

Judicial Review

An Essential Tool for Curbing the Excesses and Abuse of Executive Action in Sierra Leone

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Abstract

This essay examines judicial review in executive/administrative action as an essential tool for curbing the excesses and abuse of delegated legislative powers in Sierra Leone based on the valid assumption that there is a system of administrative law due to a developed system of judicial review in Sierra Leone. To examine and establish the facts, focus is laid on judicial review of administrative/ executive action and not on judicial review of primary legislation. This article first and foremost tried to establish that, the practice of delegated legislation from which judicial review ensues is a necessity in any given democratic society. This piece of work in trying to establish its facts, put forward arguments by scholars and writers in support and against the use of judicial review as an essential tool to curb the abuse and excesses of executive's action. This is juxtaposed in conjunction with cases laws from Sierra Leone dealing with judicial review. The irrefutable fact this article tried to illustrate is that judicial review is important in any society in curtailing the excesses and abuse of executive actions.

Keywords: delegated legislation, administrative law, judicial review.

A. Introduction

This dissertation examines judicial review in executive (administrative)¹ action as an essential tool for curbing the excesses and abuse of delegated legislative powers in Sierra Leone based on the valid assumption that there is a system of administrative law due to a developed system of judicial review in Sierra Leone. The role of the courts in reviewing the acts and decisions of government departments and other public authorities is found in all common law and other legal systems and Sierra Leone is no exception. The authority of courts to declare actions of legislative or administrative body unconstitutional or ultra vires, therefore rendering

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1 The terms administrative action and executive action are used interchangeably in this dissertation as both terms in the Sierra Leonean context have often been synonymous.

those actions unenforceable and unlawful remain a live debate especially in the legal and political field. As a result of this, various explanations and classifications have been made as to what the concept of judicial review entails.

For instance Burris² stated that the whole conceptual framework of judicial review is premised upon the assumption that there is a distinction between the power of the court to review laws to determine if they are consistent with the constitution, and reviewing laws to determine if they are good policy decisions. The latter he went on to say belongs to the political decision process and the former are decisions which are the province and the duty of the judiciary to say what the law is.

Bradley³ stated that judicial review denotes power of the courts to review acts of the executive and legislature on constitutional grounds, tracing this foundation from the landmark case of *Marbury v. Madison*,⁴ where the United States Supreme Court declared the constitution to be the fundamental law. Others are of the view that judicial review was first established by the Judiciary Act of 1789. This Act put in place all the crucial elements of judicial review, including an explicit authorization to declare federal and state laws constitutional.⁵

Nevertheless, what is clear from the views mentioned above is that the term judicial review is commonly used in relation to both administrative and constitutional review generally. The process is viewed as the courts' rights to test any legislation or other governmental action against the constitution on procedural or substantive grounds. Most Commonwealth countries with constitutions (with the exception of the United Kingdom⁶), accept that the constitution is the fundamental law which confers certain powers on the legislature, executive and judicial arm of governance. The constitution normally imposes limits as well on the authority of the legislature and the executive and gives power to the courts (for Sierra Leone the Supreme Court) to determine matters pertaining to constitutional law.

However, the origins of judicial review in the United Kingdom (from whom Sierra Leone inherited and adopted its laws⁷) are linked to certain judicial remedies such

2 J.C. Burris, 'Some Preliminary Thoughts on a Contextual Historical Theory for the Legitimacy of Judicial Review', (1987) *Oklahoma City University Law Review*, 12, pp. 585-655, at p. 586.

3 A. Bradley, 'Judicial Review', Lecture Notes on Themes in Legislative Studies 2010, p. 1. Available at <<http://studyonline.sas.ac.uk/course/view.php?id=18>>, accessed 22 January 2010.

4 [1802] 1 Cranch 137.

5 M.A. Graber, 'Establishing Judicial Review: Marbury and the Judicial Act of 1789', (2002-2003) *Tulsa Law Review*, 38, pp. 609-650, at pp. 612-613; Bradley (2010), p. 1.

6 In the United Kingdom there is no 'written constitution', however acts of parliament are supreme.

7 "These rules were received in Africa under the general reception statutes, by which the British imperial overlords imposed the common law on their new African territories"; see R.B. Seidman, 'Administrative Law and Legitimacy in Anglophonic Africa: A Problem in the Reception of Foreign Law', (1970-1971) 5 *Law & Soc'y Rev* 162-164& 167; J.A.D. Alie, *A New History of Sierra Leone* (1st ed., St Martin's Press Inc, New York 1990) 62-63; C. Fyfe, *A History of Sierra Leone* (OUP, Oxford 1962) 97; A.P. Kup, *Sierra Leone: A Concise History* (Douglas David and Charles Limited, Vancouver 1975) 167; The Constitution of Sierra Leone 1991 s 170(1) (a-e).

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as the prerogative orders or writs known as *certiorari*, *mandamus*, *prohibition* and *habeas corpus* and also the use of *declaration* and *injunctions* against public authorities.⁸ These judicial remedies could be traced from the early English landmark cases of *Cooper v. Wandsworth South London Board of Works*,⁹ (wherein notice must be given before statutory power to demolish a house could be exercised), *Associated Provincial Pictures Houses v. Wednesbury Corporation*¹⁰ (wherein the level of unreasonableness of a decision-maker was established), *Ridge v. Baldwin*¹¹ (a chief constable was dismissed without a hearing), to the creation of the procedure of ‘application for judicial review’.

Judicial review in English law has transformed in the last forty years into a modern and effective system of administrative law.¹² This application of judicial review, Bradley¹³ stated has come to be referred to as the special method of applying for public law remedies in the Administrative Court, the busiest division of the High Court (in England) which saw among others, recent judicial review cases such as *Council of Civil Service Unions v. Minister for the Civil Service*¹⁴ and *M v. Home Office*¹⁵ (Home Secretary required to comply with orders of court). In this light and from the fact that Sierra Leone inherited and adopted her laws and in particular her judicial review system largely from the English law, can one then assume that Sierra Leone has developed a similar effective system thus making it an essential tool to curtail abuse and excesses of delegated legislation in administrative actions? This matter which is the focus of this paper will be discussed and analyzed in subsequent chapters.

I. *Aims and Objectives*

The hypothesis of this paper is that judicial review is an essential tool for curbing the excesses and abuse of executive powers in administrative action in Sierra Leone. The question to be answered and facts to be established in order to prove the hypothesis are what are the various ways of reducing the excesses and abuses of delegated legislation, is judicial review one of the ways and if so, how does it serve (if at all) as an essential tool, and its importance in restricting the excesses and abuse in administrative actions. The aim and objective of this essay is to prove the above-mentioned hypothesis. The reason for this research is that judicial review in administrative action in Sierra Leone has been a controversial and

8 R.B. Seidman, ‘Administrative Law and Legitimacy in Anglophonic Africa: A Problem in the Reception of Foreign Law’, (1970-1971) *Law and Society Review*, 5, pp.161-204, at p. 165; H.W.R. Wade, *Administrative Law* (2nd edn.), Oxford, Clarendon Press 1967, pp. 42 and 46.

9 [1863] 14 CBNS 180, 143 ER 414.

10 [1948] KB 223.

11 [1964] AC 40 (HL).

12 Bradley (2010), p. 2.

13 *Ibid.*

14 [1985] AC 374 (HL).

15 [1992] 4 All ER 97; [1993] 3 All ER 537; 1994 1 AC 377; “The proper constitutional relationship of the executive with the courts is that the courts will respect all acts of the executive within its lawful province, and that the executive will respect all decision of the court as to what its lawful province is” (per Lord Justice Nolan).

highly debated topic by politicians, civil society, academics, the media and the nation as a whole. Harsh criticism has come mainly from the politicians who have described the process as non-effective, a waste of time and resources by the courts and the nation as a whole. Moreover they argue that judicial review undermines the principles of separation of powers and that the concept authorizes judges to set aside the decisions of democratically elected legislatures.

