Administrative Law

Teaching Material

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TABLE OF CONTENTS

UNIT ONE: INTRODUCTION TO ADMINISTRATIVE LAW

Introduction

This chapter presents you some highlights of the nature, meaning, scope and sources of administrative law. Administrative law, as a branch of public law, governs the relationship of the state and its citizens. Specifically, it regulates the manner of exercising power by the executive branch of government and administrative agencies so as to ensure its legal limits. Ultimately, by controlling power, it provides protection to the citizen against ultravires acts, abuse of power and arbitrariness.

This chapter begins by giving students background information about the political and economic forces shaping the evolution and development of administrative law. How and why administrative law was recognized and later developed as a distinct branch of law is discussed under this unit.

Then, the chapter discusses the meaning, sources, scope and theories of administrative law. Different definitions of administrative law given by different scholars are compared and contrasted to show the various approaches towards the subject. Sources of administrative law may be mentioned as: constitution, enabling act, delegated legislation, and judicial and administrative decisions. The study of these instruments is relevant to understanding its practical application. It is believed that these points will ultimately enable students to understand and determine the proper scope of administrative law.

The second section compares and contrasts administrative law with other concepts and disciplines. It mainly analyzes administrative law as influencing and influenced by concepts like rule of law, good governance and human rights. Administrative law was born out of constitutional law. Hence, analyzing their close relationship and determining their differences and similarities of these two subjects is relevant and necessary. It is difficult to study and understand administrative law without reference to its constitutional roots. This section outlines the interdependence between constitutional and administrative

law. Lastly it provides a comparative survey of the nature, form and scope of administrative law in common law and civil law countries.

The last part of this chapter briefly summarizes the historical development of administrative law as new legal phenomena at a global level and in Ethiopia. The development of 'Ethiopian administrative law' is discussed with some emphasis on its current and future situations within the federal and regional context.

Objectives: At the end of this chapter, students are expected to:

- Analyze the economic and political circumstances which shaped the evolution and development of administrative law.
- Define administrative law
- Understand clearly the basic purpose of administrative law and analyze the way such purpose is attained.
- Differentiate red light and green light theories of administrative law.
- Explain the place of administrative law in ensuring rule of law and enforcement of human right.
- Describe the similarity, difference and interdependence between administrative law and constitutional law.
- Compare and contrast the nature & development of administrative law in continental and common law countries.
- Examine the present state of administrative law in Ethiopia in light of the federal structure.

1.1 The Modern Welfare State and Evolution of Administrative Law

In order to understand the nature of administrative law, you should start studying the subject by looking at the political and economic circumstances that led to its 'creation,' /or its 'invention'/ as a distinct subject at a certain point in history.

Let's begin our inquiry by asking the following preliminary questions?

1) What is the meaning of the following terms?

A) laissez faire B) police state C) welfare state D) power E) administration

2) Compare the 'police state' and the 'welfare state' in light of the following points and list down the differences.

A) The role of government

B) The underlying political philosophy

C) Individual liberty and freedom

D) Extent of power of the government (extent of governmental interference)

The change in the role of government and thereby the transformation of the 'police state' to the 'welfare state' has necessitated the need for conferring more power on the administration and simultaneously the need for controlling this power. The increasing growth of these two directions, i.e. power vs. control, their conflict and struggle somehow reflect the growth of the administrative law.

Administrative law is the by- product of the growing of socio- economic functions of the state and the increased powers of the government. Power has become very necessary in the developed society and the relationship of the administrative authorities has become very complex. In order to regulate these complex relations, some law is necessary, which may bring about regularity, certainty and may check at the same time the misuse of power vested in the administration.

In the ancient society the functions of the state were very few, the prominent among them being protection from foreign invasion, levying of taxes and maintenance of internal peace and order. The rapid growth of the administrative law in modern times is the direct result of the growth of administrative powers. The theory of laissez faire in the 19th century envisages minimum government control, maximum free enterprise and contractual freedom. The state was characterized as the law and order state. Its role was limited to the

traditional role of government i.e. as a protector. The management of social and economic life was not regarded as government responsibility. But laissez faire doctrine resulted in human misery. The unequal bargaining power between labour and management resulted in exploitation of workers, dangerous conditions of work and child labour. This ultimately led to the spread of poverty and the concentration of wealth in a few hands. Then it came to be recognized that the state should take active role in ameliorating the conditions of power. This approach gave rise to the favoured state intervention, social control and regulation of individual enterprise. The 'negative state' was then forced to assume a positive role. In course of time, out of dogma of collectivism emerged the concept of "social welfare state" which laid emphasis on the role of the state as a vehicle of socio- economic- regeneration and welfare of the state. Thus, the growth of the administrative law is to be attributed to a change of philosophy as to the role and function of the state.

The characteristics of a modern welfare state in which we line in may be summarized as:

- A vast increase in the range and detail of government regulation of privately owned economic enterprise;
- The direct furnishing of services by government to individual members of the community, and
- Increased government ownership and operation of industries and businesses.

The welfare state in effectively carrying out these vast functions to attain socio- economic justice, inevitability will come in direct relationship and encounter with the private citizens. Therefore, the attainment of socio economic justice, being a conscious goal of state policy, is a vast and inevitable increase in the frequency with which ordinary citizens come into relationship of direct encounter with state power holders. Striking a balance and bringing about harmony between power and justice is the central mission of the administrative law.

It is clear that political and economic circumstances brought about the existence of administrative law. Administrative law was created as an instrument to control the ever-expanding governmental power. As Acton once said ' power corrupts and absolute power

corrupts absolutely.' Concentration of power in the hands of public officials, unless regulated and controlled properly and effectively, always poses a potential danger to the rights, freedom and liberty of individuals. Administrative law was developed as a response to the threats of 'big government.' In other words as. Massey has put it, administrative law is the by-product of an intensive form of government.

Big government or what is referred to, as the welfare state, is the product of a response to the economic, social and political reality of the 19th century. The political theory prevalent at the time, i.e. Laissez faire, failed to solve the economic ills and social evils which resulted in poverty, ignorance, exploitation and suffering of the mass. Due to the emphasis given to wider individual freedom, interference of government was minimal, and its power was limited.

Administrative law was almost non-existent at this time. When the power of the government is less and limited, the degree of interaction with the individual is minimal. Hence, the need for administrative law as a power controlling mechanism becomes insignificant under these situations.

The evolution of administrative law goes in a parallel progressive stage with the transformation of the 'police state' to the 'welfare state.' The reason for the transformation was the reason that necessitated conferring more power on the state. The pitfalls, defects and shortcomings of the 'police state' became clear at the end of the 20th century, specifically after the Second World War. The suffering, poverty and exploitation of the mass of the population were sufficient to justify the need to confer more power on the government. With more powers, the government also assumed new roles geared towards alleviating the social and economic problems and social evils to bring about development, social justice and equal distribution of wealth. Administrative law is the response to the problem of power. It unequivocally accepts the need or necessity of power, simultaneously stressing the need to ensure the exercising of such power within proper bounds and legal limits. Controlling the exercise and excesses of power is the essence and mission of the administrative law.

1.2 Definition, Purpose, Scope and Sources of Administrative Law

A) Definition

There is a great divergence of opinion regarding the definition of concept of the administrative law. The is because of the tremendous increase in the administrative process that it makes impossible to attempt any precise definition of administrative law which can cover the entire range of the administrative process. Hence one has to expect differences of scope and emphasis in defining administrative law. This is true not only due to the divergence of the administrative process within a given country, but also because of the divergence of the scope of the subject in the continental and Anglo – American legal systems.

However, two important facts should be taken into account in an attempt of understanding and defining administrative law. Firstly, administrative law is primarily concerned with the manner of exercising governmental power. The decision making process is more important than the decision itself. Secondly, administrative law cannot fully be defined without due regard to the functional approach. This is to mean that the function (purpose) of administrative law should be the underlying element of any definition. The ultimate purpose of administrative law is controlling exercise of governmental power. The 'control aspect' impliedly shades some light on the other components of its definition. Bearing in mind these two factors, let us now try to analyze some definitions given by scholars and administrative lawyers.

Austin has defined administrative law, as the law which determines the ends and modes to which the sovereign power shall be exercised. In his view, the sovereign power shall be exercised either directly by the monarch or indirectly by the subordinate political superiors to whom portions of those powers are delegated or committed in trust.

Schwartz has defined administrative law as "the law applicable to those administrative agencies, which possess delegated legislation and adjudicative authority.' This definition is a narrower one. Among other things, it is silent as to the control mechanisms and those remedies available to parties affected by an administrative action.

Jennings has defined Administrative law as "the law relating to the administration. It determines the organization, powers and duties of administrative authorities. Massey criticizes this definition because it fails to differentiate administrative and constitutional law. It lays entire emphasis on the organization, power and duties to the exclusion of the manner of their exercise. In other words, this definition does not give due regard to the administrative process, i.e. the manner of agency decision making, including the rules, procedures and principles it should comply with.

Dicey like Jennings with out differencing administrative law from constitutional law defines it in the following way. 'Firstly, it relates to that portion of a nation's legal systems which determines the legal status and liabilities of all state officials. Secondly, defines the rights and liabilities of private individuals in their dealings with public officials. Thirdly, specifies the procedures by which those rights and liabilities are enforced.'

This definition is mainly concerned with one aspect of administrative law, namely judicial control of public officials. It should be noted, that the administrative law, also governs legislative and institutional control mechanisms of power. Dicey's definition also limits itself to the study of state officials. However, in the modern administrative state, administrative law touches other types of quasi- administrative agencies like corporations, commissions, universities and sometimes, even private domestic organizations. Davis who represents the American approach defines administrative law as; "The law that concerns the powers and procedures of administrative agencies, specially the law governing judicial review of administrative action." The shortcoming of this definition according to, Massey is that it excludes rule - application or purely administrative power of administrative agencies. However, it should be remembered that purely administrative functions are not strictly within the domain of administrative law, just like rule making (legislative) and adjudicative (judicial) powers. Davis's definition is indicative of the approach towards administrative law, which lays great emphasis on detailed, and specific rule-making and adjudicative procedures and judicial review through the courts for any irregularity. He excludes control mechanisms through the lawmaker and institution like the ombudsman.

Massey gives a wider and working definition of administrative law in the following way.

" Administrative law is that branch of public law which deals with the organization and powers of administrative and quasi administrative agencies and prescribes the principles and rules by which an official action is reached and reviewed in relation to individual liberty and freedom"

From this and the previous definitions we may discern that the following are the concerns of administrative law.

It studies powers of administrative agencies. The nature and extent of such powers is relevant to determine whether any administrative action is ultravires or there is an abuse of power. It studies the rules, procedures and principles of exercising these powers. Parliament, when conferring legislative or adjudicative power on administrative agencies, usually prescribes specific rules governing manner of exercising such powers. In some cases, the procedure may be provided as a codified act applicable to all administrative agencies. It also studies rules and principles applicable to the manner of exercising governmental powers such as principles of fairness, reasonableness, rationality and the rules of natural justice.

It studies the controlling mechanism of power. Administrative agencies while exercising their powers may exceed the legal limit abuse their power or fail to comply with minimum procedural requirements. Administrative law studies control mechanisms like legislative & institutional control and control by the courts through judicial review.

Lastly it studies remedies available to aggrieved parties whose rights and interests may be affected by unlawful and unjust administrative actions. Administrative law is concerned with effective redress mechanisms to aggrieved parties. Mainly it is concerned with remedies through judicial review, such as certiorari, mandamus, injunction and habeaus corpus.

B) Purpose of Administrative Law

There has never been any serious doubt that administrative law is primarily concerned with the control of power. With the increase in level of state involvement in many aspects of

everyday life during the first 80 years of the twentieth century, the need for a coherent and effective body of rules to govern relations between individuals and the state became essential. The 20th century saw the rise of the "regulatory state" and a consequent growth in administrative agencies of various kinds engaged in the delivery of a wide variety of public programs under statutory authority. This means, in effect, the state nowadays controls and supervises the lives, conduct and business of individuals in so many ways. Hence controlling the manner of exercise of public power so as to ensure rule of law and respect for the right and liberty of individuals may be taken as the key purpose of administrative law.

According to Peer Leyland and Tery Woods (Peter Leyland and Terry Woods, Textbook on Administrative Law, 4th ed.) Administrative law embodies general principles applicable to the exercise of the powers and duties of authorities in order to ensure that the myriad and discretionary powers available to the executive conform to basic standards of legality and fairness. The ostensible purpose of these principles is to ensure that there is accountability, transparency and effectiveness in exercising of power in the public domain, as well as the observance of rule of law.

Peer Leyland and Tery Woods have identified the following as the underlying purposes of administrative law.

- It has a control function, acting in a negative sense as a brake or check in respect of the unlawful exercise or abuse of governmental/ administrative power.
- It can have a command function by making public bodies perform their statutory duties, including the exercise of discretion under a statute.
- It embodies positive principles to facilitate good administrative practice; for example, in ensuring that the rules of natural justice or fairness are adhered to.
- It operates to provide accountability and transparency, including participation by interested individuals and parties in the process of government.
- It may provide a remedy for grievances at the hands of public authorities.

Similarly I.P. Massey **(I.P. Massey, Administrative Law, 5th ed.)** identifies the four basic bricks of the foundation of administrative law as:

- To check abuse of administrative power.
- To ensure to citizens an impartial determination of their disputes by officials so as to protect them from unauthorized encroachment of their rights and interests.
- To make those who exercise public power accountable to the people.

To realize these basic purposes, it is necessary to have a system of administrative law rooted in basic principles of rule of law and good administration. A comprehensive, advanced and effective system of administrative law is underpinned by the following three broad principles:

Administrative justice, which at its core, is a philosophy that in administrative decision-making the rights and interests of individuals should be properly safe guarded.

Executive accountability, which has the aim of ensuring that those who exercise the executive (and coercive) powers of the state can be called on to explain and justify the way in which they have gone about that task.

Good administration- Administrative decision and action should conform to universally accepted standards, such as rationality, fairness, consistency and transparency.

C) Sources of Administration Law

Administrative law principles and rules are to be found in many sources. The followings are the main sources of administrative law in Ethiopia.

The Constitution

The F.D.R.E constitution contains some provisions dealing with the manner and principle of government administration and accountability of public bodies and officials. It mainly provides broad principles as to the conduct and accountability of government, the principle of direct democratic participation by citizens and the rule of law. It also embodies the

principle of separation of powers by allocating lawmaking power to the house of people's representatives, executive power cumulatively to the Prime Minister and Council of Ministers, and finally the power to interpret the laws to the judiciary. Art, 77(2) talks about the power of Council of Ministers to determine the internal organizational structure of ministries and other organs of government, and also Art 77(3) envisages the possibility of delegation of legislative power are also relevant provisions for the study of the administrative law, (see also Articles 9(1), 12, 19(4), 25, 26,37,40, 50(9), 54(6)(7) 55(7), (14)(15), (17),(18),58,66(2),72-77,82,83,93,101-103 of F.D.R.E constitution).

Legislation

Laws adopted by parliament, which may have the effect of creating an administrative agency, or specify specific procedure to be complied by the specific authority in exercising its powers, can be considered a primary sources for the study of administrative law. The statute creating an agency known as enabling act or parent act, clearly determines the limit of power conferred on a certain agency. An administrative action exceeding such limit is an ultra virus, and in most countries the courts will be ready to intervene and invalidate such action. Moreover, parliament, when granting a certain power, is expected to formulate minimum procedure as to how that power can be exercised to ensure fairness in public administration. This can be done, on the one hand, by imposing a general procedural requirement in taking any administrative action mainly administrative rule making and administrative adjudication just like the American Administrative Procedure Act (APA). And on the other hand, parliament in every case may promulgate specific statutes applicable in different situations.

Delegated Legislation

Rules, directives and regulations issued by Council of Ministers and each administrative agencies are also the main focus of administrative law. Administrative law scholarship is concerned with delegated legislation to determine its constitutionality and legality or validity and ensure that it hasn't encroached the fundamental rights of citizens. One aspect of such guarantee is subjecting the regulation and directive to comply with some minimum

procedural requirements like consultation (public participation) and publication (openness in government administration). Arbitrary exercise of power leads to arbitrary administrative action, which in turn, leads to violation of citizen's rights and liberty. Hence, the substance and procedure of delegated legislation is an important source of administrative law.

Judicial Opinion

Much, but not most, of the doctrine that envelops and controls administrative power is found in judicial analysis of other sources. However, much of administrative law will not be found solely in judicial opinions. Furthermore, the opinions themselves must be carefully pursued to avoid generalizations about controls on agency behavior that may not be appropriate, as the outcome of many cases may turn on particular statutory language that may not necessarily reflect the nature of disputes in other agencies.

The American experience as to judicial opinion influencing administrative law is characterized by lack of generalization and fluctuating impacts. These may be due to two reasons. First, cases coming before the courts through judicial review are insignificant compared to the magnitude of government bureaucracy and the administrative process. Second, even as between two apparently similar cases, there is a possibility for points of departure.

In Ethiopia, judicial opinion is far from being considered even as the least source of administrative law. Only cases less than 1% go to court through judicial reviews. The subject is not known by judges, lawyers, the legal profession and administrative officials, let alone by the poor and laypersons who are expected to seek judicial remedy for unlawful administrative acts and abuse of power by public officials. However given the fact that presently the rule of precedent is applicable, judicial opinion, it is hoped, may have a limited role as one of the sources of administrative law in Ethiopia.

C) Scope of Administrative Law

I- Public Law/Private Law Divide

The boundaries of administrative law extend only when administrative agencies and public officials exercise statutory or public powers, or when performing public duties. In both civil and common-law countries, these types of functions are sometimes called "public law functions" to distinguish them from "private law functions". The former govern the relationship between the state and the individual, whereas the later governs the relationship between individual citizens and some forms of relationships with the state, like relationship based on government contract.

For example, if a citizen works in a state owned factory and is dismissed, he or she would sue as a "private law function". However, if he is a civil servant, he or she would sue as a "public law function". Similarly, if residents of the surrounding community were concerned about a decision to enlarge the state- owned factory because of environmental pollution, the legality of the decision could be reviewed by the courts as a "public law function." It is also to be noted that a contract between an individual or business organization with a certain administrative agency is a private law function governed by rules of contract applicable to any individual – individual relationship. However, if it is an administrative contract it is subject to different rules (see civ. code art 3136 ff).

The point here is that the rules and principles of administrative law are applicable in a relationship between citizens and the state; they do not extend to cases where the nature of the relationship is characterized by a private law function.

B) Substance vs. Procedure

Many of the definition and approaches to administrative law are limited to procedural aspects of the subject. The focus of administrative law is mainly on the manner and procedure of exercising power granted to administrative agencies by the legislature. Fox describes the trend and interaction between substance and procedure as:

'It is the unifying force of the administrative process – in dramatic contrast to the wide variety of substantive problems with which agencies deal- that has persuaded most administrative law professors to concentrate on agency procedure rather than agency substance. Hence, to a wider extent, the study of administrative law has been limited to analyzing the manner in which matters move through an agency, rather than the wisdom of the matters themselves.'

With respect to judicial review, the basic question asked is not whether a particular decision is "right", or whether the judge, or a the Minister, or officials have come to a different decision. The questions are what is the legal limit of power or reasonable limit of discretion the law has conferred on the official? that power been exceeded, or otherwise unlawfully exercised? Therefore, administrative law is not concerned with the merits of the decision, but with the decision making process.

1.3 Theoretical Perspectives

The role of law in modern state is evidently a complex one. The legal thought on administrative law is largely shaped by the role of law generally and the role of administrative law in public administration specifically. The traditional view of administrative law is that it should aim to bolster the rule of law and ensure the accountability of executive government to the will of parliament and, at least indirectly, to the people. Cane describes the role of courts in achieving such purpose of administrative law in the following woeds:

"It is often said that the enforcement of statutory duties and the control of the exercise of statutory powers by the courts is ultimately justifiable in terms of the doctrine of parliamentary supremacy: even though parliament has not expressly authorized the courts to supervise governmental activity, it can not have intended breaches of duty by governmental agencies to go un-remedied (even if no remedy is provided in the statute itself), nor can it have intended to give administrative agencies the freedom to exceed or abuse their powers, or to act unreasonably. It is the task of the courts to interpret and

enforce the provisions of statutes, which impose duties and confer powers on administrative agencies. In so doing they are giving effect to the will of parliament."

This approach puts more emphasis on the role of courts through judicial reviews to control arbitrary and ultravires administrative action. Presently, the perspectives on administrative law are summarized by two contrasting models labeled by Harlow and Rowling as 'red light' and 'green light' theories. The former is more conservative and control-oriented; the latter is more utilitarian (socialist) in orientation and facilitative in nature. Both significantly serve to describe the concept of administrative law, and to act as normative (i.e. moral and political) suppositions about what its role in society ought to be.

A) Red Light Theory

The red light approach advocates strong role for the courts to review administrative decisions. It considers that the function of law is to control the excesses of state power. "The red light view can be seen to originate from a political tradition of 19th century laissez faire (minimal state) theory. It embodied a deep-rooted suspicion of governmental power and a desire to minimize the encroachment of the state on the rights (especially property rights) of individuals.

According to this theory of state, the best government is the one that governs least. Wider power means danger to the rights and liberty of citizens. Hence, the red- light theory serves the function of controlling excess and arbitrary power, mainly by the courts. Its descriptive feature is that, on the one hand, it gives much attention on control of governmental power, and on the other hand, it is confident that the effective controlling instrument are the courts through judicial review; As Harlow and Rawlings put it:

"Behind the formalist tradition, we can often discern a preference for a minimalist state. It is not surprising, therefore, to find many authors believing that the primary function of administrative law should be to control any excess of state power and subject it to legal, and more especially judicial control. It is this conception of administrative law that we have called 'red light theory".

B) Green Light Theory

The green light approach considers that the function of administrative law is to facilitate the operation of the state. It is based on the rationale that bureaucrats will function most efficiently in the absence of intervention. Administrative law should aim to help simplifying the procedures and enhance efficiency. It starts from the standpoint of a more positive, largely social and democratic view of the state.

The green light theory is originated from the utilitarian tradition, which proposes promoting the greatest good for the greatest number. According to the utilitarian theory, the state is expected to provide the minimum standards of provision, including housing, education, health, social security, and local services. To provide maximum satisfaction for most of its people, the state should assume a broader role, hence, should possess wider powers. The green light theory broadly supports the introduction of policies aiming at developing public service provisions. Law is perceived as a useful weapon and an enabling tool. It is something very concrete and can provide in principle, at least, the proper authority and framework with which to govern consensually. It regards law not as a controlling mechanism, rather as facilitative tool. Consequently, it considers the court's intervention as an obstacle to efficiency.

Harlow & Rawling write:

"Because they see their own function as the resolution of disputes and because they see the administrative function from the outside, lawyers traditionally emphasize external control through adjudication. To the lawyer, law is the policeman; it operates as an external control, often retrospectively. But a main concern of green light writers is to minimize the influence of the courts. Courts, with their legalistic values, were seen as obstacles to progress and the control which they exercise as unrepresentative and undemocratic. To emphasis a crucial point in green light theory, decision making by an elite judiciary imbued with a legalistic, rights based ideology and eccentric vision of the 'public interest' was never a plausible counter to authoritarianism."

1.4 The Relationship of Administrative Law to Constitutional Law and Other Concepts

1.4.1 Constitutional Law and Administrative Law

Administrative law is categorized as public law since it governs the relationship between the government and the individual. The same can be said of constitutional law. Hence, it is undeniable that these two areas of law, subject to their differences, also share some common features. With the exception of the English experience, it has never been difficult to make a clear distinction between administrative law and constitutional law. However, so many administrative lawyers agree that administrative law cannot be fully comprehended with out a basic knowledge of constitutional law. As Justice Gummov has made it clear "The subject of administrative law can not be understood or taught without attention to its constitutional foundation"

This is true because of the close relationship between these two laws. To the early English writers there was no difference between administrative and constitutional law. Therefore, Keitch observed that it is 'logically impossible to distinguish administrative law from constitutional law and all attempts to do so are artificial."

However, in countries that have a written constitution, their difference is not so blurred as it is in England. One typical difference is related to their scope. While constitutional law deals, in general, with the power and structures of government, i.e. the legislative, the executive and the judiciary, administrative law in its scope of study is limited to the exercise of power by the executive branch of government. The legislative and the judicial branches are relevant for the study of administrative law only when they exercise their controlling function on administrative power.

Constitutional law, being the supreme law of the land, formulates fundamental rights which are inviolable and inalienable. Hence, it supersedes all other laws including administrative law. Administrative law does not provide rights. Its purpose is providing principles, rules and procedures and remedies to protect and safeguard fundamental rights. This point, although relevant to their differences, can also be taken as a common ground

shared by constitutional and administrative law. To put it in simple terms, administrative law is a tool for implementing the constitution. Constitutional law lays down principles like separation of power and the rule of law. An effective system of administrative law actually implements and gives life to these principles. By providing rules as to the manner of exercising power by the executive, and simultaneously effective controlling mechanisms and remedies, administrative law becomes a pragmatic tool in ensuring the protection of fundamental rights. In the absence of an effective system of administrative law, it is inconceivable to have a constitution which actually exists in practical terms.

Similarly, the interdependence between these two subjects can be analyzed in light of the role of administrative law to implement basic principles of good administration enshrined in the F.D.R.E. constitution. The constitution in Articles 8(3), 12(1) and 12(2), respectively provides the principles of public participation, transparency and accountability in government administration. As explained above, the presence of a developed system of administrative law is sine qua non for the practical realization of these principles.

Administrative law is also instrumental in enhancing the development of constitutional values such as rule of law and democracy. The rules, procedures and principles of administrative law, by making public officials, comply with the limit of the power as provided in law, and checking the validity and legality of their actions, subjects the administration to the rule of law. This in turn sustains democracy. Only, in a government firmly rooted in the principle of rule of law, can true democracy be planted and flourished.

Judicial review, which is the primary mechanism of ensuring the observance of rule of law, although mostly an issue within the domain of administrative law, should look in the constitutional structure for its justification and scope. In most countries, the judicial power of the ordinary courts to review the legality of the actions of the executive and administrative agencies emanates from the constitution. The constitution is the supreme document, which confers the mandate on the ordinary courts. Most written constitutions contain specific provisions allocating judicial review power to the high courts, or the Supreme Court, including the grounds of review and the nature and type of remedies, which could be granted to the aggrieved parties by the respective courts.

A basic issue commonly for administrative law and constitutional law is the scope of judicial review. The debate over scope is still continuing and is showing a dynamic fluctuation, greatly influenced by the ever changing and ever expanding features of the form and structure of government and public administration. The ultimate mission of the role of the courts as 'custodians of liberty', unless counter balanced against the need for power and discretion of the executive, may ultimately result in unwarranted encroachment, which may have the effect of paralyzing the administration and endangering the basic constitutional principle of separation of powers. This is to mean that the administrative law debate over the scope of judicial review is simultaneously a constitutional debate.

Lastly, administrative and constitutional law, share a common ground, and supplement each other in their mission to bring about administrative justice. Concern for the rights of the individual has been identified as a fundamental concern of administrative law. It ultimately tries to attain administrative justice. Sometimes, the constitution may clearly provide right to administrative justice. Recognition of the principles of administrative justice is given in few bills of rights or constitutional documents. Australia and South Africa may be mentioned in this respect.

Constitutional law needs to be understood to include more than the jurisprudence surrounding the express, and implied provisions of any constitution. In its broader sense, constitutional law connotes "the laws and legal principles that determine the allocation of decision-making functions amongst the legislative, executive and judicial branches of government, and that define the essential elements of the relationship between the individual and agencies of the state". Wade has observed that administrative law is a branch of constitutional law and that the "connecting thread" is "the quest for administrative justice".

1.4.2. Administrative Law and Human Rights

Every branch of law has incidental effects on the protection or infringement of human rights, whether by constraining or enabling actions which affect other people. Administrative law is, however, particularly vulnerable to the permeation of human rights

claims, since, like human rights law, it primarily constrains the exercise of public power, often in controversial areas of public policy, with a shared focus on the fairness of procedure and an emphasis on the effectiveness of remedies.

At an abstract level, there is a consonance of fundamental values underlying human rights law and administrative law. Both systems of law aim at restraining arbitrary or unreasonable governmental action and, in so doing, help to protect the rights of individuals. Both share a concern for fair and transparent process, the availability of review of certain decisions, and the provision of effective remedies for breaches of the law. The correction of unlawful decision-making through judicial review may help to protect rights. The values underlying public law – autonomy, dignity, respect, status and security – closely approximate those underlying human rights law. Moreover, each area of law has been primarily directed towards controlling 'public' power, rather than interfering in the 'private' realm, despite the inherent difficulties of drawing the ever-shifting boundary between the two. A culture of justification permeates both branches of law with an increasing emphasis on reasons for decisions in administrative law and an expectation in human rights law that any infringement or limitation of a right will be justified as strictly necessary and proportionate. There is also an ultimate common commitment to the basic principles of legality, equality, the rule of law and accountability. Both administrative and human rights laws assert that governments must not intrude on people's lives without lawful authority. Further, both embody concepts of judicial deference (or restraint) to the expertise of the executive in certain matters. In administrative law, for example, this is manifested in a judicial reluctance to review the merits, facts or policy of a matter.

There are also marked differences between the two areas of law. Human rights law is principally concerned with protecting and ensuring substantive rights and freedoms, whereas administrative law focuses more on procedure and judicial review attempts made to preserve a strict distinction between the legality and the merits of a decision. Human rights law protects rights as a substantive end in themselves, whereas administrative law focuses on process as the end and it may be blind to substantive outcomes, which are determined in the untouchable political realm of legislation or government policy. It is perfectly possible for a good administration to result in serious human rights violations

(and conversely, compatibility with human rights law does not preclude gross maladministration).

Human rights law is underpinned by the paramount ideal of securing human dignity, whereas administrative law is more committed to good decision-making and rational administration. The three broad principles said to have underpin administrative law are largely neutral on substantive outcomes: administrative justice, executive accountability and good administration.

The traditional emphasis of administrative law on remedies over rights reverses the direction of human rights law, which may provide damages for the breach of a right, whereas this is not the natural consequence of invalid action in administrative law. At the same time, administrative law remedies may still guarantee essential human rights; an action for release from unlawful detention (habeas corpus) can secure freedom from arbitrary detention, and an associated declaration by the courts may provide basis for pursuing compensatory damages in a tortious claim for false imprisonment.

1.4.3 Administrative Law and Good Governance

Administrative law plays an important role in improving efficiency of the administration. The rules, procedures and principles of manner of exercising power prescribed by administrative law are simultaneously principles underlying good governance. They also share a common goal. One of the common destinations of administrative law and good governance is the attainment of administrative justice. The set of values of administrative justice which mainly comprises openness, fairness, participation, accountability, consistency, rationality, legality, impartiality and accessibility of judicial and administrative individual grievance procedures are commonly shared by administrative law and good governance.

Administrative justice is considered as having two themes. First, it comprehends the range of entities which deliver complaint and review services and assurances of those services to the citizen. Second, it comprehends the kind of resolution sought to be achieved. The

attainment of administrative justice largely depends on the existence of efficient and effective institutions like the ombudsman, administrative tribunals and ordinary courts.

Review by the ordinary courts, judicial review, supports the legitimacy of the decision making process that it reviews. A decision-maker whose decisions are reviewable can claim that because the decision is reviewable for its legality, as determined by an independent judiciary, the decision has a legitimacy that it otherwise would not have. Its legitimacy lies on the fact that it is open to a dissatisfied person to challenge its validity.

It can also be said that a decision reached by a fair decision making process is likely to be a better decision. It is likely to be better because requiring the decider to hear both points of view can make a contribution to the soundness of the decision. But, beyond that, we have to acknowledge that judicial review does not have a great deal to contribute to the quality of decision making by the executive government. Its ultimate goal remains to be maintaining the rule of law.

Administrative law also helps to realize the three underlying principles of good administration: i.e. accountability, transparency and public participation. Accountability is fundamental to good governance in modern, and open societies. A high level of accountability of public officials is one of the essential guarantees and underpinnings, not just of the kinds of civic freedoms enjoyed by the individual, but of efficient, impartial and ethical public administration. Indeed, public acceptance of agovernment and the roles of officials depend upon trust and confidence founded upon the administration being held accountable for its actions. The administrative law system, when working properly, supplements and enhances the traditional processes of ministerial and parliamentary accountability in any system of government.

Accountability does not have a precise meaning. The underlying notion is that of giving an account or an explanation to a person or body to whom one is responsible. That part of it is clear enough. But the form or process of accountability, as that term is used in debate, varies widely. The process of accountability ranges from merely being subject to comment or criticism, through to loss of office, to personal liability for damage caused by a poor

decision, and to prosecution for criminal offences. The discussion in which accountability is an issue is often confused because of the different processes and meanings of accountability. There is often a silent assumption that only certain processes of accountability, such as loss of office, represent true accountability. But, it is suggested that the underlying idea of accountability is that of giving an account or an explanation, and that it is necessary to recognize that the process of accountability can vary widely.

The accountability of the executive government for decisions made in the exercise of public powers may be manifested through different ways. By public powers it is to mean powers conferred by statute, and when the power is exercised in the public interest. This typically refers to decisions that are amenable to judicial review i.e. reviewable decisions.

Executive government refers to Ministers and public servants or government employees. Ministers are accountable to the electorate. They are called upon to explain their decisions, and can lose their parliamentary seat and hence their ministerial position. However, in practical terms, they are accountable to the electorate only as a group, not as individuals. If the party of which a minister is a member loses an election, the minister will lose office along with all other ministers. In that respect, the fate of the ministry is closely tied to the performance of the Prime Minister or Premier of his or her role. But this form of accountability cannot really be described as accountability for reviewable decisions. The link is too distant. This process of accountability is, in reality, not linked to the making of reviewable decisions.

Ministers are accountable to Parliament for reviewable decisions. They can be called upon to provide an explanation for, and account of their decisions. But, there is no convention these days of ministerial responsibility for reviewable decisions made by public servants. And, even at the level of reviewable decisions made by ministers, the control that the executive government exerts over parliament means that, in the ordinary sense, there is no effective accountability to parliament for particular reviewable decisions. Whether an adverse consequence flows from the making of a reviewable decision by a minister, or by a minister's department,it depends upon political aspects of the decision, and the process of parliamentary accountability is a highly political one. This is not an effective form of

accountability for decision-making. A similar comment applies to the accountability of an individual minister to the prime minister or premier who leads the Government of which the minister is a part.

Public servants are accountable to a departmental head, and sometimes to a minister, for reviewable decisions that they make. But, in a system in which most public servants can be punished or dismissed only for a case, erroneous reviewable decisions do not lead to sanctions against the decision-maker, unless the decision involves misconduct as distinct from mere error. Accountability involving loss of office or some formal punishment has only a slender link to decision making by ministers and public servants. To treat the executive government as accountable for the making of reviewable decisions, by a process involving loss of office, is erroneous. Neither ministers nor public servants are usually required to submit their decision-making processes to contemporaneous public scrutiny. There can be contemporaneous comment upon a decision that is being made or is anticipated. A comment may take place in parliament, or on the media, or elsewhere. There can also be retrospective scrutiny, in particular through judicial review, by merits review when legislation so provides, by an Ombudsman or use of freedom of information legislation. However, it remains true to say that the decision-making process of the executive government is not transacted in public.

It is also true that responsibility for reviewable decisions made by the executive government is often diffused. This is to mean that reviewable decisions made by the executive government are often made by a process of consideration and advice at various levels. Responsibility for a given decision may be diffused downwards to various advisers, or upwards to a departmental policy. For this reason, it is often difficult to identify a reviewable decision made by the executive government with a particular decision-maker. That can be a limit upon accountability. Ministers and public servants are not routinely required to give full reasons for a reviewable decision. Ministers and public servants are usually not personally liable for damage or loss caused by a poor decision. If a decision that goes beyond power is made, the decision-maker might then be liable in damages, but even then would usually be indemnified by the executive government. Decisions made by the executive government are, of course, subject to judicial review to determine whether

they are made within power (jurisdiction), whether they are in compliance with the law, and whether they fair or natural justices. Some governments have also provided a process of review on the merits. Many reviewable decisions made by the executive government are subject to scrutiny by parliamentary committees, by an Ombudsman, or other institutions such as the Auditor General and the Ethics and Anti-corruption Commission.

Administrative law also ensures transparency in the conduct of government administration and the decision making process. One of the requirements of an open government is the right of individuals to obtain and have access to information. Government has to implement the right to get information through specific legislation. Freedom of information act, adopted in most democratic countries, affords citizens the right to have access to public documents and the right to be timely informed of decisions affecting their interests. Government cannot be held accountable and hence, subject to criticism unless it opens its door to citizens. The existence of freedom of information legislation by itself does not guarantee open government, rather a developed system of administrative law is needed for its proper implementation. Courts, through judicial review should be able to compel public officials denying citizens of their right to get information as provided by law. Institutions, like the ombudsman should also be able to give redress to the aggrieved parties whose rights are denied or violated by the administration.

In addition to this role of administrative law enabling citizens have access to government information, it also ensures openness in the decision-making process. Administrative adjudication should be conducted openly. An interested party should get prior notice detailing the nature of the case, time and place of hearing. The concerned agency proposing a certain measure should disclose all relevant evidence to that party. Such adjudication procedure allows the party to prepare his defense and generally create public confidence in the fairness of the decision- making process.

Similarly, the administration should be transparent in the rule-making process. Before an agency, through its delegation power issues a certain rule or regulation having a binding effect, it is required to make the proposed rule or regulation accessible to concerned parties for commenting and criticism. Once an administrative rule is legally issued, it

should be officially published so that the public could know its content, and if necessary challenges its legality and validity.

Such adjudication and rule making procedures fall within the proper scope of administrative law. Some countries such as America, have introduced a comprehensive and detailed administrative procedure to make the decision-making process open and fair. Other countries, without adopting a comprehensive administrative procedure, have introduced specific procedures for the respective administrative action by the agency.

Such procedures do not only make the conduct of government open to the citizen, but also facilitate public participation in the administrative process. In a state founded on democratic principles, it is axiomatic that the basic human right (beyond access to the necessities of life) is the right to participate in civil society. Indeed, the very notion of representative democracy is predicated upon people exercising their civil rights.

In any system of government representative, democracy, for its lifeblood depends upon the participation of the public. Anything, therefore, which is likely to increase public participation in government, or in governmental decision-making processes is a good thing regardless of the merits or demerits of an individual decision. Obviously, public confidence in the institutions of government is a central concern, for without it, there is likely to be little inclination to participate. And without a public perception that one will be treated fairly by the government, it is doubtful that the confidence necessary to engender a keenness to participate will exist. Fairness in the decision-making process creates public confidence and motivates citizens to engage in active and meaningful participation in government administration.

Administrative law lays down the legal framework by which public's participation is recognized and practically implemented. The principle of public participation as an element of good administration allows citizens to have their say or their voice be heard in the conduct of government administration. In a developed system of administrative law, agencies are required to observe minimum procedures while making judicial decisions or issuing rules and procedures. The principle of natural justice which mainly requires an

individual's defence be heard and get an impartial and fair treatment in the adjudication process acts as a stimulant for public participation indirectly creating public confidence. Unless the public gets a positive impression that the decision making process is fair and impartial, it will be discouraged to participate in other aspects of public affairs seriously.

The rule making procedure, on the other hand, it directly affords an opportunity to participate in the legislative process. One of such procedural requirements is the obligation to conduct consultation with concerned parties. Such consultation may be manifested through conducting an open hearing, collecting suggestions, comments and criticisms on the proposed rule or regulation. The concerned agency is further required to take comments and suggestion from interested parties as an input in the proposed rule. In some cases, it may be required to prepare a statement of reason indicating those comments incorporated, or submit a justification for the reason that were disregarded.

1.4.4 Administrative Law and Democracy

True democracy states that the executive government would be accountable to the people. The various aspect of accountability and the role of administrative law in ensuring accountability in government administration have been discussed above. The term accountability is uniformly applicable to all branches of government: parliamentary, judicial and executive accountability. Even though administrative law is concerned with executive accountability, for a true democracy to flourish, accountability should be manifested in all branches of government. For instance, the executive branch is accountable to parliament. It is an idea which is fundamental to the operation of responsible government. Accountability is accountability to parliament and, and the parliament is the place within which the idea of public scrutiny must find its fulfilment. However, unless parliament strongly challenges the executive and takes appropriate measures, members of parliament themselves should be held accountable to the people for their failure to act according to the interest of the public.

Another meeting point of administrative law and democracy is the principle of rule of law. Administrative law is rooted in the principle of rule of law. Rule of law, in turn

nourishes democracy. Every truly democratic system of government rests upon the rule of law, and no system is truly democratic if it does not. There are at least two principles that are most important for a constitutional government. The first is that the government should be subject to the rule of law. The government should mostly and particularly comply with the basic laws establishing its constitutional structure. The second is that the government should be democratic. These two principles can overlap. For example, a democratic system, particularly one involving representative democracy, requires for its proper working that certain civil liberties be recognized, protected and applied, including rights to freedom of speech, freedom of assembly and freedom of association. However, the recognition and protection of these rights necessarily require that elected governments should comply with the laws, including the common law, that protect those rights. Consequently, within a government characterized by representative type of constitutional structure, the rule of law reinforces the democratic principle.

The two principles can also be in conflict. A conflict occurs when the rule of law is inconsistent with the democratic will. Historically, such conflicts were resolved at common law by judicial review. Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which the executive action is prevented from exceeding the powers and functions assigned to the executive by the law and the interests of the individual are protected accordingly. In order for a government to be both democratic and subject to the rule of law, the government must be accountable, to the electorate and the courts. But, unless the scope of judicial review is properly limited so as to be in harmony with the principle of separation of powers, it may encroach upon the values of democracy.

The conflict between democracy and administrative law is also reflected in the challenge to justify the democratic basis of administrative agencies and administrative decision-making. Administrative agencies make individual decisions affecting citizens' lives and also set general policies affecting an entire economy, though are usually headed by officials who are neither elected nor otherwise directly accountable to the public. A fundamental challenge in both positive and prescriptive scholarship has been to analyze and different administrative decision-making from the standpoint of democracy. This challenge is

particularly pronounced in constitutional systems such as that of United States' in which political party control can be divided between the legislature and the executive branch, each seeking to influence administrative outcomes. Much work in administrative law aims either to justify administrative procedures in democratic terms, or to analyze empirically how those procedures impact on democratic values.

A common way of reconciling unelected administrators' decision-making with democracy is to consider administrators as mere implementers of decisions made through a democratic legislative process. This is sometimes called the 'transmission belt' model of administrative law. Administrators, under this model, are viewed as the necessary instruments used to implement the will of the democratically-controlled legislature. Legislation serves as the 'transmission belt' to the agency, both in transferring democratic legitimacy to administrative actions and in constraining those actions so that they advance legislative goals.

1.5 Administrative Law in Civil Law and Common Law Countries

The comparative method is useful in many branches of law. It is particularly important in administrative law, because of the nature of the leading problems, related way of controlling government according to the interests of both state and citizen, which is common to all the developed nations of the west and in many developing countries of the third world. There is a clear difference with regards to the scope of and the approach to administrative law in these two legal systems.

France is the source of a distinct system of Administrative law known as 'droit administrative', which has a huge impact not only in civil law countries, but also on the system of administrative law of common law countries. In France, Italy, Germany and a number of other countries, there is a separate system of administrative court that deals with administrative cases exclusively. As a natural consequence, administrative law develops on its own independent lines, and is not enmeshed with the ordinary private law as it is in the Anglo- American system. In France, droit administrative is a highly specialized science administered by the judicial wing of the conseil de etat, which is staffed

by judges of great professional expertise, and by a network of local tribunals of first instance.

The British system of administrative law, which is followed through out the English-speaking world, has some salient characteristics, which distinguish it sharply from the administrative law of other European countries adopting continental legal system. The outstanding characteristic of the Anglo- American system is that the ordinary courts, and not special administrative courts, decide cases involving the validity of government action. This can be attributed to the conception of the principle of rule of law as developed by Dicey, which among other things emphasizes the resolution of disputes between government and the citizens through the ordinary courts.

The scope of Administrative law is also wider in scope in the continental system compared to its common law counterpart. Administrative law in civil law countries covers issues such as the organization, powers and duties of administrative authorities, the legal requirements governing their operation, and the remedies available to those adversely affected by administrative action. It also includes subjects like the structure and composition of the various administrative agencies, civil service law, the acquisition and management of property by the administrative authorities, public works, and contractual and non- contractual liability of administrative authorities and public officials.

In Anglo- American countries, administrative law is limited to delegation of rule- making powers, adjudication of administrative cases, manners and procedures of exercising these powers, the mechanisms of controlling and the available remedies. It mainly focuses on control through the courts or judicial review of administrative action by the ordinary courts. Hence the study of composition and structure of administrative power is not its primary concern. Wade & Forsyth, commenting on this point have said:

" An exhaustive account of the structure and functions of government is not necessary in order to explain the rules of administrative law." Moreover, its domain extends only when public officials exercise powers and discharge duties, which are in the nature of public power and statutory duties. In other words, administrative actions which are a private law

nature meaning relations arising out of contract by administrative authorities and their extra- contractual liability falls outside the scope of administrative law.

1.5.1 Administrative Law in Common Law Countries

(Source- wikipidia (http://en.wikipedia.org/wiki/Administrative_law)

Generally speaking, most countries that follow the principles of common law have developed procedures for judicial review that limit the reviewability of decisions made by administrative law bodies. Often, these procedures are coupled with legislation or other common law doctrines that establish standards for proper rulemaking. Administrative law may also apply to review of decisions of the so-called semi-public bodies such as non-profit corporations, disciplinary boards, and other decision-making bodies that affect the legal rights of the members of a particular group or entity.

While administrative decision-making bodies are often controlled by larger governmental units, their decisions could be reviewed by a court of general jurisdiction under some principle of judicial review based upon due process (United States) or fundamental justice (Canada). It must be noted that judicial review of administrative decision, is different from an appeal. When sitting in review of a decision, the court only looks at the method in which the decision has been arrived at, whereas in appeal, the correctness of the decision itself is under question. This difference is vital in appreciating the administrative law in common law countries.

