UNIT ONE: INTRODUCTION TO ADMINISTRATIVE LAW

The Modern Welfare State and Evolution of Administrative Law

- The change in the role of government ‘Police state’ to the ‘welfare state’
- Then need for conferring more power on the administration and simultaneously the need for controlling this power.
- Power vs. Control…to ensure liberty
- By- product of the growing socio-E

- **complex relations= certainty, misuse of power, regulation**

Role of laissez fair (police state).....

- Minimal government control
- Maximum free enterprise,
- freedom of k+
- The management of social and economic life was not regarded as government responsibility
- Unequal bargaining power between labour and management=poverty & con of capital
- Human misery-----

Then to welfare state=

- ✓ state intervention,
- ✓ social control
- ✓ and regulation of individual enterprise

- Accumulated power=poses danger to rights, freedoms, liberty and privacy...
- Threats of big government=resulted adm law

Definition, Purpose, Scope and Sources of Administrative Law

Definition

While defining

- ✓ 1.concerned with the manner of exercising governmental power. The decision making process is more important than the decision itself.
- ✓ 2.Ultimate purpose=controlling exercise of governmental power

1. Schwartz "the law applicable to those administrative agencies, which possess delegated legislative and adjudicative authority.'=controlling? Remedies?

2. Jennings "the law relating to the administration. It determines the organization, powers and duties of administrative authorities." No distinction made

3. Dicey

- ‘Firstly, it relates to that portion of a nation’s legal systems which determines the legal status and liabilities of all state officials.
- Secondly, defines the rights and liabilities of private individuals in their dealings with public officials.
- Thirdly, specifies the procedures by which those rights and liabilities are enforced.’ =concerned only with **judicial control** of public

4. Massey/wider and working definition “Administrative law is **branch of public law** which deals with the **organization and powers of administrative and quasi administrative agencies and prescribes the principles and rules by which an official action is reached and reviewed in relation to individual liberty and freedom**”

Based on the definitions above, we may conclude that administrative law:

- **1.studies powers of adm agencies**

nature and extent of such powers is relevant to determine whether **any administrative action is ultra vires or there is an abuse of power.**

- **2. studies the controlling mechanism of power.**

Purpose of Administrative Law

- ✓ It has a control function, acting as a check in respect of the unlawful exercise or abuse of administrative power.
- ✓ It can have a command function by making public bodies perform their statutory duties
- ✓ It embodies positive principles to facilitate good administrative practice; for example, in ensuring that **the rules of natural justice or fairness** are adhered to.

- ✓ It operates to provide accountability and transparency, including participation of interested individuals and parties in the process of government.

- ✓ It may provide a remedy for grievances at the hands of public authorities.

Governing principles of adm law

- **1.Administrative justice.**

In administrative decision- making the rights and interests of individuals should be properly safeguarded.

- **2. Executive accountability..**

Those who exercise admn power can be called to explain / justify their action

- **3.Good administration...**

Any Admn decision/action should

Sources of Administration Law

1. The Constitution

It contains some provisions dealing with the manner and principle of government administration and accountability of public bodies and officials.

- General principles of government adm.Powers,
- Separation of power...
- Accountability Art 12
- Internal organization 77(2)
- Delegated law making 77(13)
- Rule of law Art9....

2. Legislation: enabling or establishment

3. Delegated legislations (reg,

Scope of Administrative Law

Public Law/Private Law

✓The rules and principles of AL are applicable in a r/sh b/n citizens and the state; they do not extend to cases where the nature of the r/sh is characterized by a private law function.

✓Scope of AL extend only when AA performing their public law duty (public law function)

Substance vs. Procedure

- Many of the definition and approaches to AL are limited to procedural aspects of the subject.
- The focus of AL is mainly on the manner and

Theoretical Perspectives

A. Red Light Theory.

- ✓ originated from a political tradition of 19thc laissez faire (minimal state) theory.
- ✓ Considers that the function of law is to control the state power. *Hence, AL serves the* ***function of controlling excess and arbitrary power, mainly by the courts***

B. Green Light Theory

- ✓ This theory is **originated from the utilitarian tradition**, which proposes **promoting the greatest good for the greatest number**.

To provide maximum satisfaction for most of its people, the state should assume a broader role/should possess wider power

- ✓ considers that the function of **AL** is **to facilitate the operation of the state**.

- ✓ Since there is a deep-rooted suspicion on governmental power, this theory desire to minimize the encroachment of the state on the rights of individuals.
- so advocates strong control against big government b/c wider power is danger to the right /liberty.
- Generally it is more conservative and power control-oriented

- It is based on the rationale that bureaucrats will function most efficiently in the absence of intervention.
- **AL** aims to simplify the procedures and enhance efficiency.
- It regards law not as a controlling mechanism, rather as facilitative tool.
- Consequently, it considers the court‘s intervention as an obstacle to efficiency.

The Relationship b/n Administrative Law and Other Concepts

1.Constitutional Law and Administrative Law
2.Administrative Law and Human Rights
3. Administrative Law and Good Governance
4. Administrative Law and Democracy

1.Constitutional Law and Administrative Law

similarity

- Both Categorized as **public law** since they govern the relationship between the government and the individual.
- **AL is a tool for implementing the constitution**. give life **to ppl** of the contn and **AL** enhance cont nal value like **democ and ROL**
- **AL and CL**, share a common ground, and supplement each other in their mission **to bring about administrative justice.**

difference

- Related to their scope.

While CL= deals, **in general**, **with the power and structures of government**, i.e. the legislative, the executive and the judiciary,

AL = its scope of the study **is limited to the exercise of power by the executive branch of government.**

- CL , being the supreme law of the land, **formulates fundamental rights which are inviolable and inalienable.**

AL does not provide fundamental rights. Rather

Its purpose is providing

- **principles,**
- **rules and**
- **procedures**
- **and remedies** to protect and safeguard fundamental rights.

2.Administrative Law and Human Rights

SIMILARITY

1. Both systems of law **aim at restraining arbitrary or unreasonable governmental action** and, in so doing, help to protect the rights of individuals.

2. Both share a **concern for fair and transparent process,**

- the availability of review of certain decisions(unlawful decision)
- and the provision of effective remedies for breaches of the law.

3. Both Assert that governments must not intrude on people's lives without lawful authority.

4. Both embody concepts of judicial (or restraint)/ self control to the expertise of the executive in certain matters.

DIFFERENCE

1. HRL= is principally **concerned with protecting and ensuring substantive rights and freedoms**,

- **whereas AL= focuses more on procedure and judicial review** = to preserve a strict distinction between the legality and the merits of a decision.

2. HRL =**protects rights as a substantive end in themselves**,

- **whereas AL =focuses on process as the end and it may be blind to substantive outcomes**, which are determined in the untouchable political realm of legislation or government policy.
- The three broad principles of AL are largely neutral on substantive outcomes:

✓ administrative justice,
✓ executive accountability
✓ and good administration

3. HRL= have intention of securing human dignity, **whereas AL=** is more **committed to good decision-making and rational administration**.

3. Administrative Law and Good Governance

i. The rules, procedures and principles for exercising power w/c is prescribed by **AL** are simultaneously principles underlying **GG.**

ii. One of the common destinations of AL and GG is the attainment of administrative justice.

- The set of **values of administrative justice** which mainly comprises openness, fairness, participation, accountability, consistency, rationality, legality, impartiality and accessibility of judicial and administrative individual grievance procedures are commonly shared by AL and GG.

iii. AL also helps to realize the three underlying principles of good administration

- ✓ accountability,
- ✓ transparency and
- ✓ public participation.

The administrative law system, when working properly, enhances the traditional processes of ministerial and parliamentary accountability in any system of government.

- ❖ AL also ensures transparency in the conduct of government administration and the decision making process.

4. Administrative Law and Democracy

- True democracy states that the executive government would be accountable to the people.
- Even though administrative law is concerned with executive accountability, for a true democracy to flourish, accountability should be manifested in all branches of government.
- Administrative law is rooted in the principle of rule of law. Rule of law, in turn nourishes democracy.
- Every truly democratic system of government rests upon the rule of law, and no system is truly democratic if it does not.
- In order for a government to be both democratic and subject to the rule of law, the government must be accountable, to the electorate and the courts.

