of public and private law remedies among states. For the interest of comprehension, a separate discussion of grounds( other than constitutionality) and remedies common to most states is provided here in below.

#### 2.3.1. Common grounds of judicial review

##### A. Illegality

Public bodies can only generally do what the law allows them to do. The law is set out in Acts of Parliament and in regulations, rules and orders made by government ministers. It is also possible that public bodies may also have guidance and policy on the exercise of their legal powers even if they should not follow these guidance and policy unless there is good reason not to. in any way they should rely on them in contradiction to the establishing laws. Public bodies must correctly understand and apply the law that regulates their decision making powers. If they do not follow the law correctly, their decisions, action, or failure to act will be unlawful. An action or decision may be unlawful if the decision maker had no power to make it or exceeded the powers given to him/her, or if it misapplies the law.<sup>30</sup> In the third one, the point in case is that even if public authorities act within the scope of their powers, misinterpretation and as a result misapplication of the law is regarded illegal action and hence a ground of judicial review. But, this aspect of illegality is not automatic ground of judicial review of administrative acts. It becomes a ground of review only if the record of the decision shows the authority interprets the law wrongly.<sup>31</sup> Failure of public office to discharge a legal

<sup>26</sup>Chalmers Johnson, *supra* note 2

<sup>27</sup>YemaneKassa, dealing with justiciability: in defense of judicial power in Ethiopia *Mekelle University Law Journal Vol.3 No. 1 (2015) pp 46-92 p 1*

<sup>28</sup>Stephen G. Brayer And Richard B Stewart, *Administrative Law And Regulatory Policy* (Little Brown and Company, 1979), p 221

<sup>29</sup>*Id* p 866.

<sup>30</sup>Cora Hoexter, *administrative law in south Africa* (south Africa: juta publishing, 2007) p 216 and 228

<sup>31</sup>*Id* p 252

obligation is also ground of judicial review for individuals whose interest is affected by the omission of public authority.

### **B. Procedural Impropriety**

It is a common practice that when administrative bodies are delegated to make rules and empowered to exercise quasi-judicial power by the legislative bodies, the latter stipulates some procedural requirements for them to follow. Such legislative stipulation of procedural requirements can be provided in enabling acts or in a separate administrative procedural act. It is also possible that while some procedural requirements may be mandatory, some of them may be discretionary in that public authorities may opt to follow some and ignore others depending on circumstances surrounding individual cases. But, even in the latter case, still public authorities expected to comply with at least minimum rules of natural justice.<sup>32</sup>

If public authorities make rules or decisions without compliance to mandatory procedural requirements, it becomes a ground for quashing the decision/rule of the administrative organ by way of judicial review for procedural impropriety<sup>33</sup>. While notification, consultation and publication are for example procedural requirements in administrative rule making process, fair hearing and the right to legal representation are procedures for decision making in many jurisdictions.

As well, in case of violation of procedural requirements the application of which depends on the discretion of administrative bodies, courts may (not mandatory) review public authority acts on ground of the minimum rules of natural justice such as: right to notice and right to be heard.<sup>34</sup> But, it is also a common practice in many states that if the harm/injustice sustained by applicant because of procedural flaws of the administrative body is far less than the inconvenience that may be caused to the government, courts may withhold the remedy.<sup>35</sup> This is to say that courts may simply declare the procedural impropriety of the process without rendering concrete remedy to the applicant. The extent to which the procedurally unfair administrative process affects the life, liberty and property rights of the applicant matters here a lot.

### **C. Irrationality/unreasonableness**

The discussion on illegality and procedural irregularity of administrative acts as grounds of judicial review is concerned with the situation of exercise of public authority in violation of clear rules stipulating obligation and scope of their powers. But, even if administrative bodies decide/make rules within the bound of their powers, there is still a possibility of their acts challenged by way of judicial review on the basis of other grounds. These grounds deals with the way administrative authorities exercise their discretionary powers.<sup>36</sup> Despite the fact that they may act within the scope of their legal power, they may abuse the same: they may act for their personal gains or other goals contrary to the purpose of the authorizing laws- public interest.

