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Judicial Review of Administrative Action/Decision as the Primary Vehicle for Constitutionalism: Law and Procedures in Tanzania

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JUDICIAL REVIEW OF ADMINISTRATIVE ACTION/DECISION AS THE PRIMARY VEHICLE FOR CONSTITUTIONALISM: LAW AND PROCEDURES IN TANZANIA

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1.0 Introduction

Judicial review is a specialized remedy in public law by which the High Court, in case of Tanzania, exercises a supervisory jurisdiction over inferior courts, \(^1\) tribunals \(^2\) and other public bodies. \(^3\) The supervisory power of the high court is extended to acts and omissions or decisions of the public bodies in the field of public law. In speaking of the supervisory jurisdiction of the superior court Lord Sumner in his speech in *Rex. V Nat Bell Liquors Ltd.* [1922] 2 A.C 128 said at Pg 156:

“its jurisdiction is to see that the inferior court has not exceeded its own and for that very reason it is bound not to interfere in what has been done within that jurisdiction for in so doing it would, in turn, transgress the limits within which its own jurisdiction of supervision, not of review, is confined. That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise: the other is the observance of the law in the course of its exercise.”

The high court is concerned with evaluating the fairness in the action, omission or decision as Lord Hilsham L. C ably contends in the case of *Chief Constable of North Wales Police v. Evans.* \(^4\)

“It is important to remember in every case that the purpose …is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that

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\(^1\) As per Lord Morris of Borth-y- Gest in Anisminic Ltd V Foreign Compensation Commission [1968] APP.L.R. 12/17 the term “inferior court is used as categorizing but not a derogatory description and the control which is exercised by the High Court over inferior courts is of supervisory but not of an appellate nature.” Inferior Courts in Tanzania are established under the Magistrates Courts Act, 1984. They include Primary court, district court and resident magistrates’ court.

\(^2\) Tribunals may include but not limited to land tribunals, labor tribunals, tax tribunals and quasi judicial tribunals.

\(^3\) Other public bodies may include a Minister or any other executive agency with public authority.

\(^4\) [1982] 1 W.L.R 1155 at 1160
it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that authority constituted by law to decide the matters in question.”

The high court reviews decisions, actions or omissions by the executive, legislature or the subordinate courts only to retain fairness. The fairness is determined by regarding the constitution, such decisions, actions or omissions are examined as whether they are consistent with the constitution.

Through judicial review the high court determines whether or not state executive or statutes are valid.5

2.0 Historical Development of Judicial Review as a Legal Remedy

The concept of judicial review as a legal remedy in public law is mostly accredited to Chief Justice Marshall in the case of Marbury v. Madison6 where the supreme court of USA ruled an act of the Congress unconstitutional. In this case Chief Justice Marshall reasoned that since it is the duty of a court in a law suit to declare the law or action unconstitutional, and since the constitution is supreme, where a rule or action conflicts with the constitution, then the law of the constitution must prevail. It is the duty of the court to say what the law is.

The decision in Marbury v. Madison7 is regarded in USA as the Supreme Court's landmark decision regarding judicial review. It is entrusted and accredited as the first Supreme Court decision to strike down an act of Congress as unconstitutional.

The case arose when William Marbury filed a lawsuit seeking a prerogative order (a writ of mandamus) requiring the Secretary of State, James Madison, to deliver to Marbury a commission appointing him as a justice of the peace. Marbury filed his case directly in the Supreme Court, invoking the Court's original jurisdiction, rather than filing in a lower court.

The constitutional issue involved the question of whether the Supreme Court had jurisdiction to hear the case. The Judiciary Act of 1789 gave the Supreme Court original jurisdiction in cases involving writs of mandamus. So, under the Judiciary Act, the Supreme Court would have had

\[5 \text{ ibid} \]

\[6 \text{ 5 US (1Cranch) 137, 2 L Ed. 60} \]

\[7 \text{ Op cit} \]
jurisdiction to hear Marbury's case. However, the Constitution describes the cases in which the Supreme Court has original jurisdiction, and does not include mandamus cases. The Judiciary Act therefore attempted to give the Supreme Court jurisdiction that was not warranted by the Constitution.

Justice Marshall's opinion stated that in the Constitution, the people established a government of limited powers. The powers of the Legislature are defined and limited; and that those limits may not be mistaken or forgotten, the Constitution is written. The limits established in the Constitution would be meaningless if these limits may at any time be passed by those intended to be restrained. Marshall observed that the Constitution is the fundamental and paramount law of the nation, and that it cannot be altered by an ordinary act of the legislature. Therefore, an act of the Legislature repugnant to the Constitution is void.

Marshall then discussed the role of courts, which is at the heart of the doctrine of judicial review. It would be an absurdity, said Marshall, to require the courts to apply a law that is void. Rather, it is the inherent duty of the courts to interpret and apply the Constitution, and to determine whether there is a conflict between a statute and the Constitution.

“It is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each. So, if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If, then, the Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply....”

Marshall stated that courts are authorized by the provisions of the Constitution itself to look into the Constitution, that is, to interpret and apply it, and that they have the duty to refuse to enforce
any laws that are contrary to the Constitution. Specifically, the US constitution provides that the federal judicial power is extended to all cases arising under the Constitution. Judges are required to take an oath to support the Constitution. Article VI also states that only laws made in pursuance of the Constitution are the law of the land. Marshall concluded that the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written Constitutions that a law repugnant to the Constitution is void, and that court, as well as other departments, is bound by that instrument.

The Marbury has been regarded as the seminal case with respect to the doctrine of judicial review. Some scholars have suggested that Marshall's opinion in Marbury essentially created judicial review. In his book *The Least Dangerous Branch* Professor Alexander Bickel wrote:

“The institution of the judiciary needed to be summoned up out of the constitutional vapors, shaped, and maintained. And the Great Chief Justice, John Marshall -- not single-handed, but first and foremost -- was there to do it and did. If any social process can be said to have been done at a given time, and by a given act, it is Marshall's achievement. The time was 1803; the act was the decision in the case of Marbury v. Madison.”

However it may also be argued that Marbury was decided in a context in which judicial review already was a familiar concept. And the argument may be supported by the facts showing that judicial review was acknowledged by the Constitution's framers and was explained in the Federalist Papers and in the ratification debates in the USA, and was used by both state and federal courts for more than twenty years before Marbury, including the Supreme Court in *Hylton v. United States*. In conclusion, before Marbury, judicial review had gained wide support though Justice Marshall in Marbury gain judicial review acceleration.

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8 See Article III
9 See Article VI
10 Vol. 13 No. 6 (2003)
11 3 U.S. 171 (1796)
After the Supreme Court of USA has exercised its power of judicial review in Marbury, it became reluctant to strike down a federal statute during the next fifty years. The Supreme Court adopted again the spirit developed in Marbury in the case of *Dred Scott v. Sandford.*\(^\text{12}\) However, the Supreme Court did exercise judicial review in other contexts. In particular, the Court struck down a number of state statutes that were contrary to the Constitution. The first case in which the Supreme Court struck down a state statute as unconstitutional was *Fletcher v. Peck.*\(^\text{13}\)

In few cases, state courts took the position that their judgments were final and were not subject to review by the Supreme Court. They argued that the Constitution did not give the Supreme Court the authority to review state court decisions. They asserted that the Judiciary Act of 1789, which provided that the Supreme Court could hear certain appeals from state courts, was unconstitutional. In effect, these state courts were asserting that the principle of judicial review did not extend to allow federal review of state court decisions. This would have left the states free to adopt their own interpretations of the Constitution.