II. Methodology

Judicial review is a very broad subject and therefore emphasis will be on judicial review of administrative (executive) action and not on judicial review of primary legislation. The reason for focusing on the former rather than the latter aspect of judicial review is that the former action is normally directed towards the acts and omissions of other bodies or authorities who have delegated legislative powers.¹⁶ Therefore in order to examine and prove the hypothesis, particular attention will be directed towards examining the theories that govern judicial review in administrative actions generally, the law, nature and protection accorded by judicial review in Sierra Leone and also of importance, the decisions of landmark cases in judicial review applications in Sierra Leone spanning three decades starting from the mid 1980s to late 2000. This period is being used because this era will enable me to analyze and establish whether the use of judicial review application has proved essential during the course of time in curtailing or curbing the excesses and abuse of executive powers in Sierra Leone. Judicial review of administrative actions has long been recognized as common law by the United Kingdom from whom Sierra Leone adopted and inherited its judicial review principles and procedures. Therefore I am going to use as point of reference, the United Kingdom's system of judicial review in administrative action.

In furtherance to establishing my hypothesis, I will use arguments put forward by experts, legal professionals, jurists, and writers against and in support of the use and importance of judicial review as an essential means of curbing the excesses and abuse of delegated legislation in executive actions. The reason for using these arguments in conjunction with judicial review cases in Sierra Leone in the analysis is that they will help in establishing whether the use of judicial review in curtailing excesses and abuse of administrative (executive) action has proved to be an essential tool and an effective one used by the courts in Sierra Leone to act as a check and more importantly restrain the excesses and any abuse of executive powers. Traditionally, the theory of separation of power clearly states that each arm of government, meaning the legislature, executive and judiciary must work within its purview and not overlap or interfere with each other's domain. However if a country is claiming to practise democracy there must be checks and balances especially on the executive arm of government since in most jurisdictions they are entrusted by the people with the responsibility of the day-to-day running of the country. Therefore the rule of law must be seen to prevail and government

16 B. Jabbie, 'Autonomic Judicial Review: Powers in Search of Identity and Assertion', *Journal of African Law* (1999) 43, pp. 99-111 at p. 99.

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powers must be exercised according to law. Besides, there should be a reasonable degree or predictability as to the law, so that people may order their affairs accordingly.¹⁷

This matter may well be the reason for the development and increasing growth of the use of judicial review by the courts in numerous jurisdictions. Notwithstanding this fact, some experts have propounded various arguments against the use of judicial review as a means of limiting abuse or excesses of the executives' action. One such argument is that it is limited in its scope whether it takes place in terms of the common law or in terms of the constitution; as the doctrine of the separation of powers traditionally prevents the courts from reconsidering administrative actions on merits, and confines them to questions of process and procedure.¹⁸ Judicial review has also been criticized as backward-looking, marginal, negative, sporadic and peripheral, random, inapt, inaccessible, expensive, undemocratic and destructive.¹⁹ Griffith²⁰ also maintains that decisions made by public authorities made within their purview should be out of bounds to the courts.

On the other hand, other writers, jurists and the like have supported the view that judicial review is an essential mechanism to curb abuses and excesses of executives' action in governance.²¹ It has been purported that judicial review by the courts acts as a guardian of parliament's will.²² It has been put forward to be an important control mechanism on the government.²³ The question then to answer is whether the Sierra Leonean courts have proved that judicial review is indeed an essential tool to curb these excesses and abuse of the executive's action? Or does the courts' practise of judicial review confirm the arguments of those writers, experts and politicians who do not support the use of judicial review as an essential tool to check the executives' excesses? This dissertation therefore anticipates contributing to the ongoing debate of judicial review with an analytical perspective of the concept and how it works and what it has achieved (if anything) from a different part of the world (Sierra Leone) wherein not much has been written on

- 17 I. McLeod, 'Identifying the Scope of Statutory Provisions in the Context of Judicial Review', Lecture Notes on Themes in Legislative Studies 2009, p. 3. Available at: <<http://studyonline.sas.ac.uk/course/view.php?id=18>>, accessed 27 November 2009.
- 18 C. Hoexter, 'The Future of Judicial Review in South African Administrative Law', *South African Law Journal* (2000), 117, pp. 484- 519 at p. 485.
- 19 A.C. Hutchinson, 'The Rise and Ruse of Administrative Law and Scholarship', *Modern Law Review* (1985) 48, pp. 293-394, at p. 294; W. Harvey, 'The Rule of Law in Historical Perspective', *Michigan Law Review* (1961) 59, pp. 487-491, at p. 487; S.A. De Smith, Hon Lord. Woolf and J. Jowell, *Judicial Review of Administrative Action* (5th edn.). London, Sweet & Maxwell 1995, p. 3; P. Cane, *An Introduction to Administrative Law* (5th edn.). Oxford, Clarendon Press 1996, p. 378.
- 20 J.A.G. Griffith, 'The Common Law and the Political Constitution', *Law Quarterly Review* (2001) 117, pp. 42-67, at p. 63.
- 21 H. Woolf, J. Jowell and A. Le Sueur, *De Smith's Judicial Review* (6th edn.), London, Sweet & Maxwell 2007, p. 6; A.M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*. Indianapolis, Bobbs-Merrill 1962, pp 23-28.
- 22 Woolf *et al.* (2007), p. 226.
- 23 M. Fordham, *Judicial Review Handbook* (5th edn.), Oxford, Hart Publishing 2008, p. 10.

this area from this jurisdiction although it is constantly debated upon. This matter will be analyzed with practical examples of cases where courts have employed the concept in order to achieve the ends of equity, justice and fairness. In discussing these issues and to establish my hypothesis, I intend to use primary and secondary sources from which I can analyze and draw a valid conclusion. The structure which this dissertation will pursue is highlighted in the next section.

III. Structure

This article comprises five parts. Part A comprises the introduction in which a brief historical background of the concept of judicial review is highlighted and the arguments that have been raised generally against and in support of the concept. In this same part the aims, objectives and hypothesis of this dissertation are stated, followed by the methodology in which the reasons for the area of focus are also stated. The structures which this piece of work will follow are also stated.

Part B consists of the description and discussion of the concept of judicial review focusing on the aspect of administrative (executive) action. Delegated legislation and its powers will be described briefly and the necessity of delegating legislation, in other words its purpose. In this same chapter the processes and procedure of judicial review in Sierra Leone will also be briefly discussed.

Part C contains the arguments put forward in support and against the use of judicial review as an essential tool to curb the abuse and excesses of executive's action. These arguments in conjunction with the cases will be used in the analysis to prove the hypothesis.

Part D will further discuss and analyze whether judicial review serves as an essential tool to curb the abuse and excesses of executive powers, and if so what is its importance. In this same chapter the hypothesis will be established with more analyses of the above stated theory, arguments and cases. Part E is a conclusion stating the findings of my hypothesis and some recommendations.

B. Description and Discussion of Concepts

I. The Concept of Judicial Review

Judicial review represents the means by which the courts control the exercise of governmental power.²⁴ Judicial review, Barnett²⁵ observed, "has developed to ensure that public bodies which exercise law making power or adjudicatory powers are kept within the confines of the power conferred".

The scope of judicial review was succinctly summarized by Lord Diplock in the case of *Council of Civil Service Unions v. Minister for the Civil Service*²⁶ (also

24 H. Barnett, *Constitutional and Administrative Law* (7th edn.), Abingdon, Routledge-Cavendish 2009, p. 685.

25 *Ibid.*

26 [1985] AC 374 (HL).