The scope of judicial review may be limited to certain questions of fairness, or whether the administrative action is ultra vires. In terms of ultra vires, actions in the broad sense, a reviewing court may set aside an administrative decision if it is patently unreasonable (under Canadian law), *Wednesbury unreasonable* (under British law), or arbitrary and capricious (under U.S. Administrative Procedure Act and New York State law). Administrative law, as laid down by the Supreme Court of India, has also recognized two more grounds of judicial review which were recognized but not applied by English Courts viz. legitimate expectation and proportionality.

The powers to review administrative decisions are usually established by statute, but were originally developed from the royal prerogative writs of English law such as the writ of mandamus and the writ of certiorari. In certain Common Law jurisdictions such as India, or Pakistan, the power to pass such writs is a constitutionally guaranteed power. This power is seen as fundamental to the power of judicial review and an aspect of the independent judiciary.

1.5.2 Droit Administratif

French administrative law is known as "droit administratiff", which means a body of rules which determine the organization, powers and duties of public administration and regulate the relation of the administration with the citizens of the country. Administrative law in France does not represent the rules and principles enacted by the parliament. It contains the rules developed by administrative courts. Administrative law in France is a judge- made law. This seems strange for a country, representative of the civil law legal system, characterized by the statute law as the primary source of law.

France also has dual court structure: administrative courts and the ordinary courts existing and functioning in an independent line. The highest administrative court is known as Conseil d'etat, which is composed of eminent civil servants, and deals with a variety of matters like claim of damages for wrongful acts of government servants, income tax, pension, disputed elections, personal claims of civil servants against the state for wrongful dismissal or suspension and so on.

Napoleon Bonaparte was the founder of the droit Administratiff who established the Conseil d'etat. He passed an ordinance depriving the law courts of their jurisdiction on administrative matters and other ordinance matters that could be determined only by the consei d'etat. In pre- revolutionary France, a body known as Conseil du roi advised the king in legal and administrative matters, and also discharged judicial functions such as deciding disputes between great nobles. This created tension between those who supported the executive power over judicial powers (Bonapartists) and those who supported the jurisdiction of the ordinary courts (reformists). In August 1790 a law that abolished the

Coneil d' roi and the power of the executive was passed based on the justification of the principle of powers. This law also curtailed the king's powers. However, in 1799, Napoleon, who greatly favoured the freedom of the administration, established the Consei d'etat . However, its function was limited to an advisory role. It had no power to pronounce judgments. In 1872, its formal power to give judgment was established and in the subsequent year in 1873, a law that make the jurisdiction of the Conseil de etat final, was issued respect to all matters involving the administration. In 1889, it started receiving direct complaints from the citizens and not through the ministers. In case of conflicts between the ordinary courts and the administrative courts, regarding Jurisdiction, the matter was decided by the Tribunal des conflicts. This tribunal consisted of an equal number of ordinary and administrative judges and was presided over by the minister of Justice. Droit Administratif does not represent principles and rules laid down by the French parliament; it consists of rules developed by the judges of the administrative courts. Droit administratif therefore, includes three series of rules:

1. Rules dealing with administrative authorities and officials; for example, appointment, dismissal, salary and duties, etc.

2. Rules dealing with the operation of public services to meet the needs of the citizens; for example, public utility like electricity, water etc…

3. Rules dealing with administrative adjudication; for example, private and public liability of public officials.

The following are the main characteristics of the conseil de etat

- Those matters concerning the state and administrative litigation fall within the jurisdiction of administrative courts and cannot be decided by the ordinary of courts of the land.
- In deciding matters concerning the state, and administrative litigation, special rules developed by the administrative courts are applied
- Conflict of jurisdiction between ordinary courts and administrative courts are decided by the agency known as Tribunal des conflicts.
- It protects government officials from control of the ordinary courts.
- Conseil de etat is the highest administrative court.

Brown and Garner have attributed to a combination of following factors as responsible for the success of Conseil de etat.

- The composition and functions of the consei d'etat
- The flexibility of its case- law,
- The simplicity of the remedies available before the administrative courts
- The special procedure evolved by those courts, and
- The character of the substantive law, which they apply.

Further reading

DEVELOPMENTS IN EUROPEAN ADMINISTRATIVE LAW

Frank Esparraga

The question that has frequently been asked is issues related to what can be achieved by comparing different systems of administrative law. There are those (Schwartze) who say that administrative law is a technical field which is a fruitful source for finding "functional equivalents" and that it can readily be compared. It has been suggested in this paper that different systems of administrative laws are influenced to a varying degree by political, constitutional and historical experiences and choices. It is not suggested any correctness in the view of skeptics who say that administrative law is the clearest expression of the national character of a people. The convergence of the

different European systems of administrative law leads to an even greater harmonization of law. Any comparative study also serves a variety of purposes. By providing perspective, comparative study helps us to understand better our own administrative law, to stimulate our minds as to possible weaknesses, and to assist legal reform to find creative solutions for problems.

BELGIUM

The Belgian legal system is patterned to a large extent upon that of the France's legal system During the 19th century, the Belgian ordinary courts worked out a system of substantive droit administratif similar to that of the French system. In Belgium, the Constitution requires the judicial courts to hear disputes over civil and political rights. Citizens' rights with respect to administration are held to be included in these rights, except when they are specifically withdrawn from the jurisdiction of the courts by statute and placed within the jurisdiction of the administrative courts. The Conseil D'Etat, established in 1946, is the highest administrative body with several specialist administrative courts. The lower courts known as la Deputation Permanente du Conseil Provincial also have jurisdiction in certain administrative matters such as taxation. The Conseil D'Etat has five divisions, each with five members. Two of these handle cases in French; two handle cases in Dutch; and one is bilingual. The laws relating to the Conseil D'Etat empower the administrative section of the court to set aside a decision (a term which covers all acts and regulations of administrative authorities) made by an administrative authority, or court. This power is also limited by the general jurisdiction of the judicial courts. The Conseil D'Etat may quash a decision and undertake full judicial review under a number of conditions.

Power to quash or vary: The Conseil D'Etat has the power to quash decisions dealing with disputes with the administration. However, Belgium does not have lower administrative courts. For administrative matters, the Conseil D'Etat is the place of the first and the last resort. The most important cases that the Conseil D'Etat can deal with are those which involve the quashing of acts and regulations of administrative authorities. Such cases are of general interest and are brought to ensure that the law, as opposed to individual rights, is respected.

The Belgian Conseil D'Etat lacks competence when the applicant has the possibility of taking action before the judicial body which is empowered to hear problems involving personal rights, with the exception of disputes over certain political rights which are reserved to the administrative courts. However, an application to quash an administrative regulation always falls within the jurisdiction of the Conseil D'Etat since such applications are of a general nature and independent of whether or not an individual's right has been interfered with.

Belgian law makes a sharp distinction between personal applications to have an administrative measure quashed and objective applications where the application is made independently of whether or not individual rights have been interfered with. The former applications are generally heard in the judicial courts and the latter in the administrative courts.

Power of full judicial review: This is a very restricted power and is only available for a limited number of specific cases laid down by statute and essentially dealing with electoral matters. The jurisdiction of Belgian administrative courts, as will be seen, is quite narrow when compared with the administrative courts of other countries. When it comes to substituting a decision, the principle of separation of administrative and judicial functions prevents the Conseil D'Etat from further activity than quashing the decision. Consequently, when requested to vary or substitute an administrative act that is being challenged before it, the Conseil D'Etat must declare itself incompetent. As to fines, the controversial question of whether or not the Belgian Conseil D'Etat was entitled to impose a fine was answered in a 1990 statute, which granted the Conseil D'Etat the right to impose a fine on an administrative authority that failed to act on a judgment to set aside a decision. With regard to damages, the Conseil D'Etat does not have the authority to attach an order to pay damages to its judgment to quash. Persons subject to public law are subject to tort liability, and an applicant must turn to the judicial judge to enforce performance ordered in judgments of the Conseil D'Etat. As to compensation, the Conseil D'Etat determines requests for damages brought against the state or public bodies for injury sustained as a result of measures taken by them. The

procedure is rare and the Conseil D'Etat only determines it when no other competent court is found.

Belgian Conseil D'Etat is, therefore, obliged by virtue of Article 177 of the Treaty, as a court of last resort, to submit all questions raised by it that involve interpretation of European Union Law to the European Court for preliminary ruling.

The effects of decisions of administrative courts: Any decision emanating from the Conseil D'Etat, which quashes an administrative act, has retrospective effect, although this is limited, in cases of the considerations of equity, public utility and certainty. When an administrative act is quashed, the decisions taken by virtue of that act also lose their legal basis. Because of the fact that it has an absolute binding effect, a decision ordering that an administrative act be quashed creates a precedent binding on all courts. In theory, the Conseil D'Etat is not bound by the decisions of other courts, but it takes them into account.

With regards to the enforcement of decisions of administrative courts in Belgium, some laws force public persons and public bodies to be subject to public law to register in their accounts, should the case arise, the debts that result from adverse judgments handed down by administrative courts. An applicant may, in the case where the Conseil D'Etat decision has not been granted, apply to a non-administrative court to obtain reparation for the loss suffered and may also request the annulment of the new administrative decision. In 1991, a law which allowed the Conseil D'Etat to suspend the carrying out of a particular act or decision by the administration, if the act or decision would be likely to cause the applicant serious loss or damage of a kind which would be very difficult to repair once it had occurred. Was introduced.

GERMANY

Administrative law in Germany is concerned primarily with the validity or revocability of administrative acts and the right to administrative action. There is a tendency towards codification in large parts of German administrative law being codified.

There are five jurisdictional branches in Germany, each with its own court organization: the general courts; the administrative courts; the tax courts; the social courts; and the labour courts. There is also a constitutional court. In addition to the general administrative courts, the tax courts and the social courts are also considered to be administrative courts in certain instances.

There are thirty-five general administrative courts of the first instance—Verwaltungsgerichte; ten appeal courts—Oberverwaltungsgerichte; and the Supreme Court, the Bundesverwaltungsgericht.

Power to quash or vary: The administrative judge in Germany has the power to quash a decision in two ways. The first, which is most often used, is intended to protect a personal right or interest by quashing the contested act. Since the object of this action is the protection of rights or interests of individual persons, the judge must restrict considerations to the part of the act that appear to be unlawful. The second form of action is the direct review of rules and regulations. This enables the administrative judge to revoke certain executive rules which do not have the authority of law. This right to review may be exercised over certain local planning regulations and the law of the "Lander", on condition that the 'Land' has incorporated this review procedure into its law.

The German administrative judge has also the power to obtain an administrative act from the administration, but cannot issue an administrative act in the place of the administration. However, the administrative judge can quash any decision which refuses to grant a request and can oblige the administration to come to a new decision which takes into account the grounds for the decision. In some instances, the judge can oblige the administration to issue the act requested by the applicant. Another possibility open to the German administrative judge is to order measure that is to be served or withheld. This involves full judicial review, but is reserved to certain well-defined matters and is intended to get the administration to pay out a certain sum of money.

Additional powers: In the case of the quashing of an administrative act that has already been carried out, the administrative judge may decide the manner in which the administrative authorities should restitute the previous situation. The

judge cannot, however, substitute himself for the administration to do this. Judicial courts, in principle, have jurisdiction to order the payment of damages. This is the case when the State acts as a private person, in the case of State liability as a result of administrative acts governed by administrative law, or in the case of compensating private persons in expropriation for public purposes. Administrative courts determine State liability resulting from contracts entered into by the administration and, in likewise, the State's liability towards its public servants. The orders or judgments and decisions of these courts may be carried out in accordance with the rules of the Code of Civil Procedure involving the State. The court can appoint a competent authority to carry out its orders in accordance with the orders of the court when the administration is inactive. The provisions of the Code of Civil Procedure to force performance are applicable to the decisions of the administrative courts. However, it is indeed rare that steps have to be taken to force the administration to apply or carry out an order. On most occasions, the court's decisions or orders are obeyed.

Referral before an international court: In the case of conventions dealing with refugees and stateless persons and also in the case of the European Convention for the Protection of Human Rights, the German judge applies international conventions on condition that these conventions have been incorporated into the domestic law. The general rules of international law take precedence over domestic laws, and directly create rights and obligations for all citizens.

Article 177, paragraph 1 of the EEC Treaty, requires courts of the last resort, from which there is no appeal, to transfer all questions to which European Union law may be applied, to the European Court of Justice for preliminary ruling. German administrative courts are bound to take account of the judgments of the European Court of Justice.

The effects of decisions of the administrative courts: Judgments given in administrative cases have relative authority and are subject to challenge. They only bind the parties in relation to the matter concerned. This relative effect stems from the fact that the object of the action is not to decide whether the

administrative act is unlawful, but to pass judgment on the applicant's claim. The subjective nature of an action to have an administrative act quashed explains the fact that the decision has only relative binding authority. Third parties are, however, bound by the fact that the administrative act has been quashed. Decisions quashing regulations are final and these decisions are published. Any administrative act which is quashed is made retrospectively invalid and, if possible, is deemed never to have existed. A decision declaring that a regulation is unlawful takes effect ab initio unless this would cause legal uncertainty.

The enforcement of decisions of administrative courts: In general, the administration respects the principle of the rule of law, and applies the decisions of the administrative courts without direct outside pressure. Problems of enforcement that occur in the cases where the application brought before the court do not have the effect of suspending the act, or decision challenged. In such cases, when the administrative court declares an act or decision annulled, the court may, upon the application of an interested party, specify the way in which a administration must apply its judgment.

The administrative courts may oblige the administration to take a decision or carry out an act that it previously refused to do so. Such a court order may be accompanied by the imposition of a periodic fine. As a general rule, the Code of Civil Procedure may be relied upon the administrative matters to ensure that the decisions and judgments of the administrative courts are enforced. The Code of Civil Procedure provides a specific measure to be taken to encourage the administration to comply voluntarily with the decisions of the courts. The court, before deciding what enforcement measures to adopt, must inform the administration of the decision it intends to pronounce and accord a specific time limit in which the decision should be applied.

FRANCE

Administrative law has evolved as a special branch of law in France with a three tier system of general administrative courts. The first tier has the Tribuneaux Administratifs; the second tier has five Cours Administratives d'Appel; and the

highest administrative court is the Conseil D'Etat to which appeal is required, although in some instances the Conseil D'Etat may be a court of the first instance.

Power to quash or vary: In actions brought involving abuse of power, the judge is informed of arguments which challenge the legality of administrative acts. A judge, in the French Conseil D'Etat, may pronounce the contested decision quashed, if it turns out to be unlawful, otherwise, there are no further powers to annul.

Power of full judicial review: In full judicial review, questions involving the recognition of personal rights and which are attached to an individual legal situation are, in principle, referred to a judge. In such cases, the judge may order the payment of money, or reverse the decision, and in certain cases the judge may even substitute a decision. The extent of the powers actually varies according to the subject matter. Appeals against the judgments made after full judicial review are heard by the administrative courts of appeal, and only go to the Conseil D'Etat on further appeal. Cases concerning abuse of power are appealed before the Conseil D'Etat, but since 1992 appeals involving abuse of power lodged against individual administrative decisions have been progressively assigned to the administrative courts of appeal.

Additional powers: In actions against the abuse of power and in actions for full judicial review, the administrative judge is neither enabled to issue an injunction against the administration, nor may the administration be ordered to pay a fine.

It is a basic principle of French Public Law that the administrative judge is careful not to interfere with the activity of the administration or to give orders to the administration.

The effects of decisions of administrative courts: In France, the effect of a court decision varies. In most cases, it is only relative, but may be absolute if the decision quashes the administrative act as ultra vires. Once administrative acts have been quashed, they lose all legal effects and can no longer be enforced, either by the administration itself or by any other court. Acts quashed

as ultra vires are deemed to have never existed, and they disappear with retrospective effect from the country's legal framework.

The enforcement of decisions of administrative court: The majority of the decisions of the administrative courts are applied in France, although, in recent years, there has been an increase in the number of applications claiming that decisions have not been applied. Putting aside bad faith on the part of those involved, the principal cause is due to the complexity of the decisions, and the lack of legal knowledge of many persons and bodies is subject to administrative decisions. A Decree dating back to 1963 provides a mechanism that aims to prevent administrative court decisions being ignored so as to encourage their application. There is a separate division of the Conseil D'Etat which ensures that this aim is attained. Two Acts of the Parliament, in 1980's and the 1987's, reinforced this aim and added coercive measures. These Acts empower the Conseil D'Etat to impose periodic penalty payments by compelling fines on persons or bodies subject to public law and, in more general terms, on private persons or bodies charged with running public services.

1.6 Development of Administrative Law

1.6.1 In General

Unlike other fields of law, administrative law is a recent phenomenon and can fairly be described as 'infant.' Historically, its emergence could be dated back to the end of the 19th century. This era marked the advent of the 'welfare state' and the subsequent withering away of 'the police state.' The interventionist role of the welfare state practically necessitated the increment of the nature and extent of power of governments. Simultaneous, with such necessity came the need for controlling the manner of exercise of power so as to ensure protection of individual rights, and generally legality and fairness in the administration. With such background, administrative law, as a legal instrument of controlling power, began to grow and develop too fast. Typically, with the proliferation of the administrative agencies, administrative law has shown significant changes in its nature, purpose and scope.

Presently, administrative law, in most legal systems, is significantly developed and undoubtedly recognized as a distinct branch of law. However the path followed to reach at this stage is not uniform and similar in most countries. Administrative law is unique to a specific country. Such uniqueness can be explained by the fact that it is the outcome of the political reality, economic circumstances and the nature of the legal system prevailing in that country. It is also highly influenced by the constitutional structure, the system of government and principles of the public administration adopted by that country.

Generally, the proliferation of the administrative agencies and the expansion of delegated legislation were two significant factors for the growth of the administrative law in most countries. The 20th century marked with the vast increase of administrative agencies with vast and wide-ranging powers. This necessitated legislative measures and judicial interference aimed at controlling the manner of exercise of power of these entities so as to ensure protection of individual rights and freedoms. As a result, most countries introduced specific and comprehensive rules and procedures governing administrative adjudication and rule-making. In US, the Administrative Procedure Act which was made law in 1946 is one such example of a comprehensive response to deal with the growing power of agencies. Since then, the landscape of the history of the American administrative law has been changed significantly. Similarly, in England the Statutory Instrument Act was promulgated in the same year (1946) even though it was not as comprehensive and influential as the American counterpart. The Act was a direct response to the ever increasing power of agencies, more specifically, the delegation power of agencies. In the 1920s fear developed about the volume and nature of the delegated legislation being produced, which was not receiving parliamentary scrutiny; many sought necessary or desirable.

In 1929, lord chief justice Lord Hewart published The New Despotism in which he railed against what he saw as dangerous and uncontrolled growth of bureaucratic power. In 1932, the report of the Donoughmore-Scott Committee on Ministers' powers was issued. The report, amongst other things, explained the inevitability of the delegated legislation, and also suggested some

safeguards. The report also recommended better scrutiny of the vesting in Ministers of 'oppressive' powers. This, finally, led to the enactment of the Statutory Instruments Act of the 1946.

However, the growth of the administrative law is not limited to statutory prescriptions of rules and procedures governing the administrative process. Courts have also played important roles in shaping the form, substance and scope of the administrative law. In England, until the Second World War and in the period immediately following 1945, courts continued limiting the scope of their controls. Such judicial restraint was relaxed after the 1960s and there was judicial revival and activism with the judiciary reclaiming their proper role of ensuring the legality and fairness of exercise of governmental powers. In America, where the judiciary has firmly asserted its strong position in checking the constitutionality of parliamentary legislation, the courts didn't hesitate to review administrative decision, including delegated legislation.

In France, Italy, Germany and in a number of other countries, there is a separate system of administrative courts which deal with administrative cases exclusively. As a natural consequence, administrative law has developed on its own independent lines, and is not enmeshed with ordinary private law as it is in the Anglo-American system.

1.6.2 Ethiopia

It is very difficult and challenge to talk about the history of administrative law in Ethiopia. Administrative law is still not well developed, and it is an area of law characterized by the lack of legislative reform. It is also a subject in which too little attention is given in terms of research and publication. Even though it cannot be denied that there are some specific legislations scattered here and there, which are relevant to the study of administrative law, it is still at a very infant stage.

When one looks into some of the specific legislations, one could easily realize that they are not in effect rules and procedures of manner of exercising power, or in general terms tools of controlling governmental power. Rather they are

enabling acts conferring power on administrative agencies. However, since administrative law is in essence the mechanism of controlling power such enabling acts granting judicial and legislative powers it could not in any way signify the existence of administrative law in one country.

Hence, the historical development of the administrative law should be studied in terms of the process of legislative and judicial movement to curb the excess of power. In Ethiopia, the history of government is largely characterized by arbitrariness and lack of effective legislative, judicial and institutional control of power. That is why it is challenging to record the historical development or growth of administrative law.

In the final analysis, it becomes convincing that the issue has to be dealt with in terms of describing the growth of administrative power and the respective absence or few instances of legislative, judicial institutional attempts to control the exercise of administrative power. Ultimately, this task becomes the study of the constitutional history of Ethiopia, as the administrative law history could not be significantly different from its constitutional history.

Up to 1987, the previous three constitutions of the 1931, 1955 and 1974 did not contain any meaningful and practical limit on the power of government.

The 1931 constitution was simply a means of centralizing power of the Emperor, and as Markaris has explained, it was 'designed as a legal weapon in the process of centralization of governmental power.' The 1955 revised constitution has showed little improving in this regard as it tried to define and distribute powers of government. It also included provisions entitling the citizen's fundamental rights and freedoms. But it failed to do away with the accumulation of power in the hands of the Emperor. The Emperor still retained law-making power sharing it with parliament, and judicial powers, which were illdefined in the constitution as 'the power to maintain justice' and the essential executive powers were vested directly on him.

Such being the constitutional set up during that time, it is naïve to talk about the control mechanisms of power of the executive since that ultimately means

checking the unquestionable power of the Emperor. However, it is be unfair to inter this conclusion as an indicative of the total picture. There were some attempts and signs towards addressing the grievances of citizens against maladministration. There was, for instance, a legislative effort to establish the Ombudsman during the last days of the Emperor Haile Selasie's regime. In attempt to come up with a new constitution, a draft constitution was prepared which devoted the ninth chapter to the establishment of the office of the Ombudsman. This draft, and thereby the establishment of the Ombudsman, remained in paper as a result of the fall of the Emperor in 1974.

During the same period, an unsuccessful attempt was made to introduce for the first time an Administrative Procedure Act that governs the decision making process of the administrative agencies. The draft was not actually as comprehensive as the American Administrative Procedure Act since it failed to deal with the rule making procedure of the agencies. Its scope is limited only to providing mandatory adjudication procedures of the agencies and the establishment of the administrative court reviewing their decision.

In addition to such unsuccessful attempts, the establishment of some the administrative courts like the Civil Service Tribunal and an administrative tribunal entrusted with the power of reviewing assessment of tax may be taken as one step ahead for the evolution of the administrative law in Ethiopia.

The courts were also not totally silent in exercising their proper role of checking the legality of power of the executive. In very few instances, the courts used their ordinary power of interpretation of laws and entertained disputes between the citizen and the government. In one reported case, a court issued an order of mandamus compelling the agency to discharge its legal duty towards the plaintiff. This, even though, is a single and isolated incident is an indicative of the uncoordinated effort of the judiciary to wake up from the deep sleep of judicial restraint. It should also be remembered that the judiciary be totally blamed for failing to assert its proper place as 'the guardian of liberty.' This is mainly due to the fact that the citizen didn't look to the judiciary seeking redress against the government. There is no role for the court to play in the absence of a petition made to it. Too many reasons could be mentioned for such incident.

But, lack of public confidence in the judiciary reflective of absence of independence of the courts may be cited as one of the contributing factors for the lack of an active judiciary.. This is true not only with respect to the scope and extent of judicial control of administrative action during the Imperial era, but can also be taken as a general truth about the judiciary to the present day.

Administrative law didn't show any progress during the Dergue regime. The 1987 constitution was not devised to limit the power of the government. Hence, one should not expect administrative law to deviate from the prevailing constitutional structure and develop as an instrument of checking the executive.

The present Federal Democratic Republic of Ethiopia of the 1995 has laid down the constitutional framework for the development of the administrative law. It contains key principles of government administration like accountability, transparency, and public participation. It also envisages the establishment of the Ombudsman and the Human Rights Commission. Six years after the constitution, the two institutions were established by the parliament.

1.7 The Present State and Future Prospects of Administrative Law in Ethiopia

Around 1880, the renowned English constitutional lawyer professor A.V.Dicey, misled by his misconception of the rule of law, proudly stated that England did not have administrative law. Almost after a century, in what can be said a total reversal of the Dicey's position, the renowned English judge Lord Denning commented that '…it may truly now be said that we have a developed system of administrative law.'

Given the current situation in Ethiopia as to the scope and impact of the administrative law, it may be unfair to say that Ethiopia does not have administrative law. But, it is equally true that no one can boldly declare that ' we have a developed system of the administrative law.' Still there is no administrative procedure governing administrative decision-making or delegated legislation, either at the federal or state level. There are only few administrative courts poorly organized, highly subject to executive control and

ineffective due to lack of expert administrative judges and absence of clear guidelines regarding their qualification, procedure of appointment and dismissal. Control of administrative action through judicial review is almost non-existent. Institutional control through the Ombudsman and the Human Rights Commission is not as developed and effective as it should have been. Generally, the legal instrument to bring about administrative justice, executive accountability and good governance is far from being developed in a comprehensive and systematic manner. Presently, the need for such a developed system of administrative law is beyond necessity. The question of the administrative justice is still an unanswered question for the citizens of Ethiopia.

The implication of the federal structure is that there is a possibility of the Federal and the state administrative law. Since the constitution envisages for the establishment of the executive branch at the state level as one organ of government, it is be up to the states to formulate their own administrative law. This means that the decision making and rule-making procedure of one regional state may be different from that of the other state, or even from that of the federal state.

UNIT SUMMARY

Administrative law is a recent phenomena and it is still at an infant stage. It was even recognized as a distinct subject during the 19th century. This is due to the fact that the political and economic circumstances that gave rise to its existence occurred at that time. At the end of the 19th century, the 'Police State' which was rooted on the ideals of the free market economic and political system, has proved a failure in addressing the social evils and suffering of the mass population. The outcome of this condition was the birth of the 'Welfare State'; that endowed with more and wider powers in charge of playing a positive role in the political, economic and social life of the individual and the population at large.

The birth of the welfare state justified conferring wider powers on government regarding the interest of the public. But with more powers came, there was the inevitable danger and the potential danger of its abuse. Hence, it was realized that there should be a mechanism to control such power abuse. Administrative law was then born as a legal instrument to carry out such control on the exercise of power.

Administrative law could be defined in so many different ways. However, its main purpose, to control of power, should always be the basic element in any attempt made to define it. When one starts to study administrative law, he should begin by closely looking at its sources. That includes constitution, statute, delegated legislation and judicial opinion. Administrative law is closely tied with constitutional law, and it could not be understood fully without reference to its constitutional foundations. Actually, there is no significant difference between the two, apart from their scope and hierarchy.

The scope of the administrative law is always becoming wider due to the dynamic changing nature of the administrative process. In most countries, the rules, principles and procedures of the administrative law are applicable not only in case of exercising public power by agencies, but also in the decision making process of the public enterprises having monopoly power, universities and private companies exercising governmental functions through contracts.

However, it should always be remembered that administrative law is only concerned with the manner of exercising power and the legality of administrative decision, but not with the substance or merit (wisdom) of the decision itself.

Administrative law is not an isolated subject. It is influenced by different factors and it shares a common ground with other concepts. Administrative law has now become a pivotal legal instrument to maintain rule of law, to facilitate good governance, to ensure the protection of human rights and to uphold the principle of democracy.

Administrative law evolved along different lines. Its nature and characteristic vary from the common law and civil law legal systems. Administrative law in France is characterized by the existence of independent administrative courts side by side with the ordinary courts, the consei de etat, which is the final administrative court in disputes between the citizen and the government, was established as the supreme judicial organ on administrative matters. On the contrary common law countries didn't have such type of dual court structure. The ordinary courts were empowered to adjudicate disputes between the citizen and the government.

Administrative law does not have a very long history. However, its nature, essence and scope is expanding and rapidly changing. Such rapid growth and change could be explained by the ever-fluctuating form and structure of nature of government and administrative process.

Review Questions

1. Is it possible to define administrative law without resorting to its control element? If, "Yes," how?

2. What distinguishes the red light theory from the green light theory?

3. How does the administrative law ensure the protection of human rights?

4. Assume that the Ethiopian Electric Light and Power Corporation refuses to provide service to an applicant and discontinues its service to a certain customer without any justifiable ground. Are such cases simply matters that should be settled based on the law of contract (private law issue) or public law issues to be governed by the rules and principles of the administrative law?

5. What is Conseil de etat? Is there any constitutional basis to establish such type of administrative court in Ethiopia at the federal level?

6. Discuss the role of administrative law in facilitating the democratic process.

7. Describe the relationship between administrative and constitutional laws.

8. What is the central purpose of an administrative law?

9 What makes it difficult and challenging to write the historical development of the administrative law in Ethiopia?

UNIT TWO: CONSTITUTIONAL FOUNDATION AND LIMITATION OF ADMINISTRATIVE LAW

Introduction

This unit explores the impact and implications of the constitutional principles of rule of law and separation of powers on the nature and scope of administrative law. It begins by introducing meanings of rule of law which comprise procedural and substantive elements. The traditional meaning of rule of law may be summarized as the principle of legality. Legality here refers to the legality of an administrative action. Any action taken by any public official or an agency should be within the scope of power given by law. Administrative law is rooted on the principle of rule of law since it is a power-controlling instrument. It simply tries to ensure the legality of the administrative action. The first part of this unit discusses how administrative law could be justified on the principle of rule of law.

The second part tries to see the impact of the principle of separation of powers on the scope of the administrative law. According to the strict application of the principle of the separation of powers, neither organ of the government should have the powers of the other organ. Contrary to this administrative agencies accumulate all the powers of the three organs of government. Although this could be justified on practical grounds, the principle of separation of powers acts as a limitation on the extent and exercise of such powers by agencies. On the other hand, the principle limits the scope of the judicial review. The proper scope of power of ordinary courts only checks the legality of an administrative action. If they try to review the merit of the decision, they are in effect of encroaching upon the power of the executive, which is a gross violation of the principle of the separation of powers.

Objective: At the end of this, unit students are expected to:

- Define rule of law
- Distinguish procedural and substantive elements of rule of law
- Discuss how rule of law is the foundational basis of the administrative law

- Define separation of powers
- Identify the application of the separation of powers under the F.D.R.E. Constitution
- Discuss how separation of powers is a limitation of the administrative law

2.1 Rule of Law as a Basis of Administrative Law

The expression "Rule of law" plays an important role in administrative law. It provides protection to the people against the arbitrary action of the administrative authorities. The expression ' rule of law' has been derived from the French phrase 'la principle de legalite', meaning a government based on the principles of law. In simple words, the term 'rule of law, indicates the state of affairs in a country where, in main, the law rules. Law may be taken to mean mainly a rule or principle which governs the external actions of human beings, and which is recognized and applied by the state in the administration of justice.

2.1.1 Procedural Elements

Almost all administrative lawyers or anyone embarking a research on this dynamic concept usually starts to treat the subject by espousing the approach and definition given to it by the renowned English constitutional lawyer,Dicey. (1888)gave the most influential definition of rule law which mainly comprises the following three elements.

A. Supremacy of Law (Principle of Legality)

For Dicey (1888 :) the primary meaning of rule of law is supremacy of the ordinary laws of the land over the actions of public officials and administrative agencies. He writes:

> *It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even wide discretionary authority on the part of the government.*

Hence, one aspect of the concept of rule of law is absolute predominance, or supremacy of law over arbitrary, government actions. Simply stated, it means every administrative action that should be taken according to law. Applied to the powers of government, this requires that every government authority which does some act which would otherwise be a wrong (such as taking a man's house), or which infringes a man's liberty (as by refusing him a trade license), must be able to justify its action as authorized by law. An administrative agency or public official is required to justify its action by clearly establishing that it is expressly or impliedly empowered or authorized by act of the parliament (i.e. proclamation issued by the House of People's Representatives). This means also that in the absence of any authority, the affected party whose rights and liberties have been violated as a result of the action of government, should be able to take the case to court and have it invalidated.

However, acting according to law does not satisfy the meaning of rule of law in the presence of wide discretionary powers. Parliament may confer on the specific administrative agency, wide discretionary powers that enables the agency to take unpredictable and in some cases of the arbitrary actions. Hence, the government should be conducted within the framework of the recognized rules and principles that restrict discretionary power. In many countries, typically in England, many of the rules of the administrative law are rules for restricting the wide powers, which acts of parliament confer very freely on ministers and other authorities.

B Principle of Equality

" . . .It means equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts."

One meaning of the above statement is that disputes, as to the legality of acts of government, are to be decided by judges who are independent of the executive. This aspect of the rule of law, which is typical characteristics of English administrative law, is largely based on the principle of the separation of powers which prohibits interference among the three government branches, Hence, not

only civil cases, but also administrative disputes that should be adjudicated by the ordinary courts; not by the separate administrative courts.

In France, the same principle of separation of powers resulted in a totally opposite conception of the rule of law. According to French administrative law (droit adminstratif), disputes between the individual and the government are settled by separate administrative courts, the conseil de etat being the supreme administrative court. It is said that this system was developed in France based on the strict interpretation of the separation of powers. Dicey emphatically rejected the French system of the administrative law (droit adminstratif). because of his emphasis on the ordinary law courts as opposed to any specialized administrative law courts as ultimate arbiter of disputes between the government and the individual.

Another aspect of the principle of equality is that the issue that states the law should be even- handed between government and citizen. In other words, those laws governing the relationship between individuals should also similarly be applicable to the relationship between individuals and government. This implies that government officials should not entertain different, or special privileges. However, the intensive form of the government and the complexities of administration sometimes necessitate granting special powers (privileges) to the government. What the rule of law requires is that the government should not enjoy unnecessary privileges, or exemptions from the ordinary law.

C Constitution Is the a result of the Ordinary Law of the Land

" It means the constitution is the result of the ordinary law as developed by the courts through the common law tradition and provides for the legal protection of the individual not via a bill of rights, but through the development of the common law"

The rule of law lastly means that the general principles of the constitution are the result of judicial decisions of the courts in England. In many countries rights such as right to personal liberty, freedom from arrest, freedom to hold public meetings are guaranteed by a written constitution. However this is not so in

England. These rights are the result of judicial decisions in concrete cases that have actually arisen between the parties. The constitution is not the source but the consequence of the rights of the individuals. Thus, Dicey emphasized the role of the courts as ultimate guarantors of liberty.

2.1.2 Substantive Elements

The modern concept of the rule of law is fairly wide and, therefore, sets up an ideal for government to achieve. This concept was developed by the international commission of jurists, known as Delhi Declarations, in 1959, which was later on confirmed at Logos in 1967. According to this formulation, the rule of law implies that the functions of government in a free society should be exercised so as to create conditions in which the dignity of man, as an individual, is upheld.

In recent years, wide claims have been made as to the proper sphere of rule of the law. The presence of representative democracy, beneficial social and economic services and conditions, personal independency (privacy) and independent judiciary has all been taken as indicators and elements of the rule of law. One way to understand the concept is making a contrast between the two approaches which are the 'formal' and 'substantive' (ideological) versions of the rule of law. The former is not much more than the principle of legality, and the latter insists on a wide range of positive content.

2.1.3 Rule of Law as a Foundation of Administrative Law

In simple terms, the rule of law requires that government should operate with in the confines of the law; and that aggrieved citizens whose interest have been adversely affected be entitled to approach an independent court to adjudicate whether or not a particular action taken by or on behalf of the state is in accordance with the law. In these instances, the courts examine a particular decision made by an official, or an official body to determine whether it falls with in the authority conferred by law on the decision maker. In other words, the courts rule as to whether or not the decision is legally valid.

It is in this way that the principle of rule of law serves as the foundation of the administrative law. It has been repeatedly said that the basic purpose of the administrative law is to control excessive and arbitrary governmental power. This purpose is mainly achieved through the ordinary courts by reviewing and checking the legality of any administrative action. Therefore, administrative law as a branch of law, is rooted in the principle of the rule of law. This principle mainly stipulates that every administrative action should be according to law. The different control mechanisms of power in administrative law by preventing government not to go beyond the authority granted to it by law ensure that rule of law is respected.

Hence, the expression "Rule of Law" plays an important role in administrative law. It provides protection to the people against arbitrary action of the administrative law.

To clearly understand the relationship between the rule of law and the administrative law, it is important to examine a related doctrine of the administrative law, which is the doctrine of ultra virus. The doctrine to some extent is a derivation of the principle of the rule of law. The former underlines that power should be exercised according to law. The later, goes one step further and states that an action of any official or agency beyond the scope of power given to it is ultra virus (i.e. beyond power), hence it is considered as null and void. An ultra virus act does not have any binding effect in the eyes of the law.

The simple proposition that a public authority may not act outside its powers (ultra virus) might fitly be called the central principles of the administrative law. The juristic basic of judicial review is the doctrine of ultra virus. According to Wade & Forsyth an administrative act that is ultra virus or outside of jurisdiction (in case of action by administrative court) is void in law, i.e. deprived of any legal effect. This is, in order to be valid, it needs statutory authorization, and if it is not within the powers given by the act, it has no legal leg to stand on it. Once the court has declared that some administrative act is legally a nullity, the situation is as if nothing has happened. Administrative law by invalidating an ultra virus act ensures that every administrative action is in conformity with the law; indirectly guaranteeing the observance of rule of law.

Rule of law as a foundation of the administrative law has been briefly explained above. But at the same time, you should also be aware of the fact that the principle also serves as a limitation on the scope of administrative law.

It has been clearly pointed out in chapter one that the proper scope of the administrative law is procedure, not substance. This means, it is concerned with the decision-making procedure (how power is exercised), rather than the decision itself. To a wider extent the study of the administrative law has been limited to analyzing the manner in which matters move through an agency, rather than the wisdom of the matters themselves. Whether a certain decision is right is not a matter to be investigated under the administrative law, rather it should be left to the decision-making agency since it purely involves policy considerations. Similarly, the principle of the rule of law does not go to the extent of ensuring whether a certain agency's decision is right or wrong. Its primary meaning is attached to the principle of the legality or the superiority of law. Its concern is to ensure that a administrative action is taken according to law.

The court, in reviewing an administrative action, is expected to see or examine the legality of the action only. In judicial review, the judges do not substitute their own discretion and judgment for that of the government. They simply rule whether the government or its officials have acted within the ambit of their lawful authority. Thus, the judges do not "govern" the country, and do not "displace" the government when government decisions are challenged in the courts.

The principle of the rule of law, by limiting its scope only to legality, or in some cases to fairness of the administrative action, simultaneously serves as a limitation to the scope of the administrative law.

As stated by *MARSHAL* In *MARURY Vs. MADISON*

"The province of the Court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers perform duties in which they have a discretion. Questions in their nature political, or which are, by the Constitution and laws, submitted to the executive, can never be made in this court."

Further Reading

The rule of law and development (in "Law and development in the third world")

George Rukward

It is trite knowledge that rule of law is not of recent origin. The Greek and Roman thinkers examined its concept. In medieval England the issue was quite important as also it was in the rest of Europe. That period produced the Magna Carta in England which was one of the great charters of freedom of mankind, as the name implies. But the issue of rule of law was raised again in the 17th century, especially in respect of the extravagant, but understandable claim of the European monarchs to rule by Divine Right. In England, the issue took the loss of a King's head and the flight of another, thereby luckily losing only his throne, to establish the supremacy of law.

But, when one talks of the rule of law in modern times and in the common law world, one starts with Dicey if only to dismiss him. For his influence, after expounding systematically what he thought were the main tenets of the rule of law, held sway for an unduly long time. His lectures were published in 1885 in book form.

According to him, there were three cardinal tenets of the rule of law:

- Absolute supremacy of regular law as opposed to influence of arbitrary power:
- Equality of all citizens in law;

- Constitutional rights should be, and in England are, protected by the ordinary law of the land as a result of decisions of courts.

Among these Diceyan postulates, only the second could still be relevant today, but even that has not escaped criticism. The first is easier to dismiss. In the first instance, Dicey's use of "arbitrary power" as being equivalent to discretionary power and therefore not in conformity with the rule of law cannot be valid today. The rule of state has changed from the one that it was supposed to play during his time. The activities of the state are not just only to defend the citizens from external and internal threats, and also to handle external affairs generally, but also to serve as an activities factor or agent in development. Thus, the state provides social services for which there has to be taxation; it is engaged in planning of towns and cities to prevent social disorder, and so many other activities which would have horrified Dicey if he came back to life. Nonetheless, Dicey would be easily converted if he came back to life today. Today, one cannot legislate precisely for all matters because events are bound to change from day to day, or even from hour to hour. So, discretion must be given to those in authority to enable them to deal with such contingencies. At the end of the day, such functionaries have to account for their activities.

While there has been some disagreement on the validity of Dicey's postulates, some of the arguments used against Dicey are also spurious. To say that there are distinctions, as a matter of law, between landlords and tenants, between employer and employee, aliens and subjects it is to reduce Dicey's postulate to absurdity because he would not have had that kind of "inequality" in mind. All that he meant is, that at the general level, no tenant or landlord, no employer or employee should be given preferential treatment purely because of his status.

The final postulate of Dicey is definitely devoid of validity and does not require any extensive discussion. Indeed, the United Kingdom itself now has many leading jurists who are convinced that entrenchment of constitutional rights is required in the U.K. The majority of the present day constitutions have those rights entrenched in one form or another. Whether they are effective or not, or rather to what extent they are effective depends on the indeterminate variables

and threats are listed below and also the extent to which the country in question has taken the rule of law as a national ethic.

Irrespective of Dicey's erroneous, or perhaps idiosyncratic views, the rule of law is still as a vibrant issue as it was during his age. It is an issue that is going to be with us so long as there are wielders of power since there is a tendency of those wielders of power to claim as much territory as possible and, rightly or wrongly, for those are subjected to such power to try to rein in such power wielders. Indeed, such challenge to power holders is the surest safeguard against its abuse.

The best, and probably the most comprehensive, statements of the theme have come from the efforts of the International Commission of Jurists in their various conferences. Their work has been dedicated and purposeful, and for that reason, it has gained almost universal acceptance. Their conclusions are therefore very relevant to the theme of this paper. The sum total of their statements and restatements areaptly summarized by one author as follows:

The acts of the government towards the subject, particularly those affecting his right to the freedoms of the person, speech and association, and the right of choosing representatives to make the laws, shall be in accordance with previously established general rules having a reasonably specific reference.

The rights enumerated in paragraph 1, being essential to the operation of law as an order designed to regulate human affairs according to reason, shall be maintained as part of the legal system but subject to

- Well-recognized limits upon their exercise;
- Limitations consequential upon the need to reconcile them with one another; and
- Qualification of such rights in times of exceptional crises.

The interpretation and application of the general rules referred to in paragraph 1, and adjudication upon the necessary limitations upon the rights referred to in paragraph 2, shall be under the control or supervision of an independent judicial

body with effective remedial powers and acting according to fair trial procedures (or the requirements of procedural due process).

In addition to the above elements, jurists also stressed issues of effective maintenance of law and order to ensure that social and economic conditions are fostered to enable the citizens to realize their total development and dignity. Seen in this light, the political and legal aspects of the rule of law are complemented by the social and economic rights. Indeed, they are merely two side of the same coin.

However, while admitting that the state should not remain passive in the process of development, wholesale government interference should be discouraged. In any case, if the citizen is given as much freedom as possible, there may be no need for the state to become a trader. It will, then, perform its legitimate role as a guarantor of security from both external and internal threats. We do not subscribe to Hayek's theory that government interference necessarily leads to serfdom. Indeed, there is something faulty with such a proposition. What is being suggested here is a happy mean between the two extremes.

2.2 Separation of Powers as a Limitation on Administrative Law

2.2.1 Nature and Meaning of the Principle

The doctrine of separation of powers means that none of the government, i.e., the legislative, executive and judicial should ever exercise the powers of the other. It means that the three departments of government are to be separated and distinct. They are to be independent of one another, and each can exercise only one type of authority, legislative, executive or judicial.

According to some writers on the topic, like Wade and Philips, this doctrine of separation of powers means that the same person can not compose more than one of the three departments of the government. One department should not control and interfere with the acts of the other two departments, and one department should not discharge the functions of the other two departments.

Thus, according to them, the theory of separation of powers signifies three formulations of structural classification of governmental powers.

A) The same person should not form part of more than one of the three organs of the government; for example, ministers should not sit in parliament.

B) One organ of the government should not interfere with any other organs of the government. For example, the executive should not interfere in the administration of justice by the courts.

C) One organ of the government should not exercise the functions assigned to any other organ. For example, the executive branch cannot legislate laws, and as well it cannot adjudicate cases.

Given the division of powers, it should also be noted that the authorities of the three organs or departments of the government are interrelated. They are to a large extent dependent upon another. Ministers are politically responsible to parliament, and legally responsible to courts. Complete separation is found to be not possible. A complete separation of powers, in the sense of a distribution of the three functions of government among three sets of organs, with no overlapping or co- ordination, would bring government to a stand still. Similarly, some writers described this situation as:

"Had the doctrine of separation of powers been followed rigidly in any country, the development of modern administrative agencies would have been impossibility."

The division of governmental powers into legislative, executive and judicial is not an exact classification. It is abstract and general and it is not true only theory, but it is also impossible in actual practice to make complete separation. There are many powers which may be assigned to one department, or delegated to a commission, or agency created for the purpose of administering a law, while they are inherent powers of the other departments. Thus, the true meaning of the theory of separation of powers, as it has been modified by practice, is that the whole power of two or more departments shall not and should not be lodged

in the same hand, and that each department shall have and exercise such inherent powers as shall protect it in its performance of its major as well as minor duties.