Of these grounds for exercising judicial review against the decision of administrative branch of government is irrationality//reasonability Courts may intervene to quash a

decision if they consider it to be so demonstrably unreasonable as to constitute “irrationality” or ‘perversity’ on the part of the decision maker. But, there is no common understanding of what constitutes a decision unreasonable or irrational among writers and jurisdiction. While some jurisdictions consider irrationality as one element of unreasonableness, some take the two as separate grounds of judicial review.<sup>37</sup> But, the basic ground for judicial review in both understandings is when public authorities in exercising their discretionary powers act in manifestly unreasonable and irrational manner that no reasonable or rational person would find it proper.<sup>38</sup>

Whether these grounds are used as one ground or separate grounds of judicial review, what one can understand is the subjective nature of the same. This subjectivity may make it difficult for applicants to show to courts the happening of the ground/grounds effectively. It could be for this reason that some jurisdictions try to identify some indications of irrationality or unreasonableness such as consideration of irrelevant facts and manifest of bad faith on part of public authorities while making decisions on basis of their discretionary powers.<sup>39</sup>

### **D. Proportionality**

The principle of Proportionality is one potential ground of judicial review though some jurisdictions take it alongside other grounds discussed in above.<sup>40</sup> Whatever may be the approach of jurisdictions, this principle in the context of judicial review of administrative actions takes the relationship between administrative measures being challenged and the interest affected by such measures<sup>41</sup>. The fundamental question here is whether measures taken by public authorities are unnecessarily grave to the individual to maintain public interest or not. If it is found that other measures with less serious effect on the applicant than already given decisions could attain the ultimate result, such a decision or administrative measure can be challenged and courts can order corrective measures.

#### **2.3.2. Remedies of judicial review**

Normatively, public officials in most legal systems have the privilege to do acts which if done by private individuals entail to liability of many kind. This is linked to the historical necessity of establishment of many administrative agencies: to handle multifaceted social problems with effective intervention in the economic and social life of their citizens.<sup>42</sup> So, it is the privilege of the public that public officials uniquely enjoy, but for the interest of owner of the privilege. This does not, however, mean that public officials are totally exempted from any kind of liability for their every unlawful act. This is only to stress that compared to people acting in their private capacity, public bodies are held liable for violation of laws in limited grounds. This limited ground of liability of the same is not without implication on the kind and rarity of remedies courts may render to people affected by administrative acts.

<sup>37</sup>Ibid

<sup>38</sup>Ibid

<sup>39</sup>ohn Adler, *supra* note 36

<sup>40</sup>Cora Hoexter, *supra* note 34, p310

<sup>41</sup>Ibid

<sup>42</sup>Morris D. Forkasch, *The Treaties On Administrative Law*, (The Bobbs- Merrill Company, Inc. Publisher Indiana Polis 1956). P 582

<sup>32</sup>John Adler, *Constitutional And Administrative Law* (6th.Ed., 2007). P 234

<sup>33</sup>Ibid

<sup>34</sup>Ibid

<sup>35</sup>Ibid

<sup>36</sup>Cora Hoexter, *supra* note 34, p 274-278

Recent developments also show that there is an emerging general principle to make the officials liable in case they willfully exceed or abuse their power in a manner that inflicts peculiar loss on an individual.<sup>43</sup> Two major justifications are submitted to justify decisions of legal systems to limit liability of administrative bodies in to only some circumstances. One is the need to allow public bodies some institutional space to flexibly implement policies for the interest of efficiency from which the public can benefit largely. The second one is related to commitment of legal systems to the theory of separation of power. The point is that constant judicial interference can compromise efficiency of the public bodies in their effort to handle social problems within the time needed and such judicial activism can also ultimately undermine the constitutional principle of modern democracies undesirably. Be that as it may, remedies as the result of judicial review, as mentioned in above are, of two kinds: public law remedy and private law remedies. Courts can render one of them only or combination of the two to applicants depending on the nature of cases as will be discussed here-in –below sections.

#### A. Public law remedies

Public law remedies are as the name indicates those reliefs the granting of which is defined and described in public laws. They are granted with the aim to protect the public interest by directing the government and its agencies to function properly.<sup>44</sup> But this doesn't mean that these kinds of remedies should go against the individual rights. Even in some cases when courts are in dilemma to choose between protecting individuals' rights and correcting administrative authorities, they are supposed to prioritize the first one.<sup>45</sup> A public law remedy which origin is traced back to the English administrative law commonly includes: Certiorari, Prohibition, Mandamus and Habeas corpus.<sup>46</sup>