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known as the *GCHQ* case as the facts concerned the Government Communication Headquarters), when he said:

The subject matter of every judicial review is a decision... or else a refusal to make a decision. To qualify as a subject for judicial review the decision must have consequences which affect some persons (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either:

- a. By altering rights or obligations of that person which are enforceable by or against him in private law; or
- b. By depriving him of some benefit or advantage which either
 - i. he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to enjoy until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment; or
 - ii. he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.....

For a decision to be susceptible to judicial review the decision-maker must be empowered by public law (and not merely... by agreement between private parties) to make decisions that, if validly made, will lead to administrative action or abstention from action by an authority endowed by law with executive powers, which have one or other of the consequences mentioned in the preceding paragraph, the ultimate source of the power is nearly always nowadays a statute or subordinate legislation made under a statute, but... may still be... 'the prerogative'.²⁷

In other words the scope of judicial review is to ensure that decisions of public authorities conform to legal principles and observe fair procedures because there is a relationship between specific statutory rules that apply to a public service and general principles that administrators must observe.²⁸ It is in this light that McLeod²⁹ observed that, "traditionally, judicial review has been the process which requires courts to decide whether a decision-making process is lawful, without asking whether the decision itself is right". This was illustrated in the case of *Chief Constable of the North Wales Police v. Evans*³⁰ wherein Lord Brightman said,

²⁷ *Ibid.*, pp. 23-24.

²⁸ Bradley (2010), pp. 2-3; Barnett (2009), pp. 685-686.

²⁹ McLeod (2009), p. 6; Barnett (2009), p. 685.

³⁰ [1982] 3 All ER 141 (HL).

“Judicial review as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made”.^{31,32}

Some of the issues that the courts usually have to decide in judicial review are whether the person or body with law making powers had acted *intra vires* acted within confines of power or *ultra vires*.³³ Other enquiries of the court are whether there was an abuse of discretion, a breach of statutory procedure, failure to act fairly and a breach of human rights (which is normally protected by constitution or by other legislations), the list being non-exhaustive. With the *ultra vires* principle, it involves an administrator or authority acting beyond his or her powers, conferred by a primary legislation.³⁴ This was established in the notable case of *Kruse v. Johnson*³⁵ and illustrated in the more recent case of *Hazell v. Hamersmith & Fulham Council*³⁶ (wherein a local authority was speculating on the future financial market) and perhaps not.

As regards abuse of discretion, it includes exercising statutory power in a manner contrary to the aim of the statute, acting for improper purposes, acting in error of the law guiding the decision-maker’s powers, using discretion in a rigid manner and exercising statutory power in an unreasonable or irrational manner. In short, the aim of the court in judicial review is to ensure that the person or body with adjudicatory powers acts in accordance with law, reasonably and according to natural justice and fairness.³⁷

What then are the remedies that judicial review offers in order to justify it as an essential tool in ensuring that excesses and abuses of executive actions are curtailed? Bradley³⁸ observed that the courts can make an order to quash an unlawful decision, prohibit the authority or official from breaking the law, order performance of a duty, make an order to declare the law, order to pay compensation and last but not the least make orders to give temporary relief pending definitive decision on judicial review. Supperstone *et al.*³⁹ in their earlier works stated that judicial remedies include mandatory, prohibiting or quashing orders, a declaration or injunction and damages.

Notwithstanding the principles and the remedies afforded by judicial review, it stands with its own challenges. Besides non-justiciable matters such as prerogative powers, national security and the like, there are certain limitation and

31 *Ibid.*, Per Lord Brightman and Lord Hailsham of St. Marylebone also concur this point in this case.

32 Barnett (2009), p. 685; M. Elliot, J. Beatson, and M. Matthews, *Administrative Law: Text and Materials* (3rd edn.), Oxford, Oxford University Press 2005, p. 6.

33 Barnett (2009), p. 686.

34 M. Fordham, *Judicial Review Handbook* (5th edn.), Oxford, Hart Publishing 2008, p. 452.

35 [1898] 2 QB 91.

36 [1992] 2 AC 1(HL).

37 Barnett (2009), pp. 686-687; Wade (1967), pp. 49-51.

38 Bradley (2010), p. 4.

39 M. Supperstone, J. Goudie and P. Walker, *Judicial Review*, London, LexisNexis Butterworths 2005, p. 454; Wade (1967), pp. 96-101.

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restriction clauses sometimes made in statutory provision themselves. These are ouster clauses, finality clauses and also time limitation of making judicial review applications.

However these clauses have not been successful in ousting judicial review from its aim of acting as a safeguard for the rights of the ordinary man and a check on abuse and excesses of administrative actions.⁴⁰ This fact is evident in the cases of *Anisminic Ltd v. Foreign Compensation Commission*⁴¹ and *R (G) v. Immigration Appeal Tribunal*.⁴² In the latter case it was held that the common law power of judges to review the legality of administrative actions is the cornerstone of the rule of law and one that a judge guards jealously. This has been done to the extent that, the courts in affirming its jurisdictions in cases involving interpretation of such provisions in statutes, clauses have been interpreted as precluding appeals against administrative decisions but not excluding judicial review.⁴³ This fact was further illustrated in the earlier case of *R v. Medical Appeal Tribunal, ex parte Gilmore*.⁴⁴

Applications for judicial review are normally made within specific periods, and in the case of Sierra Leone it is specified as no later than three months from the date of the occurrence of the event.⁴⁵ Nevertheless, it has been confirmed that despite time limitations on judicial review application, the reliefs can still be given to those affected if it is established that an act was done in bad faith as was illustrated in the case of *Smith v. East Elloe Rural District Council*.^{46,47}

II. Delegated Legislation and Administrative Law

Delegated or subordinate legislation refers to legally binding provision made under power delegated from the legislative to the executive.⁴⁸ Gondal⁴⁹ describes it as a type of legally binding provisions made by the executive or other entities

40 Woolf *et al.* (2007), p. 186.

41 [1969] 2 AC 147 (HL).

42 [2005] 2 All ER 165(CA).

43 C. Emery, *Administrative Law: Legal Challenges to Official Action*, London, Sweet & Maxwell 1999, pp. 181-182.

44 [1957] 2 W.L.R. 498 (CA). It was held that "in any event the court had power to order the tribunal to complete the record by finding the material facts...and that the remedy by certiorari was available to quash a decision of the tribunal...despite the provision in Section 36 (3) that any 'any decision of a claim or question...shall be final'".

45 Order 52(3) (1) of the High Court Rules 2007(Sierra Leone).

46 [1956] 2 W.L.R. 888 (HL). It was held that despite the clear wording of the time limit in the statute and the fact that Mrs Smith did not challenge the order within the time limit until after six years, the House of Lords unanimously agreed that she could proceed against the clerk to the Council for damages on the basis of bad faith in procuring the order.

47 Barnett (2009), pp. 698-699.

48 H. Xanthaki, 'Clarity, Precision and Ambiguity', Lecture Notes on Legislative Drafting 2009, p. 1. Available at: <<http://studyonline.sas.ac.uk/course/view.php?id=17>>, accessed 3 March 2010.