Administrative Law in Civil Law and Common Law Countries

CIVIL LAW

- The scope of AL is wider in the continental system compared to its common law counterpart.

AL in civil law countries covers issues such as the

- organization,
- powers and duties of administrative authorities,
- the legal requirements governing their operation,
- and the remedies available to those adversely affected by administrative action.

COMMON LAW

In Anglo- American countries, AL is limited to

- delegation of rule-making powers,
- adjudication of administrative cases,
- manners and procedures of exercising these powers,
- controlling mechanisms and remedies….

So studying the composition and structure of administrative power is not its primary concern.

- In France, Italy, Germany and a number of other countries, there is a separate system of administrative court that deals with administrative cases exclusively. so
- AL has developed on its own independent lines, and is not enmeshed with the ordinary private law **as it is in the Anglo- American system.**

- The outstanding characteristic of the Anglo-American system is that the ordinary courts, and not specialadministrative courts, decide cases involving the validity of government action.

AL mainly focuses on control through the courts i.e.

- **judicial review of administrative action by the ordinary courts.**

Droit Administratiff

French administrative law is known as

“droit administratiff”= which means a **body of rules which determine the organization, powers and duties of public administration**.

Droit administratif includes three rules dealing with administrative authorities and officials; for example,

- **appointment,**
- **dismissal,**
- **salary and duties.**

AL in France does not represent the **rules and principles enacted by the parliament rather developed by administrative courts(judge made law)**

- Napoleon Bonaparte was the founder of *the droit Administratiff* who established the *Conseil d’etat.*
- He passed an order depriving the courts jurisdiction on administrative matters that could be determined only by the consei d’etat.
- **France have Dual court structure**
- The highest administrative court is known as **Conseil d’etat**
- Conflict of jurisdiction between ordinary courts and administrative courts are decided by the **agency known as Tribunal des conflicts.**

The Present State and Future Prospects of Administrative Law in Ethiopia

- Administrative law is still not well developed, and it is an area of law **characterized by the lack of legislative reform**. It is also a subject in which too little attention is given in terms of research and publication.

In Ethiopia, the history of government is largely **characterized by**

- **arbitrariness**
- **and lack of effective legislative, judicial and institutional control of power.**

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

- There were some attempts towards **addressing the grievances of citizens against maladministration.**

There was, for instance,

- a legislative effort to establish the Ombudsman during the last days of the Emperor H/S regime. It remained in paper as a result of the fall of the Emperor in 1974.
- In addition the establishment of some **administrative courts like the Civil Service Tribunal and an administrative tribunal** w/c reviewing assessment of tax **may be taken as one step ahead for the evolution of the administrative law in Ethiopia**.

- Administrative law didn’t show any progress during the Dergue regime.
- The present FDRE of the 1995 has **laid down the constitutional framework for the development of the administrative law.**
  - It contains key principles of government administration like accountability, transparency, and public participation.
  - It also envisages the establishment of the Ombudsman and the Human Rights Commission.

UNIT TWO: CONSTITUTIONAL FOUNDATION AND LIMITATION OF ADMINISTRATIVE LAW

Rule of Law as a Basis of Administrative Law

- ✓ Rule of law plays an important role in AL.
- ✓ It provides protection to the people against the arbitrary action of the administrative authorities.
- ✓ In simple words, the term _rule of law, indicates the state of affairs in a country where, in main, the law rules.

Procedural Elements

- English constitutional lawyer, Dicey (1888) gave the most influential definition of rule law which mainly comprises the following three elements.

1. Supremacy of Law (Principle of Legality)

- For Dicey the primary meaning of rule of law is supremacy of the ordinary laws of the land over the actions of public officials and administrative agencies.

He writes: *It means, in the first place,* ***the absolute supremacy or predominance /dominance of regular law as opposed to the influence of arbitrary power****, and*

- ✓ *excludes the existence of arbitrariness,*
- ✓ *Prerogative/privillage*
- ✓ *or even wide discretionary authority on the part of the government.*

- An administrative agency or public official is required to justify its action by clearly establishing that it is expressly or impliedly empowered or authorized by act of the parliament.
- This means also that in the absence of any authority, the affected party whose rights and liberties have been violated as a result of the action of government should be able to take the case to court and have it invalidated.

2. Principle of Equality

- *It means equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts.*
- Disputes, as to the legality of acts of government, are to be decided by judges who are independent of the executive.
- Another aspect of the principle of equality is that those laws governing the relationship between individuals should also similarly be applicable to the relationship between individuals and government.

- This implies that government officials should not entertain different or special privileges. However, the complexities of administration sometimes necessitate granting special powers (privileges) to the government.
- What the rule of law requires is that the government should not enjoy unnecessary privileges, or exemptions from the ordinary law.

3. Constitution Is a result of the Ordinary Law of the Land

- *It means the constitution is the result of the ordinary law as developed by the courts through the common law tradition and provides for the legal protection of the individual not via a bill of rights, but through the development of the common law.*
- The constitution is not the source but the consequence of the rights of the individuals. Thus, Dicey **emphasized the role of the courts as ultimate guarantors of liberty.**

Substantive Elements

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

What factors are indicators and elements of the rule of law.?

The presence of

- ✓ representative democracy,
- ✓ beneficial **social and economic services and conditions**,
- ✓ personal independency (privacy)
- ✓ and independent judiciary

has all been taken as **indicators and elements of the rule of law.**

Rule of Law as a Foundation of Administrative Law

- **AL** as a branch of law, is rooted in the principle of the rule of law. This principle mainly stipulates that every administrative action should be according to law.
- The expression “Rule of Law**” provides protection to the people against arbitrary action of the administrative law.**
- To clearly understand the r/sh b/n **AL&ROL** , it is important to examine a related doctrine of the **AL** , which is the doctrine of ultra virus.

This doctrine to some extent is a **derivation of the ppl of ROL.**

- **The ROL**= underlines that power should be exercised according to law.
- **The doctrine of ultra virus** =goes one step further and states that an action of any official or agency beyond the scope of power given to it is ultra virus (i.e. beyond power), **hence it is considered as null and void.**

An ultra virus act does not have any binding effect in the eyes of the law.

Separation of Powers as a Limitation on Administrative Law

The doctrine of separation of powers means that:

- ✓ **None of the government**, i.e., the legislative, executive and judicial **should ever exercise the powers of the other.**
- ✓ the three departments of government **are to be separated and distinct.**
- ✓ **They are to be independent of one another**, **and each can exercise only one type of authority**, legislative, executive or judicial.
- ✓ The same person cannot compose more than one of the three departments of the government.
- ✓ One department should not control and interfere with the acts of the other two departments, and **one department should not discharge the functions of the other two** departments

The theory of separation of powers signifies three formulations of structural classification of governmental power

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

ii. One organ of the government should not interfere/CONTROL with any other organs of the government. For example, **the executive should not interfere in the administration of justice by the courts.**

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

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

According to the principle of separation of powers

- the power and function of **AA/the executive** is =**limited to the execution or enforcement of laws.**
- However, **in order to ensure efficient and effective enforcement of laws**, it has become a compulsive necessity to delegate **the executive and AA** with additional legislative and judicial powers (functions).

1. **Delegation of legislative powers to the executive is clearly against the principle of separation of powers**.

However, it is justified on practical grounds:

- lack of time and technical expertise in the HPR /legislature to make laws necessary to solve a certain social or economic problem
- It makes the administration effective and efficient.
- **AA** could not attain their purposes for which they are established **unless they have wider power, mainly rulemaking powers**.

2. AA also share some of the judicial powers which traditionally belong to the ordinary courts.

AA can decide

- matters affecting individual rights and freedoms.
- Reversing a license,
- imposing administrative penalty,
- Decide matters like **with holding benefits (e.g. pension), etc**

Giving judicial power to agencies clearly violates the principle of the separation of powers but there are justifications:

- ✓ Some matters, by nature, **are technical and require detail expertise**. This expertise is found in the specific **AA** , not the courts.
- ✓ The trial process in the courts is **lengthy, costly and rigid** due to the **complex procedural rules of the litigation.**
- ✓ By comparison, a certain matter may be easily decided **by an administrative court** with **the least cost & easy decision-making process to the parties**.

