# ETHIOPIAN ADMINISTRATIVE LAW

## A Textbook

Abraham Yohanes
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February 2023
Addis Ababa, Ethiopia

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# Table of Contents

**Acknowledgement** ..... **xi**
**Preface** ..... **xv**
**Table of Cases** ..... **xviii**
**Table of Laws** ..... **xix**

**CHAPTER ONE** ..... **1**

**INTRODUCTION TO ADMINISTRATIVE LAW** ..... **1**

**Chapter overview** ..... **1**
**1.1 Introduction** ..... **2**
**1.2 Nature and Definition of Administrative Law** ..... **3**
1.2.1 Definition of Administrative Law ..... 3
1.2.2 Principles /Values/ of Administrative Law ..... 8
**1.3 Emergence and development of administrative law** ..... **9**
1.3.1 Emergence ..... 9
1.3.2 Historical development ..... 11
**1.4 Scope of administrative law** ..... **12**
1.4.1 General and special administrative law ..... 12
1.4.2 The merits/legality (Procedure/substance) distinction ..... 13
1.4.3 Public Law and Private Law ..... 14
1.4.4 Who is Subject to Administrative Law? ..... 15
**1.5 Sources of Administrative Law** ..... **16**
**1.6 General Overview of Federal Administrative Procedure Proclamation** ..... **18**
1.6.1 Exclusions and Exceptions ..... 21
**1.7 Red, Green and Amber Light Perspectives** ..... **21**
**1.8 The Relationship between Constitutional Law and Administrative Law** ..... **24**
**1.9 Administrative law in common law and civil law countries** ..... **25**
1.9.1 Common Law: British and American Administrative Law ..... 26
1.9.2 Civil Law: French and German Administrative Law ..... 27
1.9.3 Africa: Kenyan and South African Administrative Law ..... 29
**1.10 Development of Administrative Law in Ethiopia** ..... **30**
**1.11 Regional/State Administrative Law** ..... **32**
**1.12 Summary** ..... **34**
**1.13 Glossary** ..... **34**
**1.14 Review Questions** ..... **35**

**1.15 Further reading ..... 38**

**CHAPTER TWO..... 41**

**CONSTITUTIONAL FOUNDATIONS OF ADMINISTRATIVE LAW41**

**Chapter overview..... 41**
**2.1 Introduction ..... 42**
**2.2 The Notion and development of Rule of law ..... 43**
2.2.1 Rule of Law as a Basis of Administrative Law .....46
2.2.2 The Rule of Law in Ethiopia.....50
**2.3 Separation of Powers as a Limitation on Administrative Law ..... 52**
2.3.1 Nature, Meaning, and Origin of the Principle.....52
2.3.2 Linking separation of powers to Administrative Law .....58
2.3.3 FDRE Constitution and Separation of Powers.....59
**2.4 Due process of Law..... 61**
2.4.1 Meaning nature and development of Due process of Law.....61
2.4.2 The essential elements of Due Process of Law.....63
2.4.3 The principle of due process in Ethiopia .....67
**2.5 Basic Principles of Administrative Law /Good Governance/ ..... 68**
2.5.1 Fairness.....69
2.5.2 Reasonableness.....70
2.5.3 Proportionality.....72
2.5.4 Duty to give reasons .....73
2.5.5 Transparency.....74
2.5.6 Public Participation.....75
**2.6 Summary ..... 76**
**2.7 Glossary..... 77**
**2.8 Review Questions..... 78**
**2.9 Further readings..... 79**

**CHAPTER THREE ..... 81**

**ADMINISTRATIVE AGENCIES..... 81**

**Chapter overview..... 81**
**3.1 Introduction ..... 82**
**3.2 Administrative Agency: Historical Development and Definition ..... 83**
3.2.1 Historical Development.....83
**3.3 Definition..... 83**

**3.4 The raisons d'etre for the formation of Administrative Agencies ..... 85**
**3.5 Formation of Administrative Agencies ..... 87**
**3.6 Functions of Administrative Agencies ..... 87**
**3.7 Agency Structure and Classification ..... 89**
**3.8 Form and Nature of Power ..... 90**
**3.9 Discretionary Power of Administrative Agencies ..... 91**
3.9.1 The Necessity of Delegation ..... 91
3.9.2 Discretionary Power: Definition ..... 91
3.9.3 Arguments for and against Discretionary Power of Administrative Agencies 92
3.9.4 Express/Implied Power of Administrative Agencies ..... 92
**3.10 The Powers of Administrative Agencies ..... 93**
3.10.1 Rule-making Power ..... 93
3.10.2 Adjudicatory Power of Administration Agencies ..... 93
3.10.3 Administrative Power of Agencies ..... 93
**3.11 Summary ..... 95**
**3.12 Review Questions ..... 95**
**3.13 Glossary ..... 96**
**3.14 Further Reading ..... 96**

**CHAPTER FOUR ..... 99**

**ADMINISTRATIVE DECISION-MAKING (ADJUDICATION) PRINCIPLES AND PROCEDURE ..... 99**

**Chapter overview ..... 99**
**4.1 Introduction ..... 101**
**4.2 What is an Administrative Decision? ..... 101**
4.2.1 A note on Nomenclature ..... 101
4.2.2 Definition ..... 102
4.2.3 FAPP's definition of administrative decision ..... 104
**4.3 Levels of Administrative Decision-making ..... 106**
4.3.1 Levels of Decision-making Under FAPP ..... 108
**4.4 Decision-making (Adjudication) Principles and Procedure ..... 110**
4.4.1 Why procedural fairness? ..... 111
4.4.2 How much fair hearing is required? ..... 112
4.4.3 Elements of Procedural Rules and Principles ..... 113
**4.5 Sources of fair procedural fairness requirement in Ethiopia ..... 114**
4.5.1 FDRE Constitution Article 37 ..... 114
4.5.2 Administrative procedure proclamation ..... 115

4.5.3 Specific primary legislations ....116
4.5.4 Regulations and Directives ....116
**4.6 Overview of decision-making procedure in other laws .... 117**
4.6.1 Formal decision-making procedure ....117
4.6.2 Informal decision-making procedure ....121
4.6.3 No decision-making procedure ....123
**4.7 Decision-Making Procedure Under FAAP .... 125**
4.7.1 Prior Notice ....126
4.7.2 Contents of Charge ....128
4.7.3 Presentation of Defence ....129
4.7.4 Oral hearing ....129
4.7.5 Presentation of Evidence ....130
4.7.6 Cross-Examination ....131
4.7.7 Right to counsel ....132
**4.8 The Duty to Give Reason/s/ .... 133**
4.8.1 Form and Content of decision ....134
4.8.2 Communication of the decision ....135
**4.9 Rule Against Bias .... 135**
4.9.1 Personal bias and Pecuniary bias ....137
4.9.2 Departmental Bias ....138
**4.10 Exclusions and exceptions .... 140**
4.10.1 Hearing makes no difference ....141
4.10.2 Privilege and discretion ....141
4.10.3 Secrecy and Urgency ....142
**4.11 Applicability of FAPP to Tribunals .... 143**
**4.12 Summary .... 144**
**4.13 Glossary .... 144**
**4.14 Review Questions .... 145**
**4.15 Further reading .... 152**

**CHAPTER FIVE .... 153**

**ADMINISTRATIVE RULE-MAKING .... 153**

**Chapter overview .... 153**
**5.1 Introduction .... 155**
**5.2 Definition of Rules and Rule-making .... 155**
5.2.1 What is a Directive? ....156
**5.3 Terminology and Nomenclature .... 157**
5.3.1 Terminology ....157

5.3.2 Nomenclature ..... 158
**5.4 The Need for and Risks of Delegated Legislatio ..... 163**
5.4.1 The Need for Delegated Legislation ..... 164
5.4.2 Risks and Objections ..... 167
**5.5 Constitutional Limitations on Power of Delegation ..... 168**
5.5.1 Non-delegable matters ..... 169
5.5.2 Tests of Constitutional Scope of Delegation ..... 170
**5.6 To whom is power delegated? ..... 173**
**5.7 Mode of Delegating Power ..... 175**
**5.8 Classification of Administrative Rules ..... 177**
5.8.1 The distinction between directives and administrative decisions ..... 178
**5.9 Rule-Making Procedure ..... 178**
5.9.1 Informal and formal procedure ..... 179
5.9.2 Notice ..... 180
5.9.3 Consultation ..... 181
5.9.4 Publication ..... 184
5.9.5 Exceptions and Exemptions ..... 185
**5.10 Formality Requirements ..... 187**
5.10.1 Serial number ..... 187
5.10.2 Source of power ..... 187
5.10.3 Signature ..... 188
5.10.4 Language ..... 189
5.10.5 Registration ..... 189
5.10.6 Explanatory note ..... 191
**5.11 Control of Administrative Rule-making ..... 192**
5.11.1 Procedural control ..... 193
5.11.2 Parliamentary control ..... 194
5.11.3 Judicial control ..... 198
**5.12 Rule-Making Procedure and Practice in Some Administrative Agencies 200**
5.12.1 Ministry of Revenue ..... 200
5.12.2 Food and Drug Administration ..... 202
**5.13 Summary ..... 203**
**5.14 Glossary ..... 204**
**5.15 Review Questions ..... 205**
**5.16 Further Readings ..... 210**

**CHAPTER SIX ..... 211**

**MECHANISMS OF CONTROLLING POWER ..... 211**

**Chapter overview** ..... **211**
**6.1 Introduction** ..... **212**
**6.2 Democratic and Constitutional Basis** ..... **213**
**6.3 Controlling Modalities** ..... **214**
6.3.1 Internal control ..... 214
**6.4 External Controlling Mechanisms in general** ..... **215**
6.4.1 Parliamentary control ..... 216
6.4.2 Control by the Executive ..... 216
6.4.3 Control by administrative tribunals ..... 217
6.4.4 Control by the Judiciary ..... 219
6.4.5 Control by Human Rights Commission and Ombudsman ..... 220
6.4.6 Control by the Mass Media ..... 222
6.4.7 Control by Civil Society ..... 223
**6.5 The Supervisory Power of the House of Peoples' Representatives** ..... **224**
**6.6 The Ombudsman Principle** ..... **227**
6.6.1 Definition ..... 227
6.6.2 Characteristics ..... 228
6.6.3 Investigation Procedure and Access to Information (Human Right Commission and Ombudsman) ..... 230
6.6.4 Remedial Measures taken by Human Right Commission and Ombudsman .231
**6.7 Summary** ..... **233**
**6.8 Review Questions** ..... **234**
**6.9 Glossary** ..... **235**
**6.10 Further Reading** ..... **236**

**CHAPTER SEVEN** ..... **237**

**MERITS REVIEW: COMPLAINTS HANDLING ORGANS AND ADMINISTRATIVE TRIBUNALS** ..... **237**

**Chapter overview** ..... **237**
**7.1 Introduction** ..... **238**
**7.2 Complaint Handling** ..... **239**
7.2.1 Right to Complain ..... 240
7.2.2 Establishment of Complaint Handling Organs ..... 241
**7.3 Definition of Tribunals** ..... **243**
**7.4 Justification for Existence of Tribunals** ..... **243**
**7.5 Basic Characteristics** ..... **245**
7.5.1 Established by Law ..... 245

7.5.2 Binding Decisions ..... 245
7.5.3 Procedure ..... 246
7.5.4 Impartiality and Independence ..... 247
**7.6 Similarities and Differences between Tribunals and Courts ..... 248**
**7.7 Administrative or Judicial Organs? Constitutional status ..... 248**
**7.8 Jurisdiction and Functional Powers ..... 249**
**7.9 Procedure ..... 250**
7.9.1 Hearing ..... 250
7.9.2 Appeal ..... 251
**7.10 Categories of administrative tribunals ..... 251**
7.10.1 Specialist and Generalist /Multi-purpose/ tribunals ..... 251
7.10.2 Single Tier and Two Tier tribunals ..... 251
7.10.3 Public and private (or domestic) tribunals ..... 252
7.10.4 Primary decision-making or review tribunals ..... 252
**7.11 Tribunal Models ..... 253**
7.11.1 The UK Model ..... 253
7.11.2 The US Model ..... 253
7.11.3 The Australian Model ..... 254
7.11.4 The French Model ..... 255
**7.12 Independence and Impartiality ..... 256**
7.12.1 Aspects of Independence ..... 256
**7.13 Survey of Some Ethiopian Administrative Tribunals ..... 258**
7.13.1 Tax Appeal Commission ..... 258
7.13.2 Civil Servants Administrative Court ..... 262
**7.14 Summary ..... 265**
**7.15 Glossary ..... 265**
**7.16 Review Questions ..... 266**
**7.17 Further Readings ..... 267**

**CHAPTER EIGHT ..... 269**

**JUDICIAL REVIEW ..... 269**

**Chapter overview ..... 269**
**8.1 Introduction ..... 270**
**8.2 The Nature and Essence of Judicial Review ..... 271**
**8.3 Judicial review Vs. Merits Review ..... 272**
**8.4 Appeal and Judicial Review Distinguished ..... 273**
**8.5 Jurisdiction of courts ..... 275**

8.5.1 Inherent jurisdiction....275
8.5.2 Jurisdiction under FAPP....277
**8.6 Judicial Review Procedure....277**
8.6.1 Form and Content of Petition....277
8.6.2 Leave Requirement....278
8.6.3 Hearing....280
**8.7 Summary....281**
**8.8 Glossary....281**
**8.9 Review Questions....281**
**8.10 Further Readings....283**

**CHAPTER NINE....285**

**ACCESS TO AND GROUNDS OF JUDICIAL REVIEW....285**

**Chapter overview....285**
**9.1 Introduction....286**
**9.2 Access to Judicial review....287**
**9.3 Standing....287**
9.3.1 Standing under FAAP....289
**9.4 Non-Justiciability....291**
**9.5 Ripeness, Time Limit and Exhaustion of Remedies....294**
9.5.1 Ripeness /Final/....294
9.5.2 Time limit....297
9.5.3 Exhaustion of administrative remedies....299
**9.6 Finality /Ouster/ Clause....302**
9.6.1 Types of finality clause....303
**9.7 Grounds of Judicial Review....305**
**9.8 Illegality /Ultra Vires/....307**
9.8.1 The doctrine of ultra vires under Ethiopian Law....309
9.8.2 Legality of directive....309
9.8.3 Legality of decisions....311
**9.9 Error of Law and fact....312**
9.9.1 Error of fact....312
9.9.2 Error of law....314
9.9.3 Jurisdictional error of law and fact....315
9.9.4 Error of fact and law in FAPP....316
**9.10 Abuse of Power....317**
9.10.1 Improper purpose....318

9.10.2 Relevant and Irrelevant Considerations ..... 320
9.10.3 Proportionality ..... 321
**9.11 Non-compliance with procedural requirements ..... 322**
9.11.1 Violation of essential procedural requirement ..... 323
9.11.2 Directives ..... 323
**9.12 Summary ..... 326**
**9.13 Glossary ..... 326**
**9.14 Review Questions ..... 327**
**9.15 Further Readings ..... 332**

**CHAPTER TEN ..... 333**

**REMEDIES ..... 333**

**Chapter overview ..... 333**
**10.1 Introduction ..... 334**
**10.2 Public Law Remedies ..... 335**
10.2.1 Certiorari ..... 335
10.2.2 Mandamus ..... 337
10.2.3 Habeas Corpus ..... 338
10.2.4 Prohibition ..... 340
**10.3 Private Law Remedies ..... 340**
10.3.1 Declaration ..... 342
10.3.2 Injunction ..... 343
10.3.3 Property law Remedies ..... 343
10.3.4 Invalidation ..... 344
10.3.5 Damages ..... 345
10.3.6 Contractual Remedy ..... 346
**10.4 Summary ..... 346**
**10.5 Glossary ..... 347**
**10.6 Review Questions ..... 347**
**10.7 Further Readings ..... 348**

**BIBLIOGRAPHY ..... 351**

**INDEX ..... 363**

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Last but not least, this textbook could only have been a full-fledged teaching material with the support and information given by the key informants selected from different administrative agencies. As such, we would like to thank the key informants for sharing their valuable data, comments, and suggestions during data collection.

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# Preface

As part of the legal education reform launched two decades ago under the Comprehensive Justice Sector Reform, some attempts were made to prepare course materials in a limited scope. Even those materials were not sufficient and standardized; often, they become obsolete through time. There has been a longstanding need to update and enrich these materials, and produce them as a standard textbook. We have produced this textbook because one of the subjects that need to have updated materials immediately is the field of administrative law.

Since the first teaching materials on administrative law appeared in 2009, there have been significant developments. The most important is the government's decision to finally enact a federal administrative procedure law in 2019 after repeated attempts for sixty years before that. However, given the short time since the enactment of the administrative proclamation, there have been only a handful of cases litigated under this law with little published commentary. While there is growing interest in the academic community and among practitioners in the field of administrative law, it will take time for the literature to grow. It is clear, however, that efforts are needed to draw the attention of instructors and researchers to this dynamic and most critical subject to Ethiopian law and governance.

Despite frequent changes to existing proclamations, regulations, and directives since the adoption of Federal Administrative Procedure Proclamation No. 1183/2019, the authors of this book have made enormous effort to make it as up-to-date as possible. The textbooks places great emphasis on this newly enacted law, other specific statutes relevant to the subject, and recent court decisions. As a reminder, this textbook is not a mere update of the previous material, but an original work that acknowledges the traditional main topics.

This book is designed to introduce both students and faculty to administrative law. The text presents information that can be taught and understood within a standard semester. Although its focus is on the judicial review of administrative decisions, we have chosen to dedicate a sizeable portion of the book to merits review by tribunals in acknowledgement of the increased intervention by the state, the prohibitively high costs of judicial review, and the value and accessibility of review on the merits for 'ordinary' people. We also discuss the role of the Ombudsman in the review process, and briefly refer to some of the other processes by which administrators are held accountable for their actions.

The book is organized so that faculty, including those new to the subject, will be able to assist students to easily navigate between interrelated concepts, legal analysis, and case comments. In addition to the main table of contents, chapter table of contents are added at the beginning of each chapter. The Table of Laws and Table of Cases

indicate where the statute or cassation decision is discussed. Lastly, the index at the end of the text, is designed to help students quickly find where important concepts are discussed in the text. The index is arranged alphabetically, providing the page numbers associated with each topic.

Content-wise, each chapter is organized to provide faculty with the tools to engage students in thoughtful discussion and to help students fully grasp the key issues. The "Chapter Overview" provides a short and broad description of the chapter. This is followed by learning objectives and introductory materials to the topic. We have included examples and questions intended to stimulate students to test their problem-solving skills and to provide insight into the discussion of the subject matter within each topic. Each chapter is concluded with a brief summary of the chapter and review questions to assess students' understanding of the basic issues and key points. The glossary at the end chapter could be used as an additional short reference and contains a collection of words and phrases that may not immediately be obvious to students.

A distinguishing feature of this textbook is its practice-oriented approach to the basic topics of administrative law. Thanks to the USAID *Feteh* (Justice) Activity, we were able to secure financial assistance to conduct a study on the actual working of the administrative process. Most importantly, we documented the practice of rulemaking and tribunal decision-making (including their composition and structure) in two administrative agencies. We studied the practice of the two administrative tribunals and the resulting field report was used to enrich the text. Similar research was conducted on the parliamentary practice of supervising the executive and institutional means of control by the Ombudsman and the Human Rights Commission.

We hope this textbook will provide faculty with an effective teaching tool and enable students to understand and appreciate the subject fully. Learning through this text, students should broaden their understanding of the delegation of power to administrative agencies, the procedures that the law requires them to follow, the legal requirements for obtaining judicial review of agency decisions, and the standards applied during that review. It is relevant for researchers, legal practitioners, and judges to assist them in conducting further research or solve legal problems they encounter in their day-to-day activities.

# Table of Cases

**FSC Cassation Bench Decisions**

CFN 132714-v21 Dr. Desalegn Temesgen vs. Addis Ababa Science and Technology University (2009 E.C.) ..... **336**

CFN 14554-v3 Tsige Atnafe Vs Balambaras Wube Shibeshi (1998 E.C.)..... 64

CFN 173628-V24 Cherekos Begashaw (et al) vs Yeka Sub-city Kebele 13 Vital events registration office (2011 E.C.) ..... 330

CFN 196174-unpublished Ato Gatdet Gnachom vs. Ato Nyal Dejock (2014 E.C.)366

CFN 209203-unpublished Kelela Town leguama meri Municipality vs. Ato Seid Hussien (et al) (2014 E.C.) ..... 316

CFN 214227-unpublished Addis Ketema Sub-city Land Administration Office vs. Ato Mustefa Usman (et al) (2014 E.C.)..... 315

CFN 215115-unpublished Ethiopian Revenue & Customs Authority vs. Henock Zemariam (2014 E.C.) ..... 321

CFN 23608-v6 Ethiopian privatization and public enterprises supervising agency vs. heirs of Ato Nur Beza (2000 E.C.) ..... 293

CFN 43511-v14 Heirs and wife of deceased Ato Wassihun Mekonnen vs. Government Houses Agency (2005 E.C.) ..... 121

CFN 43781-v10 Ethiopian Revenue and Customs Authority vs. Ato Daniel Mekonnen (2002 E.C.)..... 202

CFN 44226-v11 Ethiopian National Bank vs. Hibret Insurance Company /et al/ (2003 E.C.)..... 295

CFN 51790-v12 Welday Zeru (et al) vs. Ethiopian Revenue and Customs Authority (2003 E.C.)..... 312

CFN 54697-v12 Addis Ababa Administration Land Development Administration (et al) VS. Denek sera plc (2003 E.C.)..... 312

CFN 64014-v13 Dr. Genet Seyoum vs. Kirkos Sub-city Kebele 17/18 Administration Office (2004 E.C,) ..... 62

CFN 72824-v13 Bole Sub-city Revenue office vs. Ato Million Assefa (2004 E.C)332

CFN 78945 v-14 Debreberhan University vs. Baye Wanaya Yeda (2005 E.C.) 320

CFN 91622-v16 Africa tadese vs. Yalemework tadese (2006 E.C)..... 295

CFN 99071-v8 W/ro Abrekhet Dikiya Kumjen vs. W/ro Fatuma Jemal (2007 E.C.) ..... 63

CFN-104755 v21 Durrata Battery Company vs. Ethiopian Intellectual Property Office (2009 E.C)..... 338

# Table of Laws

## FDRE Constitution

Art. 12 ..... 80, 194
**Art. 12/1/** ..... 17
Art. 19(4) ..... 360
Art. 37 ..... 121, 133, 138, 296
Art. 45 ..... 63
art. 51 ..... 180
Art. 62 ..... 63
art. 72(1) ..... 96
Art. 77/13/ ..... 186
Art. 79 ..... 64

## Federal Administrative Procedure Proc. No. 1183-2019

Art. 10 ..... **196**
Art. 11 ..... 197
Art. 14 ..... 204
Art. 15/1/ ..... 201
Art. 16 ..... 202
Art. 2 ..... 20
Art. 2(1) ..... 91
Art. 2/2/ ..... 167
Art. 2/3/ ..... 110
Art. 21 ..... 114
Art. 22. ..... 115
Art. 30 ..... 141
Art. 36 ..... 149
Art. 38 ..... 145
Art. 39 ..... 126, 141
Art. 4/2/ ..... 345
Art. 43 ..... 256
Art. 46 ..... 213
Art. 48 ..... 307

Art. 48/2/..... 309
Art. 50..... 327
Art. 50/1/ a & 2..... 343
Art. 51..... 313
Art. 51/3/..... 292
Art. 52..... 319
Art. 54..... 298
art. 56 (2)..... 358
Art. 8..... 192

**Proclamations**

Advertisement Proclamation No. 759/2012..... 172
Banking Business Proclamation No. 592/2008..... 322
Civil Aviation Proclamation No 616/2008..... 341
Coffee Marketing and Quality Control Proclamation No. 1051/2017..... 187
Commercial Registration and Licensing Council of Ministers Regulation No. 392/2016..... 109
Commercial Registration and Licensing Proclamation No. 980/2016..... 350
Customs Proclamation No. 859/2014..... 173
Definition of Powers and Duties of the Executive Organs (Amendment) Proclamation No. 603/2008..... 188
Driver's Qualification Certification License Proclamation No. 1074/2018..... 207
Electronic Signature Proclamation No. 1072/2018..... 284
Ethical Code of Conduct of Members of House of Peoples' Representative No. 6/2008..... 242
Ethiopia's Overseas Employment Proclamation No. 923/2016..... 136, 142
Ethiopian Building Proclamation No. 624/2009..... 131
Ethiopian Human Rights Commission Establishment (Amendment) Proclamation No. 1224/2019..... 18
Ethiopian Human Rights Commission Establishment Proclamation No. 210/2000235
Ethiopian Human Rights Commission Establishment Proclamation No. 211/200018
Ethiopian Institution of the Ombudsman Establishment (Amendment) Proclamation No. 1142/2019..... 18, 237, 247
Ethiopian Privatization Agency establishment Proclamation No. 110/1995..... 294

Expropriation of Land holdings for Public Purposes, Payments of Compensation and Resettlement Proclamation No. 1161/2019..... 158, 177, 233
Federal Auditor General Proclamation No. 982/2016..... 185
Federal Civil Servants Proclamation No. 1064/2017 ..... 208, 276, 280, 322
Federal Tax Administration Proclamation No. 983/2016..... 275
Financial Reporting Proclamation No. 847-2014..... passim
Firearm Administration and Control Proclamation No. 1177/2020 ..... 177
Forest Development, Conservation and Utilization Proclamation No. 1065/2018208
Freedom of the Mass Media and Access to Information Proclamation No. 590/2008 ..... 18
Investment Proclamation No. 1180/2020 ..... 188
Labor Proclamation, Proclamation No. 1156/2019, ..... 233
Live Animals Marketing Proclamation No. 819/2014 ..... 155
Media Proclamation No. 1238/2021..... 160, 291, 343
Plant Breeder's Right Proclamation No. 1068/2017..... 174
Private Organization Employees' Pension Proclamation No. 1268/2022 ... 131, 132
Proclamation no. 47/1975 to provide for government ownership of urban lands and. extra urban houses..... 294
Procurement and Property Administration Proclamation No. 649/2009..... 172
rivatization and Public Enterprises Supervising Authority Establishment Proclamation No. 412/2004..... 294
Trade Practice and Consumers' Protection Proclamation No. 813/2013 ..... 173
trademark registration and protection proclamation No. 501/2006..... 338
Urban Lands Lease Holding Proclamation No. 721/2011..... 324

**Regulations**

Coffee Marketing and Quality Control Regulation No. 433/2018 ..... 159
Council of Ministers Energy Regulation No. 447/2019 ..... 174
Federal Civil Servants Disciplinary and Grievance Procedure Council of Ministers Regulations No. 77/2002..... 123, 134
Foreign Service Officers Administration Council of Minister Regulation No. 399 /2017 ..... 129
Railway Transport Traffic and Safety Control Regulation No. 348/2015..... 353
Value Added Tax Regulations No. 79-2002..... 189

**Regulations**

Codification, Valuation and Registration of Movable Properties as Collateral for Credit, Directive No. 186/2020..... 176
Public Procurement Directive, 2010..... 172
SBB/84/2022 Reserve Requirement -8th- Replacement ..... 199
sentencing manual number 2/2006..... 185
Tax Appeal Commission Working Directive No. 2-2011..... 123, 280
Telecommunications Numbering Directive No. 795/2021 ..... 176
Tobacco Control Directive No. 771/2021 ..... 176
የኢ.ፌ.ዲ.ሪ. የህዝብ ተወካዮች ምክር ቤት የኮሚቴዎች አደረጃጀት፣ ሥልጣንና ተግባር እና አሠራርን አስመልክቶ የወጣ መመሪያ ቁጥር 27/2001 ዓ.ም,..... 241
የኢፌዴሪ የሕዝብ ተወካዮች ም/ቤት አማካሪ ኮሚቴ የአሰራር መምሪያ ቁጥር 1/2001 ዓ.ም. ..... 241
ይግባኝ የማቅረቢያ ጊዜን ስለማራዘም ወይም ዘግይቶ የሚቀርብ የይግባኝ ማመልከቻ የሚስተናገድበት ስርዓት ለመወሰን የወጣ መመሪያ መመሪያ ቁጥር 01/2011 ..... 123, 280

# CHAPTER ONE

# INTRODUCTION TO ADMINISTRATIVE LAW

## Chapter Overview

The present chapter will set the stage for the forthcoming discussions of the main themes of administrative law. It will define the subject, then consider in more detail what administrative law is all about, what kinds of things it is concerned with, and what it seeks to accomplish.

### LEARNING OUTCOMES

After studying this chapter, you will be able to:

- Define what administrative law is and is not.
- Identify and distinguish the sources of administrative law in Ethiopia.
- Compare and contrast administrative law in common law and civil law countries.
- Describe the salient features of the Federal Administrative Procedure Proclamation No. 1183/2020
- Differentiate between administrative law and constitutional law

## Chapter Table of Contents


**1.2 Nature and Definition of Administrative Law ..... 3**
1.2.1 Definition of Administrative Law ..... 3
1.2.2 Principles /Values/ of Administrative Law ..... 8
**1.3 Emergence and development of administrative law ..... 9**
1.3.1 Emergence ..... 9
1.3.2 Historical development ..... 11
**1.4 Scope of administrative law ..... 12**
1.4.1 General and special administrative law ..... 12
1.4.2 The merits/legality (Procedure/substance) distinction ..... 13
1.4.3 Public Law and Private Law ..... 14

1.4.4 Who is Subject to Administrative Law? ..... 15
**1.5 Sources of Administrative Law ..... 16**
**1.6 General Overview of Federal Administrative Procedure Proclamation ... 18**
1.6.1 Exclusions and Exceptions ..... 21
**1.7 Red, Green and Amber Light Perspectives ..... 21**
**1.8 The Relationship between Constitutional Law and Administrative Law . 24**
**1.9 Administrative law in common law and civil law countries ..... 25**
1.9.1 Common Law: British and American Administrative Law ..... 26
1.9.1.1 British Administrative Law ..... 26
1.9.1.2 American Administrative Law ..... 26
1.9.2 Civil Law: French and German Administrative Law ..... 27
1.9.2.1 French administrative law ..... 27
1.9.2.2 German Administrative Law ..... 28
1.9.3 Africa: Kenyan and South African Administrative Law ..... 29
**1.10 Development of Administrative Law in Ethiopia ..... 30**
**1.11 Regional/State Administrative Law ..... 32**
**1.12 Summary ..... 34**
**1.13 Glossary ..... 34**
**1.14 Review Questions ..... 35**
**1.15 Further reading ..... 38**

## 1.1 Introduction

Administrative law is a branch of public law concerned with the manner of exercise of power by government administration. The constitution of the Federal Democratic Republic of Ethiopia vests the highest executive power of the federal government in the Prime Minister and the Council of Ministers. However, the day-to-day implementation of laws is not carried out by the 'highest executive' but by a complex web of administrative apparatus. Ministries, agencies, authorities, commissions, tribunals, boards and the like run the government machinery. They are collectively known as 'administrative agencies'. These agencies are eastablished the House of Peoples' Representatives. They are established either directly by proclamations of the House or through delegation by regulations of the Council of Ministers.

The establishment of these agencies serves to implement different programs and policies. Some agencies are tasked with regulating trade, competition, labour, food, and medicine, and other aspects of economic and social activity. Others administer social welfare like pensions, third-party insurance, health insurance, and others, while others are in charge of collecting tax and customs or administering government finance and property.

The source of the power of administrative agencies is a law that establishes or constitutes that specific agency. It is commonly referred to as the 'enabling act', 'parent act', or 'organic act'. Such powers may be generally classified as enforcement, decision-making (adjudicative or quasi-judicial), or rule-making (quasi-legislative powers).

Unlike other fields of law, administrative law is almost everywhere in every piece of legislation. There is administrative law, for instance, in environmental law, transportation law, tax law, election law, mining law, and so forth. However, the substance of these laws is not the concern of administrative law, although, in some situations, it might be relevant. It is procedure or process with which administrative law is primarily concerned.

## 1.2 Nature and Definition of Administrative Law

In simple terms, administrative law is the law that regulates government administration. It governs how those entrusted with public authority should exercise their function. Its central focus is on the legal regulation of the executive branch of government: the 'administration'. Administrative law is about how administrative power is constituted and controlled by law.[1]

Regulation of the exercise of power may be legal or political. Legal control, which is the main focus of administrative law, includes control by the ordinary courts, administrative tribunals, and institutions such as the Ombudsman and Human Rights Commission. This type of control is limited to ensuring the legality of administrative action. On the other ahnd, political control, which forms the basis of the study of constitutional law is carried out by representatives of the people. The main focus of such control is 'correctness' or whether agencies have taken the right decision. This text will focus primarily on the legality of administrative acts. However, control of the executive by parliament will also be examined as it is significantly relevant in restraining the excessive exercise of power in a parliamentary government.

### 1.2.1 Definition of Administrative Law

Defining administrative law is a topic on which few commentators can agree, because it ultimately depends on what they want out of administrative law.[2] There is also the issue of scope or emphasis. Either the definitions are too broad and include

[1] Peter Cane *et al* (2018). *Principles of Administrative Law*. ProQuest Ebook Central: Oxford University Press. P1

[2] Mark Aronson, Matthew Groves & Greg Weeks, (2017). *Judicial review of administrative action and government liability* (6th ed.). Sydney: Thomson Reuters (Professional) Australia Limited. P9-10

much more than necessary, or they are too narrow and do not include all the necessary contents.

**What does 'administrative' mean?**

The term "administrative" in the context of administrative law does not refer to secretarial duties; it is another term for the executive power of government. The terms "executive", "government", and "administration", while they do have narrow meanings in specific contexts, can— for this introduction to the subject— be treated as meaning the same thing: i.e., the exercise of the administrative, governing power of the state. This power is exercised through numerous bodies, for example, the Prime Minister, Council of Ministers, government ministries, and other agencies accountable to the Prime Minister, Council of Ministers, or a particular ministry.

In everyday language, the word "administration" designates numerous and diverse realities. For instance, we speak of "administration of property" concerning a tutor of an incapable person, property administration by a trustee or liquidator, acts of management (administration) emanating from a general agency, and the like. All of these and similar usage of the term signify the absence of wide discretionary powers. Most importantly, when used in this sense, the meaning of the word is confined to the 'private domain', i.e., activities within the relationship sphere between individuals, companies, and other private entities.

"Administrative" in administrative law denotes actions of public institutions through public officials in carrying out their functions as determined by law.

**Some definitions of administrative law**

Some standard definitions of administrative law by jurists and scholars in the field are listed below for comparison.

**John Bell and Francois Lichère**

*Administrative law is the law that defines and regulates the administration.*[3]

This definition by the above two French scholars is very broad; this could be attributed to the peculiar characteristics of French administrative law. In France, disputes between the individual and the administration are within the exclusive jurisdiction of administrative courts. These courts, though independent, are part of the

[3] John Bell & Francois Liche`re (2022). *Contemporary French Administrative Law*. Cambridge: Cambridge University Press. P26

executive rather than the judicial branch. They settle disputes arising from not only the exercise of adjudicative and rule-making powers by the executive but also disputes about various forms of administrative agencies, civil service law, administrative acquisition and management of property, public works, obligations of the administration arising from contracts and quasi-contracts and tort liability. In common law countries, matters outside of the adjudicative and rule-making power of the administration fall within the province of private law.

**Sir Ivor Jennings**

> *Administrative law is the law relating to administration. It determines the organization, powers and the duties of administrative authorities.*[4]

Sir Ivor Jennings also considers administrative law as the law applicable to the administration. However, it differs from the French scholars' definition above, because it is more specific and relates administrative law only to public power. According to I.P. Massey, the definition lays entire emphasis on the organization, power, and duties to the exclusion of the manner of their exercise. He criticizes Jennings for focusing on how power is granted or given, but not on how that power is exercised. He says a student of administrative law is not concerned with how a minister is appointed, but only with how a minister discharges his functions in relation to an individual or a group.[5]

The concern of administrative law is indeed the manner of exercise of power. To determine whether there is a lawful and proper use of power, it is important to have a closer understanding of the source and power of agencies. Even the definition by Massey himself includes the study of the "organization, powers, and duties" of agencies as an element of the meaning of administrative law.

**A.V. Dicey**

> *[…] [P]ortion of national legal system determining legal status and liabilities of all state officials, defining rights and liabilities of private individuals in dealing with public officials & specifying procedure by which such rights & liabilities are enforced.*[6]

[4] Quoted in M.P. Jain (2011). M P Jain Principles of Administrative Law. LexisNexis. P7
[5] I.P. Massey *Administrative Law* (9th ed.). Delhi: Eastern Book Company. P3
[6] Ibid

Massey criticizes Dicey's formulation because it mainly concentrates on judicial remedies against state officials. The definition excludes the study of every other aspect of administrative law.

**K.C. Davis**

*[…] [L]aw concerning powers & procedures of administrative agencies including the law governing judicial review of administrative action.*[7]

K.C. Davis represents the American approach towards administrative law. Control of power through codified procedures governing rule-making and adjudication, including a strong role for the courts through a judicial review, is the cornerstone of American Administrative Law.

However, Massey's criticism is untenable. The list of control mechanisms cited by Massey is not within the proper scope of administrative law. This is true not only in common law countries but also to some extent in civil law countries where most activities of the administration fall within the domain of administrative law.

**Stephen G. Breyer**

*Most broadly, administrative law might be defined as the legal control of government. More narrowly, administrative law consists of those legal principles that define the authority and structure of administrative agencies, specify the procedures agencies must follow, determine the validity of administrative decisions, and define the role of reviewing courts and other organs of government in relation to administrative agencies.*[8]

*A formal definition of administrative law is that it is a branch of public law concerned with the composition, procedures, powers, duties, rights and liabilities of the various organs of government that are engaged in administering public policies.*[9]

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[7] Ibid
[8] Stephen G. Breyer et al (2017). Administrative Law and Regulatory Policy: Problems, Text, and Cases (8th ed.). New York: Wolters Kluwer. P3
[9] A W Bradley, K D Ewing & C J S Knight (2015). *Constitutional and administrative law* (16th ed.). Pearson Education. P569

This definition could be considered a working definition as it encompasses the most important aspects of administrative law. In general, a definition of administrative law should include the following salient features of the law.

- **It is a branch of public law**

As a branch of public law, its concern is limited to the exercise of public power. Private activities of agencies like contract, property, and tort are subject to private law.[10]

- **It deals with the organization, powers, and duties of agencies**

The study of organization and power is necessary to understand the extent and characteristics of administrative actions, determine applicable procedures and apply proper control mechanisms.

- **It regulates the procedures applicable in the exercise of power**

One of the main elements of the study of administrative law is the procedure by which an official action is reached. If the means (procedure) is untrustworthy, the end cannot be just. Decision-making and rule-making procedures determine fairness, openness, and accountability in public administration. Failure to follow required procedures renders an administrative decision invalid.

- **It governs review of administrative action by courts or other institutions**

Exercise of power could be reviewed mainly by the ordinary courts, administrative courts (tribunals), internal review mechanisms (within the administration), and institutions like the Ombudsman and Human Rights Commission. Through its constitutional supervisory role, the House of Peoples' Representatives also plays an important role. Lastly, the House of Federation can review administrative actions and even decisions of courts for compliance with the constitution.

[10] French administrative law which encompasses tort liability of public officials, contract and administrative contract concluded by agencies within its scope, is an exception in this regard.

- **Provides remedies for those affected by administrative action**

The primary aim of administrative law is to ensure administrative justice in government administration. This entails affording remedies to those whose rights and interests are adversely affected by actions taken by the administration.

## 1.2.2 Principles (Values) of Administrative Law

Administrative law ensures that an element of fairness operates in public decision-making. This is not only to the advantage of the individual citizen. It is also to the advantage of the government itself.[11]

Administrative law embodies positive values and principles to facilitate good administrative practice or good government. Generally, three values underpin the administrative law system:[12]

- **Administrative justice** at its core, is a philosophy that in administrative decision-making, the rights and interests of individuals should be appropriately safeguarded;
- **Executive accountability** is the aim of ensuring that those who exercise the executive (and coercive) powers of the state can be called on to explain and justify how they have gone about that task; and,
- **Good administration** is the principle that administrative decision-making should conform to universally accepted standards, such as rationality, fairness, consistency, and transparency.[13]

The core principles of administrative law vary from country to country. However, considering common themes across each jurisdiction, it is founded on five fundamental principles:

1. **Principle of legality:** decision-makers who exercise powers granted by statute ("administrators") must stay within their legal authority or jurisdiction.

2. **Principle of reasonableness:** administrators must reasonably exercise their judgment when they have discretion in making decisions.

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[11] David Stott & Alexandra Felix (1997). *Principles of Administrative Law*. Great Britain: Cavendish Publishing P1
[12] Robin Creyke et al (2019). Control of Government Action: Text, Cases & Commentary. LexisNexis Butterworths. P23
[13]Ibid

**3. Principle of fairness:** administrators must follow fair procedures when making decisions that affect a person's rights or interests. This principle is known as "procedural fairness" or, in some cases, "natural justice." In common law countries (the equivalent term in the US is "due process of law",) procedural fairness protects the rights and interests of persons affected by a decision by providing for:

**a.** the right of persons to be given notice of intended decisions that may affect them and the right to be heard before such decisions are put into effect; and,

**b.** the right to an impartial decision-maker.

**4. Principle of delegation:** to be valid, subordinate (or delegated) legislation must conform to the statute under which it is passed. In other words, regulations and by-laws must be consistent with the objectives of their enabling statutes and the scope of the regulatory powers set out in those statutes.

**6. Principle of judicial review:** if decision-makers violate any of the above principles, the superior courts have power to intervene to rectify this failure. This intervention is called "judicial review." It is an important mechanism for preventing abuse of executive power because it is available even when the legislature has made no provision for an appeal of executive action.

## 1.3 Emergence and development of administrative law

### 1.3.1 Emergence

The most notable and important development of the modern state is the rapid growth of administrative law. The growth in the 20th century can be considered a radical change. Administrative law is a by-product of the unprecedented growth of the administrative process in terms of quantity and quality. The rise of the administrative process parallels the development of the state into a large and complex machinery of administration. This was characterized by the proliferation of numerous agencies created to address various perceived problems that need attention from the government.

The primary factor that led to the growth of agencies was the shift in the state's role. The shift by itself was a response to the widespread problems and challenges of the 19th century that continued until the second world war.[14]

[14] M.P. Jain supra note 4 P1

The rapid growth of administrative law in modern times is the direct result of the tremendous growth of administrative powers and functions. Its growth is also to be attributed to a change in philosophy regarding the role and function of the state. The ruling political gospel of the nineteenth century was *laissez-faire* which manifested itself in the theories of individualism, individual enterprise, and self-help. This philosophy envisaged minimum government control, maximum free enterprise, and contractual freedom. The state was characterized as the "law and order" state, and its role was conceived to be negative as its interest extended primarily to a few activities only, such as defending the country from external aggression, maintaining law and order within the country, dispensing justice to its subjects, and collecting taxes to finance these activities. It was an era of free enterprise and minimum governmental responsibility and functions. The management of social and economic life was not regarded as the government's responsibility.[15]

But the *laissez-faire* doctrine resulted in human misery. It became apparent that the bargaining position of every person in the society was not equal, and uncontrolled contractual freedom led to exploitation of the weaker by the stronger; an example is the exploitation of labour by the management in industries. On the one hand, there existed slums, unhealthy and dangerous conditions of work, child labour, widespread poverty, and exploitation of the masses, but, on the other hand, the concentration of wealth in a few hands became the order of the day. It became apparent that the state should take an active interest in ameliorating the conditions of the poor. This act in the interests of social justice; it assumed a "positive" role.[16]

This approach led to the demise of the *laissez-faire* approach, and the growth of the new political dogma of "collectivism", favouring state intervention in and social control and regulation of the individual enterprise. The state started to act in the interests of social justice; it assumed a "positive" role. Over time, out of the dogma of collectivism, emerged the concept of the "social welfare state," which emphasizes the state's role as a vehicle of socio-economic regeneration and welfare of the people.

These positive roles mainly include regulation of economic activities, delivery of goods and services, and provision of infrastructure. This led to the creation of agencies tasked with specific missions. If one takes regulation, the government regulates food, water, agriculture, medicine, construction, land, property, education, so on and so forth. Almost every aspect of economic activity is regulated. Regulatory activity is technical by its nature. Therefore, a specialized agency staffed with experts must be established for every specific area of regulation. You can think of how many agencies are to be established if the government is to regulate major economic activities effectively. The

[15] Ibid
[16] Ibid

delivery of goods and services and provision of infrastructure also will result in the establishment of a massive number of agencies.[17]

So, how is this proliferation of new agencies related to the emergence of administrative law? It has to do with their extensive powers and the risks they pose to the citizen. Unless mechanisms are 'invented' to check for abuse of powers, erosion of liberty and freedom of the individual will follow. One of the striking and, to some extent, shocking reality of the "agency phenomena" is that they were endowed with the powers of all three branches of government. They combined judicial powers (power to make administrative decisions), legislative powers (rule-making power), and executive powers (inspection, testing, investigation, search and seizure, and more). One commentator described them as "mini-government". They were also labelled as the "4th branch of government".

As Lord Acton famously observed, "Power corrupts, and absolute power corrupts absolutely." With the expansion of agencies combining vast legislative and judicial powers, a parallel set of rules, principles, procedures, and practices of control mechanism begun to emerge and develop. Administrative law was born as a response to the increase in government power.

The inadequacy of the traditional courts to respond to this new challenge has led to the growth of the administrative adjudicatory process. Furthermore, the traditional administration of justice is technical, expensive, and dilatory. It is unworkable where the subject matter is dynamic and requires not only adjudication but also development, as in the cases of industrial disputes. Therefore, in cases where the need is the fair disposition and not merely disposition on file, the administrative adjudicatory process seems to be the only answer.[18]

## 1.3.2 Historical development

One of the striking facts about administrative law is that, unlike other fields of law, it is a recent phenomenon. Its recognition as a distinct field of study dates back to the early half of the 20th century. In the US, until the 1930s, there was no separate and explicit body of administrative law and no courses on administrative law as such in law schools.

This is by no means to suggest that there was no law governing the relationship between the government and the citizen. However, it was treated as part of the constitutional law except for France and some civil law countries. In the US, for

[17] Ibid
[18] I.P. Massey Administrative Law (9th ed.). Delhi: Eastern Book Company. P11

instance, the first casebook on administrative law was authored by Felix Frankfurter of Harvard Law School, later Supreme Court Justice, in 1932. In Australia, Wolfgang Friedmann produced the first Australian book on administrative law in 1950. In France, administrative law scholarship is credited to Maurice Hauriou, who produced a book on administrative law in 1892 and again in 1925. After four years, in 1929, Dr F.J. Port published the first book bearing the title "Administrative Law" in England.

The establishment of the Interstate Commerce Act (ICC) in 1887 is commonly considered to mark the birth of administrative law in the US. In England, administrative law dates back to the 16th century. Despite its long history, it gained recognition as a distinct body of law in England around the middle of the 20th century.

## 1.4 Scope of administrative law

Administrative law is a dynamic subject and is still evolving. One of the topics inviting debate among scholars in administrative law and other fields like public administration and politics is its proper scope. The two main issues in this debate relate to basic questions:

a) To what aspect of administrative action is administrative law concerned?

b) To which institutions are the rules, principles, and control mechanisms of administrative law applicable?

The first question deals with the distinction between merit versus legality or procedure versus substance of administrative action. The second is concerned with the type of bodies subject to the rules of administrative law.

### 1.4.1 General and special administrative law

Before addressing the first question, it is important to clarify the distinction between general and special (particular) administrative law. In the field of public administration, there are specific pieces of legislation that govern particular areas of administration. For instance, social security law (pension) determines who is entitled, the entitlement conditions, the amount of contribution from employers and employees, and so on. Similarly, there is environmental, election, tax, media, education, and even food laws. All these laws govern the relationship between the citizen and government

and are within public law. From an administrative law standpoint, they are referred to as "special administrative law".[19]

While studying administrative law, we are not concerned about the specific area of public law. Administrative law as a field of study is rather concerned with the general rules, principles, and practices applicable across all areas of "special administrative law". Due to its generality, it is sometimes called "general administrative law". Administrative law is about general rules common to all to special administrative laws. It is concerned not with what action should or should not be taken under the special regulatory laws but with how that action should be taken. In other words, administrative law is about procedure and process, not substance.

Lastly, even though general and special administrative laws are distinct fields of study, when a dispute arises in the court, in most cases it may involve both areas of law. In the above question, the main issue is whether the ten signatories are incompetent or not. This is mainly an election law issue. However, it also raises administrative law issue, because it is also a question of the power of the Board and the procedures used to make the determination. If it is determined that the ten persons could not be regarded as "incompetent", then it is beyond the power of the Board to disqualify the candidate. If the Board used improper procedures, for example, denying a review demanded by the candidate, the decision would also be invalid.

### 1.4.2 The merits/legality (Procedure/substance) distinction

The starting point for any consideration of administrative law is the realization that it is a species of adjective [procedural] law rather than substantive law. Its focus is not on what decision is reached, but on how it is reached.[20] It is mainly concerned with the legal control of the exercise of power. Therefore, the issue it addresses is whether administrative action is taken legally. Whether the resulting action is "correct" is beyond its scope.

When courts exercise a supervisory role on the power of agencies through judicial review, the merits of the agency's actions are not an issue. It matters not, for example, that the agency appears to have made the 'right' or the 'preferred' decision.

[19] Dacian C. Dragos & Bogdana Neamtu, Alternative Dispute Resolution in European Administrative Law (Springer-Verlag Berlin Heidelberg, 2014) P58
[20] Jeffrey Barnes & Roger Douglas (2015). Administrative Law: Q&A LexisNexis (3rd ed.) P3

**Example**

**Merit vs. process:**

Art. 7/8/ of Apiculture Resources Development and Protection Council of Ministers Regulation No. 372/2016 states:

Any sub-standard beekeeping equipment identified during inspection shall be kept aside from providing services.

Let's assume certain equipment belonging to a person engaged in beekeeping business was set aside by the Regional Agricultural Bureau inspector after examining it. Here, administrative law is interested in ensuring that the action was taken following the prescribed procedure, and it was taken by an official authorized to do so. If on the other hand, the decision was made based on an expert assessment of technical specification of the particular equipment and other quality factors set in the standard, without regard to the specific condition of the individual beekeeper's equipment it might be "wrong" (or not "wise") to set aside the equipment, but it is up to the Bureau (decision-maker) to make his "wrong" right.

## 1.4.3 Public Law and Private Law

Administrative law (like constitutional law and, perhaps, criminal law and international law) is a branch of 'public law'. Public law is contrasted with 'private law'. In rough terms, private law is concerned primarily with relations between citizens; public law deals primarily with the public sector and with relations between citizens and the bureaucracy.

An administrative agency is established by law with powers, rights, duties, and objectives. Upon its creation or establishment, the agency attains legal personality. As a person, some of its functions are public and others private. For instance, owning property and entering into a contract are private acts governed by the law of contract and property law. On the other hand, issuing, renewing, and revoking a license; taking administrative measures; issuing directives; and conducting inspections and investigations are all 'public'.

Public law is concerned with public institutions and their relations with private citizens and with the performance of public functions, while private law is concerned

with private activities and relations between private citizens (both individuals and corporations).[21]

Administrative law, as a branch of public law, is concerned only with the public activities of agencies. Those actions falling under the private domain of agencies are outside the scope of administrative law.

### 1.4.4 Who is Subject to Administrative Law?

If public bodies (government organs) could be governed by private law when they perform private acts, should individuals and private entities be subjected to administrative law when they exercise public functions? To answer this question, one needs to first answer another question: is it possible that individuals and private entities may exercise public functions?

Private entities like companies and associations may perform public functions through contract or delegation. In Australia, judicial review may extend to some bodies which are basically private, but whose powers and functions may have a public aspect or attract the public interest.[22]

Administrative law governs the exercise of powers granted by law. Thus, any individual or body exercising a power granted by laws enacted by the House of Peoples' Representatives or Council of Ministers is subject to the principles of administrative law. This means that in addition to government entities, organizations such as universities, hospitals, and self-regulating professions that are established or given powers by statute must follow the principles of administrative law when exercising those powers.

The principles of administrative law should also regulate exercises of power by public enterprises. In Ethiopia, most of these enterprises were initially established as administrative agencies. Similarly, when part of the administration is transferred to private entities through contract, the principles of administrative law should apply because the main question should be what power is being exercised, not who is the holder of the power. It would be unacceptable for a public body to diminish the public law remedies available to citizens by engaging in the contracting out process. The only question remaining is which body will be liable in public law— the body contracting out or the body accepting the contract. It is suggested that the body contracting out

[21] Peter Cane (2011). *Administrative Law*. Canberra: Oxford University Press p4
[22] Mark Robinson (Ed.). (2009). *Administrative law: the laws of Australia*. Sydney: Thomson Reuters. P130

remains so liable; it should not be allowed to escape pre-existing liability simply by engaging in the contracting out process.

## 1.5 Sources of Administrative Law

The various sources of administrative law are arranged in a hierarchy such that norms lower in the hierarchy must be consistent with higher norms.[23]

**FDRE Constitution**

The Constitution of the Federal Democratic Republic of Ethiopia is a significant source of law in the administrative law context. The principles of the rule of law and separation of powers embodied in the FDRE's Constitution greatly shape the nature and scope of administrative law. The Constitution also lays down the basic principles of good governance. Art. 12/1/ states that the conduct of affairs of government shall be transparent. Sub-art. 2 of the same article makes public officials accountable for their failure in official duties. It also guarantees public participation of the citizen through their elected representative and direct participation.

**Enabling Acts and Other Laws**

The source of administrative law also includes statutes— proclamations directed at a particular agency or to all agencies. The primary source among such statutes is what is referred to as an agency's ''organic statute'' or ''enabling act,'' the statute that establishes an agency and prescribes its mission, duties, and powers. Organic statutes and other statutes directed at a particular agency are essential sources of law regarding the procedural and substantive constraints on that agency's actions and should be closely consulted whenever issues arise concerning the legality of agency action.

In addition to the organic acts, other aspects of administrative law are to be found in specific legislation. Most of the specific laws provide avenues to ordinary courts by way of appeal or direct action. Additionally, specific laws determine the jurisdiction, structure, organization, and, to some extent, administrative tribunals' procedural rules. These are important for understanding the tribunal system in Ethiopia.

Often, enabling statutes contain generalized or more detailed provisions than the Administrative Procedure Proclamation.[24] Due to the rules of interpretation, which

[23] Peter Cane, supra note 21 P17
[24] Federal Administrative Procedure Proclamation No. 1183-2019 (hereinafter to be referred to as "FAPP")

affords priority to special laws over general laws, rules and procedure in the specific proclamations will prevail in case of contradiction.

Generally, applicable federal statutes that govern agency action but are not directed at any particular agency or set of agencies are also important sources of administrative law. Freedom of the Mass Media and Access to Information Proclamation No. 590/2008, The Ethiopian Institution of the Ombudsman Establishment (Amendment) Proclamation No. 1142/2019, and The Ethiopian Human Rights Commission Establishment Proclamation No. 211/2000, including amendment Proclamation No. 1224/2019, are major laws applicable across all agencies. They are relevant for Ethiopian administrative law as they set transparency and accountability mechanisms in government administration.

**Administrative Procedure Proclamation**

The fourth main source of administrative law is the Federal Administrative Procedure Proclamation (here after referred to as "FAPP"), a federal statute that became law on April 7th, 2020. FAPP is the fundamental law governing the procedures that agencies must use to perform their functions. It governs decision-making and rule-making procedure by Federal Agencies (including Addis Ababa and Dire Dawa Administration) and judicial review of administrative action by the Federal High Court.

**Decisions of House of Federations**

The House of Federations is emerging as an important 'judicial' organ passing decisions on the constitutionality of court decisions, including the constitutionality of administrative actions. Per the FDRE Constitution, the House's mandate is limited to matters related to the constitutionality of laws. Surprisingly, it has never ruled on the constitutionality of a single proclamation. On the contrary, it is exercising broader jurisdiction over the constitutionality of administrative decisions and even decisions of the cassation bench of the Federal Supreme Court. Most of these decisions are relevant sources due to the close relationship between constitutional and administrative law.

**Cassation Decisions**

Interpretations of law by the cassation Bench of the Federal Supreme Court are binding in all Federal and Regional Courts.[25] Despite challenges of consistency and transparency of the bench's decisions, such binding interpretations are critical to get insight into the actual practice of judicial control of government administration.

[25] Art. 10/2/ & 26 of Federal Courts Proclamation No. 1234/2021

**Regulations and Directives**

Regulations and directives are laws made by the Council of Ministers and administrative agencies, respectively, based on the delegation of legislative power by the House of Peoples' Representatives. Administrative law is generally not concerned with the content of these regulations and directives; however, their content might be relevant in two instances. First, in determining the scope of delegation, the content of the rules must be compared to the enabling act. Secondly, some regulations and directives provide substantive rules of administrative law. It is in the second sense that they become important sources of administrative law.

## 1.6 General Overview of Federal Administrative Procedure Proclamation

On July 1st, 2018, the Ethiopian Government, as part of its legal and justice sector reform initiative, established the Legal and Justice Affairs Advisory Council (LJAC) under the Ministry of Justice (renamed at that time "Federal Attorney General"). The Council had 13 members, all legal professionals, drawn from academia, legal practice, and civil society organizations. The reform mainly concentrated on amending existing laws such as election, media, anti-terrorism, and civil society laws. The administrative procedure was an exception in that a new draft proclamation was to be prepared "from scratch".

The Council had organized working groups for each specific area of law. After ten months of research, discussion, and deliberation, the administrative procedure working group submitted the final draft "Federal Administrative Procedure Proclamation". The draft became law on April 7th, 2020.[26]

The Federal Administrative Procedure Proclamation No. 1183/2020 contains five sections and 60 provisions. Section one defines important terms. It is short and limited to the statutory definition of three terms. These are 'administrative agency', 'directive', and 'administrative decision'.

**SCOPE OF FEDERAL ADMINISTRATIVE PROCEDURE PROCLAMATION**

Now, we will explore the institutions and activities falling under the newly enacted administrative procedure proclamation. This proclamation governs significant aspects of government administration and control by the courts. These are:

[26] This is the date of signature by the FDRE President. The effective date begins on the date of publication, which is disclosed on the Federal Negarit Gazette.

- Decision-making or adjudication procedure
- Adopting directives or rule-making procedure
- Judicial review

The questions we will try to answer are:

- To which type of institutions or organs of government do the above rules apply?
- What types of functions are subject to the administrative procedure of the proclamation?

> ## Federal Administrative Procedure Proclamation No. 1183/2020
>
> ### Art. 2. Definition
>
> In this Proclamation, unless the context requires otherwise:
>
> 1/ "Administrative Agency" means an Executive Organ of the Federal Democratic Republic of Ethiopia duly established by law and includes the Executive Organs of City Administrations accountable to the Federal Government;
>
> ### Art. 3. Scope of Application
>
> 1/ This Proclamation is applicable in all Administrative Agencies except Prosecutor and Police when they perform duties administered by the Criminal Procedure Law and Military and Security Institutions.
>
> 2/ Notwithstanding what is provided under Sub-article (1) of this Article, issuance of directives and decisions making relating to regulatory and service provision functions of these Institutions shall be subject to the requirements of this Proclamation.
>
> 3/ Without prejudice to Article 11 of this Proclamation, National Bank is not duty bound to implement obligations provided under Article 7-10 of this Proclamation when it enacts directives concerning exchange rate, interest rate of the country and other similar secret issues.

**Administrative Agency**

Institutions subject to administrative law's rules, principles, and procedures are usually identified with different nomenclature. 'Administrative agency' (or simply 'agency'), public bodies, administrative organs, or government agencies are some

common names. All of these may be used interchangeably. Since the usage adopted by the proclamation is "administrative agency", we will stick to this nomenclature throughout this textbook.

The Administrative Procedure Proclamation applies only to administrative agencies of the Federal Government. This means agencies established by Regional Governments are outside of its scope. State administrative law falls within the province of each regional government.[27] However, as Addis Ababa and Dire Dawa administrations lack the status of 'Regional Government', agencies within these administrations are required to comply with adjudicatory and legislative procedures laid down by the proclamation. Additionally, their actions are subject to review by the Federal High Court.[28]

So, what exactly are agencies? From the definition provided by the proclamation, there are two elements helpful in identifying these entities. These are:

- Agencies are part of the executive organ of government.
- Agencies are duly established by law

The first aspect of the definition tells us that the proclamation (and administrative law) is concerned with the executive branch of government. The highest executive powers of the Federal Government are vested in the Prime Minister and the Council of Ministers.[29] The source of powers of the Prime Minister and the Council of Ministers is the Constitution itself, and both are not directly involved in the day-to-day administration of government. The direct target of the proclamation is the administrative organs below the highest executive.

As per the second element of the definition, the source of powers and duties, including the legal personality of agencies, is a law enacted by the legislature. Therefore, a proclamation determining the organization, structure, power, duty, and objectives, usually called a "parent act" or organic act, is necessary for a certain entity to exist as an administrative agency. Agencies could also be created by a regulation of the Council of Ministers provided the House of Peoples' Representatives delegates such power.

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[27] See Chapter 1 of this textbook "Regional/State Administrative Law" for more on regional/state administrative law

[28] Judicial review jurisdiction of directives and administrative decisions is given to the Federal High Court. See art. 49/1/ of Federal Administrative Procedure Proclamation No. 1183/2020

[29] Art. 72/1/ of Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1999

In general, being part of or within the executive organ and establishment by law are the only requirements to be considered ‘administrative agency’.

### 1.6.1 Exclusions and Exceptions

The fact that an administrative agency is an executive organ of government established by law normally excludes those government organs which do not exercise executive power. Therefore, the legislative and judicial branches of government are outside the scope of administrative procedure proclamation. The President, House of Peoples’ Representatives, House of Federations, The Federal Supreme Court, Federal High Court, and Federal First Instance Court, including administrative offices established within these institutions such as the Secretariat of House of Peoples’ Representatives, Secretariat of House of Federations, Office of the President, and administrative departments of courts are all outside of the definition of an administrative agency.

In addition to the exclusion, the proclamation exempts agencies exercising military, security, police, and prosecutorial functions. Agencies with such functions include: Ministry of Defence, Ministry of Justice, Federal Police Commission, and National Intelligence and Security Services. A combined reading of sub-art. 1 and 2 of art. 3 of the proclamation makes it clear that those government organs are excluded from the scope of application of the proclamation. However, the exclusion is not absolute. The issuance of directives and decisions making relating to regulatory and service provision functions of these organs are still subject to the proclamation.

## 1.7 Red, Green, and Amber Light Perspectives

The notion of traffic lights— green and red lights— was first employed by two English law professors, Harlow and Rawlings, in 1948. In their book ‘Law and Administration’,[30] they discussed two alternative approaches towards the objectives of administrative law. Harlow and Rawlings analyzed various theories of administrative law in terms of the theory of the state that underlies it. Minimalist theories of the state translated into red light theories of administrative law, designed to provide maximum protectection to the individual from the intrusion of the state. Greenlight theories are more interested in facilitating state action, not limiting it.

[30] Carol Harlow & Richard Rawlings, (2009) *Law and Administration* (3rd ed.). Cambridge University Press. 22

**Red Light Theory**

The red light theorists generally advocate for a more interventionist approach by the courts to the review of administrative decisions. This approach advocates a vital role for the courts in reviewing administrative decisions. It considers that the function of law is to control the excesses of the state. 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'. The 'green light' theorist, while also acknowledging the need for and importance of judicial review and the rule of law, tends to place more emphasis on non-judicial.*

**Green Light Theory**

The green light approach, on the other hand, considers that the function of administrative law is to facilitate the operations of the state. It is based on the rationale that bureaucrats will function most efficiently in the absence of intervention. The administration should aim to help simplify the procedures and enhance efficiency. Harlow and Rawlings said:

> *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 emphasize this 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.*

**Amber Light Theory**

It should be noted that a decision-maker may take a green light approach in some instances but a red light in others. In many instances, it will be a combination of the two. Considering this fact, a third theory— amber light theory— emerged. The amber light approach tries to bring a point of consensus between the two theories. It maintains that administrative law should apply the positive elements of both the theories.

In summary, the following are the main differences between red, green, and amber light theories.

**Red Light**

- See the function of administrative law as 'to control the excesses of the state'.
- Emphasize the role of the law as controlling government in the interests of individual rights and the protection of autonomy.
- See government subject to and constrained by law.
- Concerned with using the law to control and check government activity and to hold the government accountable
- Generally advocates a more interventionist approach by the courts to review administrative decisions.

**Green Light**

- The function of administrative law is to facilitate the operations of the state rather than curb them.
- Favours the collective goals of society, which they believe are best carried out by the government through democratic mechanisms. Therefore, they see the role of law as being primarily to enable the government to effectively achieve important public goals, such as education, health care, and social welfare.
- Sees the law more as a tool of effective and efficient government.
- Emphasizes restraint by the courts to the review of administrative decisions.
- Concerned with the role of law in achieving government purposes and getting the business of government done.
- While also acknowledging the need for and importance of judicial review and the rule of law, it tends to place more emphasis on non-judicial remedies and procedures (for example, political processes, internal and external administrative review, consultative decision-making, and the like.).

**Amber Light**

- Law is both discrete from and superior to politics.
- The state can successfully be limited by law, although that law should adequately allow the administration to enjoy a somewhat controlled degree of discretionary authority.
- The best way of controlling the state is through the judicial articulation and enforcement of broad principles of legality.
- The goal of this theory is to safeguard a particular vision of human rights.

## 1.8 The Relationship Between Constitutional Law and Administrative Law

Administrative law is closely related to constitutional law since it deals with the powers of government and the remedies that are open to someone who is affected by the decisions of public officials. Not surprisingly, there is no sharp demarcation between constitutional and administrative law. A rough distinction might be that constitutional law is mainly concerned with the structure of the primary organs of government, whereas administrative law is concerned with the role of agencies in providing services and in regulating the activities of citizens.[31]

Professor S.A. de Smith said:[32]

> *I regard constitutional law and administrative law as occupying distinct provinces, but also a substantial area of common ground.*

The common ground between these two laws is that they are both branches of public law and deal with the functions of government. Both regulate the relationships between the state and the individual.

Constitutional concepts and doctrines are arguably the most important set of concepts underlying and supporting administrative law. The concepts include the rule of law, the separation of powers, representative government and democracy, ministerial responsibility, and federalism.

Despite the close similarity, there are notable differences between the two. The following summarises the main difference between constitutional and administrative law.

**Difference Between Administrative and Constitutional Law**

(1) One difference is related to scope. Whereas constitutional law deals with the whole system of government or all the branches of government, administrative law is limited to the exercise of power by the executive branch of government and different agencies of administration created by the legislature.

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[31] A W Bradley, K D Ewing & C J S Knight (2015). *Constitutional and administrative law* (16th ed.). Pearson Education. P10

[32] Michael Taggart (1997). The Province of Administrative Law. In M. TAGGART (Ed.), The Province of Administrative Law. Hart Publishing. P1

(2) The basic principles and provisions of a constitution are in most cases written and easily identifiable as there is a single codified constitutional text. On the contrary, the principles, rules and procedures of administrative law are not clearly known because they are not codified like the constitution.

(3) The sources of constitutional law are mostly found in constitutional conventions, constitutional texts, international conventions, statutes, and judicial decisions. The sources of administrative law, on the other hand, are statutes (mainly laws providing administrative procedure, judicial review, tribunals, and establishment act (parent act) of agencies), delegated legislation (in Ethiopia, regulations and directives), judicial decisions, and agencies' rules, procedure, and practice.

(4) Regarding hierarchy, constitutional law is the supreme and the highest law of the land, whereas administrative law is subordinate to constitutional law.

## 1.9 Administrative Law in Common Law and Civil Law Countries

Administrative law belongs to those fields of law where national peculiarity is most pronounced. The subject is 'domestic' in its nature. It is 'domestic' because the values, principles, and approaches to administrative law in a given country are highly influenced by the prevailing constitutional, political, economic, and cultural realities of that country. The constitutional principle of separation of power in France led to the creation of an administrative court system separate and independent from the ordinary courts.

For the English jurists and constitutional theorists, especially for A.V Dicey, the French dual court system was against the principle of the rule of law. For Dicey, one of the elements of the rule of law is that ordinary courts who solve disputes between private parties are also the ultimate arbiter of disputes between the government and the citizen. For this reason and other differences in political culture between the two countries, administrative law in England developed along different lines to that of its French counterpart. In short, one can easily discern peculiar characteristics of administrative law within any given country.

However, the central theme that runs through administrative law is the same everywhere. That theme is the legal control of governmental powers. The primary purpose of administrative law is to keep the powers of the government within their legal bounds to protect the citizen against their abuse.

Administrative law systems aim at achieving an optimum balance between an effective administration and realization of social interests on the one hand and the safeguarding of individual interests on the other.

The aim of seeing social welfare being administered effectively along with the maintenance and observance of the rule of law is equally dear to both common law and civil law legal systems. In the pursuit of that aim, the two systems have also employed the same technique of judicial process through which, in the course of time, they have developed a body of law that guides the administration and regulates the judicial control of administrative powers. [33]

### 1.9.1 Common Law: British and American Administrative Law

#### 1.9.1.1 British Administrative Law

British administrative law is the prototype of one of the main systems of administrative law in the modern world. It has influenced all nations which were once part of the British Empire and some of its features have spilled over into other traditions as well.

Its most notable characteristics are at least three in number:

1. The emphasis on the regular courts as the ultimate arbiters of administrative legality;
2. A strong and comprehensive emphasis on the protection of individuals; and
3. All of this within the orbit of the overriding principle of parliamentary supremacy.[34]

#### 1.9.1.2 American Administrative Law

Due to British influence, administrative law in America initially received less than an enthusiastic reception among practitioners.

An important characteristic the American system of administrative law shares with the British and Anglican law world is the single court system in adjudicating administrative disputes. Challenges to the actions of agencies are brought before the ordinary courts. Unlike France, judicial review of administrative action falls within the jurisdiction of the ordinary courts.

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[33] Mahendra P. Singh (1985). German Administrative Law: In Common Law Perspective. Springer P1
[34] H. B. Jacobini (1991). *An introduction to comparative administrative law*. New York: Oceana Publications. P75

## 1.9.2 Civil Law: French and German Administrative Law

### 1.9.2.1 French Administrative Law

The very concept of administrative law in France differs from what it is in common law countries. In France, administrative law includes not merely delegated legislation and adjudication, but also many other areas which we would, in general, place under the rubric of public administration.

In France, like the common law, the general rules and principles of French administrative law, especially those relating to judicial review, are laid down not in codes or legislation, but in the case law of the courts, systematized by legal scholarship.[35]

While administrative law in a common law jurisdiction confines itself to dealing with delegation of legislative and judicial powers to the administration, the procedural aspects of the exercise of those powers, and the judicial control of administrative action, administrative law in France includes these as well as various forms of administrative agencies, civil service law, administrative acquisition and management of property, public works, obligations of the administration arising from contracts and quasi-contracts, and tort liability.[36]

The most apparent characteristic of French administrative law is the dual court system for civil and administrative matters.[37] The most striking fact is that the administrative courts are part of the executive, not the judiciary.

A second feature of French administrative law is its relative simplicity. The injured person brings their action directly to one of the administrative courts, and they seek annulment or damages. Moreover, in practice, only a small aspect of governmental activity is immune today from administrative litigation, known as "acts of

[35] John Bell & Francois Liche`re (2022). Contemporary French Administrative Law. Cambridge: Cambridge University Press. P4

[36] Minattur, J. (1974). *FRENCH ADMINISTRATIVE LAW*. Journal of the Indian Law Institute, 16(3), 364–376. http://www.jstor.org/stable/43950375

[37] dual court system refers to the existence of two parallel court systems both independent of each other. Ethiopian court system at the federal and regional level is unitary, meaning we have only one court system. At the federal level, we have Federal First Instance, High Court and Federal Supreme Court. Such structure also exists at the Regional level Regional First Instance (Woreda) Courts, High (Zonal) Courts and Regional Supreme Court. However, in France there exists a court structure for civil cases and another separate court structure for administrative disputes.

government," that is, certain aspects of foreign affairs and the relationship between the Parliament and the government.[38]

The French believe that the relations between the citizen and the state should be governed by different principles from those governing relations between citizensThe state is acting in the public interest and so is given special powers to achieve that objective, whereas private citizens act in their interest and have less justification for interfering with the interests of others.[39]

*French Administrative Law (droit administratif)* is largely the creation of the administrative judges, who were, for the first 150 years, just the members of the *Conseil d'Etat.* They shaped the subject not only through judgments but also through the arguments of the *Ccommissaire du gouvernement* (now called the *rapporteur public*) and through the textbooks and scholarly articles which individual members wrote extrajudicially.[40]

### 1.9.2.2 German Administrative Law

The most distinctive feature of German administrative law is a separate system of courts to settle administrative disputes. This resembles the French system, but there are material differences between the two, the most outstanding of which is that while the administrative tribunals in France, including the *Conseil d'Etat*, are part of the executive branch of the state, the administrative courts in Germany are fully integrated with the judiciary.[41] In Germany, administrative courts are set up within the judiciary but they are independent and separate from ordinary civil courts. To be clear, the administrative courts are not benches or divisions within the ordinary courts, just like those in Ethiopia at the Federal level. On the contrary, they have their independent existence.

Administrative law is assigned to the category of public law in Germany. The distinction has important practical significance. The public law disputes, with some exceptions, are assigned to the jurisdiction of the administrative courts, while the private law disputes are assigned to the ordinary courts; the Law of Administrative Procedure applies only to the public law administrative activities of the authorities.[42]

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[38] H. B. Jacobini (1991). An introduction to comparative administrative law. New York: Oceana Publications. P114
[39] Bell, supra note 35 P5
[40]Bell, supra note 35 P6
[41] Mahendra P. Singh, supra note 33 P3
[42] ibid

In German law, as in common law, the executive has no inherent legislative powers. The executive can exercise only such legislative powers as are either specifically delegated to it by the legislature or are exceptionally given to it for a very limited purpose and as a transitional measure under the Basic Law. In this respect, German law differs from French law, which recognizes an inherent power of the executive to legislate through regulations (*règlements*) concerning all matters not specifically assigned to the legislature. German law goes even further than the common law in restraining the legislature from delegating its legislative functions to the executive.

For example, in England, the Parliament may, at least in theory, delegate its legislative powers to the executive to any extent whatsoever. In countries like the United States, India, or Australia, the constitution is silent on the question of delegation, but the courts have evolved some limitations that the legislature cannot cross in delegating its legislative functions to the executive. However, the limits are so obscure that they seem as good as non-existent. The German Basic Law, unlike the constitution of the United States or Australia, does not specifically vest all the legislative powers in the legislature, but it lays down express limits within which the legislature can delegate its legislative functions to the executive.[43]

Another peculiarity of German law is that it draws a clear distinction between the delegation of legislative powers to the executive or the government departments and delegation to the autonomous bodies. It also uses specific expressions for the two kinds of delegated legislation. The legislation made by the executive is called the ordinances (Rechtsverordnungen or Verordnungen), while the legislation made by the autonomous bodies is called the bylaws (Satzungen). The two kinds of delegations and the exercise of legislative powers under them by the delegate are governed by different legal and constitutional norms and, therefore, they require to be treated separately.[44]

### 1.9.3 Africa: Kenyan and South African Administrative Law

The principles of administrative law in Kenya descended from the Great Britain Government during its colonial period. In the late 19th and early 20th centuries, English laws and policy practices were brought to Kenya. When Kenya became independent in 1963, it wrote its first constitution.

After almost fifty years, a new constitution was written in 2010. By that time, the 1963 constitution had been amended over thirty times.

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[43] Ibid P19
[44] ibid

The 2010 Kenyan Constitution includes provisions for administrative law throughout, most notably in its Bill of Rights, where the 47th section refers to fair administrative action. It states that "every person has the right to administrative action that is expeditious efficient, lawful, reasonable, and procedurally fair." The right to know why an administrative decision was made is protected by the Fair Administrative Action Act and the actions of administrative tribunals that review their agency's actions when they are appealed.

The wording of article 47 of Kenya's Constitution of 2010 is almost identical to that of section 33, rights to just administrative action in South Africa's 1996 Constitution. Like section 33, article 47 mandates the enactment of legislation to give effect to these constitutional rights, and Kenya's Fair Administrative Action Act 4 of 2015 was strongly influenced by the equivalent South African legislationthe Promotion of Administrative Justice Act 3 of 2000 (PAJA).[45]

## 1.10 Development of Administrative Law in Ethiopia

The establishment of Ministers in 1918 was the first attempt to structure centralized power into autonomous administration. Menelik II established the first Cabinet of Ministers in I907-8 to help administrate the Empire. These Ministers' powers, duties, and responsibilities were defined in detail by a decree. Following their appointment, substantive laws to be enforced by each Minister were enacted. The Ministries were:

1. Ministry of Justice
2. Ministry of Interior
3. Ministry of Foreign Affairs
4. Ministry of Finance and Commerce
5. Ministry of Agriculture and Public Works
6. Ministry of War
7. Ministry of Palace
8. Ministry of Pen

In 1911 a Ministry for Posts and Telegraphs was added, and Foreign Affairs became a separate ministry.