49 Z. Gondal, 'Uses and Abuses of Subordinate Legislation', Lecture Notes on Themes in Legislative Studies 2010, p. 1. Available at: <<http://studyonline.sas.ac.uk/course/view.php?id=18>>, accessed 19 March 2010.

under the authority given by legislature. Thornton⁵⁰ defined it as any enabling clause, proclamation, regulation, rule, by-law, order, notice, rule of court, town planning scheme, resolution, or other instrument made under the authority of any written law and having legislative effect. Delegated legislation must flow from the primary legislation. "It is common form for delegated legislation to open with preamble reciting that the person making it has done so in exercise of certain specified powers...." ^{51,52}

Delegated legislation has grown out of necessity and for practical purposes. It is looked upon as a necessary evil, an unfortunate but inevitable infringement of the separation of powers.⁵³ As De Smith⁵⁴ observed:

...parliament cannot be expected to pass a new act every time it is desired to amend a statutory schedule of dangerous drugs, or to take extraordinary measures to deal with a stoppage of work in the public utility services.

Gondal⁵⁵ pointed out that, delegated legislation is an essential part of modern legislation. Taking into consideration the numerous issues parliament has to deal with, it is virtually impossible for parliament to make all laws and oversee all activities of the executive. Therefore parliament is obliged to delegate extensive law-making power over matters of detail and to content itself with providing a framework of more or less permanent statutes.⁵⁶

Parliament cannot possibly control the ordinary day-to-day running of governmental acts except by taking up occasional cases which have political appeal.⁵⁷ Moreover, it gives more time to important policy decisions and provides flexibility and responsiveness. Delegated legislation provides more space for prescribing details in that it focuses on minute details of the law, as it is impossible to put all details in primary legislation. It also helps in explaining the technicalities of a subject for the implementation of primary legislation and does introduce administrative arrangements necessary for primary legislation.⁵⁸ Furthermore it bridges the gap between the pace of social changes and law. Last but not the least; it is the bedrock for rule of law, justice, human rights, good governance and economic development.

50 G.C. Thornton, *Legislative Drafting* (4th edn.), London, Tottel Publishing Ltd 1996, pp. 229-230 and 329.

51 This fact was cited in the leading case of *Vibixa Ltd. v. Komori UK Ltd.* [2006] 4 All ER 294(CA).

52 McLeod (2009), p. 20.

53 Wade (1967), p. 291; Wade and Forsyth (1994), p. 859.

54 S.A. De Smith, 'Delegated Legislation in England', *Western Political Quarterly* (1949) 2, pp. 515-527 at p. 517.

55 Gondal (2010), p. 1.

56 Wade and Forsyth (1994), p. 859.

57 Wade (1967), pp. 11, 291-294.

58 Xanthaki (2010), p. 1.

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As a result of the great latitude that delegated legislation gives to those responsible in exercising its powers, this fact clearly encourages abuse. As Bickel⁵⁹ mentioned:

...elected officials... are expected to delegate some of their tasks to men of their own appointment, who are not directly accountable... The whole operates under public scrutiny and criticism - but not at all times or all parts.

The various abuse and excesses highlighted in the previous section may arise from the substantive part of the primary legislation. For instance, if the enabling clause in the primary legislation is not properly drafted, the executive will go beyond the main principles laid down to exercise power and fall back on political viewpoints.

Furthermore abuse may also occur if the enabling clause does not specify the time delegated legislation is to begin and by whom. In such instance the executive in the ministry or department responsible for carrying out the delegated legislation may institute their own time and sub-delegate without authority which is a form of abuse.⁶⁰ With excesses and abuse being imminent and constantly perpetuated, it is no wonder that safeguards such as the drafting of a well thought out enabling clause that specify the objectives and purpose of a delegated legislation is set out, the authority to carry out the delegated legislation and the procedure in which it should be done are being suggested and used. Another safeguard is parliament oversight.⁶¹ A further safeguard is the use of the local government ombudsman.⁶²

Nonetheless the essential and most effective safeguard that has been put forward by some experts, writers and jurists, and used by many jurisdictions in curtailing the excesses and abuse of executive actions is judicial review (which is the focus of this dissertation) though it has been criticized by others as being narrow to constitutional and enabling clause or natural justice principles, too expensive and time-consuming among other things.⁶³ Wade and Forsyth observed⁶⁴ that "...the courts must determine the validity of delegated legislation... for there is a fundamental difference between a sovereign and a subordinate law-making power".

1. *Administrative Law*

The use of prerogative writs to compel statutory boards, public officials, public bodies, boards, tribunals and corporations to act judicially when determining rights of citizens has increased tremendously, thus the wide use of the writs of mandamus, prohibition, certiorari and injunction has led to the growth of a large

59 Bickel (1962), p. 17.

60 Gondal (2010), p. 1.

61 *Ibid.*

62 L. Bridges, G. Meszaros, & M. Sunkin, *Judicial Review in Perspective*, London: Cavendish Publishing Limited 1995, p. 11.

63 Gondal (2010), p. 1.

64 Wade and Forsyth (1994), pp. 874-875.

body of law which we now call 'administrative law'⁶⁵ It developed as a response to the growth of the modern administrative state with its role of organizing services for the people. This role of centralized administration resulted in disputes between individuals and the states and the principle of administrative law grew out of judicial decisions to regulate these relations between citizens and the state.⁶⁶

Administrative law therefore is primarily concerned with regulating exercise of the powers of public authorities so as to protect the citizen against their abuse.⁶⁷ Wade⁶⁸ described it as "...law concerned with the operation and control of the powers of administrative authorities, with emphasis on function rather than structure". It is without a doubt that some kind of administrative law exists in every country and authorities in this division make secondary legislation. It provides a firm basis for the guidance of ministers of government and civil servants in the discharge of their duties.⁶⁹ By upholding the principles of administrative law, in particular through judicial review, the judiciary serves the public interest, not only on specific cases but provides both guidelines for future administration and remedies where these are appropriate and where proper procedures have not been followed.⁷⁰ This function of the judiciary however builds a creative tension between the two branches of government the executive and the judiciary which works for the benefit of the public.⁷¹ It is clear that while it lies with the executive government to make and execute policy, it rests with the judiciary⁷² to ensure that policies are implemented within the parameters prescribed by the constitution and statutes of the country and for its decisions to be respected.⁷³

The essential requirements of administrative law are that administrative action is to be concerned with areas authorized by the law and that the rules of natural justice and fairness be followed. Other requirements are that cases should be dealt with on their merits and that similar cases be treated in the same way. It is also important to note that persons taking decisions should not have any personal or other interest in the outcome.⁷⁴ At this point one may then ask what are the guiding principles that executive authorities should follow when exercising law-making powers (especially discretionary powers) vested in them? The administrative authority should pursue only the purposes for which the power has been confer-

65 R.M.A. Chongwe, 'Limitations on the Principles of Natural Justice: An African Perspective', in: A Paper Prepared for Committee Number 7 of the International Bar Association on Limiting Exclusions of the Principles of Natural Justice, Buenos Aires, Argentina, 22-24 September 1988. *Commonwealth Law Bulletin* (1989), 15, pp. 620-626 at p. 620; Woolf (2007), pp. 6-8.

66 Chongwe (1989), p. 620; Woolf (2007), pp. 6-8.

67 Elliot *et al.* (2005), p. 2.

68 Wade (1967), p. 2.

69 Woolf *et al.* (2007), pp. 355-357.

70 Fordham (2008), p. 123.

71 Elliot *et al.* (2005), p. 11.

72 Sections 122,124, 125 &134 of the Constitution of Sierra Leone (Act No. 6 of 1991).

73 Fordham (2008), pp. 122-123; Woolf *et al.* (2007), p. 227.

74 Barnett (2009), pp. 685-686.

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red, the power must be exercised without bias and objectivity and impartiality must be the focus.^{75,76} The principle of equality before the law must be the standard in order to avoid unfair discrimination in administrative actions.⁷⁷ Also a proper balance is to be maintained between any adverse effects which its decision may have on the rights, liberties or interests of persons and the purpose which it pursues.⁷⁸ Furthermore it is pertinent that guidelines governing administrative action must be followed in a consistent and lawful manner.⁷⁹

III. *Judicial Review in Sierra Leone*

Judicial review of administrative action is exercised by the High Court and the Supreme Court (the highest court in the land).⁸⁰ Section 134 of the constitution which empowers the High Court to hear and determine applications of judicial review states that:

The High Court of Justice shall have supervisory jurisdiction over all inferior and traditional Courts in Sierra Leone and adjudication authority, and in the exercise of its supervisory jurisdiction shall have power to issue such directions, writs and orders, including writs of habeas corpus, and orders of certiorari, mandamus and prohibition as it may consider appropriate for the purpose of enforcing or securing the enforcement of its supervisory powers.