Generally Granting legislative and judicial powers to agencies are **an exception, or it may be said a 'necessary evil'.**

- This leads to the conclusion that such powers should be given and exercised narrowly i.e. only when it becomes a compulsive necessity to do so.
- Delegation of legislative powers should be limited only to the **technical or detailed matters necessary to fill the gap** in the law issued by the legislature.
- **Ordinary judicial powers** should not be given to administrative courts.
- It should be limited only to matters which **are technical by nature and require expertise of the administration**

ADMINISTRATIVE AGENCIES: SUBJECTS OF ADMINISTRATIVE LAW

ADMINISTRATIVE AGENCIES: SUBJECTS OF ADMINISTRATIVE LAW

The Meaning of Administrative Agency

Defining an AA is not an easy task.

- ✓ **Webster's New World Law Dictionary =administrative agency is**

A governmental regulatory body that

- controls and supervises a particular activity or area of public interest
- and administers /enforces a particular body of law related to that activity or interest.

An AA is **an official governmental body** empowered with the authority to direct and supervise the implementation of particular legislative acts.

Due to the absence of an administrative procedure act in Ethiopia, there is no comprehensive definition of an **AA**.

The **income tax proclamation** and the **civil servants proclamation** similarly define **AA** as **an entity fully or partly funded by the federal government.**

- The Draft Administrative Proclamation of the Imperial government (draft proclamation No 251/1967) and that of the draft prepared by the federal government define agency relatively in a similar way.
- The 1967 draft administrative procedure act uses the term "**administrative authority**" instead of "**AA**" and defines it as:

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

Generally speaking, we may identify some important elements in distinguishing whether a certain government entity is an AA or not.

I. The nomenclature may be indicative of the status of an entity as an agency. Most agencies have names **like ministry, authority, agency, bureau/office, commission, board**, **department** etc., or any other similar terms.

II. The government entity should be empowered to legislate (through delegation), or adjudicate individual cases, in addition to its merely executive functions.(it has legislative and/or adjudicative power granted by the legislature.)

Generally, an entity is an agency if it has authority to take a binding action.

III. That the head of the agency is appointed by the executive or by the HPR.

Classification of Administrative Agencies

- With the exception of few, almost all agencies are under the direct control and supervision, in their day to today implementation of government task, law, or policy assigned to them by the enabling act.
- The remaining very small agencies **function independently outside the direct control of the executive branch** and **they are**

Agencies are classified or categorized based on mode of accountability.

1.Those **AA** directly accountable to the executive branch are known as **executive agencies**

2. those accountable to parliament are called **independent agencies.**

I. executive agencies

- ✓ In Ethiopia, executive agencies are usually accountable to a certain **M,COM,PM**.
- ✓ **The PM and the COM** holds the highest executive authority (Article 72(1) and inferred from the cumulative reading of Articles 74(3) and 77(1) which similarly confer **the power of ensuring the implementation of laws, regulations, directives and decisions of the HPR.**

Such powers mainly include

- ✓ the power to follow up and supervise the activities, functions and exercise of power of specific **AA**.
- An executive agency has a duty to submit report of its activities **to the higher executive organ**.

The executive can impacts the work of agencies in so many ways.

- ✓ The **PM** may freely appoint the head of an agency,
- ✓ and **dismiss him at any time even without valid reasons.**
- ✓ However, the appointment of ministers and other commissioners need the approval of the HPR.
- ✓ The budget to be allocated to a certain executive agency is also **greatly determined and influenced by the decision of the executive branch**.

II. independent agencies

- It has been said that independent agencies, are accountable to parliament, i.e. to the HPR.
- The establishment of these agencies, even though they need the act of the HPR for their material and legal existence, **they are predetermined by the constitution**.
- This implies that their creation is not dependent on the will of the parliament.
- With respect to these agencies **parliament has the right to appoint heads** and remove them if there are **valid reasons**

The constitution clearly imposes a duty on **HPR** to establish independent agencies indicated in the constitution.

There are some agencies falling under this category these are .

- The Federal Ombudsman=55(15)
- The Human Right Commission=art 55 (14)
- The National Election Board=art 102
- The Auditor General =art 101
- The Population and Census Commission =art 103

Generally there are two Mode of Creating an Agency

- agencies are creatures of the legislature. They do not spring up on their own, courts or the **COM,PM** cannot create them.

agencies are created in two ways:

1. through the constitution,

2.through act of parliament

The only difference between the two modes of creating an agency is that

1. through the constitution

- Even If the constitution expressly requires the establishment of some independent agencies. They do not have i.e. material and legal existence unless the **HPR** enacts a specific law for their establishment.
- Or **the HPR has a duty to promulgate the enabling act** for that specific agency.
- This means the independent agencies, which have a constitutional basis, still require an enabling act of the parliament for their legal existence.

2.through act of parliament

- When an agency is **created only through the enabling act,** in the absence of constitutional duty from the parliament, its existence is **totally dependent on the will or option of the parliament**.
- *Normally, **the parliament retains exclusive right to bring a certain executive agency into existence**, which includes **the power to modify, increase, or decrease the power and function of that agency**. By the same token it is **up to the parliament to terminate that agency***

Reasons for the Creation of Agencies

- Agencies are **created and assigned specific tasks by the legislature**.
- **Almost every AA has been created** because of a recognized problem in society, and **from the belief that an agency may be able to help in solving the problems.**

The following are the main reasons for the creation of the AA.

A. **Providing Specificity**
B. **Providing Protection**
C. **Providing Services**

1. **Providing Specificity**

- The legislative branch of government cannot legislate in sufficient detail to cover all aspects of many problems.
- The HPR cannot possibly legislate in minute detail and, as a consequence**, it uses more and more general language in stating its regulatory aims and purposes.**
- It is also true that courts could not handle all disputes and controversies that may arise.
- They simply do not have the **time or the personnel to handle the large number of cases.**

- the tax appeal commission and the welfare (pension) appeal tribunal adjudicate and decide vast number of **administrative litigations** within their jurisdiction.
- The **TAC** is an(independent statutory body) hearing and determining **appeals against assessments and decisions of the Revenue Commissioners**.
- The creation of such adjudicatory agencies (usually known as quasi- administrative agencies) is necessary, because of the fact that they have,

specialized knowledge and expertise to deal effectively with the detailed, specific and technical matters, which are normally **beyond the competency of judges of ordinary courts.**

- The development of sound policies and proper decisions in many areas requires expertise.
- Similarly, **AA** often provide needed continuity and consistency **in the formulation, application, and enforcement of rules and regulations governing business**.
- The National Bank of Ethiopia,
- Ethiopian Science and Technology Commission,
- Intellectual Property Office

are examples of such agencies with expertise beyond that of the **HPR or COM**.

2. Providing Protection

- Many government agencies exist to protect the public, especially from the business community.
- Most of the time, an **agency protects the public from the negative impacts of business through regulation**
- For instance, **the Environmental Protection Agency** is created to regulate environmental pollution.
- In the absence of such agency, business could not voluntarily refrain from polluting the environment.
- The same can be said with respect to quality of private higher education and unjustified and unreasonable increase in the price of essential goods.
- **The Ministry of Education and Ministry of Trade and Industry**, regulate respectively both of these cases **to protect consumers and the public at large.**

- When a **BO** is given monopoly power, it loses its freedom of contract, and a governmental body is given the power to determine the provisions of its contract.

We have some government companies that have monopoly power in Ethiopia,

- like the Ethiopian Electric and Light Corporation and
- Ethiopian Telecommunication Corporation.

Currently, we have the Electric Agency and Telecommunication Agency, which have the **power to set the price/fie for the utility/service.**

- Agencies also regulate **transportation, banking and insurance** because of the disparity in bargaining power between the companies and consumers
- **Set transportation tariff**
- **Set saving & borrowing rate**

3. Providing Services

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

Purpose of Administrative Agencies

- What they actually do is **to enforce a specific law** and **usually charged with the day-to-day details of government activity**.
- The function of **AA** is closely related to the reasons for their creation.
- A certain **AA** comes into existence when the legislator creates an agency for either of those reasons.