As a result of a public outcry against malpractices in the Ministries, the first batch of ministers was dismissed *en masse* in 1917. The ministerial system was reorganized and extended by Order No. I of 1943 and other orders that followed to amend it. Twelve ministries were established, and a council of ministers was set up. The functions of the ministries and their relationships were defined. Each ministry is headed by a minister

[45] Cora Hoexter "Administrative Justice in Kenya: Learning from South Africa's Mistakes" Journal of African Law (2018)

responsible for the direction and supervision of his department. He is given a right to prepare and submit draft laws necessary for the proper administration of his ministry, to issue regulations per the law for carrying out the work of his ministry, and to transact state business approved by the Emperor and the Council.[46]

The Council of Ministers set up by this law was composed of the ministers and vice-ministers, the latter having no voting right except in the absence of the former. At first, the Council was presided over by the Emperor and, in his absence, by a minister nominated by him. Later, the Prime Minister appointed by the Emperor presided.[47]

The 1931 constitution gave the first written and systematized framework to the work of re-unification and centralization begun by Emperor Tewodros. One of the peculiar features of this constitution in light of the development of administrative law is that it envisage the establishment of independent administrative court in parallel with the ordinary court. Art. 54 of the constitution states:

> *Special courts shall judge all matters relating to administrative affairs, which are withdrawn from the jurisdiction of other courts.*

The fact that the drafters had the German Administrative Court system while drafting the provision can be deduced from constitutional source documents that influenced the Constitution. The 1931 Imperial Constitution is, to some extent, influenced by the 1889 Meiji Constitution of Imperial Japan. The Japanese imperial rulers were keen to avoid ordinary courts entertaining administrative disputes. While studying for a suitable judicial model where administrative cases could be adjudicated outside of the ordinary courts, they came up with the German administrative court system and modelled their own based on the German system.[48]

The 1931 Constitution is also the first to recognize citizens' right to petition the Government. Art. 28 states that all Ethiopian subjects have the right to present to the Government petitions in legal form. Even though the precise content of the provision is not clear, it undoubtedly aimed at redressing the mal-administration of abuse of rights against the citizen. Despite its inclusion in the Constitution, no law was issued providing the mechanisms of complaint handling system within the administration.

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[46] Bereket Habte Selassie. "Constitutional Development in Ethiopia." *Journal of African Law*, vol. 10, no. 2, 1966, pp. 74–91. JSTOR, http://www.jstor.org/stable/744683. Accessed 31 Oct. 2022.
[47] Ibid
[48] John Ohnesorge "Administrative law in East Asia: a comparative historical analysis." In *Comparative Administrative Law*, edited by Susan Rose-Ackermanl and Peter L. Lindseth (Edward Elgar Publishing Limited, 2010) P83

The 1955 revised Constitution goes one step further in this case. Under Article 62, it is stated that any resident of the Empire may bring suit in the Courts of Ethiopia against the Government, or any ministry, department, agency, or instrumentality thereof, for wrongful acts resulting in substantial damage. This Article means immunity will no longer serve as a defence to government organs against their liability towards citizens. However, it came with some exemptions and limitations. First, the Emperor remained immune from any suit by the citizen. Second, action by the citizen may entail sanction if the court finds the suit was "malicious or unfounded." Therefore, the Constitution made it risky to sue the government organs as losing the case created a right of action for the Government against such residents.

The 1987 Constitution of the People's Democratic Republic of Ethiopia (here after referred to as "PDRE Constitution") under Art. 52 clearly recognized the right of Ethiopians to submit complaints against government organs and mass organizations or officials thereof. It dictated that such complaints must be examined and responses given to complainants.

A similar but more comprehensive right is also to be found under the FDRE Constitution. Access to justice is now Art. 37, one of the core principles of the Constitution. It has wide-ranging meanings and applications. In the administrative law context, it includes the availability of simple and accessible avenues to challenge the legality of government action through judicial review and procedural fairness in the administrative decision-making process.

In 1967, during the reign of Haile Selassie, a draft law on administrative procedure was prepared. Over three decades later, another draft, more detailed and comprehensive in content, was prepared around 2003. However, the draft dissipated inexplicably, failing to arrive at the intended recipient, the Council Minister. Again in 2008, there was a second attempt, but it also failed.

## 1.11 Regional/State Administrative Law

Ethiopia is a federal state. State power is shared between the federal Government and the regional states. The total number of regions established by the Constitution is eleven. On November 23rd, 2019, Sidama Regional State became the tenth regional state. Another region—South West Ethiopia Peoples' Region— joined the federation on November 23rd, 2021, bringing the total number of regional states to eleven. There are also two city administrations— Addis Ababa and Dire Dawa City administrations— with relative autonomy of self-administration but still accountable to the federal Government. The former is the capital city of the federal Government and expressly recognized by the Constitution. However, Dire Dawa is a *de facto* administration nowhere mentioned or recognized by the Constitution.

Both federal and regional governments are organized into three branches of government— legislative, executive, and judicial. The highest executive powers of the Federal Government are vested in the Prime Minister and the Council of Ministers.[49] On the other hand, the state administration constitutes the highest organ of executive power at the regional level.[50]

The three branches of government imply that the relationship between the state and the individual will be created both at the federal and regional levels. The parallel relationship gives rise to the existence of two distinct bodies of law: Federal Administrative Law and Regional Administrative Law. Because states are not federal government agencies, federal administrative law, including Federal Administrative Procedure Proclamation No. 1183/2019, does not apply to regional states or state agencies. This remains true even when states are carrying out federal functions. Instead, state agencies are governed by state administrative law. Moreover, as is true of other areas of the law (such as family law), each state's administrative law is particular to that state.

There may be areas of interaction between the Federal and regional administrative laws. The first route is through the judiciary. According to Article 80/1/ and /2/ of the FDRE Constitution, the Federal Supreme Court shall have the highest and final judicial power over federal matters. Similarly, State Supreme Courts shall have the highest and final judicial power over state matters. The Federal Supreme Court has the power of cassation over any final court decision containing a basic error of law.[51] "Any final court decision" has been interpreted as inclusive of a State Supreme Court's cassation decision. The power of the federal cassation over state cassation enables it to supervise the exercise of executive power by state agencies indirectly. When the action of state agencies is challenged in state tribunals or ordinary courts, the state cassation will ultimately review the action based on that state's administrative law. If challenged before the federal cassation, this final decision will, to some extent, influence the development of administrative law in the respective state. Surely, the federal cassation will rely on administrative law principles, rules and procedures of each state in exercising its cassation power. However, the development of administrative law at the federal level may influence how the federal bench interprets state law.

The second route of interaction is when states or state agencies are delegated power of legislation by a federal proclamation. When a state agency issues a directive based on delegation by the House of Peoples' Representatives, it raises questions about how

[49] Art. 72/1/ of Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1999
[50] Art. 50/6/ of Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1999
[51] Article 80/3/ of Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995

the directive must be issued and whether control mechanisms of exercise of power laid down by the Federal Administrative Law should apply. It is submitted that when state agencies make laws based on the delegation of power by the federal government, they should comply with the procedural requirements of the Federal Administrative Proclamation. Similarly, judicial review of directives and decisions emanating from such delegation should be available to any interested party or individuals affected by the state agency's action.

## 1.12 Summary

Administrative law is part of the legal framework for public administration. Public administration is the day-to-day implementation of public policy and public programs in areas as diverse as immigration, social welfare, defence, economic regulation, and the like. Constitutional law is another element of the legal framework of public administration. However, there is some difference between two because constitutional law deals with all branches of government, whereas administrative law is limited to the executive branch only. Administrative law (like constitutional law and, perhaps, criminal law and international law) is a branch of 'public law'. This means its rules and procedures are not applicable if the issue involved is a matter of private law.

## 1.13 Glossary

**Agency action:** refers to the totality of actions of an agency such as sanctions, measures, decisions including refusing to give decisions and issuance of directives that affect the rights and interests of individuals.

**Administrative agency:** a government organ not within the judiciary and executive that is granted powers decision-making and rule-making

**Common law:** the body of law created by judges or the system of law that is derived from judicial decisions instead of from statutes

**Civil law/Continental law:** a codified system of law that places the main emphasis on a set of core principles that are codified into a single referrable system serving as the primary source of law.

**General administrative law:** consists of rules, principles, concepts, and legal institutions applicable to all spheres of administrative activity

**Judicial Review:** Review of legality of administrative action by ordinary courts

**Legality:** The state or quality of being in conformity with the law; within the scope power granted by law; lawfulness.

**Merit review:** reconsidering the facts, law and policy aspects of the administrative decision by an administrative tribunal and determine what is the correct and preferable decision.

**Parent act (also called organic act):** A law that establishes or constitutes that an administrative agency

**Private law:** A branch of the law that deals with the relations between individuals or institutions, rather than relations between these and the state.

**Public law:** A branch of the law that deals with the relationships between private individuals or private organizations and public bodies

**Special (Particular) administrative law:** consists of the substantive law applicable to specific spheres of administrative activities, such as building law, transport law, police law, welfare law, water law, education law, and the like.

## 1.14 Review Questions

1) Modern government is an administrative government. Explain

2) Administrative law is interpenetrated with regulatory law. How?

3) Do the requirements of the federal FAPP apply to agencies of regional states and Addis Ababa and Dire Dawa administrations?

4) Identify and discuss three sources of administrative law.

5) Explain, with examples, the difference between public and private law.

6) Why is there disagreement on the definition of administrative law?

7) Explain

> *Administrative law is about the control of power. In the theory of the modern state, power derives ultimately from the people. The control of it is therefore, in the end, for the benefit of the people.*

8) Explain how administrative law became its own area of law. What role did the development of agencies play in the growth and development of administrative law?

8) Laws can be divided into several categories: Into which of these categories does administrative law fit, and why?

a) Common law and statute law,
b) Public law and private law,
c) Statute law and subordinate legislation, and
d) Substantive law and procedural law.

9) What are two goals that administrative law tries to achieve?

10) Discuss whether the following statement is true or false.

*Administrative law consists of the substantive law applicable to specific spheres of administrative activities, such as building law, transport law, police law, welfare law, water law, education law, and the like.*

11) The following is a list of powers and duties of Trade Competition and Consumers Protection Authority established by Trade Competition and Consumers Protection Proclamation No. 813/2013.

After going through the list, identify which functions fall under public law and private law domain.

**Art. 30. Powers and Duties of the Authority**

Without prejudice to other provisions of this Proclamation, the Authority shall have the powers and duties to:

1/ take appropriate measures to increase market transparency;

2/ take appropriate measures to develop public awareness on the provisions of this Proclamation and its implementation;

3/ receive, and decide on, merger notifications in accordance with the provisions of this Proclamation;

4/ undertake study and research in connection with trade competition and consumer protection, and initiate policy proposals;

5/ regularly announce to consumers goods banned by the government or at the international level from being consumed or sold;

6/ organize various education and training forums and provide education and training in order to enhance the awareness of consumers;

7/ ban advertisements of goods and services which are inconsistent with health and safety requirements or with this Proclamation when it is aware of them by itself or when it is reported to it by any person, and order the issuance of announcements of corrections for such advertisements, in the methods the advertisements were made at the expense of the person in whose interest they were made;

8/ protect consumers from unfair practices of business persons;

9/ organize judicial organs with jurisdiction on issues of trade competition and consumers protection in accordance with the provisions of this Proclamation;

10/ establish procedure enable to resolve disputes raised between traders or consumers and traders by mutual agreement and negotiation;

11/ provide support to industrial self-regulation in order to enable various industrial sectors regulate anti-competitive and unfair trade practices;

12/ provide secretarial and other services to the Federal Trade Competition and Consumers Protection Appellate Tribunal established under Article 33 of this Proclamation;

13/ give necessary advice and support to the concerned regional organs with respect to consumer protection;

14/ establish relationship and cooperation with domestic and foreign institutions having similar objectives.

12) Are the acts of the Prime Minister and the Council of Ministers immune from the principles of administrative law? What remedies are available when they act beyond the scope of their power?

13) List at least two activities of the federal or regional governments of Ethiopia that protect or support the citizen.

14) According to the Ethiopian Electoral, Political Parties Registration, and Election's Code of Conduct /Amendment/ Proclamation No. 1235/2021 to amend Proclamation No. 1162/2019, an independent candidate shall secure the endorsement signature of not less than 2,500 signatures from the constituency's residents whose voting rights have not been restricted by law or a court decision or due to insanity. If the Electoral Board of Ethiopia decides that a candidate is not eligible because ten of the persons who signed are insane, is it an election law or administrative law issue?

15) The FDRE Prime minister established a task force comprising different representatives of federal agencies to tackle the rising cost of living and illegal activities by the business community that contributed to unjustified increase in price of goods. Is this task force within the scope of the Administrative Procedure Proclamation? State your reason/s/.

## 1.15 Further reading

***Australian administrative law***

- Roger Douglas & Margaret Hyland, *FOCUS Administrative Law* (LexisNexis Butterworths 2015) P1-18

***Canadian administrative law***

- Colleen M Flood & Paul Daly (Eds.) *Administrative Law in Context* (Emond Montgomery Publications Limited 2022) PP5-11
- Robin Creyke et al, *Control of Government Action: Text, Cases & Commentary* (LexisNexis Butterworths, 2019) PP3-11

***US administrative law***

- Keith Werhan, *Principles of Administrative Law* (Thomson West, 2008) P1-6
- William F. Funk & Richard H. Seamon, *Administrative Law* (5th ed. New York: Wolters Kluwer, 2016) PP1-20

***French Administrative Law***

- John Bell & Francois Lichère, *Contemporary French Administrative Law* (Cambridge University Press, 2022)

***British Administrative Law***

- Peter Leyland Gordon Anthony, *Textbook on Administrative Law* (7th edn: Oxford University Press, 2013) PP1-16
- William Wade & Christopher Forsyth, *Administrative Law* (New York: Oxford University Press, 2009) PP3-10

***Indian Administrative Law***

- Yashomati Gosh, *Textbook on Administrative Law* (LexisNexis, 2015) PP1-15

***German Administrative Law***

- Mahendra P. Singh, German Administrative Law: In Common Law Perspective (Springer, 1985) PP1-16

# CHAPTER TWO

# CONSTITUTIONAL FOUNDATIONS OF ADMINISTRATIVE LAW

## Chapter Overview

This chapter explains the basic constitutional principles such as the rule of law, separation of powers, and due process of law and their nexus with administrative law. The chapter will also explore the basic principles of good governance in public administration.

### LEARNING OUTCOMES

After studying this chapter, you will be able to:

- Define the rule of law as a constitutional principle of administrative law
- Distinguish procedural and substantive elements of the rule of law
- Discuss how the rule of law is the foundational basis of administrative law
- Define separation of powers
- Identify the application of the separation of powers under the FDRE Constitution
- Know how the concept and development of due process
- Explain the application of due process in administrative law

## Chapter Table of Contents


**2.1 Introduction..... 42**
**2.2 The Notion and development of Rule of law ..... 43**
2.2.1 Rule of Law as a Basis of Administrative Law..... 46
2.2.1.1 Procedural Elements ..... 47
2.2.1.2 Substantive Elements..... 49
2.2.2 The Rule of Law in Ethiopia..... 50
**2.3 Separation of Powers as a Limitation on Administrative Law..... 52**
2.3.1 Nature, Meaning, and Origin of the Principle..... 52

2.3.2 Linking separation of powers to Administrative Law ....58
2.3.3 FDRE Constitution and Separation of Powers ....59
**2.4 Due process of Law .... 61**
2.4.1 Meaning nature and development of Due process of Law ....61
2.4.2 The essential elements of Due Process of Law....63
2.4.2.1 Substantive Due Process ....64
2.4.2.2 Procedural Due Process....64
2.4.3 The principle of due process in Ethiopia ....67
**2.5 Basic Principles of Administrative Law /Good Governance/ .... 68**
2.5.1 Fairness....69
2.5.2 Reasonableness....70
2.5.3 Proportionality....72
2.5.4 Duty to give reasons ....73
2.5.5 Transparency ....74
2.5.6 Public Participation ....75
**2.6 Summary .... 76**
**2.7 Glossary .... 77**
**2.8 Review Questions .... 78**
**2.9 Further readings .... 79**

## 2.1 Introduction

*"Strongly committed, in full and free exercise of our right to self-determination, to building a political community founded on the rule of law and capable of ensuring a lasting peace, guaranteeing a democratic order, and advancing our economic and social development (emphasis added)"* [1]

These days, theoretical expressions "rule of law", "separation of powers", and "due process of law" is prevalent, and a prestigious formula of Western constitutional and political foundations. Political writers and journalists, particularly, increasingly use the phrase "rule of law" to present it as an institutional characteristic which helps define Western civilization and its contrasts with other civilizations such as Islamic and Chinese Confucian. Due process of law, though a notion often interlinked with the United States of America[2], its concept as a constitutional principle of Administrative law is also enshrined in different laws and Administrative jurisprudences.

This chapter, therefore, reconnoitres the relationship between the rule of law, separation of powers, and due process of law with administrative law and their

[1] Preamble, Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995, (1995).
[2] Bird, F. W. (1913). The Evolution of Due Process of Law in the Decisions of the United States Supreme Court. *Columbia Law Review*, *13*(1), 37-50. P. 37

implications in the application of administrative law and attainment of administrative justice. These principles form part of administrative law, although their origin and development are linked to constitutional law.

In so doing, the chapter begins by presenting the meaning of the rule of law and examining the origin and development of the concept. It then discusses the principal ideals that the concept imparts to modern democratic societies, including the rule of law as a base and foundation of administrative law. This can be capitalized through the notions of procedural and substantive elements of the rule of law.

While part of the executive, administrative agencies accumulate all the powers of the three organs of government (lawmaking, implementation, and adjudication). If the principle of the separation of powers is strictly applied[3], none of such agencies should have the powers of the other organs (legislation and adjudication). Thus, the second part of the chapter tries to see the relationship between administrative law and separation of powers and the impact of the separation of power as a limitation on the scope of administrative law and agency practice.

The third part of the chapter explains the due process of law as a constitutional foundation of administrative law. Due process of law is a means or a tool by which private rights to life, liberty, and property are safeguarded from the arbitrary actions of administrative agencies. This explanation will examine substantive and procedural due process of law. While substantive due process is concerned with unreasonable and arbitrary legislative enactments, procedural due process recognizes that procedural due process is required to deprive a person's right to life, liberty, or property.

The final part discusses the basic principles of public administration. While different principles are developed in public administration and good governance, this chapter explores the basic elements of both and their relationship to administrative law.

## 2.2 The Notion and Development of the Rule of law

For many centuries it has been recognized that the possession of coercive powers by the state that may be used to oppress individuals presents a fundamental problem both for legal and political theory. Since the days of the Greek philosophers, there has

[3] Though this is something to be explained in detail in the upcoming discussion, the principle of Separation of powers refers to the division of government responsibilities into distinct branches to limit any one branch from exercising the core functions of another. The intent is to prevent the concentration of power of one branch of government on the other and provide for checks and balances.

been recourse to the notion of law as a primary means of subjecting governmental power to control.[4]

The rule of law is used as shorthand for the English and American system, while the German and Dutch regarded it as *rechtsstaat*, and its French *conception état de droit*.[5] However, the term "rule of law" is believed to be derived from the French phrase *la principe de lègalitè* (the principle of legality) which refers to government based principles of law and not of men.[6] In this sense, the concept of la *princpe de lègalitè* was opposed to arbitrary powers.[7]

Early Greeks relate the concept of the rule of law to "right reason", which must inform all state actions.[8] Aristotle (384-322 BC) made a difference between procedural justice and moral justice, and located the rule of law in moral justice.[9] Sir Edward Coke is believed to be accredited with formulating the first statement of the rule of law in English Law when he said that the king must be under God and the law and, thus, vindicated the supremacy of law over the pretensions of the executive.[10]

Despite this, the best-known articulation of the doctrine of the rule (or supremacy) of law is found in the writings of Professor A.V. Dicey.[11]

In his book 'Introduction to the Study of the Law of the Constitution', Dicey considers three characteristics of the rule of law based on distinct principles.[12] These are the Principle of the Supremacy of Law (Principle of Legality), the Principle of Equality, and the Principle of Constitutionalism.

First, the rule of law means *"no man is punishable or can be lawfully made to suffer in body or goods except for a distinct branch of law established in the ordinary legal manner before the ordinary courts of the land."*[13] In Dicey's terms, the rule of law refers to absolute supremacy or predominance of regular law as opposed to the

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[4] Anthony Bradley & Keith Ewing (2007). Constitutional and Administrative Law (4th ed.). Malaysia: Pearson Education Limited. P. 95
[5] Smits, J. M. (Ed.). (2006). *Elgar encyclopedia of comparative law*. Edward Elgar Publishing. P. 190
[6] Massey, I. P. (2016). *Administrative law*. Eastern Book Company. P. 24
[7] Ibid
[8] Ibid
[9] Ibid
[10] Barnett, H. (2002). *Constitutional & administrative law*. Routledge. P. 80
[11] Cane, P. (2011). *An introduction to administrative law*. Oxford University Press, USA. P. 35
[12] Dicey, A. V. (1915). Introduction to the study of the law of the constitution/by AV Dicey. London: Macmillan, 1915. P. 110-122
[13] Ibid

influence of arbitrary power and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government.

Second, the rule of law means *"not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals."*[14] Here, Dicey believes that everyone should be treated equally before the eye of the law. It means the equal subjection of all persons to the law of the land administered by the ordinary law courts without any discrimination between citizens, be it government official or ordinary citizen.

Third, the rule of law means *"that the constitution is pervaded by the rule of law on the ground that the general principles of the constitution….are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts; whereas under many foreign constitutions the security….given to the rights of individuals results, or appears to result, from the general principles of the constitution."*[15] That is to mean, the rules which in other countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts, thus the constitution is the result of the ordinary law of the land.

From the first conception of the rule of law by Dicey where it provides means *"no man is punishable …except ….before the ordinary courts of the land"* reveals that Dicey was indeed inclined to criticize all administrative discretion, particularly where it seemed to supersede what had traditionally been regarded as judicial functions. Despite this assertion of the rule of law by Dicey, Professor Wade has criticized Dicey in his introductory note written on Dicey's 'Introduction to the Study of the Law of the Constitution' 10th edition book.[16] Wade criticized Dicey's conception of the rule of law as forgetting the role of administrative agencies.[17] He noted that the legislature had delegated much of its authority in day to day decision making to a wide range of administrative agencies.[18] In so doing, these agencies must work within the law and are governed by it, but points out that their regulation depends upon the fundamental principle of the supremacy of parliament and not on the more limited constitutional concept of the rule of law.

[14] Ibid
[15] Ibid
[16]Dicey, A. V. (1985). Introduction to the Study of the Law of the Constitution, edited by ECS Wade. P. x-xxii
[17] Ibid
[18] Ibid

The rule of law is a dynamic concept which does not have an exact definition. This does not mean there is no agreement on the basic values and concepts it is meant to represent.

The rule of law has to be distinguished from 'a rule of law', 'rule by law', and 'rule under the law'. The phrase 'a rule of law' refers to any rule of conduct binding on the citizens or public officials. 'Rule by law', on the other hand, is particularly applicable in a totalitarian state wherein laws are used as an instrument for enforcing tyrannical rule and curbing individual rights and freedoms through rule by law. In the case of rule by law, the law can serve as a mere tool for a government that suppresses in a legalistic fashion. The concept of 'rule under law' emphasizes that public officials are themselves bound by laws.

Therefore, the rule of law means that the law rules based on the principles of freedom, equality, non-discrimination, fraternity, accountability, and non-arbitrariness. That is to say, as Tamanaha noted, the rule of law should be "The rule of law, not man" "a government of laws, not men;" law is reason, man is passion; law is non-discretionary, man is arbitrary; law is objective, man is subjective.[19]

The rule of law should not be understood as either 'rule' or a 'law'. It is should generally be understood as a doctrine of "state political morality" which concentrates on securing a "correct balance" between "rights" and "powers", and between individuals and the state in any free and civil society.

### 2.2.1 The Rule of Law as a Basis of Administrative Law

True "rule of law" plays an important role in administrative law. It is said in the definition above that the rule of law provides protection to the people against the arbitrary action of the administrative authorities. Besides this, Tamanaha distinguishes 'thin' and 'thick' definition of the rule of law. [20] He asserted that, in its 'thin' definition, the rule of law means that government officials and citizen are bound by and abide by the law.[21] This thin conception of the rule of law does not impose any requirements with respect to the content of the law. A more substantive or 'thicker' definition of the rule of law refers to fundamental rights, democracy, and/or criteria of justice or right. The thick definition requires that there must be a system of laws, and law, by its nature, involves rules set forth in advance that are stated in general terms. A particular decision or an order made for an occasion is not a rule. The law must be generally known and understood. The requirements imposed by the law cannot be impossible for people to

[19] Tamanaha, B. Z. (2004). *On the rule of law: History, politics, theory*. Cambridge University Press.
[20] Tamanaha, B. Z. (2007). A concise guide to the rule of law. P. 2-5
[21] Ibid

meet. The laws must be applied equally to every one according to their terms. Mechanisms or institutions must enforce the legal rules when they are breached.

The definition provided by the Secretary General of the United Nations seems to comprise the thick and thin conception of the rule of law by Tamanaha. The Secretary General, in its report, defines rule of law as:

> *"a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency. (Emphasis added)"*[22]

Thus, recent scholars of the rule of law espouse the broader definition of the rule of law to lay out the foundations of administrative law. This conception of the rule of law is comprised of procedural and substantive elements.

## 2.2.1.1 Procedural Elements

Following Tamanaha's footsteps on the notion of the rule of law as 'thin' and 'thick', Bedner identifies four conceptions of procedural elements of the rule of law. These are: 1) Rule by law, 2) State actions are subject to law, 3) Formal legality (law must be clear and certain in its content, accessible, and predictable for the subject, and general in its application), and 4) Democracy (consent determines or influences the content of the law and legal actions).[23]

### Rule by Law

The first category of procedural elements concerns the mode of governing and its legality. Dicey's conception of the supremacy of the ordinary laws of the land over the actions of public officials and administrative agencies is the cornerstone of the procedural element of the rule of law.[24] Present in any definition of the rule of law, even

[22] Annan, K., & Secretary-General, U. N. (2004). The Rule of Law in Conflict and Post-Conflict Societies. *New York: United Nations*. P. 4

[23] Bedner, A. (2010). An elementary approach to the rule of law. *Hague Journal on the Rule of Law*, *2*(1), 48-74. P. 56-72

[24] Dicey, supra note 12, P. 119

if only implicitly, is the element that the state 'rules by law' which suggests that the state has law at its disposal as a powerful weapon to rule without being subject to any restraint it inherently imposes. Thus, rule by law implies that there must be a law and such law should, in principle, be general in its content and that it should be known. Bedner noted that any case of state building at some point requires introducing rule by law, no matter how partial or awkward these attempts may look from a contemporary perspective.[25]

**State Actions are Subject to Law**

The second procedural element of the rule of law can be labelled the common core of all rule of law definitions. It first adds to the 'rule by law' element by requiring a legal basis for every government action, the so-called principle of legality. Lawmaking also needs such a basis. Second, it demands that the government obey its own rules. As noted above, one aspect of Dicey's idea of the rule of law is absolute predominance, or supremacy of law over arbitrary, government actions. In simple terms, it means every administrative action that should be taken according to the law.[26] Applied to the powers of government, this requires that every government authority which does some act which would otherwise be wrong (such as taking a man's house), or which infringes a man's liberty (such as 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 an act of the parliament. This also means that, in the absence of any authority, the affected party whose rights and liberties have been violated as a result of the action of the government should be able to take the case to court and have it invalidated.

The demand that every state action has a legal basis can be rendered meaningless if this legal basis lacks specificity, sometimes leading to the uncontrolled exercise of discretion by the government. For example, 'open concepts' of authority, such as 'the public interest', the 'common good', and others can be filled in by the government according to its wishes and preferences.

**Formal Legality**

Formal legality refers to the publicity of the laws to enable citizens to plan their behaviour and predict how the state will respond. The previous two elements are meaningless to a large extent for determining whether rules are clear, consistent, and accessible if formal legality is not achieved either by codifications or case law. In fact, there are debates about the proper way of achieving formal legality, for instance,

[25] Bedner, supra note 23, P. 64
[26] Dicey, supra note 12, P. 112

whether law must be written, codified, restated, or produced through case law. In the modern era, the adoption of rules and regulations (directives) have provided a degree of this formal legality.

**Democracy**

While the previous elements in this category have been generally accepted as essential elements for the rule of law, democracy is much less acclaimed. Democracy is a vast field of research on its own, and one easily overburdens oneself by including it in the concept and then attempt to say something useful about the rule of law in a particular country.

However, that idea of democracy is included as a procedural element of the rule of law to make the government responsive to citizens. This is because as the authority of any administrative agency derives from laws adopted by the legislature and the power of a democratic government from its people, democracy, at its most fundamental level, includes the democratic election of the legislature and the government's responsiveness to the legislature accordingly.

Democracy here can be used as an ideal to pursue or an inventory of means to control the state. That is to say, there should be procedures for participation in drafting a spatial plan or the principle that a citizen is heard before a legal decision is taken by the government that will affect him or her. In that sense, democracy here is translated into a procedural device, which comes close to the principles of good government used to limit the exercise of governmental discretion by participating citizens that might be affected by such a law before fully enforcing it. Thus, the consent of citizens determines or influences the content of the law and legal actions afer that.

### 2.2.1.2 Substantive Elements

The modern concept of the rule of law is relatively broad and, therefore, sets up an ideal for government to achieve. As discussed above, the procedural element of the rule of law is concerned with procedures to prevent misuse of power. The substantive element of the rule of law also does the same by introducing substantive standards to it. Accordingly, similar to the procedural element, Bedner identifies four conceptions of substantive elements of the rule of law. These are: 1) Subordination of all law and its interpretations to fundamental principles of justice, 2) Protection of individual rights and liberties, 3) Furtherance of social human rights, and 4) Protection of group rights. Unlike subordination and adherence to the natural justice principle, the rest of the concepts are almost all related to the respect of the human and democratic rights of citizens, either individually or in a group. Therefore, for swift discussion of the substantive elements, it is better to narrow the conceptions in to two: 1) Adherence of

all law and its interpretations to fundamental principles of natural justice and 2) Protection of individual and group rights.

The substantive element is vital to the legitimacy of the legal system in the eyes of a state's citizens. The most important elements include fundamental principles of natural justice such as; morality, fairness, and due process. No matter how well procedural elements are followed, they cannot substantively guarantee the just outcome of the law's application if the government's actions are unfair and immoral. That is to say, if many consider the outcomes of the law as unjust, the entire system may be endangered despite it fulfilling procedural element.

Accepted by almost all the states in the world and with some of them considered as international customary law, the respect and protection of individual rights and liberties, social human rights, and the protection of group rights are one of the benchmarks for the substantive elements of the rule of law. Perhaps the main reason to include human rights into the rule of law framework is that this field has become the central rallying theme of international development cooperation and that gradually it has become clear that in order to achieve any improvement in the realization of human rights needs an effective legal system to achieve this. Thus, including human rights, social rights, and group rights into the definition of the rule of law in the end may resolve beneficially, as it should force concerned bodies to think carefully about the relations between these rights and legal institutions.

### 2.2.2 The Rule of Law in Ethiopia

During much of Ethiopian history, the emperors' limitless power and rule prevailed over the rule of law. The emperors were the supreme legislatures, magistrates, and administrators of the people. It was the emperors who were responsible for proclaiming laws and again emperors who removed governments and judges, administered revenues and a communal army. No person, no action, no aspect of life lay outside of the authority of the throne. The kings, by "divine appointment", remain the center of every power in Ethiopia. They were said to be 'elects of God' and none challenged their acts and limitless authorities, and whatever they may do, no concept of ultra vires applied to the king. On the other hand, society respects the laws because respecting the laws was taken as respecting the king, whose word made such laws. The people made a synonymous reference and understanding between the king and the laws. In most instances, the people looked up to their rulers than the rules. One possible effect on a ruler who was arbitrary or unfair in their administration of justice is not because they were responsible; rather, they would no longer enjoy the confidence of the people under his jurisdiction. Thus, it is the people's sense of injustice that could impose a limitation on the existence of the power and action of the rulers more than the rule of law.

The 1931 Constitution was not meant to distribute the power of the emperor between himself and other organs of the state; rather, it is was enacted to formalize the powers of the emperor, reflecting the traditionally and historically acknowledged imperial power. This Constitution made the first appearance of institutional setting possible, even if it was practically a mere formality. Despite such institutionalization, there was no provision which entails the limitation on the supreme position of the emperor in all spheres of state activities. The emperor could veto any law proposed by the parliament. He had the right to draw up the procedure of the parliament and to dissolve it. It can be said that the parliament served merely as a decorative political institution. The emperor was also the chief justice, and could hear any case from any court in the land. He was also the chief executive. Thus, it can be said that the Constitution was nothing more than a means to institutionalize the powers of the emperor. Despite this, the fact that the practical application was very much under question, the Constitution had contained certain provisions of human rights in the Ethiopian legal system that contributed to the inception of the rule of law in Ethiopia.

Similarly, the revised Constitution of 1955 continues the formalization of the traditionally and historically acknowledged imperial power. The emperor had powers and functions, which were executive, legislative, and judicial in nature. The legislative branch, which was bicameral, was almost under the full supervision of the emperor. Senators were directly appointed for a six-year term by the emperor, while deputies were elected by the people whom they represented for a term of four years. The emperor had absolute power to dissolve the parliament when he deemed it necessary, and call up for a new parliamentary election. He shares considerable power with the parliament in the law-making process.

The emperor also retained a level of judicial function, which was not clearly defined in the Constitution, giving him general power— "...the power to maintain justice" under Art. 36, to continue the traditional institution of the imperial *Chilot*. Despite this, some of the rule of law principles were laid down in this Constitution. For example, Art. 110 states “The judges shall be independent in conducting trials and giving judgment in accordance with the law. In the administration of justice, they submit to no other authority than that of the law.” It follows that courts are bound to follow the law, and their independence is also respected. Similarly, matters connected with human rights such as freedom of the press, speech, assembly, movement, and many others were stipulated in the Constitution as provided under Article 37 and the following provisions. Generally, the concept of the "supremacy of the law” came to be the rule in the Constitution. The laws were taken to be beyond anything or anyone, and there were even certain implications that the king himself was subordinate to the law, as can be inferred from Art. 110. Under this constitution, the power of the king and other executive and administrative departments of the state was defined, and it was to a relatively less degree limited compared to the previous 1931 Constitution.

The other Constitution adopted in Ethiopia was the 1987 (Peoples Democratic Republic of Ethiopia (PDRE) Constitution. According to this Constitution, the highest legislative authority was vested in the National *Shengo*. It was also the highest organ of the state. This organ was given the power of legislating laws in conformity with the Constitution. Additionally, any act contrary to the Constitution was null and void. The Constitution embodied human rights, which are the manifestation of the respect for the rule of law. However, the concept of judicial review, which is one symbolizing factor of democratic constitution and one of the corner stone to the realization of rule of law, is not clearly recognized under this constitution. There is a general envision under Art. 118 of the constitution that any law or decision contrary to the constitution shall be null and void. The Shengo was given the power to supervise the constitutionality of laws by either approving or invalidating them. It can be said that the legislature of the laws was at the same time a judge for the constitutionality of the laws or the decisions it adopted. It was like being a judge in one's own case.

The present Constitution, the Federal Democratic Republic of Ethiopia Constitution of 1995, embodies a chapter (chapter three) devoted to "fundamental rights and freedoms". The first part of this chapter deals with human rights covering Articles 14-28, and the second chapter deals with democratic rights covering Articles 29-44. Rights that manifest the rule of law such as the right to life, security of person, liberty, prohibition against inhuman treatment, the right to be presumed innocent before conviction, non-retroactivity of criminal law, equality, privacy, right of thought, and opinion and expression were recognized. However, just like its predecessor, this constitution confers the power of interpreting the constitution to an organ whose representatives were elected through their ethnic background and political affiliation rather than to the courts of law. Therefore, one of the salient requirements of the principle of the rule of law, which is the requirement to confer all judicial power to the courts, is lacking. Because of this, courts can not review the constitutionality of the acts of the legislature and the executive.

In general, it can be said that, in Ethiopia, the concept of the rule of law is gaining increasing attention over time as can be seen from our preceding discussions. At the same time, the rights of citizens and the accountability of government officials were positively improved in the course of time.

## 2.3 Separation of Powers as a Limitation on Administrative Law

### 2.3.1 Nature, Meaning, and Origin of the Principle

The doctrine of separation of powers, which is the second constitutional principle that played an influential role in the growth of administrative law, helps evaluate the legal and constitutional arrangements of a modern state. The underlying idea was that

concentration of power facilitates and encourages its abuse and that 'the separation of powers' provides a bulwark against such abuse. Separation of power refers that none of the three branches of government (ithe legislative, executive, and judiciary) should ever exercise the powers of the other. It means that governmental functions frequently denoted as legislative, executive, and judicial must be maintained as separate and distinct. That is to say, each organ of government is to be independent of one another, and each can exercise only one type of authority— legislative, executive or judicial.

The origin of the doctrine is traceable to Aristotle because he is believed to have anticipated the separation of powers when he wrote that "all constitutions have three parts …One of the three deliberates about public affairs; the second concerns the offices; ...and the third is what decides lawsuits."[27] The first modern design of the doctrine of separation of powers is to be found in the constitutional theory of John Locke (1632-1704).[28] The main objective of the doctrine is to prevent the abuse of power within different spheres of government. In his assertion of the doctrine, separation of power is comprised of the legislative power of making laws, the executive power of administering the affairs of state (which included the power of adjudication), and the federative power that relates, broadly speaking, to foreign relations. Despite this, however, Montesquieu's writings gave the doctrine of separation of powers a base on which modern attempts to distinguish powers between the three organs is grounded.[29]

Montesquieu's *Esprit des Lois* (the Spirit of Laws) offered the first widely recognized articulation of the doctrine of separation of powers as it is understood today.[30] Though Montesquieu still viewed the legislative and executive powers as the two major branches of the government, he argued for a politically independent judiciary whose personnel would not be drawn from the legislative or executive branches of the government.[31]

The following excerpt from the textbook *Administrative Law* by Yashomati Ghosh is worthy for understanding the meaning and origin of the separation of power.

> *The doctrine of separation of power is the second constitutional principle which played an instrumental role in the growth of administrative law. The increased functions of the Executive organ of the state had given rise to few*

[27] Barnett, Supra note 10, P. 105
[28] Van der Vyver, J. (1993). The separation of powers. *SA Publiekreg SA Public Law*, *8*(2), 177-191.
[29] Kurland, P. B. (1986). The Rise and fall of the" Doctrine" of Separation of Powers. *Michigan law review*, *85*(3), 592-613. P.595
[30] Krause, S. (2000). The spirit of separate powers in Montesquieu. *The Review of Politics*, *62*(2), 231-265. P. 254
[31] Ibid

*legal challenges relating to the functioning and accountability of the executive. One of the important issues was whether the increased functions of the executive was contrary to the principles of separation of powers and whether such increased powers would lead to executive dominance over other organs of the state.*

*The three core state functions of law making, execution of the law and judicial functions have been traditionally entrusted with the three organs of the State - Legislature, Executive and the Judiciary respectively. The doctrine of separation of power was founded on the premise that concentration of power in one or more organs of the state would give rise to unregulated and tyrannical exercise of power which would threaten the rights and liberties of the citizens.*

*Lord Acton speaking on the issue of whether the Pope and the King should be treated in a manner different from other ordinary men and should be presumed that they can never do wrong observed. If there is any presumption it is the other way against holder of power increasing as the power increases. Historic responsibility has to make up for the want of legal responsibility. Power tends to corrupt and absolute power corrupts absolutely. Great men are almost always bad men even when they exercise influence not authority. If this principle is applied to state functionaries it would necessarily imply that if the legislature or the law makers are conferred with absolute power to administer the law made by them as well as determine all disputes involving the law then the common people would have no opportunity of a fair redressal of their claims and would have to suffer from injustice in the absence of alternative remedial mechanism.*

*John Locke was one of the earliest scholars and philosophers to conceptually formalize the doctrine of separation of power his Second Treatise of government (1689). In a well-ordered society different powers of the state should be exercised by different institutions. He divided the state powers into three categories - legislative power, executive power and federative power. The Legislative or law-making power was deemed supreme whereas the executive was relating to the internal affairs of the state and the Federative powers were maintaining the external affairs during war and peace, information of alliance and leagues. Locke advocated that for proper functioning of the state it was necessary that the legislative powers and executive powers, including the federative power should be exercised by different institutions so that the law making authority is also made subject to the same laws. However the credit for laying down the foundational stones of the doctrine is popularly conferred to Frenchman and lawyer Montesquieu. Montesquieu was greatly inspired by the writings of Locke and the*

*parliamentary form of governance in England, and was convinced that under a despotic rule where both the executive and the legislative powers were held in the same hands it would be detrimental for the protection of the rights and freedoms of the citizens. He advocated for the implementation of separation of power similar in the lines of which existed between the English Monarch and the Parliament as necessary for securing citizens' rights because Parliament being the representative of the people would not enact arbitrary laws similarly the denial of the legislative powers to the king would ensure that no unfair or arbitrary laws are made. In the 17th century England, the legislative and tax imposing powers were exercised by the Parliament and the government headed by the king administered the laws passed by the Parliament. Judges were also assured of freedom through the act of settlement which secured them tenure of service during their good behavior differentiating from the earlier practice of tenure during the pleasure of his Majesty. Hence Montesquieu felt that the secret of English's men liberty was the separation of power and the functional independence of the three department of the state from one another.*

*Montesquieu laid down the underlying principle of the doctrine in his book Esprit des Lois (the Spirit of Laws) 1748. His fundamental proposition was that legislative and executive powers should not be united in the same person or in the same body or magistrates as there will be no liberty to the common people. There will always be the possibility of tyrannical laws being enacted and similarly executed to the detriment of the people. Similarly, there will be no liberty if the judicial power is not separated from the legislative and executive power because the judiciary through the power of judicial review protects the rights of the citizens by exercising effective control against arbitrary exercise of power by administrative officers. If the judicial power is clubbed with the executive power then the judge behaves with violence and oppression. Thus, the doctrine implies that one person or body of persons should not exercise all three types of powers. Legislative, executive, and the judiciary should be separate and one organ must not perform or interfere with the functions entrusted with the other bodies.*[32]

Vyver then conceptualizes the idea of Montesquieu and noted that the notion of separation of power by Montesquieu eventually developed into a norm, comprising four basic principles: the principle of *trias politico* (horizontal separation of powers), the

[32] *Yashomati, G.* (2016). textbook on Administrative. Law LexisNexis. P.35-37

principle of the separation of personnel, the principle of the separation of functions, and the principle of checks and balances.[33]

(a) The principle of *trias politico* requires that there should be a clear and formal distinction between the three arms of government (legislative, executive, and judicial)

(b) The principle of the separation of personnel requires that the power of making laws, implementation/administration, and adjudication be vested in different officials and employees staffed separately to every three distinct organs.

(c) The principle of the separation of functions demands that every organ of state authority be entrusted with its appropriate function only; that is to say, the legislature ought only to legislate, the executive to confine its activities to administering the affairs of state, and the judiciary to restrict itself to the function of interpretation of laws and adjudication.

(d) The principle of checks and balances requires that each organ of state authority be entrusted with special powers designed to keep a check on the exercise of functions by the others in order that the equilibrium in the distribution of powers may be upheld.

Despite this, the theory of separation of powers, as explained by Montesquieu, has been subject to controversy from the moment of its conception. There are often different suggestions to contest his descriptions of the seventeenth-century English Government as a symbol of the separation of powers. In contrast to his view, many writers hold that there was no clear-cut separation of powers in seventeenth-century England.

However, Wade and Phillips have summarized the doctrine of separation of powers from three perspectives.

A) The same person should not form more than one organ of the government. That is to say, a person serving in one organ of state authority is disqualified from serving in any of the others.

B) One organ of the government should not exercise the function of other organs of the government. For example, the executive branch cannot enact laws nor can it adjudicate cases.

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[33] Van der Vyver, J. (1993). The separation of powers. *SA Publiekreg SA Public Law, 8*(2), 177-191. P. 178

C) One organ of the government should not encroach with the function of the other two organs of the government. For example, the executive should not interfere in the administration of justice by the courts.[34]

It should be noted that the doctrine of separation of powers, as an established political doctrine, is based on the fact that the accumulation of all powers— legislative, executive, and judicial— in the same hands would be tyranny. However, the doctrine does not mean that the various departments should be completely independent of each other. This is because each organ is, to a large extent, dependent upon another, especially for check and balance purposes. For example, in the United States of America, Congress has the power to make laws, but this power is subject to executive and judicial control. The executive exercises checks and balances in respect to the legislature through the qualified veto of the President. When a bill has been passed in identical form by both houses of Congress, it is presented to the President for approval, and should the President-elect veto the bill, it may again be presented to Congress but will only become law if (after a presidential veto) both houses approve the bill with a two-thirds majority. The judiciary exercises checks and balances in respect to the legislature through the power of procedural and substantive review of the Supreme Court. Enactments of the legislature can be tested by the Court against provisions of the Constitution, and the Court has the power to invalidate such enactments if it finds them to be unconstitutional.[35]

It should also be noted that, had the doctrine of separation of powers been followed rigidly in any country, the development of modern administrative agencies would have been impossible. Complete separation is found to be impossible. Thus, complete separation of powers, in the sense of the distribution of the three functions of government among three sets of organs, with no overlapping or coordination, would bring the government to a standstill for the purposes they are destined for.

The division of governmental powers into legislative, executive, and judicial is not an exact classification. It is an abstract and general theory which is impossible to apply in actual practice to create 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

[34] Singh, T. B. (1996). Principle of Separation of Powers and Concentration of Authority. *Institute's Journal*, *1*, 1-11. P.2; see also Aberham Yohannes & Desta G/Michael. (2009). Administrative Law Teaching Material. Justice and Legal System Research Institute.
[35] Ibid

exercise such inherent powers as shall protect it in its performance of its major as well as minor duties.

### 2.3.2 Linking Separation of Powers to Administrative Law

As said above, the essential functions theory advocates that every organ of the state has been charged with certain essential or core functions which the organ is required to perform without the interference of other organs. In this regard, the doctrine of separation of power was initially considered as an impediment to the growth of administrative powers under the modern welfare state functions. The increase of state responsibilities had imposed additional burdens on different organs of the state, but due to the various factors, the legislature and the judiciary were often unable to cope with the new responsibilities. Although the principle of separation of powers demarcates a line between the three arms of government (legislative, executive, and judiciary), administrative law runs contrary to the principle of separation of powers. In practice, technicalities of matters, unforeseen problems, limited time of the legislature, pressure relief, and dynamism of events are the rationale behind the delegation of legislative and judicial power to executive agencies. The legislature and the judiciary were compelled to transfer some of their legislative and judicial powers to the administrative agencies because, otherwise, without wider powers, administrative agencies could not attain the purposes for which they were established.

The growth of residuary powers in the hands of the administrative organs was a violation of the essence of the separation of power doctrine even though administrative agencies are conferred with different powers to ensure efficient and effective undertaking of their responsibilities. These powers of the administrative agencies are quasi-legislative and quasi-judicial, which could be manifested with a mere examination of the powers of administrative agencies.

While it is true that according to the principle of separation of powers, the power and function of the executive branch of government are limited to the execution or enforcement of laws, administrative agencies are nonetheless delegated additional law-making powers.

Another primary function of an administrative agency is *to adjudicate cases and controversies that arise under its purview*. Agencies also share some of the judicial powers, although traditionally judicial power (the power to adjudicate and decide cases) belongs to the ordinary courts. Here Administrative agencies can decide matters affecting individual rights and freedoms.

It should be noted here that most of the judicial functions of the agencies are usually exercised through administrative courts or administrative tribunals which may

exist within or outside that agency, enjoying relatively little independence compared to the rule-making power of administrative agencies.

Giving judicial power to agencies violates the core principle of the separation of powers. As said above, the rationale for conferring such power on the agencies is the existence of technical expertise and the lengthy, costly, and rigid process followed in courts in deciding cases. This is because, as opposed to courts, it is believed that administrative agencies have efficient technical expertise in that specific field, and can also decide cases in a more efficient, less costly, and more flexible process.

This shows how the doctrine of separation of powers limits the scope of administrative law. Thus, granting legislative and judicial powers to administrative agencies can be seen as an exception, or it may be said a 'necessary evil'. This leads to the conclusion that agencies shall be delegated legislative and judicial powers, but these should be exercised strictly and narrowly, i.e., only when it becomes a compulsive necessity to do so.

The same is true of ordinary judicial powers. Essential judicial functions such as deciding disputes among society, interpreting laws, determining the legality of government actions, and determining the civil and criminal liability of private persons and state officials should not be given to administrative agencies or administrative courts. The delegation of judicial powers to administrative tribunals should be limited only to matters which are technical by nature and require the expertise of the administration.

In general, the doctrine of separation of powers imposes a limitation on the extent of the legislative and judicial power of administrative agencies as well as on the scope of administrative law. In addition, the principle of separation of powers limits the scope of administrative law by making courts not question the substance of the actions of administrative agencies and their day-to-day activities except for the legality of their actions.

### 2.3.3 FDRE Constitution and Separation of Powers

According to the FDRE Constitution, federal and regional Government structure was formed. Accordingly, the Ethiopian state was made to consist of regional Governments and the federal Government. Under the federal level, three organs of government— the legislative, executive, and judiciary— were established in line with the principles of parliamentary supremacy in the Constitution under Article 45. Similarly, the regional Government is also formed with three levels of government (the legislative, executive, and judiciary).

In this Government structure, the legislature (which is composed of two Houses: the House of Peoples' Representatives and the House of the Federation) is the highest authority of the federal Government. The people elect members of the legislature for a term of five years. As the supreme organ, this legislative body of the Government controls the other two organs. The main function of this organ, as the name indicates, is to legislate laws. However, it also interprets laws, especially the Constitution, through the House of Federation as provided under Article 62 of the FDRE Constitution.

The highest executive powers of the federal Government are vested in the Prime Minister and the Council of Ministers. These two organs are responsible to the legislature (House of Peoples' Representatives). The Prime Minister, per Article 73 of the Constitution, in addition to being the head of the executive organ, must be a member of the People's Representatives (the legislature); while other ministers may or may not be members of the same. The House of Peoples' Representatives has also delegated the Council of Ministers to enact regulations, at the same time, each administrative agency can issue directives and manuals for the effective and efficient administration of their power. As the power to make law is left to the legislative branch of Government, delegation of legislative powers by the House of Peoples' Representatives to the Council of Ministers and each of the ministries and departments accordingly is clearly against the principle of a pure separation of powers.

It should be noted here that the delegation of legislative powers should be limited only to the technical or detailed matters necessary to fill the gap in a proclamation issued by the House of Peoples' Representatives. Agencies should not delegate essential legislative powers or areas primarily left to the legislature. Essential legislative powers, such as monitoring and supervising the policy of the government, passing of budgets, ratification of treaties and international covenants, enacting proclamations, and discussing various actions and policies of the government, shall be performed by the legislature itself.

According to Article 79 of the Constitution, judicial powers, except constitutional disputes both at federal and state levels, are vested in the courts. By the Prime Minister's recommendation, the president and vice president of the Federal Supreme Court are appointed by the House of Peoples' Representatives. Regarding other federal judges, the Prime Minister submits a list of candidates from which the Federal Judicial Administration Council selects candidates for appointment to the House of Peoples' Representatives.

The Judiciary at the federal level is accountable to the legislature. In general, when examined from the principles of the separation of powers theory, the 1995 FDRE Constitution recognized the three organs of the government. However, there is no separation of power between the three organs in the strict sense of the term as members of the executive branch, including the Prime Minister, are members of the legislative

organ. Similarly, cancellation of title deeds, revocation of license, imposing fines, and the like, which could properly be categorized as judicial functions, are being exercised by administrative agencies. A prominent example of this can be the Federal Supreme Court cassation decision, where it has decided that the power to give and cancel title deeds is left to the administrative agency, not the courts.[36] Nonetheless, this does not mean that the courts have no power to entertain cases where the title deed is given or cancelled in violation of the law. In this regard, the Federal Supreme Court cassation bench has decided that, although agencies have the power to issue or cancel title deeds, if the manner of cancellation and issuance violates the law, courts can entertain and check the legality from there.[37]

## 2.4 Due Process of Law

### 2.4.1 Meaning, Nature, and Development of the Due Process of Law

Due process of law means law in its regular administration through courts of justice. Due process of law in each case means such an exercise of the powers of the government as the settled maxims of law permit and sanction and under such safeguards for the protection of individual rights.

Collier's Encyclopedia, on the other hand, defines it as "Due process is a principle of the constitutional law, which protects the life, liberty, and property of a person against unreasonable or arbitrary laws and procedures by national state, and local governments... due process implies fair process and fair laws."

This last definition by Collier's Encyclopedia is very broad and embraces both the procedural and substantive aspects of the term. It provides that due process is a constitutional limitation on the legislative and executive departments of the government. This is evident when it says, "...against arbitrary laws and procedure... and fair process and fair laws." So is the definition according to Black. However, Webster's definition of the concept seems to denote only the procedural aspect and thus narrow.

Generally, from the previous definitions, we can understand that the due process of law is a means or a tool in the hands of individuals by which private rights of life, liberty, and property are safeguarded from the arbitrary actions of government departments.

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[36] Tsige Atnafe Vs Balambaras Wube Shibeshi, Federal Supreme Court Cassation Decision Volume 3 file no 14554

[37] See W/ro Abrehet Dekria Vs W/ro Fatuma Jemal, Federal Supreme Court Cassation Decision Volume 13 file no 64014 and Vol. 18 file no file no 99071

The principle of due process of law, which contains the idea that no person shall be deprived of his life, liberty, and property by government actions without notice and opportunity to be heard for such deprivation, is believed to be contained for the first time in history in chapter 39 of the Magna Carta.[38] However, there are options to the effect that the concept is older than that and known before the Magna Carta.[39] This, of course, is *jus naturale* or natural law, which acquired Christian content and progressed through the medieval and canon lawyers into the common law of England as it was being developed.[40]

It is even argued or held by some natural lawyers that the principle begins with the eviction or expulsion of Adam and Eve from the Garden of Eden. "I remembered to have heared it observed by a very learned man that even God himself did not pass sentence up on Adam, before he was called up on to make his defence".[41]

What we can consider from this argument is that the due process concept is a historical product other than written constitutions and is ancient in origin.

Generally, however, the central point in the history and development of the notion of the due process of law is the Magna Carta. Article 39 of the Magna Carta declares:

> *"No man of what estate or condition that he shall be put out of land or tenement nor imprisoned nor disinherited nor put to death without being brought to answer by due process of law."*[42]

This principle was transplanted from the Magana Carta to the written constitution of America in the 18th century. Additionally, it was New York that first used the phrase 'due process of law' in its basic law in 1821.[43]

At this juncture, it is worth mentioning that the US constitution, as first adopted in 1787, contained no provision guaranteeing the citizens of the new federal union the rights of the due process of law, as a result of which raised several objections to this venerable document. In response to this objection, the first Congress, led by James

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[38] Bird, F. W. (1913). The Evolution of Due Process of Law in the Decisions of the United States Supreme Court. *Columbia Law Review*, *13*(1), 37-50. P. 37
[39] Groves, H. E. (1961). Due Process of Law-A Comparative Study. *Marq. L. Rev.*, *45*, 257. P. 259
[40] Ibid
[41] Schauer, F. F. (1976). English natural justice and American due process: An analytical comparison. *Wm. & Mary L. Rev.*,*18*, 47. P. 51
[42] McSweeney, T. J. (2014). Magna Carta and the right to trial by jury. P. 146
[43] Emery, R. (2002). New York's Statutory Bill of Rights: A Constitutional Coelacanth. *Touro L. Rev.*, *19*, 363. P. 365

Madison, in 1789 passed twelve proposals for amendment, of which ten were ratified. Out of these, the Fifth Amendment to the Federal Constitution reads:

> *"No person shall be deprived of life, liberty or property without due process of law"*[44]

This amendment has been held to be a limitation imposed on the national government's actions. Moreover, in the absence of a constitutional provision, restricting arbitrary state action was meaningless. To that effect, a similar provision to the Fifth Amendment is included in the federal Constitution under the Fourteenth Amendment which states:

> *"Nor shall any state deprive any person life, or property without due process of law"*[45]

These constitutional guarantees of individual liberties, commonly known as the due process clause, put a restriction on all organs of the federal and state Governments, the legislature, the judiciary, and the executive branch, unlike "the law of the land" in Britain, which restricts the arbitrary action of only the executive but not of parliament.

The tradition of adopting a written constitution spread all over the world from the US, and nowadays, several countries have enshrined the concept of due process, although there are variations in the phrasing of the guarantee in their constitutions. In Ethiopia, for example, the Constitution has used the phrasing "except in accordance with the law"[46]

## 2.4.2 The Essential Elements of Due Process of Law

At the earliest development of the principle, which is during the time of the Magna Carta, there was no such clear demarcation between the substantive and procedural due process of law. However, through the passage of time and thereby modernization, this distinction began to appear and was fully developed in the USA where powers of government are dichotomized between the executive, the legislature, and the judiciary.

Hence, the doctrine of due process of law has been divided into two major broad categories depending on the part of the government organ it binds. These are the substantive due process which binds the legislature from enacting unfair laws, and

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[44] Crema, M., & Solum, L. B. (2022). The original meaning of" due process of law" in the Fifth Amendment. *Va. L. Rev.*, P*108*, 447.
[45] Ibid
[46] Groves supra note, 39

procedural due process, which affects the executive branch of government in its action toward private citizens. In the subsequent parts, an attempt is made to discuss these two categories of the doctrine.

### 2.4.2.1 Substantive Due Process

Substantive due process limits the legislature from enacting laws which would arbitrarily limit individual freedom of action. Substantive due process is concerned not with the procedures used to make a rule or adjudicate an individual case but with the substance of a rule or adjudication. Constitutional procedures can be used to implement a rule but for the rule itself to violate the constitution. Substantive due process protects people from arbitrary laws. In that sense, substantive due process is a requirement that laws be related to the purpose intended or that the government has some substantial reason for the regulation.[47]

In general, substantive due process is a limitation upon the legislative power that it should not enact laws which would result in arbitrary deprivation of certain fundamental private rights, such as freedom of speech and individual freedom of action.

For example, statutes not providing for notice and hearing to deprive a man's right or for payment of compensation for property expropriated or which arbitrarily discriminate against a person singling him out of the same class to which he belongs are contrary to the principles. Hence, they can be held null and void.

### 2.4.2.2 Procedural Due Process

Beginning from Magna Carta, the procedural meaning of the term due process of law was related to procedures to be followed before depriving someone of their rights by government organs. Procedural due process implies that, when a government acts in such a way that it denies a citizen of life, liberty, or property interest, the person must be given notice, the opportunity to be heard, and a decision by a neutral decision-maker. That is to say, a given procedure is unfair and unjust if their life, liberty, or property is to be deprived by the government.[48]

Due process of law in its procedural aspect means that a person should be afforded some sort of fair procedure if by governmental power he is to be denied his private rights of life, liberty, or property. Hence, the individual has the right to— and the

[47] Riggs, R. E. (1990). Substantive Due Process in 1791. *Wis. L. Rev.*, 941. Cited in Harrison, J. (1997). Substantive due process and the constitutional text. *Va. L. Rev.*, *83*, 493. P. 3

[48] Eberle, E. J. (1987). Procedural due process: the original understanding. *Const. Comment.*, *4*, 339. P. 343-45

government owes him or her— a certain just process to consider, and final determination of the basis for, and legality of such action.

Hence, government deprivation of individual basic rights without such hearing and notice is contrary to procedural due process. In dealing with individuals, the government must proceed with settled usage and modes of procedure.

Procedural due process also implies fair process, and it generally requires that a person shall receive notice and charge, be heard, have the right to confront by proof those allegations adduced against him, and be rendered an impersonal judgment based on the material facts presented.[49]

Generally, to deprive a person's life, liberty, or property procedural due process requires steps such as a public trial, notice, a competent tribunal, (which is, a court having jurisdiction on the case or matter), an opportunity to be heard, and an impartial and disinterested tribunal.

The requirements of procedural due process as noted above are many and diverse. The most important elements, however, are the following four.

**1) Notice**

Notice to a party, which is the action of informing the person sought to be deprived of a right, especially as regards to property rights, that the matter is pending before tribunals enabling him/her to prefer what actions to take about such suit, is one of the essential elements of due process.[50] It is a summon to a party to appear and defend, meaning to declare something which she/he wants to say concerning the facts in issue, and which will positively affect the judgment to be rendered in favour of him. Statutes regulating adjudication and the establishment of liability without notice— expressly or implicitly— and judgment in courts without notice breach due process of law.

The objective of notice is to bring the party into the proceeding and to afford her/him a chance to be heard on the claim or charge made againt her/him, and defend her/his case before a tribunal legally formed to adjudicate rights and as such, it should be fair to the party likely to be received and plain to be understood by the party.[51]

[49] Ibid
[50] Ibid
[51] Ibid

**2) Opportunity to Be Heard**

According to this requirement, no one may be deprived of his/her fundamental rights before being heard without contesting the charge brought against him/her and defending himself on the laws and facts in dispute.[52] The hearing accorded must be, in each case, fair, complete, appropriate, full, reasonable, and before the final disposition of the case.

The opportunity to be heard embraces such rights in the trial process as the right to appear in person or be aided and represented by counsel; be present during the taking of evidence or testimony; know the claims of his opponents; hear evidence adduced against him; confront, cross-examine and set up any defence against his/her litigant and witness thereof; introduce evidence in support of himself; and prepare and present appropriate arguments as to law and fact.[53]

**3) An Impartial Tribunal**

This clause requires some neutral and impartial decision-maker, whether it is a judge, agency, or government hearing officer— a fair trial in a fair tribunal.[54] It is said that a hearing is essential for due process, but such a hearing or defence should be before a tribunal having competent jurisdiction as well as before a just, equitable, fair, and impartial tribunal.

In a nutshell, whether the decision is judicial, executive, or administrative, the decision-maker should be disinterested and impartial. That is to say, it must not have a direct, personal, or pecuniary interest in the judgment to be rendered.

**4) Publicity**

The fourth essential requirement of procedural due process is a public hearing that the trial is held in public as opposed to the judge's chamber.[55] Nevertheless, it should be remembered that there are some circumstances where the trial or hearing may be on camera in the interest of the accused.

[52] Ibid
[53] Groves supra note 39, P. 262
[54] Ibid
[55] Ibid

Generally speaking, the purpose of this guarantee of due process of law is to protect individuals regarding their rights of life, liberty, or property against arbitrary deprivation by exercising governmental powers.

### 2.4.3 The Principle of Due Process in Ethiopia

The introduction of modern laws in general, and constitutional principles in particular, to Ethiopia is a recent phenomenon that began with Emperor Haile Selassie. Although due process was enshrined in the 1955 revised Constitution for the first time, it has its inception a few years back, before the revised Constitution.

The 1931 Constitution of Ethiopia contained the concept under Article 23, which provides "No Ethiopian subject may be arrested, sentenced or imprisoned except in pursuance of the law has the notion of the due process guaranty in that it prohibits government officials to deprive a man of his liberty without the support of the law and without following certain procedures laid therein. Article 27 of it also, though to a limited extent, protects an individual's property rights from governmental arbitrary deprivation."

Generally, Articles 22-28 of this Constitution more or less embodied the basic idea of due process of law. However, if viewed from the perspective of modern constitutions, this Constitution had some limitations. For instance, its protection was extended only to Ethiopian subjects excluding aliens residing in Ethiopia. Further, the Emperor, in emergencies, could deprive an Ethiopian of life, liberty, or property without due process of law.

It was in the revised Constitution of 1955 that this constitutional guarantee was explicitly recognized. Article 43 of this constitution provided that:

> *"No one within the Empire may be deprived of life, liberty, or property without due process of law."*

Also, this Constitution recognized basic human rights that were enshrined in the Universal Declaration of Human rights (UDHR) of 1948, which deeply deals with due process of law.

The 1955 revised Constitution was suspended in February 1974 upon the coming into power of the Provisional Military Administrative Council (PMAC), and until 1987 Ethiopia had no constitution. Thus, during these times, no constitutional limitations were imposed on the government to ensure the prevalence of thr rule of law. In 1987, however, the PDRE Constitution was enacted, but it had no clear provision on the guarantee of due process.

Nevertheless, it can generally be inferred from a cumulative reading of Articles 16, 17, 43, and 44 that a person is guaranteed his life, liberty, and property against arbitrary governmental deprivation.

The next constitution, which is the Federal Democratic Republic of Ethiopia Constitution of 1995, under Articles 14-17 cum Article 40, has embodied the notion of due process of law.

According to these provisions, except for the respect of the rights and freedoms of others and the requirements of public order and the general welfare which alone justify any restrictions, individuals are guaranteed the basic rights of life, liberty, and property.

From the reading of Article 9(1) and (2), it appears that this constitutional guarantee is a restraint on all powers of the federal and state government's legislative, executive, and judiciary branches.

In general, in comparison with the country's modern legal system development, this constitutional guarantee of private rights, due process of law, has a long life. Additionally, it has been incorporated into the nation's basic laws since the time of the first and historical constitution up to the present Constitution, although the practical application of the principle may be different depending on the nature of the government in power.

## 2.5 Basic Principles of Administrative Law /Good Governance/

In the past few decades, public concern over the operation of administrative agencies of government has increased in different parts of the world. Most importantly, doubt has arisen about whether the public power entrusted to the agencies is being used adequately, transparently, and effectively, while long-standing questions about the exercise of these powers by certain agencies have been raised with new urgency. As a result, proposals for radical changes in agency organization, especially the separation of major policy functions from the function of adjudication, have been made with augmented force; measures to reform administrative procedure across the board have received increased attention; and numerous laws to cope with the influence problem have been introduced and made the subject of hearings.

Johnston defines good governance as "legitimate, accountable, and effective ways of obtaining and using public power and resources in the pursuit of widely accepted social goals".[56] It is a process whereby public institutions conduct public affairs and

[56] Johnston, M. (2006). Good governance: Rule of law, transparency, and accountability. *New York: United Nations Public Administration Network*, 1-32. P. 3

manage public resources in a manner that promotes the rule of law. Good governance is linked with the rule of law, transparency, and accountability and embodies partnerships between the state, society, and citizens.

The following are the basic principles of administrative law (good governance).

### 2.5.1 Fairness

Fairness can be culturally specific and is often a product of moral judgment. It is shaped by a person's life experience, values, ethics, expectations, and environmental factors. It is the process by which people determine what is morally right and wrong. In the context of public servants' duties and obligations, fairness is much more than just a fair hearing or a provision of service. It includes the key element of non-discrimination towards all persons and providing easily found, accessed, and understood information. Fairness uses concepts like empathy and understanding and accounting for another person's needs, interests, and well-being when making moral decisions. It is about treating the public with dignity and respect and providing an open, accountable, and timely service.[57]

By following a fair process, members of the public can better understand the reasons for decisions made by those in positions of authority. It helps to build public trust in public services if decision-makers can demonstrate and explain how and why decisions are made. Fairness in public administration can be procedural or substantive.

Procedural fairness is a central concept in administrative law. It means fairness in the procedures followed when arriving at an administrative decision. Procedural fairness is concerned with how the decision is made.[58] It is about the process or the steps to follow before, during, and after a decision is made. At a minimum, procedural fairness requires clear communication of a decision, proper notice, an opportunity to present their case, clear reasons for the decision, timeliness, and proper records to that effect.

Substantive fairness, on the other hand, is a case where decisions are given in accordance with power and without treating similar individuals differently. [59] The doctrine of substantive fairness is employed to check whether the impact of the decision of an administrative agency is so substantively unfair that it amounts to an abuse of

[57] Broome, J. (1990, January). Fairness. In *Proceedings of the Aristotelian society* (Vol. 91, pp. 87-101). Aristotelian Society, Wiley. P. 88

[58] Ventose, E. (2012). *Commonwealth Caribbean administrative law*. Routledge. P. 313

[59] Stewart, C. (2007). The doctrine of substantive unfairness and the review of substantive legitimate expectations. *Australian Administrative Law, Fundamentals, Principles and Doctrines*, 280-298. P. 283

power. The use of substantive unfairness as grounds for review of administrative action has become a recent development, and for a better understanding of substantive fairness, it is better to elucidate substantive unfairness.

Citing Professor Craig, Cameron Stewart has identified four instances where substantive unfairness could arise. These are cases where:[60]

> A general norm of policy choice, which an individual has relied on, has been replaced by a different policy choice;
>
> A general norm or policy choice has been departed from in the circumstances in a particular case;
>
> There has been an individual representation relied on by a person, which the administration seeks to resile from in the light of a shift in general policy; and,
>
> There has been an individualized representation that has been relied on. The administrative body then changes its mind and makes an individualized decision that is inconsistent with the original representation.

Stewart noted here that, in any of the above situations, the doctrine of substantive unfairness is employed to check whether the impact of the decision is so substantively unfair that it amounts to an abuse of power.[61] Thus, an agency acts unfairly if it wrongly neglects an interest of a person affected by the decision. The neglected interest here is an interest that the outcome becomes substantively unfair to a person, leading to abuse of power.

In general, fairness in public administration allows people to be heard in processes that affect them, ensures that decisions are made without bias, and acts consistently with the rules that apply. It is also about making decisions that consider the individual's needs and circumstances and are based on relevant information.

### 2.5.2 Reasonableness

Reason is an important element for a human being to make decisions consciously. This state of need to act with reason and how it helps in the creation and assessment of laws has led to the creation of the doctrine of reasonableness in administrative law. Furthermore, by common understanding, we can say law and reasonability go hand in hand. In every system, reasonability (the idea of examining an act based on whether it is reasonable or not) is the key to the appraisal of the legal system. Reasonableness

[60] Ibid
[61] Ibid

requires the identification of an end and of the means to that end, and an assessment of the relationship between the means and the end.[62]

Administrative decisions or actions were said to be unreasonable if they are 'absurd', 'perverse', or especially 'outrageous' in their defiance of logic or of accepted moral standards. In that sense, the doctrine of reasonableness in administrative law can be used as a substantive standard to review the content and material of administrative action, and this way provides guidelines to public authority in administrative functions. In that sense, public authorities' decision can be deemed unreasonable if they do not logically follow all the legally and reasonably relevant dimensions or of accepted moral standards.

Thus, we see that doctrine of reasonableness plays a critical role in the field of administrative laws, and it is safe to say that today, judicial review of administrative action, including reasonableness review, is widely available to challenge final agency action that affects parties.

> *A given decision, action or law may not be set aside merely because he or she considers that the matter should have been decided differently. However, in exceptional circumstances a decision may be set aside for unreasonableness and if this ground for review is raised the court will have the difficult task of considering whether a decision that is otherwise within the powers of the authority may be said to be 'unreasonable'.* [63]

In the case of Associated Pro*vincial Picture Houses Ltd* v *Wednesbury Corporation,* the court has set out criteria to determine unreasonableness. In this case, Associated Provincial Picture Houses Ltd is concerned with the Sunday Entertainments Act 1932 that gave a local council power to permit cinemas to open on Sundays, 'subject to such conditions as the council thinks fit to impose'. The Wednesbury Corporation then allowed cinemas to show films on Sundays, on condition that no children under 15 should be admitted to the performances, with or without an adult. Very many types of councils permitted children to go to the cinema on a Sunday if an adult accompanied them. The condition in Wednesbury was challenged by Associated Provincial Picture, alleging that the condition was ultra vires and unreasonable, and requested the court for certiorari. The court has provided three conditions on which it would intervene to correct a bad administrative decision, including on grounds of its unreasonableness. The judgment emphasized that unreasonableness is closely related

[62] Zaring, David. "Rule by Reasonableness." *Admin. L. Rev.* 63 (2011): 525. P. 528
[63] Ibid

to other grounds of review, such as irrelevant considerations, improper purposes, and error of law. Thus, the court held, the condition was neither ultra vires nor unreasonable.

### 2.5.3 Proportionality

The doctrine of proportionality is that the means employed by the statutory rule must be 'appropriate and necessary' to attain the authorized object.[64] It means that the public authority has to maintain a sense of proportion between the particular goals and the means it employs to achieve the goals which emphasize the individual rights to preserve the public interest. If the burden imposed by the rule is clearly out of proportion to the authorized object, the rule will be invalid.

The principle requires that action taken by the agency must be proportionate to its objectives. In other words, a public authority may not impose obligations on a citizen except to the extent to which they are strictly necessary for the public interest to attain the purpose of that measure.[65] The doctrine of proportionality ensures that there is a fair balance between pursuing a legitimate aim and the protection of rights. The principle of proportionality is a civil law doctrine now creeping into common-law jurisdiction, replacing the Wednesbury doctrine of unreasonableness.[66] However, it should be noted here that proportionality is not the same as Wednesbury unreasonableness. It requires of the court a structured analysis of the decision challenged and the justification of the decision-maker for that challenge. In so doing, Massey has provided a three-step check to be applied by the court while reviewing any law or administrative action based on proportionality.[67] These are:

(a) Means check: the means adopted by the administrative authority are within its power and are least burdensome besides being rationally connected to the end.
(b) End check: that end to be achieved is legitimate and within the power of the authority.
(c) Proportion or balance check: that there is a balance between means and ends. Balancing is difficult as realities on the ground and value priorities cannot be ignored.

Thus, the doctrine of proportionality can be invoked to invalidate or quash administrative decisions or laws. If there is any arbitrary action by the administration, it shall be controlled by the administration itself, but if it fails to do so, the judiciary

[64] Cane supra note 11, P. 190
[65] Ibid
[66] Massey, I. P. (2016). *Administrative law*. Eastern Book Company. P. 378
[67] Ibid

will come into play, and shall invalidate such administrative action based on proportionality.

### 2.5.4 Duty to Give Reason

The giving of reason is considered to be inextricably bound up with natural justice or the right to be fairly heard, and is fundamentally important as a principle of administrative law.[68] That is to say, administrative agencies should provide reasons for their decisions, at least in situations where the decisions may seriously affect an individual's rights, privileges, or interests, or where reasons are necessary for the exercise of the right of appeal.

The issue of whether and to what extent a decision-maker is required to provide persons affected with a decision has become increasingly important in recent years. However, the question of whether administrators should be under a legal duty to provide reasons, and the rationales for imposing such a duty, has proved contentious in domestic administrative law systems. Some jurisdictions have addressed the issue legislatively, simply imposing the duty in constitutions and administrative law statutes/proclamations, while others developed this duty through case law. [69]In Ethiopia, for example, the duty to give reasons is stipulated under Article 30 of the proclamation.[70] This provision provides that the person rendering administrative decisions should give sufficient reason for deciding how it is made. The explanatory note on the Administrative Procedure Proclamation further stipulates that all administrative decisions should be reasoned whether they are bound or discretionary, irrespective of whether they denied or favoured the right or interest of the applicant.[71] The reason can emanate from the substance, legal ground, or evidence of the case.

Giving reasons is important because it is believed that forcing decision-makers to give reasons for their decisions will lead them to make better and more accurate decisions. The provision of reasons also facilitates judicial review by providing information to the courts on the relative expertise of the initial decision-maker. The provision of reasons by public authorities is essential for demonstrating that laws are being applied consistently and carefully, thereby helping to promote public confidence

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[68] Kushner, H. L. (1985). The Right to Reasons in Administrative Law. *Alta. L. Rev.*, *24*, 305. P. 306

[69] Opdebeek, I., & De Somer, S. (2016). The duty to give reasons in the European Legal Area: a Mechanism for transparent and accountable administrative decision-making? a comparison of Belgian, Dutch, French and EU Administrative Law. *Rocznik Administracji Publicznej*, *2*. P. 97

[70] Federal Administrative Procedure Proclamation, Proclamation No. 1183 /2020, Negarit Gazette No. 32 , April 7th 2020. (here in after called the proclamation)

[71] The Legal and Justice Affairs Advisory Council of the Federal Democratic Republic of Ethiopia Attorney General. (2021). *Explanatory Note for the Provisions of Federal Administrative Procedure Law*. P. 34

in public institutions. In addition, to give reasons is to invite accountability and transparency, and to expose oneself to criticism; this helps to ensure that power is not abused or arbitrarily exercised.

This is not to say, however, that inadequate reasons have no legal consequences. The basis of the decision must be explained, and this explanation must be logically linked to the decision made. Although inadequacy of reasons is not a "stand-alone" basis for quashing an administrative decision, a judicial review of a decision may succeed where the reasons for the decision do not support the decision. Where reasons for a decision are provided, for the decision to be upheld on judicial review, it is necessary for the reasons to clearly explain how that decision was reached.

To be sufficient, reasons do not need to include all the arguments, statutory provisions, jurisprudence, or other details the judges presiding over the judicial review might have preferred. A decision-maker is not required to make an explicit finding on each element; however, reasons must be sufficient to fulfill the purposes required of them, particularly to let the individual whose rights, privileges, or interests are affected know why the decision was made and to permit effective judicial review.

In that regard Article 39 of the proclamation stipulates that an administrative agency shall notify the concerned person of its decision and the reasons in writing. This is because giving only the decision to the applicant is not sufficient as the applicant has the right to know the substance, legal grounds, evidence, and/or other reason for the decision. This assists in ensuring transparency and accountability.[72]

### 2.5.5 Transparency

Transparency means being open, communicative, and responsive. It is a principle which advocates that refers to public bodies should be open to society to inform citizens about their activity. [73] It means that public bodies should act openly to ensure the right of the party or citizen to be informed about stages and the progress of the proceedings, access to the files, and the right to be notified about the appropriate remedies to be used.[74] Transparency in decision-making makes decision-makers less prone to errors, makes them subject to broader scrutiny. Transparency is a fundamental requirement for a responsible government. This is because transparency promotes accountability and

[72] The Legal and Justice Affairs Advisory Council of the Federal Democratic Republic of Ethiopia Attorney General. (2021). *Explanatory Note for the Provisions of Federal Administrative Procedure Law*. P. 35
[73] Fisher, E. (2010). Transparency and administrative law: a critical evaluation. *Current Legal Problems*, *63*(1), 272-314. P. 275
[74] Ibid

provides information to citizens about what their government is doing. That is to say, transparency in public administration greatly impacts on the process of public administration and promotes efficiency, effectiveness, and responsiveness.