Section 125 empowering the Supreme Court for the hearing and determination of judicial review applications states that:

The Supreme Court shall have supervisory jurisdiction over all other Courts in Sierra Leone and over any adjudicating authority; and in exercise of its supervisory jurisdiction shall have power to issue such directions, orders or writs including writs of habeas corpus, orders of certiorari, mandamus and prohibition as it may consider appropriate for the purposes of enforcing or securing the enforcement of its supervisory powers.

The source of power of the courts to hear and determine judicial review applications is enshrined in common law and in the constitution of Sierra Leone as indicated above, and by Sections 171 (11) (a) of the same constitution which provides as follows:

Where any power

(a) is conferred by this constitution to make any order, regulation, rule or pass any resolution or give any direction or make any declaration or des-

75 *Bobb v. Manning* [2006] 4 LRC 735, pp. 14. In this case it was stressed that those exercising public power should do so lawfully.

76 *Elliot et al.* (2005), pp. 1-2.

77 Fordham (2008), p. 122.

78 *Elliot et al.* (2005), p. 8.

79 Wade (1967), p. 42; Barnett (2009), p. 685.

80 Sections 134 and 125 of the Constitution of Sierra Leone (Act No. 6 of 1991) respectively.

ignation, it shall be deemed to include the power, exercisable in like manner and subject to the like conditions, if any, to amend or revoke any such order, regulation, rule, constitutional or statutory instrument, resolution, direction, declaration or designation as the case may be.

The application and procedure of judicial review is further enshrined under Order 52 of the High Court Rules 2007 which lays down cases appropriate for the application for judicial review,⁸¹ the time for application, the remedies available and the general rules of procedure for the hearing of such application.⁸² An application can be made by any person aggrieved by the decision or actions of the ministers, local and statutory authorities, or public officers as the case may be. The High Court and the Supreme Court of Sierra Leone do review the legality of the acts of public authorities and apply the law to those authorities.

It is important to state at this point that when they do sit in such matters, they do not sit in appeal from administrative decision-makers, they review any abuse or excesses perpetuated by these decision-makers whom adjudicating powers have been vested on even though these courts do have appellate jurisdiction. Like most jurisdictions, in Sierra Leone there are matters that are not amenable by judicial review application such as prerogative powers, issues of national security, policies that are highly politicized⁸³ and decisions without legal effect.⁸⁴ The remedies offered by the courts in Sierra Leone on the application for judicial review are the prohibiting or quashing orders of certiorari or mandamus, injunction, declaration and damages as the case may be.⁸⁵

It is clear at least from the sources of power and the procedures being laid down by statutes mentioned above that judicial review has developed gradually to the point that it is being enshrined in statutes and that it deals with disputes between government and the individual. It is in this light that judicial review is traditionally viewed in Sierra Leone as the court's power to police the legality of government decisions. It is also referred to as the courts exercising its supervisory jurisdiction. It is evident that they are concerned about whether the actions of the government (executive) meet certain legal standards in the law of employment, education, licensing, and immigration, (to name but a few examples of areas of law and governance) and to prevent abuse in the exercise of executive decisions.

81 Order 52 Rule 1 of the Sierra Leone High Court Rules 2007.

82 *Ibid.* Rules 2-10.

83 Sections 4- 12 & 14 of the Constitution of Sierra Leone (Act No. 6 of 1991); H. Barnett, *Constitutional and Administrative Law*, Routledge-Cavendish, Abingdon 2009, p. 689, gave examples of non-justiciable matters which are more or less the same in Sierra Leone. Matters of public policy not for judicial review were also illustrated in the case of *Nottinghamshire County Council v. Secretary of State for the Environment* [1986] A.C.240 (HL).

84 Woolf *et al.* (2007), p. 123.

85 These remedies are clearly stipulated in Order 52 rule 8, 9 & 10 of the Sierra Leone High Court Rules 2007.

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The reviewing court will often consider whether the agency acted arbitrarily or capriciously or contrary to law.⁸⁶ The courts also promote the rule of law and procedural fairness and act in support of parliament.⁸⁷ The purpose of the application in Sierra Leone is to test the lawfulness of decisions of ministers, public officers, local councils or public bodies. Having stated these facts, the arguments in favour and against the use of judicial review as a means of curbing the excesses and abuse of executive action will now be examined and analyzed.

C. Arguments Against and in Support of the Use of Judicial Review and Analysis of Sierra Leonean Judicial Review Cases Spanning Three Decades

I. Criticisms of the Use of Judicial Review

Judicial review has been criticized in many ways. First, that it leaves out of account many administrative matters that are not amenable to resolution by a court of law, meaning non-justiciable matters.⁸⁸ Secondly that there is no assurance that administrators learn from the case-law or that they generally refine their behaviour in response to what the reviewing judges say about it.⁸⁹ For some administrators rather than improve, may adopt an undesirable and defensive behaviour designed to minimize the risk of challenge.⁹⁰ Hutchinson⁹¹ further stated that judicial review is marginal or peripheral and in some instances, irrelevant. He also observed that viewing judicial review as the solution to restraining abuse of executive actions, reinforces “the mistaken belief that the courts lie at the heart of the legal and political process and insulates and shields the real sources of bureaucratic maladministration from sustained exposure and eradication”.

Judicial review has been criticized as being backward-looking or negative because instead of building up a positive, prospective picture of what good administration should be, it focuses on past maladministration or past defects in decision-making.⁹² De Smith *et al.*⁹³ 4) observed that judicial review is “sporadic and peripheral” because it is unsystematic. “It does not occur on a regular or consistent basis, but rather contingent on the appearance of applicants with time, money and standing to pursue particular disputes that happen to interest them”.⁹⁴ Besides, Harlow and Rawlings⁹⁵ stated that “... the number of judicial review cases

86 P.P. Frickey, ‘Judicial Review and the Legislative Process: Some Empirical and Normative Aspects of Due Process of Lawmaking’, in *Annual Meeting of the American Political Science Association*, San Francisco, August 30-2 September 2001, p. 2.

87 Fordham (2008), p. 122.

88 L. Fuller, ‘The Forms and Limits of Adjudication’, *Harvard Law Review*, (1978-1979), 92 (1), pp. 353-409 at p. 353.

89 Hutchinson (1985), p. 317.

90 Cane (1996), p. 378.

91 Hutchinson (1985), p. 323.

92 Cane (1996), p. 378.

93 De Smith *et al.* (1995)

94 Cane (1996), p. 378.

95 C. Harlow and R. Rawlings, *Law and Administration*, London, Weidenfeld and Nicolson 1984, p. 258.

is infinitesimal compared with the millions of decisions taken daily by public authorities". Judicial review is inappropriate because adjudication is unsuited to many kinds of administrative action particularly the complex decision-making that is so common in administrative processes.⁹⁶ It is inaccessible in the same manner as many other court-based processes, being slow, expensive and deeply mysterious to the layperson.⁹⁷

Judicial review is further criticized as undemocratic in that it permits the judiciary to usurp the powers of the executive. It is generally understood that parliament delegates power to the executive to implement policies based partly on the expertise of administrators. Judges however generally lack this expertise but are permitted to interfere with executive decisions by applying the various grounds of judicial review to them. It is in this light that judicial review of executives' actions is viewed as undemocratic and threatens the separation of powers.⁹⁸ Griffith⁹⁹ argues for a much more limited conception of judicial review, opposing that "review of substantive policy decisions made by public authorities acting within the four corners of their statutory or prerogative powers should be out of bounds to the courts".