The Supreme Court rejected this argument. In *Martin v. Hunter's Lessee*\(^\text{14}\) the Court held that under Article III\(^\text{15}\) the federal courts have jurisdiction to hear all cases arising under the Constitution and laws of the United States, and that the Supreme Court has appellate jurisdiction in all such cases, whether those cases are filed in state or federal courts. The Court issued another decision to the same effect in the context of a criminal case, *Cohens v. Virginia*\(^\text{16}\). It is now well established that the Supreme Court may review decisions of state courts that involve federal law.

The Supreme Court also has reviewed actions of the federal executive branch to determine whether those actions were authorized by acts of Congress or were beyond the authority granted by Congress.\(^\text{17}\) Judicial review is now well established as a cornerstone of constitutional law. As

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\(^{12}\) 60 U.S. (19 How.) 393 (1857)  
\(^{13}\) 10 U.S. (6 Cranch) 87 (1810)  
\(^{14}\) 14 U.S. (1 Wheat.) 304 (1816)  
\(^{15}\) Op cit  
\(^{16}\) 19 U.S. (6 Wheat.) 264 (1821)  
\(^{17}\) This is the doctrine of *ultra vires* and *intra vires*, thus the actions of the executive must be within the laws
of 2010, the United States Supreme Court had held unconstitutional some 163 Acts of the U.S. Congress. Judicial review in the United States also refers to the power of the 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 or executive order for consistency with a statute, a treaty, or the Constitution itself. Judicial review is part of the United States' system of checks and balances on government. The Supreme Court has the power to review acts of the Legislative (Congress) and Executive (Presidential) branches to ensure they don't become too powerful or abrogate the Constitutional rights of the country's citizens, this entails constitutionalism especially the aspect of human rights and human dignity.

From the US experience regarding judicial review, in Tanzania, the spirit is enshrined under the supremacy clause established under article 64(5)\textsuperscript{18} read together with article 8.\textsuperscript{19} From the two provisions state laws and actions must uphold supremacy of the constitution and the welfare of the people, thus the high court is bestowed with powers to review the acts and decision of the public bodies only to retain the spirit of the constitution i.e. supremacy of the constitution and welfare of the people.

3.0 The Guiding Legal Provisions for Judicial Review in Tanzania

Apart from article 64 (5)\textsuperscript{20} and article 8 (1)\textsuperscript{21} the constitution provides for judicial review in the following terms:

“Where a person alleges that any provision of this part of this chapter or any law involving a basic right or duty has been, is being or is likely to be contravened in relation to him in any part of the United Republic of Tanzania, he may, without prejudice to any

\begin{footnotesize}
\begin{enumerate}
\item[18] See the Constitution of the United Republic of Tanzania, 1977
\item[19] Ibid
\item[20] Op cit
\item[21] Op cit
\end{enumerate}
\end{footnotesize}
other action or remedy lawfully available to him in respect of the same matter, institute proceedings for relief in the high court.”

This clause provides for judicial review of administrative actions against basic rights and duties enshrined in the bill of rights. However, the party should decide as to make application under CAP 310 R.E. 2002 for prerogative orders and not under CAP 3 R.E. 2002 because the procedure for and the power of the High Court to issue prerogative orders do not apply for the purposes of obtaining redress in respect of matters covered by CAP 3 R.E 2002.

The traditional approach places the correlative duties of human rights on States and public authorities. But in modern approach the duties of human rights on States and Public authorities is related to fundamental freedoms including the right to religion, freedom of expression and movement. And the duties on fundamental rights are placed to the society as is contended that more than 40 percent of human rights violation is done by non state actors.

There is also the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, section 17 provides that:-

“(1) The High Court shall not, whether in the exercise of its civil or criminal jurisdiction, issue any of the prerogative writs of mandamus, prohibition or certiorari.

(2) In any case where the High Court would but for subsection (1) have had jurisdiction to order the issue of a writ of mandamus requiring any act to be done or a writ of prohibition prohibiting any proceedings or matter, or a writ of certiorari removing

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22 Article 30 (3)
23 See Section 8 (4) of CAP 3 R.E. 2002
24 See article 14 of the Constitution of the United Republic of Tanzania, 1977 states that “every person has the right to live and to the protection of his life by the society in accordance with the law” i.e. the right of protection is of the society.
26 CAP 310 R.E 2002
any proceedings or matter into the High Court for any purpose, the Court may make an
order requiring the act to be done or prohibiting or removing the proceedings or matter,
as the case may be.

(3) No return shall be made to any such order and no pleadings in prohibition shall be
allowed, but the order shall be final, subject to the right of appeal therefrom conferred by
subsection (5).

(4) In any written law, references to any writ of mandamus, prohibition or certiorari shall
be construed as references to the corresponding order and references to the issue or award
of any such writ shall be construed as references to the making of the corresponding
order.

(5) Any person aggrieved by an order made under this section may appeal therefrom to
the Court of Appeal.”

Section 18 of CAP 310 above, provides that:-

(1) Where leave for application for an order of mandamus, prohibition or
certiorari is sought in any civil matter against the Government, the court shall
order that the Attorney-General be summoned to appear as a party to those
proceedings; save that if the Attorney-General does not appear before the court on
the date specified in the summons, the court may direct that the application be
heard ex parte.

(2) In any proceedings involving the interpretation of the Constitution with regard
to the basic freedoms, rights and duties specified in Part III of Chapter I of the
Constitution, no hearing shall be commenced or continued unless the Attorney-
General or his representative designated by him for that purpose is summoned to
appear as a party to those proceedings; save that if the Attorney-General or his
designated representative does not appear before the Court on the date specified in
the summons, the court may direct that the hearing be commenced or continued, as the case may be, ex parte.

(3) For the purposes of this section the term "Government" includes a public officer and any office in the service of the United Republic established by or under any written law.

Attorney General has to appear as a party on behalf of the government but failure to that the court has a mandate to entertain the case ex parte as per the above provisions.

The requirement for leave is discussed below as whether is a statutory or procedural in Tanzania.

4.0 Application for Judicial Review

An application for judicial review can only be made to High Court. The applicant has first to seek leave of the court to apply for judicial review. The leave is sought through chamber summons supported by an affidavit.

Leave as a procedural requirement was well cemented in the case of the Republic Ex-parte Peter Shirima v Kamati ya Ulinzi na Usalama, Wilaya ya Singida, the Area Commissioner and the Attorney General where the applicant had been arrested and charged with selling goods at prices in excess of the maximum prices set under the Regulation of Prices Act. Some goods were confiscated from his shop and produced as exhibits in the proceedings. Subsequently, the charges were withdrawn and in consequence, the trial magistrate ordered the goods to be restored to the Police. The applicant appealed against this order, but before it was heard, the Officer

27 Section 17 (2) of CAP 310 provides “In any case where the High Court would but for subsection (1) have had jurisdiction to order the issue of a writ of mandamus requiring any act to be done or a writ of prohibition prohibiting any proceedings or matter, or a writ of certiorari removing any proceedings or matter into the High Court for any purpose, the Court may make an order requiring the act to be done or prohibiting or removing the proceedings or matter, as the case may be.”