1. **Regulation**
2. **Government exactions**
3. **Disbursement of money or other commodities**
4. **Provision of goods and services**

1. Regulation

- When the government decides **to regulate a certain sector**, it entrusts the task to the **AA**.
- Agencies offer several advantages over regulation more than the legislature and courts **in the management of complex and technical regulatory problems.**
- Because they are specialized bodies, they can consider technical details more effectively than the legislature.
- In the absence of regulation, business **does not respond to concerns over the environment and consumers**.

Some of the justifications for regulation include:

i/ To control monopoly power: Agencies are often created to replace competition with regulation. In this case the agency may determine rate (e.g. transportation, or electricity).

- Sometimes the difference in bargaining power may be a ground for regulation, avoiding monopoly power of one party.
- Such instances include **regulation of banking, insurance and labor relations.**

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

iii. To compensate for externalities:
"**Externalities**" occasionally referred to as "**spill overs**", that occur **when the cost of producing something does not reflect the true cost to the society for producing the goods**.

- manufacturing process that creates air pollution for which society pays the clean up costs.
- **AA** (Env.tal protection agency) must **require all companies to invest in pollution control equipment installation** in order to spread the costs of pollution control over the entire industry.

(iv.) To compensate for inadequate information:

- It is a justification for a legislation adopted for consumer protection.
- Purchasers of food, for instance, cannot analyse the **nutritional content or the health hazards of various food products**
- so that **there has to be some organ that ensures these tests are fulfilled.**

(v.) To compensate for unequal bargaining of powers:

- Contracts between banks & customers, insurers & the insured, employees & employers are adhesive in their nature.

Either the consumer has to take it or leave it.

- Hence, **it is important to regulate and set**

B) Government exactions

- In addition to regulation, AA may also engage in government exactions.
- Government exactions are the traditional powers and responsibilities of agencies. Such functions include collection of tax and military conscription.
- E.g ethiopia custom and revenue

C. Disbursement of money or other commodities

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

D. Provision of goods and services

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

Powers of Administrative Agencies

- That they don’t have inherent, constitutionally mandated power to act. Rather, a, higher level of government, normally the legislature, must delegate some of its own power to the agency.
- In order for an agency to exist, it must first be created by the enabling legislation. This statute is a device that sets up the basic framework for the agency, and the set of rules and limitations by which it must live.

- An agency may only exercise authority within the delegation of authority provided for in its enabling legislation, or subsequent legislation granting specific additional power.
- Since the delegating body has such a wide degree of latitude in deciding how much power to delegate, there is no absolute rule as to how much power an agency has.
- Since, in most cases, the whole point of creating the agency is to get the legislature out of the business of day-today management of some area of activity, delegations of power tend to be fairly broad.

Meaning and Significance of the Enabling (Establishment) Act

- Whatever forms a new administrative agency takes the legislature must enact a statute creating the agency. This statute, sometimes called an agency's organic act, parent act, or establishment act but more frequently is referred to as an agency's enabling act, is the fundamental source of an agency's power
- The principle that the legislature creates agencies and sets limits on their authority should be regarded as cardinal rule number one of the administrative law.
- Agencies make a great deal of policy within the boundaries of their enabling acts.
- Agency discretion is a second fundamental concept to keep constantly in mind in the study of administrative law.

Classification of Powers of Administrative Agencies

- Administrative agency rules and regulations often have the force of law against individuals.
- Agencies are able to adjudicate relatively minor or exceedingly complex disputes more quickly or more flexibly than the state and federal courts, which helps to preserve judicial resources and promotes swift resolutions.

1. Legislative (Rule Making) Power

- Usually known as rule- making power and more formally delegated legislation, is the power of agencies to enact binding rules through the power delegated to them by the legislator.

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

- When legislative power is delegated to administrative agency, it has to be exercised fairly and only with a view to attain its purpose. The agency should also enact rules within the limits of delegation set by the lawmaker.
- The lawmaker when delegating power should simultaneously introduce controlling mechanisms to ensure that individual’s liberty and freedom is not violated by the administration.

2. Judicial (Decision – Making) Power

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

Administrative Power

- It is concerned with the treatment of a particular situation and is devoid of generality.
- It has no procedural obligations of collecting evidence and weighing argument.
- Advisory and investigative power of agencies may be mentioned as two typical examples of administrative power.
- In its advisory function, an agency may submit a report to the president or the head of executive and the legislature. Cases falling under advisory function include proposing a new legislation to the legislature, and informing the public prosecutor the need to take measure when there is violation of law.
- Disclosing information to the general public that should be known in the public interest and publishing advisory opinions are also regarded as advisory (administrative) functions.

- While exercising their investigative powers, agencies investigate activities and practices that may be illegal. Because of this investigative power, agencies can gather and compile information concerning the organization and business practices of any corporation or industry engaged in commerce to determine whether there has been a violation of any law.
- In exercising their investigative functions, agencies may use the subpoena power.

- A subpeona is a legal instrument that directs the person receiving it to appear at a specified time and place either to testify or to produce document require reports, examine witnesses under oath, examine and copy documents, or obtain information from other governmental offices.

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

The Nature and Definition of Delegated Legislation

- The term legislation refers to the process of making or enacting and repealing a positive law in written form by a branch of government constituted to perform this process, which is the legislature.
- Whether there is a clear limitation or not, the legislature is in charge of making laws in the form of primary legislation. Any other legislation that is subordinate or auxiliary to primary legislation is known as delegated (or sometimes ancillary) legislation.
- Delegated legislation means the exercise of legislative power by an agency that is subordinate to the legislature. This subordinate body acquires the power from the act of the legislature.
- Power is transferred from the principal lawmaker to the lower body, which may be the executive, cabinet, council of minister, or a specific administrative agency, by the mechanism of delegation.

- Efficient and effective administration necessarily requires promulgation of laws, flexible to the existing situation and dealing with detailed technical matters.
- These laws have to be provided in the required quantity and quality. However, due to the limitation on the parliament as regards to the availability of sufficient time and expertise, the lawmaker will be compelled to delegate some of its powers to the administrative agencies.
- When legislative power is delegated to administrative agency, it has to be exercised fairly and only with a view to attain its purpose. The agency should also enact rules within the limits of delegation set by the lawmaker.
- The lawmaker when delegating power should simultaneously introduce controlling mechanisms to ensure that individual's liberty and freedom is not violated by the administration.

- Generally, delegation refers to the act of entrusting another authority or empowering another to act as an agent or representative.
- Delegation of legislative powers means the transfer of law-making authority by the legislature to the executive, or to an administrative agency.
- In line with the power granted to them by the legislature AA can issue rules, regulations and directives, which have a legally binding effect.

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

- One common point of difference is that the legislative power is the power to lay down the law for people in general,
- whereas administrative power is the power to lay down the law for them, or apply the law to them in some particular situation.

The Need for Delegated Legislation

1. **Limitation on Parliamentary Time:** the main reason for delegation of legislative power is to relieve the pressure on parliamentary time.
2. **Technicality Subject of Matter:** Legislation has become highly technical because of the complexities of a modern government.

Members of the parliament are not experts, and so they cannot comprehend the technicality of the subject matter of some economic and social issues.

Technical matters, as distinct from policy issues, are not susceptible to discussion in parliament and therefore cannot be readily be included in legislation.

3. Flexibility: Ordinarily legislative process suffers from lack of viability and experimentation.

A law passed by parliament has to be in force till the next session of parliament when it can be replaced therefore, in situations which require adjustments frequently and experimentation, administrative rule making is the only answer.

4. Emergency: During emergency, it may not be possible for the parliament to pass necessary legislation to cope up with the situations. Under such conditions, speedy and appropriate action is required to be taken.

The parliament cannot act quickly because of the time that requires passing an act. Moreover, immediate knowledge and experience is only available with the administration.