Certiorari, originally designed as judicial remedy which enable high courts send back records of cases which they believe are decided erroneously for reconsideration based on directions of the high courts, latter it is extended to include such an order over lower public bodies.<sup>47</sup> This remedy is given when a public authority is proved acts outside the ambit of its legal power and such a decision denies administrative decisions legal effect.<sup>48</sup> The court can then remand the case to the body passing the decision to reconsider it based on certain guidelines outlined by the court. Prohibition is another possible public law remedy courts may grant after successful judicial review. It is a mechanism to prevent an inferior tribunal or administrative authority from exceeding or from continuing to exceed its authority, or from abuse of power in contravention of the laws. It has preventive effect so that once a decision is made; claim for this kind of remedy becomes fruitless suggesting for the need to negate the effect of the decision already given by way of certiorari. Unlike the remedy of prohibition, certiorari has the effect of making a decision void in a sense that it will have retroactive effect.

In the administrative law realm as actions of administrative authorities are the subject of judicial relief, omission also has the same importance. So people whose interest is affected by failure of administrative bodies to discharge their legally prescribed obligations can apply to court requesting the court to order them fulfill their obligations. This is called mandamus.<sup>49</sup> Assume for instance that a public authority in university authorized and required to make binding decision over disciplinary matters within three months since the case is in motion may stay for a year without any decision. Delay may be the greatest harm for the people waiting the decision of the administrative body. In such a case, courts may order the public authority to determine its decision within some reasonable time-mandamus.

Habeas Corpus literally defined as "having one's body released"<sup>50</sup> is a kind of public law remedy sought from a court to quash the decision of the administrative body which cause the detention of the person. This relief safeguards an individual freedom against arbitrary state action. Because it is an effective mechanism to preserve individual liberty it is also known as "The Great Writ"<sup>51</sup>

#### B. Private law remedies

As the name informs, these kinds of remedies as the result of successful judicial review of administrative actions are derived from private laws. Concerned much with protection of individual rights and interests, historically they were given only in private cases.<sup>52</sup> It is also worth noting that private law remedies can be granted together with public law remedies or alone. They are granted when individual applicants show in the process of review that improper acts government organs affects their interests or rights defined and protected in private laws.

The common types of private law remedies as the result of judicial review include: injunction, declaration and compensation.<sup>53</sup> For a certain author<sup>54</sup>, these remedies replacing the public remedies or granted in addition to them better protect individual freedom.

Injunction, one kind of private law remedy is ordered to refrain the execution of aillegal decision which if implemented can have a determinant effect to the applicant or individual. It's also said that it's granted pursuant to the formula of a threatened irreparable injury for which there is no adequate remedy at all.<sup>55</sup> Injunction order also can have two forms.<sup>56</sup> The first one is a preliminary injunction, or an interlocutory injunction. This type of injunction is a provisional remedy granted to restrain activity on a temporary basis until a final decision is made. It is usually necessary to prove the high likelihood of success upon the merits of one's case and a likelihood of irreparable harm in the absence of a

<sup>49</sup>Richard Gordon. Q.C., *Judicial review: law and procedure* (London: Sweet and Maxwell, 1996, p 63

<sup>50</sup>Louis L. Jaffe, *supra* note 12

<sup>51</sup>*Ibid*

<sup>52</sup>Tamrat Malefya, *Judicial review and competence of administrative tribunals to give final decisions in Ethiopia: a comparative study with south Africa and UK*, a master thesis, AddisAbaba university, 2013 p 16

<sup>53</sup>Cora Hoexter, *supra* note 34, p 503

<sup>54</sup>Stephen G. Brayer And Richard B Stewarts, *supra* note 32, p866

<sup>55</sup>Louis L. Jaffe, *supra* note 12, p193

<sup>56</sup>Morris D. Forkasch, *supra* note 46, p 29

<sup>43</sup>Stephen G. Brayer And Richard B Stewart, *supra* note, 32.

<sup>44</sup>Burt Franklin, *Comparative Administrative Law* (New York, 1970), p 204

<sup>45</sup>*Ibid*

<sup>46</sup>Reginald Parker, *Administrative Law*, (The Boobbs- Merrill Company, Inc., Publisher, 1952).

<sup>47</sup>*Ibid*

<sup>48</sup>*Ibid*



preliminary in junction before such an injunction may be granted. The second type of injunction is also known as permanent injunction which will be granted if the case is decided against the party that has been enjoined, and it can stay in effect indefinitely or until certain conditions are met.