II Arguments in Support of the Use of Judicial Review

Woolf *et al.*¹⁰⁰ state that judicial review seeks to achieve broader political accountability. According to them, judicial review proceedings may prompt parliamentary action into rectifying the delegated legislative powers that may have been abused. It is further highlighted by Woolf, *et al.*,¹⁰¹ that judicial review "also goes some way to answering the age old question of 'who guards the guards?' by ensuring that public authorities responsible for ensuring accountability of government do so within the boundaries of their own lawful powers". Put in another way the judiciary by the use of judicial review acts as guardian of parliament's will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of parliament's enactments.¹⁰²

Barnett¹⁰³ argues that it is through judicial review that the requirements of legality of the exercise of powers by public bodies is tested; because how else would an individual or body of persons aggrieved by an administrative or executive decision and their rights adversely affected seek redress? Woolf *et al.*¹⁰⁴ also observes that judicial review is essential in that it improves the quality of decisions and decision-making processes by promoting compliance with law, law in this sense encompasses procedures set in legislation and the broad principles that are

96 Fuller (1978-1979), p. 353.

97 Hoexter (2000), p. 490.

98 *Ibid.*

99 Griffith, (2001), pp. 63-64.

100 Woolf *et al.* (2007), p. 6.

101 *Ibid.*, p. 7.

102 *Ibid.*, p. 226.

103 Barnett (2009), p. 686.

104 Woolf *et al.* (2007), pp. 226-227.

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articulated through the common law.¹⁰⁵ Bickel¹⁰⁶ argues that judicial review contributes to a government that derives its legitimacy from democratic participation because it advances the interest citizens share in a government. He further observed that, the court by judicial review enforces the principles people share but which are sometimes ignored by the legislature due to their inability to achieve “the creative establishment and renewal of a coherent body of principled rules”.

In supporting the practise of judicial review, Fordham¹⁰⁷ observed that “it is an important control ventilating a host of varied types of problem ranging from matters of grave public concern to those of acute personal interest; from general policy to individual discretion; from social controversy to commercial self-interest; and anything in between”. He also argued that judicial review ensures that public bodies are not “above the law”. It outweighs any inconvenience or chaos caused in governance¹⁰⁸ and it acts as a protection to the individual from injustice and oppression.¹⁰⁹

III. Analysis of Arguments and Cases of Judicial Review Application in Sierra Leone

Courts do not interfere by judicial review when powers are *intra vires*, as the central idea here is that in reviewing government action, the courts are merely doing parliament’s bidding by enforcing the limits upon power which are found (expressly or impliedly) in statute.¹¹⁰ Judicial review today cannot be described as sporadic and peripheral as the principles developed through judicial review over the years have become central to all of public administration insofar as those principles seek to enhance both the way decisions are reached and the quality of the decisions made.¹¹¹ The argument that the costs of judicial review far outweigh its benefits in curbing maladministration and making government accountable is in fact the opposite case for Sierra Leone. This is a fact because when one compares the cost of a ten-year war that was primarily caused by gross maladministration of the executive to the cost of empowering the courts to have a judicial review system and an effective one, it becomes crystal clear that it is less costly to have a judicial review system than the consequences of not having one. Besides, the principles of good administration do not come cheap and the requirements for attaining fairness and justice can be on the whole expensive but a worthy cause.

105 *Ibid.*, p. 33.

106 Bickel (1982), pp. 23-28.

107 Fordham (2008), p. 10.

108 *R (Refugee Legal Centre) v. Secretary of State for the Home Department* [2005] 1 WLR 2219 (CA), pp. 8. It was stated that: “Government is not entitled to sacrifice fairness on the altar of speed and convenience, much less of expediency; and whether it has done so is a question of law for the courts.”

109 *Nagel v. Feilden* [1966] 2 QB 633 (CA), pp. 654F-G. Lord Justice Salmon stated that: “one of the principal functions of our courts is, whenever possible, to protect the individual from injustice and oppression. It is important... that we should not abdicate that function.”

110 Elliot *et al.* (2005), p. 12.

111 De Smith *et al.* (1999), p. 21; Woolf *et al.* (2007), p. 5.

The criticism that judges must confine themselves to questions of process and procedure and not the merits of the administrative decision may be unrealistic because “in the end all but the narrowest zone of choice could be deemed to be a matter affecting the legality of the decision and not its merits”.¹¹² This is as a result of the popularity of administrative power and administrative relationships in modern times, and the simultaneous breadth of the grounds of judicial review. The area of government with which administrative law is chiefly concerned (the executive) is responsible for the practical running of the country on a daily basis with unfettered discretionary powers vested in them by the legislation. Everyone is affected daily by them. Therefore to balance this grand scale empowerment of administrators and the propensity of their decisions affecting citizens, the grounds and scope of judicial review of judges in administrative abuse and excesses is very essential to maintain such balance and restraint in Sierra Leone.

Taking into consideration the past neglect of judges in the hearing of judicial review application due to a dictatorial regime of governance in Sierra Leone between the early 1970s to mid 1980s (which led partly to the rebel war), it is difficult now for the court to resist the temptation to intervene on behalf of an aggrieved party who has no other remedy.¹¹³ They have become increasingly willing to subject the conduct of public authorities to judicial review and in peculiar cases, actions of bodies that might reasonably be carrying out both public and private functions as was the case in *Alie Basma v. The Registrar of Companies and Cotel Limited*.¹¹⁴ In this matter, the respondent who is the Administrator and Registrar-General, (responsible for registering private companies), refused to register the Applicant who was the first company to apply to be registered under a certain name. She however, registered the second respondent (who applied after the Applicant) under the said name without giving any justification legal or otherwise for her actions. The presiding judge in his ruling stated that:

...It is argued that in refusing the applicant’s application for registration, she was merely carrying out an administrative function, my answer to that argument would be that in the absence of any new machinery to address administrative complaints... the Complainants has no alternative but to utilise that which is presently available, judicial review...¹¹⁵

Taking into consideration the list of criticisms offered above, it is rather a contradictory assessment in that if on the one hand judicial review is marginal or irrelevant and potentially destructive, it stands to reason that if it is really so marginal surely its destructive effects will be peripheral too and thus not worth worrying about. Furthermore the normative effects of judicial review may be far greater than its critics imagine. This is due to the fact that, the publicity and respect

112 L. Baxter, *Administrative Law*, Cape Town, Juta 1984, p. 306.

113 D.J. Galligan, ‘Judicial Review and the Textbooks Writers’, *Oxford Journal of Legal Studies*(1982) 2, pp. 257- 276 at p. 269.

114 [2008] MISC.APP.445/08.

115 *Ibid.*, p. 8.