2.2.2 The Principle of Separation of Powers as a Limitation on Administrative Law

Even though the principle of separation of powers mainly draws a line between legislative, executive and judicial functions of government, administrative law runs, to some extent, contrary to this principle. It could be concluded that, it violates the principle of separation of powers. This could be clearly manifested with little examination of powers of administrative agencies, or the executive. According to the principle of separation of powers, the power and function of this branch of government is limited to the execution or enforcement of laws.

However, in order to ensure efficient and effective enforcement of laws, it has become a compulsive necessity to delegate the executive and administrative agencies with additional legislative and judicial powers (functions). Administrative agencies are given the power and function of writing regulations or rules that have the force of law. For instance, the council of ministers, through a power delegated to it by the house of people's representatives, may issue regulations. Similarly, specific administrate agencies can issue directives in accordance with the power granted to them by the house of people's the representatives.

Delegation of legislative powers by the legislature is clearly against the principle of separation of powers. However, it is justified on practical grounds. The lack of time and expertise in the legislature to provide laws necessary to solve a certain social or economic problem practically makes the legislature compelled to transfer some of its legislative powers to the administrative agencies. Delegation is also justified on the ground that it makes the administration effective and efficient. Agencies could not attain their purposes for which they are established unless other wise they have wider power, mainly rulemaking powers.

Agencies also share some of the judicial powers which traditionally belong to the ordinary courts. They can decide matters affecting individual rights and freedoms. Reversing a license, imposing administrative penalty, with holding benefits (e.g. pension), etc. all could properly be called as judicial functions. Most of the judicial functions of the agencies are usually exercised through organs within or outside that agency, which enjoy, relatively, little independence. These agencies are the administrative courts. Administrative courts give decision after hearing the argument of parties by applying the law to the facts. Such function normally belongs only to courts. Giving judicial power to agencies clearly violates the principle of the separation of powers. Still the justifications are practical necessities, which are more or less similar to that of the above justification with regard to granting legislative functions. Some matters, by nature, are technical and require detail expertise. This expertise is found in the specific administrative agencies, not the courts. Moreover, the trial process in the courts is lengthy, costly and rigid due to the complex procedural rules of the litigation. By comparison, a certain matter may be easily decided by an agency or an administrative court with the least cost to the parties and even to the decision-making process. Once again, practical necessities have prevailed over the principle of separation of powers.

We have seen how administrative law could be considered as a violation of separation of powers. This fact, even though, accepted due to practical necessities, serves as a limitation on the scope of the administrative law. Granting legislative and judicial powers to agencies is an exception, or it may be said a 'necessary evil'. This leads to the conclusion that such powers should be given and exercised narrowly i.e. only when it becomes a compulsive necessity to do so. Agencies should not be delegated on areas primary left to the legislature. Essential legislative functions should not be delegated to agencies. Delegation of legislative powers should be limited only to the technical or detailed matters necessary to fill the gap in the law issued by the legislature. In this way, the principle serves to check the legislature not to delegate wider powers.

In a similar fashion, ordinary judicial powers should not be given to administrative agencies or administrative courts. It should be limited only to matters which are technical by nature and require expertise of the administration. Generally, the principle of separation of powers imposes limitation on the extent of legislative and judicial power of agencies.

In addition to this, the principle mainly serves as a limitation on the scope of administrative law, by making courts not to question the substance of administrative action, but only its legality. As far as a decision is taken by an agency, which is within its confines of power, courts should refrain themselves from reviewing that decision. Administrative action that is not beyond the limits of powers conferred on the decision maker is not the proper sphere for courts to intervene. If they intervene, it will be a violation of the principle of separation of powers since they are, in effect, encroaching the power of the executive.

UNIT SUMMARY

Administrative law is rooted on the principle of the rule of law. The typical meaning of the rule of law, as expounded by the renowned English constitutional lawyer Dicey, is the principle of legality or supremacy of law. This means that every act, decision or measure of any public official or administrative agency should be made according to law. Any administrative action should be backed or supported by a law which gives a clear mandate or power to the decision making organ.

An action taken in the absence of valid legal authority or power is ultravires (beyond power), and hence is considered null and void in the eyes of the law. Administrative law, by controlling the excesses of power, ensures respect for the rule of law. For this reason, the principle of the rule of law serves as the foundation or basis of the administrative law.

Another principle having a great impact on the administrative law is the principle of the separation of powers. This principle envisages distribution of power among the legislature, executive and the judiciary. According to this principle, each organ is to exercise only a power that is assigned to it.

Administrative law violates the principle of the separation of powers since it recognizes the exercise of judicial and legislative powers by administrative agencies. This could only be justified on practical grounds. Since judicial and legislative powers of agencies offend the traditional notion of the separation of powers, the scope of delegation and exercise of such powers should be construed narrowly.

There is also another implication of the principle of separation of the powers on the scope of the administrative law. The proper scope of the administrative law is how a certain decision has been taken or reached, and as to whether there is an authority justifying such decision. It is not in any way concerned with the merit or substance of the decision. Whether the decision is wrong or right should be left to the executive. Hence, judges, while applying judicial review, should restrict themselves only to checking the legality of the administrative

action. If they go further and form their own opinion on the merits of the case, they are in effect encroaching upon the powers of the executive.

Review Questions

1. Discuss the procedural elements of the rule of law.

2. It is true that rule of law is the foundation or cornerstone of the administrative law. In some respect it is also a limitation on the scope of administrative law. Explain.

3. How does the administrative law violate the principle of the separation of law?

4. Does the F.D.R.E. constitution explicitly refer to the rule of law as the cornerstone of the constitution?

UNIT THREE: ADMINISTRATIVE AGENCIES: SUBJECTS OF ADMINISTRATIVE LAW

Introduction

Administrative law involves a challenge to the exercise of power by the executive government. For this reason, it is necessary to look at the composition and powers of executive government, and at how they exercise their powers when they take action or make decisions. In practical terms executive government interferes in our lines and their actions affect our lives in many ways. When we venture on a certain business, we have to acquire a relevant permit and license before commencing our business. Even after we comply with such requirement, a government inspector sent by the relevant agency enters into our premise without court warrant and can conduct investigation. The food and other household provisions we buy are subject to regulations. In work areas the jobs we do, and the premises on which we work are subject to licensing approvals and permits. As we are paid, we are subject to requirements as to tax. When we are ill, we seek medical treatment in health system subject to a high degree of government regulation. This brief reference is by no means complete or detailed, but it shows clearly that government intrudes into our lives in many ways..

Administrative agencies make individual decisions affecting citizens' lives and they set general policies affecting an entire economy through they are usually headed by officials who are neither elected nor directly accountable to the public.

Under this unit we will have a deeper look at the nature, purpose, scope and nature of power of the administrative agencies. The growth of the administrative law to large extent may be identified with the proliferation of administrative agencies, not only in number but also in power and function. Hence, the study of the administrative law is greatly interrelated with the study of the agencies, that shape the administrative process.

Objectives: At the end of this unit students are expected to:

- Explain the nature of administrative agencies.
- Define administrative agency and identify ways in which a definition of agency affects the scope of the administrative law.
- Identify the reasons for creating administrative agencies.
- Distinguish executive agencies from independent agencies.
- Examine the mechanisms used to enforce a law by administrative agencies particularly in Ethiopia.
- Differentiate executive, legislative and judicial power of agencies.
- Reason out why administrative law is closely related to administrative agencies.

3.1 Nature, Meaning, and Classification of Administrative Agencies

3.1.1 Nature of agencies

There is hardly any function of modern government that does not involve, in some way, an administrative agency. The 20th century has witnessed an unprecedented proliferation of agencies with varying size, structure, functions and powers charged with the task of day – to- day governing. Their existence and growth have been the typical characteristics of the modern administrative state (welfare state.) For this reason, they have been responsible for the expansion and development of administrative law greatly influencing its content, scope and future. In the broadest sense, administrative law does not involve the study of how those parts of our system that is neither legislature nor courts make decisions. It is concerned with the study of the procedures, powers and control mechanisms of the administrative agencies. For this reason, the complex web of the administrative process of agencies constitutes an essential aspect of administrative law.

Administrative agencies have become a major part of every system of government in the world. In Ethiopia, for instance, they are the primary tools through which local, states and the federal government performs regulatory functions. The vast increase of agencies in number and power has been observed by a U.S. Supreme Court judge who makes the following remarks:

" The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts . . . They have become a veritable fourth branch of government."

3.1.2 The **Meaning of Administrative Agency**

Defining an administrative agency is not an easy task. Agencies come in a huge array of sizes and shape. This is coupled with their wide ranging and complex functions and their power to legislate and adjudicate, in addition, to their normal executive powers, makes it challenging and difficult to precisely provide a precise and concise definition covering all these aspects of the administrative process.

Agencies may be defined as governmental entities, although they affect the rights and duties of persons are neither courts nor legislatures. For one thing it is true that agencies are not located within the legislative or judicial organ of the government. Although they are within the executive branch, most of them are not mainly accountable to the executive branch. The term executive branch of government is used either to refer to the president (e.g. in U.S.), or the prime minister and the council of ministers (e.g. Ethiopia). This definition lacks some precision. A government entity outside of the judiciary or the legislature does not necessarily qualify as an administrative agency. This does not mean that the legislature for some public policy reasons may not opt for a wider inclusive approach in determining which agency may properly be called as agency. The American Administrative Procedure Act adopts this and defines agency as any U.S. governmental authority that does not include Congress, the courts, the government of the district of Columbia, the government of any territory or possession, courts martial, or military authority. In this definition, the reference to "authority" signifies a restriction on the scope of government entities that may be properly called as agency. Authority refers to a power to make a binding decision. Therefore, only entities with such power constitute an agency. In a similar fashion, Black's Law dictionary defines agency as a governmental body with the authority to implement and administer particular legislation. Generally,

it can be said that the authority or power of the entity is a common denominator for a precise definition of an agency.

A more detailed definition of an administrative agency is given in the New York Administrative Procedure Act, which reads:

"An agency is any department, board, bureau, commission, division, office, council, committee or officer of the state or a public benefit corporation or public authority at least one of whose members is appointed by the governor, authorized by law to make rules or to make final decisions in adjudicatory proceedings but shall not include the governor, agencies in the legislative and judicial branches, agencies created by interest compact or international agreement, the division of the military and naval affairs to the extent it exercise its responsibility for military and naval affairs, the division of state police, the identification and intelligence units of the division of criminal justice services, the state insurance fund, the unemployment insurance appeals board."

You can see from the above definition that a very long description is used to avoid the difficulty of identifying the exact location and scope of an administrative agency. Determining whether a certain government entity constitutes an agency or not is greatly a matter of government policy so that the legislature may exclude some organs from the scope of an agency.

Generally speaking, we may identify two important elements in distinguishing whether a certain government entity is an administrative agency or not. Firstly, the nomenclature may be indicative of the status of an entity as an agency. Most agencies have names like department, authority, commission, bureau, board etc;…Secondly, the government entity should be empowered to legislate (through delegation), or adjudicate individual cases, in addition to its merely executive functions. Generally, an entity is an agency if it has authority to take a binding action. Even though the above two elements are fulfilled, it is also important to check whether there is any express exclusion from the above definition. You can clearly see in the New York Administrative Procedure Act that some entities are excluded expressly by the legislature.

Due to the absence of an administrative procedure act in Ethiopia, there is no comprehensive definition of an administrative agency. There are some specific legislation that make a reference to "government agency", though failing to provide a satisfactory definition. For instance, the income tax proclamation and the civil servants proclamation similarly define a government agency as an entity fully or party funded by the federal government. Practically, the allocation of fund by the federal government is unimportant to determine whether a certain entity is an administrative agency or not. Hence, if there is any dispute as to status of a certain governmental entity, resort has to be made to its nomenclature, and mainly to the existence of legislative and /or adjudicative power of that entity.

The Draft Administrative Proclamation of the Imperial government (draft proclamation No 251/1967) and that of the draft prepared by the federal government define agency relatively in a similar way.

The 1967 draft administrative procedure act uses the term "administrative authority" instead of "administrative agency" and defines it as:

" Any ministry, public authority or other administration of the imperial Ethiopian government, including chartered municipalities, competent to render an administrative decision."

This definition combining nomenclature with power of the agency attempts to identify which government entity may be properly called an administrative authority. The reference to competency to render administrative decision indicates that the power of the agency to legislate through delegation is missing as criteria.

The draft does not categorically exclude some entities from the purview of an administrative authority. However, it excludes some administrative decisions such as those regarding selection or tenure of public servants, those based solely on inspection tests or election, decisions as to the conduct of military or foreign affairs functions, decisions of any judicial division by courts of law, and any decision establishing rules or regulations.

Still it could not be known with exact precision what entity falls within and outside the definition of an administrative agency. Lastly, the draft administrative procedure of the federal government defines administrative agency taking the ability to render an administrative decision as criteria.

The 1967 is draft, different from the current Amharic text only in the substitution of "the imperial government" by F.D.R.E government and "chartered municipalities" by Addis Ababa and Dire Dawa Administrations. one may wonder whether the latter draft is simply a translation of the former rather than an original one. Such type of word-for-word translation is not only the characteristic of this definition, also it but extends to the whole text of the federal draft. The following parameters should be used to determine whether a certain government entity is an agency or not.

- The nomenclature used to describe the entity is ministry, authority, agency, bureau, office, commission, board, etc., or any other similar terms.
- That it has legislative and/or adjudicative power granted by the legislature.
- That the head of the agency is appointed by the executive or by the house of people's representatives.

3.1.3 Classification **of Administrative Agencies**

Agencies are created with varying size, structure, functions and powers. Some of them may be established with broader powers; in charge of regulating a certain sector of the economy. This is typically the case with ministries, which are headed by a high-level government minister. Ministries not only enforce a government program or policy, but they also supervise and overview other lower agencies that are accountable to them. Others are comparatively small in structure and are charged with a very specific task of implementing a certain portion of government policy or programme. With the exception of few, almost all agencies are under the direct control and supervision, in their day to today implementation of government task law, or policy assigned to them by the enabling act. The remaining very small agencies function independently outside

the direct control of the executive branch and they are accountable to the legislature. Agencies are classified or categorized based on such mode of accountability.

Accordingly, those agencies directly accountable to the executive branch are known as executive agencies, where those accountable to parliament are called independent agencies. In Ethiopia, executive agencies are usually accountable to a certain ministry, or council of ministries, or the prime minister. Even though the enabling act may subject an agency to the control of another ministry, it has also to be noted that they are ultimately accountable to either the council of ministers, or to the prime minister. This is true because the F.D.R.E constitution grants the highest executive authority to the Prime Minister and the Council of Ministers (Article 72 sub 1 of F.D.R.E constitution). This fact can also be inferred from the cumulative reading of Articles 74(2) and 77(3) which similarly confer the power of ensuring the implementation of laws, regulations, directives and decisions of the house of people's representatives. Such powers mainly include the power to follow up and supervise the activities, functions and exercise of power of specific administrative agencies. Besides, even though an agency is made accountable to a certain ministry or another, superior agency or authority of the ministry is directly accountable to the Prime Minister, or the Council of Ministers.

The executive impacts the work of agencies in so many ways. The Prime minister may freely appoint the head of an agency, and dismiss him at any time even without valid reasons. However, the appointment of ministers and other commissioners is subject the approval of the house of people's representatives. An executive agency has also a duty to submit report of its activities to the higher executive organ. The budget to be allocated to a certain executive agency is also greatly determined and influenced by the decision of the executive branch. Even though the budget has to be prepared and be submitted to the house of people's representatives for approval, most of the time the demand of the executive is affirmatively accepted by the house.

Can you mention at least two executive agencies having the name of a ministry, authority, agency and commission?

It has been said that independent agencies, are accountable to parliament, i.e. to the house of people's representatives. The establishment of these agencies, even though they need the act of the house of people's representatives for their material and legal existence, their is predetermined by the constitution. This implies that their creation is not dependent on the will of the parliament. Normally, the parliament retains exclusive right to bring a certain executive agency into existence, which includes the power to modify, increase, or decrease the power and function of that agency. By the same token it is up to the parliament to terminate that agency. However, this is not the case with independent agencies. The constitution clearly imposes a duty to establish independent agencies indicated in the constitution. There are time agencies falling under this category are listed below.

- The Federal Ombudsman
- The Human Right Commission
- The National Election Board
- The Auditor General
- The Population and Census Commission

With respect to these agencies parliament has the right to appoint heads. and remove them if there are valid reasons.

3.2. Formation of Administrative Agencies

3.2.1 Mode of Creating an Agency

In Ethiopia, whether it is at the Federal or state level, agencies are creatures of the legislature. They do not spring up on their own, and courts or the council of ministers cannot create them. The F.D.R.E. constitution expressly requires the establishment of some independent agencies. They do not have i.e. material and legal existence unless the house of people's representatives enacts a specific law for their establishment. Hence, agencies that are in function so far those that a legislature has given them the authority to function. The authority may be exceptionally broad or incredibly narrow.

Hence, it may be said that agencies are created in two ways: one is through the constitution, and the second is through act of parliament. However, one important point that should be emphasized. Is that the independent agencies, which have a constitutional basis, still require an enabling act of the parliament for their legal existence. The only difference between the two modes of creating an agency is that when the constitution requires the establishment of some agencies the house of people's representatives has a duty to promulgate the enabling act for that specific agency. When an agency is created only through the enabling act, in the absence of constitutional duty from the parliament, its existence is totally dependent on the will or option of the parliament.

Apart from the above two modes, there is no other means of creating an agency. Neither the prime minister, nor the council of ministers has the power to create an administrative agency.

3.2.2 Reasons for the Creation of Agencies

Agencies are created and assigned specific tasks by the legislature. They carry out the tasks making decisions of various sorts and supervising the procedure by which the decisions are carried out. There are many reasons why administrative agencies might be needed. Almost every governmental agency has been created because of a recognized problem in society, and from the belief that an agency may be able to help in solving the problems. The following are the main reasons for the creation of the administrative agencies.

A. Providing Specificity

The legislative branch of government cannot legislate in sufficient detail to cover all aspects of many problems. The house of the people's representatives cannot possibly legislate in minute detail and, as a consequence, it uses more and more general language in stating its regulatory aims and purposes. For instance, the house of people's representatives cannot enact a tax law that covers every possible issue that might arise. Therefore, it delegates to the council of ministers and ministry of revenue the power to make rules and regulations to fill in the gaps, and create the necessary detail to make tax laws

workable. In many areas, the agency has to develop detailed rules and regulations to carryout the legislative policy.

It is also true that courts could not handle all disputes and controversies that may arise. They simply do not have the time or the personnel to handle the multitude of cases. For instance, the labour relations board entertains and resolves so many number of collective labour disputes between employees and employers. Similarly, the tax appeal commission and the welfare (pension) appeal tribunal adjudicate and decide vast number of administrative litigations within their jurisdiction. The creation of such adjudicatory agencies (usually known as quasi- administrative agencies) is necessary, because of the fact that they have, specialized knowledge and expertise to deal effectively with the detailed, specific and technical matters, which are normally beyond the competency of judges of ordinary courts.

A reason many agencies are created is to refer a problem or area to experts for solution and management. The National Bank of Ethiopia, Ethiopian Science and Technology Commission, Intellectual Property Office are examples of such agencies with expertise beyond that of the house of people's representatives or council of ministers. The development of sound policies and proper decisions in many areas requires expertise. Similarly, administrative agencies often provide needed continuity and consistency in the formulation, application, and enforcement of rules and regulations governing business.

B. Providing Protection

Many government agencies exist to protect the public, especially from the business community. Business has often failed to regulate itself, and the lack of self- regulation has often been contrary to the public interest. For instance, the Environmental Protection Agency is created to regulate environmental pollution. In the absence of such agency, business could not voluntarily refrain from polluting the environment. The same can be said with respect to quality of private higher education and unjustified and unreasonable increase in the price of essential goods. The Ministry of Education and Ministry of Trade and

Industry, regulate respectively both of these cases to protect consumers and the public at large.

Most of the time, an agency protects the public from the negative impacts of business through regulation. When a business organization is given monopoly power, it loses its freedom of contract, and a governmental body is given the power to determine the provisions of its contract. We have some government companies that have monopoly power in Ethiopia, like the Ethiopian Electric and Light Corporation and Ethiopian Telecommunication Corporation, which have the monopoly of power over electricity and telecommunication. Previously, there was no agency regulating such business. Currently, we have the Electric Agency and Telecommunication Agency, which have the power to set the rate for the utility.

Similarly, agencies also regulate transportation, banking and insurance because of the disparity in bargaining power between the companies and consumers. The ministry of transport for instance determines the rate taxi and bus owners may charge the customer for their service. The National Bank of Ethiopia is given wider power to regulate banking and insurance due to the difference in bargaining power between bankers and customers.

C. Providing Services

Many agencies are created simply out of necessity. If we are to have roads, the Ethiopian Roads Authority is necessary. Welfare programs require government personnel to administer them. Social security programs necessitate that there should be a federal agency to determine eligibility and pay benefits. The Ethiopian Social Security Authority is established to process pension payment and to determine entitlement to such benefit. The mere existence of most government programs automatically creates new agencies or expands the function of the existing ones.

3.3 Structure and Organization

The structure and internal organization of an administrative agency may greatly vary depending on the government policy and the programme it is expected to accomplish. Some of them may have different departments enjoying a substantial portion of power given to the agency by the enabling act. Still there will be lower organs labeled usually as sections with the specific tasks of the day-to-day governing. Usually, the arrangement of the internal organization will take so many factors into considerations, like budget implication. However, the main objective of the form of structure is aimed at ensuring efficiency and effectiveness in administration. Since this requires expertise, such task is left to the executive branch. In Ethiopia, the constitution specifically authorizes the council of ministers to determine the structure and organization of the administrative agencies.

Due to the limitation on parliament to deal with structure and organization of an agency, which is justified on the lack of expertise, the pardiment does not interfere with the internal form of that agency. The enabling act simply provides in broader terms, the function, power, duty and rights of the agency. This being the case, it has to be noted that the enabling act greatly influences the form and scope of structure and organization that an agency assumes. The type and scope of government programme, the extent of its power and the nature of mission to be accomplished by the agency outlined in the enabling act are factors to be taken in to consideration before designing the appropriate structure and organization.

3.4 Purpose of Administrative Agencies

Administrative agencies are established by the legislator to perform specific tasks assigned to them by law. What they actually do is to enforce a specific law. They are usually charged with the day-to-day details of governing. The agencies carry out their tasks by making decisions of various sorts and supervising the procedures by which the decisions are carried out.

The function of administrative agencies is closely related to the reasons for their creation. A certain administrative agency comes into existence when the legislator creates an agency for either of those reasons. The agency, by making use of its expertise and giving close attention to detail and technical matters, takes the necessary administrative action, which may be legislative or judicial in order to enforce the law. Accordingly, the following may be summarized as purposes of the administrative agencies.

A) Regulation

One of the key reasons for regulating economic activities by the government is the inability of business to regulate itself. When the government decides to regulate a certain sector, it entrusts the task to the administrative agencies. Agencies offer several advantages over regulation through the legislature and courts in the management of complex and technical regulatory problems. Because they are specialized bodies, they can consider technical details more effectively than the legislature.

When the government regulates business its aim is to minimize the negative impacts of a free economy. In the absence of regulation, business does not respond to concerns over the environment and consumers. Some of the justifications for regulation include:

To control monopoly power

Agencies are often created to replace competition with regulation. In this case the agency may determine rate (e.g. transportation, or electricity). Sometimes the difference in bargaining power may be a ground for regulation, avoiding monopoly power of one party. Such instances include regulation of banking, insurance and labour relations.

To control excess profit

The agency regulates business to ensure that business is not collecting excess profit, which may endanger the laws of free market and also may pose a danger to consumers.

To compensate for externalities

"Externalities" occasionally referred to as "spillovers", that occur when the cost of producing something does not reflect the true cost to society for producing the goods. One example is manufacturing process that creates air pollution for which society pays the clean up costs. A business organization, unless otherwise it becomes sure that there is also corresponding participation by other companies, will not install costly pollution control equipment. Doing so will drive up that company's costs which makes it unable to compete with other companies in producing the same product without equipment and selling their products at a lower price. So, some entity i.e. a government agency must require all companies to make those investments (installing equipments) in order to spread the costs of pollution control over the entire industry.

To compensate for inadequate information

Compensating for inadequate information is a justification for a great deal of legislation for consumer protection. Purchasers of food, for instance, cannot analyze the nutritional content or the health hazards of various food products so that there has to be some organ that ensures these tests are fulfilled.

To compensate for unequal bargaining of powers

Contracts between banks & customers, insurers & the insured, employees & employers are adhesive in their nature. Either the consumer has to take it or leave it. Hence, it becomes self-evident to regulate and set minimum standards to minimize the effect of unequal bargaining of power.

B) Government exactions

In addition to regulation, administrative agencies may also engage in government exactions. Government exactions are the traditional powers and responsibilities of agencies. Such functions include collection of tax and military conscription.

C) Disbursement of money or other commodities

This purpose of administrative agencies is also the prominent one which characterizes the welfare state. In this regard, through the social security programme and other government systems of insurance or compensation, agencies disburse public money as payment of pensions for veterans or assistance for the aged, the disabled, the unemployed and generally the needy. The payments may be directly through cash or food rations.

D) Provision of goods and services

Nowadays, the government is in charge of building and maintaining roads, high ways and dams, the provision of police force and other protective services. Funding public education and the health service may also be mentioned as additional examples. More recent additions include mass transit communications, satellite systems, government research and development programmes, public hospitals and public housing.

3.5 Powers of Administrative Agencies

3.5.1 Nature and Source of Power of Administrative Agencies

At federal and state levels, administrative agencies gain whatever power they have by delegation-that is to say, that they don't have inherent, constitutionally mandated power to act. Rather, a, higher level of government, normally the legislature, must delegate some of its own power to the agency.

How much power is that? It depends. In order for an agency to exist, it must first be created by the enabling legislation. This statute is a device that sets up the basic framework for the agency, and the set of rules and limitations by which it must live. These may include a variety of things including organizational matters, staffing, salaries and procedures for conducting business. The most important is the delegation of power and its limitation. The delegation may be quite broad, giving the agency virtually complete power within an area (e.g., all taxation matters within a jurisdiction), or it may be quite

specific and restrict the agency's authority to a very narrow range of activities, such as operating a single toll road.

An agency may only exercise authority within the delegation of authority provided for in its enabling legislation, or subsequent legislation granting specific additional power. This specified authority is all the authority the legislature has "handed over" to the agency, and since the agency has no inherent authority outside of this "handed over" authority, there is no other authority to wield.

The limitation of agency power is an important concept, since actions taken by an agency which turn out to be outside the scope of its authority are not binding. A good deal of litigation between agencies and regulated parties concerns the question whether the agency acts within the scope of authority delegated to it, or whether it acts in a manner contrary to the act of the superior branch of government.

Since the delegating body has such a wide degree of latitude in deciding how much power to delegate, there is no absolute rule as to how much power an agency has. If the question arises, the first step is to read the enabling legislation or decree, and subsequently granting or restricting its authority. These define the parameters of the agency's power. However, since, in most cases, the whole point of creating the agency is to get the legislature out of the business of day-to day management of some area of activity, delegations of power tend to be fairly broad.

3.5.2 Meaning and Significance of the Enabling (Establishment) Act

The F.D.R.E. constitution imposes a duty on the house of people's representatives to create some agencies. Can you mention some of those agencies?

Even though their establishment has a constitutional basis, is there any way tin which hey may materially exist in the absence of the act of the parliament?

Whatever forms a new administrative agency takes the legislature must enact a statute creating the agency. This statute, sometimes called an agency's organic act, parent act, or establishment act but more frequently is referred to as an agency's enabling act, is the fundamental source of an agency's power. The principle that the legislature creates agencies and sets limits on their authority should be regarded as cardinal rule number one of the administrative law.

Many people running the administrative machinery and on occasion even legal professionals lose sight of this fundamental principle. A misunderstanding of this basic concept can lead to erroneous assumptions about an agency's ability to deal with a particular issue or a problem.

Some enabling acts contain specific provisions establishing agency procedures, but more often than not, when the legislature creates an agency, that agency acquires a specific substantive mission but derives its procedures from a general statue setting out procedural requirements for all agencies sharing its jurisdiction. One such example is the American Administrative Procedure Act of 1946 that uniformly governs the adjudicative and legislative procedure of administrative agencies. In Ethiopia, neither such broad, uniformly applicable administrative procedure, nor specific law detailing agency procedure exist at all. The first attempt was made under the imperial government in 1967. At that moment, a draft of proclamation dealing only with adjudicatory procedure of administrative agencies was prepared. However, it remained as a draft. Currently, the justice and legal system research institute has prepared a similar draft of the administrative procedure which is more or less similar to the 1967 draft.

Agencies make a great deal of policy within the boundaries of their enabling acts. They also establish procedures for efficient and fair decision – making. Enabling acts and administrative procedure acts often establish only minimum standard and requirements for individual agencies.

These statues are often so broadly phrased that agencies have enormous leeway to fill in the gaps, both procedural and substantive aspect of the legislation so long as they keep within the terms of the governing statutes. The areas in which

many agencies are left free to set their own policies and procedures are quite extensive. We refer this to the freedom of action as agency's discretion. Agency discretion is a second fundamental concept to keep constantly in mind in the study of administrative law.

Unfortunately, the concept of agency discretion is one of the least studied and most poorly understood aspects of administrative law. It is so little analyzed that it is frequently referred to as "the hidden component" of administrative law. A complete understanding of administrative law mainly requires a closer examination and appreciation of this phenomenon.

3.6 Classification of Powers of Administrative Agencies

Administrative agencies, in order to realize their purpose efficiently and effectively, need wider power and discretion. For this reason, they blend together three powers of government: executive, legislative and judicial powers. Even though in principle the later two powers belong to the legislature and courts, granting such powers has become a compulsive necessity for an effective and efficient administration.

Administrative agency rules and regulations often have the force of law against individuals. This tendency has led many critics to charge that the creation of agencies circumvents the constitutional directive that laws are to be created by elected officials. According to these critics, administrative agencies constitute an unconstitutional, another bureaucratic branch of government with powers that exceed those of the three recognized branches (the legislative, executive, and judiciary). In response, supporters of administrative agencies note that agencies should be created and overseen by elected officials, or the president. Agencies are created by an enabling statute; a state or federal law gives birth to agency and outlines the procedures for the agency's rule-making. Furthermore, agencies include the public in their rule-making processes. Thus, by proxy, agencies are the will of the electorate.

Supporters of administrative agencies also note that agencies are able to adjudicate relatively minor or exceedingly complex disputes more quickly or

more flexibly than the state and federal courts, which helps to preserve judicial resources and promotes swift resolutions. Opponents argue that swiftness and ease at the expense of fairness are not virtues, the thrive of the administrative agencies.

The following is a brief discussion of the nature of the three powers of the administrative agencies.

3.6.1 Legislative (Rule Making) Power

Legislative power of administrative agencies, usually known as rule- making power and more formally delegated legislation, is the power of agencies to enact binding rules through the power delegated to them by the legislator. The complex nature of the modern state is that such elected representatives are not capable of passing laws to govern every situation. Many of their lawmaking powers, as well as the power to administer and implement the laws, are therefore delegated to administrative agencies. These agencies are involved in virtually every area of government activity and affect ordinary citizens in many ways, whether these citizens are home owners needing a building permit to erect a new room, or injured employees seeking workers' compensation, or farmers selling their produce.

Efficient and effective administration necessarily requires promulgation of laws, flexible to the existing situation and dealing with detailed technical matters. These laws have to be provided in the required quantity and quality. However, due to the limitation of the on parliament as regards to the availability of sufficient time and expertise, the lawmaker will be compelled to delegate some of its powers to the administrative agencies.

When legislative power is delegated to administrative agency, it has to be exercised fairly and only with a view to attain its purpose. The agency should also enact rules within the limits of delegation set by the lawmaker.

Practically, it is difficult to avoid instances in which power may corrupt. Thus the lawmaker when delegating power should simultaneously introduce

controlling mechanisms to ensure that individual's liberty and freedom is not violated by the administration. Most importantly, the lawmaker, when granting power, is expected to provide specific procedure of rule-making. In most countries, an administrative agency exercising its legislative function is required to give notice to the public of the proposed rule and incorporate comments from the public. This ensures public participation in the administrative process. The rules issued by the agencies should also be published in a formal instrument, which is easily accessible to the public, thus, encouraging openness in the public administration.

3.6.2 Judicial (Decision – Making) Power

Efficient and effective administration also requires that those entities in charge of implementing the law be armored with judicial power, to some extent, similar to the power of the ordinary courts. Enforcement of law demands imposition of sanction and taking administrative measures and decisions. When agencies exercise their judicial powers, they are in effect applying the facts to the law just like a court. Consequently, they determine rights, entitlements and benefits of individuals. The decisions may greatly affect individual's rights and benefits, for example, revocation of license, deportation of aliens, determining whether an applicant is entitled to pension, imposition of administrative fines for non-compliance, dismissal of a civil servant, dismissal of a university student, etc … are judicial decisions that by nature that affect the rights of individuals.

When an agency exercises its judicial function it is engaged in adjudication, a process very much similar with a trial court. While adjudicating a case, it will conducts an oral hearing with direct and cross examination, administers oath, decides on the admissibility of evidence and may compel an individual or a company to produce evidence. Then by weighting evidences of the applicant and respondent applies and interpreters the law to give a reasoned decision. To ensure impartiality and fairness the person deciding the matter should be relatively neutral from agency influence.

Still there is likelihood that agencies may abuse their decision- making power. As a result, the lawmaker, while granting such powers, is expected to provide minimum procedures applicable in the adjudication process.

3.6.3 Administrative Power

Administrative power is the residual power that is neither legislative nor judicial. It is concerned with the treatment of a particular situation and is devoid of generality. It has no procedural obligations of collecting evidence and weighing argument. It is based on subjective satisfaction where decision is based on policy and expediency. It does not decide on a right though it may affect a right. Advisory and investigative power of agencies may be mentioned as two typical examples of administrative power. In its advisory function, an agency may submit a report to the president or the head of executive and the legislature. Cases falling under advisory function include proposing a new legislation to the legislature, and informing the public prosecutor the need to take measure when there is violation of law. Disclosing information to the general public that should be known in the public interest and publishing advisory opinions are also regarded as advisory (administrative) functions.

Investigation is one of the major functions of administrative agencies. While exercising their investigative powers, agencies investigate activities and practices that may be illegal. Because of this investigative power, agencies can gather and compile information concerning the organization and business practices of any corporation or industry engaged in commerce to determine whether there has been a violation of any law. In exercising their investigative functions, agencies may use the subpoena power. A subpeona is a legal instrument that directs the person receiving it to appear at a specified time and place either to testify or to produce document require reports, examine witnesses under oath, examine and copy documents, or obtain information from other governmental offices. This power of investigation complements the exercise of the agency's powers, especially the power to adjudicate.

Further Reading

The writer in the following passage strongly opposes the wider powers of administrative agencies, and tries to justify his view on constitutional grounds.

Do you agree with the writer? It is true that accumulation of administrative, legislative and judicial powers in the hands of administrative agencies pose a serious danger to individual's right and liberty. On the other hand, what do you think will be the negative consequence of depriving agencies of such powers?

The Fiction and Tyranny of Administrative Law

The conservative columnist Joseph Sobran has a lecture on audiotape called "How Tyranny Came to America." This seems like a shocking and absurd claim. How could anyone believe that "tyranny" exists in America? Sobran must be some kind of extremist nut. Well, Sobran is a bit of an extremist, but to evaluate his claim in this case, even apart from his arguments, one thing we might do is look at definitions of tyranny as formulated by the Founders of the Nation. Thus, Thomas Jefferson said, in his Notes on Virginia [1784], warning about a legislature assuming all the powers of government:

"All the powers of government, legislative, executive, and judiciary, result to the legislative body. The concentration of these powers in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy-three despots would surely be as oppressive as one.... As little will it avail us that they are chosen by ourselves. An elective despotism was not the government we fought for..."

This is significant, not only in defining "despotic government" as that which combines the three powers into the same hands, but also in noting that such a despotic government can exist even if it is democratic and elected. Some people might think that an "elective despotism" would be contradiction in terms -- since if those in office are elected, then "we are the government." No, all it

means is that those are in office in every two years, or four years, or six years simply have to look preferable to the other guy. Otherwise, they are on their own.

Similar to Jefferson's views are those of James Madison, who quotes the above Jefferson's words and continues to say, in the Federalist No. 47:

"The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."

Jefferson and Madison thus agree that combining the three powers of government is the last thing that we would want to see happen, even in elected hands. It will always produce despotism and tyranny. We might think, however, that Jefferson and Madison might represent no more than some party sentiment. They brought to an end Federalist rule, so perhaps the true spirit of the country was lost after Washington and Adams. This would be a mistake. In his own Farewell Address in 1796, George Washington said:

"It is important, likewise, that the habits of thinking in a free Country should inspire caution in those entrusted with its administration, to confine themselves within their respective constitutional spheres; avoiding in the exercise of the powers of one department to encroach upon another. The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create whatever the form of government, a real despotism. A just estimate of the love of power, and proneness to abuse it, which predominates in the human heart is sufficient to satisfy us of the truth of this proposition."

Despite all the cautions of the founders, this consolidation is precisely what has happened, and not even in the elected hands. It is now quite common, and embodied especially in the form of administrative agencies, particularly those of the federal government like the IRS, the FCC, the FDA, OSHA, the USDA, the EEOC, the EPA, the Federal Trade Commission (FTC), and countless others.

The consolidation of powers in these agencies, and their breach of constitutional protections, may be examined in turn in relation to each power:

Executive Powers

These agencies have executive powers, because they are part of the executive branch of the government. Often they do not only have their own armed agents but even also para-military SWAT teams. This is disturbing enough since it is not clear why the Postal Service, the Forest Service, etc. all need to have their own SWAT teams. More important, however, are the extra-constitutional executive powers that have been given to theseadministrative agencies. The Supreme Court has ruled (United States v. Morton Salt, 1950) that such agencies have what it actually calls "Powers of Inquisition," which means that the agencies can "investigate merely on suspicion that a law is being violated, or even just because they want assurance that it is not." Consequently, they may initiate investigations and demand records for no reason at all. This violates the Fourth Amendment in the most painfully obvious way

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizure, shall not be violated, and no Warrants shall be issued, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The current grotesque breaches of this protection are possible through the sophistry that administrative agencies are not engaged in criminal investigations, but in "administrative actions." Of course, the Fourth Amendment does not specify that this protection only applies to criminal actions, so that avenue is really not available to honest argument. Otherwise, the thought seems to be, whether stated openly in the law or not that no one has a right to engage in certain actions, mainly business activities, without government, especially federal, licensing permission, and that this permission may then be granted under whatever conditions the government decides to grant it. If business licenses are granted under the condition that searches, it may be conducted in any way and at any time. Again, such dishonest arguments

obviously void the Fourth Amendment altogether and are only made in order to circumvent the protections embodied in that Amendment and in the rest of the Constitution and the Bill of Rights. Only tyrants, of course, would want to accomplish that task and assume such "Powers of Inquisition."

I am also informed that according to the Supreme Court, the Fourth Amendment does apply to inspections, searches, and seizures by administrative agencies, but with not as much protection as to private homes, on the theory of the "greater expectation of privacy in one's home." First of all, this is a typical of jurisprudence that erodes the protections of private property when applied to businesses, rather than residences. This in itself is specious, and allows for voiding the Fourth Amendment, the Fifth Amendment "takings" clause, and other Constitutional protections. Such a holding is also disingenuous. A drug company, for instance, is not allowed to manufacture even an approved drug until the FDA inspects the factory. Since there aren't enough inspectors, and there is consequently a large backlog of facilities to be inspected, productive capital sits idle for long and expensive periods, increasing the cost of manufacture and driving up drug prices. Such companies, thus in effect, give up their Fourth Amendment rights when they agree to the procedures by which the FDA approves the sale of drugs (those powers justified under the power of the Federal Government to "regulate interstate commerce").

Legislative Powers

The same agencies also have legislative power because they have been given the function of writing regulations that have the force of law. These regulations need only be published in the Federal Register to become effective (after some "procedural requirements" that, among other things, invite public comment -- which usually ends up largely with meaning testimony from interest groups that stand to benefit from the regulation). Thus, the entire Constitutional process of passing laws -- the consent of both houses of Congress and the President (unless his veto is overridden) -- is bypassed. Instead, a bureaucrat writes a regulation, and publishes it The next thing, the agency SWAT team is breaking in on some citizen or business.

Although allowed by the Supreme Court in United States v. Grimand (1911), congress is given no power in the Constitution to delegate its functions; and the Constitution explicitly says in Article I, Section 1, "All legislative Power herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representative" -- not, "a Senate and a House of Representatives and whoever else they want to pass the buck to." The illegitimacy of this kind of device was already recognized by John Locke in his great Second Treatise of Civil Government [1690]:

Â§141: *Fourthly, The Legislative cannot transfer the Power of Making Laws to any other hands. For it being but a delegated Power from the People, they who have it, cannot pass it over to others. The People alone can appoint the Form of the Commonwealth, which is by Constituting the Legislative, and appointing in whose hands that shall be. And when the People have said, We will submit to rules, and be governed by Laws made by such Men, and in such Forms, no Body can say other Men shall make Laws for them; nor can the people be bound by any Laws but such as are Enacted by those, whom they have Chosen, and Authorized to make Laws for them. The power of the Legislative being derived from the People by a positive voluntary Grant and Institution, can be no other, than what that positive Grant conveyed, which being only to make Laws, and not to make Legislators, the Legislative can have no power to transfer their Authority of making Laws, and place it in other hands."*

The benefit for legislators of passing these powers on to others is that they can avoid the blame for the oppressive acts of the "regulators" and earn favor by individually rescuing constituents who appeal to them for help. The constituents then, do not blame the legislators for having given the regulators improper powers in the first place.

Judicial Powers

These grotesque abuses of representative government pale beside the next one the very same administrative agencies that write and enforce their own regulations have also often been given the power of judging them in their own courts and through their own "administrative law" judges. There is a spectrum

of misrule in this case, since some administrative law judges are employed by their own agencies, while others belong to relatively independent organizations. Thus, the "Occupational Safety and Health Review Commission" is either part of the Occupational Safety and Health Administration (OSHA), nor is the United States Tax Court part of the IRS or the Department of Justice. However, these "quasi-judicial" organizations are not part of the Independent Judiciary and do not contain many of the Constitutional protections; for example, trial by jury that belongs to the proper court system. The precedent for them, indeed, is the system of Military Justice, which, unlike the modern administrative courts, actually existed when the Constitution was written. The harsh truth, then, is that the precedent for even the relatively independent "quasi-judicial" organizations is the Court-Martial. That development should have been allowed means that elements of martial law are now part of the ordinary operations of the United States Government. At the same time, a judicial function like imposing fines is usually retained by the executive agencies themselves, which then assess such punishments in summary fashion without even the pretext of a judicial procedure.

The existence of these monstrous vehicles essentially spells the end of the rule of law and democratic government. "Administrative law" judges, of whatever stripe, do not belong to the independent judiciary, and frequently (as at the Federal Trade Commission, the FTC) are creatures of their executive agencies. They know who pays the piper. Agencies can simply ignore the findings of their own administrative law courts.

Beside these transparent formulae for corruption and injustice, the fiction of "administrative law" also conveniently bypasses all of the protections of the Bill of Rights. Defendants before an administrative law judge are not protected by due process, the presumption of innocence, trial by jury, or any other barrier built around criminal or civil law; for "administrative law," is in effect neither criminal nor civil law. Unmentioned in the Constitution, "administrative law" is without essential constitutional limitations or protections.

Such "administrative" procedures, to be sure, cannot imprison any American, but the agencies are free to levy fines, without evidence, trial, or defense, seize

property, and then bring criminal charges against citizens for failure to obey their often unknown, obscure, and self-contradictory regulations. If the agencies are content, just to harass and impoverish a citizen, we have been told by the Supreme Court that the citizens cannot have recourse to a real court, in the real judiciary, to appeal the tyranny of the agency until all "administrative remedies" have been exhausted. Since the agency itself defines what the "administrative remedies" are, it can take decades before such "remedies" are exhausted. Citizens are, thus, essentially at the mercy of the agencies, unless a Congressman or the President personally intervenes.

Therefore , at least in one very precise sense, tyranny came to America. Locke, Washington, Jefferson, and Madison would be appalled -- and that not so much at the "insolence of office" and the grasping arrogance of those given power, but at the thoughtlessness, passivity, and acquiescence of Americans in allowing this to come to pass. Instead, Americans usually don't even notice how vicious it is in both principle and practice They are seduced by the idea that power is good when it is used for what they like, but n it is too late when that power is turned against them for things they don't like. Tyranny has come to America.

In light of this, the following legal principles should be adopted:

- No actions by government agents or agencies are free of the restrictions imposed by the Fourth Amendment or other articles of the Constitution and the Bill of Rights.
- There are no legal actions apart from the criminal and the civil, with the full constitutional protections established for each.
- There can be no courts or judicial proceedings apart from duly constituted components of the Independent Judiciary, wherein the protections of Trial by Jury cannot be suspended or restricted.
- Legislative bodies cannot delegate the power of making laws, or confer upon anyone the power of making any rule or regulation that has the force of law.
- The only Constitutional exceptions to these rules concern the military, military discipline, military justice, and (in times of war, invasion, or rebellion) martial law.

These principles will not prevent any further bad laws or tyrannical practices, but they will defuse the structural tyranny that has been created through "administrative law," its "inquisitors," its regulatory extra-constitutional legislators, and its fraudulent "courts."

Administrative Agencies in Ethiopia

Administrative law is mostly tied with the study of manner of exercise of governmental power. By governmental power here refers to power of the executive and administrative agencies. The evolution of administrative law may be traced back to the emergence and proliferation of agencies.

The outstanding feature of administrative agencies in the history of Ethiopian government is their non-existence. For instance, a century back there were no regularly established royal councils, no clear cut system of local government, no established national army police force and no civil service system. Agencies as a machinery of public administration is relatively a recent phenomena in Ethiopia.