Theoretical Objections against Delegated Legislation

- The main constitutional objection raised against delegation of rule making power to AA has been the **doctrine of non delegability of power**, which holds that power delegated to one branch may not be redelegated to another.
- It is a cardinal principle of representative government that the legislature cannot delegate the power to make laws to any other body or authority.
- One of the most commonly cited sources of the rule of non delegation is the common law maxim ‘’*delegates potestas non potest delegari* ‘’which means that a delegate cannot further delegates his power. Simply, the maxim indicates that power that has been delegated originally may not be redelegated.
- Generally, it implies that, since the people delegated legislative power to the lawmaker, executive power to the prime minister and cabinet and judicial power to the courts, none of the institutions may redelegate its power to any other authority.

Another objection to delegation of power is based on the **doctrine of separation of powers**.

- The U.S. Supreme Court has observed that the doctrine of separation of power has been considered to be an essential principle underlying the constitution and that the powers entrusted to one department should be exercised exclusively by that department without encroaching up on the power of another.

Scope of Delegated Legislation

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

- It is accepted that a rigid application of the doctrine of non-delegability of powers or separation of powers is neither desirable nor feasible in view of the new demand on the executive.
- The new role of the welfare state can be fulfilled only through the use of greater power in the hands of the government, which is most suited to carry out the social and economic tasks.

- The legislature after formulating the fundamental laws, can delegate to administrative agencies the authority to fill in gaps which is an authority necessary to carry out their purposes.
- This indicates that only the subsidiary part of the legislation could be delegated to administrative agencies so as to enable them fill any available gaps
- Subordinate legislation can cover only subject matters delegated expressly in the principal legislation.

As a summary, the following points may be noted.

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

In Australia, the following matters could not be delegated:

- ✓ Appropriations of money;
- ✓ Rules which have a significant impact on individual rights and liberties;
- ✓ Provisions imposing obligations on citizens or organizations to undertake certain activities (for example, to provide information or submit documentation, noting that the detail of the information or documents required should be included in subordinate legislation) or desist from activities (for example, to prohibit an activity and impose penalties or sanctions for engaging in an activity);
- ✓ Provisions conferring enforceable rights on citizens or organizations;
- ✓ Provisions creating offences which impose significant criminal penalties (imprisonment or fines equal to more than 50 penalty units for individuals or more than 250 penalty units for corporations);

- ✓ Provisions imposing administrative penalties for regulatory offences (administrative penalties enable the executive to receive payment of a monetary sum without determination of the issues by a court);
- ✓ Provisions imposing taxes or levies;
- ✓ Provisions imposing significant fees and charges;
- ✓ Provisions authorizing the borrowing of funds;
- ✓ provisions creating statutory authorities (noting that some details of the operations of a statutory authority would be appropriately dealt with in subordinate legislation); and
- ✓ Amendments to Acts of Parliament (noting that the continued inclusion of a measure in an Act should be examined against these criteria when an amendment is made.)

Form and Classification of Administrative Rule Making

delegated legislations usually contain enacting clauses and that they are also detailed legislations

They are detailed because they are issued to implement other superior legislations that are drafted in broader terms.

Enacting clause

is a provision in a legislation that indicates how and from where the authority of legislating the law was derived. It is found in the preamble part of the legislation.

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

- ✓ regulation and
- ✓ directive.

UNIT SIX:CONTROLING MECHANISAMS OF GOVERNMENTAL POWERS

The Need for Controlling the Powers of Government

- The French political philosopher, Montesquieu, propounded that

  where the tripartite powers are merged in the same person, or in the same body, there can be no liberty as the life and liberty of the subject would be exposed to arbitrary control.

- So, the rational fear created by the concentration of the tripartite powers (administrative, legislative and judicial) in the hands of the same person or body of persons **together with the discretionary nature of administrative powers which is susceptible to abuse,**
- urges for developing legal and institutional devices that are important to control the arbitrary exercise of powers by AA.

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

✓ it is to curve despotism/Dictetership and arbitrariness

✓ and to promote liberty, democracy and good governance

by creating a system of check and balance.

Putting the appropriate controlling or checking mechanisms in place would promote the following benefits:

- Improves the **quality, efficiency and effectiveness** of government decision-making generally;
- Enables people **to test the legality and merits of decisions** that affect them;
- Provides mechanisms for ensuring that the government **acts within its lawful powers**;
- Provides mechanisms for achieving justice in individual cases and
- **Contributes to the accountability system for government decision-making.**

Controlling Mechanisms

Some of the commonly used controlling mechanisms are:

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

1. Internal control

- Is type of controlling mechanisms that are **set within the organizational structure of the various administrative organs of the government.**
- **In the parent act/ enabling legislation or an executive order** as the case may be, **a mechanism for internal review may be established**
- **Internal review=** is the process by which **original agency decisions** are reviewed on their merits within the responsible government agency.

An internal review officer can usually substitute a new decision if the decision under review is found to **be defective**

- **on matters of law,**
- **the merits or**
- **administrative process.**

2. External control

- limitations imposed upon the powers of AA by other authorized bodies that are found outside the structure of such agencies.

External control include

i. executive/political control,
ii. parliamentary/legislative control,
iii. control by administrative tribunals,
iv. judicial control,
v. control by watchdog institutions and the mass media.

I. Parliamentary Control

- ✓ First and foremost, the parliament has to make sure that all necessary safety measures are taken **that the enabling legislation/parent act does not transfer wide delegated powers which may be difficult to control**.

These include

- attaching qualifications to agency appropriation bills,
- conducting oversight hearings,
- reducing agency budgets,
- and amending statutes.

- ✓ if the legislature is extremely dissatisfied with the performance of a particular agency, it may rewrite the statute that created the agency in the first instance.
- ✓ By amending the appropriate statute, the legislature **may enlarge or diminish the agency's jurisdiction as well as the nature and scope of its rulemaking authority.**

United States

- **The US Congress** has a variety of ways of exercising its oversight functions.

I. First, along with the executive branch, **the Congress is involved in the appointment process**. Agency heads and other "officers of the US are appointed by the President with the approval of the Senate.

II. The Congress also has the *"power of the Purse" (* The **US** Congress must authorize the president's budget requests to fund agencies and programs of the executive branch) and **agencies must regularly submit their operating budgets to the Congress.**

- ✓ In addition, Congress may compel an agency to report to it regularly by means of committee or subcommittee hearings or more formal**, field reports.**
- **These reports and hearings** can also encourage informal contacts between agency and congressional staffs that **provide another form of congressional feedback and oversight.**

III. The Congress delegates power to agencies by the statutes it drafts.

- An agency's enabling regulatory statute defines the scope of the agency's authority and the Congress **sets forth the procedures** that an agency must use in exercising its authority and it establishes the agency's structure.
- The Congress can create a variety of agency with different forms and structures, each with different implications for the relationship of that agency to the Congress and the Executive Branch.

IV. Political control of the agency's discretionary power is the other most visible and most effective means through which the Congress can exert influence over the **AA**

V. Another important mechanism that the US Congress controls Agency Discretion is **through the Statutory Techniques.**

Over the years, the Congress has also passed numerous statutes which are designed to affect the substance of agency decisions through the implementation of generic procedural requirements.

- One of these statutes is that the National Environmental Policy Act of 1969 (NEPA).
- It **sets procedural requirements** to assure that agencies will consider substantive environmental values in the formulation and implementation of policies.
- The core of the Act is a requirement that an agency must prepare on **EIA** report before taking any major

In Ethiopia

- As clearly stipulated under **Article 50(3)** of the FDRE Constitution, the respective legislatures of both the Federal and the State governments holds the highest authority of the respective governments.
- Being the highest organ of the government, **the HPR has the power to exercise supervisory power over the administrative organs of the federal government**.
- The Parliament has the power to control the discretionary power of the executive organ including all the dependent agencies established under the umbrella of the executive and those independent agencies that fall outside the organizational structure of the executive organ.

i. Article 55(17) of the Constitution, clearly states that the legislature

> *"has the power to call and to question the Prime Minister and other Federal officials and to investigate the Executive's conduct and discharge of its responsibilities."*

- **Article 55(18**) also dictates the legislature to discuss any matter relating to the powers of the ***executive "at the request of 1/3 of its members" and "to take decisions or measures it deems necessary."***

ii. Furthermore, in accordance with **Article 74(11),** the PM is required to **submit periodic reports** of the activities accomplished by the executive as well as its **plans and proposals** to the HPR.

iii. The parliament can also exert control over the behaviour of the government **through the budgetary processes**. Usually the executive organ of the government and some of the other **AA** prepare and defend their budget before the parliament.