Ensuring transparency in Ethiopia is a constitutional duty stipulated under Article 12 of the FDRE Constitution. For that reason, Article 35 of the proclamation provides a duty for administrative agencies to ensure that their decisions are transparent. Accordingly, the person making administrative decisions should make the process and the decision it gives transparent.

### 2.5.6 Public Participation

Public participation can be seen as any process/procedure that directly involves the public in decision-making by which public concerns, needs, and values are incorporated into governmental and corporate decision-making, aiming for better decisions that give full consideration to public input in making that decision.[75]

There is also a growing recognition on the part of administrators that decision-making without public participation is ineffective.[76] Public participation has gained importance in recent times' administrative decisions as a result of a number of factors, including the demand for more accountability from public officials. When citizens participate in the decision-making process, public officials take their recommendations or opinions into account. The main reason certain decisions encounter resistance and dissatisfaction from citizens is that the citizens believe that the policymakers are destined to address the problems of some interest groups and not the general interest of the society.[77]

Thus, to promote open exchange, each agency shall endeavour to provide the public with an opportunity to participate in the regulatory process.[78] To the extent feasible, each agency shall afford the public a meaningful opportunity to comment through various means on any proposed regulation and all pertinent parts of the rule that might affect the community.[79] That is to say, before a given rule is enacted, each

[75] Cătălin, B. A. B. A., CHERECHEȘ, R., Cristina, M. O. R. A., & ȚICLĂU, T. (2009). Public participation in public policy process–case study in seven counties from North-Western region of Romania. *Transylvanian Review of Administrative Sciences*, *5*(26), 5-13. P. 6

[76] Haruta, C., & Radu, B. (2010). Citizen participation in the decision making process at local and county levels in the Romanian public institutions. *Transylvanian Review of Administrative Sciences*, (31 E), 76-92. P. 78

[77] Cramton, R. C. (1972). The Why, Where and How of Broadened Public Participation in the Administrative Process, 60 Geo. *LJ*, *525*, 538. P. 529

[78] Ibid

[79] Ibid

agency shall seek the views of those likely to be affected, including those likely to benefit, and those potentially subject to such rulemaking. In so doing, the Federal Administrative Procedure Proclamation provides the requirement of notice under Article 8 with the aim of ensuring public participation, transparency, and predictability in the formulation and implementation of directives.

In that regard, whenever an administrative agency prepares a directive, it shall publish a notice to enable citizens to participate in a meaningful way that allows having a meaningful impact and to ensure that the directive is developed with qualitative input from a variety of sources.

One of the reasons for making public notice mandatory is to enable anyone interested to participate in the consultation process through written submissions and/or oral hearings rather than limiting the consultation to the narrow circle of formally invited guests.

In addition to the public notice under Article 8, an administrative agency is required to directly solicit the opinion of relevant administrative agencies and other key stakeholders and conduct public deliberation per Article 10 of the proclamation. In general, an agency is required to consider specific conditions that could guarantee public participation such as keeping records, publishing notices, and collecting feedback through various means. Despite this, however, public deliberation may not be necessary for some exceptional circumstances. These exceptions are provided under Article 11 of the proclamations. These are the urgency of the matter in a context where it is not appropriate to take time to fulfil these procedures, where prior notice may be contrary to the public interest, and where prior notice will undermine the implementation of the directive.

## 2.6 Summary

Though the rule of law is known by different terminologies in different parts of the world, it is believed to be founded by Sir Edward Coke through formulating the first statement of the rule of law when he said that the king must be under God and the law and thus vindicated the supremacy of law over the pretensions of the executive. However, the best known articulation of the doctrine of the rule of law is found in the writings of Professor A.V. Dicey when he formulates three characteristics of the rule of law— the principle of the supremacy of law (principle of legality), the principle of equality, and the principle of constitutionalism. Accordingly, by the rule of law, we mean that a decision or measure by any public official or administrative agency should be made according to the law and should be supported by a law, which gives a clear mandate or power to the decision-making organ. If a decision of any power or mandate is exercised in the absence of a valid legal authority, it is considered null and void in the eyes of the law.

In addition to the rule of law, separation of power as the constitutional foundation of administrative law helps evaluate a modern state's legal and constitutional arrangements. The underlying idea of the separation of power is that concentration of power facilitates and encourages its abuse and that the separation of power provides a foundation against such abuse. Thus, by separation of power, we mean none of the three branches of government— the legislative, executive, and judiciary— should ever exercise the powers of the other. Based on the clear notion of separation of powers, 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 and specific reasons relating to expertise, and so on. However, the scope of delegation and exercise of such powers by administrative agencies should be construed narrowly as administrative agencies' judicial and legislative powers offend the traditional notion of the separation of powers. Similarly, the judiciary in exercising its power of judicial review, should restrict itself only to checking the legality of the administrative action without further moving to the merits of the case.

Due process of law, as the constitutional foundation of administrative law, also requires that no person shall be deprived of his life, liberty, and property by government actions without notice and opportunity to be heard for such deprivation. This constitutional guarantee of individual liberties, commonly known as the due process clause, restricts on all organs of the federal and state governments, the legislature, the judiciary, and the executive branch.

The mere existence of these constitutional principles do not guarantee the full respect of individual rights and freedoms unless accompanied by the fundamental principles of public administration such as fairness, reasonableness, proportionality, duty to give reasons, transparency and accountability, and public participation.

## 2.7 Glossary

**Good Governance:-** is the process of administration of public institutions and resources thereby guarantying the realization of human rights in a manner essentially free of abuse and corruption and with due regard for the rule of law.

**Tribunal: -** is any person or organ destined with the authority to judge, adjudicate on, or determine claims or disputes. This may include courts of law, arbitrations and organs with the power to adjudicate

**Magna Charta:-** (*Magna Carta* Libertatum) is a royal charter (a formal grant issued by a monarch under Royal prerogative) of rights agreed to by King John of England at Runnymede John on June 15, 1215

**Check and balance:-** is system whereby each organs of government control the other or amend acts of another branch so as to prevent any one branch from exercising beyond its power.

**Public administration:-** is a practice in which leaders and administrators administer societies to advance the common good and effect positive change to the public at large.

## 2.8 Review Questions

1) Discuss the difference between procedural elements of the rule of law and "procedural justice".

2) The rule of law is the foundation or cornerstone of administrative law. However, in some respect, it is also a limitation on the scope of administrative law. Explain.

3) Do you think administrative law violates the principle of the separation of power? If yes, how do you justify such a violation?

4) Courts may review by moving to the merits of the case! Comment on the validity of this assertion.

5) Does the FDRE Constitution explicitly refer to the rule of law as the cornerstone of the Constitution?

6) How do you think substantive due process is respected?

7) How do you see the basic principle of good governance in line with the Constitution? Do you think the FDRE Constitution guarantees such principles?

8) How do you think the rule of law maintains or facilitates economic development?

9) Discuss the difference between "the rule of law" and "rule by law" briefly.

10) How do you see A.V. Dicey's conception of the rule of law in line with Wade's notion of the supremacy of parliament?

11) One of the powers of the regional states under Article 52/2/a/ of the FDRE Constitution is to establish a state administration that best advances self-government, a democratic order based on the rule of law, to protect and defend the federal Constitution. However, none of the provisions of the Constitution

places the duty of establishing “a democratic order based on the rule of law” on the Federal Government. Does it mean the Federal Government has no such duty under the Constitution?

12) Is there any difference between "separations of powers," "separation of functions", and “division of power”?

13) Separation of power is a nominal division of power among the three organs of government. Do you agree?

14) What is the essence of due process in administrative proceedings?

15) Can you analyze the provisions of the FDRE Constitution that guarantee procedural due process of law?

## 2.9 Further readings


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# CHAPTER THREE

# ADMINISTRATIVE AGENCIES

## Chapter overview

This chapter explains what administrative agencies are, the form and nature of their power, how they are created, and the types of agencies that governments establish and why they establish them. It also explains the major functions and powers of administrative agencies. In general, it gives students a brief overview of administrative agencies in a constitutional or democratic system.

### LEARNING OUTCOMES

After studying this chapter, you will be able to:

- Define administrative agencies
- Analyze how the system of agencies developed
- Discuss the kinds of agencies that governments establish and why they establish them
- Sort and define functions of administrative agencies
- Explain the structure and classification of administrative agencies
- Define and explain the form and nature of the powers of administrative agencies power

## Chapter Table of Contents


**3.1 Introduction ..... 82**
**3.2 Administrative Agency: Historical Development and Definition ..... 83**
3.2.1 Historical Development ..... 83
**3.3 Definition ..... 83**
**3.4 The raisons d 'etre for the formation of Administrative Agencies ..... 85**
**3.5 Formation of Administrative Agencies ..... 87**
**3.6 Functions of Administrative Agencies ..... 87**
**3.7 Agency Structure and Classification ..... 89**
**3.8 Form and Nature of Power ..... 90**

**3.9 Discretionary Power of Administrative Agencies ..... 91**
3.9.1 The Necessity of Delegation ..... 91
3.9.2 Discretionary Power: Definition ..... 91
3.9.3 Arguments for and against Discretionary Power of Administrative Agencies 92
3.9.4 Express/Implied Power of Administrative Agencies ..... 92
**3.10 The Powers of Administrative Agencies ..... 93**
3.10.1 Rule-making Power ..... 93
3.10.2 Adjudicatory Power of Administration Agencies ..... 93
3.10.3 Administrative Power of Agencies ..... 93
**3.11 Summary ..... 95**
**3.12 Review Questions ..... 95**
**3.13 Glossary ..... 96**
**3.14 Further Reading ..... 96**

## 3.1 Introduction

The structure of the legislative and judicial branches of government has remained largely the same over the past century. However, the structure of the executive branch has changed dramatically. Departments presided over by ministers are still the core of the executive branch, and the staffs of these departments continue to exercise powers and make decisions subject to administrative law.

However, many of the former functions of departments are now carried out by a complex network of administrative agencies, boards, and commissions collectively known as "agencies" that are at an arm's length from the minister, to whom they report, and from department staff. This system gradually evolved in response to the growing complexity of society. There are now such large numbers of departmental branches or freestanding agencies that they have become recognized as a separate "sector" within the executive branch. Some commentators go so far as to call them the "fourth branch" of government, which has deranged our three-branch legal theories because administrative agencies have been called quasi-legislative, quasi-executive, or quasi-judicial, as the occasion required, in order to validate their functions within the separation of power principle.[1]

Thus, under this chapter, attempts have been made to bring the fundamental elements of administrative law together. In so doing, a comparative analysis of the existing literature and laws has been made to portray administrative agencies' historical evolution and definition. Additionally, the modes of creating administrative

[1] Strauss, P. L. (1984). The place of agencies in government: Separation of powers and the fourth branch. *Columbia Law Review*, *84*(3), 573-669. P. 578

agencies and their ultimate functions are sorted and analyzed. Besides, agencies' structures and their classification have also been elaborated by considering various feasible factors. Furthermore, the form and nature of agencies' powers have also been presented in this chapter. Finally, administrative agencies' tripartite functions have been discussed in this chapter.

## 3.2 Administrative Agency: Historical Development and Definition

### 3.2.1 Historical Development

A bird's-eye-view of Ethiopian history reveals that the history of administrative agencies in Ethiopia is a recent phenomenon and came into existence after the establishment of the different ministries in 1908. Hence, the reign of Menelik II can be considered the foundation for the formation of administrative agencies in the history of the country. Later, the 1931 Constitution drew up a provision empowering the emperor to organize and regulate administrative bodies. The aftermath of liberation has also complicated the structure of administrative agencies following the prime minister's introduction in 1943 ministerial setup. Order no. 1 was issued to ease the difficulties and created new ministries that raised the number of the ministries to eleven in 1961.

The 1995 Constitution of the FDRE[2] has developed a more comprehensive approach to setting up administrative agencies in Ethiopia. By doing so, Article 77/2/ of the Constitution empowers the Council of Ministers to decide on the organizational structure of the ministries and agencies responsible for them.

Moreover, the Constitution also included an enabling clause for forming independent administrative agencies. The Parliament recently adopted the Federal Administrative Procedure Proclamation No. 1183 /2020[3] to regulate administrative agencies' intervention against people's rights and interests.

## 3.3 Definition

Structural differences, along with the growing and complex functions of administrative agencies beyond their natural jurisdiction in the areas of legislation and adjudication in the radical and modern notion of state, have made it much more challenging to provide a precise and descriptive definition of administrative agencies

[2] Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995, (1995).
[3] Federal Administrative Procedure Proclamation, Proclamation No. 1183 /2020, 26th Year No. 32(2020).

that portrays the entire process of public administration.

Hence, any attempt to define “administrative agency” will be challenging. However, looking at the available scholarly literature and norms is extremely important for insight into defining and understanding agencies. Various definitions from the available literature and laws are noted here below.

Some accords on administrative law[4] provide that an administrative agency is a "governmental authority, other than a court and other than a legislative body, which affects the rights of private parties through either adjudication or rule-making." Likewise, the US Administrative Procedure Act[5] takes the same position as the previous definition and defines "agency" to mean any branch or agency of the government "other than Congress, the courts, or the governments of the possessions, territories, or the District of Columbia."

The aforementioned definitions have included various elements of the executive wing, including the heads of state and other medium and lower-level cabinet officers involved in public administration affecting the rights and freedom of individuals. However, though such definitions may be appropriate for legal control, they are rather broad and diffuse for study and analysis.[6] Thus, looking at existing legislation may shed some light on the definition of administrative agencies in Ethiopia, and is discussed below.

Article 2(1) of the Federal Administrative Procedure Proclamation[7] defined “Administrative Agency” as an Executive Organ of the Federal Democratic Republic of Ethiopia duly established by law and includes the Executive Organs of City Administrations accountable to the Federal Government.

Likewise, the definition of the proclamation has adopted a very broad definition that would incorporate all executive organs of the Federal Government, including the executive organs of Addis Ababa and Dire Dawa City Administration, to the exclusion of the legislative and adjudicatory branches of government. It is useful to raise questions— such as, what are the executive organs of the federal government?— to shed some light on the definition of administrative agencies under Ethiopian law. In

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[4] Clark, C. E. (1958). Davis: Administrative Law Treatise--A Symposium Review. *Minn. L. Rev.*, *43*, 601.

[5] United States Code: Administrative Procedure 60 Stat. 237 (1946), 5 U.S.C. § 1001(a) (1964).

[6] Loevinger, L. (1964). The Administrative Agency as a Paradigm of Government--A Survey of the Administrative Process. *Ind. LJ*, *40*, 287. p. 288.

[7] Federal Administrative Procedure Proclamation, Proclamation No. 1183 /2020, 26th Year No. 32(2020).

so doing, consulting the *expose de motif*[8] of the proclamation is helpful.

The legislature has envisaged two organs that would be fundamental definitional elements of an administrative agency. Accordingly, government ministries which are the permanent members of the Council of Ministers are recognized as the primary executive organs of the Federal Democratic Republic of Ethiopia.[9] Moreover, in the same category, while at different levels of government bodies, which do not have the status of ministries but are established by law (by proclamation or regulation), which comprises agencies, commissions, or authorities, and other organs with similar status and accountable to the executive are also considered as essential executive organs that would constitute a key definitional element.[10]

The other organs that bring the definition of administrative agency of the proclamation into existence are independent administrative agencies such as the Electoral Board, the Federal Auditor General, and the Office of the Ombudsperson[11], which are directly accountable to the parliament.

Hence, "Administrative Agency", under the proclamation, means an executive organ, which includes the ministries and other medium and lower-level authorities, the executive organs of Addis Ababa and Dire Dawa City Administration that are ultimately accountable to the Council of Ministers, and independent agencies accountable to the Parliament.

## 3.4 The *Raisons D'etre* for the Formation of Administrative Agencies

There are various reasons behind the formation and operation of administrative agencies. From the outset, the legislature has formed agencies to enable them to fill the possible gaps left by the parliament and the judiciary in addition to their inherent power of enforcing laws and ultimately solving prevailing social, economic, and political problems.

For instance, generality is the basic feature of parliamentary legislation since the lawmaker cannot legislate each and every detail of the prevailing problems with sufficient precision. Hence, putting administrative agencies in place and delegating

[8] The Legal and Justice Affairs Advisory Council of the Federal Democratic Republic of Ethiopia Attorney
General. (2021). Explanatory Note for the Provisions of Federal Administrative Procedure Law.
[9] Ibid.
[10] Ibid.
[11] Ibid.

specific tasks would be paramount. Similarly, it is not possible to expect courts to preside over all disputes and dispose of accordingly. Establishing administrative tribunals under the executive's auspice would then ease the caseloads of the court and provide expedient and fair justice for persons in need of it. Therefore, creating administrative agencies would provide the advantage of specificity.

Another reason for creating agencies is the critical need to protect society. Some circumstances need the protection of administrative agencies. For instance, in the absence of the Environmental Protection Agency, controlling environmental pollution would have been challenging. Hence, protecting the environment in particular and the society in general are among the rationales for bringing administrative agencies into existence.

The other possible reason may be to demonstrate independence. The government may want to ensure that decisions on specific issues are not seen to be "political". An independent agency that is also perceived to be independent can demonstrate that its function and decisions are free of political influence.

Sometimes, to reduce the size, workload, or budget of a department, the government may establish an external agency to carry out some of the functions of that department in order to save space, achieve more efficiency in the delivery of services, or reduce costs. Similarly, where several departments or ministries carry out similar or related functions, the government may create a new agency to carry out those functions, or it may set up an advisory agency to help coordinate the activities of all the departments to achieve coordination or uniformity. In addition, where one government department carries out two or more functions that may come into conflict, the conflict may be resolved by "hiving off" some of the department's functions to independent bodies to reduce conflicts of interest between departments' tasks.

Another important reason is to provide expertise and specialization. The government may want to obtain expertise in a particular subject matter that is not readily available within the civil service. The use of outside bodies to bring expertise to a problem is common in the setting of technical standards, the provision of advice, and the regulation of specialized businesses, trades, and professions.

Last but not least, providing services is also among the rationale for forming administrative agencies. Providing service is among the major responsibilities of the government. Thus, the parliament may create administrative agencies and act accordingly to discharge its responsibility. The Public Servants Social Security Agency and Private Organization Employees' Social Security Administration provide pension services to public and private employees. The Ministry of Health provides health services to citizens through public hospitals and other health institutions.

## 3.5 Formation of Administrative Agencies

Administrative agencies are established by the law. Enacting specific legislation that would give birth to administrative agencies preceded the latter. Administrative agencies do not come into operation in a vacuum. Enabling laws are fundamental precondition for bringing administrative agencies into existence. However, there are two ways of creating administrative agencies: one is through the constitution, and the other is through an act of parliament. Depending on the nature of the agencies, the enabling act may differ from one to another. While most federal administrative agencies are within a department of the executive branch, sometimes called regular agencies, the House of Peoples' Representatives has designated some agencies as "independent"- not within any department of the federal government and not under the supervision of the Prime Minister or the Council of Ministers. For instance, the FDRE Constitution expressly requires establishing some independent agencies, such as the Office of the Federal Auditor General, the National Electoral Board of Ethiopia, and the Human Rights Commission.

Even though those independent agencies are the Constitution's creation, they do not have material and legal existence unless the Parliament enacts a specific law to that effect. Thus, one can argue that the Constitution has conceived independent agencies and that the act of the Parliament birthed them. Independent agencies, which have a constitutional basis, still require an enabling act of the parliament for their legal existence. On the other hand, dependent agencies are created only through the enabling act, and their existence is completely contingent upon the assent of the Parliament.

## 3.6 Functions of Administrative Agencies

Administrative agencies serve certain governmental purposes more efficiently than traditional judicial and legislative organs.[12] Administrative agencies serve three distinct functions— executive, quasi-legislative, and quasi-judicial.[13] The fundamental functions of administrative agencies are presented as follows.

Unlike other functions, enforcing or executing regulations is the ordinary power of administrative agencies. In so doing, the administrative agencies investigate complaints and identify conducts that are alleged to violate applicable laws. Moreover,

[12] *Functions and Character of Administrative Agencies.* Available at: file:///C:/Users/user/Downloads/03-Functions%20(1).pdf.
[13] Jason Gordon. (2021, September 23). *Functions of Administrative Agencies – Explained.* The Business Professor. https://thebusinessprofessor.com/en_US/us-legal-system/function-of-administrative-agencies.

they monitor compliance and advise the legislature in drafting a bill and promulgating laws.

The other fundamental function of administrative agencies is issuing regulations that have a binding effect, like laws enacted by Parliament. Enacting laws is an inherent power of the legislature; however, due to the generality attribution of the status, the laws are not specific enough to address all the remaining issues in detail.

The regulations issued by administrative agencies are specific and outline how individuals should proceed to comply with the regulations and will identify conduct that fails to comply with the regulations. Conduct that fails to comply with the statutes would be unlawful and may be redressed accordingly.

Likewise, adjudication is an inherent jurisdiction of a court. However, some cases arise out of regulations that are beyond the reach of the regular court. Some matters are properly adjudicated within agencies due to the strict procedure followed by courts and the technicality of the issues involved.

In their proceeding, administrative tribunals follow a seemingly similar but more flexible procedure compared to regular courts. Thus, the tribunals may resolve a dispute and impose fines or sanctions for unlawful conduct. The sanction may include issuing an injunction directing a person to cease doing a specific action that violates the regulations. However, administrative tribunals cannot authorize or order the detention of individuals.

Besides these, administrative agencies have the following functions:

**Distribution of Benefits:** Administrative agencies distribute government benefits such as welfare, disability benefits, old-age benefits, medical care for poor people and seniors, loan guarantees for home buyers and students, and subsidies for industries such as agriculture. Agencies often adjudicate disputes that arise in these areas.

**License and Permit Granting and Enforcement of Standards:** Agencies rule on requests for licenses and permits in a wide variety of areas, including the construction and operation of nuclear power plants, logging on federally owned forest land, operation of stockyards, ownership and operation of television and radio stations, the sale of insurance, the operation of commercial airlines, and the scores of occupations that require licensing, such as lawyers and doctors. In addition to granting licenses, agencies monitor and enforce compliance with regulatory standards in the areas in which licenses and permits are required.

**Policymaking:** Agencies make important policy decisions in most of the areas in

which they administer government programs.

**Management of Resources and Government Property**: Agencies manage natural resources such as parks and wilderness areas, and they oversee the use, maintenance, acquisition, and disposal of government property.

## 3.7 Agency Structure and Classification

The structure of an administrative agency may vary depending on government policy and the program the agency is aspiring to carry out. Furthermore, since the law simply defines the power, duty, function, and structure of administrative agencies in broad terms, the structure of administrative agencies, including their internal regulation, would consider multiple factors.

As a result, the type and scope of government program, the extent of its power, and the nature of the mission to be accomplished by the agency outlined in the enabling act are among the factors to be taken into consideration before designing the appropriate structure and organization.[14]

Moreover, establishing the structure and internal administration of agencies requires expertise and specificities beyond the legislature's reach. To this end, the FDRE Constitution empowers the executive, specifically the Council of Ministers, to determine the structure and internal administration of administrative agencies. In so doing, the Council of Ministers shall form administrative agencies' structure and internal regulation to ensure efficiency and quality in public administration.

Thus, some administrative agencies are ministries with overwhelming power to enforce the existing legislation. However, others are lower-level administrative organs with the mandate to deal with specific tasks of governmental undertakings. Therefore, the structures of administrative agencies may be comprised of boards, ministries, commissions, departments, and other governmental institutions established to perform certain narrowly defined tasks or to be responsible for particular governmental functions.

Based on the question of whom these administrative agencies are accountable, we may classify administrative agencies into two categories. Those administrative agencies directly accountable to the executive wing of the government are called executive agencies. On the other hand, administrative agencies which are accountable

[14] Abyssinia Law. (2022). Formation of Administrative Agencies. Abyssinia Law. https://www.abyssinialaw.com/study-on-line/365-administrative-law/7197-formation-of-administrative-agencies.

to the parliament are known as independent agencies.

In Ethiopia, executive agencies are accountable to a concerned ministry depending on the nature of the agencies and, ultimately, they are accountable to the Council of Minisers, headed by the Prime Minister, since Article 72(1) of the FDRE Constitution has made the Prime Minister and the Council of Ministers the highest executive organ in the country. As a result, the executive branch of the government, headed by the Prime Minister and his cabinet, has a constitutional mandate to ensure the implementation of laws, regulations, directives, and decisions of the House of Peoples' Representatives.

However, while most agencies are under the auspices of the executive branch of government, the Parliament has also established the remaining agencies with a high degree of autonomy, fundamentally free from control by other parts of the executive wing of the government. These independent agencies are accountable to the House of Peoples' Representatives.

Even though the Parliament is mandated to bring administrative agencies to life, these agencies were first conceived by the Constitution, as discussed before. Independent agencies are generally not part of any executive department headed by the Prime Minister. This is to protect these agencies from undue influence by the executive. Additionally, their establishment and existence are not dependent on the volition of the House of Peoples' Representatives. Since the source of their existence is the Constitution, Parliament must bring about their physical existence through an enabling act. Among independent agencies, notable ones are the Ethiopian Human Rights Commission, the Institution of the Ombudsman of the Federal Republic of Ethiopia, and the National Electoral Board of Ethiopia.

## 3.8 Form and Nature of Power

The powers of administrative agencies have been primarily derived from legislative delegation. As discussed, an administrative agency lacks the inherent and constitutional authority to act. However, the Parliament also has no practical capacity to address and enforce each and every specificity of the law; hence, the legislature must delegate some of its own power to the administrative agencies. As far as the extent of delegated jurisdiction is concerned, there are no common denominators, and it may vary depending on the aspiring objectives that need to be achieved by administrative agencies.

Nevertheless, the enabling acts that gave birth to administrative agencies and delegated power to those agencies must put reasonable limitations in place on the delegated authorities of administrative agencies. Thus, delegation and its limitation are among the cardinal principles of administrative law.

Moreover, depending on the very nature of the activities supposed to be performed, the delegation may be quite specific and confined to a limited number of undertakings, or it may be quite broad, authorizing more discretionary power for administrative agencies.

## 3.9 Discretionary Power of Administrative Agencies

### 3.9.1 The Necessity of Delegation

As pointed out before, there are visible limitations on the legislature to forecast and address all specificities of the regulations. The Parliament cannot forecast and incorporate general legal norms that could regulate all cases that may occur in real life.[15] Hence, it is a must to delegate some natural and inherent jurisdiction of the legislature to administrative agencies since the latter is supposed to possess the required expertise and time to deal with each specificity of the regulations. As a result, administrative agencies cannot be tied to rigid and abstract legislation but inevitably must be free to assess the circumstances of each particular case.[16]

### 3.9.2 Discretionary Power: Definition

The term "discretionary authority" means an authority with which the administrative authority has been entrusted with a certain degree of freedom in terms of making a decision, in other words, to choose one of many legally admissible decisions that it considers most appropriate.[17] However, in so doing, the discretionary power of the administrative agency must be brought within the authority and per the objective to be achieved by such authorization.[18] Hence, the enabling act that delegated administrative power should determine the objectives of the delegation in a clear and precise manner to curtail possible abuses of power by the agencies.

Moreover, the discretionary acts should be taken by the competent authority, in prescribed procedure and on the basis of established legally relevant and facts.[19] In addition, some critical issues, such as the ultimate jurisdiction of the Parliament and the procedure for the adoption of the act cannot be subject to the discretionary power

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[15] Ventose, E. (2012). *Commonwealth Caribbean Administrative Law*. Routledge. P.149-150

[16] Dejan Vitanski. (2025). Discretionary Powers of the Administration. *Journal of Process Management – New Technologies, International,* 3(2), 27-29.

[17] Компилација на инструменти на Советот на Европа. (2005). Compilation of the instruments of the Council of Europe. Cited in Dejan Vitanski. (2025). Discretionary Powers of the Administration. *Journal of Process Management – New Technologies, International,* 3(2), 27-29. P.28

[18] Ibid.

[19] Richard B. Lillich. (1991). International Human Rights: Problems of Law, Policy and Practice. Cambridge University Press.

of administrative agencies.

### 3.9.3 Arguments For and Against Discretionary Power of Administrative Agencies

There are two-fold arguments concerning the discretionary power of administrative agencies. The first line of argument is based on the following proposition: Since administrative agency rules and regulations often have the force of law against the rights and freedoms of individuals, some scholars criticize the discretionary power of agencies to do different activities. From the outset, allowing discretionary power for administrative agencies violates the basic constitutional maxim that allows the legislature to make laws. Rulemaking is the inherent and constitutional mandate of the legislature. Hence, any undertaking that could take away the inherent and constitutional rights of the legislature in any form should be unconstitutional and void.

Proponents of discretionary power for administrative agencies, on the other hand, emphasize that administrative agencies are most often the creations of Parliament, and the latter has established the former with discretionary power to act on its behalf in cases where it has been unable to reach the specifics of the regulation. Furthermore, they also note that administrative agencies are much more effective than the judiciary in providing adequate, flexible, and expedient justice on relatively minor or exceedingly complex disputes.

### 3.9.4 Express/Implied Power of Administrative Agencies

The "express power" of administrative agencies refers to the power expressly granted to the administrative authorities under their enabling act. As stated before, the enabling act— sometimes called an agency's organic act, parent act, or establishment act— is the fundamental source of power that has expressly allocated defined powers for administrative agencies. However, there are also implicit powers that have not been expressly provided under the parent act since the legislature is not accurate enough to forecast the day-to-day activities of the regulation and public administration. In this case, the implied power should, in any case, be made in the public interest.[20] A brief description of the three powers of the administrative agencies is presented here below.

[20] Compilation of the instruments of the Council of Europe. (2005).

## 3.10 The Powers of Administrative Agencies

### 3.10.1 Rule-Making Power

Delegated legislation of administrative authorities refers to the power of administrative agencies that the Parliament has delegated to make binding legal rules. As discussed, human fallibility coupled with the complex and dynamic nature of the modern notion of the state obliged the Parliament to delegate some of its inherent and constitutional mandates, including law-making power to administrative agencies. Administrative agencies are supposed to be capable enough to address the day-to-day business of public administration with adequate specificity. Besides, efficient and quality public administration requires the enactment of legal rules, flexibility to the existing situation, and dealing with complex technical matters as a fundamental pre-condition. In so doing, the agencies should exercise their power within the limits of the laws to attain their foundational objectives. However, sometimes practical challenges or abuse of power may occur in the execution of regulation. Hence, the Parliament should introduce a controlling mechanism, including providing specific rule-making procedures along with the delegated authorities.

Likewise, Article 4(1) and (2) of the Federal Administrative Procedure Law has also empowered administrative agencies to adopt the directive based on the power delegated to them by law. Hence, administrative agencies are at liberty to make rules only within the space left by the parent act.

### 3.10.2 Adjudicatory Power of Administration Agencies

To provide speedy and inexpensive justice to society, parliament delegates some of the inherent and constitutional power of the judiciary to administrative agencies. Delegated adjudicatory power of the judiciary may include the imposition of sanctions and making administrative decisions, including but not limited to revocation of licenses and deportation of aliens. In so doing, administrative agencies follow a similar procedure in the disposition of justice for the needy. However, agencies may abuse their mandates in presiding over the cases and disposing of decisions. Thus, while granting such powers, the Parliament has put some oversight mechanisms in the adjudication process such as judicial review in place.

### 3.10.3 Administrative Power of Agencies

Administrative agencies are assigned by the legislature with the authority to direct and supervise the implementation of legislative acts. Thus, they have important functions, which are discussed below.

Regulation is the primary function of administrative agencies. It is quite clear that

there have been instances where certain sectors of the country have failed to regulate themselves. In this case, putting the regulatory role of administrative agencies in place would be helpful in protecting that particular sector and society from possible disasters. For example, there were critics of liberal economic philosophy because it advocated for a free market economic system with no significant state intervention. However, various historical incidents have demonstrated the market's inability to self-regulate and revealed economic and environmental casualties. As a result, scholars have advocated for the state's intervention in the market. In so doing, establishing administrative agencies and putting them into operation would be paramount since, unlike the lawmakers or the court, administrative agencies should have sufficient time and expertise to regulate the market.

Moreover, administrative agencies may also intervene in the market to control monopolies. Unregulated competition may lead to the monopoly of the sector by a few individuals or groups and nurture unequal bargaining power. Hence, establishing administrative agencies and putting them into operation is very important to level the playing field since they may determine rates in sectors such as transportation, and regulate financial markets and the banking sector. Furthermore, agencies may also regulate the economy to compensate for externalities, such as discrepancies between the cost of producing something and society's true cost for producing goods. Hence, administrative agencies may require industries to make the necessary investments, such as installing essential equipment to mitigate the effects of their waste on the environment and thereby spread the costs of pollution control over the entire industry.

The second function of administrative agencies is government exactions. Under this function, administrative agencies are supposed to discharge their primary responsibilities, such as the collection of taxes. The provision of goods and services is the third major function of administrative agencies. The government has an obligation to provide goods and services such as education, health, roads, and so forth to the public. To do this, creating administrative agencies is a must. Finally, the fourth major function is the disbursement of money or other commodities by administrative agencies. In so doing, the government, through its social security scheme, disburses public money as payment for pensions.

Furthermore, administrative agencies have other subsidiary powers. Their power consists of advisory and investigative powers. In their advisory function, administrative agencies submit reports of their law enforcement activities to the head of the executive and, ultimately, the parliament. Under their advisory power, the agencies may take legal action when there is a violation of laws, publicize the necessary information for the general public, and propose new legislation to the parliament since they have first-hand information on the implementation of legislation.

Under their investigative power, agencies may also investigate activities and practices that are alleged to be unlawful. As a result, 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.[21]

## 3.11 Summary

Under the Administrative Procedure Proclamation, the term 'administrative agency' means an executive organ, including the ministries and other medium and lower-level authorities, the executive organs of Addis Ababa and Dire Dawa City Administration, all of which are ultimately accountable to the Council of Ministers. The definition also includes independent agencies which are accountable to the Parliament.

Enabling laws are a fundamental precondition for establishing administrative agencies. There are two ways of creating administrative agencies: one is through the Constitution, and the other is through an act of Parliament. Hence, agencies can be classified as executive or independent based on their accountability.

The enabling act is the fundamental source of power for administrative agencies; hence, the scope of their power should be interpreted in line with their enabling acts. Administrative agencies serve three distinct functions— executive, quasi-legislative, and quasi-judicial.

## 3.12 Review Questions

1) What is an administrative agency?

2) Read Article 37 of Proclamation No. 416/2004 and discuss whether or not Dire Dawa City Administration Council can set a tax rate for real property. If yes, is it rulemaking or adjudication, and why? Where would one go to contest the rate?

3) Some argue that allowing administrative agencies to have delegated legislative and judicial jurisdiction would affect an individual's rights and liberty. Would you agree? Why? Or why not?

4) List as many reasons as you can why a government might set up a separate

[21] Cane, cited in Aberham Yohannes & Desta G/Michael. (2009). Administrative Law Teaching Material. Justice and Legal System Research Institute.

agency instead of having a department carry out a function.

5) What are the basic criteria to qualify a certain entity as an administrative agency?

6) "Independent agencies are the creation of the Parliament, and they do not have a separate existence from the acts of the Parliament". Do you agree? Why? Or why not?

7) What is the fundamental difference between a regular (dependent) agency and an independent agency? What branches of government are independent agencies?

8) Discuss instances under which the regulatory function of the administrative agencies is needed.

## 3.13 Glossary

- **Discretionary Power:** means a power which leaves an administrative authority some degree of latitude as regards the decision to be taken, enabling it to choose from among several legally admissible decisions the one which it finds to be the most appropriate.

- **Jurisdiction:** refers to the official power to make legal decisions and judgments.
- **Adjudicatory Power:** the power to make a formal judgment or decision about a problem or dispute.
- **Delegation:** a transfer of power, sometimes understood as the transfer of lawmaking power, sometimes as the transfer of policymaking power
- **Discretionary Power:** the power of a government agency or its personnel when its enabling statute gives the agency a choice of approaches to carry out its responsibilities
- ***Expose de motif*:-** is a French term, which means report or explanation of the motives or reasons for passing a given statute.

## 3.14 Further Reading

For additional reading, students may refer to the following books.

I.P. Massey, *Administrative Law* (10th ed., Eastern Book Company, 2022).

M.P. Jain and S.N. Jain, *Principles of Administrative Law* (7th ed., Lexis Nexis, 2019).

Scholler, Heinrich, *Ethiopian Constitutional and Legal Development* (Rudiger Koppe Verlag, Volume I, 2005).

Dr. J.J.R. Upadhyaya, *Administrative Law* (11th ed., Central Law Agency, 2019).

S P Sathe, *Administrative Law*, (7th ed., Lexis Nexis, 2016).

# CHAPTER FOUR

# ADMINISTRATIVE DECISION-MAKING (ADJUDICATION) PRINCIPLES AND PROCEDURE

## Chapter Overview

This chapter explores the principles and procedures by which administrative decisions that affect the rights and interests of individuals are made. The Administrative Procedure Proclamation is the first to prescribe uniform rules for decision-making procedures. Most enabling acts also contain specific procedural requirements depending on the nature and type of decision. The advantage of these specific statutes over the Administrative Procedure Proclamation is that they ensure flexibility in the administrative process, which is essential for an effective and efficient administration.

### LEARNING OUTCOMES

After studying this chapter, you will be able to:

- Define administrative decision
- Identify the levels of the decision making process
- Describe the procedures agencies must follow before they give decision
- Compare and contrast the procedures in the proclamation with those found in specific statutes
- Identify the elements of a fair hearing
- Describe what constitutes an impartial decision

**Chapter Table of Contents**

**4.1 Introduction ..... 101**
**4.2 What is an Administrative Decision? ..... 101**
4.2.1 A note on Nomenclature ..... 101
4.2.2 Definition ..... 102
4.2.3 FAPP's definition of administrative decision ..... 104
**4.3 Levels of Administrative Decision-making ..... 106**
4.3.1 Levels of Decision-making Under FAPP ..... 108
**4.4 Decision-making (Adjudication) Principles and Procedure ..... 110**
4.4.1 Why procedural fairness? ..... 111
4.4.2 How much fair hearing is required? ..... 112
4.4.3 Elements of Procedural Rules and Principles ..... 113
**4.5 Sources of fair procedural fairness requirement in Ethiopia ..... 114**
4.5.1 FDRE Constitution Article 37 ..... 114
4.5.2 Administrative procedure proclamation ..... 115
4.5.3 Specific primary legislations ..... 116
4.5.4 Regulations and Directives ..... 116
**4.6 Overview of decision-making procedure in other laws ..... 117**
4.6.1 Formal decision-making procedure ..... 117
4.6.2 Informal decision-making procedure ..... 121
4.6.3 No decision-making procedure ..... 123
**4.7 Decision-Making Procedure Under FAAP ..... 125**
4.7.1 Prior Notice ..... 126
4.7.2 Contents of Charge ..... 128
4.7.3 Presentation of Defence ..... 129
4.7.4 Oral hearing ..... 129
4.7.5 Presentation of Evidence ..... 130
4.7.6 Cross-Examination ..... 131
4.7.7 Right to counsel ..... 132
**4.8 The Duty to Give Reason/s/ ..... 133**
4.8.1 Form and Content of decision ..... 134
4.8.2 Communication of the decision ..... 135
**4.9 Rule Against Bias ..... 135**
4.9.1 Personal bias and Pecuniary bias ..... 137
4.9.2 Departmental Bias ..... 138
**4.10 Exclusions and exceptions ..... 140**
4.10.1 Hearing makes no difference ..... 141
4.10.2 Privilege and discretion ..... 141
4.10.3 Secrecy and Urgency ..... 142
**4.11 Applicability of FAPP to Tribunals ..... 143**
**4.12 Summary ..... 144**
**4.13 Glossary ..... 144**
**4.14 Review Questions ..... 145**
**4.15 Further reading ..... 152**

## 4.1 Introduction

Administrative decision-making procedure, which administrative agencies complyied with by administrative agencies during the decision-making process, is governed by Section Four of the Administrative Procedure Proclamation. The section comprises five sub-sections dealing with the different aspects of the decision-making process. These are:

Sub-section one: Initiation of administrative decision

Sub-section two: Principles of administrative decision-making

Sub-section three: Hearing the issue

Sub-section four: Administrative decision

Sub-section five: Complaint against administrative decision

## 4.2 What is an Administrative Decision?

Not everything agencies do is a decision. There are activities of the administration that are outside of decision-making and rule-making. Identifying whether a particular act is an administrative decision is crucial as it determines the scope of applicability of the Proclamation. For instance, judicial review is available, provided the action being challenged is either an administrative decision or a directive. Additionally, sub-sections two to four of the Proclamation regarding principles, procedures, and requirements of decision-making apply provided that there is an "administrative decision" as defined under Article 2/3 of the Proclamation.

### 4.2.1 A Note on Nomenclature

Administrative decision-making denotes a process. Section four of the Administrative Procedure Proclamation is the 'statutory procedure' i.e., procedure laid down by law to govern that process. The result of administrative decision-making is a 'decision'. You might encounter different substitute words that are frequently used to describe 'administrative decision-making procedure' and 'decision' in other jurisdictions and even in some of our laws.

'Quasi-judicial' and 'adjudication' are terms commonly used to describe the process or procedure to reach decisions. Decision-making procedure signifies the same idea as a quasi-judicial procedure or adjudication procedure. When used to describe the power of agencies, decision-making power, quasi-judicial power, and adjudicative power all represent the same idea.

Similarly, order, administrative action, administrative act, agency action or act, government action or act, or quasi-judicial decision all represent an output of a process.

The Administrative Procedure Proclamation uses "administrative decision" or simply "decision" to describe the output. Despite the similarity between the legal terms, significant variation in scope and content may be observed in each jurisdiction of domestic administrative law. For instance, 'administrative act' in Germany, 'order' in the US, and 'administrative decision' in Australia do not have the same meaning even though they all point toward the exercise of power by an agency that is 'judicial' by its nature.

### 4.2.2 Definition

To get insight into the meaning of administrative decision, let us first navigate how it is defined in those countries that have developed a system of administrative law. Under Australian administrative law, 'decision' refers not only to a decision made but also to actions taken to implement it. It includes a purported decision and an invalid decision.[1]

The Australian Administrative Tribunal Act (2007) defines 'decision' to include references to:

(a) making, suspending, revoking, or refusing to make an order, award, or determination;
(b) giving, suspending, revoking, or refusing to give a certificate, direction, approval, consent, or permission;
(c) issuing, suspending, revoking, or refusing to issue a license, authority, or other instruments;
(d) imposing a condition or restriction;
(e) making a declaration, demand, or requirement;
(f) retaining, or refusing to deliver up, an article; or
(g) doing or refusing to do any other act or thing.

Notwithstanding this wide definition, it has been held that the 'decision' should be a decision which has the character of a final, operative or, determinative decision and which, in effect, disposes of the issues between the parties.[2]

Under the American Procedure Act (APA) of 1946, adjudication (which is the term used to represent "decision-making") is defined as the agency process for issuing an 'order'. 'Order' is then defined as a final disposition of an agency in a matter other than rulemaking but including licensing. This means that adjudication is the term used to

[1] Section 3(3) of the Australian Administrative Tribunal act (2007)
[2] Francisco Esparraga & Ian Ellis-Jones, (2016). *Administrative Law Guidebook* (2nd ed.). Victoria: Oxford University Press. P128

describe the process by which agencies make final decisions on matters except for rulemaking. This is clearly a broad concept, covering a vast array of different types of agency actions. What the concept envisions, and what the different types of agency actions have in common, is a decision by an agency about a particular person or persons that requires the application of the law to the particular facts of the person's situation. [3]

German administrative law uses the phrase "administrative act" rather than rule or administrative decision. It is defined in Sect. 35 of the Law of Administrative Procedure of 1976 in the following words:

> *Administrative act is every order, decision or other sovereign measure taken by an authority for the regulation of a particular case in the sphere of public law and directed at immediate external legal consequences.*

Moreover, a general order (*Allgemeinverfiigung*), which addresses a category of persons who are determined or are determinable by common characteristics or which concerns the public law quality of a thing or its use by the general public, is also an administrative act.

Applying the law to facts is what judges of ordinary courts do in the judicial decision-making process. Every court order, judgment, or decision involves determining the relevant facts, ascertaining the existence or non-existence of the facts based on the available evidence, and finally, interpreting and applying the law to the facts.

Similarly, the issuance of final disposition also requires the agency to verify the facts and apply the law. For instance, one of the requirements to obtain trade name registration certificate is a letter of confirmation from the local administration that the trade name has been in use for a long period of time.[4] An applicant approaches a local administration and requests the issuance of the certificate. In support of his request, he produced evidence showing that the trade name has been in use for the last six months. In order to issue or refuse the certificate, the local administration must first ascertain that the fact (six months in use) is supported by evidence. This is fact-finding. Then, a conclusion about whether six months are enough to fit into the legal requirement "in use for long period of time" has to be reached. The conclusion reached is a "rule", and the process is adjudication within the American Procedure Act (APA)definition above.

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[3] William F. Funk & Richard H. Seamon (2016). *Administrative Law* (5th ed.). New York: Wolters Kluwer P72

[4] See art. 5/5/ of Commercial Registration and Licensing Council of Ministers Regulation No. 392/2016

If the Australian definition is employed, it will fall under S 3(3) C of the Australian Administrative Tribunal (AAT) Act ('giving or refusing to give a certificate').

### 4.2.3 FAPP's Definition of Administrative Decision

Article 2/3/ of the Federal Administrative Procedure Proclamation (FAPP) defines administrative decision like this:

> *Administrative Decision means decision issued by an administrative agency on relating to persons rights or interest in its day-to-day function, excluding issuance of Directives*

Before examining this definition, let us add another definition by an older draft of the administrative proclamation.

The draft Administrative Procedure Proclamation (2001), which was prepared by the then Justice and Legal System Research Institute (JLRSI) now renamed as "Justice and Law Institute", defined administrative decision in the following way:

> *"Administrative Decision" means 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.*

Then it excludes the following from the definition.

- decisions as to the selection or tenure of a public servant;
- decisions based solely 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 or regulations;
- decisions made by the Council of Peoples' Representatives and the Federation council;
- decisions made by the President of the Federal Democratic Republic of Ethiopia.

Now, let us examine the elements of the definition under FAPP in detail.

### Decision

The definition begins by employing the same word for the defined and defining term. "Administrative decision means decision" is clearly a circular definition. It does not tell us about the nature of the decision. Unfortunately, "decision" is not defined in the Proclamation. Therefore, it will be up to the courts to formulate their own definition. In such endeavour, the basic elements and characteristics of "decision" should be taken into account.

In the context of administrative law, 'decision' includes any action or inaction of a judicial nature. 'Judicial' denotes the application of law to facts. Additionally, the description of the common activities constituting 'decision' may be relevant. Courts may also need to consult law dictionaries and other legal materials, such as the American Administrative Procedure Act (1946) and the Australian Administrative Tribunal Act (1970), to get insight. The Australian definition, due to its clarity, has been adopted by most commonwealth countries including South Africa. The South African Promotion of Administrative Justice Act 3 of 2020 copies the lists in S 3(3) of the AAT Act verbatim, except it deviates in its inclusion of not only decisions made but also proposed to be made or required to be made.

### Administrative Agency

"Administrative Agency" has already been defined in Chapter One (Scope of Federal Administrative Procedure Code), and further elaborated in Chapter Two. As a reminder, please take note that "agency" includes not only ministries and other authorities, boards, commissions, as well as administrative tribunals.

### Rights or Interest

The term "right" covers instances in which the challenged action affects a recognized proprietary or personal right. On the other hand, the term 'interest' includes instances where the individual would not be regarded by law as having any substantive entitlement or right. This part of the definition might help to determine rules of standing which determine who can challenge administrative decisions in court. However, whether a certain action of an agency affects rights and interests or not, though indicative, is not by itself sufficient to determine if it is an administrative decision. This is because rights and interests may also be affected by directives.

### Day-to-Day Function

Public administration is the totality of the working day's activities of all the world's bureaucrats—whether those activities are performed legally or illegally, competently or incompetently, decently or despicably. Throughout the world, government

employees do things that affect the daily lives of their fellow citizens. Although it is true that administrative decision is the result of the day-to-day activities of the administration, it should be borne in mind that, not all of those activities constitute administrative decisions as defined above. Again, this part of the definition fails to define the basic nature of administrative decision.

The following points should be taken into consideration in understanding the definition of administrative decision in the Proclamation:

A) **It is particular**: Particularity is what fundamentally distinguishes decision from directive. A decision is targeted against a particular individual. In some cases, a decision may affect more than one individual. However, if they constitute a group or a section of society sharing common characteristics, the agency is not making a particular decision but a general rule of conduct governing the conduct of the group.

B) **It is final**: The decision-making process passes through different stages, such as consultation, discussion, information gathering, and recommendation by a group of experts within the internal structure of the agency. Decision represents the final stage of this process. It signifies no other conditions or further action is required to make the decision effective.

C) **It is binding:** A decision produces a binding legal effect. It diminishes, creates, or destroys an existing right or legitimate interest. A recommendation, for instance, does not have such a feature.

D) **It includes inaction**: A decision includes not only action to do something but also an inaction or refusal to do something. Therefore, refusal to issue a license is a decision— the same as a decision to revoke an existing license.

## 4.3 Levels of Administrative Decision-Making

A helpful approach to understanding the decision-making procedure of FAPP is to break down the decision-making process levels starting down at the agency until it reaches a tribunal at the top. We can divide these levels into three major stages. These are:

Initial decision

Internal level

Merits review

**Level 1: Initial Decision (Primary Adjudication)**

This is the initial stage where the first decision is reached. The decision-maker may be an officer, team leader, head of the agency, or any civil servant within the agency entrusted with decision-making power. A vast number of decisions are made at this level.

The initial decision may be given either by the agency on its own initiative or upon the party's request. The agency itself initiates all decisions by the agency in exercising its regulatory and enforecement functions. Of course, the process may be triggered from information obtained from the public. However, the decision to pursue the matter still lies solely with the agency.

Decisions to take administrative measures for non-compliance, suspending, revoking, imposing a condition or restriction, making a declaration, demand or requirement, and the like start within the agency that is specifically authorized to make that decision.

In most cases, decisions at the party's request are cases related to entitlement, benefit, licensing, registration, provision of service, and the like. For instance, for a business person to get a business license, they have to apply before the appropriate organ. Unless the concerned party makes a request, the agency responsible for issuance of licenses does not process the license on its own initiative.

**Level 2: Internal Review**

At this level, initial decisions will be reconsidered in response to complaints made against initial decisions. The internal review will be conducted by a group of civil servants and/or appointed agency officials. It may be established *ad hoc* or as a permanent grievance hearing committee of the agency. Some agencies have more than one ladder of review mechanisms. However, since all members of each review are officials of the agency itself, and the purpose of the review is a reconsideration of the initial decision, it falls within the second level of decision-making.

**Level 3: Appeal to Tribunal (Merits Review)**

This is a stage where the initial and review decisions will be scrutinized for any error of law, fact, and policy. At this stage, compliance with the adjudication procedure (the decision-making procedure of FAPP) becomes citical because parties before the tribunal expect procedural fairness during the proceedings.

A tribunal, unlike an internal review, is established by law, independent from the agency that made the initial decision. It is more or less similar to a court, and it exercises

judicial function. The decision-makers sitting on a tribunal are usually referred to as ‘judges’ rather than civil servants or agency officials.

### 4.3.1 Levels of Decision-Making Under FAPP

The Federal Administrative Procedure Proclamation governs two of the three levels of decision-making process. Section 3 Articles 20-22 of the Proclamation govern the initial level whereas, Sub-Section 5 Articles 43-47 apply to the internal review procedure. Decision-making by administrative tribunals is governed by specific statutes establishing the respective tribunal.

**Administrative Procedure Proclamation No. 1183/2020**

Art. 20. Initiation of Administrative Decision

1/ An application for an administrative decision be made by an interested person or his agent.

2/ An administrative decision process may be initiated by the relevant administrative agency.

Art. 21. Manner of Administrative Decision Application

1/ An application for administrative decision shall be made in writing and may be submitted in person, a registered postal address or electronic means.

2/ A written application of administrative decision shall include:

a) Date, name of the applicant or his agent, signature and address;

b) Name of the administrative agency to whom the petition is made;

c) The right and interest of the applicant being sought;

d) Act that the administrative authority has to do.

e) Facts and evidence relevant for the decision.

3/ An agency may prepare forms through which an application may be made.

Art. 22. Record of Applications

> 1/ Upon receiving an application for administrative decision, the agency shall immediately furnish.
>
> 2/ A written confirmation of application, shall contain details of receiving relevant documents attached there.

The two modes of initiating administrative decisions are listed under Article 20. The decision may be initiated by an application from an interested person or his agent. The agency itself could also initiated it. Articles 21 and 22 specify how a request or application should be made. Both Articles are about the decision upon initiation of an interested person. How an agency initiates a decision is not dealt with by both provisions.

The following are examples of how an interested person may initiate a decision.

**Example 1**

The application to be submitted to the Energy Authority for an energy efficiency and conservation, audit, contracting, or consultancy license shall contain the following:

a) address of the applicant and copy of his identity card;

b) as appropriate, certificate of competence of recruited employees;

**Example 2**

Without prejudicing the possibility of additional preconditions that may be determined by a directive, a competency license for railway works may be issued when the applicant fulfils the following basic requirements:

a) produces evidence showing that he has successfully completed the training required for the railway work he is applying for from an accredited training institute;

b) passes the competence assessment test given by the body authorized by law to administer railway transport, as the case may be;

c) must be 18 years of age and above;

d) produces medical evidence showing that he is physically and mentally fit to perform railway work;

e) if he is an Ethiopian national, evidence showing that he has been permitted by the body authorized by law to administer railway transport to perform railway work;

f) If he is not an Ethiopian national, evidence of a work permit issued by the appropriate organ to perform railway work in Ethiopia;

c) as appropriate, degree, diploma, or certificate of acquired competence and directly relevant experience; and,

d) other relevant information the Authority may determine by a directive

## 4.4 Decision-Making (Adjudication) Principles and Procedure

**Key Issues**

The following are the basic issues related to procedural rules of adjudication or procedural fairness in any legal system.

It is necessary for any legal system for there to be some criteria through which to decide whether procedural fairness is applicable.

It is also necessary for a legal system to decide on the content of procedural fairness, assuming that it applies to a particular case. This can vary significantly, from a full set of process rights approximating an ordinary trial to something more modest.

How the issues are dealt with in terms of degree and approach may vary in each country. For instance, in the UK, it is the courts in their application of the principle of natural justice, who determine the scope of applicability of procedural fairness. On the other hand, in the US, the legislature has stepped in and provided the courts with a general rule in the APA (1946). The APA makes a clear distinction between informal and formal adjudication. The formal procedure applies when Congress, by a specific statute, determines its applicability. However, the courts still have an important role in addressing the above key issues as disputes will inevitably ensue in interpretating the organic statutes, the APA, and the due process requirements of the Constitution. The German Law of Administrative Procedure (1976) also distinguishes the formal and informal procedure, and the formal procedure is applicable only when a law specifically so requires.[5]

[5] Mahendra P. Singh (1985). German Administrative Law: In Common Law Perspective. Springer P38

### 4.4.1 Why Procedural Fairness?

Giving a person a fair hearing does not guarantee that the decision will be fair, but a fair hearing does increase the chance of a fair outcome. Moreover, fair hearings are valuable not only instrumentally for their contribution to fair outcomes but also intrinsically. Giving a person a fair hearing shows respect for the individual. People value fair procedure for its own sake, and are more prepared to accept adverse decisions if they have been treated fairly.

There are two rationales for procedural justice: instrumental and intrinsic. The instrumental rationale emphasizes the connection between the provision of hearing rights and the outcome's correctness on the case's substance. The intrinsic rationale focuses on how process rights protect human dignity.

**Instrumental and Intrinsic Justifications**

Procedural rules are not merely of instrumental importance in producing fair decisions, they are also independently important in expressing respect for individuals whose interests are affected by decisions and in maintaining confidence in the decision-making process.[6]

A duty to give reasons is important on two principal grounds. The first concerns the individual. Here, there are both instrumental and intrinsic reasons. From an instrumental point of view, knowledge of the reasons for a decision is crucial in mounting a challenge against the actions of a minister or other body, and, at the same time, the requirement to give reasons might improve the quality of decision-making. Intrinsically, showing concern and respect for an individual is part of the requirement. Decisions which affect individuals but are arbitrary and unexplained deny those individuals their fundamental rights.[7]

***Extract from Peter Cane, Administrative Tribunals and Adjudication[8], on the justification for procedural fairness in administrative adjudication.***

*Debates about procedural (in)formality and flexibility assume a theory about the function(s) of decision-making procedures. Traditionally, procedures are said to promote both instrumental and non-instrumental values. Non-instrumentally, the role*

[6] Peter Cane et al (2018). Principles of Administrative Law. ProQuest Ebook Central: Oxford University Press. P405
[7] Diane Longley & Rhoda James (1999). Administrative justice: central issues in UK and European administrative law. London: Cavendish Publishing. P209
[8] Peter Cane (2009) *Administrative Tribunals and Adjudication* Hart Publishing P233-4

*of procedure is understood in terms of 'fairness', and respect for the 'dignity' and 'autonomy' of parties to the decision. The essence of procedural fairness (or 'due process')88 is said to be embodied in the so-called 'rule against bias' (which promotes the value of impartiality in decision-making) and the 'fair hearing rule' (which requires disclosure to parties of information relevant to making the decision and an opportunity to 'put their case'). In short, the concept of procedural fairness is based on the values of impartiality and participation.*

*Although the requirements of procedural fairness are sensitive to context ('flexible'), they establish a minimum, irreducible set of obligations for all decision makers including tribunals. From an instrumental perspective, procedure is related to the purpose of the decision-making process. For instance, the difference between the so-called 'inquisitorial' and 'adversarial' modes of decision-making is sometimes said to be that the goal of the former but not of the latter is to discover the 'real truth'.*

*Instrumentally, the role of procedure is to promote decision-making that complies with the relevant substantive criteria for making decisions of the relevant type. The instrumental approach raises the issue – amongst others – of the relevance to procedure of the distinction between merits review and judicial review, explored in Chapter 5. In particular, what are the procedural implications of the objective of producing the 'correct or preferable decision' as opposed to that of assessing the 'legality' of the decision under review? The instrumental goal of procedure may be expressed in terms of 'accuracy' of decisions, 'accuracy' being understood in terms of proper application of relevant decision-making criteria (such as 'correct or preferable').*

*In summary, we might say that the ideal procedure promotes impartiality, participation and accuracy.*

### 4.4.2 How Much Fair Hearing is Required?

Most agencies follow strict rules to protect the right to a fair trial in civil and criminal proceedings. In a criminal trial, with life or liberty at stake, strict rules, announced in advance, bind the government. Slightly less strict rules govern civil trials because such trials should not threaten life or liberty. In England, the basic approach is that the requirement of a fair hearing should be applied flexibly and with sensitivity to circumstances.[9]

[9] Peter Cane (2011). *Administrative Law.* Canberra: Oxford University Press P74

A legal system must necessarily have some criterion for deciding whether procedural protection is applicable. It is common for legal systems to focus on the nature of the applicant's right or interest. The general approach used by UK courts is to consider whether there is some right, interest, or legitimate expectation to warrant the applicability of procedural protection.[10]

The UK has no general procedural code to determine the detailed content of procedural rights, although sector-specific legislation operates in particular areas, and such codes have been increasingly developed by tribunals. The courts, therefore, generally undertake a balancing test to determine the content of procedural rights in a particular case.[11]

In more general terms, the result is arrived at after balancing three types of factors: the individual's interest, the benefits to be derived from added procedural safeguards, and the cost to the administration, both direct and indirect, of complying with these procedural safeguards.[12]

### 4.4.3 Elements of Procedural Rules and Principles

Fundamentally, there are two elements of fair procedure in decision-making. In England, they are collectively known as the principle of natural justice. The first element is called fair hearing. It is usually described in Latin as *audi alteram partem.* The second is impartiality, commonly known as the rule against bias, *nemo iudex in sua causa* in Latin, requires that a decision-maker must not be judge in his or her own cause.

The principle *audi alteram partem* is an imperative which, translated, means "hear the other side!" More generally, it refers to the administrative law requirement that a person must know the case being made against him or her and be given an opportunity to answer it before a decision is made against him. Beyond that, however, the content of the principle often has altered over time and continues to evolve.

The principle *nemo iudex in sua causa* translated means "no one should be a judge in their own cause". This in short means no one should act as a decision-maker (including a judge) in a case in which they have a personal or pecuniary interest in the outcome of the case. The principle is designed to ensure impartiality in the decision-making process.

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[10] Ibid P888
[11] Ibid P895
[12] Ibid P896

Both principles of natural justice are incorporated in the Administrative Procedure Proclamation. However, this does not mean the courts will apply the principles in the absence of the specific statutory provisions. The difference between adopting the rules in Ethiopia and the UK is that, in the latter, they are common law principles, hence agencies have an obligation to comply in the absence of any written legal requirement. However, in Ethiopia, the procedures to be followed by agencies are prescribed by the legislature, and courts cannot create additional principles that are not recognized by written law.

## 4.5 Sources of Fair Procedural Fairness Requirement in Ethiopia

### 4.5.1 FDRE Constitution Article 37

In most countries, statutory law is the source of the rules and principles of procedural fairness. The legislature enacts basic procedures governing the decision-making process. Usually, the statute's content will lay down a general administrative procedure applicable in exceptional or expressly required cases and also a specific procedure governing a category of decisions or decisions of a specific agency.

When no applicable procedure is determined by law or the existing rules are insufficient to guarantee a fair hearing, courts in common law countries resort to the principles of natural justice. These are judge-made laws developed by the courts to ensure minimum fair hearing requirements . In the US, the constitutional principle of due process of law serves to fill in the gaps of the Administrative Procedure Act.

What about Ethiopia? Is there any constitutional principle of fair hearing that agencies must comply with in the absence of express provisions of the law? Article 37 of the FDRE Constitution, which ensures access to justice for citizens, is interpreted by the Cassation Bench and even by the House of Federations as a basic principle of fair hearing in the administrative adjudication.

In CFN 43511 (volume 14),[13] it was held even in the absence of mandatory legal provisions, bodies entrusted with quasi-judicial powers must respect the right of citizens to a fair hearing.

In its reasoning, the Bench indicated:

[13] Applicants Heirs and wife of deceased Ato Wassihun Mekonnen (*et al*) vs. Respondent Government Houses Agency (2005 E.C.)

*The right to be heard should be observed at the initial level of administrative adjudication until the case reaches the final judicial organ. This can be inferred from FDRE Constitution and the contents and spirit of provisions of the Civil Procedure Code governing the conduct of hearing proceedings.*

CFN 43511 may be considered a historical decision in requiring agencies, for the first time, to comply with fair hearing rules before they make final and binding decisions affecting the rights and interests of individuals. However, much of the credit goes to the Constitutional Inquiry Tribunal and the House of the Federations.

The facts of the case show that the same case had been submitted to the Cassation Bench for review on grounds of violation of the fair hearing right. However, the Bench rejected the applicant's submission and failed to correct a fundamental error committed by the decision-making agency.

The case arose when the applicants requested the Ethiopian Privatization Agency to return immovable property confiscated contrary to proclamation No. 47/67. The agency, after giving an opportunity to the respondent to submit his defence and examining the evidence, the law ordered the respondent to return the property to the applicant. Aggrieved by the decision, the respondent submitted a complaint to the Board of the agency. The Board revoked the agency's decision without hearing the response of the applicants. Then, the applicants requested the Cassation Bench to annul the decision of the Board, alleging their constitutional right to a fair hearing was not respected. Unfortunately, the bench affirmed the decision of the board and rejected the applicants' cassation petition. Lastly, the applicants challenged the decision of the bench as unconstitutional and submitted a request to the Constitutional Inquiry Commission to review the constitutionality of the bench's decision. Their application was accepted by the Commission and based on its recommendation, the House of Federation revoked the decision of the Bench. It is after all these ups and downs that the bench was finally forced to accept fair hearing as a cardinal principle of the constitution.

### 4.5.2 Administrative procedure proclamation

The Administrative Procedure Proclamation No. 1183-2019 is now the basic source of fair hearing procedure in administrative adjudication. The procedural requirements are mandatory and non-compliance entails invalidation of the decision. The importance of the proclamation is not only in imposing mandatory uniform rules but also warning agencies that the fate of their decision given in violation of the procedure is invalidation by the courts. The recognition of judicial review is the most effective tool in implementing procedural requirements.

### 4.5.3 Specific primary legislations

These are pre-FAPP decision-making procedures applicable to a specific agency. A great deal of enabling acts contain procedures to be complied with by an agency in the decision-making process. However, the scope of these rules is limited to that specific agency. For instance, the Customs Commission has its own rules, there will also be decision-making procedure for the Ministry of Education, and so on and so forth. The shortcomings of such an approach are that the procedures do not govern all decision-making process in the specific agency. Procedure is required only for selected types of decisions of the agency. Additionally, in most cases, the effect of non-compliance is not indicated leaving the courts to follow different approaches and interpretation.

### 4.5.4 Regulations and Directives

Subordinate legislative instruments enacted through delegation by the legislature are important sources of administrative decision-making procedure. Regulations enacted by the Council of Ministers may determine specific procedures applicable at the agency level or general rules of procedures governing a certain category of decisions across all agencies. The typical example, in this case, is Federal Civil Servants Disciplinary and Grievance Procedure Council of Ministers Regulations No. 77/2002. All agencies, before taking disciplinary measures against civil servants, should adhere to the procedures in the regulation.

Directives are also significant in determining tribunal procedures. Almost all administrative tribunals in Ethiopia are empowered by law to determine their own adjudication procedure. Some of them have issued such rules. These rules are detailed and even more advanced than the Administrative Procedure Proclamation in covering all aspects of the decision-making process.

To mention some examples, the Tax Appeal Commission Working Directive No. 2-2011 contains detailed rules governing the appellate proceeding and other procedural matters. The Commission has also issued a directive governing the conditions where leave out of time appeals may be accepted.[14]

[14] ይግባኝ የማቅረቢያ ጊዜን ስለማራዘም ወይም ዘግይቶ የሚቀርብ የይግባኝ ማመልከቻ የሚስተናገድበት ስርዓት ለመወሰን የወጣ መመሪያ መመሪያ ቁጥር 01/2011

## 4.6 Overview of Decision-Making Procedure in Other Laws

The Administrative Procedure Proclamation is not the first legal instrument to lay down mandatory adjudication procedures for agencies. There were and are laws, regulating the administrative decision-making process. Even the oldest law that existed before the introduction of codified laws contained rules providing decision-making procedures.

The decision-making procedure found in different statutes vary in terms of detail and formality of hearing requirements. However, they could be classified into two broad categories. These are:

**A) Formal procedure, and**

**B) Informal procedure**

### 4.6.1 Formal Decision-Making Procedure

The formal decision-making procedure is a trial-like procedure where parties are afforded sufficient hearing rights. The typical feature of a formal procedure is an oral hearing, examination of witnesses, and the right to counsel. Another distinctive feature is a clear demarcation between prosecution and decision-making roles. On the one hand, there will be different officers investigating and prosecuting noncompliance, on the other hand the officer in charge of making the decision will be a different officer, and in most cases, this will be the head of the agency. Sometimes, the hearing may be conducted by a group of officers who may have final decision-making power or will submit a recommendation to the head of the agency.

The formal procedure is time consuming and may significantly hinder effective administration. Strict requirements of procedure restrict the ability of agencies to effectively regulate economic activities within their areas. Unless managed properly, it may greatly inhibit the power of agencies to efficiently enforce the law. For this reason, it is to be found only in a few statutes. On the other hand, it affords the greatest protection to the affected persons.

**Disciplinary Proceeding**

A typical example of the formal procedure is the disciplinary proceedings of civil servants. Before a disciplinary measure is taken against a civil servant, strict observance of procedural rules is required. The Federal Civil Servants Disciplinary and Grievance Procedure Council of Ministers Regulations No. 77/2002 provides the procedures to be followed before disciplinary measure against a civil servant is taken. The regulation identifies two procedures applicable to minor and major disciplinary offences. These

are summary inquiry and formal procedure. In summary inquiry, the alleged offence committed by the civil servant will be investigated by one or two civil servants.[15] Despite the informal nature of the procedure, they are still legally required to send a charge to the civil servant and afford him an opportunity to present his case. If he denies his charge, the inquiry officer will examine relevant evidence and submit a recommendation to the concerned official, who will then decide the case. Where the accused replies in admission, the inquiry officer shall submit his recommendation on the basis of the reply.[16]

The formal inquiry is governed by Articles 7 to 21 of the regulation. The proceeding is similar to the one in ordinary courts. Proceedings are initiated by a formal charge, which should be adequately served to the civil servant. The hearing includes a preliminary objection, an examination of witnesses, a statement of defence, the final opinion of the accused, the production of evidence, and the like.

**Hearing Examiners**

Another example of the formal procedure is the decision-making procedure before the Accounting and Auditing Board of Ethiopia. The relevant part of the procedure is reproduced below for your reference. We will examine the procedural requirements in detail in the next topic. For now, it is sufficient to grasp the formal nature of the procedure. There is a close resemblance between this procedure and the adjudication procedure of the US APA(1946), especially the proceeding before commissions. A commission in the US is an independent agency in charge of regulating specific economic activities. Some typical examples of commissions are the Federal Communications Commission (FCC), which is in charge of regulating interstate and international communications by radio, television, wire, satellite, and cable, and the National Labour Relations Board (NLRB), which administers the principal United States labour law, the National Labour Relations Act.

Decision-making in one of these commissions is formal with a trial-like proceeding presided over by a hearing examiner or Administrative Law Judge who is an employee of the agency but practically independent and impartial. An appeal against his decision will be reviewed by Commissioners (who are the heads of the agency; in most cases, a commissioner and four deputy commissioners) who may affirm or reverse his decision.

The initial decision-making and appeal procedure in the Accounting and Auditing Board of Ethiopia is similar to the US formal adjudication procedure. When there is an

[15] Art. 6/1/ of Federal Civil Servants Disciplinary and Grievance Procedure Council of Ministers Regulations No. 77/2002
[16] Ibid Article 6/2-4/

alleged violation of Financial Reporting Proclamation No. 847-2014, an investigating officer will first conduct an investigation. If, based on his analysis of evidence, he concludes there is a violation of law, he will submit a recommendation to the Chief Executive Officer of the Board that a proceeding be instituted against the alleged violator.

Almost in all agencies, final decision-making power is reserved to the head of the agency. However, the hearing examiners, after conducting the hearing, will render a decision. The hearing is formal and involves an oral hearing and an examination of witnesses. The defendant will be given the right to be represented by counsel. Finally, the decision of the hearing examiners will be reviewed by an administrative tribunal established within the board.

**Financial Reporting Proclamation No. 847-2014**

Art. 38. Initiation of Proceedings

1/ If it appears to the investigating officer that a violation of this Proclamation or the regulations or the directives issued hereunder, has occurred, the investigating officer may recommend to the Chief Executive Officer of the Board that a proceeding be instituted against the public auditor, public interest entity, or any person alleged to have committed the violation.

2/ The Chief Executive Officer, on his own initiative or on the recommendation of the investigating officer, may institute proceedings.

3/ If the Chief Executive Officer of the Board decides to institute proceeding pursuant to sub-article (2) of this Article, he may appoint three persons of whom one is a lawyer, from among the staff members ,of the Board who were not involved in the investigation, to act as Hearing Examiners.

4/ The public interest entity or person against whom the proceeding has been brought shall have 'the right to counsel in the proceedings.

Art. 39. Procedure at the Disciplinary Hearing

1/ For the purpose of any hearing that is part of the proceedings stated in Article 38 of this Proclamation, the Hearing Examiners-; at the request of either party may:

a) summon any person who, in their opinion, may be able to give material information concerning the subject of the hearing or who is believed to have in possession or custody or under control any book, document or thing which has

any bearing on the subject of the hearing, to appear before them at the time and place specified in the summons, and to be interrogated or to produce such book, document or evidence and may retain for examination any book, document or evidence;

b) administer an oath to, or accept an affirmation from the person summoned under sub-article 1(a) of this Article and require him to answer questions put forward to him and to produce any book, document or any other evidence in his possession or custody or under his control.

2/ The respondent in the disciplinary hearing shall be informed of the nature of the complaint made against him and shall be entitled to appear personally or by counsel to produce evidence, call and examine witnesses and cross-examine other witnesses

3/ A summon for the attendance before the Hearing Examiners of any person or for the production of any book, document or other evidence shall be in the form prescribed by the Board, and shall be signed by one of the Hearing Examiners and shall be served in the same manner as it would have been served if it had been a subpoena in a civil matter in a court.

4/ Any witness, who, having been duly sworn or having made an affirmation, gives a false answer to any question lawfully put to him or makes a false statement on any matter, knowing such answer or statement to be false, commits perjury and shall be held criminally liable in accordance with the Criminal Code.

5/ In any investigation or disciplinary proceeding, it shall be sufficient, for the purpose of proving the proper execution or the terms or the content or the authenticity of a document, for a copy of the document purporting to be a copy of the original to be used in evidence, subject to the right of any person to adduce evidence that any copy so presented in evidence is not authentic.

### Art. 40. Failure to Appear

1/ without prejudice to the previsions of sub articles (5) and (6) of Article 36 on this Proclamation, if any person who has been duly summoned fails without sufficient cause, to attend at the time and place specified in the summon, or to remain in attendance until excused from further attendance by the Hearing Examiners, or refuses to swear or to affirm as a witness or fails without sufficient cause to answer fully and satisfactorily to-the best of his knowledge and belief, all questions lawfully put to him concerning the subject of the hearing or to produce any book, document or thing in his possession or custody or under his

control which he has been required to produce, he shall be criminally liable in accordance with the relevant provision of the Criminal Code.

2/ The law relating to privilege of a witness subpoenaed to give evidence or to produce any book, document or other evidence before a court of law shall apply to a witness summoned to give evidence or to produce any book, document or other evidence in accordance with this Proclamation.

41. Imposition of Sanctions

1/ After hearing all of the arguments and evidence at the hearing, the Hearing Examiners shall decide if the respondent has violated this Proclamation or the regulation or directive issued hereunder.

2/If the Hearing Examiners decide that the respondent has violated this Proclamation or the regulation or directive issued hereunder, they shall impose a sanction in accordance with Articles 42 and 43 of this Proclamation.

3/ If no appeal is filed by the respondent as provided in Article 47 of this Proclamation, the decision of the Hearing Examiners shall be deemed the final decision of the Board.

### 4.6.2 Informal Decision-Making Procedure

Informal procedure is the exception to the administrative decision-making process. A great deal of the process is predominantly informal. The informality is unique to each agency. Decision-making in this category is not governed by uniform rules. There are variations and differences in the scope of the hearing requirements. The informal approach takes into consideration the requirement of flexibility in the administrative process.

**Example**

Before a refugee status is cancelled or revoked, the Agency for Refugees and Returnees Affairs is only required to give to the person whose status is being reviewed prior written notification and an opportunity to explain the issue. This may be an oral or written explanation, but does not include the right to present defence and evidence. The informality of the process is recognized by the Refugees Proclamation because when the decision of the Agency is appealed to the Appeal Hearing Council established within Agency, there is a specific requirement for a formal hearing. The relevant provision reads:

*The hearing before the agency is formal where the agency and the appellant are given the right to present their case.*[17]

**Example 2**

Foreign Service Officers Administration Council of Minister Regulation No. 399 /2017 governs the decision-making process in the Ministry of Foreign Affairs regarding the rights and entitlements of foreign service officers.

The initial decision-making process by the Ministry on those matters specified in Article 26 is not governed by any procedure. When the matter reaches the second level i.e., review by the Grievance Board, again there is no hearing requirement. When a complaint is made to the Board, the matter will be investigated informally, and the Board will submit its recommendation to the Minister.

**Foreign Service Officers Administration Council of Minister Regulation No. 399 /2017**

Art. 26. Matters Considered by Grievance Board

The Grievance Board established in accordance with Article 50(1)(C) of the Proclamation shall investigate complaints made by foreign service officers and submit recommendation to the Minister regarding matters relating to:

1/ the protection of rights and benefits;

2/ placement, recall, career ladder promotion;

3 /performance evaluation;

4/ the implementation of the Proclamation and this Regulation.

Art. 27. Procedures for submission of Grievance

1/ A Foreign Service officer who is not satisfied with the response by his immediate supervisor or with the concerned official, on issues under Article 26 of this Regulation, on the implementation of the Proclamation and this Regulation, has the right to submit a petition to the Grievance Board within ten working days from the response.

[17] Art. 8/3/ of Refugees Proclamation No. 1110/2019

2/ An officer who is unable to submit his petition within the period specified under sub-article (1) of this Article due to reasons that are beyond his control, may submit his petition within ten working days after such reasons has passed.