It was in the mid of the 19th century during the reign of Emperor Tewodros that a series of reforms including abolition of slave trade, suppression of the custom of vendetta, regulation of the power and lands of the church, and the civil service system were introduced in Ethiopia for the first time. Foreseeing the need of a decentralised system of administration to implement these reforms, Tewodros sought to turn the local chiefs into salaried officials responsible to the imperial power. However, apart from the establishment of a territorial police force and a regular army any specific agency charged with public administration was unknown and non-existent. Despite this there was some traditional administrative personnel in the government. Early historians e identified four primary heads of department under the emperor; 1) *Yetor Abegaz*(commander-in-chief of the army) 2) *Afe Negus*(judge on all appeals in the name of the emperor save the death sentence) 3) *Tsehafe Tezaz*(keeper of the great seal of the Enperor and writer of all imperial orders) ; 4)*Ligaba*(communicator of all imperial orders, deputy yettor Abegaz, and sergeant-at-arms to the Emperor.)

In 1907, Emperor Menelik created the first ministerial framework in ethiopia, consisting of the following ministries:

- Ministry of Justice
- Ministry of Interior
- Ministry of Foreign Affairs
- Ministry of Finance
- Ministry of Agriculture and Industry
- Ministry of Public Works
- Ministry of War
- Ministry of Pen
- Ministry of Palace

To some extent, the process was simply of giving new titles to old officials. The Afenegus became Minister of Justice and the Tsehafe tezaz became the Ministry of Pen. Further, the ministers bore the status of personal servants to the crown. However, during this time, though autonomy was hardly realized and though delegation of usable power existed more on paper than in reality, a permanent administrative body was established as an integral organ of the central government.

The 1931 constitution laid a foundation for the existence of the first administrative agencies in the Ethiopian history of public administration. The constitution recognised the existence of the executive branch of the government. Under Article 11 it was provided that the Emperor would lay down the organization and the regulation of all administrative departments. During that time a number of ministries and administrative departments.

In 1962, the most relevant government institution for the development of formal administration, the Imperial Ethiopian Central Personnel Agency (CPA), was established by order no. 23 of 1962. The agency was given the power to classify jobs, to recruit public servants, to establish pay scales and to issue regulations necessary for the establishment of homogeneous public service.

Until the fall of the imperial regime in 1974, various administrative and chartered agencies were established. Most of those administrative agencies bearing names of ministry, commission authority or agency were made accountable to the prime minister. There were about twenty one agencies at the ministerial level. These are The Ministry of National Community Development and Social affairs, The Ministry of Public Health, The Ministry of Land Reform and Administration, The Ministry of Communications, The Ministry of Information and Tourism, The Ministry of Mines, The Ministry of Public Works, The Ministry of Education and Fine Arts, The Ministry of Commerce and Industry, The Ministry of National Defence, The Ministry of Interior, The Ministry of Agriculture, The Ministry of Foreign Affairs, The Ministry of Finance, The Ministry of Imperial Court, The ministry of Pen, The Ministry of Justice, The Ministry of Planning and Development, The Ministry of Posts, Telegraph, and Telephones, The Ministry of Stores and Supplies, and The Ministry of Pensions. A number of chartered agencies were also established during that time. These include National Community Development(1957), Board of National Community Development(1957), Our National Defence Council(1958), Central Personnel Agency and Public Service(1962), Public Employment Administration(1962), Technical Agency(1963), Charter of The National Bank of Ethiopia(1963), Ethiopian Tourist Organization(1964), Land Reform and Development Authority(1965), Institute of Agricultural Research(1966), Haile Selassie I University Charter(1961), and Awash Valley Authority Charter.

The 1987 constitution of The People's Democratic Republic of Ethiopia under Article 89(1) gave all administrative powers to the council of ministers. The council was composed of the prime minister, deputy prime ministers, ministers and other members including heads of the secretariat of state committees. authorities and commissioners. Following the constitution, in the created the cabinet there were twenty ministries, seven commissions, six authorities, two state committees, and two institutes.

The 1995 F.D.R.E constitution introduced a federal structure sharing power between the federal government and the regional states. The federal government

comprises of the house of people's representatives as the supreme lawmaker, the executive (the prime minister and the council of ministers) and the judicial branch (first instance, high court and supreme court) A similar division of power also introduced at each regional state.

Currently, administrative agencies are established at the federal and state level. The constitution does not directly or indirectly make a reference to administrative agencies as parts of the system of government. It recognises the separation of powers among the three branches of government. This means, in effect, the source of legislative and judicial power of administrative agencies, typically those at the federal level could not be easily justified on constitutional grounds. For instance, the constitution does not in any way allow the house of people's representatives to share or transfer some of its law making powers to agencies headed by unelected officials. Legislation through delegation is only mentioned with respect to the council of ministers. Hence, it will be a challenge for the Ethiopian administrative law to formulate a theoretical justification for the very existence and source of power of administrative agencies.

Two types of agencies exist at the federal level: These are independent and executive agencies. The independent agencies have a constitutional basis for their existence, and are directly accountable to the house of peoples representatives. They are five in number and all of them have been formally established through an act of parliament. These are the Human Rights Commission, The Ombudsman Office, The Auditor General, The Naational Election Board and The Population Census Commission.

The executive agencies are accountable directly to the prime minister, or the superior ministry, or the council of ministers. In 2007, there were about fifty government entities named as government agencies. Due to the lack a precise definition of an administrative agency in Ethiopia, every government entity partially or fully funded by the government is considered to be an administrative agency.

UNIT SUMMARY

When a law provides for a program with framework to carry out program services and enforcement, it more likely develops an administrative Agency. The agency is created to carry out designated tasks in a defined program. An administrative agency can be defined as authority of government other than the judiciary and the legislature. But not all government entities characterized in this way could be taken as an agency for the purpose of the administrative law. The power that the entity is to exercise, either judicial or legislative functions, is the most important test to determine whether it is an agency, or not.

One of the basic characteristics of an agency is that it is always the creature of the legislature. since its creation may be to provide specificity, or providing protection, or service. The purpose of an agency which is greatly tied reasons for its creation may be to regulate business, or to provide service or directly to provide goods and services to the community.

Agencies are generally classified as executive or independent based on their accountability. Executive agencies are directly accountable to the executive, whereas independent agencies are accountable to the legislature. The F.D.R.E. constitution envisages for the establishment of five agencies thereby guaranteeing their independence from the executive. Even though the house of people's representatives has the sole mandate establishes all agencies, their structure and organization is determined by the Council of Ministers.

The scope of power of an agency should be interpreted in line with its enabling act. The enabling act, sometimes called parent act or establishment act, is the necessary statute for the material and legal existence of the agency. Normally, the typical power of an agency is enforcement of law or administrative power. In addition it also shares legislative and judicial powers.

Review Questions

1) The Ethiopian government is distributing wheat at a lower price to the community that affected by the recent high inflation. Currently each federal

and state kebeles are in charge of such distribution. Do you think that the government should have established an agency for the sole purpose of wheat distribution? Discuss factors that should be taken in to consideration before creating an agency?

2) Administrative agencies have a power of investigation, which mainly includes conducting search without obtaining a court warrant. In Ethiopia too, most regulatory agencies (e.g. National Bank, Ministry of Labour and Social Affairs, Ministry of Revenue, Ministry of Education etc…) possess the power to enter into a premise of a company without court order, and conduct investigation. Do you think that such kind of search could be can justified constitutionally? Does it violate any of the provisions of the F.D.R.E. constitution?

3) What is the difference between executive and independent agencies?

4) Can a directive or a regulation be the source of power of administrative agencies?

5) Is it possible that an entity (other than a public enterprise) established by the legislature may not be considered as an administrative agency?

UNIT FOUR: RULE-MAKING (QUASI-LEGISLATIVE) POWER OF ADMINISTRATIVE AGENCIES (DELEGATED LEGISLATION)

Introduction

'Delegated legislation' is legislation made by a body or person to whom the parliament has delegated its power to legislate. It refers to a binding law issued by a body subordinate to the parliament. In Ethiopia, Delegated legislation refers to directives and regulations issued by administrative agencies and the council of ministers, respectively.

Delegated legislation tends to provide detail legislative scheme setting out matters that are regarded as not necessary for the parliament itself to approve by passage of primary legislation. Since legislation should preferably be made by the parliament, and not delegated to non-parliamentary entities, delegated legislation is regarded, at best, a necessary evil that is only tolerated because of the growth in functions and requirements of a modern government. A more problematic issue is that delegated legislation might be regarded as a challenging concept regarding the separation of powers in that it is 'legislative in form and executive in source'.

This unit discusses the nature, definition the challenge and justifications, the constitutional scope and procedures of a delegated legislation.

Objective: At the end of this unit, students are expected to:

- Understand and enumerate the practical justifications for and theoretical objections against delegated legislation
- Discuss the scope or constitutional limit of delegating power by the legislator under the F.D.R.E. constitution,
- Indicate the forms of delegated legislation in Ethiopia
- Compare and contrast rule-making procedure in different countries and summarize the common standards
- Examine the practice with respect to rule making procedure by agencies and the council of ministers in Ethiopia

4.1 The Nature and Definition of Delegated Legislation

The term legislation refers to the process of making or enacting and repealing a positive law in written form by a branch of government constituted to perform this process, which is the legislature. The legislative organ of every country has the power to make laws on every matter concerning the lives of its citizens and the government subject to the limitations imposed by the constitution. In England, where the doctrine of parliamentary sovereignty is propounded, parliament as a matter of principle can enact or repeal legislation as it sees fit. Whether there is a clear limitation or not, the legislature is in charge of making laws in the form of primary legislation. Any other legislation that is subordinate or auxiliary to primary legislation is known as delegated (or sometimes ancillary) legislation.

In short, delegated legislation means the exercise of legislative power by an agency that is subordinate to the legislature. This subordinate body acquires the power from the act of the legislature. Power is transferred from the principal lawmaker to the lower body, which may be the executive, cabinet, council of minister, or a specific administrative agency, by the mechanism of delegation. Generally, delegation refers to the act of entrusting another authority or empowering another to act as an agent or representative. By the same token, delegation of legislative powers means the transfer of law-making authority by the legislature to the executive, or to an administrative agency. In line with the power granted to them by the legislature administrative, agencies can issue rules, regulations and directives, which have a legally binding effect.

The study of rule-making (delegated legislation) by the executive branch of government occupies a significant place in the administrative law due to its increasing growth, complexity and the dangers it poses to individual liberty and freedom. Scholars regard delegated legislation as a typical characteristic of administrative activity in public administration.

One of the most significant developments of the present century is the growth in the legislative powers of the executive. Measured by volume, more legislation is produced by the executive government than by the legislature. The increase in

quantity and quality of delegated legislation, if not supplanted by clear procedures and effective controlling mechanisms, may ultimately result in arbitrariness and abuse of power, which in turn leads to injustice and violation of liberty. That is why it is regarded by many as a "necessary evil." It was considered a danger to the liberties of the people and a devise to place despotic powers in few hands. It was said that delegated legislation preserved the outward show of representative institutions while placing arbitrary and irresponsible power in new hands.

However, in reality, the intricacies and complexities of modern government have proved beyond doubt that the delegation of legislative powers to administrative agencies is a compulsive necessity. In no democratic society committed to the establishment of a welfare state, the legislature monopolizes the legislative power. It will be futile for the legislature to solve the ever increasing social and economic problems, unless it shares some of its powers with the executive and other administrative organs of the state. A statute may be inexact, incomplete, and unintelligible, and may even be misleading unless it is read with specific rules and regulations made there under. Delegated legislation also serves a technique to relieve pressure or legislature's time so that it can concentrate on principles and formulation of polices. After this, it has to leave technical and detailed matters which are necessary to fill the gaps in the primary legislation. Nowadays, administrative rule-making has become a typical characteristic of the administrative law and administrative activity. The 20th century has been termed as the age of regulation due to the increasing number of instruments issued by the executive branch of government. Most of the legislations that govern the conduct of the individual come from administrative agencies, not from the legislature.

How do you distinguish administrative actions from quasi-legislative actions?

There is only a hazy borderline between legislation and administration, and it is difficult to show there exists a fundamental difference between the two. One common point of difference is that the legislative power is the power to lay down the law for people in general, whereas administrative power is the power

to lay down the law for them, or apply the law to them in some particular situation. It is also a common principle of legislation that legislative acts should be public.

One test of distinction may be that where the former is a process of performing particular acts or of making decisions involving the application of general rules to particular cases, the latter is the process of formulating a general rule of conduct without reference to particular cases and usually for future operation.

Rule - making action of the administration partakes with some exceptions, all the characteristics of a normal legislative action process. These may be generality, non-retroactivity and a behavior which bases action on policy consideration and gives a right or a disability. In some cases, however, administrative rule making action may be particularized, retroactive and based on evidence. On the other hand, a quasi-judicial action is particularly based on the facts of the case and declares a pre-existing right.

4.2 The Need for Delegated Legislation

Despite the ever-increasing volume of primary legislation, the complexities of governing a sophisticated society (and even a developing society) demands the delegation of some legislative functions to inferior bodies such as ministers and administrative agencies. Clearly parliament does not have time or resources to enact every single piece of legislation that is needed in the form of primary legislation, which can be fully debated and scrutinized in accordance with legislative procedures. The result is delegated legislation- legislation produced by an 'inferior body' which nevertheless has the force of law.

Tackling the complexities of modern administration in an efficient and efficient manner demands an atmosphere of complexity. Parliament has to follow strict legislative procedures to make a single law. Hence, it will be far from being flexible without delegating some of its powers to the executive.

Can you try to identify impacts of retaining all legislative power by the lawmaker (parliament)?

The complexities of modern administration are so baffling and intricate and bristle with details, urgencies and difficulties. Therefore, to tackle these problems, an atmosphere of flexibility is needed. A parliament which sits for a limited period of time and which is required to observe strict legislative procedures will be far from being flexible without delegating some of its powers to the executive.

Taking into account the above general justification, the following factors may be mentioned as reasons for the need for delegated legislation.

A) Limitation on Parliamentary Time

Art 58(2) of the F.D.R.E. constitution reads:

"The annual session of the house shall begin on Monday of the final week of the Ethiopian month of Meskerem and end on the 30th day of the Ethiopian month of sene. The House may adjourn for one month of recess during its annual session"

As stated in Art. 58(2) of the constitution, assuming that there is one month recess, for how many maximum days will the House of representatives sit in parliament? Then subtract 39-week days and multiply it by 8 working hours. Taking into consideration the average time necessary to make law, do you think the house of people's representatives has sufficient time to provide all the laws in quantity and quality?

It is said that even if today parliament sits all the 365 days in a year and all the 24 hours, it may not give the quantity and quality of law, that which is required for the proper functioning of a modern government. Therefore, it is clear and self-evident that the main reason for delegation of legislative power is to relieve the pressure on parliamentary time.

B) Technicality Subject of Matter

Read carefully the following provisions:

I.) *"For the purpose of fostering monetary stability and credit and exchange conditions conducive to the balanced growth of the economy of Ethiopia, the Bank may issue directives governing its own credit transactions with banks and other financial institutions, and credit transactions of banks, and other financial institutions.* **"(Art 28(1) of Monetary and Banking Proclamation No.83/1994)**

II) *"The council of ministers may by regulations exempt any income recognized as such by this proclamation for economic, administrative or social reasons"*

(Art 13(e) of Income Tax Proclamation No.286/2002)

III) *"1. Regulations and directives may be issued for the complementary of this proclamation.*

"*2. The regulations shall, in particular, provide for the payment of fees in connection with applications for the grant of patents and utility model certificates and for the registration of industrial designs and matters related there to."*

(Art 53 sub 1 and 2 of Inventions and Industrial Designs Proclamation No 123/1995)

Which of the above provisions do you think are technical matters which do not involve policy issue and need some expertise knowledge?

Legislation has become highly technical because of the complexities of a modern government. Members of the parliament are not experts, and so they cannot comprehend the technicality of the subject matter of some economic and social issues. Technical matters, as distinct from policy issues, are not susceptible to discussion in parliament and therefore cannot be readily be included in legislation. Therefore, technicality of the subject matter stands as another justification for delegation. It is convenient for the legislature to confine itself to policy matters only and leave the technical law making sequence to the administrative agencies.

C) Flexibility

Ordinarily legislative process suffers from lack of viability and experimentation. A law passed by parliament has to be in force till the next session of parliament when it can be replaced Therefore, in situations which require adjustments frequently and experimentation, administrative rule making is the only answer.

The need for frequent adjustment or flexibility can be observed from the following provision.

"The Bank may, from time to time, prescribe by regulations the terms and conditions upon which persons departing from Ethiopia may carry with them foreign exchange or make remittance for services." **(Art 55 of Monetary and Banking Proclamation No.83/1994)**

In the above provision, the terms and conditions for carrying foreign exchange by persons departing from Ethiopia could be changed from time to time. Hence this flexibility could be attained through delegation of power to make these rules.

D) Emergency

During emergency, it may not be possible for the parliament to pass necessary legislation to cope up with the situations. Under such conditions, speedy and appropriate action is required to be taken. The parliament cannot act quickly because of the time that requires passing an act. Moreover, immediate knowledge and experience is only available with the administration. For this reason, wide legislative power must be conferred up on the executive to enable the government to take actions quickly.

The above grounds clearly justify the need for administrative rule making. On the other hand, this rule-making may have some negative effects. Can you give one undesirable impact of the administrative rule making?

4.3. Theoretical Objections against Delegated Legislation

The fact that delegation is indispensable and inevitable due to practically convincing needs, it has not been a bar to theoretical challenges and criticisms against it. The main constitutional objection raised against delegation of rule making power to administrative agencies has been the doctrine of non delegability of power, which holds that power delegated to one branch may not be redelegated to another. People elect their representatives based on their fitness, knowledge and ability to represent their interest. Hence, it is a generally accepted rule that this mandate bestowed by the people cannot be delegated to another individual or organ, which does not stand in a direct relation to the people. It is a cardinal principle of representative government that the legislature cannot delegate the power to make laws to any other body or authority.

One of the most commonly cited sources of the rule of non delegation is the common law maxim delegates potestas non potest delegari which means that a delegate can not further delegates his power. Simply, the maxim indicates that power that has been delegated originally may not be redelegated.

The maxim was originally invoked in the context of delegation of judicial power and implies that in the entire process of adjudication, a judge must act personally except in so far as he is expressly absolved from his duty by a statue. Therefore the basic principle underlying the maximum is that discretion conferred by the statute on an authority must be exercised by that authority alone, unless a contrary intention appears from the language, scope or object of the statute. Generally, it implies that, since the people delegated legislative power to the lawmaker, executive power to the prime minister and cabinet and judicial power to the courts, none of the institutions may redelegate its power to any other authority.

Another objection to delegation of power is based on the doctrine of separation of powers. In America, the doctrine of separation of powers has been raised to a constitutional status. The U.S. Supreme Court has observed that the doctrine of separation of power has been considered to be an essential principle underlying

the constitution and that the powers entrusted to one department should be exercised exclusively by that department without encroaching up on the power of another.

4.4 Scope of Delegated Legislation

It is accepted at all hands that a rigid application of the doctrine of non-delegability of powers or separation of powers is neither desirable nor feasible in view of the new demand on the executive. The new role of the welfare state can be fulfilled only through the use of greater power in the hands of the government, which is most suited to carry out the social and economic tasks. The task of enhancing the power of the government to enable it to deal with the problems of social and economic reconstruction can be effectively and efficiently accomplished through the technique of delegation of legislative power to it. Thus it can be clearly observed that pragmatic considerations have prevailed over theoretical objections.

Therefore, the position has been shifted from one of total objection to the issue of the permissible limits of valid delegation. Legislative delegation raises the issue of delegable and non-delegable legislative powers. There is no agreed formula with reference to which one can decide the permissible limits of delegation. However, as a rule, it can be said that the legislature cannot delegate its general legislative power and matters dealing with policy.

The legislature after formulating the fundamental laws, can delegate to administrative agencies the authority to fill in gaps which is an authority necessary to carry out their purposes. The matters which are appropriate for delegation are such matters as procedures for the implementation of the substantive provisions contained in the principal legislation. This indicates that only the subsidiary part of the legislation could be delegated to administrative agencies so as to enable them fill any available gaps;i.e. the legislative body ought to state an intelligible principle and that the executive branch would merely fill in the details. Subordinate legislation can cover only subject matters delegated expressly in the principal legislation.

As a summary, the following points may be noted.

- Delegation of some part of legislative powers has become a compulsive necessity due to the complexities of modern legislation.
- Essential legislative functions cannot be delegated by the legislature.
- After the legislature has exercised its essential legislative functions, it can delegate non-essentials, however, numerous and significant they may be.
- The delegated legislation must be consistent with the parent act and must not violate legislative policy and guidelines. Delegatee cannot have more legislative powers than that of the delegator.

In Australia, the following matters could not be delegated.

A. Appropriations of money;

B. Significant questions of policy including significant new policy or fundamental changes to existing policy;

C. Rules which have a significant impact on individual rights and liberties;

D. Provisions imposing obligations on citizens or organizations to undertake certain activities (for example, to provide information or submit documentation, noting that the detail of the information or documents required should be included in subordinate legislation) or desist from activities (for example, to prohibit an activity and impose penalties or sanctions for engaging in an activity);

E. Provisions conferring enforceable rights on citizens or organizations;

F. Provisions creating offences which impose significant criminal penalties (imprisonment or fines equal to more than 50 penalty units for individuals or more than 250 penalty units for corporations);

G. Provisions imposing administrative penalties for regulatory offences (administrative penalties enable the executive to receive payment of a monetary sum without determination of the issues by a court);

H. Provisions imposing taxes or levies;

I. Provisions imposing significant fees and charges (equal to more than 50 penalty units consistent with (f) above);

J. Provisions authorizing the borrowing of funds;

K. Procedural matters that go to the essence of the legislative scheme;

L provisions creating statutory authorities (noting that some details of the operations of a statutory authority would be appropriately dealt with in subordinate legislation); and

M. Amendments to Acts of Parliament (noting that the continued inclusion of a measure in an Act should be examined against these criteria when an amendment is made.)

Which of the following do you think are essential legislative functions which could not be delegated?

a) Power to levy tax

b) Power to exempt any item from tax

c) Power to repeal or amend a proclamation

d) Power to extend the applicability of a proclamation to other sectors

e) Power to exempt certain sectors not to be covered by the proclamation

f) Power to determine the standard rate of interest for borrowings and saving

4.5 Form and Classification of Administrative Rule Making

A close scrutiny of delegated legislations reveals that they usually contain enacting clauses and that they are also detailed legislations. Enacting clause is a provision in a legislation that indicates how and from where the authority of legislating the law was derived. It is found in the preamble part of the legislation. Delegated legislation is considered as legislated by the legislature in so far as they are enacted following the proper procedure. They are also considered as part and parcel of the main legislation under which they are issued. These legislations are detailed because they are issued to implement other superior legislations that are drafted in broader terms.

Thus, delegated legislation may assume different forms. In our country there are mainly two types of delegated legislations regulation and directive.

Regulation

Pursuant to Art 771(13) of the F.D.R.E. constitution, the council of ministers has the power of issuing regulations in accordance with a power vested to it by the house of people's representatives. The power to issue regulations is found in the specific legislation.

Directive

These types of delegated legislations are issued by each administrative agency. Agencies issue these subordinate legislations to implement regulations and other primary legislations.

Pursuant to Art. 93 of the F.D.R.E. constitution, the council of ministers has the power to declare emergency, which is subject to approval by the House of Representatives. Can we say that this decree by the Council of Ministers is a delegated legislation?

Administrative rule-making may also be classified based on the different purposes, that it is made to serve.

A-Enabling act- Such acts contain an "appointed date" clause under which the power is delegated to the executive to appoint a date for the act to come into operation. In this category, the legislature prescribes the gun and the target and leaves it to the executive to press the trigger. It is aimed at easing the executive the time to equip itself for the administration of the law. In this class of legislation, rule making exercise is valid only to the extent it is preparatory to the act coming in to force.

B-Extension and application act- The technique of administrative rule-making may sometimes be used for the extension and application of an act in respect of a territory, or a given for duration of time, or for any other such objects. Power may be delegated to extend the operation of the act to other territories.

E.g. Reduction or Extension of Time

" Notwithstanding any provision of these regulations which may specify a period of time within which an act is to be performed, the licensing authority may for good cause provide for a shorter or longer period, provided that such reduction or extension shall not jeopardize the rights of a licensee or engender his ability to perform the duties and obligations under the license or under the proclamation."

(Art 42 of Mining Operations Regulation No 182/94)

C-Dispending and suspending act- Sometimes the power may be delegated to the administrative authority to make exemptions from all, or any provision of the act in a particular case or class of cases. These exemption clauses are meant to enable the administrative authority to relieve hardship, which may be occasioned as a result of uniform enforcement of the law.

See for instance the following provision:

"Not withstanding the provisions of rule - articles (1) of this article, the council of ministers may be regulations determine the inapplicability of this proclamation on employment relations established by religious or charitable organizations."

(Art 3(b) of Labour Proclamation No 377/96)

D- Classifying and sanctioning acts- Under this type of delegation, power is given to the administrative authority to fix standard of purity, quality or fitness for human consumption. See, for instance, Classification of Hotels, Pensions and Restaurants Regulations No 209/1995.

E- Penalty for violation acts - Sometimes power may be delegated to an administrative agency to prescribe punishment for the violation of rules. Usually, making an act penal is a parliamentary function and cannot be delegated to the administrative agency.

4.6. Rule Making Procedure

In order to ensure power delegated by the legislature is exercised fairly and lawfully, the administrative agency is expected to follow some minimum rule making procedures. Such procedure is usually provided in a comprehensive manner applicable to every agency at all time (e.g. the American Procedure Act.) In other cases, it may provide on specific legislations i.e. on the enabling act. The rule making procedure under the U.S. Federal Administrative Act (hereinafter referred to as APA) is a detailed one that provides different types of rule-making procedures ensuring flexibility in the administrative process. Before discussing the specific requirements applicable for each type of rule-making procedures under APA, let's have a brief look at the rule-making procedure in England.

Rule Making Procedure in England

A- Prior Consultation

Under English administrative law, the rules of natural justice do not apply to delegated legislation, and failure to consult parties does not entail invalidity of the rules by court. As has been noted by one judge:

"Many of those affected by delegated legislation and affected very substantially, are never consulted in the process of enacting that legislation and yet they have no remedy."

Even though prior consultation with concerned parties is not a mandatory requirement, in practice, many agencies informally comply with this requirement upon their own initiative. The informal consultation of representative bodies by the legislative administrative body is very common. Few statutes may also specifically provide a general process of considering objection, or prior consultation and publishing draft delegated legislation. Where consultation with certain parties is required by the enabling act, the courts are likely to interpret this as being a mandatory requirement; failure to comply could invalidate any resulting order.

B-Laying procedure

In England, most rules and regulations issued through power of delegation will not have a binding force unless they comply with review mechanism by parliament. Such parliamentary review mechanism commonly known as laying procedure affords an opportunity for the legislature to control the exercise of the power of delegation by subordinate bodies. In effect, it is an effective mechanism to ensure legality and fairness in delegated legislation. If the enabling act subjects the agency to comply with laying procedure, non-observance results in the nullity of the rule or regulation. Laying procedure may assume different forms some of which are indicated below.

Bare Laying Procedure

No further procedure is necessary for the provision to be effective. The statutory instrument is drawn to the attention of members and can come into operation once laid.

Negative Resolution Procedure

The legislative instrument once it is laid before parliament may be annulled if there is a request (prayer) to this effect. However, the annulment of the instrument does not invalidate retrospectively action taken by the minister.

Positive Laying Procedure

The enabling act requires the instrument to be laid before parliament; it can only become law if it receives the affirmative approval of the parliament.

Laying of a Draft Statutory Instrument

A draft instrument is laid before parliament, and the instrument itself cannot be made until 40 days have passed from the date of laying of the draft instrument. During this period, the draft instrument may be subject to a negative resolution procedure.

C-Publication

Under English administrative law, there is difficulty and argument as to when a statutory instrument is "made". One view is that the statutory instrument is made as soon as it is signed by the appropriate minister, and it becomes effective from that time onwards notwithstanding that any publication or laying requirements have not been complied with. According to the second view, the statutory instrument is made when it is signed, but only comes into effect on a certain date, on the order itself. Third it is said that it becomes after it is signed and is due to become into effect on some specified date in the future, after one of the various laying procedures has been complied with.

As can be seen from the above different arguments, it is clear that there is no uniform procedural requirement of publication. However, the enabling act may specifically provide for the publication requirement that is mandatory, resulting in invalidation for non-compliance.

Rule Making Procedure in U.S.

The Administrative Procedure Act (APA) enacted in 1946 and recodified in 1966, is the procedural roadmap for the federal executive branch. The federal government passed the act in 1946, in response to the increasing resentment of the agencies' latitude in matters affecting the rights of individuals. Following the federal lead, most of the states also passed similar statutes during the late 1940s and early 1950s. Unless another statute provides otherwise, every executive branch department and agency must follow the APA's minimum procedures for adjudication and rule making. It also establishes general ground rules for the judicial review of agency actions. Although it has been supplemented by several other laws discussed in this volume (e.g., the Freedom of Information Act, Regulatory Flexibility Act, and Administrative Dispute Resolution Act), it has been amended remarkably little since 1946, and its provisions have served as models for many other administrative procedure laws in the fifty states and other countries around the world.

The Administrative Procedure Act sets up the procedures to be followed for administrative rule making. Before adopting a rule, an agency generally must publish advance notice in the Federal Register, the government's daily publication for federal agencies. This practice gives those who have an interest in, or are affected by the proposed rule an opportunity to participate in the decision making by submitting written data or by offering views or arguments orally or in writing. Before a rule is adopted in its final form, and 30 days before its effective date, the agency must publish it in the Federal Register. Formally adopted rules are published in the Code of Federal Regulations; a set of paperback books that the government publishes each year so that rules are readily available to the public.

Administrative agencies promulgate three types of rules: procedural, interpretative, and legislative. Procedural rules identify the agency's organization and methods of operation. Interpretative rules are issued to show how the agency intends to apply the law. They range from informal policy statements announced in a press release to authoritative rules that bind the agency in the future, and are issued only after the agency has given the public an opportunity to be heard on the subject. Legislative rules are statutes enacted by a legislature. Agencies can promulgate legislative rules only if the legislature has given them this authority.

Types of Rule-Making Procedure

The APA subdivides the categories of rule-making into formal and informal proceedings. A rule-making procedure is considered formal when the proceeding is required by another statute to be "on the record after opportunity for an agency hearing." The APA prescribes complex procedures for hearings in formal rule-making procedure. It requires relatively minimal procedures for informal rule-making. Each agency which will be affected by section 4 should publish under section 3 (a) (2) the procedures, formal and informal, pursuant to which the public may participate in the formulation of its rules. The statement of informal rule making procedures may be couched in either specific or general terms, depending on whether the agency has adopted a fixed procedure for all its rule making or varies it according to the type of rule to be promulgated. In the latter instance, it would be sufficient to state that the proposed substantive rules will be adopted after allowing the public to participate in the rule-making process either through submission of written data, oral testimony, etc. The method of participation in each case to be specified in the published notice in the Federal Register.

A- Informal Rule Making

In every case of the proposed informal rule-making according to the requirements of section 4 (a), section 4 (b) provides that "the agency shall afford interested persons an opportunity to participate in the rule-making through submission of written data, views, or arguments with or without opportunity to

present the same orally in any manner." The quoted language confers discretion upon the agency, except where statutes require "formal" rule-making subject to sections 7 and 8, to designate in each case the procedure for public participation in rule-making. Such informal rule making procedure may take a variety of forms: informal hearings (with or without a stenographic transcript), conferences, and consultation with industry committees, submission of written views, or any combination of these. These informal procedures have already been extensively employed by federal agencies. In each case, the selection of the procedure to be followed will depend largely upon the nature of the rules involved. The objective should be to assure informed administrative action and adequate protection to private interests.

Each agency is affirmatively required to consider "all relevant matter presented" in the proceeding; it is recommended that all rules issued after such informal proceedings should be accompanied by an express recital that such material has been considered. It is entirely clear, however, that section 4 (b) does not require the formulation of rules upon the exclusive basis of any "record" made in informal rule-making proceedings. Accordingly, except in formal rule-making governed by sections 7 and 8, an agency is free to formulate rules upon the basis of materials in its files and the knowledge and experience of the agency, in addition to the materials adduced in public rule making proceedings.

Section 4 (b) provides the completion of public rule-making proceedings "after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose". The required statement will be important in that the courts and the public may be expected to use such statements in the interpretation of the agency's rules. The statement is to be "concise" and "general". Except as required by, statutes providing for "formal" rule-making procedure, findings of fact and conclusions of law are not necessary. Nor is there required an elaborate analysis of the rules or of the considerations upon which the rules were issued. Rather, the statement is intended to advise the public of the general basis and purpose of the rules.

B-Formal Rule Making

Section 4 (b) provides that "Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection." Thus, where a rule is required by some other statute to be issued on the basis of a record after opportunity for an agency hearing, the public rule-making proceedings must consist of hearing and decision in accordance with sections 7 and 8. The provisions of section 5 are in no way applicable to rule-making. It should be noted that sections 7 and 8 did not become effective until December 11, 1946, and, pursuant to section 12, did not apply to any public rule making proceedings initiated prior to that date.

Statutes authorizing agencies to prescribe future rates (i.e., rules of either general or particular applicability) for public utilities and common carriers typically require that such rates be established only after all opportunity for a hearing before the agency. Such statutes rarely specify in terms that the agency action must be taken on the basis of the "record" developed in the hearing. However, where rates or prices are established by an agency after a hearing required by statute, the agencies themselves and the courts have long assumed that the agency's action must be based upon the evidence adduced at the hearing. Sometimes, the requirement of decision on the record is readily inferred from other statutory provisions defining judicial review.

UNIT SUMMARY

Delegated legislation also, referred to as 'ancillary', subordinate, administrative legislation or quasi-legislation is the exercise of legislative power by an agency, which is subordinate to the legislature. Delegation has now become almost an every day fact of public administration of the modern welfare state. The complexities and intricacy of modern government practically necessitates sharing some of the legislative functions of the legislature. More specifically, the lack of sufficient parliamentary time to provide the necessary laws in quantity and quality makes delegation inevitable. Elected representatives also lack expertise to deal with technical and scientific matters. On the contrary, the executive and agencies have ample time and specialized expertise and competency, giving them a better hand to effectively deal with detailed and technical matters in due time. Procedurally, delegation creates a conducive environment to flexibility, paving the way for the agencies to experiment with ever changing practical problems. Lastly, in case of emergency, there is no such short-cut as delegation enabling the executive to take immediate measure.

In spite of its advantages due to practical necessities, it should be similarly be emphasized that delegated legislation is a necessary evil. There has been a serious criticism against it by scholars. Most of the arguments are theoretical in nature. However, there has also been practical concern. Theoretically, such challenge refers to the fact that it offends the traditional constitutional principle of separation of powers. The principle of non-delegability of legislative power, as it is against dictates of democracy, since power delegated to the legislature by the people is being re-delegated to unelected officials, is also another theoretical objection to delegation. On practical terms, there has been a serious concern by politicians, the legislature, the judiciary and even administers on the dangers of delegation for the fear that it may lead to the abuse of power and subsequently violation of individual right, liberty and freedom.

To balance the pros and cons, much attention is now given, to administrative rule-making procedures providing safeguards against abuse by the rule-making organ, which may be taken as the key concern for administrative law. Administrative rule-making may assume different forms, and is classified differently based on its nature and purpose. Generally, regulation, rule, order, memorandum, circular, directive, decree, etc., may be used to describe a certain delegated legislation depending on its

nature and the intention of the legislature. In Ethiopia, a delegated legislation may take the form of regulation or directive. The former is issued by the council of ministers, and the latter is by each specific administrative agency.

Currently, it is accepted in most jurisdictions as to the requirement of the clear and specific procedures governing the rule-making process. The rule-making procedure may be applicable universally by every administrative agency (like the Administrative Procedure Act, 1946. U.S.A.) Otherwise the enabling act may specifically require minimum procedures to be followed in each particular case.

Be it universal or specific, agencies should mainly be cognizant to the minimum procedures of consultation, and publication. Consultation which allows the citizen to participate with the rule-making process, requires taking into consideration the comments, suggestions and criticisms of parties likely to be affected by the proposed rule. Publication in an official document is also a requirement, which significantly increases its acceptance and obedience by the public. In the absence of publication and access to the approved rules, it will be inconceivable for the affected persons to challenge its legal validity in case it violates their rights and interests. The rule-making procedure ensures fairness in the administrative process and similarly serves as a control mechanism of the delegated legislation.

Activity

This is an activity which helps you to thoroughly understand the substance, procedure and control of delegated legislation. Make a group of 5-7 students. Then, the group will conduct an investigation on the rule-making process by administrative agencies and submit a report of its findings to the class following the problems given below.

1. Go to a nearby administrative agency and make a formal request for a copy its directives.

2. After obtaining the directive, conduct an interview with the relevant officials as to the rule-making procedure applied to that specific directive (if any) and in general the procedure adopted by that agency while issuing other directives. (for instance, check whether agency has complied with consultation & publication requirements),

3. Next evaluate the constitutional and legal validity of the directive by asking the following questions and following the procedures suggested.

    - Is the directive constitutional? Firstly, check whether the matter delegated by the legislature is an essential legislative function which could not be delegated under the constitution. Secondly, check whether it contains any provision(s), which violates the F.D.R.E. constitution.
    - Is the directive ultravires? Compare it to the enabling act which confers a legislative authority to issue that directive and determine whether it goes beyond that of the scope of the delegated power.
    - If it is intravires, does it contain any provision which constitutes unreasonable, irrationality, bad faith or generally abuse of discretion?

4. in case you have found that the directive is either unconstitutional, ultravires or if there is an abuse of power and the agency hasn't complied with any of the rule making procedures point out the negative impact on right, liberty and interest of the interested parties.

5. Suggest some mechanisms by which the delegated legislation could be controlled in Ethiopia. Indicate the role of the house of people's representatives, house of federation, the ombudsman and the human right commission, and the judiciary.

6. Prepare your report and present it to the class.

7. Each member of the group should actively participate in each activity.

8. Every student is also expected to actively engage himself in the discussion at the time of the presentation of the reports.

Review Questions

I) Discuss the following statements

1. In spite of the supposed justifications, delegated legislation offends traditional constitutional principles and is open to obvious abuse.

2. The most effective safeguard against the abuse of delegated powers is not to delegate them in such terms as to invite abuse.

3. Administrative rule making is highly democratic because of the fact that it can provide effective people's participation for better acceptance and efficiency. Discuss the validity of this statement in line with the practice and procedure of administrative rule-making in Ethiopia.

4. The source of power to issue regulations and directives by the council of ministers and administrative agencies does not emanate directly from the F.D.R.E constitution; rather the source of power is always the act of the legislature in the enabling act.

5. "A legislature cannot escape responsibility by explicitly delegating that function to others or by failing to establish an effective mechanism to insure the proper implementation of its policy decisions, but established legislation is not rendered invalid, as an unlawful delegation, by the mere fact that a third party, whether private or governmental, performs some role in its application or implementation."

II) Answer the following questions

1) Wade says that to delegated legislation is 'a necessary evil.' Why is delegated legislation considered a necessary Erie?

2) The F.D.R.E. constitution does not expressly or impliedly allow the legislature to delegate some of its law making functions either to the council of ministers or to other administrative authorities. Do you agree? If you disagree, how can you justify delegation of legislative power in line with the constitution?

UNIT FIVE: JUDICIAL POWER OF ADMINISTRATIVE AGENCIES

Introduction

As it has been already indicated in the previous discussions, administrative agencies may exercise one or all of the three powers of government- administrative, legislative and judicial powers. The first two powers of agencies are thoroughly appreciated in the previous unit. This unit, in turn, shall discuss the meaning and nature of agency adjudication, the forms of agency adjudication, the merits and demerits of agency adjudication; the nature, composition, power and tenure of administrative tribunals in a comparative perspective.

Objectives

At the end of this unit, the students are expected to:

- Understand the meaning of judicial power (decision-making power) of administrative agencies and distinguish it from the legislative power;
- Discuss the nature, characteristics and need for tribunals (administrative courts).
- Identify administrative courts in Ethiopia and examine their organization and structure;
- Identify the qualification, appointment and dismissal of administrative law personnel;
- Identify the power and procedure of inquires;
- Understand the principle of natural justice and its basic elements.

5.1 The Meaning and Nature of Administrative Adjudication

As it has been discussed previously, an administrative agency may be conferred with the tripartite powers (executive, legislative and adjudicative) of various nature and scope. As a logical sequence, of the previous chapters have delt with the executive and legislative powers of administrative agencies. This unit discusses the concept agency adjudication in detail keeping taken this in mind, let's turn to the merits of the discussion.

An important question that may be and should be raised here is that related to the meaning of judicial/adjudicatory powers of the administrative agency. What are the peculiar features of an agency's adjudicatory powers vis-à-vis its executive and legislative counter parts? A clear-cut answer cannot be provided to this question. However, it is possible to put some objective tests as a benchmark to differentiate the adjudicatory powers of administrative agencies from their executive and legislative powers. The first of such often -cited test is related to the conclusiveness of the agency's decision. This is to mean that the agency's decision in this regard must have a binding effect on the parties in dispute without any need for confirmation by any other organ. As an authority stated it properly, "…the broad exercising of power which are of a mere advisory, deliberative, investigatory, or conciliatory character or which do not have a legal effect until confirmed by another body, involve only the making of a preliminary decision will not normally be held to be acting in a judicial capacity…." Thus, the decisions that administrative agencies render in their judicial capacities are conclusive in the sense that such decisions are binding on the parties in dispute without awaiting for further confirmation for any other authority, or without checking whether such decisions subject to review collaterally. However, as conclusiveness of the agency's decision is only one test not the only test and it shall not be confused with other binding acts of an agency passed in its administrative or legislative capacity. For example, an administrative agency may adopt rules and regulations that have the force of law. These rules and regulation, like judicial or quasi- judicial determinations, are binding. But unlike the latter, which focus on the resolution of factual disputes concerning a specific party, rules and regulations are general in their application. So, conclusiveness of the decision should not be taken as the only decisive test.

The second test for identifying whether a certain agency's function is judicial or not relates to the availability of some sort of procedural attributes. While exercising their adjudicatory powers, administrative agencies normally follow preset procedures. The procedure adopted for this purpose may be formal, which is more or less similar to the ordinary court procedures, or informal, which is a simplified procedure that provides only the minimal procedural safeguards to the persons subject to the decision. The

action could be initiated by private individuals against an administrative agency or vice versa, or by an administrative agency against another administrative agency. The administrative forum to which such action is brought for determination is expected to entertain the parties' opinions, arguments and evidences as the case may be. So, decisions passed by administrative agencies in their judicial capacity are fruits of certain procedures. This to mean that the decision making process is not arbitrary, rather it is guided by procedures adopted in advance.

The third important test for identifying whether or not an administrative agency passes a decision in its judicial capacity is related to the presence or absence of interpretation and application of legal rules. Obviously, interpretation of laws, application of laws to resolve specific factual disputes and declaration of laws are the core functions of the judiciary whether it is a regular court or an administrative body. Hence, in order to determine whether the decision of an administrative agency is judicial or not, it has to be tested whether or not the decision passed is based on pre-existing legal rules or other prescribed standards. The point of controversy to be resolved by the concerned agency could be legal or factual that involves the interpretation and/or application of the governing laws to the controversy or mere declaration of the meaning of laws in issue.

To summarise, the judicial act of administrative agencies can be identified by reference to their formal, procedural or substantive characteristics, or by a combination of any of them. So judicial act may be differentiated from the rest of other administrative functions in that if the decision has conclusive effect, binding nature, have force of law without confirmation by another body, solve questions of law or fact, the function is treated as judicial [Steven: P.18]. keeping this in mind, what follows is a definition of the term administrative adjudications given by various authorities.

The United States of America's Federal Administrative Procedure Act of 1946 defines the term "adjudication" as every final agency action resulting in an order other than rule-making. More precise definition is provided under the 1961 Revised Model State Act of the United States of America. Under this act, adjudication is equated with the determination of contested cases. The term contested cases further defined as " a

proceeding including but not restricted to ratemaking and licensing, in which the legal rights, duties or privileges of party are required by the law to be determined by an agency after an opportunity for hearing." As per the definition provided under the Model Act, an administrative act of ratemaking (price fixing) is included within the spectrum of adjudication. However, it has to be noted that the fact that the result is an outcome of a contentious process does not warrant adjudication. Such contentious cases must be resolved conclusively based on principles and rules already in being if the act is to be treated as adjudicatory. Most states of the United States of America adopting administrative procedure laws have followed similar approach to that provided in the Model Act. There are also few states in the US that define adjudication in a language more closely approximating that of the federal act.

Other definitions departing both from the pattern of the Revised Model State Act and that of the federal act that deserves special note are the following:

Ohio defines adjudication as "the determination by the highest or ultimate authority of any agency of the rights, duties, privileges, benefits, or legal relationships of a specified person." Similarly, the Pennsylvania statute defines adjudication as "any final order, decree, decision, determination, or ruling by an agency affecting personal or property rights, privileges, immunities or obligations of any or all of the parties to the proceeding." Wisconsin provides that contested cases means "a proceeding before an agency in which, after hearing required by law, the legal rights, duties, or privileges of any party to such proceeding are determined or directly affected by a decision or order in such proceeding and in which the assertion by one party of any such right, duty, or privilege is denied or contravened by another party to such proceeding."

The Federal Democratic Republic of Ethiopia also prepared a draft Federal Administrative Procedure Proclamation in 2001. The Federal Administrative Procedure Proclamation does not mention the term adjudication at all Instead, the term "Administrative Decision" is used as synonymous term for similar purpose in the draft document. An "Administrative Decision" as defined in Article 2 Sub-Article 2 of this draft states that administrative procedure is to "any decision, order or award of an agency having as its object or effect the imposition of a sanction or the grant or

refusal of relief, including a decision relating to doing or refusing to do any other act or thing of an administrative nature, or failure to take a decision…." This draft attaches some exceptions restricting the scope of this definition. The following administrative acts are excluded from the spectrum of the formal definition of administrative decision:

- Decisions as to the selection or tenure of a public servant;
- Decisions based on inspections, tests or elections;
- Decisions as to the conduct of military or foreign affairs or security of police functions;
- Decisions of any of the courts established by law made in exercise of the judicial power as referred to in Article 79 of the Constitution of the Federal Democratic Republic of Ethiopia;
- Decisions establishing rules and regulations;
- Decisions made by the Council of People's Representatives and the Federation Council; and
- Decisions made by the President of the Federal Democratic Republic of Ethiopia.