Declaration is a claim made by an individual to ascertain the existence of a certain legal rights. Despite the fact that such declaration prevents the applicant from the possible abuse of his right, it is difficult to say that such declaration amount to relief because such mere declaration by itself doesn't impose any obligation on another to give relief to the applicant. Because of such limitation countries request the joining of other form of private rights remedies. For instance in USA and UK, such declaration is requested to be joined with injunction.<sup>57</sup>

Public authorities while exercising their powers may inflict injury over person or property of individual citizens. And with the aim to address such damage because of tortious acts of government organs, courts may grant applicants compensation prescribed in tort law.<sup>58</sup> This is called compensation as kind of judicial review remedies. This triggers the question of who must be liable to cover the amount of compensation determined by court. In Ethiopia, public officers may be held fully liable to pay such compensation if they inflict the injury with negligence or by abusing their power in violation specific provisions of law. This remedy from its nature seems to be the last option for courts to grant when especially injunction and declaration are found insufficient to address grievances against given administration because an individual already suffers from its legally wrong acts.

## 2.4. Limitations of judicial review

In every legal system and jurisdiction, the scope of judicial review of administrative actions is a source of debate and extensive discussion among lawyers, policy makers and politicians. And there is a consensus on part of both courts and executive bodies in most jurisdictions that some administrative actions are more amenable to judicial review than others.<sup>59</sup> Many different reasons are submitted to limit judicial review, major of which are<sup>60</sup>: the constitutional principle of separation of power, polycentric nature of some administrative decisions, the need to allow executive bodies policy space and implement national policies efficiently. Separation of power as is the base of courts to review legality of administrative actions also serves to limit the scope of their power. It is also held in many jurisdictions that if the nature of administrative decision is complex in terms of: legal questions it involves, the number of people who can be affected by the decision, issues of distribution of scarce resource, courts do not have institutional competence to determine legality of such kind of decisions. The need to allow executive bodies to enjoy policy space with the aim to promote public interest is also another reason to limit the reach of courts by way of their reviewing power. Finally, the conventional belief that judicial interference in every action of public authority hinders bureaucratic efficiency partly

explains the need to limit scope of judicial review only to some aspects of administrative actions. For these different explaining reasons, there are various kinds of limitation on the scope of judicial power to supervise administrative actions. They are generally classified as substantive and procedural limits

### 2.4.1. Substantive limits

#### A. Non-justifiability of the matter

It is true that the cornerstone of judicial review is the concept of justiciability for it only a „justiciable matter that can be subjected to judicial review.<sup>61</sup> The FDRE constitution under article 37 also stipulate that one can as matter of right to justice bring matters that are justiciable to courts/ other institutions with judicial power. But, it is not easy to find a commonly accepted meaning of the concept across jurisdictions.

Originated in the common law legal system, it is historically understood as the suitability for, or amenability to, judicial review of a particular administrative decision or class of decisions.<sup>62</sup> It is also understood as disputes capable of being determined and enforced by judicial interpretation and application of preset rules without the judiciary violating constitutional principle of separation of power: without being engaged in the exercise of power of the executive and legislative bodies.<sup>63</sup> So, the nature of administrative action determines whether a given case is justiciable or not. Again, if power to decide seems belong exclusively to the executive from the reading of the constitution, it be regarded as non-justiciable so that courts are precluded from having reviewing power on the same.

The reasons for a subject matter to be non-justiciable are various. These include (i) deference to matters of high policy and to Parliament; (ii) lack of judicial knowledge and effectiveness; (iii) the absence of objective standards; (iv) the need to trust the executive in an emergency; (v) the existence of other remedies; and (vi) worries about hampering government efficiency.<sup>64</sup> Accordingly, prerogative powers such as those relating to the making of treaties, defense, granting mercy, awarding honors, the dissolution of parliament and the appointment of ministers as well as other similar matters are considered as non-justiciable, may be, because their nature and subject matter are not to be amenable to the judicial process.<sup>65</sup> This implies that whether a matter applied to court for review is justiciable or not is determined from nature of the subject taking the principle of separation of power, not the source of power of the authority( statutory or prerogative. Generally despite variation in meaning and scope justicability is one doctrine (substantive limit) to limit power of courts to entertain certain cases.