- When the parliament is not happy with the performance records of the past and /or the current fiscal year, it may resort to cutting off the proposed budget of the concerned agency for the next fiscal year.

iv/. The various **standing committees of the parliament** can visit the concerned institutions and offices to observe whether or not they are discharging their responsibilities to the level of their expectation in accordance with the law.

- Each standing committee of the parliament can bring to the attention of the parliament any act of the executive organ of the federal government and federal offices that necessitates parliamentary deliberation

v. In the parent act, the legislature can specify the scope of the power entrusted to an agency and incorporate principles, guidelines and standards that regulate the decision-making process of the agency.

- In Ethiopia there is no formal procedure by which the parliament can control the rulemaking power of the AA

2. Executive Control

- There are possibilities whereby some **AA** may be formed by executive order without the blessing of the parliament.
- Those agencies or bureaus formed under the executive hierarchy (referred to as executive dependent agencies) **are subject to the supervision of the executive organ.**
- The concerned ministry of the government can **put different modalities of control** to ensure whether or not the authorities formed under its hierarchy are acting within the bound of the law.
- **Article 77** of the Constitution, which deals with the powers and functions of the COM, in its sub-Article 2 states that the COM

  "shall decide on the organizational structure of ministries and other organs of government responsible to it; it shall coordinate their activities and provide leadership."

According to art 74(7) & 76(2) & (3)The executive organ of the government may also exercise some indirect control over the independent agencies that are accountable to the Legislative organ of the government.

- In this regard Article 74(7) is worth mentioning.

  *It says "He [the Prime Minister]" as the chief executive has the power to select and submit "for approval to the **HPR** nominations for posts of Commissioners …and Auditor General."*

This indicates that the executive organ of the government can have a sort of loose control over the independent agencies as well.

3.Control by Administrative Tribunals

AT or administrative courts have been defined as

“Bodies outside the hierarchy of the courts with administrative or judicial functions or administrative counter part of ordinary courts’’

- The decisions of **AA** can also be subjected to the supervision of administrative tribunals. So they can exercise important supervisory role over the decisions of AA.
- Administrative tribunals undertake merits review over the decision of AA falling under their jurisdiction to decide whether the decision which is being challenged is correct and preferable‘ decision.

4. Judicial Control

- the purpose of the principle of separation of powers is not to create three empires, but **to create an effective system for checking and balancing among the three organs of the government.**
- In line with this PPL and the need for checking and balancing, the Constitution vests the Judicial power both at the Federal and State levels in the judiciary. This means that the judiciary is the final arbiter of disputes on point of law and facts.
- Individuals aggrieved by **AA** decisions may seek court intervention in appropriate cases.
- Broadly speaking, there are two modalities by which the judiciary can exercise supervisory role over the powers of **AA**.
- **These are appeal and judicial review**. The striking difference between appeal and judicial review is that

Appeal

- related to the power of the court:& it is a plea for the matter to be judged again
- the court has the power to substitute its decision on the matter in issue
- appellate court has power to decide whether the decision under appeal was „right or wrong“
- An appeal is requested to ask the higher court to change the decision of the lower court.
- The decision of the lower court can stay the same or the Higher Court can change it.

Judicial Review

- the court’s basic power in relation to an illegal decision is to quash it(to hold it to be invalid).
- If the decision is illegal it can be quashed; otherwise the court cannot intervene, even if it thinks the decision to be wrong in some respect.
- A review is **applied for at the same court** where the original decision was made and is a request to consider the legality of the ruling.
- A review is based on procedural irregularity, impropriety, irrationality, and illegality

5. Control by Human Rights Commission and Ombudsman

- In many jurisdictions, watchdog institutions have been used as alternative forums for controlling AA, especially on administrative matters that are not suitable for parliamentary deliberation and adjudication.
- Appreciating the role of these institutions in promoting good governance, protecting and enforcing human rights, the Constitution under **Sub- Articles 14 & 15 of Article 55** dictate the HPR to establish the Human Rights Commission and the institution of Ombudsman respectively.
- Accordingly, the House established the Human Rights Commission and the Institution of Ombudsman in **Proclamations No. 210/2000 & 211/2000, respectively**.

Human Rights Commission

- under **Article 5** of the **Human Rights commission Establishment Proclamation No.210/2000**, the objective of the Commission is

  "to educate the public to aware of human rights, see to it that human rights are protected, respected and fully enforced as well as to have the necessary measure taken where they are found to have been violated."

Article 6 of the proclamation deals with the 'powers and duties' of the Commission: the following are among the powers and duties given to the commission:

- To ensure that the human rights and freedoms provided under the Constitution of the FDRE are respected by all citizens, organs of state, political organizations and other associations as well as by their respective officials;

- To ensure **that laws, regulations and directives as well as government decisions and orders** do not contravene the human rights of citizens guaranteed by the Constitution;
- To undertake investigation, upon complaint or its own initiation, in respect of human rights violation;
- **To make recommendations for the revision of existing laws, enactment of new laws and formulation of policies**;
- Although its recommendations are not binding, the reports it may issue manifesting human rights violations have far reaching moral and political overtone.
- To provide consultancy services on matters of human rights;
- **To forward its opinion on human rights reports to be submitted to international organs**.
- Up on receiving complaints or on its own motion, the Commission may conduct investigation on alleged violations of human rights and is expected to make all the efforts to settle the complaint brought before it amicably.

Institution of Ombudsman establishment Proclamations No.211/2000

- The word “ombudsman” which is Scandinavian in origin can be translated as **citizen’s defender or representative of the people.**
- As can be inferred from the preamble of the above proclamation**, there are fundamental grounds that necessitate the establishment of the institution of Ombudsman.**

These are:

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

According to art.5The objective of the proclamation, **is to bring about good governance that is of high quality, efficient and transparent, and are based on the rule of law, by way of ensuring that citizens rights and benefits provided for by law are respected by organs of the executive.**

In order to attain these objectives, **in Article 6** of the proclamation, the Institution entrusted with a broad range of powers and duties. These are to:

- ✓ Supervise that administrative directives and decisions adopted by the executive organs and the practices thereof do not contravene the constitutional rights of citizens and the law as well;
- ✓ Receive and investigate complaints in respect of maladministration;

- ✓ Conduct supervision, with a view to ensuring that the executive carries out its functions in accordance with the law and to preventing maladministration;
- ✓ Seek remedies in case where it believes that maladministration has occurred;
- ✓ Undertake studies and research on ways and means of curbing maladministration;
- ✓ Making recommendations for the revision of existing laws, practices or directives and for the enactment of new laws and formulation of policies, with a view to bringing about better governance.
- **The primary jurisdiction of the institution of Ombudsman** is to investigate an administrative action or inactions following the lodging of complaints or on its own motion (initiation) with a view to ascertain whether there exist maladministration or not.

The term maladministration is a combination of two words: ‘mal’ and ‘administration’.

According to Black’s

- Law Dictionary, the term “mal” is a “prefix meaning **bad**, wrong fraudulent.”
- Thus, while prefixed with the term administration, it may give the meaning **bad, wrong or fraudulent administration**
- According to **Article 2(5) of Proc. No.211/2000**

  “*maladministration includes acts committed, or decisions given, by executive government organs, in contravention of administrative laws, the labour law or other laws relating to administration”.*

8. Mass Media Control

- A strong media plays vital role in promoting the ideals of democracy and good governance.
- By bringing administrative malpractices and corrupt behaviours of the agencies to the attention of the public, the media may also exert moral and political pressure on the day-to-day activities of the administration.
- Media can serve as a forum for mobilizing public opinions concerning governmental activities.

UNIT SEVEN: JUDICAL REVIEW

The term '**judicial review**' has different meaning and scope in different jurisdictions.

i. in the United States, judicial review refers to the power of a court

- to review the **actions of public sector bodies in terms of their lawfulness**, or
- to review the **constitutionality of a statute or treaty**, or
- to review an **administrative regulation** for consistency with a **statute, a treaty, or the Constitution** itself.

