CHAPTER TWO
Constitutional Foundations of Administrative Law

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  - *The relationship of administrative law with other concepts*
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    - *Due Process of Law*
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2.1 Rule of Law

- **General Introduction**
  - Notions/concepts of the rule of law
  - Definition of the rule of law
  - Elements of the rule of law

2.2.1 The Rule of Law as a Basis of Administrative Law

- How is the rule of law considered as a basis for Adve. law?
- Rule of law plays an important role in the development of administrative law
- Rule of law provides protection against the arbitrary actions of the government
- Rule of law claims all government officials and citizens are bound by and abide by the law [the ***thin/procedural elements*** of rule of law]
- On the other hand the rule of law protects fundamental rights, and democratic rights (democracy), ensures criteria of justice or right [***the thick/substantive elements*** of the rule of law]

2.2.2 The Concepts of Procedural and Substantive rule of law

- Recently, scholars have discussed ***the rule of law*** by dividing it into *procedural and substantive elements:*

a) *Procedural element of the rule of law [thin element]:*

➢ ***This includes:***

- ***Rule by the law:***
  - ✓ The supremacy of the ordinary laws over the actions of the public officials and administrative agencies
  - ✓ There should be a legal basis for every government action
- ***State actions are subjected to the law***
  - ✓ The government should obey its own rule
  - ✓ Every government action should be justified by the law
  - ✓ Every government official is required to justify their actions based on the law
  - ✓ Hence, if there is no power in the law; the affected party may take the cases to court and invalidate it accordingly.

- ***Formal Legality***
  - ✓ Formal legality deals with the publicity of the laws
  - ✓ To enable the citizens to plan their behaviors and predict how the state will respond
  - ✓ This formal legality may achieved through codifications or case laws
- ***Democracy***
  - ✓ Democracy is considered as one procedural element of the rule of law; to make the government responsive to citizens
  - ✓ Democracy is used to control the government; i.e., through election
  - ✓ Democracy is used as the element of good governance; the people who elected a certain government have the right to know the plan of the government beforehand

b) Substantive (thick) elements of rule of law

- Of course the modern concepts of the rule of law are too broad
- As discussed above, *the procedural elements* of the rule of law are concerned with procedures, to prevent the government from misuse of powers
- The substantive elements of the rule of law have the same purpose by introducing the substantive standards:
- Similarly: four substantive standards are recognized as elements of the rule of law:
  - ✓ Subordination of all laws its interpretations to fundamental principles of justice;
  - ✓ Protections of individual rights and liberties;
  - ✓ Furtherance of human and democratic rights; and
  - ✓ Protection of group rights

i) Adherence of all laws and their interpretations to fundamental principles of natural justice; and

ii) The Protection of individual and group rights

- The substantive elements are:
  - ✓ Legitimacy of a certain legal system in the eyes of the state's citizens
  - ✓ The most important principles include the Fundamental Principles of ***Natural Justice***, such as:
    - Morality,
    - Fairness, and
    - Due Process of Law

2.2.3The Rule of Law in Ethiopia

- During the emperors/monarchies; 1931, 1955 Constitutions
- The 1987 PDRE Constitution
- The 1995 FDRE Constitution

2.3 The Principle of Separation of Power

A) Nature and Meaning of the Principle:

- The doctrine of separation of powers means:
  - that none of the government, i.e., the legislative, executive, and judicial should not exercise the powers of the other;
  - It means that the three departments of government are to be separated and distinct;
  - They are to be independent of one another, and each can exercise only one type of authority, legislative, executive, or judicial.

❑ *The theory of separation of powers signifies three formulations of structural classification of governmental powers:*

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

b. *One organ of the government should not interfere with any other organs of the government. For example, the executive should not interfere in the administration of justice by the courts; and*

c. *One organ of the government should not exercise the*

Complete Separation of Powers: Is it Possible in modern times?

- Complete separation is found to be not possible;

- A complete separation of powers, in the sense of distribution of the three functions of government among three sets of organs, with no overlapping or co-ordination, would bring government to a standstill;

- Similarly, some writers described this situation as:
  - *"Had the doctrine of separation of powers been followed rigidly in any country, the development of modern administrative*

The True Meaning of Separation of Power in modern governance system is:

- *Thus, the true meaning of the theory of separation of powers, as it has been modified by practice, is that the whole power of two or more departments shall not and should not be lodged in the same hand, and that each department shall have and exercise such **inherent powers** as shall protect it in its performance of its major as well as minor duties.*

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

- Even though the principle of separation of powers mainly draws a line between legislative, executive, and judicial functions of government, administrative law runs, to some extent, *contrary to this principle*;
- It could be concluded that *it violates the principle of separation of powers*;
- This could be clearly manifested with little examination of the powers of administrative agencies, or the executive;
- According to the principle of separation of powers, the power and function of this branch of government is limited to the execution or enforcement of laws;
- However, in order to ensure efficient and effective enforcement of laws, it has become a ***compulsive necessity to delegate*** the executive and administrative agencies with additional ***legislative and judicial powers*** (functions).

❑*Delegated Legislative functions*

- Administrative agencies are given the power and function of writing regulations or rules that have the force of law;
- For instance, the Council of Ministers, through a power delegated to it by the House of People's Representatives, may issue regulations.;
- Similarly, specific administrate agencies can issue directives in accordance with the power granted to them by the House of People's Representatives;
- Delegation of legislative powers by the legislature is clearly against the principle of separation of powers. However, it is justified on practical grounds. The lack of time and expertise in the legislature to provide laws necessary to solve a certain social or economic problem practically makes the legislature compelled to transfer some of its legislative powers to the administrative agencies;
- Delegation is also justified on the grounds that it makes the administration effective and efficient
- Agencies could not attain the purposes for which they are established unless otherwise, they have wider power, mainly ***rulemaking powers***.

❑ *Delegated Judicial Powers*

- Agencies also share some of the judicial powers which traditionally belong to the ordinary courts
- They can decide matters affecting individual rights and freedoms: Like,
  - ✓ Reversing a license, imposing an administrative penalty, holding benefits (e.g. pension), etc. all could properly be called as judicial functions.

- Of course, giving judicial power to agencies clearly ***violates the principle of the separation of powers***
  - ✓ Still the justifications are practical necessities, which are more or less similar to that of the above justification with regard to granting legislative functions
  - ✓ Some matters, by nature, are ***technical and require detailed expertise***. This expertise is found in the specific

2.31. Separation of Power in Ethiopia

- Separation of power in Ethiopia: Historical development
- Separation of Power under the 1995 FDRE Constitution
- Separation of power at:
  - Federal level
  - At regional level

2.4 Due Process of Law

- **What is due process of law? Discuss**

A. Substantiative due process of law

B. Procedural due process of law

Substantiative due process of law

- To control the legislature from enacting arbitrary law
- Null and void principles

Procedural due process of law

- No one shall be deprived from his/her ***property, liberty or life,*** except according to due process of law
- The process of any adjudication should be inline of natural justice
  - ✓The right to have notice
  - ✓The right to be heard (defense)
  - ✓The right to have impartial tribunals
  - ✓Fairness, reasonableness, etc.

Thanks!