The question one can trigger here is who would decide the justicability or otherwise of matters. In many states with common law legal tradition such as UK and Australia courts

<sup>61</sup>I. Ellis-John, *Essential Administrative Law*, (2nd ed., 2001), p.9

<sup>62</sup>Chris Finn, *The Concept of 'Justiciability' in Administrative Law*, in M. Groves and H. P.Lee (eds.) *Australian Administrative Law: Fundamentals, Principles and Doctrines*, (2007), p.143

<sup>63</sup>Hon Sir Anthony Mason AC KBE, 'supra note 63 p, 14

<sup>64</sup>J. Alder, *General Principles of Constitutional and Administrative Law* (4th ed.,2002), p. 305-306

<sup>65</sup>Paul Daly, *Justiciability and the 'Political Question' Doctrine*, Public Law Series,(2010), p.1

<sup>57</sup> Ibid

<sup>58</sup>Hoexte Cora, supra note 34

<sup>59</sup>The Hon Sir Anthony Mason AC KBE, 'The Importance of Judicial Review of Administrative Action as a Safeguard of Individual Rights' (December 1994) 1(1) *Australian Journal of Human Rights* 3-8.

<sup>60</sup>Ron McLeod AM, supra note 23, p 32-36



are supposed to determine which cases are non-justiciable and impose self-restraint to maintain the power division between them and the executive bodies.<sup>66</sup> It is also true that law making body in some common law countries may categorize some matters as non-justiciable in their administrative procedure acts.<sup>67</sup> This is legislation of some matters outside the jurisdiction of regular courts and other institutions will handle disputes of such kind. It is also possible that some establishing legislation may come with institutions other than courts to replace the judiciary and hence a limitation on judicial review. This is particularly linked with increase of power of the executive body for different reasons.<sup>68</sup>

#### **B. Ouster clauses/privative clauses**

Ouster clauses are clauses provided by a primary legislation which purport to exclude the courts from reviewing the decisions of a public body.<sup>69</sup> Ouster clauses can be of different types, mainly, 'total ouster clauses' and 'finality clauses'. Total ouster clauses are those which state that a decision of public body is *not to be challenged in any court of law*.<sup>70</sup> *Despite such kind of privative clause, total exclusions were not, however, successful in most jurisdictions because courts read such clauses down to maintain their inherent power*.<sup>71</sup> *Absence of good faith, irrelevant consideration and unreasonableness are for instance the limited grounds based on which courts in Australia keep examining administrative decisions*.<sup>72</sup>

Finality clauses, on the other hand, are clauses in the primary legislation which provide that the decision of a public body *shall be final*. Unlike total ouster clauses, finality clauses do not prevent judicial review, but only an appeal.<sup>73</sup> In both cases, ouster clauses have the implication of the sovereignty of the parliament to restrict courts power of reviewing agency decisions. From this, it is safe to infer that unless a clear provision to exclude judicial review is indicated in statutes which establish administrative agencies, finality clause should not preclude courts to conduct their inherent enterprise. An exclusion of appeal should not be construed as preclusion of judicial review.

#### **C. Standing of applicant and wide discretion of administration**

Another legislative way of limiting the scope of judicial review is by giving the administration wide discretion of power.<sup>74</sup> It is regarded as an implicit mode of precluding judicial review because it allows the administration to flexibly implement policies with in wider legal power making it difficult for courts to confine administrative bodies in to

defined power scope. It is however, still possible for courts to supervise administrative actions on the basis of lack of good faith of the decision maker, improper consideration of information in decision making process and reasonability of the decision.<sup>75</sup>

Standing understood as the presence of vested interest of the applicant is also another limitation in that lack of it denies people the right to request judicial review of administration action.<sup>76</sup> While the presence or lack of standing can generally be determined based on the rules of the civil procedure/ acts of jurisdiction of regular courts, parent acts can also limit the number and type of persons with real interest to apply for judicial review.<sup>77</sup> The purpose with the latter kind of definition of standing is to limit access to courts so that administrative bodies with little attention to individual cases can place much focus on efficient implementation of policies

#### **2.4.2. Procedural limits**

##### **A. Exhaustion**

Judicial review is the last resort that can be invoked by a party aggrieved by the decision of an administrative body after exhausting all the avenues available in the concerned agency.<sup>78</sup> Administrative agencies as discussed in above may provide internal or external mechanisms of handling grievances and it is only after trying through such mechanisms that one can apply for judicial review. The basic reason behind this rule is that agencies must be given the opportunity to rectify their mistakes and resolve matters in light of their own policy objectives and priorities before premature judicial intervention.<sup>79</sup> The agency raising defense must prove, of course, the existence of a suitable internal avenue that ought to have been used by the complainant. The doctrine of exhaustion of internal remedies is also helpful to avoid premature intervention of the court on administrative matters and relieves the court from being seized by over flooding administrative complaints<sup>80</sup>