As was discussed in the previous units, the legislature and the judiciary, despite their role in developing and shaping administrative laws, are not subject to the regulation of administrative law. Thus, decisions made by these organs of the government in their respective spheres of powers are not within the domain of the administrative adjudication. Even decisions of the administrative agencies establishing rules and regulations are excluded from the spectrum of the administrative adjudication. Other prerogative powers of the executive organs of the government that involve administrative discretion are also not subjected to the formal limitations of administrative adjudication. Decisions of the FDRE President, for example, granting amnesty and decisions of the executive organ of the government related to the conduct of the military and foreign affairs are discretionary by their nature. For these and other similar reasons, the draft federal administrative procedure proclamation of Ethiopia exclude some administrative acts, which may pass the general test, from the definition of adjudication as understood in the formal sense of the draft proclamation.

These types of exclusions are, of course, not noble to Ethiopia. Although the scope may vary from country to country, there are similar tendencies in other jurisdictions in excluding administrative acts that are contentious or adjudicatory in their attributes from the statutory definition of the term administrative adjudication. The experience in some member states of the United States of America can be taken as a good example in this case. In Indiana, it is excluded from the definition of adjudication of the issuance of warrants for the collection of taxes, the payment of benefits under the unemployment insurance laws, certain appellate functions of the state board of tax commissioners, determination as to the eligibility for public assistance, and the dismissal of certain public employees.

In Maine, the term-contested case, which is equated with adjudication, does not include "informal meetings held by consent of the agency and all interested parties." Massachusetts, likewise, with exception to the definition of "adjudicatory proceedings," exempts certain types of administrative adjudication from the procedural requirements of the Act, including (a) proceedings to determine whether the agency shall institute or recommend institution of proceedings in court, (b) proceedings for the arbitration of labor disputes, (c) proceedings for the disposition of grievances concerning public employees, (d) proceedings to classify appointment to governmental positions.

In Virginia, it is excluded from the definition of contested case controversies relating to the amount, the payment, or the refund of taxes; controversies relating to the issuance, denial, revocation or suspension of licenses by the Virginia Alcoholic Beverage Control Board; and controversies, in cases in which an agency issues a license, permit or certificate after an examination to test the knowledge or ability of the applicant, whether the examination was fair or whether the applicant passed the examination. In Pennsylvania, the definition excludes from "adjudication" matters involving the seizure for forfeiture of property. [Smith: pp.57-77]

From the comparative understanding of the facts provided above, it is possible to conclude that the term adjudication in administrative law context is a fluid concept. The meaning and scope of this term may vary from country to country, and even from time to time in the same country to a certain degree. As can be inferred from the

discussions above, different states of the United States of America excluded various administrative acts that are contentious or adjudicatory in their general attributes from the formal working definition of adjudication. Thus, although an administrative act may pass the general tests discussed earlier to qualify as a judicial or adjudicatory act, it may be excluded from the working definition of the term for one or another compelling pragmatic reason. In fact, such exclusions may not frustrate the due process of law guarantee incorporated in their respective constitutions or other basic laws.

An important question that may be triggered at this juncture is that what would be the practical significance of including or excluding an administrative act within the formal definition of adjudication in administrative law context? The discussion whether or not an administrative act should be included or excluded in the formal or statutory definition of the term adjudication is not merely an academic discourse. It has far reaching practical significance. Related to this point, **Smith** in his 3rd edition book titled "Judicial Review of Administrative Action" noted as follows:

> *The importance of the statutory definition of adjudication (or contested cases) lies in the fact that it is only with respect to the administrative proceedings which are included within the definition that the parties can insist, as a matter of statutory right, an observance of the procedural safeguards specified in the respective statutes. These procedural safeguards (guaranteeing adequate notice, a faire hearing in accordance with prescribed rules of evidence, a separation of prosecutory and adjudicatory responsibilities, and a decision made on a written record by responsible officials having personal familiarity with the contents of the record) are vital not only in protecting the private right of respondents, but also in preserving the public interest that administrative determinations shall reflect fully informed decisions made on an adequate record.*

5.2 Forms of Administrative Adjudication

As was stated somewhere else, one of the striking features of adjudication is the existence of predetermined procedures that guide the decision-making process. The decision may be preceded by full-blown formal hearings that are similar to court trials or an informal process, which is just like a summary proceeding where the participation of the parties is very minimal. Normally, adjudication process begins either with a complaint filed against a private person, a business, or even another agency. The party charged in the complaint is the defendant (called the respondent). The respondent has the right to file an answer to the complaint. In principle, respondents are entitled to a hearing before the agency adjudicating the case. However, the depth of the hearing may vary from circumstance to circumstance.

5.2.1 Informal Adjudication

The vast majority of administrative adjudications involve informal actions. As will be discussed in the subsequent sub-sections, the informality of the process of administrative adjudication is among the justifications behind the delegation of judicial power to administrative agencies. The informal mode of adjudication, although it may vary from county to country and from case to case in terms of content, tries to provide the minimal statutory safeguards for the protection of fundamental rights of individuals.

The United States Administrative Procedure Act (APA) can be cited as a typical example. In the USA, the Administrative Procedure Act (APA) governs federal agency adjudicatory procedures in general. However, most states have their own counterpart to the APA. The APA requires the most basic elements of due process, that is, notice and hearing. Regarding notice, APA provides that "persons entitled to notice of an agency hearing shall be timely informed of the time, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing is to be held; and the matter of fact and law asserted. As to the hearing, the agency is required to give all interested parties opportunity for …the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit…" The APA requirements for

administrative hearings are minimal, allowing agencies to operate rather informally. Although hearing in this sense may be treated as important elements of the procedural due process of law, it does not necessarily mean that a full-blown oral hearing is to be conducted. Depending upon the nature of the case in hand, a written submission of opinion, argument, data, or otherwise may suffice. So, in the majority of cases, APA dictates administrative agencies to fulfill the minimum requirements of notice and hearing before proceeding to act on matters that affect the rights of others. Indeed, the notice has to be adequate enough in terms of time, place and content. But hearing could be informal such as written submissions and interview like oral communications. In all cases, the due process clauses of the fifth and fourth amendments to the US constitution dictate that neither the federal nor state governments shall deprive of "life, liberty, or property, without due process of law." The notion of due process of law connotes two things: the substantive aspect of the action that the decision of the agency must be backed by lawful authority and the procedural aspect that the process of decision making must be guided by predetermined procedures, or in default by the minimum requirements set under APA. To put it simply, a person cannot be deprived of his entitlements to life, liberty and property except for strong reasons expressly provided under the relevant substantive laws and in accordance with the procedures set under the related laws.

The ordinary rules of procedure and evidences that govern court proceedings are not fully applicable to administrative/tribunal proceedings in their entirety. Courts in the common law tradition, therefore, have developed general principles that are expected to ensure fairness in agency adjudication. These principles are known as the rules of natural justice and fairness. The rules embody two concepts. First, *audi alteram partem*- that means a person should not be condemned without a fair hearing. Second, nemo judex in causa sua–which means that no one should act as judge in any matter if he or she has some kind of vested interest in the decision since all decisions should be free from bias. In the United Kingdom, there is an established precedent on the application of the rules of natural justice in the following types of situations:

- Where someone is dismissed from office; or
- Where someone is deprived of membership of a professional or social body;
- Where someone is deprived of property rights or privileges.

Where the rules of natural justice apply in their entirety, a fair hearing will be expected to consist of the following elements:

a) Adequate notice must be given to the person affected;
b) The person affected must be informed of the full case against him or her;
c) Adequate time must be allowed for that person to prepare his or her own case;
d) The affected person must be allowed the opportunity to put forward his or her own case;
e) The decision maker may be required to give reasons for his or her decision;
f) The affected person may be able to cross-examine witnesses;
g) The affected person may be entitled to legal representation.

But it has to be noted that the concept of fair hearing may not imply the same thing in all circumstances. The requirements listed from (a) to (d) are made mandatory- the minimum requirements of fair decision, whereas those listed from (e) to (g), are discretionary in the sense that their application may be required having regard to the nature of each particular type of case. In McInnes v Onslow-Fane [1978] 1 WLR 1520, Megarry V-C said that natural justice was a flexible term which imposed different requirements according to the nature of the case. The closer a decision came to being termed 'judicial,' the more applicable the full elements of the rules of natural justice. However, the closer a decision came to being 'administrative' in nature, it was more appropriate to talk about the requirements of 'fairness'. [Cumper & Waters: P. 311]. Normally, the consideration of an application for a license is an administrative task - the full rules of natural justice do not apply - the requirement is only that of fair consideration of the application. In contrast, the revocation of a license is more of a judicial decision – it is taking away someone's rights – therefore they are entitled to the full protection of the rules of natural justice. [Id.]

It has to be noted further that fair hearing does not always necessitate oral hearing. Sometimes, written representations will comply with the rules of natural justice or the duty to act fairly. Case law suggests that written representation will suffice when the facts of a case are not in dispute. However, where this is not the case, the requirements of natural justice may require that there be an oral hearing.

To put it in nutshell, informal adjudication does not involve full-blown trial type hearing. Unless otherwise statutes or case laws (in common law practice) dictate the agency to follow a full-fledged formal hearing process, agencies are usually at liberty to adopt their own decision-making procedures having regard to the minimum requirements of due process of law or natural justice or fairness as such terms may be differently known in different jurisdictions. The more the process of administrative adjudication is highly formalized, the less would be the resultant advantages sought from the delegation of adjudicatory powers to administrative agencies. The more administrative adjudication process is made highly informal, the more would be the possibility for administrative arbitrariness and the threats posed on the rights of individuals. Thus, while it is important to dispense administrative agencies/tribunals from the highly formalized and stringent ordinary court procedures so that laws and policies will be enforced, it is equally important to device the minimum procedural safeguards for the protection of individual rights from arbitrary violation for such powerful agencies. These are the two apparently conflicting and actually competing important interests what APA and the doctrine of fairness as developed from case laws try to strike balance.

5.2.2 Formal Adjudication

As mentioned above, informal administrative adjudication offers only the minimal statutory safeguards of notice and hearing; and hearing in the majority of cases does not involve oral hearing, but written submission of opinions, arguments, data, and so on. But formal adjudication involves an almost full-blown trial type hearing. Having regard to the magnitude of the individual interest at stake, the enabling legislation (parent act) or other statutes may dictate the concerned administrative agencies to hold a formal hearing before passing decisions. Formal adjudication, among other things, may provide the following procedural safeguard to the respondent:

- Notification of charges;
- Notification of hearing;
- Representation by an attorney;
- An impartial tribunal/administrative law judge;
- Presentation of evidence;

- Cross examination of the witness of the agency;
- A decision based on the regulation.

In a formal adjudication, the respondent has the right to confront an agency witnesses. Hence, oral hearing must be always there. Even where the statutory requirements regarding agency adjudication process appear inadequate to ensure fairness or to protect the fundamental rights of individuals, the US Supreme Court has applied the Due Process Clause of the Fifth and Fourth Amendments that dictate neither the federal nor the state governments shall deprive persons of "life, liberty, or property, without due process of law." Regarding the notion of administrative due process, authorities are noted as follows:

In administrative due process cases, the Court must make two determinations. First, it must decide whether the Due Process Clause is applicable. Administrative decisions are constrained by the Due Process Clause only if, they in some meaningful way, deprive an individual of "life, liberty or property." Of course, today those interests are broadly defined. Second, assuming that the Due Process Clause does apply, the Court must determine what "process" is in order to ensure fundamental fairness. Here, the Court has been reluctant to adopt a one-size-fits-all approach to administrative due process. In *Mathews v. Eldridge*, the Court said, "due process is flexible and calls for such procedural protections as the particular situation demands." Beyond the general requirements of fair notice and fair hearing, it is difficult to say precisely what due process requires in a specific administrative context. But one guiding principle is that the greater the magnitude of the individual's life, liberty or property interest, the greater the requirement for procedural protections**.**

The greater an agency's action tends to encroach to the fundamental constitutional rights of individuals, the greater should be the procedural protections provided to such individuals. This is also what the principle of natural justice and the doctrine of fairness as discussed in the previous subsection dictate. Thus, there are circumstances where administrative agencies/tribunals are required to conduct a full-fledged formal administrative adjudication. They may be dictated to do so in the majority of cases by the enabling legislations or other related statutes, by the constitutional principles guarantying due process of law, the principles of natural justice and fundamental fairness.

To date, Ethiopia has not come up with an instrument that provides uniform standards or guidelines that regulate administrative agencies' adjudication process. Both at the federal and the regional levels, there is no uniform legislative guidance that dictates administrative agencies concerning the procedural steps they must go through while adjudicating cases. So, if there are any, such procedures have to be searched in each of the pieces of enabling legislations that create the respective agencies. At the federal level, a fruitless attempt was made in 2001 to adopt a federal administrative procedure proclamation that was intended to regulate the process of rulemaking and adjudication by federal administrative agencies. But for unknown reason, it has remained as a draft for almost a decade. Federal administrative agencies can refer to this draft document like any other an unbinding legal literature at their discretion; the draft document cannot dictate such agencies decisions for it is not yet adopted in the form of law.

However, this does not necessarily imply that administrative adjudication in Ethiopia is completely arbitrary. You can see some procedural requirements dispersed here and there in the enabling legislations that create and empower particular agencies. Even where the procedural safeguards provided in such particular legislations are found, inadequate to protect the fundamental constitutional rights of individuals, recourse has to be made to the principles of due process of law enshrined under the FDRE Constitution. Our constitution expressly protects, among other things, the right to life, liberty and property. These rights cannot be restricted or taken away arbitrarily by any individual or administrative authority. Rather, all citizens and organs of the federal and regional government have the duty to ensure the observance of the constitution and obey it. Thus, as it happens in the United States of America, there is a wide room for our courts to play active role in ensuring the principles of due process of law incorporated in our constitution. Implicit in the concept of due process of law are there always the core requirements of fair notice and fair hearing.

In an attempt to provide a procedural safeguard to the protection of individual rights from administrative agencies, the draft federal administrative procedure proclamation of Ethiopia (herein after referred to as the draft) incorporates the core principles of due process of law such as notice and hearing. The joint reading of Articles 24 and 26 of the draft indicates notice and hearing as requirements. Before an administrative

action that affects the right of individuals is taken, adequate notice and a fair hearing opportunity shall be given by the agency to such concerned individuals. The general requirement of notice under Article 24 of the draft dictates administrative agencies to notify the cause of action of the case they intended to take, the time, place and nature of the hearing. The purpose of notice is to let individuals aware of the action an agency actually plans or intends to take on cases that involve their legitimate interest. The right to hearing before an administrative measure is taken is also provided under Article 26 of the draft. Unless otherwise hearing is dispensed in those circumstances expressly provided under the law for different reasons, an agency is obliged to conduct a public hearing (Article 26 cum Article 28). The hearing enables the party to the case voice his objections and arguments against the decision. Article 28(3) of the draft confers parties to administrative proceedings the right to submit documentary and other evidences to request agencies to summon witnesses, and to cross-examine the allegation of the other side. Article 25 of the draft allows parties to administrative proceedings the right to counsel and represent by a licensed advocate, or any other person.

In the conduct of the hearing, agencies are required to maintain the record to all proceedings carried out in rendering decision, and upon request to give the copy of the record to the parties or their representatives. Furthermore, Article 32 of the draft dictates administrative agencies to reduce their decision into a written form and to include disputed facts under consideration including the substance and source of the evidence, the findings of facts made and the evaluation of the evidence which bases the decision, the determination of the issue and action to be taken on the basis of such decision.

5.3 Tribunals and the Tribunal System

5.3.1 Meaning and Nature of Tribunals

The attempt to provide a uniformly applicable single definition of the term tribunal is more than difficulty. Even where the subject of discussion is one and the same, there are situations where different authorities use different terminologies having regard to the diverse social realities surrounding them. This is also the case that one may

appreciate while discussing the term tribunals in administrative law context. While discussing the forums where administrative disputes are being formally resolved different jurisdictions use different terminologies having regard to the social set up of their own systems. The Federal Administrative Procedure Act of America use the term Administrative Law Judges to connote those persons who adjudicate administrative disputes. Whereas the French uses "Conseil d'Etat", "Cours Administrative d'Appel" and "Tribunaux Administratifs" to refer to their three-tier hierarchy administrative courts that adjudicate administrative disputes. Other authorities also use the term "tribunal" with or without the designation "administrative" to denote the same thing.

Despite the differences in the terminologies used and their organizational set-up from country to country, tribunals or administrative tribunals or administrative courts, as the case may be, refer to the forums where justiciable disputes that involve government agencies, in one or another form, are being adjudicated by a panel of impartial decision makers. So, instead of trying to define this fluid concept of tribunal, it seems convenient to state what tribunals usually do and how they proceed. Tribunals are bodies established outside the structure of ordinary courts to adjudicate disputes that involve the government as a party on matters pertaining to governmental functions. The dispute could be between two or more government agencies, or between government agencies or between one or more individual parties. Hence, the typical tribunal, like an ordinary court, finds facts and decides the case by applying legal rules laid down by statute or legislation. In many respects, the tasks performed by tribunals are similar to that of performed by regular courts. As the jurisdiction of these tribunals are restricted to adjudicating disputed cases involving administrative agencies as parties in their governmental functions based on the principles, rules and standards set under administrative law, it seems appropriate to call them with the designation "administrative tribunals" instead of simply "tribunals." However, in using the term 'tribunal' together with the adjective "administrative", care has to be taken in order to avoid the concerns raised by some authorities in using that designation. Two prominent administrative law authorities criticized the very designation of the term "administrative tribunal" for being misleading for the following four reasons:

In the first place, no tribunal can be given power to determine legal questions except by Act of Parliament. Normally a tribunal is constituted directly by the Act itself. Sometimes, however, the power to constitute a tribunal like may be delegated by the Act to a minister, but in such cases the act will make it clear a tribunal is intended. Secondly, the decisions of most tribunals are in truth judicial rather than administrative, in the sense that the tribunal has to find facts and then apply legal rules to them impartially, without regard to executive policy. Such tribunals have in substance the same functions as courts of law. These tribunals therefore have the character of courts, even though they are enmeshed in the administrative machinery of the state. They are "administrative" only because they are part of an administrative scheme for which a minister is responsible to parliament, and because the reasons for preferring them to the ordinary courts are administrative reasons. Thirdly, tribunals are not concerned exclusively with cases to which government departments are parties. Rent assessment committees and agricultural land tribunals, for example, are adjudicating disputes between landlords and tenants without any departmental intervention. Fourthly, and most important of all, tribunals are independent. They are not subject to administrative interference as to how they decide any particular case. No minister can be held responsible for any tribunal's decision. Nor are tribunals composed of officials or of people who owe obedience to the administration. [Wade & Forsyth: pp. 907-908]

However, three of the critics labeled against the designation administrative tribunal as stated above do not stand valid. Of course, the term tribunal seems broader in meaning and scope than the term administrative tribunal as the former may embrace bodies formally instituted outside the structure of the ordinary courts to adjudicate disputes of private characters as contrasted to disputes that involve the agencies of the government. The Labor Relations Board that resolves collective labor disputes between employers and employees may be taken as a good example of these tribunals. But, the designation administrative tribunal is purposefully used to exclude the types of tribunals established here and there to resolve disputes between private individuals in their private relations. The adjective "administrative" as used in

the above critics does not necessarily imply that the tribunal is created by the administration or that the tribunal resolves non-justiciable administrative disputes or that the tribunal is an appendix to the government agencies with no relative autonomy. It is simply to mean that the term administrative tribunal is a tribunal with all its attributes, but its jurisdiction is limited to resolving disputes of governmental nature as distinguished from disputes of private character.

As suggested by Garner and Jones (Administrative Law), tribunals have the following five hallmarks:

- Independence from administration;
- Capacity to reach a binding decision;
- Decision taken by a panel of members (as opposed to a single judge);
- A simpler procedure than that of a court; and
- A permanent existence.

5.3.2 Jurisdictional Issues

On the basis of the nature and scope of their jurisdiction, administrative tribunals can be classified into two. These are tribunals having general jurisdiction (general tribunals) and tribunals having special jurisdiction (special tribunals). The French model is a typical example of the tribunals having general jurisdiction on administrative matters. In France, there is a clear dichotomy between administrative law and private (ordinary) law, on the one hand, and between the machineries applying these laws, that is, administrative courts and civil courts also known as regular courts or ordinary courts on the other hand. Administrative courts adjudicate cases falling within the domain of the administrative law. These courts are, thus, the focus of the discussion in this section.

In France, judicial control of the administration is entrusted to a special corps of judges who sit in special courts- known as administrative courts. These courts form a three-tier hierarchy headed by the Conseil d'Etat (Council of State) in Paris, below which are the regional intermediary Cours Administratives d'Appel (Administrative Courts of Appeal) and the Tribunaux Administratifs (Administrative Tribunals) in metropolitan France. They respectively correspond to the Supreme, Higher and First

Instance ordinary courts in structure. These three-tier administrative courts have general judicial jurisdiction on administrative matters falling under their respective material and/or local jurisdictions.

In addition to these courts of general jurisdiction, there are a number of other administrative tribunals exercising judicial functions in narrowly defined fields of activity. These are administrative courts of special jurisdiction that are established in special circumstances where the appropriate expertise does not exist in a general tribunal. But these specialized administrative tribunals are still under the supervision of the Conseil d'Etat as the supreme administrative court. Thus, the French administrative justice system has two striking features: firstly, there is a full-fledged system of administrative law that regulates the relationship between the administrative agencies and citizens and the interrelationship among the various organs of the government. Secondly, there is a full-fledged administrative court system. All administrative disputes are finally resolved within the system of the three-tier administrative court of general jurisdiction as supplemented by those relatively fewer (for example, compared to U.K.) administrative tribunals of special jurisdiction. The Conseil d'Etat is the court of final resort on administrative matters. There is neither possibility of lodging appeal nor possibility for invoking judicial review against the administrative decision before regular courts in France. Inspired by Montesquieu's theory of separation of powers, the French strictly prohibits interference of regular courts on the affairs of the administrative organs of the government on whatever ground. In French, it is a criminal offence for the judges of the ordinary courts to interfere in any manner whatsoever with the operation of the administration, or to call administrators to account before them in respect of the exercise of their official functions.

Most of the common law jurisdictions do not have the French type system of administrative law and tribunals; but tribunals of special jurisdiction proliferated here and there in response to particular circumstances. The same thing seems true in Ethiopia, where there is neither full-fledged corpus of administrative law, nor structured system of administrative court. Of course, this does not mean that Ethiopia has no administrative law and administrative tribunals. As it has been explained earlier, there are diverse sources of administrative law such as the constitution, pieces

of primary and delegated legislation. So, the law is there and also the tribunals are there. But what is missing there is that unlike the French system of administrative justice, here in Ethiopia there is that is no generally defined administrative law jurisprudence. We do not have general principles of administrative law that govern the jurisdictional dichotomy between the adjudicatory powers of administrative agencies/tribunals on the one hand and regular courts, on other hand, Thus, for academic purpose it would be quite important to appreciate the French experience where there is a unified system of administrative justice.

If administrative tribunals and ordinary courts are required to confine themselves within the domain of their respective sphere of powers, a clear demarcation has to be made between the jurisdictions of administrative courts and that of the ordinary courts. This is especially important for countries that adopt the French model of administrative system that provides a clear dichotomy between the provinces of administrative law and private law. It is also important for countries where tribunals of special jurisdiction are proliferated here and there like ours. But the problem is that how this ideal line can be drawn. As it was discussed in the previous chapters, the concerns of the administrative law are governmental activities that administrative agencies carry out. There is a possibility where a given administrative agency may involve in activities that are governmental in nature; for example, regulating private business such as issuing or canceling of license, or rate fixing, or setting safety standards and so on, or in activities that are private in nature such as owning and administering property and producing goods and services for gain. There is a general opinion that when the dispute arises from activities of the first category, it falls within the domain of the administrative law- thus it is the jurisdiction of the administrative tribunals. But when the disputed act arises from activities of the second category, that is, activities private in nature, it falls within the province of private law-subjected to the jurisdiction of ordinary courts. This general criterion, homers, may not be always true.

French administrative law writers and practitioners have been engaged in searching for general principles and criteria which make a clear demarcation between the jurisdiction of administrative courts and ordinary courts. According to Brown and

Bell, in the period before Blanco (TC 8 February 1973), the following criteria were developed:

- The first was that of the state as a debtor, under which the Conseil d'Etat denied the ordinary court's competence to condemn the state to any money payment.
- The second was the criterion of 'the act of public authority' that drew a distinction between those actions of the administration, which involved its public authority and mere acts of management that did not: the former were outside the jurisdiction of the ordinary courts, the latter were within it.
- The third criterion and the one favoured by the ordinary courts, was that of 'public administration' as distinct from 'private administration'; in the latter the administration used the same process as the private citizen and therefore came within the scope of the ordinary courts. On the other hand, disputes arising out of its public administration belonged to the administrative courts.

These early criteria, tentative and overlapping, were discarded in Blanco in favour of a new principle, that of 'public service'. The child Agnes Blanco was injured by a wagon, which was crossing the road between different parts of the state-owned tobacco-factory at Bordeaux. The question then arose, to which court, civil or administrative, the claim for damages should be brought. The Tribunal des Conflits, adopting the analysis proposed by Commissaire du gouvernement David, held that the injury arose out of the activities of a *service public* and that for this reason the administrative court had jurisdiction. Such influential doctrinal writers as Duguit…Jeze, and Rolland subsequently approved this approach. According to this last criterion, 'a public service is any activity of a public authority aimed at satisfying a public need'. This definition stresses that for a public service two elements must both be presented: the activity of a public authority, and satisfying a public need. [Brown and Bell: pp125-126] A 'public need' is not only that defined by statute; it can simply be identified by a decision of public authority. The second element in the concept of *service public*, namely, that the activity in question must be carried on by a public authority, has been extended almost to vanishing point in recent decades. In particular, it is necessary to distinguish between the public authority's role as creator

or director of the public service from its role as provider. For a public service to exist, it is not necessary for a public body actually to provide the service.

A third element may be distinguished in the concept of *service public,* in addition to the meeting of a public need and the participation of a public authority. The authority must have recourse to methods and prerogatives which would be excluded in relations private parties. For example, it may operate as the service concerned as a monopoly, or may finance it by compulsory contributions from those it benefits.

But even where the activity has the appearance of a *service public,* it may not come under the supervision of the administrative courts sime the special regime of administrative law is excluded. Such exclusion may be expressed by statute, or implied because the interests involved are ones traditionally within the protection of civil courts, or because the public authority decides to function under the same conditions as private operators.

In short, the choice of criterion has been swung back and fro between the concept of public service and public authority. However, the latter seems currently the preferable test for the competence of administrative judge. The basic principles for separating the functions of the administrative courts and the ordinary courts as indicated above would lead to giving jurisdiction to the ordinary courts only when the activity of public body was private in character. However, these principles are subject to a number of exceptions based on convenience more than principle. So, some disputes, although they arise from acts of public authorities, may in exceptional circumstances be left to the jurisdiction of ordinary courts. Hence, a watertight demarcation of jurisdiction cannot be made based on a single principle only.

It is suffice say that disputes involving administrative agencies, which arise out of the conducts of public authorities, are in principle falling under the jurisdiction of administrative courts. But the French administrative law gives a room for some exceptions to this principle.

5.4 The Advantages and Disadvantages of Administrative Adjudication

Technically speaking, judicial power/function is the primary function of courts. As mentioned somewhere else, the FDRE Constitution expressly vested judicial power, both at the Federal and State levels in courts. This goes in line with the principle of separation of state powers. However, it does not necessarily imply that only regular courts shall exercise judicial power. There are possibilities where judicial power may be delegated to other bodies falling outside the structure of ordinary courts. As can be inferred from the wordings of Articles 37(1) and 80(4 & 5) of the Constitution, such possibilities are not prohibited. Having said this, let us discuss the arguments developed concerning the advantages and disadvantages of delegating judicial power to administrative agencies

To begin with the advantages, judicial power is usually delegated to administrative agencies/tribunals with the purpose to provide cheap, accessible, informal, speedy and specialized justice. Concerning the paramount advantages of administrative adjudication over adjudication by ordinary courts, Philps, Jackson and Leopold: p886

> *…They (administrative tribunals) could offer speeder, cheaper and more accessible justice, essential for the administration of welfare schemes involving large number of small claims…. The process of courts of law is elaborate, slow and costly…it (court process) is to provide the highest standard of justice; generally speaking, the public wants the best possible article and is prepared to pay for it…. In administering social justice…the objective is not the best article at any price but the best article that is consistent with the efficient administration. Disputes must be disposed of quickly and cheaply for the benefit of the public purse as well as for that of the claimant*. [Philips, Jackson and Leopold: p 886]
>
> As can be inferred from this, the arguments asserted in favor of delegating adjudicatory power to administrative agencies can be summarized as follows:

- Expediency: administrative agencies are better than ordinary courts in disposing cases timely.

- Administrative adjudication is cheaper than court adjudication
- Administrative adjudication is more convenient and accessible to individuals compared to ordinary courts.
- The process of adjudication in administrative agencies is flexible and informal compared to the rigid, stringent and much elaborated ordinary court procedures.
- Another justification which is not included in the above suggestion, that is related to the special expertise knowledge administrative tribunals manifest as compared to ordinary court judges. Administrative tribunals are filled by a panel of persons vested with special skill and expertise related to the complicated dispute they adjudicate. Whereas ordinary court judges are generalists in law and lack such expertise knowledge on the needs of the administration in this technologically advanced world.

  In short, due to the informal adjudication process, liberal standards of evidence in administrative adjudication and the special expertise administrative tribunals demonstrate the possibility of getting quality justice timely and cheaply is very high. However, administrative/tribunal adjudication is not free of critics. Of the prominent critics are:

- Lack of legal expertise: The argument here is that, as many of the members of the panel are selected from different walks of life with no or little legal background, they may lack the requisite legal expertise to adjudicate disputes.
- Partiality: The fear here is that, as many or all of the members of the administrative tribunals are at the same time employees of the various offices or agencies, they might not be free from bias and partiality towards the agency.
- Violation of the principle of separation of powers and rule of law: Adjudication is the primary business of ordinary courts. So, transferring this power to administrative agencies is argued by some authorities to be a violation to this principle.

5.5 The Organizational Structure of Administrative Tribunals

As was incidentally stated earlier, the organizational structure of administrative tribunals is different from jurisdiction to jurisdiction. In some countries like France, there are tribunals of general jurisdiction that are hierarchically organized in a way that corresponds to the three-tier ordinary court structure. But many other countries appear to form tribunals of special jurisdiction here and there to address specific problems. The Britain and Austrian models may be taken as a typical example. The subsequent subsections will devote to discussing these two models of administrative tribunals in turn and to appreciate whether or not the organizational structure of administrative tribunals in Ethiopia fits to any of such models.

5.5.1 France

As you may recall from the previous discussions, in French there is a clear demarcation between administrative law and private law on the one hand and between the institutions that interpret and apply these laws to resolve specific disputes, i.e., administrative courts/tribunals and ordinary/regular courts, respectively.

The French formed a three-tier administrative court system having general judicial jurisdiction on administrative matters. The structure of French administrative courts having general jurisdictions, just like the ordinary courts, has a pyramidal form. At the apex, there is one "Conseil D'Etat" (council of state) in Paris, below which are the seven intermidiary regional "Cours Administraives D'Appel"(administrative courts of appeal) followed by the thirty-five "Tribunaux Administratifs"(administrative tribunals) in metropolitan France. The Conseil D'Etat is the court of final resort on administrative matters. It exercises appellate and cassation powers over decisions of subordinate to administrative courts. It has also original jurisdiction on some administrative matters. The Cours Administratives D'Appel is the administrative counter part of the French high court. It entertains appellant jurisdiction over justiciable administrative disputes brought from lower administrative tribunals and original jurisdiction in certain matters reserved to it. The Tribunaux Administratifs is the administrative counter part of the French first instance courts. It hears

administrative disputes at the first instance level. That is, it is the court of the first instance on administrative matters.

In addition to these administrative courts of general jurisdiction, there are a number of other administrative tribunals exercising judicial functions in particular spheres. They are referred to as specialized jurisdiction tribunals that entertain administrative disputes in particular fields of administration. Decisions of these specialized tribunals may be reviewed by the Conseil D'Etat by way of appeal or cassation. In general, the Conseil D'Etat(Council of State) plays advisory and judicial role on administrative matters.

5.5.2 Britain and Australia

Unlike in France, there is no integrated administrative justice system in many countries following the common law tradition. In Britain, for example, there are numerous specialized jurisdiction tribunals that exercise jurisdiction in particular fields of the administration. Conversely speaking, there are no structured administrative courts of general jurisdiction. Rather, there are numerous specialized tribunals having specialized jurisdiction limited to particular sphere of the administrative fields of activity. Many tribunals/ adjudicating agencies having first instance jurisdiction over administrative disputes are found in almost all the particular spheres of the administration. There are also numerous specialized jurisdiction administrative review tribunals that are established to entertain cases appealed from lower adjudicating agencies or tribunals.

However, the system in Australia is a bit different from that of the Britain counter part. In addition to the several first instance and administrative review tribunals having specialized jurisdiction to entertain administrative disputes or to review administrative decisions in particular sphere like in the case of Britain, Australia has also established Administrative Appeal Tribunal (AAT) entrusted with a general jurisdiction to conduct merit review on administrative decisions and on the decisions of many of the specialized tribunals. After the time of the establishment of AAT in 1975, some existing specialized merit review tribunals were abolished and many

review procedures were subsumed in the new AAT structure. But there are still several specialized administrative merit review tribunals that operate alongside the AAT. This kind of arrangement is absent in Britain where there are thousands of specialized jurisdiction administrative tribunals that operate in particular sphere of the administration. In Australia, in addition to the multitudes of specialized jurisdiction tribunals like in the case of Britain, there is Administrative Appeal Tribunal (AAP) having a general jurisdiction to conduct merit review on administrative decisions. But there are also some specialized administrative review tribunals that operate side by side with AAP and whose decisions cannot be subjected to review by AAP. The Administrative Appeal Tribunal is the highest merit review court on administrative matters subjected to its jurisdiction. However, disputes on points of law can be appealed to the Federal Court of Australia and in exceptional circumstances upon special leave to the High Court of Australia, which is the highest court in the Australian judicial system. The striking feature of Australian administrative system is that, unlike in the French system, technical review of administrative decisions including the decisions of the AAT can be carried out by the Federal Court of Australia and in exceptional situations by the High Court of Australia.

5.5.3 Ethiopia

In Ethiopia, like in many common law countries, there is no integrated administrative justice system. There are some sector wise tribunal-like adjudicating agencies/ known by different names such as disciplinary committees, boards, commissions and so on that have the first instance (original) jurisdiction in particular aspects of the administration. There are also tribunals that exercise appellant jurisdiction in particular sphere of the administrative field. The Civil Service Commission Tribunal that assumes appellate jurisdiction on complaints of civil servants brought from the various government organs or bureaus governed by the civil service law, the Social Security Appellate Tribunal that entertains appellate jurisdiction on complaints related to social security benefits and the Tax Appeal Commission that hears tax related disputes on appeal are typical examples of the specialized jurisdiction administrative review tribunals. The Labor Relation Board that hears industrial/labor disputes of collective nature between employers and employees is another example of special

jurisdiction tribunal, although it may not fall within the technical definition of the term "administrative" tribunal as it is dealing with disputes between two or more individuals based on the ordinary substantive law of the country as contrasted to the administrative law. Under the draft of the Federal Administrative Procedure Proclamation No. 2001, an attempt was made to establish "Federal Administrative Grievances Appellate Court", which is a division within the Federal High Court that was intended to assume appellate jurisdiction over all final administrative decisions of all federal agencies. However, the document remained in the status of a draft for almost a decade. Regardless of whether such general jurisdiction administrative court/tribunal be established as a special division within or as an independent body outside the structure of ordinary courts, its existence would be quite important in developing standardized and integrated administrative justice system.

5.6 Qualification, Appointment and Dismissal of Administrative Judges

Needless to say, that competent and impartial tribunals are extremely important in promoting rule of law and good governance within the administrative system. Taking this fact into consideration, many countries formed administrative tribunals that are appropriate to their respective realities. As stated above, the organizational structure of the administrative tribunals varies from jurisdiction to jurisdiction. There are also differences concerning the qualification, composition, appointment and dismissal of the personnel of administrative tribunals from country to country. To appreciate the magnitude of the difference, comparisons are made below among three countries – France, Australia and Ethiopia.

France: As was discussed earlier, there is three-tier administrative justice system in France- the council of state at the apex, the administrative courts of appeal at the intermediary and administrative tribunals at the bottom of the pyramid. The council of state (Consel d'Etat) plays a double role both as an advisory body charged with advising ministers and the head of state on the drafting of legislation and regulations and on administrative matters generally, and as a judge of final resort of the administration. As the membership of the Conseil d'Etat, it is part of the French

administration and staffed entirely by civil servants. As to the manner of recruitment, there are two distinct avenues of access to the Conseil d'Etat: examination and invitation.

Most members of the Conseil d'Etat are recruited from the National School of Administration (l'Ecole Nationale d'Administration) which was founded by the Provisional Government of General de Gaulle in 1945 to serve as a graduate staff college for the higher ranks of the administration. Admission to l'Ecole Nationale Administration (l'ENA as it is popularly called) is by a stiff concours, or open competitive examination, one being conducted for recent graduates of universities and other comparable institutions (only a minority being law graduates), and a second for those who are already members of the civil service. After two years of intensive studies, the outgoing class is arranged in order of merit according to their performance in the final examination and over the course as a whole. Depending on this placement, each successful graduate from l'ENA then chooses from among the administrative posts which happen to be available at the time. The double sieve imposed by the concours on entry and the placing at the end of the course guarantees that entrants to the Conseil by way of l'ENA are necessarily of the highest intellectual quality. In addition, the nature and content of their strenuous course at l'ENA ensures that they have a thorough training (both theoretical and practical) in the field of public administration.

The other method of recruitment is by way of the 'active administration' or invitation. It is a long-standing practice to recruit about a quarter of the entrants to the Conseil d'Etat 'from outside', that is from the rank of those who have already distinguished themselves in the practice of public administration. Recruits of this second category will necessarily be considerably older than those in the first and will usually enter at the higher levels of Conseiller (the highest grade) or Maitre des requetes (the intermediate grade). Currently, one Conseiller out of every three and one Maire des requete out of every four must be recruited externally. This mixed system of entry provides the Conseil with a remarkable combination of young intellect and mature experience. It ensures that the Conseil has within its ranks both theoretical and practical expertise in public administration. Recruitment to the lower courts (*Cours*

Administrtives d'Appel and Tribunaux Administratifs) resembles *Conseil d'Etat* that tdiscussed above.

Membership of the *Conseil* is divided into three basic grades: Conseiller (the highest grade) Maitre des requetes (the intermediate grade) and the Auditeur (the lowest grade or 'Auditorat', which is in turn subdivided into Auditeur de premiere classe and Auditeur de seconde classe). There are also certain posts of special responsibility. Members of the Conseil are civil servants (fonctionnares) with the usual safeguards, which French law confers in matters of promotion and discipline. In matters of discipline, the reform of 1963 has provided a number of new safeguards, but members of the Conseil still lack that status of irremovability, although practically it is unthinkable that a member should be dismissed or otherwise disciplined by reason of political consideration. However, members of the lower tiers of administrative courts are conferred with the status of irremovability; they cannot be transferred to a new post without their consent, even by way of promotion.

Australia: The Australian Legal and Judicial System is based on the common law tradition. As discussed earlier, there are multitudes of the first instance jurisdiction and the second instance (appellate) jurisdiction specialized administrative tribunals on the one hand, and a merit review Administrative Appeal Tribunal (AAT) having general jurisdiction over the majority of cases decided by lower administrative tribunals and other similar administrative bodies, on the other hand. Decisions of the AAT related to the merit of the case are final. But disputes on points of law can be appealed to the Federal Court of Australia and upon leave further to the High Court of Australia, which is the court of highest judicial resort in the Australian Legal System.

The AAT of Australia is a federal merit review tribunal. Merits review is usually performed by tribunals set up explicitly for that purpose. The Federal tribunal is known as the Administrative Appeals Tribunal (the AAT) and its equivalent in NSW is the Administrative Decisions Tribunal (the ADT). Victoria also has an administrative tribunal known as the Victorian Civil and Administrative Tribunal (VCAT).

Members of the Tribunal consist of a president, presidential members (including

judges and deputy presidents), senior members and members. The President must be a judge of the Federal Court of Australia. Some presidential members are judges of the Federal Court or Family Court of Australia. All Deputy Presidents must be lawyers. Senior members may be lawyers or those who have special knowledge or skills relevant to the duties of a Senior Member. Members have expertise in areas such as accountancy, actuarial work, administration, aviation, engineering, environment, insurance, law, medicine, military affairs, social welfare, taxation and valuation.

A President, who must be a judge of the Federal Court of Australia, is appointed by the Attorney-General to head the Tribunal. Members are appointed for a term that extends up to seven years.

The NSW ADT has a similar structure and purpose, but it is concerned with government decisions made at the states rather than at the federal level. The expertise of non-judicial members can be of considerable value, particularly in technical areas where lawyers might not be the most appropriate decision-makers. Lawyers and judicial officers who sit on a tribunal are not performing a judicial role.

Ethiopia: As was discussed earlier, there are different tribunals and tribunal-like adjudicating agencies of special jurisdiction. In the Federal Democratic Republic of Ethiopia Many of the first instance jurisdictions adjudicating agencies are found within the umbrella of many different administrative heads known with different names such as disciplinary committees, boards, and so on.

There are also second instance (reviewing agencies/tribunals) that are formed by statutes to hear grievances on appeal in different areas of the administration activities. As indicated earlier, the Federal Civil Service Commission Appeal Tribunal, the Social Security Appeal Tribunal and the Tax Appeal Tribunal are the prominent ones. There are also regional tribunals that are operating in the respective regions of the federal units. There is no general requirement set governing the qualification, appointment, composition and tenure of the personnel of administrative tribunals in Ethiopia.

5.7 Inquiries

In this complex technological and democratic world, in addition to tribunals that investigate facts and apply laws to resolve specific administrative disputes, the formation of inquires that conduct fact and/or legal findings and provide recommendation to ministers or other agency heads to take policy considered action based on the findings of facts is becoming a paramount importance. Inquires are concerned with fact-finding directed towards making recommendations on questions of policy. The statutory inquiry is the standard device for giving a fair hearing to objectors before the final decision is made on some question of government policy affecting citizens' rights or interests.

Contrasting to the difference between tribunals and inquires, two joint authors noted as follows:

> *The typical tribunal finds facts and decides the case by applying legal rules laid down by statute or regulation. The typical inquiry hears evidence and finds facts, but the person conducting it finally makes a recommendation to a minister as to how should the minister act on some questions of policy, e.g. whether he should grant planning permission for some development scheme. The tribunal needs to look no further than the facts and the law, for the issue before it is self-contained. The inquiry is concerned with the local aspects of what will usually be a large issue involving public policy which cannot, when it comes to the final decision be resolved merely by applying law. Tribunals are normally employed where cases can be decided according to rules and there is no reason for the minister to be responsible for the decision. Inquires are employed where the decision will turn upon what the minister thinks is in the public interest, but where the minister, before he decides, needs to be fully informed and to give fair consideration to objections… Where an appeal has to be decided by a minister, he must necessarily appoint someone to hear the case and advise him (*Wade and Forsyth, 910-911).

In a nutshell, inquires, unlike tribunals, cannot pass binding decisions but, as their name indicates they inquire or search for facts by conducting preliminary fair hearing on objections raised against proposed administrative actions. Based on the results of the fact finding, the inquiry recommends the concerned minister or agency to take or not to take a certain course of action, although the latter may not be bound by the recommendation involving policy considerations.

5.7.1 Inquiries in Ethiopia

Having defined inquires as impartial fact finding devices that are established by law to assist decision makers, it deems now quite important to appreciate some of the statutory inquires operating in Ethiopia. Some inquires are event derived that have temporary existence that remain valid until accomplishing the specific fact finding assignment given to them by law. Examples of such inquires are the Inquiry Commission established under proclamation No.398/2004 to investigate the conflict occurred in Gambela Regional State on December 13,2003, and the inquiry commission established to investigate the proportionality of the measures taken by the Ethiopian security forces to control the post election crisis happened in 2005. These inquires were established by proclamation with specific mandate of fact-finding limited to space and time. Such type of inquires usually dissolve immediately after accomplishing their mandate in accordance with the terms of references.

There are also inquires that have permanent in nature. Inquires falling under this category, although they are usually with specific mandate, have permanent institutional existence. The following are prominent example of such inquires:

- The Council of constitutional inquiry established by proclamation no. 250/2001;
- The Human Rights Commission and the Institution of Ombudsman;
- Anti corruption commissions established at federal and regional levels.

Review Questions

1. What is agency/administrative adjudication?

2. Discuss the peculiar features of the adjudicative (judicial) powers of the administrative agencies.
3. Discuss the advantages and disadvantages of agency adjudication.
4. Explain the main differences between formal and informal agency adjudication.
5. What are administrative tribunals?
6. What makes tribunal adjudication preferable to adjudication by regular courts?
7. Discuss the similarities and differences between tribunals and inquiries.
8. Provide a list of administrative tribunals and inquiries operating under the federal level or in the region' to which you are familiar.

UNIT SIX CONTROLING MECHANISAMS OF GOVERNMENTAL POWERS

Introduction

So far we have thoroughly appreciated that the concern of administrative law is regulating the powers of administrative agencies lest abuse of such powers may cause prejudice to public interest in general and to individual interest in particular. In addition to creating various administrative agencies and empowering them with necessary power to carry on specific social, economic and political programs in the interest of the public, administrative law puts appropriate controlling mechanisms that restrain administrative agencies within the scope of the powers entrusted to them. So, this unit tries to outline the various modalities of controlling the powers of the administrative agencies. The discussion begins with the appreciation of the question why the need for controlling the powers of administrative agencies becomes of paramount importance. This unit also provides in-depth discussion on the various legal and institutional mechanisms that may be devised to control the powers of administrative agencies in various circumstances.