28 This simply means permission of the court to apply for judicial review.

29 1983 TLR 375 (HC)
Commanding District (OCD) informed him that the goods were to be sold by the police, his trading licence had been revoked and he had to leave Singida town within a specific period.

The applicant then applied for orders of certiorari and prohibition to quash the orders of the OCD and to restrain him from carrying out the order of expulsion. This application was granted. He later learnt that the OCD was acting on the orders of the Area Commissioner and the District Defence Committee (Kamati ya Ulinzi na Usalama). He then applied for leave to apply for the orders of certiorari and prohibition against the Area Commissioner and the District Defence Committee. The court held that:-

“(i) The practice of seeking leave to apply for prerogative orders has become part of our procedural law by reason of long use;

(ii) The existence of the right to appeal and even the existence of an appeal itself is not necessarily a bar to the issuance of prerogative order; the matter is one of judicial discretion to be exercised by the court in the light of the circumstances of each particular case;

(iii) Where an appeal has proved ineffective and the requisite grounds exist, the aggrieved party may seek for, and the court would be entitled to grant, relief by way of prerogative orders;

One of the issues in this case was whether the requirement for leave was a legal requirement. The court responded that it has become part of our procedural law.

In the case of *Mohamed v Regional C.I.D. Officer, Mbeya*\(^{30}\) a question was raised in a preliminary objection and it was whether an application for mandamus could be entertained in the absence of prior leave. Mwakibete, J. stated, inter alia that:-

“The urgency of the matter - the subject of this application - cannot be overemphasized. There is an allegation - albeit impliedly - of flagrant misuse of authority to the suffering

\(^{30}\) Miscellaneous Criminal Cause No. 29 of 1978 (Mbeya Registry)
of the applicant. Surely the circumstances demand that the application is heard with
dispatch on its merits.... It is a case properly crying for dispensation of the alleged leave.
Thus by virtue of this court's inherent powers I hereby order that the leave to file the
application be dispensed with.”

From the wordings of Mwakibete J above it is implicit that the learned judge acknowledges the
desirability of an application for prior leave but he develops a principle that the court may
dispense with the requirement of a leave on the exigencies of the case before it. This is also
evidenced by Lord Woolf in the case of M v Home Office.31

“Where the case is so urgent as to justify it, (the judge) could grant an interlocutory
injunction or other interim relief pending the hearing of the application for leave to move
for judicial review. But if the judge has refused leave to move for judicial review he is
functus officio32 and has no jurisdiction to grant any form of interim relief. The
application for an interlocutory injunction or other interim relief could, however, be
renewed before the Court of Appeal along with the renewal of the application for leave to
move for judicial review.”

31 [1993] 3 WLR 433

32 Simply means an officer or agency whose mandate has expired either because of the arrival of an expiry date or
because an agency has accomplished the purpose for which it was created. Functus officio, Latin for "having
performed his office," is a legal term used to describe a public official, court, governing body, statute, or other legal
instrument that retains no legal authority because his or its duties and functions have been completed. The term is
most commonly used by a higher court as a justification for vacating or overturning all or part of a lower court's
opinion. For example, if a plaintiff in a United States federal court, after filing a complaint but failing to serve it on
the defendant, then files an amended complaint, the plaintiff cannot then serve the initial complaint on the
defendant, because the filing of the amended complaint renders the original "functus officio." In the Canadian case
of functus officio: "The general rule (is) that a final decision of a court cannot be reopened.... "The rule applied only
after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions: where there
had been a slip in drawing it up, and where there was an error in expressing the manifest intention of the court
In the case of *Mwikilasa v The Principal Secretary (Treasury)*[^33], it was specifically held that prior leave to judicial review was a necessity. But the issue arose again in *Lakarau v Town Director Arusha*[^34], where an application for mandamus had similarly been brought without prior leave. It was there stated by Maganga, J that:-

"... it still appears to me that the application as filed is incompetent for the reason that no leave to file the application had been granted. The procedure for Orders of mandamus and other writs as stated at page 70 of Halsbury's Laws of England (3rd Ed. Vol. 11) make it mandatory for leave to apply to be obtained before an application for any of the writs is made. It is stated therein that...No application can be made unless leave therefor has been granted...”

If I may repeat what court of laws ventured to say in the above cases it is a settled canon that the High Court has the power to grant an interlocutory injunction before hearing an application for leave to apply for a prerogative order.

A different view was taken by Mroso, J. in *Makule v The R.P.C Kilimanjaro*[^35] where he was considering an ex parte application for leave to apply for mandamus and ruled that leave to apply was not part of the law of this country, citing *D.M.T. Ltd. v The Transport Licensing Authority*[^36] and section 2(2) of the Judicature and Application of Laws Ordinance, Cap. 453[^37]. He therefore struck out the application.

Responding to above argument, Lugakingira J[^38] states that it is clear from section 2(2), Cap. 453[^39] that what the High court is expected to apply is the substance only of the English Common

[^33]: Miscellaneous Criminal Cause No. 14 of 1978 (Mbeya Registry)
[^34]: Miscellaneous Civil Application No. 56 of 1979 (Arusha Registry)
[^35]: Miscellaneous Civil Application No. 87 of 1979 (Arusha Registry)
[^36]: [1959] E.A. 403
[^37]: Which recently CAP 358 R.E 2002
[^38]: Lugakingira was one of the Judges of the High court of Tanzania who had much contribution in the judiciary towards development of the law.
[^39]: 453
Law, the doctrines of equity and the statutes of general application in force on the 22nd July, 1920. He continues to ascertain that it is evident that prior leave has been the accepted procedure before the High court for long. Lugakingira cites the case of *Re Fazal Kassam (Mills) Ltd.* where an application for the writs of certiorari and mandamus, leave had been applied for and granted. And the case of *Re Hirji Transport Service* was a ruling on an application for leave and it was granted. Lugakingira concludes that it is therefore clear that the efficacy of applying for leave as a procedure has never before been questioned or doubted.

From what is contended above it suffices to say that the requirement of leave before applying for judicial review is a procedure received from the British colonial laws that were made applicable to Tanganyika from 1920. For example, section 2 (2) cited above by Lugakingira J, is to be read together with Article 17 (2) of the Tanganyika Orders in Council, 1920 which made the English Office Crown Proceedings Act and the Crown Office Rules applicable in Tanganyika. The two laws create a requirement for leave to apply for prerogative orders. Thus, one may argue basing on these provisions that leave is both statutory and procedural.

It is noteworthy that absence of a statutory requirement implies that an application for leave, whenever brought, must necessarily be rejected. It is clear from s. 2(2) of Cap. 453 that what the High court is expected to apply is the substance only of the English Common Law, the doctrines of equity and the statutes of general application in force on the 22nd July, 1920. It has therefore never been suggested that an application for leave would contravene the Crown Office Rules, 1906 and what the law does not forbid, it permits.

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39 The Judicature and Application of Laws Ordinance

40 [1960] E.A. 1002

41 [1961] E.A. 88

42 The Crown Proceedings Act 1947 CAP 44 is an Act of the Parliament of the United Kingdom that allowed, for the first time, civil actions against the Crown to be brought in the same way as against any other party. The Act also reasserted the common law doctrine of Crown privilege but by making it, for the first time, justiciable paved the way for the development of the modern law of Public Interest Immunity.