3/ The Board shall submit a report containing its findings and recommendations to the Minister not later than 15 working days from the date of receipt of the petition.

4/ The Minister or the official delegated by him may, within ten working days from the date of receipt of the Board's report, approve the recommendation of the Board or, give a decision different from the recommendation of the Board or instruct the Board to further review the case.

5/ The decision passed in accordance with sub-article (4) of this Article shall be communicated to the petitioner in writing.

### 4.6.3 No Decision-Making Procedure

In some of the specific laws, no procedure is prescribed. The enabling act simply grants the power of making a decision to the agency without indicating the procedure to be followed. In some sensitive matters, procedural requirements may be exempted on justified grounds. However, most decisions under this category are not justified on public policy grounds.

Denial of hearing rights is a potential loophole for abuse of power and, consequently for violating the right and interests of the individual. The specific laws are special laws, whereas FAPP is a general law. In the absence of a transitory provision in the proclamation dealing with the inconsistency between the special and general provisions, one could argue that the absence of procedure should be interpreted as an express exception to the procedural requirement. To some extent, this argument may be plausible. However, given that the very reason for the promulgation of administrative procedure was to subject agencies to mandatory decision-making, the applicability of FAPP to decisions where there is no procedure should not be questioned. To do so would make the proclamation practically meaningless.

Here are some examples of decisions not subject to any procedure in the specific statutes.

**Example**

Under Ethiopian Building Proclamation No. 624/2009, a building officer is granted very wide powers including the following:

1) receive all applications for approval of plans and issue approved plans after ascertaining full compliance with this Proclamation and other laws;

2) is empowered to order rectification work if plans are approved by error;

3) order a building constructed without approved plans to be demolished, if the plans utilized to construct such building do not comply with the provisions of this Proclamation or other laws.

Most of these decisions affect the constitutional right to property of individuals. The matters under the jurisdiction of the building officer are not as such sensitive national security issues. There is no justification for why he would be allowed to exercise such huge powers without allowing the owner to submit contrary opinions and arguments.

Employees' Pension is another area where administrative justice to pensioners is denied. If you read the excerpt (given below) from Private Organization Employees' Pension Proclamation No. 1268/2022, the Private Organization Employees Social Security Fund Administration decides on the benefits and entitlements of pensioners without any hearing procedure. The initial level of the decision-making process is solely made on the administration's record and evidentiary data submitted to it during employment.

The administration is in charge of the administration of pension employees in the private sector. The collection and organizing of data require a systemized way of data analysis. Problems will surely occur, and the nature of the problems raises legal and evidentiary issues. Therefore, although it is not necessity to conduct a trial-like hearing to determine benefits and entitlements, the pensioner should be given an opportunity to respond to the problems and even present evidence if there is the likelihood of denial or reduction of benefits by the administration. However, as you can see from Article 55 of the Proclamation even when the administration reviews or revises its own decision with the possible effect of cancellation or deduction of entitlement, the pensioner does not have a say in the decision-making process.

**Private Organization Employees' Pension Proclamation No. 1268/2022**

Art. 54. Decision of the Administration

1/ The fulfillment of conditions for entitlement to any kind of benefit payable in accordance with this Proclamation and the amount of the benefit shall be decided by the Administration.

2/ The decision of the Administration[18] to be rendered in accordance with Sub-Article

(1) of this Article shall be based on its own record, evidentiary data submitted to it in accordance with Article 16 and 53 of this Proclamation, and as may be appropriate, on additional evidences produced by the beneficiary.

3/ In the case of a difference between the records of the Administration and evidentiary data submitted to it, the prevailing evidence shall be decided by the Administration.

Art. 55. Review of Decisions

1/ The Administration may review its previous decision upon request by an aggrieved beneficiary or on its own initiative.

2/ Without prejudice to the provision of Article 51 of this Proclamation, where upon review, the Administration finds that there is reasonable ground for cancellation, deduction or termination of benefits, it may suspend payment to the extent the benefit is to be cancelled, deducted or terminated.

3/ Notwithstanding the provisions of Article 51 of this Proclamation, if the Administration, upon review, has decided to deduct the benefit or the benefit paid is contrary to this Proclamation, it shall have the power to deduct the amount paid thereof from the benefit of the beneficiary and transfer same to the Pension Fund.

## 4.7 Decision-Making Procedure Under FAAP

The decision-making procedure includes all the processes of the proceedings until the decision-maker reaches a final resolution with the effect of disposing of the case. Key elements of the decision-making procedure are:

- Notice (summon)
- Presentation of case and evidence
- Oral hearing
- Cross-examination and,
- Right to counsel

[18] Private Organization Employees Social Security Fund Administration

The main provision of the FAAP governing the decision-making procedure is found under Article 37. There are also other provisions supplementing it. If you compare the article with the existing adjudication procedures in other laws, you can easily observe that it does not cover all aspects of the proceeding. Even minimum requirements like notice are missing.

**Administrative Procedure Proclamation No. 1183/2020**

Art. 37. Conditions of Hearing

1/ The parties to case have the right to appear in person and have the right:

a) To give testimony;

b) To produce evidence;

c) To access and examine evidence presented to the Authority

2/ The Agency may use all legal methods to get documents of investigation and other any evidences from the party participated in the argument, witnesses and professional persons

### 4.7.1 Prior Notice

The sending of notice marks the first step towards initiating an adjudication process and fulfils the objective of informing the other party and enabling him to prepare for the defence. The minimum content requires the person affected to be notified of the place, time, and purpose of a hearing. A further aspect of this notice requirement is that a party has a reasonable opportunity to prepare their case.

Notice is a mandatory requirement even in informal administrative adjudication because, without adequate information about the initiation of the proceeding, a person will not be able to defend himself. That is why its absence in the Administrative Procedure Proclamation may be criticized as a grave drafting error. Without prior notice, it is hard to imagine how the hearing under Article 37 could be conducted.

Other specific laws governing administrative adjudication require notice to be served before the hearing. In disciplinary hearings before the Accounting and Auditing Board of Ethiopia, informing the respondent about the nature of the complaint made

against him is a mandatory requirement.[19] Still, how the requirement of notice is formulated is defective. Notice and charge are two different documents. The purpose of the notice is to provide sufficient information about the proceeding, whereas the charge describes the alleged violation or non-compliance by the defendant.

The mandatory notice requirement with a precise and full description of the particulars is found in the Federal Civil Servants Disciplinary and Grievance Procedure Council of Ministers Regulations No. 77/2002. The relevant provision is reproduced here below.

> Art. 11. Service of Charge
>
> 1) The disciplinary committee shall cause the charge to be served on the accused together with copies of evidence attached 'therewith and summon him to appear with his statement of defence.
>
> 2) The summons shall indicate the place, date and time of the hearing and shall be served at least ten days before the date of the hearing.
>
> 3) Where the charge could not be served either because the whereabouts of the accused is unknown or he is unwilling to receive it, the summons shall be posted on the notice board of the government office for fifteen days

**Serving Summons**

The purpose of a notice, as indicated above, is to enable the defendant to be fully informed of the nature, time, and place of the hearing. Hence, for this purpose to be achieved, the notice has to reach the defendant in person. That is the preferred way of serving a summon.[20] In the Civil Procedure Code, there are multiple alternative ways of serving summon if the defendant can not be found. However, it will be costly to implement all substitute forms of serving summon. Effective administration requires that it be limited, taking into account the efficiency concerns.

A fair approach when the accused could not be found to receive summon is to post it on the notice board of the agency. The Civil Servants Disciplinary and Grievance Procedure Regulation requires notice to be posted for fifteen days if the defendant can not be found or is unwilling to receive summon.

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[19] Article 39/2/ of Financial Reporting Proclamation No. 847-2014
[20] As used in this text, oth notice and summon mean the same thing

**Contents of a Summon**

A valid notice should contain information about the time, place, and nature of the hearing; the legal authority before whom the hearing is to take place; a description of the specific charges, and the like. The adequacy of a notice is determined on the basis of whether sufficient information had been provided to the affected person to enable him to prepare for his defence effectively [21].

**Time**

Another important aspect of notice is the time needed to prepare a defence. Defence preparation requires gathering evidence, talking to witnesses and experts, and preparing a written response. All these tasks require reasonable time. If a notice informs the defendant to appear before a hearing body the next day, adequate notice has not been served to him. In most statutes, the average period is ten days.

The regulation above requires "at least ten days before the date of the hearing." Ten days is the minimum. Depending on the complexity of the case, more time may be necessary. Whenever the time is not fixed in the specific statute, granting the defendant a reasonable time is necessary.

## 4.7.2 Contents of a Charge

The charge contains the allegations or acts committed by the defendant, including the source of legal liability. It is unnecessary to frame a formal charge like a statement of claim in civil proceedings or a charge in criminal trials. The important point is that clear information should be provided regarding the facts and source of liability.

The following violations are listed as grounds for suspension of a license of an employment agency under Article 42 of Ethiopia's Overseas Employment Proclamation No. 923/2016

a) obstruction or attempt to obstruct the activities of labour inspector assigned for the purpose of inspection by the Ministry or appropriate authority;

b) appointing a general manager or members of board of directors or recruit an employee without prior notice to the Ministry or the appropriate authority;

[21] Yashomati Gosh. (2015). Textbook on Administrative Law. LexisNexis P184

c) recruiting a worker not completed at least grade eight and who does not possess Certificate of Occupational Competence from an authorized organ;

d) influencing or attempting to influence any employer not to employ a worker other than those registered by his own Agency;

e) failure, without good cause, to deploy a worker within the legally prescribed time limit

Let us assume the employment agency is accused of obstruction of the activities of the labour inspector. In the charge to be sent to the agency, the alleged violation which is obstructing inspection by the labour inspector, should be clearly specified. It should also indicate when the alleged act happened.

Sometimes, administrative penalties are determined based on the gravity of the offence. A certain act may constitute a first-time violation or have been repeated over time. The charge must clarify whether the accusation is a first-time or for repeated actions.

### 4.7.3 Presentation of Defence

Defence to the charge may be written or oral, depending on the gravity of the case. In formal proceedings, defendants should be allowed to submit a written defence. The defence will also include a list of documentary and oral evidence. In informal hearing, such formality may not be necessary. The defence could be simply limited to written or oral explanations.

### 4.7.4 Oral Hearing

In an oral hearing, all the participants are physically present in the same place, receiving the same information simultaneously. This offers several advantages, in particular:[22]

Oral presentation of arguments and testimony reduces the need for documentation and, therefore may save preparation time and costs.

Communication is direct and efficient.

The physical presence of participants allows the tribunal, parties, and representatives to assess the credibility of parties, witnesses, and

[22] Liz Nastasi, Deborah Pressman & John Swaigen (2020). Administrative Law: Principles and Advocacy (4th ed.). Toronto: Emond Montgomery Publications. P220-1

representatives and allows parties and representatives to observe the tribunal's responses.

Procedures such as cross-examination, presentation of arguments, and responses can be carried out more efficiently than in other hearing formats.

The tribunal directly controls the hearing process and can intervene as necessary.

The oral format facilitates observation of proceedings by the public and the media, which promotes tribunal transparency and accountability— both necessary to create a perception of procedural fairness.

In all cases, an oral or personal hearing is not regarded as an inevitable or indispensable ingredient of fair hearing. Even though it is the best and the most effective form of hearing, an agency cannot give such a hearing in all cases because it is time-consuming and expensive.

Therefore, an oral hearing is not as yet a universal rule in adjudicatory proceedings by administrative bodies. Submission of written explanation or representation may be accepted as a substitute for oral hearing.[23]

Article 37 of the FAAP requires the appearance of both parties in person. They have a right to present evidence and access and examine evidence presented to the agency.

### 4.7.5 Presentation of Evidence

In an oral hearing, the adjudicating authority is obligated to give the person concerned an opportunity to produce all the evidence he wants to produce in support of his case or to rebut the evidence against him. A fundamental principle of a fair hearing is that a party should have the opportunity of adducing all relevant evidence on which he relies. Refusal to receive evidence of the affected person may amount to a breach of fair hearing rules, vitiating the decision given by the adjudicatory authority.[24]

Article 37 of the FAAP not only affords the parties to present their evidence but also authorizes the hearing body to order third parties to adduce evidence under their possession. This is to be inferred from Sub-Article 37 of the proclamation. The provision authorizes the agency to use all legal methods to get documents of investigation and any other evidence from the party participating in the hearing, witnesses and professionals, not a party to the case. However, the lack of clarity is

[23] M.P. Jain (2011). M P Jain *Principles of Administrative Law*. LexisNexis. P376
[24] M.P. Jain supra note 23, P385

visible. What does, for instance, "party participated in the argument" mean? If the statement could be understood as the party acting as the plaintiff, the hearing body's power is limited to obtaining evidence only from that agency. Remember, the hearing body or officer and the plaintiff are from the same government agency. However, for the sake of administrative adjudication, prosecution and hearing responsibilities will be separated and in most cases assigned to different departments within the agency. In most cases, relevant evidence may be in the hands of third parties outside the agency. The hearing body, if it cannot issue an order for such parties, the right of the defendant to defend himself may be severely hampered.

### 4.7.6 Cross-Examination

Cross-examination is an integral part of the right to rebut adverse evidence. It enables the aggrieved person to challenge the veracity of the various charges against him and discredit all adverse evidence. It is an essential component of the adversarial system of adjudication.

In most jurisdictions, the right of cross-examination cannot be demanded as a matter of right in administrative adjudication. It becomes applicable in those circumstances wherein fairness in adjudication would be adversely affected in the absence of such procedural norms. In cases where the proceedings have been based on written submissions in the form of affidavits, cross-examination is generally not permitted.[25] The entitlement to cross-examination is a feature only of the more 'judicialized' forms of decision-making. This is to mean cross-examination is a feature of a formal hearing.

In England, the question of whether procedural fairness requires cross-examination will only arise in those circumstances where the individual is entitled to an oral hearing. Where this is required, it has been suggested that it carries with it an automatic right to question those who give evidence to the decision-maker. Even in cases where an oral hearing is required, all depends on the circumstances of the particular case and whether, in that specific context, a fair hearing could be provided without 'insisting on the observance of the procedures of a court of justice which professional lawyers alone are competent to operate effectively'.[26]

Under the American Administrative Procedure Act, cross-examination is limited to "such cross-examination as may be required for a full and true disclosure of the fact." This applies when the type of adjudication is formal adjudication.

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[25] Yashomati Gosh. Supra note 21, P245
[26] Alex Carrol (2017). Constitutional and administrative law (10th ed.). Pearson Education. P443

The above discussion should give a hint as to how the issue of cross-examination should be dealt within the administrative decision-making process. A law on administrative procedure code should devise a mechanism to determine in what type of instances cross-examination is required, including the exceptional circumstances in which it could be denied.

Article 37 of the Proclamation indicates an opportunity will be offered to both parties to cross-examine witnesses. This might be true for a formal hearing. However, as pointed out above, most government agencies' decision-making process is informal.

### 4.7.7 Right to Counsel

In England and also most common law countries, the existence of a right to be legally represented before the decision-maker will be recognized only where the individual has a right to be heard orally, and all the surrounding circumstances indicate that the hearing cannot be conducted fairly unless the legal representation is allowed.

The following criteria will be applied by English courts to determine entitlement to representation by counsel.

(a) the seriousness of the charge and the potential penalty;

(b) where any points of law were likely to arise;

(c) the capacity of the prisoner to present their own case;

(d) the complexity of the procedure; and

(e) the need for reasonable speed in decision-making[27]

In the Ethiopian case, it is not up to the courts to determine the right to counsel on a case-by-case basis. The existence of an express provision of law is needed to allow the party the right to be represented by counsel. For instance, Article 38/4/ of the Financial Reporting Proclamation No. 847/2014 grants the public interest entity or person against whom the proceeding has been brought the right to counsel in the proceedings. Article 37/1/ of the Administrative Procedure Proclamation envisages the personal appearance of both parties during the hearing. This does not necessarily suggest that representation by an attorney is prohibited. Depending on the complexity of the case, the representation may be allowed. This may be inferred from Article 36/1/,

[27] Ibid P443

which states a general requirement of "adequate opportunity of hearing." If the nature and complexity of the case warrant representation, a denial may constitute an inadequate hearing.

## 4.8 The Duty to Give Reason/s/

**Administrative Procedure Proclamation No. 1183/2020**

Art. 30. Reasoned Decision

The person rendering administrative decisions should provide adequate reason for the decision he makes.

Art. 39. Giving the Decision to the Client

Art. An Agency shall notify the concerned person of its decision with its reason in writing.

Agencies are required to support their decision with valid reason and make their decision reasonable. Not all reasons mentioned by an agency are necessarily justified or reasonable. That is the difference between supporting a decision with reason and giving a reasoned decision. A reasoned decision is one supported with logic, persuasive, well-articulated, and rendered per the message and spirit of the law. On the contrary, a decision gives a reason irrespective of the reasonableness or validity of the reason.

**Why should a reason for a decision be given?**

There are several reasons why an adjudicator should give reason/s/ for his decision.

- to help himself or herself clarify his or her thinking, which often results in a better decision;
- to demonstrate respect for the parties;
- to permit parties to make an informed decision whether they have grounds to appeal or seek judicial review of the decision;
- if there is an appeal or judicial review of the decision, to permit the court or reviewing body to assess the correctness or reasonableness of the decision;
- to enhance the likelihood that the decision will be upheld if appealed or judicially reviewed;
- to guide regulated communities and their advisers as to the appropriate standards of conduct; and

- to bolster the credibility of the tribunal or administrative agency.[28]

### 4.8.1 Form and Content of Decision

The Administrative Procedure Proclamation requires all decisions to be in writing and contain:

1/ Date and number of decision;

2/ Name of the authority;

3/ Parties to the case and their address;

4/ Issues of claim;

5/ Description of evidence;

6/ Description of fact and law; and

7/ Decision.

The provision does not take into consideration the different types of informal decisions. Such format of a decision may be relevant only when there is formal adjudication. For instance, when an agency denies license renewal due to non-compliance with requirements (for example, tax clearance was not submitted) it might be sufficient to orally inform the person concerned to fulfill the missing requirement.

Specific statutes may also determine the contents of a decision. Such approach is important because it limits the requirement only for formal adjudication.

**Ethiopia's Overseas Employment Proclamation No. 923/2016**

Art. 49. Content of Decision

The decision of the Ministry or the appropriate authority rendered in accordance with Article 45 (5) of this Proclamation shall be written in short and precise manner and contain the following:

1/ material facts;
2/ issue framed;
3/ laws, regulations or directives relevant to the issue;
4/ reasoning and conclusion;
5/ crux of the decisions

[28] Liz Nastasi, supra note 22 P308

### 4.8.2 Communication of the Decision

Once the agency gives a decision, communicating that decision to the concerned party is very crucial. Only when he obtains the decisions can he lodge judicial review on time. He will also get a chance to examine the contents of the decision.

## 4.9 Rule Against Bias

It has often been said that the public perception of fairness is key, and in no other area of administrative law does this principle have more significance than in the rule against bias. The test is objective: whether right-thinking members of the public, apprised of all the facts and circumstances, would conclude that the particular tribunal, body, or person was biased.

The rule against bias is based on the maxim *nemo debet esse judex in propria sua causa*, which means 'no one should be a judge in their own cause'. This rule requires a decision-maker to be neutral and unbiased. However, there are inherent difficulties in this concept of neutrality. What is 'neutral' will have different meanings in different circumstances.

A decision that has been affected by bias on the part of the decision-maker will, of course, be illegal (or 'unlawful') and 'invalid'. A decision-maker is biased 'if motivated by a desire to favour one side or disfavour the other' 'for reasons unconnected with the merits of the issue', such as 'prejudice, predilection, or personal interest'. Regardless of actual bias, a decision-maker who is a party to the matter to be decided or who has a financial interest in the decision to be made is 'automatically disqualified' as a decision-maker if the decision has not yet been made; and if a decision has been made, it will be invalid.[29]

**Actual and Apprehended Bias**

There are two forms of bias— actual and apprehended bias. A claim of actual bias requires proof that the decision-maker approached the issues with a closed mind or had prejudged the matter and could not be swayed by the evidence.

The rule applies:

(1) where there is some direct interest in the matter to be adjudicated, and

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[29] Peter Cane, supra note 9 P70-1

(2) where, short of a direct interest, there is some reasonable suspicion, appearance, or likelihood of bias

The bias rule forbids those making decisions subject to the rules of natural justice from exercising their power if they are actually or ostensibly biased. The content of the bias rule is, like the hearing rule, flexible. The requirement that decision-makers must not be biased is constant in an abstract sense but in practice, it varies greatly according to the nature of the process, the character of the decision-maker, and the wider factual and legal circumstances of each case. As these factors vary, so does what may constitute one of the many forms of bias. Just as the requirements imposed under the hearing rule can be anywhere from very demanding to almost nothing, the bias rule may impose quite clear restrictions on decision-makers, or very few real restrictions, or anything between those two extremes. These issues are ultimately determined by reference to the standards of the hypothetical observer, who is fair-minded and informed of the circumstances.

The observer is also aware of community standards and general social trends and can, therefore, move with the times. The hypothetical observer is necessarily protean and can assume knowledge as required by each case, but this fictional device cannot obscure the obvious judicial control over the matter. Judges decide what the hypothetical observer knows and then draw from that knowledge to determine what the observer will and will not accept.

Impartiality and the confidence it engenders are essential to the successful and proper operations of the public service, the tribunal system, and the judiciary. The reasons for this may be broken down broadly into those which are instrumental and those which are not. Neutrality serves the instrumental goals of promoting the accuracy of fact-finding and enhancing the quality of policy formulation and application. People adversely affected by a decision are also more likely to accept it if they do not doubt its maker's impartiality. Impartiality, therefore, helps reduce enforcement costs in the decision-making process. The bias rule also serves the non-instrumental values of treating the parties with equal respect and dignity, promoting the public's participation in decision-making processes that affect them individually, and enhancing the institutional legitimacy of government agencies.

**Administrative Procedure Proclamation No. 1183-2020**

Art. 38. Recusal

> 1/ A person may be recused from the decision-making on one of the grounds listed here under:
>
> a) He has a direct or indirect interest on the matter ;

b) The matter at hand affects a person that has a relation with a decision-maker in consanguinity or Affinity, close friend ;

c) If he has represented the person regarding whom the decision is being considered, as an agent, attorney or in any other professional capacity ;

d) He has made a decision on the matter in another capacity ;

2/ In case where one of the grounds listed under sub article (1) of this Article is present, the person may be recused from decision-making process on his own accord, or at the petition of an interested person;

3/ If recusal is requested, until the head of administrative decision rendering final decision the person raised matter of recusal shall remain suspended from entertaining the case;

4/ The Head accepted the recusal request initiated by the interested person or others shall render decision within five working days to stay or recused.

### 4.9.1 Personal Bias and Pecuniary Bias

Article 38 sub. Article 1 a and b are cases where the person or body has a pecuniary or proprietary interest in the outcome of the subject matter of the decision. If that interest exists, that person cannot participate or in any way attempt to influence the actual decision made. Moreover, even if there is no actual influence, the law presumes bias in such cases, and that person is automatically disqualified because of the existence of that interest.

When personal or pecuniary interest is detected before a decision is rendered, this may be rectified in two ways. First, the Proclamation imposes a duty on the decision-maker to remove himself from that position upon his own initiation. However, this is unrealistic in most cases. Pecuniary or personal bias occurs with the full knowledge and intention of the decision-maker. If recusal by the decision-maker does not take place, the second avenue is available to the party to request removal of the decision-maker. These two avenues are provided under Article 38/2/ of the Proclamation.

Request by the interested party for the removal of the decision-maker is to be submitted to the head of the agency, who then should give his decision on the request within five working days. The decision-maker whose removal is requested shall remain suspended until a final decision is given.

The available avenues are devised to stop the making of a biased decision. The Proclamation does not specifically provide any remedy if bias is detected after a

decision is made. Violating the Principles provided under Chapter Three of the Proclamation constitutes a valid ground for judicial review.[30] Therefore, it might be possible to argue that the effect of a biased decision is invalidation. However, violation occurs if the decision-maker, knowing he has personal or pecuniary interest in the outcome of the case, fails to remove himself or petition by an interested party is rejected without good cause. In such types of cases, the effect of non-compliance with Article 38 should be invalidation of the decision.

It is also possible that a biased decision might be given in the absence of knowledge of personal or pecuniary interest by the decision-maker or a petition for removal is not submitted by the party despite having full knowledge of the facts. In such cases, unless it could be established that the decision-maker should have known the existence of personal or pecuniary interest, there is no reason why the decision should be invalidated. Similarly, a party should not be allowed to challenge the impartiality of the decision-maker if he had full knowledge of the circumstances but chose not to raise his objection at the early stage of the decision-making process.

### 4.9.2 Departmental Bias

Some government agencies are multi-purpose bodies responsible for a variety of functions. Where individuals or groups within a multi-purpose agency carry out conflicting functions, there is a risk of bias in decision-making. Agencies should be guided by the maxim: "No one shall be a judge in his own cause." A person who examines the basis for a dispute and forms an opinion on the correct outcome should not also act as the prosecutor and make the final decision. If the person has already reached a conclusion and is arguing that it be accepted, that person cannot be impartial in deciding whether the decision is correct and fair.

When an agency undertakes an investigation, carries out a prosecution, holds a hearing, and renders a decision, it is important to avoid conflicts of interest between the individuals or groups carrying out these different functions. This is achieved in multi-function agencies by ensuring that the investigators, prosecutors, tribunal members, and others involved in the decision-making function operate at arm's length from each other as well as from the government to which the agency reports.[31]

The Proclamation identifies only two instances of departmental bias under Article 38 sub Article 1 c and d. Accordingly, there will be departmental bias if the decision-maker participates in the matter either in a representational or decision-maker capacity. However, there are also other instances where departmental bias may occur. Most

[30] Federal Administrative Procedure Proclamation No. 1183/2011 art. 50/2/
[31] Liz Nastasi, supra note 22 P47

importantly, a person who has participated in the case as a prosecutor, investigator, or auditor should not be allowed to sit as a decision-maker on the same case. If he acted in such capacity, it is unlikely that he will reach a different conclusion contradicting his investigative or prosecutorial opinion.

Some specific laws prescribe detailed rules and standards to prevent bias in the decision-making. One such statute with a mandatory requirement of disclosure is Financial Reporting Proclamation No. 847/2014. The Proclamation, in addition to disclosure, prohibits members from engaging in the provision of audit or assurance services.

**Financial Reporting Proclamation No. 847/2014**

**Article 3. Separation of functions**

1/ The Administrative Tribunal will not be responsible for or subject to the supervision or direction of any officer, employee, or agent of the Authority in carrying out its adjudicatory functions and responsibilities.

2/ No officer, employee or agent of the Authority who is engaged in the performance of investigative or prosecuting functions in connection with any proceeding shall, in that proceeding or any factually related proceeding, participate or advise in the decision of the Administrative Tribunal or the Authority except as witness or counsel in the proceeding, without the express written consent of the respondents in the proceeding.

**Financial Reporting Proclamation No. 847/2014**

Art. 50. Conflicts of Interest

1/ A person who could, directly or indirectly, derive benefits from any matter that the Board has the right to determine shall, if being considered for membership of the Board of Directors of the Board, disclose with specificity to the nominating body the nature and amount of any such direct or indirect benefits.

2/ A member of the Board of Directors of the Board prior to voting on any matter that could directly or indirectly benefit him, shall disclose to the Board of Directors with specificity the nature an amount of any such direct or indirect benefits an shall excuse himself from participating in any sue vote.

3/ An employee of the Board or a consultant or advisor to the Board who has a private professional or official interest in, or whose immediate family member is

directly or indirectly interested in, any matter being considered by the Board shall disclose such interest.

4/ A disclosure of interest made as per sub-article (3) of this Article shall be made to the Chairperson of the Board of Directors of the Board who shall take such decision as he considers appropriate in each case and submit a report thereon to the Board of Directors.

5/ On being appointed as a member of the Board of Directors of the Board, a person shall not engage in providing audit or assurance services, either in his own name or in the name of any other person, unless he complies with sub-article (2) of this Article.

6/ No member of the Board of Directors of the Board shall engage in, or continue in, any profitable pursuit outside of the Board, unless the member discloses with specificity the nature and extent of such pursuit to the Board.

7/ No member of the Board of Directors or employee of the Board shall engage in or carry on any activity, which may create or have an adverse effect on the discharge of his duties.

8/ For the purpose of this Article "immediate family" means spouse, children, father and mother and siblings of the person concerned.

## 4.10 Exclusions and Exceptions

In some limited situations, the effectiveness and efficiency of public administration may necessitate restricting or even excluding the right to procedural fairness. I.P. Massey justifies the need for exclusion in the following terms:

> *…[If] the right to be heard will paralyze the process, law will exclude it. It has been said that no army can be commanded by a debating society… if to condemn unheard is wrong, it is wrong except where it is overborne by dire social necessity.*

The Administrative Procedural Proclamation lists three instances where a hearing right may be excluded. These are:

No argument in the case,

Privilege, and;

Urgency

The list is exhaustive and covers only a few justifiable instances. This will surely create an obstacle for the administration to deal with similar justifiable cases of exclusion. For instance, cases constituting secrecy, national security, and temporary preventive measures are not included in the list.

**Federal Administrative Procedure Proclamation No. 1183/2020**

Art. 36. Hearing of the Case

1/ Before rendering any administrative decisions shall provide adequate opportunity of hearing.

2/ Notwithstanding to sub article 1 of this Article decision may render without hearing:-

a) If there are no arguments on the facts of the case;

b) If it is special privilege or if the administrative agency has alternative decision power ;or

c) The issue is urgent

### 4.10.1 Hearing Makes No Difference

The first exclusion in the Proclamation states: "If there are no arguments on the facts on the case". This, to some extent, resembles the exclusion in most common law countries, which is: "hearing makes no difference". However, there is visible difference between "no argument" and "no difference". Whereas the former concerns one aspect of the process, the latter determines exclusion based on the projected outcome of the case.

### 4.10.2 Privilege and Discretion

If a decision is a special privilege, a hearing will be excluded. The inclusion of 'privilege' within the list of exclusion in the Proclamation is difficult to understand. The first question to ask is when does decision become a privilege? Whose privilege is the provision referring to? Is it the privilege of the agency or the party in favour or against whom a decision is to be made?

It makes no sense to attach privilege to the agency. All power conferred on an agency emanate from law within the Ethiopian constitutional context. There is no other source of power to be categorized under 'privilege'.

Here is how the explanatory note attempts to elaborate Art. 32/2/ b of the Proclamation.

> *Article 36 (2) (b) indicates the situation where the right or interest at issue is exclusively assigned by law to one of the claiming persons or the law gives special authority to the administrative agency to do this in which case there is no need for a hearing. For instance, an administrative agency authorized to return an illegally confiscated house to the owner can consider the confiscation record and decide to return it to the owner without the need for hearing third parties.*

What is clear from the short note is its vagueness. The example offered to explain the practical application of the provision is unrelated. The return of a confiscated house is governed by law. The agency in charge has no privilege to return or not to return the property. To "consider the confiscation record" part of its obligation to verify whether it should be returned or not.

## 4.10.3 Secrecy and Urgency

Good administration requires that individuals affected by decisions are heard, and that the exercise of an administrator's powers are not frustrated. Where national security or secrecy issues arise, these considerations may outweigh considerations of fairness. Similarly, where urgent action is required, the implication of procedural fairness may be qualified.[32]

Some actions are inherently inconsistent with an obligation to accord procedural fairness, such as the powers to arrest and seize. In such exceptional cases of emergency where prompt action— preventive or remedial— is needed, the requirement of notice and hearing may be obviated. Therefore, if the right to be heard will paralyze the process, the law will exclude it. Therefore, in situations where a dangerous building is to be demolished, or there is an imminent danger to peace, or a trade dangerous to society is to be prohibited, dire social necessity requires exclusion of the elaborate process of fair hearing.[33]

The following is a typical example of measures to be taken during an emergency situation to prevent more significant harm to the public and the environment.

---

[32] Roger Douglas; Margaret Hyland (2015). FOCUS Administrative Law. LexisNexis Butterworths P208

[33] I.P. Massey Administrative Law (9th ed.). Delhi: Eastern Book Company. P256-7

**Radiation and Nuclear Protection Proclamation No. 1025/2017**

> Art. 17. Enforcement of Law
>
> 1/ When the inspector determines that an activity or practice is conducted in violation of this Proclamation and regulations, directives and necessary requirements and conditions of authorization issued hereunder and poses an immediate risk of injury to persons or substantial damage to property or the environment, the inspector as may be necessary shall make enforcement of law by:
>
> a) order immediate suspension of the activity or practice on temporary basis; or seal the premises of the radiation sources;
>
> b) order the authorized person to prohibit radiation worker who does not meet applicable requirements from engaging in the activity or practice;
>
> c) order that nuclear or radioactive material originating from a suspended activity or practice be safely and securely stored or seized;
>
> d) summon and receive statement or testimony, either alone or in the presence of any other person as he thinks fit, any person with respect to matters under radiation and nuclear regulatory activities; and
>
> e) require a medical examination to be carried on as may be necessary to minimize the negative adverse effect of urgent measure
>
> 3/ Notwithstanding sub-article (2) of this Article the decision of inspector may not be enforced:
>
> a) when the top official of the Authority takes measure which reverses or modifies the order or decision of the inspector; or
>
> b) when complaint handling body reverses the order or decision of the inspector;
>
> 4/ In cases of enforcement of law, the inspector shall produce a report containing relevant findings and identifying the evidentiary basis for the findings, including measures as necessary, test results, explanations or other information.

## 4.11 Applicability of FAPP to Tribunals

The scope of the Administrative Procedure Proclamation has already been discussed in chapter one. However, that discussion concentrated on the general scope

of applicability of the proclamation. More specifically, the Proclamation's general scope was examined in light of the types of government organs and agency actions.

Let us remind readers of two key points without repetition

1) The decision-making procedure of the proclamation applies to administrative agencies

2) The Proclamation, without explicitly making it clear, seems to exclude administrative tribunals from the scope of the decision-making procedure of the proclamation. That is at least what the drafting committee contends in its explanatory note. Despite the drafter's intention, the law's express language does not warrant the explanation of the Committee. By definition, an administrative tribunal is an administrative agency, although a different type of agency. If there is agreement on the definition, there is no way tribunals could be exempted from the procedural requirement of the Proclamation. In short, the Proclamation's decision-making procedure also applies to administrative tribunals.

## 4.12 Summary

Procedure in the decision-making process of an agency is the cornerstone of good administration. A fair and impartial decision improves the quality of decisions and recognizes the dignity of the individual against whom decision is being taken. Until the Federal Administrative Procedure Proclamation came into effect, there was no uniform administrative procedure governing the decision-making process.

Despite the advantage of uniform procedure, caution should be taken not to burden the administration with a strict trial-like adjudication procedure. These should be reserved only for serious matters with grave consequences on the right and liberty of the individual.

Day-to-day administration activity does not involve a formal decision-making process. The informal procedure reflects the reality of public administration in Ethiopia and other places where there is a relatively modern public administration.

## 4.13 Glossary

**Administrative adjudication:** The process by which administrative agencies make decision. It is similar with decision-making but is used when the type of proceeding is formal.

**Quasi-judicial:** essentially judicial in character but not within the judicial power. "Quasi" means "resembling," "having some, but not all of the features of,"

**Fair hearing:** consideration of statements or arguments from both sides of an issue

**Bias:** inclination or prejudice for or against one person or group, especially in a way considered to be unfair.

**Administrative Law Judge:** An administrative law judge in the United States is a hearing officer within the administrative agency who presides over the formal hearing and adjudicates claims or disputes involving administrative law, rendering either a preliminary or recommended decision to the agency head.

## 4.14 Review Questions

1) Is prior notice a requirement under the Federal Administrative Procedure Proclamation No. 1183? If not, do you see any justification for its absence?

2) What is the difference between formal and informal decision-making procedure?

3) You have been asked to legally represent your client before a statutory body reluctant to have legal practitioners before it. However, the statutory body wishes to hear your submissions about why your client should be allowed legal representation.

A) How would you convince the statutory body that your representation of the client is necessary?

B) What if your client is a well-educated, articulate person used to negotiation and public speaking? Would this be an obstacle to your arguments?

C) Does the seriousness of the issue involved play a part in the ruling of the statutory body regarding your representation?

4) Is the following statement true under the Ethiopian Administrative Law?

*"The kind of notice that must be given and the nature of the opportunity to be heard vary according to the authority responsible for making the decision and the impact of the decision on the person affected"*

5) In the US, when is a formal trial-type hearing legally required during administrative adjudication (decision-making)?

6) The following is a list of powers and duties of 'appropriate organs' under the Live Animals Marketing Proclamation No. 819/2014. After reading the provisions, answer the questions that follow.

**Live Animals Marketing Proclamation No. 819/2014**

Art. 15. Power and Duties of the Appropriate Organ

Without prejudice to the 'powers and duties under other laws and other provisions of this Proclamation, the appropriate organ shall 'have the powers and duties to:

1/ designate live animals market centers and ensure that they meet the required criteria;

2/ authorize the selling and buying of live animals through dealings or auctions and assign auctioneers;

3/ ensure that health check is conducted on live animals supplied to domestic or export market and provide with health certificate and ownership document;

4/ monitor the quality standards of live animals to be supplied to export market;

5/ take appropriate administrative measure on any market actor who distorts live animals marketing process through misleading act;

6/ issue business license to persons who have obtained certificate of competence to engage in the business of marketing live animals;

7/ establish and implement identification system;

8/ seize live animals being transported or marketed illegally; sell them through auction at first or second level live animals market center, as the case may be, arid deposit the proceeds thereof in a blocked bank account; transfer to the government when decision of confiscation is given pursuant to Article 17 of this Proclamation;

9/ submit proposal to the government on the rate of commission to be paid to informers of illegal live animals marketing activities and implement same upon approval;

10/ charge fees for the services it renders in accordance with the rate approved by the government.

A) Assume that the ‘appropriate organs’ exercised each of its power under the list and gave administration decision. Compare each of the respective decisions with the definition of ‘decision’ by Section 3(3) of the AAT Act of Australia. Which decision under Art. 15 will correspond to the list in the definition. For instance, under s 3(3) (c) of the definition, issuing, suspending, revoking or refusing to

issue a license, authority, or other instrument is an administrative decision. When you relate this to the list under Art. 15, it corresponds to one aspect of the decision, which is 'licensing'. Do the same for the remaining lists.

B) Is the collection of fees for services per Art. 15 /10/ a decision? Answer the question based on FAPP's definition of 'administrative agency' and definition of 'decision' by s 3(3) of the AAT Act.

C) Art. 15 /10/ states fee will be collected based on a rate approved by the government. Who is 'the government'? The Federal Ministry of Agriculture? The Council of Ministers? The regional government executive? The Regional Government Agricultural Bureau? Or another organ?

D) Let us assume the rate was fixed and approved by 'the government'. How do you categorize the 'rate fixing' exercise— decision-making or rule-making power? Why? What is the significance of categorizing an agency's action as 'decision-making' or 'rule-making'?

7) An individual should be afforded with the right to procedural fairness including the reason for a decision taken against him which adversely affects his rights and interests, because:

> *... partly from an obvious human desire to be told the reason for a decision so gravely affecting his future, and partly because he hopes that once the information is obtained he may be able to point out errors of fact or reasoning and thereby persuade the [decision-maker] to change his mind, or if he fails in this to challenge the decision in the courts.*

Does the quote above justify procedural fairness on the grounds of instrumental or intrinsic grounds?

8) What procedural rules will apply in the absence of any specific statutes governing the matter or when the statutory procedure is not sufficient to guarantee fair hearing?

9) What is the difference between the duty to give reason and the duty to give a reasonable decision? Does the Administrative Procedure Proclamation require the decision-making agency to give reasons and a reasonable decision?

10) After reading Article 37 of the Administrative Procedure Proclamation No. 1183/2020, answer the questions that follow.

A) Does the above Article or any other provisions of the Administrative Procedure Code require notice to be given before hearing?

B) What about giving a charge or written particulars of the allegations? Is there any such requirement in the Proclamation?

C) What does "authority" mean under Article 37/1/ c above? Is it the same as "Agency"?

D) When you read Article 37 of the proclamation, does it in any way suggest there will be an oral hearing?

E) Is there disparity between the Amharic and English versions of Article 37/1/ b?

F) What is the effect of non-appearance by one of the parties?

a) for good cause

b) without good cause

11) The following is an explanation with an example of Art. 36(2) (a) of the Proclamation from 'Explanatory Note on Administrative Procedure Law'

Article 36 (2) (a) indicates the situation where the issue requiring administrative decision affects the rights and interests of more than one person and there is no dispute between the persons. For instance, when a land leaseholder applies to incorporate land adjacent to the leasehold and the City Land Administration Office has the full record and documentation regarding the adjacent land, the Officer can make a decision without the need for hearing the applicant and third parties.

1. Do you think the explanatory note properly understood the meaning (content) of Art. 36(2) (a)? What are its flaws?

2. Does "no argument" refer to argument between private parties or the agency and private party or parties?

12) Which approach in defining "administrative decision" do you think is preferable? Listing down instances of the defined term like the Australian Act? or the American APA with its broad definition leaving wide discretion to the decision-maker and to courts? What about the definition by the German Administrative law? Which one do you think is more clear to understand and comprehensive enough to include all actions and measures which affect the rights and interests of the individual?

13) The Health Professional Ethics Committee established under Article 71/1/ of the Food, Medicine, and Health Care Administration and Control Council of Ministers Regulation No. 299/2013 is authorized to examine, investigate, and propose appropriate administrative measures to the Ethiopian Food and Drug Authority on complaints made about substandard health services and incompetent and unethical health professionals.

The Committee's recommendation may be approved or disapproved by the Authority.

a) is the proposal or recommendation of the Committee an administrative decision? State your reason/s/

b) if your answer to the above question is yes, how do you categorize it in terms of the stages of administrative decision-making?

14) After reading the provisions below, identify the three levels of decision-making. (Hint: The "Appeal Hearing Council" is a tribunal)

**Expropriation of Land holdings for Public Purposes, Payments of Compensation and Resettlement Proclamation No. 1161/2019**

Art. 19. Complaints

1/Any person who received an order of expropriation of his landholding; or who has an interest or claim on the property to be expropriated may file an application within 30 (thirty) days of service of the order to the Complaint Hearing Body which is established as per sub-Article 1 of Article 18 of this proclamation.

2/The body mentioned under sub article 1 of this Article, after investigating the complaint submitted to it; shall make its decisions within 30 (thirty) days of the filing of the application and notify in written to the parties.

Art. 20. Appeal

1/ A party who is aggrieved with the decision given under Article 19 sub article 1 of this proclamation shall file an appeal to the Appeal Hearing Council within 30 (thirty) days of the receipt of the written notice of the decision thereof.

2/ A party aggrieved with the decision of the Appeal Hearing Council may file an appeal to the Regional High Court in case of Addis Ababa and Dire Dawa city, Federal First Instance Court within 30 (thirty) days of the receipt of the decision in writing. The party who is dissatisfied with the decision has the right to continue his

claim, however, for the continuance of the development, he has to surrender his land holdings

**Coffee Marketing and Quality Control Regulation No. 433/2018**

Article 32. Application for Certificate of Competence

1/ Any Person who wants to obtain the certificate of competence should:

a) submit application to the Authority, if he wants to engage in export coffee processing and warehousing service, coffee exporting, export coffee roasting or roasting and grinding, bonded warehousing service, export trading agent, coffee quality inspecting and grading service or any other activities related with these.

b) submit application to the appropriate regional organ, if he wants to engage in coffee supplying, domestic coffee consumption roasting, supply coffee processing and warehousing, coffee husk processing, coffee leaf processing, domestic coffee consumption wholesaling, domestic consumption retailing trade, domestic consumption trading agent, coffee transporting service, coffee loading and unloading service and other related activities with these.

c) Provide with the application, evidences for fulfilling the requirements provided by this Regulation and provide other information according to directive to be issued by the Authority or the appropriate regional organ to obtain the requested certificate of competence.

2/ The Authority or the appropriate regional organ shall decide on the application within 15 working days from the date of receipt of the application;

3/ When the Authority or the appropriate regional organ rejects the application for certificate of competence, it shall provide a letter for the applicant stating the detailed reasons in written form.

15) Article 67/1/ of Media Proclamation No. 1238/2021 requires any broadcasting licensee to put in place and implement a compliant handling mechanism to address concerns and complaints by its audience. If you submit a complaint to one of the radio stations in Ethiopia against its news aired on a specific day and the compaint handling body of the station decides to reject your complaint, can such a decision be considered as an administrative decision? State your reason/s/.

16) Despite the shortcomings, there is a huge advantage in stating specific procedural rules customized to the nature of the decision. What are those advantages? Hint: in the US, the formal hearing procedures under the Administrative Procedure Act are

applicable only when the legislature by specific statutes expressly requires such a hearing.

17) In formulating rules of procedure, which approach do you think is more appropriate— Specific procedure to individual agency? Or universal procedure applicable to all agencies? State your reason/s/.

18) Why does the Civil Servants Disciplinary and Grievance Procedure Council of Ministers Regulations No. 77/2002 categorize the disciplinary (administrative decision-making) procedure in two: summary inquiry and formal procedure?

19) Do you think it is essential to devise different types of procedural rules based on the seriousness of the offense and the disciplinary measure? If you agree with this approach, how do you evaluate the Administrative Procedure Proclamation, which uses only one procedure for all agencies and for all decisions?

20) Read Art. 55 of the Private Organization Employees' Pension Proclamation No. 1268/2022 above. When the Administration conducts review on its own initiation or upon request and reaches a decision, is this level of decision-making, an initial, internal review, or tribunal review? State your reason/s/

21) Read the article 11 of Administrative Procedure Proclamation and try to identify the following basic issues regarding the notice requirements.

a) To whom and how should a notice be served?

b) What documents should be sent to the defendant with the notice?

c) In order to fully provide the accused of the hearing, what particulars should a notice contain?

d) If the defendant could not be found, what should be the alternative form of serving the notice to claim that it has been adequately served?

e) What should a notice contain to enable the accused to fully defend himself?

22) What particulars should be disclosed in a notice to be issued to a civil servant according to the Federal Civil Servants Disciplinary and Grievance Procedure Council of Ministers Regulations No. 77/2002?

23) Do you think hearing rights should be excluded or limited by the likelihood that the hearing would make no difference to the result in the case? If yes, how is it possible

to verify that hearing could not make a difference without actually conducting a hearing?

24) When can we say with certainty that "there is no arguments of the facts of the case"? Is it when the facts are admitted by the person whose rights and interests will be affected by the decision? What facts constitute "facts of the case"? Assuming there is no arguments of the facts of the case within the meaning of FAPP, why should submission of argument on point of law (it could be for instance on interpretation or mitigation, or the like) be excluded?

## 4.15 Further reading

Giacinto della Cananea, *Due Process of Law Beyond the State: Requirements of Administrative Procedure* (New York: Oxford University Press, 2016) P36-83

K. Keith Werhan, *Principles of Administrative Law* (Thomson West, 2008) PP158-218

Jack M. Beermann, *Inside Administrative Law: What Matters and Why* (Aspen Publishers, 2011) P227-262

Massey, I. P. (2016) *Administrative law* Eastern Book Company. P187-193

# CHAPTER FIVE

# ADMINISTRATIVE RULE-MAKING

## Chapter Overview

This chapter discusses how agencies make laws: binding laws with the same force and effect as the laws enacted by the House of Peoples' Representatives. The law-making power of the House emanates from the people. The members are delegates (representatives) of the people. A portion of this legislative power is then re-delegated to the executive branch. In Ethiopia, the Council of Ministers and administrative agencies issue regulations and directives respectively through delegation from the House of Peoples' Representatives.

In principle, delegation is against the constitutional principle of separation of powers. However, the practical realities of modern administration have made delegation inevitable. To guarantee the legal and proper exercise of power, agencies should be subject to a legislative procedure that ensures transparency, accountability, and judicial oversight.

This chapter will begin by discussing the theoretical and constitutional framework of rule-making. It will then discuss in detail the procedure introduced by the Administrative Procedure Proclamation.

### LEARNING OUTCOMES

After studying this chapter, you will be able to:

- Define delegation and explain the types of delegations
- Identify the theoretical justifications against and the practical justifications for delegation
- Describe the mandatory procedural rules governing the legislative process by agencies

## Chapter Table of Contents

**5.1 Introduction..... 155**

**5.2 Definition of Rules and Rule-making ..... 155**
5.2.1 What is a Directive?..... 156
**5.3 Terminology and Nomenclature ..... 157**
5.3.1 Terminology ..... 157
5.3.2 Nomenclature..... 158
5.3.2.1 Standard..... 159
5.3.2.2 Circular..... 160
5.3.2.3 Guideline ..... 161
5.3.2.4 Manual..... 161
5.3.2.5 Code ..... 162
5.3.2.6 Public notice..... 162
**5.4 The Need for and Risks of Delegated Legislatio ..... 163**
5.4.1 The Need for Delegated Legislation..... 164
5.4.1.1 Expertise..... 164
5.4.1.2 Pressure on parliamentary time ..... 165
5.4.1.3 Unforeseen contingencies..... 165
5.4.1.4 Flexibility ..... 166
5.4.1.5 Opportunities for Experiment..... 167
5.4.1.6 Emergency Powers..... 167
5.4.2 Risks and Objections ..... 167
5.4.2.1 Representative Democracy..... 167
5.4.2.2 Separation of Powers..... 168
**5.5 Constitutional Limitations on Power of Delegation ..... 168**
5.5.1 Non-delegable matters..... 169
5.5.2 Tests of Constitutional Scope of Delegation ..... 170
**5.6 To whom is power delegated? ..... 173**
**5.7 Mode of Delegating Power..... 175**
**5.8 Classification of Administrative Rules ..... 177**
5.8.1 The distinction between directives and administrative decisions ..... 178
**5.9 Rule-Making Procedure..... 178**
5.9.1 Informal and formal procedure..... 179
5.9.2 Notice..... 180
5.9.3 Consultation..... 181
5.9.3.1 Comment ..... 182
5.9.3.2 Public Hearing..... 184
5.9.3.3 Opinion of Ministry of Justice..... 184
5.9.4 Publication..... 184
5.9.5 Exceptions and Exemptions..... 185
**5.10 Formality Requirements..... 187**
5.10.1 Serial number..... 187
5.10.2 Source of power..... 187
5.10.3 Signature..... 188

5.10.4 Language ..... 189
5.10.5 Registration ..... 189
5.10.6 Explanatory note ..... 191
**5.11 Control of Administrative Rule-making ..... 192**
5.11.1 Procedural control ..... 193
5.11.2 Parliamentary control ..... 194
5.11.2.1 Tabling /Laying Procedure/ ..... 197
5.11.2.2 Scrutiny ..... 197
5.11.3 Judicial control ..... 198
**5.12 Rule-Making Procedure and Practice in Some Administrative Agencies 200**
5.12.1 Ministry of Revenue ..... 200
5.12.2 Food and Drug Administration ..... 202
**5.13 Summary ..... 203**
**5.14 Glossary ..... 204**
**5.15 Review Questions ..... 205**
**5.16 Further Readings ..... 210**

## 5.1 Introduction

The constitutional doctrine of the separation of powers allocates the power of law-making to the Parliament; the administration and enforcement of the law to the executive; and adjudication of disputes or interpretation of the law to the judiciary. The doctrine is reflected in the structure of the Ethiopian Federal Constitution. Accordingly, Chapter Six Part One of the Constitution is entitled 'The House of Peoples' Representatives'; Chapter Eight, 'The Executive'; and Chapter Nine, 'The Structure and Powers of Courts'.

Due to the expansion and complexity of modern-day administration, the law-maker, after stating the general principles, is forced to entrust the power of making necessary directives and regulations for the detailed implementation of proclamations to the responsible agency or Council of Ministers.

## 5.2 Definition of Rules and Rule-Making

'Legislation' refers to the sum of laws made by a parliament and laws made on behalf of and with the express authority of that parliament. Delegated legislation is the exercise of legislative power by the executive and administrative agencies in pursuance of authority given by parliament. The act of "giving" such authority or power is known as delegation. Simply put, the legislature delegates part of its law-making power to government organs within the executive branch. These organs, in turn, in line with their

delegated power, make binding and effective legislation. In other words, they make "delegated legislation".

According to the Administrative Procedure Act, "rulemaking" means an "agency process for formulating, amending, or repealing a rule," and "rule" means "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency".[1]

### 5.2.1 What is a Directive?

The Federal Administrative Procedure Proclamation No. 1183/2020 does not employ a generic term such as rule-making or delegated legislation to describe the agency's legislative process. "Issuance of Directive", as used in Sub-section one of Section two of the Proclamation might be considered a somewhat similar term, but issuance of directives is not wide enough in terms of scope to include the whole rule-making process.

The definition part of the proclamation is limited only to "directive", legislation made by agencies. The process or procedure is not defined. Art. 2/2/ of the Proclamation defines "directives" in the following terms.

> *"Directive" means a legislative document that is issued by an administrative agency based on delegation of Power bestowed up on it by the Legislator which affects people's Rights and Interests. The term also includes the amendment, or repeal of an already existing directive.*

The descriptive definition fails to provide a clear differentiation between administrative directives and decisions. Moreover, it does not address the basic characteristics of directives. Let us say one tries to determine whether a certain document named "manual" or "code of conduct" could be properly called a directive. Any attempt will be futile if the definition in the proclamation is to be used for such determination. The core elements from the above definitions are:

A directive is a legislative document

It is issued based on the delegation of power

Affects the people's rights and interests

Includes amendment and repeal of an existing directive

---

[1] Keith Werhan, Principles of Administrative Law (Thomson West, 2008) P340

The reference to "legislative document" implies that a directive is, for all legal purposes, a law same as a law enacted by the House of Peoples' Representatives. It is a product of law-making or legislative processes by the administration. It is self-evident that legislative activity by administrative agencies is exercised pursuant to a delegation by the legislature which is the House of Peoples' Representatives. It indicates that agencies lack inherent rule-making powers.

A directive creates rights and obligations. It also imposes sanctions if there is non-compliance with the prescribed rules. Ultimately, it will affect people's rights and interests upon its implementation. Not all directives the administration issues directly or indirectly affect rights and interests. There are, for instance, directives issued solely to govern the internal operation and organization of the agency.

The definition in Art. 2/2/ applies not only to issuing a new directive but also to the amendment or repeal of an existing directive. An amendment is about making changes to the existing one, whereas repeal, which may be partial or total, revokes or annuls an effective directive. The definition implies that the legislative procedure of the proclamation equally applies when a directive is made, amended, or revoked.

## 5.3 Terminology and Nomenclature

The study of rule-making might be confusing due to the lack of uniformity in terminology. First, similar terms are understood slightly differently in different jurisdictions. "Delegated legislation" in England or Australia has ascribed a different meaning in Germany. There is also the possibility that another country will use different terminology. Secondly, even within one jurisdiction, various terms are employed to describe the same legal instrument.

Here we are concerned only with the generic terms used to describe the legislative power of agencies and the process they follow in exercising their power.

### 5.3.1 Terminology

This chapter is titled "Administrative Rule-making". It will denote the whole regime of law-making activity by government organs, which are neither parliament nor courts. However, the same activity is also represented by other terms: delegated legislation, subordinate legislation, subsidiary legislation, secondary legislation, quasi-legislation, and the like. Administrative lawyers and scholars commonly use these terms , but as used in this textbook there is no difference among them.

While administrative rule-making is expressive of the process, the term "delegated legislation" is preferable in discussing the final product of rule-making. The term is used in two senses:

1. the exercise by a subordinate agency (a delegate of the legislature) of legislative power; or
2. the subsidiary rules themselves, which emanate from the subordinate agency as a result of the exercise of power as mentioned in (i).[2]

Since administrative law's primary concern is process, procedure, or technique, we will primarily use "administrative rule-making" because it is more descriptive of the process. Delegated legislation may also be used, especially while discussing the source and grant of power by parliament. As "delegated legislation" is often used in common law countries, especially in the UK and Australia), we will use this term if reference is made to these countries.

Delegated or subordinate legislation, sometimes called quasi-legislation, consists of legislation made by bodies other than parliament, which obtain the authority to make legislation by an act (which is equivalent to 'proclamation' in Ethiopia) of parliament.

### 5.3.2 Nomenclature

Delegated legislation and other similar terms are generic terms used to signify either the power or process of legislative activity by executive organs. "Administrative rules" is also a generic term used to collectively represent the laws thus made by these organs. To add to the confusion of terminology, the specific rules are identified by different names. Given the variety of names, it becomes challenging to classify such rules as administrative decisions or administrative rules at times.

In most jurisdictions, administrative rules made by the executive come with a bewildering variety of names. In England, for instance, they may be designated as *orders in council, rules, regulations, bylaws, and directions*. In Australia, the terminology used varies across jurisdictions. Key terms include *'legislative instruments', 'regulations', 'subordinate laws', 'subordinate legislation', 'statutory rules'*, and *'subsidiary legislation'*. These terms are themselves defined in a variety of ways. *Regulation* in Australia refers to subordinate rules made by a state governor or the Governor-General that are general in their application.[3] *Rule* usually specifies matters of procedure made by a court. *Bylaw* is the description normally given to an instrument limited to a specific geographic area (for example, the rules made by a local government council or by a university council).

[2] M.P. Jain (2011). M P Jain Principles of Administrative Law. LexisNexis. P41

[3] The Governor-General of Australia is The King's representative. In practice, he is Australia's Head of State.

An *ordinance* in Germany is legislation made by the executive or the government departments while legislation made by the autonomous bodies is called *bylaws*. *Administrative directions* regulate the internal matters of the administration. *Ordinances* relate to special or subordinate power relationship such as defence services, schools, universities, public services, and the like. Many other terms and descriptions have also been used by the legislature, including *determination, order, direction, notice, plan, proclamation, and declaration.*[4]

One helpful mechanism for understanding the different legislative instruments is to take note of the different devices employed to make the rules.[5] This includes identifying who is responsible for the issuance of that specific rule. For instance, *Orders in Council*, as used in England, is drafted by the executive but enacted as an Order of the Privy Council.[6] Regulations and rules are issued by a minister, agencies, or local authorities. Bylaws are commonly promulgated by local authorities but can also be made by agencies.[7]

The most common names in Ethiopia are "regulation" and "directive". Regulation refers to legislation made by the Council of Ministers. Directives, which are lower in hierarchy compared to regulations, are issued by administrative agencies. A directive is the standard name recognized by the Administrative Procedure Proclamation.

However, there are a multitude of names with undetermined status and legal effect in practice. Some of the names with examples of respective legal instruments are given below.

### 5.3.2.1 Standard

A standard is, for all legal and practical purposes, binding law. When an agency sets a regulatory standard, it is prescribing law to be complied with by a group of persons.

**Example**

> One of the objectives of the Ethiopian Geospatial Information Agency (formerly Ethiopian Mapping Organization) is to:

[4] Robin Creyke et al (2019). Control of Government Action: Text, Cases & Commentary. LexisNexis Butterworths. P347
[5] Paul Craig (2021). Administrative Law (9th ed.). Thomson Reuters P P1031
[6] The Privy Council (PC) is a formal body of advisers to the Sovereign of the United Kingdom.
[7] Paul Craig, supra note 5 P1031

> *coordinate and control the quality and standard of aerial photographing, surveying, mapping, remote sensing and related geospatial information activities in the country, and establish professional standards and provide certificate of competence for professionals engaged in surveying, mapping, remote sensing.*[8]

The agency is conferred with the power of delegated legislation for the implementation of its objective, powers, and duties by the parent act.[9] To regulate the standard of aerial photographing, surveying, mapping, remote sensing, and related geospatial information activities in the country; the agency is required to set the applicable standard.

Sometimes a standard may be published as "public notice". For instance, Art. 15 of Financial Reporting Proclamation No. 847/2014 titled "Publication of Standards" under sub-article 1 reads:

> *The Board [Accounting and Auditing Board of Ethiopia] shall communicate the standards it approves for implementation in Ethiopia through an official publication called "Public Notice for Financial Reporting and Auditing Standards" to all stakeholders by posting it on its website.*

The actual legal instrument is "standard", not public notice. The reference to "public notice" indicates the means of notification. The purpose of the notice is simply to communicate the actual standard to the public. To determine whether such standards are binding or have the same status as directives, it is important to determine how power was given and the binding effects of the standard. Art. 4/2/ of the proclamation grants power to the Board to issue standards and directives relating to financial reporting and auditing and ensure compliance therewith. The provision does not specify what aspect of financial reporting and auditing is to be determined by standards or directives. Therefore, a standard issued under the provision may be treated as a directive, provided that it affects the rights and interests of individuals.

## 5.3.2.2 Circular

A circular is essentially a letter. It is designated as "circular" because it is distributed to a specific group or a large number of people. It shares common characteristics with a legislative rule due to its generality. However, to properly classify it as a rule or directive, closely examining its content is necessary. If it simply provides

[8] Art. 6/3/ of Ethiopian Geospatial Information Agency Re-establish the Proclamation No. 1079/2018
[9] Art. 15/2/ of Ethiopian Geospatial Information Agency Re-establish the Proclamation No. 1079/2018

information, it is a letter without any binding legal effect. On the other hand, if it prescribes rules of conduct to be complied with, it is a directive irrespective of its name.

### 5.3.2.3 Guideline

A guideline is an instruction regarding procedure, operation, or organization. A guideline is a statement by which to determine a course of action. A guideline aims to streamline processes according to a set routine or sound practice. It is issued to make a process or operation more predictable and consistent. In most cases, a guideline is not binding and lacks any legal effect. However, the name could be misleading. What is important is whether the guideline prescribes rules of conduct with potential sanctions for non-compliance.

### 5.3.2.4 Manual

A manual is a document that provides practical instructions on how to do or use something. In the administrative process, manuals are step-by-step instructions for internal operations. Despite its designated name, there might be a discrepancy between the name and the actual content of the manual. A typical example is the "Manual on Public Procurement Complaint Procedure" issued by the FDRE Public Procurement and Property Administration Agency. This manual, among other things, prescribes rules regarding who may submit a complaint, when a complaint may be lodged, contents of the complaint, a method of submission of a complaint, and timing of a complaint procedure. It also regulates the adjudication procedure, including representation, hearing, and production of evidence. There is no doubt that the document bears the wrong name. The adjudication procedure before an administrative agency determines the level of procedural fairness afforded to those affected by the decision of the agency. Any rule that determines the decision-making or adjudication process could not be categorized as "manual" irrespective of its apparent name.

The "Manual on Public Procurement Complaint Procedure" is not just an explanatory or interpretive document detailing the step-by-step application of the existing proclamation and directive, rather it is a legislative rule implementing the general provisions found in the primary and secondary legislation. The public procurement complaints system in Ethiopia is regulated by chapter thirteen of the Procurement and Property Administration Proclamation No. 649/2009 and part ten to twelve of the Public Procurement Directive.[10] The manual, in addition to providing detailed procedural rules, prescribes mandatory provisions applicable to the

[10] Ministry of Finance, Public Procurement Directive (June 8, 2010)

adjudication procedure like *ex parte* proceeding, representation, oral hearing, presentation of evidence, and the like.[11]

## 5.3.2.5 Code

The Ethiopian Media Authority [formerly, Ethiopian Broadcasting Authority] is authorized to issue a code of conduct for advertising activity in consultation with stakeholders.[12] The content and presentation of any advertisement is required to comply with the professional code of conduct. Non-compliance with the code entails a fine not less than ETB 20,000 and not exceeding ETB 150,000.[13] This is a typical example of a mandatory administrative rule imposing a sanction. Sometimes, a code may lay down a code of good practice that is non-binding. In this case, it is simply a recommendation to be followed. Therefore, whether or not a legislative instrument bearing the name "code" is an administrative rule depends on its content.

## 5.3.2.6 Public notice

Sometimes a public notice may be issued pursuant to delegated authority to implement primary legislation. Art. 46/3/ of Trade Practice and Consumers' Protection Proclamation No. 813/2013 states:

> *The Ministry [of Trade] may issue directives and public notices necessary for the implementation of this proclamation and regulations.*

The previous [repealed] Trade Practice and Consumers' Protection Proclamation No. 685/2010 did not even mention directives. It delegates the power of implementing the proclamation only through public notice. Under normal circumstances, when public notice is employed as a legal instrument for implementing a proclamation, it could be safely concluded that for all practical and legal purposes, it has the same status as a directive.

The fact that nomenclature could be misleading is underscored by the following two provisions of Customs Proclamations.[14]

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[11] See 4.2.7 – 4.2.8 of the manual
[12] Art, 31/2/ of Advertisement Proclamation No. 759/2012
[13] Ibid Art. 34/1/ c
[14] Customs Proclamation No. 622/2009 is repealed by Customs Proclamation No. 859/2014

**Art. 30/2/ of Customs Proclamation No. 622/2009**

*The rate of warehouse fees shall prescribed by a public notice to be issued by the Authority [renamed "Customs Commission"]*

**Art. 59/2/ of Customs Proclamation No. 859/2014**

*The rate of customs warehouse fees shall be determined by regulation of the Council of Ministers.*

Rate fixing is one of the most essential functions of administrative agencies. It significantly impacts the rights and interests of individuals and businesses. It is also subject to abuse if proper safeguard mechanisms applicable to rule-making are not implemented. In the repealed proclamation, the rate of warehouse fees was left to determination through public notice. Later, change was made in the subsequent proclamation with a clear delegation of legislative power to the Council of Ministers. This shows that the applicability of the Administration Procedure Proclamation (rule-making procedure) should not depend on the name of the legal instrument but on the subject matter and the likelihood of the legal instrument creating rights and duties.

## 5.4 The Need For and Risks of Delegated Legislation

Making of detailed rules pursuant to a primary statute is a common feature of all polities.[15] Delegating legislative power to the executive is now commonplace and essential for an efficient and effective government. There are several reasons why the practice of transferring legislative power is prevalent. First, the area may be technically complex and expertise is lacking within the legislature. Secondly, the strict lalaw-makingrocedure of the legislature coupled with scarcity of time leaves no room for flexibility. Time may be needed to experiment and to determine how the legislation is operating, making delegated legislation the most appropriate tool. Thirdly, the executive may wish to implement part of the legislation at a later stage, or to alter its detail. Generally speaking, the justifications for delegating the legislative function to the executive are borne largely of law-making convenience and executive expediency.

Despite the widespread practice of delegation and its acceptability, which, nowadays, has become an inevitable reality, there has been stiff resistance against the transfer of power from elected representatives to unelected officials. In order to give you a broader picture of the pros and cons of delegated legislation, the major justifications (need) for and objections (risks) against delegated legislation are

[15] Paul Craig, supra note 5 P1027

summarized below. One of the salient characteristics of these objections and justifications is that, whereas the former is theoretical, the latter is rooted in practical necessity.

## 5.4.1 The Need for Delegated Legislation

### 5.4.1.1 Expertise

Perhaps the primary reason legislators delegate power is expertise. The other list of practical justifications makes the task of parliament without legislation difficult but not impossible. However, the lack of expertise on diverse, detailed, and technical subject matters is not something parliament can overcome unless it establishes specialized institutions of its own, which is costly and challenging to manage. Additionally, creating huge apparatus of parliamentary institutions amounts to creating parallel executive agencies. The only difference would be the degree of control which is, by itself, another challenge. Additionally, if the issue ultimately turns out to be a matter of control, there is no need for parliament to establish its own institutions, instead it could delegate its power and exercise a supervisory role on the executive and the agencies.

Modern legislation is highly complex, technical in nature, and can only be satisfactorily handled by experts.[16] Members of parliament cannot possibly have sufficient expertise to understand and evaluate all the various detailed requirements in the vast range of areas that comprise the regulatory and welfare state.[17] Such expertise requires education and training as well as experience in dealing with a particular issue.

**Example**

To see how legislation can become technical, take a look at the following proclamation.

**Electronic Signature Proclamation No. 1072/2018**

Art. 21. Auditing

1/ The overall operation and safety measures of certificate provider may be audited by the Root Certificate Authority at any time.

[16] Ibid Sup. N 75
[17] Colleen M Flood & Paul Daly (Eds.). (2022). *Administrative Law in Context.* Emond Montgomery Publications Limited.

2/ To implement sub-article (1) of this Article, the Root Certificate Authority shall issue a directive and notify the same to certificate providers subject to audit.

### 5.4.1.2 Pressure on Parliamentary Time

There is no sufficient time within parliament to make all legislative rules or to regularly update the rules that specify important practical details.[18] The pressure on parliamentary time is so great that it cannot cope with the volume of the legislative task in the modern state. Parliament needs time to concentrate on discussions of high policy and basic problems of legislation. To do this, it has no choice but to thrust away subordinate problems to the executive as much as possible. Pressure on parliamentary time makes it impractical and undesirable for parliament to occupy itself with the minutiae of legislation.[19]

Let's take the following directives as an example:

Telecommunications Numbering Directive No. 795/2021

Tobacco Control Directive No. 771/2021

Codification, Valuation and Registration of Movable Properties as Collateral for Credit, Directive No. 186/2020

For the first directive, at least knowledge and experience in telecommunications technology, engineering, or related fields is necessary. For the second directive, experts on food science, nutrition, environment, and the like are needed. Lastly, for the third directive, a combination of expertise on banking business and land management is needed.

### 5.4.1.3 Unforeseen Contingencies

In the case of large and complex matters, it is not possible for the legislature to foresee all contingencies and local conditions and to work out the administrative machinery to the last detail. Therefore, these matters are left to the departments to be regulated appropriately.[20]

[18] Robin Creyke supra note 4 P344
[19] S. A. de Smith. (1949). Delegated Legislation in England. The Western Political Quarterly, 2(4), 514–526. https://doi.org/10.2307/442972
[20] ibid

### 5.4.1.4 Flexibility

Because legislation can be difficult and time-consuming to alter, legislators may delegate the power to fill in requirements to increase flexibility to allow the requirements to be changed as new information arises. This flexibility is particularly important in rapidly changing areas such as banking, insurance, and customs regulation. The need for flexibility stems from the fact that the implications of a given law may change according to the external environment.[21] Problems may arise which were not anticipated by lawmakers. Parliament lacks the required time and resources to fill each loophole. The method of delegation makes possible a speedy and flexible adjustment to fresh circumstances and technical new developments, without the necessity of continually setting the legislative machinery in motion.

**Example**

In the following two proclamations, enforcement is made subject to the situation prevalent in a certain place. Substitute land may not be scarce in one town and there may not be such shortage in other places. Similarly, the type and quantity of firearms to be permitted to individuals may vary from place to place based on the security status of the place and other factors.

In the following two Proclamations, rule-making is delegated to enable the administrative agency to deal with changing circumstances.

**Expropriation of Land holdings for Public Purposes, Payments of Compensation and Resettlement Proclamation No. 1161/2019**

Art. 4/ Displacement compensation and substitute land for Urban Landholders Permanently Displaced

f) Where the expropriated land is under leasehold, the substitute land to be given shall be equivalent to the expropriated land in standard and size. If it is not possible to do this, the alternative operating situations shall be determined by a directive depending on the situation of the cities.

**Firearm Administration and Control Proclamation No. 1177/2020**

Art. 6. Condition under which Firearm License is Given

[21] Roger Douglas; Margaret Hyland (2015). FOCUS Administrative Law. LexisNexis Butterworths P126

> 1/ Firearm license shall be given:
>
> a) the type and quantity of firearms and the number of ammunition allowed for an individual in urban, pastoralist and farmers' areas, shall be determined by a directive to be issued by the Supervising Institution;
>
> b) The type and quantity of firearms allowed for an organization, as well as the number of ammunition allowed shall be determined by a directive to be issued by the Supervising Institution;

#### 5.4.1.5 Opportunities for Experiment

The method of delegation enables experiments to be carried out, which would be impossible if the slow parliamentary method had to be issued on each occasion. Moreover, rules or orders, if found unsuitable, can be revoked or amended, which is not easily possible in the case of statutes.

#### 5.4.1.6 Emergency Powers

In emergency situations where the national interest demands rapid and effective action, it will be essential to equip the government with extraordinary powers.

### 5.4.2 Risks and Objections

The criticism against delegated legislation emanates from two fronts: representative democracy and separation of powers. These are both fundamental constitutional principles.

#### 5.4.2.1 Representative Democracy

Representative democracy, also known as indirect democracy, is a type of democracy where elected persons represent a group of people. In a representative democracy, the government is elected by the people. They decide through election who will represent their interest, ideas, and concerns. In Ethiopia, at the federal level, an election is held every five years to elect members of House of Peoples' Representatives. Because our system of government is parliamentary, the head of the executive (who is the Prime Minister) will be chosen from members of the house.

One of constitutional law's basic principles is the non-delegability of power. The principle is expressed in the legal maxim *"delegata potestas non potest delegare."* This is translated as "what has been delegated cannot be delegated".

When the people elect their representatives, they confer their trust and power to make laws necessary for the effective and effective administration of their affairs. The source of the power of legislatures is the people. Therefore, elected representatives cannot delegate their power to unelected officials because that constitutes government by unelected officials. If representatives are to transfer their powers rather than exercise them themselves, it makes the underlying principles of election and representative government meaningless.

### 5.4.2.2 Separation of Powers

Delegation of the parliament's legislation-making power to the executive government 'has the appearance of a considerable violation of the separation of powers, the principle that laws should be made by the elected representatives of the people in Parliament and not by the executive government.'[22] From a practical point of view, such criticism goes beyond "appearance". Given the extent of power being transferred to the executive and the proliferation of directives and regulations by the executive, delegated legislation can no more be justified as an acceptable exception to the constitutional principle of separation of powers.

## 5.5 Constitutional Limitations on Power of Delegation

One common element in all jurisdictions regarding delegation is the absence of clear constitutional limitation on the legislature's power to delegate its legislative power. From the separation of powers doctrine, and from the principle that it is Parliament's role to make laws on important matters of policy, the principle that legislative power should not be inappropriately delegated to the executive may be derived. Laws that have a significant impact on rights and liberties, and laws creating offences with high penalties, should usually be in primary, not delegated, legislation. More generally, wide and vague delegations of legislative power undermine the separation of powers doctrine by allowing those who enforce the law to also make the law.[23]

In England, the Parliament may, at least in theory, delegate its legislative powers to the executive to any extent whatsoever. In countries like the United States, India, or Australia the constitution is silent on the question of delegation, but the courts have evolved some limitations which the legislature cannot cross in delegating its legislative functions to the executive. However, the limits are so obscure that they seem as good as non-existent. The German Basic Law, unlike the constitution of the United States or

[22] Robin Creyke supra note 4 P341
[23] Bannister, J., & Olijnyk, A. (2018). Government Accountability – Australian Administrative Law Sources and Materials. Cambridge University Press P53

of Australia, does not specifically vest all the legislative powers in the legislature, but it lays down express limits within which the legislature can delegate its legislative functions to the executive.[24]

The reason for laying down express limits can be seen in the misuse of the delegation of legislative powers under the Weimar Constitution of 1919. The Weimar Constitution, like any other constitution, did not have any provision for delegation of legislative powers, but the legislature almost abdicated its powers and functions to the executive by authorizing it to make not only ordinary laws to an unlimited extent but also laws amending the constitution.[25]

### 5.5.1 Non-Delegable Matters

**Power to legislate on matters of policy**

The power of legislation in all matters assigned by the FDRE Constitution to Federal jurisdiction (those listed under art. 51) belongs to the House of Peoples' Representatives.[26] Before delegating on these matters, the house should first determine through primary legislation the basic principles and policy issues. Important questions of policy, particularly when they affect individual rights, are often considered an inappropriate subject matter for delegated legislation.

**Power to prescribe offenses**

Offence provisions, including civil penalties, generally belong in primary legislation.

**Power to impose taxation and administrative penalty**

The power of imposing tax and administrative penalties is considered essential legislative power that should be transferred to agencies. There will be a significant risk of abuse of power if unelected officials obtain the power to determine the tax payable by individuals and private entities. Similarly, agencies should not be given discretion to impose fine and other administrative penalties.

[24] Mahendra P. Singh (1985). German Administrative Law: In Common Law Perspective. Springer P19
[25] Ibid
[26] Art. 55 of FDRE Constitution

**Power to amend, alter, or modify an Act of Parliament**

The type of delegated legislation most constitutionally problematic is that which contains a "Henry VIII" clause. This is the nickname for clauses that allow a minister to amend the primary statute, or some other statute, through delegated legislation.[27] Such legislation is unknown in Ethiopia, and it will be unconstitutional to allow a subordinate organ to make changes to the primary legislation.

**Power granting discretionary rule-making power**

Grants of delegated power ought not to be so wide that it becomes impossible in practice for courts to review the limits of the power. For example, provisions should not give powers to ministers to do that which is, in their opinion, 'requisite or expedient for a broadly framed statutory purpose'.

German law requires the contents, purpose, and scope of the authorization to make ordinances (secondary legislation made by executive organs) sufficiently defined. It lacks the required limitations if it is so indefinite that it cannot be foreseen in which cases and with which propensity it will be used and what would be the content of the ordinances that can be issued on the basis of that authorization.[28]

On this issue, the German Constitutional Court ruled:

> *It is a consequence of the principle of the rule of law that the authorization must be so exactly definite that already from it and not for the first time from the ordinance based upon it, it must be discernable and foreseeable as to what can be required of a citizen.*[29]

## 5.5.2 Tests of Constitutional Scope of Delegation

Despite the necessity of delegated legislation for an effective and efficient administration, there are serious dangers and risks of transferring unlimited and very broad legislative authority. Sometimes, the consequence could be catastrophic, if the legislature delegates power to the extent of abducting its fundamental law-making power.