Objective**s**

At the end of this unit, the students are expected to:

- Appreciate the need for and the mechanisms of controlling governmental power.
- Explain the modalities used by the parliament controls the executive branch and administrative agencies- particularly in light of the F.D.R.E constitution
- Define Ombudsman and Human Rights Commission
- Appreciate the significance of the Ethiopian Human Rights Commission and Ombudsman in protecting human rights and promoting good governance.
- Identify the procedure of initiation and investigation of complaints by the Ombudsman and Human Right commission.
- Understand the meaning of maladministration and its scope in Ethiopia.

- Enumerate instances which could properly be categorized as cases of maladministration
- Evaluate the principles of impartiality, independency and accessibility, as applied to the Ethiopian Ombudsman Office and Human Rights Commission
- Indicate the remedy for an aggrieved party.

6.1 The Need for Controlling the Powers of Government

As it has been thoroughly discussed in the previous units, there are great possibilities that the three powers of government may be concentrated in the hands of many administrative agencies. The delegation of rulemaking and adjudicating powers to administrative agencies become an inevitable phenomenon of the complex technological world. In addition to the broad discretionary administrative powers originally entrusted to the executive organ and its agencies by the constitution, the delegation of rulemaking and adjudicating powers to these agencies, although may be justified by certain social and economic rationales, pose an inevitable threat on individual freedom and liberty. As propounded by the French political philosopher, Montesquieu, where the tripartite powers are merged in the same person, or in the same body, there can be no liberty as the life and liberty of the subject would be exposed to arbitrary control. So, the rational fear created by the concentration of the tripartite powers (administrative, legislative and judicial) in the hands of the same person or body of persons coupled with the discretionary nature of administrative powers which is susceptible to abuse, urges for devising legal and institutional devices that are important to control the arbitrary exercise of powers by administrative agencies.

The principle of separation of state power is proved to be an effective mechanism for controlling abuse of powers. It is founded on the presumption that the division of state power between the legislature, executive and the judiciary can best protect individual liberty and democracy. The purpose of the principle of separation of power is to prevent any single branch of the government from becoming too powerful, providing a series of checks and balances; it is to curve despotism and arbitrariness and to promote liberty, democracy and good governance by creating a system of check and

balance. As **James Madison** noted in the Federalist No. 47: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."

However, the doctrine of separation of state power among the three branches of government should not be interpreted in its extremity. In reality, there is no move for the pure separation of state power as such in this contemporary world. Because of the various social, economic and political justifications discussed in the previous chapters, the delegation of rulemaking and adjudicating powers to administrative agencies is becoming an inevitable and blessing phenomenon in this technologically advanced and complicated world. Thus, acknowledging the inevitability and importance of the delegation of relatively broad discretionary powers to administrative agencies in this complex world; appreciating the resultant possibilities of concentration of tripartite powers in the hands of a government agency, and the possibility these powers may be abused unless checked, there comes the need to devise the mechanism for controlling the powers of these agencies. The existence of various checking mechanisms of power may induce administrative agencies to use the powers entrusted to them in the interest of the public. In relation to this issue, the Chief Justice of the Australian High Court, the Honourable AM Gleeson, quoted from an article written by the Chief Justice of Canada in 1998 that exposes the underlying philosophy of administrative law as follows:

> *"Where a society is marked by a culture of justification, an exercise of public power is only appropriate where it can be justified to citizens in terms of rationality and fairness. Arbitrary decisions and rules are seen as illegitimate. Rule by fiat is unaccepted. But these standards do not just stand as abstract rules. Indeed, most importantly, the ability to call for such a justification as a precondition to the legitimate exercise of public power is regarded by citizens as their right, a right which only illegitimate institutions and laws venture to infringe. The prevalence of such a cultural expectation is, in my view, the definitive marker of a mature Rule of Law."*

No matter how fair and efficient a bureaucracy is, it will always require supervision. Abuses of power can never be entirely eliminated. Legitimate differences of opinion are bound to arise between honest bureaucrats and honest citizens. Moreover, the mere possibility of review helps ensure that the first-instance decisions are considered and rational.

6.2 Controlling Mechanisms

As the experience of many jurisdictions in the modern democratic world indicates, there are different devices that can be used to control the powers of administrative agencies. That is, there are different controlling mechanisms that can be set in parallel to supplementing each other in checking the powers of administrative agencies. Some of the commonly used controlling mechanisms are:

- Internal administrative review by superior officials;
- Parliamentary control;
- Political control;
- External administrative review by tribunals;
- External scrutiny and recommendations by Ombudsmen and other watchdog institutions and
- Judicial control

Most of these controlling mechanisms are introduced through legislation in many jurisdictions. The diversification of the controlling mechanisms is partly justified by the perceived inadequacies of each mechanism to check the ever increasing involvement of the government in matters that affect the interest of the citizens. They were designed to improve the quality of administrative decision-making by providing effective alternative checking mechanisms that would be appropriate under the given circumstance. Putting the appropriate controlling or checking mechanisms in place would promote the following benefits:

- Improves the quality, efficiency and effectiveness of government decision-making generally;
- Enables people to test the legality and merits of decisions that affect them;

- Provides mechanisms for ensuring that the government acts within its lawful powers;
- Provides mechanisms for achieving justice in individual cases and
- Contributes to the accountability system for government decision-making.

6.2.1 Internal control

The term internal control refers to the type of controlling mechanisms that are set within the organizational structure of the various administrative organs of the government. For administrative convenience, administrative agencies usually have internal structure. Formally or informally, original decisions of the authorities within the lower structure of the administrative hierarchy are subjected to review by those in the next upper hierarchy. Internal review is the process by which original agency decisions are reviewed on their merits within the responsible government agency. An internal review officer can usually substitute a new decision if the decision under review is found to be defective on matters of law, the merits or administrative process. In some areas of government administration, there is a formal system for the internal review of agency decisions. The internal review system in these areas is created and regulated by legislation, in the same way as other review methods. Even where there is no statutory requirement, it is common for an informal internal review system to be established on an administrative basis within government agencies.

In the parent act/ enabling legislation or an executive order as the case may be, a mechanism for internal review may be established. As stated above, an internal review is a process by which original agency decisions are reviewed on their merits within the responsible government agency. This type of review gives opportunity for agencies to reconsider their decisions and rectify the mistakes, if any. The enabling legislation or the executive order by which the agency is created may include, in that act, a formal system for the internal review of agency decisions. In the absence of such formal mode of controlling, the agency using its discretion can set informal controlling mechanisms in place.

6.2.2 External control

The term 'external control' in administrative law context refers to the various limitations imposed upon the powers of administrative agencies by other authorized bodies that are found outside the structure of such agencies. These types of controlling mechanisms include executive/political control, parliamentary/legislative control, control by administrative tribunals, judicial control, control by watchdog institutions and the mass media. Despite the difference in the mode and scope of these controlling mechanisms, all of them have positive contribution in promoting the principles of good governance.

6.2.3 Parliamentary Control

As was repeatedly stated earlier, while appreciating the importance of delegating powers to administrative agencies in promoting efficiency and effectiveness in the administration and implementation of public policies, it is equally important to take note that unless otherwise safeguards are put in place, such power may be abused and used to promote evil motives. Having appreciated the side effects of delegation of rulemaking powers to administrative agencies, the parliament can put effective checking mechanism in place. First and foremost, the parliament has to make sure that all necessary precautions are taken that the enabling legislation/parent act does not devolve wide delegated powers which may be difficult to control. These include attaching riders to agency appropriation bills, conducting oversight hearings, reducing agency budgets, and amending statutes. Of course, if the legislature is extremely dissatisfied with the performance of a particular agency, it may rewrite the statute that created the agency in the first instance. By amending the appropriate statute, the legislature may enlarge or contract the agency's jurisdiction as well as the nature and scope of its rulemaking authority**.** In this regard, it is quite important to appreciate the experience of Britain and United States together with Ethiopia for comparative purpose.

6.2.3.1 In Britain

From Cumper &Walters, Constitutional & Administrative Law pp. 26b-271.

There are different procedures for controlling delegated agency legislation. As with primary legislation there is an opportunity for the extent and purpose of the delegated legislation to be discussed, both in the parliament and at the committee stage. The usual procedures of both Houses may be employed (e.g., parliamentary question time, adjournment motions etc.). However, the very pressure on parliamentary time which in the first place necessitates delegation may actually prevent any really effective consideration at this stage in the first place. Instead, control may be exercised through procedural requirements for laying the instrument before the parliament, or through scrutiny by the Select Committee on Statutory Instruments.

Laying the Instrument before Parliament

Laying the Instrument before Parliament is a procedural requirement that the parliament may use to check the legality of an agency's delegated legislation at various stages. Whether or not an instrument must be laid before the parliament will depend on the provisions of Parent Act. An instrument is usually presented before both Houses, with the exception of financial matters, which are only laid before the Commons. As Cumper & Walters stated, laying before Parliament may take one of the following forms:

(a) **Laying simpliciter:** The Parent Act may do no more than make it obligatory for the instrument to be laid on the table of both Houses for the information of members. No resolution is necessary for the instrument to become effective.

(b) **Laying subject to negative resolution**

In this case, there are two types of procedures. The first is that the final instrument to be laid down before the parliament will automatically come into force after 40 days, unless before the expiry of that time either the House passes a resolution that the order be annulled. The second is that an order may also be laid in draft form subject to a similar resolution that no further proceedings is be taken – in effect a direction to the minister is not to make the instrument.

In both cases, no amendments can be made so it can only be accepted or rejected. The 40 days excludes any time during which the parliament is dissolved.Minister concerned will usually be able to count on a government majority, it is unlikely that such an instrument would be annulled.

(c) **Laying subject to an affirmative resolution**

By this procedure an instrument which is not approved within 40 days of its being laid before the House will not come into effect. Minister concerned must therefore, present the instrument for approval and government time must be found to deal with it. Usually amendments are not possible. An instrument may also be laid in draft subject to an affirmative resolution before it can be 'made'. The instrument can be laid down in one of the following three forms:

- Laying of draft instrument before the parliament and requiring affirmative resolution before instrument can be made;
- Laying instruments after it had been made to come into effect only when approved by affirmative resolution;
- Laying of instruments that take immediate effect but requires approval by affirmative resolution within a stated period as a condition for its continuance.

Scrutiny in Committee: This is another important controlling mechanism of agency rulemaking widely used in Britain. A joint committee of both Houses of the Parliament scrutinizes statutory instruments and draft instruments where appropriate. The Joint Select Committee on Statutory Instruments is required to consider whether the attention of each House should be drawn to the instrument. The department concerned should first be given the opportunity to forward its case. The committee consists of seven members of each House, Council to the speaker and Council to the Lord Chairman of Committees. It is a convention that the chairperson is from the opposition.

The most important aspect of the Joint Select Committee on Statutory Instruments is that it submits regulations for parliamentary debate and scrutiny. Government departments are aware of its 'critical eye'. Adverse reports from the Committee can lead to a prayer for annulment, or force a department to revoke, or amend a particular instrument.

In addition to the scrutiny of subordinate legislations by Parliament and the Joint Select Committee, there exists also 'political' control through the procedural requirements of consultation and publication. Acts of parliament sometimes provide that the Minister may or shall consult with interested bodies or advisory committees before issuing regulations. The Parent Act may, therefore, stipulate that there must be consultation in either general or specific terms. Consultation with interested parties is now common for the reasons of political expediency as well as legal necessity. Such bodies may be specified in the Act or chosen at the Minister's discretion but, while Ministers may be obliged to consult, they are not normally bound to follow the advice offered. As to the effect of publication, delegated legislation usually comes into force when it is made unless some other date is specified in the Parent Act. Twenty-one days are usually allowed from the date it was laid before the Parliament. Section 2 of the Statutory Instrument Act 1946 provides that after a statutory instrument has been made, it shall be sent to the Queen's Printer of Acts of Parliament. There it is printed, numbered and usually made available to the public at Her Majesty's Stationary Office as soon as possible. The basis of the requirement of the publication is that if every person is to be presumed to know the law, then the contents of the law must be accessible to him/her.

6.2.3.2 United States

From Aman & Mayton, Administrative Law (2nd ed.), PP. 565-612

The US Congress has a variety of ways of exercising its oversight functions. First, along with the executive branch, the Congress is involved in the appointment process. Agency heads and other "officers of the United States are appointed by the President with the approval of the Senate. The Congress also has the "power of the Purse" and agencies must regularly submit their operating budgets to the Congress. In addition, Congress may compel an agency to report to it regularly by means of committee or subcommittee hearings or more formal, field reports. These reports and hearings can also encourage informal contacts between agency and congressional staffs that provide another form of congressional feedback and oversight.

The Congress also exercises various forms of statutory control. The Congress delegates power to agencies by the statutes it drafts. An agency's enabling regulatory

statute defines the scope of the agency's authority and the Congress sets forth the procedures that an agency must use in exercising its authority and it establishes the agency's structure. The Congress can and does create a variety of agency forms and structures, each with different implications for the relationship of that agency to the Congress and the Executive Branch. Based on their organizational structure, administrative agencies can be classified into independent and dependent agencies. Independent agencies serve under the Congress and have been described as the agents of the Congress.

Political control of the agency's discretionary power is perhaps the other most visible and most effective means through which the Congress can exert influence over the administrative agencies through the appropriate process. Budgetary hearings in both of the Houses of the Congress are opportunities for members of the appropriation committee to review agency performance, and affect future agency policy by changing the levels of funds appropriate for certain purposes.

After passing the authorizing legislation for an agency and appropriating funds to it, the Congress can still monitor the performance of an agency through the process of the congressional oversight. Oversight is an important test of the political acceptability of the regulation. Statutory standards usually do not provide precise notice of the policy which will emerge from the agency so that many people who have never had the chance to affect the formulation of the legislation may be affected by its implementation. Many statutes specifically provide for periodic oversight hearing by the Congress. In addition, a congressional committee or subcommittee can call an oversight hearing at any time to enquire into a particular agency's policies and programs. Such hearings are particularly valuable to the members of the Congress because of the fact that they provide legislators a visible opportunity to press for regulatory initiatives which can affect the public interest. They are especially effective when undertaken by committees which focus on specific areas of policy. In addition to the formal oversight devices of a committee hearing, there exist less formal ways through which individual members of the Congress can exert influence over agency policymaking. One method used by every member of the Congress is intervention in matters pending before an administrative agency, usually those that made on behalf of the constituents. The nature of these inquiries made by members of the congress and

their staffs to agency personnel can range from status reports on an individual's request currently before the agency to complaints regarding the substance or procedure of the current regulatory scheme. While this type of activity will not usually lead to substantive changes in a particular agency's regulatory scheme, it can lead to an accelerated decision on a particular party's claim before the agency, or an informal review of procedures by agency officials who are aware of the potential power which an individual member of the congress may hold. It is proper for a member of the Congress to represent vigorously the interest of his or her constituents before an administrative agency engaged in general rulemaking so long as he or she does not frustrate the intent of the Congress as a whole or undermine the applicable procedural rules.

Another important mechanism that the US Congress controls Agency Discretion is through the Statutory Techniques. Over the years, the Congress has also passed numerous statutes which are designed to affect the substance of agency decisions through the implementation of generic procedural requirements. One of these statutes is that the National Environmental Policy Act of 1969 (NEPA). That Act was a response to a growing national concern over the state of the environment. It sets forth procedural requirements to assure that agencies will consider substantive environmental values in the formulation and implementation of policies. The core of the Act is a requirement that an agency must prepare on environmental impact assessment report before taking any major administrative action. This report must identify the possible effects of the proposed action on the environment, and must evaluate possible alternatives. Although NEPA does not say that all actions which are hazardous to the environment must be avoided, it has the effect of the increasing administrative awareness of the environment, and often fosters rethinking of government actions. Another statute through which the Congress is able to influence administrative policy through procedural means is the Regulatory Flexibility Act of 1980 (RFA), that also amended in 1996. Through out the mid of the sixteenth to late seventies the Congress became increasingly concerned with the impact that regulation, especially environmental and health regulation, upon small business. These regulations often had a disproportionately greater economic effect on small business, hurting their competitive positions. Under the RFA, an agency must study the economic effect which proposed actions will have on small businesses, as well as

review and reevaluate regulations. By requiring that agencies consider a rule's impact on small businesses, this statute effectively slows down the development of new initiatives and fosters the development of alternative actions.

The 1980 Regulatory Flexibility Act (RFA),that also amended in 1996, requires that whenever agencies engage in rulemaking they should consider special circumstances and problems of the small entities. In 1996, the Act was extended to Internal Revenue Service (IRS) interpretive rules that regulated information collection from small entities. Each time the agency promulgates an information collection rules, it must prepare a regulatory flexibility analysis that describes the likely effect of the rule on the small entities. The Unfunded Mandates Reform Act of 1995 also triggers regulatory review. This legislation requires the Congress and the federal agencies (except independent agencies) to give special consideration to all legislations and regulations likely to impose mandates on state, local, and tribal entities. Agencies in particular are required to prepare a regulatory analysis for any rulemaking likely to impose costs in excess of 100 US Dollars on the private sector.

Legislative Veto was the other mechanism through which the US Congress has been exerted control over agency rulemaking. Prior to the Supreme Court's decision in *INS v*. Chadha, one house and two house vetoes were common methods by which the the Congress sought to control agency rulemaking. Though the Court's opinion in *Chadha* dealt only with a one-house veto of the suspension of a deportation order by the Attorney General subsequent Supreme Court decisions have applied *Chadha* to two-house vetoes as well as agency rules. Various alternatives to the veto have become more popular. One of these alternatives is sunset legislation. Another is the use of joint resolution either to disapprove agency action or to conditionally approve them in advance. Similarly, the Congress can order agencies to "report and wait" before implementing new regulations, giving chances to the Congress to intervene with legislation, if it is needed. Given the demise of the legislative veto, the political, statutory and structured controls discussed above have now taken on even greater significance.

In 1996, a new chapter was added to Title 5 of the U.S. Code, and like the RFA and the Paperwork Reduction Act of 1980, Chapter 8 directly affected agency's

procedures. The title of the chapter is Congressional Review of Agency Rulemaking. Although the definition of the "rule" is broad, the focus of the legislation on the "major rules". A major rule is defined as one having a significant impact on the economy, particularly on those whose annual economic effect is likely to be more than 100 million US Dollars. Under the statute, agencies are required to submit to both the Houses of Congress and the Comptroller General, a report containing information that can be used to evaluate the proposed rule. This report includes a cost-benefit analysis of the rule, if any, a regulatory flexibility analysis, and an analysis pursuant to the Unfunded Mandates Reform Act of the 1995.

6.2.3.3 In Ethiopia

Like in the case of the countries mentioned above, the Parliament of the FDRE also has the power to control the discretionary power of the executive organ of the government including all the dependent agencies established under the umbrella of the executive and those independent agencies that fall outside the organizational structure of the executive organ of the government. As clearly stipulated under Article 50(3) of the FDRE Constitution, the respective legislatures of both of the Federal and the State governments are the highest authority of the respective governments. Being the highest organ of the government, the House of Peoples' Representative (hereinafter referred to as the legislature) has the power to exercise supervisory power over the administrative organs of the federal government. As clearly stated in Article 55(17) of the FDRE Constitution, the legislature "has the power to call and to question the Prime Minister and other Federal officials and to investigate the Executive's conduct and discharge of its responsibilities." Article 55(18) also dictates the legislature to discuss any matter pertaining to the powers of the executive "at the request of one-third of its members" and "to take decisions or measures it deems necessary." Furthermore, in accordance with Article 74(11) of the FDRE Constitution, the Prime Minister is required to submit periodic reports of the activities accomplished by the executive as well as its plans and proposals to the House of Peoples' Representatives.

In a similar vein, the cumulative reading of the relevant provisions of the FDRE House of Peoples' Representative Working Procedure and Members' Code of Conduct (Amendment) Proclamation No. 470/2005 under scored that the House of Peoples' Representative has the power to call and question the Prime Minister and other Federal officials with a view to oversight and check them whether or not their activities are carried out in accordance with the set rules and regulations. All this clearly indicates that the parliament has the power to hold discussion at the floor concerning the conduct of the executive and other federal officers and to take remedial measure thereof.

The parliament can also exert control over the behavior of the government through the budgetary processes. Usually the executive organ of the government and some of the other administrative agencies prepare and defend their budget before the parliament. When the parliament is not happy with the performance records of the past and /or the current fiscal year, it may resort to cutting off the proposed budget of the concerned agency for the next fiscal year. The Legislature has also the power to oversight the conduct of the executive and other federal officers through the instrumentality of its standing committees. The various standing committees of the parliament can visit the concerned institutions and offices to observe whether or not they are discharging their responsibilities to the level of their expectation in accordance with the law. Each standing committee of the parliament can bring to the attention of the parliament any act of the executive organ of the federal government and federal offices that necessitates parliamentary deliberation.

Many administrative agencies are formed by acts of the parliament (usually referred to as the parent act or enabling legislation). In the parent act, the legislature can specify the scope of the power entrusted to an agency and incorporate principles, guidelines and standards that regulate the decision-making process of the agency. In this regard, the legislature can play a great role in controlling the agencies by clearly defining their respective powers, procedures and structures. Where circumstances justify it, in addition to shrinking the activities of the agency by cutting off the budget in case of need, the legislature is also at liberty to demolish the agency by another legislative act.

However, in Ethiopia, unlike in the countries discussed above, there is no formal procedure by which the parliament can control the rulemaking power of the administrative agencies. For example, except for the regulations issued by the Council of Ministers at the Federal level and by the respective counter part federal units, there is no general formal requirement for other administrative rules to be published in the register (Negarit Gazette). An attempt was made to regulate the rulemaking process of the administrative agencies under the Draft Federal Administrative Procedure Proclamation No. 2001. Had the draft been adopted in the form of law, it would have been facilitated the so-called political control of rulemaking powers of the administrative agencies. Because the draft incorporated a number of requirements that ensure, among other things, public participation and publication of the rules adopted.

6.2.4 Executive Control

The executive organ of the government also has the power to oversight the activities of the various government offices in different modalities. As it was discussed somewhere else, there are possibilities whereby some administrative agencies may be formed by executive order without the blessing of the parliament. Those agencies or bureaus formed under the executive hierarchy (referred to as executive dependent agencies) are subject to the supervision of the executive organ of the government. So, the concerned ministry of the government can put different modalities of control to ensure whether or not the authorities formed under its hierarchy are acting within the bound of the law. In relation to this, Article 77 of the FDRE Constitution, which deals with the powers and functions of the Council of Ministers, in its sub-Article 2 states that the Council of Ministers "shall decide on the organizational structure of ministries and other organs of government responsible to it; it shall coordinate their activities and provide leadership."

The executive organ of the government may also exercise some indirect control over the so-called independent agencies that are accountable to the Legislative organ of the government. In this regard Article 74(7) of the FDRE Constitution is worth mentioning. It says "He [the Prime Minister]" as the chief executive has the power to select and submit "for approval to the House of Peoples' Representatives nominations

for posts of Commissioners …and Auditor General." This indicates that the executive organ of the government can have a sort of loose control over the independent agencies as well.

In many cases, there are also dual accountability systems. For example, as it can be inferred from Article 76(2) & (3) of the FDRE Constitution, the Council of Ministers are made jointly accountable to the Prime Minister and to the House of Peoples' Representatives, respectively. Thus, in the exercise of the powers entrusted to it by the constitution and other legislations, the executive organ of the government can oversee the activities of the various administrative agencies of the government responsible to it.

6.2.5 Control by Administrative Tribunals

The decisions of administrative agencies can also be subjected to the supervision of administrative tribunals. As it has been briefly discussed previously, administrative tribunals are the administrative counter part of ordinary courts. Technically speaking, administrative tribunals also referred to as administrative courts: courts that are established outside the organizational structure of ordinary/regular courts. In terms of function, administrative tribunals are similar to ordinary courts, as both are entrusted with judicial power. Having said this as a compliment to the previous discussion, let us briefly see the type of control administrative tribunals exercise over the administrative agencies.

Despite the differences in terms of appointment, composition, jurisdiction, and tenure and so on from one country to another country, administrative tribunals exercise important supervisory role over the decisions of administrative agencies. Administrative tribunals undertake merits review over the decision of administrative agencies falling under the former jurisdiction. The purpose of a merits review action, as explained by the Australian Administrative Review Council, is to decide whether the decision which is being challenged is 'correct and preferable' decision. The Council provided this explanation by making reference to the defect it observed in a leading case as follows:

> *In the leading authority on the role and function of the AAT [Administrative Appeal Tribunal] in undertaking merits review of decisions- the decision of the Full Federal Court in Drake v Minister for Immigration and Ethnic affairs (1979) 24 ALR 577- Chief Justice Bowen and Justice Deane said, at page 589, that the question for the determination of the AAT was whether the decision was the 'correct or preferable one' on the material before the Tribunal. In the Council's view, their Honours intended to convey the meaning that a decision must be legally correct, but that if there is a range of decisions that could be made, all of which would be correct, the decision-maker has a choice as to the preferable decision. However, the phrase 'correct or preferable' may give the impression that a decision may be the preferable decision, even though it is not correct. For this reason, the Council prefers the phrase 'correct and preferable'.*

In the Council's view, the overall objective of merits review system is to ensure that all administrative decisions of government are correct and preferable. As per the Council's interpretation, when the decision is not both correct and preferable, the tribunal can ordinarily substitute it by a new decision. The process of merits review will typically involve a review of all the facts that support a decision. That is, not only disputes on point of law but also those disputes on point of fact involving an administrative agency as a party may be subjected to the review of administrative tribunals.

Having appreciated the important roles that the administrative tribunals may play, many jurisdictions of the contemporary world have established tribunals that fit their respective realities.

6.2.6 Judicial Control

As was mentioned in the previous units, the principle of separation of state power among the three organs of the government (the legislature, the executive and the judiciary) has been blessed in many democratic jurisdictions of the modern world. The objective of the principle of the separation of powers is to promote the ideal of

law, liberty and democracy by controlling circumstances that give rise to tyranny and dictatorship. As was discussed earlier, the concentration of legislative, executive and judicial powers or any combination of these in the hands of one person or body of persons is the primary cause of tyranny and dictatorship. According to the advocates of this principle, tyranny and dictatorship cannot strive where power is divided amongst the three organs, and where there are effective checks and balances. Thus, the purpose of the principle of separation of state powers is not to create three empires, but to create an effective system for checking and balancing among the three organs of the government. In the previous sub-section, we have seen ways in which the legislature checks the powers of administrative agencies. This sub-section, in turn, discusses the modalities of judicial control of administrative agencies.

In line with the principle of separation of state powers and the need for checking and balancing, the FDRE Constitution, among other things, vests judicial power in the judiciary. Judicial power both at the Federal and State levels are vested in the judiciary. This means that the judiciary is made the final arbiter of disputes on point of law and facts. Thus, the judiciary is one of the most effective machineries in restraining administrative agencies within the bounds of their powers. Individuals aggrieved by agency decisions may seek court intervention in appropriate cases.

Broadly speaking, there are two modalities by which the judiciary can exercise supervisory role over the powers of administrative agencies. These are appeal and judicial review. The striking difference between appeal and judicial review is that the former is statutory in origin whereas the latter is the inherent power of courts. Concerning this, Cane writes:

> *It is important to understand the main difference between appeal and review. The first relates to the power of the court: in appeal proceedings the court has the power to substitute its decision on the matter in issue for that of the body appealed from…. In review proceedings, on the other hand, the court's basic power in relation to an illegal decision is to quash it, that is, to hold it to be invalid. If any of the matters in issue have to be decided again, this must be done by the original deciding authority and not by the supervising court. If the*

authority was under a duty to make a decision on the matters in issue between the parties, this duty will revive when the decision is quashed and it will then be for the authority to make a fresh decision. It is also open to the court, in appropriate cases, to issue an order requiring the authority to go through the decision-making process again.

Another course open to the …Court when it quashes the decision of a government body is to remit the matter to the agency with a direction to reconsider it in accordance with the findings of the …Court. The difference between this and the two previous outcomes is that under this procedure the agency does not have to go through the whole decision-making process again. For example, it might be that all the relevant facts have already been ascertained and the finding of the…Court only concerns their legal significance. In such a case a complete reconsideration of the case, including the taking of evidence and the findings of facts, would be a waste of time and money; so the court can remit the case and direct the authority to reconsider the facts in the light of the law as it has been held to be. This procedure differs from an appeal in only *a very formal sense. On the other hand, remission would not be appropriate where, for example, the authority is found to have been biased. Then a complete rehearing before a differently constituted body would be needed in order for justice to be seen to be done.*

The second main distinction between appeal and review relates to the subject matter of the court's jurisdiction. This distinction can be put briefly by saying that whereas an appellate court has power to decide whether the decision under appeal was 'right or wrong', a court exercising supervisory powers may only decide whether the decision under review was 'legal' or not. If the decision is illegal it can be quashed; otherwise the court cannot intervene, even if it thinks the decision to be wrong in some respect. ***(Cane, pp. 8-9)***

In a nutshell, the judiciary is an important organ of the state machinery in controlling the powers of administrative agencies through its supervisory power (judicial review) and appellate power. The supervisory power (reviewing) of the court is different from its appellate jurisdiction in terms of the source and the scope of the respective powers. In the common law tradition, judicial review is treated as the inherent power of ordinary courts. But the source of the appellate power of courts is legislation (statutory in origin). Judicial review is a technical review whereby the court tests whether an agency decisions are legal or illegal. An appellate court may substitute a new decision by overruling the decision of the lower body where the appeal was brought. Hence, it is a merits review.

6.2.7 Control by Human Rights Commission and Ombudsman

As it has been already indicated, different jurisdictions adopt various modalities for controlling the powers of administrative agencies which include parliamentary control, judicial control, and control by administrative tribunals. Each of these controlling mechanisms, however, has its own shortcomings. Individuals need to have other alternative forums that can be easily accessed, and devise speedy solutions to their administrative grievances. In many jurisdictions, watchdog institutions have been relied on as alternative forums for controlling administrative agencies, especially on administrative matters that are not suitable for parliamentary deliberation and adjudication. Appreciating the role of these institutions in promoting good governance, protecting and enforcing human rights, the FDRE Constitution under Sub- Articles 14 & 15 of Article 55 dictate the House of Peoples' Representatives to establish the Human Rights Commission and the institution of Ombudsman respectively. Accordingly, the House established the Human Rights Commission and the Institution of Ombudsman in Proclamations No. 210/2000 & 211/2000, respectively.

Human Rights Commission

As clearly provided under Article 5 of the Human Rights Establishment Proclamation No.210/2000, the objective of the Commission is "to educate the public be aware of human rights, see to it that human rights are protected, respected and fully enforced as well as to have the necessary measure taken where they are found to have been violated." In order to attain these objectives, great latitude of powers is entrusted to the Commission. Article 6 of the proclamation deals with the 'powers and duties' of the Commission: the following are among the powers and duties given to the commission:

- To ensure that the human rights and freedoms provided for under the Constitution of the Federal Democratic Republic of Ethiopia are respected by all citizens, organs of state, political organizations and other associations as well as by their respective officials;
- To ensure that laws, regulations and directives as well as government decisions and orders do not contravene the human rights of citizens guaranteed by the Constitution;
- To educate the public, using the mass media and other means, with a view to enhancing its tradition of respect for, and demand for enforcement of, rights upon acquiring sufficient awareness regarding human rights;
- To undertake investigation, upon complaint or its own initiation, in respect of human rights violation;
- To make recommendations for the revision of existing laws, enactment of new laws and formulation of policies;
- To provide consultancy services on matters of human rights;
- To forward its opinion on human rights reports to be submitted to international organs and
- To perform such other activities as may be necessary to attain its objectives.

From the above lists, we can infer that the Human Rights Commission has been entrusted with such a broad range of powers that are important for the attainment of its objectives in the promotion, protection and enforcement of human rights guaranteed under the FDRE Constitution. Up on receiving complaints or when

necessary on its own motion, the Commission may conduct investigation on alleged violations of human rights and is expected to make all the efforts to settle the complaint brought before it amicably. Although the Commission's recommendations are not binding, the reports it may issue manifesting human rights violations have far reaching moral and political overtone. What makes the commission very important is that it can receive complaints concerning allegations of human rights violations formally and informally via different mediums of communications; it can also investigate violations of said rights on its own motion.

Ombudsman

The Institution of Ombudsman is also one of the widely used important institutions for checking the powers of administrative agencies in the contemporary world. The word "ombudsman" which is Scandinavian in origin can be translated as citizen's defender or representative of the people. In its Swedish original conception, it is said that it is gender neutral that represents persons of either sex that represent the institution. According to in Rhodes' (1974:7) defines Ombudsman as follows: 'The Ombudsman: Understanding the Concept' at page 7, the 1974 Resolution of the International Bar Association, defined the

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

This definition seems that it is broad and all-inclusive. However, it has to be noted that it may not fit the situation across countries as there are differences related to the manner of establishment of the office and the legal weight of its recommendations from jurisdiction to jurisdiction.

By Proclamation No.211/2000, the Federal House (House of Peoples' Representatives) of Ethiopia proclaimed the establishment of the Institution of

Ombudsman. Nowhere is the term 'Ombudsman' defined under the proclamation. However, it is not difficult to understand the nature of this institution from the powers and duties entrusted to it and from the whole spirit of the proclamation. As can be inferred from the preamble of the above proclamation, there are fundamental premises that necessitate the establishment of the institution of Ombudsman. These are:

- It appreciates the ever increasing powers and functions of the executive organs of the government and the effect of their decisions on the daily lives and rights of the citizens;
- It takes a firm stand that unjust decisions and orders of the executive organs and officials that prejudices the lives and rights of citizens have to be rectified or prevented;
- It appreciates the possibility that citizens having suffered from maladministration may be left without redressing unless supported by an institution, which is easily accessible to them.

Thus, these are the core premises that necessitate the establishment of the institution of Ombudsman. The objective of the Institution, as clearly provided in Article 5 of the proclamation, is to bring about good governance that is of high quality, efficient and transparent, and are based on the rule of law, by way of ensuring that citizens rights and benefits provided for by law are respected by organs of the executive. In order to attain these objectives, in Article 6 of the proclamation, the Institution entrusted with a broad range of powers and duties. These are to:

- Supervise that administrative directives and decisions adopted by the executive organs and the practices thereof do not contravene the constitutional rights of citizens and the law as well;
- Receive and investigate complaints in respect of maladministration;
- Conduct supervision, with a view to ensuring that the executive carries out its functions in accordance with the law and to preventing maladministration;
- Seek remedies in case where it believes that maladministration has occurred;
- Undertake studies and research on ways and means of curbing maladministration;

- Making recommendations for the revision of existing laws, practices or directives and for the enactment of new laws and formulation of policies, with a view to bringing about better governance and
- Perform such other functions as are related to its objectives.

Thus, from these open ended broad range of powers entrusted to the Institution of Ombudsman, it can be safely said that this institution, considering that it maintains its institutional capacity and independence, would contribute a lot to the promotion of high quality good governance- a system of governance that renders efficient, effective and transparent service to the public without compromising the constitutionally guaranteed rights of the citizens. The primary jurisdiction of the institution of Ombudsman is to investigate an administrative actions or inactions following the lodging of complaints or on its own motion (initiation) with a view to ascertain whether there exist maladministration or not. The Institution is expected to resolve the complaints brought before it through a process of conciliation by bringing the parties together. Where the results of its investigation indicate the existence of maladministration, the institution is required to recommend the concerned agency to rectify the maladministration committed and to discontinue the act, practice, or directives having caused same.

The accessibility of the institution of ombudsman is an advantage, in addition to its broad jurisdiction to investigate cases of maladministration. The institution can receive complaints of maladministration in any form and can also conduct investigation upon its own motion. In this regard, it provides an accessible alternative to individuals who have no other necessary means to challenge the prejudice caused to their interest before court of law.

In short, ensuring high quality of good governance in the administration system is the ideal goal of the Institution of Ombudsman in Ethiopia. Its bottom line expectation is to exert utmost effort to curve maladministration by taking appropriate proactive measures that prevent and rectify administrative malpractices by providing easily accessible administrative forum to the citizens.

6.2.7.1 What is Maladministration?

In the preceding sub-section, the term maladministration was mentioned repeatedly. As clearly indicated in the provisions of the proclamation that established the institution of Ombudsman (proc. No.211/2000), fighting maladministration is among the primary duties that necessitates the establishment of the Institution of Ombudsman. So, The pertinent question in this sub-section is related to the concept of maladministration. In addition to establishing and empowering the Institution of Ombudsman in order to curve maladministration in the administration system, providing a working definition of the term maladministration may have paramount importance in helping the institution to carry out its responsibilities efficiently and effectively within the domain of its power. However, despite its importance, providing a clear-cut definition of the term maladministration has remained a difficult business for the lawmakers. Before discussing the definition provided under proclamation No. 211/2000, it seems very important to have a brief look at the definition given to the term maladministration by some authorities.

The term maladministration is a combination of two words: 'mal' and 'administration'. According to Black's Law Dictionary, the term "mal" is a "prefix meaning bad, wrong fraudulent." (Black's Law Dictionary, 6th Ed.) Thus, while prefixed with the term administration, it may give the meaning bad, wrong or fraudulent administration. However, the cycle of confusion is not still there; determination of the acts or practices that constitute bad administration is still another problem. Consensus may not be reached concerning the exact meaning of maladministration between different jurisdictions. Having regard to the level of their economic, socio-cultural and political realities, jurisdictions may have different understanding concerning the issue as to what constitutes maladministration or its antithesis good administration as the level of efficiency and effectiveness of the administration in turn may vary due to the differences in their human and physical resources both in terms of quality and quantity. However, providing a working definition or explanation of the term maladministration, may be of paramount importance at, least, for the purpose of this discussion.

Section 15(1) of the Australian '**Ombudsman Act 1976'** sets out the occasions that may give rise to the Ombudsman reporting action to the department or concerned authority. These occasions include circumstances in which the action:

-appears to be contrary to law

-was unreasonable, unjust, oppressive or improperly discriminatory;

-was in accordance with a rule of law but the rule is unreasonable, unjust, oppressive or improperly discriminatory;

-was based either wholly or partly on a mistake of law or of fact;

-was otherwise, in all the circumstances, wrong; or

In the course of taking the action, a discretionary power had been exercised for an improper purpose or on irrelevant grounds.

Sir William Reid, who was an English parliamentary ombudsperson until 2 January 1997, criticized the attempt to define the term maladministration in the 1993 annual report of the parliamentary commissioner for administration stating: "to define maladministration is to limit it. Such limitation could work to the disadvantage of individual complaints with justified grievances which did not fall within a given definition." Thus, instead of providing a single definition, the above quoted authority suggested the following 15 elements to be incorporated in maladministration:

- Rudeness (though that is a matter of degree)
- Unwillingness to treat the complaint as a person having rights
- Refusal to answer reasonable questions
- Neglecting to inform a complaint on request of his or her rights of entitlement
- Knowingly giving advice which is misleading or inadequate
- Ignoring valid advice or overruling considerations which would produce an uncomfortable result for the over ruler
- Offering no redress or manifestly disproportionate redress
- Showing bias whether because of color, sex or any other grounds
- Omission to notify those who thereby lose a right of appeal
- Refusal to inform adequately of the right to appeal
- Faulty procedures
- Failure by management to monitor compliance with adequate procedures
- Cavalier disregard of guidance, which is intended to be followed in the interest of equitable treatment of those who use a service
- Partiality and

- Failure to mitigate the effects of rigid adherence to the letter of the law that produces manifestly inequitable treatment.
  (http/www.gahooygle.com=maladministration.)

As contrasted to the broad definitions and explanations provided above, Article 2(5) of Proc. No.211/2000 defined the term narrowly as follows: "maladministration includes acts committed, or decisions given, by executive government organs, in contravention of administrative laws, the labour law or other laws relating to administration". Thus, in Ethiopia, the term maladministration is equated with violation of laws. But as can be inferred from the definitions and explanations given to the term maladministration in foreign jurisdictions, the term has a broad coverage beyond the mere violation of laws that involve the administration. Decisions contrary to reason and conscience, although may not contravene any formal law, are included within the domain of administrative law in the foreign jurisdictions mentioned above. In these countries, the term maladministration is broadly construed to include "any kind of administrative shortcomings". Hence, the term maladministration is a fluid concept which is amenable to time and the realities of each country.

6.2.8 Mass Media Control

The role of the mass media in controlling maladministration cannot be undermined. A strong media plays vital role in promoting the ideals of democracy and good governance. By bringing administrative malpractices and corrupt behaviors of the agencies to the attention of the public, the media may also exert moral and political pressure on the day-to-day activities of the administration. Media can serve as a forum for mobilizing public opinions concerning governmental activities. Thus, media can be regarded as one of the most effective informal controlling mechanisms of the powers of administrative agencies provided that freedom of the press is well guaranteed.

Review Questions

1. Discuss the following terminologies in administrative law context:
   - Internal control vs. external control
   - Parliamentary control vs. executive control

- Judicial control vs. control by watchdog institutions
- Maladministration

2. Discuss the difference between the powers of the Human Rights Commission and the Institution of Ombudsman.
3. Discuss the instances of maladministration prevailing in your locality.
4. What makes controlling agency power by watchdog institutions advantageous than by courts?
5. Distinguish the difference between judicial review and appeal.
6. What is the rational behind the need for controlling administrative agencies?

UNIT SEVEN: JUDICAL REVIEW

Introduction

As was stated earlier, judicial control of administrative agencies is one of the effective mechanisms for ensuring rule of law and improving the quality of decision-making in the administration. The judiciary, being the guardian and the ultimate arbiter of justice, can intervene to test the legality of administrative decisions either in its appellate or reviewing capacity. Thus, understanding the basic similarities and differences of these two important powers of the court will be given due consideration in this chapter. Particularly, this chapter tries to introduce you with the notion, the grounds, the scope and limitation of judicial review. Needless to say, courts do not have an outright power to monitor every administrative activity. The court's supervisory powers on administrative matters should be squared with the fundamental constitutional principle of separation of governmental powers among the three state organs. Having regard to this fundamental principle, courts are expected to play their supervisory roles only based on the accepted grounds. So, the rich experiences of some foreign jurisdictions in relation to judicial review will be given due attention during the course of the discussion in this unit.

Objectives:

At the end of this unit students are expected to:

- Understand the meaning of judicial review
- Differentiate been judicial review from merits review
- Identify the basis of judicial review power of courts
- Determine the proper scope of judicial review
- Identify the grounds in which courts may intervene in reviewing administrative action.
- Define and analyze ultra virus acts and abuse of power as grounds of judicial review.
- Distinguish been ultra virus act from jurisdictional error.
- Identify reviewable and justiciable matters under judicial review

- Identify procedural requirements for judicial review
- Define and understand the concepts of ripeness, exhaustion of remedies, and finality clause
- Analyze how the above concepts affect the availability of judicial review

7.1 The Meaning and Nature of Judicial Review

The term 'judicial review' has different meaning and scope in different jurisdictions. For example, in the United States, judicial review refers to the power of a court to review the actions of public sector bodies in terms of their lawfulness, or to review the constitutionality of a statute or treaty, or to review an administrative regulation for consistency with a statute, a treaty, or the Constitution itself. (http://www.en.wikpidedia.org/wiki/Judicial_review_in *the*_United_States.) Broadly speaking, the term judicial review may have the following two meanings: "Higher court's review of a lower court's (or an administrative body's) factual or legal findings" or "Supreme Court's power to decide whether a law enacted by the legislature is constitutional or not."
(http:/www.businessdictionary.com/definition/judicial-review.html accessed on 20 June 2008)

But in the United Kingdom's context, the term judicial review refers to the power of the judiciary to supervise the activities of governmental bodies on the basis of rules and principles of public law that define the grounds of judicial review. It is concerned with the power of judges to check and control the activities and decisions of governmental bodies, tribunals, inferior courts…. (Cumper, P.291.) Judicial review is a procedure in English Administrative Law by which English courts supervise the exercise of public power. A person who feels that an exercise of such power by, say, a government minister, the local council or a statutory tribunal, is unlawful, perhaps because it has violated his or her rights, may apply to the Administrative Court (a division of the High Court) for judicial review of the decision … Unlike the United States and some other jurisdictions, English law does not know judicial review of primary legislation (laws passed by Parliament), save in limited circumstances where primary legislation is contrary to the EU law.

Although the Courts can review primary legislation to determine its compatibility with the Human Rights Act 1998, they have no power to quash or suspend the operation of an enactment which is found to be incompatible with the European Convention of Human Rights- they can merely declare that they have found the enactment to be incompatible. (http://en.wikipedia.org/wiki/Judicial-review) The principle of Parliamentary supremacy in the UK implies that the Parliament can legislate on any matter. Thus, the principle of Parliamentary supremacy in the UK dictates that the judiciary cannot review a law enacted by the Parliament.

However, appreciating the differences concerning the meaning of judicial review among jurisdictions, for the purpose of this discussion, the term judicial review is taken in its narrow sense: it meant the power of the court to supervise/ control the legality of the powers of administrative agencies. Judicial review is the exercise of the court's inherent power to determine whether an agency's action is lawful or not and to award suitable relief. Judicial review is a fundamental mechanism for keeping public authorities within due bounds and for upholding the rule of law (**Wade & Forsyth, PP. 33-34**) The primary purpose of judicial review is to keep government authorities within the bounds of their power.