43 1906

44 See Lugakingira J at Pp 380
Leave can be heard in absence of the other party i.e. *ex parte*. But once leave is granted the applicant must file the main case and save it on the other party. Hearing of the main case is inter partes. It is worth noting that the requirement of notice under the Government Proceedings Act does not apply here. This is well explained by Samatta J (as he then was) in the case of *Vidyadhar Girdharal Chavda v The Director of Immigration Services and Others.* In this application the High Court considered, inter alia, whether it has power to grant an injunction against the Government, a government minister or official in the light of the provisions of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance Act 1968 as amended by the Written Laws (Miscellaneous Amendments) (No 3) Act 1991 and s 11 of the Government Proceedings Act, 1967. In particular the Court considered whether the term 'civil proceedings' as defined in s 2(1) of the Government Proceedings Act includes an application for an order of injunction against the Government, government minister or official.

The court went on to develop the following principles:

That The term 'civil proceedings' was intended to have a restricted meaning; it was intended to mean civil matters as understood in the traditional sense of the term, that is to say, civil matters that are dealt with under the High court's general civil jurisdiction;

That any statutory provision which purports to restrict the High Court's jurisdiction, including inherent jurisdiction, must in the interest of everyone, be construed strictly; (emphasis is mine.)

That the application of that principle in the interpretation of s 11 of the Government Proceedings Act compels the holding that the term 'civil proceedings' in the subsection does not embrace proceedings for prerogative orders;

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45 See section 18 (1) of CAP 310. Op cit
46 CAP 5 R.E 2002
47 1995 TLR 125 (HC)
And that the prohibition imposed by ss (2) of s 11 of the Government Proceedings Act was not intended to, and does not, extend to an application in which the relief sought is injunction itself.

Samatta J in the case above adopted the reasoning developed in the case of *M v Home Office*.48

“... as in private law proceedings, once the Crown or a body representing the Crown is a party to proceedings, unless some express restriction exists, the Crown, like any other litigant, is liable to have interlocutory orders made against it with which it is required to comply....”49

“My Lords, the argument that there is no power to enforce the law by injunction or contempt proceedings against a Minister in his official capacity would, if upheld, establish the proposition that the executive obey the law as a matter of grace and not as a matter of necessity, a proposition which would reverse the result of the Civil War. For the reasons given by noble and learned friend, Lord Woolf, and on principle, I am satisfied that injunctions and contempt of court proceedings may be brought against the minister in his official capacity ...”50

Apart from leave requirement, section 19 (2) of the CAP 31051 sets a time limit within which an application can be made. The section provides that:-

“… that applications for an order under section 17 shall, in specified proceedings, be made within six months or such shorter period as may be prescribed after the act or omission to which the application for leave relates.”

The time starts to count from the date on which the decision or action which is challenged was made, and this is a condition precedent to application for judicial review.

48 [1993] 3 WLR 433

49 See Lord Woolf at 456H--C

50 Lord Templeman said, at 431

51 Op cit
The question of sufficient interest in the case i.e. *locus standi* is determined by examining the relation of the applicant and the all the circumstances of the case. In some cases interests may not be personal but of public nature that the court will have to grant leave on public basis though applied by an individual. Some statutes make it clear that any person may institute a proceeding on behalf of the society. For example, if the action or decision is affecting the environment one may apply for leave for judicial review under section 4 of the Environmental Management Act, 2004.

Applications for judicial review must be brought within a time limit and the applicant must have *locus standi*. An application for judicial review shall be made promptly and in any event within six months from when grounds for the application first arose, unless there is good reason for extending the period.\(^{52}\) At the stage when leave is sought for an application for judicial review, the court will not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates.\(^{53}\)

*The Judge Over Your Shoulder* states that:

> “If the person challenging the decision can say that he is affected by it and there is no more appropriate challenger, and there is substance in his challenge, the court will not usually let technical rules on whether he has sufficient interest stand in its way.”\(^{54}\)

Both representative groups\(^{55}\) and pressure groups acting in the ‘public interest’\(^{56}\) have also been found to have sufficient standing, on the basis that they represent the interests of the persons directly affected.

In the case of *R v Monopolies and Mergers Commission, ex parte Argyll Group plc*\(^{57}\) Lord Donaldson MR observed that:

\(^{52}\) See the case of *R v Inland Revenue Commissioners, ex parte NFSSB* (1982)

\(^{53}\) See *The Judge Over Your Shoulder, A Guide to Judicial Review for UK Government Administrators, 4*\(^{\text{th}}\) Edition, 2006, Treasury Solicitor, para 3.4, referring to the case of *R v DPP ex parte Bull and Another* [1998] 2 All ER 755 QBD in which Amnesty International UK was held to have standing.

\(^{54}\) See *The Judge Over Your Shoulder, A Guide to Judicial Review for UK Government Administrators, 4*\(^{\text{th}}\) Edition, 2006, Treasury Solicitor, para 3.4, referring to the case of *R v DPP ex parte Bull and Another* [1998] 2 All ER 755 QBD in which Amnesty International UK was held to have standing.

\(^{55}\) See the case of Mwanza Restaurant and Catering Association v. Mwanza Municipal Director, High Court of Tanzania at Mwanza, Misc. Civil Cause No. 3 of 1987 (unreported)

\(^{56}\) See section 4 of the Environmental Management Act, 2004
The first stage test which is applied on the application for leave [now called permission], will lead to a refusal if the applicant has no interest whatsoever and is, in truth, no more than a meddlesome busybody. If, however, the application appears to be otherwise arguable and there is no other discretionary bar, such as dilatoriness on the part of the applicant, the applicant may expect to get leave to apply, leaving the test of interest or standing to be reapplied as a matter of discretion on the hearing of the substantive application. At this second stage, the strength of the applicant's interest is one of the factors to be weighed in the balance.

The government being one of the duty bearers in protecting human rights, it becomes clear that the reasoning that the requirements under the Government Proceedings Act do not extend to judicial review because this is the primary vehicle to human rights and constitutionalism. I respectfully think that this is the modern approach of courts towards their duty to control government actions and omissions which affect the freedoms and rights of the individuals.

However, it should be remembered that judicial review is a discretionary remedy. It is within the mandate of the court to grant leave or refuse it. The court may refuse to grant leave if it is of the view that there is another adequate remedy available or that the applicant has not exhausted all available avenues or that there are no merits in the application or that the applicant has no *locus standi* or on the ground that the application is time bared. However, existence of other remedies in favor of the applicant may not bar the court to grant leave particularly when those remedies are ineffective or the procedure to obtain is hard to the applicant.

The procedural bars in applying for judicial review intend to protect public authorities from disruption without good cause and to ensure that the High court is not overburdened with inappropriate claims. This is also witnessed under the provisions of the Basic Rights and Duties Enforcement Act\(^58\) under section 8 (4) prohibiting to apply for judicial review in matters covered under that Act. The provision protects the High court from entertaining same matter in different

\(^{57}\) [1986] 1 WLR 763 and see also *R v Somerset County Council ex p Dixon* [1997] COD 323

\(^{58}\) CAP 3 R.E 2002
procedures as already has inherent powers to hear matters arising in that Act under a different capacity.

“For the avoidance of doubt, the provisions of Part VII of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, which relate to the procedure for and the power of the High Court to issue prerogative orders, shall not apply for the purposes of obtaining redress in respect of matters covered by this Act.”