Applicants can however be relieved of this kind of condition to invoke judicial review in case where there is an excessive delay on the part of the administrative agency or where there is a great possibility that the complainant will incur an irreparable injury awaiting agency review.<sup>81</sup> This is because, conscious of this procedure, administrative bodies may fail to give final decisions to avoid the risk of their decisions being challenged.

##### **B. Ripeness**

The other important limitation on the availability of judicial review is ripeness'. In order to invoke judicial review, the case complained of must be ripe for review. It requires the complainant to wait until the concerned agency

<sup>66</sup>J. Alder, supra note 68, p 9

Ron McLeod AM supra note 23, p 13-14

<sup>68</sup>Ibid

<sup>69</sup>It is conventional wisdom in parliamentary systems like in UK that parliaments which are sovereign power can by way of primary legislations exclude judicial review of certain cases totally or partially. See D. Longley and R. James; *Administrative Justice: Central Issues in UK and European Administrative Law*, (1999) p 161 and P.P Craig, *Administrative Law*, (5th ed., 2007), p.847

<sup>70</sup>Ibid

<sup>71</sup>Ibid

<sup>72</sup>Ron McLeod AM supra note 23, p15

<sup>73</sup>D. Longley, supra note 9, p 160

<sup>74</sup>H.W.R.Wade And C.F. Forsyth, *Administrative Law* (Oxford University press, 8th ed., 2000).p 20-23

<sup>75</sup>Ibid

<sup>76</sup>Jermone A. Barron, *Constitutional Law In A Nut Shell* (ST. Paul, Minn 4th ed., 1999), p 123

<sup>77</sup>Ibid

<sup>78</sup>Ibid

<sup>79</sup>JUDICIAL REVIEW: A SHORT GUIDE TO CLAIMS IN THE ADMINISTRATIVE COURT (Unpublished,2006), P 22

<sup>80</sup>Bell & Brown L.Neville, *French Administrative Law* (Oxford University Press, 1993, p 157

<sup>81</sup>Ibid

has passed its final decision.<sup>82</sup> Before the concerned agency passes its final decision over the subject matter, a party cannot invoke judicial review against a speculated or hypothetical future decision.

However, in some cases where the claim has urgent character that on delay it may inflict irreparable injury, the controversy would be as ripe for judicial review consideration as it calls ever are.<sup>83</sup> So, where an agency excessively or unreasonably delays or withholds action/decision altogether, although no final decision has been made, judicial review can be invoked seeking appropriate remedy.

### **Conclusion**

In our contemporary world, the function of state is increased than the past. The shift from *laissez-faire* government to welfare state escalated the functions of state from its traditional functions of maintaining peace and security to providing different services pertaining to health, education; technology, engagement in investment etc. In turn, such an increase in the function of state is said to create prejudice of citizen's rights and privileges by the government. It has been said that this results in various public grievances on Administrative decision of the government especially by the executive. Ethiopia is not an exception to this claim as the government of the state openly and courageously identified lack of good governance. The Ethiopian government also

identified lack of good governance as one big challenge for its developmental efforts and pace.

Unless, such an abuse/problem is tackled by the judiciary, the basic values of the society like democracy and good governance will be at stake. It can also negatively impact developmental efforts of states like Ethiopia. Hence the judiciary should act proactively to perform its inherent power of judicial review up on the final decision of Administrative action. This in turn can help the state to maintain the constitutional mega values that is the BILL OF RIGHTS and promote efficiency of public administration in designing and implementing development policies.

Judicial review literally refers to testing the legality of the final administrative action/decision by the judiciary so as to make sure that rule of law and good governance are maintained.

In Ethiopia, although there is legal frame work that confers the judiciary to perform judicial review, judges are said to be very much reluctant to act accordingly. It has been alleged that there is a great awareness and courage problem towards judicial review by the lawyers in general and the judges in particular. Let alone acting proactively to exercise judicial review by their own initiation, judges are usually condemned for being too much reluctant even when cases are brought by the clients before them.

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<sup>82</sup>ibid

<sup>83</sup>Ibid