In Germany, one of the contributing factors for the rise of Nazism and the holocaust that ensued was the unlimited delegation of legislative authority to Hitler. Hitler and

[27] Paul Craig, supra note 5 P1035
[28] Mahendra P. Singh, supra note 24 P21
[29] Ibid P22

the Nazi government took over the essential legislative power to make laws on almost on all matter under the disguise of delegated legislation. The enabling act allowed the Reich government to issue laws without the consent of Germany's parliament, laying the foundation for the complete Nazification of German society. The law was passed on March 23, 1933, and published the following day. Its full name was the "Law to Remedy the Distress of the People and the Reich."[30]

The Second World War and the Holocaust led Germany to learn from history. After the demise of Nazi, the German Basic Law introduced stringent measures aimed at curbing unlimited delegation of legislative power. It lays down express limits within which the legislature can delegate its legislative functions to the executive.[31]

Article 80 of the Basic Law clause (1) of the Basic law reads:

> *The Federal Government, a Federal Minister or the Land Governments may be authorized by a law to issue ordinances (Rechtsverordnungen). The content, purpose and scope of the powers conferred must be set forth in the law. The legal basis must be stated in the ordinance. If a law provides that such authorization may be delegated, such delegation shall require another ordinance.*

Among the restriction, the most important one is the requirement of expressly laying down content, purpose, and scope of the legislative powers. Any delegation that fails to conform to this standard will be struck down by the courts.

In countries like the United States, India, or Australia the constitution is silent on the question of delegation but the courts have evolved some limitations which the legislature cannot cross in delegating its legislative functions to the executive. The limits, however, are so obscure that they seem to be as good as non-existent.[32]

In India, the essential legislative function test is used by the courts to determine excess of delegation of legislative power. In one case, the Supreme Court of India stated the principles governing the permissible limits of delegation by upholding the essential legislative function test. The Court said:

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[30] United States Holocaust Memorial Museum. (2022, 12 4). Holocaust Encyclopedia. Retrieved from United States Holocaust Memorial Museum: https://encyclopedia.ushmm.org/content/en/article/the-enabling-act

[31] Mahendra P. Singh supra note 24 P20

[32] Ibdi

> *…essential powers of legislation cannot be delegated. In other words, the legislature cannot delegate its function of laying down legislative policy in respect of a measure and its formulation as a rule of conduct. The Legislature must declare the policy of the law and the legal principles which are to control any given cases and must provide a standard to guide the officials or the body in power to execute the law. The essential legislative function consists in the determination or choice of the legislative policy and of formally enacting that policy into a binding rule of conduct.*[33]

Essential legislative function consists of the determination of the legislative policy and the legislature cannot abdicate essential legislative function in favour of another. The power to make subsidiary legislation may be entrusted by the legislature to another body of its choice but the legislature should, before delegating, enunciate either expressly or by implication, the policy and the principles for the guidance of the delegates.

In the US, the non-delegation doctrine serves as a constitutional restriction on Congress on the delegation of its fundamental legislative power. The doctrine holds that Congress may not delegate its legislative power to the President, an agency, or any other entity inside or outside of government. It is axiomatic that only Congress has the constitutional power to legislate. Congress cannot pass a law authorizing another body, such as a federal agency, the President, a private organization, or a congressional committee, to write statutes and place them in the United States Code. In that sense, it is a truism that the Constitution prohibits Congress from delegating its legislative powers, and the early cases said so in so many words. The nondelegation doctrine is about preventing Congress from avoiding that basic restriction by delegating away so much discretionary power that someone else, in effect, has been granted the power to legislate.[34]

The doctrine does not completely prohibit Congress from transferring rule-making power to agencies. It only demands Congress supply an ‘‘intelligible principle’’ to guide the delegation of legislative power. In theory, this intelligible principle doctrine ensures that Congress will clearly establish the broad objectives of public policy, relying on the agencies, when necessary, only to fill in the details.

The constitutional test for Congress’s delegation of quasi-legislative power to an agency or official is easily stated: Congress can delegate quasi-legislative power as long as it gives the agency (or official) an ‘‘intelligible principle’’ to follow in exercising

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[33] Yashomati Gosh. (2015). *Textbook on Administrative Law*. LexisNexis P79

[34] Jack M. Beermann, Inside Administrative Law: What Matters and Why (Aspen Publishers, 2011) P29

that power. The Supreme Court has generally interpreted the ‘‘intelligible principle’’ test to allow Congress to give very broad rule-making powers to federal agencies.[35] In practice, however, finding an intelligible principle in some delegations may be impossible.[36] An ‘intelligible principle’ is not a very demanding standard and much of the American debate over “delegation” has addressed its indefiniteness. The very existence of the requirement, however, gives agency officials an incentive to frame their actions to support the appearance of legality, incorporating extended explanations of their reasoning process in their required explanatory statements, supplying and explaining supporting data, and so forth.[37] The current Court seems interested in revisiting the delegation question and may impose limitations on the agencies.

## 5.6 To Whom is Power Delegated?

There is no limit to the identity of the recipient of rule-making power. The House of Peoples’ Representatives may delegate legislative power to the executive, including the Council of Ministers and administrative agencies, to the judiciary, and even to itself. Power is also sometimes delegated to regional governments to make regulations.

The following is a list of organs that exercise rule-making power through delegation by House of Peoples’ Representatives

Federal Supreme Court
House of Peoples’ Representatives
Council of Ministers
Administrative Agency
Regional Governments

**i) Federal Supreme Court**

The constitutional task of the judiciary is interpretation of law, not rule-making. Delegation to the supreme court occurs in very limited circumstances. One area where such power has been granted is sentencing. Art. 88/4/ of the Criminal Code reads:

[35] William F. Funk & Richard H. Seamon (2016). *Administrative Law* (5th ed.). New York: Wolters Kluwer P256
[36] David H. Rosenbloom, *Administrative Law for Public Managers* (Westview Press, 2nd 2015) P6
[37] Strauss, P. L. (2017). Politics and agencies in the administrative state: the U.S. case. In S. Rose-Ackerman, P. L. Lindseth, & B. Emerson (Eds.), Comparative Administrative Law (2nd ed., pp. 44-60). Edward Elgar Publishing Limited. P134

*In order to ensure the correctness and uniformity of sentencing, the Federal Supreme Court shall issue a manual relating to sentencing.*

Accordingly, the first entencing Manual (1/2002) issued in 2002, which was later repealed and replaced by Sentencing Manual number 2/2006 which became effective on October 11, 2013. Despite its name, the sentencing guideline is a binding rule. Courts are duty bound to apply the manual in their determination of sentencing unless the manual itself allows deviation in specific circumstances.

**ii) House of Peoples' Representatives**

The House of Peoples' Representatives Working Procedures and Code of Conduct (Amendment) 2005 states:

*The loophole that may be created in this Regulation may be filled by the directive issued by the House of Peoples' Representatives.*

The amendment of Proclamation of the Federal Auditor General Proclamation No. 982/2016 also delegates legislative power to the House to issue regulations for the effective implementation of the Proclamation, simultaneously authorizing the Auditor General to issue directives for the same purpose of effective implementation of the Proclamation.

Self-delegation does not serve any purpose of delegated legislation. First of all, there is no convincing reason why the House needs to issue subsequent regulations after enacting a proclamation. Such practice does not solve the problems of technicality, flexibility, and time. If a different legislative process is to be followed in the issuance of regulations, a special procedure should be laid out without resorting to a vague delegation mode.

**iii) Council of Ministers**

The Council of Ministers is the oldest government institution in Ethiopia. It was first mentioned in the 1931 Constitution. Initially, its role was limited to advising the King. Through time, it became the most powerful legislative organ. Under the FDRE Constitution every piece of primary legislation is initiated or reviewed by the Council of Ministers. Its exercise of delegated legislation goes beyond "technical details to fill the gap" in the proclamation.

Among the vast powers of the Council of Ministers is to enact regulations pursuant to powers vested in it by the House of Peoples' Representatives.[38] The source of its power to make regulations is the House of Peoples' Representatives not the constitution. Still, it requires express authorization by the House of Peoples' Representatives to make regulations.

**iv) Administrative Agency**

In some cases, rule-making power may be delegated directly to the head of the agency. However, this is exceptional and unusual. In the Ethiopian practice, legislative power is delegated to the agency as an entity, though the head exercises considerable power in shaping the directive's content. An example of delegation to the head of the agency is Art. 2 /5/ /2/ of Income Tax (Amendment) Proclamation No. 693/2010. It reads:

> *The Director General of the Revenue and Customs Authority may by a directive prescribe the conditions under which the administrative penalty may be waived, and the amount of penalty that officials of the Authority and the Review Committee are authorized to waive.*

**v) Regional Governments**

In limited cases, the legislature transfers part of its legislative powers to regional governments. Article 24/3/ of Coffee Marketing and Quality Control Proclamation No. 1051/2017 delegates regional states to issue laws necessary to implement the Proclamation.

## 5.7 Mode of Delegating Power

There are mainly four mechanisms by which legislative power is transferred from the House of Peoples' Representatives to the Council of Ministers and Administrative agencies. These are:

General
Special
Establishment and Reorganization
Designation Power

[38] Art. 77/13/ of FDRE Constitution

**General Legislative Power of Implementation**

The general delegation of power is limited to the implementation of the proclamation. "Implementation" may have broad or narrow meanings depending on the scope and content of the proclamation. However, such powers should be understood as limiting the scope of power rather than permitting the power recipient to legislate on matters not indicated in the primary legislation.

Usually, general delegation is specified in the last part of the primary legislation. The following expression is used to delegate a general power of implementation:

> *The Council of Ministers may issue regulations necessary for the implementation of this Proclamation.*

When the delegation is to an administrative agency, the legislature uses a similar expression.

> *The Authority may issue directives necessary for the implementation of this Proclamation and regulations issued pursuant to sub-article (1) of this Article.*

**Special Legislative Power on Specific Issues**

Sometimes a provision in a proclamation delegating legislative power is expressed broadly, and there is little substantive law in the primary legislation. In Australia, this is sometimes called a 'skeleton' legislation, a 'coat-hanger' legislation, or a 'framework' legislation. The basic foundation is in the primary legislation, but the bulk of the law is in the delegated legislation.[39]

When delegation is specific, directives or regulations can only be issued on the specified matter. For instance, according to Article 32/4/ of Investment Proclamation No. 1180/2020, the Investment Board shall adopt a directive determining the procedure for its overall working, the conduct of meetings, the submission of matters it considers, and the rendering of decisions. The Board can issue directives pursuant to this provision only on those specified matters.

**Establishment and Reorganization Legislative Power**

This is delegation of power to the Council of Ministers to create, modify, dissolve, or re-organize administrative agencies. It first appeared in Proclamation No. 603/2008.

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[39] William F. Funk, supra note 35 81 P176

The practice continued and one of the most important powers of the House of Peoples' Representatives has been given away (practically) permanently.

**Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia (Amendment) Proclamation No. 603/2008**

Art. 34. Reorganization of Federal Executive Organs

The Council of Ministers is hereby empowered, where it finds it necessary, to reorganize the federal executive organs by issuing regulations for the closure, merger, or division of an existing executive organ or for change of its accountability or for the establishment of a new one.

**Designation Power**

Designation power is practically a power to define something. In some cases, the statutory definition grants power to an agency to extend or restrict the scope of the defined matter. In most cases, such power is transferred as a decision-making power, not legislative. However, some of the delegations are legislative, like the one mentioned below.

Art. 35/1/ /a/ of Council of Ministers Value Added Tax Regulations No. 79-2002 defines "export country" in the following terms:

*"export country" means any country other than Ethiopia and includes any place which is not situated in Ethiopia, but does not include any specific country or territory that the Minister of Finance may by Directive designate as one that is not an export country.*[40]

Here, the Ministry of Finance is delegated to issue a directive for the sake of designating a country not included under "export country".

## 5.8 Classification of Administrative Rules

Administrative rules may be categorized based on their form and legal effect:

*By their form.* We can distinguish rules according to what a rule is called. In Ethiopia, there are mainly two types of rules depending on their designation. "Regulation" refers to administrative rules enacted by the Council of Ministers. All the

[40] Art. 35/1/ a of Council of Ministers Value Added Tax Regulations No. 79-2002

remaining rules are collectively referred to as "directives". Specific administrative agencies issue them.

*By their character and effect.* The best way to classify rules is in terms of their binding nature. Therefore, we can distinguish rules according to those that are legislative or determine the law and those that are non-legislative or do not determine the law. Council of Ministers regulations and administrative directives issued by agencies are "legislative" and have binding effect, same as laws promulgated by the legislature.

### 5.8.1 The Distinction Between Directives and Administrative Decisions

We have seen that administrative rules are created with a multiplicity of names. This poses a challenge in identifying the line between whether a particular administrative action is a product of rule-making or decision-making activity. When a petition for judicial review is submitted, the Federal High Court entrusted with exclusive jurisdiction of judicial review must determine whether the act the applicant is challenging properly falls under a "directive" or " administrative decision". The need for distinction emanates from the difference in the applicable administrative procedures, the standard of review, and to some extent, the remedy available to the applicant. The legislative activity involves the process of formulating general rules of conduct without reference to particular cases (and usually operating prospectively), while executive action involves the process of performing particular acts, issuing a particular order, or making decisions that apply general rules to particular cases.[41] The High Court of Australia adopted a similar approach. The Court stated that:

> *The general distinction between legislation and the execution of legislation is that legislation determines the content of the law as a rule of conduct or a declaration as to power, right, or duty, whereas executive authority applies the law in particular cases.*

## 5.9 Rule-Making Procedure

The greatest impact of the Administrative Procedure Proclamation is in introducing a universal and mandatory procedure for issuing directives. This is the area where little or no law existed. Agencies were not subjected to any procedure despite the proliferation of directives affecting almost every area of social and economic activities.

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[41] Dennis Pearce & Stephen Argument, Delegated legislation in Australia (LexisNexis Butterworths, 5th edn 2012) P2

Every day administrative sanctions were imposed, or benefits and entitlements were denied based on inaccessible directives. There was no consultation or publication requirement. Due to the lack of publication, there was no way to distinguish a draft directive from a final and effective one.

The proclamation will hopefully solve the problems associated with the rule-making practice. Now, directives are relatively accessible to the public. However, as there is a positive side to imposing procedure, such uniformity creates burdens to effective public administration. The "one-size-fits-all" approach of the proclamation fails to take into consideration the need for flexibility in public administration. The type of rule-making procedure adopted by the proclamation is a formal procedure. There is no informal, less stringent procedure for some directives which may not require public hearing and consultation.

### 5.9.1 Informal and Formal Procedure

Not all countries have written and detailed procedures for rule-making. Even for those with such a procedure, its applicability is limited to a few instances. In the UK, the Statutory Instruments Act (1946) mainly requires the publication of subordinate legislations only to "orders in Council" made pursuant to a statutory power. Other rules, regulations, or orders must be exercised by statutory instrument only when the particular statute states that the power must be so exercised.[42]

In the US, informal notice-and-comment rule-making, which simply provides notice and an opportunity for interested parties to comment on the proposed rule, is by far the most common procedure. The APA provides for formal rule-making to be employed "when rules are required by statute to be made on the record after an opportunity to be heard. Formal rule-making under the APA required the same procedures as formal adjudication, a trial-type proceeding with an administrative law judge, submission of evidence, cross-examination, and the like.

The primary process for promulgating rules under the APA is notice and comment rule-making under APA §553, also called informal rule-making. This is a legislative process designed to allow agencies to formulate legislative rules after receiving input from the public. The principal requirements of informal rule-making are notice, opportunity to comment, and publication of the decision, together with a concise

[42] Paul Craig (2021). Administrative Law (9th ed.). Thomson Reuters P1032

general statement of the basis and purpose of any rules adopted. Agencies have the discretion to supplement the APA's requirements to gather additional input.[43]

The APA requires administrators to follow several important procedural steps when making rules.

First, administrators are required to give public notice of proposed rulemaking by publishing the proposal in the Federal Register (an official daily government publication). To be proper, the notice should include the following:

- The "time, place, and nature" of the proposed rulemaking proceedings;
- The legal basis on which the rules are proposed; and
- A general description of the proposed rule along with an explanation of the issues involved.

Second, agencies are compelled to provide opportunities for "interested persons" to take an active part in the rulemaking process by allowing them to submit "written data, views, or arguments with or without opportunity for oral presentation."

Third, the act specifies that a "substantive rule" should not be allowed to take effect until at least thirty days have elapsed after its public notice.

Fourth, administrators are legally obligated to grant concerned parties "the right to petition for the issuance, amendment, or repeal of a rule."

The agency must also publish a statement of basis and purpose for the final rule, which courts have expanded to require a discussion of the comments received and why the agency accepted or rejected the suggestions.

### 5.9.2 Notice

**Federal Administrative Procedure Proclamation No. 1183/2020**

Art. 8. Noticing

An agency shall publish a notice containing the following information on a newspaper with wide circulation, its website and other media, prior to the adoption of a directive:

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[43] Jack M. Beermann, Inside Administrative Law: What Matters and Why (Aspen Publishers, 2011) P320

> 1/ The legal basis for to draft the law and the subject matters to be covered by the draft;
>
> 2/ Indicating that persons may get a copy of the draft and where they may access it;
>
> 3/ Where, when and how persons may give comments on the draft;
>
> 4/ Where, when and how persons may get access to the records kept in accordance with Article 7 of this Proclamation.

Meaningful consultation requires the disclosure of sufficient information. The purpose of notice under Art. 8 is to provide citizens with clear information to enable them to engage in the rule-making process.

The US Administrative Procedure Act 1946 provides that notice of any proposed rule-making is to be published in the Federal Register, including a statement of the time and place of the rule-making proceedings and the substance of the proposed rule. This is followed by a period during which consultation will be held, and the public's reaction to the proposed rule will be considered.

### 5.9.3 Consultation

Consultation is designed to secure consideration of the rule by interested parties prior to its passage. In England, there is no general duty to consult, imposed by common law or statute. Consultation may be required by the terms of a particular statute.[44]

The principal arguments for participation rights are as follows:

- it enables views to be taken into account before an administrative policy has hardened into a draft rule;
- it can assist Parliament with technical scrutiny;
- it can improve the quality of rules by input from interested parties with knowledge of the area being regulated; and
- allows those outside government to play some role in shaping policy.[45]

Consultation enables those affected by a proposed instrument to consider its likely effect upon them, assess the costs and benefits of an instrument, and influence the shape

[44] Paul Craig, supra note P5 1044
[45] Ibid P 1045

of any proposed regulatory regime. This can result in greater acceptance of the need for regulation by those affected. It is thought that participation can also result in more successful policy outcomes by involving the community in policy formulation and regulation.[46]

In the US, there are three modes of participation, with varying degrees of formality based on the type of procedure. These are:

**notice and comment (informal rule-making)**: Most administrative rules are subject to notice and comment rule-making. Under this procedure, the proposed rule is published, and interested parties can proffer written comments.

**Formal rule-making:** A few rules are subject to a full trial-type hearing, which can include the provision of oral testimony and cross-examination.

**Hybrid rule-making:** Other rules are governed by an intermediate or hybrid process, which entails more formality than notice and comment but less than the trial-type hearing.

### 5.9.3.1 Comment

**Federal Administrative Procedure Proclamation No. 1183/2020**

Art. 12. Time and Manner of Ratifying Directive

> 1/ An Agency may not ratify a Directive before the period for oral hearings and written submissions prescribed under Articles 9 and 10 expires.
>
> 2/ An agency shall consider comments submitted on the draft before ratifying a Directive.
>
> 3/ In fulfilling the obligation to consider indicated under Sub Article (2) of this Article, the agency may amend the draft in line with the comments or prepare a written justification for rejecting the comments
>
> 4/ Prior to ratification of a Directive, the Agency shall send the draft to the Federal Attorney General for its opinion.
>
> 5/ The Attorney General shall submit its opinion within 15 working days. Where the Attorney General fails to submit its opinion within the time prescribed here, it

[46] Robin Creyke et supra note 3 P431

shall be considered as though it does not have opinion on the draft and the agency may proceed to ratification.

Comments, feedback, challenge, objection, or any opinion from interested persons before a directive becomes effective and binding is of great constitutional relevance. Public participation is one of the pillars of the principles of good administration under the FDRE constitution. The informed opinion of stakeholders significantly improves the quality of administrative rules.

There are four stages whereby an agency will collect comments on draft directives. These are:

**a) ring the notice stage.** One of the particulars to be included on the publicized notice of the proposed directive is information regarding where, when and how persons may give comments on the draft.[47] This is the first stage where comments from the public may be obtained. Depending on the agency's instruction on the notice, a comment may be given in writing (in person), through email, fax, or even through feedback or the forum page of agencies web site. There has to be sufficient time for the public to send its comments. The agency itself will determine the time limit. The minimum set by the law is fifteen working days starting from the date of publication of notice. Therefore, it should not be in any way less than fifteen working days.

**b) During solicitation stage.** The agency is not expected to idly wait for comments to come in. It should identify public and private entities most likely to provide suggestions, expert opinions, or recommendations and send the draft to solicit their comment.[48] For instance, the National Bank of Ethiopia, before adopting a directive on banking business, is expected to send the draft to banks and financial institutions.

**c) During public hearing.** The agency should organize a public forum. During this stage, the comments by stakeholders and other interested persons will be shared verbally. However, the Proclamation provides a second chance for those who were unable to submit their written comment during the "notice stage" to forward their comment in writing during the oral hearing stage.

d) **After adopting the final draft.** After all the comments in the above three stages are collected, organized, and analyzed, the agency may incorporate the inputs and re-write the draft accordingly. If there is no substantial change made by the agency in response to comments, a written justification for rejecting the comments should be

[47] Art. 8/3/ of Federal Administrative Procedure Proclamation No. 1183/2020
[48] Art. 9/1/ of Federal Administrative Procedure Proclamation No. 1183/2020

prepared. Once the final content is determined and the directive is adopted by the agency, it should finally be sent to the Ministry of Justice for its opinion.

### 5.9.3.2 Public Hearing

Article 10 of the English version of the proclamation is titled "public hearing". Hearing normally involves listening to arguments or testimony. An oral hearing is the typical feature of the American APA formal procedure. It is not a one-way process where stakeholders express their opinion and agency officials listen or responds to the comments. Hearing in the legislative process signifies submission of written or other evidence, examination and cross-examination of witnesses, and presenting legal and factual and arguments.

Despite the title of Article 8 of the Proclamation, the title of the Amharic version and also the body of both versions indicate that oral hearing is not the intention of the proclamation. For instance, Article 10/1/ states:

> *After the expiry of the date for receiving written comments, the agency shall organize a public forum open for all interested persons and gather inputs.*

Therefore, the "public hearing" is not a trial-like hearing like the APA formal procedure, but simply a discussion forum to collect oral comments. The agency may be involved in the discussion explaining and responding to the comments. However, the process is not adversarial.

### 5.9.3.3 Opinion of the Ministry of Justice

Obtaining the opinion of the Ministry of Justice is the final phase of the consultation process. It is not clear whether the nature of the opinion is limited to the format or substance of the directive. Given the rigid process of consultation the draft has passed, it is unlikely that fresh comments on the merit of the draft will be entertained. There is no reason the Ministry should wait until the final stage of the consultation procedure to submit its comment on the subject matter.

## 5.9.4 Publication

Publication ensures knowledge of the rules. Publishing is not mandatory for all types of rules in most countries. This does not mean it is non-existent. There are still exceptions depending on the nature of the rule and the manner of the publication.

In Australia, for much of the subordinate legislation, the publication requirement is satisfied by the publication of a notice stating that the legislation has been made and where copies of it may be obtained.

Failure to publish affects the validity of a directive since the public would not otherwise have the opportunity to know the law being applied to them.

### 5.9.5 Exceptions and Exemptions

**Federal Administrative Procedure Proclamation No. 1183/2020**

Art. 11. Exemption from Procedures

1/ An Agency may be exempted from the requirement provided under Articles 7 to 10 of this Proclamation where conditions listed hereunder are fulfilled:

a) Where there are emergencies and time does not allow to go through the requirements;

b) Where the issuance of advance notice may be contrary to Public Interest;

c) Where the issuance of notice may undermine the implementation of the directive;

2/ An agency issuing directives relying on Sub Article (1) of this Article shall prepare a record explaining the reasons justifying the exemption.

The Legal and Justice Affairs Advisory Council of the Federal Democratic Republic of Ethiopia Attorney General. (2021). *Explanatory Note for the Provisions of Federal Administrative Procedure Law*. P15-16

> *This provision sets out the specific conditions under which the procedural obligations such as keeping records, publishing notice, and collecting feedback through various means may be waived. The first of these is the urgency of the matter in a context where it is not appropriate to take time to fulfil these procedures. For example, Article 27 (7) of proclamation No. 1097/2011, provides that the Ministry of Health is given the authority and responsibility to "take measures to prevent conditions that may harm the health of the community and when emergency situations occur, it shall provide solution by coordinating with other bodies" Accordingly, if an outbreak (for example, the recent outbreak of COVID 19) occurs in one place, it may be necessary to restrict the movement of people in order to control the spread of the virus, or to issue directives that require special precautions to be taken. In this case, time does not allow to comply with procedures such as sending the draft for comment, setting up a forum for public hearing and others. Thus, the Ministry would be justified to adopt a directive immediately upon finalization of the draft and proceed towards immediate implementation. This is what*

*Article 11(1)(a) is trying to address. One can also think of many other similar situations.*

*Incidentally, it should be noted that the phrase "in case of emergency" in this provision is meant to indicate the urgency of the situation and does not imply the requirement of a formal declaration of "State of Emergency" as enshrined under Article 93 of the Constitution.*

*The second exception is situations where "prior notice may be contrary to public interest". The obvious question this expression begs is, how can transparency harm the public interest? But it can happen occasionally. For instance, for various policy objectives, the Ministry of Trade and Industry may decide the sale of certain basic commodities at prices determined by the Government. Should the Ministry go through the procedures outlined under Articles 7 to 10, regarding consultation, in promulgating the directive outlining the prices, it is highly likely that before the final decision is made, market distortion will be created. As a result, uncertainty may affect the supply of these essential commodities, thereby harming public interest. Accordingly, preparing and adopting these kinds of directives should preferably be exempted from such procedures and be undertaken in a confidential and non-consultative process.*

*The third and final exception is a context where "prior notice will undermine the implementation of the directive." To illustrate: considering that the Government Housing Agency is preparing to issue a directive to sanction those who are illegally sub-letting rental housing to third parties, if one of the measures to be introduced by the Directive is a possibility for lessees of the agency's tenants to enter into a lease agreement directly with the Agency, the disclosure of this planned measure through the consultation process will give the rule-breakers an opportunity to evict their tenants in advance of the adoption of the directive, thereby frustrating its implementation. In such circumstances, agencies should be exempt from the above-mentioned open and public consultation procedures.*

*Nevertheless, here is one thing to bear in mind. A cardinal rule of legal interpretation stipulates that exceptions should be interpreted narrowly. Exemption from public consultation is an exception to the general rules, and hence these exceptions should be applied in a strict fashion. With this mindset, the proclamation stipulates that an agency invoking such exceptions should document a detailed description of the reasons for the exemption (Article 11 (2)). This is to ensure that institutions do not deviate from the procedural obligation by a mere invocation, but rather they should provide detailed*

*justification as to why the specific exemption they are invoking is in line with the objectives for which they are meant.*

*Finally, if an agency adopts a directive by invoking the exceptions while the circumstances to preclude the procedures are not met, it may be instructed to initiate the process afresh, or the directive may be nullified in its entirety, pursuant to the provisions of the proclamation relating to judicial review. In the event that the validity of a directive is challenged on any of these grounds, it is assumed that the documentation of a detailed explanatory statement will help in the trial process by serving as pre-constituted proof.*

## 5.10 Formality Requirements

### 5.10.1 Serial number

Generally speaking, serial numbers are unique identifying codes. They can be strictly numerical or contain letters and symbols as well— the key is that they are a one-off code matched to a single product or component.[49] Usually, a serial number in a directive, just like proclamations, is supplemented by the year or sometimes category of the subject matter. For instance, in a directive issued by the National Bank of Ethiopia, *SBB/84/2022 Reserve Requirement -8th- Replacement, SBB* stands for Supervision of Banking Business. The number 84 is the serial number, whereas 2022 indicates the year of issuance. Similarly, *SIB/57/2022*, is a directive on the supervision of insurance business, the numbers 57 and 2022 representing serial number and year of issuance, respectively.

### 5.10.2 Source of power

The power to make subordinate legislation is derived from the enabling Act, and, fundamentally, that the delegate on whom such a power is conferred has to act within the limits of authority conferred by the Act.[50] A directive must cite the enabling provision on which it is based. The executive lacks inherent legislative power. It can exercise only the power granted to it by the legislature. Disclosure of the source of power creates an easy reference for determining the validity of the directive by a court or any interested person.

In Ethiopia, the source is usually cited in the preamble part of the directive. Proclamations and Regulations also follow the same format.

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[49] Cornelius M. Kerwin; Scott R. Furlong, Rulemaking: How Government Agencies Write Law and Make Policy (CQ Press, 5th edn. 2019) P19

[50] M.P. Jain (2011). M P Jain Principles of Administrative Law. LexisNexis. P41

The following is an extract from *Telecommunications Licensing Directive No. 792/2021.*

TELECOMMUNICATIONS LICENSING DIRECTIVE

WHEREAS a legal framework for licensing that will allow for an effective and efficient licensing process is necessary for the operation of Telecommunications systems, infrastructures, and Telecommunications Services;

UNDERSTANDING the requirement to formulate a framework that allows the Authority to supervise Telecommunications Operators and modify, renew, suspend, and revoke licenses;

RECOGNIZING the importance of distinguishing between the various types of licenses, including class and individual licenses, and the terms and conditions that accompany them;

NOW, THEREFORE, the Authority hereby issues Telecommunications Licensing Directive in accordance with Ethiopian Communication Service Proclamation No. 1148/2019, Articles 6(2), 6(7), 20(2), 20(4), and 52(4)

### 5.10.3 Signature

A signature is one of the most critical elements in the legislative process. Regarding primary legislation (that is, proclamation) Art. 57 of the FDRE Constitution requires proclamations issued by the House of Peoples' Representatives to be signed by the President. The President should put his signature on "laws deliberated upon and passed by the House" within fifteen days of their presentment. If the President does not sign the law within fifteen days, it shall take effect without his signature.[51]

Unfortunately, a similar signature requirement is missing in the Federal Administrative Procedure Proclamation. Before the introduction of the Proclamation, a signature was one of the major problems of directives. Some, if not all, did not bear either the signature of the head of the agency and most of them were not stamped. This negligent practice made it, at times, challenging to distinguish valid and effective directives from merely draft documents.

[51] Actually, it does not "take effect" because a law becomes effective upon its publication on the Negarit Gazette. *See Art, 2/2/ of Federal Negarit Gazeta Establishment Proclamation No.3/1995*. It should be understood to mean failure to sign within the specified time does not affect the validity of its adoption. In other words, it will be still considered as a 'law passed by the House'.

## 5.10.4 Language

Before the enactment of FAPP, directives were not required to be bilingual. Depending on agencies' working language, many directives were being prepared either in Amharic or English. English is, in practice, the official language of the National Bank of Ethiopia and a few agencies. The Bank uses English to communicate with banks, insurers, and other stakeholders and prepare directives regulating banking, insurance, and capital financing business. Amharic is the official language of public administration at the Federal level. Almost all directives are prepared and issued only in Amharic with few exceptions. Even directives that affect foreign business owners, like customs and tax directives, are prepared only in Amharic.

FAAP has tried to correct the unfair practice in the usage of language. Article 15/1/ states that a directive adopted by an agency shall be prepared in English and Amharic. Despite the requirement, the previous practice has continued and agencies are still adopting directives in Amharic or English only. This puts these directives at risk of invalidation if challenged in court. Non-compliance with the procedural rules is one of the grounds for judicial review entailing invalidation.[52]

Before the promulgation of the proclamation, language was not a factor in determining the effectiveness of directives. In CFN 43781 (Volume 10),[53] a directive issued by the National Bank of Ethiopia prepared only in English was denied legal effect by the lower courts. In reversing their decisions, the Cassation Bench ruled that directives produce legally binding effect irrespective of the fact that they are prepared either in Amharic or English only.

## 5.10.5 Registration

**Federal Administrative Procedure Proclamation No. 1183/2020**

Art. 16. Filing of Directive

> 1/ Up on adoption, an agency shall before put on the directives it has sending the copies and accompanying explanatory statement to the Attorney General.

[52] Art. 50 sub art. 1 /c/ and art. 56 sub arts. 2 & 3 of Administrative Procedure Proclamation No. 1183-2020

[53] Applicant Ethiopian Revenue and Customs Authority vs. Respondent Ato Daniel Mekonnen (2002 E.C.)

2/ The Federal Attorney General shall provide a serial identification number and record Directives submitted to it in accordance with sub-Article (1) of this Article. It shall also immediately notify the agency about the status of registration.

3/ The Attorney General shall publicize to the public a filled directive with its explanatory statement since the date of notifying its registration.

4/ All Agencies shall file directives they have adopted prior to the coming in to force of this Proclamation within 90 Days after the coming in to force of this Proclamation by sending copies to the Federal Attorney General

The Legal and Justice Affairs Advisory Council of the Federal Democratic Republic of Ethiopia Attorney General. (2021). *Explanatory Note for the Provisions of Federal Administrative Procedure Law*. P20-21

*One of the main objectives of the proclamation is to ensure that all acts of administrative agencies are done in a transparent manner and respecting the principle of legality. Studies consulted during the drafting phase of the proclamation have shown that there are agencies that are not able to specify how many active directives they have; and are not capable to state whether or not they have directives governing a certain subject matter within their competence. One of the ways to rectify this drawback is thought to be a requirement that all directives be under the custody of a central database. This will facilitate the achievement of a level of clarity about the directives of a given agency in a centralized fashion.*

*The fact that all directives of a given agency are registered and deposited at a central database will allow easy determination of which directives are still active, which are amended or repealed. Moreover, it will be easy to identify which directives are adopted in keeping with the legal requirements from those that are not. That the directives will be registered along with the corresponding explanatory notes is assumed to facilitate accessibility of information for anyone who may have suspicion about the process of their adoption or who many want to simply get a better understanding of the contents of the directives.*

*Agencies should send the directives they intend to implement before the intended date of coming into force. The Attorney General, on its part, has the obligation to assign a serial number and register the directives sent to it as well as promptly confirm the registration to the Agency concerned. This will have a bearing on the date of effectiveness for the directive pursuant to Article 18. Moreover, the Office of the Attorney General has the obligation to publicize and ensure public access to the directives and explanatory notes it*

*compiles. One of the reasons for establishing a central registry is to facilitate easy access to these documents by users.*

*It is apparent that this proclamation only aims to govern the issuance of directives subsequent to its coming into force. However, leaving the rampant mal-administration that existed prior to it, as it then existed, would be extremely unfair and may even jeopardize the reforms that this proclamation aims to achieve. On the contrary, if all directives issued prior to the coming into force of this law were to be required to conform to the procedural requirements of this proclamation, the overwhelming administrative burden it would create is not to be understated. Hence, a middle-ground approach is chosen.*

*Accordingly, all directives that existed prior to the coming into force of this proclamation will only be required to be registered and publicized. This means they are not required to be reissued in accordance with the procedure stipulated by this proclamation. Hence agencies are expected to send to the Attorney General all existing directives for purposes of registration and dissemination within 90 days from the coming in to effect of this law under the pain of loss of validity.2 A joint reading of this rule in conjunction with the stipulations under*

*Article 18 implies that directives that are not duly registered shall become invalid upon the expiry of this period. Should this scenario occur, and a directive becomes invalid, the concerned agency may initiate the directive issuance procedure under this proclamation to adopt it anew if it determines that it still needs such a directive*

## 5.10.6 Explanatory note

American Procedure Act (1946) §553 requires that final rules must be accompanied by a ‘‘concise general statement of . . . basis and purpose.’’ The concise general statement of basis and purpose must explain the agency’s decision on major issues involved in the rulemaking and must provide answers to major concerns raised in the comments.

**Federal Administrative Procedure Proclamation No. 1183/2020**

Art. 14. Explanatory Statement

At the time of adopting a directive, an agency shall prepare a directive explanatory note containing the following:

1/ The objective and legal basis for adoption of the directive;

2/ Where there are differences of content from the draft circulated through notice and the directive adopted, a note explaining the changes and the rationale thereof;

3/ A summary of comments on the draft and measures taken in accordance

The Legal and Justice Affairs Advisory Council of the Federal Democratic Republic of Ethiopia Attorney General. (2021). *Explanatory Note for the Provisions of Federal Administrative Procedure Law*. P17-18

> *To facilitate compliance by the public and to ensure that any ambiguous or vague clause in the directive is interpreted appropriately, any agency adopting a directive is required to prepare an explanatory note outlining the purpose of the directive and the legal basis for the directive. This does not only mean a simple reference to the parent law but a detailed exposition of the objective the directive and its parent law aim to achieve.*
>
> *Furthermore, the explanatory note should be prepared in a manner that allows verification of whether or not the agency took its obligation to consider comments given pursuant Article 12 seriously as well as assess the existence of significant differences in Article 13 above. For this purpose, the explanatory note should outline any discrepancies in the content of a draft directive published for comments and the final one to be adopted, along with a summary of comments and justification for the changes, if any. This is expected to help properly understand the process by which the directive has passed through. It also allows the content to be understood not only by a professional lawyer but also by any literate person, and whenever future reamendment is warranted to the directive, it would serve as an essential document*

## 5.11 Control of Administrative Rule-Making

Despite the risks, delegate legislation has become inevitable due to the need for efficient and effective administration. That is why scholars like Wade describe it as “a necessary evil”.

Subordinate legislation made by the executive is not subject to the same parliamentary and public controls as primary legislation and alternative methods have been devised (in most developed democracies) to ensure that the executive is accountable for the way it discharges its law-making function. The controls include the requirement for executive adherence to statutory procedures, public consultation in

subordinate law-making, the appraisal of subordinate laws by parliamentary committees, and judicial scrutiny of the validity of subordinate laws.

Legislative power by administrative agencies requires an adequate measure of control if it is not to degenerate into arbitrary government.[54]

The justification for control is justified on the grounds of legitimacy. In the opinion of two scholars:

> *Holding those who write rules accountable for the decisions they make and the manner in which they make them is critical to maintaining…democracy. The legitimacy of rulemaking is bolstered considerably when the people are secure in the knowledge that rulemaking is being conducted under the close scrutiny of elected officials and judges sworn to uphold the Constitution and laws of the nation. Mechanisms of accountability can ensure that the original intent of …statutes is truly reflected in implementing regulations. The judiciary, with whom we entrust the structure and operation of a constitutional democracy, can preserve basic legal principles if given the opportunity to examine the content of rules and the processes by which they are formulated.*[55]

## 5.11.1 Procedural Control

Some concerns about delegated legislation may be addressed by the procedures that must be followed in making the legislation. The rule-making procedure of FAPP is meant to ensure transparency, accountability, and public participation in government administration. The duty of agencies to provide sufficient information about the draft directive to the public and the requirements of publication and registration once made is a key step in realizing openness in the administrative process. Without the opportunity to get access to draft and published directives, it will be difficult to hold public authorities who infringe on the individual's right by exceeding their legislative authority.

The requirement that directives be published was a significant development introduced by the Federal Administrative Procedure Proclamation (FEPA) No. 1183/2020, powerfully transforming rule-making towards a more open and accountable administrative process.

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[54] Francisco Esparraga & Ian Ellis-Jones, (2016). Administrative Law Guidebook (2nd ed.). Victoria: Oxford University Press. P15

[55] Cornelius M. Kerwin, supra note 41 P210

## 5.11.2 Parliamentary Control

The House of Peoples' Representatives is the source of rule-making power by agencies and the Council of Ministers. As delegation creates a principal-agent relationship, it is the ultimate responsibility of the principal to ensure that delegated power is used in the interests of good administration and to the benefit of the public. It has a constitutional duty to check delegated legislative power is not abused, does not take away constitutionally guaranteed rights of the individual, is exercised without exceeding the scope of delegation, and compliance with mandatory procedures is achieved.

In addition to controlling the agent, the House also needs to 'supervise' itself and implement procedures and mechanisms to ensure that the nature and extent of delegation are clear and limited to "filling up details". Most importantly, it should continuously re-evaluate its delegation practice to ensure that essential legislative functions are not transferred to the executive.

So, what control mechanisms are available to the House of Peoples' Representatives? Generally, these may be divided into:

**A) Pre-delegation** and

**B) Post-delegation** control mechanisms.

On the pre-delegation stage, i.e., before rule-making authority is transferred to agencies and the Council of Ministers, the House of Peoples' Representatives must, in the course of its deliberations on the proclamation, consider the extent of delegation form of the provision empowering the making of any delegated legislation.

When delegation is given on a subject matter which is clear and specific, it dramatically reduces the risk of abuse. However, it is not practicable to always use narrow language to describe the subject matter to be determined by a directive or regulation as it may curtail the ability of the agency to implement the legislation effectively. Broader discretionary power is necessary to deal with changing and contingent circumstances. What is expected from the legislature is to determine significant issues and leave the details by laying down guiding principles in formulating the regulation or directive.

**Example**

Below is a comparison of some of the manners of delegation to agencies.

**Delegation 1**

Article 5/8/ of Driver's Qualification Certification License Proclamation No. 1074/2018 empowers Federal Transport Authority to:

***determine by a directive*** *national requirements to be fulfilled by training institute for issuance of training institute competency qualification certificate*

**Delegation 2**

**Cooperative Societies Proclamation No. 985/2016**

**Article 7 Formation of Cooperative Societies**

*Sub-art. 2/ The primary cooperative society shall be established:*

*a) by individuals who live or work or engaged in specific profession within a given area; and*

*b) by number of members not less than fifty.*

*3/ Notwithstanding paragraph (b) of sub-article (2) of this Article, the appropriate authority may* ***specify in the directive*** *the minimum number of members of a society based on the nature of the work and economic feasibility; provided, however, that the minimum number of members shall not be less than 10.*

**Delegation 3**

Forest Development, Conservation and Utilization Proclamation No. 1065/2018

**Article 19 Forest Development, Conservation and Utilization**

*Sub-article 8/ Forests that are designated as protected or productive state forests may be given to the community, associations or investors so that they conserve and utilize them in accordance with forest management plan and* ***a directive that issued*** *by the responsible body.*

**Delegation 4**

**Federal Civil Servants Proclamation No. 1064/2017**

> *4/ Notwithstanding sub-article (1)(a) of this Article, the Ministry* ***shall issue directive*** *on circumstances in which young persons above the age of 14 and below 18 may be recruited as civil servants and on the conditions of work applicable to them.*

Prescribing the limits within which the delegate may legislate minimizes abuse of power. However, it is not guaranteed that power will be used within the confines of delegation and for the sake of effective implementation of the parent act. Therefore, there has to be a system that enables parliament to scrutinize regularly and, if necessary, revoke the power it granted to the Council of Ministers or agencies.

The most effective method of control of delegated legislation is carried out during the rule-making process, either at the draft stage or after the publication. The law-maker needs to be informed about the directives and regulations made by the executives. More importantly, it should conduct a review or scrutiny against a clear set of parameters. Parliamentary review or scrutiny of administrative rules takes the form of submitting the rules at the draft stage or after they become effective. If any of the rules are against the intent of the enabling act, they may be annulled or revoked. It is also possible to subject the rules to prior approval of parliament before they become binding.

The procedure and mechanism of submitting administrative rules for approval or disallowance are known as the tabling or laying procedure. It is widely implemented in common law countries, especially England and Australia.

In America, the Congressional Review Act (CRA) was enacted in 1996 to oversee the rulemaking process. The law requires that all major rules be submitted to both houses of Congress and the Government Accountability Office (GAO) at least sixty days before they go into effect.[56] The office's role is to monitor the rules for procedural compliance. The act also empowers Congress to disapprove any rules issued contrary to congressional will. In practical terms, however, Congress can only change a rule through the action of both houses and the signature of the President, similar to any other legislation. Some American states allow or require special legislative committees to review and approve new rules.

In Ethiopia, no specific law requires the submission of directives and regulations to the House of Peoples Representatives either at the draft stage or after they are published. The Federal Administrative Procedure Proclamation No. 1183/2020 also does not contain any provision for a review mechanism by the House.

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[56] Cornelius M. Kerwin; Scott R. Furlong, Rulemaking: How Government Agencies Write Law and Make Policy (CQ Press, 5th edn. 2019) P209

### 5.11.2.1 Tabling (Laying Procedure)

Tabling or laying is a procedure by which delegated legislation is submitted to parliament for review. This allows the parliament to see the use of the delegated power. The procedure enables parliament to either disapprove or disallow the delegated legislation in question if there is a misuse of power.[57] Generally, it may take two forms depending on the final resolution of parliament. These are

A) affirmative laying procedure /resolution/
B) negative laying procedure /resolution/

**Affirmative laying procedure**;[58] is a disapproval procedure that requires prior approval either at the draft stage or after publication. This procedure may take two forms. Accordingly, it may:

require that the delegated legislation be laid before the parliament and not come into operation unless the parliament approves of it or;

allow the legislation to come into force immediately but providing that its continuance in operation is dependent upon a resolution of the parliament permitting that continuance.

**Negative laying procedure /resolution/**; on the other hand, is a disallowance procedure that operates on legislation that is already in force. Under this procedure, the delegated legislation continues to be in force unless parliament decides to revoke or disallow it. There are two ways this could be done. Accordingly, such procedure may:

provide for the delegated legislation to be tabled in the parliament and for it to come into force after a specified number of days unless the parliament resolves that it should not come into operation or;

allow the delegated legislation to commence immediately it is made but requiring that it be tabled and providing the parliament with the right to disallow the legislation, by resolution, at any time or within a specified time.

### 5.11.2.2 Scrutiny

After tabling, the delegated legislation is referred to a specialist scrutiny committee within the parliament. Scrutiny of delegated legislation, specially the tabling procedure, may havean unnecessary consequence if the scope of review is not properly determined.

[57] Dennis Pearce, supra note 41 P58
[58] Ibid P58

Technical matters of expertise are beyond the competence of parliament. Therefore, an effective system of parliamentary scrutiny requires clear parameters. In Australia, the works of parliamentary scrutiny committees are guided by four scrutiny principles.[59]

The standard terms of reference of most scrutiny committees require them to examine whether the delegated legislation is:

A) in accordance with the statute
B) does not have a retroactive operation
C) does not trespass unduly on personal rights and liberties, and
D) does not contain matters more appropriate for parliamentary enactment.

Effective parliamentary oversight hinges on the work undertaken by the specialist scrutiny committees.[60] In UK or Australia, the work of scrutiny committees is of paramount importance. As Parliament does not have enough time and expetise to go through the details of each delegated legislation, it mostly relies on the reports and recommendations of the committees to pass a resolution.

### 5.11.3 Judicial Control

If one is to mention the significant achievements of the Federal Administrative Procedure Proclamation No. 1183/220, it is the transformation of the rule-making procedure and judicial control of directives. Before the proclamation came into force, agencies were not required to comply with minimum rule-making procedures. There was also confusion within the judiciary due to a lack of clear standards of review and remedies they could give to individuals aggrieved by directives issued beyond their scope of delegation.

The issue of judicial control is introduced in this chapter but is taken up in detail in chapters 8 and 9. Here, the discussion will be limited to a brief overview of standards (grounds) of review and remedies.

Unlike the judicial review of administrative decisions, a directive may be challenged not only by a person aggrieved by the directive but also by any person interested person. Art. 46/1/ of FAAP states that any interested person may file a petition requesting a judicial review of a directive. Therefore, the issue of standing is not an obstacle to challenging the legality of the directive.

[59] Dennis Pearce supra note 41 P65
[60] Robin Creyke supra note P34

**Grounds of Review**

In exercising its control function, what the court checks or reviews? In other words, what tests or standards should a directive pass not to be revoked or remanded back to the agency? It is a cardinal principle of judicial review that the substance or merit of directives (also administrative decisions) is beyond the proper competence of the courts. It is not up to the courts to judge whether a particular directive is correct regarding its policy objectives.

For instance, the Alcohol Advertisement and Labelling Directive no. 41/2011 (issued by Food and Drug Administration) prohibits the advertisement of any kind of alcohol through broadcasting or on billboards. Such directives may negatively impact alcohol industries in the country in marketing their products. This, in turn, may entail a reduction of profit which subsequently may affect the employment market and to some extent the economy. On the other hand, alcohol advertising may contribute to the conduct of hazardous activities and negatively impacts the productivity of the youth and society. Whether the benefits of alcohol advertising outweigh the risks and dangers is a policy decision. That policy decision should be left to the legislative and executive branches of government, not to the judiciary.

**Standards of Review**

The proper scope of judicial review is not merit/substance but legality/procedure. The judges are concerned with checking how directives are made, not of what directives are made. Generally speaking, the two fundamental issues to be examined by the courts are:

i) Whether the directive is issued by complying with the general rule-making procedure laid down by the FAAP or other specific statutes

ii) Whether the directive contravenes the principle of legality, that is whether it is beyond the scope of delegation or inconsistent with other laws higher in the hierarchy.

Article 50 of the FAAP lists down the following three grounds or standards of review.

a) It is proved to have failed to comply with the procedural rules provided in Chapter Two of this Proclamation;

b) It is ultravires; or

c) It is contrary to other laws placed higher in the hierarchy of laws.

**Remedies**

Remedy in judicial review refers to the relief the applicant is to be granted. From the court's perspective, it refers to what the court can do when a directive fails to pass one of the standards of review stipulated under Article 46 of FAAP. A directive failing to comply with the prescribed procedure, contravening higher law or exceeding delegation power will not produce any legal effect. Therefore, it will be revoked or annulled by the court. The revocation may be total or partial.

## 5.12 Rule-Making Procedure and Practice in Some Administrative Agencies

### 5.12.1 Ministry of Revenue

**Initial Drafting Stage**

The initial stage of rule-making in the Ministry begins with a request to issue a new directive or revise an existing one. This may come from various working units. Sometimes, though rarely, initiation might also originate from the legal service directorate's motion. These being the possible sources of the request, later on, the proposal will be presented and discussed further to develop the content and form of the draft directive, and finally, it will be approved by the higher officials of the Ministry.

Legal experts of the Ministry play a pivotal role in shaping the content and form of draft directives. The Ministry's task of preparing a directive is inherently entrusted to the Legal Service Directorate. Legal experts play a paramount and significant role in the process from the early inception to the final adoption of any directives.

**Compliance with Administrative Procedure Proclamation**

The Ministry, per information eceived from respondents, prepares directives by strictly following the procedural requirements of the proclamation. Regarding the possible means through which new or revised directives are publicized to stakeholders, respondents indicated that posting on the institution's official website is the most commonly used platform. The Ministry also dispatches to stakeholders written documents such as leaflets and brushers (though not widely accessible enough) whenever they come to the Ministry in search of other services. However, respondents admitted that so far, the ministry is lagging in disseminating directives and very recently the Ministry has taken clear direction to work more on making directives accessible in any form possible.

**Consultation**

In addition, respondents were asked whether there is consultation with stakeholders in of rule-making or directive preparation. On this point, respondents affirmed the aforementioned concern. To this end, they explained the working experience of the Federal Ministry of Revenue in terms of engaging stakeholders and wider communities at large. For instance, they indicated a trend in the Ministry to invite stakeholders to discuss and enrich the draft directive as much as possible. However, they also admitted that there are still challenges to engaging the wider public in the rule-making process. From the part of the general public, a good case in point is the problem of being reluctant to actively take part in the process of directive adoption. For instance, the Ministry usually blames C-Level Taxpayers for being unavailable to discuss draft directives that would likely affect their interest. While A-Level taxpayers (particularly, importers and exporters, manufacturers, and such) are relatively appreciated for their responsiveness. This is perhaps due to the amount of tax they are supposed to pay, which makes them very much attentive to the rule-making process.

Respondents also indicated that the Ministry seriously considers the comments and opinions of stakeholders to be incorporated into the final rule adopted, so long as they find them convincing and feasible.

**Publication**

As far as the publication of directives is concerned, respondents indicated that there is yet to be an official mode of publication of directives. They also added that a mandatory procedure requires the Federal Ministry of Revenue to send the first draft of any prospective directive to the Ministry of Justice. Finally, after incorporating comments, it will be returned to the Ministry of Justice for registration, where it will be given an official number for reference.

**Mechanism of distinguishing directive from other types of legal instruments**

One final question that was posed to the respondents was the mechanism employed to distinguish between directives and other legal instruments like manuals, guidelines, standards, codes, and the like. Respondents explained that a directive, by its very nature, offers rights and imposes duties on service providers and recipients, whereas the other documents are commonly used only for internal reference and evaluation purposes. At times, according to respondents, they may also serve as the means of communication among multiple working units within the Ministry.

## 5.12.2 Food and Drug Administration

### Initial stage

Request for the preparation or revision of a directive in the Food and Drug Administration may originate from various departmental units or the Legal Drafting and Medico-Legal Directorate. Following a formal request, the proposal will be presented, discussed, and finally decided by the higher officials of the Administration.

The Legal Drafting and Medico-Legal Directorate leads the shaping and drafting of directives. The legal team is involved from the early inception to the final adoption. As with the Ministry of Revenue, legal experts play a pivotal role in the rule-making process.

### Compliance with Administrative Procedure Proclamation

Based on respondents from the Administration, rule-making is practised in conformity with the procedural requirements of the proclamation. To make a draft directive accessible to the public for subsequent consultation, posting the preliminary draft on the Administration's official website is the most commonly used means of communication.

In some cases, the written copy will be sent directly to stakeholders. When the full copy is not distributed, the Administration will prepare leaflets and brochures to distribute to public and private institutions with working relationships with the administration. Most of the time, they will not be sent to stakeholders, but a copy will be freely provided whenever they come to the agency in search of other services.

### Consultation

There is a strong culture of conducting a consultation on draft directives. Stakeholders are invited to express their opinions and raise their concerns and objections. The Administration uses comments and suggestions to enrich the draft directive. However, per the respondents, there are still pervasive challenges to engage the wider public in the process of rule-making. The problem of reluctance to actively take part in the process of directive adoption, from the part of the general public, is the most notable. They also indicated that the Administration takes into account the comments and opinions of stakeholders and incorporates them into the final rule adopted so long they are found persuasive and justified.

**Publication**

As far as the publication of a directive is concerned, respondents made it clear that there is not yet an official publication in its strictest sense. They also added that there is a mandatory procedure that requires the agency to send the first draft of any prospective directive to the Ministry of Justice. Lastly, after incorporating comments, it will be resent to the Ministry to be registered and given an official number for reference to be cited as a formal legal document since then.

**Mechanism of distinguishing directive from other types of legal instruments**

One more final question posed to the respondents refers to how the agency distinguishes between directive and other types of legal instruments like manual, guideline, standard, code, and the like? In response to this question, they stated that a directive from its basic characteristics offers rights and imposes duties for service providers and recipients while other documents like guidelines, standards, and codes are commonly used only for the agency's internal reference and evaluation purposes.

## 5.13 Summary

Rule-making is the single most important function performed by agencies of government. Rule-making refines and, in some instances, defines the mission of every government agency. In so doing, it provides direction and content for budgeting, program implementation, procurement, personnel management, dispute resolution, and other important government activities. Rules provide specific, authoritative statements on the obligations the government has assumed and the benefits it must provide.

The practice of enacting binding legislative instruments by agencies through delegation by the legislature is described by different terminologies. Rule-making, delegated legislation, subordinate legislation, and secondary legislation are some of the terms used to describe the process and the product of the process. 'Delegated legislation' is a convenient general description for a legislative instrument made by a body to which (or a person to whom) the power to legislate has been delegated. This description necessarily involves being able to identify two things: first, a form of delegation, and, second, an instrument that can be described as 'legislation' or as being 'legislative' in effect. In Ethiopia, the form of delegation is mainly general power implementation or specific delegation on limited matters.

In principle, making laws by unelected officials contravenes the basic principle of separation of powers. At the early stage of the introduction of rule-making in public administration, there was a strong objection by scholars and jurists. In addition to the separation of powers, the principle of non-delegability of legislative power tried to challenge delegation by the law-maker. There is no doubt that arbitrary exercise or

abuse of rule-making powers by the Executive may constitute a threat to the liberty of citizens, but it will be futile to oppose delegated legislation because of the possibility of its abuse.

The scarcity of time and knowledge, including the technicality of detailed laws, have practically justified the objections against delegation. To minimize the potential dangers of delegation, it became necessary to devise procedural rules and other control mechanisms to ensure that power is used within the limits of delegation.

The rule-making procedures are, to some extent, similar to the law-making procedure of parliament. However, due to the need for flexibility and informality in public administration, they are applied with varying degrees and formality.

The Administrative Procedure Proclamation, enacted in Ethiopia for the first time, is a historical legal instrument aimed at protecting individual and collective rights and freedom and avoiding arbitrariness in public administration. The proclamation mainly requires notice to the public about proposed rules. It also guarantees public participation by requiring the agency to solicit comments from the public and stakeholders. Finally, the proclamation imposes an obligation on agencies to publicize their final directive on their website. Registration is also mandatory for the directive to produce a legal effect.

## 5.14 Glossary

**Affirmative procedure:** (In England and Australia) A parliamentary scrutiny procedure under which delegated legislation requires the active approval of the House of Commons and in most cases also the House of Lords.

**Delegated legislation:** Law made by the Council of Ministers and administrative agencies using delegated powers granted to them by the House of Peoples' Representatives.

**Explanatory statement:** A document produced by the agency adopting a directive containing:

The objective and legal basis for the adoption of the directive;

Where there are differences of content from the draft circulated through notice and the directive adopted, a note explaining the changes and the rationale thereof

A summary of comments on the draft and measures taken in accordance

**Rule-making:** The process that the executive and agencies use to create, or promulgate directives or rules.

**Laying before the table:** (In England and Australia) to make a motion for the permanent disposal of a bill, resolution, amendment, appeal, or motion.

**Regulation:** law issued by the Council of Ministers using delegation by the House of Peoples' Representatives.

**Directive:** law issued by administrative agencies using delegation by the House of Peoples' Representatives.

## 5.15 Review Questions

1) In not more than two paragraphs, explain what you understand by the following statement.

> *There is no doubt that arbitrary exercise or abuse of rulemaking powers by the Executive may constitute a threat to liberty of citizens, but it will be futile to oppose delegated legislation because of the possibility of its abuse.*

2) Assume you are working as a public prosecutor in the Ministry of Justice. Your main task is the registration of directives as provided in the Administration Procedure Proclamation No. 1183/2020. Prepare a checklist that ensures the registration process complies with the requirements of the Proclamation.

3) When considering the practical reality in Ethiopia, the lack of qualified personnel is one of the key problems within administrative agencies. On the other hand, nowadays, most members of the House of Peoples' Representatives have at least a first degree, and even a few have a second or third degree. Therefore, in the Ethiopian situation, how can expertise still be a valid justification for the delegation of legislative power?

4) Let us assume the agency issued the following standards pursuant to its delegated power:

i). Ethiopian aerial photographing standards
ii). Ethiopian geospatial information professional standards

Are the above two standards subject to the rule-making procedure of the Administrative Procedure Proclamation?

5) Should it be for the House of Peoples' Representatives to choose, without limitation or guidance, what rules to put in a statute and what subordinate rules can be developed by the executive? If there is a need for limitation, should it be included in the Constitution or be determined by primary legislation (such as a Proclamation)?

6) In Ethiopia, which organ has the mandate to examine and decide on the extent of delegation given to the Council of Ministers and administrative agencies?

7) From where do agencies derive their authority to make directives? What about the Council of Ministers?

8) It is true that, if the law-maker could be more specific in the substance of its delegations of authority to implementing departments and agencies, the risk of abuse will be diminishes to a greater extent? However, being specific brings its own challenges. Discuss the challenges associated with using specific language in delegating power.

9) Relate the following terms and phrases to the types of laying procedures.

- antecedent safeguard
- draft delegated legislation
- effective (in force) delegated legislation

10) What is the effect of repeal of the primary statute (proclamation) that delegated legislative power with respect to:

A) The power of the delegated organ to make subsequent administrative rules?

B) Validity of rules made prior to repeal?

11) **Explain**

*Administrative legislation is traditionally looked upon as a necessary evil, an unfortunate but inevitable infringement of the separation of powers. But in reality, it is no more difficult to justify it in theory than it is possible to do without it in practice.*

12) Why is it important to make a distinction between directives and decisions?

13) The following assertion is from Kenneth F. Warren, *Administrative Law in the Political Process*

*The reality is that legislators, as well as judges, realize that formal rulemaking normally "does not work"; consequently legislators have tried to write legislation that does not statutorily require formal rulemaking, while judges have handed down decisions allowing agencies to escape having to employ formal rulemaking.*

Do you agree that formal rule-making normally "does not work"? If yes, explain the impact of formality in rule-making on the efficiency and effectiveness of government administration.

14) If a directive is issued without following the mandatory procedure of the proclamation, the consequence is invalidation by a court. The definition above requires observance of the rule-making procedure whenever a directive is repealed by the agency. When a directive is invalidated by a court due to procedural defect or lack of power (ultra vires), the directive ceases to produce any legal effect. Similarly, the act of repeal also revokes an existing directive, denying it any legal effect. However, in terms of the applicable procedure, there is a significant difference between the two. Whereas invalidation by a court is not subject to rule-making procedure, the agency is legally required to follow the rule-making procedure before repealing the directive.

Is there any valid justification for why an agency should be forced to follow a rule-making procedure to repeal an existing directive?

15) After reading the following circular issued by the National Bank of Ethiopia, determine whether it can be categorized as a "directive".

**National Bank of Ethiopia**

Ref: V/GOV/FIS/006/2020

Date: June 01, 2020

AH Microfinance Institutions

Ethiopia

Dear Sir/Madam,

**Subject: Circular No. MFISD/01/2020**

The outbreak of Covid-19 pandemic in countries around the world including Ethiopia has seriously affected individuals, businesses, corporations and the overall economic activities in different sectors that resulted in closure or reduced operation of businesses, rise in unemployment and reduced income of individuals. In response to this pandemic and in order to mitigate its effect, in addition to measures already taken by the National Bank that include availing short term financing facility through Development Bank of Ethiopia for the microfinance sector, it has become necessary to take further actions and also temporarily relax

some of the regulatory requirements to enable MFIs to help their borrowers in managing their debt. Accordingly, the National Bank hereby:

• encourages microfinance institutions to fully implement the existing NBE Directives that provide for renegotiation i.e., restructuring or rescheduling of loans and advances for sectors that have been hardly hit by the impact of Covid-19 through undertaking case by case assessment and decision-making at the discretion of each individual microfinance institution in a responsible manner. This is applicable to performing loans that have not been past due for more than 90 days as of March 31, 2020.

• temporarily suspends the requirements stipulated under Article 8.2.2, Article 8.2.3 and Article 9.2 of NBE Directives No. MFI/28/2016 for categorizing restructured loans as substandard loans, i.e., exempting MFIs from holding provision that have been required otherwise on same;

• temporarily suspends Article 6.1 and Article 6.2 of NBE Directives No. MFI/28/2016 that set out the maximum limit of 1% for a single borrower and 4% for group of borrowers, i.e., only for one time advancement of working capital loans to ensure continuity of viable businesses of existing customers in case borrowers have reached their maximum borrowing limit.

• temporarily suspends the requirement stipulated under article 7.4 of Establishment and Operation of Credit Reference Bureau Directives No. CRB/02/2019 that requires for updating of credit information to the credit reference system for those borrowers impacted by Covid-19 and whose credit standing as a result has been downgraded to substandard or more severe classification. However, it is proposed that the updated information with the actual/real status of the loans shall be separately submitted to the Credit Bureau for information and follow up purpose; This is, therefore, to inform you of the above direction and temporary relaxation of some of the regulatory requirements that shall be effective from June 01 - September 30, 2020 and be applicable only to those borrowers affected by the impact of Covid-19 for your implementation.

Sincerely Yours

16) Are public notices in the following two cases binding rules?

A) Where the Ministry of Agriculture grants a plant breeder’s right, it shall give public notice in mass media having wider circulation.

B) Where it is ascertained that the generation, transmission, distribution, and sales licensee is not providing service as per the determined service standard, the

Ethiopian Energy Authority shall issue a written notice to the licensee and give sufficient time for corrective action.

17) Income Tax (Amendment) Proclamation No. 693 /2010 authorizes the Director General of the Revenue and Customs Authority to prescribe, through a directive, the conditions under which administrative penalty may be waived, and the amount of penalty that officials of the Authority and the Review Committee are authorized to waive. Do you think this power is essential legislative function which should not be delegated?

18) In light of the practical justifications for delegation, does the House of Peoples' Representatives delegating itself to issue directives or regulations exhibit any rationality?

19) Do you think the delegation of establishment and reorganization powers to the Council of Ministers is constitutional?

20) In the above regulation, the Ministry of Finance was delegated legislative power not by the House of Peoples' Representatives but by the Council of Ministers. The Council of Ministers itself issued the regulation based on delegation from the House of Peoples' Representatives. In other words, the delegation by the Council of Ministers is a sub-delegation. Does delegation of power to one entity allow sub-delegation to another organ?

21) One critic of formal rule-making, Bernard Schwartz, asserts in sharp prose that formal trial-like procedures:

> "*are out of place in rulemaking. They imprison a legislative process within a formal strait jacket designed for an entirely different type of proceeding and may produce a virtual paralysis of the administrative process.*"

Do you agree?

22) According to Article 8 of the Proclamation, the mode of publication of notice is:

newspaper with wide circulation;

agency website; and

other media.

23) Are these alternative modes of publication presented as options or are the provisions requiring notice to be published through all three modes?

24) Do you see any problem in issuing directives that are not bilingual?

25) In the Ethiopian context, what standards do you think should be included if the the House of Peoples' Representatives is to adopt the laying procedure?

26) Which principle of the constitution dictates the courts not to interfere with the substance/merit of a directive?

## 5.16 Further Readings

Dennis Pearce & Stephen Argument, *Delegated legislation in Australia* (LexisNexis Butterworths, 5th edn 2012) P108-256

Cornelius M. Kerwin; Scott R. Furlong, *Rulemaking: How Government Agencies Write Law and Make Policy* (CQ Press, 5th edn. 2019) P39-68

Keith Werhan, *Principles of Administrative Law* (Thomson West, 2008) P218-268

# CHAPTER SIX

# MECHANISMS OF CONTROLLING POWER

## Chapter Overview

This chapter explains the mechanisms for controlling administrative agencies. It first explains the democratic and constitutional basis for controlling administrative agencies and the modalities that exist to control administrative decision-making and rule-making. It then explores the major ways of controlling the agency so that individual rights and liberties are protected.

### LEARNING OUTCOMES

After studying this chapter, you will be able to:

- Elucidate the democratic and constitutional bases for controlling governmental power.
- Explain how the parliament controls the executive branch and administrative agencies
- Discuss the role of the Ombudsman and Human Rights Commission in controlling governmental power
- Examine the significance of the Ethiopian Human Rights Commission and Ombudsman in protecting human rights and promoting good governance.
- Identify the procedure of initiating and investigating complaints by the Ombudsman and Human Right commission.
- Discuss the possible remedies for an aggrieved party of maladministration and human rights violation

**Chapter Table of Contents**

6.1 **Introduction** ..... **212**
**6.2 Democratic and Constitutional Basis** ..... **213**
**6.3 Controlling Modalities** ..... **214**
6.3.1 Internal control ..... 214
6.3.1.1 External Control ..... 215
**6.4 External Controlling Mechanisms in general** ..... **215**
6.4.1 Parliamentary control ..... 216
6.4.2 Control by the Executive ..... 216
6.4.3 Control by administrative tribunals ..... 217
6.4.4 Control by the Judiciary ..... 219
6.4.5 Control by Human Rights Commission and Ombudsman ..... 220
6.4.5.1 Control by Human Rights Commission ..... 220
*6.4.5.2* Control by Ombudsman ..... 221
6.4.6 Control by the Mass Media ..... 222
6.4.7 Control by Civil Society ..... 223
**6.5 The Supervisory Power of the House of Peoples' Representatives** ..... **224**
**6.6 The Ombudsman Principle** ..... **227**
6.6.1 Definition ..... 227
6.6.2 Characteristics ..... 228
6.6.3 Investigation Procedure and Access to Information (Human Right Commission and Ombudsman) ..... 230
6.6.4 Remedial Measures taken by Human Right Commission and Ombudsman 231
**6.7 Summary** ..... **233**
**6.8 Review Questions** ..... **234**
**6.9 Glossary** ..... **235**
**6.10 Further Reading** ..... **236**

## 6.1 Introduction

The nature, exercise, and control of administrative agencies is a fundamental concern of administrative law for various reasons discussed below. Administrators must be checked in exercising their broad powers in case their shortsightedness or overzealousness leads to unwise policies or unfair or oppressive administrative decisions.

The social imperative for control of agency power is entirely consistent with existing institutional arrangements in the context of separation of power. If one believes that the more important the legal decision, the greater the need for a check inside and outside the agency, increased control seems appropriate.

Controlling mechanisms enable people to test the legality and merits of decisions that affect them; They provide devices for guaranteeing that the government acts within the ambit of its powers; They provide mechanisms for achieving justice in individual cases in the event of a miscarriage of justice occurs; and they also contribute to the

accountability system for government in general and agencies in particular in decision-making, rulemaking, and adjudication.

Thus, administrative law sets the controls by prescribing the conduct of agency action and providing for review or appeal for aggrieved parties.

## 6.2 Democratic and Constitutional Basis

As democratic theory demands that all public servants elected or nonelected be accountable to the people, it requires specific oversight mechanisms so that administrative behaviour can be watched, regulated, and controlled. This comes from the principle of constitutionalism and democracy developed in the democratic traditions, thereby requiring the creation of accountability and controlling the organs of government.[1] This is because a government should not only be sufficiently limited in a way that protects its citizens from arbitrary rule but also that such a government should be able to operate efficiently and in a way that it can be effectively compelled to operate within its constitutional limits.

True, within the vast field of government, questions often arise about the sources of administrative power, the adjudication of disputes arising out of the public services, and, above all, the means of securing a system of control over the activities of government which maintains an acceptable balance between public needs and the private interests of the individual.

Thus, the idea of a limited government in its action and accountability to its citizens for its actions is becoming a modern and democratic concept. That is to say, in addition to the traditional functions of the government, which are ensuring law and order, standard setting, and quality control and monitoring have been among the responsibilities of modern governments. The control of Administrative agencies can be defined as the power of supervision and correction exercised upon it by the Judicial, Legislative, and Executive Branches seeking the adherence of their practice to the legal system. As said above, this power emanates from the constitution or adherence to democratic norms since every constitution requires accountability and transparency of government officials and activities. Thus, Administrative agencies are necessarily at the centre of tugging and hauling by the legislature, the executive branch, and the judiciary, each of which has different means of exercising political control over them.

It is said that in addition to express and implied power vested in agencies, they are also entrusted with discretionary power, which poses an inevitable threat to individual

[1] Warren, K. (2019). Administrative Law in the Political System: Law, Politics, and Regulatory Policy. Routledge. P. 105

freedom and liberty unless properly controlled or regulated. This is because, as Montesquieu noted, where different powers are exercised by the same person or in the same body, it can lead to arbitrariness and abuse of power. 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 of legal and institutional mechanisms that are effective to control the arbitrary exercise of powers.

The principle of separation of state power is believed to be the solution as it advocates a clear separation of power among each organ of government and a way for controlling abuse of power. However, it has become impossible to bring clear separation in practice as agencies are entered with the three powers derogating such principle and, in reality, there is no move for the pure separation of state power. Thus, various controlling mechanisms may persuade agencies to use the public power entrusted to them properly and only in the public's interest.

## 6.3 Controlling Modalities

Control is the faculty of supervision, guidance, and correction that one branch of government, agency, or authority exercises over the functional conduct of another. There are two controlling modalities of the actions of administrative agencies. These are internal control and external control.

### 6.3.1 Internal Control

For administrative convenience and efficiency, administrative agencies usually have internal structures and hierarchical relationships within the agency. Internal control is a kind of administrative control derived from the power of self-control that authorizes an agency to revise or reverse town decisions. This review by the agency itself is also called an internal review. Accordingly, an internal review is the process by which original agency decisions are reviewed on their merits within the agency. An internal review comes as a result of control set within the organizational structure of the various administrative organs of the government. Internal control is fitted in the machinery of public administration and exists in every section, branch and department of public administration. Thus, internal control is materialized in surveillance action directed to public administration practices contextualized within the monitored agency's structure. In so doing, decisions will be reviewed if found to be defective based on the merits of matters of law or defective administrative process/procedure.

In that regard, decisions of the authorities within the lower structure of the administrative hierarchy are subjected to review by those in the next upper hierarchy. This type of review gives an opportunity for agencies to reconsider their decisions and rectify the mistakes, if any.

Internal control systems can be created formally or informally. A formal controlling system is created through the legislation creating the agency or executive order. An example of a formal complaint hearing organ is established by the Food and Medicine Administration Proclamation No. 1112/2019. Art. 66 of the Proclamation states complaint-handling organ shall be established by the executive organ or regional health regulator to handle complaints when a regulated person believes that any administrative measure that was taken on its product, institution or itself, or the denial of a legitimate service under this proclamation inappropriate, not proportional or illegal.

The same holds true concerning the compliant hearing body/committee established in accordance with Article 18 of Proclamation no.1161/2019 and Article 71 of The Federal Civil Servants Proclamation No.1064/2017.

An informal controlling mechanism is created where there is no statutory created internal review mechanism. It is common for an informal internal review system to be established on an administrative basis within government agencies in case certain grievances are presented on a given decision. Similarly, Article 44 of the Federal Administrative Procedure Proclamation requires all administrative agencies to establish a complaint-handling division and notify clients of such establishment.

#### 6.3.1.1 External Control

External controls assume a special significance in a democratic setup. Democracy and constitutionalism are not satisfied with only internal controls but expect the officials to be responsible and responsive to public opinion. Thus, the public official is accountable and responsible to the Legislature, Executive, and Judiciary, as well as the people and organs that reflect the public's voice. External control is different from internal control as a system of control of the power of agencies by external organs. Thus, external control refers to the various checks and controls imposed by other authorized bodies outside the structure of such agencies. In general, external Controls are organizational arrangements that operate from outside the boundaries of particular government departments, to ensure effective and efficient performance in public sector agencies.

## 6.4 External Controlling Mechanisms in general

External controlling mechanisms include:

Parliamentary control,

Control by the executive,

Control by administrative tribunals,

Judicial control,

Control by the Human Rights Commission and the Office of the Ombudsman, and

Control by the mass media and civil society.

## 6.4.1 Parliamentary Control

It is said above that delegating powers to administrative agencies promotes efficiency and effectiveness in the administration and implementation of public policies. It is also said that there should be a safeguarding mechanism so that such power is not misused or abused. One such safeguarding mechanism is parliamentary control/control by the legislature. The cardinal principle of the parliamentary form of government is parliamentary supremacy, where the executive is responsible to the legislature. This is because every delegate is subject to control and oversight by the principal, and the exercise of such delegated power can be directed, reviewed, or annulled by the principal. Hence, parliamentary control over delegated legislation should be a continual exercise as long as legislative power is delegated.

In that regard, the parliament has to ensure that all necessary precautions are taken that the enabling legislation/parent act does not devolve wide delegated powers that may be difficult to control. That is to say, the parliament in the parent legislation has to provide decisions regarding the character of work to be undertaken and the means to be employed in performing such work; giving the necessary direction for its performance; and subsequently exercising such supervision and control over the persons to whom the work is entrusted as will ensure that it is being properly and efficiently done. Sometimes the legislature may also determine the nature and extent of administrative organization, the methods and procedure of work and the funds to be made available to the administration for carrying the policy into practice.

Having said this on the general controlling system by the parliament, the later topics will discuss in detail how such control by the parliament/legislature is exercised.

## 6.4.2 Control by the Executive

It is repeatedly said that expansion in administrative agencies' authority has resulted in a massive migration of policy decision-making from legislative bodies to executive branch agencies for various reasons. It is also said that this power shift requires proper way of control over administrative decision and rule-making. Thus a well-recognized executive control mechanism requires agencies to conduct their duties effectively and efficiently. Regulatory analysis has become a catchword for executive policymaking. It serves several purposes, including regulatory relief in response to political pressure for less regulation, bureaucratic accountability, and more rational decision-making.

When agencies are created by statute, the statutory text is the best indicator of the intent of the legislature concerning how much control the executive /President/Council of ministers/Prime Minister has in any given agency. Accordingly, it can be said that in Ethiopia, the Prime Minister's power with respect to any given agency is determined by reference to the agency's enabling statute. In so doing, the executive (the council of ministers or the Prime Minister) will create different systems to evaluate the activities and the actions of each ministry and department. In relation to this, Article 77/2/ of the FDRE Constitution provides 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."* By the same token, the *Prime Minister has a duty to exercise the overall supervision over the implementation of policies, regulations, directives and decisions adopted by the Council of Ministers under Article 74/5/ of FDRE Constitution.* Thus, the executive branches of the federal government and also regional states have introduced oversight mechanisms to control agency/bureaus activities and decisions. This includes the recently introduced Council of Ministers' 100 Days Performance Monitoring System.[2]

The executive organ may also exercise some indirect control over the so-called independent agencies that are accountable to the Legislative organ of the government. Article 74(7) of the FDRE Constitution is worth mentioning. It provides that "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." From this, it can be understood that the executive organ of the government (the Prime Minister and the Council of Ministers can also have indirect control over the independent agencies.