5.0 Grounds for a Court to Issue a Prerogative Order

Lord Diplock is accredited with the criteria or grounds for judicial review as he identified in the case of Council of Civil Service Unions v Minister of State for Civil Service.\(^5^9\) In this case Lord Diplock identified three broad grounds for judicial review namely **illegality, irrationality** and **procedural impropriety**.

In Tanzania Moshi J, pointed out the three grounds above for judicial review in the case of Lausa Alfan Salum and 116 others v Minister for Lands Housing and Urban Development and National Housing Corporation,\(^6^0\) and he had this to say:-

“Broadly speaking, prerogative orders of certiorari and Prohibition may be issued in certain cases, either to quash a decision made in the course of performing a public duty or to prohibit the performance of a public duty, where the injured party has a right to have anything done, and has no other specific means of, either having the decision quashed or the performance of the duty prohibited, when the obligation arises out of the official status of the party or public body complained against ….had an imperative legal duty of public nature which they had to perform in their official capacity. In my considered view, any of their actions or decisions is challengeable; firstly, if it is tainted with illegality, that is, the power exercised is *ultra vires* and contrary to the law. Secondly, if it is tainted with irrationality, that is, the action or decision is unreasonable in that it is so outrageous

\(^5^9\) (1985) AC 374

\(^6^0\) 1992 TLR 293 (HC)
in its defiance of logic or of accepted moral standards that no sensible person who had rightly applied his mind to the matter to be acted upon or to be decided could have thus acted or decided. Thirdly, if the action or decision is tainted with procedural impropriety, that is, failure to observe basic rules.”

In the cases of Associated Provincial Picture Houses Ltd v. Wednesbury Corp\textsuperscript{61} and Council of Civil Service Unions v. Minster for Civil Services\textsuperscript{62} there were widely enumerated the grounds for judicial review as it follows:-

- a. Taking into account matters which it ought not to have taken into account
- b. Not taken into account matters which it ought to have taken into account
- c. Lack or excess of jurisdiction
- d. Unreasonable decision that no reasonable tribunal or authority could ever come to it
- e. Violation of natural justice rules; and
- f. Illegality procedure or decision

5.1 Illegality

In principle judicial review is limited to a review of the lawfulness or legality of a decision or action by a public body-the court however does not review the merits of a decision. Courts ensure that public bodies act legally within their powers i.e. \emph{intra vires} and the principles of natural justice are observed in making decisions by these bodies. Public bodies derive their authority from the constitution and ultimately from the electorate, and it is not for the judges to step into their shoes\textsuperscript{63} but ensure fair treatment to the people by the authority.\textsuperscript{64}

\textsuperscript{61} [1947] 2 ALL. E.R 680
\textsuperscript{62} [1984] 3 ALL E.R 935
\textsuperscript{63} As per Laws J in the case of R v. Secretary of State ex p Mahmood [2001]
\textsuperscript{64} As per Lord Hailsham in the Chief Constable of North Wales Police v. Evans (1982)
By illegality as a ground for judicial review Lord Diplock means that the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is a question to be decided in the event of dispute by judges. This would mean that when a power vested in a decision-maker is exceeded, acts done in excess of the power are invalid as being ultra vires (substantive ultra vires).

Illegality is extended to include excessive jurisdiction, errors of law, failure to fulfill a statutory duty, acting for an improper purpose, delegating discretionary powers unless permitted by law, failing to take into account all relevant considerations, fettering discretion, and interference with fundamental rights.

Error of law simply means any misdirection in law that would render the relevant decision ultra vires and a nullity. The case of Anisminic Ltd v Foreign Compensation Commission made it clear that all errors of law are now subject to judicial review and thus cleared doubt as whether errors of law by an inferior court, or tribunal or public authority ‘within jurisdiction’ (which were not reviewable) could be subject to review.

Illegality is well explained in the case of Shaban Nassoro and Another v Tanzania Portland Cement Co. Ltd and another whereby on 5 September 1990, the Applicants were summarily dismissed from their employment at the First Respondent company without the required ‘Form No. 10’. The Applicants, aggrieved by their dismissal, then appealed to the Conciliation Board, which subsequently ordered, on 22 July 1991, the Applicants' reinstatement. Aggrieved by the Board's decision, the First Respondent appealed to the Minister of Labour (the Second Respondent). In his decision dated 13 November 1991, the Minister reversed the Board's decision reinstating the Applicants.

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65 Delegatus non potest delegare i.e. statutory power must be exercised only by the body on whom it has been conferred unless delegation is expressly authorized by statute or by necessary implication.

66 [1969] 2 AC 147

67 1996 TLR 96 (HC)
The Applicants challenge the Minister's decision on the grounds that First Respondent's referral of the matter to the Minister was improper since First Respondent had not filled out 'Form No. 10', allegedly required by law. The Applicants seek orders of certiorari, quashing the Minister's ruling overturning the Board's decision, and mandamus, ordering the First Respondent to reinstate the Applicants pursuant to the Board's decision.

The court held that:

"The requirement in Section 51 of the Security of Employment Act, that the prescribed forms are to be used `for the purpose of this Act', is mandatory, and it follows that Form 10, as contained in the Third Schedule to Regulation 4 of the regulations to the Act, should have been used.

The First Respondent had lost his right to appeal to the Minister since the proviso to Section 26 (1) of the Act, that the employer's right of appeal is made subject to compliance with the `appropriate procedures', had not been complied with.

The First Respondent's appeal was accordingly not properly before the Minister, who lacked jurisdiction to reverse the Board's decision.

The orders of certiorari are granted as prayed, and the Minister's decision dated 13 November 1991 is declared null and void.

The Conciliation Board's decision dated 22 July 1991 is restored, and is ordered to be enforced."

Also the case of Said Juma Muslim Shekimweri v Attorney-General\textsuperscript{68} where the applicant sought an order of certiorari to bring up and quash a decision of the President of the United Republic `retiring' the applicant, an immigration officer, in the public interest. It appeared that the applicant had been employed by the Government of Tanzania for some years without having been subjected to any disciplinary sanction. The applicant had read a newspaper report of his

\textsuperscript{68} 1997 TLR 3 (HC)
dismissal for allegedly receiving bribes. About two months later the applicant received a letter informing him of his retirement. The developed the principle that:

“The common law principle that a civil servant was dismissible at pleasure of the President was not part of the law of Tanzania; That the letter informing the applicant of his retirement cited provisions of law which were incompatible and this had caused the applicant considerable embarrassment; Standing Order F35 which provided that all appointments were at the pleasure of the President was invalid as it was in conflict with the provisions of art. 22 and 36(2) of the Constitution; The only legislative provision which permitted the compulsory retirement was paragraph (d) of section 8 of the Ordinance which would be utilized only for the purpose of facilitating improvements in the organization of the department to which the civil servant belonged. It was clear that the applicant's removal had not been sought on these grounds.”

In R v Secretary of State for the Environment, ex p Nottinghamshire County Council [1986] AC 240 Lord Scarman explicitly indicated that Wednesbury was not an exhaustive statement of the law, noting that:

“Wednesbury principles’ is a convenient legal ‘shorthand’ used by lawyers to refer to the classical review by Lord Greene MR in the Wednesbury case of the circumstances in which the courts will intervene to quash as being illegal the exercise of an administrative discretion. No question of constitutional propriety arose in the case, and the Master of the Rolls was not concerned with the constitutional limits to the exercise of judicial power in our parliamentary democracy. There is a risk, however, that the judgment of the Master of the Rolls may be treated as a complete, exhaustive, definitive statement of the law.”