7.2. Judicial review Vs. Merits Review

In terms of purpose and scope, merits review of an agency's decision is different from judicial review (technical review). As was stated somewhere else, the purpose of merits review action is to decide whether the decision which is being challenged was the 'correct and preferable' decision. If not, the reviewing body can overrule such decision and substitute it with a new decision it deems 'correct and preferable' under the given circumstance. The issue in merits review is to test whether decision complained is 'right or wrong'. The process of merits review will typically involve a review of all the facts that support a decision. Merits review is said to be the sole responsibility of the executive, because the person or tribunal conducting the review 'stands in the shoes" of the original administrative decision maker. Administrative tribunals are not bound by strict rules of evidence and seek to provide a less formal atmosphere than the courts. If the reviewing body would make a different decision,

then that decision will be substituted for the original decision. As practices of different countries indicate, the power to conduct merits review of an agency's decision may be conferred to a court (in the form of appeal), a special tribunal, or a general administrative tribunal

Whereas, judicial review is a technical review; while reviewing an agency's decision, the court is concerned with the legality or illegality of the decision under review. If the court finds out the decision is legal, it will not do anything on it even if the decision deems incorrect in terms of preference. But if the court finds out the decision against which review is sought is illegal or ultra vires, it can set it aside and order the concerned agency to reconsider the decision based on the directions of the court. The reviewing court does not substitute its own new decision in place of an agency's invalidated decision on account of illegality. In one case, the phrase judicial review was described in the follows terms:

The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative error or injustice, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone ((*Attorney-General (NSW) v Quin (1990) 170 CLR at 35-36 per Brenan J.*))

The fundamental principle of judicial review is that "all power has its limits," and when administrative decision-makers act outside of those limits, they may be restrained by the judiciary. Judicial review does not prevent wrong decisions; it, instead, prevents them from being made unjustly. It does not matter whether the judge who is reviewing the decision would himself or herself has arrived at a different conclusion to the administrative decision-maker. The decision will only be interfered if there was some illegality in the process by which it was made. The jurisdiction of the court is confined to quashing the decision and remitting the matter back to the original decision-maker for determination in accordance with the law. This may not always be satisfying- either for individual judges or for the party seeking relief- but it

is often unfairness in the making of a decision, rather than the decision itself, that causes people the greatest distress (**Justice Peter McClellan,** p.4)

Unlike merits review which is statutory in origin, the source of judicial power is not statute; statutory authority is not necessary the court is simply performing its ordinary functions in order to enforce the law. The basis of judicial review, therefore, is common law (**Wade & Forsyth**, P.34) However, it has to be noted here that, although a statutory empowerment may not be necessary to exercise judicial review, this power can be taken away from the court by a statute. For example, in French, regular/ordinary courts have no supervisory power over the activities of government agencies. That is, regular courts cannot claim inherent power of judicial review to challenge administrative acts. This is the mandate of the French administrative tribunals that are established outside the structure of the ordinary courts. There are also countries that confer statutory judicial review power to ordinary courts in order to supervise and ensure legality in administrative decision-making.

7.3 The Bases of the Power of Courts to Supervise Administrative Action

7.3.1. In General

Concerning the basis or the sources of the power of ordinary courts to supervise (review) administrative actions, there is no single universally applicable formula that is accepted by all jurisdictions. As indicated above, some authorities state that judicial review is the exercise of the court's inherent power to determine whether an action is lawful or not. According to these authorities, since the basis of judicial review is common law, no statutory authority is necessary: the court is simply performing its ordinary functions in order to enforce the law (**Wade & Forsyth**, P.34). But the practices in some other countries indicate that statutes may empower ordinary courts to review administrative acts based on defined criteria thereof. For example, Australia, appreciating the arcane and complications of the common law practice and procedures relating to judicial review, codified the principles of judicial review; reform the procedures for commencing a judicial review proceeding; confer supervisory jurisdiction upon a specialist Federal Court. These criteria are clearly

provided under section 5 of the *Administrative Decisions (Judicial Review) Act 1977 ('AD (JR) Act'.* The practice in Australia indicates that judicial review of administrative decisions is possible by other methods besides the AD (JR) Act, such as review by the High Court in its original jurisdiction conferred by section 75(v) of the Constitution, and review by the Federal Court under section 39B of the *Judiciary Act* 1903.

The system of judicial remedies is derived from two main sources. First, there is a group of statutes which establishes an agency and incorporates provisions for the review of its actions. Second, there is a branch of remedies which has been developed by the combined action of the common law and statutes consolidating, simplifying, or in some other ways reforming the common law remedies. These remedies are certiorari, mandamus, prohibition, habeas corpus, quo warranto (the so- called prerogative writs), damages suits, bill in equity, and defense to enforcement proceedings. To them, modern statutes have added the declaratory judgment procedure. These remedies are available where no specific review has been provided, or where the specific review provisions have been drafted in such a way as to make them unavailable for the review of certain decisions of the agency.

No two of these systems are identical. The same administrative action may be controlled in one state by a specific statutory provision, in another by certiorari, in another by mandamus, in a fourth by injunction, and in a fifth it may be doubtful whether it is subject to control at all. Assuming the availability of any relief, the remedies may be both complementary and supplementary. If certiorari is not available, mandamus may be, and if neither, the proper remedy may be injunction; and different questions relating to the same proceeding may have to be tested by different means. Nevertheless, all of the systems are based on the system developed by English judges and parliaments. (Jaffee From **Administrative Action,** pp. 152-196)

The English judges were the King's judges. As such they exercised his supreme plenary power of judicator. The King's Bench issued writs, the so-called prerogative writs, to all the inferior officers. The writ ordered the officer to demonstrate the legality of this order or determination. The King's courts also allowed actions for

damages against an officer who by exceeding his powers had injured the plaintiff. The theory was that public officers were subject to "the law" as were the private citizens, i.e., they were answerable in the regular courts of law. It was this latter phenomenon of damage suit which came to characterize the "rule of law,' though it is one aspect- and not the most impeared to exclude it. (**Jaffee, pp. 152-196).**

As can be inferred from the remarks made above, the basis of the power of the court to supervise (review) administrative decisions is either common law, or statute, or both as the case may be. However, the assertion that judicial review is the inherent power of the regular/ordinary courts may not always stand valid, as there are jurisdictions that do not allow judicial review of administrative decisions by regular courts at all. The French and other continental systems, for example, which follow the extreme version of separation of power doctrine, take away from the regular court the power of judicial review of administrative decisions; they have a system of administrative courts - the administrative counter part of regular courts within the administration is established to perform judicial function on administrative matters. But this does not mean that there is no judicial review in France and other continental law countries. It is to mean that this power is exercised by administrative courts not by regular courts, like in many common law jurisdictions.

In the United States, there is a different position. The US Federal Supreme court, as it is well known, not only has the power to review administrative decisions and subordinate legislations like in the case of United Kingdom, but also has the constitutionality of any act be it a parliamentary legislation or any act of the government administration. The US Supreme Court can render a primary legislation invalid on constitutionality ground. One may wonder concerning the source of this broad power of the court. There is no comparable common law practice expressly stated anywhere in the US Constitution. In a landmark case, *Marbury v. Madison,* the basis for the exercise of judicial review in the United States, is said to be an interpretation of the Constitution as applying to the law and policies of the government. This implies that the power of federal courts to consider or overturn any congressional and state legislation or other official governmental action is deemed inconsistent with the Constitution, Bill of Rights, or federal law.

The two important Articles incorporated under the US Constitution proponents of the doctrine often quoted are Article III and Article Six of the Constitution. In Article III, the Constitution says:

> *The judicial power of the United States shall be vested in one Supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish… The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution…*

Article Six of the US Constitution also dictates, "This Constitution and the Laws of the United States which shall be made in pursuance thereof…shall be the supreme Law of the Land…" From the wordings of this provision of the Constitution, proponents of the doctrine inferred the laws of the United States which are not in pursuance to the Constitution are not the supreme law of the land. So, even though nowhere the constitution explicitly authorizes the Supreme Court to challenge acts of congress on constitutional ground, by the cross reading of the two Articles mentioned above, the US Supreme Court maintained the power to interpret the Constitution.

To extend similar argument to other administrative matters, the federal and state courts in the United States exercise supervisory (judicial review) power over administrative decisions and subordinate legislations. In this regard, courts can test the legality of the decision or administrative act in question against the Parent Act, or they can question even the legality of the Parent Act and decisions passed under its cover against the Constitution.

7.3.2 In Ethiopia

Coming back to the status of judicial review in Ethiopia, there is no clearly defined jurisprudence on the evolution and status of the judicial review. Judicial review of administrative decision dwells inthe fundamental principle of separation of power among the three conventional organs of the state: the legislature, the judiciary and the executive. Judicial review could be meaningful only when judicial power is ultimately vested in the judiciary and when the principle of rule of law reigns. Thus, a brief discussion of the evolution of the separation of power and the rule of law in Ethiopia is of great help in understanding the status of judicial review in historical perspective.

During the Imperial regime, the principle of separation of power was absent. The 1931 Constitution conferred to the Emperor uncontested and boundless executive, legislative and judicial power. In this regard, an authority named Scholler cited an important remark made by a famous Ethiopian writer, Mahtama Slassie, concerning the power of the Emperor as follows:

> *The Ethiopian Emperor has an uncontested and boundless power over the territory he rules. He is both the temporal and spiritual ruler. With the supreme sovereignty vested in him, he appoints or dismisses government officials, he gives gifts or refuses to give them, he imprisons or releases, he sentences criminals to death or punishes them, and does many other things of similar nature*. (Scholler, p.35)

During the Imperial regime, the Emperor was the head of state and the government, the fountain of justice and equity, the supreme law giver. Emperor Haile Selassie I continued with this omnipotent power until he was demised by the military revolution of 1974. In short, the Emperor, during the period under discussion, was above the law. He was immune from any judicial procedure. Thus, the general opinion is that since ultimate judicial power was dwelling in the hands of the Emperor and the Emperor himself he was above the law of the empire. Thus, it would be nonsense to say that there was a meaningful room for judicial review during the Imperial regime of Ethiopia. Although the 1955 Revised Constitution of the Imperial Ethiopia, which was modelled under the U.S. Constitution, formally recognized the concept of judicial reviews. Since ultimate judicial power remained in the hands of the Emperor intact, it could not have practical meaning as such.

Following the downfall of the Monarchical regime by force in the 1974 the Provisional Military Administrative Council (PMAC) commonly known by the Amharic word 'Derg' overtook the political power. The Derg suspended the application of the 1955 Revised Constitution and ruled the country for almost thirteen years without having a constitution. After forming the Worker's Party of Ethiopia (WPE) in 1984, which was the only party with the political power, the Constitution of the People's Democratic Republic of Ethiopia (PDRE) was adopted in 1987. Article 62 of the Constitution vested supreme legislative power in the National Shango (assembly). The PDRE Constitution, as stated under Chapter XIV of the same, vested

judicial power in courts that were established by law. The highest judicial organ was the Supreme Court. It had the authority to supervise the judicial functions of all courts in the country.

An important question that may be raised here is that whether or not the principle of separation of state power was duly recognized under the PDRE Constitution. In addition to the discussion made above, having a brief look to the power of the executive organ of the PDRE government has paramount importance in answering this question. Chapter XI of the PDRE, Constitution outlined the powers and duties of the President. Accordingly, the President who was to be elected by the National Shango was the head of the state, representative of the Republic at home and abroad and was the Commander-in-Chief of the Armed Forces. He had vast power to supervise the activities of the various organs of the government. Article 86(c) and (e) of the Constitution, for instance, state that the President has the power, among other things, to ensure that the Council of Ministers, the **Supreme Court**, the Procurator General… carry out their responsibilities. The president had also the power to nominate the President and the Vice-President of the Supreme Curt for approval by the National Shango, and when compelling circumstances warrant it, he can between the sessions of the National Shango appoint and dismiss the same. The President had a wide opportunity to abuse his power since the National Shango was required to meet once a year unless emergency necessitates the calling of extra ordinary meeting. Although the Constitution required that the judges of the Supreme Court were to be elected and dismissed by the National Shango, since the Shango was in recess through out the year, the President had the opportunity to exercise his power in disguise.

The President and the Vice President of the PDRE were also the President and the Vice President of the Council of State, respectively. As stated under Article 82 of the PDRE Constitution, the Council of State had the power and duty to ensure the implementation of the Constitution and other laws, to interpret the Constitution and other laws, to revoke regulations and directives which do not conform to the Constitution Interpretation of laws during the Derg period was done not only by courts; state organs such as the National Shango, the Council of State and the General Procurator were also entrusted with such power.

From the facts provided above, one can understand that the PDRE Constitution not only vested supreme executive power in the hands of the Council of State, which was under the presidency of the PDRE President, but also judicial power such as interpretation of the Constitution and other laws as well as revocation of laws that contravene the constitution. Were also under the plisenderry of the PDRE President.It is also possible to say that the judiciary did not have administrative independency as the PDRE Constitution made the Supreme Court directly accountable to the President. Here is the paradox; he/she was the Chief-Executive and Head of the PDRE, the President whom the Constitution empowered to supervise the Supreme Court Judges in effect rendered judicial review non-existence during the Derg regime.

The Constitution of the Federal Democratic Republic of Ethiopia (FDRE) vested judicial powers both at federal and state levels in the courts. This is expressly stated under Article 79(1) of the Constitution. Thus, one may safely say that supreme judicial power under the FDRE is vested in the Judiciary. Being a final arbiter of the law, the judiciary can review and annul administrative decisions on grounds of legality. However, Ethiopian courts did not have the power to interpret the Constitution. This power was explicitly given to the House of the Federation in Article 62(1) of the FDRE Constitution. But this should not be construed to mean that courts could not invalidate an administrative decision or other subordinate legislation that contravened the clear words of the Constitution (in circumstances where there is no need for interpretation), provided that they have the very power of judicial review. So, an important question that should be raised here is that: Do Ethiopian courts have the power of judicial review? As was mentioned above, in some foreign jurisdictions like France, regular courts are prohibited from reviewing administrative decisions; France has full-fledged administrative tribunal systems that are established to resolve disputes on administrative matters in accordance with the principles and standards of administrative law. But, there is no such kind of institutional arrangement in Ethiopia, although technically speaking it seems possible. As can be inferred from Articles 37(1) and 78(4) of the FDRE Constitution, despite the existence of Article 79(1) of the same, judicial power is not exclusively vested in regular courts. Other bodies such as administrative courts can be established to assume judicial power on administrative matters. Thus, it may not be labeled unconstitutional if Ethiopia adopts the French

type model provided that it is preferable in terms of relevancy and feasibility having regard to the specific situations of the country.

However, having regard to the existing situation in Ethiopia, that is the absence of full-fledged administrative court system like the French counter part, it seems justifiable to argue that regular courts must have the power to test the legality of administrative decisions in the same manner as courts in the common law tradition do. The power of the court to review administrative decisions, thus, may be derived from the very principle of separation of power that vests judicial power in the judiciary and the doctrine of rule of law enshrined under the FDRE Constitution by way of interpretation just like the practice in the United States, at least, for the purpose of reviewing administrative decisions and subordinate legislations. There are also possibilities where the parent acts that create the respective agencies may also empower courts to review administrative decisions under specified conditions. Thus, one may plausibly argue that implied in the principles of separation of state power and the rule of law that are duly recognized under the FDRE Constitution is that the judiciary as the ultimate arbiter of justice has the power to test the legality of administrative acts. In the absence of a systematically devised administrative reviewing mechanism like that of the French one, precluding the ordinary courts to review administrative acts on technical grounds renders the doctrine of rule of law meaningless. However, practically speaking, the status of judicial review in Ethiopia lacks clear-cut jurisprudential evidence.

Wherever courts have the power to review administrative actions or inactions that tantamount to decisions, the prerequisites that they are expected to observe are discussed subsequently.

7.4 Grounds of Judicial Review

Needless to say that courts do not have an unlimited power to supervise the activities of administrative agencies. The principle of separation of powers dictates the various organs of the government to act within the scope of their respective sphere of powers and refrain from interfering on matters that are exclusively entrusted to others. So,

judicial review does not authorize the court an outright power to interfere on administrative matters. The rational behind the need for the determination of the justifiable grounds of judicial review is, thus, to delineate the boundary where judicial review may be available to challenge administrative decisions.

As was clearly stated in the foregoing sub-section, the purpose of judicial review is to test the lawfulness of government's decisions. Worth discussing point for this sub-section is, therefore, related to the determination of the grounds that may render an administrative decision unlawful/illegal. In order to delineate the boundaries in which judicial review may be called into operation, different jurisdictions crafted their own standards or criteria that may render administrative decisions unlawful or illegal. Australia can be taken as a good example in this regard. In Australia, an administrative decision is said to be unlawful if it breaks one of the criteria that are defined in section 5 of the Administrative Decision (Judicial Review) Act 1977 ('AD (JR) Act'). The grounds of judicial review as outlined in section 5 of the AD (JR) include the following:

- A breach of the rules of natural justice;
- A failure to observe the procedures that were required by law to be observed in connection with the making of the decision;
- The person who purported to make the decision did not have jurisdiction to make the decision;
- The decision was not authorized by the enactment in pursuance of which it was purported to be made and
- The making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made. An exercise of power may be improper if the relevant conduct involves:
    - Taking an irrelevant consideration into account in the exercise of a power;
    - Failing to take a relevant consideration into account in the exercise of a power;
    - An exercise of a power for a purpose other than a purpose for which the power is conferred;
    - An exercise of a discretionary power in bad faith;

- An exercise of a personal discretionary power at the direction or behest of another person;
- An exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;
- An exercise of a power that is so unreasonable that no reasonable person could have so exercise the power;
- An exercise of a power in such a way that the result of the exercise of the power is uncertain; and
- Any other exercise of power in a way that constitutes abuse of the power;

- An error of law;
- The decision was induced or affected by fraud;
- There was no evidence or other material to justify the making of the decision, but only if:
  - The person who made the decision was required by law to reach that decision only if a particular matter was established, and there was no evidence or other material (including facts of which he or she was entitled to take notice) from which he or she could reasonably be satisfied that the matter was established; or
  - The person who made the decision based on the decision on the existence of a particular fact, and that fact did not exist and
- The decision was otherwise contrary to law.

The grounds of judicial review incorporated under the Australian Administrative Decision (Judicial Review), as listed above, have predominantly common law origin. But some of them are refined and reformed in a manner that fits the Australian situation. It does not mean, however, that these criteria are not used in the continental law world as grounds for reviewing administrative decisions. In France, for example, many of these criteria are receiving blessing as bases for reviewing administrative decisions by administrative tribunals. Having this general information in mind, it seems important to proceed with the details under the subsequent sub-sections.

7.4.1 Simple (Narrow) Ultra Vires

The simple proposition that a public authority may not act out side its powers (ultra vires) might fitly be called the central principle of administrative law. The juristic basis of judicial review is the doctrine of ultra vires (Wade & Forsyth, p.35). In its reviewing capacity the court is essentially looking at whether a decision- making body has acted 'ultra vires'or 'intra vires'. The term 'ultra vires' means 'without power', while 'intra vires' means 'within power.' If a decision-making body acts ultra vires the reviewing court has the discretion to intervene (Cumper, p.291.), From the opinions of the authorities cited above, one can infer that the term ultra vires in administrative law context refers to decisions passed by administrative authorities without having the requisite power or in excess of the limits of the power conferred upon them. An administrative decision may be rendered ultra vires due to substantive or procedural issues affecting the decision.

7.4.1.1 Substantive Ultra Vires

The term substantive ultra vires refers to the substantive defects of the decision as contrasted to the procedural irregularities. In the strictest sense of the term, an administrative decision is said to be ultra vires in terms of substance where the decision maker exceeds the power duly entrusted to him/her in the public interests or where the subject matter of the decision falls outside the jurisdictional limit of the decision-maker. This goes in line with the principle that says each power has its own legal limits. Thus, where the decision maker passes decisions on matters falling outside the boundary of his statutory powers, there comes what we call substantive ultra vires in the narrow sense of the term. The underlining principle behind substantive ultra vires is that every power entrusted in the public interest has its own limits. So, when the decision-maker renders a decision that exceeds the power conferred upon him, it can be attacked through the forum of judicial review.

7.4.1.2 Procedural Ultra Vires

Even if the decision-maker passes a decision within the scope of the statutory power conferred upon him, still the decision may be rendered ultra vire because of procedural irregularities affecting the decision. The phrase procedural ultra vires refers to a decision passed disregarding mandatory (formal) procedural requirements. Procedural requirements could be obligatory (need strict compliance) or directory (provide direction to the decision-maker to be followed in at the discretion of the decision-maker in appropriate cases). Where there is a statutory procedure that dictates a course of an administrative action to be taken based on the established mandatory formal requirements, non observance of these requirements rendered the decision procedurally refers to ultra vires.

Procedural illegalities, also known in the broader sense as procedural improprieties applly not only to non-observance of mandatory statutory procedural requirements, but also to situations where the decision-maker fails to observe the rules of natural justice or fail to act fairly. See section 4.2.1 of this material in order to appreciate the rules of natural justice and fair hearing.

7.4.1.3 Jurisdictional Error

As a general rule, errors of fact made by the primary decision-maker are not to be corrected by a court. They are accepted as errors within the jurisdiction of the administrative decision-maker, and as such he or she is entitled to make them. Factual issues are typically issues that go to the merits of a decision, not to its legality. Jurisdictional facts are different. Whether or not a decision-maker does or does not have jurisdiction to make, a decision is a question of law and open to judicial review. (McClellan, p.7) A decision-maker who erroneously interpreted the law as providing a power that did not exist was said to have made a ‘jurisdictional error of law’. An error of fact can also be challenged if the error is jurisdictional. A jurisdictional error of fact occurs where the existence of a particular state of affairs is a condition precedent to a decision-maker actually having jurisdiction, (Cumper, pp. 302-303)

As can be inferred from the above-cited opinions, jurisdictional error results where the decision maker assumes jurisdiction over a subject matter either due to the wrong interpretation of the law or the wrong appreciation of facts that are essential conditions precedent for assuming jurisdiction over a subject matter. Jurisdictional error of law arises when, due to the wrong interpretation of the law, the decision maker exercises a power over a subject matter that actually did not fall under his jurisdiction. But jurisdictional error of fact happens while the decision-maker assumes jurisdiction over a subject matter in the absence of a certain fact that is set as a condition precedent to assume such jurisdiction. In short, jurisdictional error is one of the species of ultra vires that may give rise to judicial review.

7.4.1.4 Error of Law

As was discussed somewhere else, judicial review is concerned with testing the legality of the administrative decisions. This means that courts are more expertise to review errors of law than errors of fact. Broadly speaking, errors of law can be classified into 'errors going to jurisdiction' (jurisdictional errors of law) and errors of law 'within jurisdiction'. According to Cumper, prior to the case *Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 14*, there was an important distinction between errors of law 'going to jurisdiction' (jurisdictional errors of law) and errors of law 'within jurisdiction' (errors of law on the face of the record). As was stated in the preceding sub-section, jurisdictional error of law refers to a decision made without power (ultra vires) due to the wrong interpretation of the law. But an error of law 'within the jurisdiction' is the type of error made by a decision-maker who errs in law whilst exercising powers which have been conferred on him/her. This type of error will not automatically render the decision *ultra vires*. The courts have discretion to intervene if the error of law appeared on the record of the decision. However, in *Anisminic Ltd v foreign compensation*, the House *of* Lords decision renders the distinction unnecessary in most cases. Their lordship decided that errors of law could be treated as going to jurisdiction, even when there had been an error made in the process of exercising power conferred, rather than an error in deciding whether the power had actually existed.

According to Cumper, following the decision in *Anisminic* case, the distinction between errors of law on the face of the record and jurisdictional errors of law is probably rendered obsolete. However, the House of Lords in this case did leave open the possibility of a decision-maker making an error of law within jurisdiction. As mentioned above, judicial review may be available where a body is acting within its powers but has erred in law whilst doing so and that error appears on the record relating to the decision. Cumper cited an important case related to the error of law on the face of the record as follows:

> *In R v Northumberland Compensation Appeal Tribunal, ex parte shaw [1952] 1 KB 388, a statute provided that all hospital employees who had been made redundant should be paid compensation. The amount of compensation was to be calculated not merely on the basis of the length of service in a particular hospital, but it was also to include periods of employment in any other local government service. The amount of compensation awarded by the Appeal Tribunal in this case reflected only the period of employment in the hospital and ignored previous service in other local government departments. The basis of the calculation was included on the record of the tribunal's decision. The decision was therefore quashed*. (Id., pp.302-303)

7.4.1.5 Failure to Discharge Statutory Duty

The grounds of judicial review are not limited to ultra vires acts in the positive sense. An agency's failure to discharge a statutory duty towards the designated beneficiaries can also give rise to judicial review. For example, in the area of pension and social security, where the concerned organ of the government persistently fails to provide the benefit to the statutorily designated beneficiaries, the latter can invoke judicial review seeking mandamus (compelling court order). That is, an authority's forbearance to discharge a statutory duty towards the beneficiaries without any strong reason can give rise to judicial review. The remedy that may be granted by the reviewing court in this case will be discussed in the last chapter.

7.4.2 Abuse of Power (Broad Ultra Vires)

For the purpose of judicial review, an ultra vires act can be liberally construed to include not only those decisions of an authority that are rendered with no power, in excess of power, or contrary to mandatory statutory procedural requirements such as discussed above; but it may also include those administrative decisions, although fall within the wide discretionary power of the decision-maker, may be found to be defective on the grounds of manifest unreasonableness, disproportionality, irrationality and other grounds that shall be appreciated in the subsequent sub-sections in turn.

7.4.2.1 Unreasonableness

Although there are critics labeled against conferring discretionary powers to administrative agencies for fear that such agencies may abuse such unrestrained powers, still it remains the hallmark in the science of administration. As Cane pointed out, discretion is a feature not only of a policy decision but also of decisions on questions of fact and law, which often have no 'right answer' but more than one 'reasonable answer' from which the decision-maker must choose. Discretion, as to procedure to be followed in making a decision, can also have an important impact on the decision itself, (**Cane,** p.133). Drawing a sharp contrast between discretion and 'duty', Cane further noted on the ways discretionary powers may be limited as follows:

> *The essence of discretion is choice; the antithesis of discretion is duty. The idea of 'decision-making' implies an element of choice: duty does away with the need to make decisions. Duty removes discretion; but discretion may also be limited without being entirely removed, by standards or guidelines or criteria which the decision-maker is to take into account in exercising discretion.* (Id. Pp.133-134)

The very concept of administrative discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold different opinions as to which is to be preferred, (Lor Diplock cited in Wade and Forsyth, 365.) As expounded by the 19th centaury jurist Dicey, discretionary power

should be controlled: uncontrolled (absolute) discretion is an evil to be avoided in most contexts. But according to Cane, discretion has both advantages and disadvantages and the purpose of controlling discretion should be to preserve the advantages to the greatest degree consistent with minimizing the disadvantages. Discretion has the advantage of flexibility; it allows the merits of individual cases to be taken into account. Discretion is concerned with the spirit, not the letter of the law, and it may allow government policies to be more effectively implemented by giving administrators freedom to adapt their methods of working in the light of experience. It is useful, in new areas of government activity as it enables administrators, to deal with novel and, perhaps, unforeseen circumstances as they arise. On the other hand, discretion puts the citizen in much more at the mercy of the administrator, especially if the latter is not required to tell the citizen the reason why the discretion was exercised in the particular way it was. Discretion also opens the way for inconsistent decisions, and demands a much higher level of care and attention on the part of the administrator exercising it (Ibid. P.135)

Discretion may be structured by providing that it should be exercised 'reasonably' –this gives the decision-maker a degree of freedom because people may fairly disagree about what is reasonable, but it rules out certain results as unacceptable. (Id.) Despite the difficulties to demarcate the line between reasonable decision and its antithesis- unreasonable, there is a consensus in the common law world that when a decision-maker reaches a decision that no reasonable person would have made, it can be well taken as a ground for judicial review. In R v Greenwich London Borough Council, ex parte Cedar Holdings [1983] RA 17 it was held that a decision is unreasonable if it is the kind of decision that is so outrageous that no right thinking person would support it.

In Wednesbury case, a case involving a decision to deny access to a movie theatre to youngsters on Sunday, presumably to preserve their moral health, in refusing to interfere with the decision, Lord Greene MR noted that there was considerable overlap between many of the grounds of review that fell within the rubric of "unreasonableness." In words which have been repeated by countless judges on many occasions his Lordship said:

*It is true that the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably.' Similarly, there may be something so absurd, that no sensible person could ever dream that it lay within the power of the authority. Warrington LJ in Short v Poole Corporation [1926] Ch 66 at 90,91 gave the example of the red-haired teacher dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration an extraneous matter. It is so unreasonable that it may be described as being done in bad faith; and, in fact, all these things run into one another. (*Associated *Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223 p. 229)*

This ground came to be known as Wednesbury unreasonableness. It is important to emphasis Lord Green's words that state "something so absurd that no sensible person could ever dream that it lay within the power of the authority." Lord Green stated further: "It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. That, is quite right; but to prove a case of that kind would require something overwhelming…" (Id. P.230)

In the effort to delineate the border between legality and merits, McClellan quoted the opinion of courts from different cases as follows:

Courts have repeatedly emphasized that the "unreasonableness" ground "must not be allowed to open the gate to judicial review of the merits of a decision or action taken within power." Minister for Urban Affairs and

Planning v Rosemount Estates Pty Ltd (1996) 91 LGERA 31 at 42.) The requirement of "something overwhelming" has by and large been taken seriously by judicial decision-makers, so that a decision cannot be interfered with unless it is so unreasonable that it is "obvious" that the decision-maker "is acting perversely," (Puhlhofer v Hillingdon London Borough Council [1986] AC 484 at 518.) or it is so unreasonable that the decision is one "for which no logical basis can be discerned" (Minister for Immigration and Multicultural Affairs v Eshetu (1999) 197 CLR 611 at 626.) or one that "amount[s] to an abuse of power." (Attorney-General v Quin (1990) 170 CLR 1 at 36.)…

An authority has listed the following other types of cases where administrative decisions have been set aside for Wednesbury unreasonableness:

- Where a decision is devoid of plausible justification.
- Where a decision-maker has made an erroneous finding of fact on a point that is fundamentally important in the case.
- Where the decision-maker has failed to have regard to departmental policy or representation.
- Where the effect of the decision is unnecessarily harsh.
- When the decision-maker has failed to give genuine, proper or realistic consideration to a matter. (Beazley, "The Scope of Judicial Review", cited in McClellan, Id.)
- Where there are demonstrable inconsistencies with other decisions.
- Where there is discrimination without a rational distinction.

7.4.2.2 Proportionality

Wade & Forsyth stated that in the law of a number of European countries there is a 'principle proportionality', which ordains that administrative measures must not be more drastic than it is necessary for attaining the desired result (**Wade & Forsyth**, p.366). According to these authorities, the principle of reasonableness and proportionality cover a great deal of common grounds. A sever penalty for a small offence may be challenged based on the principle of proportionality or reasonableness. They cited further Lord Hoffmann as follows: "it is not possible to

see daylight between them." Nevertheless a clear difference has emerged and has been corroborated by the House of Lords. Proportionality, requires the court the action taken was really needed as whether it was within the range of course of action that could reasonably be followed.

The concept of proportionality has its origin in the civil law of continental Europe. It takes whether:
(i) The legislative objective is sufficiently important to justify limiting a fundamental right;
(ii) The measures designed to meet the legislative objective are rationally connected to it; and
(iii) The means used to impair the right or freedom are no more than is necessary to accomplish the objective (*de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 at 80).

Proportionality was first adopted in England as an independent ground of judicial review in *R v Home Secretary; Ex parte Daly* [2001] 2 AC 532. It was accepted that while there was considerable overlapping between proportionality and the traditional grounds of judicial review (especially Wednesbury unreasonableness), the test of proportionality led to a "greater intensity of review" than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision plays a much greater role (**McClellan,** p.16.), As McClellan further quote from the case cited above, there are three significant differences between proportionality and the traditional grounds of review that may lead to different outcomes in some cases:

> *First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly…the intensity of the review…is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and*

the question whether the interference was really proportionate to the legitimate aim being pursued.

The adoption of proportionality as an independent ground of review is not without any problem. It may let courts interfere on the merits of an administrative decision which is not within the purview of judicial review. Appreciating this problem, McClellan writes*:*

> *The adoption in England of proportionality as an independent ground of review, and the shift towards examining the merits that this involves, represents a significant departure from the strict observance of the distinction between legality and merits that still prevail in Australi. Proportionality has been accepted by the High Court of Australia as a test of constitutional validity in relation to certain heads of power. However, it has not been endorsed as an independent test for the validity of subordinate legislation.)*

Concerning the role of proportionality in the context of judicial review of administrative decisions in NSW [New South Wales], McClellan quoting the explanation made by Spigelman writes:

> *It can be accepted that a complete lack of proportion between the consequences of a decision and the conduct upon which it operates may manifest unreasonableness in [wednesbury] sense. However, the plaintiff also invoked "proportionality" as a new and separate ground of review.*
>
> *Proportionality has not been adopted as a separate ground for review in the context of judicial review of administrative action, notwithstanding a considerable body of advocacy that it be adopted. The concept of proportionality is primarily more susceptible of permitting a court to trammel upon the merits of a decision than Wednesbury unreasonableness. This is not the occasion to take such a step in the development [of] administrative law, if it is to be taken at all. (Bruce v Cole and Ors (1998) 45 NSWLR 163 at 185)*

As can be inferred from the above, proportionality can be invoked as an independent ground of judicial review in England, where as in Australia, it cannot be invoked as an independent ground of judicial review, but only within the spectrum of the classical Wednesbury unreasonableness. In short, the notion of proportionality has received increasing importance in recent years. This requires a certain proportion or balance between the administrative measure to be taken and the end to be achieved. In France, too, disproportionality of the administrative measure may be invoked as a ground for reviewing the decision by administrative courts.

7.4.2.3 Irrationality

The distinction between irrationality and unreasonableness is not as such clear; some authorities appear to use both as separate grounds of judicial review, whereas some use 'unreasonableness' as one of the typologies of 'irrationality'. Cane, for example, write, "'Irrationality' is more often referred to as 'unreasonableness' So, for writers like are the expounding of what constitutes unreasonable decision is a manifestation of its irrationality and vice versa. However, which include, writers like Cumper provide a list of the species of irrationality:

- Failure to exercise discretion properly: where the decision-maker either did not exercise discretion sufficiently free from outside influences, or abused the discretion;
- Acting as though limited by external authorities: where the decision-maker fails to exercise any discretion at all, believing himself or herself to be bound by external rule;
- An authorized delegation
- Decision-maker applies policy without flexibility: where the decision-maker who is conferred with discretionary powers is expected to consider each case on its own facts and merits but renders a decision rigidly without considering whether the particular case has extenuating factors which would necessitate them making an exception;
- Abuse of discretion: where the decision-maker uses power for an improper purpose or frustrates the legislative purpose; makes a decision on the basis of irrelevant factors or fails to take account of relevant factors; reaches a decision that is unreasonable in itself; reaches a decision that is unreasonable itself;

- Uses of power for an improper purpose or to frustrate the legislative purpose;
- Forming decision on basis of irrelevancies or ignoring relevant factors;
- And unreasonableness.

7.4.2.4 Relevant and Irrelevant Considerations

As provided in the preceding sub-section, reaching at a decision on the basis of irrelevant considerations, or by disregarding relevant considerations, is one of the manifestations of irrationality. So, as stated in the case *R v Secretary of State for Social Services, ex parte* Wellcome Foundation Ltd [1987] 1 WLR 1166, it is a reviewable error either to take account of irrelevant considerations or to ignore relevant ones, provided that if the relevant matter has been considered or the irrelevant one is ignored, a different decision or rule might (but not necessarily would) have been made. According to Cane, many errors of law and fact involve ignoring relevant matters or taking in to account of irrelevant ones. Ignoring relevant considerations or taking account of irrelevant ones may make a decision, or rule unreasonable in accordance with statutory policy.

As Cooke J pointed out in the case *Ashby v. Minister of Immigration [1981] 1 NZLR 222 at 224*, considerations may be obligatory i.e. those which the Act expressly or impliedly requires the Minister to take into account and permissible considerations i.e. those which can properly be taken into account, but do not have to be (Cited in Wade & Forsyth, p.381.) Where the decision-maker fails to consider those obligatory considerations expressed or implied in the Act, the decision has to be invalidated. Whereas, in the case of permissive considerations, the decision-maker is not required to strictly abide to such considerations. Rather, the decision-maker is left at discretion to take the relevant considerations having regard to the particular circumstances of the case by ignoring those irrelevant ones from consideration. According to Cane, the number and scope of the considerations relevant to any particular decision or rule will depend very much on the nature of the decision or rule. Citing the opinions of different authorities he writes:

> *For example, licensing authorities are normally required to consider not only the interests of the applicant and of any objectors but also of the wider public. By contrast, for example,*

> *decisions about individual applications for social security benefits are usually to be made solely on the basis of considerations personal to the applicant. (D. Galligan, Discretionary Powers (1986), 188-195).) It should be noted, however, that the courts do not, under this ground of review, engage in 'hard-look' review (as it is called in the United States [Id. P 314-420]); they do not require decision-makers to show that they have considered all relevant available evidence and that the decision made is in the light of that evidence, a rational way of achieving desired policy goals. All that the courts do is to decide whether the particular consideration(s) specified by the complainant ought or ought not to have been taken into account. (Cannock Chase DC v Kelly [1978] 1 All ER 152.) In effect, under this head the courts only require the decision-maker to show that specified considerations were or were not adverted to. In technical terms, the burden of proof is on the applicant, but the respondent will have to provide a greater or less amount of evidence as to what factors were or were not considered and how they affected the decision. A mere catalogue of factors ignored or considered may not be enough: R v Lancashire CC, ex parte Huddleston [1986] 2 All ER 941.) Decision-makers are not required to conduct comprehensive pre-decision inquiries or to justify the decision made in the light of the relevant and available material. Some academics argue strongly that English courts should follow something like the hard-look approach, but judges are unlikely to do so for fear of being seen to be interfering unduly with the policy choices of decision-makers.*

It is suffice to say that where the decision-maker fails to take relevant considerations into account but takes those irrelevant ones, there is high probability that the outcome of the decision may be affected by defects than not. So, the interference of the court to review such kind of decisions seems justifiable.

7.4.2.5 Bad Faith

It is that administrators have a general duty to exercise their powers in good faith to achieve the purposes for which those powers are entrusted to them according to the interest of the public. Although it is difficult to discern the constituting elements of all decisions rendered in bad faith, one can safely say that it indicates lack of good faith on the part of the decision-maker. Contrasting bad faith with dishonesty, Wade & Forsyth states:

> *It is extremely rare for public authorities to be found guilty of intentional dishonesty: normally they are found to have erred, if at all, by ignorance or misunderstanding. Yet the courts constantly accuse them of bad faith merely because they have acted unreasonably or on improper grounds. Again and again it is laid down that powers must be exercised reasonably and in good faith. But in this context 'in good faith' means merely 'for legitimate reasons'. Contrary to the natural sense of the words, they impute no moral obliquity* (p. 416.)

In the Wednesbury case cited earlier, Lord Green MR, used the term 'bad faith' interchangeably with unreasonableness and extraneous considerations as follows:

> *It is true that discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in Short v. Poole Corporation gave the example of the red-haired teacher, dismissed because she had red hairs. This is unreasonable in one sense. In another it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.*

Appreciating the interconnection between the other grounds of judicial review such as unreasonableness, irrationality and the consideration of irrelevant matters or ignoring relevant matters, Wade and Forsyth say:

> *Bad faith scarcely has an independent existence as a distinct ground of invalidity. Any attempt to discuss it as such would merely lead back over the ground already surveyed. But a few examples will illustrate it in its customary conjunction with unreasonableness and improper purposes. If a local authority were to use its power to erect urinals in order to place one 'in front of any gentleman's house', then 'it would be impossible to hold that to be a bona fide exercise of the powers given by the statute'. If they wish to acquire land, their powers are 'to be used bona fide for the statutory purpose and for none other'. If they refer numerous cases en masse to a rent tribunal without proper consideration, this is not 'a valid and bona fide exercise of the powers'. If a liquor license is cancelled for political reasons, the minister who brought this about is guilty of 'a departure from good faith'. Such instances could be multiplied indefinitely. Cases of misfeasance in public office, where the misfeasor knows that he is acting outside his powers, could be added to the collection.*

The out come of a decision may be affected due to the existence of bad faith on the part of the decision-maker. The unreasonableness or irrationality of a decision may result from a decision that is induced by bad faith on the part of the decision maker. But the reverse may not be always true. That is, unreasonable decision may be passed in good faith due to the erroneous bona fide appreciation of matters. So, as the interrelation between unreasonableness and bad faith is not as such overlapping, the existence of the former may not help us to infer the existence of bad faith on the part of the decision-maker. As discussed earlier, where a decision is found manifestly unreasonable, judicial review can be invoked against such decision regardless of whether the decision is passed in good faith or its antithesis bad faith. But it is difficult to expect reasonable decision, where the decision is induced by bad faith or extraneous factors. Thus, it is possible to treat bad faith within the spectrum of the various grounds of judicial review discussed earlier.

7.5 Limitations on Judicial Review

The preceding sections have thoroughly discussed the grounds that give rise to judicial review. This section shall further appreciate some of the most important procedural and substantive constraints of judicial review. Issues related to the determination of the parties to a judicial review, the availability, timing and scope of judicial review and other preliminary hurdles, if any, are the main concerns of this section.

According to Cumper (**Cumpe**r PP.292-293.), in determining whether a particular issue is appropriate or not for judicial review, a court [in England] will often consider the following factors, by asking:

- Is the decision in question a public law matter and thereby subject to judicial review?
- Has the right to judicial review been expressly excluded, say in a statute?
- Has the applicant sufficient interest in the issue (locus standi)?
- Has the applicant sought permission for judicial review within 3 months of the actual reason for bringing the application?
- Do specific grounds for judicial review exist?

But these are not the only questions that the court may ask in determining whether the decision complained of is appropriate for judicial review or not. The following questions must be added to the above questions:

- Are internal avenues exhausted?
- Is the decision in question ripe for judicial review?

Since many of these questions are appreciated in the previous chapters of this module, the discussion in the subsequent sub-sections will give due attention to some selected issues.

Is the decision in question a public law matter and thereby subject to judicial review? As you may recall from the discussion in the previous units, administrative law, as a branch of public law, concerns with the behavior of the various administrative organs of the government in their relation with citizens and the interrelation among themselves. In principle, only decisions of administrative bodies passed in their official capacity (decisions of governmental nature) can be subjected to judicial review. this means that for acts or decisions falling outside the purview of administrative law, the complainant cannot invoke judicial review.

Do specific grounds for judicial review exist? The grounds or conditions that justify judicial intervention/review are thoroughly discussed in the preceding section. The point that should be made clear here is that the reviewing court does not have unlimited power to test the decisions of administrative agencies. The power of the court is limited to test the legality of the decision complained of. So while the court determines to review the decision of an agency, it has to make sure that any of the specific grounds/conditions justifying judicial review as discussed earlier are met.

The other important point included in the above list, although it may necessarily be taken as a mandatory requirement by all jurisdictions, is related to seeking permission for judicial review. For example, in England, if an aggrieved person wants to invoke judicial review, s/he must first seek permission to apply for judicial review. Without securing permission upon application from the concerned court, within the statutory time limit of three months, an aggrieved person cannot invoke judicial review. The rational behind putting this procedural requirement is said to be the need to filter out those cases which are not amenable to judicial review. So, in determining whether a particular issue is suitable for judicial review, the court is expected to consider all the factors listed above.

7.5.1 Standing

As was provided in the above lists, in order to obtain leave/permission to bring an action for judicial review, the applicant must have **sufficient interest** in the matter to which the application relates. A worth discussing point here is related to the nature of the interest affected. What is a 'sufficient interest'? In answering this question, C**ane** gave a frequently quoted remark as follows:

> The guidance given in the *Fleet Street Casuals case as to the meaning of the term 'sufficient interest' is very abstract. Can anything more concrete be said on this topic? In answering this question, we need to distinguish between personal interests and public interests. An applicant would obviously have a sufficient personal interest in a decision which adversely affected the applicant's health or safety. A person would also have a sufficient interest in a*

decision which affected his or her property or financial well-being. For instance, neighbours have sufficient interest to challenge planning decisions in respect of neighbouring land. Producers and traders have standing to challenge the grant of a license or other benefit to a competitor, and a taxpayer might have standing to complain about the favourable treatment of a competitor by the revenue. The expenditure of time, energy and skill in caring for a particular species of wildlife or some feature of the natural environment could give a person a sufficient interest in a decision adversely affecting that species or feature. An aesthetic interest in the built environment may also generate a sufficient interest.

What about public interest? It seems clear that the public has a sufficient interest in the observance of basic constitutional principles such as 'no taxation or expenditure without parliamentary approval'. The public also has an interest that governmental powers such as that to ratify treaties or to set up a non-statutory compensation scheme (**Cane**, pp. 57-58.)

An important case is Inland Revenue Commissioners v National Federation of Self-Employed and Small business Ltd [1982] AC 617 – commonly known as Lords held that NFSSB did not have locus standi to challenge the Revenue's decision the Fleet Street casuals case. The NFSSB was attempting to challenge the Revenue's grant of a tax amnesty to Fleet Street casual workers on the grounds that it was illegal. The House of Lords held that NFSSB did not have locus standi to challenge the Revenue's decision with regard to another group of taxpayers. According to ***Cumper****, the House of Lords stated that the question of locus standi should be looked at in two stages:*

- *At the application for leave for judicial review; and*
- *At the hearing it self*

At the first stage, only cases where the applicant clearly does not have sufficient interest would be rejected. At the second stage, however, a more detailed look at the applicant's 'standing' should take place- it then becomes important to examine the merits of the case if the applicants have strong grounds for review, it is more likely that they will be deemed to have the necessary locus standi *(**Cumper**, p. 297.)*

In determining whether or not the applicant has sufficient interest (locus standi) for judicial review, the general opinion is that the legal and factual circumstances of each case need to be

considered critically. However, Cane suggested the following guidelines need to be considered*:*

- *Examining the case law: the question of sufficient interest is partly a question of legal principle –what do earlier cases say about standing? – and partly a question of fact to be decided in the light of circumstances of the case before the court. So it will often be impossible to be entirely sure, in advance of litigation, whether any particular applicant has a sufficient interest.*
- *Look at the relevant statute: the question of sufficient interest has to be judged in the light of the relevant statutory provisions – what do they say, or suggest about who is to be allowed to challenge decisions made under the statute.*
- *Consider the nature of the applicant's complaint: having look at the substance of the complaint may patently show that the applicant has or does not have sufficient interest.*
- *The seriousness of the alleged wrong: whether the applicant's interest is sufficient depends to some extent on the seriousness of the alleged illegality.* Standing is a preliminary question, separate from that of the substance and merits of the applicant's case: standing rules determine entitlement to raise and argue the issue of illegality, and it makes little sense to say that entitlement to argue the merits of the case depends on whether one has a good case on the merits. Only if the chance of failure at the end of the day approaches certainty should the likely outcome affect the question of access to the court.