Broadly speaking, the term judicial review may have the following two meanings:

- ✓ "Higher court's review of a lower court's (or an administrative body's) factual or legal findings" or
- ✓ "Supreme Court's power to decide whether a law enacted by the legislature is constitutional or not."

II. But in the UK's context, the term judicial review refers to the

- ✓ power of the judiciary to supervise the activities of governmental bodies on the basis of rules and principles of public law that define the grounds of judicial review.
- ✓ It is concerned with the **power of judges to check and control the activities and decisions of governmental bodies, tribunals, inferior courts.**
- ✓ Judicial review is the exercise of the court's inherent power to determine whether an agency's action is lawful or not and to award suitable relief.
- ✓ Judicial review is a fundamental mechanism for **keeping public authorities within due bounds of their power and for upholding the rule of law.**

Judicial review vs. Merits Review

Judicial review

- **JR** is a technical review; while reviewing an agency's decision, **the court is concerned with the legality or illegality** of the decision under review.
- If the court finds out the decision is legal, it will not do anything on it **even if the decision deems incorrect in terms of preference.**
- But if the court finds out the decision against which review is sought is illegal or ultra vires, it can set it aside and **order the concerned agency to reconsider the decision** based on the directions of the court.
- The reviewing court **does not substitute its own new decision** in place of an agency's **invalidated decision on account of illegality.**
- Unlike **merits review which is statutory in origin**, the source of judicial power is not statute; statutory authority is not necessary **the court is simply performing its ordinary functions in order to enforce the law. The basis of judicial review, therefore, is common law.**

Merits Review

- The purpose of **merits review** is to decide whether the decision which is being challenged was the 'correct and preferable' decision.
- If not, the reviewing body can **overrule such decision and substitute it with a new decision** it deems 'correct and preferable' under the given circumstance.
- The issue in merits review is to test whether decision complained is 'right or wrong'.
- The process of merits review will typically involve a review of all the facts that support a decision.

III. In Ethiopia

- there is no clearly defined jurisprudence on the evolution and status of the judicial review.
- The power of the court to review administrative decisions may be derived from the very principle of separation of power that vests judicial power in the judiciary and the doctrine of rule of law enshrined under the constitution **for the purpose of reviewing administrative decisions and subordinate legislations.**
- There are also possibilities where the parent acts that created the respective agencies may also empower courts to review administrative decisions under specified conditions.
- The Constitution vested judicial powers both at federal and state levels in the courts. This is expressly stated under **Article 79(1**) of the Constitution. Thus, supreme judicial power under the FDRE is vested in the Judiciary.
- **Being a final arbiter of the law, the judiciary can review and annul administrative decisions on grounds of legality.**
- However, Ethiopian courts did not have the power to interpret the Constitution. This power was explicitly given to the **HF in Article 62(1) of the FDRE Constitution.**

Grounds of Judicial Review

- The rationale behind the need **for the determination of the justifiable grounds for judicial review is to describe the boundary where judicial review may be available** to challenge administrative decisions.
- In order to demarcate the boundaries in which judicial review may be called into operation, different jurisdictions crafted their own standards or criteria that may render administrative decisions unlawful or illegal.

i. Simple (Narrow) Ultra Vires

- The juristic basis of judicial review is the doctrine of ultra vires
- In its reviewing capacity the court is essentially looking at whether a decision- making body has acted **'ultra vires' or 'intra vires'.**
- **The term intra vires** = If an act requires legal authority and it **is** done with such authority, it **is** characterized as **intra vires** ("within the powers") .

- **The term ‘ultra vires**’ = means ‘without power’ or If it **is** done without legal authority ,
- The term ultra vires in **AL** context refers to decisions passed by administrative authorities without having the required power or in excess of the limits of the power conferred upon them.
- An administrative decision may be rendered ultra vires **due to substantive or procedural issues affecting the decision.**

Substantive ultra vires

- refers to the **substantive defects** of the decision as contrasted to the **procedural irregularities.**
- **An administrative decision is said to be ultra vires in terms of substance**

I. where the decision maker exceeds the power duly entrusted to him/her in the public interests or

II. where the **subject matter** of the decision falls outside the jurisdictional limit of the decision-maker.

- The principle behind substantive ultra vires is that **every power entrusted in the public interest has its own limits.**
- So, when the decision-maker renders a decision that exceeds the power conferred upon him, it can be attacked through the forum of judicial review.

Procedural ultra vires

- refers to a decision passed disregarding mandatory (formal) procedural requirements.

Procedural requirements could be

i. **obligatory (need strict compliance)** or

ii. **directory** (provide direction to the decision-maker to be followed in **at the discretion** of the decision-maker in appropriate cases).

- Where there is a statutory procedure that dictates administrative action to be taken based on the **established mandatory formal requirements**, **non observance of these requirements rendered the decision procedurally ultra vires.**
- Procedural illegalities, apply not only to non-observance of mandatory statutory procedural requirements, but also to situations **where the decision-maker fails to observe the rules of natural justice or fail to act fairly.**

2. Jurisdictional Error

i. **Jurisdictional error of law**

A decision-maker who erroneously interpreted the law as providing a power that did not exist was said to have made a 'jurisdictional error of law'. or

jurisdictional error of law refers to a decision made without power (ultra vires) due to the wrong interpretation of the law.

ii. jurisdictional error of fact

A jurisdictional error of fact occurs where the existence of a particular state of affairs is a condition precedent to a decision-maker actually having jurisdiction

Or happens while the decision-maker assumes jurisdiction over a subject matter in the absence of a certain fact that is set as a condition precedent to assume such jurisdiction. Whether or not a decision-maker does or does not have jurisdiction to make, a decision is a question of law and open to judicial review.

3. Failure to Discharge Statutory Duty

- An agency's failure to discharge a statutory duty towards the designated beneficiaries can also give rise to judicial review.
- For example, in the area of **pension and social security,** where the concerned organ of the government persistently fails to provide the benefit to the statutorily designated beneficiaries, the latter can invoke judicial review seeking mandamus (compelling court order).
- That is, an authority's leniency to discharge a statutory duty towards the beneficiaries without any strong reason can give rise to judicial review.

4. Abuse of Power (Broad Ultra Vires)

For the purpose of judicial review, an ultra vires act can include not only those decisions of an authority that are **rendered**

- **with no power,**
- **in excess of power, or**
- **contrary to mandatory statutory procedural requirements** such as discussed above;

but it may also include those administrative decisions, although fall within the wide discretionary power of the decision-maker, may be found to be defective on the grounds of manifest

- ✓ unreasonableness,
- ✓ disproportionality,
- ✓ irrationality
- ✓ Bad faith

I. Unreasonableness

- Discretion may be structured by providing that it should be exercised ‘reasonably’ –this gives the decision-maker a degree of freedom because people may fairly disagree about what is reasonable, but it rules out certain results as unacceptable.
- On the other hand, discretion puts the citizen in much more at the mercy of the administrator, especially if the latter is not required to tell the citizen the reason why the discretion was exercised in the particular way it was.

II. Proportionality

- The principle of reasonableness and proportionality cover a great deal of common grounds. A severe penalty for a small offence may be challenged based on the principle of proportionality or reasonableness.

III. Bad Faith

- The unreasonableness or irrationality of a decision may result from a decision that is induced by bad faith on the part of the decision maker though it might be d/ct to establish bad faith.

Limitations on Judicial Review

- **Standing**
- **Justiciability**
- ***Exhaustion* and Ripeness**
- **Finality Clause**

1. **Standing**

to bring an action for judicial review, the applicant must have sufficient interest in the matter to which the application relates.art37,art 32 of cpc and PIL in environmental case

2. **Justifiability**

The other limitation on the availability of judicial review is related to the justiciability of the decision in question. The justiciability refers to the capability of the disputed state of fact to be resolved by the application or interpretation of existing laws.

political/ministerial decisions are non-justiciable matters.

3. Exhaustion and Ripeness

- Judicial review is the last resort that can be invoked by a party aggrieved after exhausting all the avenues available in the concerned agency.