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accorded to court proceedings means that an individual decision has the tendency to influence the outcome of many other disputes.¹¹⁶

D. Judicial Review Serves as Essential Tool to Curb Excesses and Abuse of Executive Actions

I. Analyses of Sierra Leone Judicial Review Cases

From the mid-1970s to the early 1990s Sierra Leone was under a one-party dictatorial government, in which judges were under the whims and caprices of the government and therefore judicial review applications were few and biased as judges were afraid for their lives. It was only in 1992 when a military government¹¹⁷ took over power that Sierra Leone witnessed an increase in judicial review application in which the remedies applied for were granted to the applicants as it emerged in the case of *Kamara v. The Attorney General*.¹¹⁸ In this case, it was held that a judicial or quasi-judicial decision reached by a tribunal in violation of the rules of natural justice is to be quashed on certiorari. In another highly publicised case of *The State and the Hon Justice Gbow (Judge) v. Julius Spencer & others*,¹¹⁹ the judges of the Supreme Court granted the Orders of mandamus, prohibition and certiorari to the applicants (Julius Spencer & others), quashing the orders of an inferior court without fear or favour in the governance of the then National Provisional Ruling Council military junta who had accused and secured a judgment against the applicants for “seditious publication, publishing defamatory libel, publishing false reports likely to injure the reputation of the Government of Sierra Leone, knowingly publishing false defamatory libel and publishing false report likely to disturb the public peace”.¹²⁰

It is important to state that while the High Court and the Supreme Court of Sierra Leone hears, determines and grants remedies of judicial review without fear or favour to all who were aggrieved over one abuse of power or another, they also did not allow citizens to abuse the process as established in the cases of *The State v. Alghassim Jah*,¹²¹ *The State v. LT. COL. C. N. Deen*,¹²² and *Dr. Harry Will v. Attorney-General*.¹²³ This stance by the Court also included lawyers who wanted to waste the court’s time¹²⁴ and judges who thought they were above the law as was demonstrated in the case of *Honourable Justice Muctaru Ola Taju-Deen v. The Commissioner of the Anti-Corruption Commission and The Anti-Corruption Commission*

116 Cane (1996), p. 5.

117 The National Provisional Ruling Council (NPRC) took over power from the one-party dictatorship of the All Peoples’ Congress (APC) Government in a coup-d’etat in 1992.

118 [1992] SC. MISC. APP. NO. 4/92.

119 [1993] SC. MISC. APP. NO. 6/93A&B.

120 *Ibid.*, p. 152.

121 [1994] SC.MISC.APP. 1/94.

122 [1995] MISC. APP. 1/95.

123 [1999] SC. MISC.APP.6/99.

124 *Hon. Kakpindi Jamiru and Hon. Joseph Sallu Conteh v. Dr. John Karefa-Smart*, [2000], SC3/ 97.

*and The State.*¹²⁵ In this case, the above named judge was charged on a 12 count indictment from the Anti-Corruption Commission and charged to court by the Attorney-General. While his trial was going on he applied to another judge of the High Court for leave to proceed on certiorari for the report of the Commission on him to be quashed. His leave to make the application was granted but the application itself was dismissed. He made another application (*ex parte*) for certiorari to the Supreme Court in which he failed to make full and frank disclosure of the material fact that he had already made such application to the High Court and was refused. The Supreme Court who was not aware of the preceding circumstance granted the order based on the available facts. The Attorney-General upon being served the order granted to the applicant by the Supreme Court, immediately made an application for the order to be discharged by the Supreme Court to which they upon hearing the full facts “discharge the Order Nisi pronounced by this court on the 19th December, 2000...”¹²⁶

Nevertheless, the review of the executives’ actions is ineffective if the courts themselves are not vigilant: *Jalloh v. National Insurance Co. LTD.*¹²⁷ The judiciary needs to be committed and efficient in dealing with matters under review and must be courageous to redress the aggrieved against maladministration, arbitrariness and injustice, otherwise the role of judicial review will be defeated. This is the reason why the increasing growth of judicial review of administrative action has been seen by many as a valuable development and that an independent, impartial and informed judiciary holds a central place in the realization of a just and accountable government which the ordinary citizen is entitled to in Sierra Leone.

It is apparent therefore from the above cases that judicial review has become even more vibrant and significant in Sierra Leone, the recent past of war and the reasons for it have played a central role in judicial intervention by review to ensure ultimate sanction against abuse and excess of power. It is important to reiterate that before the war in Sierra Leone, the applications for judicial review were few and far between in comparison to recent times. It is now likely to remain the most visible and significant method of dealing with maladministration for some time to come due to the increasing and effective use of it by the courts in Sierra Leone.¹²⁸

125 [2000] SC. MISC.APP. 6/2000; [2001] SC.MISC.APP.1/2001. A further application for Prohibition was also dismissed by the Supreme Court.

126 *Ibid.*, p. 365.

127 [1986] SC. MISC. App. No. 2/86. In this case, the applicant’s application was refused. It was the period of a one-party dictatorship in Sierra Leone and the case was between a government company and a poor widow whose matrimonial home was ordered to be given to the company.

128 *Alhaji Abdulai Bangura v. Sierra Leone National Petroleum Company Limited & Others*, [2006] SC. MISC.APP. 4/2006. In this case the Supreme Court asserted their authority to hear and determine judicial review application.

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II. How Judicial Review Serves as an Essential Tool

The basic proposition of delegated legislation is that where parliament has delegated a decision-function to a particular person, parliament wants that person to perform that function and no one else, however practicality necessitates that civil servants or public officers exercise these powers.¹²⁹ These delegated powers can be so powerful that decisions can be made on discretions alone. For instance some acts provide that the empowered executive may exercise his discretion as “he thinks fit and proper”.¹³⁰ Such wide discretion to interpret a statute contains inadequate guidelines wherein the executive may fall back on political and bureaucratic perspective which may clearly encourage impartiality, nepotism and abuse of power. And “every act of delegated authority, contrary to the tenor of the commission under which it is exercised, is void”.¹³¹

Furthermore, judicial review gives the citizens notice of what rights they have and what actions the government, or any other institution or individual is prohibited from engaging in at the expense of the individual’s rights. It is for such reasons mentioned above that the remedy and protection that judicial review offers is widely used and seen as an essential mechanism. It is mind-boggling to speculate what would be the fate of citizens when they become affected by such unchecked discretions and without a remedy. Thus the courts through judicial review applications engage in a supervisory role by ensuring that there is limited or no excess or abuse of executive power. This exercise by the judiciary does not mean that it is usurping the powers of the executive; it is merely delineating the executives’ permissible scope of discretions.

It is in this vein that Lord Diplock in the case of *Council of Civil Service Unions v. Minister for the Civil Service*¹³² stated that “judicial review provided the means by which judicial control of administrative action is exercised”. It is also in this light that Lord Hailsham of St. Marylebone said that the court is:

... not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner.¹³³

The courts have often exercised this form of oversight function with respect to the legislature. There is no reason why the judiciary cannot exercise the same function with respect to the executive. After all, why should the executive powers to implement policies, a product of legislative delegation not be checked as well?

129 McLeod (2009), p. 14.

130 For instance Section 24 of the Mines and Minerals Act 2009 (Act No. 3) “authorises the minister as ‘he may determine’ authorise any person to undertake non-commercial investigations into the geological or mineral resource of Sierra Leone”.

131 E.M. Cogan. ‘Executive Non-acquiescence: Problems of Statutory Interpretation and Separation of Powers’, *Southern California Law Review* (1986-1987) 60, pp. 1143-1177 at p. 1154.

132 *Supra* n. 9.

133 *Supra* n. 11.

III. *The Importance of Judicial Review in Curtailing Excesses and Abuse of Executive Actions*

From the arguments and analyses above, one can deduce that judicial review is inherently essential to protect politically powerless minorities against majoritarian excesses.¹³⁴ Arbitrariness in official action offends the rule of law.¹³⁵ The rule of law is the backbone of judicial review making it a means of checking abuse of those in the reins of power, lest they forget that no one is above the law.¹³⁶ It is the foundation in attaining equity, fairness, justice and democracy.