*Courts dislike the possibility of there being a lacuna in the legal system – if there is a chance that an aggrieved person will not have an alternative means of challenging the decision in question, it increases the likelihood that the applicant will satisfy the locus standi requiremen. (***Cane,** *pp. 49-50.).*

Concerning the function/purpose of standing rules, Cane further states:

> *In general terms, it is to strict access to judicial review. But why restrict access? One suggested reason is to protect public bodies from vexatious litigants with no real interest in the outcome of the case but just a desire to make things difficult for the government…. Other reasons for restricting access have been suggested: to prevent the*

> *conduct of government business being unduly hampered and delayed by 'excessive' litigation; to reduce the risk that civil servants will behave in over-cautious and unhelpful ways in dealing with citizens for fear of being sued if things go wrong; to ration scarce judicial resources; to ensure that the argument on the merits is presented in the best possible way and by a person with a real interest in presenting it (but quality of presentation and personal interest do not always go together); to ensure that people do not meddle paternalistically in the affairs of other* (pp.59-60).

In short, the purpose of the standing requirements is simply to 'filter out' unmeritorious, frivolous or trivial applications, and thereby to save the court time (Cumper, p.298). The general requirement of standing dictates that in order to invoke judicial review, the complainant must show that the decision in question is one injurious to his/her interest. According to Brown & Bell, "this requirement creates no difficulty in proceedings against the administration for damages. It is rather in proceedings to annul an administrative act that the rules governing the plaintiff's *locus standi*…have been worked out in considerable detail.

Then, who would be the applicants for judicial review? According to Cane, judicial review is available not only to citizens (individuals, corporations, trusts and so on) with grievances against government, but also to government bodies with a grievance against another government body. To be entitled to seek a remedy by way of judicial review an applicant must have sufficient standing (locus stander P. 420). Dwelling on this principle, the House of Lords in the *Fleet Street* casuals case cited above rejected the application of the National Federation of Self-Employed and Small Business Ltd that was attempting to challenge the Revenue's grant of a tax amnesty to Fleet Street casual workers on the grounds that it was illegal. The principle dictates that only individuals or a group of individuals whose interest is substantially affected may invoke judicial review.

Concerning application for judicial review by pressure groups, there is no consistent practice among jurisdictions. Some countries allow action by pressure groups such as associations to invoke judicial review on behalf of their members. Even the case laws of England, shows us lack of inconsistency: some pressure groups are denied access to judicial review on the grounds of standing, but some others have been shown successfully appearing before the

court of review representing others. Some countries like India also allow public interest litigation – where any individual is allowed to seek judicial review of an agency's action on matters that affect the interest of the general public.

Coming back to the issue of standing in Ethiopia, the FDRE Constitution in Article 37 stipulates that:

"(1) *Every one has the right to bring justiciable matters to, and to obtain a decision or judgment by, a court of law or any other competent body with judicial power.*

(2) The decision or judgment referred to under sub-Article 1 of this Article may also be sought by:

(a) Any association representing the collective or individual interest of its members; or

(b) Any group or person who is a member of, or represents a group with similar interests.

As clearly stated in the above provisions of the constitution, any one whose interest is sufficiently at stake, any association on behalf of the collective interest of its members or on behalf of the individual interest of its members, any group of individuals with similar interests or any member of such identifiable group on such matters of common interest can apply for judicial review provided that the matter is justiciable and the avenue of judicial review is there. However, the provisions of the constitution stated above are not clear enough whether or not they give room for public interest litigation on matters that concern the general public. Of course, there appear under the constitution a departure from the rigid requirements of locus standi provided under our civil procedure code that restricts the right of standing only to those persons whose interest is directly and sufficiently at stake. But on matters related to environmental Pollution, the Environmental pollution Control Proclamation authorizes any one to institute a complaint before the concerned organ of the government without the need for showing locus standing.

7.5.2 Justiciability

The other limitation on the availability of judicial review is related to the justiciability of the decision in question. Broadly speaking, administrative controversies can be classified into justiciable and non-justiciable. "Justiciable controversy" as defined in Black's Law Dictionary, "is a controversy in which a present and fixed claim of right is asserted against

one who has an interest in contesting; rights must be declared upon existing state of facts and not upon state of facts that may or may not arise in future."

The genesis of the doctrine of justiciability is traced back to the U.S.A. Constitution. Under Art III of the U.S.A. Constitution, matters not to be precluded as being 'nonjusticiable' need to pass the screening test of "case of controversy" doctrine. Courts require that litigation be presented in an adversary form and be capable of judicial determination with out leading to violation of the principle of separation of powers (Destaw Andarge, [Addis Ababa University Facilty of Law (unpublished)].) The justiciability of the controversy refers to the capability of the disputed state of fact to be resolved by the application or interpretation of existing laws. Courts are expected to entertain only issues that can be legitimately judicialized (justiciable issue) – issues that can be conclusively resolved through the application or interpretation of laws in force.

The classification of the disputed issues into justiciable and nonjusticiable has a far-reaching implication on the courts judicial power in general and reviewing power in particular. Only justiciable matters are said to be suitable or appropriate for judicial appreciation. As courts are experts in law, it is justifiable to make them the final arbiters of law. But on nonjusticiable controversies – controversies that are not capable of being resolved through the application or interpretation of existing laws, for example, political/ministerial decisions or purely administrative/managerial decisions are not suitable for judicial consideration. As was discussed somewhere else, the scope of judicial review is limited to testing the legality or illegality of the decision contested. The reviewing court does not concern with the merits of the decision. Courts are not expected to have better expertise on the merits of the decision than the concerned administrative agencies. Rather, the bureaucracies that are composed of experts from different walks of the profession are said to have better expertise on administrative matters. Extending judicial review to nonjusticiable controversies is not only inappropriate for the court's business; it may also be against the principle of separation of powers. The principle of separation of state power dictates that each organ of the government shall refrain from interfering in the affairs of the others. This means, inter alia, that the judiciary should refrain from unduly interfering in matters that are exclusively entrusted to the other organs of the government. Particularly important to the discussion in hand is that the judiciary should not interfere in matters that are exclusively reserved to the administrative organ of the government such as political and purely administrative or ministerial issues.

Hence, where an application seeking permission for judicial review is brought to the competent court, it is advisable to check whether the decision contested is justiciable or otherwise before hand.

7.5.3 *Exhaustion* and Ripeness

Judicial review is the last resort that can be invoked by a party aggrieved by the decision of an administrative body after exhausting all the avenues available in the concerned agency. Being the last resort, the party aggrieved must go first through the internal agency avenues. Thus, a party seeking judicial review will usually be required, as a condition precedent to challenge the validity of the administrative action, to exhaust all the remedies or avenues available in the administrative channels. The basic tenet behind this rule is that agencies must be given the opportunity to rectify their mistakes and resolve matters in light of their own policy objectives and priorities before judicial intervention. As was discussed earlier, depending upon their administrative organization, agencies may have their own internal grievance/complaint handling avenues. These agency avenues have to be exhausted before judicial review is sought. Where, for example, there is a statutory right to appeal against the decision in question before a body within/outside the agency or before a regular court, judicial review cannot be invoked. Normally, an aggrieved party may not invoke judicial review before looking for agency internal remedies. But the doctrine of exhaustion of internal remedies may be successfully raised as a defense at the hearing stage by the concerned agency. The agency raising defense must prove, of course, the existence of a suitable internal avenue that ought to have been used by the complainant. However, in case where there is an excessive delay on the part of the administrative agency or where there is a great possibility that the complainant will incur an irreparable injury awaiting agency review, the applicant may be dispensed from the requirement of exhaustion of internal remedy.

The doctrine of exhaustion of internal remedies, in addition to giving agencies the opportunity to rectify their mistakes in their own avenues in the light of their policies, also avoids premature intervention of the court on administrative matters and relieves the court from seized by over flooding administrative complaints.

The other important limitation on the availability of judicial review is ‘ripeness’. In order to invoke judicial review, the case complained of must be ‘ripe for review’. The requirement of

'ripeness' shares some common features with the doctrine of exhaustion of internal remedy. It requires the complainant to wait until the concerned agency has passed its final decision. Before the concerned agency passes its final decision over the subject matter, a party cannot invoke judicial review against a speculated or hypothetical future decision. Until the concerned agency gives its decision on the subject matter, as a rule, judicial review may not be invoked.

The requirements of finality and ripeness are designated to prevent premature court intervention in the administration process, before the administrative action has been finally considered, and before the legal disputes have been brought into focus. However, in some cases where the claim has urgent character that on delay itself may inflict irreparable injury, the controversy would be as ripe for judicial review consideration as it calls ever be. The question in such cases is whether administrative inaction is equivalent to denying relief'. So, where an agency excessively or unreasonably delays or withholds action/decision altogether, although no final decision has been made, judicial review can be invoked seeking appropriate remedy. In this case, the requirement of ripeness (finality) may not stand valid to preclude judicial review. In this regard, it deems important to cite as a closing remark the following note concerning the practice in French:

> *It [the requirement of prior decision or ripeness], cannot, however, be used as a device on the part of the administration to deny the victim justice; thus, the silence of the administration when faced with the question for compensation is, by special statutory provision, treated as an implied rejection of the request after the lapse of four months. (***Brown & Bell**, p.157*).*

7.5.4 Finality Clause

As it has been already stated in the previous units of this module, judicial review (the supervisory power of the court) is treated, especially in the common law world as the inherent power of regular courts. Since courts are the ultimate arbiters of the law, it is argued that they have an inherent power to review any administrative decision where any of the grounds for review are there. The term 'inherent' in this context implies that the source of the reviewing power of the court is not statute; but it is inherent in the very fundamental principle

of division of state power among the three organs of the government where by judicial power is ultimately vested in the regular courts.

Despite the fact that statutes are not the source of the supervisory power of courts, it is not uncommon to exclude this power of the court by statutes. There are occasions where a statute may exclude judicial review of agency decisions expressly, or impliedly.

While delegating rulemaking and/or judicial powers to an agency, the legislature may in the parent act expressly preclude the power of regular courts to review decisions of the agency passed in such capacity. That means although the source of the reviewing power of the court is not statute, such power can be excluded by incorporating a finality clause in a statute (the Parent Act). However, such exclusion has to be expressly stated if it is needed to have effect in limiting or eliminating the inherent power of the court. For example, where the Parent Act incorporates a provision stating that the findings or decisions of the agency on such and such matters 'shall not be called into question' or 'shall be final', what does this finality clause imply? Is the intention of the parliament here to exclude the right to appeal or to deny any access to court to challenge any decision made under the Act? Authorities suggest that unless otherwise the finality clause incorporated in an Act expressly and clearly excludes judicial review of a decision passed under the Act, it has to be interpreted restrictively to mean no appeal can be lodged against the decision. Cane, for example, stated: "judicial review is seen as a basic right of citizens which the legislature will be taken to have excluded only by the very clearest words. This attitude seems to be the result of viewing judicial review as chiefly designed to protect the rights of the individual from unlawful interference by government." (p.81). There are similar arguments in case laws. In this regard it is important to reproduce the following landmark cases cited in Cumper's work:
Some attempts at exclusion, however, will never oust the court's jurisdiction. For example, in *R v Medical Appeal Tribunal, ex parte Gilmore* [1957] 1 QB 574, the Court of Appeal held that a clause stating that a decision of the Tribunal 'shall be final' would not exclude the court's jurisdiction to review. Lord Denning stated that 'the remedy by certiorari is never to be taken away by statute except by the most clear and explicit words' and that the word 'final' only means "without appeal" and not without recourse to certiorari." Similarly, in Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147, the Court of Appeal held that a clause in a statute stating that a decision of the FCC 'shall not be questioned in any court of law' would not exclude the court's jurisdiction to review where the decision-

maker had made an error of law which affected his/her power to decide. In asserting the court's right to retain the power of judicial review, Lord Wilberforce noted: "What would be the purpose of defining by statute the limit of a tribunal's powers, if by means of a clause inserted in the instrument of definition, those limits could safely be passe." (**Cumper**, pp. 295-296).

At this juncture, an important question may be raised: What will happen where there is no express statutory exclusion on judicial review? Concerning this issue, **Cumper** states the following remark:

> *On occasions where there has been no express attempt in a statute to exclude judicial review, the courts may decide that they have been impliedly excluded because an alternative remedy exists. However, the court will retain discretion to review, even where there is an alternative remedy available, if the case involves (inter alia) serious illegalities or to not intervene would lead to a serious delay or an unsatisfactory outcome for the applicant* (P. 296).

However, the implied exclusion is indicated here has a provisional nature. As discussed in the preceding sub-section, until after the alternative remedies are exhausted by the complainant, in line with the principle of the doctrine of exhaustion of internal remedies, the court is required to refrain from prematurely interfering in administrative matters. For detail, refer to the discussion in the previous section.

Another important question may be raised here. What about in case the legality of the finality clause that prohibits judicial review is questionable? In the United States, no problem as the US Supreme Court has the power to interpret the Constitution; it can automatically invalidate the statute that incorporates such unconstitutional finality clause. But, the answer may be different in the United Kingdom. As was discussed somewhere else, the UK Parliament is sovereign. It can promulgate any law whatsoever. In this regard, the court cannot question the status of the law enacted by the Parliament. So, where in a statute the UK parliament incorporates a finality clause that expressly precludes the court to review administrative decision on a certain subject matter, the court will not do any thing even if the legality of such clause or the administrative decision passed under its cover is questionable. In this regard, it is important to see the French experience that is closely similar to that of the situation in Ethiopia. The French parliament is sovereign in the sense that statutes

promulgated by the parliament cannot be subjected to judicial review (by administrative or civil court) for reasons of unconstitutionality. This is the exclusive power of the Constitutional council. Dwelling upon this constitutional theory, one can say that French courts, be it administrative or civil court, cannot bypass the "sufficiently categorical words of exclusion in a statute" that excludes the jurisdiction of administrative courts to review some administrative decisions. However, the paradox is noted as follows:

> *It is a striking fact, however, that there is no recorded instance of this [exclusion of jurisdiction] having occurred. Judicial review of administrative action has become so much part and parcel of the basic republican tradition which underlies all constitutions since 1875 that it is inconceivable in the present temper of French politics that any parliament would be willing, or any government would venture, to break with that tradition (***Brown & Bell***, p. 164).*

Thus, as it can be inferred from the opinion cited above, French administrative courts have, from their rich experience, developed a sort of unwritten 'general principle of law' as a kind of basic legal framework into which the statute must somehow be fitted. Thus, the presumption in France is in favour of judicial review of administrative actions.

However, in Ethiopia, wherever there appears finality clause incorporated in a statute the constitutionality of which is questionable, or where an illegal administrative decision is passed under the cover of such finality clause be itself constitutional or unconstitutional, what can the court do? Obviously, where the constitutionality of the finality clause is a matter of interpretation, this is exclusively the power of the House of Federation. It has to be referred to the House. But, where the finality clause as a plain fact contravenes any fundamental principle of the constitution, or even if the finality clause is presumed as if it were constitutional, but the administrative decision passed under its cover as a plain fact contravenes any higher law, it seems that it is a matter of policy advisable for the court to challenge the decision. After all, the intention of the finality clause is not to galvanize illegal acts of the administration, but to achieve certain intended objectives. But where things go contrary to what was intended for, why should such clause be observed to shield the corrupt administrator's act?

Review Questions

1. **Discuss the differences between judicial review and merit reviews.**
2. What are the grounds for judicial review?
3. Discuss the prerequisites of judicial review.
4. Explain the following terminologies:
    - Exhaustion of alternative/internal remedies
    - Ripeness
    - Finality clause
    - Justiciability
    - Technical review
    - Merit review
5. What does the requirement of standing (locus standi) imply? Discuss the requirement of standing under the Civil Procedure Code in line with Article 37(2) of the FDRE Constitution.
6. What does the principle of proportionality connote in the administrative law context?

UNIT EIGHT: REMEDIES ANS GOVERMENT (ADMINISTRATIVE) LIABILITY

Introduction

Remedies and rights have important correlation. Whenever rights are threatened or violated, people usually need the intervention of the law. It is the law that provides appropriate remedies proactively, or retrospectively. Administrative law is one of the most important laws that regulate the relationship between the strong-armed administrative bodies and week individuals. In addition to providing general principles and standards of behavior regarding the administration, this law tries also to devise mechanisms for rectifying administrative illegality. So, this unit, as a logical sequence of the previous units that deal with judicial review of administrative decisions, tries to explore various types of remedies that may be granted by the reviewing court in appropriate circumstances. Since the very purpose of judicial review is to provide appropriate remedies to ultra vires acts, understanding of the nature of the various types of remedies that may be granted and the difference and interrelation among them will be of paramount significance. Thus, this chapter gives due attention to these and related issues.

Objectives

At the end of this unit, students are expected to:

- Distinguish private law from public law remedies;
- Identify remedies available to an aggrieved party under private law;
- Define and identify public law remedies;
- Distinguish differences between the write of certiorari and prohibition;
- Discuss the circumstances under which the remedies of mandamus; and declaration and quo warranto may be granted;
- Define and discuss the remedy of habeas corpus;
- Apply their knowledge to solve practical cases;

8.1 Remedies

The term remedy in this context refers to the varieties of awards/relieves that may be granted by the reviewing court following an application for judicial review. As a general rule, where any of the grounds justifying judicial review are there, a person complained against the agency decision has to include in his or her application for judicial review the type(s) of order or redress he or she sought from the reviewing court. Thus, the relief that the applicant seeks from the reviewing court is what we call remedy.

For technical and historical reasons, remedies are broadly classified into public law remedies and private law remedies. Those included within the category of public law remedies also known as prerogative orders are certiorari (a quashing order), prohibition (prohibiting order), mandamus (mandatory order), Quo Warrant, and Habeas Corpus, whereas private law remedies include injunction, declaration and damages. Despite the classification of these remedies into public law and private law remedies, due to technical and historical reasons, both types of remedies have been now used in many common law jurisdictions as remedies in public law. At the outset, it has to be noted that each of the remedies listed above are not mutually exclusive. Appreciating this fact, Cane writes:

> *Leaving damages aside, these remedies perform four main functions: the mandatory function of ordering something to be done is performed by mandamus and the injunction; the prohibiting function of ordering that something not be done is performed by prohibition and the injunction; the quashing function of depriving a decision of legal effect is performed by certiorari; and the declaratory function of stating legal rights or obligations is performed by the declaration. The use of more than one remedy to perform two of these functions involves unnecessary duplication and produces undesirable complications in the law* (**Cane**, p.62.)

Having said this as introductory remark, let us proceed to the detail in the subsequent sub-sections in turn.

8.1.1. Public Law Remedies

As it has been discussed in the previous chapters, the primary purpose of judicial supervision of the administration is to restrain the latter from operating within the bounds of the law. So, public law or prerogative remedies of public law, in the English tradition, have primarily been used to ensure whether or not the government machinery operates properly. Due to this fact, it is said that these remedies are more liberally granted than the private law remedies that are mainly concerned with the enforcement of private rights. Brief mentions of the typical public law remedies that are widely used to rectify administrative wrongs through the process of judicial review are discussed below.

8.1.1.1 Certiorari

The writ of certiorari, also referred to as quashing order, is a procedure through which the reviewing court investigates the legality of an agency's decision complained of, and will quash or nullify where the decision in question is found to be ultra vires. According to Cane, "In its term, an order of certiorari instructs the person or body whose decision is challenged to deliver the record of the decision to the office of the Queen's Bench Division to be quashed (deprived of legal effect). Concerning the theoretical and practical effect of certiorari Cane makes important remark as follows:

> *There is a theoretical problem here because a decision which is illegal in the public law sense is usually said to be void or a nullity in the sense that the decision is treated as never having had any legal effect. A decision which has never had any legal effect cannot be deprived of legal effect. On this view, when we say the certiorari quashes an illegal decision, what we really mean is that the order formally declares that from the moment it was purportedly made ('ab initio') the decision had no effect in law. Thus, anything done in execution of it is illegal. This is the declaratory view of certiorari. An alternative view is that an illegal decision is valid until a court decides that it is illegal, at which point it can quash it with retrospective effect. On this view, certiorari has a constitutive effect rather than a purely declaratory effect.*

> *Even if the declaratory view of certiorari is theoretically correct, however, and illegal decisions never have legal effect, it may not be possible or wise for a person just to ignore such a decision, especially if it authorizes the government to act to that person's detriment. Apart from the fact that it is often unclear, as a matter of law, whether a decision is illegal or not (and so it would be unsafe just to ignore it), it is not the case that a void decision is forever void. However, illogical it may seem, a void decision will become valid unless it is challenged within any time limit for challenges, by an applicant with standing, and unless a court exercises its discretion to award a remedy to the applicant. Once the decision 'matures into validity' as it were, acts already done in execution of it also mature into legality because maturity is retrospective. So, whatever the position in theory, in practice, certiorari is not just declaratory in effect (**Cane**,* pp.63-63.)

Thus, if a person feels aggrieved because of ultra vires administrative acts affecting his interest, it is advisable for him or her to invoke judicial review within the allowable period of time lest the illegal administrative decision may be turned to legality (or to use Cane's word 'maturity') after the expiry of the statutory period fixed for filing application for judicial review. Normally, where certiorari is granted by the reviewing court, the parties have to be returned to their original pre-decision position.

8.1.1.2 Prohibition

The prerogative order of prohibition, as its name implies, performs the function of ordering a body amenable to it to refrain from illegal action. It is an order issued by a higher court to prevent an inferior tribunal or administrative authority from exceeding or from continuing to exceed its authority, or from behaving ultra virally while dealing on matters that affect the interest of the complainant. The striking contrast between certiorari and prohibition is that, while certiorari quashes what has been already done, ultra virally restrains a government body from taking a certain course of ultra vires action. Thus, certiorari has retrospective effect - nullifying an already made illegal or ultra vires act, whereas prohibition has a prospective effect - it stops the continuity of an ongoing course of action or restrains the

execution of an already made decision beforehand. Thus, while certiorari has nullifying effect, prohibition has preventive effect.

The applicant may, in appropriate cases, seek both certiorari (quashing order) and prohibition (prohibiting order) in conjunction; for example, certiorari to quash the decision in question and prohibition to prevent the execution of the nullified decision or the taking of other particular action.

8.1.1.3 Mandamus

Mandamus (mandatory order) is the other important public law remedy that deals with agency inaction. According to Cane, certiorari and prohibition are concerned with control of the exercise of discretionary powers, whereas the prerogative order of mandamus is designed to enforce the performance by governmental bodies of their duties. However, as case laws indicate, this comparison does not hold always true. According to Cumper, mandamus may also be used to compel the decision-maker to exercise his/her discretion properly. Cumper,(320) cited two important cases to substantiate his opinion as follows:

> *Thus, it [mandamus] may force a decision-maker to take relevant considerations into account (R v Birmingham Licensing Planning Committee, ex parte Kennedy [1972] 2 QB 140) and not to abuse power which has been conferred (Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997). Mandamus (a mandatory order is often applied for in conjunction with certiorari (a quashing order). For example, where there has been a breach of the rules of natural justice, certiorari (a quashing order) will quash the decision and mandamus (mandatory order) will compel a rehearing*.

Concerning the legal consequences that breaching statutory duties may entail to the decision-maker, **Cane**:

> *Breach of statutory duty can take the form either of non-feasance (i.e. failure to perform the duty) or misfeasance (i.e. bad performance). In certain circumstances a person who suffers damage as a result of a breach of statutory duty by a public authority can bring an action in tort for damages or an injunction. Public authorities can also be*

*attacked for nob-feasonce by being required to perform their duty. Mandamus (or an injunction in lieu) is the remedy for this purpose. Mandamus sometimes issues in conjunction with certiorari to require a body whose decision has been quashed to go through the decision-making process again. In this type of case the duty which mandamus enforces is often not a statutory one but the common law duty, which every power-holder has, to give proper consideration to the question of whether or not to exercise the power(*p64).

8.1.1.4. Quo Warranto

From Wade & Forsyth, Administrative Law (7th ed., 2000), pp. 567-568

Quo warrant was originally a prerogative writ which the Crown [in the United Kingdom] could use to inquire into the title to any office or franchise claimed by the subject. It fell out of use in the sixteenth century and was replaced by the information in the nature of quo warranto, which in form was a criminal proceeding instituted in the name of the Crown by the attorney general or by a private prosecutor. Since 1938, the information was replaced by the Administration of Justice (Miscellaneous Provision).Since then, the injunction has been made available by statute to prohibit the usurpation of public office, in place of the former proceeding known as quo warranto. The Miscellaneous Provisions Act 1938, in turn, was replaced by the Supreme Court Act, of 1981, which provided that, where any person acts in an office to which he is not entitled and an information would previously have lain against him, the High Court may restrain him by injunction and may declare the office to be vacant if may need be; and no such proceedings shall be taken by a person who would not previously have been entitled to apply for information. Consequently, the old law of quo warranto is still operative, but the remedy is now injunction and declaration. The procedure is similar to that of the prerogative remedies, and it is must now be by 'application for judicial review'.

The old procedure by information was available to private persons subject to the discretion of the court. A private prosecutor brought the best-known modern case, in which it was unsuccessfully claimed that two foreign born Privy Councilors were disqualified from membership, the courts held that the Naturalization Act 1870 had repealed the disqualification imposed by the Act of settlement 1700. The modern tendency has been to

extend the remedy, subject to the discretion of the court to refuse it to a private prosecutor; for example, if he has delayed unduly. A private prosecutor acting on public grounds may expect the assistance of the court. He is sometimes called the relator, although he does not have to obtain the leave of the General-Attorney.

The remedy as now defined applies to usurpation of 'any substantive office of a public nature and permanent character which is held under the Crown or which has been created by any statutory provision or royal charter. But it must not be a case of 'merely the function or employment of the deputy or servant held at the will and pleasure of others'. Here, once again, we meet the difference between office and mere contractual employment. The procedure was typically used to challenge the right to such office as those of freeman or burgess of a borough, mayor, town councilor, sheriff, justice of the peace, county court judge, chief constable or member of the General Medical Council. But the alleged usurper had to be in possession of the office and to have acted in it.

For challenging the qualification of a member of a local authority, there are special statutory provisions under the Local Government Act 1972. Proceedings may be instituted in the High Court or a magistrates' court, but only by a local government elector for the area concerned, and only within six months of the defendant having acted as a member; if the defendant merely claims to be entitled to act, proceedings lie in the High Court only. The various remedies include declarations, injunctions and financial penalties.

An inference can be made from the explanation of the authorities stated above that quo warranto is a prerogative writ, which falls within the category of public law remedies. It has been used for a long period of time in England as a process to challenge the legitimacy of titles assumed by government officials, and now it is also applicable to challenge the usurpation of offices assumed in the interest of the public. The prerogative writ of quo warranto is sanctioned by declaration, injunction and financial penalties.

8.1.1.5 Habeas Corpus

The writ of habeas corpus (produce the body) is used to obtain the release of someone who has been unlawfully detained, e.g., wrongfully arrested. It is a procedure through which an

illegally detained person applies to the court requesting an order for his physical release. It serves as a modality for securing the liberty of a person by affording an effective means of immediate release from unlawful or unjustified detention. Habeas corpus referred to as the "Great Writ" in common law, has traditionally maintained high reputation as a safeguard of personal liberty. Currently, it is an attempt to measure up to the standards of human rights and fundamental freedoms which entitle the detainee to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered, if the detention is found to be unlawful.

The writ of Habeas Corpus has received blessing in many jurisdictions, and is being used as a vital instrument for protecting the fundamental human rights of individuals to their liberty. Currently in Ethiopia, too, it has received the blessing of the FDRE Constitution. In chapter three of the constitution that deals with 'fundamental rights and freedoms', Article 19 particularly deals with the right of arrested persons stated that in its sub-Article 4 as follows: "All persons have an inalienable right to petition the court to order their physical release where the arresting police officer or the law enforcer fails to bring them before a court within the prescribed time and to provide reasons for their arrest…." Authorities assert that the public law remedies are privileges that can be granted at the court's discretion. this means that, unlike in the case of appeal, individuals, as of right, cannot invoke judicial review. However, although the Writ of Habeas Corpus falls within the traditional category of public law remedies, it is recognized under our constitution as inalienable right conferred to all persons detained. This right can be denied only on its merit where the detention has justifiable ground; but there is no need for leave for judicial review like the other public law remedies discussed above.

8.2.1 Private (Ordinary) Law Remedies

As stated earlier, the basis of the classification of the public law and private law is mainly historical. According to Cane, the private law remedies are so-called because they were originally used only in private law but later came to be used in public law (**Cane**, p. 66). Many of these remedies, for example in England, are used in conjunction or as alternatives to the other public law remedies. So, classification between private and public law remedies is merely historical and technical. Technically speaking, prerogative remedies may be invoked

by an application for leave for judicial review but this is not the case in most private law remedies.

8.2.1.1 Injunction

An injunction in the common law tradition is known as an equitable remedy, which means that it is in the discretion of the court whether or not to grant it. It is a court order, which in the majority of cases that orders the party to whom it is addressed not to do a particular act. But broadly speaking, it can be negative (i.e., forbidding a decision-maker from doing something), or mandatory (i.e., ordering a decision-maker to do something). In public law, injunctions tend to be negative in nature, because mandamus will normally be sought in order to compel a decision-maker to carry out a duty (**Cumper**, pp. 320-321.) In a similar vein, Cane also stated that injunction may be granted in lieu of prohibition (prohibiting order) or mandamus (mandatory order). This remedy found its way into public law partly as a means of enforcing public law principles, especially the rules of natural justice, against non-governmental regulatory bodies which derived their powers from contract and so were not amenable to orders of prohibition or mandamus **Cane**, p.66).

Injunction can be granted in both public and private law as an interim or final relief. An interim injunction (also referred to as interlocutory injunction) is a provisional remedy that may be granted at the court's discretion at the interlocutory proceedings pending the hearing of the case. Its purpose is to prevent a party from continuing the actions complained of until a full hearing of the case. As a rule, an interim injunction has to be granted where there is imminent danger of irreparable injury and damages would not be an adequate remedy. There are also cases where injunction may be granted as a final relief in public matters both in the positive and negative sense in lieu of mandamus and prohibition, respectively.

8.2.1.2 Declaration

This is simply asking the court to make a ruling on what the law is. It is used in both public and private laws and is available in wider circumstances than the prerogative orders. (Blakemore & Greene, p.122.) Another authority noted concerning the meaning of declaration in England as follows :

> *A declaration, or declaratory judgment is a remedy which was used in the crown of chancery and also in the common law Court of Exchequer. It declares what the legal rights of the parties to the action are and differs from other judicial remedies in that it declares the law without any sanction and has no coercive effect. The reason for this is that it was always sought in conjunction with remedies, which the court could enforce. Now in England, a declaration may be sought in public law case along with one or more of the prerogative orders as well as with an injunction and/or an award of damages.*

Although it is a private law remedy in its origin, declaration is now widely in use as a remedy in both private and public law cases. Its main purpose is to determine or ascertain what the law says without changing the legal position or rights of the parties. It declares what the law is or says in relation to a certain uncontested fact.

8.2.1.3 Damages

In legal parlance, the term damages is usually used interchangeably with the term compensation. The purpose of awarding damages in this context is to repair the pecuniary or non-pecuniary harm inflicted upon the complainant because of administrative wrongs. The worthmentioning point here is that damages may not be awarded to the complainant on the mere ground that s/he has suffered some sort of compensable injury due to the act of an administrative body, which is found to be ultra vires in a judicial review. This means, the fact that an administrative action is successfully attacked in judicial review does not necessarily entitle the victim of that act a right to claim compensation.

Damages are purely a private law remedy that can be claimed by the victim of a wrongful act in accordance with the dicta of private law. As in *Cooper v Board of Works for the Wands worth District* (1836), damages may also be awarded in judicial review but only if the applicant also has private law rights. (**Cumper**, p. 321.) In this regard, Cane gave an elaborative remark as follows:

> *Unlike declaration and injunction, which are private law remedies (remedies for the redress of private law wrongs) which have been extended to redress public law illegality, damages are purely private law remedy. In other words, in order to obtain an award of damages it is necessary to show a private law wrong; damages cannot be awarded simply on the basis that a government body has acted illegally. The relevance of the remedy in public law is that public bodies can commit private law wrongs, and so damages are a remedy available against public bodies. For example, damages for breach of contract can be obtained against a government department. Conversely, whereas a declaration or injunction is available to restrain a breach of natural justice or to declare the invalidity of a decision made in breach of the rules of natural justice, damages are not available for breach of natural justice as such, because this is a wrong recognized only in public law. If a breach of natural justice also amounted to a breach of contract, damages might be available for the breach* (p.73).

As can be inferred from the above-mentioned authorities, a claim for award of damages can be filed before the reviewing court, but the granting of the award depends on whether or not the decision rendered is invalid on the grounds of the public law principles at the same time constitutes a civil wrong in private law such as torts and contract and whether or not the applicant suffers a compensable injury due to such private wrong. So the award of damages in judicial review is a matter of coincidence. That is, when the grounds justifying judicial review at the same time constitutes private wrongs, damages may be awarded to the applicant provided that s/he proved a compensable injury caused to her/his interest as per the governing private laws.

7.2 Liability of the Administration

As was stated above, the awarding of damages belongs to the private law remedies. In addition to, or apart from applying for either of the public law remedies such as certiorari, prohibition, mandamus, or the private remedy- injunction, where the applicant suffers a compensable injury due to administrative wrong, s/he may also claim damages in the form of pecuniary compensation or in the form of other appropriate compensatory remedies. Thus,

there is a possibility for suing the state, its administrative units, and servants for damages based on extra contractual wrongs or for breaches of contractual obligations. The term administrative liability, here, is preferred to state or governmental liability since this principle of liability in many jurisdictions including Ethiopia is extended to all public authorities.

In the common law tradition, the reviewing court may award damages, in addition to granting either of the prerogative remedies or injunction, where the decision in question constitutes a wrong under the governing private law, that is, law of torts or contract. Where the reviewing court rejects the application for judicial review for one or aother reason, it cannot award damages even if the administrative conduct complained of constitutes a manifest extra contractual or contractual wrong. Thus, the award of damages, for example, in the United Kingdom is conditioned on the grant of any of the prerogative remedies mentioned above. But it does not mean that, whenever there is judicial review, there is always award of damages; as factors justifying judicial review may not sometimes completely overlap with those of constituting civil wrong. In the United Kingdom, for example, since the adoption of the Crown Proceedings Act 1947, the liability of the Crown and other public authorities is generally accepted, so that the citizens are able to sue them for damages in tort or contract which is applied to public authorities as to private individuals (Brown & Bell, p.173) In fact, because of the nature of the special relation the administration has with individuals, it may incur special civil liabilities But in the majority of cases, the administration in England is held civilly liable in the same manner as individuals in their private relation.

However, in France, which is a typical model of the continental law system, there is a different practice. As was discussed some where else, in France, there is a clear divorce between public law and private law, On one hand there are administrative courts and on the other hand they are civil courts. The French administrative courts have the power, among other things, to litigate administrative legality and liability in accordance with the governing principles of the administrative law. The rules governing administrative liability are different in many respects from those found in the droit civil (civil code) and applied by the civil courts in suits against private individuals. In a very real sense, therefore, there co-exist in France two laws of tort, two laws of contract, the one private and the other public or administrative. French administrative courts/tribunals are entrusted with the power to entertain not only disputes related to the legality of administrative decisions but also those related to the liability of the state and its servants to the victims of administrative wrong, be it

tortuous or contractual wrong. In France, the administration is liable to compensate a citizen who is harmed through the decisions or activities of the administration, which need not be unlawful in all cases (Brown & Bell, p. 173). Thus, the French administration is normally held vicariously liable for civil harms caused due to faults committed by its servants in relation to public service and also in exceptional cases for those harms caused without fault due to the danger or risk associated activities the state operates.

The practice in Ethiopia fits neither the English nor that of t the French in absolute terms. Like the practice in English, but unlike the French one, the tortuous liability of the administration (the state and its servants) in Ethiopia is governed by the ordinary law of the country. And like the French practice, but unlike the English one, the tortuous liability of the state and its servants in Ethiopia is not limited to fault based liabilities. There are cases where the state or its administrative sub-units may be held strictly and vicariously liable for the injury caused to third parties because of the dangerous activities it operated, or due to the official fault committed by its employees or servants during discharging their duties.

Concerning the contractual liability of the state, too, the practice in Ethiopia neither fits the common law nor the continental law counter parts. Normally, the state is contractually liable for damages it caused to a contracting party due to breach of its contractual obligation. Special provisions that particularly deal with administrative contract are incorporated under the Ethiopian Civil Code. These provisions reserve many exceptional powers to the administration in the interest of the public. So, appreciating, on the one hand, the interest of the public at stake and on the other hand, the prejudices that may be caused to the legitimate expectation of a party to the contract due to the unilateral act of the administration, the special provisions of administrative contract provide certain protections to the contracting individual. In this regard, there is a similarity with that of the French. However, the ordinary principles of contract, in general, are still applicable to administrative contract in Ethiopia unless otherwise stipulated to the contrary in the special provisions of administrative contract. But regular courts determine the contractual liability of the state and its administrative units in Ethiopia, like the common law counter parts; but unlike the practice in French where administrative courts entertain jurisdiction on disputes related to administrative contract.

In short, the administration is civilly liable to compensate the injuries it causes to individuals during the course of its administrative interaction with them. In Ethiopia, there are provisions that deal with the extra contractual liability of the administration specifically. As per Article

2126(2) cum Article 2157(2) of the civil code, the administration is vicariously liable for the torts committed due to the official fault of its servants or employees. If the fault is personal as contrasted to official fault, the person who committed the fault is personally liable to compensate the victim.

In this regard, the extra contractual liability of the administration in Ethiopia is modeled after the French counter part despite minor differences. For example, in the French counter part, torts occasioned by the faults of state servants are classified into service fault (faute de service) and personal fault (faute personelle) that corresponds to the Ethiopian classification into official fault and personal fault. Concerning the meaning and implication of the classification of faults into service and personal faults, it is noted as follows:

There is said to be faute personelle where there is some personal fault on the part of the official, that is, a fault 'which is not linked to the public service but reveals the man with his weaknesses, his passions, his imprudence'…Where such personal fault is present, the official can be sued personally in the ordinary courts. On the other hand, where there is simply a faute de service (one which is linked with the service), the official preserves his immunity by reason of the principle of separation of powers, which prohibits the ordinary courts receiving actions against the administration or its officials. But the injured party must sue the administration before the administrative court. (Brown & Bell, p.177)

But in terms of scope, the term faute de service (service fault) in France has broader meaning and application than the term official fault in Ethiopia. The other striking difference in this regard is that, in France, once the fault is categorized as faute de service, liability exclusively goes to the administration the servant is immune from personal liability. But as clearly stated in Article 2126(1) of the civil code, this is not the case in Ethiopia. Even if the fault is an official fault, the "servant or government employee is in every case liable to make good the damage he causes to another by his fault." The term official fault mentioned in sub-Article 2 of Article 2126 does not immune the public servant or government employee from personal liability; it merely gives the victim an option to sue the administration for compensation jointly and severally with the public servant or government employee. As expressly stated in sub-Article 2 of Article 2157 cum Article 2158(1) of the civil code, as a matter of discretion, where the fault consists of an official, the court may decide that the liability shall be ultimately borne by the administration wholly or partly having regard to the gravity of the fault committed. This indicates that, even if the fault is an official fault, the public servant or

government employee is personally liable to compensate the victim, unless the court is willing to exercise its discretion in shifting the liability to the administration (the state, its territorial sub-divisions or the public service concerned.)

In Ethiopia, only specific categories of officials are immune from being sued for extra contractual liability. The first provision that deals with sovereign immunity is Article 2137 of the civil code. Accordingly, "No action for liability based on a fault committed by him may be brought against His Majesty, the Emperor of Ethiopia." This provision reflects the prevailing situation at the time of its enactment. First, sovereignty was in the hand of the then Emperor. Having anointed himself as the elect of God, he was not subject himself to the rule of land law, but only to his conscience and ordain of God. Thus, the rational behind this immunity could be any of the two classical common laws dicta, "The King cannot do wrong" or "The King cannot be sued in His Courts."

The other immunity is given to ministers, members of the parliament, and judges. As clearly stated in Article 2138 of the code, members of the Imperial Ethiopian Government, members of the Ethiopian Parliament and judges of the Ethiopian courts are immune from being sued for liability in connection with their office. First of all, this provision has to be construed in line with the current FDRE Government structure. Hence, the then members of the Imperial Government may be equated with the ministers, commissions and others constituting members of the Council of Ministers at the Federal level, on the one hand and, the respective regional counter parts, on the other hand. The same line of interpretation should go to members of the parliament and judges. But the immunity given to these officials is not an absolute immunity like the one given to the Emperor. It is an immunity given to them only for civil liabilities they incur in connection with their respective official duties. They are liable for torts they committed in their private capacity (while enjoying private life like any citizen). Even in matters related to their official duty, where the fault they committed constitutes an offence under the penal law and are convicted to such effect, any one who suffers civil injury due to such faults can sue the wrongdoer.

The purpose of the immunity granted to those officials mentioned above is not to render the victim helpless. In this case, the victim should be compensated by the concerned administration. Of course, to make those officials personally liable for the civil injuries they caused to third parties might have futile consequences. Intimidated by the threat of actions for

civil liabilities, individuals may not be willing to assume such positions, and even when they assume it by any magic of miracle they may lack the requisite courage in exercising their discretion in order to reach at a sound decision within the reasonable time bound. So, while providing immunity to them in this regard seems acceptable from policy perspective, it should not be done at the expense of individual victims. In this regard, it seems important to see the French experience. The French administrative law jurisprudence developed an alternative principle that connects liability of the administration with the fundamental principle of the equality of all citizens in bearing public burdens. Brown & Bell jointly cited an important remark from Duguit as follows:

[T]he activity of the state is carried on in the interest of the entire community; the burdens that it entails should not weight more heavily on some than on others. If then state action results in individual damage to particular citizens, the state should make redress, whether or not there be a fault committed by the public officers concerned. The state is, in some ways, an insurer of what is often called social risk… (Brown & Bell, p.184). Here French is basing liability on the principle that what is done in the general interest, even if it is done lawfully, may still give rise to a right to compensation when the burden falls on one particular person.

Another worth mentioning point on extra contractual liability of the administration is related to the strict liability for dangerous or abnormal risk associated administrative ventures. Like in the case of France, in Ethiopia, where the state causes injury to third parties while pursuing dangerous activities or abnormal risk associated ventures in the manner stated in Article 2069(1) of the civil code, it will be held strictly liable to compensate the victim in accordance with sub-Article 2 of same.

Review Questions

1. Discuss the various types of public law remedies and private law remedies.

2. What are the bases of the classification between public and private remedies?

3. Provide short explanations that illustrate the circumstances in which each of the public and private remedies may be sought by the aggrieved party.

4. Compare and contrast injunctions with mandamus and prohibition.

5. What is administrative liability?

6. Compare and contrast the extra contractual liability of the administration in Ethiopia with that of the French counter part.

7. What is the rational behind administrative strict civil liability?

REFETENCE MATERIALS

I. Books

- Blakemore, Timothy & Green Brendan, Law for Legal Executives (7th ed., Oxford University Press, 2004)
- Cane, Peter, An Introduction to Administrative Law (3rd ed., Oxford University Press, 1966)
- Cumper, Peter &with Walters Terry, Constitutional & Administrative Law (Oxford University Press, 2001
- Scholler, Heinrich, Ethiopian Constitutional and Legal Development (Rudiger Koppe Verlag, Volume I, 2005)
- S. Bell & Brown L.Neville, French Administrative Law (Oxford University Press, 1993)
- Wade H.W.R. &Forsyth C.F., Administrative Law, (9th ed., Oxford University Press, 2004)
- (Peter Leyland and Terry Woods, Textbook on Administrative Law ,4th ed.)
- Black's Law Dictionary, 6th Ed.
- **Administrative Action,** pp. 152-196)

II. Laws

- The Federal Democratic Republic of Ethiopia Constitution of 1995
- The Civil Code of Ethiopia Proc. No. 165/1965
- Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proc. No. 256/2001
- Reorganization of the Executive Organs of the Federal Democratic Republic of Ethiopia Proc. No. 256/2001
- Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proc. No 4/1995
- Monetary and Banking Proc. No. 83/1994
- Inquiry Commission to Investigate the Conflict Occurred in Gambela Regional State on December 13, 2003 Establishment Proc. No.398/2004
- Ethiopian Human Rights Commission Establishment Proc. No. 210/2000
- Institution of the Ombudsman Establishment Proc. No. 211/2000

- Trade Practice Proclamation 329/2003
- Federal Tax Appeal Tribunal Establishment proc. No. 233/2001
- Social Security Authority Establishment proc. No. 38/1996
- Labor Proclamation No. 377/2006

- Council of Constitutional Inquiry Proc. No. 250/2001
- Higher Education Proc. No. 351/2003
- Electricity Proclamation No. 86/1997
- Federal Civil Servants Proc. No. 515/2007
- The Re- Establishment and Modernization of Customs Authority Proc. No. 60/1997
- Source- wikipidia (http://en.wikipedia.org/wiki/Administrative_law
- **(I.P. Massey, Administrative Law, 5th ed.)**
- http/www.gahooygle.com=maladministration.
- http:/www.businessdictionary.com/definition/judicial-review.html accessed on 20 June 2008
- (http://www.en.wikpidedia.org/wiki/Judicial_review_in *the*_United_States,
- http://en.wikipedia.org/wiki/Judicial-review
- Addis Ababa University Facilty of Law (unpublished)].)

III. Regulations

- *Federal Civil Servants Disciplinary and Grievance Procedure Regulation No. 77/2002*