A public body is not entitled either to improperly delegate its powers or to act under a completely inflexible policy. In particular, while it is accepted that Ministers cannot personally make every decision issued in their name69 where legislation confers a power on a specified individual or body, the power cannot be delegated to another person or body.

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69 Carltona Ltd v Commissioners of Works [1943] 2 All ER 560
Moreover, a body or tribunal is not entitled blindly to follow policy guidelines. Neither is it entitled to fetter the exercise of its discretion. In the case of *Port of London Authority, ex p Kynoch Ltd*70 Lord Justice Banks observed that:

“There are on the one hand, cases where a tribunal in the honest exercise of its discretion has adopted a policy, and without refusing to hear an applicant intimates what its policy is, and that after hearing him it will in accordance with its policy decide against him, unless there is something exceptional in his case … On the other hand there are cases where a tribunal has passed a rule, or come to a determination, not to hear any application of a particular character by whomsoever made.”

It is this latter course of action which is not acceptable. In the more recent case of *R v Secretary of State for the Home Department, ex p Venables*27, Lord Browne-Wilkenson observed that:

“When Parliament confers a discretionary power exercisable from time to time over a period; such a power must be exercised on each occasion in the light of the circumstances at that time. In consequence, the person on whom the power is conferred cannot fetter the future exercise of his discretion by committing himself now as to the way he will exercise the power in the future … By the same token, the person on whom the power has been conferred cannot fetter the way he will use that power by ruling out of consideration on the future exercise of that power factors which may then be relevant to such an exercise. These considerations do not preclude the person on whom the power is conferred from developing and applying a policy as to the approach which he will adopt in the generality of case … But the position is different if the policy adopted is such as to preclude the person on whom the power is conferred from departing from the policy or from taking into account circumstances which are relevant to the particular case … If such an inflexible and invariable policy is adopted, both the policy and the decision taken pursuant to it will be unlawful.”

70 [1919] 1 KB 176
5.2 Irrationality

By irrationality as a ground for judicial review it is associated with what is referred to as Wednesbury unreasonableness. In Associated Provincial Picture Houses Ltd v Wednesbury Corp\textsuperscript{71} the Court of Appeal held that a court could interfere with a decision that was so unreasonable that no reasonable authority could ever have come to it. Irrationality applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.\textsuperscript{72}

This ground has been used to uphold constitutionalism as it prevents powers from being abused by, for example, exercising a discretion for an improper purpose or without taking into account all relevant considerations. In doing so, courts have been in return protecting human rights.

In \textit{Rv. Ministry of Defense ex p Smith} [1996] the court reviewed a decision to discharge a number of individuals from the army on the basis of their homosexuality. The basis for the decision was that the presence of homosexuals in the armed forces would have a substantial and negative effect on the operational effectiveness of the armed forces. The court of appeal affirmed the decision of the government and developed the principle of anxious scrutiny. But the case was again referred to the European Court of Human Rights as \textit{Smith v. United Kingdom (no.1)} [1999] where it was held that there had been violation of right to private life and the right to an effective remedy. The court held that the irrationality test in judicial review provided an insufficiently effective means of scrutiny in the circumstances.

It suffices to say that the test for irrationality in uncertain because if the basis is human rights, what is a human right in Tanzania may not necessarily be a right in Europe. If refer such a case to Tanzanian courts, the approach and decision could be different as homosexuality is itself illegal.

\textsuperscript{71} Op cit

\textsuperscript{72} As per Lord Diplock, \textit{op cit}
5.3 Procedural Impropriety

Procedural impropriety as a ground for judicial review covers the failure by the decision-maker to observe procedural rules that are expressly laid down in the legislation by which its jurisdiction is conferred, or a failure to observe basic rules of natural justice, or a failure to act with procedural fairness i.e. procedural ultra vires.

Principles of natural justice comprises of three main categories namely:-

a. *nemo judex in causa sua* i.e. no man is to be a judge in his own cause.

b. *Audi alteram partem* i.e. no man is to condemned unheard.

c. *Nullum arbitrium sine rationibus* i.e. the right to reasons for the decision.

In Ridge v Baldwin\textsuperscript{73} the court held that a police authority’s decision to dismiss a chief constable was procedurally unfair in that it failed to provide the applicant with a proper opportunity to challenge allegations made against him. Lord Denning says what fairness demands will depend upon the nature of the individual’s interests, the impact of the decision, whether the decision is preliminary or final, the subject matter of the decision, the terms of any relevant statutory provisions and all the circumstances of the case.

In the case of *Mohamed Jawad Mrouch v Minister for Home Affairs*\textsuperscript{74} the court observed the application in respect to non observance of principles of natural justice. The Applicant arrived in Tanzania during the course of 1987 and was subsequently granted a ‘Residence Permit Class 'A' No.004307’, issued on 14 September 1990. Renewed on 16 September 1993, the permit was to remain current until 12 September 1994. In the interim, however, it was cancelled by the Director of Immigration Services and duly confirmed by the Minister for Home Affairs, on 2 December 1993.

\textsuperscript{73} [1964] AC 40

\textsuperscript{74} 1996 TLR 142 (HC)
In a letter to the Applicant, the Director advanced that `the power conferred upon me under s.15 (2) of the Immigration Act No.8 of 1972' constituted the reason for the cancellation of the Applicant's permit.

The Applicant's counsel contended that the unstated reason for the cancellation of the permit was due to certain criminal charges pending against the Applicant, and that the effect of such cancellation was that the Applicant, as persona non grata in the Republic, could not clear his name by defending the charges.

The Applicant accordingly sought the invalidation of the cancellation of the permit on account of the alleged bias of the Minister and also on the basis that the Applicant was `punished' unheard. The court held that:-

“The Applicant learnt of the cancellation of his permit from a third party, since he was himself out of the country at the time of cancellation and the letter of cancellation was served upon his son.

Once a permit is granted to an immigrant, he has the right to remain in the Republic until such permit expires. If, however, the permit should be revoked during its currency, the immigration authorities have a duty to give reasons for such revocation and to afford the affected person the opportunity of being heard, prior to a final decision being taken.

Discretionary powers must be exercised fairly, and this requires adherence to the rules of natural justice which include the right to be heard. There is nothing in Section 15(1) of the Immigration Act which ousts that right.

Although the Applicant had a legitimate expectation of remaining in the country until the expiry of his permit, that expectation could have been justifiably extinguished if, and only if, he had been given an opportunity of making representations to the authorities.

In the result, the following orders of certiorari are made: the Director's decision, cancelling the Applicant's permit is quashed; the Minister's decision, confirming the Director's decision of cancellation, is quashed; and the Minister's order of deportation of
the Applicant is quashed. A mandamus is issued, ordering the Director to restore 'Residence Permit Class `A' No.0043607' to the Applicant forthwith.”