Being the last resort, the party aggrieved must go first through the internal agency avenues. Because agencies may have their own internal grievance/complaint handling avenues

- Thus, a party seeking judicial review will usually be required, as a condition precedent to challenge the validity of the administrative action, to exhaust all the remedies available in the administrative channels.

✓ **Ripeness**

In order to invoke judicial review, the case complained of must be **'ripe for review'.**

It requires the complainant to wait until the concerned agency has passed its final decision.

4. Finality Clause

While delegating rulemaking and/or judicial powers to an agency, the legislature may in the parent act expressly preclude the power of regular courts to review decisions of the agency passed in such capacity.

REMEDIES AND GOVERMENT (ADMINISTRATIVE) LIABILITY

- The term remedy in this context refers to the varieties of awards/relieves that may be granted by the reviewing court

Remedies are broadly classified into public law remedies and private law remedies.

I. public law remedies also known as prerogative orders & they are

- **certiorari (a quashing order),**
- **prohibition (prohibiting order),**
- **mandamus (mandatory order),**
- **Quo Warrant,** and
- **Habeas Corpus**

II. whereas **private law remedies** include

- **injunction,**
- **declaration**
- **damages.**

Public Law Remedies

- Public law or prerogative remedies of public law, in the English tradition, have primarily been used to ensure whether or not the government machinery operates properly.
- These remedies are more liberally granted than the **private law remedies that are mainly concerned with the enforcement of private rights.**

1. Certiorari

- The writ of certiorari, also referred to as quashing order, is a procedure through which the reviewing court investigates the legality of an agency's decision complained of, and **will quash or nullify where the decision in question is found to be ultra vires.**

- If a person feels aggrieved because of ultra vires administrative acts affecting his interest, it is advisable for him or her to invoke judicial review within the allowable period of time otherwise the illegal administrative decision may be turned to legality (**after the expiry of the statutory period fixed for filing application for judicial review.)**
- Normally, where certiorari is granted by the reviewing court, the parties have to be returned to their original pre-decision position.

2. Prohibition

- It performs the function of ordering a body to refrain from illegal action.
- It is an order issued by a higher court to prevent an inferior tribunal or administrative authority from exceeding or from continuing to exceed its authority, or from behaving ultra virally while dealing on matters that affect the interest of the complainant.
- While certiorari quashes what has been already done, prohibition restrains a government body from taking a certain course of ultra vires action.

✓ **Thus, certiorari has retrospective effect** - nullifying an already made illegal or ultra vires act,

✓ whereas prohibition has a prospective effect - it stops the continuity of an on going course of action or restrains the execution of an already made decision beforehand.

- While certiorari has nullifying effect, prohibition has preventive effect.
- The applicant may, in appropriate cases, seek both certiorari (quashing order) and prohibition (prohibiting order) in conjunction; for example, certiorari to quash the decision in question and prohibition to prevent the execution of the nullified decision or the taking of other particular action.

3. Mandamus (mandatory order)

- The prerogative order of mandamus is **designed to enforce the performance by governmental bodies of their duties**.
- May also be used to compel the decision-maker to exercise his/her discretion properly.

4. quo warranto is a prerogative writ, which falls within the category of public law remedies. It has been used for a long period of time in England as a process to challenge the legitimacy of titles assumed by government officials, and now it is also applicable to challenge the usurpation of offices assumed in the interest of the public.

The prerogative writ of quo warranto is sanctioned by declaration, injunction and financial penalties.

4. quo warranto

- is a prerogative writ requiring the person to to show what authority they have for exercising some right, power, or authorization they claim to hold.
- It has been used for a long period of time in **England** as a process to challenge the legitimacy of titles assumed by government officials, **and now it is also applicable to challenge the usurpation of offices assumed in the interest of the public.**
- The prerogative writ of quo warranto is sanctioned by declaration, injunction and financial penalties.

5. Habeas Corpus

- The writ of habeas corpus (produce the body) is used **to obtain the release of someone who has been unlawfully detained**, e.g., wrongfully arrested.
- It is a procedure through which an illegally detained person applies to the court requesting an order for his physical release.
- It serves as a modality for securing the liberty of a person by affording an **effective means of immediate release from unlawful or unjustified detention**.
- Currently, it is an attempt to measure up to the standards of human rights and fundamental freedoms **which entitle the detainee to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered, if the detention is found to be unlawful.**

II. Private (Ordinary) Law Remedies

1. Injunction

- An injunction in the common law tradition is known as an **equitable remedy,** which means **that it is in the discretion of the court whether or not to grant it.**
- It is a court order, which in the majority of cases that **orders the party to whom it is addressed not to do a particular act.**

But broadly speaking, it can be

- ✓ negative (i.e., forbidding a decision-maker from doing something), or
- ✓ mandatory (i.e., ordering a decision-maker to do something).

Injunction can be granted in both public and private law as an interim or final relief.

An **interim injunction** (also referred to as interlocutory injunction)

- a court order to compel or prevent a party from doing certain acts pending the final determination of the case. It is an order made at an interim stage during the trial, and **is usually issued to maintain the status quo until judgment can be made**.
- Its purpose is to prevent a party from continuing the actions complained of until a full hearing of the case.
- As a rule, an interim injunction has to be granted **where there is imminent danger of irreparable injury and damages** would not be an adequate remedy.

There are also cases where **injunction may be granted as a final relief** in public matters both in the positive and negative sense in lieu of mandamus and prohibition, respectively.

2. Declaration

- Is simply asking the court to make a ruling on what the law is. Although it is a private law remedy in its origin, declaration is now widely in use as a remedy in both private and public law cases.
- Its main purpose is to determine or ascertain what the law says without changing the legal position or rights of the parties.
- It declares what the law is or says in relation to a certain uncontested fact.

3. Damages

- the term damages are usually used interchangeably with the term compensation.
- The purpose of awarding damages in this context is to **repair the pecuniary or non-pecuniary harm** inflicted upon the complainant because of administrative wrongs.
- Damages are purely a private law remedy that can be claimed by the victim of a wrongful act in accordance with the dicta of private law.
- a claim for award of damages can be filed before the reviewing court, but the granting of the award depends on whether or not the decision rendered is invalid on the grounds of the public law principles at the same time constitutes a **civil wrong in private law such as torts and contract and whether or not the applicant suffers a compensable injury due to such private wrong.**

- When the grounds justifying judicial review at the same time constitutes private wrongs, damages may be awarded to the applicant provided that s/he proved a compensable injury caused to her/his interest as per the governing private laws

Liability of the Administration

- There is a possibility for suing the state, its administrative units, and servants for damages based on extra contractual wrongs or for breaches of contractual obligations.
- The term administrative liability, here, is preferred to state or governmental liability since this principle of liability in many jurisdictions including Ethiopia is extended to all public authorities.
- In the common law tradition, the reviewing court may award damages, in addition to granting either of the prerogative remedies or injunction, where the decision in question constitutes a wrong under the governing

- private law, that is, law of torts or contract. Where the reviewing court rejects the application for judicial review for one or another reason, it cannot award damages even if the administrative conduct complained of constitutes a manifest extra contractual or contractual wrong.
- the tortuous liability of the administration (the state and its servants) in Ethiopia is governed by the ordinary law of the country. The tortuous liability of the state and its servants in Ethiopia is not limited to fault based liabilities.

- There are cases where the state or its administrative sub-units may be held strictly and vicariously liable for the injury caused to third parties because of the dangerous activities it operated, or due to the official fault committed by its employees or servants during discharging their duties.
- Concerning the contractual liability of the state, too, the practice in Ethiopia neither fits the common law nor the continental law counter parts. Normally, the state is contractually liable for damages it caused to a contracting party due to breach of its contractual obligation.

- The administration is civilly liable to compensate the injuries it causes to individuals during the course of its administrative interaction with them.
- In Ethiopia, there are provisions that deal with the extra contractual liability of the administration specifically. As per Article 2126(2) cum Article 2157(2) of the civil code, the administration is vicariously liable for the torts committed due to the official fault of its servants or employees. If the fault is personal as contrasted to official fault, the person who committed the fault is personally liable to compensate the victim.