### 6.4.3 Control by Administrative Tribunals

With the increasing complexity of the state and the issues for which resolution must be achieved, the use of tribunals to determine matters of general public importance has been one of the ways in which the state has dealt with such issues.

Of course, no definition of 'tribunal' can adequately capture the range of bodies to which the term is applied and distinguish tribunals from courts and the ordinary agencies of government. This is because courts and be also defined as tribunals that have the power to make decisions affecting the rights and interests of individuals. Thus, the legal meaning of the term is broader than its use in ordinary speech. However, Tribunal can be understood as any official body with the power to make decisions or a body that has the right to entertain first instance jurisdictions or appellate jurisdiction

[2] 100 Days Performance Report, https://pmo.gov.et/performance/public/3/1/

over an administrative dispute and gives decisions "on merits" therefrom that would affect the rights and interests of individual's accordance with procedures laid down by law.

The arguments for establishing tribunals to deal with specific categories of dispute rather than giving jurisdiction to the ordinary courts are usually for one or more of the following reasons:

- Tribunals can operate more flexibly and informally than courts. This makes them more accessible to parties and saves costs by reducing the need for parties to have legal representation.
- Tribunals can be staffed by members with specialist skills and expertise in areas other than law. This makes tribunals an attractive forum for decision-makers in specialized areas such as planning and disability assessments.
- From the government's perspective, the staffing of tribunals is more flexible than for the courts.

Besides, it is said above that there are internal review mechanisms where the responsible government agency reviews the merits of a decision made by one of its officers. In addition to this discretionary and ad hoc internal review, administrative review tribunals were created in some jurisdictions to review decisions "on the merits". Accordingly, review by a tribunal is the process where an independent body, separate from the responsible government agency, reviews on the merits a decision made by the primary decision-maker or the review officer of the agency. The external review body can usually substitute a new decision if the decision under review is found to be defective in matters of law, merits, or administrative process.

Thus, the objectives of merits review indicate a tension between the need to ensure individual justice through a process of open and accountable government and the demands of administrative efficiency and justice. Hence, Tribunals are another major component of the administrative justice system. Some tribunals are part of the civil justice system such as employment tribunals (the labour board) in accordance with Article 145 of the Labour Relation Board established in accordance with Proc. No 1156/2019.[3] Tribunals that belong to the administrative justice system are, in effect (although not technically), administrative courts. The most important of these are Tax Appeal Commission, and Appeal Hearing Council, established in accordance with Article 86 of Federal Tax Administration Proclamation No 983/2016[4] and Article 18 of

[3] Labor Proclamation, Proclamation No. 1156/2019, Federal Negarit Gazette No. 89, 5th September,2019

[4] Federal Tax Administration Proclamation No. 983/2016 Federal Negarit Gazette No. 103, 14th August ,2016

Proclamation on Expropriation of Land Holdings for Public Purposes, Payments of Compensation and Resettlement Proclamation No. 1161/2019[5], respectively.

### 6.4.4 Control by the Judiciary

As discussed in previous chapters, in any constitutional and democratic system, separation of power requires the division of power among the three organs of government to promote the rule of law democracy by monitoring situations that give rise to abuse of power and dictatorship. This is because, as discussed in a very detailed manner earlier, the concentration of powers in the hands of one organ or person is the primary cause of such abuse and dictatorship. Thus, separation of powers among the different organs of government is not to create three empires where each organ is vacant and do whatever it pleads but rather to create an effective system of checks and balances among each organ of the government (the legislative, executive and judiciary).

In the previous topics it was discussed how Parliament/legislation checks the legality of administrative actions by (a) by conferring new jurisdiction on the ordinary courts; (b) by creating new machinery in the form of a tribunal, sometimes with the right of appeal to a higher tribunal or to the courts; or (c) by leaving decisions to be made by the administrative bodies responsible for the scheme. It is also discussed that the possible variants in solution (c) may require (i) allowing an individual to seek review at a higher level within the same public body of a decision that he or she does not accept; (ii) providing for an appeal to another administrative body. Whether or not any provision of these kinds is made, the judicial review procedure is potentially available to supervise the legality of decisions. This is because, although there are practical factors favouring the use of tribunals over the courts[6], this does not, however, exclude the importance of the judiciary in reviewing the decisions of administrative agencies or even quashing the laws enacted by these agencies. An injunction is an effective method and example of judicial control of administrative action where the authority has acted without jurisdiction, has abused its jurisdiction, or has violated the principles of natural justice.

The theoretical rationale for judicial control of government behaviour derives from parliamentary sovereignty and separation of powers. This requires the government may only perform those tasks that Parliament/legislations permit. The court's constitutional

[5] Expropriation of Land holdings for Public Purposes, Payments of Compensation and Resettlement Proclamation No. 1161/2019, Federal Negarit Gazette No.90, 23rd September ,2019

[6] Including the need for the speedy, cheap and decentralized decision of many cases; the need for expert knowledge in the tribunal, whose members may include both lawyers and also other professionals or lay persons and the belief that there is a value in enabling the individual affected to be heard in person by the tribunal.

role here, therefore, is to police the boundaries of legislative intent and ensure that government cannot overstep those boundaries without incurring legal liability.

This is because, per the principle of separation of powers, for example, the FDRE Constitution vests judicial power in the judiciary/courts both at the Federal and State level. For that reason, the judiciary is one of the most effective machinery in restraining administrative agencies within the bounds of their powers and rectifying the grievance of individuals aggrieved by agency decisions. Thus, it can be said that judicial review of executive action is an essential process in a constitutional democracy founded upon the rule of law. That is to say, it is useful that all decision-makers exercising public power should know that the courts exercise jurisdiction over the legality of their decisions on such matters as the extent of their powers and the proper observance of procedure in reaching a given decision. Certainly, judicial review is no substitute for administrative or political control of the merits, expediency or efficiency of decisions. However, the courts can ensure that decisions made by public authorities conform to the law and that standards of fair procedure are observed.

Courts exercise judicial control over administrative discretion if the authority has either abdicated its power or has put fetters on its exercise, or the jurisdictional facts are either non-existent or have been wrongly determined. Thus, there are two modalities by which the judiciary can exercise its control over the powers of administrative agencies. These are appeal and judicial review. It should be noted here that judicial review, which should be an exceptional remedy, does not provide a right of appeal and cannot ensure the quality of numerous decisions at first instance. The prominent difference between an appeal and judicial review is that the former is statutory in origin, whereas the latter is the inherent power of courts.

### 6.4.5 Control by Human Rights Commission and the Ombudsman

The National Human Rights Institutions- Eyhiopian Human Rights Commisson- is a standalone entity of the Government of Ethiopia with the mission of promoting and protecting human rights.

#### 6.4.5.1 Control by Human Rights Commission

The Ethiopian Human Rights Commission was established in July 2000 through Proclamation No 210/2000 with the mandate to promote, protect, and enforce the human and democratic rights of citizens and peoples of Ethiopia as enshrined in the Constitution and other laws of the land, as well as the international human rights

conventions and instruments.[7] Its mission is to ensure human rights are protected, respected, and fully enforced, as well as to have the necessary measures taken where they are found to have been violated.[8] The Commission has the responsibility and duty to conduct investigations in the case of abuse and violation of human rights, either in response to complaints, or acting on its initiative.[9]

The role of the Ethiopian Human Rights Commission in controlling government power is through ensuring that constitutional human rights and fundamental freedoms are well protected[10] by conducting various human rights advocacy, counseling, monitoring, conducting research on the country's human rights situations, and investigating and addressing human rights violations, while paying particular attention to vulnerable groups.[11]

### *6.4.5.2* Control by the Ombudsman

The Ombudsman is an independent institution with the power to examine governmental abuses affecting members of the public. The Office of the Ombudsman is originally meant 'Representative' of the public and at the same time, it operates as a watchdog looking at the work of administrative law.[12] The Constitution of the Federal Democratic Republic of Ethiopia requires the establishment of an ombudsman institution. In 2000, the Ethiopian Institution of the Ombudsman was legally established with the sole objective of bringing about good governance, a grand project which requires concerted efforts of all branches of government.[13]

The Institution was established to address maladministration problems in the executive. It deals with maladministration in two ways: prevention of maladministration and protection of citizens from maladministration.[14] The

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[7] National Human Rights Institutions History, Principles, Roles and Responsibilities Professional Training Series No.4, Rev.1(2010), pp.5,

[8] Lemessa Gudeta, "The Ethiopian Human right commission: Critical analysis in its role of promoting human rights", P.1.

[9] Ethiopian Human Rights Commission Establishment Proclamation No. 210/2000, Federal NegaritGazeta-No. 40(4 July, 2000), pp. 1357, Art. 19.

[10] Wondemagegn T. Goshu, The Ethiopian [National] Human RightsCommission and its Contribution to Constitutionalism, 2015, Ethiopian Constitutional Law Series, Vol. VI, P. 13

[11] Ibid

[12] Abdi Jibril Ali, The Role of the Ethiopian Ombudsman Institution in Good Governance,: P 3 & 4.

[13] FDRE Constitution (1995). Proclamation No. 1/1995, A Proclamation to Pronounce the Coming into Effect of the Constitution of the Federal Democratic Republic of Ethiopia, Federal NegaritGazeta, 1st Year, No. 1, 21st August 1995, Art. 55(14). See generally, Institution of the Ombudsman Establishment Proclamation No. 211/2000 Federal Negarit Gazeta 6th year No. 41 Addis Ababa,4 July 2000 [hereinafter cited as: Institution of the Ombudsman Establishment Proclamation No. 211/2000]

[14] Institution of the Ombudsman Establishment Proclamation No. 211/2000, Art. 19.

Institution's mandate of prevention includes supervision of the executive. It is entrusted with the responsibility of ensuring that the executive respects the rights of individuals and groups when it issues directives, makes decisions, and follows practices.[15] Such supervision may relate to ensuring compliance of decision-making process with the appropriate laws. It also ensures that the consequences of decisions and directives comply with the laws of the country.[16]

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, or fraudulent, while 'administration' refers to the process or activity of running a business, organization.[17] Thus, 'maladministration' may give the meaning of bad, wrong, or fraudulent administration. The Ethiopian Institution of the Ombudsman establishment proclamation, Proclamation No. 1142/2019 Article 2/4/ defines the term "maladministration" to include acts committed, decisions given, or failure to give decision, omission by executive organs or public development enterprise in contravening applicable laws related to administration.

The classic formulation of the meaning of 'maladministration' includes bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude, arbitrariness, and so on. Three kinds of failure that may give rise to a finding of maladministration are failure to respect a legal rule or principle; failure to respect the principles of good administration; and failure to respect human or fundamental rights.[18] In general, the Ombudsman is destined with investigating the maladministration conducted in administrative agencies.

### 6.4.6 Control by the Mass Media

Even though the most prominent role of media is informing people about the news, in some cases, it takes a vital role in protecting people's rights and expressing serious concerns about specific issues. When problems become apparent, the government has to take action, which means the media is indirectly involved in the decision-making process. Thus, the media acts on behalf of the people when it comes to protecting their interests.[19]

One of the media's central roles is to make the government responsible for its actions or inactions. Increasing the government's accountability is essential to improve

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[15] Abdi Jibril Ali, The Role of the Ethiopian Ombudsman Institution in Good Governance,: P. 3 & 4.
[16] Ibid
[17] Black, H. C. (1910). *Law dictionary* (Vol. 1188). St. Paul, Minn.: West Publishing Company
[18] Hawke, N. (2013). *Introduction to administrative law*. Routledge-Cavendish. P. 143
[19] James Deane, Media and Governance, Applied knowledge services, No. 39., P. 3.

service delivery, establish good communication between the state and citizens, support transparent elections, and allow marginalized groups to be heard.[20]

Media is one of the main coordinators of democracy and the protection of human rights. It is an essential platform for freedom of expression, truth, and investigations related to elites. Media activities eagerly protect democratic values by revealing the actual state of affairs. In addition, other massive mass media platforms can promote social issues on a international level.[21]

### 6.4.7 Control by Civil Society

As an integral part of democracy, civil society has been studied with growing interest in recent years. Civil society can contribute to social changes by influencing the government and serving as watchdogs of institutions; for example, empowering voiceless people and ensuring their right to access to information, but also by promoting development work to improve their well-being.[22] Taking this into consideration, it is important to emphasize that the representatives of civil society and their increasing power strengthen the growth of civil participation and, in this way, they influence the decision-making process.[23] Civil societies limit state power by checking its political abuses and violations of the law and subjecting it to public scrutiny. In other words, an efficient civil society acts as a provider of interests in the relationship between the state and the public[24].

As a result, it is clear that civil society and the media play fundamental roles in democratic systems of government. Their main objectives, according to this conclusion, are to express diverse interests, promote political participation, raise public awareness of issues, and limit and control the power of the state. The only way to promote democratic governance is for the media and civil society to collaborate closely with the executive branch.

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[20] Lamp, E., & Kepplinger, H., M. (2008). Public opinion, media effects on. In The International Encyclopedia of Communication, PP. 4 & 5.
[21] Ibid. see also, osales-Viray, K., & Versoza, S., M. (2017). Media's influence on government and society. KnE Social Sciences, pp. 1223-1234,
[22] Bahmani J (2016) The Role of Civil Society in Development. J Civil Legal Sci 5: 215, P. 2.
[23] Jensen, L. G. (2016). Civil Society: A Powerful Concept., P. 5.
[24] Džatková, V. (2016). The role of civil society in public governance. *Rocznik administracji publicznej*, *2*. P. 373.

## 6.5 The Supervisory Power of the House of Peoples' Representatives

Since embarking on parliamentary democracy, Ethiopia established a sovereign Parliament which is inherently entrusted with the legitimate mandate of conducting parliamentary oversight (among many other constitutionally-endowed powers and functions) with the ultimate purpose of supervising, controlling, and also empowering administrative agencies, enabling them to properly discharge their duties as the extensions of their respective executive branch of the government. In so doing, the Parliament ensures that the day-to-day activities (decisions, measures, actions, and the like) of administrative tribunals and agencies comply with substantive rights, freedoms, and duties covered under various laws. At this critical juncture, it bears reminding that administrative tribunals and agencies are normally operating at the frontline where basic rights and freedoms of citizens would be tested and exercised. That is why it is widely believed that the parliamentary oversight role was and is still one of the most effective mechanisms in democratic state structure.

Thus, in a parliamentary democracy, it is the function of the legislature to legislate. If it seeks to delegate its legislative power to the executive for any given reason, it is the right and obligation of the legislature, as principal, to see how its agent— the executive— carries out the agency entrusted to it. Since it is the legislature that grants legislative power to the administration, it is primarily its responsibility to ensure the proper exercise of delegated legislative power, to supervise and control the actual exercise of this power, and ensure against the danger of its objectionable, abusive, and unwarranted use by the administration. The legislature represents public opinion.

According to the FDRE Constitution Article 53, the Federal Democratic Republic of Ethiopia has two Federal Houses: the House of Peoples' Representatives and the House of the Federation.[25] The House of Peoples' Representatives is the highest authority of the federal government. It has various supervisory roles in controlling the powers of the government at different levels. [26] These include the following.

### a. Memorandum on Delegation

At the central level, the first step in the chain of parliamentary control over delegated legislation is taken at the stage of delegation by Parliament. A directive on Adoption of Laws enacted by the House of Peoples' Representatives requires that a bill

[25] The FDRE Constitution, art. 53.
[26] Hon. Mr. Haile HALEFOM, The Federal Parliament of Ethiopia, Constitutional and Parliamentary Information,1998, P. 94.

presented for adoption shall be "accompanied by a memorandum explaining such proposals and drawing attention to their scope"[27] Thus, a bill involving proposal for delegation of legislative power shall be "accompanied by such memorandum for delegation".

### b. Laying Procedure

Once the rules are enacted, the second link in the chain of parliamentary control comes into play. This is achieved by the mechanism of the "laying procedure". Unfortunately, there is no such procedure in the Ethiopian parliamentary system. Rules or regulations laid before Parliament may be attacked on any ground. The basic purpose of this procedure is informational. The underlying idea is that if Parliament is to exercise any control, the Parliament must be informed of the content of the delegated legislation made by the government from time to time under various statutes. The object of the laying procedure is to bring the legislative measures to the "potential notice" of the Members of Parliament.[28] There is no general obligation on the Administration to lay the rules before the Houses of Parliament. Whether the rules made under a statute are to be laid or not before the Houses depends on the terms of each delegated statute. If the statute has a laying clause, then the relevant delegated legislation is to be laid in terms of the statute; if there is no such clause, then it is optional for the government to lay or not to lay delegated legislation.

### c. Parliamentary Scrutiny Committees

As made clear above, the laying procedure by itself does not afford much of an effective parliamentary supervision. To make parliamentary supervision over delegated legislation more effective, it is better to consider Parliamentary Scrutiny Committees.

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[27] የኢ.ፌ.ዴ.ሪ. የሕዝብ ተወካዮች ምክር ቤት የሕግ አወጣጥ ሂደት መመሪያ ቁጥር 11/2000 ዓ.ም
አንቀጽ 10 ስለ ሕግ ረቂቅ ማብራሪያ
1. ማንኛውም የሕግ ረቂቅ ቢያንስ የሚከተለውን ይዘት ያሟላ ማብራሪያ ይኖረዋል።
ሀ/ የሕግ ረቂቁን ዓላማ እና ግብ፣
ለ/ የሕግ ረቂቁን ዝርዝር ይዘት፣
ሐ/ የሕግ ረቂቁ ጸድቆ ተፈፃሚ ቢሆን በመንግሥት በጀት ላይ ስለሚኖረው ተፅዕኖ እና
መ/ የሕግ ረቂቁን ለማዘጋጀት የተደረገ ጥናት (ካለ)፣
2. የረቂቅ ሕጉ ማብራሪያ በአጭሩ እና በግልፅ ተዘጋጅቶ ከረቂቁ ጋር ተያይዞ መቅረብ ይኖርበታል።
3. ማንኛውም የረቂቅ ሕግ ማብራሪያ እንደሁኔታው፡-
ሀ/ በዜጐች የገቢ ወይም የወጪ ሁኔታ ላይ የሚያስከትለው ተጽዕኖ፣
ለ/ በአካባቢ ላይ የሚያስከትለው ተጽዕኖ፣
ሐ/ በፆታ ግንኙነትና እኩልነት ላይ የሚያስከትለው ተጽዕኖ፣
መ/ በሰብአዊ መብትና አጠባበቅ ላይ የሚያስከትለው ተጽዕኖ፣ እና የመሳሰሉትን ማካተት አለበት፡፡
4. የረቂቅ ሕጉ ማብራሪያ በሀገሮች መካከል የተደረጉ የሁለትዮሽ ወይም ባለፈርጅ ብዙ አህጉራዊ ወይም ዓለም አቀፋዊ ስምምነትን አስመልክቶ ከሆነ ስምምነቱ የሀገርን ጥቅም የሚያስጠብት ስለመሆኑ የሚዘረዝር መሆን አለበት፡፡

[28] Massey, I. P. (2016). *Administrative law*. Eastern Book Company. P. 197

The need for such committees was felt because mere laying of rules before a House could not be of much efficacy unless some method was evolved to scrutinize the rules so laid. The House, as a whole, being pressed for time, cannot exercise any effective supervision over delegated legislation by itself. Therefore, the members themselves have to be vigilant, but individual members themselves are not adequately equipped to scrutinize the massive and complicated delegated legislation being turned out constantly by the government departments, and so they need support in discharging their responsibilities in Parliament. It was thus realized that some organized effort was necessary so that there may be some kind of automatic scrutiny of delegated legislation on behalf of the House to make parliamentary control somewhat more effective. It was therefore thought necessary that a Parliamentary Scrutiny Committee be instituted to keep watch over and report on delegated legislation on behalf of the House.

In this regard, the House of Peoples' Representatives has various committees in implementing its roles and functions enshrined under Article 55 of the FDRE Constitution. Accordingly, the House controls the public power by enacting various legislations.[29] The House of Peoples' Representatives committees have different powers and functions to regulate the powers of the government.[30]The committees come in different types— standing committees, sub-committees, advisory committees, and temporary committees.[31] The major roles of all types of committees in supervising public powers are the following:

a. Preparing draft laws that are relevant to legal reforms. After consideration of various circumstances on the subject matter, they need to submit draft laws. It helps to control the powers of the government officials when they act contrary to the existing laws.[32]
b. Examining draft laws submitted by themselves or one of the committees of the House.[33]
c. Each committee is required to supervise governmental institutions assigned under their respective jurisdictions and reports any abuses accordingly.[34]
d. The committees of the House have the power to receive any complaints and examine witness and documents that are relevant to conducting their official duties.[35]

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[29] See generally, የኢፌዴሪ የሕዝብ ተወካዮች ም/ቤት አማካሪ ኮሚቴ የአሰራር መምሪያ ቁጥር 1/2001 ዓ.ም.
[30] Ibid, art. 14.
[31] የኢ.ፌ.ዲ.ሪ. የህዝብ ተወካዮች ምክር ቤት የኮሚቴዎች አደረጃጀት፣ ሥልጣንና ተግባር እና አሠራርን አስመልክቶ የወጣ መመሪያ ቁጥር 27/2001 ዓ.ም, Arts. 8, 9 & 10.
[32] Ibid, art.20.
[33] Ibid, art. 21.
[34] Ibid, art. 22.
[35] Ibid, art 23.

e. The committees of the House conduct various relevant studies to control public powers and serve as the source of legal and institutional reforms.[36] Such studies are also relevant in identifying the following essential areas:

- powers and functions of bodies of administration,
- procedures of implementing existing laws,
- goals, tasks, and powers of bodies of administration, and
- ensuring compliance to existing laws.

Similarly, respondents from the House of Peoples' Representatives during data collection on the preparation of this text revealed that, according to Ethical Code of Conduct of Members of the House of Peoples' Representative Article 79 (1 (a-e)) of No. 6/2008, the House of Peoples' Representatives is entitled to require administrative agencies to directly submit and present work report for the pertinent standing committee, at least annually. Again, being the head of the Council of Ministers, the Prime Minister is also supposed to engage in person on the concerns which deserve explanation. Where it is required, the House of Peoples' Representatives can order to conduct and submit a financial audit from potential suspect administrative agencies. Based on the gravity of matters under inquiry, the House of Peoples' Representatives may also hear witnesses, experts, or might even order the concerned administrative agencies to submit relevant documents for investigation. Above all, the House of Peoples' Representatives is also mandated with undertaking work field trips for the purpose of supervision and follow-up on the performance of administrative agencies.[37]Thus, the respondents elucidated that the House of Peoples' Representatives is practically exercising its controlling power over administrative agencies.

## 6.6 The Ombudsman Principle

### 6.6.1 Definition

The term ombudsman became popularized around the world in the 1960's and 1970's.[38] At its most basic level, an ombudsman is someone who supports individuals and groups in resolving issues or concerns. The name "ombudsman" (om - budz - man) originates from the Swedish language and literally means "representative."[39] Ombudsman is a quasi-judicial officer who acts independently and non-patricianly to

[36] Ibid. art 25.
[37] Interview with Haimanot Debebe, Office of House of Peoples' Representative Senior Legal Expert Oct. 27, 2022
[38] Srig Jaerskiod, .(1961). "The Swedish ombudsman: 1601 -1775, "university of Pennsylvania law Review, vol. 109 P. 1077.
[39] Rowat Donald, "Why an Ombudsman to supervise the court? "The ombudsman Journal 1O (1992), P.16

perform his duty to supervise the administration. However, the term took on its current meaning after the introduction of an official with the title Ombudsman in the Swedish Constitution of 1809, who monitors the public administration to ensure its fairness and constitutionality.[40]

In brief, the Ombudsman Committee of the International Bar Association defines the term "Ombudsman" as follows:

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.[41]

## 6.6.2 Characteristics

The institution of the Ombudsman is one of the important pillars of government bearing accountability to the people. The functions of the Ombudsman are to rectify the misuse or abuse of executive power of government through impartial and thorough investigations into governmental activities against its citizens. Thus, it is required to have the following characteristics:

### a. Confidential

The personnel of the Office of the Ombudsman will keep all discussions and pertinent material in the strictest confidence. The Ombudsman staff will keep visitors' identities and the specifics of any interactions confidential. Without the visitor's consent, the Ombudsman will not disclose any information. Rare deviations to this rule might happen.[42]

### b. Independent

The Ombudsman institutions should maintain a separate office for complaints made to the Office of the Ombudsman. The Ombudsman does not pass judgments, evaluate guilt or innocence in relation to problems or issues, alter or reverse

[40] Gerald E. Caiden. (1983). " The institution of the ombudsman", evaluation and present function: International handbook of the Ombudsman Caiden, Gerald E. (ed) vol. 1, P. 3

[41] Satyanand, A. (1999). The ombudsman concept and human rights protection. *Victoria U. Wellington L. Rev.*, *29*, 19. P.3.

[42] Ombudsman, Confidentiality A guide to section 9(2)(ba) of the OIA and section 7(2)(c) of the LGOIMA", (2020). P. 4-10.

administrative decisions, or change policies. In addition, the institution shall ensure that citizens have an avenue open to them free of red tape and free of political interference.[43]

**c. Impartial**

The Ombudsman's institution should not act as an advocate for any one person alone. The ombudsmen shall actively promote just procedures and their consistent application.[44]

**d. Informal**

The institution does not formally recognize the Office of the Ombudsman as a reporting organization. Outside of the official reporting systems, it functions as an informal and/or supplemental method. The Ombudsman can help by educating visitors about the institution's formal procedures. They can then direct visitors to those policies and procedures after that. The visitor must decide what actions to take next in every case.[45]

**Development**

The world has been facing political evils such as corruption and maladministration which has had a huge impact on the social, political, and economic conditions of every country. In order to redress grievances and remove corruption, citizens must rely and depend upon the bureaucracy which itself is responsible for maladministration. On account of this paradoxical situation, it is extremely difficult for the common man to seek justice.[46]

The Ombudsman institution is thought to have its roots in Sweden. The word "*umbodhsmadr*" is directly derived from the Swedish phrase for "ancient Norse." In Sweden, the Parliament created the position of ombudsman to support it in its interactions with the executive and judicial branches. It may be argued that the Swedish Parliament was unable to oversee the operations of other government agencies. [47] The Swedish Parliament felt the need for an official who could actively deal with citizen complaints against actions being taken by the Executive and the Judiciary in order to effectively fulfill its job as the People's Representation. The ombudsman office was

[43] Ruppel-Schlichting, K. G. (2008). The independence of the Ombudsman in Namibia. *The independence of the judiciary in Namibia. Windhoek: Macmillan Education Namibia*, *227*. P. 273.
[44] Ibid.
[45] Ibid
[46] Ruppel-Schlichting, K. G. (2008). The independence of the Ombudsman in Namibia. *The independence of the judiciary in Namibia. Windhoek: Macmillan Education Namibia*, *227*. P. 271.
[47] Salman, R. (2006). The ombudsman ınstitution: A view from the rule of law. P. 2& 3.

also established as a result of the lack of ministerial authority and the judiciary's close resemblance to the old executive style of decision-maker.[48]

During the final days of Emperor Haile Selassie's rule in Ethiopia, the concept of the ombudsman was originally proposed. At that time, Ethiopians who had grown resentful of their oppressive and exploitative ruler rose out in groups against them, unwaveringly determined to bring about change[49]. The Ombudsman proposed in the 1974 draft Constitution dealt with issues relating to appointment, the ombudsman's examination of the office's administrative malpractice, the ombudsman's independence in carrying out his duties, the ombudsman's irrevocability from office save for a few condition, and more.[50]

The modern ombudsman is adopted under the FDRE constitution and it states in Art. 55(15) that the House of Peoples' Representaives is responsible for creating the institution of the Ombudsman as well as choosing and appointing its members. Accordingly, the House established the institution of ombudsman creation proclamation in 2000 with a view to fulfilling its constitutional duty and with the intention of fostering good governance rather than engaging in frivolous pursuits.[51]

### 6.6.3 Investigation Procedure and Access to Information (Human Rights Commission and the Ombudsman)

With regard to complaints and conducting an investigation, the authors contacted respondents from the Office of the Ombudsman and Human Rights Commission. The respondents from the Ombudsman revealed that, in accordance with Article 26-27 of the amended Proclamation No. 1142/2019 and Article 6-16 of Investigation Manual No. 1/2006 enacted by the Office, the Office of the Ombudsman will receive complaints in various modalities through direct physical presence, through representative/agent or spouses or any other third parties, through means like telephone call, fax, and email. They also noted that the investigation will be conducted based on the Office of the Ombudsman's own motion to investigate and monitor maladministration cases which

[48] NDI. (2005). The Role and Effectiveness of the Ombudsman Institution, Rule of Law Series Paper. P. 6.
[49] Abdi Jibril Ali, The Role of the Ethiopian Ombudsman Institution in Good Governance, P.2.
[50] Ibid. see also, DESSİE, S. H. (2018). Ombudsman for Good Governances in Ethiopia: Assessing the Awareness and Perceptions Of Civil Servants: Insight from South Wollo Zone Civil Servants. *Global Journal of Human-Social Science Research*, *18*(1), 28-31. P.1.
[51] The FDRE Constitution, art 55.

the office cases have obtained through various news outlets like television, radio, or news paper.[52]

With respect to the manner of how the Office of the Ombudsman conducts investigations against the alleged maladministration and miscarriage of administrative justice, respondents referred to pertinent provisions such as Article 24 of Proclamation no. 211/2000 and Article 28 of the amended one of 1142/2019. These impliedly govern or regulate the overall manner of undertaking investigation of cases within the ambition of the institution of the ombudsman without jeopardizing the fundamentals of criminal law that regulate the same matter. On top of these, they also cited Article 32-36 of a more relevant manual prepared by the Ethiopian Office of the Ombudsman that can also be referred to as Conducting Investigation Manual No. 1/2006.

The same holds true in relation to investigation and information access for the Human Rights Commission as respondents from the office referred to Article 22 and 23 of Proclamation no. 210/2000. The Articles state that the Commission can receive complaints in various modalities such as direct physical presence, through representative/agent or spouses or any other third parties, or through means like telephone call, fax, and email. The Commission, on its own initiative, will usually investigate and monitor sensitive human rights violation cases which might have already aired through various news outlets, same as the Office of the Ombudsman.

With regards to the human rights investigation process, respondents referred to pertinent provisions (Article 24) of the Proclamation no. 210/2000 and Proclamation No. 1224/2020 (as amended), stating that the overall manner of undertaking investigation of cases will be made within the scope of the Commission's power to investigate.[53]

### 6.6.4 Remedial Measures Taken by the Human Rights Commission and the Ombudsman

It has been already stated that the Office of the Ombudsmen is one of the offices established to serve as a human rights body as well as an institution for the advancement of administrative justice, and also deals with the specific allegations or complaints from the public against administrative injustice and maladministration. Nevertheless, for a

[52] Interview with Selam Anteneh, Investigation Expert, Ethiopian Institution of Ombudsman Aug. 20, 2022; Interview Danawit Zeru Investigation Expert, Ethiopian Institution of Ombudsman Aug. 20, 2022

[53] Interview with Yosef Girma, Ethiopian Human Rights Commission Human Right Case Investigation Expert, Oct. 25, 2022 ; interview with Girma Negash Ethiopian Human Rights Commission Human Right Case Investigation Expert, Oct. 25, 2022

variety of reasons, the recommendations put forth by the Ombudsman institution are frequently not complied with to the necessary extent.[54] Despite these limitations, according to respondents, the institution ombudsman is still striving to keep pursuing ensuring administrative justice. Towards this noble mission, in addition to seeking a judicial solution, the institution of the ombudsman resorts to work on facilitating the task of negotiation among disputing parties, engage in the task of conducting an investigation and coming up with a corrective recommendation, and also resorts to a tactic of blame and shame against potential violators of administrative justice.[55]

Article 29 of Proclamation no. 1142/2019 regarding remedies available to the institution of ombudsman provides that:

*1/ The Institution shall make all the effort it can summon to settle, amicably, a complaint brought before it.*

*2/ It shall notify, in writing, the findings of its investigation, and its remedies thereon, to the Superior Head of the concerned Organ.*

*3/ The remedy proposed by the Institution, pursuant to sub-Article (2) of this Article, shall expressly state that the act or practice having caused the Maladministration be discontinued or that the Directive having caused same be rendered inapplicable and that the Maladministration committed be rectified or that any other appropriate measure be taken.*

*4/ The Institutions shall inform complainant on the results of the investigation in writing.*

*5/ Complaints submitted to the Institution shall be accorded not more than a period of six months.*

The remedy that could be proposed by the Office of the Ombudsman in accordance with sub-Article (2) of the above provision includes that the act or practice having caused the maladministration be discontinued or that the directive having caused same be rendered inapplicable and that the maladministration committed be rectified or that any other appropriate measure be taken.

[54] Interview with Selam Anteneh, Investigation Expert, Ethiopian Institution of Ombudsman Aug. 20, 2022; Interview Danawit Zeru Investigation Expert, Ethiopian Institution of Ombudsman Aug. 20, 2022

[55] Ibid

Similarly, in relation to the remedy against the alleged human rights violations, all respondents from the Human Rights Commission have pointed to Article 26 of the Proclamation. It provides:

> *26. Remedies*
>
> *1) The Commission shall make all the effort it can summon to settle, amicably, a complaint brought before it.*
>
> *2) It shall notify, in writing, the findings of its investigation, and its opinion thereon, to the superior head of the concerned organ and to the complainant.*
>
> *3) The remedy proposed by the Commission, pursuant to this Article, shall expressly state that the act having caused the grievance be discontinued, that the directive having caused the grievance be rendered inapplicable and that the injustice committed be redressed or that any other appropriate 'measure be taken.*
>
> *4) Complaints submitted to the Commission shall be accorded with due response, within a short period of time.*

Thus, the remedy that can be proposed by the commission may include discontinuance of the human right violation, a directive that caused such violation be rendered inapplicable, and that the injustice committed be redressed or any other appropriate measure be taken to rectify the human rights violation.

## 6.7 Summary

It has been emphasized that Administrative agencies exercise a bulk of the power to guarantee the need of citizens in the contemporary democratic welfare state. This is due to the modern administrative process which is a by-product of intensive form of government, The traditional separation of powers doctrine is endangered, as agencies have assumed the powers of both branches of government and have consolidated into a single entity all of the powers that were traditionally exercised by the three different organs of the state. That is to say, the delegation of rule-making and adjudicating powers to administrative agencies has become an inevitable phenomenon of the complex technological world.

In addition, discretionary powers of administrative agencies may be justified for various reasons. Thus, administrative agencies have a number of chances to become arbitrary or masters of the citizens. This is why it is necessary to control them. There are two ways of controlling administrative agencies— internal control and external control. Internal control is the process where the responsible government agency

reviews the merits of a decision made by one of its officers. The reviewing officer can usually substitute a new decision if the decision under review is found to be defective on matters of law, merits, or administrative process. External control is a control mechanism by organs other that the agency itself. These include control by administrative tribunal, parliament, the executive, the judiciary (judicial review), human rights commission and the ombudsman, civil society, and mass media. In a parliamentary form of government, every delegate (agency) is subject to control and oversight by the principal (parliament). In so doing, the exercise of such delegated power of agencies can be directed, reviewed, or annulled by the parliament. In executive control, agencies or departments formed under the executive hierarchy are subject to the supervision of the executive organ of the government.

The same is true for judicial control and control by the tribunal where the courts and tribunals exercise their judicial review and review by appeal power to control the legality of administrative actions, decisions, and laws. Moreover, other organs outside the arms of government, such as the ombudsman and human right commission, also have an immense role in controlling the agencies from human rights abuses and maladministration.

## 6.8 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 administrative tribunal

Maladministration

2) What is the rational behind the need for controlling administrative agencies?

3) Discuss the difference between the powers of the Human Rights Commission and the Institution of the Ombudsman.

4) Discuss the instances of maladministration prevailing in your locality.

5) What advantages are conferred on the control of agency power by watchdog institutions as opposed to courts?

6) One of the remedies for maladministration and human rights violation is rectification or redress. Do you believe that the institutions possess immediate power in this matter, or will they need to seek the assistance of the court?

7) Distinguish the difference between judicial review and appeal.

8) Do you believe the definition of ombudsman in the Proclamation broadly and clearly articulates the meaning of maladministration?

9) Recent developments show that Facebook, YouTube, and other social media outlets are useful in sharing information. Do you think these media outlets help in controlling agencies? Give the reasons for your answer.

10) Do you believe laying procedure can be useful to examine the delegated legislations in Ethiopia?

11) The rights and responsibilities of the Speaker of the House of Federation are expressly stated in Article 66 of the FDRE Constitution; however, the role of the Speaker of the House of Peoples' Representatives has not addressed these matters. There is no mention of the powers in Article 58/4 other than a statement that a meeting will be held when the council is in session. In the House of Peoples' Representatives' Rules of Procedure and Code of Conduct of Members No. 6/2008, Article 9 provides the following roles of the speaker of the house;

- Makes decisions on interpretation questions that arise during meetings or directs them to the relevant party.

- To chair committees; The Vice-Chancellor and members as well as the Council shall elect members to be represented in the bodies to which they are represented according to law. It makes them represent.

- Coordinates the work of the Standing Committees.

- Communicates on behalf of the council.

In line with this, how do you see the role of the Speaker in controlling agency power? Do you think the Speaker of the House has no role at all?

12) The Ethiopian parliamentary system is characterized by its dual nature of parliament which comprises of the House of Peoples' Representatives and the House of Federation. Article 62/1/ of the FDRE Constitution has given the power to interpret the Constitution to the House of Federation. Do you believe that the House of Federation still has a role in controlling the powers of agencies?

## 6.9 Glossary

- **Internal Control:** is a kind of administrative control by the agency itself
- **External Control:** is a kind of control of governmental power by organs other than the administrative agency

- **Remedial Measures:** Measures provided for a person whose right are infringed as a result of maladministration or violation of human right
- **Redress:** A remedy or set of right provided for a person as a compensation or any similar kind
- **Watchdog institutions:** institutions other than courts and Parliament that control the administrative agencies

## 6.10 Further Reading


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# CHAPTER SEVEN

# MERITS REVIEW: COMPLAINTS HANDLING ORGANS AND ADMINISTRATIVE TRIBUNALS

## Chapter Overview

This chapter is about merits review, a mechanism by which the substance of an administrative decision, including its legality, is reviewed. Merit review is carried out typically through complaints-handling organs within the agency or through administrative tribunals. Tribunals are, in the strict legal sense, administrative agencies, but unlike other agencies, they are entrusted with the judicial power of adjudicating disputes and rendering a final and binding decision. In principle, they are preferable to courts because they are less costly, follow informal procedures, and dispose of cases within a short period of time. We will explore how tribunals work and how they are structured and organized in order to serve as vehicles of administrative justice.

### LEARNING OUTCOMES

After studying this chapter, you will be able to:

- Define complaint and administrative tribunals.
- Identify the basic characteristics of tribunals and their difference with ordinary courts.
- Describe the different models of tribunals.

## Chapter Table of Contents

7.1 **Introduction** ..... **238**
**7.2 Complaint Handling** ..... **239**

7.2.1 Right to Complain ....240
7.2.2 Establishment of Complaint Handling Organs ....241
**7.3 Definition of Tribunals .... 243**
**7.4 Justification for Existence of Tribunals .... 243**
**7.5 Basic Characteristics .... 245**
7.5.1 Established by Law ....245
7.5.2 Binding Decisions ....245
7.5.3 Procedure ....246
7.5.4 Impartiality and Independence ....247
**7.6 Similarities and Differences between Tribunals and Courts .... 248**
**7.7 Administrative or Judicial Organs? Constitutional status .... 248**
**7.8 Jurisdiction and Functional Powers .... 249**
**7.9 Procedure .... 250**
7.9.1 Hearing ....250
7.9.2 Appeal ....251
**7.10 Categories of administrative tribunals .... 251**
7.10.1 Specialist and Generalist /Multi-purpose/ tribunals ....251
7.10.2 Single Tier and Two Tier tribunals ....251
7.10.3 Public and private (or domestic) tribunals ....252
7.10.4 Primary decision-making or review tribunals ....252
**7.11 Tribunal Models .... 253**
7.11.1 The UK Model ....253
7.11.2 The US Model ....253
7.11.3 The Australian Model ....254
7.11.4 The French Model ....255
**7.12 Independence and Impartiality .... 256**
7.12.1 Aspects of Independence ....256
7.12.1.1 Administrative Independence ....257
7.12.1.2 Institutional Independence ....257
7.12.1.3 Adjudicative Independence ....257
**7.13 Survey of Some Ethiopian Administrative Tribunals .... 258**
7.13.1 Tax Appeal Commission ....258
7.13.2 Civil Servants Administrative Court ....262
**7.14 Summary .... 265**
**7.15 Glossary .... 265**
**7.16 Review Questions .... 266**
**7.17 Further Readings .... 267**

## 7.1 Introduction

Administrative tribunals, sometimes referred to as “administrative justice tribunals” or simply “tribunals”, are judicial organs set up to adjudicate disputes. Their legal status defined under the Federal Administrative Procedure Proclamation determines they are agencies. They are established by law specifically for the purpose of adjudicating disputes between the administration and the citizen and sometime

between citizens. They are judicial bodies with judicial power without being part of the Judiciary. They are "court-like" bodies, but not courts in the sense of ordinary federal or regional courts. In short, tribunals are "essentially simplified versions of courts of law."[1]

They exist with different names, jurisdiction, and organizational structure. Civil Servants Administrative Court, Labour Relations Board, Tax Appeal Commission, Social Security Appeal Tribunal, Intellectual Property Tribunal, and Trade Competition and Consumer Protection Appellate Tribunal are some of the most common and active tribunals in Ethiopia.

Tribunals operate in many areas of the law where they are designed to settle disputes but without the formality, time, and cost of litigation. Most of them hear appeals from decision-making bodies or committees.[2]

Tribunals generally use a more formal, court-like procedure than that followed by government staff when deciding whether to take administrative measures or revoke a license. There is no fixed boundary between tribunals and other government decision-makers. All government decision-making processes that affect people's rights and entitlements fall somewhere on a continuum, from very informal procedures carried out primarily behind closed doors to procedures similar to those of a court that involve adversarial techniques and are usually conducted in public. However, compared to courts, tribunals are not bound by the strict procedural rules [of the Civil Procedure Code] applicable to civil litigations.

## 7.2 Complaint Handling

Administrative appeal is the most common remedy for a person aggrieved by an administrative action. There are two categories of administrative appeal which have considerable practical importance. The first is where an appeal may lie from the decision of local authorities or departments to an appropriate body within the administrative agency itself. The appropriate body may be the head of the agency or a permanent or *ad hoc* specialized body or committee which is set up for the purpose of hearing complaints. Such form of appeal is recognized under sub-section five of the Administrative Procedure Proclamation. Article 43 of the Proclamation provides any person against whom an administrative decision has been made with the right to lodge

[1] John Alder & Keith Syrett (2017). *Constitutional and Administrative Law*. Palgrave. P474
[2] Ibid

a complaint to the agency. It also requires the administrative agency to establish a complaint-handling body.[3]

In essence, complaints can be taken as a form of appeal because it is a mechanism to enable the administrative agency to review its decision before the aggrieved person resorts to other judicial remedies. Of course, one may contend whether the procedure can be characterized as an appeal because the complaint-handling committee is expected to provide only recommendations to the head of the administrative agency which, in most cases, happens to be the entity that made the decision in the first place.[4]

### 7.2.1 Right to Complain

Article 43 of the Administrative Procedure Proclamation recognizes the right of the citizen to complain and seek remedy against administrative decision taken against him. The provision reads:

> *Any person against whom and administrative decision is made has the right to lodge a complaint to the Agency.*

The complaint can be a request for cancellation of the decision or reconsideration of the substance, legal ground, or evidence of the decision. The complaint can be made on all administrative decisions, whether they are made upon application or by initiation of the administrative agency.[5]

There are obvious advantages of speed, cost, and simplicity in encouraging the administration to correct its mistakes. For that reason, seeking a remedy through the submission of a complaint is a right as well as a requirement. Despite the language of Article 43, seeking internal remedy within the agency is not only a right but also a requirement to initiate judicial review proceedings. A petitioner is required to bring a request for administrative review before commencing litigation. As stated in Article 53 of the Proclamation, a petitioner for judicial review is required to exhaust all remedies available within the agency before petitioning the court for judicial review.

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[3] Art 44 of Administrative Procedure Proclamation No. 1183/2020

[4] Art 46 of the proclamation reads "The complaint handling body shall properly examine the complaint it has received and present its recommendation to the Head of the Agency or an officer duly authorized by the Head. See also art 74 and the following of the Federal Civil Servants Proclamation.

[5] The Legal and Justice Affairs Advisory Council of the Federal Democratic Republic of Ethiopia Attorney General. (2021). Explanatory Note for the Provisions of Federal Administrative Procedure Law. P37

## 7.2.2 Establishment of Complaint Handling Organs

Article 44 of the Proclamation requires every administrative agency to establish a complaint-handling body. The body should not be an *ad hoc* organ which handles a specific complaint but rather a permanent establishment within the agency. The nature of its organization is left to decision of each agency.[6]

The agency has to publicize the establishment of the complaint-handling body. The publicity should be made through a medium that can be accessed by clients all the time. It can be done through electronic or non-electronic means of publicity. Establishing a complaint-handling body is generally useful to enable the agency to review its decisions according to its own internal procedure.[7]

Before the enactment of the Proclamation, administrative review organs were established in some agencies by specific statutes.

**Food and Medicine Administration Proclamation No. 1112/2019**

Art. 66. Complaint on administrative measure

> 1/ A complaint-handling organ shall be established by the executive organ or regional health regulator to handle complaints when a regulated person who believes that any administrative measure that was taken on its product, institution or itself, or the denial of a legitimate service under this proclamation inappropriate, not proportional or illegal.
>
> 2/ The complainant shall have the right to be heard by the complaint handling organ established in accordance with this article, and may lodge a written complaint, proffer evidence, respond to answer, and request copy of decision.
>
> 3/ Any complaint to be made in accordance with this article shall be lodged within 30 working days from the date of final decision by the process owner of the executive organ or regional health regulator or from the date of confirmation of the decision by the higher official of the executive organ or regional health regulator. The complaint, however, may be directly brought before the complaint handling organ, if the higher official of the executive organ or regional health regulator doesn't decide it within 5 working days.

[6] Ibid P38
[7] Ibid

4/ The complaint handling organ that received a complaint in accordance with subarticle (1) of this article shall render its decision within 60 working days from the date it receives a complete complaint.

5/ A final decision rendered by the complaint handling organ in accordance with this article may be appealed to the appropriate court of law.

Review of Complaint and Manner of Giving Decision

**Federal Administrative Procedure Proclamation No. 1183/2020**

Article 46. Considering the complaint

1/ The complaint handling body shall properly examine the complaint it has received and present its recommendation to the Head of the Agency or an officer duly authorized by the Head.

2/ The decision of the Head of the Agency or an officer duly authorized by the Head of the Agency, after considering the recommendation of the complaint handling body shall be considered as the final decision of the agency.

Article 47. Notification of Decisions

An agency shall notify the petitioner, in writing, the decision made pursuant to Article 46 of this Proclamation.

The complaint-handling body envisaged in the Proclamation, does not have authority to make decision on the complaint. Making the decision falls in the authority of the head of the agency or the person to whom the head delegated. However, some of the complaint-handling organs established by specific laws do have a power to render decision. As indicated in Article 66/5/ of the Food and Medicine Administration Proclamation No. 1112/2019, the complaint-handling organ is empowered to render a final decision on complaints submitted to it.

The decision against which the complaint is submitted may have been made by the head or a lower official or worker of the agency. In both cases, the decision on the complaint should be made by the head of the agency or the person to whom the head delegated. When the decision against which the complaint is submitted was made by the head of the agency, the complaint will give him the chance to reconsider and improve the decision. When the decision against which the complaint is submitted was made by a lower official or worker of the agency, the complaint to the head will create an opportunity to reinvestigate and improve the decision of the official or worker. It is

believed that both cases will lead to improved administrative justice. The post-complaint decision in both cases is considered final for the agency. [8]

The decision on the complaint has to be made and given to the applicant in writing like the decision against which the complaint was made. Similarly, like any other administrative decision, it should be sufficiently reasoned out. This is because this is a decision which makes the decision against which the complaint was made final.[9]

## 7.3 Definition of Tribunals

The term "tribunal" broadly refers to a judgment seat, a court of justice, a board or a committee appointed to adjudicate on claims of a particular kind. It is generally acknowledged that all tribunals are not courts, though all courts are tribunals. Tribunals are vested with judicial functions and powers, and adjudicate on matters that affect the rights of the citizens. However, in the ordinary context, tribunals are distinguished from courts and primarily refer to adjudicating bodies other than the ordinary courts of law. In the performance of their judicial functions, tribunals are not required to strictly comply with procedural rules but are bound by the principles of natural justice.[10]

The definition of what constitutes a tribunal is no easy matter. The name is not conclusive; they may be designated by different names such as authorities, boards, councils, commissions, committees, or tribunals. We must look beyond the label attached, and have a regard for the nature of the body.

## 7.4 Justification for Existence of Tribunals

The creation and proliferation of statutory tribunals independent from the courts has been described as one of the most important and controversial features of the development of the legal system in the 20th century. Due to the ever-increasing role of government within the modern state, the potential for disputes has been greatly increased.[11] The most common explanation for the initial creation and continued existence of tribunals is that they are considered to be better suited than courts to adjudicate disputes between citizen and government.

In many cases, an initial decision may be made in an informal manner, so a statutory right to appeal the decision to a tribunal ensures that the decision can be judged

[8] Ibid
[9] Ibid
[10] Yashomati Gosh. (2015). *Textbook on Administrative Law*. LexisNexis P354
[11] Neil Parpworth (2012). *Constitutional and Administrative Law*. Great Britain: Oxford University Press. P336

objectively and fairly. In some cases, the decision may have serious consequences for a person or society. An informal decision-making process for decisions that may affect things such as an individual's livelihood or the public's health or safety is inappropriate. The higher the stakes involved, the more likely it is that the agency making the initial decision will be a tribunal, or if the initial decision is made by a department or an agency that is not a tribunal, there will be an appeal to a tribunal.

In summary, Governments create administrative tribunals for many of the same reasons that they delegate functions to other agencies. Some of the reasons for the creation of administrative tribunals are listed below.

- to demonstrate the impartiality of a decision-making process and avoid any perception that the decision-maker is biased (that is particularly important where the decision of a government official or minister is being reviewed, since an appeal to someone within the same department may not appear to be impartial);
- to ensure fairness of procedure and outcome through the use of a procedure similar to that of a court;
- to send a message to the community that the issue is important to the government;
- to distance the government from potentially unpopular or controversial decisions;
- to allow for citizen participation (to give the public affected by a government decision the opportunity to participate in the decision-making process);
- to involve experts in the decision; or
- to handle cases more efficiently or cost-effectively (where this may be achieved more easily by creating a new agency than by expanding or modifying the structure of an existinginistry).

**Advantages of Creating Tribunals**

First, tribunals are often preferred to courts because they have the advantages of speed, affordability, informality, and expertise. These advantages are of particular importance in areas involving mass administrative justice, such as social welfare. Moreover, it would be extremely difficult for ordinary courts to cope with the caseload if these matters were assigned to the ordinary judicial process.

Secondly, the ordinary courts might not be sympathetic to the protection of the substantive interests contained in the legislation that laid the foundation of the welfare state at the turn of the century, and that, therefore, the matter should be assigned to a tribunal instead.

Thirdly, the creation of some tribunals is seen as a symbolic means of giving the appearance of legality in a particular area in order to render more palatable unpopular changes in the substantive benefits to which individuals were entitled.[12]

## 7.5 Basic Characteristics

It is possible to articulate a number of "properties" that a tribunal should possess, and then test to see how many do in fact possess them.[13] The main distinctive features of tribunals are:

They are created by law

They render binding decisions just like courts

They follow flexible procedures during adjudication. Most of them are even empowered to adopt their own procedural rules

### 7.5.1 Established by Law

Just like administrative agencies, tribunals are also established by the legislature. It could be one person, for instance a Minister[14] or a group of persons or an entity with its own legal personality.

In Ethiopia, most tribunals are established by specific laws passed by the House of Peoples' Representatives. This law, sometimes called, 'parent act' or 'organic act' lays down their jurisdiction, basic organizational structure, and applicable procedural rules including the scope of administrative functions to be exercised by each tribunal. Since we do not have a generalized system of tribunals, for each tribunal, there exists a corresponding specific establishment law. Few tribunals are established by the Council of Ministers through regulation or by an administrative agency through directive based on express delegation of power by the House of Peoples' Representatives. For instance, the establishment of the Intellectual Property Tribunal is delegated by law to the Intellectual Property Office.[15]

### 7.5.2 Binding Decisions

One of the salient features of tribunals is their ability to make final and legally enforceable decisions. The decisions of tribunals are as binding as any ordinary court

[12] Paul Craig (2021). *Administrative Law* (9th ed.). Thomson Reuters. P640
[13] Ibid
[14] *See* Art. 38 Railway Transport Administration Proclamation No. 1048/2017
[15] Copyright-and-Neighbouring Rights protection /Amendment/ Proclamation No. 872-2014 Article 44/1/

decision. Lacking this basic feature, an entity could not properly qualify as an 'administrative tribunal'. The judicial exercise of the power of tribunals is not in any way different from that of the ordinary judicial organs. Both will assess and determine the relevant facts of the case based on available evidence. Similarly, both tribunals and courts apply the law to the relevant facts in reaching a binding decision. A significant difference between the two lies in the fact that administrative tribunals are outside of the judiciary. For practical, legal, and constitutional purposes, they are part of the executive branch of the government, but independent in exercising their judicial function.

### 7.5.3 Procedure

The main reason for the creation of tribunals is to enable the citizen to get administrative justice that is easily accessible and less costly. One way of ensuring this is by devising a procedure that is flexible and less formal compared to the ordinary civil procedure. Wider discretion is conferred on most tribunals to either devise their rules of evidence and procedure or to apply the Civil Procedure Code. This enables them to maintain a high measure of flexibility. On the other hand, it should also be noted that consistency is equally important. Therefore, they are required to follow basic rules of procedural fairness, but without being bound by strict procedure of proceedings.

There is no uniformity in the way applicable procedural rules are determined by the establishment act. Some tribunals are empowered to utilize the ordinary procedural rules in the adjudication process, at the same time conferring discretion on the tribunal to determine the scope and extent of its applicability.

For instance, in the adjudication before Federal Trade Competition and Consumer Protection Appellate Tribunal, both civil and criminal procedure codes may apply "as appropriate".

**Trade Competition and Consumers Protection Proclamation No. 813-2013**

Art. 41. Applicability of Procedural Laws

> *The provisions of the Civil Procedure or the Criminal Procedure Codes shall, as may be appropriate, be applicable in conducting adjudication pursuant to this Proclamation.*

However, the most widely accepted approach is to authorize the tribunal to issue its own rules of procedure. The Labour Relations Board, Refugee Appeal Hearing Council, and Financial Appeals Board are some examples of tribunals entrusted with the power of issuing their own procedural rules. Even in such cases, some basic procedural safeguards of the hearing are provided by the establishment act.

**Refugees Proclamation No. 1110-2019**

Art. 19

> *The Council shall issue its own rules of procedure*

**Financial Reporting Proclamation No. 847-2014**

Art. 48/3/

> *The Appeals Hearing Panel shall issue its own rules of procedure for the hearing of appeals.*

**Labour Proclamation No. 1156-2019**

Art. 149

> *A Permanent or an Ad hoc [*Labour Relations*] board may adopt its own rules of evidence and procedure. In the absence of own procedure, the provisions of the Civil Procedure Code shall apply.*

### 7.5.4 Impartiality and Independence

Tribunals adjudicate disputes on matters that normally fall within the jurisdiction of ordinary courts. The creation of tribunals is guided by principles of efficiency, effectiveness, and fairness. Key components of fairness are impartiality and independence. They have to be impartial to all the parties appearing before the tribunal and should enjoy relative independence from the executive organ of government. The following is a short description of impartiality and independence of tribunals in Australia.

> *To ensure the appearance of fairness, particularly where one of the parties is a government department or agency, the government often ensures that a tribunal has an arm's-length relationship with the administrative agency to which it reports or which is a party to its hearings; this is often achieved by establishing the tribunal under separate legislation and ensuring independent operation from the agency, such as by giving the tribunal its own staff rather*

*than staffing it with civil servants and providing that the tribunal's members may not be civil servants*[16]

## 7.6 Similarities and Differences between Tribunals and Courts

Like courts, tribunals generally must follow a fair process, which means that affected persons must have the right to be heard and to be heard by an impartial decision-maker. This entails rules governing notice, disclosure, the presentation of evidence, the questioning of witnesses, adjournments, submissions, and representation by counsel or other agents.

In general, tribunals, like courts, must:

ensure that all parties have been given reasonable notice of the proceedings before the hearing begins;

ensure that all parties have an opportunity to present their case;

ensure that all parties have been informed of the case they have to meet;

allow all parties to present evidence and to cross-examine witnesses or test the accuracy of the evidence against them in other ways;

grant adjournments if a party would otherwise be deprived of a reasonable opportunity to present its case fully;

allow all parties to be represented by a lawyer or agent;

avoid any statements or actions that would suggest that the tribunal has prejudged issues or harbours a bias for or against a party;

apply the law that governs the proceedings and take into account considerations that are relevant under that law;

give all parties a chance to make final submissions; and

give reasons for their decisions that are reasonably clear

## 7.7 Administrative or Judicial Organs? Constitutional status

In England, tribunals were originally called administrative tribunals, thus blurring the distinction between the judicial and executive branches and raising fears that they were not independent. At a time when the judicial status of tribunals had not been clearly established, there was a traditional preference for the use of courts rather than tribunals. Thus, in the view of the Franks Committee, 'a decision should be entrusted

[16] Liz Nastasi, Deborah Pressman & John Swaigen (2020). *Administrative Law: Principles and Advocacy* (4th ed.). Toronto: Emond Montgomery Publications. P33

to a court rather than to a tribunal in the absence of special considerations which makes a tribunal more suitable'.[17]

In 2001, for the first time since the Franks report of 1957, a review of all tribunals was conducted. It was undertaken for the Lord Chancellor by a retired Court of Appeal judge, Sir Andrew Leggatt, assisted by an expert panel. He found that leaving regulatory bodies to one side, there were nearly 70 different tribunals in England and Wales, between them disposing of nearly a million cases each year. However, of the 70 tribunals, only 20 heard more than 500 cases a year. Many of the tribunals were defunct and some had never met. Leggatt criticized the lack of system in tribunals, commenting that tribunals had grown up in a haphazard way, created piecemeal by legislation and separately administered by government departments with wide variations of approach, in a way that (in his view) took more account of departmental needs than the convenience of tribunal users.[18] Based on the report, measures were taken to modernize and systematize the tribunal system in England.

What we are witnessing now in Ethiopia is the same dilemma and problem faced in England 30 years ago. Still, there is no comprehensive body of law governing the work of tribunals. There is a body overviewing and supporting administrative justice by tribunals. They are established separately, scattered here and there. Most of the judges are part-time experts and lack legal background.

As indicated above, one of the bottlenecks for the development of tribunals is their undecided constitutional status. Before we look into what the FDRE Constitution says about tribunals, be reminded that the constitutional challenge is not peculiar to Ethiopia. They have been arguments by proponents and opponents of tribunals at the time of their emergence. However, rather than trying to justify their existence theoretically and constitutionally, it is important to take into consideration their practical necessity just like delegation of legislative power.

## 7.8 Jurisdiction and Functional Powers

Tribunals have jurisdiction in a wide variety of areas as determined by their enabling act. Unlike courts, they do not have universal jurisdiction on civil or administrative matters. The statute establishing the tribunal will specify those issues that the tribunal can try and decide. For instance, the jurisdiction of the Labour Relations Board is limited to collective labour disputes, the Tax Appeal Commission is

[17] Anthony Bradley & Keith Ewing (2007). *Constitutional and Administrative Law* (4th ed.). Malaysia: Pearson Education Limited. P696
[18] Ibid. P697

empowered to adjudicate cases related to tax and customs. Similarly, the Social Security Appeals Tribunals has jurisdiction over pension benefits and entitlements.

## 7.9 Procedure

Tribunals are created by piecemeal legislation enacted at different dates and modified from time to time as government priorities change. Since there is no single set of rules that tribunals must observe, countless variations in tribunal rules and procedures exist.[19] This is particularly true in Ethiopia where each tribunal is created with its own rule of procedure and delegation power to determine its own procedure.

### 7.9.1 Hearing

Hearing before tribunals may involve a fresh hearing, known as a hearing *de novo*. Such a hearing requires applicants to make out their case again by producing evidence and calling witnesses. Tribunals exercise their powers based on the evidence before them, whether or not such evidence had been presented before the primary decision-maker or even existed at the time of the original decision. In Ethiopia, it can be said the *de novo* procedure is employed by tribunals since new evidence and argument is admitted during the proceeding.

The other type of appeal procedure is *on record*. In such type of appeal, the tribunal relies on the proceedings of the agency or a lower tribunal, if any. With few exceptions, tribunals in Ethiopia are the primary decision-making bodies. For this reason, on the record appeal procedure is not applicable.

The most common type of hearing in tribunals is inquisitorial, where the presiding judge enjoys wider power to be actively involved in the proceeding. The inquisitorial system provides the parties the opportunity to present a written or oral submission. An inquisitorial reconsideration proceeding is unstructured and controlled by the reconsidering officials. An advantage of an approach styled as an inquiry into the case is that it might be more likely to ensure that justice is done. The panel does not merely sit back and listen to a contest between opposing parties. Adversarial proceedings, meaning a lawyer-controlled proceeding before a relatively passive and independent adjudicator, is not suitable for tribunals.

Regarding the degree of formality, hearings before tribunals are relatively formal and closely resemble the hearing in ordinary courts.

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[19] Ibid P701

### 7.9.2 Appeal

Appeal from decisions of tribunals will be available to ordinary courts. The court, having appellate jurisdiction, is determined by the enabling act. In most cases, appellate jurisdiction is given to the Federal High Court. However, in limited cases, direct challenge in Federal First Instance may be allowed. Sometimes, the Federal Supreme Court also hears appeal from a tribunal.

## 7.10 Categories of Administrative Tribunals

Tribunals can be classified into:

specialist and generalist or multi-purpose tribunals

first and second-tier tribunals

public and private (or domestic) tribunals

primary decision-making or review tribunals.[20]

### 7.10.1 Specialist and Generalist (Multi-purpose) Tribunals

Specialist tribunals specialize in one or more nominated areas of activity. Tribunals with jurisdiction across government, meaning they are not limited to a specific area of administration, are known as generalists or general jurisdiction tribunals.

In Ethiopia, all tribunals are specialist tribunals. For instance, Civil Servants Administrative Court has jurisdiction over disciplinary measures taken against civil servants, the Appeals Hearing Panel established under the Financial Reporting Proclamation No. 847-2014 hears appeals against decisions by hearing examiners. The examiners have first-instance decision-making power on complaints related to violations and non-compliance with the Proclamation.

### 7.10.2 Single Tier and Two Tier Tribunals

In many countries, there is only one opportunity for tribunal review. In high volume areas, however, it is common to find two tiers of decision-making by tribunals. The two-tier tribunal has both primary and appellate jurisdiction. It has an appeal panel, which can hear an appeal from the first tier of the tribunal either with full merits review (facts and law) or on a question of law only.

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[20] Robin Creyke "Administrative tribunals." In *Australian administrative law: Fundamentals, principles and doctrines*, edited by Matthew Groves and H. P. Lee. (Cambridge University Press, 2007) P79-81

In the first tier tribunal, the next avenue is appeal to ordinary courts. The lower tier is designed to filter out the majority of review applications in a relatively efficient and quick manner. The final or 'superior' tier offers further, more authoritative review of the lower tier decision.

The Exchange Authority Administrative Tribunal is a typical example of two tier tribunal. The Administrative Tribunal of the Authority has first instance or primary decision-making jurisdiction. There is also Exchange Authority Board empowered to hear appeal from the tribunal. The Board is practically a review tribunal.

The Accounting and Auditing Board of Ethiopia is also a two-tier tribunal. Primary jurisdiction belongs to the hearing examiners and appeals will be submitted to the Appeals Hearing Panel.

There is also a two-tier tribunal in the Federal Trade Competition and Consumer Protection Authority. The adjudicative benches of the Authority have first instance jurisdiction whereas, the Appellate Tribunal hears appeals from the benches.

Apart from the above few examples, all other tribunals are single-tier tribunals. The Labour Relations Board has primary jurisdiction over collective labour disputes. There is no other appellate tribunal. The decision of the Board is reviewed by a Regional or Federal High Court.

## 7.10.3 Public and Private (or Domestic) Tribunals

Most tribunals considered in this chapter deal with administrative disputes between citizens and governmental agencies. These are bodies that carry out a mix of judicial or quasi-judicial and administrative tasks, notably to adjudicate disputes about entitlements to or infringements of pre-existing legal rights.

## 7.10.4 Primary Decision-Making or Review Tribunals

Some tribunals make the initial decision in relation to disputes. Some examples under this category include:

Hearing examiners in the Accounting and Auditing Board of Ethiopia,

Adjudicative Benches of Federal Trade Competition and Consumer Protection Authority, and

Exchange Authority Administrative Tribunal

With the exceptions to the examples above and some other few tribunals, the remaining category of tribunals in Ethiopia are review tribunals.

## 7.11 Tribunal Models

### 7.11.1 The UK Model

In UK, to modernize the system of tribunals, a comprehensive review was conducted. Following the review, a report was published in August 2001. The report made many important recommendations to improve the general performance of tribunals, and this report has led to fundamental changes. After the reform, the most important tribunals, previously falling under many different government departments, have been dramatically refashioned to create a single system with structural coherence, comprising first tier and an appellate second tier of tribunals. A key objective of this major structural overhaul has been to create a single route of appeal to an appellate division for all tribunals, and a single route of appeal on a point of law which lies from first to second tier tribunals, then to the Court of Appeal.[21]

There are also specialized tribunals which are not part of the these tribunals like the Agricultural Land Tribunal, the Family Health Services Appeal Authority, and the National Parking Adjudication Service.

### 7.11.2 The US Model

Under the US model, the agency that makes the initial decision and performs reconsideration is a combined-function agency. The initial decision occurs after an adversarial hearing presided over by an administrative law judge. The judge works for the agency in question, but did not participate in the investigation or prosecution of the case.

The reconsideration phase occurs at a higher level of the same agency that rendered the initial decision. Courts of general jurisdiction provide judicial review of the legality and reasonableness of the agency decision. Judicial review is closed (meaning, no new evidence, arguments, or reasons) and the court does not substitute its judgment for that of the agency concerning matters of law, fact, or discretion.[22]

**The Role of the Administrative Law Judge (ALJ)**

The APA provides that the ‘‘agency,’’ one or more members of the body comprising the agency or an ALJ can preside at a formal adjudication. As a practical matter, an ALJ almost always presides. When the APA was passed in 1946, ALJs were

[21] Peter Leyland Gordon Anthony, Textbook on Administrative Law (7th edn: Oxford University Press, 2013) P161

[22] ASIMOW, M. (2015). Five Models of Administrative Adjudication. *The American Journal of Comparative Law*, *63*(1), 3–31. http://www.jstor.org/stable/26386647

called Hearing Examiners. This reflected the view at the time that their function was generally ministerial, presiding over the hearing and assembling the record. As time passed and formal adjudications tended to take on many of the characteristics of judicial proceedings, their title was changed to reflect that development. In the federal system, an ALJ is technically an employee of the agency over whose adjudications he will preside. Nevertheless, he is supposed to be neutral and impartial in deciding the cases before him, even though in many, if not all of them, the agency will be a party to the proceeding.

In order to preserve that independence, despite his employee status, the personnel laws applicable to ALJs are special. First, agencies have little control over who is hired. The hiring process is performed by the Office of Personnel Management, a separate executive agency, which engages in a rigorous selection process that ends up ranking the candidates for an ALJ position. The agency can then choose only from the top three candidates for each vacancy, and cannot pass over a veteran.

Second, agencies can neither reward nor punish ALJs, and they are exempt from the annual performance ratings that normal employees must endure. Third, unlike other federal civil servants, they have a right to a formal adjudication before they may be fired, and this adjudication is heard not within the agency but by the Merit Systems Protection Board, another independent agency. Of course, this means a hearing before another ALJ. In fact, ALJs think of themselves as independent and strive to maintain or enhance that independence from their employing agency. Private litigants should have no fear that ALJs are biased in favour of the agency because of their employment status.[23]

## 7.11.3 The Australian Model

In the Australian system of administrative adjudication, the initial decision and the reconsideration decision are inquisitorial rather than adversarial. There is no separation of functions, meaning the same person or persons exercise investigatory, prosecutorial, and adjudicatory functions. Proceedings at the initial decision level are considered part of the investigation. The decisionmaker is active rather than passive and assists unrepresented parties. The reconsideration decision is made by a tribunal that is separate from the investigating and prosecuting agency.

[23] William F. Funk & Richard H. Seamon (2016). Administrative Law (5th ed.). New York: Wolters Kluwer P88-9

Australia has a developed system of administrative tribunals. A unique feature the tribunal system is the generalist merit review tribunal.[24] It takes a fresh look at the relevant facts, law, and policy and arrives at its own decision. By "generalist", it is to mean a single tribunal with general jurisdiction over wide and different matters. It is structured so that jurisdiction-specific tribunals are amalgamated into one umbrella tribunal. Different Divisions are created for different jurisdictions. These Divisions operate under procedures tailored specifically for that jurisdiction. This is to be compared with a specialist tribunal with jurisdiction over a single area of administration such as asylum or mental health.

There are also specialist tribunals in Australia, though few in number. However, the generalist tribunal is the dominant one. Its jurisdiction has been expanded over time and it now reviews a vast array of federal government decisions made under more than 400 Acts. The AAT's jurisdiction includes a wide range of areas such as veterans' entitlements, social security, taxation, criminal deportation, civil aviation, freedom of information, bankruptcy, customs, export market development grants and student assistance. It has a high volume workload in the areas of veterans' entitlements, social security and taxation. The CATs' administrative jurisdiction includes occupational registration, mental health and, in some states, planning.

## 7.11.4 The French Model

The existence of a dual court system in France is the a very peculiar feature of the judicial system. It is also the distinct characteristics of French administrative law and administrative adjudication. The existence of a body of administrative law (*le droit administratif*), separate and distinct from the civil law, dealing in the main with the competence of the administrative authorities and regulating their relations with one another and with private individuals, together with a separate and distinct body of tribunals charged with deciding controversies between the administration and private persons and of resolving conflicts of competence between the administrative and the civil courts, distinguishes fundamentally the administrative and legal system of France from that of Anglo-Saxon countries.[25]

In France, all suits arising in connection with the operation of a public service are withdrawn from the cognizance of the ordinary courts and are subjected to the exclusive

[24] Robin Creyke "Administrative tribunals." In *Australian administrative law: Fundamentals, principles and doctrines*, edited by Matthew Groves and H. P. Lee. (Cambridge University Press, 2007)

[25] Garner, J. W. (1924). French Administrative Law. The Yale Law Journal, 33(6), 597-627. Retrieved August 27, 2014, from http://www.jstor.org/stable/787920

jurisdiction of the so-called administrative courts (*juridictions administratives*), composed of officers belonging to the administrative organization.[26]

At present, there is a three-tier structure of general administrative courts. This structure dates back to 1987, but a number of additional courts have also been created over the years. In particular, some specialist administrative courts have been created to deal with some of the largest areas of judicial work. Most of these are called commissions and they deal with particular types of litigation.[27]

On the first tier, the *tribunaux administratifs* are the principal administrative court for most complaints against the administration. Indeed, there are a large number of matters on which they are judge at the first and last instance. For example, social assistance to the unemployed or in relation to housing, access to public documents, local taxes, the removal of driving licenses, and civil service pensions.[28]

In the second tier, the *cours administratives d'appel* hears appeals from decisions of lower administrative courts, the *tribunaux administratifs.* On the last of the tier is found the *Conseil d'Etat* which is a cassation or court of last resort on administrative disputes. It was created in 1799. When jurisdictional conflicts arise, the tribunal of conflicts, a special tribunal for deciding conflicts of competence between the civil and administrative courts has jurisdiction to settle the conflict.

## 7.12 Independence and Impartiality

There is no single model of independence, and no agreed minimum standard of institutional features that define a tribunal as independent. Independence is a matter of degree, and is multi-faceted. It can be secured in different ways, by varying combinations of features. An analytical approach to defining and measuring independence is required, one which identifies and evaluates key elements or components of institutional arrangements.

### 7.12.1 Aspects of Independence

There are three aspects of independence of tribunals: administrative independence, institutional independence, and adjudicative independence.

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[26] Duguit, L. (1914). The French Administrative Courts. Political Science Quarterly, 29(3), 385-407. Retrieved August 27, 2014, from http://www.jstor.org/stable/2141458

[27] John Bell & Francois Liche`re, Contemporary French Administrative Law (Cambridge University Press, 2022) P65

[28] Ibdi P67

The three aspects of independence can be broadly distinguished as follows. Administrative independence is about the ability of the tribunal, as an entity, to perform its functions; institutional independence is about the exercise of executive powers that affect the interests of members individually; and adjudicative independence is about the relationships that enable members to decide cases impartially.

### 7.12.1.1 Administrative Independence

Administrative independence means the extent to which the tribunal controls its staff, its budget and expenditure, its premises and facilities, and all other resources required to carry out its functions. Control of resources can significantly affect the tribunal's ability to maintain the administrative, procedural, staffing, and spatial arrangements required for the tribunal to carry out its functions. While the courts' claim to administrative independence is firmly based on branch independence, tribunals must rely on functional arguments.

### 7.12.1.2 Institutional Independence

Institutional independence refers to a set of arrangements that affect the tribunal's membership and the individual interests of its members. They include provisions for appointments, tenure or term of appointment, security of remuneration during term, reappointments, and removal from office during the term. The provisions give the executive power to make decisions that affect the interests of individual members in a direct and concrete way. Safeguards are needed to ensure the powers do not influence the tribunal's decisions or impair the perception of impartiality.

### 7.12.1.3 Adjudicative Independence

Adjudicative independence includes the ability of tribunal members to adjudicate impartially in matters assigned to them, free of improper interference or influence. Judicial review is an important safeguard because it is the mechanism by which the bias rule and other requirements of administrative law are enforced. Since the common law standards and judicial review are not sufficient to guarantee independence, provisions in tribunal codes and legislation impose specific duties and restrictions on members to preserve their impartiality. They include, for example, a duty to take an oath to act 'without fear or favour', to comply with a code of conduct, to maintain the confidentiality of certain information, and to refrain from outside employment except with permission. To protect members from external pressure, immunity provisions relieve them from personal liability for things said or done in the performance of their duties.

## 7.13 Survey of Some Ethiopian Administrative Tribunals

### 7.13.1Tax Appeal Commission

The Commission was re-established by Article 86 of the Federal Tax Administration Proclamation No. 983/2016. The Commission is the first and also the only tribunal in Ethiopia with its own legal identity separate from the respective administrative agency, the Ministry of Revenue. It is also the first tribunal accountable directly to the Prime Minister.

To assess the actual organization and structure of the Commission data was collected from key informants[29] through on-site interviews with two judges of the Commission.

**Composition**

The key informants were asked to describe the composition of the commission in which they are serving right now. Questions such as— how many judges reside on a given case entertained under the tribunal? And, how are judges represented within the composition, for instance, is there anyone among them who represents the interest of public or private employees?— were presented to the respondents. They indicated that there are two benches within the commission, namely the tax bench and the customs bench. However, they admitted that such distinction has not yet been implemented in practice, except in terms of mere structural arragement.

They also mentioned there are six judges and two assistant judges on active duty. Moreover, as far as the number of judges presiding over a case, the respondents confirmed that at least three judges should engage in presiding over a given case. However, there should be five signing judges (at least four) to approve the final decision of every bench. This is odd in terms of the basic principles of judicial decision-making. On the one hand, they stated that there should be three judges to preside over a case while paradoxically five judges are required to sign on a decision. When asked to explain this, they disclosed that the additional two judges were directly from the other bench and, after being briefed by colleagues and arriving at a consensus, they endorse the decision by signing it.

The composition of judges does not reflect a "balanced tribunal" where each side is represented by one judge. The previous enabling act[30] of the Commission did require the presence of members (judges) representing the interest of the business community.

[29] Ato Yosef Alemu and W/ro Serkalem, Tax Appeal Commission Judges
[30] Article 10 (2) and (3) of Federal Tax Appeal Tribunal Establishment Proclamation No. 233/2001

The new Act, however, does not contain a similar provision. All judges are appointed by the Prime Minister based on the criteria set by the Proclamation.[31]

The respondents tried to justify the absence of a balanced tribunal based on the identity of parties appearing before the Commission. They insisted the representation of interests is unnecessary as the litigants before the Commission are private individuals or business organizations (including civil societies) and tax administration agencies. They also claimed there is no room to consider the special interest of public or private entities manifested in the composition of judges. This is because of the assumption that the Tax Appeal Commission is supposed to be impartial and neutral to either of the parties in dispute.

**Appointment**

The next question posed to the respondents was about the manner of appointment and revocation of judges, and were asked to reflect in terms of the procedural aspects of the process. Article 87/1/ Federal Tax Administration Proclamation No. 983/2016 confers power to the Prime Minister to appoint such number of members to the Commission as the Prime Minister considers necessary. Legally speaking, the Prime Minister enjoys sole discretion in the selection and appointment of judges subject to the qualification criteria listed under Article 87/2/ of the proclamation.