In Tanzania it is required for an authority deciding to give reasons for the decision as it was said in the case of Tanzania Air Services Limited v. Minister for Labour, Attorney General and the Commissioner for Labour75 where the applicant company, aggrieved by the decision of the Labour Conciliation Board re-instating an employee whose services had been terminated, referred the matter to the Minister for Labour under s 26 of the Security of Employment Act 1964, Cap 574. The Minister lawfully delegated his power to deal with the reference to the Commissioner for Labour who confirmed the decision of the Conciliation Board but gave no reasons at all for reaching that decision. Section 27(1) of the Act stated that the decision of the Minister was final and conclusive. The applicant sought an order of certiorari to quash that decision contending that the failure to give reasons rendered the decision a nullity. The observed that:-

“Under common law there is no general requirement that public authorities should give reasons for their decisions but that position has been under criticism; The interests of justice call for the existence, in common law, of a general rule requiring public authorities to give reasons for their decisions; Under s 2(2) of the Judicature and Application of Laws Ordinance, Cap 453, the High Court has power to vary the common law to make it suit local conditions; the conditions of the people of Tanzania make it a fundamental requirement of fair play and justice that parties should know at the end of the day why a particular decision has been taken; The provision that the Minister's decision is final and conclusive does not mean that the decision cannot be reviewed by the High Court; indeed no appeal will lie against such a decision but an aggrieved party may come to the High Court and ask for prerogative orders; Quashing the Labour Commissioner's decision and letting the matter lie there will be unsatisfactory as it will leave in force the decision of the Conciliation Board; an order of mandamus, therefore, can be issued by the High Court invoking its inherent powers notwithstanding that there is no prayer for the same; To ensure that justice is done and also it is seen to be done the

75 1996 TLR 217 (HC)
order of mandamus should be directed to the Minister himself, not the Commissioner for Labour.”

In Tanzania these rules are constitutionally provided especially under article 13 (6) (a). This provision forms the basis for procedural impropriety in Tanzania.

Another aspect under procedural impropriety can be traced the case of R v North and East Devon Health Authority, ex p Coughlan the Court of Appeal determined that:

“To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be consciously taken into account when the ultimate decision is taken.”

6.0 Remedies Available under Judicial Review

If an application for judicial review is successful the following remedies are available. It should be noted that these remedies vary from country to country.

a. The prerogative orders (mandamus, prohibition and certiorari)

Mandamus is an order from the High Court commanding a public authority or official to perform a public duty (mandatory order).

Prohibition is an order issued primarily to prevent an inferior court or tribunal from exceeding its jurisdiction, or acting contrary to the rules of natural justice (prohibiting order).

Certiorari is an order quashing decisions by inferior courts, tribunals and public authorities where there has been an excess of jurisdiction or an ultra vires decision; a breach of natural justice; or an error of law. By setting aside a defective decision, certiorari prepares the way for a fresh decision to be taken (quashing order).

76 Op cit
As I pointed out earlier, the High Court has discretion to grant these remedies or not as it explained below by case laws.

In *Shah Vershi & Co. Ltd. v G the Transport Licensing Board*\(^{77}\) it was held by Chanan Singh, J., at p. 294 that:

“Ordinarily, the High Court will decline to interfere until the aggrieved party has exhausted his statutory remedy.... But this is a rule of policy, convenience, and discretion, rather than a rule of law. In other words, the existence of a right of appeal is a factor to be taken into account: it does not bar the remedy (of certiorari), especially where the alternative is not speedy, effective, and adequate.... I am of the view that neither the existence of a right of appeal nor the filing of an appeal deprives the company of its right to ask for certiorari.”

Re A.G.’s Application\(^{78}\)

“It is well-settled law that, where there is express legislation as to appeal, the prerogative, while not repealed (for that is difficult to conceive) cannot ordinarily be invoked unless and until the local substantive provisions have been fully exploited and found wanting in remedy. The ancient remedy of prerogative is from time to time superseded. In a sense it become obsolete…I am unable to see how the appellant can now be permitted to abandon the procedure he has followed, recede from the statutory procedure hitherto followed and ignore procedure for relief provided by a statute and be permitted to invoke the non-statutory jurisdiction provided by the prerogative.”

In *Re Fazal Kassam (Mill) Ltd.*\(^{79}\) one of the objections raised was that the applicants were precluded from seeking relief by way of mandamus since they had a right of appeal to the

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\(^{77}\) [1971] E.A. 289, a Kenyan case

\(^{78}\) [1958] E.A. 482, it was said by Cram, Ag. J., at p. 485-486

\(^{79}\) [1960] E.A
Minister against the respondent's refusal to issue them with a coffee exporter’s licence. It was stated by Sir Ralph Windham, C.J., at p. 1005, that:-

“... it is not the law that the court will always refuse mandamus when the applicant could have appealed. The matter is one of discretion, to be carefully and judicially exercised, the position being simply that as stated in Halsbury’s Law of England (3rd Ed.) Vol. 11 at p. 107: The court will, as a general rule, and in the exercise of its discretion, refuse an order of mandamus, when there is an alternative specific remedy at law which is not less convenient, beneficial and effective.”

Certiorari, as with prohibition, may issue where an inferior tribunal has wrongly assumed jurisdiction or has exceeded jurisdiction in the discharge of judicial functions. That the decisions complained must bear judicial character and not purely administrative. It is stated in Halsbury's Law (above, at pp. 134-135 that:-

“Certiorari will issue to quash the determinations of any body of persons having legal authority to determine questions affecting the right of subjects and having the duty to act judicially. Certiorari lies only in respect of judicial, as distinguished from administrative acts.”

b. Other Remedies

In this category the remedies include injunctions, declarations and damages. An injunction is a court order that requires somebody involved in a legal action to do something or refrain from doing something. A declaration is a statement of the legal position in the matter before the court. The court may simply declare that an administrative action or decision is valid or not. A declaration lacks coercive power as the case has been in Tanzania with High court declaring some statutes null and void and wait for responsible authority to rectify the situation.80 Damages may be awarded with any of the applied orders above but an applicant may not seek damages

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80 See Article 30 (5) of the Constitution of the United Republic of Tanzania, 1977.
alone in judicial review. Judicial review only provides means to claims damages which otherwise would have to be claimed in separate proceedings.

However, it is should be noted that in Tanzania declaration is not part of prerogative remedies available under CAP 310.\textsuperscript{81} This is a remedy falling under civil proceedings under the Government Proceedings Act.\textsuperscript{82} As to injunction this can be obtained as an interim measure to restrain unlawful act about to be, or in the process of being committed. It is a tool to maintain \emph{status quo ante}.

The remedies available for judicial review in Tanzania are the prerogative orders namely mandamus certiorari and prohibition as per section 17 of CAP 310. Damages may be granted if claimed by the applicant.