Because the executive makes the day-to-day regulations and adjudicates issues under those regulations, they suffer from the conflict inherent in trying to make their adjudication serve principles rather than their regulations. By this action, very little real protection exists for the individual in an administrative adjudication.¹³⁷ Therefore if an executive abuses its discretion, then the judiciary using its supervisory powers should be able to clarify what is required through statutory construction and legislature's intent without bias. The legislature cannot always oversee every executives' action. It delegates power to the executive because it lacks the time and resource, its primary function being legislating laws for the nation. Therefore unless the judiciary's power to review is given sufficient effect to curb the executives' abuse of delegated powers and discretions, the executives' action becomes effectively unchecked. Moreover, the judiciary on most occasions is particularly suited to deal impartially with politically charged issues as their function is not to be popular to majority caprices, but to be mindful of and faithful to the requirements of the law.

Judicial review is entirely consistent with democratic practices for the actions of government to be scrutinized by the courts at the instance of citizens, to ensure that decisions taken and administrative practices followed comply in all respects with the constitution, with relevant statute and other laws and also with administrative practices in the sense that administrative decisions be taken fairly, reasonably and according to law. It brings the laws' practical application into step with how these laws should be practiced. It does not merely require that the courts make sure constitutional principles are followed, but also that statutory laws and statutory delegations to the executive are carefully restricted to prevent any abuse of discretion notwithstanding the fact that the standards of review differ from country to country.

Another importance is that by providing for judicial review of administrative or executive actions, the law provides not only a means for citizens to seek redress where they believe they have a grievance against official action, but also for good administrative practice to be actively promoted as mentioned in the previous

134 J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review*, Cambridge, Harvard University Press 1980, p. 73-179.

135 W.H. MacLauchlan, 'Some Problems with Judicial Review of Administrative Inconsistency', *Dalhousie Law Journal* (1984) 8, pp. 435-473 at p. 435.

136 Fordham (2008), p. 122.

137 Cogan (1986-1987), p. 1169.

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chapters. The level of relevance of judicial review was summarized by Lindley MR in the case of *Roberts v. Gwyrfai District Council*¹³⁸ when he said: “I know of no duty of the court which it is more important to observe, and no power of the Court which is more important to enforce, than its power of keeping public bodies within their rights”.

E. Conclusion

From the above analysis it is apparent that despite the arguments against the principles of judicial review, the limitations and restrictions, judicial review still remains an essential tool and safeguard in Sierra Leone which is available to citizens against maladministration and arbitrariness on the part of executive powers.

What this essay attempted to prove is that judicial review is an essential mechanism to curtail the excesses and abuse of executive (Administrative) action in Sierra Leone. From research done it appears that there is indeed a system of judicial review of administrative action (which was the focus of this dissertation) and judicial review of primary legislation. It was discovered that judicial review of administrative or executive action by the courts is concerned with the courts ensuring that decisions of public authorities conform to legal principles and observe fair procedures in the exercise of the delegated powers entrusted to the executive arm of government.¹³⁹

However, as with most legal principles, there are certain limitations, restrictions and surrounding circumstances that may limit the court’s application in their power to review. Nevertheless, as has been highlighted above, these limitations have had little success in ousting the supervisory jurisdiction of the courts in Sierra Leone. It was established that out of necessity and practicality there is the need for delegating legislation to the executive as parliament cannot make all legislation and the executive is the body empowered to implement or carry out these administrative actions on a daily basis with certain powers. It was further highlighted that these powers can be abused and used in excesses; therefore there are a couple of mechanisms used by the legislature and the judiciary to check these excesses and abuse of executive action. Judicial review has been identified as the most effective and essential mechanism from the rest generally. However judicial review being an effective and essential mechanism for some jurisdiction does not automatically and necessarily mean that it is an essential tool to check the excesses and abuse of executive actions in Sierra Leone as most jurisdictions (even though they may have the same legal systems) differ vastly in terms of size, economic and social strength and human resources which can be a mitigating factor. Besides, what may work for one jurisdiction may not work for another jurisdiction.

138 [1899] 2 Ch 608 (CA), p. 614.

139 Barnett (2009), p. 685; Wade and Forsyth (1994), pp. 4-6.

Nonetheless, taking into consideration that Sierra Leone was involved in a brutal war for ten years (1991-2001) and is only just trying amidst the global economic recession to revive its economic and social strength and build up the integrity of its legal system and courts in particular, the use of the application of judicial review was investigated using the theories that guard the concepts and cases of judicial review establishing the theory in conjunction with Sierra Leonean cases spanning three decades.

It has been established that despite the restrictions and shortcomings experienced by the courts in Sierra Leone, judicial review has proved to be an essential and an effective tool in curbing the excesses and abuse of administrative (executive) action in Sierra Leone. However, although it has proved essential a separate administrative court has not yet been set up to deal with judicial review matters as the English courts have done. It has also been established that judicial review is a necessary application that should be enshrined in statutes, diligently practised with vigilance and impartiality by the courts and in fairness¹⁴⁰ and transparency if the rule of law, natural justice, equity and democracy is to prevail in a society.

From the facts raised above, it is clear that an independent and fearless judiciary are important requirements for judicial review as an essential measure to check and restrain abuse and excess of executive powers. In almost all cases, the executive may have a political agenda separate from that of the legislature who empowered the executive to implement laws made by them. For instance an administration that is concerned with budget reduction may require that the executive reduces its expenditure in every way possible. The executive in defiance may undermine the policy process and in return, the legislature may refuse to clearly state its objectives in an enabling statute because those objectives though necessary, are politically volatile. The enabling clause will be drafted in an ambiguous manner thus giving the executive an unbridled discretion which is dangerous. In such a situation, one cannot help but agree that the judiciary by judicial review is the best mechanism presently for critical control of the executives' action. And besides, "all subordinate power must have legal limits somewhere".¹⁴¹

It is from these perspectives that one can conclude that judicial review is an essential tool to curtail the abuse and excesses in administrative action in Sierra Leone. Although one must state that the application of judicial review is an essential and effective system in ensuring that inconsistent or unfair decisions do not deprive citizens of their rights, the law alone sadly cannot ensure good administration in Sierra Leone. It is in this vein that the following recommendations are made in the next section.

140 These views are confirmed in the cases of *Cinnamond v. British Airport Authority* [1980] 2 All ER 368 (CA) (Per Lord Denning) and *Bushell v. Secretary of the State for the Environment* [1981] AC 75 (HL) (Per Lord Diplock).

141 Wade and Forsyth (1994), p. 888.

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I. Recommendations

Judicial review of administrative decisions in general is seen as important and useful in most countries, especially in Sierra Leone; however it may be inadequate in its efficiency if the quality of decision-making bodies is not improved. This is why the improvement of the quality of administrative decision-making is suggested as one of the most effective methods of protecting individual and social rights against government encroachment in Africa¹⁴² and Sierra Leone is no exception. And to achieve such improvement and to give effect to the ideals of the rule of law as institutional morality, there needs to be a partnership between authorities and the courts.¹⁴³ Therefore it is strongly recommended that judicial review needs to be supplemented by other measures to improve the overall quality of executive decision-making. Such measures can include:

1. An increase in resources for civil services;
2. More and better training of administrators;
3. Specialist training;
4. Where there is little man-power, an increase in civil service man-power;
5. Promoting greater awareness of the legal aspects and implications of administrators' work (especially where abuse and excessive power is used by them) through seminars, conferences and publications.

It is pertinent to say that for Sierra Leone to implement such recommendations considering her present financial constraint to meet national obligations, it would be a very difficult using its own resources alone. Therefore for the realization of these recommendations, the injection of monetary and technical assistance from developed jurisdictions would be of great value and economic and social development for both donor and recipient.

142 Chongwe (1989), p. 620.

143 Woolf *et al.* (2007), p. 34.