To verify the actual practice of appointment, respondents were questioned about how and by whom appointment is made. Accordingly, they disclosed that judges of tax appeal tribunals are directly assigned by the Prime Minister based on the recommendation by the President of the Tax Appeal Commission. They also indicated that the House of Peoples' Representatives has no role in the approval of appointments as it was habitually a practice for judges of regular courts and other higher public officials. The President of the Tax Appeal Commission is also selected and appointed by the Prime Minister.

The tenure of judges is two terms maximum, where each term is three years. Thus, based on this calculation, it is imperative to note that every judge of the Tax Appeal Commission would serve for six years though there are other grounds to remove such a judge given he/she had been found to seriously violate rules that entail termination.

The grounds of termination are listed under Article 85/5/ of the Proclamation. These are:

[31] See art. 87 of Tax Administration Proclamation No. 983/2016

a) the individual becomes employed or engaged as a tax officer;

b) the individual is liable for a penalty or convicted of an offence under a tax law relating to tax avoidance or evasion;

c) the individual is convicted of a crime of corruption under the Corruption Crimes Proclamation or any other law;

d) the individual becomes bankrupt;

e) the individual resigns by notice in writing to the Prime Minister;

f) the individual's term of appointment comes to an end and the individual is not reappointed as a member of the Commission; or

g) the individual is removed by the Prime Minister, by notice in writing, for inability to perform the duties of office or for proven misconduct

**Qualification**

With regard to the qualifications required for being appointed as judge of the Tax Appeal Commission, respondents identified certain criteria which are more or less similar to the preconditions required for judges of regular courts. However, they also mentioned there are qualifications peculiar to the Commission such as education or knowledge in accounting and other relevant business fields in addition to competency in law. This approach has gained support from judges of the tribunal because tax related disputes are often too technical which require expertise in tax administration in addition to knowledge of law.

As stated in Article 87/2/ of the Proclamation, to be appointed as a member to the Commission, the candidate should satisfy any one of the following competencies:

a) the individual is a lawyer with significant experience in tax or commercial matters;

b) the individual is a member of the Institute of Certified Public Accountants with significant experience in tax matters;

c) the individual has previously been engaged as a tax officer with significant technical and administrative experience in tax matters;

d) the individual has special knowledge, experience, or skills relevant to the functions of the Commission.

The above qualification requirements are not enough for appointment. There are disqualification criteria listed under Article 87/3/ of the Proclamation. Accordingly, the following individuals shall not be appointed as a member of the Commission:

a) an actively serving tax officer or an individual who has ceased to be a tax officer for a period of less than two years;

b) an individual who has been liable for a penalty or convicted of an offence under a tax law relating to tax avoidance or evasion;

c) an individual who has been convicted of a crime of corruption under the Corruption Crimes Proclamation or any other law;

d) an individual who is an undischarged bankrupt.

**Organizational Structure**

There are two distinctive staff structures— judicial and administrative staff— entrusted with separate but mutually reinforcing mandates. There are still vacant positions which need to be urgently filled with qualified personnel to improve the quality of service rendered by the tribunal. The Commission is by far staffed with enough registrar personnel and secretary, though not adequately enough.

**Independence**

Institutionally, the Commission is an independent organ of government with its own personality. This means there is no room of influence from the tax authorities in discharging its judicial functions.

The tribunal is the budgetary institution that is optimally independent and accountable in terms of budgets as well as corresponding duties entrusted to it. As indicated by respondents, budget scarcity is not a pressing challenge.

**Adjudication Procedure**

The practice in adjudication is formal and closely similar with appellate procedure of regular courts save for minor deviations in its inclination to documentary evidence over oral evidence owing to the special feature of tax related disputes. Litigants (appellant and respondent) are given opportunity to present their respective cases and evidence that support their claims, though the procedure is not as strict as the one seen in regular courts.

There is also a phase allotted to hearing of cases, examination and weighing of evidence, adduced in the process of adjudication. Based on the personal observation in the pronouncement of judgment, it is exactly similar with the judgment pronouncement in regular courts. Respondents were also asked to reflect on whether the decisions of tax appeal tribunals are normally backed by legal and logical rationales. They affirmed it is common practice to support decisions with detailed reasoning.

Some procedural matters are specified in the enabling act of the Commission.[32] A person may appeal an appealable decision by filing a notice of appeal against the decision with the Commission in the approved form and within 30 (thirty) days of service of notice of the decision. The notice must contain a statement of reasons for the appeal. If the time for submission is elapsed for good cause, the Commission may, on an application in writing, extend the time for lodging a notice of appeal.

Issuance of detailed rules of procedure including appeal out of time is delegated to the Commission. Based on its delegated rule-making power, the Commission has issued the following directives.

- Tax Appeal Commission Working Procedure 2-2001 (Amharic) governing the appellate proceeding[33]
- Extension of time of notice of appeal and appeal out of time No. 1-2001[34]

## 7.13.2 Civil Servants Administrative Court

The Civil Servants Administrative Tribunal was re-established by Article 79 of the Federal Civil Servants Proclamation No. 1064/2017. The provision also contemplates the establishment of chambers responsible for examining and deciding on appeal cases within the tribunal. Each chamber shall have a chairperson and two members designated by the Civil Service Commissioner.

**Composition of the Tribunal**

To assess the actual organization and structure of the tribunal, data was collected from key informants[35] through on-site interviews with two judges of the tribunal.

[32] Article 87 of Federal Tax Administration Proclamation No. 983/2016.
[33] የታክስ ይግባኝ ኮሚሽን የአሰራር መመሪያ መመሪያ ቁጥር 02/2011
[34] ይግባኝ የማቅረቢያ ጊዜን ስለማራዘም ወይም ዘግይቶ የሚቀርብ የይግባኝ ማመልከቻ የሚስተናገድበት ስርዓት ለመወሰን የወጣ መመሪያ ቁጥር 01/2011
[35] Judges of the Civil Servants Administrative Court

Regarding the composition and organization of the tribunal, the respondents indicated that there are three benches within the Civil Servants' Administrative Tribunal/Court, where each of the benches would indiscriminately entertain every sort of case provided that the very nature of the case falls under the scope or jurisdiction of the Civil Servants' Administrative Tribunal/Court.

There are nine judges on active duty within the three benches. The Tribunal is presided by one of the judges who is responsible for the judicial activity of the Tribunal. The judicial activities of the Tribunal is supported by administrative staffs such as secretary, court clerk registrar, and the like. In total, there are three registrar officers, one being assistant registrar, one security guard, and one tribunal secretary. Moreover, as far as the number of judges who preside over a case, the respondents confirmed that at least three judges should sit in each proceeding.

The Composition of the judges does not reflect the commonly used approach known as "the balanced tribunal". In this type of tribunal, the judges are selected to represent the interest of the two sides. In Labour Relations Board for instance, judges are selected from the employer and employee side with a presiding judge representing common interest. The Civil Servants Administrative Tribunal does not follow this approach. There is no one from the civil servants side to represent their interest.

The respondents suggested that judges of the Tribunal represent neither the interest of the administrative agency nor that of civil servants. However, they did not hesitate to ascertain that there is no way to make any distinction among disputing parties, rather ensuring neutrality and impartiality are supposed to be the grand norms of the tribunal.

**Appointment of Judges**

There is nothing in the Proclamation about the manner of appointment and removal of tribunal judges. Article 79/4/ grants the Commission to issue directives relating to the manner of execution of the function of judges of the Administrative Tribunal, the code of ethics they should observe, and other related matters.

On the issue of appointment and revocation, respondents disclosed that judges of civil servants administrative tribunal are simply ordinarily recruited employees just like any other civil servants. In other words, there is no appointment procedure for tribunal judges, rather, for all intents and purposes, they are regarded similarly to the rest of civil servants in any other sector.

Therefore, in case where there is no special appointment (that would have an implication on conferring privilege and special incentive package by default), it is not logical and even unnecessary to discuss revocation procedure and the issue of tenure security of judges of the Civil Servants' Tribunal. The respondents disclosed that

recently, there is a rumor about the amendment of the Proclamation/regulation that would reconsider the problem that hindered the effectiveness of the Tribunal. They hoped the upcoming proclamation/regulation would more likely address both the constraints on judges as well as of the Tribunal at large.

**Qualification**

With regard to the qualifications required to serve in the tribunal in the role of a judge, respondents pinpointed certain criteria which are more or less congruent to the preconditions required to be met in the procedure of appointment in case of regular courts and other similar tribunals. However, they contended that the requirements are tight and burdensome for judges of the Civil Servants' Tribunal while their remuneration remains meager and status remain substandard (as compared to judges of regular courts and other tribunals); their employment would not be comparable in any respect with their counterpart judges in regular courts.

**Organizational Structure**

Questions were raised to the respondents in relation to organizational structure of the Tribunal, more importantly, emphasizing on how judicial and administrative tasks are assigned in the context of the Civil Servants' Administrative Tribunal? The position of respondents in response to this question was more or less affirmative or positive. In a sense, they had stated that there are two distinct staff structure— judicial and administrative staff entrusted with their separate but mutually reinforcing mandates. However, there are still vacant positions which need to be urgently filled with qualified personnel to improve the quality of service rendered by the Tribunal. In a similar veil, respondents also reaffirmed the Civil Servants' Administrative Tribunal is by far staffed with sufficient registrar personnel and secretary though not adequately enough when it comes to other staffs.

**Independence**

The tribunal is a budgetary institution that is optimally independent and accountable in terms of budgets as well as corresponding duties entrusted to it. On this point, respondents indicated that institutional budget scarcity is not a pressinig challenge, rather the challenge may be failure to properly plan with the readily available resources, be it human and financial resources.

**Adjudication Procedure**

The final question posed to respondents was the manner in which administrative related disputes would be adjudicated. The respondents were asked to reflect in terms of presentation case, evidence, hearing and pronouncement of decisions, and the like.

In this regard, the response obtained from the respondents affirmed that the Tribunal uses a procedure closely similar with the ordinary procedure practiced in regular courts except for the tendency to incline into quasi-judicial nature. In other words, disputing parties (appellant and respondents) would be given due opportunities to present their respective case though the procedure is not as such strict as the one in the regular courts.

There is also a phase allotted to hearing of cases, examination and weighing of evidence adduced in the process of adjudication. Actual observation of the proceeding also affirms that, with some exceptions, the ordinary court procedure is employed in hearing appeals. Respondents were asked to reflect on whether the decisions of the tribunal are backed by legal and logical reasoning. To this, they affirmed that it is common practice to support decisions with detailed reasoning in the Tribunal.

## 7.14 Summary

Tribunals are effectively an alternative procedure to the court system for enforcement of legal rights. The resolution of disputes is, of course, a task which the courts perform on a daily basis. However, courts are not the only forum for dispute resolution. Given the ever-increasing role of government within the modern state, as evidenced by initiatives such as the creation of the welfare state, the potential for disputes has been greatly increased. Although it is clear that both courts and tribunals perform an adjudicative function, they are distinct bodies.

There are a lot of advantages of tribunals over ordinary courts. Tribunals provide a more affordable means of resolving disputes than the courts. There is no equivalent of a court fee to be paid and, often, legal representation will be unnecessary. They are also more accessible than the courts both physically and in the way in which they conduct their proceedings.

## 7.15 Glossary

**Administrative Law Judge:** in the United States is a judge and trier of fact who both presides over trials and adjudicates claims or disputes involving administrative law.

**Administrative Tribunal:** Judicial organ that is not a court, responsible for settling disputes between the government and private individuals or between private individuals

**Adversarial Procedure:** A procedure used in the common law countries where two advocates represent their parties' case or position before an impartial person or group of people, usually a judge or jury, who attempt to determine the truth and pass judgment accordingly.

***Conseil de etat*:** In France, the Council of State (Conseil de etat) is a governmental body that acts both as legal adviser to the executive branch and as the supreme court for administrative justice.

**De novo:** is a Latin term that means "anew," "from the beginning," or "afresh." When a court or administrative tribunal hears a case "de novo," it is deciding the issues without reference to any legal conclusion or assumption made by the previous court or tribunal to hear the case.

**Inquisitorial Procedure:** A procedure in which the court, or a tribunal, is actively involved in investigating the facts of the case. This is distinct from an adversarial system, in which the role of the court is primarily that of an impartial referee between the prosecution and the defence.

**On record appeal:** When appeal is "on the record" the decision of the tribunal relies solely on the documents and full transcript of the proceeding in the administrative agency or on some cases of lower tribunal.

## 7.16 Review Questions

1) Give examples of areas of dispute that are typically delegated to tribunals for resolution.

2) List as many similarities between courts and tribunals as you can.

3) List as many differences between courts and tribunals as you can.

4) How can tribunal independence from the government be sufficiently assured, particularly when many tribunal members are part-time, short-term appointments?

5) After reading the following provision of Electronic Signature Proclamation No. 1072/2018, answer the question that follows.

**Article 51 Administrative Appeal**

1/ Any subscriber or relying party may submit his complaint to the Root Certificate Authority in writing, within 30 working days after the provision of the service, for any administrative grievance regarding certificate works and services. Particulars shall be determined on a directive issued by the Root Certificate Authority.

2/ After receiving the complaint in accordance with sub-article (2) of this Article, the Root Certificate Authority shall give appropriate decision on the matter within 30 working days.

3/ Anybody who is not satisfied with the decisions of the Root Certificate Authority may appeal to the Federal High Court.

The proclamation does not specify the adjudication procedure governing the handling of complaints before the Root Certificate Authority. In the absence of mandatory procedure, is the Authority under any obligation to comply with requirements of procedural fairness?

A subscriber who submitted a complaint to the Authority argues that, in the absence of a specific procedure before the authority, the Federal Administrative Procedure, which is a general law, should be applicable. Advise the Authority on how it should give a ruling on the subscriber's argument.

6) Is there any provision or principle in the FDRE Constitution that prohibits the establishment of administrative tribunals?

7) If an administrative tribunal determines its own rules of procedure by a directive, do you believe the tribunal is duty bound to comply with rule-making procedure of the Federal Administrative Procedure Code?

8) Which model of the tribunal system is most suitable to implement in Ethiopia?

## 7.17 Further Readings

Peter Cane, *Administrative Tribunals and Adjudication* (Hart Publishing, 2009) P60-91

Chantal Stebbings, *Legal Foundations of Tribunals in Nineteenth-Century England* (New York: Cambridge University Press, 2006) P110-147

# CHAPTER EIGHT

# JUDICIAL REVIEW

## Chapter Overview

Assume that you are a lawyer and your client wants to challenge an action of an agency or government official in court. He wishes to argue that the agency is acting unlawfully. How does he get into court? Where does he find a court with jurisdiction? Is the agency action complained of "reviewable"? Does he have "standing"? Is the action "ripe" for review? Has he properly "exhausted his administrative remedies"? This and the next chapter deal with these questions. We explore the major doctrines of administrative law that govern whether and when a court can consider a challenge to administrative action.

### LEARNING OUTCOMES

After studying this chapter, you will be able to:

- Define judicial review and explain its basic purpose in democratic government
- Identify and distinguish judicial review, appeal, and civil action
- Describe the procedural rules applicable to judicial review proceeding.

## Chapter Table of Contents


**8.1 Introduction ..... 270**
**8.2 The Nature and Essence of Judicial Review ..... 271**
**8.3 Judicial review Vs. Merits Review ..... 272**
**8.4 Appeal and Judicial Review Distinguished ..... 273**
**8.5 Jurisdiction of courts ..... 275**
8.5.1 Inherent jurisdiction ..... 275
8.5.2 Jurisdiction under FAPP ..... 277
**8.6 Judicial Review Procedure ..... 277**
8.6.1 Form and Content of Petition ..... 277
8.6.2 Leave Requirement ..... 278

8.6.3 Hearing .....280
**8.7 Summary ..... 281**
**8.8 Glossary ..... 281**
**8.9 Review Questions ..... 281**
**8.10 Further Readings ..... 283**

## 8.1 Introduction

The judicial review of executive action is an essential process in a constitutional democracy founded upon the rule of law. Irrespective of the nature of the statutory provision put in place for lodging appeals against official decisions, it is essential that all decision-makers who exercise public power are cognizant of the fact that the courts possess jurisdiction over the legality of their decisions. Such jurisdiction extends to matters such as the scope of their powers and the correct adherence to procedural requirements. Certainly, judicial review is no substitute for administrative or political control of the merits, expediency, or efficiency of decisions.[1] The role of the judiciary is both to determine what the legal rules are that apply and to decide on the facts whether the rules have been breached.

In this Chapter, the following will be the key points we will address.

Should the facility of judicial review apply to all government decisions? Should decisions, for example, with high political content, concerning matters of national security, or that are premised on budgetary choices, be reviewable by courts? What is the province of judicial review in an era of commercialization, privatization, and contracting out of government services?

Should government business enterprises be subject to judicial review, or are market accountability and political controls a satisfactory alternative? Should decisions made in the private sector that, in essence, constitute an exercise of public power be subject to judicial review?

At what stage of the administrative process should judicial review be available only when a 'final' decision has been reached? Or at the first sign of unlawful conduct? Should courts apply a 'leave' process to filter out proceedings that are instituted prematurely or vexatiously?

Should administrative law principles apply to disciplinary decisions of a private club or association? Which administrative law grounds of review

[1] A W Bradley and K D Ewing, *Constitutional and Administrative Law* (14th edn: Pearson Education Limited, 2007) P725

can suitably be applied in this context? And, using a contract analogy, can the members of a private club exclude judicial review?

## 8.2 The Nature and Essence of Judicial Review

Judicial review is a fundamental mechanism for keeping public authorities within due bounds and for upholding the rule of law. It is the primary means through which the courts can supervise the exercise of public powers and the performance of public duties.[2] The role of courts in review proceedings is not to examine the 'merits' of a decision or other measure under challenge, but rather to scrutinize the fairness of the procedure by which it was reached and/or whether the decision is lawful.[3]

Judicial review is concerned not with the decision but with the decision-making process. According to Lord Brightman, unless that restriction on the power of the court is observed, 'the Court will, in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power . . . Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made'. The corollary of such a definition is that, once a decision is made in accordance with the principles of legality, fairness, and rationality, and is therefore legally sound, an application for judicial review cannot be made to the Federal High Court to determine the issue of correctness. The function of the court on an application for judicial review is limited to determining whether or not the impugned decision was legal, not whether or not it was correct. The freedom to exercise a discretion necessarily entails the freedom to get it wrong; this does not make the decision unlawful.[4]

In the broad context of the administrative process, the role of judicial institutions is inevitably sporadic and peripheral. The administrative process is far more than a succession of justiciable controversies. Public authorities are set up to govern and administer, and if their every act or decision were to be reviewable on unrestricted grounds by an independent judicial body, the business of administration would be brought to a standstill. The prospect of judicial relief cannot be held out to every person whose interests may be adversely affected by administrative action.[5]

In order to enable them to fulfil their governmental functions, public authorities are vested with a wide range and variety of legal powers and duties. These are derived from laws made by the House of Peoples' Representatives. A judicial review is the legal

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[2] Gordon Anthony, *Judicial Review in Northern Ireland* (Hart Publishing, 2008) P3
[3] Ibid
[4] Rajendra Ramlogan (2007). *Judicial Revie in the Commonwealth Caribbean*. Abingdon: Routledge-Cavendish P1
[5] S.A. DE Smith (1959). *Judicial Review of Administrative Action*. Sydney: The Law Book co. of Australia Pty Ltd. P3

process through which an individual may challenge the legality of how any of these powers has been used.

Ensuring efficiency in public decision-making processes- requires minimal judicial invigilation and where the corresponding grounds for judicial review are not unduly intrusive. In this model, public decision-makers can thus carry out the business of government more efficiently and effectively as their decisions, once taken, can be interfered with by the courts only within closely and clearly defined parameters. On the other hand, an emphasis on the protection of the individual highlights how the public at large benefits when individuals are able, as a matter of priority, to vindicate their interests in the face of the actions or inactions of public authorities. In this model, the parameters within which a judicial review challenge can be made to a decision or other measure would therefore be drawn more widely.

The basic principles of judicial review are intended to ensure heightened degrees of certainty and efficiency in public decision-making by permitting challenges to decisions only where the applicant has, among other things, made the application ‘promptly and in any event within three months’.

## 8.3 Judicial Review Vs. Merits Review

Judicial review precludes the courts from undertaking "merits" review of administrative decisions. The essential warrant for judicial supervision of administrative action is the declaration and enforcement of the law affecting the extent and exercise of power. Secondly, the court's duty and jurisdiction do not go beyond the declaration and enforcement of the law which determines the limits of the repository's power:

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.

The consequence is that the scope of judicial review must be defined not in terms of the protection of individual interests but the extent of power and the legality of its exercise. For the courts to declare and enforce the law, it is necessary to answer the question: what is the law? The courts themselves must answer that question. In doing so, the role of the courts is not to balance the competing interests of the public at large and the interests of individuals since the courts cannot evaluate the competing policy considerations.

If the courts were to review administrative decisions on the ground that they were unfair on the merits, the courts would be doing the very thing entrusted to the repository

of the administrative power, namely choosing among courses of action on which reasonable minds might differ. The courts must recognize the autonomy of the three branches of government within the limits of their own competence and, thus, the legal effectiveness of the due exercise of power by the other branches of government. To do otherwise would be to put the legitimacy of the courts at risk.[6]

## 8.4 Appeal and Judicial Review Distinguished

Judicial review must not be confused with an appeal. An appeal is a procedure that exists only under a particular statute. An appeal allows the appellate body to decide the whole matter afresh, unless the particular statute limits the grounds of appeal.

An appeal, therefore, may involve a thorough reconsideration of the whole decision whereas a judicial review is concerned only with ensuring compliance with legal standards. Depending on the particular statute, an appellate body might be a court, tribunal, minister, or indeed anyone. A claim for judicial review is only possible in court.

When an appeal right is specified by law, that law determines the extent of the power of the appellate court. In most cases, the court's jurisdiction includes reconsideration of both factual and legal issues. For instance, Art. 82/3/ of the Media Proclamation No. 1238/2021 authorizes the Federal High Court to review questions of fact and law when a petition against the decision of the Ethiopian Media Authority is submitted to it.

An appellate body can usually substitute its decision for the first instance decision, although, in some cases, its powers are limited to sending the matter back to be decided again by the lower body. In judicial review proceedings, the court cannot make a decision on the merits but must send the matter back to the decision-maker with instructions for its legal duties. Article 51/3/ of the Administrative Procedure Proclamations instructs the court to order the administrative agency to revise or reenact the directive or reconsider its administrative decision by rectifying the shortcomings identified through the court's decision, following invalidation of the directive or decision.

Unlike a right of appeal, which can be raised only in the body specified, the invalidity of government action can be raised not only in the court during judicial

[6] Justice Ronald Sackville (2018). 'The Limits of Judicial Review of Executive Action - Some Comparisons Between Australia and the United States. In P. Cane (Ed.), Administrative Law. Routledge.

review proceedings but, by way of 'collateral challenge' in any proceedings where the rights of a citizen are affected by the validity of government action.[7]

Wade explains the basic difference between appeal and judicial review in the following terms:

> *The system of judicial review is radically different from the system of appeals. When hearing an appeal, the court is concerned with the merits of a decision: is it correct? When subjecting some administrative act or order to judicial review, the court is concerned with its legality: is it within the limits of the powers granted? On an appeal the question is 'right or wrong?' On review the question is 'lawful or unlawful?*

Professor Ian Loveland also places emphasis on remand as the distinctive feature of judicial review:

> *Judicial review is a supervisory rather than appellate jurisdiction. A court which holds a government action unlawful will not substitute its own decision for the one made by the government body concerned, but will return the question to the original decision- maker so that the decision can be made again, this time in accordance with legal requirements. In contrast, in an action for (for example) trespass or breach of contract, the court will impose its solution on the dispute before it.*[8]

Another difference between the two is that rights of appeal are always statutory. Judicial review, on the other hand, is the exercise of the court's inherent power to determine whether an action is lawful or not and to award suitable relief. For this reason, no statutory authority is necessary, although that may be somewhat controversial in the Ethiopian context. However, following the enactment of the Administrative Procedure Proclamation, any discussion about the inherent nature of the court's jurisdiction is of no practical significance. The proclamation has established the statutory basis of the judicial review jurisdiction of ordinary courts. The Federal High Court now has primary jurisdiction over the judicial review of administrative decisions and directives.

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[7] Jhon Alder (2002). General Principles of Constitutional and Administrative Law (4th ed.). Palgrave Macmillan. P366

[8] Ian Loveland (2012). Constitutional Law, Administrative Law, and Human Rights: A Critical Introduction (6th ed.). Oxford University Press. P62

## 8.5 Jurisdiction of Courts
### 8.5.1 Inherent Jurisdiction

Do courts in Ethiopia have an inherent power to review the legality of administrative actions? Most legal scholars in Ethiopia are strong adherents of the 'inherent power' approach, arguing that courts have inherent power to review acts of administrative agencies. However, such an argument has invited mixed reactions from the Cassation Bench of the Federal Supreme Court. In CFN 23608 (*Ethiopian privatization and public enterprises supervising agency vs. heirs of Ato Nur Beza (2000 E.C.) volume 6*), it was held that the source of judicial power in Ethiopia is statutory. Courts do not have inherent judicial power and there is no legal framework governing the judicial review of administrative actions.

Courts are constitutionally mandated to interpret and apply the law. Unless their jurisdiction is excluded or the matter is assigned to another judicial or quasi-judicial organ, courts do have inherent judicial power to determine the legality of administrative actions. The bench's position fails to duly investigate the existence of a law authorizing courts to annul ultra vires administrative actions. Article 401 of the Civil Code unequivocally declares acts performed by government organs in excess of the powers given to them by law or without the observance of the conditions or formalities required by law to be of no effect. By this provision, courts are authorized to annul or invalidate ultra vires acts. The basic issue in the above cassation case should have been whether the applicant acted within the limits of its legal authority.

Determining 'excess of power' is a complex issue. It all depends on how the court understands the principle of ultra vires and its choice of either broad or narrow interpretation. For instance, the courts in England have developed the ultra vires principle very broadly to include cases of abuse of power. Therefore, the fundamental issue is not about whether the case could be submitted and adjudicated before the court, but about the grounds of review, the court can scrutinize the act.

The second reason the bench did not interpret the law correctly is that the case differed from the ordinary matters falling under the agency's power. The applicant agency was established by Privatization and Public Enterprises Supervising Authority Establishment Proclamation No. 412/2004. According to the Article, the powers and duties given to the Management Board of Ethiopian Privatization Agency under the provisions of Proclamation No. 110/1995 were given to the Board.

Based on the transferred power, the Board of the Agency had jurisdiction to accept a request for the return of immovable property confiscated contrary to Proclamation no. 47/1975 to provide for government ownership of urban lands and extra urban houses. More specifically, the agency is authorized to return property confiscated through "directive, written order, or oral official order". In CFN 23608, there is no petition

submitted to the agency for the return of property. The applicant has already secured a decision from the then Ministry of Works and Urban Construction for the return of the properties. His request to the Agency was for the execution of the decision alleging there was a delay in delivery. The agency then decided on a partial return of the property. The respondent submitted an application to the Board. The Board revoked the Agency's decision for lack of jurisdiction. The respondent instituted an action in court, claiming both the Agency and the Board lack jurisdiction for their respective decisions.

Both the Agency and the Board treated respondent's petition as if it was a request for return of property. With this understanding, the Agency decided the return of some of the properties, but not all of them. Aggrieved by this decision, he appealed to the Board of the Agency. Again, the Board treated the petition as if it was a request for return of the properties. Then, it revoked the Agency's decision. The main argument of the respondent in court was that his petition was treated as if it was a petition for return of the properties even though it was a request for immediate delivery as the Ministry has already decided they be returned to him.

In short, respondent's action was for the invalidation of an ultra vires decision. The bench emphasized that courts lack on matters specifically assigned to other organs with judicial power. However, it was clear from the facts of the case that the way respondent's petition was handled and the nature of the matter itself was outside of the agency's jurisdiction.

Despite the strong words of the bench, not all cases involving judicial review of administrative action are rejected for lack of 'inherent' judicial power. When a directive was challenged on ultra-virus ground, neither the lower courts nor the cassation bench rejected the legal action for a lack of inherent judicial power or the absence of a legal framework governing the judicial review.

In CFN 44226 (volume 11)[9], the Federal First Instance Court invalidated some provisions of a directive issued by the applicant. The court's decision was affirmed by the appellate Federal High Court. Both decisions of the lower courts were overturned by the Cassation Bench, however, unlike the Ethiopian privatization case (CFN 23608), it was not due to lack of jurisdiction. The bench affirmed the legality of the directive stating it was within the scope of power granted to the National Bank.

From silent acknowledgment of the jurisdiction of courts, the bench even went further in expressly recognizing citizens' right to challenge administrative action. In

[9] Applicant Ethiopian National Bank vs. Respondents Hibret Insurance Company /et al/ (2003 E.C.)

CFN 91622 (volume 16)[10], the Cassation Bench expressly acknowledged the right of citizens when their rights and interests are violated by an illegal act of the executive branch of government. This strong position of the bench was reflected while examining the legality of revocation of certificate of ownership. The relevant part of the bench's ruling is given here below.

> *Cumulative reading of article 1195 and 1196 of the Civil Code show that the administration lacks absolute authority over the issuance of proof of ownership. On the contrary, when the provisions are viewed in relation to each other read in conjunction with article 1198, it becomes clear that certificate of ownership could be revoked only for those reasons specified by law. When the administration acts illegally contrary to the reasons and requirements, a person whose interest is affected by such illegal acts is entitled to submit his case to the competent court in accordance with articles 37, 78 and 79 of the FDRE Constitution.*

### 8.5.2 Jurisdiction Under FAPP

The Federal Administrative Procedure Proclamation confers exclusive judicial review jurisdiction to the Federal High Court.[11] The jurisdiction extends to the review of both administrative decisions and directives. The Proclamation stipulates the establishment of a special 'Judicial Review Bench' within the High Court.

One important point about the High Court's jurisdiction is that the criteria for its selection as exclusive court of review. Why not the Federal First Instance Court? In the explanatory note, an attempt was made to justify this based on the complexity of the nature of the cases. The explanatory note reads:

> *As a matter of fact, matters which have been reviewed and decided by administrative agencies have passed through one level of review and, if they necessitate a further review, they can be considered to be fairly complex.*

## 8.6 Judicial Review Procedure

### 8.6.1 Form and Content of Petition

A petition to the Federal High Court initiates a judicial review proceeding. Unfortunately, there is no guidance in the Administrative Procedure Proclamation

[10] Applicant w/o Africa tadese vs. respondent w/o Yalemework tadese (2 persons) Megabit 12-2006 E.C.

[11] Art. 49/1/ of Federal Administrative Proclamation No. 1183/2020

regarding the content of the petition and the particulars that must be stated on the petition. Due to their significant difference, judicial review and ordinary civil action follow different routes starting from the initial to the final stage of the proceeding. In general, the procedure governing judicial review is not suitable for civil action and *vice versa*.

The proclamation failed to account for the peculiar nature of the judicial review and simply hoped the relevant Civil Procedure Code provisions would provide a solution to the procedural challenges not addressed by the proclamation. This is stated under Article 58, which reads:

> *On procedural matters not covered by Chapter Four of this Proclamation, the relevant Provisions of the Civil procedure Code shall apply.*

## 8.6.2 Leave Requirement

In private lawsuits, a statement of claim may be rejected by the registrar for non-compliance with formality requirements[12] or by a court for lack of cause of action or jurisdiction.[13] There are three grounds a registrar of court may reject a statement of claim. These are:

a) it is not in the form provided for by Art. 222;

b) it is not accompanied by the annexes provided for by Art. 223[14]; or

c) it is not verified in the manner provided for by Art. 91

The court will determine the cause of action assuming the facts stated on the statement of claim are true. If, based on that assumption, the plaintiff cannot entitle the relief he sought, then he has not passed the test of action and his case will be rejected. Similarly, if the facts of the case indicate the court's lack of jurisdiction, the claim will be rejected without the need to issue summon to the defendant.

[12] Civ.P.C Art. 229
[13] Civ.P.C Art. 229
[14] It is mandatory to support a statement of claim with oral, documentary or other types of evidences. If this the case, the Civil Procedure Code requires a declaration to the effect that plaintiff does not have any evidence. Therefore, whether there is evidence or not annex is mandatory.

The requirement for the grant of leave prior to the commencement of judicial review proceedings was designed to filter out applications that are either groundless or hopeless.

In one English case[15], the Court said that the purpose of the requirement for leave to be granted is:

> *'to prevent the time of the Court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left . . .'*

A logical consequence of this approach is that the court is, therefore, not concerned to delve into the merits of the application at the leave stage.

In England, the grant of leave by the Court is necessary before a person may pursue an application. In Caribbean countries, the situation is somewhat mixed, with few countries relieving parties of leave requirement.[16] Even before this stage, the claimant should write to the public body identifying the issues at stake to which the defendant should reply. The purpose of this procedure called "pre-action protocol" is to avoid litigation and achieve a settlement.[17]

**FAPP Leave Requirement**

FAAP leave requirement is found in Article 54 of the Proclamation. The provision reads:

> *Where the court finds that the petition for review has the merit, court shall give to the agency against whom a petition of review had been filed an opportunity to submit a written response within 15 days.*

According to the provision, before a hearing is conducted, the court must be satisfied that the petition has merit. What does "has the merit" mean? How is merit of the case to be determined? There is no guidance in the Proclamation to answer these questions. The absence of any test of merit in effect bestows to the court very wide

[15] R v Inland Revenue Commissioners, ex p National Federation of Self-Employed and Small Businesses Ltd

[16] For instance, there no requirement for an applicant to first seek the leave of the court in Barbados to seek permission to make an application for judicial review. *See* Eddy Ventose, (2013). *Commonwealth Caribbean Administrative Law* . New York: Routledge P8

[17] Mark Ryan (2014). *Unlocking constitutional & administrative law* (3rd ed.). Routledge. P522

discretionary power to accept or reject judicial review petitions. There is even no duty to give reason while rejecting the application.

Making judicial review dependent on the discretion of the judge is inconsistent with the very purpose of the Proclamation. One of the underlying reasons for the promulgation of the Administrative Procedure Proclamation is because it became necessary:[18]

> *…to guarantee administrative justice by promoting culture of transparency and accountability through legally establishing a system of judicial review for persons who might be aggrieved by acts of administrative agencies, in their rule-making and decision-making capacities.*

When the only access to judicial review is through the discretionary door of the court, there is no guarantee of administrative justice. Worse, merit as criteria for leave endangers the court's impartiality even if the petition is permitted. The merit of case is determined by the facts and the law to be applied to the case. If a judge is to form an opinion at the earliest stage of the proceedings, that is likely to influence his final decision.

### 8.6.3 Hearing

There is no indication in the Proclamation that there will be an oral hearing of the parties before a final decision is rendered. It seems the final decision will be reached based on the petition and written response by the respondent. There is no indication that the judicial review proceeding includes an examination of witnesses. Of course, the court is given the power to order the agency against whom a review petition is being considered to submit records relating to the directive or administrative decision under consideration.[19] But, that is one element of examination of evidence and the parties who know their case well should be allowed to submit written and oral evidence. Especially in those instances the petitioner is denied the opportunity to present rebuttal evidence, he must be given the chance to prove his case or rebut the allegations brought against him by submitting relevant evidence.

One option for the problems raised above is to resort to Article 58 of the Proclamation, which governs the applicability of the ordinary rules of the Civil Procedure Code to judicial review proceedings. The provision states:

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[18] See Administrative Procedure Proclamation preamble
[19] Art. 54 of Administrative Procedure Proclamation No. 1183/2020

*On procedural matters not covered by Chapter Four of this Proclamation, the relevant Provisions of the Civil procedure Code shall apply.*

## 8.7 Summary

Judicial review is a procedure whereby the courts can determine the lawfulness of exercising executive power. It is concerned with the legality of the decision-making process as opposed to the merits of the actual decision. It is a supervisory rather than an appellate jurisdiction. Accordingly, the court's role is to supervise the exercise of discretionary power in order to ensure that it has been exercised lawfully.

In Ethiopia, the courts' jurisdiction to invalidate ultra vires acts emanates broadly from the constitutional principles of access to justice and the rule of law. However, there is also a statutory basis to invalidate acts done beyond power in the Civil Code (Article 402). The Federal Administrative Procedure Proclamation grants exclusive jurisdiction of judicial review to the Federal High Court. Judicial review is different from ordinary civil cases. The Civil Procedure apply for matters not covered in the Proclamation.

## 8.8 Glossary

**Appeal:** an application to a higher court for a decision to be reversed.

**Leave:** Permission by a court to admit judicial review petition

**Merit review:** a thorough, consistent, and objective examination of applications based on pre-established criteria by persons who are independent of those submitting the applications and who are knowledgeable in the field of endeavor for which support is requested.

**Inherent jurisdiction:** A doctrine that a superior court has the jurisdiction to hear any matter that comes before it.

## 8.9 Review Questions

1) Is judicial review antithetical to administrative efficiency?

2) Is it possible to challenge broader systemic issues and matters of general administration through judicial review?

3) Addis Ababa Administration issued a notice on September 20, 2022 announcing land and land related services will not be provided to authorized agents, but only upon physical appearance of the principal.

A) How do you classify the notice? Is it an administrative decision or a directive?

B) Who has standing to challenge the notice?

4) The Administrative Review Council (ARC) of Australia, after conducting study on the Administrative Decisions (Judicial Review) Act 1977, which is the law governing judicial review in Australia, put forward the following comment on its report:

> *In the Council's view the Act prescribes a clear, straightforward, and self-contained procedure for commencing judicial review proceedings.*

Do you think the Ethiopian Federal Administrative Procedure also prescribes a clear, straightforward, and self-contained procedure for commencing judicial review proceedings? What are the problems and loopholes of the Proclamation as regards judicial review procedure?

5) When a third party is joined as party in judicial review proceeding, what is the criteria to determine his standing? Is the standard of third party standing different under FAPP Judicial review and statutory review i.e., appeal under specific legislations?

6) What does "collateral review" mean?

The explanatory note on the Administrative Procedure Proclamation claims the special judicial review bench of the Federal High Court share common features with the Administrative Court structure found in Germany. It states:

> *This approach is more or less similar to the German judicial review system.*

Is it true that there is a similarity between the Ethiopian and German Judicial Review Systems?

7) When you challenge an interference on your property rights by a government agency, you can do it either by petitioning the Federal High Court through judicial review or you can take the case to the ordinary courts and institute petitory action in the Federal First Instance. In both types of proceedings, the basic issue of law is the same. Both courts have to resolve the legality of the action of the agency.

If a person, aggrieved by an administrative decision, opts to seek a remedy from the ordinary courts (through civil action) after exhausting internal remedies within the agency, does it in any way indicate that the nature of the case or dispute is complex? Is there any correlation between complexity and internal agency review mechanism?

8) In civil matters, before appeal could be heard, it should pass the leave stage. Unless leave is granted, the respondent will not be summoned to respond to the appeal application. The same is true when application is submitted to the Federal Supreme Court Cassation Bench on grounds of fundamental error of law. Discuss the grounds upon which leave may be denied by the appellate court and the Cassation Bench.

## 8.10 Further Readings

Chris Taylor, *Constitutional and Administrative Law* (Pearson Education Limited, 2008) P108-118

Daniel E. Hall (2015). *Administrative law: bureaucracy in a democracy*. Pearson Education P243-301

S.A. DE Smith (1959). *Judicial Review of Administrative Action*. Sydney: The Law Book co. of Australia Pty Ltd. P3-50

# CHAPTER NINE

# ACCESS TO AND GROUNDS OF JUDICIAL REVIEW

## Chapter Overview

This chapter concerns the availability of judicial review or the rules and principles that determine access to judicial review. To protect against undue interference in the conduct of public administration, courts and the legislature have devised rules, principles, and doctrines regarding the scope of judicial review. The first part of this chapter deals with some of the preconditions and procedures to obtain judicial reviews, such as standing, justiciability, finality, and exhaustion of remedies.

The second part will investigate one of the contentious topics of administrative law: grounds of judicial review. This is where the tension between the executive and the judiciary is vividly seen. Review grounds such as legality, abuse of power and procedural irregularity will be examined in detail in this topic.

### LEARNING OUTCOMES

After studying this chapter, you will be able to:

- Understand the rules that limit access to judicial review.
- Define standing and explain how it is applied in judicial review of decisions and directives.
- Understand the scope of leave requirement to judicial review and the power of courts to summarily dismiss cases (leave).
- Distinguish between error of fact and error of law.

**Chapter Table of Contents**

**9.1 Introduction ..... 286**
**9.2 Access to Judicial review ..... 287**
**9.3 Standing ..... 287**
9.3.1 Standing under FAAP ..... 289
**9.4 Non-Justiciability ..... 291**
**9.5 Ripeness, Time Limit and Exhaustion of Remedies ..... 294**
9.5.1 Ripeness /Final/ ..... 294
9.5.1.1 Ripeness under FAPP ..... 295
9.5.2 Time limit ..... 297
9.5.3 Exhaustion of administrative remedies ..... 299
**9.6 Finality /Ouster/ Clause ..... 302**
9.6.1 Types of finality clause ..... 303
**9.7 Grounds of Judicial Review ..... 305**
**9.8 Illegality /Ultra Vires/ ..... 307**
9.8.1 The doctrine of ultra vires under Ethiopian Law ..... 309
9.8.2 Legality of directive ..... 309
9.8.3 Legality of decisions ..... 311
**9.9 Error of Law and fact ..... 312**
9.9.1 Error of fact ..... 312
9.9.1.1 Essential statutory element ..... 313
9.9.1.2 Errors related to materiality and classification of facts ..... 314
9.9.2 Error of law ..... 314
9.9.3 Jurisdictional error of law and fact ..... 315
9.9.4 Error of fact and law in FAPP ..... 316
**9.10 Abuse of Power ..... 317**
9.10.1 Improper purpose ..... 318
9.10.2 Relevant and Irrelevant Considerations ..... 320
9.10.3 Proportionality ..... 321
**9.11 Non-compliance with procedural requirements ..... 322**
9.11.1 Violation of essential procedural requirement ..... 323
9.11.2 Directives ..... 323
**9.12 Summary ..... 326**
**9.13 Glossary ..... 326**
**9.14 Review Questions ..... 327**
**9.15 Further Readings ..... 332**

## 9.1 Introduction

Before an applicant can proceed through judicial review, they need to show that they have standing to claim relief before the court. The applicant must also first obtain leave from the court. There are also additional challenges such as ripeness, exhaustion of administrative remedies and time limit, which significantly restrict the availability of review. After all these procedural hurdles are tackled, the court will review the legality of administrative decisions or directives based on one of the grounds listed

under the Administrative Procedure Proclamation. We will explore in detail how courts in Ethiopia were interpreting and applying availability and grounds of review. We will also analyze the new Administrative Procedure Proclamation, its impact and the existing trends and practice of application of judicial review.

The issues of accessibility and grounds of review raise constitutional issues about the role of the judiciary and the executive. When a court reviews the lawfulness of a particular agency decision, to what extent should it "respect," "defer," or give "weight" (perhaps controlling weight) to the agency's judgment? This central question of administrative law involves the proper relation of the courts to the administrative agencies. Should a court accept whatever conclusion an agency reaches? If it did so, judicial review would be meaningless; it would not exist at all. But if a court were to decide every question afresh, we would lose many of the advantages of having administrative agencies.[1]

## 9.2 Access to Judicial Review

Several prerequisites must be satisfied before a person may obtain judicial review. One is the requirement that a court has jurisdiction over the case. A second requirement for judicial review is a statutory cause of action, which in administrative law is usually found in the FAPP and other specific statutes, but it is subject to qualifications and exceptions. In addition, other requirements relate to the timing, exhaustion of remedies, and finality of administrative decision or directive. The issue of leave and jurisdiction have been discussed in Chapter Eight. Now, we will turn to the other topics.

## 9.3 Standing

Briefly stated, standing or *locus standi* is the interest required to seek judicial remedy.

In the US, the requirement of standing as summarized by the Supreme Court[2] must fulfill the following preconditions. According to the court, irreducible constitutional minimum of standing contains three elements:[3]

[1] Stephen G. Breyer et al (2017). Administrative Law and Regulatory Policy: Problems, Text, and Cases (8th ed.). New York: Wolters Kluwer. P209
[2] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992) P45
[3] William F. Funk & Richard H. Seamon (2016). *Administrative Law* (5th ed.). New York: Wolters Kluwer. P213

**First,** the plaintiff must have suffered an ‘‘injury in fact’’ — an invasion of a legally-protected interest which is:

concrete and particularized and

‘‘actual or imminent, not ‘conjectural’ or ‘hypothetical.’’

**Second,** there must be a causal connection between the injury and the conduct complained of — the injury must be ‘‘fairly . . . trace[able] to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.’’

**Third,** it must be ‘‘likely,’’ as opposed to merely ‘‘speculative,’’ that the injury will be ‘‘redressed by a favourable decision.’’

In short, a plaintiff must show *injury*, *causation*, and *redressability*. As the Court explained, the role of the courts is to protect the rights of individuals; vindicating the public interest is the role of the political branches. Thus, the standing requirement is intended to distinguish between those who are individually harmed and those who only have a generalized grievance shared by the public at large.

The US rules of standing are among the strictest compared to other jurisdictions. Flexible and less stringent rules are found under French administrative law, the basic principle in French law is that anyone with a direct and certain interest can challenge an administrative decision which affects him or her. Individuals can bring an action which affects them as individuals, as members of a group, as users of a public service or for a collective interest. In several situations, associations can bring challenges. Because actions in the courts are not just the defence of rights, as in private law, but are designed to maintain the legality of public decision-making, the requirements for having a legitimate interest in bringing an action are much less than in private law.[4]

Interests as an individual can arise either because you are the person to whom the administrative decision is addressed – for example, the refusal of planning permission – or because your personal situation is affected. To be affected, there must be something in the decision which changes the individual’s legal situation.[5]

[4] John Bell & Francois Liche`re, Contemporary French Administrative Law (Cambridge University Press, 2022) P155
[5] Ibid

## 9.3.1 Standing Under FAAP

**Federal Administrative Procedure Proclamation No. 1183/2020**

Art. 48. Filing of Petition for Review

Without prejudice to the Provisions under Article 46 of this Proclamation:

1/ Any interested person may file a petition requesting a judicial review of a directive;

2/ Anyone whose interest is affected by an administrative decision may file a petition requesting judicial review.

**Standing to Challenge Directives**

The Administrative Procedure Proclamation does not require the existence of any injury or interest to be affected whenever a challenge to an administrative directive is brought before a court. A wider, more flexible approach to standing might be arguably acceptable. However, abolishing the requirement of standing in judicial review is something unheard of.

It is a generally accepted rule of administrative law in many countries that before a person can obtain judicial review of agency action; the person must show that the agency action has caused or is about to cause concrete injury to the person, which can be avoided or redressed by a court. The easy case is when an agency acts against someone or adopts a rule that imposes duties on or restricts a person's freedom.

We should ask what motivated the drafter to allow the review of directives without any standing precondition. The explanatory note details the difference in approach between the working group and the Legal and Judicial Advisory Council in the following manner:

> *The working group discussed this issue at length. The following concluding remarks were made at the 21$^{ST}$ Meeting Minute of the Working Group on the 7th of April 2019 "On the other hand, it has been suggested that the right to request a judicial review should be broader, as directives are generally applicable and do not immediately affect the interest of people. To this end, using the phrase "any interested person" was presented as an option." Later, when the draft was presented to the Legal and Judicial Advisory Council for discussion, it was agreed that the petition for a judicial review of directives*

> *are matters of public interest[6] that should be understood broadly and should be open for any interested person to petition.[7]*

The Advisory Council tried to justify its position on the general nature of the directive. However, generality by itself is not sufficient to abolish standing requirement. Firstly, the generality factor should not be as such given too much weight. Directives, unlike decisions, apply to a certain group of people, but these groups may be few. Banking directive primarily governs only those engaged in the banking business only. The total number of banks in the whole country is less than fifty. Therefore, in the administrative law context, "general" should be understood as "not limited to a specific individual or group of individuals". However, it is important to take note that its applicability may be limited to members of the group who may be few.

The advisory council relied solely on the general nature of the directive to change the proposition made by the working group. The following is a quote from the explanatory note:

> *[a] directive is a third level legal document that has an effect on the rights and interests of the general public. In the case of a generally enforceable legal document, it is the concern of everyone to make a general inquiry or to point out a problem with the document. Because the law is a document that affects the interest of the general public, it may not be necessary for an individual to show how a certain directive or law affects her interest. Consequently, the phrase "any interested person" should be interpreted broadly.*

It might be a legitimate "concern of everyone to make a general inquiry or to point out a problem with generally enforceable legal document". However, making a general inquiry and identifying the problem could never be equated with challenging the directive in court. The question should not be viewed only in terms of ensuring legality. The corresponding public interest in maintaining effective and efficient administration should also be important factor.

A flood of litigation is a waste of public money and time of the administration. It also significantly inhibits the ability of the administration to effectively carry out its function. Allowing anyone to challenge directives may entail a flood of litigation due to unwarranted and unjustified actions in court.

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[6] This is similar to the French justification

[7] Council, T. L. (2021). Explanatory Note for the Provisions of Federal Administrative Procedure Law. Addis Ababa: The Legal and Justice Affairs Advisory Council P42

**Standing to Challenge Administrative Decisions**

According to Art. 48/2/ of the Proclamation, any person as far as his interest is affected may petition to the Federal High Court to seek judicial review of an administrative decision. What does "affected interest" mean? Unfortunately, the explanatory note is silent on this issue. There is no discussion on standing within the context of administrative decisions.

To determine whether a person's interest is affected, it is important to recall the meaning of administrative decisions in Chapter Three. One of the key elements of the definition is that it affects the rights and interests of individuals. Therefore, the existence of interest affected is the same as determining the existence of an administrative decision against that person. If there is an administrative decision, there is no question that the interest of the person against whom the decision was taken will be affected.

However, the correlation between the meaning of administrative decision and standing will not provide a satisfying answer to the question of whose interest? An administrative decision may affect the interest of the person against whom the decision was taken and other persons who are not a party to the decision-making process. In some cases, third parties may be affected by a decision which may not necessarily affect the person against whom the decision was taken. For instance, a decision to transfer title to the owner of an immovable property may affect third parties who may claim a property right.

Therefore, in addition to an administrative decision the court should verify whether the claimant possesses a right or interest and whether the decision restricts or in any way interferes with the exercise of his right or interest.

## 9.4 Non-Justiciability

A 'justiciable' decision is one that is fit for judicial review; a 'non-justiciable' decision is not. To ask whether a dispute is justiciable is to consider whether the dispute is suitable for resolution by the judicial process, irrespective of who is bringing the action.[8]

Even though a decision by a public body has been found ultra vires or in breach of procedural requirements, the courts will decline to review it if it is within a field which they regard as being 'non-justiciable', a field they regard as being essentially within

[8] Paul Craig (2021). Administrative Law (9th ed.). Thomson Reuters P1598

the executive domain. A non-justiciable decision is one that cannot be challenged in a court by way of judicial review.

Non-justiciable matters include:

- foreign affairs, defence, and national security;
- law enforcement;
- prison operational decisions;
- political decisions.

Justiciability is said to refer 'to the aptness of a question for judicial solution'. If a court concludes that a decision is non-justiciable, it will decline to exercise its jurisdiction to review it on the basis that judicial involvement is not 'appropriate' or 'proper'. A finding of non-justiciability is a finding that a decision is not amenable to judicial review.[9]

The fundamental question in determining the existence of justiciability is to whether, having regard to its nature and subject matter, the decision should be subject to a judicial review. The primary emphasis is placed on the decision, as opposed to the decision-maker.

Courts in Ethiopia should be very cognizant of their limited role in judicial review proceedings. Courts are concerned with the process by which the decision was made and not the substantive merits thereof. Since judicial review concerns the court's ability to exercise power over executive or administrative action, courts should be careful, lest they usurp the function of the executive in determining and executing policy.

In common law countries, while courts have the power to declare administrative action as unlawful, they hesitated to extend their power into certain areas which they believe quite properly belong to the executive sphere. The courts have definied these categories in various decisions, including certain policy decisions, actions by the head of state, treaty provisions, and matters relating to national security and the military and defence force. The courts have particularly avoided deciding political questions.[10]

When it comes to comprehending its exact meaning, there is a good deal of confusion surrounding justiciability. At least in part, this is because the term is used in several discrete, albeit sometimes overlapping, senses. It is important to keep these various strains of meaning analytically separate. Some are best analyzed quite

[9] Peter Cane et al (2018). Principles of Administrative Law. ProQuest Ebook Central: Oxford University Press. P65

[10] Eddy Ventose (2013) *Commonwealth Caribbean Administrative Law* . New York: Routledge P91

separately from justiciability in its strict sense. The following senses of the term may be encountered from time to time:

1) The matter is beyond the jurisdiction of the court;

2) The matter is within the jurisdiction of the court, but beyond the reach of the administrative law remedies, as it does not involve an exercise of 'public' power;

3) The court possesses jurisdiction but is institutionally incompetent to resolve the matter;

4) The court possesses jurisdiction and is competent, but regards the matter as constitutionally inappropriate for its intervention;

5) The court views the matter as premature, and thus not yet appropriate for judicial intervention;

6) The court can find no ground of review, or at least no argument that would not involve an impermissible intrusion into the administrative merits;

7) The court lacks admissible evidence upon which to determine the matter, particularly due to crown immunity from disclosing that evidence.[11]

In CFN 51790 (volume 12)[12], the cassation bench understood justiciability as synonymous with jurisdiction. It said a matter before a court is non-justiciable if it falls within the exclusive jurisdiction of another organ. A similar decision was given in CFN 54697-v12[13]. In this case, the bench could not find any organ with exclusive jurisdiction, allowing the case to proceed before the ordinary courts. In its reasoning, the bench stated:

> *Regular courts do not have jurisdiction to adjudicate cases that are legally identified to be resolved by administrative organs. A court should not entertain*

[11] Chris Finn (2007). The concept of 'justiciability' in administrative law. In M. Groves, & H. P. Lee, Australian administrative law: Fundamentals, principles and doctrines. Cambridge University Press. P143-4

[12] Welday Zeru (et al) vs. Ethiopian Revenue and Customs Authority (2003 E.C.)

[13] Addis Ababa Administration Land Development Administration (et al) VS. Denek sera plc (2003 E.C.)

*a case that is within the legally defined authority of administrative agencies or determined by law to be resolved by the administration.*

In short, the bench's position delineates the borderline between the executive and the judiciary. Despite defects in the reasoning and confusing jurisdiction with justiciability, the central theme underlies the court's duty not to interfere with the executive regarding matters falling within the exclusive jurisdiction of the administration.

## 9.5 Ripeness, Time Limit, and Exhaustion of Remedies

All modern systems have this twin channelling: prohibition of challenges that are inconveniently early (inconvenient for court and administration, that is) or are inconveniently late. Challenge comes when, and only when, it is convenient for courts and administration.[14]

The courts have treated as hypothetical questions that come too early and are thus unripe or which come too late and are therefore moot.

### 9.5.1 Ripeness (Final)

Ripeness concerns with whether a matter is developed well enough for the court to exercise review. In other words, ripeness is concerned with maturity— that is, whether a case is sufficiently mature to be heard by a court. Accordingly, agency investigations, hearings, and rules that are under consideration but not finalized may not be challenged through judicial review.

The requirement that a case must be "ripe for review" before a court may hear it means that agencies' actions must first have an adverse effect, concreteness, and imminence. If rights or obligations have been determined by the agency action, or legal consequences will flow from it, then a court will hear the complaint.[15]

"Ripeness" implies what one would think it implies. When a contested agency determination is ripe, it is mature enough for judicial review. Just as apples need to ripen before they are edible, disputes with administrative agencies need to ripen before

[14] William Bishop (2008). A Theory of Administrative Law. In P. Cane (Ed.), Administrative Law. Routledge P368

[15] Daniel L. Feldman (2016). Administrative Law: The Sources and Limits of Government Agency Power. CQ Press. P285

the courts hear them. If the court perceives a controversy as green, it will regard the controversy as premature and deny review until it reaches maturity.

The ripeness principle serves a dual purpose. That is, the ripeness principle functions to protect the administrative process from undue interference by the courts as well as to protect the courts from having to hear controversies that the courts were not designed to decide.[16]

### 9.5.1.1 Ripeness Under FAPP

Article 51 of the proclamation states that a judicial review may only be sought against a final decision of an agency. The provision is a ripeness requirement for judicial review. The Proclamation does not define finality. It all depends on the nature of the decision and its impact on the right and interests of the party against whom the decision is taken.

In some cases, specific statutes may require decisions to be ripe before they could be challenged in court. For instance, only final administrative decisions of the management board of the National Electoral Board may be appealed to the Federal High Court, and final decisions regarding the electoral process and results may be appealed to the Federal Supreme Court.[17]

The ripeness doctrine typically comes into play when a party challenges a rule or other statement that an agency has made at a relatively early stage of the regulatory process prior to seeking to enforce its policy against a given individual.[18]

In the United States, an administrative decision may be challenged only if it is ripe for review, the criterion being a "concrete adverse effect."[19]

**Example**

*Suppose an agency issues a regulation prohibiting certain business practices. When and if the regulation is enforced, the defendant can challenge the validity of the regulation as a defence. But can it challenge the regulation as*

[16] Paul Craig, supra note 8, P590
[17] Article 17/1/ of National Electoral Board of Ethiopia Establishment Proclamation No. 1133/2019. That means decisions regarding the electoral process and results may only be challenged as far as they are final.
[18] Ronald M. Levin & Jeffrey S. Lubbers (2017). *Administrative Law in a Nutshell* (6th ed.). West Academic Publishing. P401
[19] William Bishop (2008). A Theory of Administrative Law. In P. Cane (Ed.), Administrative Law. Routledge P369

> *soon as it is promulgated? On the one hand, nothing has happened. The agency has not told it to do anything, it is subject to no sanction, we do not know whether the regulation will be enforced, we do not know how it will be interpreted if it is, and there is no concrete case in the context of which the legality of the regulation can be evaluated. For these reasons, the challenge may be not yet "ripe."*[20]

In the landmark Abbott Laboratories case in US, Justice Harlan for the Court, explained that the ripeness doctrine was intended:[21]

> *[T]o prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties' premature questions are not adjudicated.*

In CFN 214227 (unpublished)[22], a notice was issued to respondents to return their title deed to correct errors on the certificate of title. The correction to be made by the applicant (Addis Ketema Sub-city Land Administration Office) will reduce the size of the respondents' immovable property. Respondents' petitory action was found justifiable and the lower courts gave injunction relief. However, the cassation bench revoked the decision. The bench indicated that the issuance of notice by the applicant to make a correction on the errors that were not detected at the time of issuance of the title deed is a lawful exercise of power. Such an exercise of power cannot be challenged because it constitutes undue interference by the courts.

Despite the vagueness of the bench's reasoning (because the basic issue was whether issuance of the notice subject to the threat of revocation of the title deed was legal), there is some indirect reference to ripeness to justify its position. It stated that, for instance, if an applicant revokes the title deed or commits acts contrary to law, he will be compelled to rectify its illegal measures and including being liable to payment of compensation. So, in short, what the cassation bench is saying is that issuance of notice for the return of the certificate of title is not ripe to be challenged by petitory action in court. In other words, a challenge in court will be available when a final decision on the correction is disclosed.

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[20] Stephen G. Breyer, supra note 1 P879

[21] Daniel L. Feldman (2016). Administrative Law: The Sources and Limits of Government Agency Power. CQ Press. P285

[22] Addis Ketema Sub-city Land Administration Office vs. Ato Mustefa Usman (et al) (2014 E.C.)

In the above case, exactly what corrections are to be made and their consequence on the ownership rights of respondents were not disclosed. That is why the bench considered the notice not ripe to be challenged in court. If the measure is stated or could be inferred from the content of the notice, what is being challenged is not issuance of notice but the administrative action to be taken after expiry of notice period.

In CFN 209203 (unpublished)[23], the applicant issued an order to respondents to demolish a building and vacate it. The reason for the notice, as stated by the applicant, was the absence of a lawful building permit. The Cassation Bench, unlike its position in CFN 214227, recognized the case was ripe and found issuance of the notice illegal.

The bench reasoned:

> *It is an act of interference with property rights to issue a notice to an owner of a building to demolish the building and vacate it, without first proving the fulfillment of the preconditions and requirements set by the law.*

## 9.5.2 Time Limit

In both common law and civil law legal systems, an action for judicial review should be submitted within a definite period. Expiry of the time limit may result in the rejection of the application. Under French administrative law, any challenge to an administrative act must be brought before a French administrative court within two months after that "act" has been completed.[24] In the United States, limitation periods vary with the legislation, though sixty days is common.[25] In Ethiopia, too, sixty days is the average time to submit appeal to the ordinary courts.

Some examples of the various periods in some statutes are given below.

**Sixty days**
**Proclamation No. 481/2005 Plant Breeders' Right Proclamation**

Article 30
A party who is aggrieved of a decision on the granting, refusal, revocation, or restriction of a plant breeders' right may lodge an appeal to the federal high court within sixty days from the date of receipt of the decision.

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[23] Kelela Town leguama *meri* Municipality vs. Ato Seid Hussien (et al) (2014 E.C.)
[24] William Bishop (2008). A Theory of Administrative Law. In P. Cane (Ed.), Administrative Law. Routledge P368
[25] Ibid P369

**Plant Breeder's Right Proclamation No. 1068/2017**

Article 30. Court Action

Any person aggrieved by a decision of the Ministry on the granting, refusal, revocation, transfer, restriction, compulsory licensing, or infringement of a plant breeder's right may lodge an action in the regular court of law within 60 days from the date of receipt of the decision.[26]

**Thirty days**

**Excise Tax Proclamation No. 1186/2020**

Any party aggrieved by the decision of the Tax Appeal Commission may appeal to the Federal High Court on question of law within 30 days from the date of the decision.[27]

**Article 29/4/ Urban Lands Lease Holding Proclamation No. 721/2011**

A person dissatisfied with the decision of the Tribunal on the issue of compensation may appeal, within 30 days from receipt of the decision, to the relevant municipal appellate court or, in the absence of municipal appellate court, to the regular high court.

**No time limits**

Sometimes the law granting appeal right may not fix a time for appeal.

**Electronic Signature Proclamation No. 1072/2018**

Article 51/3/

Anybody who is not satisfied with the decisions of the Root Certificate Authority may appeal to the Federal High Court.

**Proclamation No. 728/2011 Veterinary Drug and Feed Administration and Control Proclamation**

[26] Art. 30 of Plant Breeder's Right Proclamation No. 1068/2017
[27] Article 24/2/ of Excise Tax Proclamation No. 1186/2020

Article 25

1/ Any person who is aggrieved of the denial, suspension, or revocation of certificate of competence or professional license may lodge his complaint within 30 working days from the date of decision to the complaint handling body established by the appropriate organ

2/ The body that has received a complaint in accordance with sub-article (1) of this Article shall render its decision within 30 working days.

3/ When the petitioner has not got decision within the time specified under sub-article (2) of this Article or dissatisfied with the decision, he may submit the case to regular court.

**Question 8**

If there is no time limit under the specific law how should the court having appellate jurisdiction deal with time requirement?

## 9.5.3 Exhaustion of Administrative Remedies

The requirement that parties seeking judicial review of an agency action exhaust their administrative remedies before going to court is one of the pillars of the common law of judicial review. In general, this doctrine requires that judicial review is available only after the exhaustion of all administrative remedies or avenues.

The French administrative law provides that, in many cases, the citizen is required to bring a request for administrative review before commencing litigation. But it is primarily the right of the citizen than a strict mandatory requirement.[28] Under German law, before coming to the court, the plaintiff must exhaust the administrative remedy. The Law on Administrative Courts 1960 lays down the general provisions with respect to such remedy. It provides that, before filing a suit for invalidity or for a mandatory injunction against the rejection of an application to take an administrative act, the plaintiff must exhaust the administrative remedy. However, the requirement may be dispensed with by law in specific cases.[29]

[28] Mahendra P. Singh (1985). German Administrative Law: In Common Law Perspective. Springer P123

[29] John Bell & Francois Liche`re, Contemporary French Administrative Law (Cambridge University Press, 2022) P99

Exhaustion, just like ripeness, is concerned with the timing of a review. Ripeness signifies final administrative decision that adversely affects the rights and interests of the individual. On the other hand, the exhaustion requirement indicates the decision is ripe, but before it reaches the court for review, remedies available within the agency's internal complaint mechanism must be sought first.

The exhaustion doctrine provides that all administrative remedies must be pursued and exhausted (completed) before judicial review is available. The administrative process must be given a full and complete opportunity to correct its own errors before judicial intervention occurs.

Availability of remedy should be determined based on factual assessment of the complaint-handling mechanisms. Merely relying on legal instruments providing internal review structure and procedure may lead to a wrong conclusion.

**Administrative Procedure Proclamation No. 1183/2020**

Art. 52. Exhaustion of Remedies

1/ Unless otherwise provided by law, a petitioner for Judicial Review is required to exhaust all remedies available within the Agency before petitioning the court for judicial review.

2/ Notwithstanding the rule under Sub Article (1) of this Article, where there is an undue delay on the part of the agency to provide remedies, the obligation to exhaust remedies will not apply.

Courts will apply the requirement of exhaustion of remedies even in the absence of express provision of law. Exhaustion is not limited to petitions to court but merit review applications to administrative tribunals. Exhausting internal remedies within the administration presupposes the existence of a complaint-handling or appeal procedure laid down by law or by the agency itself. In the absence of such procedure, it is not the duty of the individual to submit his grievance to a higher officer or body.

In CFN 78945 (volume 14)[30], the bench ruled that the disciplinary measures against university lecturers could not be reviewed by the Civil Servants Administrative Tribunal without first exhausting remedies available within the University organizational structure. In most public universities, any grievance against disciplinary measure of the university will be reviewed by the board of the university. In the above

[30] Debreberhan University vs. Baye Wanaya Yeda (2005 E.C.)

case, the respondent submitted his petition directly to the administrative court before requesting review of the decision by the board.

The following passage from *Daniel E. Hall Administrative Law: Bureaucracy in a Democracy* summarizes the nature and the need for the requirement of exhaustion of administrative remedies in judicial review.[31]

> *The doctrine of exhaustion of administrative remedies is the administrative equivalent of the finality rule in judicial settings. That is, only in rare instances is an interlocutory appeal permitted from a trial court. It is equally disruptive and inefficient to allow premature judicial review of an administrative proceeding.*
>
> *There are a number of reasons why exhaustion of remedies is required. First, exhaustion allows agencies to correct their own mistakes and thereby learn from their errors. Second, it preserves agency autonomy and independence by preventing premature judicial intervention into agency affairs. Third, it promotes judicial economy by allowing a complete record to be made. Fourth, it promotes judicial economy by allowing the agency, rather than the reviewing court, to make findings. Fifth, it encourages cooperation and communication between agencies and parties because judicial intervention is not immediately available.*

**Exceptions to Exhaustion Requirement**

As indicated in Article 50/2/ of the Proclamation, the requirement to exhaust administrative remedies will not apply if there is undue delay. This is to mean if the reviewing organ fails to respond to the grievances of the applicant within a reasonable period, the applicant can go directly to court before remedies within the agency are exhausted.

Exhaustion will not also be a precondition if the agency refuses to consider the complaint. In CFN 215115,[32] the respondent requested the lower court for the reimbursement of foreign currency notes confiscated by the applicant. According to the facts of the case, the respondent, upon entering Ethiopia, declared possession of foreign currency notes. Declaration was issued by the applicant for each note. According to a directive issued by the National Bank of Ethiopia, the notes will be returned to the declarant provided he exits the country within 30 days. In this case, the respondent first traveled to Uganda without requesting the return of the notes. Then he returned to

[31] Daniel E. Hall (2015). *Administrative law: bureaucracy in a democracy* . Pearson Education P267
[32] Ethiopian Revenue & Customs Authority vs. Henock Zemariam (2014 E.C.) unpublished

Ethiopia without making any declaration. Again, for the second time, he was leaving Ethiopia for another country. It is at this time he requested the applicant the return of the notes. The applicant, however, informed him that the notes were confiscated because he failed to make a declaration upon his trip to Uganda.

One of the issues, in this case, was whether the respondent can directly petition the ordinary courts for remedy without exhausting available administrative remedies within the authority and without first submitting the case to the Tax Appeal Commission. The applicant's objection in this regard was rejected by the lower courts including the Cassation Bench. During the hearing in the lower court, it was established that the respondent repeatedly submitted complaints to the Authority and the Complaint Hearing Committee within the Authority. Unfortunately, all his applications and complaints were not accepted. The Bench reasoned that, if administrative avenues are denied, a petitioner is entitled to take the matter directly to the ordinary courts and seek remedy. Here, the exemption from exhaustion requirement was justified based on the existence refusal by the agency to accept the respondent's complaint.

When the time to give a decision is prescribed by law, a party can submit a petition to ordinary courts upon the expiry of the time limit. For instance, the plant breeder's right holder may seek relief in a regular court of law if the Ministry of Agriculture fails to respond to his complaint within 30 days.[33]

## 9.6 Finality (Ouster) Clause

Although a petitioner may have locus standing, the court may, nonetheless, decide that the matter does not fall within the purview of the courts because, perhaps, it was excluded from adjudicating on the matter because of an ouster clause.

Under Caribbean administrative law, courts have retained their review jurisdiction despite a finality clause where either:

(a) the decision of the tribunal is a nullity; or

(b) the tribunal had made an error of law which affected its jurisdiction.[34]

[33] Art. 27/6/ of Plant Breeder's Right Proclamation No. 1068/2017
[34] Eddy Ventose (2013) Commonwealth Caribbean Administrative Law . New York: Routledge P114

## 9.6.1 Types of Finality Clause

### A. Final on issue of fact

Most statutes prescribe finality on statutory appeal only on question of fact leaving questions of law to be challenged. The decision of the Civil Servants Administrative Tribunal on question of facts is final. However, any party claiming the decision of the Administrative Tribunal has error of law may appeal to the Federal Supreme Court within 60 days up on receiving the decision of the Tribunal.[35] The decision of the Refugee Appeal Hearing Council shall be final; provided, however, that any party claiming error of law may appeal to the Federal Supreme Court within 30 days from the date of receipt of the written decision of the Council.[36]

The National Bank shall appoint a receiver (or it may also act as a receiver itself) to take possession and control of a bank if it determines that one or more of the circumstances enumerated under Article 33 of Banking Business Proclamation No. 592/2008 exists. An appeal against the action of any receiver may be brought before the Federal High Court.[37] The court may require the receiver to pay compensation, if it determines that he has acted in an arbitrary and capricious manner, provided, however, that the action being challenged may not be reversed.[38]

### B. Final and Binding

Final and binding is another way of stating the finality of a decision. The "binding" nature is simply to avoid the legal status of the decision, not to determine its finality. For instance, arbitral award by the Energy Authority shall be final and binding on all parties involved in the arbitration proceeding.[39] Even if it says it is final, the courts should still assume jurisdiction to check whether the Authority acted within its proper scope of jurisdiction.

### C. Final with Time limit

Article 41/3/ of the Financial Reporting Proclamation No. 847/2014 provides that, if no appeal is filed by the respondent as provided in Article 47 of the Proclamation, the decision of the Hearing Examiners shall be deemed the final decision of the Accounting and Auditing Board. According to Article 47, any party aggrieved by the

[35] Art. 81/5/ of Federal Civil Servants Proclamation No. 1064/2017
[36] Art. 19/5/ of Refugees Proclamation No. 1110/2019
[37] Art. 47/1/ of Banking Business Proclamation No. 592/2008
[38] Art. 47/2/ 4 of Banking Business Proclamation No. 592/2008
[39] Art 64/4/ of Council of' Ministers Energy Regulation No. 447/2019

decision of the Hearing Examiners may submit an objection to the Appeals Hearing Panel within 30 days of the receipt of the decision of the Hearing Examiners specifying the grounds for the objection including any facts or analyses of legal, accounting, and auditing standards.

Normally, provisions like the above are not ouster clauses. They are rather time limit provisions which preclude action in court upon expiry of the specified time limit.

### D. Final on Questions of fact and law

This scenario arises in situations where the jurisdiction of the courts is precluded and no avenue for appeal is permitted on matters concerning both issues of fact and law. This is a very rare occurrence. Even such preclusion is not a bar from submitting Cassation review by the Federal Supreme Court. The Cassation Bench has jurisdiction over any final decision of judicial or quasi-judicial organs.

**FDRE Constitution**

Art. 80

1) The Federal Supreme Court shall have the highest and final judicial power over Federal matters

2) State Supreme Courts shall have the highest and final judicial power over State matters. They shall also exercise the jurisdiction of the Federal High Court.

3) Notwithstanding the Provisions of sub-Articles 1 and 2 of this Article;

   a) The Federal Supreme Court has a power of cassation over any final court decision containing a basic error of law. Particulars shall be determined by law.

   b) The State Supreme Court has power of cassation over any final court decision on State matters which contains a basic error of law. Particulars shall be determined by law.

In some cases, appeal is allowed on issue of law, but the law may specify stringent requirements beyond ordinary error of law. Art. 56/4/ of Public Servants' Pension Proclamation No. 1267/2022 makes the decision of the Social Security Appeal Tribunal final but allows appeal to the Federal Supreme Court on fundamental error of law.

Finality may also be limited on a specific issue leaving the other issues of fact and law reviewable by court. Art. 29/3/ of Urban Lands Lease Holding Proclamation No.

721/2011 makes decisions of the "Urban Land Clearing and Compensation Cases Appellate Tribunal" final on the determination of compensation and claims for substitute land, leaving other matters of fact and law subject to appeal to the ordinary courts.

## 9.7 Grounds of Judicial Review

There is no general agreement on how to classify the grounds of judicial review, and textbooks take different approaches. For example, a broad distinction is sometimes made between what is called 'excess of power', where the decision-maker acts outside the limits of the power imposed by statute, and 'abuse of power', where the decision-maker misuses power; for example, by acting unfairly.[40]

According to German Administrative Law, the following constitute grounds of judicial review.[41]

(a) Disregard of Form and Procedure

(b) Lack of Competence[42]

(c) Excess of Jurisdiction[43]

i). Excess of Territorial Jurisdiction
ii). Excess of Substantive Jurisdiction

(d) Substantive Defects

These are the defects relating to the contents or substance of an administrative action. They may be either of law, facts, means, or of some other kind. Generally substantive defects are sub-divided into:

i). Legal Defects
ii). Factual Defects
iii). Inconsistency with Good Morals

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[40] John Alder & Keith Syrett, *Constitutional and Administrative Law* (Palgrave, 11th edn. 2017) P410
[41] Mahendra P. Singh (1985). German Administrative Law: In Common Law Perspective. Springer P72-79
[42] A decision of a person who is not entitled to hold an office either because he has not been properly appointed to it or has been suspended or removed from it
[43] An administrative authority may exceed its jurisdiction either by acting upon a matter which lies beyond its territorial limits or by acting upon a matter which is not assigned to it.

iv). Wrong Means

Section 5(3) of the Judicial Review Act No 60 of 2000 of Trinidad and Tobago summarizes the instances in which someone may file an application for judicial review:

The grounds upon which the Court may grant relief to a person who filed an application for judicial review includes the following:[44]

(a) that the decision was in any way unauthorized or contrary to law;

(b) excess of jurisdiction;

(c) failure to satisfy or observe conditions or procedures required by law;

(d) breach of the principles of natural justice;

(e) unreasonable, irregular, or improper exercise of discretion;

(f) abuse of power;

(g) fraud, bad faith, improper purpose, or irrelevant consideration;

(h) acting on instructions from an unauthorized person;

(i) conflict with the policy of an Act;

(j) error of law, whether or not apparent on the face of the record;

(k) absence of evidence on which a finding or assumption of fact could reasonably be based;

(l) breach of or omission to perform a duty;

(m) deprivation of a legitimate expectation;

(n) a defect in form or a technical irregularity resulting in a substantial wrong or miscarriage of justice; or

[44] Rajendra Ramlogan (2007). *Judicial Revie in the Commonwealth Caribbean* Abingdon: Routledge-Cavendish P8

(o) an exercise of a power in a manner that is so unreasonable that no reasonable person could have so exercised the power.

The Administrative Procedure Code uses a very broad specification of grounds of review of decisions and directives without any categorization or providing any list of the grounds.

**Federal Administrative Procedure Proclamation**

Art. 50. Grounds of Review

1/ A Directive will be revoked by the Court where

a) It is proved to have failed to comply with the procedural rules provided in Chapter Two of this Proclamation;

b) It is ultra vires; or

c) It is contrary to other laws placed higher in the Hierarchy of Laws.

2/ An administrative decision may be revoked if it is made in violation of the Principles provided under Chapter Three of this Proclamation.

For the sake of convenience, we will explore the grounds under the following category.

**a) Illegality (ultra vires)**

**b) Error of fact and law**

**c) Abuse of power**

**d) Non-compliance with procedural requirements**

## 9.8 Illegality (Ultra Vires)

Ultra vires simply means beyond power. It is the opposite of intra vires which means within the scope of power. Ultra vires is indicative that the action is beyond the power. It is the ultimate test of the legality of administrative action. If an administrative decision or directive lacks legal authority or exceeds the scope of the enabling provisions, it is deemed illegal or ultra vires. The doctrine of ultra vires has two limbs:

1) **simple or narrow ultra vires**; and

2) **extended or broad ultra vires**.