\section*{7.0 Examples from Tanzania on the Grounds and Remedies under Judicial Review}

Festo Barege and 794 others v Dar es Salaam City Council\textsuperscript{83}, the applicants were residents of a suburb of Dar es Salaam where the City Council dumped waste and refuse which attracted swarms of flies. When the rubbish was set on fire, a lot of smoke and foul smell was produced and inconvenienced the neighborhood. The applicants applied for orders of certiorari to quash the decision of the City Council of dumping waste; prohibition, to stop the City Council from continuing that nuisance; and mandamus, to compel the respondent to discharge its functions properly by establishing and using an appropriate site. The application was granted by the High Court. A number of findings were made: One, the City Council’s action was \emph{ultra vires} the Local Government (Urban Authorities Act, 1982. Two, the action was contrary to the City’s Master plan. Three, it was not a statutory duty of the respondent to create nuisance but to stop it and avoid to endanger the residents’ health. Four, Article 14 of the Constitution, which guarantees the right to life and its protection by the society was breached.

\begin{itemize}
  \item \textsuperscript{81} \textit{Op cit}
  \item \textsuperscript{82} \textit{Op cit}
  \item \textsuperscript{83} Misc. Civil Cause No. 90 of 1991, High Court of Tanzania at Dar es Salaam (unreported).
\end{itemize}
In the case of *Edward Mlaki Liston Matemba v The Region Police Commander*\(^{84}\) there was an allegation that the applicant’s two vehicles were involved in transporting smuggled goods. The Regional Police Commander of Kilimanjaro Region, pursuant to the instructions of the Secretary to the Regional Security Committee, arrested and detained the vehicles. The applicant was later summoned to appear before the Region Security Committee where he denied the allegations. He was told that he would be informed of the outcome but that was not done. The vehicles remained in police custody though no criminal charges were preferred against him. The High Court held that in the absence of any pending criminal matter the respondents had no power to detain the applicant’s vehicles, and an order of mandamus was issued to release the vehicles.

Another example may be cited in from the case of *Palm Beach Inn Ltd and Another v Commission for Tourism and Two Others*\(^{85}\), where the second applicant, Ms. Naila Majid Jiddawy, was operating a tourist hotel, on the eastern coast of the Island of Zanzibar. The first respondent’s employees ordered the closure of the hotel, cancelled her business licence, and ordered her to vacate the premises for good. The applicants challenged those three orders in the High Court of Zanzibar which made a number of findings: One, the respondents exceeded their powers in closing the hotel and revoking the applicants’ licence. Two, the respondents’ actions were *ultra vires*. Three, the deportation order served on the second applicant deprived her of freedom of movement. Four, the applicants were denied the right of a hearing in spite of their demands to know what were their faults. Orders of certiorari were granted to quash the 2nd respondent’s decisions to close the hotel and cancelling the licence. A prohibition order was also issued to restrain the 2nd respondent from purporting to act as the Commission for Tourism while no commissioners had been appointed.

**8.0 A Distinction between Judicial Review and Appeal**

An appeal is concerned with the merits of the decision while judicial review is concerned with the legality of the decision. Judicial review is not concerned with the ‘merits’ of a decision or whether the public body has made the ‘right’ decision. The only question before the court is whether the public body has acted unlawfully. In particular, it is not the task of the courts to substitute its judgment for that of the decision maker. The courts would traditionally only

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\(^{84}\) Misc. Civil Application No. 38 of 1979 (unreported)

\(^{85}\) High Court of Zanzibar Civil App. No 30 of 1994 (unreported)
intervene where a public body had used a power for a purpose not allowed by the legislation (acting *ultra vires*) or in circumstances where when using its powers, the body has acted in a manner that was obviously unreasonable or irrational. In cases where there is a real unfairness, the courts may now be willing to intervene where the public body has made a serious factual error in reaching its decision.  

The court in appeal have the power to determine whether a decision was right or wrong and if wrong it is generally permitted to substitute its own decision for the erroneous one. By contrast in judicial review the High Court is limited to a supervisory role i.e. decision and decision making process. If the High Court finds the decision being flawed then it may quash the decision but it will then be for the decision maker to reconsider the decision.

Appeal is a constitutional right to a person aggrieved by a certain decision either by the court or a tribunal or a quasi judicial tribunal or even of an administrative agency while judicial review is a privilege at the discretion of the High Court to grant leave or refuse.

Appeal starts from the district court to the Court of Appeal depending on the nature of the case but it is only the High bestowed with powers to receive and hear application for judicial reviews. In appeal there is no application for leave except that when the appeal is from the High Court to Court of Appeal on matters of law but in judicial review leave is a mandatory procedural requirement unless the High Court chooses to waive the requirement where it deems necessary like issues of urgency.

9.0 Conclusion

Judicial review is the procedure by which you can seek to challenge the decision, action or failure to act of a public body such as a government department or a local authority or other body exercising a public law function. If you are challenging the decision of a court, the jurisdiction of judicial review extends only to decisions of inferior courts. It does not extend to decisions of the High Court or Court of Appeal. Judicial review must be used where you are seeking: a mandatory order (i.e. an order requiring the public body to do something and formerly known as an order of mandamus); a prohibiting order (i.e. an order preventing the public body from doing something and formerly known as an order of prohibition); or a quashing order (i.e. an order quashing the public body’s decision and formerly known as an order of certiorari) or damages if

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sought. Moreover, in the case of *R v HM the Queen in Council, ex parte Vijayatunga*\(^{87}\), Mr. Justice Simon Brown (now Lord Brown of Eaton Under Heywood) observed that “judicial review is the exercise of the court's inherent power at common law to determine whether action is lawful or not; in a word to uphold the rule of law.”. Professor Paul Craig has explained the conceptual justification for judicial intervention in this way:

> It is readily apparent that the execution of legislation may require the grant of discretionary power to a minister or an agency. Parliament may not be able to foresee all the eventualities and flexibility may be required to implement the legislation. The legislature will of necessity grant power subject to conditions …Herein lies the modern conceptual justification for judicial intervention. It was designed to ensure that those to whom such grants of power were made did not transgress the sovereign will of Parliament.\(^{88}\)

He went on to suggest that if the courts did not intervene, ministers or agencies would be allowed to exercise a power in areas not specified by Parliament. Thus, courts have to intervene to maintain the spirit of the Parliament.

However, there have been a number of attempts by the executive to introduce legislation to exclude or oust the possibility of judicial review. Generally these exclusions are construed by the court in a restrictive fashion, so as not to deprive the courts of their ability to exercise a supervisory jurisdiction.\(^{89}\) In the case of *Anisminic Ltd. v. Foreign Compensation Commission*,\(^{90}\) the court considered certain issues pursuant to Orders made under the *Foreign Compensation Act 1950*. Section 4(4) of the 1950 Act provided that the determination by the Foreign Compensation Commission of any application "shall not be called into question in any court of law".

In his judgment, Lord Reid observed that:

> Statutory provisions which seek to limit the ordinary jurisdiction of the court have a long history. No case has been cited in which any other form of words limiting the jurisdiction

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\(^{87}\) [1988] QB 322


\(^{89}\) See for example Supperstone and Knapman, *Administrative Court Practice*, Butterworths LexisNexis, 2002, para 2.7

\(^{90}\) [1969] 2 A.C. 147
of the court has been held to protect a nullity. If the draftsman or Parliament had intended to introduce a new kind of ouster clause so as to prevent any inquiry even as to whether the document relied on was a forgery, I would have expected to find something much more specific than the bald statement that a determination shall not be called in question in any court of law …

In *Mwanza Restaurant and Catering Association v. Mwanza Municipal Director*\(^1\) where the court said that it is settled the effect of exclusion clauses is not to disarm the High Court of its supervision role of inferior tribunals and statutory bodies.

Therefore, judicial review is a primary vehicle for constitutionalism and rule of law and the High court is a supervisory organ for checks and balances in Tanzania.

**NB.** This document is prepared for Constitutional Law and Administrative Law Students at SAUT; it is yet on progress to form part of the Constitutional Law Manual for Students and Law Practitioners. All mistakes remain mine.

\(^1\) High Court of Tanzania at Mwanza, Misc. Civil Cause No. 3 of 1987 (unreported)