Simple ultra vires has, itself, two limbs:

A. **substantive ultra vires,** including so-called 'implied ultra vires'; and

B. **procedural ultra vires**.

Extended ultra vires also has two limbs:

A. **abuse of power**; and

B. **failure to exercise power.**

Abuse of power covers bad faith, improper purpose, irrelevant considerations, manifest unreasonableness, lack of proportionality, uncertainty and lack of finality, and no evidence. Failure to exercise power covers fettering discretion, acting on a policy, acting under dictation, sub-delegation, and estoppel. Illegality provides the basis for challenging decisions and measures that lack a legal foundation. This is most apparent in circumstances, for instance, where the decision-maker did not possess the purported power that was exercised. However, beyond such straightforward cases—usually designated as 'simple ultra vires' in common law countries except the US— the ground also allows challenges to the way in which discretion is exercised or, depending on circumstance, to a public authority's failure to take action.[45]

In the mid-19th century, the doctrine of ultra vires or 'beyond power' became a means of ensuring that executive and administrative authorities, particularly local government authorities, acted within their powers.

When there is neither an express nor an implied power to make a decision or take other measure, a finding of illegality should follow. It is an important element in all systems of administrative law and it is self-evident that the enabling legislation must be considered when determining the ambit of a body's powers. Thus, if an administrative agency is accorded authority over employees, it cannot assume power over those who are not employees.

Where a decision-maker is exercising a power, a superior court has the power to review the exercise of that power to ensure that the decision-maker has not gone outside

[45] Leyland, P., & Anthony, G. (2013). *Textbook on Administrative Law*. Oxford University Press. P267

the limits of the power, or otherwise abused the power, and acted ultra vires. A decision-maker must not act in excess of its express power. If it purports to do so, its decision will be void. However, whatever may be fairly regarded as incidental to, or consequent upon, those things which the legislature has authorised, ought not (unless expressly prohibited) be held, by judicial construction, to be ultra vires.

The doctrine of ultra vires, in its simple or narrow form, must nevertheless be reasonably, and not unreasonably, understood and applied, particularly where it is clear that the legislature intends to confer wide powers in general terms. However, even where there is no exact limit of power, the courts may still 'imply' limitations on the scope of the general power having regard to, among other things, the nature of the decision-maker. This is sometimes referred to as 'implied ultra vires'.

Otherwise, wide powers of a local government authority may, for example, be read so as not to go beyond the accepted notions of local government or the matters of proper concern to councils.[46]

## 9.8.1 The Doctrine of Ultra Vires Under Ethiopian Law

The doctrine of ultra vires is as old as the Civil Code, though courts in most cases do no resort to it in determining the legality of administrative action. The doctrine is incorporated under Article 401 of the Civil Code.

**Civil Code Art. 401. Failure to comply with legal requirements.**

(1) Acts performed by the bodies referred to in this Chapter in excess of the powers given to them by law or without the observance of the conditions or formalities required by law shall be of no effect.

(2) The provisions of sub-art. (1) shall apply notwithstanding that nullity is not expressly provided by law in such circumstances.

## 9.8.2 Legality of Directive

A challenge to the legality of directives may be submitted in accordance with Article 48(2) of the administrative proclamation. The legality of a directive may also be an issue during the judicial review of administrative decisions. This happens when the agency relies on a directive as a source of power. The decision is examined

[46] Francisco Esparraga & Ian Ellis-Jones, (2016). Administrative Law Guidebook (2nd ed.). Victoria: Oxford University Press. P142-4

considering the directive may be within the scope of power of the agency. It means, in other words, the decision was given without exceeding the scope of the power conferred to the agency by the directive. However, if the directive is itself ultra vires the enabling act, the decision lacks legal validity.

In some cases, the legal validity of a directive may also be challenged by way of collateral review in civil or criminal proceedings.

A decision given by the Cassation Bench of the Federal Supreme Court in CFN 173628 (volume 24) elaborates review of the legality of a directive during the judicial review of an administrative decision.

## KEY CASES

### Federal Supreme Court Cassation Decision

Cassation File Number 173628 Volume 24[47]

In CFN 173628 the parents (first and second applicant) entered into an adoption agreement with 3rd applicant to give four of their children through adoption. The adoption agreement was approved by the Federal High Court. Then 3rd applicant requested the respondent to issue her certificate of adoption, which is required if the children are to travel abroad.

Respondent was willing to issue the certificate of adoption, but there was disagreement on the content of the certificate mainly how the names of the adopted children should be recorded on the certificate. Respondent insisted that the adopted children could no longer have the name of their biological father and grandfather, but the names of the adopter's (3rd applicant's) father and grandfather.

Respondent relied on a directive issued by the Federal Vital Events Registration Agency to justify the legality of its decision

Directive No. 7/2010, cited by the respondent under part 4 subsection 43, lists the following particulars to be recorded on the certificate if the adopter is a woman:

[47] Applicants Cherekos Begashaw (3 persons) vs Respondent Yeka Sub-city Kebele 13 Vital events registration office (2011 E.C.)

- The first name of the adopted child as it appears on the adoption agreement approved by the court followed by;
- The names of the adopter's father and grandfather

The cassation bench accepted the content of the directive without examining its legality, hence concluded that the respondent's action is not illegal. The bench referred to the enabling act i.e., Registration of Vital Events and National Identity Card Proclamation No. 760/2012 as amended by Proclamation No 1049/2017 which authorizes the agency to issue directives for the implementation of the proclamation and regulations issued pursuant to the proclamation. It failed to investigate the scope of the power. The basic issue was whether the power to issue a directive for the implementation of the proclamation authorizes the agency to change the name of the biological father and grandfather of the adopted child to be changed and substituted by the adopter's father and grandfather. There is nothing in the proclamation that suggests name of the adopted child to be changed upon issuance of registration of adoption certificate.

## 9.8.3 Legality of Decisions

One of the primary tools available for agencies to exercise their regulatory and enforcement power is the imposition of sanctions against those who do not comply with the legal standards, requirements and obligations specified by proclamations, regulations, or directives. The power of imposing sanctions or taking administrative measures is not a general power implied from the agency's mission and objectives. In most cases, the enabling act will determine the grounds, the corresponding penalty, and the decision-making power.

In such cases, the legality of administrative sanction depends on so many factors, like availability of sufficient evidence, interpretation of the applicable law, existence of preconditions to exercise power, the decision-making procedure, among others.

**Example**

An administrative measure against a person for his alleged failure to discharge his legal obligation will be within the scope of power of the agency, provided the person has an obligation, and there is ample evidence showing he failed to discharge his obligation. The following decision of the Federal Supreme Court Cassation Bench is a good example of how the scope of power will be determined when a person is fined due to failure to discharge his obligation.

KEY CASES

**Federal Supreme Court Cassation Decision**

Cassation File Number 72824 (Volume 13 Hamle 18, 2004 E.C,)

Applicant: Bole Sub-city Revenue office

Respondent: Ato Million Assefa

In this case, the respondent who is a licensed advocate was fined by the applicant for failing to keep records. Respondent is a category C taxpayer and a taxpayer in this category is legally required to keep books of account. Applicant argues that given the yearly income of the respondent, he should have declared tax income as a category B taxpayer, not as a Category C taxpayer.

Now, the issue before the Cassation was whose duty is it to designate a taxpayer in one of the tax Categories. The applicant argued that the respondent must declare his tax payment in proportion to his increase in income. On the other hand, the main argument of the respondent is that declaring the tax category of the taxpayer is the duty of the tax authority, but not the taxpayer. A taxpayer has no obligation to change his category and declare it to the tax authority.

The Cassation Bench after elaborating on the applicable tax laws at that time in detail, agreed with the respondent's submission. In its interpretation of the law, the Bench emphasized a taxpayer has no duty to declare his status (as regards his category). That decision has to be made by the tax authority. In the absence of such obligation, the penalty imposed on the respondent is unlawful.

## 9.9 Error of Law and Fact

### 9.9.1 Error of Fact

In this topic, we will explore the test for judicial review of questions of fact and how far the courts must review evidentiary material. We will also discuss the limits of judicial intervention on factual grounds, emphasising the respective roles of the court and the initial decision-maker.

Any error of fact can lead to a bad or legally flawed decision. A decision that is based on an incorrect fact can be unfair, and justice will be better served if there is a legal procedure for at least identifying the error and reconsidering the decision in an appropriate case. Some administrative law principles reflect the importance attached to the factual component of decision-making; two examples are that a decision can be invalid if a relevant consideration is not taken into account, or if a policy is applied

inflexibly without regard to the individual merits of a case. The common theme in those principles is that a decision-maker has failed to take account of a relevant and existing fact. In other instances, the facts may be unclear or in dispute and the decision-maker has made a finding of fact. If that finding is wrong, the resulting decision can be wrong or unfair. These and other problems are often revealed in the various statutory requirements that a person be given a statement of the reasons for a decision. Reasons produced under these requirements must usually include the facts and evidence on which the decision was based.

Despite the importance of facts and evidence in administrative decision-making, there are good reasons why not every mistake about facts should not undermine the validity of a decision. Factual mistakes are not uncommon, and some are relatively unimportant to the decisions to which they relate. Administrative decision-making could be a far more demanding process if exactitude was required in every process. It is questionable even whether exactitude is a realistic goal: what are described as facts are often inferences, opinions and statements of policy and values. The legality/merits distinction is based on those considerations and consequently assigns discrete and different tasks to the judiciary and the executive[48].

### 9.9.1.1 Essential Statutory Element

The principle applied at common law is that a decision made under a statute will be invalid if there is a lack or absence of evidence to satisfy an essential statutory element of the decision. This includes a factual element in a chain of reasoning and facts classified as jurisdictional. However, a decision will not be invalid under this ground if there is some evidence to support the statutory element, even though it is questionable whether that evidence is adequate or sufficient to provide support[49]

Until recently, the extent to which facts were susceptible to review or appeal was unclear in Australia,. The commonly accepted test was that “the mistake of fact is (so) fundamental”, and that it could “vitiate the basis upon which the decision has been made” This is what is called the “narrower view” which limits judicial review for error of fact only in limited circumstances. It was accepted that the review could lie for a jurisdictional fact. These were facts that related to the existence of the public body’s power over the relevant area. A statute will always stipulate certain preconditions for the exercise of the agency’s power. For instance, it may state that compensation can or

[48]Robin Creyke et al (2019). Control of Government Action: Text, Cases & Commentary. LexisNexis Butterworths. P 835
[49] Ibid P 837

should be granted if an employee is injured at work. In most cases, the statutory conditions may be factual, legal, or discretionary in nature.

The Australian narrow view approach to judicial review of errors of fact is similar with the "essential statutory element" test applied in England.

### 9.9.1.2 Errors Related to Materiality and Classification of Facts

In France, the fact could be subject to review where the decision-maker was mistaken or where an account had been taken of irrelevant facts and where the factual finding had no justifiable basis. The court will examine the existence or materiality of facts which give rise to the competence of an administrator to take a decision.[50]

Apart from examining the materiality of facts, administrative courts may also review the classification of facts (*qualification juridique des faits*). Let us use one French case as an example.

Legislation in France permitted the authority to refuse planning permission where a proposed construction affected an existing view of architectural value. The claimant's application for planning permission was refused for a building in Place *Beauvau* (opposite the Elysée Palace, the official residence of the President of the Republic).

Here, there are two fundamental factual issues:

Whether the Palace forms a view of architectural value

If yes, will the building to be built affect the view

The *Conseil d'état* quashed the refusal on the ground that 'taken as a whole, the place Beauvau could not be considered as forming a view of architectural value.'

## 9.9.2 Error of Law

An error of law is a basic failure of a judge or decision-maker and needs to be sanctioned by a court in order to maintain the principle of legality. It covers cases where there has been an error in the misinterpretation of an enabling statute or the violation of some established legal principle.

In English law, questions of law are deemed to have a single right answer. The ultimate authority on issues of law is the Supreme Court, the highest court in the system.

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[50] John Bell & Francois Liche`re, Contemporary French Administrative Law (Cambridge University Press, 2022) P188

The obligation of public administrators is to answer questions of law correctly, and in the final analysis, this means the way the Supreme Court would answer the question. In practice, however, administrators must resolve most of the issues of law with which they are confronted in exercising their powers and performing their duties without knowing how the Supreme Court would resolve the issue. It follows that an administrator should approach the task of answering questions of law in the same way as a court would. Resolving issues of law typically involves interpreting primary or secondary legislation (or soft law), and so administrators should follow the principles of interpretation that courts use.[51]

In the US, it is generally accepted that courts should independently review administrative interpretations of constitutional provisions, statutes of general application, and judicial precedent. The only questions of law on which reviewing courts consider deferring involve interpretation of the enabling acts and regulations that agencies administer.[52]

### 9.9.3 Jurisdictional Error of Law and Fact

The following Cassation clarifies how jurisdictional error of law or fact may arise.

In *Dr. Desalegn Temesgen vs. Addis Ababa Science and Technology University (CFN 132714 v. 21 2009 E.C.),* applicant was dismissed by respondent due to alleged misconduct. He then requested the Civil Servants Administrative Court for review of the decision, claiming it was unlawful. Before the merit of the case was examined by the court's, jurisdiction became an issue. Respondent raised a preliminary objection arguing the Court lacks jurisdiction to entertain the case because its jurisdiction is restricted to permanent civil servants.

This made it so the basic issue before the court was the employment status of the applicant. If as alleged by respondent, it is proved that applicant is a temporary employee, the court could not adjudicate the case, because the then existing Civil Servants Proclamation No. 515/2007 limits its jurisdiction only to permanent civil servants. As you can see here, employment status is a key issue that will ultimately solve the issue of jurisdiction. Employment status involves both issues of fact and law. Error made in determining the status will constitute error of fact or law directly going to the question of jurisdiction.

[51] Peter Cane (2011). Administrative Law. Canberra: Oxford University Press P181
[52] Keith Werhan, Principles of Administrative Law (Thomson West, 2008) P328

The applicable laws mentioned below are now repealed and replaced by new laws. We will use this case only to show how jurisdictional error of law and fact may arise.

The applicable higher education law at the time was Proclamation No. 651/2009. Article 33/1/ of this Proclamation provides job security only for tenured employment of academic staff. Tenured employment constitutes a privilege to be attained through meritorious continuous service and outstanding scholarly teaching and/or research or institutional leadership achievements as an incentive to encourage academics to continue to excel in their professions. The Proclamation and the establishment regulation grant the respondent to issue bylaws for the administration of its employees.

Respondent's argument, based on the above laws and directives issued by the Civil Service Commission, is that since applicant was only employed for two years subject to renewal, applicant is a temporary employee.

On the other hand, applicant argued the temporary employment of civil servants' directive was annulled by the Prime Minister's Office instructing all agencies not to employ temporary employees unless it is for project work or other exceptional circumstances, subject to approval by the Civil Service Commission. He also insisted that his employment was on a job which is permanent by its nature.

In resolving the issue, the Cassation Bench reasoned the purpose of tenure in academic institutions is to promote quality education. Tenure is not to be equated with "temporary employment". The strong suggestion for this was the annulment of the temporary employees' directive by the Office of the Prime Minister. The instruction by the Office makes temporary employment, unless for project work, impossible. Therefore, the bench concluded. The Administrative Court and the Appellate Court wrongly classified the applicant as a temporary employee based on a directive which was not legally effective.

Once the status of the applicant was determined, the administrative court had jurisdiction to adjudicate on the legality of applicant's dismissal since he was not a temporary employee.

### 9.9.4 Error of fact and law in FAPP

One of the three grounds of review of directives, as stipulated under Article 50/1/ c, is "contradiction with other laws placed higher in the Hierarchy of Laws." Proclamations and regulations are laws placed above directives. This review ground expects agencies to be wary of inconsistencies when the issues dealt with by the directives are also regulated by other laws. Contradiction may also exist with other directives of the same or different agencies. How this will be settled or whether it stands

as its own ground of review is not clear. It is suggested the reviewing court should apply rules of interpretation when such contradictions occur.

Contradiction may be described as "error of law", but it is only one aspect of error. It does not include other errors of law discussed above. Therefore, a court could invalidate a directive for error of law only if there exists contradiction with other higher laws.

The situation regarding decisions is different. The general ground of review under Article 50/2/ covers wide categories, including error of law and fact. This is not explicitly stated, but one of the basic principles of decision-making is analysis of evidence, fact, and law. If such analysis is subject to review, then an error made by the decision-maker regarding fact and law will be reviewed by the court. However, in the absence of any test to apply, it will be challenging for the courts to determine on what circumstances they should allow the decision to be invalidated. In other words, should each and every error be a valid ground for review? If not, how will the court identify those errors of fact and law that are acceptable to invalidate the decision?

This is not an easy task and without a simple answer. It all depends on each circumstance of the case, and considerations of the constitutional principle of separation of powers, individual freedom, and good administration. To balance the interest of the individual and the concerns of effective administration is vital here. The more the court interferes with every minor error of fact and law, it will find itself reviewing the merit of the case. Judicial review is not about the merit or wisdom of the decision but about how power was exercised to reach a decision.

## 9.10 Abuse of Power

According to Article 7/1/ of Trademark Registration And Protection Proclamation, No. 501/2006, one of the cases states a trademark may not be registered because of third-party priority rights is:

> *when it is identical with an earlier trademark of another person in respect of the same goods or services or closely related goods or services, or if it so nearly resembles such a trademark as to be likely to deceive or cause confusion*

In CFN 104755 (volume 21)[53], applicant submitted registration application for the registration of **"DURA SUN"** as trademark for his products. His request was rejected

[53] Applicant Durrata Battery Company vs. Ethiopian Intellectual Property Office (2009 E.C)

by the respondent due to the existence of prior right of another registered trademark **"DURA CELL"**. Respondent, after making its own assessment and comparing the two trademarks, concluded that both are similar in their look and tone when they are read, hence, are likely to deceive or cause confusion for consumers if both are registered and given protection.

Applicant's attempt seeking relief for the revocation of the office's decision was unsuccessful after it took the case to the Federal High Court. Similarly, his cassation application was rejected for the same reason given by the office.

The bench, in its reasoning, indicated that the office is authorized by law to refuse registration if the new trademark resembles a prior registered trademark. The office, after making an assessment of both trademarks, has concluded there is a close similarity between the two. Therefore, the refusal is not against Proclamation No. 501/2006. The Court also made its own conclusion regarding the level of similarity.

## 9.10.1 Improper Purpose

Statutory power may be exercised only for the purposes for which it is conferred. 'Improper', in this context, does not mean wrong or incorrect. It refers to something that is not a proper exercise of power. In other words, the power has been exercised for an ulterior purpose, that is, for a purpose other than the purpose for which the power was conferred.[54]

Discretionary power is granted for a particular purpose or purposes, which are discerned through interpretation of the enabling legislation. The courts will, therefore, quash decisions where the discretion has been used for an improper purpose.[55]

In deciding whether to make a decision, public authorities must act in accordance with the stated purpose of the legislation granting them the power to make decisions. In other words, they must not act for an improper purpose. The test in most common countries is whether the decision-maker took into account and acted upon matters that were immaterial or irrelevant or that he exercised his statutory power for an improper purpose.[56]

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[54] Ian Ellis-Jones, Essential Administrative Law (2nd edn: Great Britain: Cavendish Publishing Limited, 2001) P57

[55] Paul Craig (2021). Administrative Law (9th ed.). Thomson Reuters P 804

[56] Rajendra Ramlogan (2007). Judicial Revie in the Commonwealth Caribbean. Abingdon: Routledge-Cavendish P182

As one writer put it, "The principle is straightforward. Applying it is not."[57] First, it may be difficult to assess whether power has been conferred for a particular purpose and, if so, for what purpose or purposes. Second, it may be difficult to prove that the powers have been exercised for an improper purpose.

Some decisions openly announce or disclose their purpose. The purpose sought to be achieved by subordinate legislation is also often apparent from the face of the instrument. In other situations, it may be necessary for a court to draw evidentiary inferences from such matters as the conduct or documentation of a government agency in order to identify the motivating purpose for which a decision was made.

It is difficult, though not impossible, to check administrative action on grounds of improper purpose. One probable explanation is that it is easier to establish the alternative ground that an irrelevant consideration was taken into account. Another explanation is that it can be difficult to prove that a decision-maker acted to achieve an ulterior purpose. Among the reasons for this difficulty are that the legislation may support multiple purposes, an astute decision-maker can carefully disguise their real purpose, or the evidence may simply not be strong enough to support an argument of ulterior purpose.[58]

Improper purpose, as a ground of review, is not explicitly recognized in the Administrative Procedure Proclamation. However, this does not mean there is no way courts will refuse to review decisions and directives if there is manifest evidence that there is exercise of power for a purpose completely unrelated to the basic purpose of the enabling act.

*Ultra vires* is a basic principle of ground of review for both decisions and directives in the proclamation.[59] It is here where judges may employ their creative techniques of interpretation. The doctrine of ultra vires is wide and flexible. Improper purpose is abuse of power that can be categorized under illegality. To invalidate a decision due to an improper purpose means, in other words, an agency acting contrary to the purpose of power given to it, acts illegally, and hence is ultra vires.

[57] Roger Douglas; Margaret Hyland (2015). FOCUS Administrative Law. LexisNexis Butterworths P123

[58] Robin Creyke et al (2019). Control of Government Action: Text, Cases & Commentary. LexisNexis Butterworths. P581

[59] *See* art. 26 for decisions and 50/1/ c for directives

## 9.10.2 Relevant and Irrelevant Considerations

In making decisions and rules, administrators must not take account of irrelevant considerations or ignore relevant ones, provided that if the relevant matter had been considered or the irrelevant one ignored, a different decision or rule might (but not necessarily would) have been made. Under this principle, for example, decisions or rules that discriminate unfairly between people in similar situations or fail to take account of relevant differences between people may be illegal. This principle is closely related to other general principles of administrative law. For example, many errors of law and fact involve ignoring relevant matters or taking account of irrelevant ones.[60] A decision will be ultra vires if it is based on irrelevant considerations, or if relevant considerations are not taken into account.

The body concerned must consider relevant factors and discount irrelevant factors. In some instances, the statute which confers the power may indicate what factors must be considered in exercising that power. However, that may not always be the case and it may not be easy to decide what the relevant matters are when they are not expressly stated in the relevant statute. The court may clearly have to exercise its own discretion in such cases.[61]

In defining what is or is not relevant, or what is an improper purpose, the court may be in danger of substituting its own policy view. The court must not substitute its own view for that of the authority.

Sometimes statutes that confer discretion list relevant considerations to be considered in the decision-making process. In the example below, the considerations to be considered when the Civil Aviation Authority imposes sanctions are listed in detail.

**Civil Aviation Proclamation No 616/2008**

Art. 82. Decisions of the Civil Aviation Authority

> In determining any sanction, the Authority shall take into account:
>
> 1/ the nature, circumstances, extent, and gravity of the violation committed;

[60] Peter Cane (2011). Administrative Law. Canberra: Oxford University Press p173
[61] Diane Longley & Rhoda James (1999). Administrative justice: central issues in UK and European administrative law. London: Cavendish Publishing. P182

2/ the degree of culpability and history of prior offences of the person found to have committed the violation;

3/ in case of imposing a fine, the ability of the offender to pay and its effect on his ability to continue to do business; and

4/ such other matters as justice may require

If a consideration is deemed relevant as a matter of statutory construction, then it must be considered by the decision-maker; similarly, if a consideration is deemed irrelevant as a matter of statutory interpretation, then it cannot be considered. If, however, the statute does not compel that conclusion, then it is for the decision-maker, and not the court, to make the primary judgment as to what should be considered in the circumstances of a given case.

Not every consideration that a decision-maker is bound to consider but fails to consider will justify the court setting aside the impugned decision and order that the discretion be re-exercised according to law. A factor might be so insignificant that the failure to take it into account could not have materially affected the decision.[62]

### 9.10.3 Proportionality

The standard of review of proportionality has its roots in European human rights law. A public authority may not impose obligations on a citizen except to the extent to which they are strictly necessary in the public interest to attain the purpose of the measure. This requires that there should be a reasonable relationship between the end and the means, and it is, to some extent, analogous to the English concept of reasonableness.

Proportionality is a requirement of reasonableness, and no public authority should ever act disproportionately. Nonetheless, that does not mean that judges should interfere when an administrative authority does so. The point of the Wednesbury doctrine was to recognize that comity generally requires judges not to decide what would be a reasonable decision, but only to interfere with a decision that no reasonable person in the position of the administrative authority would take.

The Wednesbury principles apply quite broadly (although even they do not apply to all decisions by public authorities), because they offer ways in which judges can identify administrative decisions as arbitrary. However, it is not necessarily arbitrary to

[62] Bannister, J., & Olijnyk, A. (2018). Government Accountability – Australian Administrative Law Sources and Materials. Cambridge University Press P380

do too much or too little. So, proportionality calls for some rationale other than the judges' general responsibility to impose the rule of law on other public authorities. Proportionality should only be a ground for judicial review when there is good reason to empower judges to go beyond their ordinary role of imposing the rule of law by preventing arbitrary decisions.

One of the problematic aspects of the doctrine of proportionality is that it leaves a great deal of discretion to the Court, enabling it to exercise control of the legality of a measure and, to some extent, control of its merits. Strict application of the doctrine may lead to excessive judicial interference with public decision/rule-making by allowing judges to pronounce on the 'merits' (as opposed to the 'legality') of decisions and rules. Proportionality reasoning empowers judges to require good decisions.

Proportionality is not among the basic principles of decision-making found in sub-section two of section three of the Proclamation. In the absence of clear statutory provisions, the courts could not invalidate an administrative decision, violating the principle of proportionality.

In some statutes, the decision-maker may be required to take into account the principle of proportionality in his decision.

Art. 72 /3/of the Media Proclamation No. 1238/2021 states that any administrative measure taken in accordance with the Proclamation shall consider the gravity of the non-compliance and the past records of recidivism of the media. The presence of such kind of express provision of law requiring proportionality as an element of the decision enables judges to measure whether the means employed is proportional to the gravity of the case.

## 9.11 Non-Compliance with Procedural Requirements

Although the content of a public body's decision or directive may be within the powers of the decision-maker, the exercise of the power will be lawful only if the proper procedure for making the decision or directive has been observed. Procedural review examines the process by which a decision or a directive has been reached. If there is a failure to observe procedural requirements, then the decision will be invalid.

Review on procedural grounds covers both decision-making and rule-making procedures. The effect of non-compliance in both cases is the same, which is invalidation.[63] This means, a decision or a directive made without complying with the

[63] Art. 50/1/ a & 2 of Administrative Procedure Proclamation No. 1183-2020

procedural requirements will not produce any legal effect. However, the agency is free to make the same decision or directive after complying with the missing procedure.

### 9.11.1 Violation of Essential Procedural Requirement

Procedural irregularity may occur at different stages and forms. First, an agency may fail to follow the decision-making and rule-making procedure. Secondly, it may comply with some procedures but not others. Thirdly, there might be compliance, but it is not sufficient. For instance, the agency failed to allocate "sufficient" time during the public consultation on a draft directive. Lastly, the agency may have complied with all procedural requirements but acted within a shorter period than provided in the proclamation. It is also possible that disputes on procedural compliance which are outside of the four instances mentioned above may occur.

Administrative procedure is important not only for protecting individual rights but also for the effective and efficient administrative process. It will more likely improve the task of the administration. It also creates consistency and predictability. Despite its advantage, it will be against the very interest protected by procedural requirements if each and every deviation and non-compliance is leads to the invalidation of the decision and the directive issued by the agency. It will be an unbearable burden on the administration if the slightest mistake in procedure results in the revocation of the administrative action. Courts in every country do not invalidate decisions and directives, irrespective of the degree of violation of procedural rules.

Unfortunately, the opinion of the drafting committee, as reflected in the explanatory note, seems to totally disregard the needs and concerns of the administration. In the document, they have suggested that violation of procedural requirements, irrespective of the degree of irregularity, should invalidate the decision or the directive. Despite what is stated in the explanatory note it is important to observe that the proclamation itself does not make a distinction between the effects of basic and non-basic violation of procedure. Therefore, it will be up to the courts to devise some tests to balance individual rights and societal interests in effective and efficient administration.

### 9.11.2 Directives

The procedural requirements for the issuance of directives are found in section two of the Proclamation (Article 4-19). The procedures are mandatory requirements as stated under Article 4/2/ of the Proclamation. The procedures are already discussed in Chapter 5 of this textbook; there is no need to repeat the specific procedural elements.

To give a general idea regarding some of the problems associated with review of directives on procedural grounds, we will use the summary and example found in the explanatory note.

An administrative agency issuing a directive needs to adhere to the following main procedures:

- the administrative agency preparing to issue a directive shall keep a record indicating the timeline for issuing such directive (Article 7 (1)(a));
- publish a public notice concerning the draft directive and its issuance procedure (Article 8);
- send the draft directive to concerned administrative agencies, other stakeholders, and the Federal Attorney General (Articles 9 and 12 (4));
- organize public consultation on the draft directive and allocating enough time to participants (Article 10);
- prepare the explanatory note describing the content of the directive and the process of issuance thereof (Article 14);
- prepare the directive in line with the form prescribed under Article 15 of the Proclamation; and
- send the Directive to the Attorney General to be registered and post it on the agency's website (Articles 16 and 17)

**Example**

Here is an example in the explanatory note to show the effect of non-compliance with the above procedures.

An administrative agency was planning to issue a directive and published a notice and organized an official record of the directive making process. Then, it sends the draft directive to the relevant administrative agencies and the Federal Attorney General. A public consultation was held between these entities, and thorough discussions were held on the draft directive. However, private sector actors or their representatives, who may be subject to the directive, were not invited to participate in the consultation.

Few stakeholders, having seen the announcement made by the administrative agency, have submitted written comments on the draft directive. However, the agency adopted the directive under the signature of the Minister and entered the directive into effect, without considering the comments it has received in writing. The stakeholders, who realized that the agency has not revised the directive based on their feedback or did not indicate why their comments were not incorporated, did not send the directive to the Federal Attorney General for registration; and started implementing the directive

without posting it on its website; file a petition for judicial review. The petition mainly stated the following procedural violations by the Ministry:

The agency failed to consider comments submitted to it in writing, as per Article 12(2 and 3); and if it did not accept such comments, has not prepared an explanatory statement as to why it did not accept them.

It has not prepared a statement explaining the contents of the directive and the process of issuing directive as per Article 14.

It has failed to send the directive to the Attorney General for registration as per Article 16, and it has also failed to post the directive on its website as required under Article 17.

The following conclusion is reached in the explanatory note in response to each of the three violations.

*All these violations of the provisions of the proclamation constitute good causes for judicial review. The court, by looking into the violations committed by the Ministry while issuing the directive may decide to invalidate the directive as per Article 18(1) and may order the agency to reissue the directive rectifying the non-compiled procedures.*

There are a lot of factors to be considered before a directive is invalidated for procedural non-compliance. The reviewing court's first obligation is to ensure compliance with the essential elements of rule-making procedure. These may be summarized as:

Public notice including accessibility of the draft directive

Opportunity for the public to submit written comment on the draft

Consultation

Publication

These are the essential procedural requirements to ensure transparency, public participation, and accountability in public administration. If one of the essential procedures are disregarded by the agency, the effect should be invalidation of the directive. For the other requirements, it depends on the circumstances. The degree of non-compliance and its impact should be weighed carefully before a court denies the directive legal effect.

For instance, failure to accommodate the comments of stakeholders and absence of justification for why the comments were not adopted depends on how much other stakeholders and the public were involved in the consultation process. The agency may prepare justification documents for some stakeholders only. In simple terms, he reason

for the rejection of each and every stakeholder's comment should not in any way result in invalidation.

Regarding the preparation of explanatory statements in accordance with Article 14, again the court should first verify if the agency complied with the essential rule-making procedures. If that is the case, there is no reason to invalidate the directive. The court should simply order the agency to provide explanatory statement without revoking the directive. As explanatory statement is the final stage of the process, it is possible to prepare the document without the directive losing its legal effect.

## 9.12 Summary

Judicial review must balance the need to protect individual freedom and concerns for effective and efficient administration. Unlimited interference in the the supervision of government action hinders good administration.

The procedural rules of standing, exhaustion, finality clause, and ripeness are devised to ensure that a flood of litigation brings public administration to a standstill. They are designed to ensure that arbitrary and ultra vires acts are strictly scrutinized while giving the agency some level of protection to decide what is right within the limits of its power.

Similarly, the grounds to prohibit the courts from interfering in the lawful activity of the administration even when it is wrong. Ultra vires is the primary ground for review in most countries, including Ethiopia. Ultra vires signifies excess of power.

## 9.13 Glossary

**Standing:** Having a strong enough interest in a matter to be allowed to bring a lawsuit based on it; also called standing to sue.

**Finality clause:** Also called **ouster clause** is a clause in some statutes that the decision of some delegated authority shall be final.

**Ripeness:** The principle that courts will only hear cases involving actual controversies, not cases that are hypothetical, speculative, or otherwise not in need of immediate decision.

**Exhaustion of remedies:** The doctrine of exhaustion of remedies prevents a litigant from seeking a remedy in a new court or jurisdiction until all claims or remedies have been exhausted in the original one.

**Error of fact:** A mistake made because an essential fact is not known or because something that was believed to be a fact was not true; also called error in fact.

**Error of Law:** A mistake made in applying the law to a case; also

called error in law.

**Proportionality:** A principle which states that when the government acts, the means it chooses should be well- adapted to achieve the ends it is pursuing

**Legality:** The state of being consistent with the law or of being lawful or unlawful in a given jurisdiction, and the construct of power.

***Ultra vires:*** (Latin) Beyond the powers; outside one's official authority; used specially to describe actions by a corporation that exceed the powers granted to it by its charter or by state law

## 9.14 Review Questions

1) Explain the statement by identifying the aspects of limitation on judicial review that it addresses.

*A supervisory court will want to examine a complaint at a time convenient to the court, at the time that best permits it to determine whether the administrator has acted illegally. To that end, a well-designed system will direct challenges into a narrow channel neither so early in the administrative process as to interfere with administration or forestall administrative self-correction nor so late as to create insecurity by allowing administrative acts to be open to challenge for long periods.*

2) Discuss the doctrine underlying the following quote.

*Judicial review is 'designed to remedy real and substantial injustice rather than to give satisfaction, however legitimate'*

3) Has an individual exhausted his or her remedies if the complaint is not heard by the agency because the complainant did not file his or her complaint on time?
4) Are decisions by the FDRE Prime Minister or Council of Ministers justiciable?
5) The conclusion that some exercises of executive power raise non-justiciable questions arguably limits the reach of the rule of law. Discuss.
6) In the case CFN 173628 volume 24, the respondent was unwilling to register the name of the adopted children in accordance with their given (biological name) as indicated in the adoption agreement. At the same time, the respondent informed the 3rd applicant that the name should be entered in accordance with the requirements of the directive.

A) If you are attorney for 3rd applicant, what is the decision you will petition to the court for judicial review?

B) Is refusing to enter the given (biological) names of the adopted children an administrative decision as defined by the Administrative Procedure Proclamation?

C) If refusal constitutes an administrative decision, what will be the ground for a review?

D) What remedy is available under the Proclamation when an agency refuses to do or perform some action?

7) "A sledgehammer is not needed to crack a nut" which ground of judicial review does this statement reflect?
8) The finality clause does not preclude the jurisdiction of the courts in cases where the action taken by the administrative authority is ultra vires. Discuss.
9) Which of the following administrative actions are ripe for judicial review?

A) A notice issued to comply with certain requirements with a threat of sanction.

B) Recommendation of a committee to the head of the agency to take serious administrative measure against a business person. Assume the committee, upon investigation, found the person in serious violation of the law.

C) An order by an agency against a group of service providers to submit a report disclosing confidential information about their customers.

10) What is the difference between finality (ripeness) and exhaustion of administrative remedies?
11) Read Article 47 of the provision Commercial Registration and Licensing Proclamation No. 980/2016 regarding time limit. Then answer the following questions

If the aggrieved person submits his grievance to the head of the relevant authority after fifteen days, should a court accept his application:

A) If his application was rejected by the relevant authority on the ground of the elapse of time?

B) If his application was rejected by the relevant authority on the merit?

**Commercial Registration and Licensing Proclamation No. 980/2016**

**Art. 47. Grievances against administrative measures**

1/ Any person aggrieved by the decisions of relevant authority on matters covered in this Proclamation,[64] regulation and directives issued hereunder may submit his grievance to the head of the relevant authority within 10 days.

2/ The head of relevant authority to which the petition is submitted shall notify his decision to aggrieved person in writing within five days; if the head of relevant authority fails to notified such decision within the specified time, the aggrieved person may lodge his petition to a court of law having jurisdiction.

3/ Any person aggrieved by the decision given or if the head of relevant authority fails to notify pursuant to sub-article (2) of this Article may lodge appeal in connection with his grievance to the regular court having jurisdiction only on issues of law

11) What is the difference between capacity, standing, and cause of action?

12) Discuss the validity of the following statement.

*In private law cases, such as tort law, the issue of standing will not arise because the requisite interest is bound up in the elements of the relevant cause of action.*

[64] E.g. Cancellation of commercial registration and trade name registration

13) Do you agree with the justification of the drafting group? What problems and potential risks can you identify in opening the door for any person to challenge directives issued by the administration?

14) Does the Administrative Procedure Proclamation exclude some agencies from the applicability of judicial review? In other words, is there any agency whose decision and directive are not subject to judicial review?

15) Like directives, regulations issued by the Council of Ministers are secondary legislations. Is it possible to challenge regulations in court through the procedure of judicial review? If yes, what law governs judicial review of regulations? Is it the Administrative Procedure Proclamation or other laws?

16) Can a court review a decision made by the Prime Minister of Ethiopia? If not, what is the justification for the exclusion?

17) Do you agree with the reasoning of the Bench in CFN 51790? Is justiciability similar with jurisdiction? In trying to answer this question, refer to the different senses the term "justiciability" is used (see the above list). In that list, only the third and fourth of these contexts lie at the core of the concept of 'non-justiciability.' Take this fact into consideration to evaluate the decision of the Bench.

18) Is ripeness requirement applicable to directives? In other words, is it possible to challenge a directive which is not final and not published, if there is gross violation of procedure during the rule-making process?

19) Assume a draft directive at a consultation stage was cited by the issuing agency to take administrative measure against your business. Can you apply to the Federal High Court for its invalidation? Why?

20) Read the provisions of the following Proclamation and answer the following questions

a) Can the decision of the Authority under Article 38/2/ be challenged in court through judicial review?

b) Can the decision of the Ministry under Article 38/6/ be challenged in court through judicial review?

c) Assume the penalty imposed was beyond the amount stated in the regulation. This was brought to the attention of the Authority but it failed to rectify it. Is the decision of the Authority final? Is the decision of the agency precluded from review by court?

d) If decision of an agency is expressly excluded and cannot be reviewed by the ordinary courts, is it possible to submit Cassation application before the Federal Supreme Court on grounds of fundamental error of law?

## Railway Transport Traffic and Safety Control Regulation No. 348/2015

Article 34. Complaint Procedure

1/ Without prejudice to sub-article (4) of this Article, any person who is informed in writing to pay the penalty imposed on him pursuant to Article 33 of this Regulation shall immediately pay the penalty. and may lodge complain to the Authority within three working days if he has a complaint.

2/ The Authority shall give decision within a reasonable short period of time on the complaint lodged pursuant to sub-article (1) of this Article and, such decision of the Authority shall be final.

3/ The identity card of a pedestrian, passenger or other person who are not able to pay the penalty pursuant to sub-article (1) of this Article shall be withheld and shall cause to commit himself to pay the penalty within one month.

4/ Any operator or train master who is dissatisfied by the decisions made pursuant to this Regulation may lodge his compliment to the Director General of the Authority within ten working days of the decision.

5/ A party who is dissatisfied by the decision of the Director General rendered pursuant to sub-article (4) of this Article may lodge his complain to the Ministry within twenty working days.

6/ The decision of the Ministry rendered pursuant to sub-article (5) of this Article shall be a final

21) Assume the case arose in Ethiopia with the same issue. Do you think the Federal High Court would review what constitutes a view of architectural value?

22) If decision was reached based on expert evidence, do you think the court should be allowed to challenge the expert opinion and reach a different conclusion?

23) Is there any provision in the Administrative Procedure Proclamation that authorizes the Federal High Court to invalidate an administrative decision or directive due to exercise of power for an improper purpose?

24) If the reason for a decision is not stated, how is it possible to know whether power was exercised for proper or improper purpose?

25) Do you think each and every aspect of procedural requirement should be a ground for invalidation of a decision or a directive? Is it necessary to make distinction between minor and essential procedural irregularities? If yes, does the Administrative Procedure Proclamation make such a distinction?

26) Assume an administrative agency makes a decision by complying with a procedure under a specific law, but that procedure does not afford sufficient protection to the person against whom the decision is made. Is it possible to challenge that decision for failing to accommodate the procedure provided by the Administrative Procedure Proclamation?

27) When a specific statute prescribes a procedure without indicating the effect of non-compliance, how should we decide its legal effect? Is it possible to apply the relevant provisions of the Administrative Procedure Proclamation?

28) Do you agree with the above conclusion? In other words, do you believe a judge should invalidate a directive if one of the above three violations occur?

## 9.15 Further Readings

12) Chris Taylor, *Constitutional and Administrative Law* (Pearson Education Limited, 2008) P108-118

13) Daniel E. Hall (2015). *Administrative law: bureaucracy in a democracy*. Pearson Education P243-301

14) S.A. DE Smith (1959). *Judicial Review of Administrative Action*. Sydney: The Law Book co. of Australia Pty Ltd. P3-50

15) Longley, Diane, and Rhoda James. 1999. Administrative Justice: Central Issues in UK and European Administrative Law, Cavendish Publishing Limited

# CHAPTER TEN

# REMEDIES

## Chapter Overview

This Chapter outlines the remedies or relief available to a person whose rights and interests are affected by administrative decisions or directives. The remedy is the fruit of administrative law. Remedies could be sought from the agency, tribunals, or, most importantly, from ordinary courts. The remedies available from courts will be the main concern of this Chapter.

### LEARNING OUTCOMES

After studying this chapter, you will be able to:

- Define administrative and judicial remedies;
- Identify the nature and types of public law and private law remedies;
- Discuss the circumstances under which the public and private remedies may be granted;
- Distinguish differences between the writ of certiorari, mandamus, and prohibition;
- Define and discuss the remedy of habeas corpus;
- Apply your knowledge to solve practical cases regarding remedies

## Chapter Table of Contents


**10.1 Introduction ..... 334**
**10.2 Public Law Remedies ..... 335**
10.2.1 Certiorari ..... 335
10.2.2 Mandamus ..... 337
10.2.3 Habeas Corpus ..... 338
10.2.4 Prohibition ..... 340
**10.3 Private Law Remedies ..... 340**
10.3.1 Declaration ..... 342

10.3.2 Injunction....343
10.3.3 Property law Remedies....343
10.3.4 Invalidation....344
10.3.5 Damages....345
10.3.6 Contractual Remedy....346
**10.4 Summary....346**
**10.5 Glossary....347**
**10.6 Review Questions....347**
**10.7 Further Readings....348**

## 10.1 Introduction

In addition to the safeguards which control the power of the government, administrative law also provides the remedies that are available for unlawful and irregular administrative action.[1] When an administrative wrong occurs, individuals may resort to these available remedies whose nature and effect may vary depending on a wide range of factors. For instance, one may largely categorize remedies into administrative and judicial remedies. According to Neil, a remedy can be described as an administrative remedy where it is provided for by the statutes and does not involve recourse to a court of law.[2] Such is the case of administrative appeals from the decision of local authorities to administrative agencies and from the latter to administrative tribunals.[3] In case of judicial remedies, the law seeks to ensure that administrative decisions are taken in accordance with the requirements of the law. If not, the aggrieved individual may apply to the court for one of the judicial remedies. The types of remedies the aggrieved person seeks may differ depending on the nature of the administrative wrong. However, whatever the nature of the remedy, the main purpose is to provide individuals with a way to challenge the administrative action.

Once a party decides to bring an administrative wrong before a court of law for review, he/she has a handful of options for the type of remedy he/she may choose to pursue. Such judicial remedies may be classified into different categories depending on the purpose and the nature of the remedy under consideration. However, for the purpose of this chapter, we have classified judicial remedies into two major categories— public law and private law remedies. The judicial remedies that fall under the public law category are the declaration, injunction, *certiorari*, prohibition, and *mandamus,* which are described in the following section.[4] Private law remedies envisage remedies that

[1] Hawke, N. (2013). *Introduction to administrative law*. Routledge-Cavendish. p.6
[2] Ibid P. 208
[3] Article 43-45, Federal Administrative Procedure Proclamation, Proclamation No. 1183 /2020, Negarit Gazette No. 32 , April 7th 2020.
[4] Hawke, N. Supra Note 1, p 213

may be claimed per the rules incorporated in private laws, such as the law of extra-contractual liability, property and land law, law of contract.[5]

## 10.2 Public Law Remedies

In judicial review proceedings, the claimant always approaches the court requesting a remedy. It is that remedy that determines nearly everything else. It is only if the applicant has made out that he has *locus standi* that the defendant or decision is subject to judicial review, and, importantly, that one of the many grounds of judicial review could be made out, that he would be entitled to one or more of the available remedies. The remedies available to applicants in judicial review applications were public law remedies, including mandamus, certiorari, prohibition, and more. The following discussion explains more about the public law remedies remedy in a more detailed manner.

### 10.2.1 Certiorari

*Certiorari* is the most commonly used prerogative remedy in the common law system. Certiorari ("cause to be certified") is a special proceeding by which a superior court requires some inferior body to provide it with the record of its proceedings for review.[6] As a general rule, certiorari applies to statutory bodies performing public duties with an obligation to act judicially. Hence, it may be obtained against administrative tribunals, inferior courts, local authorities, and statutory and non-statutory bodies exercising public functions.[7] It was the established method by which the Court of King's Bench in England, from the earliest times, checked the jurisdiction of inferior courts and maintained the supremacy of the royal courts. In the United States, most applications to the U.S. Supreme Court are still made by way of a petition for certiorari. A successful certiorari application results in the "quashing" (effectively, the invalidating) of a tribunal's order or decision.[8]

*Certiorari* is an *ex post facto* remedy. Note, however, that the court cannot substitute its decision for the decision of a tribunal that the court finds had erred because the court has not been granted the statutory decision-making authority and does not have the expertise that the tribunal has. According to Neil, there are three grounds

[5] Ventose, E. (2012). *Commonwealth Caribbean Administrative Law*. Routledge. P.421-425
[6] Ford, C. (2012). Dogs and Tails: Remedies in Administrative Law. ADMINISTRATIVE LAW IN CONTEXT, 2d ed.(Toronto: Emond Montgomery, 2013), 85-123. P. 31; See also Massey, I. P. (2016). *Administrative law*. Eastern Book Company. P. 398
[7] Hawke, N. Supra Note 1 P 225
[8] Ford, Supra Note 6 P 31

where the administrative body may set aside the decision of the administrative agency.[9] They include ultra-vires, breach of natural justice, and error of law on the face of the record. In a similar fashion, Ian notes that relief in the nature of certiorari is applied in the event where the superior court finds the decision ultra-vires or was otherwise made in want or excess of jurisdiction or that there was a breach of the rules of procedural fairness or fraud.[10]

To an extent, judicial remedy in the form of *certiorari* is recognized in Ethiopia. The Administrative Procedure Proclamation under Articles 56 (2) and 57 (1) indicates that after reviewing an administrative action, the court may fully or partially reverse or invalidate the administrative decision or a directive. This has the same effect as the remedy of *certiorari* which is quashing the decision of the administrative body's order or decision. Hence, this provision of the Proclamation may be taken as proper recognition of *certiorari* as a remedy for judicial review in Ethiopia. The Proclamation also provides the grounds where the court may invalidate the decision. As far as a directive is concerned, such is the case where:

a) it is proved to have failed to comply with the procedural rules provided in the Proclamation;

b) it is ultra-vires; or

c) it is contrary to other laws placed higher in the hierarchy of laws.[11]

On the other hand, an administrative decision may be revoked if it is made in violation of the principles provided under Chapter Three of the Proclamation.[12]

The Civil Code is another area of law where an attempt to incorporate the judicial remedy of *certiorari* is made. It provides that acts performed by the bodies referred to, state administrative organs, …in excess of the powers given to them by law or without the observance of the conditions or formalities required by law shall be of no effect. As per this provision, a person can require the nullity of an administrative action on the ground that such action is ultra-vires or against the principles of procedural fairness,

[9] Ford, Supra Note 6, P 225
[10] Ellis-Jones, I. (2003). *Essential administrative law*. Routledge-Cavendish P 93
[11] Art 50 (1) of Federal Administrative Procedure Proclamation No. 1183/2019
[12] Art 50 (2) Federal Administrative Procedure Proclamation No. 1183/2019. According to the proclamation principles of administrative decision making include: Respecting Scope of Authority, Balancing of Public and Individual Interest, Avoiding Irrelevant Matters and Interests, Rendering of Professionalism, Hearing, Good faith, Reasoned Decision, Avoiding Conflict of Interest, Keeping Customers Equality, Timely Decision, Predictability, and Transparency.

which is a typical feature of *Certiorari* as a judicial remedy.[13] The provision under sub-article 2 further notes that such rule shall apply notwithstanding that nullity is not expressly provided by law in such circumstances.[14]

## 10.2.2 Mandamus

An order of *mandamus* (literally meaning "we command") is used to order a person or a body to perform a lawful public duty. In the words of Cristie Ford, it is a writ issued by a superior court to compel a lower court or a government agency to perform a duty it is mandated to perform.[15] The need for public duty means that mandamus would not be available to enforce a private duty arising out of, for example, contract.[16] In most cases, it is employed to compel the performance of a clear statutory duty on any occasion when the administrative agency has plainly and unlawfully refused to undertake the duty at the request of a person intended to benefit from it. For relief by way of mandamus to be available, three requirements must be satisfied: there must be a 'duty' to be performed; the duty must be a 'public' one; and the duty must be 'lawful'.[17]

In practice, the mandamus is usually combined with others forms of relief. For instance, Certiorari would be used to quash a decision for a lack of procedural fairness, while mandamus would be used to force the tribunal to reconsider the matter in a procedurally fair manner. A variation on mandamus gives the court the ability to send a matter back to a tribunal for reconsideration with directions. Superior courts have the inherent power to order reconsideration with directions, and if the court issues directions, it must clearly state what the original panel is to do or what it must refrain from doing. These directions may only protect against unfair procedures or excess of power and cannot tell the tribunal how it must decide. In particular, the general rule is that mandamus cannot be sought to compel the exercise of discretion in a particular way.[18]

When it comes to Ethiopia, Article 57 of the Proclamation stipulates that where the court renders a decision that partially or fully invalidates the administrative decision or directive, it may also order the administrative agency to revise or reenact the directive or reconsider its administrative decision by rectifying the shortcomings identified

[13] Civil code art 401 (1)
[14] Civil code art 401 (2)
[15] Ford, Supra Note 6, P 32
[16] Hawke, N. Supra Note 1, p 230
[17] Ellis-Jones Supra note 10. P. 105
[18] Ford, Supra Note 6, P. 31

through the court's decision.[19] From the reading of this provision, one can understand that after reviewing an administrative action one of the remedies that the court may take is to remand the case to the lower body so that it can reconsider the matter in a procedurally fair manner or any other manner it deems appropriate.

### 10.2.3 Habeas Corpus

The Latin term *habeas corpus*, which means *"you have the body"*, refers to the judicial determination of the legality of a person's detention**.** The writ of habeas corpus originated in the English common law, however, there is no consensus on the time of its origin.[20] Some track it back to 1679 when the Habeas Corpus Act was enacted.[21] Others claim the writ was in use before that time. It was used in different contexts and its meaning changed over time. The right to habeas corpus was recognized first as a constitutional guarantee of liberty in the United States.[22] By 1945, the right to habeas corpus was recognized in the constitutions of 34 countries. Now, it is recognized in the constitutions of 118 countries.

The right to habeas corpus was first recognized in Ethiopia in the 1965 Civil Procedure Code. See Articles 177-179. It was also incorporated under Article 19(4) of the FDRE Constitution which recognizes one's right to apply for physical release.[23] It provides:

> *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.*

The purpose of habeas corpus is not only to verify whether the detention can be justified. It is also to provide access to judicial authority and require that the decision be given speedily and effectively, and examine whether other formal guarantees, such as those concerning a person detained on remand, have been respected.[24] There are different approaches among legislations as to query who is eligible for a habeas corpus proceeding. According to the International Covenant on Civil and Political Rights, anyone who is deprived of his liberty by arrest or detention shall be entitled to take

[19] Article 56(3) of FAPP
[20] Assefa, S. K. (2010). Criminal Procedure Law: Principles, Rules and Practices. Xlibris Corporation. p 199
[21] Wondosen, D. (2012). Ethiopian Criminal Procedure. School of Law Addis Ababa University P. 122
[22] ibid
[23] Article 9(4) of the ICCPR recognizes the right to habeas corpus while it is also claimed that article 8 of the UDHR impliedly incorporates the concept.
[24] Assefa Supra Note 20, P. 200

proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.[25]

On the other hand, as per the Civil Procedure Code an application for habeas corpus may be made to the High Court by any person restrained otherwise than in pursuance of an order duly made under this Code or the Criminal Procedure Code.[26] Accordingly, the right to habeas corpus extends only to illegal arrest (arrest not made in accordance with the Civil and Criminal Procedure Codes). The constitution, on the other hand, prescribes a detained person can only apply for habeas corpus where he is not brought before a court within 48 hours.[27]

When it comes to the purpose of habeas corpus, the Constitution and the Civil Procedure Code both recognized a different rationale for habeas corpus than that articulated by the scholars and international and regional human rights instruments. The Civil Procedure Code stipulates that the primary purpose of the habeas corpus is to release the detained person but the court releases the detained person only if the detention is unlawful.[28] The Constitution states the purpose of the proceeding is to order the release of the detained person.[29]

Once an application for a habeas corpus is made, the next issue is the remedy that the court may give after entertaining the matter. The ICCPR, the Civil Procedure Code, and the Constitution provide the same remedy in a habeas corpus proceeding, which is the release of the detained. There is, however, a slight difference among the three sets of laws for the ground of the release. The ICCPR provides that the court shall order the release of the detained only if the detention is found to be unlawful.[30] Likewise, the Civil Procedure Code stipulates that if the court finds the detention to be unlawful it shall order the release of the defendant.[31] Nevertheless, according to the Code the court may still conditionally release the defendant if it is not sure about the lawfulness of the detention.[32] Per the Constitution, the unlawfulness of arrest is not adequate for the arrestee to be released. Rather, it is only where the interest of justice requires so that the detained may be released.[33] The interest of justice is related to the possibility of the arrestees to abscond, if released.

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[25] ICCPR Art 9 (4)
[26] Article 177 of the civil pro Code
[27] Article 19 (4) of the Constitution
[28] Art 177(1) and 179 (2) Civil pro code
[29] Article 19 (4) of the Constitution
[30] ICCPR Art 9 (4)
[31] Article 179 (2) of the Civil Procedure Code
[32] Article 179 (3) of the Civil Procedure Code
[33] Article 19 (4) of the Constitution

### 10.2.4Prohibition

This remedy is very similar to the order of certiorari in seeking to prevent ultra vires action or action in breach of natural justice pending a final decision by a statutory agency exercising public functions with an obligation to act judicially. It is an order from a superior court that restrains an administrative authority or tribunal from entering upon a matter or proceeding further with a matter which lies beyond its power, authority, or jurisdiction. Prohibition is a type of remedy that may be used in conjunction with other judicial remedies, particularly certiorari and mandamus. In such a sense, a party may seek certiorari to quash the decision in question and prohibition to prevent the execution of the nullified decision or the taking of other particular action.

Despite its combined application with certiorari, prohibition has some contrasting features compared to the latter. Certiorari nullifies or quashes an already made illegal or ultra vires act. Thus, it has a retrospective effect as it restrains a government body from taking a certain course of ultra vires action. Conversely, prohibition has a prospective effect because it stops the continuity of an ongoing course of action or restrains the execution of an already made decision beforehand. Thus, while certiorari has a nullifying effect, prohibition has a preventive effect.

## 10.3 Private Law Remedies

In the previous discussion, public law remedies were briefly examined. In this one, the private law remedies— including declaration, damages, and injunctions (interim and mandatory), property law Remedies and Contact Law Remedies— available to applicants are covered. Over time, it soon became clear that those public law remedies were insufficient to meet the demands of justice in particular cases, and most of the civil procedure rules made provision for the use of private law remedies. Thus, the following discussion briefly outlines the major private law remedies available for an aggrieved party in line with the Ethiopian Perspective.

Before we begin the discussion in detail, there are some key points you should remember throughout our discussion. When we talk about remedies that are “private” we mean remedies available from the ordinary courts for illegal acts and wrongs of the administration. It is neither statutory appeal nor judicial review. In principle, it is the same remedy you are entitled to when your rights and interests are violated by another individual.

In chapter one and in other related chapters, we made a distinction between private law and public law. The underlying difference between the two is that public law concerns act of the administration while exercising their public functions. For instance, issuance of license is a public law function. In addition to public law acts, the administration through each administrative agency also exercises non-public functions

which are purely private by nature. These acts are identical to acts performed by private parties. To cite examples: agencies enter into contracts just like private entities and individuals. The contract, if it has a public nature, will be governed by a special contract known as administrative contract. However, when an agency buys stationery, it is purely governed by a private law of contract.

Liability of agencies may emanate from arbitrary exercise of power or acts that are not necessarily illegal. This is the case for instances when someone is physically injured by a vehicle belonging to the agency. The agency will be liable to pay damages because it is vicariously liable for the acts of its employee.

This is how you should approach selecting the type of remedy in a specific case. This is also the common reality in both civil law and common law countries. There is one significant deviation when Ethiopian law is compared to other jurisdictions. In both legal systems, due to the development of administrative law, despite some debates, there is a distinction between private law and public law. However, in Ethiopia, until the enactment of the Administrative Procedure Proclamation, the concept of public law/private law divide is unknown.

The absence of distinction is not to be taken as a disadvantage when it comes to remedies for an aggrieved party. On the contrary, there is an advantage that continues to exist today. Until judicial review was introduced in Ethiopia, it was possible to challenge the legality of administrative action through private law remedies. As we will see in detail below, both the private and public acts of the administration could be successfully challenged in court even without the need for judicial review. One problem not to be ignored is that, in some cases, due to uncertainties in the courts, a person may be denied a remedy.

Take for instance interference with your property right by the agency. It is possible to request the court for the invalidation or permanent injunction against the measure of the agency by bringing a civil petitory action.

Remember also that a judicial review might not be suitable in some circumstances, and there are also a lot of limitations compared to civil action. In a civil action, there is no leave requirement, however, judicial review is a discretionary remedy. A petition could be thrown out even before the agency is served with summons. There is also no chance of appeal in judicial review of administrative decisions. The case will be instituted in the Federal High Court without any option for appeal when the act being challenged is an administrative decision. This is not the case in civil suits. In civil matters, the right to appeal is always available to the appellate court.

## 10.3.1 Declaration

Declaration which is also referred to as a declaratory judgment or order, is a court order which creates, asserts, preserves, or testifies to the existence of a legal right or duty or the correct legal position between parties.[34] There are two kinds of declarations: the public law variety, used to declare some government action ultra vires, and the private law variety used to clarify the law or declare a private party's rights under a statute. The public law variety is the main concern of administrative law.[35] Declaration is not a coercive remedy, and thus, unlike *certiorari* it does not quash an administrative act or decision unlike injunction, nor does it force or coerce a party to do or refrain from doing something. In the words of Neil, it is only meant to confirm the legal status of a relationship. A declaration is a broad-based and flexible remedy that is available in a wide range of situations. Among those situations are where the act or the decision of an administrative agency is ultra vires, where a relationship is affected by a breach of natural justice, where it is desired to challenge the legality of a delegated legislation, and where there is a duty to act.[36]

Usually, declaration is sought in conjunction with other judicial remedies such as injunction or *certiorari*. For instance, in case of ultra vires, the court confirms that the act or decision of an administrative agency is ultra vires, that is, declaration. In addition, the party may file for an injunction to prevent any reliance on or enforcement of the administrative decision. If the decision is against a voidable act or decision of an agency, which is merely affected by an error of law, the party may apply for the remedy of *certiorari* in order to quash the voidable decision.

The court has wide discretion whether to grant or refuse a declaratory relief. Lord Dunedin set out the rules which should, in general, be satisfied before the discretion is exercised in favour of a grant of declaratory relief.

The 'question' may be one of fact or law, but must not be merely 'abstract' or purely 'hypothetical; there must be a 'real' legal controversy between the parties, such that the rights and interests of the respective parties depending upon its resolution. A party with a present stand of neutrality or who is simply prepared to abide by any order, which the court might make, can still be a 'proper contradictor', provided the party has a 'true interest' in the other side's claim.[37]

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[34] Ellis-Jones Supra note 10 P 104
[35] Ford, Supra Note 6, P 31
[36] Hawke, N. Supra Note 1, P 104
[37] Ellis-Jones Supra note 10, P. 105

## 10.3.2 Injunction

An injunction is a coercive court order which restrains the continuance of a wrongful act or directs the doing of some specific act. There are different types of injunction remedies depending on the nature of the remedy required. Considering the duration of the order, an injunction may be perpetual or interlocutory.[38] A perpetual injunction is one which is given at the conclusion of the proceeding. By contrast, an interlocutory injunction is one which is given during or before the conclusion of the proceeding to preserve the status quo between the parties until the issue is finally determined. As noted by one scholar, the court will grant an interlocutory order where there is a serious question to be tried and the court decides that, on the balance of convenience, the injunction should be granted.[39]

The other two contrasting types of injunction are prohibitory (restrictive or preventive) injunction and mandatory (compulsive) injunction. A prohibitory injunction seeks to restrain any action or decision which is found to be contrary to the law. One of the areas where a prohibitory injunction may be used is in the case of ultra vires. It may also be used for breaches of statutory duty and continuing breaches of criminal law. Mandatory injunction, on the other hand, commands a person to act in a certain manner. It usually arises where a party fails to perform its legal duty.

## 10.3.3 Property aw Remedies

One of the easiest and most comprehensive (in the sense that it combines all remedies, including compensation) is petitory action against any interference to the possessory right and interest by an unauthorized person. The remedy is available against private entities and individuals and against unauthorized acts of the administration. Article 1149/1/ of the Civil Code reads:

> *The possessor or holder who Is deprived of his possession or whose possession is interfered with may require the restoration of the thing or the cessation of the interference and claim compensation for damages.*

The provision contains three types of remedies: restoration of the thing if there is dispossession of the thing, injunction or cessation of interference, and additional compensation for damage.

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[38] Cane, P. (1992). *An introduction to administrative law*. Oxford University Press, USA. P.122 255; Freedman, J. O. (1972). Summary Action by Administrative Agencies. *The University of Chicago Law Review, 40*(1), 1-65. P.57

[39] Hawke, N. Supra Note 1, P 222

There are two requirements to obtain the remedy pursuant to Article 1149 of the Civil Code. The requirements were elaborated in CFN 196174 (unpublished).[40] The first is to establish actual and lawful possession of the property. Second, it must be shown the defendant interfered without legal justification in the use of the property. These are easy to prove and the remedy will enable the plaintiff to seek prohibition order to stop defendant from his acts of interference or injunction to deter future unlawful acts. If interference has resulted in dispossession of property, the court will order its restoration to the rightful possessor. In addition to these remedies, compensation for damage could also be claimed.

When interference with possessory right is committed by an administrative agency, the property law remedy is far better than the judicial review remedy. There are a lot of reasons why this is true. First, the Administrative Procedure Code does not expressly specify injunction as a remedy. Only invalidation is specified as a primary remedy under Article 56 of the Proclamation. Such remedy is not appropriate to stop continued acts of interference and it is not suitable to claim restoration. The second reason is the absence of a consolidated avenue of remedy in the Proclamation. Whereas petitory action enables the party to seek injunction or restoration simultaneously with damage, that is not possible through judicial review.

As stated in Article 59 of the Proclamation, a person who has incurred damages as a result of a fault committed through the issuance of directives or administrative decisions is entitled to seek compensation from the administrative authority that is responsible, in accordance with the relevant laws. The provision excludes claims for damages from the scope of judicial review. A civil action is required to claim damage from the agency. Such approach entails the institution of two claims in two different courts for the same cause of action. The result is a burden to the party in terms of time and cost.

The third reason is related to the procedural hurdles of judicial review compared to an ordinary civil claim. A party to seek remedy through judicial review has to pass the procedural tests of leave, standing, exhaustion of remedies, and time limit. These are not preconditions in a civil suit.

## 10.3.4 Invalidation

Invalidation is a remedy to revoke or deny legal effect to administrative acts. Article 401 of the Civil Code authorizes courts to annul or invalidate agency actions in excess of the powers given to them by law or without the observance of the conditions

[40] Applicant Ato Gatdet Gnachom vs. Respondent Ato Nyal Dejock (2014 E.C.)

or formalities required by law. The provision expressly declares that such acts shall be of no effect. The same remedy with the same effect could also be obtained through a judicial review.

For the reasons stated above, the civil course of action is preferable as it could be claimed with additional remedies like compensation for damage. Invalidation may also be requested in collateral review. This type of review may be found in civil and criminal litigation incidental to other issues. For instance, the legality of administrative decision or directive may be at issue in a criminal proceeding. The court should rule on legality of decision or directive to decide the conviction or acquittal of the accused.

## 10.3.5 Damages

Compensation for damage against administrative agencies may be claimed in different scenarios. The first is tort action pursuant to Article 2126 of the Civil Code. The other is as part of contractual remedy. Compensation could also be claimed for interference with property rights.

As you have learned in your extra contractual liability course, an action for tort is an action committed for a civil wrong. The gist of tort law is that a person has certain interests which are protected by law. These interests can be protected by a court awarding a sum of money, known as damages, for infringement of a protected interest.

**Art. 2126. Liability of the State**

1. Principle.

(1) Any civil servant or government employee shall make good any damage he causes to another by his fault.

(2) Where the fault is a professional fault, the victim may claim compensation from the State, provided that the State may subsequently claim from the servant or employee at fault.

(3) The State shall not be liable where the fault is a personal fault.

The state is vicariously liable for damages caused by its civil servants, provided it is a professional fault. This is to mean the fault occurs as a result while discharging the ordinary duty of the agency.

Apart from tort liability damage may also be awarded for agency action during the exercise of regulatory or enforcement powers. Ultra vires acts, most of the time, result in actual loss of pecuniary interest. When this happens, a party may request the ordinary

courts to award him compensation for the damage he sustained as a result of illegal exercise of power.

### 10.3.6 Contractual Remedy

An administrative agency is a product of the law. The enabling act is its constituting documents. Upon establishment, the agency acquires rights and duties and is bestowed upon legal personhood. Acquiring legal personality enables it to perform juridically. One of the most important acts is entering into contracts. The agency for its continued existence needs to buy equipments, materials, services, and the like.

Upon entering a contract, its rights and duties arising out of the contract will be determined in accordance with the ordinary law of contract. Because contracting is a private activity, the rules, procedures, and principles of administrative law will not apply.

In case the agency defaults on its contractual obligation, the remedy available to the other party will be those remedies of non-performance in the law of contract. These remedies are mainly specific to performance and compensation for damages due to non-performance of the contract. Contracts concluded by agencies could be of two types. The first is the one discussed above, which is governed by the ordinary rules of contract. There is a second type of contract called contract subject to special rules which is governed by Articles 3131 to 3306 of the Civil Code. Article 3132 defines administrative contract as a contract connected with an activity of the public service and implies a permanent participation of the party contracting with the administrative authorities in the execution of such service. A contract with an administrative agency will also be considered as administrative if it contains one or more provisions which could only have been inspired by urgent considerations of general interest extraneous to relations between private individuals or there is designation by agreement of the parties.

The peculiar feature of administrative contract is that the agency is given wide discretionary powers to terminate the contract at any time. Unlike ordinary contract, the party does not have remedy of specific performance. The only remedy available to the party is compensation for damage.

## 10.4 Summary

Remedy, in the above discussion, refers to the type reliefs that may be granted for a person who has grievance on Administrative Decision Adjudication or Rule-making. In so doing, the above discussion explains the major types of remedies available to a person in case his right is violated by agencies in performance of any of these duties. The available remedies are classified in to two as administrative appeal and judicial

remedy. Administrative appeal can be made within the organization or outside the organization (by another organ established to hear appeals from decisions of agencies. In the first case, (where an appeal may lie from the decision of departments to an appropriate body within the administrative agency itself), the appropriate body may review the decision of the agency and give appropriate decision accordingly. In the latter case, (where an appeal lies from the decision of an administrative agency to an administrative tribunal), the tribunal may review administrative decisions on their merits.

The relief that the applicant seeks from the reviewing court is what we call judicial remedy. Judicial remedies are broadly classified into public law remedies and private law remedies. Those included within the category of public law remedies are *certiorari* (a quashing order), prohibition (a prohibiting order), mandamus (a mandatory order), and habeas corpus. These orders remain the basis of the modern law of judicial review but are now called mandatory orders, prohibiting orders, and quashing orders, respectively. On the other hand, private law remedies include injunction, declaration, property law remedies, and remedies of contract and damages.

## 10.5 Glossary

**Administrative contract:** a contract concluded between an administrative agency and a natural or artificial person where the object of the contract involves public interest

**Certiorari**: To be more fully informed. A writ issued at the discretion of an appellate court directing a lower court to certify and deliver the record of a case that is not appealable as of right to the appellate court for possible review.

**Mandamus:** A writ issued by a court to compel a public official (including the judge of a lesser court) to perform a task or duty

**Injunction:** A judge’s order to a party compelling or prohibiting certain described conduct.

**habeas corpus:** A process to challenge the validity of a person's detention, either in official custody or in private hands

**Invalidation:** Revocation, annulment, or withdrawal of a conferred power

## 10.6 Review Questions

1) According to Article 49/1/ of the Administrative Procedure Proclamation, decision of the High Court on a directive may be appealed to the Federal Supreme Court. However, the court’s decision on administrative decision is final. Therefore,

remedy available to the party will be to submit cassation application alleging fundamental error of law. Assume you petitioned the Federal High Court, a remedy for invalidation of a directive and, simultaneously, invalidation of administrative decision given based on the directive. If the court rejects your petition, can you appeal against the decision on the directive and the decision to the Federal Supreme Court? If you submit appeal on the directive and cassation petition on the decision, what remedy is available to you to stop the appellate court and cassation bench from giving two different decisions on one and the same cause of action?

2) Is there any valid justification for the exclusion of claim for damage from the scope of the Administrative Procedure Proclamation?

3) In what types of instances is judicial review preferable compared to civil action?

4) If you are unlawfully dismissed from a university, what type of remedy is available to you in the Administrative Procedure Proclamation?

5) Can one take the above provision as an example of the remedy of mandamus being recognized in Ethiopia? Or, in order to say writ of mandamus is recognized, should the court be empowered to order the administrative body to perform one or more of its statutory duties?

6) Is habeas corpus civil (private) or public (criminal) law remedy?

7) Article 5 (1) (O) of the Federal Courts' Establishment Proclamation puts habeas corpus within the civil jurisdiction of Federal Courts. Do you agree with such characterization of habeas corpus in Ethiopia?

8) It is said above that mandamus is an order by court made to order a person or a body to perform a lawful public duty. It is also said that an injunction is an order by court order which directs the doing of some specific act. Given all this, how is mandamus different from injunction?

## 10.7 Further Readings

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## Index


A.V Dicey, 25
abuse of power, 308
actual bias, 135
adjudication
  American Procedure Act, 102
  informal, 126
administrative agency
  function, 58
  history -Ethiopia, 83
  how it is created, 87
administrative agency"
  decision, 105
administrative appeal, 334
administrative decision
  meaning, 102, 105
administrative law
  definition, 3
  general and special, 12
  historical developmnet, 11
  process & substance, 3
Administrative Law Judge, 253
administrative remedy, 334
administrative state, 9
administrative tribunal
  scope of FAPP, 144
Administrative Tribunal
  Civil Servants Administrative Tribunal, 303
appeal, 273
apprehended bias, 135
Aristotle
  separation of powers, 53
*audi alteram partem*, 113
British administrative law, 26
Cassation Bench
  sources of administrative law, 17
cause of action, 278
Certiorari, 335
charge, 128
circular, 160
code of conduct, 162
comment, 183
complaint, 240
*Conseil d'Etat*, 256
consultation, 181
Council of Ministers
  sources of administrative law, 18
cross-examination, 131
decision
  content, 134
Declaration, 342
delegated legislation, 158
  meaning, 157
delegation
  administrative agency, 90
  justifications, 163
  separation of powers, 60
departmental bias, 138
directive
  definition, 156
disciplinary proceeding, 117
  formal inquiry, 118
  summary inquiry, 117
discretion, 91
*droit administratif*, 28
due process of law, 42, 61
  substantive, 64
  US constitution, 62
duty to give reason, 111
  leave, 280
efficiency, 272
enabling act, 3, 16
error of fact, 312
error of law, 314
essential legislative function, 171
exhaust of remedies, 299
exhaustion
  administrative remedies, 299
expertise
  delegated legislation, 164
explanatory statement, 191
fair hearing, 111

due process of law, 66
fairness
principles of administrative law, 69
Federal Agencies
Accounting and Auditing Board of Ethiopia, 118
Agency for Refugees and Returnees Affair, 121
Ethiopian Geospatial Information Agency, 159
Ethiopian Media Authority, 162
Food and Drug Administration, 202
Ministry, 200
Ministry of Foreign affairs, 122
Ministry of Justice, 184
Ministry of Trade, 162
National Bank of Ethiopia, 276
Private Organization Employees Social Security Fund Administration, 124
Public Procurement and Property Administration Agency, 161
Federal High Court
jurisdiction, 277
finality clause, 302
flexibility
delegated legislation, 166
formal procedure
decision makung, 117
French Administrative Law
administrative courts, 5
definition, 4
German administrative law
administrative act, 103
good administration
fairness, 8
green light, 22
grievance, 107
guideline, 161
habeas corpus, 338
hearing
judicial review, 279
hearing examiner, 118
hearing right
denial, 123
House of Federations
sources of administrative law, 17
Human Rights Commission, 7
impartiality, 136
improper purpose, 318
indirect democracy, 167
informal
rule-making, 182
informal procedure
decision making, 117
inherent power
courts, 275
judicial power, 275
initial decision, 107
initial stage
rule-making, 200
injunction, 343
internal review, 107
invalidation, 336
irrelevant considerations, 320
issue of fact
finality, 303
ground of judicial review, 312
judicial review, 74
Judicial review
availability, 287
difference with appeal, 273
difference with merits review, 272
essence, 271
grounds, 305
process vs. merit, 271
jurisdiction, 276
*laissez-faire*, 10
laying procedure, 197
leave, 279
Legal and Judicial Advisory Council, 289
Legal and Justice Affairs Advisory Council, 18
legality, 8
formal, 48
judicial review, 311

legislative document, 157
levels of decision making, 106
*locus standi. See* standing
Magna Charta, 63
mandamus, 337
manual, 161
merit vs. procedure, 13
natural justice, 113, 136
*nemo debet esse judex in propria sua causa*, 135
*nemo iudex in sua causa*, 113
nomenclature
  decision making, 101
  ruke-making, 157
non-delegability of power, 167
non-justiciable, 291
notice
  content, 128
  decision making, 126
  due process of law, 65
  summon, 127
Ombudsman, 7
oral hearing, 129
  adjudication, 130
  judicial review, 280
ordinance, 159
organic act, 3
parent act, 3
parliamentary control
  delegated legislation, 194
perpetual injunction, 343
petition, 279
post delegation
  control, 194
pre-delegation
  control, 194
preventive injunction, 343
procedural control
  rule-making, 193
procedural fairness
  balancing, 110
  due process of law, 64
  execlusion, 140
  instrumental & intrinsic, 136
Procedural irregularity, 323
procedural justice
  Aristotle, 44
  instrumental & intrinsic, 111
procedure fairness
  effect of non-compliance, 322
proceeding
  judicial review, 277
prohibition, 340
proportionality, 72, 321
public administration
  effectiveness, 140
public hearing, 66
public notice, 162
  rule-making procedure, 180
public participation, 75
public vs. private law, 14
publication, 184
reasonableness, 71
red light, 22
relevant considerations, 320
remand, 274
remedies, 334
remedy
  rule-making, 200
representative democracy, 167
Representative democracy, 167
responsive government, 74
Revised constitution, 67
Revised Constitution, 83
right and interest
  rule-making, 157
right or interest
  affecting-, 105
right to counsel, 132
ripeness, 294, 295
rule against bias, 135
rule of law, 42
  A.V. Dicey, 44
  basis of administrative law, 46
  judicial review, 271
  procedural elements, 48

substantive elements, 49
rule-making
nomenclature, 157
notice and comment, 182
procedure, 179
separation of powers, 42, 52
delegated legislation, 167
FDRE constitution, 60
judicial review, 273
limitation on administrative law, 59
rule-making, 155
serial number, 187
standard, 159
standing, 287
subordinate legislation, 158
tabling, 197
terminology
regulation & directive, 159
the duty to give reason, 73
time limit, 297, 329
tribunal
appeal, 107
fairness and impartiality, 66
tribunal procedure.
regulations & directives, 116
ultra vires, 275, 309
ultravires, 336
Wednesbury, 321
written defense, 129




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